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Walt Disney Parks and Resorts, U.S., Inc. *and* American Guild of Variety Artists Petitioner. Case 21–RC–306324

September 11, 2024

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On July 21, 2023, the Regional Director issued a Decision and Direction of Election in which he concluded that the petitioned-for specialty performers do not share a community of interest with the employees in the existing unit and that a self-determination election accordingly is not appropriate; he instead directed an election in a standalone unit of specialty performers. In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, on August 25, 2023, the Petitioner filed a timely request for review, contending that the specialty performers share a community of interest with the employees in the existing unit and that the specialty performers should have been given the opportunity to vote on whether to join the existing unit. The Employer filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Petitioner's request for review is granted as it raises substantial issues warranting review. Having carefully considered the entire record, including the request for review and the opposition, we find that the specialty performers share a community of interest with employees in the existing unit. Accordingly, we reverse the Regional Director and conclude that the specialty performers should be given the opportunity to vote on whether they wish to be included in the existing unit.

I. PROCEDURAL HISTORY

The Petitioner represents an existing bargaining unit of performers who work for Walt Disney Parks and Resorts, U.S., Inc. (the Employer) at Disneyland Resort in Anaheim, California. On October 31, 2022, the Petitioner filed a petition seeking a self-determination election to ascertain whether the Employer's specialty performers wish to join the existing unit. The Employer contended that a self-determination election is not appropriate because the specialty performers do not share a community of interest with the performers in the existing unit. On July 21, 2023, the Regional Director issued his decision in which he concluded that the specialty performers do not share a community of interest with the existing unit members and that, therefore, a self-determination election is inappropriate. The Regional Director determined that the Petitioner could, however, proceed to an election to represent the specialty performers in a standalone unit. The Petitioner prevailed in the election, and, in the absence of objections or determinative challenges, the Regional Director issued a Certification of Representative on August 22, 2023. The Petitioner then timely filed a request for review, and the Employer filed an opposition.

II. FACTS

Disneyland Resort is composed of two individual and separately ticketed theme parks, Disneyland and Disney California Adventure (DCA). Disneyland and DCA are connected by an esplanade that takes approximately 10 minutes to traverse. The Petitioner represents an existing unit of performers which, according to the unit description in the most recent collective-bargaining agreement between the parties,[1] includes "singers, ice skaters, dancers, comedians, chorus and principal/featured performers, acrobats, exotics, and circus performers." According to a Side Letter of Agreement executed by the parties in 2020, the existing unit also includes the classification of high intensity stunt performer. The performers in the existing unit perform in shows throughout Disneyland Resort, including *The Musical Tale of the Lion King*, *Disneyland Forever* (the nighttime fireworks show), *Castle Fantasy Faire*, the *Dapper Dans*, and *Tomorrowland Terrace Dance Party* in Disneyland; *Avengers Assemble* and *Spider-Man Encounter* at DCA; and *Doctor Strange*, *Guardians of the Galaxy*, *Citizens of Buena Vista*, *Sarge and the Green Army Men*, and *First Officer* at unspecified locations within Disneyland Resort.

The petitioned-for specialty performers perform in a show called *Fantasmic!*, which takes place on Tom Sawyer Island in Disneyland. At the time the petition was filed, none of the cast members in *Fantasmic!* were represented by the Petitioner. The show lasts approximately 27 minutes and runs twice a night, at 9 and 10:30 p.m. It runs 7 days a week during busy seasons (such as the summer and winter holidays) and from Friday through Sunday at other times. The show stars Mickey Mouse and involves both special effects (such as lights and projections on water) and live performers on boats. The boats sail past the audience while the cast members on the boats perform scenes related to classic Disney movies, such as *The Lion King*, *Beauty and the Beast*, and *The Jungle Book*.

The petitioned-for specialty performers perform on the pirate ship *Columbia*, which is designed to look like the *Black Pearl* ship from Disney's *Pirates of the Caribbean* movie. The *Columbia* passes by the audience approximately 10 minutes into *Fantasmic!* During the ship's pass, which lasts about 3 and 1/2 minutes, five specialty

[1] As of the hearing, held December 6–9, 2022, the most recent collective-bargaining agreement was effective from January 31, 2018, through January 30, 2023.

performers perform on the *Columbia*: one as Captain Jack Sparrow; one as Lizzie; and the others as Pirates One, Two, and Three. Jack and Lizzie lip sync to prerecorded dialogue while embodying the mannerisms of their characters, and all five specialty performers perform various acrobatic activities, including rappelling down, climbing up, and swinging on ropes; hanging upside-down; swinging over the water on the side of the ship; doing "slides for life;"[2] engaging in choreographed swordplay; being catapulted into the air on bungee cords; bouncing on trampolines and diving boards; running on highwires; and performing "flights," which entail being lifted by a pulley system. The specialty performers also perform general choreography such as pretending to be stabbed or kicked, flailing helplessly, and executing generic "pirate choreography." For certain parts of the performance, the specialty performers do not use safety gear.[3] During the show, two stunt technicians work with the specialty performers to coordinate and assist with the performance.

