

DIC Entertainment, L.P. and Motion Picture Screen Cartoonists and Affiliated Optical Electronic and Graphic Arts, Local 839, I.A.T.S.E., Petitioner. Case 31-RC-7705

May 28, 1999

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND BRAME

The National Labor Relations Board, by a three-member panel, has considered the Employer's request for review of the Acting Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix).¹ The request for review raises a substantial issue solely with respect to whether storyboard supervisors are supervisors within the meaning of the Act. The Board concludes, however, that this issue can best be resolved through use of the Board's challenge procedure. Accordingly, the Decision is amended to permit storyboard supervisors to vote under challenge and the request for review is denied in this and all other respects.

Regarding the voter eligibility formula, the Acting Regional Director found that the Employer's "freelance" employees have a reasonable expectation of future employment, and, thus, they are eligible to vote if they have been employed in the unit on at least two productions for a minimum of 5 working days during the 12 months preceding his decision, or who worked at least 15 working days in the last 12 months preceding his decision. The Employer does not contest the use of a 15-day requirement for eligibility. But, the Employer argues that the Board should find eligible only those employees who have worked on at least two productions for a total of at least 15 days within the preceding 12 months. Contrary to the Employer, we agree that the Acting Regional Director carefully tailored an appropriate eligibility formula reflecting the circumstances of this case.

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992). The Board has sought to be flexible in devising various formulas suited to unique conditions in the different entertainment industries, where employees are often hired to help on a day-by-day or production-by-production basis, to afford em-

ployees with a continuing interest in employment the optimum opportunity for meaningful representation. See, e.g., *Medion, Inc.*, 200 NLRB 1013 (1972) (employees eligible where they worked two productions for 5 days over 1 year); *American Zoetrope Productions*, 207 NLRB 621 (1973) (employees eligible where they worked two productions during the past year); *Blockbuster Pavilion*, 314 NLRB 129, 142-143 (1994) (same); *Juilliard School*, 208 NLRB 153 (1974) (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 2-year period); *Society of Independent Motion Picture Producers*, 94 NLRB 110, 112 (1951) (carpenters and set erectors eligible where they worked 2 days over a 6-month period); and 123 NLRB 1942, 1950 (1959) (motion picture musicians eligible where they worked 2 days over a 1-year period).

The Acting Regional Director devised a formula that is similar to that found in *Medion*, supra. However, he also included employees who worked at least 15 working days for the Employer during the year prior to his decision. The Acting Regional Director apparently devised the alternative "15 days over a 1-year period" voter eligibility requirement because he found "the record in the instant case does not reveal the details of the employment history of the employees or any general employment pattern, in terms of the number of days, weeks, or months employees work on particular projects and the frequency with which they return to work for the Employer." Thus, we lack the detailed evidence here to determine whether most of these employees worked on two or more projects.² The record shows that 17 unit employees have worked at least 3 weeks for the Employer, all of the Employer's 8 "new" hires were already working for the Employer, and at least 14 were hired for 40 hours per week.

The Employer has not shown that the Acting Regional Director's added alternative of requiring a minimum of 15 days work in the year prior to his decision is unreasonable under the circumstances present in this case.

¹ Review was requested with regard to the Acting Regional Director's finding that the storyboard supervisors are not supervisors within the meaning of Sec. 2(11) of the Act, and his finding eligible to vote all employees who worked at least two productions for at least 5 days in the last 12 months preceding his decision, or who worked at least 15 days in the last 12 months preceding his decision.

² The Employer, contrary to the Acting Regional Director, contends that the "evidence is undisputed that a substantial number of the employees in the petitioned-for unit have been under [its] employ only for a single production." The cited evidence does not support the Employer's assertion that the Employer employs a substantial number of employees for only one production. The relevant evidence only establishes what the start and end date of employment is and whether the employee, at the time of employment, currently occupied a position with the Employer. There are 17 unit members represented. Of these, four hires currently occupied a position on the same project, two hires currently occupied a position with the Employer, but the name of the project was not readable on the exhibit, one hiree currently occupied a position on another project, and one hiree, hired for "development" currently occupied a position in "development." All the 3 to 5 weeks-employment employees currently occupied positions. There is one 25 hour per week employee hired for 33 weeks, two employees whose hours per week are unreadable on the exhibit, and the rest work 40 hours per week.

