

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

MARKETPLACE APM/MPR,¹

Employer

and

Case 21-RC-270627

**SCREEN ACTORS GUILD – AMERICAN
FEDERATION OF TELEVISION AND
RADIO ARTISTS (SAG-AFTRA),**

Petitioner

DECISION AND DIRECTION OF ELECTION

A petition was filed on December 22, 2020, by Screen Actors Guild – American Federation of Television and Radio Artists, known as SAG-AFTRA (Petitioner) seeking to represent certain employees of Marketplace APM/MPR (Employer). A hearing was held before a hearing officer of the National Labor Relations Board on January 15 and 19, 2021. The Petitioner is seeking a unit of content creators and technical/engineering employees for a public-media company. The parties stipulated at the hearing that the following would be an appropriate unit within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time writers, reporters (including reporter, senior reporter, reporter II, and digital reporter), correspondents (including senior correspondent), hosts, producers (including producer I, producer II, and digital producer), assistant producers, associate producers (including associate digital producer and associate float producer), full stack product engineers, and editors (including planning editor and copy editor).

Excluded: All other employees, executive producers, managing editors, supervisor editors, director/product, director/social and engagement, temporary employees, interns, managerial employees, guards, confidential employees, and supervisors as defined in the Act.

Others Permitted to Vote: The parties agreed that the following individuals will be allowed to vote in the election, but their ballots will be challenged since their individual

¹ I grant the parties' joint motion to amend the petition and other formal documents to correctly reflect the names of the parties as set forth herein.

eligibility has not been resolved: Senior Producer (Caitlin Esch); Foreign Editor (John Buckley); Senior Editor/Bureau Chief (Amir Bibawy); Senior Editors (Eve Epstein, Jon Gordon, and Richard Karr); and Copyeditor (Edward Silver). The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Others Not Permitted to Vote: The parties further agreed that following positions will not be permitted to vote in the election because the parties agree that the duties of the individuals in these positions at the time of the petition exclude them from inclusion in the Unit: Senior Producer/Editor (Michael Lipkin); Senior Producers (Megan Detrie and Bridget Bodnar); and Senior Editor (Olga Oksman).

The unit encompasses the Employer's employees employed out of its facilities in Los Angeles, California; New York, New York; and Washington, D.C.²

The unit stipulated above contains between 45-50 employees.

The parties agreed that the sole issue to be determined at the hearing is whether the audio engineers, media designers, technical director, and senior technical director are appropriately included in the above-described unit of employees who create content for the Employer. There are approximately 10 employees in these disputed classifications.

Petitioner stated that it was willing to proceed to an election in any unit that I find appropriate, and the parties agreed that the election should be held by mail-ballot.

The Employer asserts that the unit initially proposed by Petitioner is not appropriate in that it includes employees who do not create content for the Employer, but who perform technical and engineering duties as part of a separate division of the Employer's operation and do not have a community of interest with the other employees in the proposed unit. Moreover, the Employer argues, their inclusion would be inconsistent with the typical exclusion of technical and engineering employees from content creators in the public media industry. Petitioner argues to the contrary that the employees at issue herein, specifically the audio engineers, media designers, and technical directors, have an overwhelming community of interest with the stipulated unit that outweighs any differences in organizational structure.

For the reasons set forth below, I find that the audio engineers, media designers, and technical directors do not share a community of interest with the content creators – reporters, correspondents, hosts, producers, and editors.

² This unit also includes several "remote" employees who work for the employer in Pittsburgh, PA; Austin, TX; Oakland, CA; San Francisco, CA; Portland, OR; Baltimore, MD; St. Paul, MN; and Ann Arbor, MI.

THE EMPLOYER'S OPERATION

Organizational Structure

American Public Media Group (APMG), a non-profit organization, is the nation's second-largest producer of public radio programs with between 10 and 14 million weekly listeners nationwide.

APMG consists of four distinct divisions, including American Public Media (APM), a national program production and distribution operation that includes the Employer (Marketplace). Other divisions include Minnesota Public Radio (MPR), and Southern California Public Radio (SCPR) which provide production and broadcasting services on respective regional issues and are not at issue herein.³ The fourth division of APMG is its "Centers of Excellence" consisting of finance, human resources, media operations, philanthropic development, marketing and communications, and legal department, all of which operate as a shared service group across the entire organization to avoid unnecessary duplication of services and to achieve economies of scale. Media Operations, where the disputed technical employees work, has been a part of the Centers of Excellence since about 2019.⁴

Marketplace – the Employer herein – is the flagship program of APM and produces economic and business news programming in an innovative, interesting, and "lively" manner through newsroom and digital offerings for distribution to over 800 public radio stations. Some segments are broadcast live and some are recorded for later airing, and many go online as podcasts. Among Marketplace's programs offered through APM are two daily live broadcasts – Marketplace Morning Report and The PM Show – as well as a number of prerecorded programs and podcasts, including Marketplace Tech, Make Me Smart, Corner Office from Marketplace, and the Uncertain Hour.

