

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

MINNESOTA TIMBERWOLVES
BASKETBALL, LP

Employer,

-and-

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES,
AFL-CIO,

Petitioner.

Case No. 18-RC-169231

**PETITIONER'S BRIEF ON REVIEW OF REGIONAL
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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INTRODUCTION

Petitioner International Alliance of Theatrical Stage Employees (“IATSE”) submits this Brief on Review pursuant to Section 102.67(h) of the National Labor Relations Board’s Rules and Regulations. The Regional Director’s March 3, 2016 Decision and Order (“Decision”) in this case incorrectly concludes that employees working on in-house video feeds of live events for Minnesota Timberwolves Basketball, LP (“Employer” or “Timberwolves”) are independent contractors as defined under the NLRA. For the reasons below, the Regional Director’s decision must be vacated and a representation election ordered for the proposed bargaining unit.

IATSE filed its Request for Review (“RFR”) of the Decision on March 17, 2016 arguing that the Regional Director misapplied Board precedent, and based his conclusions upon flawed findings and misapplications of facts to the independent contractor issue. The Employer submitted papers in Opposition to Petitioner’s RFR on March 24, 2016 (“RFR Opp’n”), claiming that the Regional Director’s findings should be upheld. The Board granted the Petitioner’s RFR on July 19, 2016.

The Petitioner seeks reversal of the Regional Director’s Decision because it overtly departs from and is contrary to Board precedent, including the Board’s refined independent contractor test in FedEx Home Delivery, 361 NLRB No. 55, slip op. at 1-3 (2014) (reaffirming and refining test to be applied in determining independent contractor status under Section 2(3) of the Act). The Employer did not meet its burden of proving that the employees are independent contractors. In wrongly concluding that the Employer did so, the Regional Director assigned inappropriate weight to several factors of the independent contractor test. Additionally, the Regional Director made seriously erroneous factual findings concerning the employees and their relationship with the Employer. The Board should not accept the Regional Director’s

conclusions. It should instead order an election in the petitioned-for unit, which is composed of employees within the meaning of Section 2(3) of the Act.

FACTS

I. Procedural Background

The Employer operates two professional basketball teams in Minneapolis, Minnesota—the National Basketball Association (NBA) Minnesota Timberwolves and the Women’s National Basketball Association (WNBA) Minnesota Lynx.

On February 8, 2016, IATSE filed a representation petition for an election among part-time technical personnel working on in-house video feed of live events (e.g., basketball games) within the Employer’s Minneapolis facility (the “Target Center” arena) where both teams host their events (Bd. Ex. 1(a).)¹

At the Hearing, the parties stipulated to the following bargaining unit (see Pet. Ex. 1.):

All regular part-time freelance technicians, including Directors, Technical Directors, Audio/Tape Operators, Engineers in Charge, Engineers, Camera Operators (including stationary, mobile, and remotely operated), Font Operators, Thunder Operators, Replay Operators, Utilities and others in similar technical positions performing pre-production, production and post-production work in connection with closed circuit telecasts displayed on the in-house video system within the Employer's home arena, including such telecasts of Minnesota Timberwolves games, Minnesota Lynx games, pre-game shows and post-game shows.

¹ References to the March 3, 2016 Decision and Order appear as “DO ___.” References to the transcript of the February 18, 2016 hearing (“Hearing”) appear as “Tr. [page].” Exhibits introduced by the Petitioner during the Hearing are referenced as “Pet. Ex. ___.” Board exhibits are referenced as “Bd. Ex. ___.” Employer exhibits are referenced as “Er. Ex. ___.”

The parties also agreed that the job classification of “Director” was not a supervisory or managerial designation within the meaning of the Act. (Bd. Ex. 2.) The parties’ stipulations yielded a proposed unit of exactly 30 individuals. (Bd. Ex. 3.)

The only issue raised by the Employer at the Hearing was whether all individuals in the petitioned-for unit are independent contractors within the meaning of Section 2(3) of the Act (a point on which the Employer has the burden of proof).

Despite ample evidence to the contrary, the Regional Director’s Decision concluded that the unit included only independent contractors and dismissed the petition. (DO 15.) The Board granted the Petitioner’s RFR of the Regional Director’s Decision on July 19, 2016. As discussed below, in addition to numerous substantial factual errors and the Regional Director’s improper assessment of the evidence, the Decision misses the mark by failing to apply established Board precedent to the independent contractor question.

II. The Petitioned-For Unit’s Relationship with the Employer.

The petitioned-for unit (the “technicians” or “crew”) perform various roles in the production of closed-circuit video feeds that are aired on a large center-hung video display within the Target Center during Timberwolves and Lynx home games. (Tr. 15, 147.) While there are 30 people in the proposed unit, each game includes a crew of only 16 individuals. (Tr. 15, Bd. Ex 1, 3.) The crew members include camera operators who shoot footage from the arena floor. (Tr. 34-35.) The camera operators are accompanied by “utilities” who handle camera cables. (Tr. 148, 155.) Within a separate control room are replay operators who run instant replay machines (Tr. 38-39), technicians who operate equipment that displays font and graphics on the center-hung display (Tr. 33-34), a technical director who operates equipment (“switcher”) that

dictates the flow of media to the display (Tr. 201, 208-209), audio technicians responsible for sound (Tr. 38), engineers who make sure the technical equipment is properly working (Tr. 28), and a director who acts as a point person within the control room. (Tr. 30, 211-12.)

The Timberwolves (with the exception of minor tools for one engineer position) provide all of the equipment necessary to complete the work. (Tr. 101-2, 119-20.) This includes the cameras, audio equipment, video equipment, and computer hardware in the control room. (Id.) The center-hung video board is generally only used during live events. (Tr. 118.) Thus, the petitioned-for employees are part-time workers since their services are only needed during the approximately 60 live events that occur each year. (Tr. 151.)

The evidence also shows that the technicians have continuous, long relationships with the employer. Again, during the current Timberwolves season, 16 employees from the petitioned-for unit are required to staff each basketball game. (Pet. Ex. 2.) At least 11 of the regularly scheduled employees have been working for the Employer seven or more years. (Tr. 171.) One individual has worked for the Employer for 18 to 20 years. (Tr. 95.)

