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

DOW JONES & COMPANY, INC.[1]
Employer

and **Case 02-RC-304551**

INDEPENDENT ASSOCIATION OF PUBLISHERS' EMPLOYEES, TNG LOCAL 1096
Petitioner

DECISION AND DIRECTION OF ELECTION

Dow Jones & Company, Inc. (Employer), publishes financial and news publications, both online and in print. Independent Association of Publishers' Employees, TNG Local 1096 (Petitioner) currently represents a bargaining unit of approximately 1,300 of the Employer's employees across several publications, including *The Wall Street Journal*. By the instant Petition, Petitioner seeks to add approximately 35 photo editors and lead photo editors employed at *The Wall Street Journal* to the bargaining unit.

Petitioner seeks a self-determination election. The Employer opposes the Petition, and while it does not dispute a community of interest exists between the voting group sought and the existing unit, it contends the Board's contract bar doctrine applies, rendering the petitioned-for election inappropriate. The Employer alternatively argues the Board should dismiss the Petition and defer to the parties' negotiated dispute resolution process. Absent deferral, the Employer further maintains the Petition must be dismissed because the petitioned-for voting group consists of managerial or supervisory employees. A hearing officer of the National Labor Relations Board (Board) held a videoconference hearing on October 25-26 and November 15-17, 2022, to receive evidence on these questions. Both the Employer and Petitioner filed briefs after the conclusion of the hearing.

The Board has delegated its authority in this proceeding to me under §3(b) of the National Labor Relations Act (Act). As explained below, based on the record, the briefs, and relevant Board law, I find the evidence establishes the petitioned-for voting group of photo editors and lead photo editors constitutes an identifiable and distinct group, and share a community of interest with the employees in the existing unit. Additionally, I do not find the Employer's contentions regarding contract bar, deferral, or managerial or supervisory status forecloses an election. Accordingly, I have directed the election sought. Consistent with the stipulation of the parties, I am directing a mail ballot election.

[1] The names of the parties appear as amended at hearing.

A. RECORD EVIDENCE

The Employer produces numerous print and digital publications, including *The Wall Street Journal*, *Wall Street Journal Magazine*, and *Barron's*, as well as research and analytical tools. The Employer's headquarters is in New York City, New York, and it maintains additional offices worldwide. Petitioner has represented a wall-to-wall unit of approximately 1,300 employees employed by the Employer on these publications (existing unit) since the 1930s. The most recent collective-bargaining agreement covering the existing unit has effective dates of July 1, 2022, through June 30, 2023 (2022 agreement or current agreement).

The Employer utilizes a multitude of employee classifications in its newsroom. Historically, the recognition language in the parties' collective bargaining agreements has not identified the classifications included in the existing unit, but instead has merely referenced the wall-to-wall nature and the locations included. The Employer and the Petitioner have participated in a joint "Classification Committee," which meets periodically to assess the unit status of various classifications. Given the volume of classifications and number of employees, the parties track *excluded* classifications by name, rather than included classifications. In 2009, Petitioner compiled a list of excluded classifications, which it sent to the Employer by a memorandum, which relayed that Petitioner's intention was to compile a "fresh, comprehensive document of titles excluded from the [] unit." That memorandum identified 682 classifications as outside the existing unit at that time but stated a caveat of "We recognize that there may be errors in the following list; we forward this to you only for purposes of discussion with the Classification Committee." The classification "photo editor" appears on the 2009 list as an excluded classification.

1. Bargaining History and Contract Language

During negotiations for the collective-bargaining agreement effective 2016 to 2019 (2016 agreement), the parties addressed the issue of excluded classifications, and photo editors specifically. A side letter to the 2016 agreement (2016 side letter) states the following, in part:

> In addition to the specific exclusions from the bargaining unit noted in the collective bargaining agreement (e.g., Legal Department, Executive Department, printing trades jobs, etc.), the parties recognize that certain other positions are excluded from the bargaining unit because: (1) the employees are not eligible to be included in the unit under the standards of the National Labor Relations Act; or (2) the parties have mutually agreed that certain positions should be excluded from the unit. Any employees occupying such jobs will be excluded from the unit as described below, subject to the union's right to challenge, on an individual basis, whether an employee occupying an excluded title is actually performing the job functions that make the position excluded. Any such challenge shall be raised in the Classification Committee and, if not resolved there, may be raised as a grievance. For those job classifications that have been historically excluded from the unit, and listed below, employees occupying those jobs will remain excluded provided that the substantial functions of the job remain unchanged.

The photo editor classification is addressed in Section II, "News Department Exclusions." The introduction to that section stats "[i]n addition to the above general exclusions, certain positions in the News Department that might not otherwise qualify for a general exclusion shall be excluded from the unit as follows." The photo editor classification is specifically addressed in subsection "C." That section states:

> Photo Editor. Even in the absence of direct reports, a Photo Editor is excluded from the unit because the Photo Editor is responsible for significant decisions regarding the content of the Company's publications and has significant authority to direct and evaluate the work of others. Photo Editors may participate in editorial-level decisions concerning whether certain stories should be accompanied by visual supplements, and may exercise management-level authority regarding assigning work to staff or freelance photographers, approving or rejecting work product submitted to the company, scheduling photo shoots, directing and evaluating employees or freelancers who are charged with the editing and preparation of visuals, and establishing direction and procedures for the area under the Photo Editor's control.