Before the show, the specialty performers clock into the Wishes Building, an area of Disneyland that is not accessible to the general public, around 7 or 7:30 p.m. The specialty performer acting as lead for the night checks in with the stage manager, while those performing the roles of Jack and Lizzie go to hair and makeup. Then, all the performers travel to Tom Sawyer Island and board the *Columbia*. They have approximately 45 minutes to warm up before the performance begins. During this time, the specialty performer acting as lead for the night sets up some of the performance apparatuses on the boat. Both the lead and the other specialty performers conduct safety inspections of the equipment on the boat before each performance. Between shows, the specialty performers stay together on the *Columbia* and reinspect the show elements for the second show. After the second show, they return to the Wishes Building to clock out.

Regardless of actual worktime, Pirates One, Two, and Three are paid a minimum of 5 hours per shift. Lizzie and Jack are paid a minimum of 5-1/2 hours per shift. (The additional minimum is due to the time spent in hair and makeup.) The lead for each night is paid a minimum of 8 hours per shift. Specialty performers are paid between $25 and about $34 per hour and are considered part-time employees. Operations Manager Chris Jakwerth testified that the existing unit also includes casual and/or part-time employees. Most of the specialty performers have day jobs, such as working as an accountant or doing stunt work in other live shows outside of Disneyland Resort,[4] in TV productions, or in films.

The internal job posting for specialty performers states that they must have "gymnastic abilities and experience in the following: rope climb (30'), high falls (30'), slide for life, rope swings, high wire, mini-tramp and gymnastics bungee." The job requirements also include live stage experience and willingness to work in all weather conditions. Those applying to work as a specialty performer on *Fantasmic!* must submit a stunt reel, headshot, and resume; those who are called back for an audition are expected to climb a rope without the use of their lower bodies, execute a rope swing, execute a slide for life, perform some trampoline work, carry out swordfight choreography, and read a few lines of dialogue for either Jack or Lizzie. The four specialty performers who testified at the hearing have backgrounds in gymnastics; two also have backgrounds in martial arts, although that is not a requirement of the position.

Three of the specialty performers who testified at the hearing worked on other shows at Disneyland before *Fantasmic!* For most of those shows, the specialty performers worked in classifications not in the existing unit (nor otherwise represented by the Petitioner). In 2015, however, one of the petitioned-for specialty performers performed in *Aladdin: A Musical Spectacular* (*Aladdin*), in which the entire cast was represented by the Petitioner. The *Aladdin* show, which has since been discontinued, lasted approximately 45 minutes and was performed at the Hyperion Theater in DCA. The specialty performer who was in *Aladdin* stated that her roles in *Aladdin* involved singing, dancing, tumbling, and face/body acting. The show also included some stage combat and work with harnesses or wires, such as when Aladdin performed a flight across the stage, and when Jafar was hoisted onto the stage in a giant snake puppet.

The specialty performers who testified indicated that they do not usually interact with other cast members in *Fantasmic!* or with any of the other performers in the existing unit. In this regard, Steve Rosen—the Petitioner representative who manages the existing unit and negotiated the most recent collective-bargaining agreement—testified that it is unusual for unit members performing in one show to interact with unit members performing in other shows, because many performers in the existing unit perform in only one show at a time. Operations Manager Jakwerth agreed that, as a general matter, performers in the existing unit do not interact with other unit members

[2] A slide for life is a slide down an anchored rope from one point to a lower point. When executing a slide for life, the specialty performers use a circus loop (a safety precaution that keeps a performer's hand secured to a rope) on the rope and brake using their hands.

[3] For example, Pirate One bounces off a diving board and swings over the water on the side of the ship using only his grip strength to hold onto the rope. If he loses his grip, he will fall into the water, and the show will have to be stopped for safety reasons.

[4] Most notably, more than three of the petitioned-for specialty performers have previously performed in stunt/stage fight shows at Knott's Berry Farm (another nearby amusement park), including the *Wild West Stunt Show* and/or *The Hanging*. At least three of the high intensity stunt performers in the existing unit have previously performed in those shows as well.

(apart from those who are performing in the same show) in the course of their duties.

Although the existing unit includes performers in a wide variety of shows and performances, the evidence at the hearing focused mostly on the high intensity stunt performers in the *Avengers Assemble*[5] show, which is performed at the Avengers Campus section of DCA. *Avengers Assemble* takes place on the outside of a building designed to look like the Avengers' headquarters, with the audience standing at street level, about 30 feet away. The premise of the show is that superheroes Black Widow and Black Panther are fighting three villains (Taskmaster, Task Force Male, and Task Force Female), who are attempting to steal Vibranium[6] from the Avengers. The high intensity stunt performers perform actions such as rappelling down and climbing up the building using harnesses; performing a "ratchet pull" where the high intensity stunt performer is yanked backward through the air with a harness; and engaging in tightly choreographed fight sequences, involving both weapons and hand-to-hand combat. As with *Fantasmic!*, stunt technicians help to set up the show and assist with stunts.