Thus, Marketplace has the elements of a traditional newsroom as well as digital production. Approximately 45-50 nonsupervisory journalists or editorial staff create content for the Employer: the writers, reporters, correspondents, hosts, producers, digital producers, and editors who report, analyze, write, and discuss on-air news for daily broadcast on the Employer's radio programs and for digital programs like podcasts. These employees comprise the agreed-upon unit of content creators, and report to the Executive Director of News, while most of those who work primarily on digital content and podcasts report to the Executive Director on On-Demand. There are also approximately 10 technical employees in Media Operations who comprise the disputed employees that record and enhance the broadcasts, and who are part of the APMG Centers of Excellence as described above and report to the Manager of Media Production of APMG.

APMG has a single benefits program that spans the entire company which includes medical, dental, 403(b) plans, and a variety of other benefits that are available to all employees

³ The newsroom employees in MPR are currently represented by SAG-AFTRA, as are the newsroom employees at SCPR. Neither unit encompasses technical employees.

⁴ Prior to 2019, these employees were called APM tech: their duties did not change when they were transferred to APMG and became part of the Centers of Excellence.

of APMG, including those in the proposed unit. There is also a universal payroll system utilizing the same timekeeping system for all employees of APMG distinguished by pay group, location, department, and job.

The Employer's offices and most of the unit employees are located in Los Angeles, California, with news bureaus located in New York, New York; and Washington, D.C., each of which has a single reporter or correspondent.

Content Creation Employees

The creation of content for series, daily pieces, and individual broadcast segments is a complex and collaborative effort. Typically, the reporters, hosts, editors, and producers (collectively referred to herein as content creators or journalists) attend an editorial meeting to discuss and plan the content of particular programs. Reporters propose or "pitch" stories in their respective areas of experience and expertise which, if approved for production, are subsequently written and "voiced" on air by the reporters, working closely with the editors to ensure accuracy. The producers perform multiple roles from proposing topics and interview subjects and then preparing the interviews for editing and working with the show host: they also direct the show in accordance with the agreed-upon script by cueing the speakers, music, and ads. Hosts write dialogue and perform interviews in conjunction with the producers and the rest of the program staff: they are the literal "voice" of the programming and are expected to be subject matter specialists as well as engaging on-air personalities.

The Employer's reporters generally work regular set hours, in contrast to reporters at most other media outlets. When first hired, they are instructed by the editors and producers on how to create stories in a manner consistent with the Marketplace tone and style. Before the current COVID-19 restrictions, most interviews were conducted by the reporters in the Employer's Los Angeles studio and were recorded for later broadcast. When reporters conducted live interviews in the field, they were sometimes accompanied by an audio engineer to assist with the recording. Currently with personnel not working in studios, reporters generally will record their own segments at home, or be patched into another studio where an engineer will record them.

Reporters' shorter stories or spots – 60 to 90 seconds in length – are assigned to them at the editorial meetings where ideas are proposed or "pitched." Reporters are generally, but not always, assigned the topics they pitch, and may be given topics by the producers. Once the reporter, host, and producer complete their editorial meeting to discuss the contents of a particular piece, the reporter will research the issue, contact experts, conduct interviews from which clips are extracted, and then meet with the editor to create a script describing the entire broadcast, from the host's introduction to the reporter's quote to the interview, including all the necessary sound clips and effects, which is then sent to the show producer for final approval. Once approved, the script is then submitted to Media Operations to assign a team of audio engineers to work on the program as described below.⁵

⁵ Again, this was done in the studio before the COVID-19 restrictions went into place: now it is done remotely and often by only the reporter.

Regarding feature stories of 2 or 3 minutes in length, the pitch can be developed over time and may require some pre-reporting to narrow or refine the topic before it is approved by the producers. If feature interviews are done in the field, the reporter can consult with an audio engineer regarding what equipment to use and how to decrease ambient noise and get the best sound.⁶ On occasion, a reporter can ask an audio engineer to create a particular sound effect or to suggest music that might enhance the story.

In addition to the creation and production of daily or weekly shows, the Employer also annually presents several full-length features or specials of an hour or more which go through essentially the same procedures as the regularly-scheduled broadcasts but spread out over a longer period to allow for greater development.

There are a few reporters and correspondents who work in other bureaus – specifically in Washington D.C., and New York, New York – who would go into their local studio and record their shows or conduct interviews using a simplified sound board with pre-set parameters. Presently, due to the pandemic, these functions are performed at the reporters' homes with the remote assistance of an audio engineer from Media Operations in Los Angeles, if needed. The audio engineer may interrupt an interview or recording to advise of any issues with the recording or to provide feedback regarding the sound. More often, rather than interacting directly in real time with the reporter or host during their taping of the show, the engineer receives the prepared recordings from the reporter and can then select or edit from the several proffered versions to create the best sound. Again, all edits and suggestions must comport with the approved script.