The parties moved the above language from a side letter into the agreement itself in the collective bargaining agreement effective 2019-2022 (2019 agreement) but in substance the language remained unchanged.

Prior to entering into the 2022 Agreement, the Employer and Petitioner addressed the status of photo editors in bargaining and at the Classification Committee. Regarding the classification as a whole, Petitioner sought to remove the exclusion, questioning whether the "exercise management level authority" language contained in the collective bargaining agreement was an accurate description of the photo editors' job duties. Consistent with the Classification Committee contract mechanism, Petitioner then requested the Employer review the exclusion as it related to individual photo editors. While that process was ongoing the parties finalized the current agreement, an agreement that continues to contain the contract language referenced above.

Although the contract identifies "photo editor" as an excluded classification the record indicates photo editors are not treated uniformly. The petitioned-for photo editors, employed on *The Wall Street Journal*, have been excluded from the existing unit, consistent with the contract language. However, approximately 6 photo editors assigned to the *Wall Street Journal Magazine* and *Barron's* are included in the existing unit. The record does not identify how these photo editors came to be included in the existing unit.

The instant Petition was filed on September 9, 2022. By letter dated November 7, 2022, the Employer notified the Petitioner it would agree that 10 of the photo editors at issue did not meet the requirements of the exclusion language and would be properly included in the existing unit, but the remainder were properly excluded. Petitioner rejected this position, asserting all the photo editors at issue are non-managerial employees and are the subject of a proper self-determination election. Both parties continued to maintain these positions at hearing.

2. Photo Department Organization and Employee Duties

The petitioned-for photo editors and lead photo editor work in *The Wall Street Journal* photo department. The photo department consists of employees in several classifications, including photo editor, photographer, and photoshop specialist. Some photo editors simply have the "photo editor" title, while others have more specific designations such as "news photo editor" or "features photo editor."[2] Photo Director Lucy Gilmour is the highest-ranking manager in the photo department. The photo director reports to Global Head of Visuals Shazna Nessa, who in turn reports to Editor-in-Chief of *The Wall Street Journal*, Matt Murray.

The Photo Director directly supervises three Deputy Photo Directors, one lead photo editor, and three photo editors. The Deputy Photo Directors lead teams of lead photo editors and editors organized by subject area. The "news deputy" is responsible for five lead photo editors and nine photo editors in New York and Washington D.C., covering national and international news, as well as the enterprise team, responsible for *The Wall Street Journal's* investigative journalism. The "business deputy" supervises a team of two lead photo editors and six photo editors. Employees on this team are assigned to individual subject matter sections such as markets, health, science, or technology. The "features deputy" has a team consisting of one lead photo editor and nine photo editors responsible for sections such as fashion and real estate. This team also includes the photographer, as in-house photography is almost exclusively used in features, and a photoshop specialist.[3] Except for one photo editor reporting to the Employer's Los Angeles, California office the petitioned-for employees report to *The Wall Street Journal's* New York newsroom.

a. Photo Commission and Selection

The Wall Street Journal publishes 120 to 150 stories per day; all or almost all stories will contain a visual element. The visual element consists of a photograph, chart, or graphic. Photo editors obtain and then select the visual element in collaboration with the reporters and editors working on the story. The photo editor job descriptions contained in the record address the need for photo editors to have good news judgment, the ability to work quickly, and work with others in the newsroom. Photo editors typically obtain photographs from one of four sources: commissioning original photography or other visual work, subscription services such as Associated Press or Getty, licensing through a third-party vendor, or directly from a subject of a story. A photo editor considers several factors in deciding which source to use, including speed, location, and the nature of the story.

Commissioning original photography begins with the photo editor contacting an available freelance photographer in proximity to the subject. Because newsworthy events take place worldwide *The Wall Street Journal* maintains a pool of freelance photographers in the United

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[2] In this Decision "photo editor" refers to the petitioned-for photo editors collectively, lead and non-lead. Where it is necessary to distinguish lead photo editors or photo editors with specific titles, titles are used. Where the photo editors already in the existing unit are referenced, this status is also made clear.
[3] The in-house photographer and photoshop specialist assigned to the features team are already included in the existing unit. A photoshop specialist based in London reports directly to the Photo Director and is excluded from the existing unit.

States and around the globe, although photo editors build their own networks of photographers. When possible, photo editors will contact a photographer that has previously worked with *The Wall Street Journal* – these photographers are familiar with *The Wall Street Journal's* editorial standards and have completed some basic onboarding that needs to be completed by freelance employees – but photo editors are also free to use new freelance photographers. The onboarding materials provided to a freelance photographer and the contract used are produced by other departments and provided to the photo editors. The photo editors do not set the pay rate for freelance work.