A. *Timberwolves Personnel Sets the Schedule and Hours; Solicit Crew Members and Assign Them to Specific Games and Job Duties.*

Prior to the start of each team's basketball season, the Timberwolves' Senior Broadcast Production Manager ("SBPM") Erik Nelson sends a list of the Timberwolves or Lynx home games to the employees. (Tr. 223.) The employees are asked to tell him which games they are available for during the upcoming season. (Tr. 133-34, 178-79.) The SBPM completes the schedule and has discretion over who gets scheduled to work and when. (Tr. 52-53, 73, 153-54.) Several crew members are qualified to work in more than one classification. (Tr. 121, 147-448.) The SBPM assigns them to roles as he sees fit. (Tr. 121-22.) Beginning with the 2015-2016 Timberwolves season, the SBPM also imposed specific requirements mandating that employees

send an email to him and find a suitable replacement (from among the existing list of crew members) if they are unable to make it to a scheduled game. (Tr. 92, Pet. Ex. 5.) It is expected that once someone becomes a regular part of the crew they will continue as a crew member from year-to-year. (Tr. 121, 171.) However, the Timberwolves' SBPM has the authority to discipline the crew members and end their relationship. (Tr. 73.) He has, in fact, done so in one instance due to a crew member's insubordination. (Tr. 89, 124.) An individual was taken off the schedule for the remainder of a season and the remaining crew members were told that he would no longer be returning to work. (Tr. 89.)

The SBPM informs employees when they need to show up at the arena for work. He also sends guidelines for attire and distributes shirts to wear for employees appearing in the public area of the arena. (Tr. 74.) The SBPM informs crew members what their pay rates will be. (Tr. 158-59, 206.) For the 2015-2015 Timberwolves season, the SBPM communicated the pay rates to employees in a memorandum. (Tr. 157-58.) The memorandum set forth (for the first time) detailed instructions about how the employees should "invoice" the Timberwolves for each game they work. (Pet. Ex. 5.) The crew members must also adhere to the Employer's direct deposit payment system. If they fail to take those payroll steps they will not get paid. (Tr. 47-8, 53.)

The pay rates for crew members are budgeted by the Timberwolves and there is no specific evidence, aside from one employee who implored the SBPM not to *cut* her pay, that any crewmember has ever negotiated a pay increase. (Tr. 95-6.) Both crew employees who testified at the hearing said that their pay rates had been predetermined by the employer. (Tr. 158-60, 206.) They had discussed this subject with the SBPM but never received an increase. (Id.)

Up until the 2015-2016 Timberwolves season, the Employer admittedly paid the employees an hourly rate of pay. (Tr. 56.) The SBPM changed the payment intervals to a "game

rate” around October 2015. (Id.; Pet. Ex. 5.) The “game rate,” for each classification differs depending upon how much time is spent at the arena (i.e., how long each particular classification’s shift lasts). (Tr. 157.) This is because, the SBPM testified, a “game rate” is based on “around” the number of hours that each crew member needs to be at the facility for a game. (Tr. 65-66.)

The Employer has never withheld taxes or other payroll withholdings and it issues the crew members 1099 tax forms each year. (Tr. 62, 206.) However, the employees have never been asked to complete any form of written agreement or other document which expressly identifies them as independent contractors. (Tr. 99, 205, 215.) And witness testimony unequivocally shows that they believe they have a part-time employee relationship with the Employer rather than an independent contractor relationship. (Tr. 175, 216.) Notably, here as in other cases, at least 30 percent of the technicians signed onto the Union’s showing of support in which they expressed their desire to be treated as employees for collective bargaining purposes.²

B. The Employer’s Director of Live Programming and Entertainment Has Control over Day-to-Day Work.

In addition to the administrative controls exercised by SBPM Nelson, the substantive aspects of the crew’s work is also closely controlled by the Timberwolves. Execution of the center-hung video production is overseen by the Timberwolves’ Director of Live Programming and Entertainment, Chadwick Folkestad (“DLPE”). During each game, employees are guided by a script (or “rundown”) created by the DLPE. (Tr. 214.) The script includes specific instructions about the work employees should produce. (Tr. 214.) One unit employee who often works as a camera operator testified that in connection with his duties, the script or “rundown” includes

² FedEx, 361 NLRB No. 55 slip op. at 14; Lancaster Symphony Orchestra, 357 NLRB 1761, 1766 (2011).

specific instructions for elements that he should shoot throughout a game. (Tr. 164.) The script also sets forth the timing of other specific elements of the production (e.g., advertisements) that are scheduled to appear on the center-hung board throughout the games. (Tr. 217.) However, the script is subject to the DLPE's ad hoc modification (i.e., "live calls") during games. (Tr. 232.)

Another unit witness described the DLPE as akin to the "producer" of the show and noted that he talks to the whole crew in order to request that specific elements of the production appear on the video board at a particular time. (Tr. 211, 213-14.) The DLPE runs pre-game rehearsals in which he issues instructions to the camera operators about camera angles and shots to capture. (Tr. 162.) During the rehearsals, the DLPE dictates specific spots where cameras should be located in order to shoot features according to his preferences. (Id.) During games, the DLPE communicates with the director through an intercom headset. (Tr. 165-69, 213.) He communicates orders directly to the crew and to the director, who passes them on to the crew. (Tr. 167-69.) The DLPE's "vision" dictates how the show that appears on the center-hung video board and the director along with the other crew members help him execute it. (Tr. 181-82.)

ARGUMENT

I. The Standard to Be Applied in Determining Whether Individuals Are Employees or Independent Contractors Under Section 2(3).

The Board has long held that the burden of establishing independent contractor status (a statutory exclusion) rests on the party asserting it. See, e.g., FedEx, 361 NLRB No. 55, slip op. at 2, citing BKN, Inc., 333 NLRB 143, 144 n.3 (2001). In this case, the Decision barely acknowledges the Employer's burden and contrary to the Regional Director's findings, the Employer has failed to meet it under the following test.

In FedEx the Board "restated and refined its approach for assessing independent contractor status." 361 NLRB No. 55 slip op. at 1. In accordance with the Supreme Court's

ruling in NLRB v. United Insurance Co. of America, 390 U.S. 254, 256 (1968), the Board is bound to conform to common law agency principals when distinguishing between statutory employees and independent contractors. Thus, the FedEx Board identified the following factors from the Restatement (Second) of Agency §220 (1958) for determining whether putative independent contractors are excluded from the Act's coverage, with no single factor being decisive:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (f) The length of time for which the person is employed.
- (g) The method of payment, whether by the time or by the job.
- (h) Whether or not the work is part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relations of master and servant.
- (j) Whether the principal is or is not in the business.

FedEx, 361 NLRB No. 55, slip op. at 2.

