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**Peacock Productions of NBC Universal Media, LLC
and Writers Guild of America East, Inc., Petitioner.** Case 02–RC–092111

August 26, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On April 30, 2013, the Regional Director for Region 2 issued a Decision and Direction of Election, in which she found that the Employer failed to establish that its freelance and run-of-show producers are supervisors within the meaning of Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, the Employer filed a timely request for review. Contrary to the Regional Director, the Employer contended that its freelance and run-of-show producers (herein producers) supervise associate producers (APs), directors of photography (DPs), actors, and crew. The Petitioner filed an opposition.

On June 12, 2013, the Board granted the Employer’s request for review.¹ Thereafter, the Employer and the Petitioner each filed briefs on review.² Having carefully considered the entire record in this proceeding, including the briefs on review, we find, for the reasons set forth below and those in the Regional Director’s decision,³ that the record evidence does not establish that the producers at issue are statutory supervisors.⁴ We therefore remand

¹ At the time of the Order granting the request for review, the composition of the Board included persons whose appointments were challenged as constitutionally infirm, two of whom participated in this case. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. In view of that decision, we have carefully considered this matter, and having done so, we reaffirm the earlier decision to grant review. We deny as moot the Employer’s request that we hold this proceeding in abeyance until the Board has a constitutionally appointed quorum.

² The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

³ The Regional Director’s decision in its entirety is attached as an appendix to this decision.

⁴ The Employer contends that the producers possess authority under Sec. 2(11) to (1) effectively recommend the hire of APs, hire or effectively recommend the hire of DPs and crew, and hire actors; (2) assign APs, crew, and actors; and (3) responsibly direct APs, actors and crew. The Employer appears to have abandoned its argument that the producers supervise editors within the meaning of Sec. 2(11). The Petitioner argues that the actors and crew whom the producers allegedly supervise are independent contractors, not statutory employees. As did the RD, we find it unnecessary to decide that issue because, even assuming the

this case to the Regional Director for further appropriate action.

Facts

The Employer creates 1-hour nonfiction television episodes for cable television clients such as The Weather Channel and MSNBC. Each episode requires about 12 weeks of work, one of which is spent in production and the remainder in preproduction and postproduction. Each episode usually includes a narrative voiceover, with interviews and event reenactments. The Employer typically assigns one producer and one AP to each hour-long television episode. The Employer employs a staff of permanent, full-time producers and APs, but it also maintains a fluid work force of freelance producers and APs. Under its contract with the employment agency that refers most of its freelancers, if the Employer has employed a freelance producer or AP for 52 continuous weeks, the Employer must either convert that individual to a temporary full-time position, called “run-of-show,” or cease employing that individual for 6 months. At issue in this case is the supervisory status of the Employer’s freelance and run-of-show producers, not its permanent, full-time producers, supervising producers, senior producers, or line producers described below.

Supervising Producer Ann Kolbell oversees the producers and APs. One of the Employer’s seven senior producers, whose status is not at issue here, is assigned to each television episode. Each senior producer generally manages about four projects at a time but can manage more. The senior producer on a project creates the budget for that project, then works with Kolbell to assign the project a producer and an AP. Line producers track the budgets of shows and assist with some hiring functions, such as negotiating salaries. The parties stipulated that Supervising Producer Kolbell, the senior producers, and the line producers are statutory supervisors.

The producer and AP work on the project for the entire 12 weeks, though sometimes APs can be reassigned by Kolbell or a senior producer during postproduction.

Each production also employs a director of photography (DP). Some productions also employ sound and lighting technicians and other film assistants (collectively referred to, along with the DP, as the crew). The members of the crew work only during the week of production, and all production work is done in the field.

All preproduction and postproduction work is performed at the Employer’s facility, generally within the industry-standard work hours of 10 a.m. to 6 p.m. During preproduction, the producer researches the subject

actors and crew are statutory employees, we find the producers have no statutory supervisory authority over them.

matter of the show, creates a list of interviewees and characters, and writes the treatment, which outlines the story and important elements of the shoot. Sometimes, the storyline dictates the location of the shoot, such as if the story involves a particular natural disaster or interviewees in a particular location. Other times, the producer picks the location of the shoot, subject to the senior producer's approval. Senior producers review, edit, and sometimes rewrite the treatment. During preproduction, APs coordinate logistical aspects of the shoot. APs also assist producers with specific tasks, such as researching particular issues. Although some producers testified that they have requested specific APs, the Employer does not always honor these requests, and the record indicates that, most often, Kolbell assigns an AP to a producer without any input from the producer.