Once a freelance photographer accepts an assignment the photo editor will brief the photographer, providing specific instructions ranging from the overall tone of the shoot to details such as whether the assignment requires still portraits or candids. The photo editor then completes the assignment paperwork and may be involved in logistics for the photo shoot. The logistics arranged by a photo editor may involve tasks from renting a car to obtaining work visas. Graphics and other design elements are handled in a similar manner. A photo editor may be able to create the visual element themselves, but if not they will commission a freelance photo illustrator to create graphics, charts, or interactive media for a story.

Other options available to a photo editor include obtaining a photograph from wire services, essentially subscription services that provides copy and photographs to subscribers, or licensing a specific photograph from another news source or photographer. At times the subject of a story may also provide a photograph, referred to as a "handout photo," that can be used as the visual element of a story.

When a photo shoot is complete or a visual element is otherwise ready the photo editor will work with the reporter, editor, or bureau chief to determine the "photo build," the photograph, set of photographs, or visual element to be used in the story. Witnesses differed in their description of their role; some employee witnesses described the choice as ultimately the photo editor's while others described the photo editor's contribution as a suggestion.

b. Budgeting

When commissioning freelance photography or licensing photographs the photo editors utilize a budget, provided by management of the photo department. The photo department maintains spreadsheets that break down this budget into monthly team allocations, and the photo editors log their assignments to track expenditures.

Photo editors manage their budgets by utilizing less expensive wire service photography when possible and commissioning more expensive original photography where they believe it will have the most impact, or when it is the only option available. Photo editors also use their judgment in deciding whether the importance of a story dictates committing additional resources from the budget to the visual element of a story. The cost of commissioning original work and licensing photographs are subtracted from the same budget.

A photo editor may consult with their deputy if costs related to the visual element are particularly high, either commissioning original work or licensing, but this is not required. When licensing a specific photograph from a source the photo editors work with the operations director

on paying the fee and processing the receipt. The record indicates the licensing fee is set by the owner of the photograph, and the photo editor must decide whether that cost is a worthwhile expenditure. A lead photo editor testified the photo department has a baseline of $75 to $150 for licensing photographs, above which they would consult with their deputy.

c. Editorial Meetings

The petitioned-for photo editors and lead photo editors attend weekly editorial meetings organized by subject matter, including international news, national news, and politics. These meetings address what topics will likely be covered in the future, and photo editors can pitch story ideas. The record does not quantify how frequently this occurs, either in the abstract or in relation to other editors. The photo director and deputy photo directors may attend these meetings as well.

d. Assignment

The record identified two ways in which employees in the petitioned-for voting group possibly assign work: lead photo editors assigning work to photo editors and either lead photo editors or photo editors making assignments to the in-house photographer. The work of the in-house photographer is largely limited to shooting for the "off duty" section, a weekly features section that also involves two photo editors. The photo director testified the two "off duty" photo editors notify the photographer of upcoming needs and the photographer will make decisions about how to arrange the shoot, or the photo editors and the photographer may work collaboratively. This includes decisions such as the style or theme of the shoot. The photo director estimated approximately 70 percent of these decisions are made by the photo editor and 30 percent by the photographer.

Regarding the responsibility of the lead photo editors, the photo director described the leads as overseeing the photo editors to ensure full coverage on large or breaking stories. Examples provided include the 2022 mid-term elections, the 2021 building collapse in Miami, and the invasion of Ukraine. A Deputy Photo Director described the role of lead photo editors in similar terms: coordinating the photo editors working on the same project when a significant breaking story occurs. The role of the lead photo editor is described in very general terms regarding most assignments, but the record does contain a detailed spreadsheet regarding photo editor assignments during the 2022 mid-term elections.

The spreadsheet of photo editor assignments lists times, in one-hour increments, on the X-axis and photo editors on the Y-axis. Cross-referencing identifies an assignment for the photo editor, including roles such as "liveblog" that were specific to the election coverage. The news deputy testified that a lead photo editor on the news team completed the spreadsheet, assigning photo editors to roles at specific times. However, the lead photo editor who completed the chart testified they utilized the coverage spreadsheet from the last election and updated it. In substance, the lead photo editor testified they were given instructions by the photo director on whom to assign to what role, such as having the photo editors that regularly work the national news and Washington D.C. desk take high priority coverage areas. The timing of the assignments was a function of the photo editors' schedules, schedules that are set by the photo

department's operations director. According to the lead photo editor, they met with the operations director and matched photo editors' existing schedules to the coverage areas consistent with the photo director's instructions.

e. Hiring

The record demonstrates that photo editors may assist in aspects of the hiring process. According to a Deputy Photo Director, the photo director and a deputy would normally select candidates for an open position. Resumes may be shared with photo editors, but they have no formal involvement in this phase of the process. The photo director and deputy also conduct the first of two interviews with candidates. If the candidate advances, photo editors may attend a second interview where the photo director and deputy are again in attendance. After the second interview the candidate will complete an edit test, and the results are reviewed by the photo director and deputy. The deputy testified again that the test results "may" be shared with the photo editors and that they "often" provide feedback. The deputy testified this feedback is considered, but it is the photo director that ultimately makes the decision on whom to recommend to the hiring committee, the final step in the hiring process. The record suggests the hiring committee consists of upper management, but the members are not specifically identified.

