American Zoetrope Productions, Inc.[1] ***and*** **Association of Film Craftsmen, Nabet, Local 532, AFL–CIO, CLC,**[2] **Petitioner.** Cases 20–RC–9585 and 20–RC–9698

November 28, 1973

DECISION AND DIRECTION OF ELECTION

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Helen A. Phillips on several days between November 13, 1970, and May 3, 1971. Following the hearing, these cases[3] were transferred to the National Labor Relations Board in Washington, D.C., pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, as amended. Thereafter, the Petitioner and the Employers, American Zoetrope Productions, Inc., and Korty Films, Inc., filed briefs.

On September 9, 1971, the National Labor Relations Board issued an Order reopening the record and remanding the proceeding to the Regional Director for further hearing, pursuant to which a further hearing was held on October 4, 1971, and April 24, 1973, before Hearing Officer Phillips.[4] Thereafter, the Petitioner, the Employer, American Zoetrope Productions, Inc. (hereafter Employer), and the Intervenor, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO, filed supplementary briefs.[5]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in these cases, and the briefs filed herein, the Board finds:

1. The Employer is a California corporation engaged in the production of motion pictures. The parties stipulated, and we find, that during the calendar year 1970, the year in which the instant petitions were filed, it received in excess of $50,000 for services provided to Warner Brothers, Inc., which sold and shipped directly to points outside the State of California goods valued in excess of $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer. The Petitioner produced evidence showing that the original Petitioner, herein, Film Workers Union, Independent, voluntarily merged with it pursuant to a vote taken of the membership of each of the organizations, and that the present Petitioner has, accordingly, succeeded to the interests of the Film Workers Union. The Intervenor contends that the Petitioner should be required to submit a new showing of interest, arguing that the Petitioner has no standing to, in effect, inherit the showing of interest submitted by its predecessor. The Board's showing-of-interest requirement is simply an administrative device to avoid conducting frivolous elections.[6] As there is no evidence suggesting either disagreement among the affected employees concerning the merger, or confusion as to the identity of the labor organization seeking to represent them, we deem the original showing of interest adequate.[7]

3. The Intervenor contends that its contract with the Employer bars an election. On September 8, 1969, the Employer signed a collective-bargaining contract with the Intervenor covering all production employees engaged in feature length films. Although the Intervenor referred some employees to the Employer for the feature length production "THX 1138," there is evidence that the contract was not enforced, even on this production, with respect to such matters as wages and union-security clauses. The contract ran to February 10, 1970, with an automatic renewal clause, absent reopener. However, by letter dated December 30, 1970, Intervenor reopened the contract and it appears that, at present, no valid contract is in effect. In such a situation, the Board has held that the reopening of the contract prevents its renewal for contract-bar purposes.[8] Furthermore, the Employer has not engaged in any feature length productions for some time and

[1] The petition in Case 20–RC–9698 was amended at the hearing so as to eliminate Korty Films, Inc., and Warner Brothers Inc., as parties to the proceeding.

[2] The name of the Petitioner, originally Film Workers Union, Independent, was amended at the hearing.

[3] Case 20–RC–9580 was severed by stipulation of the parties for the purpose of proceeding with a separate election on that petition for employees of Korty Films, Inc. We hereby approve the stipulation and sever that case

[4] Proceedings were suspended during the investigation and disposition of unfair labor practice charges filed by Petitioner against American Zoetrope Productions, Inc. See fn. 16, *infra.*

[5] The Intervenor, which has had contractual relations with the Employer and was recognized by the Employer at the time the instant petitions were filed, referred in its supplementary brief to an "original memorandum" filed previously. The Board has no record of receiving any such memorandum.

[6] See NLRB Rules and Regulations and Statements of Procedure, Series 8, as amended, Sec. 101.18.

[7] *Harold's Club, Inc.,* 194 NLRB 13

[8] *Deluxe Metal Furniture Company,* 121 NLRB 995, 1002.

apparently has no present intention to do so in the future. Accordingly, we find no merit in Intervenor's position and hold that its 1969 contract with the Employer is not a bar to the petitions herein.

We therefore find that a question affecting commerce exists concerning the representation of employees within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

4. The Petitioner seeks to represent a unit of all film editors, sound editors, assistant editors, and negative cutters employed by the Employer within the San Francisco Bay Area. The Board has held that a separate unit of editorial workers is appropriate because of the distinctive nature of their skills and the work performed, as well as the history of bargaining in the industry.[9] The evidence shows that, in the instant case, editorial workers begin working on a film at a different time from the rest of the production crew, use special and different rooms from other film workers, and utilize highly specialized equipment. Moreover, it appears, the Intervenor has traditionally maintained separate locals for its editorial worker-members. It appears that the parties would all include negative cutters in any unit of editorial workers.[10] In view of the separate and distinctive skills and functions performed by editorial workers, including negative cutters, we find that a unit of all editorial workers, including negative cutters and others, as set forth more fully below, would be appropriate for purposes of collective bargaining.

We find that 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:

> All editorial employees, including film editors, sound editors, assistant editors, and negative cutters employed by the Employer in the San Francisco Bay Area, but excluding all other employees, guards, and supervisors as defined in the Act.