During the week or so of production, the producer directs the field work, often in collaboration with the crew and senior producers. Producers instruct crew in preparation for shooting. Together with APs, producers determine the shoot schedule. Producers generally determine when shooting ends each day, and make any modifications needed to a particular day's shoot schedule. Producers cannot, however, add production days or make other decisions that will cause the shoot to go over budget—including by changing plane tickets or shoot locations—without the senior producer's approval. Accordingly, producers give regular field reports to senior producers and consult with senior producers on major changes to the production, such as changes necessitated by losing an interviewee. The APs coordinate logistics, such as renting equipment, arranging transportation, contacting actors and interview subjects, and ordering catered food.

In the postproduction phase of the project, editors work with the producer and senior producer to create a final cut out of the available raw footage.

Some productions require actors for re-creations of historical events. When a production requires actors, the senior producers and upper management approve the use of actors and a budget for the actors. The Employer's written manual states that casting emails must be reviewed by human resources (HR) and the Employer's legal department before being distributed and that all actors must be paid. The testimony, however, indicates that senior producers, APs, and producers do not uniformly follow any one procedure in hiring actors. Two producers testified that they selected actors after their APs placed ads on local websites seeking actors. One producer testified that she sent headshots of her proposed actors to her senior producer for approval. The record also reveals that the Employer employs casting produc-

ers, who presumably have some role in hiring actors, but neither party elicited any testimony about the duties of casting producers. Producers have no authority to negotiate pay or other terms and conditions of employment with actors.

Producers also have no authority to negotiate pay or other terms and conditions of employment with crewmembers. If a producer requests to work with a DP who has not worked for the Employer before, the Employer conducts an independent investigation into that DP's work to make sure he or she would be a good fit. If a producer requests a particular crew member who has worked for the Employer before, the Employer tries to accommodate that request. However, these requests are sometimes not honored; if the crew member is unavailable or the line producer determines that the budget requires using a local crew, the Employer can deny a producer's request.⁵ There is no evidence in the record of any producer suffering a negative consequence for bad photography or sound work. However, several producers testified generally that they believed they were responsible for the end product.

The Employer does not formally evaluate the producers. There is also no evidence of any producer being disciplined for failing to adequately supervise another worker or for another worker's deficient performance. The Employer's "Who Does What at Peacock" document states that requests for days off should be sent to Kolbell, and several APs and producers testified that Kolbell approves time-off requests.

Analysis

Section 2(11) defines a supervisor as any individual having the authority, in the interest of the employer, to (among other functions) hire, assign, or responsibly direct employees, so long as the individual exercises independent judgment in doing so. The burden of establishing supervisory status lies with the party asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Conclusory evidence, in the absence of specific examples of the exercise of supervisory authority, does not satisfy that burden. See, e.g., *Lynwood Manor*, 350 NLRB 489, 490–491 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). The party asserting supervisory status must show that the

⁵ In this regard, the Regional Director relied more heavily on the testimony of producers in the petitioned-for unit than the testimony of staff producer Kimberley Ferdinando, who testified, contrary to the testimony of other producers, that she directly hired her crew and approved her APs' leave requests. We agree with the Regional Director that the testimony of producers in the petitioned-for unit is more relevant than that of nonunit staff producers, and we affirm the Regional Director's reliance on that testimony over Ferdinando's.

individuals in question have the authority to engage in at least one of the supervisory functions set forth in Section 2(11), that their exercise of that authority is not simply routine or clerical but requires the use of independent judgment, and that their authority is exercised in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).⁶ Supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” *Republican Co.*, 361 NLRB No. 15, slip op. at 5 (2014) (citing *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)).⁷

Authority to assign

A party can prove supervisory authority by showing that an employee exercises independent judgment in assigning “significant overall duties” to another employee. See *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Supervising Producer Kolbell assigns APs to particular productions, and while she takes into account a producer’s request, a producer’s request is not enough to reassign an AP who is working on something else. Indeed, the record indicates that senior producers must approve transfers of APs from their shows, and, in at least one instance, the producer was not even consulted or informed before the AP assigned to his show was transferred. Similarly, the record indicates that although pro-

ducers may request particular DPs for their productions, the Employer has denied those requests when the DP is working on a different production or when the budget necessitates using a local crew. We therefore agree with the Regional Director that producers do not assign or effectively recommend the assignment of other employees to their productions.