B. ANALYSIS

1. Self-Determination Election

Under the Board's *Armour-Globe* doctrine, *Armour & Co.*, 40 NLRB 1333 (1942), and *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), employees sharing a community of interest with an already represented unit of employees may vote whether they wish to be included in the existing bargaining unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990). When an incumbent union seeks to add a group of previously unrepresented employees to its existing unit and no other labor organization is involved, the Board conducts a self-determination election provided that the employees to be added constitute an identifiable, distinct segment and share a community of interest with unit employees. See, e.g., *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990); *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

The first consideration, whether the voting group sought is an identifiable, distinct segment of the workforce, is merely a question of whether the voting group sought unduly fragments the workforce. *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972). Whether a voting group is an identifiable, distinct segment is not the same question as whether the voting group constitutes an appropriate unit; the analysis if a petitioner was seeking to represent the employees in a standalone unit. *St. Vincent Charity Medical Center*, 357 NLRB 854, 855 (2011) (citing *Warner-Lambert*, 298 NLRB at 995). The second consideration, whether the employees in that voting group share a community of interest with the existing unit, requires application of the Board's traditional community of interest test. *United Operations, Inc.*, 338 NLRB 123, 123 (2002). The community of interest factors include whether 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. Id.

Petitioner contends that the petitioned-for voting group of photo editors is an identifiable, distinct segment of the workforce that shares a community of interest with the employees in the existing unit. The Employer does not dispute these contentions. The record establishes that, although the Employer employs numerous photo editors with a variety of titles, those in the petitioned-for voting group are employed in the photo department of *The Wall Street Journal*, an identifiable group. The record also establishes a shared community of interest demonstrated by a common department and supervision, as well as similar job duties, and terms and conditions of employment. Accordingly, I find the voting group sought is an identifiable, distinct segment of the workforce that shares a community of interest with the existing unit. The Employer's arguments regarding why the election sought is improper are addressed in the following sections.

2. Contract Bar

Under the Board's contract-bar doctrine, a collective bargaining agreement covering a bargaining unit will bar a representation election among those employees under certain circumstances. *Hexton Furniture Co.*¸ 111 NLRB 342 (1955). The doctrine exists to achieve a reasonable balance between the aims of industrial stability and employee free choice. *Seton Medical Center*, 317 NLRB 87, 88 (1995). The burden of proving that a contract is a bar is on the party asserting the contract should bar the petition. *Roosevelt Memorial Park, Inc.*, 187 NLRB 517 (1970). The Board has a well-established set of requirements that must be met for a contract to act as a bar, including that the contract must be written, contain the signatures of the parties, cover an appropriate unit, and address substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship. *Appalachian Shale Products Co*., 121 NLRB 1160, 1163 (1958)).

The Board does not apply the contract-bar doctrine to preclude self-determination elections; processing a petition to add a currently excluded classification to an existing unit during the term of a collective bargaining agreement is permissible. *UMass Memorial Medical Center*, 349 NLRB 369, 369 (2007). However, if the parties to a collective bargaining agreement go beyond mere exclusion and instead agree to a restriction on a union's right to represent a specific group of employees during the term of the agreement, the Board will recognize that restriction. *Briggs Indiana Corp*., 63 NLRB 1270 (1945). The *Briggs Indiana* rule only applies where the contract contains an express promise, it will not be inferred merely from the contract excluding the classification from the unit. *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959).

a. Included Classification

The Employer argues a contract bar applies here because the current collective bargaining agreement includes photo editors other than those in the petitioned-for voting group. The Employer maintains the petitioned-for photo editors are not currently in the existing unit only because of their specific exclusion as managerial employees, not an exclusion as a classification. The Employer argues that absent this managerial exclusion – explicitly contained in the current agreement – the petitioned-for photo editors would be included in the existing unit in same

manner as the *Barron's* and *Wall Street Journal Magazine* photo editors. In contrast, Petitioner observes the petitioned-for photo editors are excluded as a classification; the current agreement specifically excludes photo editors and the terms of the collective bargaining agreement have never been applied to the petitioned-for photo editors. Petitioner contends that, a self-determination election consistent with *UMass* is appropriate.

I do not find the Employer's contract bar argument persuasive. As a classification, the status of "photo editors" is complicated by the parties' manner of describing the unit and approach to inclusion and exclusion. Included employees are not identified, only exclusions. This alone is not problematic – photo editors are specifically excluded – but the photo editor exclusion also contains a purported basis for exclusion. This stated basis – managerial status – has a specific meaning and body of law under the Act. Further, while the contract addresses the exclusion of photo editors as a classification, the record is clear that the parties do not treat classifications uniformly. The Classification Committee considers individual employees and whether they are properly included or excluded in the existing unit based on contract language and work performed. This is reflected in the current status of the photo editors employed by the Employer; some are included in the existing unit and some are excluded. Indeed, even at hearing the Employer argued 10 currently excluded photo editors in the voting group should be included based on its review of their duties and the relevant contract language.