United Insurance specifies that “all of the incidents of the relationship must be assessed . . . [and] [w]hat is important is that the total factual context is assessed in light of the pertinent common-law agency principals.” 390 U.S. at 258. In other words, “there is no shorthand formula or magic phrase that can be applied to find the answer.” Id. The FedEx Board recently reaffirmed these guidelines: “(1) all factors must be assessed and weighed; (2) no one factor is decisive; (3) other relevant factors may be considered; and (4) the weight to be given a particular factor or group of factors depends on the factual circumstances of each case.” 361 NLRB No. 55, slip op. at 2.

The Board’s key FedEx refinement is an additional factor, which asks whether “the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*” Id. at 11 (emphasis in original). This includes, whether an individual “exercises significant entrepreneurial opportunity for gain or loss,” which must be “an actual, not merely theoretical, opportunity for gain or loss.” Id. at 10. Examination of entrepreneurial opportunity in the Board’s analysis, is “part of a broader factor that—in the context of weighing all relevant, traditional common-law factors identified in the Restatement—asks whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business.” Id. at 11. This consideration also encompasses “whether the putative contractor (a) has a realistic ability to work for other companies; (b) has proprietary ownership interest in her work; (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection and assignment of employees; the purchase and use of equipment; and the commitment of capital.” Id. at 12.

II. The Regional Director Departed from Existing Board Precedent by Failing to Correctly Apply the “Independent Business” Factor.

A. *The Regional Director Failed to Appropriately Measure Employees’ Entrepreneurial Opportunity for Financial Gain or Risk*

Under established Board precedent, the crew members in this case do not bear any entrepreneurial opportunity for gain or risk of loss. Nonetheless, the Regional Director wrongly concludes that their freelance work relationship “evidences the entrepreneurial nature of their enterprise.” (DO 14.) In doing so, the Regional Director conflates “entrepreneurial opportunity” with an “opportunity to work for other employers.” (*Id.*) The Decision thus distorts the Board’s recently announced independent business factor. Entrepreneurial opportunity for gain or loss should be considered separate and apart from the employees’ ability to work for other enterprises when they are *not* working for the Timberwolves.

Entrepreneurial opportunity refers to, “significant . . . opportunity for gain or loss *when they are [performing services] for the [e]mployer.*” BKN, Inc., 333 NLRB 143, 145 (2001) (emphasis added). This means that the crew would have entrepreneurial opportunities to increase their profits *within the confines of* their relationship with the Timberwolves. To have real entrepreneurial opportunity, they must be able to take an “economic risk and ha[ve] the corresponding opportunity to profit from working smarter, not just harder.” Corporate Express Delivery Systems v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002). See also Roadway Package System, 326 NLRB 842, 852 (1998) (“[U]nlike the genuinely independent businessman, the drivers’ earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits”).

The employees in this case have no such opportunities for risks and rewards. The employees cannot expand their income by increasing the speed or efficiency with which they work. Employees testified that they have no way of increasing their Timberwolves earnings, aside from working more games. (Tr. 159, 174.) Nor do the employees deploy any business acumen to generate more revenue. They do not make capital investments or sell their right to Timberwolves work for a profit. (Tr. 100,124.) Here, as in Lancaster Symphony Orchestra, 357 NLRB at 1765, enforced, Lancaster Symphony Orchestra v. NLRB, 822 F.3d 563 (D.C. Cir. 2016), the “choice to work more hours or faster does not turn an employee into an independent contractor.” The musicians there, as the crew members here, “do not receive more or less money based on ticket sales, or how well or poorly they perform in a given performance.” Id. The Timberwolves admit that the crew employees have no ownership stake in their work product and make no business decisions that affect the outcome of their work product. (Tr. 99-100.) They have no authority to repurpose or reuse the in-house video shows for their own profit. (Id.) In sum there is no way for employees to increase their earnings because of their business capabilities. (Tr. 159.)

In contrast, workers in cases like DIC Animation, 295 NLRB 989, 991 (1989) were found to have entrepreneurial opportunity. In that case, writers were found to be independent contractors where they invested “in their own offices, computers, equipment, software, and supplies,” and sold story ideas. Id. The writers ran the risk that if an employer “rejects the ideas, the writers do not get paid” Id. See also Glen Falls Newspapers, 303 NLRB 614, 616 (1991) (independent contractors purchased newspapers from employer and “assume[d] the entrepreneurial risk associated with trying to resell them.”)³ Yet, in this case, a crew member

³ See also Restatement of Employment Law § 1.01, cmt. f, illustration 11:

“does no more than sell his services, as does any ordinary employee.” Avis Rent A Car System, Inc., 173 NLRB 1366, 1367 (1968). He or she has no “opportunity to exercise his [or her] business judgment in a manner that would affect his [or her] future profit or loss.” Id.

***B. Crew Members Ability To Work For Other Employers
Has Little Significance in This Case.***

The primary “independent business” consideration that the Regional Director focused on—the employees’ realistic ability to work for other employers—should be given virtually no weight in this case. The Regional Director incorrectly found that there is “strong” evidence of entrepreneurial opportunity based on the employees’ ability to work for *other* employers. (DO 15.) Simply put, it should be expected that crew members would work for other employers—*because they only work part-time for the Timberwolves*. This does not form evidence that crew members are independent businesspeople.

Remarkably, the Decision acknowledges that it is “industry practice” for the crew members here to work for other employers. (DO 14.) This practice is a consequence of the seasonal schedules of professional sports teams and the fact that teams do not play games

P, a commercial laboratory, hires A, a physician, as its senior pathologist. A is paid an annual salary and directs the analytical work on matters assigned to A’s department. A is expected to work full-time on these assignments on Monday, Tuesday, and Wednesday every week, but may do consulting work for other businesses at other times.

A is an employee of P. Although, given A’s senior status and skill level, the details of A’s work may not be controlled by P and although A may be able to enhance his total personal income by consulting on days he is not assigned to work for P, A is not engaged in an independent business during A’s work at the laboratory.

(emphasis added).

continuously for eight hours a day, five days a week. It would be impossible to work full-time by working as a technician for only one sports employer like the Timberwolves. (Tr. 140.)

