

The Express-News Corporation and San Antonio Typographical Union #172 a/w International Typographical Union, AFL-CIO, Petitioner. Case 23-RC-4219

April 2, 1976

DECISION ON REVIEW

BY CHAIRMAN MURPHY AND MEMBERS FANNING,
JENKINS, AND PENELLO

On June 13, 1975, the Regional Director for Region 23 issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate the Petitioner's requested unit of news department employees, including reporters and staff writers, columnists, editorial writers, editors, copy editors, cartoonists, photographers, photo clerks, librarians, CRT operators, typists, and copy carriers. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Regional Director's decision on the ground that compelling reasons exist for reconsideration of the Board's policy with regard to the professional status of employees in its editorial department engaged in the assimilation, compilation, and editing of news and editorial matter.

By telegraphic order dated July 9, 1975, the National Labor Relations Board granted the request for review and stayed the election pending decision on review. Thereafter, the Petitioner filed a brief on review. Southern Production Program, Inc., and the Newspaper Guild referred to herein as SPPI and the Guild, respectively, sought and were granted leave to file briefs *amici curiae*.¹ The Employer, joined by SPPI, requested oral argument. On August 21, 1975, the Board granted the requests for oral argument and, on September 12, 1975, oral argument was heard. On October 15, the Petitioner, joined by the Guild, filed a motion to stay decision. The Employer and SPPI filed a joint statement in opposition thereto.

The Board has considered the entire record in this case with respect to the issues under review, including the briefs on review and the oral argument, and hereby affirms the Regional Director's decision for the following reasons:²

In finding the requested unit appropriate the Regional Director, on the basis of precedent,³ rejected

the Employer's contention that certain categories of the employees involved (reporters, staff writers, columnists, copy editors, editors, editorial writers, and the cartoonist, referred to herein collectively as journalists) are professional employees and therefore may not be included with the nonprofessional employees in the editorial department without a self-determination election. The Employer and SPPI urge reconsideration of the precedent relied on by the Regional Director, contending that the record herein supports a finding that the Employer's journalists are professional employees within the meaning of Section 2(12) of the Act. For the reasons below, we find no merit in this contention.

The Employer is engaged in the publication of two daily newspapers as well as a Sunday edition at its San Antonio, Texas, facility. There are approximately 104-112 employees in the news department. The total number of employees in journalist classifications is not entirely clear—somewhere in the neighborhood of 90.⁴ There is no history of collective bargaining among any of the employees in the news department.

The record reveals that there are approximately 45 reporters and staff writers whose duties include observing and reporting events, conducting interviews, taking news reports over the telephone, and doing research and other such tasks as are assigned by their supervising editors. The Employer expects its reporters and staff writers to exercise initiative and imagination in the performance of their duties, as well as to be accurate and have the ability to write clearly on any topic which may be assigned to them. The Employer has four columnists who maintain regular columns in the Employer's newspapers, generally dealing with various aspects of city life. Columnists are usually senior staff members who have demonstrated superior writing ability. Editorial writers work under the immediate supervision of the Employer's editor and publisher in the preparation of material to be included on the editorial pages of the paper.⁵ Copy editors, about 21 in number, and editors are usually senior staff members. They work at various desks, e.g., general news, sports, and women's news, reviewing reporters' stories for accuracy, clarity, and style and making any necessary corrections or revisions.

³ *Jersey Publishing Company*, 76 NLRB 467 (1948); and *Free Press Company*, 76 NLRB 1047 (1948).

⁴ We note that there appear to be minor numerical discrepancies between some of the Regional Director's findings and the documentary evidence submitted by the Employer, but these differences are insignificant and would not alter the result herein.

⁵ The Employer's job description for this classification indicates that editorial writers are members of the Employer's editorial board but it is not clear from the record what role, if any, they play in the formulation of the Employer's editorial policy. No party contends they are managerial employees.

¹ SPPI stated that its brief was also filed on the Employer's behalf.

² The motion to stay filed by the Petitioner is hereby denied. We also deny a motion by Binghamton Press Company, Inc., to stay this decision, and to consolidate it with Case 3-RC-6496, a pending case.

Copy editors in addition may be called upon occasionally to write news stories from material obtained through the wire services. All editors are expected to exercise judgment to assure that all stories appearing in the newspapers meet the Employer's standards. The Employer at present has one cartoonist who, as his title implies, is responsible for creating pictorial political commentary in accordance with the directives of various editors. In addition, he may be called upon to illustrate in simple terms stories ranging from politics to sports. Occasionally, he touches up photographs and draws diagrams and maps to accompany particular articles.

The Employer has no policy of hiring and employing only journalists who have a degree evidencing advanced educational training in journalism or communications.⁶ Nor does the Employer maintain any formal training or apprenticeship program which its employees must complete prior to becoming journalists. A college degree, although a favorable factor, is not a prerequisite for employment as a journalist by the Employer. As the Employer stated, "What we're looking for is someone who has a broad education, a capacity for intellectual advancement, someone who can grow on the job We try to hire creative people who show an interest in writing." The record reveals that 52 of the Employer's currently employed journalists have at least a college degree (with 6 of these having advanced degrees), 31 have completed some college level courses, and about 8 have no college study.⁷ Of the six with advanced degrees, two have M.J.'s (master of journalism). Additionally, 10 have B.J. degrees (bachelor of journalism), 29 have B.A., B.S., or B.B.A. degrees with their subjects including journalism,⁸ and 13 had B.A. degrees with no indication of any courses in journalism.