Bargaining over the inclusion and exclusion of employees is entirely consistent with Board precedent. Creating a contractual mechanism to make individual status determinations based on contract language is also perfectly acceptable. However, where the parties engage in this activity, and as a result a classification is not uniformly included or excluded, this undermines arguments that are premised on the parties' treatment of the classification as a whole. Here, it is undisputed the petitioned-for photo editors are currently excluded from the existing unit. Petitioner seeks a self-determination election among only that voting group. This is the situation addressed by the Board in *UMass*, and the Board has concluded the existence of an agreement covering the existing unit in this situation does not bar an election.

The Employer's argument that the photo editors in the petitioned-for voting group should be excluded as managerial employees is a separate issue addressed in a following section, not a question that implicates the contract bar doctrine.

b. Express Promise

I also do not find that the Employer's arguments under *Briggs Indiana* persuasive. *Briggs Indiana* and subsequent cases make clear that an express promise is required; the Board will not infer a promise to not represent employees in the future will from a classification's mere exclusion. Here, the Employer argues that, by entering into contract language referencing the photo editors and managerial responsibly, and because managerial employees are excluded from bargaining units under Board policy, Petitioner promised to not seek representation of photo editors in the future. This is not an express promise, but an inference or argument based on the Employer's interpretation of the contract language. Indeed, the language relied on by the Employer makes no reference to future representation and only addresses exclusion.

At hearing, the Employer introduced evidence about the negotiations that resulted in the photo editor language contained in the 2016 side letter, 2019 agreement, and current agreement. On brief, the Employer relies on this evidence to distinguish the bargaining history in this case from *UMass*. However, while a factual difference may exist, I do not find it determinative here; the critical aspect of the Board's holding in *UMass* – that an express promise is required – cannot be set aside based on factual differences. Further, delving into the bargaining history behind the contract language could, at best, support an *inference* of a promise, no amount of bargaining history will change the contract language. By requiring an express promise in the contract language, the Board necessarily limits the analysis to the terms of the contract, not the intent of the parties in reaching an agreement on language.

Again, if the petitioned-for photo editors are managerial employees consistent with the Board's definition they are not properly included in the existing unit, but this is a question I address in a following section.

3. Contractual Mechanism

Questions of representation, accretion, and appropriate unit involve the application of statutory policy, standards, and criteria, which the Board reserves for itself to resolve, not an arbitrator. *Marion Power Shovel*, 230 NLRB 576, 577-78 (1977) (citations omitted). The Board will only defer representation matters when resolution of the issue turns solely on the interpretation of the parties' contract. *McDonnell Douglas Corp.,* 324 NLRB 1202, 1205 (1997). If parties enter an agreement regarding recognition the Board may also decline to process a petition outside that agreement. *Verizon Information Systems*, 335 NLRB 558, 558 (2001) (Board recognized estoppel principles where parties negotiated a voluntary recognition agreement involving an arbitrator, union derived benefit, and then a party left the process to seek recognition from the Board).

In *Tweddle Litho, Inc.*, 337 NLRB 686, 686 (2002), an employer began operations at a second facility and the union representing an existing unit pursued a contractual grievance to apply the existing recognition language to the new employees. Id. The employer subsequently filed a unit clarification petition seeking a determination that the new employees were a separate bargaining unit. Id. The Board concluded the issue presented was not contractual, but instead whether the new employees constituted a valid accretion, a representation issue for the Board to determine. Id. In reaching this conclusion the Board specifically distinguished *Verizon*, cited above, stating that *Verizon* raised an issue of estoppel vis-à-vis the voluntary recognition agreement not present in *Tweddle Litho*. Id.

In contrast, in *Appollo Systems, Inc*., 360 NLRB 687, 687 (2014), the Board dismissed an employer's unit clarification petition seeking a determination of a separate bargaining unit. In that case a non-signatory residential employer purchased a signatory commercial business, recognized the existing union as the representative of the commercial employees, and continued business as two distinct divisions. Id. Over several years operations merged, and the union filed a contractual grievance arguing the residential employees had been brought under the recognition language that applied to the commercial employees. Id. The employer then filed a unit clarification petition seeking a determination that the commercial employees were a separate

bargaining unit. Id. The Board concluded the issue was not, as in the typical unit clarification context, "the disputed employees' duties in relation to an existing unit," but instead whether there was a valid agreement "as to their unit status, what the terms of any such agreement were, and whether the Employer subsequently breached that agreement." Id. at 688. Finding the question contractual, and not that posed by a unit clarification petition, the Board concluded dismissing the petition was not "abrogating [its] longstanding policy against deferral of representation issues that can be resolved only through the application of statutory policy." Id.

The Employer equates the instant case to *Appollo Systems*, describing both cases as disputes over recognition language. The Employer additionally draws a parallel between *Verizon* and the instant case, arguing that the union's departure from arbitration in *Verizon* is equivalent to Petitioner's failure to use the Classification Committee to resolve the instant dispute. I do not find either comparison on point.