During live broadcasts, the host can consult with the producer and the audio engineer regarding possible changes or retakes needed for later rebroadcast or podcast. Again, the engineer cannot unilaterally alter the words or focus of the story.

Correspondents are the most experienced reporters who create “big story” features or projects and can also act as hosts or back hosts for broadcast shows. All of the foregoing content creators are considered by the Employer to be professional journalists subject to certain ethical guidelines and are expected to have strong story-telling and writing skills.

The Employer creates job descriptions for its various positions, listing core requirements for reporters, hosts, producers at various levels, digital producers, and copy editors, which are regularly updated to meet current needs. A Bachelor's Degree or equivalent experience is required of all journalists. Because Marketplace is a high-profile national brand, however, there are no entry-level journalist positions, and all hires are required to have considerable prior broadcast experience on the national level.

In addition to an on-air presence, the Employer also has a digital footprint. The digital content production employees in the Employer's On-Demand department rewrite and edit recorded broadcast stories for posting on websites as podcasts. Like the reporters, they also utilize editors and producers before publishing content online. Currently, there is one reporter who creates original content for posting. Original digital content is also created and posted on YouTube by the digital content production employees: these recordings are visual as opposed to

⁶ Pre-pandemic, these recordings were usually made in the field by the reporter accompanied by an audio engineer.

audio. These employees are considered media creators akin to reporters, even though much of their work product is not original.

Media Operations Employees

As noted above, Media Operations – part of APMG’s Centers for Excellence – provides anything technology-oriented throughout the organization, including PC and laptop support, meeting technology support, software support, troubleshooting, and security for Marketplace and other operations. The Media Operations division, where the disputed employees work, provides services that enhance broadcasts, including sound and technical engineering.⁷ The approximately 10 Media Operations employees in the disputed classifications of audio engineer, media designer, technical director, and senior technical director (collectedly described herein as technicians) are located in Los Angeles, although they are not necessarily limited to servicing that area.

The work of the audio engineers is at the heart of Media Operation. Once the script has been developed and approved by the content-creators as described above, the audio engineering team assigns its engineers to mix the various parts – the reports, stories, and interviews known as “voice packs and tracks” along with music and sound effects – into the version that is ultimately broadcast. The audio engineers can also suggest music – original or pre-recorded from an extant library– or other aural enhancement be added to a piece with the input of the producers: they do not, however, have any input into the content of the program.

Thus, as noted above, the audio engineers do not have editorial or journalistic functions, nor do they interchange with the content creation employees described above. All of them, however, collaborate together in producing the “Marketplace sound” – that is, certain parameters of tone, viewpoint, production, hosting qualities, and audio values that are touted as unique to the Employer and which allow it to engage in its trademark “unorthodox and explanatory storytelling.” The contributions of the engineers are particularly important, since unlike print reporters, audio and broadcast reporters are particularly aware of how stories sound and how that sound – tone of voice, background or ambient noise, and music – can enhance the story.

Regarding the core duties of the audio engineers, they record, clean up background and ambient sound, mix, and level audio⁸ on a complex broadcast sound board or console. The sound board allows the audio engineers to mix and edit various tracks and music in real time while the show is being aired live. The audio engineers also do recording in the field with hosts and reporters, as well as in the studio.⁹

⁷ Prior to November 2019, the technical employees were part of Marketplace operations before being reorganized in APM Technology. None of their job duties changed as a result of the reorganization, however.

⁸ “Leveling” refers to ensuring that all the components of the broadcast are at the same sound level and quality.

⁹ The audio engineers have been particularly crucial during the ongoing COVID-19 pandemic when many interviews are conducted virtually and where there might be unwelcome background or ambient noise that would affect the quality of the broadcast. Also, because the reporter and the guest cannot be together in the studio, the audio engineer can connect them to one another through the sound console and records the interview in accordance

The audio engineers work closely with the producers regarding prerecorded – as opposed to live – broadcasts, cutting and mixing interviews to the time allotted by the producer and storing them in an audio file to be replayed during the show. The same collaboration exists in the longer feature productions, but there is generally more content and more lead time for editing. The audio engineers can also insert “ambient” sound appropriate to the locale of an interview, like factory or dockside sound effects, as requested.¹⁰ A rough mix is created by the audio engineers consistent with the script and then submitted to the editors and producers for review, after which a final mix is created for broadcast.

More specifically, the audio engineer who “drives” the sound board assigns other engineers to perform specific tasks for the program, including working on “spots,” features, pre-recorded interviews, music and sound effects, and whatever else is set out in the outline of the show and the script that they have been provided by the content creation team. After the rough mix has been approved by the executive producer of the program, the audio engineers would then create the final mix and make any changes requested by the producer, and any final adjustments like balancing the audio (ensuring the same level throughout the broadcast) and erasing any unwanted ambient sound, and then finally uploading into the system for later broadcast.