In support of its contention that employees in the disputed classifications are professionals, the Employer adduced evidence at the hearing that competition from other types of media, as well as demands for excellence by its increasingly sophisticated readership, has compelled it to hire specialists in several

fields, including politics, energy, business, medicine, and education, among others. The Employer's publisher and editor testified that, since the early 1950's when he served as Sunday editor, the Sunday editions have been vastly expanded and now include special sections devoted to particular fields of interest. One of these, called Insight, contains in-depth background reports on major items in the news. Other such sections deal with current developments in the areas of the economy and finance, sports, and the cultural scene, among others. In addition, the Employer publishes a Sunday magazine supplement. The Employer claims this type of comprehensive coverage requires it to employ a staff of specialists of the type not heretofore found at metropolitan dailies such as the Employer's.

The gravamen of the Employer's position expressed both in its briefs and in oral argument is that *Jersey Publishing, supra*,⁹ should be reversed and journalists accorded professional status in view of the dynamic changes which have occurred in the communications media in recent years. Among the reasons advanced in support of its position are the trends towards specialization among news department employees such as those involved herein; the increasing number of college-trained personnel on the staff, as well as the Employer's preference for college graduates in its hiring practices; the close cooperation between the newspaper industry and schools of communications with respect to development of academic standards and curriculum; the greater demand for excellence by a more enlightened public; and the unique responsibility of a free press in a democratic system. The Petitioner and the Newspaper Guild, in urging adherence to the cited precedent, contended that journalists are not professionals within the statutory definition of that term because they are not operating in a field that requires all of its members to have knowledge of an advanced type customarily acquired by a prolonged course of specialized intellectual instruction. They argue that the field of journalism is essentially one of generalists, and further argue that the Board would contravene legislative intent were it now to conclude the journalists are professionals within the meaning of the Act.

Section 2(12) of the Act states:

⁹ Contrary to our dissenting colleague, the critical issue in *Jersey Publishing* was not whether journalists were required in that case to have licenses or specialized training in institutions of higher learning. Rather, the Board relied primarily on the following finding in fn. 3:

We find nothing in the legislative history of the Act to indicate that the Congress intended to include employees such as those involved in the instant case in the above definition of professional employees.

Inasmuch as *Jersey Publishing* was decided in 1948—only 1 year after the enactment of Sec. 2(12)—we find the Board's view of legislative history very significant and still relevant to the case before us.

⁶ Prior to the hearing in this case, the Employer had no written job descriptions containing qualifications for the employees in question. However, during the week between the first and second sessions of this hearing, the Employer prepared (and later introduced into evidence) documents with job descriptions for the disputed classifications.

⁷ Over a more recent period, of 26 journalists hired between January 1974 and the hearing date, 19 had a college degree, 6 had completed some course work on a college level, and 1 had not been to college. However, the Employer acknowledged that the high number of college graduates recently available in the job market has contributed to its increased hiring of people with degrees.

⁸ The Employer's statistical evidence does not make fully clear the extensiveness of the training of these 29 employees in journalism or communications. All these employees took "subjects" in college which included journalism, but it is unclear whether all of these employees majored in journalism.

The term "professional employee" means—

(2) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Based on the record before us, our interpretation of Section 2(12) of the Act, and Board precedent in this area, we conclude that the Employer's journalists are not "professional employees" within the meaning of Section 2(12). We do not question the intellectual demand of the modern journalist's job nor the special responsibilities inherent in his position. Certainly reporters, staff writers, editorial writers, editors and copy editors, and columnists must possess superior writing skills and use initiative in approaching the variety of tasks in which they are involved. We recognize that in the performance of their duties these employees must of necessity exercise judgment in deciding how to approach a given assignment and that the story which ultimately appears in a newspaper is often the result of rigorous intellectual work.

However, though the work of journalists may be challenging and diverse, the critical issue, as recognized by the parties and the *amici* in their briefs and in their oral argument, is whether the work of these journalists meets the requirements of clause (iv) of paragraph (a) of Section 2(12). In our opinion it does not. While knowledge of the type described in that clause might be desirable for a journalist to have, it is clear that his work generally does not require it. The Employer's own testimony, as quoted above, shows that in hiring journalists it looks for those with a broad education. Clause (iv) specifically distinguishes knowledge acquired from a general education from that required for professional work. In our view, the general college education, which appears

increasingly possessed by journalists, does not satisfy the standard of Section 2(12)(a)(iv). Assuming, *arguendo*, that the knowledge obtained through an advanced degree specializing in journalism meets the requirements of the statutory definition, we would not find the Employer's journalists to be professional employees because, as stated above, the Employer does not require such a degree of its journalists—or equivalent experience in lieu of a degree—and only a handful of them in fact have advanced degrees in journalism.

We do not suggest that Section 2(12) of the Act mandates that "knowledge of an advanced type" be acquired by all professionals in the unit through training in an institution of higher learning. Rather, this advanced knowledge must be customarily received by a prolonged course of specialized intellectual instruction and study in an institution of higher learning. The test for determining professional status, as stated by the Board in *Western Electric Company, Incorporated*, 126 NLRB 1346, 1348-49 (1960), remains valid. In *Western Electric*, the Board refused to adopt any specific formula of education and experience as a prerequisite for finding professional status. However, the Board, in addition to the language cited by the dissent, also significantly stated:

This is not to say that the background of individuals within a disputed group is in irrelevant consideration, for background is examined for the purpose of deciding whether the work of the group satisfies the "knowledge of an advanced type" requirement of Section 2(12)(a). If . . . a group of employees is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, it may logically be presumed that the work requires "knowledge of an advanced type." Conversely, if few in the group possess the appropriate degree, it logically follows that the education characteristics of the work are not those requiring the utilization of advanced knowledge. . . .