There are six performances of *Avengers Assemble* throughout the day. Nineteen high intensity stunt performers, all represented by the Petitioner in the existing unit, cover the performances throughout the week. Each character is represented by one full-time performer, who works 4 days a week, and by one part-time performer, who works 2 or 3 days a week. The remaining performers are substitutes, working about 1 or 2 days a week. All high intensity stunt performers are paid a minimum of 8 hours per shift and earn $33.62 per hour. They generally clock in at 9 a.m. and clock out at 4:30 p.m. Each day, one high intensity stunt performer is designated as the stunt captain, who oversees the safety of the stunts happening in the show and uses a checklist to check the integrity of the safety gear. The high intensity stunt performers generally clock in at DCA, but they can clock in at Disneyland. After clocking in, they have about 15 minutes to warm up before they perform a "fight call"—in which they run the full show—to get used to their stunt partners for the day. Finally, they head to the green room to get ready, which includes putting on their costumes (for everyone) and make-up (for Black Widow only).

The job description for high intensity stunt performers requires "previous theatrical stunt experience and training, ability to uphold Character Standards, [and] skills in acrobatics or gymnastics." It also states that high intensity stunt performers "must be able to complete the required strength test," must have the "ability to retain acrobatic choreography and creative direction in a timely manner," and "must maintain strength and skill level required for the show." Applicants must submit a stunt reel, and callback auditions involve a choreographed fight with a bo staff,[7] doing squats and pushups, and performing lines of dialogue.

The one high intensity stunt performer who testified at the hearing has a background in gymnastics, as well as in boxing and karate. She has worked in several Petitioner-represented shows at Disneyland Resort, including *Legends of Frontierland* (an improv show with guests) in 2014; *Jingle Jangle Jamboree* (a scripted melodrama with minimal singing and dancing) in 2014; *Olaf's Snow Fest* (a singing and acting show) in 2014–2015; and the *Jedi Training Academy* (a scripted comedy with stage combat) from 2015–2018. This high intensity stunt performer joined *Fantasmic!* as a specialty performer in 2019, and she later started performing in *Avengers Assemble* when it first opened in June 2021.

The parties stipulated that, at the time of the hearing, there were five high intensity stunt performers in *Avengers Assemble* who had formerly worked as specialty performers in *Fantasmic!*, including the high intensity stunt performer who testified at the hearing. Two of the petitioned-for specialty performers auditioned for roles as high intensity stunt performers in *Avengers Assemble* and were not offered the positions. Operations Manager Jakwerth testified that they were not offered the positions because they did not have the skills for the roles, although he acknowledged that he had not reviewed their auditions and did not personally know what skills they lacked. Conversely, one of the specialty performers who was not offered a role in *Avengers Assemble* testified that she was not given a reason for why she did not get the position and that she would be "surprised" if it was because she did not have the necessary skills, as she was capable of performing all the stunts in the Black Widow part.

Both the specialty performers and the high intensity stunt performers bear some risk of injury when performing in *Fantasmic!* and in *Avengers Assemble*. Both *Fantasmic!* and *Avengers Assemble* have multiple safety checks throughout the show: if the performers indicate that they are not ready to perform a specific action, or if there is a problem at the last minute, there are contingencies so that they can perform alternative movements. The specialty performers and high intensity stunt performer who testified all stated that, when performing in both *Fantasmic!* and *Avengers Assemble*, they need to carefully time, perform, and coordinate their actions with the other performers to avoid injury. As one of many examples, one

[5] The Avengers are a group of superheroes from the Marvel Cinematic Universe, a movie franchise based on characters from Marvel comic books.

[6] Vibranium is a fictional metal. Within Marvel mythology, it is rare and has extraordinary abilities to absorb, store, and release large amounts of kinetic energy. Vibranium is associated with the superheroes Black Panther (who wears a suit of Vibranium) and Captain America (who bears a shield made of Vibranium and steel alloy).

[7] According to the Employer, "[a] bo staff is a long stick that, in the context of combat, is used for blocking, striking, trapping, and pushing amongst other things."

specialty performer explained that mistiming the "shackle drop" in *Fantasmic!* could result in the specialty performer hitting the mast of the ship and possibly suffering a concussion or whiplash.[8]

One of the specialty performers testified that, prior to the COVID-19 pandemic, the specialty performers had always been referred to as "stunts."[9] However, the Employer's stunt and special performance designer, Eric Miranda, testified that there is no industrywide definition of what qualifies as a "stunt"—usually, it is the stunt coordinator on any given production who makes that determination. Miranda provided his own definition, explaining that he looks at the risk associated with the activity. Thus, if there is a likelihood that performing the activity might result in an injury requiring medical attention, despite attempts to mitigate that risk, then Miranda considers that activity to be a stunt. In contrast, if the action creates the illusion of danger but has little actual risk to the performer, Miranda considers that activity a "specialty performance."