Regarding shorter stories, like news features, there is less time for back-and-forth, and the script and the elements (interviews, etc.) are sent to the audio engineers who just make a final mix.

The duties of the audio engineers differ slightly during live broadcasts. Generally, there is a lead engineer or “driver” and a backup, one of whom arrives before the broadcast is scheduled to begin to set up the sound board – a task which has been complicated by everyone broadcasting from home or at a site other than the studio due to the restrictions of the COVID-19 pandemic. “Driving” the broadcast from the sound board consists of turning on mics, bringing in music, “firing” or hitting play on pre-recorded stories, and generally crafting the broadcast by working with the host and the director in accordance with the script. The audio engineer receives an e-mail the day before the show is broadcast live that has a list of the elements involved – the news spots, features, and interviews that will air on the morning show – and also receives the script of the broadcast to follow. Pre-recorded segments are prepared the preceding day by another audio crew.

Because the broadcast is aired live, there is generally no rehearsal: the engineers listen to the director for cues when to bring in or fade out music, open the host’s microphone, run credits, and so forth. The backup engineer maintains a simultaneous audio in case the main computer goes down, in addition to checking signal continuity to the satellite company and listening to the

with the script that was provided by the producer. Where the reporters do not have a clear line to the engineer, the reporters can record the interview themselves and send it to the engineer who cleans it up.

¹⁰ As a consequence of the COVID-19 pandemic, interviews are now conducted by Zoom or a similar platform, or by telephone rather than in the studio and may need more audio editing as a result.

broadcast to adjust tone and volume as needed. The show can also be edited after the fact for later download by local stations or for the podcast.¹¹

In the rare instance of a broadcast “emergency” where there is an audio or system failure during a live broadcast, the audio engineer avoids “dead air,” or silence by playing pre-recorded music, telling the host to keep talking, or even switching to a pre-recorded backup show. These decisions are generally made by consultation with the host or the producer, but if there is no producer or if the producer doesn’t respond promptly, the audio engineer will decide what to do. This situation has occurred five or six times in the past year since the COVID-19 pandemic foreclosed having employees in the studio, resulting in more frequent broadcast problems.

On occasion, in order to comport with the “Marketplace Sound,” an audio engineer may ask to enhance a broadcast where, for example, the host is having an “off day,” lacking the proper “gusto” or mispronouncing a word. The audio engineers can make these small changes on their own using their own discretion, or can rely on notes taken by the producer during the actual recording. As noted above, they cannot change the content of the broadcast without approval.

In addition to the daily shows and broadcast, the audio engineers are also involved with the creation of the Employer’s feature broadcasts. However, since they are longer and generally more-in depth, additional mixing and sound design is required, with multiple hosts and interviews, many soundbites, and more music to enhance the story. The program director or the audio engineers can choose the music so long as the host or producer does not object to it. An hour-long feature can take as long as 3 months to complete.

In sum, the production of a broadcast is a symbiotic process between the content creators – the reporters, editors, hosts, and producers – and the audio engineers, even though the latter have little or no authority to make changes to the content of the broadcast. The audio engineers do not create content or host programs, and there is no interchange with the content creators.¹² Likewise, the content creators – reporters, editors, and producers – do not run the sound board and there is no interchange between the two groups.¹³

On occasion, an audio engineer can work on product other than for Marketplace, particularly for APM on shows with topics unrelated to the economy, for example, cooking and entertainment shows, and a show called Mash Up America. In addition, the Employer’s audio

¹¹ Subsequent editing is often necessary for the podcasts, for example, removing the credits so that the episode can be resold. Also, the show may be edited into smaller specific segments for the podcasts. On occasion, an audio engineer can edit out a mistake or repeated sentence or even ask the host to re-record a short segment that cannot be corrected. Substantive edits to the podcast content generally must be approved by the respective hosts.

¹² On rare occasions, an audio engineer can read a scripted simultaneous voice-over translation into the recording of a show, but generally they are not “on mic.” The engineer running the sound board may use their own voice, or can recruit another engineer with a more appropriate voice suitable to the age and gender of the speaker, for example.

¹³ There is a particular incidence of an individual host activating her own microphone on a small board with presets, but from that point the show is “driven” by the audio engineers. Also, there is one incident in the record of a media operations employee becoming an editorial intern on the content creation side who now works out of the New York bureau.

engineers can work on programs for outside clients or guests from other public radio stations by “piping in” that host or guest from another studio. Specifically, the Employer’s audio engineers would set up the studio for the guest and then leave to perform other tasks, while occasionally listening in to ensure everything is proceeding smoothly. The engineers do not clean up or otherwise mix the final product for these outside clients. In these cases, those clients would be billed for the services of the Employer’s engineers. In 2019, for example, 500 hours were billed to outside studios. This has not been done since the onset of the COVID-19 pandemic, however, since broadcasters are presently not sharing live studios.