It is clear, based on our examination of the hiring practices and the personnel of this Employer, that the news department herein is not predominantly composed of individuals with advanced knowledge acquired through a prolonged course of specialized study in journalism or communications in an institution of higher learning. The Employer has few employees with advanced degrees in journalism. As to others, while they have had "subjects" in college which included journalism, it is not clear how specialized or extensive was their journalism education. Further, the Employer employs numerous journalists with either no college or college training unrelated to journalism. These facts support the Petitioner's con-

tention that journalism is primarily a field of generalists with general academic backgrounds. The diverse and broad backgrounds of journalists lead to the conclusion that the knowledge required by and the work of the journalists is not that customarily acquired through *specialized* training in journalism or communications, but instead is predominantly that acquired through a varied and broad education.¹⁰ Certainly, universities have increasingly developed departments of journalism, and students are utilizing such academic training for careers in journalism. However, we cannot conclude that journalism is composed predominantly of men and women with advanced training in these schools of journalism.

In rushing to find the work of journalists to be "professional" within the meaning of our Act, our dissenting colleague misinterprets Board precedent and does not fully consider the strict requirements of clause (iv) of paragraph (a) of Section 2(12). While citing *Western Electric*, our colleague, having found the work in question to be professional, argues that it is irrelevant whether the person performing the work received his training in an institution of higher learning or through experience. We do not agree because the Board, as the language quoted above from *Western Electric* clearly shows, has considered it relevant whether the group of employees in question is predominantly composed of employees with degrees in the field to which the profession is devoted. Secondly, before the work can be found to be "professional," it must pass muster with the narrow requirements of Section 2(12) that the knowledge of an advanced type be customarily acquired through specialized study. It would appear undisputed by all, including our colleague, that journalists have different and broad backgrounds and are called upon to perform varied functions and shoulder many responsibilities. In our judgment, it is this diversity of background and function that leads to the conclusion that journalists are not required to have knowledge of an

advanced type customarily acquired through specialized training in an institution of higher learning. Situations elucidated in this record—such as a sportswriter with a B.A. in history—serve to belie the contention that all journalists, to properly perform their job, require knowledge of an advanced type customarily acquired through specialized training in journalism and communications.

Nor do we find professional status for journalists because some professions (e.g., lawyers) have allowed people to enter the profession through an apprenticeship. It is only logical—as in the case of lawyers—that a person could join the profession only after the *completion* of a long apprenticeship. Here, the Employer has hired as journalists persons with neither advanced academic training in journalism nor its equivalent in experience. Under our colleague's analysis, these persons, though their academic backgrounds or experience were limited or unrelated to journalism, would instantly become professionals within the meaning of the Act. This result would be contrary to the narrow limits imposed by Congress in enacting Section 2(12) of the Act. The statute requires a *prolonged* course—or equivalent experience—of specialized instruction. As journalists are not required to have attained knowledge of an advanced type through an advanced degree or completion of an extensive period of apprenticeship prior to becoming journalists, their work is not "professional" within the meaning of Section 2(12).

Also, the strict requirements of Section 2(12) are not met because some journalists may have advanced knowledge in fields other than journalism. Though it appears that the Employer has four individuals with master degrees in fields other than journalism, the record does not adequately inform us as to how many individuals in the Employer's news department have knowledge of an advanced type in other fields such as economics or politics. However, even though there be such individuals, Section 2(12) and Board precedent do not allow for this factor to confer "professional" status on all journalists. Again, Section 2(12) was meant to apply to small and narrow classes of employees. We find it inconsistent with the narrowness of the statute to permit any advanced background (rather than one in journalism or communications) to support a finding that all journalists are "professionals." Further, we note that it is not unusual today for a newspaper to hire someone with a specific background in another field—perhaps a prominent figure in politics or sports—to write a column or cover certain significant events. Under our colleague's analysis, these persons also, contrary to the statute's intent, would become instant "professional" journalists.

¹⁰ We do not find support for the Employer's position in cases such as *Twentieth Century-Fox Film Corporation*, 96 NLRB 1052 (1951). In that case, all employees found to be professional had advanced knowledge in two specific areas—literature and writing—and they all performed the same work of evaluating manuscripts. Here, it is clear that all journalists do not have knowledge of an advanced type in the specific area of journalism. Neither is *Westinghouse Electric Corporation*, 80 NLRB 591 (1948), dispositive of the issue herein. In that case the Board found that a unit of engineers was "professional" because the work performed—engineering work—met the requirements of Sec. 2(12), including clause (iv) of par. (a). That case is inapposite because our ultimate conclusion in this case is based on our finding that the work of journalists—unlike the work of engineers in *Westinghouse*—does not require knowledge of an advanced type customarily received through a prolonged course of specialized instruction and study in an institution of higher learning. Thus, more in point is *General Dynamics Corporation*, 213 NLRB 851 (1974), where the Board concluded that publication editors, who used their engineering backgrounds to prepare publications for external use, were not professionals within the meaning of the Act.