As an initial matter, *Verizon* addressed a very specific situation involving a voluntary recognition agreement. No voluntary recognition agreement is present here. Unlike in *Verizon* the Classification Committee here does not exist purely to decide the same question presented by the petition. The Classification Committee language makes clear that it assesses the placement of *individual employees* based on job duties and classification, and the record confirms this happens in practice. This is a benefit that extends to both parties, and it cannot be argued that one has induced the other to agree to this language and then abandoned the procedure. The Employer also provides no support for its argument that the estoppel issues present in *Verizon* can or must be expanded to apply in any situation where a contractual mechanism may resolve a dispute touching on recognition. Indeed, in *Tweddle Litho* the Board the Board held the opposite, specifically declining to expand that reasoning outside of the specific facts of *Verizon*.

Tweddle Litho and *Appollo Systems* address a specific question regarding unit clarification petitions and accretion under Board law. A unit clarification petition is not at issue here and the factual circumstances present differ significantly. The Employer's attempt to draw a parallel between *Appollo Systems* and the instant case by stating both cases involve a "dispute over recognition language" is painting with far too large a brush. Representation cases involving an existing unit often can be categorized as a dispute over recognition language. However, these disputes arise in a broad variety of representational contexts. Because the factual circumstances and legal issues presented in *Appollo Systems* and *Tweddle Litho* differ from the instant case I do not find this unit clarification analysis probative here.

Finally, the substantive question in this case, raised by the Employer, is whether the petitioned-for photo editors are managerial employees or supervisors. The contract language relied on by the Employer addresses this issue, but the question implicates representation issues that can be resolved only through the application of statutory policy of the type properly addressed by the Board. To dismiss the petition would be to essentially send an arbitrator the question of whether photo editors are managerial employees or supervisors under the Act. The Employer provides no support for such an outcome. Although the instant dispute could have proceeded in several ways, a unit clarification petition as in the cases above or resolution by the contractual mechanism, I do not find the possibility of other resolutions somehow trumps employees' representation rights under Section 7. Where a petition properly raises a

representation question, the Board should resolve the question, not send that question back to the parties.

Before turning to the managerial and supervisory questions central to this case I note that, on brief, the Employer additionally argues the instant case should be deferred consistent with *Collyer Insulated Wire*, 192 NLRB 837 (1971) as the instant case does not raise a question concerning representation. The Board applies *Collyer* in the unfair labor practice context, not the representation context. Further, a question concerning representation is a predicate to processing a petition. Procedurally, if I agreed with the Employer that no such question concerning representation was present here, I would dismiss the petition, not defer.

4. Managerial Status

Well-settled Board law defines managerial employees as those employees that "formulate, determine, and effectuate an employer's policies" by expressing, and making operative, the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy. *Bell Aerospace*, 219 NLRB 384, 385 (1975) (citations omitted). Normally, an employee may be excluded as managerial only if they represent management's interests by taking or recommending discretionary actions that effectively control or implement their employer's policy. *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). However, the authority to exercise considerable discretion does not render an employee managerial where their decision must conform to their employer's established policy. *Bell Aerospace* at 385. Moreover, employees whose decision making is limited to the routine discharge of professional duties are not managerial. *Yeshiva University* at 690. Managerial employees are "much higher in the managerial structure" than statutory supervisors mentioned in the Act by Congress because Congress regarded managerial employees "as so clearly outside the Act that no specific exclusionary provision was thought necessary." Id. at 682.

The Board has addressed the managerial status of newsroom editors in several cases, including a comprehensive treatment in *The Washington Post Co*., 254 NLRB 168, 168 (1981). In *Washington Post* the Board considered the managerial status of a variety of editors employed in newsroom. 254 NLRB at 199. The employer's argument in favor of managerial status specifically included an editor's role in contracting with freelance "stringers" and budgeting. Id. at 201-202. The Board did not agree, finding the selection of freelancers, and compensating them from a limited pool of funds, did not lead to a managerial finding. Id. at 202. Further, although an editor participated in budgetary discussions, they did not prepare the budget and were not directly responsible for expenditures, and as such this too was insufficient to establish managerial status. Id. The Board also rejected the employer's contention that an editor's role in selecting the stories that would appear in the newspaper demonstrated managerial status. Id. at 209. The Board found this selection "a journalistic and technical judgment" regarding the importance of a story and its appeal to the reader, not managerial decision making. Id. The Board has described this authority to determine content and layout as "news judgment," distinguishing these decisions from the type of decisions that formulate policy and indicate managerial status. See *Kenosha News Publishing,* 264 NLRB 270, 270 fn. 3 (1982); *The Scranton Tribune*, 294 NLRB 692, 692 (1989).