Regarding “underwriting,” or commercial ads during a broadcast, they are prerecorded and mixed ahead of time by an employee in Minneapolis and inserted into the program by the audio engineer. For the commercials on the podcasts, however, two audio engineers from the Employer’s Media Operations department were selected to provide a younger, more casual voice suited to the demographic.¹⁴ As noted above, the ads are written out and scripted in advance and are merely read by these engineers. Also, one engineer acts as a moderator for a live weekly podcast called Half Full – Half Empty, reading the selected topics to the commentators from a script written by the program’s producer.

The audio engineers must utilize specialized computer applications such as Adobe Audition, ProTools, and others for editing, controlling, and enhancing sound production. Most of the Employer’s technicians have prior radio broadcast and/or audio experience and are already familiar with operating a sound board in general and with using these applications. Some have degrees in audio engineering, but this is not required: most of them appear to have degrees or experience in music composition. Some on-the-job training occurs insofar as becoming familiar with personnel and broadcast routines, and the Employer offers tuition reimbursement for approved courses that would enhance job performance.¹⁵

The media designers, who are also part of the Media Operations division, have the ability to compose music for feature broadcasts as well as podcasts, and are asked to compose original music about three or four times a year. The music as well as its placement must be approved by the producer for the program or podcast. The job description for media designers requires them to be adept at music performing and sound design and to have a bachelor’s degree and at least 6 years of audio experience. Media designers also work as audio engineers on both live and prerecorded programs and podcasts.¹⁶ Currently, there is only one media designer employed by the Employer.

The senior technical director and technical director who work in the Employer’s Media Operations division primarily work on remote and field recordings and live events, as well as

¹⁴ Again, because of the COVID-19 pandemic, these employees are unable to come into the studio as they had in the past to record their podcast commercials and most do so from home or another site, resulting in sound of lesser quality which has to later be cleaned up before broadcast.

¹⁵ For example, one audio engineer was reimbursed for taking on-line music composition and film-scoring courses at Berklee College of Music.

¹⁶ Podcasts can also be live videotaped by a digital producer and posted to YouTube to be watched on demand. The audio engineers have no role in the videotaping, although the record shows one occasion where a media designer filmed a reporter outdoors.

broadcasts and podcasts. The technical directors have the same basic skills as the audio engineers but do more troubleshooting and establish protocols and standard operating procedures (SOPs). A technical director can work only on a certain program, but most of them work across all the shows as needed. The senior technical director is more like a project manager for road shows, organizing gear and the like.

ANALYSIS

In determining an appropriate unit, the Board will first consider the petitioned-for unit, and if that unit is appropriate the inquiry will generally end there. It is well settled that the unit sought need not be the most appropriate unit, but merely an appropriate unit. *Overnite Transportation Company*, 331 NLRB 662 (2000). However, if the petitioned-for unit is not appropriate, the Board may examine the alternative units proposed by the parties, and also has the discretion to select an appropriate unit that differs from those alternatives. *Id.* at 663. The Board generally attempts to select a unit that is the smallest appropriate unit encompassing the petitioned-for employees. See, e.g., *Bartlett Collins Co.*, 334 NLRB 484 (2001).

The Board recently reaffirmed the traditional community-of-interest test for determining the appropriateness of a bargaining unit, reiterating that its standards were not met where the “interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit,” and that a unit without internal, shared community of interest is inappropriate.” *The Boeing Company*, 368 NLRB No. 67 (2019), citing *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017).

The establishment of a community of interest among a group of employees consists of an examination of the following factors:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised

The Board has long held that these factors must be weighed in their totality, and that no single factor has controlling weight. *Airco, Inc.*, 273 NLRB 348 (1984).

Corporate Organization

It is undisputed that the two groups of employees are organized in separate departments and work for different corporate divisions: the journalists work exclusively for the Employer as part of APM, while the engineers work in the Media Production group under APMG and are not confined to doing work only for the Employer. They have distinct chains of command and different supervisors and managers: the journalists report to either the Executive Director of

News or the Executive Director – On Demand for APM, and the technicians report to the Manager of Media Production in the Centers of Excellence for APMG.¹⁷

Based thereon, I find that the two groups of employees are organized into separate departments and that this factor weighs against finding a community of interest.

Skills and Training

The Broadcast journalists are required to have years of experience in their field: most have college undergraduate or advanced degrees in journalism, English, history, or other disciplines. A few reporters have rudimentary technical skills, but those skills are ancillary to their primary duties to write, create, research, and present relevant and timely programming for the Employer. There is no formal training offered for their positions since there is no entry level hiring and the journalists are assumed to be expert in their respective areas.

