

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

ACTIVISION PUBLISHING, INC.¹

Employer

and

**COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO**

Petitioner

Case 18-RC-289570

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of approximately 21 quality assurance functional testers (“QA testers”) employed by the Employer at its Raven Studio located in Middleton, Wisconsin. The Employer raises two main objections to conducting an election in the petitioned-for unit: (1) that the petition should be dismissed because the Employer recently implemented organizational changes impacting the QA testers; and (2) that any appropriate unit must include all Raven Studio employees, representing approximately 230 employees in over 80 job classifications. Many of the job classifications the Employer seeks to include represent different progressions in the same job—for example associate artist and expert artist. According to its Statement of Position, the Employer’s proposed unit is as follows:

All full-time and regular part-time employees in the following classifications
Animator, Artist, Associate Animator, Associate Artist, Associate Audio Designer, Associate Audio Engineer, Associate Community Specialist, Associate Concept Artist, Associate Dialog Editor, Associate Game Designer, Associate Lighting Artist, Associate Motion Capture Technician, Associate Producer (Developer), Associate Software Engineer, Associate Systems Administrator, Associate Systems Designer, Associate Technical Artist, Associate Tools Software [sic] Eng, Associate UX Designer, Audio Designer, Audio Engineer, Build Engineer, Concept Artist, Environment Artist, Environment Concept Artist, Environment Game Designer, Environment Producer (Developer), Environment Software Engineer, Environment Systems Engineer, Environment Technical Artist, Environment UI Artist, Expert Animator, Expert Artist, Expert Audio Designer, Expert Concept Artist, Expert FX Artist, Expert Game Designer, Expert Level Designer, Expert Lighting Artist, Expert Motion Capture Technician, Expert Producer (Developer), Expert Rigger, Expert Software Engineer, Expert Systems

¹ As noted in Board Exhibit 2, the parties stipulated to amend the Petition and formal documents to correctly reflect the name of the Employer as set forth above.

Administrator, Expert User Experience Designer, FX Artist, Game Designer, Junior Animator, Level Designer, Lighting Artist, Motion Capture Technician, Narrative Designer, Principal Artist, Producer (Developer), Production Coordinator, Rigger, Software Engineer, Senior Animator, Senior Artist, Senior Audio Designer, Senior Audio Engineer, Senior Community Specialist, Senior Concept Artist, Senior Expert Animator, Senior Expert Engine Engineer, Senior Expert Software Engineer, Senior FX Artist, Senior Game Designer, Senior Level Designer, Senior Lighting Artist, Senior Motion Capture Principal Artist, Senior Producer (Developer), Senior Rigger, Senior Software Engineer, Senior Systems Administrator, Senior Systems Designer, Senior Technical Artist, Senior Tools Software Engineer, Senior User Experience Designer, Senior Video Editor, Supervisor Art, Supervisor Lighting, Supervisor Systems Administrator, Systems Administrator, Systems Designer, Tools Software Engineer, UI Artist, UI Artist, Senior, User Experience Designer, UX Designer, and Video Editor employed by the Employer assigned to its Middleton, Wisconsin location EXCLUDING office clerical employees, temporary workers, contingent workers, managers, supervisors, confidential employees and professional employees, as defined in the Act.²

A hearing officer of the Board held a video hearing in this matter and the parties subsequently filed briefs with me. As described below, based on careful consideration of the entire record and relevant Board law, I find that the organizational changes implemented by the Employer do not preclude an election. I also find that the petitioned-for unit of QA testers is an appropriate unit under the Board's standard set forth in *Boeing*.³

I. FACTS

A. Employer Operations and Organization

Activision Publishing, Inc. (the Employer) is engaged in the business of developing and producing video games. Raven Studio in Middleton, Wisconsin is one of several studios operated by the Employer. Since about 2010, Raven Studio has worked