In spite of these facts, the Regional Director incorrectly found “strong” evidence of “entrepreneurial opportunity” based on the employees’ ability to work for multiple employers. (DO 15.) In doing so, the Regional Director failed to apply Board precedent from other cases involving irregular or part-time workers. Here as in those instances, the crew’s outside employment is “essentially indicative of their part-time work schedule and has little bearing on whether [individuals] are employees or independent contractors.” Sisters’ Camelot, 363 NLRB No.13 slip op. at 5 (2015). (citation omitted).⁴

Much like the musicians in Lancaster Symphony, the fact that employees here “hold other jobs simply reflects the part-time nature of” the work. 357 NLRB at 1765. Thus, virtually no weight should be given to the ability to work for other employers in this case. Even assuming without deciding that the crew’s ability to work for other employers could be viewed as “entrepreneurial” opportunity, the D.C. Circuit recently held that such “limited” opportunity offers “miniscule support for independent contractor status.” Lancaster Symphony Orchestra v. NLRB, 822 F.3d at 570. The employees in Lancaster had the “ability to back out of a concert in order to take advantage of a more profitable gig.” Id. Similarly here, employees have declined work for the Timberwolves in favor of other sports teams (where they enjoy being classified under the protections offered to statutory employees). (Tr. 49-50, 144, 187, 234.) Yet, here as in

⁴ The present case is not closely comparable with FedEx, where the Board held that employees as “a practical matter” worked “from 6 a.m. to 8 p.m. from Tuesday through Saturday” the precise times when “most other commercial opportunities would be available.” 361 NLRB No. 55 slip op. at 15. The FedEx Board that the employer there effectively prevented employees from working exercising their entrepreneurial freedom. Id. That viewpoint and reasoning is not appropriate here where employees work part-time hours for the Timberwolves.

Lancaster, “Were this quite minor entrepreneurial opportunity given much weight, *it might lead to almost automatic classification of many part-time workers as contractors.*” Lancaster Symphony Orchestra v. NLRB, 822 F.3d at 570 (emphasis added). Accordingly, here as in that case, the employees’ ability to work for other employers does little to suggest that they resemble independent contractors. Instead, in view of all the circumstances, the independent business factor tips strongly in favor of employee status.

C. The Decision Contains Prejudicial Factual Errors in its Discussion of the Independent Business Factor.

The Decision speculatively notes that “[a]t least several of the crew members appear to operate their own businesses . . .” (DO 14.) (emphasis added.) The record does not clearly disclose how many crew members actually “operate” businesses, nor the nature of their supposed business operations. Moreover, there is no evidence that those supposed businesses involve entrepreneurial risks in connection with work for the Timberwolves. Even assuming without deciding that they do, the “fact that only a small percentage of workers in a proposed bargaining unit have pursued an opportunity demonstrates that it is not, in fact, a significant aspect of their working relationship.” FedEx, slip op. at 11.

The Regional Decision again misses the mark with his assertion that the crew members “ability to select which [Timberwolves or Lynx] games they would like to work” evidences their entrepreneurial opportunity for gain or loss. It is factually incorrect that all crew members select which games they would like to work. The testimony shows that multiple people may offer to work the same game in the same classification. (Tr. 121.) In those instances, the SBPM (the employees’ supervisor) assigns a candidate according to an “order of preference.” (Id.) Thus, the employees do not have unrestricted discretion to select which games they want to work.

The other considerations that make up the independent business factor—all of which tilt heavily in favor of employee status—are deserving of much greater weight. The Regional Director’s incorrect application of this factor should be vacated.

III. The Regional Director Failed to Accurately Apply the Board’s Remaining Independent Contractor Test, Made Incorrect Factual Findings, and Incorrectly Weighed the Evidence.

A. *Timberwolves Personnel Exercise Control Over the Crew.*

The Regional Director erred by concluding that there is “scant evidence that the crew members take direction from the Employer’s supervisors or managers.” (DO 6.) Witnesses from the petitioned-for unit unequivocally identified the SBPM as their supervisor. (Tr. 175, 207.) As discussed below, The SBPM exercises control over the employees’ assigned job duties, hours, and pay. He gives them instruction and has the authority to discipline them.

As mentioned above, many employees are qualified to fulfill one or more job titles during any game. (Er. Ex. 1.) Employees with multiple qualifications offer their availability on a particular *date*, but they do not generally select the job duty (e.g. engineer, director, technical director, font operator, camera operator, Thunder operator, audio/tape operator, replay operator or utility) that they will perform. (Tr. 93.) The SBPM testified that where employees are equipped to handle multiple roles, he assigns them to a specific duty on each particular game. (Id.) See also Sisters’ Camelot, 363 NLRB No. 13 slip op. at 2 (the canvassers “do not choose the area in which they will canvass,” it is selected by the employer). These assignments signify The SBPM’s control over the workforce.

Further, The SBPM issues special instructions to technicians, such as a March 2015 instruction to wear “show blacks” (all black clothing) for a Timberwolves special event. (Pet. Ex. 4.) More significantly, The SBPM testified that he has issued specific instructions pertaining to functions that technicians must perform during their shifts. For example, The SBPM emailed

replay operators in August 2015 and instructed them to put together a “melt” (or compilation) of questionable calls by basketball officials at the end of each game. (Pet. Ex. 3; 103-104.)

The SBPM also controls the start times—when employees are to report for their shifts. (E.g., Pet. Ex. 5; Er. Ex. 3.) Each position has a different start time or “call time” before the tip-off of a basketball game. And employees must remain through the end of the game to fulfill their duties. Similarly, in Sisters’ Camelot, the “Respondent sets the daily start and end times for canvassing.” 363 NLRB No. 13 slip op. at 2. And in Lancaster Symphony, 357 NLRB at 1761, the musicians were “required to attend all rehearsals on dates and times set by the music director and all performances on dates set by the Symphony.” Unlike a “true independent contractor” such as a roofer—the Board noted—who is hired to do a job and can choose when to do it and control how long it takes, the “musicians have no control over their worktime.” Id. Similarly, in the present case, once an employee agrees to work a shift, there is no evidence that he or she has any control over the amount of time that he or she will spend working.

No employees testified that they have discretion over their start time or “call time” before a basketball game. Yet even if they had limited discretion, this factor would still favor employee status. In FedEx, 361 NLRB No. 55 slip op. at 13 (2014), the Board found “pervasive control” over the putative employees’ day-to-day work because (among other things) while the employees were given “some say” over starting times, their freedom was “limited by FedEx’s requirement that all packages be delivered on the day of assignment.” The same is true in this case. Here, the Employer expects the technicians to be present for the call time because, as the SBPM testified, they are “set to ensure that what needs to happen before the game happens, both between the crew and the organization.” (Tr. 104.)

The SBPM has told employees that if they are unable to work a scheduled shift, “it will be your full responsibility to cover that shift with an acceptable replacement.” (Pet. Ex. 5. See also Tr. 94.) Yet employees cannot replace themselves with anyone they choose. They must utilize individuals on the roster of technicians maintained by The SBPM. (Pet. Ex. 5.) These procedures further signify the control the Timberwolves exercise. When judged in the light of all relevant facts, this requirement is yet another feature among many control factor indicative of employee status.

The Regional Director concludes that “there is no evidence that the Employer disciplines crew members.” (DO 6.) He then notes “one instance” in which the Employer removed a crew member from the schedule. (Id.) The SBPM testified that he removed that individual because of insubordination. (Tr. 89, 124.) It is mystifying that the Regional Director concludes that this is *not* discipline. Moreover, it is immaterial that the discharge crew member was insubordinate to other members of the crew. It was Nelson, the SBPM, who *imposed the discipline*. For purposes of the common law agency test, this demonstrates the Employer’s control. Had the other crew members been truly independent of the Employer, they would not have had to rely upon the SBPM to execute such disciplinary action.

It is also of no moment that there is only one example of discipline in the record. Even “occasional instances of discipline indicate significant control by an employer.” Sisters’ Camelot, 363 NLRB No. 13 slip op. at 2. Similarly, the Board found it significant that an employer had the authority to issue discipline even though it had been imposed on only one employee. Lancaster Symphony, 357 NLRB at 1762.

The Board has ruled that the facts will favor employee status where an employer maintains “control over the manner and means by which the result is accomplished.” Id. at 1763.

In Lancaster Symphony, the employer, acting through its music director, maintained “complete and final authority over how the musicians performed at both rehearsals and concert performances.” Id. at 1764. The musicians there were given “precise instructions on the tone, volume, and content of the music.” Id. The present case is analogous. Like the orchestra in Lancaster Symphony, the Timberwolves here have overall control of the content and appearance of the center-hung board.

Similar to the musicians in Lancaster, employees here are specifically guided concerning the content and elements of the in-house production. Each game, employees are guided by a script (or “rundown”) created by the Timberwolves DLPE. (Tr. 214.) The script includes specific instructions about the content of the video feed that the employees should produce. (Tr. 164.)⁵

There is no evidence, as the Regional Director concludes, that the “run-down” is limited to what should be done “during breaks and half-time.” (DO 6.) While the testimony does show that live calls, take precedence over the run-down, those are live calls *from the* DLPE requesting specific elements of the production to appear on the video board at a particular time. (Tr. 211, 213-14.) Moreover, the Regional Director discounts evidence of the DLPE’s control by suggesting that he only focuses on “minor non-game elements.” (DO 3.) Yet, one out of the three camera operators at each game handles the “fan cam.” (Pet. Ex. 2; Tr. 34.) The fan cam does *not* capture live game play, it is exclusively dedicated to shots of breaks, skits, fans and the like (Tr. 34.) In other words, one-third of the camera coverage is devoted to non-game elements, which is by no means “minor.” In sum, the DLPE and SBPM thoroughly control the crew’s work.

⁵ To the extent that the Employer seeks to further rely upon its argument that the director is responsible for overseeing the crew, that contention must be rejected. (See RFR Opp’n at 19.) The director takes instructions from the DLPE and merely passes them along to the crew. (Tr. 165 – 169.) Moreover, the parties stipulated that the director position is neither supervisory nor managerial. (Bd. Ex. 2.)

i. The Regional Director Failed to Apply Existing Board Precedent Concerning the Control Exercised by the Employer.

The Regional Director mistakenly believes that the Decision should have only been governed by cases issued in the wake of FedEx. (See DO 5.) (“[T]he “post-FedEx universe of cases is finite” and “guidance from recent Board precedent is limited.”) Yet, the Board has applied the common-law test of employee status for decades.

The FedEx Board reaffirmed the Restatement factors from its preexisting test. See FedEx, 361 NLRB No. 55 slip op. at 1 (reaffirming the Board’s “longstanding position” that independent contractor status is evaluated “in light of the pertinent common-law agency principles . . . guided by the non-exhaustive common-law factors enumerated in the Restatement (Second) of Agency”). Nonetheless, the Regional Director notes that in post-FedEx cases, the “manner and conduct of work were, for the most part, distinct from that in the instant case.” (DO 5.) Yet, the Board has ruled on many other cases—like Lancaster and BKN cited above—which closely parallel the current case and focus upon the Restatement factors. There is no basis for limiting the analysis in this case only to post-FedEx cases.

Nonetheless, the Regional Director disregarded existing pre-FedEx authorities. Instead of measuring the facts of this case against the common law of agency in light of the Restatement (Second) of Agency (and as applied throughout decades of Board cases), the Regional Director measured the control exerted by the Employer in this case against the Board’s decision *in* FedEx. In doing so, the Decision departs from controlling Board precedent. FedEx does not set the hurdle which all future cases must clear, it merely reaffirms the Restatement factors, which are to be applied (along with the independent business factor). For this reason, the Decision should be reversed.

Regarding the right to control factor in FedEx, the Regional Director notes (with emphasis) that the employer there exercised “pervasive control” over the employees work. (DO 5.) Yet, the common law of agency hardly requires “pervasive” control by an employer in order to find that individuals are employees under Section 2(3). See Restatement (Second) of Agency § 220, cmt. d (“[T]he control or right to control needed to establish the relation of master and servant may be very attenuated.”) See also BFI Newby Island Recyclery, 362 NLRB No. 186 slip op. at 14 (2015) (recognizing the Restatement’s admonition that control over the conduct of work may be “very attenuated”). Here, one employee broadly described the types of directions that he receives from the DLPE as “any and all.” (Tr. 168.) And the record shows that the director is used as a pass-through to communicate the DLPE’s instructions to the crew. (Id.) Thus, the control—while not pervasive (it need not be)—nonetheless demonstrates that the crew is composed of employees under Section 2(3).

B. The Crew Works Under the Supervision of the Employer.

The Board’s decision in BKN, Inc., 333 NLRB at 143, is analogous to the present case in connection with the supervisory factor. There, the Board ruled that freelance writers working on an animated television series were employees under the Act. Id. The Board noted that the BKN freelancers were overseen by an employer team that “specifies what the writers are to produce from the beginning of the script-writing process until its end.” Id. at 145. Similarly, here, the DLPE ensures that the employees are making a production that conforms to his vision. (Tr. 181-82.)⁶

⁶ The testimony unequivocally shows that while the DLPE may be absent from a particular game, it is *not* an individual within the proposed bargaining unit who runs the operations of the crew. Rather a Timberwolves replacement for the DLPE does so. (Tr. 196-97.)

The Board has also ruled that it “naturally” must consider “the nature of the occupation.” Mitchell Bros. Truck Lines, 249 NLRB 476, 481 (1980). Where the nature of the work requires little supervision, the Board has ruled that the even relatively benign supervisory measures will tip in favor of employee status. Id. In Michigan Eye Bank, 265 NLRB 1377, 1379 (1982), the Board ruled that medical research assistants were employees within the meaning of Section 2(3) where on a “day-to-day basis, the nature of the technicians’ work is such that it requires little, if any, supervision.” There, the “employer effectively overs[aw] the technicians’ work through the weekly monitoring meetings, which it requires them to attend.” Id. at 1379. See also Restatement (Second) of Agency § 220, cmt. d (“In some types of cases which involve persons customarily considered as servants, there may even be an understanding that the employer shall not exercise control. Thus, the full-time cook is regarded as a servant although it is understood that the employer will exercise no control over the cooking.”).

Here, the Regional Director concluded there was “limited interaction” between the Employer’s supervisors and managers. Yet, the nature of the work here is not conducive to in-person supervision. And Timberwolves DLPE Folkestad is continuously in contact with the crew via a headset intercom system, making face-to-face supervision redundant. (Tr. 165.) Plus, the DLPE monitors the crew through rehearsal meetings. (Tr. 76, 162, 228.) In sum, in the context of this case, even though the crew may not need extensive physical oversight, the Timberwolves DLPE holds final authority over the crew.

It is also appropriate to consider the degree of control in the context of the surrounding community. See AmeriHealth, Inc., 329 NLRB 870, 870 n.1 (1999) quoting Restatement (Second) of Agency, § 220, cmt. I (“The custom of the community as to the control ordinarily exercised in a particular occupation is of importance.”) Here, the evidence shows that the DLPE,

in comparison with similar managers within the broadcast industry, maintains *greater* substantial control over the petitioned-for employees. The DLPE’s oversight role as a producer of the video board show is more “hands-on,” “direct,” and “intense” than comparable individuals in other area workplaces. (Tr. 197-98.)

C. There Is Insufficient Evidence That the Employees Are Engaged in a Distinct Occupation or Business.

Here as in Sisters’ Camelot, 363 NLRB No. 13 slip op. at 3, the Timberwolves, “significant control over the [employees] and the importance of their” work to the Employer’s operations show that this factor points toward employee status. This factor favors employee status where the individuals can be easily identified as working for the Employer. Sisters’ Camelot, 363 NLRB No. 13 slip op. at 3. Here, the employees working in the public areas of the arena are provided with “Video Board” shirts. (Tr. 74.) Camera operator employee Jason Wiltse testified that he generally wears one on game days. (Tr. 156.) This identification shows that they are well integrated into the Timberwolves organization.

The Timberwolves do not require the individuals in the petitioned-for unit to carry insurance or otherwise protect against losses or liability even though it is common for independent contractors to be faced with insurance requirements. E.g., Dial-A-Mattress, 326 NLRB at 891. (See also Tr. 170.) The Employer does not enter into any vendor agreements or facilities agreements with the individuals in the petitioned-for unit. (Tr. 170.) These details show that crew members do not operate as distinct businesses.

As discussed above, in connection with the independent business factor, an employee’s part-time work for other employers does not prove that he or she operates a distinct independent business. See BKN, Inc., 333 NLRB at 143 (freelance employees who perform work for more

than one employer were held to be employees within the meaning of Section 2(3)). Here, as noted in Sisters' Camelot and Lancaster Symphony, this is an industry where “employees . . . typically have intermittent working patterns.” 357 NLRB at 1765. In broadcast sports, it is almost unheard of for someone to work for only one employer. (See Tr. 139:23-140:10.) Notably, Jason Wiltse and JoAnn Babic who both testified at the Hearing respectively work on other in-house college and professional sports productions within the Minneapolis region and in those workplaces they are treated as putative part-time employees. (Tr. 173; 234.)

Finally, even assuming the evidence concerning the employees' distinct occupations were accurately characterized in the Decision (which it is not), it does not provide a basis for concluding that the crew members are independent contractors. A small number of employees in this case receive paychecks from the Timberwolves through the auspices of a limited liability company. (Er. Ex. 6.) Witness Jason Wiltse, for example, testified that he receives payments through his LLC, called “PosiCreative” (Id.; Tr. 98, 187.) This does not provide compelling evidence that the employees here are operating a distinct business in connection with their Timberwolves Relationship. Companies (the limited number of employees' LLCs in this case) may temporarily lend an employee to another employee (here the Timberwolves). See Restatement (Second) of Agency § 227 (1958). Accordingly, the Board must consider who in fact assumes control over the employee's work. Id. at cmt. a. (“The important question is not whether or not he remains the servant of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other”). In this case, as discussed extensively above, the Timberwolves DLPE and SBPM assume comprehensive control over the employees' work.

D. The Skills and Training of the Employees at Issue Here Do Not Weigh in Favor of Independent Contractor Status.

The Employer did not offer sufficient evidence that the skills of the employees favor independent contractor status. Yet the Regional Director, with scarce support in the record, concluded that the “Employer typically does not train crew members” and he consequently decided that the skill of the employees “weighs heavily” in favor of independent contractor status. (DO at 9-10.)

The Regional Director’s conclusions are not supported by the evidence. The Employer’s chief witness, SBPM Erik Nelson, could not competently testify about the training and experience of much of the proposed bargaining unit because half of the crew members in the unit have worked for the Timberwolves longer than Nelson has. (Tr. 90.) He therefore had no way of determining what level of training—if any—those employees arrived with. Instead, due to his ignorance about the training of the long-time crew members, Nelson testified about what experience individuals would be “expected” to have. (E.g., Tr. 35-38.) It would seriously undermine the independent contractor inquiry to allow the Regional Director to grant “heavy” weight to testimony about the level experience that employees were “expected” to have (see DO at 9-10) rather than the skills and experience employees *actually* have.

The testimony shows that employees actually receive training specific to their employment with the Timberwolves. Even in the utility position—which the Employer concedes is an “entry level” position in the proposed bargaining unit (Tr. 42-3.)—employees receive on-the-job training specific to the Target Center. (Tr. 148, 150.) Nelson testified that at least one individual in the bargaining unit came to the Timberwolves with no experience doing broadcast work. (Tr. 91.) The Board has ruled that where the limited training necessary to complete a job is

provided by an employer, this factor favors employee status. Sisters' Camelot, 363 NLRB No. 13 slip op. at 3.

Even if the Employer carried its burden of showing that all employees in the proposed unit were highly skilled (which it did not), the Regional Director also departed from existing Board precedent in evaluating whether the skills of the crew weigh in favor of employee status. In Lancaster Symphony, the Board ruled that the “musicians were highly skilled, but so are many other types of employees who are covered by the Act.” 357 NLRB at 1766 (citing cases). See also Pulitzer Publishing Co., 101 NLRB 1005, 1007 (1952) (camera operators who were skilled at that craft nonetheless deemed employees rather than independent contractors in view of the control employer exercised over performance of their work). The same principle is applicable here. As in Lancaster, the skill level of the employees is more likely attributable to the many years that they have been doing the same job for the Timberwolves—a detail which pushes the crew toward employee status. In light of the analogous circumstances in Lancaster, the Regional Director’s conclusion that this factor favors independent contractor status is flawed.

In sum, the limited evidence on this topic is insufficient to have satisfied the Employer’s burden of proof. The skill level of the employees deserves little weight and hardly the heavy weight that the Regional Director grants. Consequently, this factor favors employee status.

E. The Work is Part of the Regular Business of the Employer and the Regional Director Erred in Finding This Factor Weighs in Favor of Independent Contractor Status.

The Regional Director concluded that the “core business” of the Employer is the performance of basketball games. In doing so, he did “not find the [video] board to be a regular or essential part of its business mission.” (DO 13.) No witness provided testimony about the “mission” of the Timberwolves. Yet, the Employer is plainly in the business of earning revenue through ticket sales. (Tr. 86.) Ticket revenue from paying customers who watch games is the *sine*

qua non of professional sports operations. And the center-hung video board is an important feature of the fans' experience. (Tr. 86.) In this connection, the Regional Director completely ignored testimony from a unit employee—and *the Employer's witness*—that the center-hung video board show is “essential” to Timberwolves and Lynx games. (Tr. 86, 216.)

In Arizona Republic, 349 NLRB 1040 (2007), the employer was in the newspaper publishing business. Yet, the Board found that the delivery of newspapers was an integral part of that business. Similarly, here even accepting the Regional Director's (faulty) conclusion that the Employer's business is the “performance of” basketball games, the crew members are an integral part of the performances. The Employer agrees that the “product” produced by the crew—the content of the video board— helps ensure the success of the business. (Tr. 86.)

The Regional Director also asserts that it is “undisputed” that a basketball game would be played if the center-hung board were not functioning (DO 13.) This is hardly a fact, let alone an “undisputed” fact. The Regional Director's conclusion rests only on suspicion, not proof. There is no evidence that a professional basketball game (Timberwolves or Lynx) has *ever* been played *without* a video feed projected on the center-hung board. The Employer's self-serving conjecture that a game “would” be played without an in-house video broadcast is far from “unquestionable” as the Regional Director concludes. (Tr. 113.)

Moreover, the crew is indispensable on certain WNBA games. Basketball referees rely upon the crew for their replay work—to evaluate controversial officiating calls—during Lynx games when the games are not broadcast on television. (Tr. 87.) These facts strongly show that the work is a regular part of the Employer's business. Yet they were entirely overlooked by the Regional Director. Had they been considered, this factor would point toward employee status.

Additionally, testimony shows that that the crew's work (the video board production) is reviewed by the NBA, which gives feedback on the value of the production. (Tr. 86, 156, 216.) If the center-hung board were not essential to the Employer's "core business" of the performance of basketball games as the Regional Director suggests, it plainly would not be subject to review by the basketball league that the Timberwolves are part of. In these circumstances, it would flout reality to accept the Regional Director's conclusion that the crew's work is not a regular part of the Timberwolves business.

If this factor is not found to favor employee status, it should alternatively be given no weight. The Board has ruled that where a party bears the burden of excluding an individual from the Act's coverage, putting forth inconclusive evidence does not advance the party's case. C.f. Custom Mattress Manufacturing, Inc. 327 NLRB 111, 112 (1998) ("When evidence is inconclusive on a particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia."). The Regional Director's speculative conclusion about the "mission" of the Timberwolves is a result of the Employer's failure to satisfy its factual burden, and therefore independent contractor status has not been established on the basis of this factor.

F. Contrary to the Regional Director's Conclusion, the Employer's Method of Paying the Technicians Indicates They Are Employees.

The Regional Director concluded that payment factor of the Restatement was inconclusive. It is undisputed that the employees here are treated as independent contractors for payroll purposes. However, this fact is neither controlling nor decisive. The Board has properly found that individuals are employees under the Act even if they are paid pursuant to invoices

submitted to an employer, receive no benefits, and have no taxes or payroll deductions withheld. See BKN, 333 NLRB at 144.⁷

There is no significant evidence that employees' wages rates are subject to negotiation. There is evidence of one employee who engaged in so-called negotiations over her pay rate. Yet, she was not negotiating for a pay increase, rather she was attempting to prevent the Timberwolves from *cutting* her pay after serving the Employer for decades. (Tr. 95-96.). This sole example does not provide conclusive evidence that the employees have any real ability to negotiate their rate. Other employees testified that their pay rate is predetermined by the Employer and has not been negotiated. (Tr. 157, 198, 206.) The Board has found that non-negotiable rates support a finding of employee status. Sisters' Camelot, 363 NLRB No.13 slip op. at 4. And in this case, a tightly controlled budget is in place over the employees' compensation. (Tr.95:15-20.) This factor favors employee status.

More indicative of employee status is the fact that employees are paid for their time rather than on a project basis. The evidence shows that until October 2015 (including during the 2015 Lynx season), the employees were paid an hourly rate of pay. (Tr. 56.) In October 2015, pay was recalculated as a "game" rate for each position. (See Pet. Ex. 5.) Game rates nonetheless approximate an hourly rate of pay. (Tr. 66, 107-108; Er. Ex. 6.) In similar circumstances—where individuals do not receive a traditional hourly wage, but a "payment scheme" which

⁷ The Employer solicited testimony from Timberwolves human resources director Sianneh Mulbah. However, Ms. Mulbah had no direct knowledge of the employees in the petitioned-for unit whatsoever and her testimony focused on compensation and benefits of *other putative employees*. (See Tr. 128-136) The compensation terms of *other* employees outside the petitioned-for unit does not rank among the common law Restatement factors. Thus, her testimony concerning *other employees* outside the petitioned-for unit is virtually irrelevant. C.f., FedEx, 361 NLRB No. 55 slip op. at 11. ("Evidence that goes only to employees who are outside of the petitioned-for unit is unlikely to have probative value.")