Miranda described the performance in *Avengers Assemble* as involving stunts due to the potential for injury—for example, a performer in *Avengers Assemble* could accidentally hit another performer while performing stage combat. In contrast, the specialty performers in *Fantasmic!* do not perform stunts, per Miranda's definition, because (in his view) they perform more "basic" athletic moves (such as climbing, bouncing, and swinging) that require athleticism and strength but are not inherently risky due to the safety mitigations in place. Miranda also testified that the Employer's hazard reports for *Fantasmic!* and *Avengers Assemble*, which he did not write but had reviewed, reflect a level of risk for both performances that is consistent with his testimony (i.e., they reflect more risk for *Avengers Assemble* and less risk for *Fantasmic!*).

In contrast to Miranda's testimony, the high intensity stunt performer who testified at the hearing stated that, in her personal opinion and based on her performance in both shows, the odds of critical injury happening due to a mistake in *Avengers Assemble* are lower than the odds of a critical injury happening due to a mistake in *Fantasmic!* The Petitioner also introduced evidence concerning injuries suffered by specialty performers while performing in and rehearsing *Fantasmic!*, including broken bones (from a failed slide for life), torn abdominal muscles, whiplash, and cuts requiring stiches. One specialty performer testified to at least seven occasions when specialty performers were injured during performances or rehearsals of *Fantasmic!*, but indicated that there were more incidents than that (although the other incidents involved less severe injuries, such as splinters and sprains). That said, Operations Manager Jakwerth testified that there have been no injuries during performances of *Fantasmic!* in the past 2 years, and none of the other witnesses rebutted that specific statement (either because the injuries discussed occurred in 2019 or earlier, or because the testimony did not establish when the injuries discussed occurred).

The record contains relatively minimal detail with respect to the content of other shows currently or previously performed by the performers in the existing unit. In the *Spider-Man Encounter* show currently performed at DCA, Spider-Man, a unit employee, performs parkour (free running), including flipping, jumping, and rolling over obstacles, climbing down walls, and hanging off ledges.[10] One specialty performer testified that Spider-Man uses harnesses and wires to perform the show. The existing unit also includes Tinkerbell's performer in *Disneyland Forever*, Disneyland's nightly fireworks show, during which Tinkerbell "flies" over Sleeping Beauty Castle on a zip line, about 130 feet in the air. Tinkerbell's pass lasts approximately one minute, and a technician assists her. Finally, in *Castle Fantasy Faire*, two comedian singer-dancers, who are represented by the Petitioner in the existing unit, perform in an old-time variety and story-time show. Petitioner representative Steve Rosen also described several past productions at Disneyland Resort in which the performers did "stunts" and were represented by the Petitioner, including the *Aladdin* show discussed above; a pirate stunt show on Tom Sawyer Island (which included slides for life and stage combat); *Aladdin's Oasis* (which included stage combat on the rooftops); *An Amazement* (which included slides for life); and *Lights, Camera, Chaos* (a stunt show with acrobatics and parkour).

The petitioned-for specialty performers in *Fantasmic!* report directly to Senior Entertainment/Entertainment Manager Jessica Lester, who is also the production stage manager (PSM) overseeing the day-to-day performances of *Fantasmic!* The specialty performers who testified at the hearing indicated that they view the PSMs as their frontline supervisors and that Lester has the authority to issue discipline. Lester reports to Area Manager Chris Smith, who reports to Jakwerth, the operations manager for entertainment. Dana Barnes, the PSM for the *Castle Fantasy Faire* show, reports to Jakwerth as well, although it is unclear whether she does so directly.[11] Jakwerth testified that he currently oversees certain shows at Disneyland, including *Fantasmic!*, *Castle Fantasy Faire*, and the

[8] According to the Petitioner, in performing the shackle drop, a "performer wears ankle straps, hooks webbing and bungees to the ankle straps, jumps backwards off a yardarm (pieces of wood on the *Columbia* that are horizontal to the masts), and hangs upside down by his or her ankles for about forty to forty-five seconds."

[9] To corroborate this testimony, the Petitioner introduced two emails from 2017 (one relating to a callback audition and the other providing the "stunt calendar" to the specialty performers) that refer to the specialty performers as being stunt performers. The specialty performers also received a different "stunt rehearsal calendar," via email, in 2019.

[10] Miranda testified that, in his view, *Spider-Man Encounter* involves stunts because Spider-Man could fall off a high ledge.

[11] Although the Employer introduced an organizational chart into the record, it shows the supervisory structure for only the high intensity stunt performers in *Avengers Assemble* and the specialty performers in *Fantasmic!* The chart does not include the supervisory hierarchy for any other performers in the existing unit.