In contrast, the technicians have a distinct skill set. They are not required to have advanced degrees, and most of them have musical and/or technical backgrounds. They must familiarize themselves with sophisticated equipment and computer programs, and the media designers must be able to compose original music. The Employer offers tuition reimbursement for certain college or certificate courses that would enhance these skills – a perk not offered to the journalists who are already highly skilled.

I find that the skills and training required of the two groups of employees are distinct from one another and there is no common training, and that this militates against finding a community of interest between them.

Distinct Functions and Job Responsibilities

The functions and job responsibilities of the journalists that the parties agree comprise an appropriate unit are clearly distinct from those of the engineers whom the Petitioner seeks to include in the unit. The only times the work of the two groups overlaps is when a program is broadcast live or recorded for later broadcast: otherwise they perform their work independently of one another.¹⁸

In this regard, the duties of the journalists are to work together to create original and unique content that comports with the Employer's unique "voice." To this end, the writers, reporters, correspondents, hosts, producers, and editors agree on relevant topics and ultimately create a "script" for the broadcast, whether it be live, recorded, or later edited for a podcast.

¹⁷ Although the technicians were a part of Marketplace for a few years before they were reorganized under APMG in 2019, they had historically been a part of APMG. Moreover, it is the current corporate organization of the Employer that is relevant to this factor, and not past organizational structure.

¹⁸ Their duties do overlap when the reporters conduct interviews in the field accompanied by an audio engineer to assist with the recording. The record does not describe how often this occurs, but it appears that most interviews are self-recorded by the reporters, particularly now in the midst of the pandemic. Thus, I find the amount of overlap to be insufficient to overcome the marked differences in the functions and job responsibilities performed by the two groups.

In contrast, the engineers perform technical and engineering work that enhances the sound quality of the broadcasts: they cannot suggest, research, write, edit, or report stories. They have no role in preparing the script for a broadcast, nor can they change a script. They do not perform on air with the reporters and host, with the very limited exception of commercial and translation voiceovers that are pre-scripted.

Thus, the record supports my finding that the two groups of employees at issue do not share a community of interest regarding their job functions and responsibilities.

Interchange and Contact with Other Employees

The content creators – the journalists – have regular contact with the technicians because they work in collaboration to create a finished product. As described in some detail above, the reporters, correspondents, hosts, producers, and editors write and develop the content of the broadcast or podcast, after which the engineers then mix, record, and enhance with music and sound effects. The engineers also transmit the broadcast to be aired. Most of the contact between the two groups occurs only when the show is being broadcast or recorded, since the journalists’ writing and research work is done entirely without the involvement of the technicians. Likewise, much of the technicians’ work is done at night or at times when the reporters are not involved. The technicians do not attend the “pitch” meetings conducted by the journalists to discuss story subjects, nor do they have any input into the content of the story.

Although all of the factors to show community of interest must be considered in their totality, the Board has noted that interchange between groups of employees is of particular significance. *Boeing, supra*, slip op. at 5. It appears undisputed that there is no interchange between the journalists and the technicians. In this regard, there is no evidence in the record that employees in one group transfer either permanently or temporarily to the other group. Moreover, it is clear that one group cannot and do not do the tasks of the other: the journalists do not have the requisite skill sets to run the sound board, compose music, and perform the other tasks that the technicians do, and the technicians do not create content or speak on the air.¹⁹ Thus, I find the absence of this factor strongly supports my finding that there is no community of interest between the two groups of employees.

Functional Integration

There is an arguable degree of functional integration between the two groups of employees but only insofar as they work symbiotically to create a finished broadcast. The engineers unquestionably contribute to the “Marketplace sound” by recording and integrating the various elements of the broadcast and ensuring audio quality. They can also enhance a broadcast by inserting or even composing appropriate music. However, the engineers are not responsible for the subject matter, research, or editing of the broadcasts, as these as tasks are solely within

¹⁹ There are a few limited instances where technicians provide scripted voiceovers or provide voices for broadcasts and podcasts, but this is not part of their regular duties and they have no discretion regarding what to say. Also, some journalists can run a simplified pre-set sound board and perform simple recording tasks, but these instances are largely the result of their inability to work in the studio with the audio engineers as a result of the COVID-19 pandemic. Thus, I find these very limited instances of interchange to be de minimis.

the purview of the experienced journalists. Likewise, although the journalists collaborate with the technicians to create a finished product, they do not perform the requisite merging and editing of the broadcast elements. Rather, they create a script for the order and duration of each element – introductions, interviews, ads, music, sound effects, etc. – which then must be followed by the engineers.

Also, unlike the journalists who work exclusively for Marketplace, the engineers can do mixing and recording work for other media outlets and outside clients.

Based upon the foregoing, I conclude that the daily interactions between the journalists and the engineers are not sufficient to overcome the differences in job functions, skills, and training and the lack of interchange. Therefore, I find that the lack of functional integration between the journalists and the engineers to be a strong factor against the requisite community of interest between the two groups.