“approximates” an hour wage, the method of payment has favored employee status. See Lancaster Symphony, 357 NLRB at 1766 (employees “are paid based on the time they spend working . . . [t]his indicates employee status.”) The same is true here. Therefore, rather than being inconclusive as the Regional Director suggests, this factor favors employee status.

The Regional Director’s reliance upon Pennsylvania Academy of Fine Arts, 343 NLRB 846 (2004) in connection with the method of payment factor is misplaced. (DO 11-12.) The Board, in Pennsylvania Academy noted as to the method of pay that the individuals there were “paid per class not by the hour or on a salary basis.” 343 NLRB at 847. As described above, the same is not true here. The employees are paid a game rate which approximates an hourly wage. Therefore, this factor points toward employee status.⁸

Citing no authority, the Regional Director concludes that “crew members must submit an invoice to the Employer” in order to be paid, and this fact weighs in favor of independent contractor status. (DO 11.) The Decision fails to include any discussion about why this fact supports an independent contractor finding. The Board may take administrative notice that statutory employees are often required to submit time cards, which closely resemble the invoices

⁸ Under the Decision’s “method of payment” heading, the Regional Director cites Pennsylvania Academy in concluding that the employees in this case “can control their own schedules” and therefore they resemble independent contractors (Id.) The Board in Pennsylvania Academy did not rely on individuals’ scheduling authority in evaluating the method of their pay. See Pennsylvania Academy, 343 NLRB at 847. Nonetheless, the same is not true here. Here, the employees *do not* schedule themselves for work at their will. As described above, the Timberwolves concede that The SBPM completes the schedule and has discretion over who gets scheduled to work and when. (Tr. 52-53, 73, 153-54.) Several crew members are qualified to work in more than one classification. (Tr. 121, 147-448.) The SBPM assigns them to roles according to a preference. (Tr. 121-22.) And if more than employee may wish to work a particular position at a particular game, the SBPM makes the decision about who works. (Id.) Thus, Pennsylvania Academy is inapposite (both generally and in connection with the “method of payment” factor). The Regional Director erred in relying upon it.

required by the Timberwolves. It is impossible to comprehend how invoices, as opposed to timecards or some similar recording method, tends to prove individuals are independent contractor as opposed to employees. If anything, the invoicing requirement—which is imposed on the crew employees in painstaking detail (Er. Ex. 3)—is merely another feature of the administrative control the Employer exercises over the work.

G. Whether or not the Principal Performs the Same Work Should be Given Little Weight in the Context of This Case.

As described immediately above, the employees here are an indispensable and integral part of the employer's business. See Sisters' Camelot, 363 NLRB No.13 slip op. at 4. In spite of this, the Regional Director goes to great lengths to conclude that even though the Employer operates a video department (of putative statutory employees who are not part of the petitioned for unit), the Timberwolves organization is nonetheless *not* engaged in the same business as the petitioned-for unit. (DO 14.) Even assuming without deciding that the Employer is not in the same business as the petitioned-for unit, this factor is of little consequence in comparison to the numerous other factors that should weigh in favor of employee status or have been deemed inconclusive.

H. Greater Weight is Owed to the Length of the Crew Members' Employment and the Employer's Supply of Tools and Facilities.

The Restatement factor focusing upon the length of the petitioned-for employees' tenure with the Employer is entitled to great weight under the circumstances of this case. In Sisters Camelot, 363 NLRB No. 13 slip op at 4, the Board noted that the employees at issue there were allowed to retain their positions indefinitely. It noted that a "potentially long-term working relationship" may weigh in favor of employee status. Id. Here, the employees have more than a

“potentially” long-term relationship, many actually have a demonstrated, years-long relationship with the employer.

As discussed above, during the 2015-2016 Timberwolves basketball season, 16 employees from the petitioned-for unit staff each basketball game. (Pet. Ex. 2.) The testimony shows that at least 11 of the regularly scheduled employees have been working for the Employer seven years or more. (Tr. 171.) Both witnesses from the petitioned-for unit testified that their working relationships (of seven and eight years, respectively) with the employer were continuous. (Tr. 146, Tr. 202.) Furthermore, a Timberwolves witness twice testified that after an individual becomes a regular part of the workforce, he or she is generally asked back season after season. (Tr. 94-95.) In sum, the evidence shows that the working relationships are open-ended. The long-term working relationships in this case weigh in favor of employee status. Given the remarkable lengths of these spans, this factor should be granted great weight by the Board.⁹ The Decision fails to grant appropriate weight to the employees’ tenure.

The Decision similarly fails to devote significant discussion to the Restatement factor that considers whether the Employer furnishes the tools, instrumentalities and place of work. Here, it is undisputed that the technicians supply *none* of the broadcast equipment used to produce the in-house program. (Tr. 155, 215.) In addition, the Employer provide the arena and control room facilities where the employees work. (Tr. 88.) The Timberwolves provide virtually every

⁹ The Bureau of Labor Statistics reported that the median number of years workers in the U.S. have been with their current employer was only 4.6 as of September 18, 2014 (the most recent date this data was compiled). Employee Tenure Summary, Bureau of Labor Statistics, United States Department of Labor (Sept. 18, 2014), <http://www.bls.gov/news.release/tenure.nr0.htm>. Employees in the petitioned-for unit are well above the median.

instrument necessary to carry out the crew's duties.¹⁰ The Regional Director dedicates little discussion to this factor. It should be granted greater weight in light of all the factors discussed above that offer broad support for a finding that the individuals here are employees within the meaning of Section 2(3).

CONCLUSION

For the foregoing reasons, and in light of the record as a whole, the Petitioner respectfully requests that the Board vacate the Regional Director's decision and order an election in the petitioned-for bargaining unit.

Respectfully submitted,

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¹⁰ SBPM Nelson identified one individual from the petitioned-for unit—Engineer in Charge Shaun Nottingham—who brings small tools with him to work. (Tr. 100.) Nelson confirmed that this was the only individual (out of a bargaining unit of 30 individuals) who supplied some tools. (Id.) The exact purpose of all tools was not made entirely clear.