Board precedent supports our view in this matter. For example, in *A. A. Matthews Associates*, 200 NLRB 250 (1972), the Board found certain engineers—an endeavor normally conferred professional status by the Board—were not professionals because the work they performed for that employer was not professional work. Thus, it follows that though men and women with backgrounds and advanced knowledge in fields such as engineering, law, medicine, economics, etc., write for newspapers, this factor cannot serve to confer professional status within the meaning of Section 2(12) on all journalists.

Contrary to our dissenting colleague's assertion, we fully recognize that in determining the "professional" status of employees we must examine both the nature of the work performed and the background of the employees involved. Thus, while an employer's requirement that all its employees in the unit have advanced degrees in the field to which the profession is devoted would be persuasive evidence that the employees are "professionals," such evidence is not necessarily conclusive. Should an employer impose academic or experience requirements that are unnecessary to accomplish the work in question, the work may remain outside the definition of "professional" work. Here, as noted above, many individuals with limited academic training in journalism or limited journalistic experience perform well their newsroom functions. This fact supports our view that the work of these journalists is not "professional" within the meaning of the Act because it can be competently accomplished without requiring advanced degrees in journalism or equivalent experience.

In reaching our conclusion, we do not denigrate journalism as a calling or question in any way the quality of the work product of journalists as a class. Indeed, "professional" pride in one's work is an admirable trait, commonly associated with journalists as a class, and one that is to be encouraged. We in the majority take second place to no one, including our dissenting colleague, in our admiration and respect for those many journalists, past and present, who have made significantly beneficial contributions to our democratic system. Nonetheless, though many journalists have performed important, laudable, and even unique functions in our society, it does not necessarily follow that journalists should be regarded as "professionals" within the strict limits of Section 2(12) of the National Labor Relations Act. In many fields of endeavor in our society there are men and women who, in their own way, have made valuable and unique contributions to the betterment of society and the improvement of our institutions. It is not unusual for such people or groups of people to be

referred to by admirers as "pros."¹¹ The dissent has failed to distinguish between "professionals" within the meaning of our Act and the term "professional" as used to denote a person or persons doing admirable and challenging work. While we must be cognizant of all the facts relevant to the issue before us, the Board is not endowed with the responsibility of evaluating the past and present contributions to society of various fields of endeavor and somehow rewarding or commending those fields where service has been outstanding. Rather, in light of the statute which we administer and the record before us, we decide the issues, frequently narrow, in the case at hand. Our dissenting colleague, while analyzing and praising the field of journalism and its role in our democratic system, has failed to focus on the limited issue before us. In regard to "professional" status, we do not have the latitude to confer this status on individuals other than those satisfying the strict criteria set forth in Section 2(12) of the Act. Therefore, based on the facts herein, our interpretation of Section 2(12) of the Act, and Board precedent for determining professional status, we conclude that those employees employed by the Employer as journalists are not professionals within the meaning of the Act.

Accordingly, as we have affirmed the Regional Director's decision,¹² the case is hereby remanded to him in order that he may conduct an election in the unit found appropriate by him, as described below, pursuant to his Decision and Direction of Election, except that the eligibility payroll period therefor shall be that immediately preceding the date of this decision on review.¹³

All full-time and regular part-time news department employees, including reporters, columnists, staff writers, editorial writers, cartoonists, editors, copy editors, photographers, photo-clerks, librarians, CRT operators, typists and copy carriers, employed by the Employer at its San Antonio, Texas, facility, excluding all other employees, office clerical employees, confiden-

¹¹ In journalism, it is not unusual for the more gifted or experienced to be viewed as "professionals." See discussion of "Journalism" in the *International Encyclopedia of Social Sciences*, Vol. 8, pp. 265-271.

¹² Member Jenkins would exclude editors, editorial writers, and columnists from the unit herein as he believes employees in these categories are primarily management related and reflect the views, policies, and guidance of the owner-publishers of newspapers, and therefore lack a community of interest with other news department employees. However, Members Fanning and Penello note that the status of "editors, editorial writers, and columnists" as management related was not litigated in this case, and they are not prepared to indicate a willingness to exclude these categories from bargaining units in all cases. They note that, while in some cases these categories may be primarily management related, they do not think that at all newspapers these employees necessarily will reflect the views of the owner-publishers. They would accordingly affirm the Regional Director's unit finding including editors, editorial writers, and columnists.

¹³ [Excelsior footnote omitted from publication.]

tial employees, guards, watchmen and supervisors as defined in the Act.

CHAIRMAN MURPHY, dissenting:

Contrary to my colleagues, I would find that most, if not all, of the Employer's newsroom employees, including reporters, the political cartoonist, columnists, staff writers, editorial writers, editors, and copy editors, are professional employees within the meaning of Section 2(12) of the Act and, as such, are entitled to a self-determination election under Section 9(b)(1) of the Act before being included in a unit with nonprofessional employees.¹⁴ To the extent that this result is contrary to established Board precedent,¹⁵ I would overrule such precedent. For, "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."¹⁶

It has been nearly 30 years since the Board decided, in *Jersey Publishing Company, supra*, and *Free Press Company, supra*, that reporters and journalists are not "professional employees" under our Act. One of the reasons—indeed the critical reason stated in *Jersey Publishing*—for this conclusion was that "the editorial department employees are not required to have a license or undergo specialized training in a school of higher learning."¹⁷ As will be discussed below, this is clearly an erroneous test under current Board standards for determining professional status.¹⁸ Nevertheless, the majority has chosen to adhere to the foregoing precedent with respect to reporters, thus ignoring the enormous advancements which have occurred in the news profession generally and, more specifically, in the nature and scope of journalists' work and the training and education, including continuing education, which they must have to perform their work effectively.

In finding that the news department employees are professional employees, I rely on the nature of their work, the advanced skills and specialized training required for effective performance of such work, and the employees' and the Employer's unique responsibilities under the First Amendment to the United States Constitution.

Section 2(12) of the Act defines "professional employee" as follows:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechan-

ical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

It is not disputed that the above definition of "professional" fits employees in the Employer's news department as far as the first three criteria are concerned. But the Petitioner vigorously argues that the final requirement is not met. In my judgment, they do meet all of the foregoing requirements and, therefore, are professional employees within the statutory definition.¹⁹

The record reveals that an employee in the news department generally begins his or her journalistic career as a reporter or staff writer, then moves up the hierarchy to copy editor, and finally to editorial writer, to columnist, or into management. The record establishes that reporters and staff writers here must have a college education or its equivalent in experience and training. They must be knowledgeable not only in journalism generally, but also in special fields such as politics, economics, science, law, and similar areas in order to explain accurately the many complex technical events occurring in the world today. Reporters and staff writers must be able to understand, analyze, relate, and explain these events correctly and in proper historical perspective as well as in relation to other current events. Finally, they must

¹⁴ *Boyd S. Leedom v. William Kyne, President of Buffalo Section Westinghouse Engineers Assn.*, 358 U.S. 184 (1958).

¹⁵ *Jersey Publishing Company*, 76 NLRB 467 (1948); *Free Press Company*, 76 NLRB 1047 (1948).

¹⁶ *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

¹⁷ *Jersey Publishing, supra* at 469.

¹⁸ See, e.g., *Western Electric Company, Incorporated*, 126 NLRB 1346 (1960).

¹⁹ This is not to say that everyone hired by the Employer as a reporter is thereby automatically rendered a professional employee within the meaning of Sec. 2(12) of the Act. Rather, I find, for the reasons fully explicated in the text, *infra*, that most of the Employer's journalists meet the statutory requirements for professional status. To the extent that there may be some newly hired employees in the Employer's news department who have had neither formal nor informal training as journalists, it is possible that they do not perform work requiring "advanced knowledge" and that they are, therefore, not professional employees. Such employees, however, should be permitted to vote subject to challenge so that their status can be resolved in a postelection proceeding.

be able to write in a style which the public can comprehend.

Copy editors are more experienced reporters who review the stories written by reporters and newswriters for accuracy, balance, clarity, and style. They also write stories from materials received through the wire services. Hence, copy editors must synthesize the story and relate it in a manner the public will understand. Copy editors possess not only the skills mentioned above, but also the ability to condense a story to its essence in order to meet space limitations without destroying the story's balance and accuracy.

The Employer's columnists are selected for their special expertise in a particular field (i.e., city life, aviation, sports) and their demonstrated writing ability. The columnists analyze, explain, and comment upon the meaning of the events within their fields of specialty. They are usually journalists with extensive experience as reporters and copy editors.

Similarly, the Employer's editorial writers are senior journalists who have had extensive experience as reporters and copy editors. They are members of the Employer's editorial board which formulates the newspaper's editorial policy.²⁰ They must keep informed on all local, national, and international events in order to assist in developing editorial policy. They must have knowledge of history in order to understand the deeper significance of current events and comment upon them in fullest perspective. After the editorial policy decision is made, the editorial writers must do extensive research of the subject and write the editorial so as to express the paper's viewpoint in a concise and logical manner.

The political cartoonist, like the editorial writer, explains an event and conveys an opinion, generally on matters of current public concern, but does so by a picture drawing rather than by extensive writing. However, like the columnists or editorial writers, the cartoonist must have a broad knowledge of world events, be well informed on all matters of current public interest, and understand their subtle implications. In addition, of course, the cartoonist must be clever, original, and able to draw.²¹

The record shows—and the Regional Director found—that, of the approximately 91 employees in the Employer's news department, 52 have college degrees including 6 with advanced degrees; 23 have had some college training plus practical experience in the field of journalism; 8 have had some college training but no practical experience; and 2 have had

neither college nor practical training.

Based on the foregoing and the entire record herein, it is clear that the work of the above-mentioned employees is immensely varied and predominantly intellectual in nature. Nor is it denied that the work in the printed media requires the consistent exercise of discretion and independent judgment in determining what story to pursue; how far to pursue it; whom to interview; what questions to ask; and what to include, exclude, and emphasize in a story, and so forth. Additionally, the character of the employees' product, i.e., the news story, the editorial, or the cartoon, cannot be standardized in relation to a given period of time. Finally, it is my judgment that the work requires knowledge of an advanced type which is *customarily*, albeit not always or exclusively, received in institutions of higher learning.²²

The only rationale advanced by my colleagues for finding that the journalists herein are *not* professional employees within the meaning of the Act is that neither their work nor their Employer requires them to possess advanced degrees in journalism. In support of their first conclusion, the majority purports to rely on the "Employer's own testimony . . . [which] shows that in hiring journalists it looks for those with a broad education." The majority's syllogistic reasoning is that since "clause (iv) [of Section 2(12)(a)] specifically distinguishes knowledge acquired from a general education from that required for professional work," and because the Employer does not require its journalists to have an advanced degree in journalism, the employees are not performing professional work. The majority next reasons that, even if an advanced degree in journalism were to satisfy the requirements of clause (iv), the employees here would nevertheless not have professional status under the Act because the Employer does not require them to have such a degree. Presumably, if the Employer were not to require all of its journalists to have advanced degrees in journalism, the majority would find them to be professional employees.

There are several major weaknesses in the majority's rationale. First, it distorts the Employer's testimony that its journalists are required to have a college education or its equivalent in training and experience to qualify for employment. Next, it ignores the Board's prevailing test for determining professional status. And, finally, it ignores the nature of the work which the journalists perform.

The fact that not all of the Employer's present news department employees possess college or university degrees in journalism or, for that matter, in some other specialized discipline, is irrelevant be-

²⁰ See fn. 38, *infra*.

²¹ At oral argument, counsel for the Union contended that Jack Anderson, whose column, with Les Whitten, appears in over 900 newspapers, and Herblock, the famed Washington Post political cartoonist, are not professionals under our Act. This I cannot accept under any definition of "professional."

²² *The Ryan Aeronautical Co.*, 132 NLRB 1160, 1164 (1961); *Twentieth Century-Fox Film Corporation*, 96 NLRB 1052, 1054-55 (1951).

cause the Act does not require such degree for professional status. All that Section 2(12) of the Act requires is that the employees possess knowledge of an advanced type which is *customarily* received in institutions of higher learning. It does not mandate that such knowledge *must* have been received at an institution of higher learning, but merely that it is *customarily* received there. Indeed, the Board has repeatedly held that a college education, least of all a degree, is not essential for professional status if the employee performs professional work²³ or has obtained comparable skills by individual study or on-the-job training.²⁴ Thus, in *Westinghouse, supra*, the Board found that certain engineers were professional employees despite their lack of college degrees, because they "have acquired comparable skill in their specialized fields by individual study and experience, and by taking numerous courses of instruction in institutions of higher learning." In that case the employer did not require its engineers to have college degrees and the Board did not deem this fact to detract from a finding that they performed professional work and therefore were professional employees. Without reversing that precedent, the majority here finds that the journalists, even if they possessed advanced degrees in journalism, cannot be found to be professional employees because their Employer does not require them to have such degrees. The record is clear, however, that, although the Employer does not require the journalists to have advanced degrees in journalism, it does require them to have the equivalent in experience and training.

Similarly, in *Twentieth Century-Fox Film Corporation, supra* at 1055, the Board found that employees who read, evaluated, and critically analyzed manuscripts were professional despite their lack of a college education, and despite the fact that the employer did not require such education as a condition of employment. There the Board said:

While the Employer does not require that a reader have a college degree, a good educational background, formal or otherwise, is necessary. A representative of the Employer testified that the Employer sought to "get people with some college education," although the equivalent, e.g., experience in similar work, was accepted. The record discloses that a majority of the readers have some college training. More important, however, is the requirement that a reader have a fairly wide knowledge of literature and some tal-

ent for writing. Consistent with this requirement, the record discloses that the Employer has preferred "people who had some flair for the literary field."

[The readers'] work is predominantly intellectual and varied in character, involving the consistent exercise of discretion and an aesthetic type of judgment. Its performance requires a generally advanced knowledge of literature and writing. Upon the record as a whole, we find that the readers are professional employees within the meaning of the Act.

The facts here are clearly analogous to those quoted above, and the holding of that case is equally applicable to writers as to readers.²⁵

Furthermore, in *Western Electric Company, Incorporated*, 126 NLRB 1346 (1960), the Board expressly declined to adopt a specific formula containing educational and experience requirements, the individual fulfillment of which would be a prerequisite to inclusion in a professional unit. In rejecting this approach the Board stated at 1348-49:

We have carefully considered the positions of the parties to this proceeding . . . and have concluded that the Petitioner's formula approach for determining whether professional work "is being engaged in by professional employees" is not warranted. Section 2(12)(a) defines a professional employee in terms of the work he [or she] performs. And Board decisions make it clear that it is the work and not individual qualifications which is controlling under Section 2(12)(a).³ Therefore, if the work satisfies the Act's criteria, the employees who engage in it are professional employees; if the work does not meet the specified requirements, the employees performing it are not professional employees This approach, unlike the Petitioner's, does not emphasize personal qualifications at

²⁵ The facts in that case are, in my view, virtually indistinguishable from those herein. There, as here, the employer did not require the employees to have a college degree; there, as here, the employer required its employees to have a good educational background, formal or otherwise; there, as here, the employer tried to get employees with "some college education," although the equivalent in experience was accepted; there the majority of the employees had "some college training," whereas here a vast majority of the employees (52 of 90) have a college degree, an additional 31 "have completed some college level courses," and only 8 employees out of 90 have had no college courses; there the employer required its readers to have "a fairly wide knowledge of literature and some talent for writing," whereas here the Employer requires its journalists to have a fairly wide knowledge in such fields as economics, history, politics, etc., and as the majority concedes "must possess superior writing skills."

The majority tries but cannot distinguish that case from this except by so stating. Thus, in *Twentieth Century*, the Board, based on the above facts, concluded that the readers had advanced knowledge in literature and writing and, hence, were professionals. Here, the majority is unwilling to conclude on even stronger evidence that journalists have advanced knowledge in journalism and writing and are, hence, professionals.

²³ *Chrysler Corporation-Space Division*, 154 NLRB 352 (1965), and cases cited therein; *Western Electric Company, Incorporated*, 126 NLRB 1346 (1960), and cases cited therein.