Lion King show, and that he reports to upper-level managers on the Disneyland side of the supervisory structure. Prior to the COVID-19 pandemic, Jakwerth used to oversee all the shows at Disneyland, including the *Dapper Dans*, the *Tomorrowland Terrace Dance Party*, and *Disneyland Forever* (all of which include at least some unit performers), but he no longer oversees those specific shows.

The high intensity stunt performers report to their own PSM, who is in a reporting chain with managers who oversee productions at DCA, all the way up to Vice President of Disney California Adventure Park Brent Davies. Brent Davies reports to Senior Vice President of Operations Patrick Finnegan, which is where the Disneyland and DCA entertainment branches meet. The specialty performers and high intensity stunt performers are both five or six levels of supervision away from Finnegan.

The record contains little information about the departmental organization of the specialty performers or of the classifications in the existing unit. It appears that the petitioned-for specialty performers are in Disneyland's parade department, along with some of the performers in *Sarge and the Green Army Men* who perform in the Christmas parade (but that only the Sarge character is part of the existing bargaining unit). Some green army men, who are not in the parades department at Disneyland, work at DCA and are seemingly unrepresented. The high intensity stunt performers are in an unidentified department at DCA.

All the Employer's employees, including the specialty performers and the existing unit performers, are subject to the same employee handbook. Furthermore, all the employees go through the same initial training videos, using an Employer site called the Hub. Employees can also view paycheck stubs on the Hub or use the Cast Life phone application. All regular part-time employees are eligible for ACA Consumer's Choice, a health savings account, wellness rewards, an employee assistance program, commuter assistance, paid time off for things such as child bonding and jury duty, Disney Aspire (an educational reimbursement program), a main entrance pass, periodic complementary tickets, discounts on experiences and merchandise, and employee-exclusive events.

III. ANALYSIS

An *Armour-Globe* self-determination election[12] is the proper method by which a union may add unrepresented employees to an existing unit. The Board will direct such an election where the petitioned-for employees share a community of interest with the unit employees and where the petitioned-for employees constitute an identifiable, distinct segment that is an appropriate voting group. See *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990). The Board considers the following factors in determining whether employees share a community of interest:

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

United Operations, Inc., 338 NLRB 123, 123 (2002).

Here, there is no dispute that the petitioned-for specialty performers constitute an identifiable, distinct segment that constitutes an appropriate voting group; the only dispute is whether they share a community of interest with the existing unit performers. In finding that the specialty performers and existing unit performers do not share a community of interest, the Regional Director relied heavily on certain differences between the petitioned-for specialty performers and the high intensity stunt performers. The Regional Director found that the specialty performers and high intensity stunt performers are not functionally integrated and do not interchange with one another; that they perform different functions, using different skillsets, because they perform different shows with distinct choreography, and because the high intensity stunt performers perform "stunts" (using specialty equipment) while the specialty performers do not; and that the specialty performers and high intensity stunt performers are in different divisions of the Employer's operations, with the specialty performers operating on the Disneyland side of the organization and the high intensity stunt performers operating on the DCA side. The Regional Director acknowledged that the specialty performers and high intensity stunt performers have similar terms and conditions of employment—including the rate of pay, benefits, working environment, and the auditions process—and that the factor of supervision is neutral because the specialty performers share some third-level supervision with unit performers. However, the Regional Director concluded that these similarities are outweighed by the differences between the two groups, and that, accordingly, a self-determination election is not warranted.

Contrary to the Regional Director, we conclude that the petitioned-for specialty performers share a community of interest with the existing unit performers and therefore may appropriately be included in the unit, should they so desire.

To begin, there are two significant errors with the Regional Director's overall approach to the community-of-interest analysis. First, when analyzing the differences

[12] See *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

between the petitioned-for specialty performers and the high intensity stunt performers, the Regional Director mostly relied on cases that apply a much more stringent standard than the one that is applicable here. More specifically, the Regional Director primarily cited cases in which a nonpetitioning party contended that additional classifications must be added to the petitioned-for unit in order to make it appropriate.[13] In such cases, it is not enough for the nonpetitioning party to show that the additional employees share a community of interest with the petitioned-for employees; rather, "the test is whether the community of interest [the additional employees] share with the [petitioned-for] employees is so strong that it requires or mandates their inclusion in the unit."[14] No party has argued that this more stringent standard applies here, nor should it.[15] In self-determination cases like this one, rather, the standard is simply whether the petitioned-for employees share *a* community of interest with the existing unit employees.[16] By focusing on inapposite cases, the Regional Director gave too much weight to relatively minor differences between the petitioned-for specialty performers and the performers in the existing unit.