American Zoetrope, supra, a film industry case relied on by the Employer for its contention that there is an established standard formula within the entertainment industry, itself modified the formula in another film industry case, *Medion*, supra. It did so in order to adapt *Medion*'s formula to the unique facts in *American Zoetrope*. In *American Zoetrope*, the Board devised its formula of requiring work on at least two productions because the only evidence produced in the record relevant to the employer's satisfaction with an employee's work was whether the employer reemployed the employee within a reasonable period of time. Indeed, we emphasized in *American Zoetrope* that it is the Board's responsibility to devise an eligibility formula that is "compatible with our obligation to tailor our general eligibility formulas to the particular facts of the case." *American Zoetrope*, supra, 207 NLRB at 623.

Furthermore, whereas *Medion* and *American Zoetrope* involved the motion picture industry, the instant case concerns predominantly the television animation industry. The circumstances in the television industry, e.g., multiple episodes for each project, do not appear to be the norm for the film industry, and thus a different formula may be, and in the instant case is, more appropriate.

Accordingly, we deny the Employer's request for review in this regard.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit comprised of all full-time and regular part-time employees who work in the production of animated cartoons. The Employer asserts that the directors and storyboard supervisors should be excluded from the unit because they are statutory supervisors and that the writers should be excluded from the unit because they are independent contractors. In addition, the Employer asserts that employees who have a definite termination date should be excluded from the unit as "temporary" employees. The parties have agreed that employees in the following classifications should be included in the unit (assuming that they are not excludable as temporary employees): storyboard revisionists, model designers, color key artists, visual development artists, and background artists.

The Employer produces cartoons, primarily for videos and television series. The television series generally have either 13, 26, 40, 52, or 65 episodes. At the time of the hearing in this matter, the Employer was working on the television series *Sabrina*, which has 65 episodes, and the Employer was completing work on the television series *Sherlock Holmes*.

DIC does not employ animators. After preproduction work is completed, the work is sent to either Korea or China, where the animation work is performed. Similarly, the postproduction work is not performed by employees of DIC. With respect to the preproduction work currently being performed by the Employer, the record reveals that some of the preproduction work is performed by outside studios, with whom the Employer subcontracts, and other preproduction work is performed by DIC employees. In addition, some of the preproduction work is

performed on a "freelance" basis. The Employer uses the term "freelance" to refer to a situation where somebody, who may or may not be a regular DIC employee, is hired to work on a particular project for a set price. DIC employees sometimes perform "freelance" work for DIC over the weekend or after work hours.

Once the Employer receives an acceptable script, the script is broken down by the production coordinators and/or the associate producers. Sometimes the director also breaks down the script. A "breakdown" of a script is a work list describing everything in the script that must be designed, such as the background, the characters and the props. The breakdown is given to an outside studio, with whom the Employer contracts to design the models for each item that must be drawn. The Employer also provides the model company with stock characters which set the style of the show. The stock characters are designed by DIC's development department or by another company. According to the vice president of production, the stock characters usually are designed by "freelancers." The model design companies fax the model designs to the Employer. If the director is not satisfied with a model design, employees of DIC may make revisions.

After the models are designed, the color key artists and background artists select the colors and paint the characters, props, and backgrounds. Also, the model packs are sent to an outside company where storyboard artists design a storyboard. A storyboard consists of visual pictures that show the action for a script. The storyboard has blocks for the drawings of each scene and other blocks for words that describe the scene and for the dialogue lines. It also contains blocks of space in which, as will be described below, the "slugger" marks the time for each scene. DIC does not employ storyboard artists on staff.

After the storyboard is created, a storyboard supervisor employed by DIC becomes involved in the project. The director goes through the storyboard and make notes of revisions which should be made. Sometimes the storyboard supervisor also goes through the storyboard and makes notes about necessary revisions. The notes are given to the outside company, which usually has 1 week to make the corrections. After the storyboard is returned, the director (and sometimes the storyboard supervisor) goes through the storyboard making notes of other revisions to be made. At that point, storyboard revisionists employed by DIC make the remaining revisions to the storyboard. Sometimes the storyboard supervisor also makes revisions. After the director is satisfied with the storyboard, it is given to a "slugger" to be "slugged." A storyboard slugger is a director or animator with a keen sense of timing, who marks the rough time for all actions so that they know how much time to allot to each scene. The storyboard slugger is a "freelancer."