² It appears the Employer inadvertently left out QA testers from its proposed unit language in its Statement of Position. During the hearing, the Employer submitted a revised attachment to its Statement of Position. The record reflects the Employer's revisions to its Statement of Position were intended to correct certain job titles in the Employer's proposed unit, changing "Environment" to "Entry" in eight of the above classifications, and eliminate nine listed positions based on the Employer's belief that the individuals occupying those positions were supervisors under Section 2(11) of the Act. Although the Employer introduced the revised attachment to its Statement of Position into evidence, and that document was received, the Employer did not formally request to amend its Statement of Position. Generally, a party can only amend its Statement of Position with permission from the Regional Director for good cause shown, which did not occur during the course of the hearing. Regardless, the revised attachment to the Employer's Statement of Position did not change the fundamental questions presented at hearing and had no consequential effect on my consideration of the issues before me.

³ *The Boeing Company*, 368 NLRB No. 67 (2019).

on the Employer's Call of Duty titles. There are over 250 employees employed by the Employer assigned to Raven Studio. At the time of hearing, most employees of Raven Studio were working remotely due to the pandemic.

In November 2020, Raven Studio was designated as the lead studio for Activision's "Call of Duty Warzone," a free-to-play live and multi-player downloadable game under the Call of Duty franchise. Warzone is in a state of constant development at Raven Studio. Each month, Raven Studio releases a "season" to Warzone requiring changes to the game. This may involve changing the map of the game, adding new characters, and other virtual goods that consumers can purchase in the game.

In addition to Warzone, Raven Studio also works on the development of premium titles for Call of Duty. Premium titles are shipped to stores each year and based on new military simulations. Premium titles may be played as a multi-player game or a single player experience which involves playing through a narrative storyline, referred to as a "campaign."

Given these different ongoing projects, Raven Studio has a "Warzone Team" and a "Campaign Team." The Campaign Team focuses on the annual releases of the premium titles.⁴ The Warzone Team works on the monthly releases. These teams are made up of employees across all of the departments at Raven Studio. At the time of the hearing, all employees assigned to Raven Studio were working on either Call of Duty or Warzone.

The following is a listing of the departments at Raven Studio along with a short summary of their respective functions:

- Community: The community department is responsible for monitoring social media so as to be able to report any issues that arise when the public is playing the game—both technical issues as well as what is referred to as cheating and toxicity moderation. They also have certain marketing functions.
- Audio: The audio department is responsible for anything that can be heard in the game, such as the sound effects of an explosion or narrative dialogue.
- Design: The design department is tasked with developing the games' virtual environment, as well as gameplay decisions.
- Information Technology (IT): The IT department is responsible for ensuring that the Employer has the hardware, servers, internet, and proper licenses for software the studio needs to perform its work.

⁴ According to the Senior Director of Production, approximately 115 employees at Raven Studio report into the campaign team.

- Art: The art department is responsible for creating the visuals in the world of the game, including things like the natural features in the environment of the game, vehicles, and characters.
- Engineering: The engineering department is responsible for ensuring that the game is running smoothly and can support large groups of live players.
- Animation: Animation is responsible for anything that moves in the game—such as a character walking or a flag waving.
- Production: The production department ensures that tasks are appropriately assigned and performed. Production coordinates work among departments throughout the studio.

Each department is led by a director, who reports to the Raven Studio Head.

B. Overview of the Video Game Production Process at Raven Studio

The production process begins with the concept phase, led by the creative director of the project. During this stage there are multiple brainstorming sessions to flush out the concept and creative vision for the game or feature. The next stage is pre-production. In the pre-production stage, employees throughout the departments at Raven Studio create a slice of the game which provides a snapshot of what the overall game experience would feel like. If the studio gets the Employer's approval to proceed, the game moves into the production stage where Raven Studio works to develop and complete the entire game. After production is complete, the game moves to the alpha stage. By this stage, all the necessary components of the game have been completed but require polishing and perfecting to get the game ready for its final form. Following the alpha stage, the game moves into the beta stage where Raven Studio works with Sony and Microsoft to ensure that the game is functioning properly and must fix anything that is not functioning as desired. Next is the launch stage. The launch stage refers to the game being shipped to stores or, as it relates to Warzone, made available for download by consumers. The final phase is post-release. During the post-release phase, because millions of consumers are actually playing the game, additional problems or issues may arise which require attention. Those issues are then assigned to the appropriate department or to multiple departments to be addressed and fixed.