Second, the Regional Director erred by largely limiting his analysis to the similarities and differences between the petitioned-for specialty performers in *Fantasmic!* and the high intensity stunt performers in *Avengers Assemble*, without considering the highly relevant, additional context—namely, that the existing unit contains a diverse array of performers in many different productions. In this regard, the Board has made clear that although the diversity of an existing unit is not itself a community-of-interest factor, such diversity "may be relevant to consider generally."[17]

Turning to the individual community-of-interest factors, we find that the factors of job functions, skills and training, and terms and conditions of employment weigh in favor of including the specialty performers in the unit, and that those factors outweigh the factors that weigh against finding a community of interest.

To start, although the Regional Director misstated the test for functional integration, we agree with his conclusion that this factor weighs against finding a community of interest between the petitioned-for specialty performers and the existing unit. Contrary to the Regional Director's overly broad characterization, functional integration is present when employees must work together and depend on each other in order to accomplish their overall duties.[18] Nevertheless, the evidence here does not establish functional integration: as the Regional Director correctly observed, the specialty performers in *Fantasmic!* do not rely on performers in the existing unit[19] to put on their show; nor do unit performers rely on specialty performers.

The factors of department and contact are neutral. With respect to department, although there is some testimony suggesting that both the specialty performers and at least one existing unit employee in *Sarge and the Green Army Men* are in the Disneyland "parades" department, the record contains little evidence about the specific departmental organization of the petitioned-for specialty performers and existing unit performers. But because the existing unit contains performers in multiple departments under both the Disneyland and the DCA supervisory hierarchies, any difference in department between the specialty performers and the unit performers is entitled to less weight than it might receive in other contexts.[20] For similar reasons, we find that the factor of contact is neutral:

[13] See, e.g., *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penney Co.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992); *Executive Resources Associates*, 301 NLRB 400 (1991).

[14] *Engineered Storage Products Co.*, 334 NLRB 1063, 1063 (2001). See also *American Steel Construction, Inc.*, 372 NLRB No. 23, slip op. at 4, 6 (2022) (explaining that the Board has historically applied a heightened community-of-interest standard under circumstances where a nonpetitioning party contends that additional classifications must be included in a petitioned-for unit for the unit to be appropriate).

[15] As we explained in *American Steel*, above, "Sec[.] 9(b) of the Act states that the Board's unit determinations must assure employees' 'fullest freedom' in pursuing their rights under the Act," and the Supreme Court accordingly has observed that the Act "implies that the initiative in selecting an appropriate unit resides with the employees." 372 NLRB No. 23, slip op. at 5 (quoting *American Hospital Assn. v. NLRB*, 499 U.S. 606, 610 (1991)). These principles apply in self-determination election cases, where employees seek to join an existing bargaining unit.

[16] See *Alaska Communications Systems Holdings, Inc. v. NLRB*, 6 F.4th 1291, 1294 (D.C. Cir. 2021) ("The Board's approval of a self-determination election is contingent on, among other things, a determination that the voting group and the preexisting unit share a 'community of interest.'"); *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990) ("[A]n *Armour-Globe* election permits employees sharing a community of interests with an already represented unit of employees to vote whether to join that unit."). Compare *Engineered Storage Products Co.*, 334 NLRB at 1063 ("[C]ontrary to the [e]mployer's contentions, the fact that the jointly employed employees supplied by Tandem Staffing may share *a* community of interest with the petitioned-for employees does not mean that they must be included in the unit or that the petitioned-for unit is inappropriate.") (emphasis added).

[17] *Public Service Co. of Colorado*, 365 NLRB 1017, 1017 fn. 4 (2017); see also *MV Transportation, Inc.*, 373 NLRB No. 8, slip op. at 7 (2023).

[18] See, e.g., *MV Transportation, Inc.*, above, slip op. at 5; *WideOpenWest Illinois, LLC*, 371 NLRB No. 107, slip op. at 7 fn. 16 (2022) (citing cases).

[19] The stunt technicians—who work with the specialty performers in *Fantasmic!* and work with unit performers on other productions—are not represented by the Petitioner.

[20] See *Public Service Co. of Colorado*, 365 NLRB at 1017 fn. 4 (self-determination election appropriate where "most of the planners work in the same departments as unit maintenance employees, and all of the planners are more broadly part of the energy supply area"); see also *MV Transportation*, above, slip op. at 6 (observing that "the parties agreed to a diverse unit straddling two departments, and the unit placement of the maintenance supervisors should be assessed in the context of that diversity"). Because this is a self-determination case where the existing unit already includes employees spread across several departments, it is distinguishable from *Bergdorf Goodman*, 361 NLRB 50, 52 (2014), and *K&N Engineering, Inc.*, 365 NLRB 1392, 1394 (2017), where the Board found that petitioned-for units lacked a community of interest, in part, because the petitioned-for units did not track any of the employer's organizational or functional lines.

although the petitioned-for specialty performers do not interact with employees in the existing unit during the course of their duties, in the context of this case that fact is entitled to little or no weight given the general lack of contact between unit performers in different productions.[21]