²⁴ *Westinghouse Electric Corporation*, 80 NLRB 591, 593 (1948); *Twentieth Century-Fox Film Corporation*, 96 NLRB 1052, 1054-55 (1951).

the expense of the statutory mandate to make a determination of professionalism on the basis of work performed.

⁵ See, for example, *Northwestern Bell Telephone Company*, 79 NLRB 549, 552, where the Board said, "In finding the plant engineers to be professional employees, we are not passing on the individual qualifications of each engineer, but rather upon the character of the work required of them as a group. This work we find meets the requirements of Section 2(12)(a) of the amended Act."

This, it seems to me, is the logical approach to determining whether an employee is a professional.²⁶ Whether the person performing professional work received his or her training in an institution of higher learning or by on-the-job training and practice is, I believe, irrelevant. For it should be remembered that, before the relatively recent emergence of widely accessible professional schools, most doctors, dentists, and lawyers received their professional training by merely serving a term of apprenticeship with a practitioner in the field coupled with extensive individual reading and study.²⁷ That these persons did not attend formal institutions of higher learning or receive academic degrees in their areas of specialty did not detract from their professional status if, in fact, they subsequently performed professional work. Indeed, even today a person can become a lawyer in some States—like the great Commonwealth of Virginia—by "reading" for the law, i.e., serving a term of apprenticeship with a practicing attorney and by thereafter passing a bar examination.

Furthermore, the record discloses that journalism, like teaching, nursing, and engineering, to name a few, has become recognized by colleges and universities throughout the country as a professional discipline in which degrees are awarded. The number of colleges and universities granting degrees in journalism has increased tremendously over the years, as has the student enrollment in these schools. In addition, many schools of journalism now maintain close working ties with local newspapers where senior journalism students are provided actual on-the-job training and experience in their profession while still attending classes. The Employer, for example, provides such training to journalism students of the University

²⁶ My colleagues purport to affirm the standards established in *Western Electric* but do not follow them. Rather, they adhere to the proposition that, because the Employer does not require its journalists to have an advanced degree in journalism, the journalists are not performing professional work and, therefore, are not professional employees. This is simply not the standard adopted in that case. Indeed, the majority's reasoning totally ignores the teachings of that case; namely, that "the statutory mandate [is] to make a determination of professionalism on the basis of work performed" rather than the individual worker's qualifications. That this is so is obvious from a reading of that case in its entirety.

²⁷ Some of America's great lawyers who did not attend formal law schools include Abraham Lincoln, Chief Justices John Marshall and Salmon P. Chase, Daniel Webster, and Clarence Darrow.

of Texas. This form of joint endeavor between school of journalism and newspaper is very much like that which has long existed between schools of medicine or nursing and hospitals, or between university schools of education and local elementary or high schools. In all of these situations, students are afforded an opportunity to supplement their theoretical classroom education by actual experience in their chosen professions. The growth of such internship programs for journalism students is a further example of the development that journalism is a recognized profession. I reject the argument that journalists lack professional status under our Act because they, unlike doctors, lawyers, nurses, teachers, etc., are not required to pass a state imposed examination and are not licensed, or because they do not belong to professional societies which restrict membership to those who meet their standards. Such licensing requirement would, in my opinion, be unconstitutional under the First Amendment.²⁸ Nor is the journalist's professional status impaired because some newspaper writers are inept, inaccurate, or irresponsible. Sad to state, one finds similar deficiencies in other professions.²⁹

Nor is "advanced knowledge" for a professional journalist limited to journalism *per se*. Indeed, as is shown by the wide range of complex and technical subjects and events which journalists must regularly assess and communicate to the public, advanced knowledge in other specialized fields, such as economics, politics, science, literature, and the humanities, coupled with an ability to write for easy comprehension, compels the qualification—or recognition—of journalists for professional standing under our Act. One need only read *Future Shock*³⁰ or, indeed, any daily metropolitan newspaper, to know that the journalist must have a vast and diversified knowledge of a myriad of disciplines to observe,

²⁸ *Associated Press, et al. v. United States*, 326 U.S. 1, 20 (1945). Mr. Justice Black, writing for the majority, said that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . . Freedom to publish means freedom for all and not for some." Similarly, in *Liberty Lobby, Inc. v. Drew Pearson, et al.*, 390 F.2d 489 (C.A.D.C., 1968), the court affirmed that the First Amendment "protects the free expression and exchange of ideas regardless of their merit because this is considered imperative to open and 'robust debate' on matters of public interest."

²⁹ I fully agree with my colleagues that a "professional" employee under Sec. 2(12) of the Act must be one who performs professional work. Thus, I would have no difficulty in finding that a doctor, a lawyer, or even a journalist who is working as a production or maintenance employee in a factory is not a "professional" employee, but part of the production and maintenance unit.

My colleagues assert that I have failed "to distinguish between 'professionals' within the meaning of our Act and the term 'professional' as used to denote a person or persons doing admirable and challenging work." In response to that, I shall only quote Gertrude Stein who said "A rose is a rose" and under the facts in this case a professional is a professional.

³⁰ Alvin Toffler, *Future Shock*, Random House (1970).

understand, and explain intelligently, in words the average reader can understand, the ever-changing events governing our lives which occur every day around the world. It would indeed be archaic and unrealistic to believe that the work of the journalist can be performed without the "advanced knowledge" which the Act requires of "professional employees."