C. History of QA Testers at the Employer

Until December 2021, approximately 28-30 QA testers were employed directly by the Employer under temporary employment agreements (referred to as TEAs).⁵ The temporary employment agreements were typically limited to one-year periods, though subject to extension. Employees subject to a temporary employment agreement did not

⁵ The use of TEA agreements at Raven Studio was not exclusive to QA testers.

enjoy the same level of benefits as regular employees. Only three QA testers were considered “regular” employees by the Employer as they were not subject to temporary employment agreements. Those three regular QA testers were considered QA tester leads at the time.

In December 2021, the Employer converted many QA testers at Raven Studio from temporary employee status to regular employees. The remaining QA testers, representing about twelve individuals, were laid off at that time. At the time of hearing, there were no QA testers employed as temporary employees at Raven Studio.

The Employer informed the Raven QA testers by letter that they were converted to regular employees and that their new job title would be “QA Functional Tester II.” The Employer also informed the QA testers that they would continue to report to QA Manager Robert [REDACTED] as they had prior to the conversion process. At this same time, the converted QA testers received a raise to \$18.50.⁶ The three QA testers that were already working for the Employer as regular employees are now considered “QA Functional Tester IV,” the highest tier of QA Functional Testers. As of February 21, 2022, there were 18 employees in the classification of QA Functional Tester II and three employees in the classification of QA Functional Tester IV. No QA testers at Raven Studio were classified as QA Functional Tester I or Tester III at the time of hearing.

At the time of the conversion to regular employees, all QA testers at Raven Studio belonged to a QA group within the production department. QA Manager [REDACTED] oversaw the group of QA testers and did not supervise any other employees. The QA Manager reported to Lead Producer Trevor Traub within production. Prior to the pandemic, QA testers physically sat together in a designated area on the second floor of the Employer’s facility. Since the pandemic, most employees are performing their work remotely.

D. Announcement and Implementation of Embedding QA Testers

On January 24, 2022, the Employer announced that they would be assigning QA testers at Raven Studio to specific departments across the studio. The Employer refers to this process as “embedding.” The actual reassignment of QA testers to their departments took effect on January 31, 2022, just days after the petition in this matter was filed.

QA testers were reassigned to specific departments and teams within those departments across the studio. QA Manager [REDACTED] and Director of Production [REDACTED] made the determinations as to which departments the QA testers should be assigned. However, the assignments of QA testers to their respective departments

⁶ Only one exemplar letter explaining the changes to a converted QA tester was included in the record, though it appears from the testimony that it is likely that all QA testers converted at this time received the same pay increase to \$18.50.

appears to be a work in progress.⁷ At the time of the hearing, QA testers were placed within the engineering, art, design, animation, audio, and production departments.

The embedded model of QA testing has been in use at other studios. According to the Employer, the objective behind the embedded model at Raven Studio is that it allows the QA testers to gain expertise in their assigned department so that they may anticipate issues that may arise in the game and allows for testing at earlier stages in the game development process.

E. Duties, Requirements, and the Nature of Employee Skills and Functions

1. Duties and Minimum Requirements of QA Testers

QA testers' primary duty is to test the game in order to identify bugs and perform verification checks to confirm that bugs have been resolved. When hired, QA Testers undergo a three-day training dedicated to QA testing work.

To test the game, QA testers must play the game. Sometimes this is done as a single player in the game and other times QA testers may be part of a small or large team of QA testers within the game. Unlike a consumer, QA testers play the game with the objective of discovering glitches or bugs. This requires that QA testers play the game in creative ways that were not originally contemplated by those developing a new feature. QA testers must at times be methodical in their playing—for example, cycling through every available weapon when testing out a new feature. When doing so, QA testers may use what is referred to as a “test plan” to ensure that the testing of a given feature is comprehensive.