5. The parties are in disagreement with respect to voting eligibility requirements. As we noted recently in *Medion, Incorporated,* 200 NLRB No. 145, the employees in this industry are hired for a particular production, sometimes only for a day's work, and then laid off without any promise of reemployment. When work is again available, the employer recalls those who have proved satisfactory in the past.[11] The record in the instant case shows a similar pattern, and demonstrates further that the film industry in San Francisco, where both this Employer and Medion are located, is less structured and much smaller than in Los Angeles (Hollywood), and that the jobs for individual employees are for shorter duration. In fact, the Employer in the instant case has for some time been engaged almost exclusively in producing television commercials, for which productions the editorial workers are employed, typically, for 1 or 2 days. On the basis of this irregular pattern of employment, as we said in *Medion, supra,* it is our 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 with the Employer.

In *Medion,* we decided that the most appropriate formula for voting eligibility was to give a vote to any employee who was employed by Medion on at least two productions for a minimum of 5 working days during the year preceding the issuance of the Board's Decision, and who had not quit or been terminated for cause. The Employer in the instant case would have us follow the *Medion* formula. However, at the hearing the Employer's counsel conceded that two named employees should be eligible who, on the basis of the year preceding the date of the April 1973 hearing, would not have been eligible under the *Medion* formula.[12] The Petitioner would have us rule eligible all editorial employees listed on the Employer's payroll any time between January 1970 and the date of the election. In the alternative, Petitioner argues for an eligibility requirement of 2 or more working days during the year preceding the direction of the election. The Intervenor would have us abandon the *Medion* approach in the instant case and determine eligibility according to the standard rule for employees in most industries, i.e., employment at the time of the election and during the payroll period immediately preceding the direction of election.

[9] See *Esquire, Inc. (Coronet Instructional Films Division),* 105 NLRB 205; *Columbia Broadcasting System, Inc.,* 97 NLRB 566.

[10] Petitioner and Employer would exclude negative cutter Doris Fox from the unit because she works in Los Angeles, outside of the San Francisco Bay Area geographical scope of the unit sought by Petitioner. The Intervenor would not so limit the geographical scope of the unit, as the evidence shows that Fox works on film shot and otherwised processed in the Bay Area and shipped to Fox for cutting. Fox is the only employee doing work similar to that done by employees in the unit we find appropriate who is located outside the Bay Area, and the record shows that Bay Area editorial workers do their work at the Employer's premises, while Fox works in Los Angeles and uses her own equipment. We find, therefore that she has insufficient community of interest with the Bay Area editorial employees to be included in the unit and that the unit's geographical scope should properly be limited to the Bay Area. Cf. *R. L. Polk & Co.,* 91 NLRB 443, 118 NLRB 1454.

[11] Meanwhile, these individuals often work for other employers within the industry.

[12] Pat Jackson, said to be properly eligible by counsel, had worked for 5 days, but on only one production. A. Christina Crowley had worked on two productions for a total of 4 days. We recognize, of course, that their employment totals during the year preceding the date of this Decision will vary from those during the year preceding the hearing.

We think, as indicated above, that the general approach we took in *Medion* best reflects the policy of allowing a vote to "employees who by happenstance are not currently employed, but who have a reasonable expectancey of future employment."[13] The facts in the instant case are similar to those in *Medion* in significant respects. In both cases, for instance, an individual employee's chances of reemployment depend in large part upon the employer's satisfaction with his past performance.[14] Since the only evidence produced in the record relative to this Employer's satisfaction with an employee's work is whether it has in fact reemployed him within a reasonable period of time, we think the *Medion* formula is appropriate in the instant case to the extent it requires employment on at least two productions during the 1-year period. However, it appears that here most unit jobs last only 1 or 2 days, whereas in *Medion* there was apparently a different balance between shorter jobs, such as television commercials, and longer jobs such as documentaries and features. In the instant case, where there is a good chance that an employee will have worked successfully on two productions and yet not have been employed for 5 working days, we think the fact of having been reemployed and having completed the last job is a more significant indication of the likelihood of future employment than the total number of days worked. Elimination of the 5-day requirement for purposes of the instant case will give due recognition to the fact that on the instant record, fewer days worked is still compatible with a reasonable expectancy of future employment.[15] Such action, we believe, is also compatible with our obligation to tailor our general eligibility formulas to the particular facts of the case.

Accordingly, we determine to be eligible to vote all unit employees who were employed by the Employer on at least two productions during the year preceding our Decision and Direction of Election herein, and who were not terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.[16]

[Direction of Election and *Excelsior* footnote omitted from publication.]

[13] *Hondo Drilling Company N.S.L.*, 164 NLRB 416, 417.

[14] Petitioner's contention that employees who were members of Petitioner's predecessor, the Film Workers Union, were discriminated against, is discussed *infra*, fn. 16.

[15] Cf. *Independent Motion Picture Producers Association, Inc*, 123 NLRB 1942, 1948–50.

[16] Pursuant to a charge filed against the Employer in 1971, a complaint issued in Case 20–CA–6641, alleging that the Employer discriminated in its hiring practices to discourage membership in the Film Workers Union, the original Petitioner in the instant case. The unfair labor practice case was settled before trial, and a consent judgment entered in the United States Court of Appeals for the Ninth Circuit containing a cease-and-desist order and agreed amounts of backpay for some of the alleged discriminatees. Petitioner contends that all of the individuals awarded backpay should be eligible to vote. As the settlement stipulation and judgment contained no finding or admission of unlawful discrimination, we conclude that these individuals should be subject to the same eligibility requirements as all other unit employees.