Finally, and perhaps most significantly, journalists and their publishers have a unique responsibility which is not shared by any other profession. The paramount importance of a free press was recognized among the American colonies long before the Constitution was envisioned. Thus, in 1737, James Alexander, then editor of the colonial *New York Weekly Journal*, wrote, "Freedom of speech is a principal pillar in a free government. When this support is taken away, the Constitution is dissolved."³¹ Alexander was one of the principals in the saga of John Peter Zenger whose trial and acquittal on August 4, 1735, was the first step toward establishing freedom of the press in America.³² The Zenger case guaranteed for the first time the right of the people to know—through newspapers, periodicals, and pamphlets—what was going on within their Government; it freed them to engage in open political discussions and debates; and it made public opinion a powerful factor in the conduct of Government affairs. The framers of our Constitution recognized their indebtedness to the Zenger case.³³ Indeed, so cherished and deep rooted was the belief that a democratic form of government cannot exist without a free press that the Founding Fathers in 1791 deemed it essential to guarantee, in the First Amendment to the Constitution, that "Congress shall make no law . . . abridging the freedom of speech or of the press."³⁴

The continuing importance of the journalist's role in informing and educating the public and encouraging and promoting open debate upon all issues affecting the citizenry cannot be overstated. To the ex-

tent that we enjoy the blessings of liberty in a democratic society today, a primary debt of gratitude must go to the journalists, the reporters, columnists, newswriters, editors, and their publishers who have battled on the people's behalf to keep the free press from, and untrammelled by, Government interference.³⁵ Explaining the importance of the journalist's role, Mr. Justice Black, concurring in the *Pentagon Papers* case,³⁶ said:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . In my view, far from deserving condemnation for their courageous reporting, . . . [the newspapers involved] and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

In a similar vein, Judge Skelly Wright, concurring in the *Liberty Lobby* case,³⁷ said:

The public has an interest in knowing who is influencing or attempting to influence their public officers, for what purpose, the means adopted to that purpose, and the results achieved. *And the press has a solemn obligation to exercise its First Amendment right to keep the public informed in an area so vital to the democratic process.* [Emphasis supplied.]

In addition to the foregoing well-established constitutional principles, it must be remembered that the employees here in issue are not engaged in manufacturing nuts and bolts and a newspaper is not a can of tomato soup. The "product" with which the employees deal is the promotion of truth. As Mr. Justice Frankfurter, concurring, so aptly and cogently stated, in *Associated Press, et al. v. United States*, 326 U.S. 1, 27-28 (1944):

³⁵ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited therein.

³⁶ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971). See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-492 (1975); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), dissenting opinion of Justice Brennan.

³⁷ *Liberty Lobby, Inc. v. Drew Pearson, et al.*, 390 F.2d 489, 492 (1968).

³¹ Vincent Buranelli, *The Trial of Peter Zenger*, New York University Press, Inc. (1957), p. 141.

³² *Ibid.* Zenger, a German immigrant printer who became publisher of the *New York Weekly Journal*, was accused of "seditious libel" for publishing articles exposing and criticizing the corrupt administration of New York's Colonial governor, Colonel William Cosby. At that time, 1735, truth was no defense against libel. Indeed, "the greater the truth, the greater the libel" was the accepted legal principle. Andrew Hamilton, a lawyer from Philadelphia, defended Zenger and secured his acquittal by the jury and upon the novel theory that freedom of the press is a basic need of a free society and that truth is a defense to libel. See also Livingston Rutherford, *John Peter Zenger: His Press, His Trial, and a Bibliography of Zenger Imprints*, Dodd, Mead & Company (1904).

³³ Gouverneur Morris pronounced that "The trial of Zenger in 1735 was the morning star of that liberty which subsequently revolutionized America." *Ibid.*, p. 63.

³⁴ In fact, Thomas Jefferson once said, "Were it left for me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

But in addition to being a commercial enterprise, it [the Associated Press] has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes.

To take the position that persons applying the breadth of knowledge and understanding that is essential in performing these vital functions are performing only routine, nonprofessional skills is ludicrous on its face. The broad spectrum of knowledge, the ability to probe into the meaning of an event, and the ability to write clearly and concisely in newspaper style are the essence of professionalism exercised by employees who, as reporters, editors, columnists, and political cartoonists, carry the constitutional

burden of keeping the citizens informed on all manner of subjects around the world affecting their lives. There is no question in my mind, and I would find, that they meet the statutory definition of "professional employee."³⁸

³⁸ Contrary to Member Jenkins' view, I am not persuaded that the record herein contains sufficient evidence to establish conclusively that the Employer's editors, editorial writers, and columnists are "primarily management related" employees. Indeed, none of the parties contended that these employees are managerial, and there is not a scintilla of evidence that either the editors or the columnists participate in management decisions or that they have a role in formulating management's editorial policies. There is some evidence that the editorial writers sit on the editorial board which formulates the Employer's editorial policy, although the record does not disclose the extent, if any, of their actual participation in the policymaking process. It is also possible, although not contended by the parties, that the editors possess and/or exercise some supervisory authority over staff writers and/or the copy editors. There is no evidence, however, that columnists or editorial writers possess or exercise such authority. Nevertheless, I would agree with Member Jenkins' view that if the editorial writers and the editors are in fact managerial and/or supervisory employees, they should, of course, be excluded from the unit. *N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267 (1974). In light of the inadequacy of the record on this issue, however, I would allow the editorial writers and editors to vote subject to challenge so that their status can be resolved in a postelection proceeding.