After the storyboard is "slugged," actors record the script and exposure sheets are "track read," so that the appropriate words are matched to each frame of film. The words are phonetically written down so that the animators will know how the mouths of the talking characters should look. Packets containing the "slugged" storyboard, the exposure sheet timing (depicting the starting and ending film frame for each scene), and color packs are then shipped overseas where the actual animation begins.

DIC currently employs two model designers, seven storyboard revisionists, one color key artist, three visual development artists, and three background artists. These employees will collectively be referred to as preproduction artists. The

visual development artists work on the development of new shows and on in-house graphic arts projects, such as projects relating to advertising or award presentations. They also do “freelance” work on productions in progress. For example, they may perform color key work over the weekend or after regular hours. The preproduction artists work at the Employer’s facility. They are paid weekly for 40 hours of work. They do not work overtime. If overtime work is required, the Employer will ask one of them to work “freelance” after hours or on weekends, usually away from the office for a set fee. The preproduction artists do not punch a timeclock or maintain timecards. Although they do not have set hours, they generally report for work between 9:30 and 10:15 a.m. and leave work between 6 and 7:15 p.m. The preproduction artists receive paid vacation time after they have worked for 6 months.

....

The Employer urges that the eligibility formula used by the Board in *Medion, Inc.*, 200 NLRB 1013 (1972), which involved an employer in the entertainment industry, be used to determine voter eligibility herein. In *Medion*, the Board noted its responsibility “to devise an eligibility formula which will protect and give full effect to the voting rights of those employees who have a reasonable expectancy of further employment.” Therefore, noting a pattern of employment where crews were hired for particular productions, sometimes only working for 1 day before being laid off without any promise of reemployment, the Board found it would be appropriate to permit all employees who worked on at least two productions for a minimum of 5 working days during the preceding year to vote. The formula used in *Medion* was modified in *American Zoetrope Productions*, 207 NLRB 621, 623 (1973), so as to permit all employees who worked on at least two productions in the preceding year to vote, regardless of whether or not they worked for 5 days. In doing so, the Board noted its “obligation to tailor [its] general eligibility formulas to the particular facts of the case,” *Id.* at 623, as well as its “responsibility to devise an eligibility formula which will protect and give full effect to the voting rights of those employees who have a reasonable expectancy of further employment.” *Id.* at 622. In *American Zoetrope* and *Medion*, the employees worked for short-term, sporadic, and intermittent periods of time. In *American Zoetrope Produc-*

tions, supra, the Board found that the employees typically only worked for 1 or 2 days at a time.

The record in the instant case does not reveal the details of the employment history of the employees or any general employment pattern, in terms of the number of days, weeks, or months employees work on particular projects and the frequency with which they return to work for the Employer. However, the record clearly establishes that the current employees have worked and will continue to work on the *Sabrina* project for a significant period of time. The requisition forms which are in the record indicate that unit employees will work on *Sabrina* for periods ranging from 4 to 48 weeks, with the vast majority of such employees working between approximately 20 and 35 weeks. Since some of the employees working on *Sabrina*, who have been employed for a substantial period of time, may not have worked on another project for this employer, it would not be appropriate to use a formula which disenfranchises employees who have not worked on at least two projects. I agree with the Petitioner that the application of a strict *Medion* formula in this case would be wrong and would violate the Board’s policy of adopting a formula which “will likely insure eligibility to the greatest number of employees having a direct and substantial interest in the choice of representatives.” *Steiny & Co.*, 308 NLRB 1323, 1326 (1992).

I conclude that in the circumstances herein, the most useful formula would be one that accords voting eligibility to all employees who meet the standard criteria for eligibility and also accords eligibility to employees who have been employed by the Employer in the unit on at least two productions for a minimum of 5 working days during the 12 months preceding the issuance of this decision or who worked at least 15 working days in the 12 months preceding the issuance of this decision, and who have not quit or been terminated for cause. This modification of the *Medion* formula is necessary to avoid disenfranchising employees who have worked for a significant period of time, but only on one production. As noted above, the employees in *Medion* typically worked for only short periods of time. See *Manncraft Exhibitors Services*, 212 NLRB 923 (1974); *Julliard School*, 208 NLRB 153 (1974).