QA testers must properly classify the bugs they observe. For example, a bug could be related to a spawning issue, mistimed audio or overlapping user interface windows. QA testers must also detail the steps needed to reproduce the bug and may include media documenting the bug, such as video clips. The verification process involves confirming that previously identified bugs have been fixed and do not generate the same or new bugs.

Prior to the embed process, testers would often test the game later in its development, after the “package build.” Since the embed model took effect, testers are now able to test the game earlier in the process by locally loading the specific changes to be tested, instead of having to wait for the entire package build to be submitted. This allows QA testers to discover bugs earlier in the development process. However, the manner in which QA testers conduct testing remains the same.

There remains a “test team” of QA testers within the production department, consisting of seven QA testers, representing the largest concentration of QA testers in any single department. This test team handles “live” QA assignments. These are issues

⁷ For example, one embedded QA tester testified that she had been reassigned three times as of the time of her testimony.

which may not be identified until millions of consumers are playing the game in its live and multi-player format. The QA test team must often work together within the game to investigate and identify issues being identified in the live environment.

QA testers do not fix bugs they identify in the game. QA testers do not write code, animate, create art, or produce other content for the game in their role as QA testers. There is a voluntary mentorship program which provides QA testers the opportunity to create content for the game. However, the non-QA work done by the QA tester as part of that mentorship program is unpaid.

In terms of minimum requirements, the job description of Embedded Tester requires interest and experience playing video games and strong written and oral communication skills. It also requires basic PC knowledge, with knowledge of Microsoft Word and Excel. The minimum education requirement is a high school diploma and an associate degree in an unspecified technical field or equivalent work experience in a relevant field.

With respect to non-QA tester positions, the Employer submitted into the record approximately 71 job descriptions covering many of the excluded classifications. All have minimum requirements that exceed, to varying degrees, those listed for a QA tester. For example, among the excluded classifications, nearly all of the job descriptions require numerous years of experience performing the work in the listed job. There is no such requirement for QA testers. Several jobs require a bachelor's degree in a particular field of study. Still others require that the applicant submit to testing or submit a portfolio of their work. While QA testers are required to be proficient in Word and Excel, numerous excluded positions require extensive knowledge of industry-specific programs.⁸

2. Work Assignments

Requests for QA testing can be transmitted in Slack channels or via email in Outlook to the QA-request email account, along with instructions about what is needed to be checked. These are referred to as QA requests (or QARs). QARs range in size and complexity. For example, a QAR may be for a simple check requiring the work of only one QA tester or it may require a large-scale check of various weapon animations, amounting to a 25,000-part checklist and requiring the work of the entire QA team. It is unclear whether all QA testers may still be called upon to contribute to such large testing requests now that QA testers are embedded.

⁸ Many of the job descriptions of non-tester positions call into question the professional status of employees occupying those positions as defined in Section 2(12) of the Act. Because I find that QA testers constitute an appropriate unit, I need not pass on the issue of whether many of the positions that the Employer argues must be included in any appropriate unit would be "professionals" as defined in Section 2(12). If a larger unit were found appropriate, it would be necessary to identify which classifications are Section 2(12) professionals, as a self-determination election would be required pursuant to Section 9(b)(1) of the Act. *Sonotone Corp.*, 90 NLRB 1236 (1950).

Embedded QA testers may receive direction from their department lead, a production lead, or the QA manager. For example, the animation embedded tester may receive assignments from their animation lead, the QA manager, or a producer from the production department.

3. Tools used by QA Testers

QA testers frequently use a project-management application called Jira. QA testers identify bugs that must be fixed by entering them into the Jira tracking system. To enter a bug, QA testers must enter a detailed description of the bug and the steps needed to reproduce the bug. They also may attach video files of the bug to the ticket. Production assigns the ticket in Jira and triages the assignment, determining the level of priority it should be given and what employee is assigned to fix the issue. Before the Jira ticket is closed, a QA tester must test to verify the bug has actually been fixed.