Here, the record establishes the photo editors obtain photographs and other visual elements, and then choose what visual elements appear in *The Wall Street Journal*. This process involves discretion. A photo editor has the discretion to choose whether to pull a photograph from a wire service, license a specific photograph, or commission original photography. If original work is commissioned the photo editor has the discretion to select the freelancer, and while a pool exists the photo editors are not limited to this pool. If a photographer provides multiple photographs the photo editor selects the photo build or, at a minimum, makes a suggestion which carries significant weight. This is the discretion the Employer emphasizes in maintaining photo editors are managers. The Employer highlights photo editors do not need permission to contract with a photographer or license a photograph, and even have discretion in the amount they spend when licensing photographs. Moreover, photo editors determine content, selecting photographs and attending editor meetings that coordinate future coverage.

However, I agree with Petitioner that this discretion does not demonstrate photo editors effectively control or implement employer policy. When exercising the discretion described above the photo editors are working within established boundaries. Photo editors have an overall budget, such that they must balance utilizing the various sources. This is a skill, and an essential skill for a photo editor to perform their job well, but this is the same dynamic – selecting freelancers and compensating them from a limited pool of funds – present in The *Washington Post*. Moreover, while photo editors have some discretion in what is paid to license a photograph the overall cost, $75-$150, is low. Similarly, while photo editors have wide discretion in choosing *who* to select as freelance photographer, *how* the Employer contracts with freelancers is an established process. Freelancers agree to the same contract at the same commission rates and provide photographs that must comply with standards of *The Wall Street Journal*. The Employer maintains a standard onboarding process that addresses the standard nature of its freelance agreements.

Taken together, the discretion given photo editors and the choices made demonstrate judgment consistent with that addressed in *The Washington Post*. The petitioned-for photo editors make decisions regarding the content of *The Wall Street Journal* consistent with the Employer's policies, they do not set those policies.

5. Supervisory Status

Supervisory status under the Act depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

> 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.

Possession of any one of these authorities is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). As the Board stated in *Oakwood*, "to exercise independent judgment an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and comparing data." 348 NLRB at 692.

In addition to the factors identified in the Act, the Board also considers secondary indicia that can provide support for a supervisory finding but are not sufficient alone to establish supervisory status. *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000). Secondary indicia may include factors such as a higher rate of pay, or an employer holding out the employee as a supervisor. *American Commercial Barge Line Co*., 337 NLRB 1070, 1072 (2002); *Carlisle Engineered Products*, 330 NLRB 1359, 1360 (2000).

The burden of establishing supervisory status rests on the party asserting that status. *Croft Metals, Inc.,* 348 NLRB 717, 721. (2006). Supervisory status cannot be established by record evidence which is inconclusive or otherwise in conflict. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006). Any lack of evidence in the record on an element necessary to establish supervisory status is construed against the party asserting supervisory status. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Board looks to evidence of supervisory authority in practice, not simply paper authority; job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006), citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

The Employer contends the lead photo editors are supervisors under the Act because they are involved in the hiring process and because they assign work to the photo editors on their teams.[4] The Employer additionally contends the photo editors employed on the "off duty" section are statutory supervisors because they assign work to the staff photographer.

a. Lead Photo Editors

i. Hire

Supervisory authority can be held independently or where the employee in question has the authority to effectively recommend one of the powers. *DirecTV*, 357 NLRB 1747, 1748-1749 (2011). Effective recommendation in this context means not simply that the recommendation is

[4] On brief the Employer makes a passing reference to "responsibly to direct," but does not provide a full argument regarding this factor. The Board has held that direction is responsible in the Section 2(11) context when the person delegating the task is held accountable for the performance of the task by others, and there is the prospect of adverse consequences if the tasks are not performed properly. *Oakwood* at 692. As there is no evidence of accountability in the record to the extent this issue is raised, I do not find the Employer has met its burden.

followed, but also the absence of an independent investigation by superiors. *The Republican Co*., 361 NLRB 93, 97 (2014).

The record contains minimal evidence on photo editors participating in the hiring. The record describes a formal hiring process involving the photo director and a relevant deputy – resume review and selection, two interviews, a test, and a presentation to the hiring committee – where photo editors may be consulted in an informal way. The photo director and deputy testified photo editors may be shown resumes, may attend second interviews, may be shown the results of the test, and may provide feedback.[5] In each instance the testimony regarding photo editor participation was qualified, that a photo editor "may" be involved or is "often" involved. In addition to the qualifiers strongly suggesting photo editor participation is informal and ad hoc, the testimony also consists only of general and conclusory statements unsupported by specifics or examples. The record also does not detail how any input from the photo editors is applied, how it connects to subsequent steps such as preferred candidate selection and presentation to the hiring committee.

In sum, the record provides no basis to determine photo editors participating in the hiring process are exercising independent judgment regarding hiring sufficient to be considered a statutory supervisor.

ii. Assign

In the Section 2(11) context, "assignment" is defined as the "giving [of] significant overall duties, i.e., tasks, to an employee," but "significant overall duties" do not include "ad hoc instructions to perform discrete tasks." *Oakwood Healthcare*, 348 NLRB at 689. Assignment also includes designating an employee to a place, such as a location, department, or wing, and appointing an employee to a time, such as a shift or overtime period. *Id*. Distributing assignments to equalize work among employees' well-known skills is considered a routine function not requiring the exercise of independent judgment. *The Arc of South Norfolk,* 368 NLRB No. 32, slip op. at 4, citing *Oakwood* at 689, 693, 695.