The factors of supervision and interchange provide some support for finding a community of interest between the specialty performers and the existing unit, albeit only slightly. As the Regional Director observed, the specialty performers in *Fantasmic!* share third-level supervision with unit performers in *Castle Fantasy Faire* and the *Lion King* show in the person of Chris Jakwerth.[22] And, with respect to interchange, there are five high intensity stunt performers who used to work as specialty performers in *Fantasmic!*, which constitutes evidence of permanent interchange between the two groups. In this regard, we acknowledge that, when considering whether two groups of employees *must* be represented in the same unit, the Board usually gives less weight to evidence of permanent (as opposed to temporary) interchange.[23] However, when considering whether two groups of employees *may* be represented in the same unit, permanent interchange can support a community-of-interest finding.[24] Although there are only five examples of permanent transfers here, those five transfers are nevertheless entitled to greater weight because both productions operate with relatively small casts (approximately 16 specialty performers for *Fantasmic!* and 19 high intensity stunt performers for *Avengers Assemble*).[25] And, although there is no evidence of temporary interchange between the specialty performers and the existing unit performers in different productions, this lack of temporary interchange is entitled to only minimal weight, because, due to the nature of the existing unit's work, performers in different productions cannot easily (and do not regularly) fill in for one another.[26] Overall, the evidence of permanent interchange counterbalances the lack of temporary interchange and, on these facts, weighs slightly in favor of finding a community of interest between the two groups.[27]

Regarding job functions and skills and training, we find—contrary to the Regional Director—that these factors weigh in favor of finding a community of interest between the specialty performers and the performers in the existing unit. With respect to job functions, we observe that the existing unit comprises a diverse group of performers who (depending on the show) perform functions such as dancing, singing, performing choreography, wearing costumes, embodying the mannerisms of Disney characters, and engaging in various acrobatic and physical feats, including flights, work with harnesses, and stage combat. The petitioned-for specialty performers perform functions that are either broadly consistent with or exactly the same as the functions performed by unit members in both current productions and prior productions: the specialty performers lip-synch, perform choreography, embody the mannerisms of Disney characters, engage in acrobatics and stage swordplay, perform on heights with and without harnesses, and more. Even accepting Miranda's testimony that the specialty performers engage in "specialty performances," while the high intensity stunt performers perform "stunts" with a higher level of risk, we do not find this distinction analytically significant:[28] there is no indication that all unit performers perform "stunts,"

[21] See, e.g., *Metropolitan Life Insurance Co.*, 181 NLRB 814, 819 (lack of contact between insurance consultants and other unit employees did not support excluding the consultants from the unit where many unit classifications did not have regular contact with each other).

[22] See *Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998) ("While they do not share common immediate supervision, secondary and overall supervision is the same."); *Warner-Lambert*, 298 NLRB at 995 (observing that, although the unrepresented employees had separate immediate supervision from the represented employees, the employer had placed the represented and unrepresented employees "in one department under the same general supervis[ion]"). Further, the lack of shared supervision between the specialty performers and existing unit classifications does not necessarily negate a community of interest between the two groups, especially where the current unit performers do not share supervision among themselves. See *Southern California Permanente Medical Group*, 209 NLRB 106, 108, 109 (1974).

[23] See, e.g., *Red Lobster*, 300 NLRB 908, 911 (1990).

[24] See, e.g., *Sperry Rand Corp.*, 190 NLRB 488, 488–489 & fn. 2 (1971) (self-determination election, but not accretion, appropriate where there had been two instances of permanent interchange).

[25] Compare *Bashas, Inc.*, 337 NLRB 710, 711 fn. 7 (2002) (no significant interchange where there were 50 instances of permanent interchange among 17 different stores). We note, furthermore, that in *Bashas* the Board was evaluating whether a multifacility unit was appropriate, not whether a self-determination election was appropriate.

[26] See *MV Transportation, Inc.*, above, slip op. at 6–7 ("[W]e agree with the [p]etitioner that the lack of evidence of interchange between maintenance supervisors and included classifications is entitled to little weight given that there is no evidence of interchange between any of the included classifications.").

[27] We disavow the Regional Director's statement that interchange is a "critical" factor in the self-determination context. *Executive Resources Associates*, cited by the Regional Director, was not a self-determination case, but involved the distinct question of whether the employees at one location shared a community of interest with employees at a second location, 35 miles away; the Board observed that the lack of interchange was a "strong indicator" that employees at the second location did not share a community of interest with the petitioned-for employees, but the Board did not accord this factor any more inherent weight than the other factors. See 301 NLRB at 403. The Board, in *Executive Resources Associates*, did cite a court case that referred to interchange as a "critical factor," 301 NLRB at 403 fn. 10 (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)), but the court's actual reference in *Spring City Knitting* was to "employees who work in separate *plants*," 647 F.2d at 1015 (emphasis added), and the separate plants at issue in *Spring City Knitting* were 140 miles apart. The material facts here are simply not comparable to those of either *Executive Resources Associates* or *Spring City Knitting*. And, although interchange and supervision are "critical" factors in the Board's accretion analysis—see *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005)—the Petitioner is not seeking to accrete the petitioned-for specialty performers into the existing unit here.