QA testers use a “jet tool” to convert Jira tickets to an Excel spreadsheet. QA testers also use Microsoft Excel for their test plans and to log their progress on those plans. Additionally, QA testers may employ a “weapons tool,” which operates as a shortcut when playing the game so as to be able to quickly switch weapons on the player for testing purposes. QA testers also use open broadcast software so they can record their screen and attach videos of the bugs they report. QA testers also now use Perforce, which allows them to locally download changes to the game and test the game in earlier stages of development.

Like all employees at Raven Studio, QA testers use Slack, Outlook, and Zoom platforms to communicate with one another and with other employees at Raven Studio. QA testers may also use Confluence, which is a collaborative platform used to manage projects.

As discussed further below, QA testers may receive training on programs specific to their embedded department. However, that training process had yet to be completed as of the time of the hearing. Even after any training, it remains unclear how or to what extent testers would be using such programs.⁹

4. Training

When they are hired, QA employees, along with all other Raven Studio employees, receive the same initial onboarding training—which reviews the Employer’s history, culture, and basic personnel functions. QA testers also undergo three days of training within the QA department when hired. While it is unclear who will perform this training now that the QA testers are embedded, historically it was QA leads or

⁹ The embedded QA employee in the audio department states that she had not been informed of any changes to her job or any training she needed to complete in order to work as an embedded tester in the audio department. She further testified that she has never been told that she would need to use specific tools or software in that department. The new embedded tester job description does not list any specific programs that testers must be familiar with, other than Microsoft Word and Excel.

experienced QA employees who conducted the training.¹⁰ The QA-specific training includes things like the “bug museum” where there are examples of different types of bugs. There is no evidence that any other employees undergo QA-specific training of this nature.

With the embed model, the Employer expects the embedded testers to receive training on programs used by other classifications within their department—such as programs used to animate the game or motion capture programs. The exact nature and length of any such anticipated training remains unclear at this stage. Neither of the two embedded testers that testified had been trained on department-specific programs in the course of their work as QA testers by the time of hearing. Rather, the only training they received was on the Perforce program, used by QA testers to locally launch certain portions of the game so as to limit the testing to a targeted section.

F. Interchangeability and Contact Among Employees

QA testers do not fill-in or substitute for non-QA employees at Raven Studio. Similarly, non-QA employees do not substitute or fill-in for QA testers. QA testers, even as embeds, may interchange with one another. Embedded QA testers may be called upon to assist the production QA team or close out other issues. While there are no temporary transfers at Raven Studio, a number of QA testers have moved to permanent “professional” positions.¹¹ For example, in Quarter 4 of 2021, four QA testers transferred into other classifications within the production department. There have been no transfers from other classifications into the QA tester classification.

Even as the embed model has been implemented, QA testers continue to interact with one another. QA testers continue to have their own dedicated Slack channel and Zoom room. QA testers attend a daily QA stand-up meeting, where they review what they are working on from their assigned department and any other projects. If assigned to the Warzone project, QA testers may attend to the “QA floor call.” If assigned to the campaign team, the QA tester may participate in the QA campaign team meeting. One embedded QA tester testified that about 80-90 percent of her time was spent in the QA floor call, with the remainder spent in art department-specific meetings.

QA embedded testers, aside from their assigned department meetings, do not interact or work with every classification of employee in their department on a daily basis. QA testers’ contact with employees in other classifications varies significantly depending on the number of bugs and breaks in the game, as well as the number of features being added to the game. QA testers’ interaction with those within their department may be sporadic and fluctuate significantly depending on the project (campaign or Warzone) and the phase of that project. For example, the embedded tester from the audio department testified that her contact with audio department

¹⁰ According to the Employer, there are no longer “QA leads” since the implementation of the embed model.

¹¹ QA testers are coded as “support” by the Employer’s internal system.

employees at the time of hearing occurred on a weekly basis and was generally limited to the departmental weekly meeting and the Slack channel.

All employees, including QA testers, attend Raven Studio's town hall meetings. These meetings are held to make important announcements related to Raven Studio's projects or other issues of general concern. These meetings occur every few weeks. There are also daily evening meetings held at Raven Studio referred to as burn-down meetings, but QA testers' participation is not mandatory. The sole evidence of QA participation is that a former QA lead, a position which the Employer states no longer exists, attended the burn-down meeting. An embedded QA tester testified she had never been invited to attend the burn-down meeting.

Embedded QA testers attend department-specific meetings currently held via Zoom. These meetings are held once or twice a week. At these meetings, employees share what they are working on and the progress of their assignments. There may also be opportunities at these meetings for the team to share creative feedback on the project or assignment. The embedded testers also are included in team and department-specific emails and the department's Slack channel.

QA testers assigned to Warzone also interact with other classifications through their participation in the "play test." To conduct a play test, the Employer aims to have 150 participants fill the server so as to get the simulation as close as possible to how the game would be played in the real world. All employees can participate in play testing (even employees from outside the Raven studio), but QA testers serve a special role. If participating in the play test itself, QA testers are playing the game with the goal of finding as many issues as possible while there is a full server of players. Other employees may play the game to look at the features they have been working on so as to inform the design or development moving forward. QA testers are also responsible for recording the play test so that those developers who were unable to participate can see the feature they are working on in action. Another QA team referred to as the "beehive" must monitor the play test's Slack channel to identify issues that are being reported by any of the play test participants. When an issue is reported, a QA tester must first search prior Jira tickets to see if the issue has already been identified. If it is not, after the play test is complete, a QA tester goes in to try to reproduce the observed bug and document all the information into Jira, creating a new ticket. QA testers assigned to the campaign, while they may participate in play testing when there is downtime, do not normally participate in the daily play test. It is not entirely clear how the play tests have been impacted with the implementation of the embed model. The embedded audio tester testified that she has been participating in play tests and is responsible for writing up Jira tickets for bugs related to audio issues identified during the play test.

G. Degree of Functional Integration

QA testers are primarily responsible for testing and validating bugs in the game. This has not changed even through the embed process. Jira tickets are created by QA

testers and are left to be resolved by employees in other classifications. QA testers refer to those employees outside of their classification as “devs” for “developers.” The term developer, as used by QA testers, refers to any position that is responsible for creating content in the game, such as an artist, animator, or programmer. QA testers exclusively test the work of developers. Employees in other classifications may periodically test their own work as part of the development process. However, there is no evidence which suggests that this type of periodic testing, inherent to creation process, is equivalent to the testing performed by QA testers. The evidence reflects that the vast majority of Jira entries are initiated by QA testers.¹² QA testers do not perform bug fixes or create content for the game outside of the voluntary mentorship program, which is unpaid.

QA testers, like any employee at Raven studio, may provide creative input on the game. There are multiple outlets through which any employee, including QA testers, could express input on the game—either through feedback meetings or specific channels set up to solicit feedback on the game. However, QA testers are not required to participate in such meetings or forums.

While testing is their primary role, QA testers may perform work to support live performances or “shoots” used to capture animation for the game. QA testers support the shoot by moving boxes, stairs, and props. QA testers may even be called upon to perform in a motion capture suit as a background character for the performance.

Employees in excluded classifications have very specialized functions in the development of the game that are distinct from that of a QA tester and from other employees. Below is a sampling of positions within the excluded classifications, along with a short summary of their primary functions to illustrate the distinct and specialized nature of the work performed by employees in the excluded classifications.¹³

- Concept Artist: Concept artists must translate ideas and concepts for the game into detailed visuals by creating prototypes, concept pieces, drawings, and digital paintings.
- Rigger: A rigger must create controllers on models (such as a vehicle or a hand) so that the model may be animated in the game. According to the job description, this requires experience with computer programming and knowledge of certain types of programming language.
- Narrative Designer: A narrative designer must craft the story for the game by writing, reviewing, editing, and implementing dialogue and text for the game. This includes performing subject-matter research related to the narrative of the game.

¹² The Employer presented a summary document reflecting that 83 percent of the total bugs opened between October 1, 2021, and February 14, 2022, were opened by QA testers.