The Employer points to evidence of particular tasks, such as researching a storyline, preparing a draft production schedule, and purchasing props, that producers assign to APs. But these discrete tasks do not rise to the level of significant overall duties, and there is no evidence in the record of producers assigning duties to APs that are outside the ordinary duties generally expected of the Employer’s APs. Moreover, the authority to assign tasks to an employee does not establish supervisory status if there is “only one obvious and self-evident choice.” *Oakwood*, 348 NLRB at 693. Here, except for “crashes,” which are overseen directly by senior producers, producers work with only one AP at a time.⁸ As the Regional Director found, APs typically work during the normal industry work hours of 10 a.m. to 6 p.m., and there is no evidence that producers approve APs’ overtime or otherwise determine their schedules during preproduction.

The dissent contends that the producers’ role in setting schedules in the field supports a finding that producers exercise supervisory authority. We disagree. Producers have limited discretion in creating the shoot schedule, which is often a collaborative effort between producers and APs. Producers need the approval of senior producers to add any days of shooting or make other decisions that will cause the shoot to go over budget. The dissent attempts to obscure the indispensable role senior producers play by stating that producers’ contact with them during production is generally limited to a daily phone conversation. Plainly, regardless of the number of phone calls, producers do not act independently with respect to scheduling. Rather, they must work within the constraints set by senior producers. Several other factors, including the availability of interview subjects and actors, further constrain producers’ discretion during production. For instance, if an interview subject arrives late and pushes production times back, producers do not have any discretion to choose to end early and shoot an extra day. In light of these constraints, their choice to extend the crew’s hours does not involve independent judgment.

Even if producers did exercise independent judgment in assigning extra time to crew shifts, we would not find their authority to slightly modify crew shifts sufficient to

⁶ The dissent suggests that because the name of the employer is “Peacock Productions” and the focus of the entire business is the production of programs for television, it is “obvious” that “the person in charge of everything and everybody is—no surprise—the Producer.” Titles, however, are insufficient to show supervisory status. *Oakwood Healthcare*, 348 NLRB at 690 fn. 24 (“the Board has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor.”).

⁷ In setting forth general supervisory principles, the Regional Director relied on *D&J Ambulette Service*, 359 NLRB 580 (2013), *Brusco Tug & Barge, Inc.*, 359 NLRB 486 (2012), *Alternate Concepts, Inc.*, 358 NLRB 292 (2012), and *Connecticut Humane Society*, 358 NLRB 187 (2012), which were rendered invalid by the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We note that a properly constituted Board has since reaffirmed and incorporated by reference the decision in *Brusco Tug & Barge*. See 362 NLRB No. 28 (2015). Instead of *D&J Ambulette Service*, we rely on *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 1 (2014), in which the Board found, for purposes of responsible direction, that although the putative supervisors possessed the authority to take “corrective action,” the employer failed to satisfy its burden of proof, inter alia, that there was a “prospect of adverse consequences” for the putative supervisors if other employees performed poorly. Instead of *Alternate Concepts*, we rely on *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006), in which the Board found that the employer failed to meet its burden of proving supervisory authority because, inter alia, the testimony was “utterly lacking in specificity.” Finally, we do not rely on *Connecticut Humane Society*.

In addition, we do not rely on another Board decision on which the Regional Director relied, *Family Healthcare, Inc.*, 354 NLRB 254 (2009). See *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

⁸ A “crash” is a special project related to a current event. Because they require expedited production schedules, several producers and APs may be assigned to them.

confer supervisory status. At most, producers are able to perform these functions for a limited period of time in 1 week out of every 12. The sporadic exercise of this authority is simply not a major part of the producers' job duties. The dissent characterizes the 1-week production phase as the most important, in part because the three phases in the creation of an episode are called "pre-production," "production" and "post-production." The dissent does not deny, however, that the episode cannot be created without the pre-production and post-production phases, which together comprise 11 weeks. In short, the producers' role in setting schedules during production does not demonstrate supervisory status.