[28] Accordingly, we need not reach the Petitioner's arguments that the "hazard assessments" relied on by Miranda represent hearsay and/or circumstantial evidence; that the Regional Director engaged in prejudicial error by declining to strike Miranda's testimony and by revoking the

and in fact it appears that many types of unit performers (such as dancers, singers, and comedians) do not perform "stunts". In any event, the relevant question here is whether the specialty performers perform functions that are generally similar to those of the unit performers, not whether the two groups perform completely identical or interchangeable functions.[29] And, based on the record before us, the specialty performers clearly do perform functions that are similar to those performed by the existing unit performers.

We also find that the factor of skills and training weighs in favor of finding a community of interest between the specialty performers and the existing unit performers. There are many similarities between the specialty performers and the high intensity stunt performers in *Avengers Assemble*: the specialty performers and high intensity stunt performers have similar backgrounds in gymnastics and martial arts; performers in both groups have performed stunts in television and film, and they have even performed in the same shows at Knott's Berry Farm; the job descriptions and auditions process for both specialty performers and high intensity stunt performers contain many of the same elements; and both *Fantasmic!* and *Avengers Assemble* do, in fact, require many of the same skills, as evidenced by the fact that five specialty performers have gone on to perform in *Avengers Assemble*.[30] Even assuming the high intensity stunt performers possess more specialized skills because they perform "stunts," this minor difference does not negate the otherwise significant similarity in skills between the two groups, especially in the context of an existing unit that encompasses performers with a wide variety of skills and specializations.

Finally, we agree with the Regional Director that the factor of terms and conditions of employment weighs in favor of finding a community of interest. The existing unit contains many performers who, like the specialty performers, are part-time and/or casual employees and who have the same benefits. The specialty performers also have the same hourly wage structure and general wage range as the unit performers in *Avengers Assemble*, and the two sets of performers have the same general working conditions in terms of clocking in, designating leads, going to hair and make-up, etc. All the Employer's employees, including those in the existing unit, are subject to the same employee handbook, go through the same initial training videos, and use the "Hub" website.

In sum, applying the correct standard, we conclude that there are sufficient similarities between the petitioned-for specialty performers and the existing unit performers to warrant a self-determination election. The specialty performers and the unit performers perform broadly similar functions, using broadly similar skills; there is some evidence of permanent interchange between the two groups; the specialty performers share third-level supervision with some unit performers; and the specialty performers share many terms and conditions of employment with the performers in the existing unit, including general working conditions. To the extent that there are differences between the specialty performers and the existing unit performers—most significantly, in terms of department, temporary interchange, and contact—those differences also exist *among* the performers in the existing unit, and therefore they weigh (at most) only minimally against finding a community of interest between the two groups.[31] Finally, although the factor of functional integration more clearly weighs against finding a community of interest, the overall balance of the factors nevertheless establishes that the specialty performers share a community of interest with the unit performers.

Accordingly, we shall remand this case to the Regional Director to conduct a second election. Because the specialty performers have already voted that they wish to be represented by the Petitioner, the second election need only resolve the question of whether the specialty performers wish to be included in the existing unit (as opposed to being separately represented, as they are now). If the specialty performers vote to join the existing unit, the Regional Director shall revoke the existing certification of representative for the stand-alone unit of specialty performers and shall issue a new certification adding the specialty performers to the existing unit. If the specialty performers do not vote to join the existing unit, the existing certification of representative will not be disturbed.

ORDER

The Regional Director's Decision and Direction of Election is reversed. The case is remanded to the Regional Director for Region 21 for further appropriate action consistent with this Decision on Review and Order.

Dated, Washington, D.C. September 11, 2024

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Lauren McFerran, Chairman

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Petitioner's subpoena duces tecum seeking the hazard reports; and that the Regional Director erred in deferring to Miranda's testimony.

[29] See, e.g., *IKEA Distribution Services, Inc.*, 370 NLRB No. 109, slip op. at 11 (2021) ("[T]he fact that both classifications perform the same basic function makes this factor weigh slightly in favor of finding that the maintenance technicians and power equipment technician share a community of interest."). Notably, *IKEA Distribution Services* was a case in which the employer argued that additional employees had to be included in the petitioned-for unit, and it therefore required an even higher showing of shared interests than what is required here.

[30] Although two of the specialty performers were not offered positions in *Avengers Assemble*, the testimony (as described above) does not establish that they were denied roles because they did not possess the relevant skills.

[31] See *MV Transportation, Inc.*, above, slip op. at 6.

David M. Prouty, Member

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Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD