

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

PEACOCK PRODUCTIONS OF NBC
UNIVERSAL MEDIA, LLC

Employer,

and

WRITERS GUILD OF AMERICA EAST, INC.

Petitioner.

Case No. 2-RC-092111

**PETITIONER'S STATEMENT IN OPPOSITION
TO EMPLOYER'S REQUEST FOR REVIEW OF
DECISION AND DIRECTION OF ELECTION**

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TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. STATEMENT OF FACTS	3
III. LEGAL ARGUMENTS	6
A. Legal Standard for Request for Review under 29 C.F.R. §102.67(c)	6
1. The Employer Fails to Establish that the Regional Director Made Clearly Erroneous Findings of Fact or Misapplied Board Precedent in Determining that Producers Do Not Hire or Effectively Recommend the Hiring of Associate Producers, Crew or Actors.....	9
a. Producers Do Not Hire or Effectively Recommend the Hiring of Associate Producers	9
b. Producers Do Not Hire or Effectively Recommend the Hiring Crew	14
c. Producers Do Not Hire or Effectively Recommend the Hiring of Actors	16
2. The Employer Fails to Establish that the Regional Director Made Clearly Erroneous Findings of Fact or Misapplied Board Precedent in Determining that Producers Do Not Assign Work	18
a. Producers do not assign crew to particular locations and times	19
b. Producers do not assign significant overall duties to associate producers or the crew	24
3. The Employer Fails to Establish that the Regional Director Misapplied Board Precedent in Determining that Producers Do Not Direct the Work of Others	29
IV. CONCLUSION.....	35

Table of Authorities

<u>Cases</u>	<u>Page</u>
<u>Beverly Enterprises-Minnesota, Inc.</u> , 348 NLRB 727 (2006)	7,19, 32
<u>Chicago Metallic Corp.</u> , 273 NLRB 1677 (1985)	7
<u>Dean & Deluca New York, Inc.</u> , 338 NLRB 1046 (2003)	8, 33
<u>Elmhurst Extended Care Facilities, Inc.</u> , 329 NLRB 535 (1999)	13
<u>Emmis Communications, Inc.</u> , d/b/a KOIN-TV, Case No. 36-RC-6310, Regional Director Decision and Direction of Election (July 5, 2005)	8
<u>Golden Crest Healthcare Center</u> , 348 NLRB No. 39 (2006)	7
<u>Golden West Broadcasters</u> , 215 NLRB 760 (1974)	8
<u>GRB Entertainment</u> , 331 NLRB 320 (2000)	9
<u>Great Western Broadcasting Corp. d/b/a KXTV</u> , 192 NLRB 1203 (1971)	30
<u>Greenspan, D.D.S., P.C.</u> , 318 NLRB 70 (1995), enforced 101 F.3d 107 (2d Cir. 1996)	19
<u>Harborside Healthcare, Inc.</u> , 330 NLRB 1334 (2000)	14
<u>Hearst Broadcasting Corp.</u> , d/b/a WDTN-TV, 267 NLRB 326 (1983)	33
<u>Hogan Mfg., Inc.</u> , 305 NLRB 806 (1991)	9
<u>HS Lordships</u> , 274 NLRB 1167 (1985).....	14
<u>ITT Lighting Fixtures</u> , 265 NLRB 1480 (1982)	16
<u>Kentucky River Community Care</u> , 532 U.S. 706 (2001)	7, 27, 28, 29
<u>King Broadcasting Co.</u> , d/b/a KGW-TV, 329 NLRB 378 (1999)	8
<u>Magnesium Casting, Co. v. NLRB</u> , 401 US 137 (1971)	6
<u>Management Consulting, Inc. (Mancon)</u> , 349 NLRB 249 (2007)	13
<u>Mars Home for Youth v. NLRB</u> , 666 F.3d 850 (3rd Cir. 2011).....	32

<u>McGraw-Hill Broadcasting, Inc. d/b/a KGTV</u> , 329 NLRB 454 (1999)	8
<u>Meredith Corporation and AFTRA, Kansas City/Omaha Local</u> , 243 NLRB 323 (1979).....	8
<u>Multimedia KSDK, Inc.</u> , Case No. 24-RC-12419, Regional Director’s Supplemental Decision and Direction of Election (May 9, 2007)	8
<u>NLRB v. Sav-On Drugs, Inc.</u> , 728 F.2d 1254 (9th Cir. 1984)	6
<u>Oakwood Healthcare, Inc.</u> , 348 NLRB No. 37 (2006)	7, 17, 18, 19, 32
<u>Pacific Coast M.S. Industries Co.</u> , 355 NLRB No. 226 (2010)	13
<u>Robert Greenspan, DDS</u> , 318 NLRB 70 (1995)	18
<u>Ryder Truck Rental, Inc.</u> , 326 NLRB 1386 (1998)	9
<u>Seven-Up Bottling Company of Boston, Inc. and New England Joint Board, Retail, Wholesale & Department Store Union, AFL-CIO</u> , 211 NLRB 521 (1974).....	6
<u>Sheridan Universal Hotel</u> , 350 NLRB 1114 (2007)	14
<u>Springfield Terrace LTD</u> , 355 NLRB No. 168 (2010)	9
<u>Training School at Vineland</u> , 332 NLRB 1412 (2000)	9
<u>Volair Contractors, Inc.</u> , 341 NLRB 673 (2004)	7, 19
<u>Waverly-Cedar Falls Health Care, Inc.</u> , 297 NLRB 390 (1989)	9
<u>Westinghouse Broadcasting Company, Inc.</u> , 188 NLRB 157 (1971)	23
<u>Westinghouse Broadcasting, Inc. (WBZ-TV)</u> , 215 NLRB 123 (1974).....	8, 28

I. PRELIMINARY STATEMENT

The Writers Guild of America East, Inc. (“Petitioner”) filed an election petition on October 26, 2012 requesting an election for all part-time and full-time freelance and run of show producers, associate producers and casting producers employed by Peacock Productions of NBC Universal Media, LLC (“Employer”). (Attachment #1).

The Employer argued that freelance and run of show producers (“producers”) should be excluded from the petitioned unit on the grounds that they are statutory supervisors under Section 2(11) of the National Labor Relations Act (the “Act”) because they have the authority to hire, “assign” tasks and “responsibility direct” on behalf of the Employer. The Petitioner argued that producers do not have the authority to engage in any of the three (3) indicia argued by the Employer. Even assuming producers have the authority to engage in such conduct, producers do not exercise “independent judgment” when engaging in this conduct, nor are they held “accountable” for such conduct.

The Regional Director issued a Decision and Direction of Election dated April 30, 2013 (“DDE”) determining that producers are not supervisors under Section 2(11) of the Act and are eligible to vote with the aforementioned unit. (Attachment #2). The DDE further directed an election by secret ballot based on the eligibility formula previously agreed to by the parties. On May 17, 2013, the Regional Director ordered a mixed mail and manual election with mail ballots to be sent on May 30th and returned on June 13th and a manual election and vote count on June 14th. (Attachment #3).

The Employer files a Request for Review of Decision and Direction of Election dated May 28, 2013 (“RR”) arguing that the Regional Director made erroneous findings of fact and misapplied Board precedent.¹

The Petitioner submits this Statement in opposition to the Employer’s Request for Review and requests that the Request for Review be denied on the grounds that the Employer fails to establish that the Regional Director made erroneous findings of fact or misapplied Board precedent. The Regional Director correctly determined that producers are not supervisors under the Section 2(11) of the Act.

The scope of Board review of a Regional Director’s Decision and Direction of Election is very limited and does not include a *de novo* determination of the factual issues based on extensive review of the entire record. Instead, the Employer here bears the heavy burden of demonstrating that the Regional Director’s decision is based on “clearly erroneous” findings of fact. The issue the Regional Director was called upon to decide is whether producers are supervisors, which is an inherently factual determination, and is an issue on whether the Employer failed to sustain its burden of proof.

¹ The Employer argues that the Board should hold this matter in abeyance due to the finding that the Board is without the authority to act because it lacks a quorum in Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). Thus, oddly, the Employer contends that the Board lacks the authority to grant the relief the Employer requests in this appeal.

II. STATEMENT OF FACTS

The Employer produces long format non-fiction programming for various clients such as TLC, Discovery, The Military Channel, and internal clients such as MSNBC. (Tr. 22, 51-52). The programming may include “one-off” programs on a particular subject such the assassination of Osama Bin Laden or series programing, such as “Caught on Camera,” “Fatal Encounters,” or “True Crimes.” (Tr. 22-23, 51-52). The bulk of the Employer’s annual 200 to 250 hours of programming consists of series programming. (Tr. 23, 51-52). The vast majority of the programming is one (1) hour in length. (Tr. 53). For a regular one (1) hour program, the actual programming time is approximately 43 minutes, 30 seconds to 44 minutes, 30 seconds. (Tr. 438, 554).

The Employer’s management team currently includes Sharon Scott, General Manager, Scott Walker, Senior Vice President of Programming and Executive Producer, Ann Kolbell, Supervising Producer, and seven (7) senior producers: Gretchen Eisele, Lloyd Fales, Elizabeth Fischer, Colleen Halpin, Keith McCay, Loren Michelman and Betsy Wagner. (Tr. 18, 21, 58, 60-61). Mr. Walker reports to Ms. Scott and Ms. Kolbell and the senior producers report directly to Mr. Walker. (Tr. 21, 24, 58, 60-61, 90).²

The job duties of the Supervising Producer, Ann Kolbell, include the interviewing, hiring and assigning of both associate producers and producers. (Tr. 121). Ms. Kolbell will consider input from senior producers during the interviewing process, (Tr. 115-116), and input from associate producers and producers regarding the decision to change an associate producers status from freelance to run of show or to assign associate producers to a particular episode, but Ms.

² There is no dispute that senior producers are managers excluded from the petitioned-for unit.

Kolbell makes the ultimate determination. (Tr. 957, 573, 285-286). Ms. Kolbell also approves time off requests. (Petitioner's Exhibit #6, Tr. 889).

The job duties of senior producers include communicating with the Employer's various clients regarding the entire production process, (Tr. 121), and producing the episode on budget and in a timely manner. (Tr. 27, 59). They are usually assigned four (4) episodes at a given time. (Tr. 25-26). To accomplish these responsibilities, senior producers oversee the day to day production process of their producers and associate producers. (Tr. 27).

Producers and associate producers work as a "team" to complete each phase of production. (Tr. 31, 80, 123). For a regular series one (1) hour episode, the production process entails three (3) weeks of pre-production, one (1) week of production and eight (8) weeks of post-production. (Tr. 573). During pre-production, producers and associate producers work together to research the story, to contact potential interviewees and to finalize the arrangements for the production phase. (Tr. 450, 572). Producers will additionally write a treatment, or a summary of the episode, and then a story, or an act breakdown of the episode. (Tr. 574-575). During both pre and post-production, both producers and associate producers are instructed to work standard business hours established by the Employer of 10 a.m. to 6 p.m. (Tr. 452, 488, 577-578, 677).

During a production shoot, producers and associate producers work with a crew, which may include a director of photography or ("DP"), a grip, a sound and/or a lighting person. (Tr. 458-460). Producers are responsible for shooting scenes that reflect the story treatment by conducting recreations and interviews. (Tr. 584-585). The associate producer are responsible for logistics such as organizing and labeling the footage, ordering lunch, reminding the producer to stay on schedule, communicating with the actors and interviewees and obtaining releases. (Tr.

586-587). During production, both producers and associate producers have discretion in their work hours, but usually work standard business hours established by the Employer of 10 a.m. to 6 p.m. (Tr. 452, 488, 577-578, 677).

The crew and actors are hired per the Employer's hiring practices posted on the "Wiki," an on-line resource available to all employees of the Employer. (Petitioner's Exhibits #4 through #6). Although input from associate producers and producers may be solicited, the ultimate decision to hire and the negotiating of terms and conditions of employment is implemented by the Employer's management team. (Tr. 132, 154, 279, 281-282, 384, 388, 401-403, 459, 460, 589-590, 656, 679-680, 718, 719, 770, 772-776, 993).

In the post-production process, producers spend a week writing the script for the episode and then seven (7) weeks in the editing process. (Tr. 572-573). Associate producers engage in follow-up research and creating documentation to submit to the client. (Tr. 884).

Throughout the production process, the producer remains in contact with the senior producer regarding the entire production process. Senior producers provide extensive detail to producers regarding the "look" and "format" of the series and reiterate that strict compliance with these parameters is required. (Tr. 475, 476, 554-555, 711-712). The producer must receive approval from the senior producer for the story, treatment, shooting schedule, scripts, interviewees, radio cut, rough cut and fine cut. (Tr. 487, 490, 579-580, 683, 720-721, 793-794, 683, 464, 786-787). At times, the producer receives a producer budget indicating various expenses during the shooting phase of production. The producer must receive approval from his or her senior produce before modifying the producer budget. (Petitioner's Exhibit #1, Employer's Exhibit #28, Tr. 138, 142, 456-457, 507, 560-561, 564, 570-571, 569, 570, 673-675, 767).

III. LEGAL ARGUMENTS

A. Legal Standard for Request for Review under 29 C.F.R. Section 102.67(c)

Section 3(b) of the National Labor Relations Act authorizes the National Labor Relations Board to delegate to its regional directors the power to determine the unit appropriate for collective bargaining. The Board accordingly adopted rules delegating this authority to the regional directors and conditions when the Board will review the determination of a regional director. The standard set forth by the Board for granting review of a determination by a regional director are “highly restrictive.” Magnesium Casting, Co. v. NLRB, 401 US 137, 138 (1971). According, a request for review may be granted only upon one of more of the following grounds:

- (1) that a substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent;
- (2) that the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party;
- (3) that the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or
- (4) that there are compelling reconsideration of an important Board rule or policy. 29 C.F.R. Section 102.67(c).

The party requesting review must show not merely that the regional director’s decision was clearly erroneous, but that there are “compelling reasons” for review. NLRB v. Sav-On Drugs, Inc., 728 F.2d 1254, 1256 (9th Cir. 1984). This analysis does not include a *de novo* determination of a regional director’s determination. Seven-Up Bottling Company of Boston, Inc. and New England Joint Board, Retail, Wholesale & Department Store Union, AFL-CIO, 211 NLRB 521, 522 (1974).

In the instant case, the Employer relies only on the first two (2) grounds in its Request for Review. The Regional Director determined that producers are not statutory supervisors per the standard defined below. Section 2(11) of the Act defines supervisors 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).

To confer supervisory status, these enumerated powers must be exercised “in the interest of the employer” and with the use of “independent judgment.” Kentucky River Community Care, 532 U.S. 706, 713 (2001). The burden of proving supervisory status rests on the party asserting that such status exists. Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 9 (2006). The Board has a duty “not to construe supervisory status too broadly because the employee who is deemed supervisor is denied rights with the Act is intended to protect.” Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985). The Employer cannot prevail in its contention that the Regional Director’s findings with respect to an inherently factual determination – whether the Employer has met its heavy burden of proving supervisory status – was clearly erroneous.

The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status. Instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. Beverly Enterprises-Minnesota, Inc., 348 NLRB 727, 729-730 (2006); Volair Contractors, Inc., 341 NLRB 673, 675 (2004). Detailed evidence of independent judgment, rather than mere inferences or conclusionary statements, is also required. Golden Crest Healthcare Center, 348 NLRB No. 39, slip op. at 5 (2006). Lack of specific

evidence of supervisory status is construed against the party asserting supervisory status. Dean & Deluca New York, Inc., 338 NLRB 1046, 1048 (2003).

The Board has consistently held that producers are not supervisors under Section 2(11) of the Act. See McGraw-Hill Broadcasting, Inc. d/b/a KGTV, 329 NLRB 454 (1999); King Broadcasting Co., d/b/a KGW-TV, 329 NLRB 378 (1999); Westinghouse Broadcasting, Inc. (WBZ-TV), 215 NLRB 123 (1974); Golden West Broadcasters-KTLA, 215 NLRB 760, (1974); Multimedia KSDK, Inc., Case No. 24-RC-12419, Regional Director's Supplemental Decision and Direction of Election (May 9, 2007); Emmis Communications, Inc., d/b/a KOIN-TV, Case No. 36-RC-6310, Regional Director Decision and Direction of Election (July 5, 2005).

In the instant matter, the Employer argued that producers exercise supervisory authority under Section 2(11) of the Act because they have the authority to hire, "assign" tasks and "responsibility direct" on behalf of the Employer. The record reflected that producers do not have the authority to engage in any of the three (3) indicia argued by the Employer. Even assuming producers have the authority to engage in such conduct, producers do not exercise "independent judgment" when engaging in this conduct, nor are they held "accountable" for such conduct.

The Regional Director determined that producers are not supervisors under the three (3) indicia of supervisory status argued by the Employer. The Employer fails to establish that the Regional Director made clearly erroneous findings of fact or misapplied Board precedent when making its determination. The request should be denied as the Employer fails to raise substantial issues warranting review. See Meredith Corporation and AFTRA, Kansas City/Omaha Local, 243 NLRB 323 (1979)(request for review denied).

1. The Employer Fails to Establish that the Regional Director Made Clearly Erroneous Findings of Fact or Misapplied Board Precedent in Determining that Producers Do Not Hire or Effectively Recommend the Hiring of Associate Producers, Crew or Actors

The Regional Director determined that producers do not hire nor do they effectively recommend the hiring of associate producers, the crews or actors based on the record and established Board precedent. The Board recognizes that providing an opinion or participating in the process of hiring does not constitute effective recommendation for hire. Springfield Terrace LTD, 355 NLRB No. 168, slip op. at 42, 55 (2010); Training School at Vineland, 332 NLRB 1412, 1417 (2000); Ryder Truck Rental, Inc., 326 NLRB 1386, 1387-88 n.9 (1998). Even where an individual may assess an applicant's technical ability to perform the required work, this conduct does not constitute an effective recommendation to hire. GRB Entertainment, Inc., 331 NLRB 320, 320-321 (2000); Hogan Mfg., Inc., 305 NLRB 806, 807 (1991). Further, even where an individual may make recommendations regarding an applicant, if the matter is "independently investigated" prior to ultimately hiring, it is not considered effective recommendation to hire. Waverly-Cedar Falls Health Care, Inc., 297 NLRB 390,392 (1989).

The Employer fails to establish that the Regional Directors made clearly erroneous findings of fact based on the record or that the Regional Director misapplied Board precedent.

a. Associate Producers

The Regional Director determined that the Employer hires associate producers through an initial interview process with Ms. Kolbell and a senior producer. Ms. Kolbell then follows through with candidates that have received approval by the senior producer. (DDE, p. 6, 15). The Employer argues that the Regional Director erroneously made this determination as Ms. Kolbell "plays only an administrative role" in hiring of associate producers and producers

effectively recommend the assigning of associate producers. (RR, p. 6). The Employer's argument is baseless and not supported by the record.

All three (3) associate producers who testified, including the two (2) associate producers presented by the Employer, confirmed that Ms. Kolbell played more than an "administrative role" and, more importantly, that producers were not involved in the hiring of associate producers. Katharine Ferraguto was hired as a freelance associate producer by Ms. Kolbell after being recommended by two (2) staff producers, Kimberly Ferdinando and Aaron McGary, and subsequently interviewed by Ms. Kolbell. (Tr. 329-330, 350). Ms. Kolbell similarly notified her when she became a run of show associate producer. (Tr. 356, 358). Alexander Baertl was interviewed first by Ms. Kolbell and senior producer Gretchen Eisele and was subsequently interviewed for a second time by Ms. Kolbell and senior producers, Keith McKay and Loren Michaelman. He was eventually hired as a freelance producer by Ms. Kolbell. (Tr. 870-872). Finally, Ms. Kolbell herself testified that she interviews associate producers and then she ultimately determines, with input by either senior producers or Knute Walker, Senior Vice President of Programming and Executive Producer, who will be offered a position. (Tr. 112, 115-116). The record further indicated the testimony of associate producer, Erica Matson. She did not indicate who hired her as a production assistant or who hired her as a freelance associate producer in August 2011. (Tr. 378-379). However, a senior producer, Keith McKay, notified her about becoming a run of show associate producer in in March 2012. (Tr. 398). The Regional Director highlighted the testimony of Ms. Ferraguto and Mr. Baertl. (DDE, p. 6).

When arguing that producers "hire" associate producers, the Employer confuses the hiring of associate producers with the assigning of associate producers to particular episodes after they are hired. (RR, p. 6-7). However, the Regional Director's determined that Ms. Kolbell

also “determines the assignment of the associate producer to a particular project, depending on availability and skills.” Ms. Kolbell may “attempt to accommodate the producer’s preferences,” but “frequently, the producers have no input on assignment.” Thus, the “authority to assign exclusively resides with the senior producers, the line producers and Kolbell.” (DDE, p. 4, 6-7, 15).

Again, all three (3) associate producers who testified confirmed the Regional Director’s determination that producers do not assign associate producers to particular episodes. Ms. Ferraguto is notified about her assignment by Ms. Kolbell. (Tr. 334). Ms. Matson indicated that Ms. Kolbell assigns her to projects. (Tr. 381). Mr. Baertl indicated that Lloyd Fales, senior producer, asked if he wanted to work on “Fatal Encounters” and he was reassigned after Mr. Fales met with Ms. Kolbell. (Tr. 873-874). Similarly, on later projects, he discussed his options with Ms. Kolbell and she assigned him to “Late Night with Aprodite Jones.” (Tr. 876-878). He describes this process as “you get hired by Ann Kolbell for a particular show and then your senior producer assigns you to the episodes.” (Tr. 879). For his upcoming assignment, Mr. Baertl was notified by Ms. Fischer that he will be assigned to another episode of “Dead of Night.” (Tr. 893). The testimony from producers further substantiates the Regional Director’s determination that producers do not assign associate producers to particular episodes. Numerous producers confirmed that associate producers are assigned or even reassigned during a project by Ms. Kolbell or a senior producer without any input from producers. (Tr. 274, 285-286, 439-442, 573, 675, 690, 719, 777-778, 816, 849, 859). Even when some producers request to work with a specific associate producer, the record indicated that their requests were denied. (Tr. 285-286, 573). The Regional Director highlighted the testimony of Ms. Ferraguto in the DDE. (DDE, p. 6-7).

The Employer finally argues that the Regional Director failed to find supervisory authority to producers due to their authority to effectively recommend against the hiring of associate producers. More specifically, the Employer argues that negative feedback from producers regarding associate producers impacts the ability of associate producers to be reassigned to new projects. The Regional Director determined that producers may “evaluate” the work of associate producers, but this was “insufficient to support a finding of supervisory authority.” (DDE, p. 16). The record substantiates the Regional Director’s determination.

The Employer cites the testimony of from Staff Producer Kimberly Ferdinando as support for this supervisory authority.³ (RR, p. 7-8). It should be noted that staff producers are not a job classification included in the election petition and, thus, her testimony is not relevant in the instant matter.⁴ In any event, the Regional Director specifically addressed the testimony of Ms. Ferdinando and found it was not sufficient to establish supervisory authority. The Regional Director assessed Ms. Ferdinando’s testimony as:

... often hypothetical and lacked specific examples. Moreover, as a staff producer, her testimony regarding the authority of the freelance producers carries less weight than the testimony of the freelance producers themselves. Even if some ad hoc recommendations for hire may have been followed, the overwhelming record demonstrates

³ It should be noted that the Employer mischaracterizes Ms. Ferdinando’s testimony. Ms. Ferdinando testified that if she did not want to work with a specific associate producer, Ms. Kolbell would not assign that associate producer to her project. Ms. Ferdinando did not testify that her request not to be assigned to a specific associate producer would ultimately result in Ms. Kolbell not reassigning that associate producer to another producer. (Tr. 234). In fact, Ms. Kolbell testified that she has the ultimate authority in this decision-making process. (Tr. 112, 115-116).

⁴ It should be noted that the Employer further relies on the allegedly authority of Staff Producer Elizabeth Waller regarding Associate Producer Anastasia as evidence of producer authority. The Employer submitted this scenario through the testimony of Ms. Kolbell. Not only is this argument irrelevant as it relates to staff producers and not producers, but Ms. Kolbell later contradicts her testimony by stating she has the ultimate authority to hire and assign associate producers. (RR, p. 9, Tr. 95-96, 118).

that the Employer's supervisory producer, senior producers, and line producers retain the authority to hire and assign candidates . . . (RR. 15).

Further, Ms. Kolbell herself characterized the feedback she receives even from staff producers, not freelance or run of show producers, as information that "merely informs" her about the associate producers. (Tr. 100, 104).

The Employer relies on mere feedback from Mr. Rivo to Ms. Kolbell regarding one (1) associate producer to establish supervisory authority. (RR, p. 8-9). The Regional Director specifically addressed Mr. Rivo's testimony and concluded that the authority to "evaluate" is not a supervisory function. (DDE, p. 16). Mr. Rivo's feedback was "merely reporting on the quality of the associate producer's work which is independently investigated by management. Accordingly, the producer's feedback does not, standing alone, affect employment decisions concerning freelance employees." (DDE, p. 16). Ms. Kolbell testified that she ultimately decided not to reassign the associate producer to a new episode. (Tr. 118). As the Regional Director wrote, the "overwhelming record" indicates that producers rarely provide feedback regarding associate producers and when proffered, their feedback does not arise to supervisory authority either to hire or assign associate producers. (Tr. 285, 318, 490-491, 512-513, 529, 600, Employer's Exhibit #25).

The Regional Director appropriately relied on Elmhurst Extended Care Facilities, 329 NLRB 535, 536 (1999) when holding that the authority to provide feedback about an employees' performance without an impact on the terms and conditions of employment is not Section 2(11) indicia. (DDE, p. 16). The holding in Elmhurst, as indicated in the Petitioner's Post Hearing Brief, is well established Board precedent. Pacific Coast M.S. Industries Co., 355 NLRB No. 226, slip op. at 2 n.13 (2010) ("The authority to evaluate employees' performance is not a Sec. 2(11) indicium"); Management Consulting, Inc. (Mancon), 349 NLRB 249, 260 (2007) citing

Harborside Healthcare, Inc., 330 NLRB 1334 (2000) (“The ability to evaluate must have an impact on wages or terms and conditions of employment before it can be considered as a supervisory attribute”). The Employer relies on Sheridan Universal Hotel, 350 NLRB 1114, 1118 (2007) and HS Lordships, 274 NLRB 1167, 1173 (1985) when arguing the Regional Director failed to follow Board precedent. In both cases, the supervisor’s recommendation not to hire an applicant was consistently solicited and followed and the supervisors exhibited other supervisory authority. As stated above, the record failed to reflect that producers were even asked for feedback and failed to reflect any other circumstances whereby solicited feedback impacted an associate producer. The Regional Director, thus, distinguished these cases and appropriately applied Board precedent.

b. Crew Members

The Regional Director determined that the senior producers and line producers hire the crew and establish their wages and conditions of employment. The Employer assigns either crew which is employed as part of NBC staff or freelance crew based on the demands of the production. (DDE, p. 4, 15). The Employer argues that the Regional Director erroneously made this determination as producers exhibit supervisory authority when they recommend crew members that are, in some cases, ultimately hired. (RR, p. 10-12). In all the circumstances the Employer highlights, there is no evidence that any producer independently authorized the hiring of the crew beyond merely “refer[ing] fellow journeyman.” (DDE, p. 15; RR, p. 10-12). The record reflects that producers make recommendations, but the Employer not only independently investigates these recommendations, but may not even follow these recommendations.⁵ The

⁵ The Employer virtually ignores the documentary evidence relied upon by the Regional Director, relegating any discussion of that evidence to a footnote. (RR, p. 11-12, Petitioner’s

Regional Director highlighted the testimony of Mr. Van Taylor, Mr. Mettler and Ms. Wong.

(DDE, p. 8), and the record further indicates the following:

- Ms. Halpin stated that the Employer will “try” to employ the crew requested by the producer. (Tr. 132, 154).
- Dan Bowen, a freelance producer, similarly stated that he makes a crew request to Pat Nugent or Peter Burke, but the line producers only fulfill his request based on availability. (Tr. 279, 281-282).
- Lise Zumwalt, a freelance producer, stated that she was, “allowed to suggest camera people.” However, her request was not granted as a camera person, who was available to shoot all the episodes, was eventually hired instead. The production manager ultimately hired and negotiated the term and conditions of the crew. (Tr. 679-680).
- Annie Wong, a freelance producer, recommended a camera person to her executive producer, Liz Fischer, only after the camera person assigned to her became unavailable. (Tr. 718). However, Ms. Fischer had to approve her recommendation by looking “at his body of work to see if his style would be suitable for our series.” (Tr. 718-719, 736). After Ms. Fischer’s approval, the line producer actually hired and negotiated his terms and conditions of the crew. (Tr. 719).
- David Van Taylor, a run of show producer, “mentioned” a director of photography to Lloyd Fales, senior producer. Mr. Fales “reached out to that person, interviewed him and before I even came on as a producer, I think he – that person was working for Peacock for multiple productions.” (Tr. 460). For the episodes Mr. Van Taylor has actually produced, a director of photography is assigned by the line producer and Mr. Van Taylor is asked for recommendations only if the regular director of photography is unavailable. (Tr. 459).
- David Mettler, run of show producer, will request a director of photography, but the line producer will make the ultimate decision to hire and negotiate the terms and conditions of the crew. With the other members of the crew, Mr. Mettler has not requested specific individuals. (Tr. 589-590, 656). Ericka Grotheus, a line producer, notified Mr. Mettler to peruse the “Wiki” to confirm practices in hiring crew. (Tr. 593-594).

Exhibits #4 through #6). The Regional Director discussed at length the guidelines established in “On-Boarding Procedure” and “Crew Booking Procedures” that indicate the crew is hired and terms and conditions are established by the crew office, not the producers. (DDE, p. 7-8). The Employer completely disregards the lack of documentary evidence to indicate otherwise.

- Steve Rivo, a run of show producer, was informed by a line producer or senior producer to use the crew office for hiring the director of photography. On one (1) occasion he requested a specific director of photography to a line producer. The director of photography had previously worked for the Employer on the same series that Mr. Rivo was producing. The line producer granted his request. However, the line producer hired and negotiated his own terms and conditions of the crew. Mr. Rivo's senior producer hired the other members of the crew. (Tr. 772-776).
- Ms. Matson secures members of the crew by contacting them for their availability, but she eventually contacts the line producer to do the actual hiring and negotiating the terms and conditions of employment. (Tr. 384, 388, 401-403).
- Mr. Baertl utilizes the crew office to hire the sound person, while the line producer hires the rest of the crew and negotiates the terms and conditions for the crew. (Tr. 883, 890-891).
- Ms. Ferdinando testified that even if staff producers contact the crew for their availability, but the line producer or the crew office does the actual hiring of the crew. (Tr. 202, 253-256).

The Employer cites to only one case, ITT Lighting Fixtures, 265 NLRB 1480, 1481 (1982), in support of its argument that the Regional Director failed to follow Board precedent when determining that producers effectively recommend the hiring of the crew. However, ITT Lighting Fixtures, requires that recommendations to hire be implemented without the "independent investigation" of supervisors. As indicated above, the record indicates that "independent investigation" by senior producers or line producers occurs in all circumstances. The Employer's reliance on ITT Lighting Fixtures fails to establish that the Regional Director did not follow Board precedent.

c. Actors

The Regional Director determined that although the producers make casting selections, actors are reviewed by HR Representative Teryle MacDonald or NBC Production Attorney Beth Lobel and either the casting director or associate producers implement the

Employer's On-Boarding Procedures. (DDE, p. 8). Thus, the record "is insufficient to conclude that the producers are independently vested with authority to hire and do not "effectively" recommend hire of actors." (DDE, p. 15). The Employer argues that the Regional Director erroneously failed to find that producers hire actors and misapplied Board precedent when determining their authority lacked "independent judgment" as established under Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006).

The Regional Director's finding that producers do not hire actors is clearly not erroneous on the record. In fact, the record reflects the two (2) procedures the Regional Director highlighted the DDE. In both situations, producers may make recommendations regarding which actors most similarly resemble the actual person in the recreation scene, but they do not make the final determination regarding who will be hired, nor do they extend an offer or employment or negotiate the terms and conditions of employment. (Tr. 907, 920).

The Employer mischaracterizes the testimony of Mr. Mettler, Ms. Wong, Ms. Zumwalt, and Mr. Rivo when arguing this point. Ms. Halpin and Mr. Walker approved Mr. Mettler's request for actors before the casting director hired the actors. (Tr. 658-659). Ms. Wong indicated that she did not extend an offer of employment to actors and was not even sure if the actors were paid. (Tr. 728-729, 734-735, 738-739). Mr. Zumwalt "vetted" the actors to be hired with her senior producer and consulted with her series producer before an actor was paid. (Tr. 698, 702, 705-706). Mr. Rivo stated that the casting director provided different options for actors and would review them, but the casting director ultimately hired the actors. (Tr. 830, 840-841). The Regional Director highlighted the testimony from Mr. Mettler and Ms. Wong. (DDE, p. 8).

The Employer further fails to establish that the Regional Director misapplied Board precedent by finding producers do not exercise “adequate independent judgment” when hiring actors or effectively recommending actors for hire as established in Oakwood. The Board’s analysis regarding “independent judgment” in Oakwood applied to the supervisory indicia for assigning or responsibly directing, not to the supervisory authority to hire or effectively recommend the hiring. Thus, when the Regional Director found that “the record is insufficient to conclude that the producers are independently vested with authority to hire and do not “effectively” recommend,” (DDE, p. 15), the “independent” variable references is whether the individual has the authority to hire without supervisory approval, not whether producers exhibit “independent judgment” when hiring or effectively recommending an applicant be hired. The Regional Director found that the Employer had not established that producers hire actors for the reasons argued above. When the Regional Director applied the holding in Robert Greenspan, DDS, 318 NLRB 70, 76 (1995) to the instant matter, she did not, therefore, misapply Board precedent in Oakwood as argued by the Employer.

For the reasons stated above, the Employer fails to establish that the Regional Director made clearly erroneous findings of fact or misapplied Board precedent in determining that producers do not hire associate producers, the crew or actors.

2. The Employer Fails to Establish that the Regional Director Made Clearly Erroneous Findings of Fact or Misapplied Board Precedent in Determining that Producers Do Not Assign Work

The Regional Director determined that producers do not assign work hours or particular locations to associate producers, the crew or actors. (DDE, p, 17). The Employer specifically argues that the Regional Director made erroneous findings of fact and misapplied Board

precedent when it determined that producers do not assign work hours and approve time off during pre and post production and do not assign work hours, overtime and work location during production. Finally, the Employer argues that producers assign significant overall duties to associate producers and the crew.

To “assign” for purposes of Section 2(11), “refers to the designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” Oakwood Healthcare, Inc., 348 NLRB No. 37, slip op. at 7 (2006). It is well established that the party seeking to establish supervisory authority must show that the individual has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority to merely to request that a certain action be taken. Beverly Enterprises-Minnesota, Inc., 348 NLRB 727, 729 (2006). The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent. Volari Contractors, Inc., 341 NLRB 673, 675 (2004); Greenspan, D.D.S., P.C., 318 NLRB 70, 76 (1995), enforced 101 F.3d 107 (2d Cir. 1996). Finally, to constitute supervisory authority, the individual must also exercise independent judgment when making such assignments. The Board has defined “independent judgment” to mean exercising significant discretion and judgment free from the control of others. Oakwood Healthcare, Inc., supra. slip op. at 7.

a. The Employer fails to establish that the Regional Director erroneously determined that producers do not “assign” the crew or associate producers to specific locations and times

The Regional Director determined that “during pre- and post-production phases, the employees work normal office hours of 10:00 am to 6:00 pm, which are set by management in conformity with the industry standard.” (DDE, p. 17). Additionally, although producers may be

informed of an associate producer's request for personal time and sick time, "the record establishes that after the senior producers approve leave requests, the associate producer informs Kolbell so that the leave time is properly reported." (DDE, p. 17). The Employer argued that producers assign associate producers work hours and approve time off during pre- and post-production.⁶ The only evidence the Employer presented in support of this argument is the testimony from management witnesses, Ms. Kolbell and Ms. Halpin, and the testimony and accompanying exhibits through non-unit Staff Producer Ferdinando. (RR, p. 15).

Not surprisingly, the testimony from the people directly involved – the associate producers and producers - reflects that producers do not assign associate producers work hours during pre- and post-production and, in fact, producers work similar hours as associate producers. The DDE appropriately indicated that the Employer requires employees to work hours customary for the industry, 10 a.m. to 6 p.m., when they are not in production. (DDE, p. 17, Tr. 452, 488, 577-578, 677). Further, the testimony from Mr. Mettler, Mr. Van Taylor and Ms. Zumwalt substantiated these business hours and reiterated the fact that producers were not authorized to assign different hours. (DDE, p. 8, Tr. 453-454, 677-687).

The record includes other witnesses that corroborated their testimony. Both Ms. Ferraguto and Mr. Baertl were informed by Ms. Kolbell, not by producers, about these work hours. (Tr. 353-354, 880-881). Additionally, Ms. Wong and Mr. Rivo testified that they have never authorized, nor did they tell associate producers to work different hours than those described above. (Tr. 718, 782).

In regards to time off requests, the Regional Director referenced the Employer's time off policy codified on the "Wiki" in Petitioner's Exhibit #6, "Who Does What at Peacock"

⁶ It should be noted that the crew only works during the one week of production and, thus, the crew does not work during pre or post production.

document. (DDE, p. 12, 17, Petitioner's Exhibit #6). In the "Time Off" section, it states that vacation requests should be sent to Ms. Kolbell. Further, any requests made by "Yoh" or freelance employees should be discussed first with the project senior and then sent to Ms. Kolbell. (Petitioner's Exhibit #6). The Employer failed to produce any policy, handbook or even an e-mail which contradicted this policy. The DDE further referenced testimony from associate producer Baertl and producers Van Taylor and Rivo and producers which reflects that this internal policy is followed by producers and associate producers. (DDE, p. 11-12, Tr. 889-890, 892-893, 902-903, 453-454).

In regards to the assigning tasks in the production phase, the Regional Director determined that producers do not "assign" work hours, location or overtime. The DDE stated that:

The record is clear that the storyline and budget determine the location of the shoot. The shoot schedule is depending on the availability of the interview subjects and the allotted number of shoot days as budgeted by upper management. Further, the producer and associate producer work collaboratively to make and update the shoot schedule which is submitted to the senior producer for review and alternations prior to being finalized.

Television producer can entail long workdays in the field. Here, in the event that the shoot extends later in the day or requires an additional day, the producer must obtain the senior producer's approval prior to making any change in the plan developed in the pre-production phase. The hours in the field are driven by executing the task of gathering the necessary footage to tell the assigned story, and the senior producer decides which additional or different material is necessary. (DDE, p. 17).

The Employer argues that the Regional Director erroneously found that producers do not "assign" work hours, overtime and work location during production. The only evidence it cites is the testimony of non-unit Staff Producer Ferdinando, Mr. Rivo and Mr. Van Taylor. (RR, p. 16). However, Mr. Rivo merely testified that a particular crew member received overtime, not

that he authorized overtime. (Tr. 843-844). Mr. Rivo and Mr. Van Taylor both testified that they do not assign overtime to the crew. (Tr. 486, 856-857).

The Regional Director credited the testimony of Mr. Van Taylor, Mr. Rivo and Mr. Mettler that producers do not independently, assign work hours and location, rather they collaborate with associate producers to create a shooting schedule. (DDE, p. 6, Tr. 454-455, 576, 613, 783). The record includes additional testimony supporting this practice. Ms. Zumwalt confirms that her associate producer “did play a role also in setting the schedule” as the schedule was a “collaboration” between her and her associate producer, Becky Teitle. (Tr. 694). Ms. Zumwalt further “vets” the schedule with the crew just in case she “forgot something.” (Tr. 694). The record further references that fact that the budget determines the number of shooting days for each episode and even how many days will be allocated to recreations or for visual taping. (Tr. 455, 581-582, 765). The availability of the interviewees dictates the agenda on those shooting days. (Tr. 454-455, 581-582, 694, 785). And, the shooting location further encumbers any remaining flexibility remaining in the schedule. (Tr. 576, 613). For example, Mr. Mettler testified that the restrictions of the interview set for “Fatal Encounters” requires extensive set-up and requires renting a conference for a few days. (Tr. 581-583). Finally, the timing of interviews and set-up is not exact and the shooting schedule will be frequently changed throughout the days of shooting. (Tr. 695). The Regional Director further cited the testimony from Mr. Mettler, Mr. Rivo and Mr. Van Taylor that during production producers seek the approval of their senior production if a change to the shooting schedule is necessitated. (DDE, p. 9, Tr. 683, 692, 782, 784, 860-861).

Finally, the Regional Director cited the testimony of Mr. Mettler and Mr. Rivo and Petitioner’s Exhibit #6, “Who Does What at Peacock” when assessing the producers authority to

assign overtime. She noted that the testimony of non-unit Staff Producer Ferdinando was contradicted by Mr. Mettler and Mr. Rivo, and also by Petitioner's Exhibit #6. The only document presented by the Employer on this matter is discredited by the Regional Director. She concluded that Employer's Exhibit #27 merely showed that Mr. Mettler confirmed the number of hours a crew member worked on a specific day, rather than authorized overtime as argued by the Employer. (DDE, p. 11, Tr. 486, 519-520, 591, 620, 856-857).

Although the Employer argues that the Regional Director misapplied Board precedent when determining that producers do not assign work hours and location, the Employer merely cites to one (1) case in support of this argument, Westinghouse Broadcasting, Co., 188 NLRB 157 (1971). The Regional Director specifically addressed this case in the DDE and distinguished the authority the producers held in Westinghouse to producers at Peacock. In Westinghouse, the Board found that producers were "completely responsible for the content of the programs. Those producers were more akin to the senior producers in the instant case." Further, they met with "high echelon officials to discuss the development of programs." (DDE, P. 19). Clearly, the producers working for the Employer are not vested with these authorities. Producer, as more fully discussed below, are not held accountable for the content of the programs and they are not involved in the decision-making process with clients regarding the format or content of the episode. (DDE, p. 19) The Regional Director, thus, followed Board precedent when distinguishing Westinghouse from the instant matter and finding producers do not assign hours, location or overtime during the production phase.

b. The Employer fails to establish that the Regional Director erroneously determined that producers do not “assign” overall duties to associate producers and the crew

When asserting its argument regarding the assigning of overall duties, the Employer first argues that the Regional Director erroneously determined that the duties of the associate producers and the crew are not routine in nature. (RR, p. 17). The Regional Director concluded that associate producer tasks are definable as they are “responsible for coordinating the logistical aspects of the shoot, including among other things, finding props, contacting the actors and interview subjects, gathering releases, arranging transportation, and ordering the catering.” (DDE, p. 9). Additionally, the Employer ignores the Regional Director’s finding that duties of the associate producers and the crew are also “well-defined in the industry.” (DDE, p. 17). Based on the testimony of Mr. Mettler, Ms. Zumwalt and Mr. Rivo, the Regional Director concluded that “the Employer mostly hires experienced associate producers who know what is expected based on the well-established industry practice.” (DDE, p. 10, Tr. 588, 676, 778). The Employer own documentary evidence, Employer’s Exhibit #35, a job description for associate producers, requires “at least three years editorial production experience in longform programming for network or cable operations.” (DDE, p. 10, Employer’s Exhibit #35). Ms. Wong further reiterates Ms. Zumwalt’s point about industry practice, “Well I think it is in our business. Producers typically deal with the content and associate producers deal with logistics. So it is kind of always split out that way.” (Tr. 717).