Authority to responsibly direct

A putative supervisor has the authority to responsibly direct if that individual is "accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Oakwood Healthcare*, 348 NLRB at 692. The party asserting supervisory status based on possession of authority responsibly to direct must show that the putative supervisor has the "authority to take corrective action" and can potentially receive adverse consequences for the performance errors of other employees. *Id.*; see also *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 1. The Regional Director found that producers direct the crew to perform individual tasks, but because their direction is either routine or motivated by the artistic effect the producer seeks to achieve, producers do not exercise independent judgment in doing so. The Employer contends that the Regional Director's finding conflicts with the Court's holding in *Kentucky River*, 532 U.S. at 713.⁹ We do not reach this issue. Even assuming that producers use independent judgment in directing other employees, the Regional Director correctly found that the record does not establish that the Employer holds producers accountable for their direction of others.

Here, the Employer has presented no evidence that any producer has ever been held accountable for another employee's mistake. Rather, the record includes only conclusory statements about the producers' responsibility for

⁹ In *Kentucky River*, the Court rejected the Board's view that "judgment is not 'independent judgment' to the extent that it is informed by professional or technical training or experience." *Id.* at 708. The Regional Director found that producers do not exercise independent judgment in instructing other employees to perform specific tasks because their instructions "are motivated by the artistic effect the producers seek to achieve." Decision & Direction of Election at 17-18. The Employer contends that this finding conflicts with the Court's holding in *Kentucky River*.

the work of others, including a manager's claim that producers have "ultimate responsibility for the contents, the form, the shape, whatever you see on television" and a producer's testimony that he is the "highest in command." The testimony the Employer cites is "simply a conclusion without evidentiary value."¹⁰ The Employer has presented no evaluations where it held producers responsible for the performance of others, nor any examples of discipline or other adverse consequence that befell a producer for another employee's deficient performance. The Employer has also presented no evidence of producers receiving any kind of commendation for the good work of crewmembers or APs. Moreover, Producer David Van Taylor testified that, if an AP made a mistake in the AP's normal duties, the senior producer would generally hold the AP, not the producer, accountable. Because the Employer has not produced any specific examples to the contrary, it has not carried its burden of establishing that it holds producers accountable for others' work. We therefore adopt the Regional Director's reasoning and analysis finding that the Employer failed to establish that producers responsibly direct other employees.

Authority to hire or effectively recommend hire

A supervisor exercises the power to effectively recommend hire if the supervisor's recommendations are followed with no independent investigation by superiors. See *Republican Co.*, 361 NLRB No. 15, slip op. at 5. The Employer contends that producers hire or effectively recommend the hire of DPs and crew, effectively recommend the hire of APs, and hire actors. Producers have no authority to directly hire any employees and may not negotiate pay rates or other terms and conditions of employment with potential employees. There is no record evidence of producers effectively recommending the hire of new APs who had never before worked for the Employer. Instead, as the Regional Director found, APs interview with Kolbell and a senior producer before they are hired. Likewise, when a producer requests a particular crew member such as a DP who has never before worked for the Employer, the Employer conducts an independent review of that person's qualifications. We therefore agree with the Regional Director that producers lack authority to recommend the hire of APs and to hire or recommend the hire of DPs and crew.

We also find that producers lack authority to hire actors. In this regard, the testimony and the documentary evidence are inconsistent regarding producers' authority to hire actors. Two producers testified that they had their

¹⁰ *NLRB v. NSTAR Electric Co.*, 798 F.3d 1, 18 (1st Cir. 2015) (internal quotations omitted).

APs find actors for particular positions and then selected those actors based on their headshots. But one of those two producers had her senior producer review the headshots first. And these examples exist against the backdrop of contrary documentary evidence: the Employer's own manual states that casting emails must be reviewed by human resources and the Employer's legal department. In light of this conflicting evidence, we find that the Employer has not carried its burden of proving that producers hire actors within the meaning of Section 2(11).

Response to dissent

Lastly, we note that the dissent proposes a different test for supervisory status and would examine the nature of the employer's operations, the work performed by undisputed supervisors, and "whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute." We previously rejected this proposed test, finding that it would "usurp Congress's authority to promulgate the law."¹¹ We see no reason to revisit that decision here. Contrary to the dissent, we make no finding as to the supervisory status of any individuals other than the freelance and run-of-show producers at issue here. The Employer's burden is to demonstrate, through actual examples, that its producers have the authority to act as supervisors, and it has not done so. Accordingly, we find that the producers in the petitioned-for unit are not supervisors within the meaning of Section 2(11) of the Act.

ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision on Review and Order.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹¹ *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 2 (2015) (quoting *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154, 163 fn. 5 (3d Cir. 1999)). The only authorities cited by our dissenting colleague in support of his proposal are his own dissenting opinions in *Buchanan* and other cases.

MEMBER MISCIMARRA, dissenting.

The Employer, Peacock Productions, produces hour-long nonfiction television episodes. A team of professionals works throughout a 12-week period to produce each episode. The process is helmed by a freelance or run-of-show producer (herein Producer), who works full time on the production, assisted by an associate producer (herein Associate Producer). The Producer writes the script, develops the shoot schedule, oversees and directs all personnel during the shoot, and is responsible for the final product. Yet the Regional Director and my colleagues find that the Producers, the highest-in-command individuals assigned to each production, do not supervise any of the workers who work under them. For the following reasons, I dissent from this finding.¹

Discussion

A. Applicable Law and the Employer's Operation

Section 2(11) of the Act sets forth 12 indicia of supervisory authority, possession of any one of which is sufficient to make its possessor a supervisor. Section 2(11) states:

The term "supervisor" means 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.

As the statutory language indicates, even if an individual has no authority to take any of the 12 actions enumerated in Section 2(11), he or she is still a supervisor under that provision if he or she possesses the authority to "effectively . . . recommend" any one of the 12 actions.

I have previously expressed the view that, in many cases, the Board's analysis of supervisory status has become "increasingly abstract" and out of touch with the "practical realities" of many workplaces.² Therefore,

¹ The Petitioner argued before the Regional Director that, even if the Producers supervise actors and crew, Producers are not supervisors within the meaning of Sec. 2(11) because crew and actors are not statutory employees. In light of my finding that the Producers supervise Associate Producers, who are undisputed employees, it is unnecessary for me to address whether the Producers also supervise crew and actors within the meaning of Sec. 2(11). However, I address that issue below because my colleagues do so. As do my colleagues, I assume the employee status of the crew and actors in that analysis.

² See *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 4 (2015) (Member Miscimarra, dissenting). See also *G4S Government Solutions, Inc. d/b/a WSI Savannah River Site*, 363 NLRB No. 113, slip op. at 6 (2016) (Member Miscimarra, dissenting); *Veolia Transportation*

when determining whether certain individuals possess supervisory authority under Section 2(11) of the Act, I believe the Board should take into account the following considerations: (i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.³ As I have explained previously, this last factor in plain English essentially asks, "If one accepts the Board's finding that the disputed employees are *not* supervisors, does that produce a ludicrous or illogical result—for example, one where *nobody* has the authority to hire, discharge, discipline, assign, or responsibly direct employees (or to exercise any of the other indicia of supervisory authority set forth in Section 2(11))?"⁴ These factors are meant to help the Board avoid conclusions regarding supervisor status that "fail the test of common sense."⁵

Here, applying Section 2(11) and taking these factors into account, I would find that Producers assign and responsibly direct Associate Producers, crew, and actors, effectively recommend the hire of Associate Producers, and hire actors.

The Employer's business is the production of nonfiction television episodes. Each of the Employer's Senior Producers generally manages an average of seven to eight episodes at a time, though the exact number varies. A Producer is responsible for each of these episodes, which requires a team of employees to complete. As pertinent here, those employees include an Associate Producer, a Director of Photography, other crewmembers, and actors.⁶ These employees work at various times with the Producer over a 12-week period to produce the episode. The Employer divides the work into three phases: preproduction, production, and postproduction, but it is unnecessary here to deal with the third phase.