Terms and Conditions of Employment

There is little evidence in the record regarding the terms and conditions of employment of the two groups of employees, except for their both receiving the same benefits that are consistent throughout APMG. As noted above, except for the times when the engineers are “driving the sound board” during a broadcast, they appear to work in separate parts of the facility and currently, due to the COVID-19 pandemic, the journalists generally work from home. The record indicates that the journalists keep “regular hours,” but does not otherwise describe them. Likewise, the record does not describe the technicians’ hours except to describe how some work at night to prepare the early-morning show. Moreover, there is no evidence of wages for either group.

Therefore, I must conclude that there is insufficient evidence of the terms and conditions of employment for either group of employees, and therefore this factor is inconclusive regarding supporting a finding of a community of interest between the employees.

Bargaining History

Although bargaining history is perhaps the least significant of the community of interest factors in *Boeing, supra*, slip op. at 2, I nevertheless note that bargaining units represented by the Petitioner at other APMG divisions – specifically Minnesota Public Radio (MPR) and Southern California Public Radio (SCPR) – include only those employees who “create content” for broadcast and exclude technical employees.²⁰ Based thereon, I conclude that there is historical exclusion of technical employees from the Employer’s other bargaining units represented by Petitioner, which tends to support my conclusion that these two groups lack a community of interest.

The Employer argues at length in its brief that the technicians are not properly included in a unit with the content creators because the Board has long disfavored such inclusions in the

²⁰ According to the Employer’s brief, there are apparently also two other editorial units represented by the Petitioner at MPR – MPR Classical and The Current – that exclude technicians.

broadcast radio industry. Indeed, *Boeing, supra*, slip op at 4, states that “consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.” Thus, according to the Employer, not only must consideration be given to the fact that the technicians have traditionally been excluded from other of its bargaining units with the Petitioner, but similar cases where technical employees were found to have no community of interest with on-the-air employees must also be considered. In support thereof, the Employer cites a number of older cases, along with a recent case involving another public radio station where the journalists and “editorial employees” are represented by the Petitioner and the engineers are represented by a different union.²¹ While this is a relevant factor, I do not rely on these examples in view of my findings above regarding the nearly total absence of the requisite community of interest factors.

Moreover, I do not rely upon the Employer’s assertion that the Petitioner previously argued in a 1979 case that reporters and anchors should be in a different bargaining unit from the employer’s technical employees as relevant to the instant case, inasmuch as a position of the predecessor to the Petitioner some 40 years ago has little bearing on the instant case.²² Moreover, even if this argument had merit, it would be rendered moot by the lack of community of interest between the two groups of employees currently sought by Petitioner.

Nor do I rely on the Petitioner’s argument that Board precedent requires a multi-department unit as exemplified in *Boeing Co.*, 337 NLRB 152 (2001). In that case, the Board reversed a Regional Director’s finding a unit of mechanics and quality assurance employees in favor of a plant-wide unit of all production and maintenance workers based on similarity of skills, training, and functional integration. Inasmuch as I find that none of those community of interest factors are present in the instant case, that case is readily distinguishable.

I also find distinguishable the other case relied upon by Petitioner: *KJAZ Broadcasting Co.*, 272 NLRB 196 (1984) where the Board reversed a Regional Director’s finding of a unit of broadcasters in favor of a station-wide unit based on evidence that the broadcasters spent half their time operating turntables and tape recorders, cueing records, regulating equipment, and performing other tasks necessary to operate a small radio station. That case did not involve technicians, and all the employees in a station-wide unit shared a substantial community of interest such that “the recognized distinction for bargaining purposes between on-air and not-on-air employees has broken down.”²³

In summary, I find that the interests shared by the content creators – reporters, correspondents, hosts, producers, and editors – are far too disparate from those of the audio

²¹ Specifically, the Employer cites *National Public Radio, Inc.*, 328 NLRB 75 (1999). That case is distinguishable in that the petitioned-for unit included only technicians, and the journalists were already part of another unit. The Employer also cites a Stipulated Election Agreement in *WHYY Inc.*, Case 04-RC-249398 (Oct. 16, 2019), and a Certification of Representative in *Chicago Public Media, Inc.*, Case 13-RC-130569 (Aug. 5, 2014). I note that the latter are not Board cases and therefore have no precedential value in the instant decision.

²² *Buffalo Broadcasting Co.*, 242 NLRB 1105 (1979).