The Employer argues that the Regional Director misapplied Board precedent when determining that record failed to establish producers utilize “independent judgment” when assigning tasks. (RR, p. 19-20). The Regional Director based her determination that producers do not exercise “independent judgment” on the extensive factual record that producers do not

create the budget or the shooting schedule and senior producers consistently monitor the production process from pre- through post-production to enforce the strict format and look of the series. The DDE concluded that non-unit Staff Producer Ferdinando is the only witness to testify that producers have any input into the budget. Again, the Regional Director stated that “staff producers are not encompassed in the petitioned-for unit.” (DDE, p. 5). Additionally, Employer’s Exhibit #36, a job description for producers, indicates that producer job responsibilities do not include project development or finance. (DDE, p.5). The testimony of Mr. Rivo and Mr. Mettler indicates that producers must contact the senior producers when making any changes to the budget. (DDE, p. 10, Tr. 560-561, 564, 569-571, 592, Employer’s Exhibit #28, 764-767). The DDE concluded that, “this demonstrated that the producers have very little discretion and are closely supervised regarding the budget.” (DDE, p. 10).

The record includes others witnesses who testified about how producers lacked any discretionary power over the budget:

- Ms. Halpin detailed the restrictions placed on producers by the budget by stating the budget dictates the, “number of weeks of edit that we may estimate, a base number of crew days that we may estimate, a base number of staff that we may estimate, a base number that will cost for music for a show. So there are some – there is a framework, so to speak, I guess you could say.” (Tr. 138). Additionally, she confirmed that a producer must get approval if s/he wants to increase the number of production days. (Tr. 142).
- Ms. Zumwalt testified that on one shoot, the owner of the house where the actual event occurred proved challenging when negotiating a location fee. Mr. Fales permitted Ms. Zumwalt to go from \$1,000 to \$1,500. When Ms. Zumwalt asked his permission to agree on \$1,500, Mr. Fales even went to Ms. Fischer for approval. (Tr. 674-675).
- Mr. Van Taylor would always seek approval from his senior producer when adding an extra day of production or when adding more than one trip to the producer’s budget. (Tr. 456-457, 507). In regards to budgetary discretion, he stated that, “the general message that I get from production managers, seniors, APs is that saving money on one category does not give you discretion to go over in another category.” (Tr. 516).

- It should be noted that the Employer never even provided a producer budget for Ms. Wong. (Tr. 712). If Ms. Wong had any questions about her expenses, like a plane ticket for \$2,000, the line producer Ericka Grothues, would have to approve that expenditure. (Tr. 715-717).

As indicated above in the discussion about the assigning of hours to associate producers, the Regional Director cited extensive record evidence indicating the producer does not exhibit independent judgment regarding the shooting schedule. (DDE, p. 9, 17).

The Regional Director concluded that “senior producers are responsible for the “look” of the show, which is constrained by the budget the client’s preferences. As such, the senior producer provides editorial input through the whole process.” (DDE, p. 5). In pre-production, Mr. Van Taylor, Mr. Mettler and Mr. Rivo all confirmed that senior producers closely supervise their work product. They all testified that “their senior producers reviewed, edited and sometimes rewrote the treatment prior to its release to the network executives or the client.” (DDE, p. 5, Tr. 574, 579-580, 520, 793-594). During actual production, the Regional Director found that the “senior producer monitors the progress of the production.” (DDE, p. 9) Mr. Mettler, Mr. Rivo and Mr. Van Taylor all reached out to their senior producers for “guidance and approval before implementing any changes.” (DDE, p. 9, Tr. 683, 464, 786-787).

In post-production, the Regional Director also found that the “senior producer reviews the script and provides notes” to the producers, (DDE, p. 12), and also has “close involvement in the editing process.” (DDE, p. 13). The DDE specifically referenced the testimony of Mr. Van Taylor and Mr. Rivo respectively. (Tr. 486-487, 490, 795, 867, 597-598, 701). The record includes testimony from other witnesses regarding senior producers review process during production. At each of these phases, Mr. Mettler will receive feedback including “notes and comments and changes, suggestions” for the various cuts he submits. Ms. Zumwalt would send

each act as she wrote it to her senior producer. (Tr. 683). Ms. Wong provided at least three (3) drafts of her scripts to her senior producer per her senior producer's request. (Tr. 720, 737).

The Employer's own witnesses reiterate that senior producers extensively review all phases of production. Senior Producer Colleen Halpin confirms that she, on behalf of the Employer, establishes strict control inhibiting any "independent judgment" on the part of the producers:

I will let the producer know what the parameters of the project. I will tell them how much time they have to do it. I will discuss with them when I can expect to review the script before they go into an edit room. I will discuss with them when I can expect to be able to screen the program, to give any notes that I may have on the program. I will discuss with them when we might be able to deliver a cut, as we call it, over that program to the client and we'll be in agreement about when that will go into – when they show will finish, what we call locking the program. And then we take the program into the final line process, which is the sound mix and any color correction. So I am communicating with the producer so that I may convey all the information to the client and work with the client towards delivery of the program. (Tr. 134).

Ms. Halpin further highlighted how senior producers restrict any communication between the producer and the client. In describing her job duties, states that she "will speak with [clients] liaise with them throughout the entire production process, from the concept and development potentially through the formulation of terms, budget, production, which includes pre-production, field work, editing, post production, and final deliverables." (Tr. 121). In fact, Ms. Halpin confirms that it is her position and not that of producer to make "sure that the program is produced according to [the client's] expectations that we have agreed upon before production." (Tr. 120).

It is clear that the Regional Director correctly applied the "independent judgment" standard established in Kentucky River and the Employer failed to demonstrate that the Regional

Director's reliance on King Broadcasting, Co., d/b/a KGW-TV, 329 NLRB 378, 382-383 (1999) is misplaced. The Employer argues that the Regional Director based her finding on the fact that the producers exercise judgment "merely . . . on professional or technical skill of expertise" which the Employer argues is not permitted under Kentucky River. (RR, p. 19-20). The Court in Kentucky River found that:

It is also undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in Chevron Shipping Co., 317 N.L.R.B. 379, 381 (1995), the Board concluded that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur." Id. at 714-715.

The Court further confirmed that, "It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies." Id. at 714-715. The Board in King found that, "assignments based on assessment of employees' skills when the differences in skills are well known have been found routine, as have assignments made to equalize employees' work on a rotational or other rational basis." King Broadcasting, Co., d/b/a KGW-TV, 329 NLRB at 382. Therefore, the Board's determination in King Broadcasting is entirely consistent with the "independent judgment" standard articulated in Kentucky River.

The Regional Director's decision clearly established that a producers ability to "assign" lacked "independent judgment" under Kentucky River when "assigning" tasks, as was also the case in King Broadcasting. The Regional Director determined by the weight of the record as extensively detailed above that producers lack "independent judgment" regarding all aspects of the production including the budget, the shooting schedule, the look and format of the series, the

editing process of the scripts and “cut” in post-production. (DDE, p. 17). The Regional Director further determined that producer instructions were “routine in nature” based on the fact “job duties of the associate producers, the crew, and the editors are routine in nature and well-defined in the industry.” (DDE, p. 17). The Employer fails to establish that the Regional Director’s determination violates Kentucky River.

For the reasons stated above, the Employer failed to establish that the Regional Director erroneously applied the facts and misapplied Board precedent when it determined producers do not assign tasks under Section 2(11) of the Act.

3. The Employer Fails to Establish that the Regional Director Misapplied Board Precedent in Determining that Producers Do Not Direct the Work of Others

The Region Director determined that producers do not “responsibly direct” within the meaning of Section 2(11). More specifically, the Regional Director found that producers do not exercise “independent judgment” when directing and are not held “accountable” for the actions of others. (DDE, p. 18). The Employer argues that the Regional Director misapplied Board precedent when it found both that producers do not exercise “independent judgment” and are not held “accountable” when directing the work of others. (RR, p. 21-23).

The Employer fails to establish that the Regional Director misapplied either the “independent judgment” or the “accountability” standard. The Employer argues that the Board misapplied Board precedent when she determined that producers do not direct the work of others with “independent judgment” as they “are motivated by the artistic effect that the producers seek to achieve,” a similar argument to the one the Employer makes to the assigning of tasks. As with assigning tasks, the Regional Director determined in regards to directing that “freelance producers do not exercise independent judgment in relation to the format, look and content of the

projects that they undertake. Their work is set within parameters established by the senior producer and upper management.” (DDE, p. 18). Additionally, producers are “confined by a fixed budget and any changes to itemized costs must be approved by the senior producer. The record demonstrates that the overall responsibility for the project is vested in the senior producer.” (DDE, p. 18).

The Regional Director further cited Board precedent when determining producers do not exhibit “independent judgment” when directing. She noted that in Oakwood, the Board stated that in order to establish “independent judgment,” the direction “must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve “a degree of discretion that rises above the ‘routine or clerical.’” (DDE, p. 18). The DDE cited Great Western Broadcasting Corp. d/b/a KXTV, 192 NLRB 1203 (1971), to highlight a situation where producers were found to “responsibly direct” because they “enjoy a level of authority tantamount to “full responsibility from the planning stage through the presentation on the air.” (DDE, p. 18). The Regional Director distinguished Great Western Broadcasting Corp. from the instant matter by concluding again that “freelance producers do not exercise independent judgment in relation to the format, look and content of the projects that they undertake.” (DDE, p. 18).

The record supports the Regional Director’s findings, as detailed above on pages 25 to 26, regarding budgetary restrictions and the record further supports the Regional Director’s findings that the Employer establishes the format, look and content of the projects:

- Mr. Mettler testified that about the “look” of “Disappeared,” “In particular to “Disappeared, the look of the interviews is that they are shot in real world situations. So you typically would be in the home of say, like the mother of a missing young person. And the interview would be – the look of the interview is that the – this mother is, you know sitting in a certain spot in which the background looks pretty and out of focus, but we see that she’s actually in a home, in a house. The – there

are two cameras used, so that's part of the look, as well. There's a wide shot of the interview subject, which is one of the cameras. And then the B-camera is set up as a tighter shot where you really just see, like, from the neck up. And then we use those intercut and then I would consider that part of the look for the interview. (Tr. 547-548).

- Mr. Mettler further testified about the "look" of "Killer Instinct" which his senior producer, Liz Fischer, informed him at staff meetings. (Tr. 551, 555). For example, he was told, "to shoot the interviews, you know, basically in the same style as Disappeared." (Tr. 548-549). The only nuance would be that, "we were told to shoot the interviews in – with our host of the show, Mark Safarik, with a, sort of, grey backdrop. It was to be lit a certain way and he was to, you know, look – be lit a certain way." When taping Mr. Safarik's interviews with local police officers, he was instructed to use "to-shot reverse angle interviews where he's talking to this character and we're shooting, you know, across each other." (Tr. 549).
- Mr. Mettler finally testified about the "look" of "Fatal Encounters" which was imparted to him at staff meetings with other producers and assistant producers by Senior Producer, Lloyd Fales. (Tr. 555-556). The interviews for "Fatal Encounters" required a "series-wide" uniformity so that "every interview was shot with a backdrop, and not in a real world situation, as in "Disappeared." So the way we shoot the interviews for that is we setup a – two big backdrops, and we shoot, again, a wide shot and a tighter shot of their – of the interview subject's face. But the backdrop was to be lit a certain way, so that you had, sort of, a glowy, kind of, little halo effect around the person's head. And again, kind of, a moody look, so you know, maybe a little bit less light on one side of the face of the interview subject." (Tr. 550-551). For reenactments, both Ms. Fischer and Mr. Fales requested that the shoots be "conventional" and "show the full faces of the actors" as the actors "improvised lines back and forth." (Tr. 551, 552).
- Mr. Van Taylor testified about the "format" of "Fatal Encounters", "Fatal Encounter" is what's called a five act structure, which means there's four commercial breaks in the middle of the show and you, you know, lead into each break with a tease and you come out of each break with a - some kind of a recap. That show as the title suggests, is about murder and it's about tracking the murderer and the victim, or sometimes, there's more than one victim, over hours and days they come together, resulting in the murder. And, there's a graphic clock on screen where you count down to the murder and you also do, you know, kind of flashbacks in their back story, you know, before that period of time that you're counting down. And, it's essentially a look at, you know, how it is that people come to – people from both sides, the murderer and the victim, come to be in a homicide. (Tr. 435).
- Even Ms. Wong, a freelance producer who produced only one (1) episode of "Disappeared" was given previous shows to review by her supervisor. As to her ability to change the format, Ms. Wong states that, "I knew there wasn't any change

in format. You make a show that is part of the series, so it would have to conform to whatever the series looked like.” (Tr. 711-712).

The Employer further fails to establish that the Regional Director misapplied Board precedent when determining that producers were not held “accountable” for the direction of associate producers, the crew, actors or editors. The Board in Oakwood held that, for direction to be “responsible,” the person directing the performance of a task must be accountable for its performance. Oakwood, 348 NLRB at 6-7. The Board defines the element of “accountability” as follows:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. Id. at 7.

Where an employer fails to give examples in the record of the “authority to take corrective action” or the “prospect of adverse consequences,” a finding of supervisory authority will not be established. Beverly Enterprises-Minnesota, Inc., 348 NLRB 727, 729-730 (2006); Mars Home for Youth v. NLRB, 666 F.3d 850, 854 (3rd Cir. 2011).

The Employer fails to assert any caselaw or documentary evidence to prove producers “accountable” under Oakwood in its Request for Review. (RR, p. 24, DDE, p. 19). The Employer merely argues that Mr. Bowen testified he was held “responsible” and Mr. Rivo testified he was the “highest in command on the shoot.” Mr. Bowen also testified that he had not actually experienced any “consequences” for the performance of his associate producer. (Tr. 324). Mr. Rivo also testified that he was not held accountable for the actor, the crew, the associate producer or the editor. (Tr. 791-792, 797, 850). The fact that a producer may be “in charge” on the production set, does not establish supervisory authority without a showing of

independent judgment. Dean & Deluca New York, Inc., 338 NLRB 1046 (2003)(being in charge of store does not establish supervisory authority without a finding of the independent judgment).

The Regional Director found that “the record contains only the mere assertion that the producer is responsible for the tasks of others and the overall show.” (DDE, p. 19). As highlighted by the Regional Director, the Employer failed to submit any documentary evidence exhibiting “accountability” at the hearing and the record, in fact, substantiated that producers were not held “accountable.” (DDE, p.18-19).

- Ms. Wong testified she was not held responsible for the work of her associate producer. (Tr. 722). When asked by the Hearing Officer if she has been held accountable for the performance of the actors, Ms. Wong testified that her executive producer brought up that the victim was skinnier than the actor. However, she stated, “it was something that she brought up,” but her executive producer did nothing further. (Tr. 735-736).
- Ms. Zumwalt testified that she was “never held responsible” for the work of her associate producer. (Tr. 684).
- Mr. Van Taylor indicated that he was never held “accountable.” (Tr. 492). In fact, he stated that both he and the associate producer would be held accountable if the episode when over budget. (Tr. 518).
- Mr. Metter testified that he has not experienced any “consequences” for unsatisfactory work. (Tr. 599-600).

Finally, the Employer cites again to Hearst Broadcasting Corp., d/b/a WDTN-TV, 267 NLRB 326 (1983) when arguing the Regional Director misapplied Board precedent. The Regional Director specifically distinguished this case through a detailed explanation. (DDE, p. 19). The producers in Hearst were not required to comply with a specific program format and were authorized to change assignments and to submit reports leading to discipline. The Employer fails to assert specifically how the Regional Director misapplied the case except by referencing the testimony of Mr. Walker. The fact that Mr. Walker asserts that producers are “ultimately responsible” for the episode does not override the extensive references to the record,

as cited above, that producers, in practice, are not held responsible for the episode. Thus, the Regional Director found that the facts of this case were distinct from those in Hearst.

Thus, the Employer failed to establish that the Regional Director misapplied Board precedent when it determined that producers do not “responsibly direct” under the Section 2(11). The Employer’s request for request should be denied on these grounds.

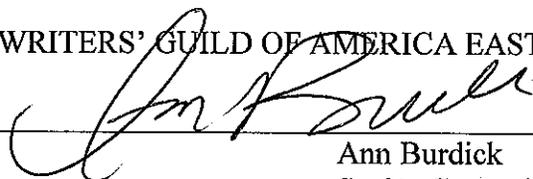
CONCLUSION

The Regional Director correctly determined that producers are not supervisors under any indicia of supervisory status under Section 2(11) of the National Labor Relations Act ("Act"). The Employer failed to establish that the Regional Director's decision determining that producers are not supervisors either departed from Board precedent or was clearly erroneously based on the record. The Employer's request for review should be denied on the ground that the issues raised are not substantial enough to warrant review.

DATED: June 11, 2013

WRITERS' GUILD OF AMERICA EAST, INC.

By:



Ann Burdick
Senior Counsel

STATEMENT OF SERVICE

I hereby certify that on June 11, 2013, a true copy of Petitioner's Brief was served electronically with the National Labor Relations Board pursuant to the Rules and Regulations of Section 102.114(i) upon the following parties:

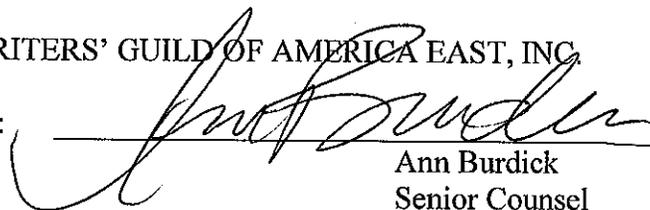
Andrew Herzog
Charles O. Rooker II
Kauff, McGuire & Margolis, LLP
950 Third Avenue – 14th Floor
New York, NY 10022

National Labor Relations Board
26 Federal Plaza, Room 3614
New York, NY 10278

DATED: June 11, 2013

WRITERS' GUILD OF AMERICA EAST, INC.

By:



Ann Burdick
Senior Counsel

Attachment #1

INTERNET FORM NLRB-502 (2-08)

UNITED STATES GOVERNMENT NATIONAL LABOR RELATIONS BOARD PETITION

FORM EXEMPT UNDER 44 U.S.C.

DO NOT WRITE IN THIS SPACE

Case No. 02-RC-092111 Date Filed 10/26/12

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

- 1. PURPOSE OF THIS PETITION (if box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
[] RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
[] RM-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
[] RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE) - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
[] UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES) - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
[] UC-UNIT CLARIFICATION - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees. (Check one) [] in unit not previously certified [] in unit previously certified in Case No.
[] AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. Attach statement describing the specific amendment sought.

2. Name of Employer: Peacock Prod. of NBC Universal Media, LLC. Employer Representative to contact: Sharon Scott, Executive Vice President. Tel. No.: 212-664-3582

3. Address(es) of Establishment(s) Involved (Street and number, city, State, ZIP code): 30 Rockefeller Center - 27th Floor, New York, NY 10112. Fax No.:

4a. Type of Establishment (Factory, mine, wholesaler, etc.): Media Production Facility. 4b. Identify principal product or service: Television Programs. Cell No. e-Mail:

5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification): Included: All part-time and full-time Freelance Project and Run of Show Producers, Associate Producers, and Casting Producers. Excluded: All other employees. 6a. Number of Employees in Unit: Present: 92. Proposed (By UC/AC): 6b. Is this petition supported by 30% or more of the employees in the unit? [X] Yes [] No (Not applicable in RM, UC, and AC)

7a. [] Request for recognition as Bargaining Representative was made on (Date) recognition on or about (Date). (If no reply received, so state). 7b. [] Petitioner is currently recognized as Bargaining Representative and desires certification under the Act

8. Name of Recognized or Certified Bargaining Agent (if none, so state): None. Affiliation: Address: Tel. No.: Date of Recognition or Certification: Cell No.: Fax No.: e-Mail:

9. Expiration Date of Current Contract, if any (Month, Day, Year): N/A. 10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year):

11a. Is there now a strike or picketing at the Employer's establishment(s) involved? Yes [] No [X]. 11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of (Insert Name) organization, of (Insert Address) Since (Month, Day, Year)

12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above (if none, so state): Name: Address: Tel. No.: Fax No.: Cell No.: e-Mail:

13. Full name of party filing petition (if labor organization, give full name, including local name and number): Writers Guild of America East, Inc.

14a. Address (street and number, city, state, and ZIP code): 250 Hudson Street, Suite 700, New York, NY 10013. 14b. Tel. No. EXT: 212-767-7808. 14c. Fax No.: 212-682-1909. 14d. Cell No.: 203-207-1622. 14e. e-Mail: jmolto@wgaeast.org

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization):

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief. Name (Print): Ann Elurdick. Signature: [Signature]. Title (if any): Senior Counsel. Address (street and number, city, state, and ZIP code): 250 Hudson Street, Suite 700, New York, NY 10013. Tel. No.: 212-767-7844. Fax No.: 212-682-1909. Cell No.: 646-228-1463. e-Mail: aelurdick@wgaeast.org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment #2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**Peacock Productions of NBC Universal Media, LLC,
Employer**

- and -

Case No. 2-RC-092111

**Writers Guild of America East, Inc.,
Petitioner**

DECISION AND DIRECTION OF ELECTION

Peacock Productions of NBC Universal Media, LLC ("the Employer") is a television production company located in Manhattan's Rockefeller Center. The Writers Guild of America, East, Inc. ("the Petitioner") filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended ("the Act") seeking to represent a unit of all part-time and full-time freelance and "run of show" producers, associate producers and casting producers, excluding all other employees.

Under a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter¹ and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated and I find that the Employer is a Delaware corporation with an office and place of business located at 30 Rockefeller Plaza, New York, NY, the only facility involved herein. The Employer produces long-form, documentary-style, non-fiction programming primarily for distribution over cable television. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$100,000, and purchases and receives at its New York, NY facility goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

¹ The briefs filed by the parties have been duly considered.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

As stated above, in its petition, the Petitioner seeks to represent all part-time and full-time producers, associate producers and casting producers who work as "freelancers" on a specific project, or who work on a more extended temporary basis, which is referred to as "run of show." The Employer does not contest that the petitioned-for classifications share a community of interest sufficient to find that the proposed unit is appropriate.² The only issue presented was whether the freelance and "run of show" producers are supervisory. The Petitioner will not proceed to an election in any other unit found to be appropriate.

The Employer contends that the freelance producers and the "run of show" producers are supervisors within the meaning of §2(11) of the Act and, therefore, must be excluded from the unit. Specifically, the Employer argues that the freelance and "run of show" producers have the authority to assign and responsibly direct work, and to effectively recommend the hire, discharge and discipline of the freelance and staff associate producers, the crew, and the editors.

In contrast, the Petitioner asserts that the disputed producers do not exercise independent judgment in making assignments. Rather, the location of the assignment is dictated by the storyline of the show and work hours conform to industry standards, and the overall tasks performed by the associate producers, the crew and the editors are well-defined and routine. Further, the Petitioner submits that while the producers direct work in a collaborative sense, the evidence is insufficient to find that the producers are held accountable for the work performance of the associate producers, the crew, or the editors, and therefore, they do not responsibly direct within the meaning of Section 2(11). Regarding the authority to effectively recommend hire, the Petitioner argues that while the producers may request particular individuals to be assigned or transferred to their project, or make hiring referrals, the record establishes that management does not always accommodate these preferences and that the producers do not participate in the hiring process. Finally, the Petitioner argues that the record does not demonstrate that the disputed producers effectively recommend promotion, discipline or discharge; rather, their feedback is merely reportorial. In the alternative, the Petitioner argues that even if the producers possess some indicia of supervisory status, the crew is not comprised of "employees," and therefore, the producers do not exert supervisory authority within the meaning of Section 2(11).

I have considered the evidence and arguments presented by the parties on this issue. As more fully discussed below, I find that the freelance and "run of show" producers are properly included in the unit, along with freelance and "run of show" associate producers and casting producers. The record does not establish that they effectively recommend hire, discipline and

² Staff producers, staff associate producers and staff casting producers are not encompassed by the petitioned-for unit.

discharge, nor do they exercise the requisite independent judgment regarding assignment, and no evidence substantiates that they are held accountable for directing work. Accordingly, the producers do not possess the level of authority necessary to find them to be supervisors excluded from coverage of the Act.

To provide a context for my discussion, I first will provide an overview of the Employer's operations and the record evidence concerning each of the supervisory indicia mentioned above. Then, I will present the facts and reasoning that support each of my conclusions on this issue.

FACTS

A. OVERVIEW OF OPERATIONS

The Employer is a mid-sized television production company affiliated with NBC, and engaged in the business of producing and selling documentary or fact-based programming to various cable networks and internal clients, such as, MSNBC.

At a minimum, the Employer produces 200 – 250 hour-long episodes every year. Each episode typically requires twelve weeks of work which stretches over a period of about three to four weeks in pre-production, one week in production, and about six to seven weeks in post-production. Although the content and format vary depending on the subject matter, each episode usually includes narration, interviews and event re-enactments with actors on location. A series consists of six episodes per television season. The Employer may use the same producer and associate producer throughout the season, and sometimes retains the same personnel over the course of several seasons. The Employer also produces special projects referred to as "crashes" which cover a specific topical event. Because these special one-hour programs require an expedited production schedule, several producers and associate producers may be assigned. As an example, a show called "Superstorm Sandy," which aired on the Weather Channel, required the collaboration of six producers and six associate producers in order to complete the project in a matter of days.

The top management team related to the above-described operations is comprised of: General Manager/Executive Vice-President, Sharon Scott; Senior Vice-President of Programming, Knute Walker; and, the Senior Vice-President of Development, Benjamin Ringe. At this management tier, the focus is project creation and development through direct contact with clients.

Senior VP of Programming, Knute Walker, testified that his position primarily involves negotiating contracts with clients. He is also the liaison for programs produced for NBC affiliates. He maintains a high level of oversight for these productions and directly supervises the director of operations, the senior producers, the supervising producer, and the line producers. It is not in dispute that the aforementioned titles are managerial and/or supervisory.

For every show, Walker meets with the Director of Operations, Danielle Bibbo, who manages finance and strategy, and one of the senior producers to develop a budget for the

production. They consider, among other things, a base number for crew days, and the cost of licensing or permit fees for music and locations. The senior producers reporting to Walker are: Gretchen Eisele; Lloyd Fales; Elizabeth Fischer; Colleen Halpin; Keith McCay; Loren Michelman; and, Betsy Wagner. As a general rule, the senior producers simultaneously manage about four projects; however, the number of projects varies, especially where the senior producer oversees the entire season of a series. The line producers, who seem to be involved in more complicated projects, track the budget as the logistics unfold during production.

The Employer employs a core staff of permanent full-time producers and associate producers. While it appears that the overall duties of the staff producers are the same as the freelance producers, I note that to the extent that the testimony of Staff Producer Kimberly Ferdinando is inconsistent with the freelance producers, I will rely more heavily on the experience of the freelance producers because the staff producers are not encompassed by the petitioned-for unit. The record does not disclose the total compliment of staff producers or staff associate producers, nor is there evidence regarding the ratio of staff to freelance employees.

The Employer also maintains a fluid group of freelance producers and associate producers. In that regard, the Employer contracts with an employment agency for most of the freelance referrals in these classifications. Pursuant to the agency contract, the Employer may hire freelance employees to work continuously, but not for a period exceeding 52 weeks. After 52 continuous weeks of work, the contract requires that the freelance employees either take a 6 month hiatus or convert to temporary staff positions, which are referred to as "run of show." The record does not fully explore the process or frequency with which the freelance producers and associate producers are converted to full-time staff.

Supervising Producer Ann Kolbell oversees the freelance producers and freelance associate producers. The record demonstrates that she has the authority to assign and transfer freelance employees to various projects.

The field production crew consists of the director of photography, cameramen, sound and lighting technicians, and other film assistants. Although the crew may be comprised of NBC staff, the Employer commonly hires freelance employees who work on a daily hire or project-to-project basis. The casting producer is primarily responsible for finding actors who have a physical likeness to the subjects in the story. It is unclear whether the casting director is solely a freelance position or whether the Employer also employs staff casting producers for these productions.³

Finally, the editors work in the post-production phase of the project. Together with the producer and the senior producer, the editors work with the raw footage and shape the episode. Upon upper management's review, the "final cut" is delivered to the client for broadcast.

³ Notably, the community of interest in the petitioned-for unit is not in dispute and therefore, the record almost exclusively centered on the supervisory status of the freelance producers.

B. PRE-PRODUCTION WORK

As stated above, in the development stage, Senior VP of Programming, Knute Walker, Director of Operations, Danielle Bibbo, and the senior producer(s) on the project create the initial budget for a production. After establishing the parameters of the budget, the producer may request additional shoot days or some other adjustment in the budget allocations. Frequently, management will reallocate costs among the budget items due to changed circumstances.

The senior producers are responsible for the "look" of the show, which is constrained by the budget and the client's preferences. As such, the senior producer provides editorial input throughout the production process. According to Senior Producer Colleen Halpin, she merely sets the deadlines for the shoot schedule and the "cuts" which she reviews as the project progresses. While Halpin retains final approval, she claimed that the producer has complete discretion to plan, delegate and supervise the execution of the project.

It appears that the producers primarily perform the pre-production work at the Employer's facility. The producer's duties include researching the subject matter and writing the original content of the show. The producer creates the list of experts, interviewees, and the characters in the story. The producer also contributes to the detailed planning for the logistics of the actual shoot. Freelance Producer Daniel Bowen testified that his ultimate responsibility is to create a unique way of articulating the story that the senior producer has assigned to him.

Several "run of show" producers -- David Van Taylor, David Mettler and Steve Rivo - elaborated on the extent of the senior producer's editorial input and the limitations placed on their discretion.⁴ Their corroborative testimony demonstrates close supervision throughout the pre-production phase. As an example, one of the primary duties of the producer is to write the "treatment" which outlines the story and the important elements of the shoot. All of these witnesses testified that their senior producers reviewed, edited and sometimes rewrote the treatment prior to its release to the network executives or the client.

More specifically, Van Taylor testified that the senior producer dictated various aspects of the production schedule, the format of the show, and the particular equipment to be used in production. Similarly, Mettler testified that for an episode of "Disappeared," Senior Producer Liz Fischer discussed possible storylines, how the treatment should be broken down into acts, and how the re-enactments and interviews should be shot. In addition, Rivo recalled a particular incident regarding content. For an episode of "Caught on Camera," Rivo and the associate producer found amateur videos of the event on which the episode was based. They met with Senior Producers Loren Michelman and Keith McCay to present the videos. Rivo did not have discretion to deviate from the treatment and integrate the footage without the senior producers' approval.

For an established series, the producer's discretion appears to be even more circumscribed. Freelance Producer Lise Zumwalt testified that by the time she was hired for a series called "Killer Instincts," the format was set and she was not authorized to exercise any

⁴ It does not appear that any of the freelance producers worked with Halpin as their senior producer.

discretion in that regard. Van Taylor, Mettler, and Rivo corroborated that when they were hired for an ongoing series, the format was established and they were instructed to use previously aired episodes as the template for how to shoot an episode.

Only one employee witness, Staff Producer Kimberly Ferdinando, appears to be involved in the early conceptual stages of a project and in devising the budget. Notably, the job description offered by the Employer lists the responsibilities of the producer as "work[ing] directly with senior producers to help write and produce non-fiction, non-scripted content for distribution." (Er Ex 36). It does not include project development and finance. Again, the staff producers are not encompassed by the petitioned-for unit.

With respect to the associate producer, their primary role is to coordinate the logistical aspects of the shoot. The record demonstrates the collaborative nature of the work done in preparation for filming. As an example, in an e-mail dated November 29, 2012, Freelance Producer Dan Bowen, as an experienced "old-timer," provided Freelance Associate Producer, Daniel Mehrer, with informal feedback and guidance "from both a logistical and creative point-of-view." (Er Ex 14). Van Taylor and Mettler also testified that they work with the associate producer to create the shoot schedule which is the guide for the field work. Rivo testified that on his first few episodes as a new producer on "Disappeared" and "Fatal Encounters," the more experienced associate producer created the shoot schedule for him. Revising the shoot schedule throughout the production process often requires input from the senior producer and the associate producer.

C. HIRING AND ASSIGNMENT OF PRODUCER AND ASSOCIATE PRODUCER

Supervising Producer Ann Kolbell testified that once a project is lined-up, she works with the Senior Producer to find an available producer with the matched skill set for the job. All of Petitioner's witnesses corroborated this process for hiring freelance producers. As an example, Van Taylor testified that Kolbell and Senior Producer Lloyd Fales interviewed him when he was first hired as a freelance producer. Rivo and Annie Wong testified that they were interviewed by Kolbell and Senior Producer Elizabeth Fischer for their freelance producer positions. Zumwalt testified that she was also interviewed by Kolbell and a senior producer prior to her hire as freelance producer.

The same initial hiring process appears to be used for hiring the freelance associate producers. As an example, Katherine Ferraguto interviewed with Kolbell and Senior Producer Keith McCay when she was first hired as an associate producer. Alexander Baertl testified that Kolbell and Senior Producer Gretchen Isoloy interviewed him for the position of freelance associate producer.

The documentary evidence suggests that all freelance producer and associate producer resumes and referrals for hire must be approved by the senior producer and once that approval is granted, Kolbell is contacted for on-boarding instructions.

With respect to assignment, the record indicates that Kolbell determines the assignment of the associate producer to a particular project, depending on availability and skills. As an

example, in an e-mail dated August 3, 2011, Kolbell asked staff producers for feedback on Freelance Associate Producer, Katharine Ferraguto, who had just recently been hired. (Er Ex 3). This e-mail also shows Kolbell's authority to assign and reassign the freelance population based on availability. Erica Matson, a "run of show" associate producer, testified that Kolbell makes the ultimate decision as to her project assignments and determines her availability for transfer to new projects.

The record evidence regarding the producer's authority to effectively assign a particular associate producer varied. In that regard, Staff Producer Kimberly Ferdinando testified that sometimes her request was granted and sometimes it was denied because of a scheduling conflict. On his first project, Freelance Producer Daniel Bowen testified that he requested a strong associate producer who was familiar with the Employer's procedures; Kolbell complied and assigned an experienced associate producer. The most common situation described by the freelance producers is that Kolbell simply informs them of the assigned associate producer without their input.

Finally, although the producer may request an additional associate producer, the record does not reveal the frequency with which this occurs or whether the requests are granted or denied. Regarding whether producers can effectively recommend the removal of an associate producer, Rivo recalled a specific incident during pre-production for an episode of "Fatal Encounters." In that regard, Rivo informed Senior Producers Lisa Fisher and Lloyd Fales that the assigned Associate Producer, Therese Palaia, was too inexperienced, needed training and should be replaced. Rivo's request was denied.

D. HIRING THE PRODUCTION CREW

According to Senior VP of Programming Knute Walker, the producers have input into the selection of their crew, especially the cameraman. Although Walker claimed that the producer has some leeway to negotiate salaries, the documentary evidence shows the Employer's strong disinclination to allow deviation from the fixed rate. A guideline titled "On-boarding Procedure" states that all crew hires should go through the crew office and that office will negotiate rates and options for payment directly with the crews. (P Ex 4).⁵ "You should not negotiate payment on your own." These procedures were developed by: Director of Operations Bibbo, NBC Employment Attorney Stephanie Franco; NBC Production Attorney Beth Label; Director of Production Carmella Tripodi; Senior Director of Finance Mindy Boyle and HR Representative Stacey Green. The freelance producers did not provide input and had no involvement with creating this procedure.

While Staff Producer Kimberly Ferdinando appears to take a "hands on" approach by directly contacting her preferred crew, most of the producers rely on the senior producer, the line producer or the associate producer to hire local film personnel.

⁵ Pursuant to subpoena, the Employer produced the document identified as P Ex 4. The Union offered it as a business record and the Hearing Officer reserved ruling. I hereby receive P Ex 4 in evidence as part of this record as a business record.

Ferdinando testified that if a cameraman whom she prefers is available, she instructs the crew office to put him "on hold" for her project, pending the formal hiring process. The parties adduced very little testimonial evidence regarding the workings of the crew office. A document titled "Crew Booking Procedure" states that the crew office encourages any recommendations because "we are always looking to increase our lists of available and acceptable crews." (P Ex 4). Specific instructions include "fill[ing] out a Crew Request in the peacock.crew-requests file" and to "[b]e sure to obtain Senior approval" and add their name to the request form. The submission of a request form indicates that the producers' referrals for hiring crew members are vetted by management. Further, the record is unclear as to whether Ferdinando selected the cameraman from a pre-approved list generated by the crew office.

With respect to the director of photography, it appears that management prefers a select group who are regularly hired for shoots on location. Van Taylor, Mettler, Zumwalt and Wong have referred certain directors of photography who were sometimes hired; however, the producers did not participate in the interview or any other aspect of the hiring process, including setting the terms and conditions of employment.

With respect to the talent, the casting director selects a group of potential actors based on photographs of the real-life people involved in the story that the actors will portray, and provides their headshots to the producer for selection. It appears that HR Representative Teryle MacDonald and NBC Production Attorney Beth Lobel review all casting requests and then the casting director follows through with the Employer's on-boarding procedures.

Although Ferdinando stated that she has authority to find the talent and sign them onto the project, the record demonstrates that, more typically, the freelance producers select the actors from the casting director's pool based on physical appearance. Mettler testified that for one episode of "Casino Secrets," the associate producer hired the actors because no casting producer was assigned to this project. Wong testified that her associate producer once found the actors on "Craig's List" after advertising on this website. The record does not indicate whether the associate producers in these examples were staff or freelance employees.

E. PRE-PRODUCTION SCHEDULE AND HOURS

The production team usually works during the Employer's normal operating hours, from about 10:00am to 6:00pm, Monday through Friday, which is the industry standard. Although Freelance Producer Bowen testified that he sets the associate producer's work schedule at all phases of production, other freelance producers disputed that they had such authority. "Run of Show" Producer Mettler stated that he is not aware that he has the authority to assign different hours, however, as deadlines approach, he and the associate producer have worked longer hours. "Run of Show" Producer Van Taylor claimed that he and his associate producer discuss what tasks need to be completed by a certain date, but they do not usually discuss specific hours to report to work. "Run of Show" Producer Zumwalt corroborated that the associate producer generally works normal office hours, however work expands as the job dictates. Zumwalt stated that she never informed her associate producers of specific hours.

F. PRODUCTION: THE FIELD WORK

The storyline of the project determines the location of the shoot. The production team spends about a week on location filming interviews with the eye-witnesses, the actors' re-creation of the event, commentary with the host, and any other shots of the location itself that are related to the project's storyline.

The senior producer monitors the progress of the production. Halpin testified that she serves as a resource for the producer should any problems or questions arise. Ferdinando stated that throughout the production process, she directs any questions to the senior producer because she is "the boss." Similarly, Mettler, Rivo and Van Taylor testified that if something goes wrong during the shoot, if the shoot goes very late, or if the shoot deviates from the plan in an important way, they reach out to their senior producer for guidance and approval before implementing any changes. In that regard, Rivo recalled an incident when an interviewee suddenly pulled out of the shoot. He had to check with the senior producer to make sure that it was still okay to move forward with the story without that witness. During the two projects that Zumwalt worked on as freelance producer, she emailed production reports from the field on a daily basis to Series Producer Lloyd Fales, which detailed the production's progress.⁶

Notwithstanding this oversight, the producer directs the field work. Mettler analogized his role as the producer to that of a quarterback on a football team - he calls the plays and executes the game plan during a shoot. The record makes clear that the extent of the direction, the degree of oversight, and the collaborative nature of the work combine in different ways depending on the experience level of the personnel and the complexity of the shoot.

The record demonstrates that the producer's direction of the crew is collaborative. Each member contributes particular skills, knowledge and expertise to help the producer execute a shoot. The producer's relationship with the director of photography ("DP") illustrates the collaboration involved in the creative process. As Rivo explained, the DP is responsible for everything that happens on the inside of the video frame, such as, how things are lit, the motion of the camera and the composition of the frame. The DP is essentially responsible for making the image suit the specific technical specifications required for the show. To that end, Rivo and the DP have discussed what lens to use, how close to shoot, the master shot, and whether they need another take.

As mentioned above, the associate producer is responsible for coordinating the logistical aspects of the shoot, including among other things, finding props, contacting the actors and interview subjects, gathering releases, arranging transportation, and ordering the catering. "Run of Show" Associate Producer Katherine Ferraguto testified that her overall duties in the field are to make sure that everything goes smoothly and that the production is on time. Associate Producer Alexander Baertl testified that on every show, the senior producer gives him a rundown of his general duties. Mettler, Zumwalt and Rivo testified that the Employer mostly hires

⁶ It appears that the series producer is a managerial/supervisory position and may be used interchangeably with "line producer."

experienced associate producers who know what is expected based on well-established industry practice. Similarly, Wong testified that the associate producer assigned to her project had been on the series for some time and that she knew the "lay of the land." The job description for the associate producer lists as one of the qualifications/requirements, "at least three years editorial production experience in longform programming for network or cable operations." (Er Ex 35).

The producer monitors the work of the associate producer and reports positive and negative feedback to the senior producer, the line producer and Kolbell. The record does not indicate, however, that this feedback necessarily impacts the associate producer's terms and conditions of employment. As an example, by e-mail dated September 19, 2011, Van Taylor gave positive feedback on freelance associate producer Terese. (Er Ex 25). Nonetheless, Kolbell subsequently informed Terese that she would not be reassigned. In another case, Associate Producer Matson testified that after a year, Senior Producer Keith McCay, with whom she had never directly worked, informed her that she was being converted from freelance to "run of show" based on feedback from other producers.

Further, the record does not establish that the producers participate in the decisional process for personnel actions concerning the associate producers. In that regard, staff associate producers receive formal evaluations written and signed by their senior producer. Although Senior VP of Programming Walker and Senior Producer Halpin testified that the freelance producer's comments and opinions concerning the quality of the associate producer's work are given great weight, none of the evaluations were proffered into evidence to show that the freelance producers' feedback impacted the appraisal. Further, Kolbell gives verbal feedback to the freelance associate producers at the end of the project; notably, the producer does not attend the meeting. Kolbell testified that irrespective of whether the producer is freelance or staff, she considers the producer's feedback in deciding whether to convert a freelance associate producer to "run of show." Again, no documents or concrete examples regarding the decisional process were offered into evidence to support the testimony of Kolbell.

Although Ferdinando claimed that she is held responsible for any errors that the associate producer makes, no specific examples were adduced on the record. As a staff producer, Ferdinando received written evaluations of her work performance, which were not introduced in evidence. No documentary evidence was introduced to establish that the producers - staff or freelance - are held responsible for the associate producer's work.

Finally, regarding the budget, Walker and Kolbell testified that the senior producer is responsible for bringing a project in on budget, even though the producer bears some responsibility to keep the shoot within the set budget. Rivo testified that when he was going to go over budget on licensing fees, he was obligated to tell the senior producer and ask for approval for doing so. Similarly, Mettler testified that if the production is going over budget by more than a couple hundred dollars, he calls his senior producer for approval. By e-mail dated January 17, 2012, Kolbell informed Mettler that although she approved his expenses, he had to keep his meal expenses under \$50 per day. (Er Ex 28). This demonstrates that the producers have very little discretion and are closely supervised regarding the budget.

Freelance Producer Bowen testified that the producer is responsible for making the budget work when things go wrong in the field. His testimony described hypothetical situations, in part, because he has only five months experience working for the Employer.

G. PRODUCTION SCHEDULE AND HOURS

Notwithstanding the shoot schedule, ten to twelve hour days are generally expected for this type of field work. The record demonstrates that the crew works until the producer decides that it's a "wrap." Hours are generally dictated by the workload and deadlines. Some producers claimed that they told the associate producers to come in early and work late; others emphatically denied that they assigned hours. Although the associate producers are not paid overtime pay for working longer than scheduled hours, they may be granted a "comp day" by either the senior producer or Kolbell.

Often, due to the vagaries of field work, an additional day of shooting is required. The record demonstrates that the producer must get approval from the senior producer before moving forward. Mettler testified that if he wants to add another day of shooting or needs to shift a scheduled shoot day, he must ask his senior producer and line producer for approval. Van Taylor stated that in consultation with the senior producer, he has made changes in the number of shoot days.

With respect to the crew, the record indicates the crew may contract with the Employer to receive overtime payment past a ten-hour workday. Even though the record shows that the producer determines when to quit for the day, "Run of Show" Producers Van Taylor and Mettler testified that they do not have the authority to grant overtime pay. In that regard, an e-mail dated August 7, 2012, indicates that Line Producer Peter Burke calculated the overtime payment for the DP. (Ex Ex 27). Mettler merely confirmed that the overtime appeared accurate based on the time that they finished the shoot. The e-mail demonstrates that Mettler was not involved in negotiating or authorizing the overtime pay for the crew member. "Run of Show" Producer Rivo corroborated that he never signed-off on overtime invoices. Staff Producer Ferdinando's testimony, unsupported by documentation, that she signs the overtime bills for the camera and sound technicians and then sends it to the Employer's accounting department is not only contradicted by the freelance producers, it seems at odds with a document titled "Who Does What at Peacock." (P Ex 6). This document states that all finance inquiries should be directed to the line producer on the project, the senior producer, or specific managers, such as, Pat Nugent, Erika Grothues and Lisa Fisher. Management did not direct the crew to the freelance producers as a resource for guidance on finance issues.

With respect to the producer's authority to approve leave requests, Kolbell testified that an associate producer must first contact the producer for approval before contacting her to request a day off. "Run of Show" Associate Producer Erica Matson and Ferdinando corroborated that the associate producer gets permission from the producer and then contacts Kolbell because she keeps track of employees' time. However, in e-mails dated September 18 and 24, 2012, the associate producers appear to merely inform Ferdinando of their absence. (Er Ex 12). Although Ferdinando testified that she approved these requests, it is noteworthy that the Employer did not provide the responsive e-mails that would show that she authorized the leave.

In direct contradiction, Van Taylor and Rivo both testified that they have never approved any leave requests from the associate producers. Rather, the senior producer and Kolbell authorize the associate producer's leave requests, and the producers are merely informed as a courtesy. In his testimony, associate producer Baertl testified that he has only requested time off once and he had to clear this with his senior producer. Baertl testified that he understands the procedure to be that he seeks approval for leave from his senior producer and then from Kolbell because these two are his managers. Once they have approved his leave request, Baertl tells his producer that he will be out. Baertl's testimony is consistent with Kolbell's instructions in a document titled "Who Does What at Peacock?" (P Ex 6). Regarding time off, Kolbell wrote that any requests by freelance producers and associate producers "should be discussed first with your project senior [producer] and then sent to Ann Kolbell with a cc to Katie Hannafin [the front desk assistant]."

H. POST-PRODUCTION

The post-production phase usually takes about seven weeks to complete and this work is performed at the Employer's facility. During the first week, the producer gathers the materials from the shoot, chooses sound bites, reads the transcripts and then writes a script. The record clearly demonstrates that at this phase, the senior producer reviews the script and provides notes which are then incorporated into the script. Van Taylor also stated that there have been instances when the senior producer has made significant changes and completely rewritten his script. He also recalled instances where the senior producer has directed him to go back in the field for another day of shooting to more completely cover the story.

After approving the script, the senior producer presents it to the client for review. The producers do not have direct contact with the client at any point in the post-production process. Based on the client's feedback and revisions, the producer revises the script in consultation with the senior producer. After the script has been fully vetted by the senior producer and the client, the editing process begins.

During the editing phase, the producer works closely with the editor to build "cuts." The cuts are made in the following order: the radio cut, the rough cut and the fine cut. The radio cut is the audio, such as, the voiceover narrations. The rough cut builds on the radio cut by adding the shots and attempting to tell the story using all the footage. The fine cut requires further editing to use the sequences that best tell the story.

The producer screens the tape, reviews materials, gathers information, and writes the voiceover. The editor operates machinery to assemble the video. The associate producer is responsible for managing all the footage by creating a clip log of everything that was shot in the field. Although the associate producer may assist in finding footage or finishing up the field work by returning rented props and equipment, the associate producer's role in post-production is minimal. In fact, the associate producer can be reassigned to begin pre-production on another project before post-production is finished.

Again, the record demonstrates the senior producer's close involvement in the editing process. All of the witnesses corroborated that the senior producer reviews each cut and provides detailed notes about what is working, what is not, what needs to be changed and how it should be changed. Rivo specifically recalled that the senior producer provided a lot of oversight for his work on "Caught on Camera," "Disappeared" and "Fatal Encounters," because the particular format was set for these shows.

I. HIRING, ASSIGNMENT, AND DIRECTION OF THE EDITOR

The record indicates that while the senior producers and the producers can request a particular editor, it appears that they are usually assigned to the project by the senior producer. Nugent has the authority to assign. Mettler recalled one project where the senior producer asked him for a referral. Mettler recommended an editor with whom he had worked; however, he was not involved in the interview which was conducted exclusively by the senior producer. Like the assignment of associate producers, some of the producers testified that they had no knowledge of the editors who were working for the Employer and therefore, did not make any specific requests.

Although Staff Producer Ferdinando testified that she evaluates the editor's work, "Run of Show" Producers Mettler and Rivo stated that they merely provided feedback to the senior producer. No documentary evidence was introduced to show that the producers' comments result in an employment action for the editors affecting their terms and conditions of employment or that the producers are held accountable for their work.

Senior VP of Programming Walker testified that the producer is responsible for the editor's work. Senior Producer Halpin and Ferdinando testified that the producer directs the editor with specific instructions regarding footage. The freelance producers testified that the editors are clear about the expectations of their job, that the senior producer is directly involved with instructing the editor to make certain changes, and that the relationship between the producer and the editor is collaborative.

Finally, the record demonstrates that the producer and the associate producer return to working the Employer's normal office hours of about 10:00am to 6:00pm during the post-production part of the project. Like the other phases of the project, the record does not demonstrate that the producers have the authority to schedule hours or grant overtime during post-production.

ANALYSIS

In defining "employees," Section 2(3) of the Act specifically excludes supervisors 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.

To establish that the individuals are supervisors, the party asserting supervisory status must show: (1) that they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and, (3) that their authority is exercised "in the interest of the employer." *Oakwood Healthcare, Inc.* 348 NLRB 686, 687 (2006). A party can prove the requisite supervisory authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend the exercise of a supervisory function. *Id.* at 688.

The party asserting that an individual has supervisory authority has the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046 (2003). "[W]henver the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43 (2012). Purely conclusory evidence is not sufficient to establish supervisory status; rather, the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). A "paper showing" or testimony merely asserting generally that individuals exercised certain supervisory duties is not sufficient to meet the burden of proof. Like a job title, a job description is not determinative of supervisory status. *Atlantic Scaffolding Co.*, 356 NLRB No. 113 (2011). "[M]ere inferences or conclusory statements, without detailed, specific evidence are insufficient to establish supervisory authority." *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012). Rather, the testimony must include specific details or circumstances demonstrating the existence of supervisory authority. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

In applying the above-mentioned case law, and based on the record evidence, I conclude that the evidence is insufficient to establish that the employees at issue, the freelance and "run of show" producers, are supervisors as defined by Section 2(11) of the Act.

A. EFFECTIVELY RECOMMEND HIRE, FIRE, DISCIPLINE

With respect to the authority to effectively recommend hire, the Board defines the power to effectively recommend as meaning that the recommended action is taken with no independent investigation by superiors." *Family Healthcare, Inc.*, 354 NLRB 254 (2009); *ITT Corp.*, 265 NLRB 1480, 1481 (1982); *Wesco Electric Co.*, 232 NLRB 479 (1982). Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish 2(11) supervisory authority. *Conn. Humane Society*, 358 NLRB No. 31 (2012); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enfd.* 933 F. 2d 626 (8th Cir. 1990).

In the instant case, Supervising Producer Ann Kolbell is in charge of recruiting freelance associate producers. Kolbell and the senior producer on the project interview associate producers for hire, without the participation of the producers. To the extent that the producers may request a particular associate producer, Kolbell merely attempts to accommodate the producer's preferences. Frequently, the producers have no input on assignment. Kolbell assigns associate producers based on their availability and suitability to that project. In contrast to conclusory testimony offered by the Employer, the detailed testimony of "Run of Show" Producer, Steve Rivo, illustrates that the authority to assign exclusively resides with the senior producers, the line producers and Kolbell.

Regarding hiring the crew, Senior VP of Programming Knute Walker noted that the producer's choices regarding the crew are limited by the budget and location of the project. The record demonstrates that senior producers and line producers often assign the director of photography from a preferred group with prior experience to ensure that the footage will stay within the format and look of prior episodes. Producers merely refer fellow journeymen. As "Run of Show" Producer David Van Taylor testified, over the course of five projects, the senior producer only once asked him to recommend a director of photography. The senior producer independently interviewed and hired the candidate. Further, the associate producer and the producer refer local technicians to the Employer's crew office for hire. In that regard, the documentary evidence shows that the wages are generally fixed and the producers do not negotiate any other terms and conditions for the daily hires. The casting producer or the associate producer find local actors based on their physical resemblance to the real-life people involved in the story and the producer makes a selection. Accordingly, the record is insufficient to conclude that the producers are independently vested with authority to hire and do not "effectively" recommend hire. *Robert Greenspan, DDS*, 318 NLRB 70 (1995)(selections were not demonstrated to be more than experience of a journeyman expertise in determining which employee had the requisite skills or other characteristics to perform the job); *Ryder Truck Rental*, 326 NLRB 1386, 1387-1388, n.9 (1998).

Finally, although producers have sometimes requested the assignment of a particular editor for their projects, the record demonstrates that, like the associate producers, the editor is commonly assigned without the producer's input. Thus, the authority to effectively recommend assignment is sporadic and isolated. *Volair Contractors*, 341 NLRB 673 (2004).

I also note that although Ferdinando testified that she has authority to hire all of the above-mentioned classifications, her testimony was often hypothetical and lacked specific examples. Moreover, as a staff producer, her testimony regarding the authority of the freelance producers carries less weight than the testimony of the freelance producers themselves. Even if some *ad hoc* recommendations for hire may have been followed, the overwhelming record demonstrates that the Employer's supervising producer, senior producers, and line producers retain the authority to hire and assign candidates, many of whom have already been vetted by a temporary employment agency or the crew office. *Atlantic Scaffolding Company, supra*; *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (conclusory evidence, without specific explanation that the disputed person or classification in fact exercised independent judgment, does not establish supervisory authority).

Regarding the authority to affect promotion, discipline or discharge, the Employer contended that the producers evaluate the associate producers, directors of photography, and the editors and that this feedback affects job status. I find that the fact that the producers may evaluate others' work, standing alone, is insufficient to support a finding of supervisory authority.

The Board, in *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999), noted that Section 2(11) does not include the authority to "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function. Here, Supervising Producer Ann Kolbell testified that she did not retain Freelance Associate Producer, Teresa Palaia, based on negative feedback from "Run of Show" Producer, Steve Rivo. I note, however, that the record demonstrates that the freelance producers are merely reporting on the quality of the associate producer's work which is independently investigated by management. Accordingly, the producer's feedback does not, standing alone, affect employment decisions concerning freelance employees. *Arizona Public Service Company*, 310 NLRB 477 (1993); *Pepsi-Cola Bottling Company of Merced-Modesto*, 154 NLRB 490, 493-494 (1965)(individual who reviews service by salesperson, and, if he discovers faults, reports them to the plant manager who makes an independent investigation, is not a statutory supervisor).

Additionally, I note that the senior producers write and sign formal evaluations for the permanent staff associate producers. Although some testimony indicates that the freelance producers' feedback is given a lot of weight in determining personnel decisions, no documentary evidence was introduced to support this assertion. This lack of evidence should be construed against the Employer as the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000).

In conclusion, based on all of the above, the evidence is insufficient to demonstrate that the producers "effectively recommend" hire, assignment, discharge, promotion or discipline. Rather, the producer's recommendations are sporadically followed and this authority rests in the next tier in the management hierarchy.

B. ASSIGN AND RESPONSIBLY DIRECT

The Board, in *Oakwood Healthcare, Inc.*, *supra*, clarified the criteria for finding that a putative supervisor "assigns" or "responsibly directs" the work of others, and uses "independent judgment" in doing so. The Board held that the authority to assign refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. *Id.* at 689. In sum, to 'assign' for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... *ad hoc* instruction that the employee perform a discrete task." *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006), citing *Oakwood Healthcare, supra*, at 689-90. The authority to make an assignment, by itself, does not confer supervisory status. The putative supervisor must also use independent judgment when making such assignments. *Oakwood Healthcare, supra*, at 692-693.

The Employer contends that the producers assign overall tasks to the associate producers, crew members, and actors; set their schedules; and, assign them to particular locations in the field. I find that the evidence is insufficient to establish that the producers exercise independent judgment in setting the tasks, hours and location during production.

The record is clear that the storyline and budget determine the location of the shoot. The shoot schedule is dependent on the availability of the interview subjects and the allotted number of shoot days as budgeted by upper management. Further, the producer and the associate producer work collaboratively to make and update the shoot schedule which is submitted to the senior producer for review and alterations prior to being finalized.

Television production can entail long workdays in the field. Here, in the event that the shoot extends later in the day or requires an additional day, the producer must obtain the senior producer's approval prior to making any changes in the plan developed in the pre-production phase. The hours in the field are driven by executing the task of gathering the necessary footage to tell the assigned story, and the senior producer decides whether additional or different material is necessary. Notably, during the pre- and post-production phases, the employees work normal office hours of 10:00 am to 6:00 pm, which are set by management in conformity with the industry standard. Although the producer is informed of an associate producer's request for personal time and sick time, the record establishes that after the senior producer approves leave requests, the associate producer informs Kolbell so that the leave time is properly reported.

To be supervisory, the supporting evidence must be sufficient to establish that the producers make assignments tailored to the needs of the work and the particular employees' skill sets, analyzing the employee's skill set and level of proficiency at performing certain tasks to match the work assigned. *Oakwood Healthcare, Inc., supra*, at 695. Where tasks are highly regulated, repetitive, and well known to the employees, the degree of independent judgment is reduced when directing employees in such tasks. *Id.* at 691-693; *Croft Metals, supra*, at 721.

In the instant case, the record establishes that the job duties of the associate producers, the crew, and the editors are routine and well-defined in the industry. Obviously, the producers instruct members of a production crew in preparation for and during actual filming; however, any discretion or judgment that the producers exercise in giving directions relates to their own responsibilities to achieve a desired artistic effect. Thus, these instructions are either routine in nature or are motivated by the artistic effect the producers seek to achieve and do not entail the exercise of supervisory independent judgment. *King Broadcasting Co. d/b/a KGW-TV*, 329 NLRB 378, 382-383 (1999).

In its submission, the Employer relies on the Board's decision in, *Superior Bakery, Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1990) in support of its contention that the producer's scheduling duties make the producer a statutory supervisor. In *Superior Bakery*, the individual found to be a statutory supervisor exercised more than "strictly routine" authority in selecting people necessary to do work at the times he chose. The instant case is easily distinguishable as

the producers in question are merely scheduling slots within the confines of shoot days set by his superiors and the availability of the participants under the close review of his superiors.

With respect to the producer's authority to responsibly direct work, the Board has recognized that the presumption that a producer directs others is unavoidable. *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123, 125 (1974). However, the Board has also held that such direction may not amount to responsible direction within the meaning of Section 2(11). *Id.* The Board has stated that in order to exercise independent judgment, the direction "must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Oakwood Healthcare, Inc., supra*, at 693. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies, rules, or the verbal instructions of a higher authority. *Id.* In the television industry, the Board has found that producers have the authority to "responsibly direct" other employees where the producers enjoy a level of authority tantamount to "full responsibility from the planning stage through the presentation on the air." *Great Western Broadcasting Corp. d/b/a KXTV*, 192 NLRB 1203, 1204 (1971).

Here, the freelance producers do not exercise independent judgment in relation to the format, look and content of the projects that they undertake. Their work is set within parameters established by the senior producer and upper management. Although producers have some leeway to reallocate resources, they are confined by a fixed budget and any changes to itemized costs must be approved by the senior producer. The record demonstrates that the overall responsibility for the product is vested in the senior producer. Like the producer/directors in *Westinghouse Broadcasting (WBZ-TV)*, *supra*, the producers here are part of an integrated production team in which their skills and responsibilities are joined in a collaborative effort to coordinate and develop a single product.

As an example, the producer confers with the director of photography to find the best angle for a shot. The producer directs the actors and technicians by calling the cues during each scene, however, the crew perform their jobs by exercising discretion and judgment based on their own expertise and experience. The record demonstrates that the producer coordinates with the production team so that they are all working towards the common goal of getting the necessary footage with the established look and format of the show. Thus, the producer's instructions to the crew are either routine in nature, or are motivated by the artistic effect that the producers seek to achieve. Similarly, in post-production, the editor and the producer work collaboratively to create the "cuts" which are reviewed and annotated by the senior producer and client. *McGraw-Hill Broadcasting Co., Inc.*, 329 NLRB No. 48, 456-457 (1999); *citing KGW-TV*, 329 NLRB No. 39 (1999); *Westinghouse Broadcasting (WBZ-TV)*, *supra*, at 125.

Moreover, for direction to be "responsible," the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks are not performed properly. *Oakwood Healthcare, supra*, at 691-693. To prove accountability, the party asserting supervisory status must show both that the putative supervisor has "the authority to take

corrective action" and can potentially receive "adverse consequences" for the performance errors of other employees. *D & J Ambulette Service*, 359 NLRB No. 62 (2013).

Here, the record contains only the mere assertion that the producer is responsible for the tasks of others and the overall show. Bowen's claims were largely based on hypothetical situations, rather than actual events that occurred during his brief five month tenure. Senior Producer Halpin testified that she holds the freelance producers accountable because she does not rehire them if she's not pleased with the way the production went. Her testimony, however, lacked examples or any specifics regarding the criteria used for rehiring freelance producers. The Board has also long-recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Volair Contractors*, 341 NLRB 673, 675 (2004); *The Door*, 297 NLRB 601, 602 (1990).

Further, the Employer failed to proffer any documentary evidence to establish that the freelance producers are held accountable. In that regard, I note that even though the freelance producers are not formally evaluated, the staff producers receive written evaluations. Notwithstanding the Employer's claim that the staff and freelance producers are vested with the same authority, none of the staff producer's appraisals were introduced in evidence to show that they are held accountable. Additionally, no evidence was adduced that the producers take corrective action; nor did the record testimony support the conclusion that the producers hold such authority. In the absence of such specific testimonial evidence or any documentation, I find that the producers do not responsibly direct work as defined in Section 2(11) of the Act.⁷

The Employer cites to the Board's decision in, *Hearst Broadcasting Corp. d/b/a WDTN-TV*, 267 NLRB 326-327 (1983), which is distinguishable. In *Hearst*, the producers were not required to adhere to any format. They could make changes to the content and length of the story, and instruct the reporters how to write the story. They had final authority to change work assignments made by the assignment editors, and submitted reports which could result in discipline. In contrast, here, the run of show and freelance producers are primarily responsible for gathering the footage necessary to tell the story of the show. The content of the story, the format and the look of a show is overseen, edited and approved by the senior producer, the line producer and the client. Thus, the latitude with which the freelance and run of show producers execute their duties does not involve independent judgment and therefore, does not rise to supervisory authority within the meaning of Section 2(11).

Similarly, in its brief, the Employer cites to *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972) and *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971), as support for its case. These cases are distinguishable. In these cases, the Board stressed that the producers were completely responsible for the content of the programs. Those producers were more akin to the senior producers in the instant case - they reviewed the total script of the program for continuity, accuracy, and adherence to company policy. They had the overall responsibility for bringing the whole package together. They met with high echelon officials to discuss the development of programs.

⁷ Having found that the freelance producers do not responsibly direct, I do not reach the issue of "employee" status with respect to the crew and the talent who the Union alternatively contends are not "employees" within the meaning of Section 2(3) of the Act.

Finally, the Employer cites to two cases and argues that the Board also relies on secondary indicia as supporting evidence on questions of supervisory status. First, the Board's decision in *Poly-America, Inc.*, 328 NLRB 667 (1999), is inapposite. In that case, the Board found that the employer was liable for the statements in violation of Section 8(a)(1) of the Act because its dye shop leadman were found to be agents based on apparent authority. In the instant case, even if the Employer could show that the producers are "agents," they still are not supervisors absent evidence of their exercise of any primary indicia set forth in Section 2(11) of the Act. Second, the Employer's citation to *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998), is not on point. In that case, the Board reversed the ALJ and found that the disputed department heads were not supervisors within the meaning of Section 2(11) of the Act because "their assignment and direction of work did not involve the use of independent judgment and their involvement in appraisals did not meaningfully affect employees' terms and conditions of employment.

It is well-settled that secondary indicia, without more, is insufficient to establish supervisory authority. *Springfield Terrace, LTD*, 355 NLRB 937 (2010). Accordingly, I find that the evidence of secondary indicia is not dispositive of the issue of whether the freelance producers are supervisors.

In conclusion, I find the instant case to be factually similar to the facts in *Westinghouse Broadcasting Co. (WBZ-TV)*, *supra*, wherein the Board determined the producer/directors were not supervisors on grounds that they functioned as part of an integrated production team, each member of which was independently capable of executing his assignment. Similarly, the record in the instant case establishes that the producers work within inflexible formats and their instructions to employees are routine in nature, involving little independent authority and are motivated by the artistic nature of the job. The producers do not have the authority to change work assignments, or effectively recommend assignment. Due to the extensive oversight of the senior producers, the producers are more akin to team leaders. Although most of the record dealt with the freelance producers' time in the field, I note that their time spent in the field – approximately one week out of twelve – is a small fraction of the overall duties of the producer. Further, as the Board observed in *Golden West Broadcasters – KTLA*, 215 NLRB 760 (1974), the mere absence of close supervision by a recognized supervisor over the production crew does not *per se* clothe the producer with the supervisory mantle. Rather, the Board found greater significance in the routine or artistic nature of the jobs performed by the producer and the crew than in the absence of detailed, direct supervision. *Telemundo De Puerto Rico, Inc.*, 113 F.3d 270 (1st Cir. 1997). Finally, the producer's participation in making or recommending personnel decisions is merely reportorial, sporadic and often ineffective.

Based on the record and Board case law, I find that the Employer has failed to meet its burden of showing that the freelance producers and run of show producers are supervisors within the definition of Section 2(11) of the Act and I shall include the freelance producers and run of show producers in the bargaining unit(s) found appropriate herein.

5. Accordingly, I therefore find that the following constitutes a Unit that is appropriate for the purposes of collective bargaining:

Included: All full-time and regular part-time freelance and "run of show" producers, associate producers and casting producers who meet the criteria of the stipulated eligibility formula: "run of show" employees in these classifications who were employed as of October 26, 2012, and all freelance employees in these classifications who worked 6 weeks or more in the 52 weeks prior to October 26, 2012. Employment in any workday in a given week constitutes one week of employment.

Excluded: All other employees, guards, professional employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations. Eligible to vote are the following: all "run of show" employees employed as of October 26, 2012, and all freelance employees who worked 6 weeks or more in the 52 weeks prior to October 26, 2012. Employment in any workday in a given week constitutes one week of employment.

Also eligible are employees engaged in an economic strike, which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁸ Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by the Writers Guild of America East, Inc.⁹

Date at New York, New York
This 30th day of April 2013



Karen P. Fernbach
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

⁸ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before May 7, 2013. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than May 14, 2013.

Attachment #3



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 2
26 FEDERAL PLZ
RM 3614
NEW YORK, NY 10278-0004

Agency Website: www.nlr.gov
Telephone: (212)264-0300
Fax: (212)264-2450

May 17, 2013

ANN BURDICK, ESQ.
WRITERS GUILD OF AMERICA
250 HUDSON ST, SUITE 700
NEW YORK, NY 10013-1437

MICHAEL DAVIS VELASCO, ESQ.
VICE PRESIDENT, LABOR RELATIONS
PEACOCK PRODUCTIONS OF NBC UNIVERSAL MEDIA, LLC
30 ROCKEFELLER PLZ, FL 27
NEW YORK, NY 10112-0015

Re: Peacock Productions of NBC Universal
Media, LLC
Case 02-RC-092111

Dear Ms. Burdick and Mr. Davis Velasco:

Pursuant to the Decision and Direction of Election that was issued in this matter on April 30, 2013, all parties were requested to provide their positions in writing regarding the date, hours and location of the election to be held in this matter. Based on your proposals, and my consideration of them, the election will be conducted as follows.

MIXED MAIL AND MANUAL ELECTION

FOR THE MANUAL BALLOTING:

Date: June 14, 2013

Hours: 9:30 a.m. to 10:30 a.m.
5:30 p.m. to 6:30 p.m.

Location: Cafeteria on the 27th floor of the Employer's offices at 30 Rockefeller Plaza, New York, NY

FOR THE MAIL BALLOTING:

Date Mail Ballots to be Sent to Voters: May 30, 2013

Date Voters Are Requested to Notify Regional Office if Mail Ballot Not Received or Replacement Ballot Is Needed: June 4, 2013

Date Mail Ballots Must Be Received by Regional Office: June 13, 2013

Date, Time and Place of Ballot Count: The ballot count will be held on June 14, 2013 at 6:35 p.m. at Cafeteria on the 27th floor of the Employer's offices at 30 Rockefeller Plaza, New York, NY. Representatives of the parties are invited to attend and observe the ballot count at which time they may voice any challenges to any of the ballots.

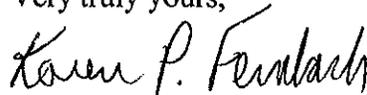
Payroll Eligibility Date: October 26, 2012

Posting of Election Notices

Election notices will soon be mailed to the parties. Section 103.20 of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places. In this case, the notices must be posted **before 12:01 a.m. on May 24, 2013**. If the Employer does not receive copies of the notice by **May 20, 2013**, it should notify the Regional Office immediately. Pursuant to Section 103.20(c), a failure to do so precludes an employer from filing objections based on nonposting of the election notice.

If there are any questions, please feel free to contact Field Examiner Maria Belonis at telephone number (212) 264-6079 or by email at maria.belonis@nlrb.gov, or Supervisory Field Examiner, Nicholas Lewis, at telephone number (212) 264-0316, or via email at nicholas.lewis@nlrb.gov, or Assistant to the Regional Director, Elbert F. Tellem, at telephone number (212) 264-0334, or via email at elbert.tellem@nlrb.gov. The cooperation of all parties is sincerely appreciated.

Very truly yours,



KAREN P. FERNBACH
REGIONAL DIRECTOR

Enclosure: Designation of Observer Form

cc: PEACOCK PRODUCTIONS OF NBC
UNIVERSAL MEDIA, LLC
ATTN: SHARON SCOTT, EXECUTIVE VP
30 ROCKEFELLER PLAZA; ROOM 75/639N
NEW YORK, NY 10112-0002