At this early point in our analysis, it is relevant to stop and consider what we already know about the role that the Producer plays in this business. The name of the employer is "Peacock Productions." The focus of the entire business is the *production* of programs for television. The term "production" means "something *pro-*

duced" (as in a "literary or artistic work").⁷ Although the creation of programs involves many people over the course of a three-phase process, each phase is defined either in terms of a program's *production* or in relation to when *production* takes place. Thus, as noted above, the phases are "pre-*production*," "*production*," and "post-*production*." To state the obvious, television programs do not create themselves. Rather, they are produced, and for each individual episode, the person in charge of everything and everybody is—no surprise—the Producer. Equally significant is the fact that the persons who assist Producers—and who, in my view, are clearly supervised by them—are their immediate subordinates, the Associate Producers.

During preproduction, the Producer, assisted by an Associate Producer, writes the script, puts together the production schedule, and creates a list of interviewees and characters. Following preproduction is the most important part of each episode's creation, the 1-week production phase. During this time, the Producer controls the shoot location. The Producer interviews subjects on camera and directs the director of photography and other crew in obtaining all footage. The Producer makes any necessary changes to the shoot schedule and determines when the shoot ends each day. The Producer calls all the cues to actors during each scene. As the Regional Director found, "the producer's instructions to the crew . . . are motivated by the artistic effect that the producers seek to achieve." Producers do not consult with any higher management before giving such instructions. Their contact with the Senior Producers during production is generally limited to a phone conversation each day.

Producers thus occupy the central role in managing and completing each episode. They are indisputably the highest in command during the production phase, and they are responsible for most of the on-the-ground decisions that lead to the final product. This general context informs my analysis below of each of the relevant Section 2(11) indicia of supervisory authority in this case.

B. Producers' Authority to Assign Associate Producers, Crew, and Actors

The term "assign" means "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, i.e., tasks, to an employee." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). Producers assign Associate Producers (who are undisputedly statutory employees) numerous significant duties, including finding critical

Services, 363 NLRB No. 98, slip op. at 13 (2016) (Member Miscimarra, dissenting).

³ See *Buchanan Marine*, supra, slip op. at 5 (Member Miscimarra, dissenting).

⁴ *Id.*, slip op. at 10 (Member Miscimarra, dissenting).

⁵ *Id.*

⁶ Although the Employer employs staff, freelance, and run-of-show Producers, and the petitioned-for unit includes only the latter two classifications, the undisputed testimony establishes that all Producers have the same job duties. I therefore see no need to make any distinction between or among the several categories of Producers.

⁷ Merriam-Webster Dictionary, "production" (<http://www.merriam-webster.com/dictionary/production>) (emphasis added).

people that the Producer wants to interview, securing “rights and clearances” to use certain material in a program, researching locations for interviews and shoots, preparing draft production schedules, fact checking, and arranging shoot logistics. During production, which generally happens at a location selected by the Producer, employees report to work according to the shoot schedule assembled by the Producer and Associate Producer. The Producer decides when the team has shot enough footage to end each day. Although Producers do not negotiate overtime rates with employees, all employees must stay at the production each day until released by the Producer. There is no evidence that any undisputed supervisor sets start or end times for any employees during production; indeed, no undisputed supervisors communicate at all with the crew or actors during production.⁸ This evidence amply demonstrates that during the production week, Producers assign employees to a place and a time.

The Regional Director discounted the Producers’ authority to select a location for the shoot by pointing out that the location is constrained by a number of factors, such as the story being told and the budget for the shoot. But even within these constraints, Producers use their artistic judgment to determine the best specific location for the shoot. Moreover, through their creation of the shoot schedule, Producers determine the start time for each employee during production, and they also decide when to release employees at the end of the day. Working within constraints does not rob supervisors of their authority. Indeed, as the Regional Director found, Producers use their artistic judgment in determining when to end the day’s production work. Using professional judgment in exercising supervisory authority clearly demonstrates that Producers are Section 2(11) supervisors. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (reversing Board’s determination that nurses do not exercise independent judgment because they use their ordinary professional judgment in carrying out their duties). The fact that Producers sometimes work with Associate Producers in setting the schedule does not diminish the Producers’ authority, particularly considering that the record is clear that when disagreements arise between Producers and Associate Producers, the Producers have the final say.

I believe my colleagues reach the wrong conclusion from the fact that production occupies only 1 week of the

12-week production process. My colleagues suggest that this makes the exercise of Producers’ authority to assign “sporadic.” Rather than sporadic, the Producers’ exercise of authority during production week is continuous, concentrated, and essential to the overall success of the production. My colleagues’ position disregards the fact that the production week is the focus of everything that precedes it, and it constrains everything that follows it. There is a reason that the three phases in the creation of an episode are called “pre-production,” “production” and “post-production.” The focus at all times is on what will occur, what is occurring, or what did occur during the week of production. Although many employees, including crew and actors, only work during the week of production, this reinforces the critical nature of what occurs during that week.