The Employer contends the lead photo editors assign work to the photo editors with whom they share a team. The photo director and a deputy photo director testified the lead photo editors oversee the work of the photo editors and coordinate work on large projects. Much of this testimony is conclusory, merely asserting this takes place. Outside of general references to larger news events in such as the Miami building collapse and the invasion of Ukraine the record is largely silent on what this oversight or coordination involves. However, a notable exception is the spreadsheet addressing the 2022 mid-term elections, a document that does appear to demonstrate a lead photo editor assigning photo editors to specific roles at a particular time.

It is not disputed the spreadsheet was completed by a lead photo editor, or that it includes specific election coverage assignments for the photo editors. However, the record evidence regarding the circumstances surrounding the document undercuts what the document appears to

[5] The Employer contends the lead photo editors are statutory supervisors. The testimony regarding the hiring process does not distinguish between the lead photo editors and photo editors in general.

show on its face. Specifically, the lead photo editor that completed the chart testified they did not create the document to record the assignments they were making, but instead that they were synthesizing the information from various sources and placing it one document. The lead photo editor began by reusing the spreadsheet from the prior election, providing the basic format. They then followed the instructions of the photo director on who should have the lead roles, and the schedule information provided by the operations director. In short, the lead photo editor completed a document that matched the photo editors' schedules to the coverage areas consistent with the photo director's instructions.

The Employer's argument regarding lead decision making on the mid-term elections would still leave open the question of whether these are merely an ad hoc instruction, or whether the lead photo editor was merely equalizing work assignments. However, I do not find it necessary to reach these questions as, more fundamentally, the evidence does not establish the lead photo editor makes decisions designating an employee to a time or places, or in a manner that would otherwise establish supervisory status.

b. "Off Duty" Photo Editors

The Employer argues that the two photo editors assigned to the "Off Duty" section assign work to the staff photographer. As described by the photo director, the photo editors notify the photographer of upcoming needs and the photographer will make decisions about how to arrange the shoot, the photo editors will provide instructions, or the photo editors and the photographer may work collaboratively. Decisions include overall concepts such as the style or theme, as well as specifics such as lighting. The photo director estimated approximately 70 percent of these decisions are made by the photo editor and 30 percent by the photographer. Neither the photo editors at issue nor the photographer testified.

While not in dispute, the record evidence regarding the "Off Duty" section is too minimal to find these photo editors are statutory supervisors. The testimony of the photo director only establishes that the photo editors and the photographer work together on photo shoots and that the photo editors provide direction. The record contains no details regarding how these directions are conveyed, what they consist of, whether the work of the photographer is ever rejected, or any other detail that would allow for a supervisory finding. Without more detail regarding how this process works it is impossible to determine to what extent these photo editors are assigning work within the meaning of Section 2(11).

C. CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[6]

3. The labor organization involved claims to represent certain employees of the Employer.

4. 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.

5. The following employees of the Employer constitute a voting group appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time[7] photo editors and lead photo editors, including features photo editors, lead features photo editors, and news photo editors; excluding all other employees, Photo Editor *Barron's*, Assistant Photo Editor *Wall Street Journal Magazine*, London-based international photo editors, student interns, managerial employees, guards, and supervisors as defined by the Act.

There are approximately 35 employees in this voting group.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Independent Association of Publishers' Employees, TNG Local 1096**. If a majority of valid ballots are cast for Independent Association of Publishers' Employees, TNG Local 1096 they will be taken to have indicated the employees' desire to be included in the existing unit currently represented by the Petitioner. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

The ballot will ask:
Do you wish to be represented for purposes of collective bargaining by Independent Association of Publishers' Employees, TNG Local 1096?

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[6] The parties stipulated to the following commerce facts:

> Annually, in the course and conduct of its operations, the Employer has derived gross revenues in excess of $500,000, and purchases and receives at its New York, NY facility goods and materials in excess of $5,000 directly from suppliers outside the State of New York.

[7] The parties have stipulated that employees who averaged 4 or more hours per week during the preceding calendar quarter are eligible to vote. *Davison-Paxon* 185 NLRB 21 (1970)

A. Election Details

The election will be conducted by mail. On August 17, 2023, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 2. 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 August 25, 2023, should communicate immediately with the National Labor Relations Board by either calling the Region 2 Office at 212-264-0300 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 2 office by close of business on September 7, 2023. The mail ballots will be counted at the Region 2 office at 10:00 a.m. on September 8, 2023.

B. Voting Eligibility

Eligible to vote are those in the voting group who were employed during the payroll period ending **July 25, 2023,** including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the voting group on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

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. Voting group employees in the military services of the United States may vote by mail consistent with the instructions above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (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.

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 **August 3, 2023.** 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.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 accompanying this Decision in conspicuous places, including all places where notices to employees in the voting group 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 voting group 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 election 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.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.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 the circumstances concerning not having access to the Agency's E-Filing system 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.

Dated: August 1, 2023

John D. Doyle, Jr.
Regional Director
National Labor Relations Board
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