²³ As referenced above, this case was also cited by the Employer for the proposition that the Board has traditionally held that a unit of on-air broadcasters is an appropriate one. However, the Board in *KJAZ*, which recognized that this was “long standing precedent,” specifically noted that the question of the appropriateness of the unit is dependent on the specific facts of each case. *KJAZ, supra*, at 197, fn. 10.

engineers, media designers, and technical directors to form a community of interest within the petitioned-for unit. I further find that this conclusion is amply supported by my above findings regarding the separate departments and supervision; different job functions and work; distinct skills and training; paucity of job overlap and functional integration; limited contact; and total absence of interchange between the two groups of employees sought by the Petitioner. Petitioner has confirmed that it is prepared to proceed to an election in any unit found appropriate. Accordingly, I shall order that an election be held by mail ballot in the smallest appropriate unit described below. That unit contains approximately 45-50 employees.

CONCLUSIONS

I have carefully considered the record evidence and the arguments of the parties, as well as current Board law, and I conclude based on the reasons set forth above that the employees in the unit stipulated appropriate by the parties, excluding the Media Operations employees (audio engineers, media designers, and technical directors), comprise the smallest appropriate unit and shall order that an election be held in that unit. Accordingly, I find as follows:

1. The parties stipulated, and I so find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and is subject to the jurisdiction of the Board.²⁴
2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time writers, reporters (including reporter, senior reporter, reporter II, and digital reporter), correspondents (including senior correspondent), hosts, producers (including producer I, producer II, and digital producer), assistant producers, associate producers (including associate digital producer and associate float producer), full stack product engineers, and editors (including planning editor and copy editor) employed by

²⁴ The parties stipulated to the following commerce facts:

The Employer, Marketplace APM/MPR, a Minnesota corporation, with offices located at 261 South Figueroa Street, Suite 200, Los Angeles, California; New York, New York; and Washington, D.C., the only facilities involved in this matter, is engaged in the business of broadcasting and electronic media. During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$100,000 in conducting its business described above. During the same period of time, the Employer purchased and received goods valued in excess of \$50,000 directly from points outside the State of California.

the Employer at its facilities located at 261 So. Figueroa St., Suite 200, Los Angeles, CA; 1150 Connecticut Ave. NW, Washington, D.C.; and 747 Third Ave., 8th Floor, New York, NY; and those employed remotely in Pittsburgh, PA; Austin, TX; Oakland, CA; San Francisco, CA; Portland, OR; Baltimore, MD; St. Paul, MN; and Ann Arbor MI.

Excluded: All other employees, executive producers, managing editors, supervisor editors, director/product, director/social and engagement, audio engineers, media designers, technical directors, temporary employees, interns, managerial employees, guards, confidential employees, and supervisors as defined in the Act.

Others Permitted to Vote: The parties agreed that the following individuals will be allowed to vote in the election, but their ballots will be challenged since their individual eligibility has not been resolved: Senior Producer (Caitlin Esch); Foreign Editor (John Buckley); Senior Editor/Bureau Chief (Amir Bibawy); Senior Editors (Eve Epstein, Jon Gordon, and Richard Karr); and Copyeditor (Edward Silver). The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Others Not Permitted to Vote: The parties further agreed that the following positions will not be permitted to vote in the election because the parties agree that the duties of the individuals in these positions at the time of the petition exclude them from inclusion in the Unit: Senior Producer/Editor (Michael Lipkin); Senior Producers (Megan Detrie and Bridget Bodnar); and Senior Editor (Olga Oksman).

5. The parties stipulated, and I so find, that there is no history of collective bargaining between these parties in the unit identified above, and there is no contract or other bar in existence to an election in this case.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret-ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA)**.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **2:30 p.m. on Tuesday, March 30, 2021**. Ballots will be mailed to voters by the National Labor Relations Board, Region 21. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Tuesday, April 6, 2021**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by calling the Region 21 office at (213) 894-5254.

The ballots will be commingled and counted by the Region 21 San Diego Resident Office at **10:00 a.m. on Wednesday, April 21, 2021**. In order to be valid and counted, the returned ballots must be received by the Region 21 San Diego Resident Office office prior to the counting of the ballots.

The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those employees in the unit who were employed during the **payroll period ending Saturday, March 13, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as described above.

Others Permitted to Vote: The parties agreed that the following individuals will be allowed to vote in the election, but their ballots will be challenged since their individual eligibility has not been resolved: Senior Producer (Caitlin Esch); Foreign Editor (John Buckley); Senior Editor/Bureau Chief (Amir Bibawy); Senior Editors (Eve Epstein, Jon Gordon, and Richard Karr); and Copyeditor (Edward Silver). The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Others Not Permitted to Vote: The parties further agreed that the following positions will not be permitted to vote in the election because the parties agree that the duties of the individuals in these positions at the time of the petition exclude them from inclusion in the Unit: Senior Producer/Editor (Michael Lipkin); Senior Producers (Megan Detrie and Bridget Bodnar); and Senior Editor (Olga Oksman).

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Monday, March 22, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and

holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the election.

The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations. Unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden, a request for review must be E-Filed through the Agency's website. A request for review may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: March 18, 2021



William B. Cowen, Regional Director
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