It misconstrues the nature of a production company to suggest that the supervisory work performed by the Producer is limited because “production” takes only 1 week out of the 12-week process of creating an episode. By the same logic, when a surgical team separates conjoined twins, if that surgery requires 2 years of preparation and 10 years of follow-up treatment, but the surgery itself only takes 24 hours, the brain surgeon’s supervisory role during the surgery must be considered limited. The mere statement of such a proposition is sufficient to refute it.

Therefore, I find that Producers assign Associate Producers within the meaning of Section 2(11), and, assuming that the crew and actors are statutory employees, the Producers likewise assign them within the meaning of Section 2(11).

C. Producers’ Authority to Responsibly Direct

It is undisputed that Producers direct other employees to perform specific tasks, such as directing Associate Producers to research an issue or calling cues to actors. My colleagues, however, find that this direction is not “responsible” within the meaning of Section 2(11). To establish accountability, “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.” *Oakwood Healthcare*, 348 NLRB at 692 (emphasis added). Here, the Employer has shown that both of these requirements are met.⁹

⁸ It is undisputed that senior producers are absent during production week and that Producers’ contact with them is limited to a daily phone conversation. Producers make all day-to-day and minute-to-minute decisions to ensure that the daily shooting schedule is met and that the production week is successfully completed.

⁹ Indeed, given that the Producer has overall responsibility for each episode, and he or she is the *only* individual with such responsibility (apart from Senior Producers, who exercise general oversight over seven or eight episodes at a time), the record precludes any doubt regarding the Producer’s role in responsibly directing employees in the production of the episode.

Several Producers testified about their authority to take corrective action. One Producer testified that, when his Associate Producer wrote an email to a potential interviewee, he rewrote it because a poorly worded email might cause the production to lose “a big get.” In the field, the Producer decides when a shot has been completed to the Producer’s satisfaction. In other words, if the director of photography or another employee makes a mistake in a shot, it is the Producer’s responsibility to determine whether that mistake needs to be corrected and to re-shoot. There is no evidence of Producers checking with any other managers before determining that a shot needs to be redone in the field. Similarly, uncontroverted testimony establishes that it is the Producer’s job to “check the sound and make sure it is gotten,” in the words of Producer Lise Zumwalt. The evidence clearly establishes that Producers have authority to check others’ work and fix mistakes made during production.

Likewise, uncontroverted evidence proves at least the prospect of adverse consequences should a Producer fail to correct mistakes in production. Senior Producer Colleen Halpin testified that she would not rehire a Producer if she were not pleased with the way the production went. No witness contradicted this testimony or gave any example of a situation where a Producer who had overseen a poorly done production was rehired. Vice President Knute Walker testified that the Producer is ultimately responsible for the performance of the Associate Producer and director of photography. The context of the Employer’s operations also supports the conclusion that Producers are responsible for their direction of others. Producers’ primary duty is to create television episodes, which is the Employer’s only business and which requires integrated teams of employees to complete. It is undisputed that Producers are the highest in command on the shoot. It is not reasonable to conclude that Senior Producers, who manage many projects at a time and are not even present during the critical phase of production, direct the daily work of any other employees.

D. Producers’ Authority to Hire or Effectively Recommend for Hire

Section 2(11) provides that a supervisor is “any individual having authority . . . to hire . . . or effectively . . . recommend” hire of an employee. The Act requires only that supervisors have the *authority* to hire or effectively recommend for hire, not that they consistently exercise

that authority to the exclusion of any other hiring process. The record demonstrates that the Producers have effectively recommended the hire of Associate Producers. Ann Kolbell, the Employer’s Supervising Producer, relies on the input or preference of the Producer on the project in selecting the Associate Producer for that project. Requests by a Producer for an Associate Producer employed by Peacock are granted unless the Associate Producer is already assigned to another project. Conversely, Producers can indicate that they do not wish to work with a particular Associate Producer, and that is honored. And the evaluation of the Associate Producer’s work that the Producer must submit at the end of a project is the basis for determining whether the Associate Producer will work for the Employer going forward.

Regarding actors, two Producers testified that they have hired actors based on those actors’ headshots. Another Producer testified that when a Senior Producer asked him to hire an actor he did not want to hire, the Producer found a different actor to play the part. A third Producer testified that she had her Senior Producer review headshots of actors she had selected, but the Senior Producer did not overrule her selections. Thus, the testimony establishes that three different Producers have hired actors for their productions. There is no evidence that any higher manager indicated to these Producers that they should not have done so. Moreover, there is no evidence that a Producer used an actor who had been hired by somebody else. Thus, the evidence demonstrates that Producers have the authority to hire actors.

I respectfully disagree with my colleagues’ finding that the evidence of Producers’ authority to hire actors is “inconsistent.” The record shows that the Employer did not use any specific process for hiring actors. Under the circumstances, I would characterize hiring inconsistencies as the product of an inconsistent process rather than as evidence that Producers are not supervisors. As I have previously observed, the Board should not discount evidence of supervisory authority “merely because it could have been more detailed or supported by more specific examples.”¹⁰ Here, my colleagues do exactly that. The record is sparse on the process of hiring actors, with witnesses only mentioning actors a handful of times. But the Employer’s burden here is only to show, by a preponderance of the available evidence, that Producers possess the authority to hire. The Employer has produced some evidence that Producers have hired actors, and the Petitioner has not produced any evidence that they do not. Since the record demonstrates that Produc-

Regarding responsible direction, my colleagues rely on the principles stated in *Community Education Centers, Inc.*, 360 NLRB No. 17 (2014). I relevantly dissented in that case on the basis that the majority had embraced an unduly restrictive interpretation of “accountability.” See *id.*, slip op. at 2 (Member Miscimarra, concurring in part and dissenting in part).

¹⁰ *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 4 (2015) (Member Miscimarra, dissenting).

ers have hired actors, necessarily the record establishes that Producers possess the *authority* to hire actors. The majority's holding that the Employer's evidence is insufficient increases the Employer's burden of proof beyond the preponderance standard. Contrary to my colleagues, I find that Producers have authority to hire actors and are therefore supervisors within the meaning of Section 2(11). Because of my findings regarding Associate Producers and actors, it is unnecessary for me to decide whether the Producers also hire or effectively recommend the hire of the crew.

Conclusion

I return to the three commonsense factors that, as noted above, I believe the Board must consider in every case when determining whether particular individuals are supervisors under Section 2(11) of the Act. See *supra* fns. 2–5 and accompanying text. Applied here, each factor confirms that Producers possess supervisory authority, including the authority to assign associate producers, crew, and actors; the authority to responsibly direct them; and the authority to hire and to effectively recommend hiring.

First, the “nature of the employer’s operations” is the production of hour-long television episodes, and the work done by the Producer is obviously central to the Employer’s business.

Second, the work performed by subordinates—including Associate Producers, crew and actors—clearly requires that they be assigned and directed. Production companies are not engaged in the manufacture of widgets. Hour-long television programs do not assemble themselves, and the record demonstrates that each episode produced requires the involvement of many people who are not interchangeable and who must be told what to say, where to be and when, and what tasks to accom-

plish at various times for each episode to be successfully completed.

Third, if the Board concludes that Producers do not have any supervisory authority under Section 2(11), is it plausible to conclude that all supervisory authority is discharged by other individuals? Here as in *Buchanan Marine*, I believe my colleagues’ reasoning fails the “test of common sense.”¹¹ It is simply not plausible that the Senior Producers, who oversee seven or eight episodes at a time and are not even present during production, have exclusive authority to assign and responsibly direct everyone involved in the production of an hour-long television episode. Rather, the record clearly establishes that Producers have responsibility for each episode *because* these matters require such careful planning and execution throughout the production process.

In short, the creation of an hour-long television episode is a complicated process with many moving parts. These episodes do not magically come together by themselves; they require someone in charge of the day-to-day process. That person is the Producer. I believe any reasonable evaluation of the record in this case in light of the three factors mentioned above warrants a finding that the Employer’s Producers possess supervisory authority under Section 2(11) of the Act. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

¹¹ 363 NLRB No. 58, slip op. at 10 (Member Miscimarra, dissenting).