¹³ No employee in any of the excluded job classifications was called to testify at the hearing. The description of their function is based on the job descriptions entered into evidence or testimony from others as to their role.

- Lighting Artist: A lighting artist is dedicated to all aspects related to the lighting in the game. This includes working on where to locate the sun in the sky or the placement of shadows throughout the game.
- Artist: An artist creates visual content in the game. However, within the classification of artists, there are numerous specialties. For example, a foliage artist is dedicated to creating the plant life within the game whereas a prop artist would create any props used by characters in the game.

H. Common Supervision

Prior to the embedding of QA testers within departments, all QA testers were direct reports to QA Manager [REDACTED]. Under the embedded model, QA testers now have a dual reporting system. Embedded QA testers will report to a supervisor or lead within their embedded department and continue to report to QA Manager [REDACTED]. No other employees report to [REDACTED]. [REDACTED] will handle discipline of any QA tester. [REDACTED] will also handle QA testers' requests for time off as well as conduct performance evaluations for QA testers, though it is anticipated those evaluations will be done jointly with the department lead of the embedded tester. It is anticipated that [REDACTED] and a representative from the department where the job will be located will sit in on future interviews with QA testers. It is not yet clear what proportion of the work performed by QA testers will be coming directly from the department where they are embedded, but some of their work assignments may continue to come from [REDACTED].

I. Terms and Conditions of Employment

1. Common to All Employees

All Raven studio employees have the same benefit package for medical care, dental insurance, disability insurance and 401(k) plan, among other benefits. All Raven Studio employees are subject to the same Employer handbook.

2. Pay

QA testers are paid hourly. Raven Studio has a range of pay for each job classification, called compensation bands, which is set by the Employer and which represents their yearly compensation. Presently there are four separate QA tester positions with their own compensation bands: QA Functional Tester I, QA Functional Tester II, QA Functional Tester III and QA Functional Tester IV.¹⁴ The bands for QA testers are as follows:

| | |
|--------------------------|----------------------|
| QA Functional Tester I | \$27,500 to \$44,000 |
| QA Functional Tester II | \$31,900 to \$51,000 |
| QA Functional Tester III | \$37,600 to \$60,200 |
| QA Functional Tester IV | \$43,400 to \$69,400 |

¹⁴ As noted above, at the time of hearing, there were no employees in the position of QA Functional Tester I or III.

The evidence reflects that QA Functional Testers II received a pay increase to \$18.50 when they were converted from temporary employees to regular employees in December 2021. This would put the vast majority of QA testers at \$38,430 annually, which is well below any other position's listed minimum salary range. QA Testers IV earn more hourly, but the exact amount at the time of the hearing is unclear.

The maximum earning potential for QA testers according to the compensation bands is near or below the minimums listed for many of the excluded classifications. With the exception of QA Functional Tester IV, QA testers are the lowest paid employees at the Employer. Only one other position (Entry Game Designer) has the same pay band listed as a QA Functional Tester IV, but the actual pay of employees in those positions at Raven Studio is unknown. All other classifications at the Employer have a minimum level at least \$5,000 above the QA Tester IV minimum.

Many of the compensation bands are significantly higher than the rate listed for QA testers. For example, approximately 48 of the excluded positions have a minimum compensation equal to or higher than \$69,000. That is \$37,100 more than the minimum listed for QA Functional Testers II and \$25,600 more than the minimum listed for a QA Functional Tester IV. Approximately 17 of the excluded classifications have a minimum starting salary between \$85,000 to \$94,5000. Nine of the excluded classifications have a minimum listed at \$101,300 or higher, with maximums listed between \$162,000 and \$234,800.

Many of the job classifications that the Employer contends should be included in the unit are not paid hourly, but rather paid on a salaried basis. Nearly all of those paid on a salaried basis are considered by the Employer to be exempt under the Fair Labor Standards Act. The following positions are paid on a salaried basis:¹⁵ Software Engineer; UX Designer; Tools Software Engineer; Build Engineer; Senior Game Designer; Senior Systems Designer; Senior Lighting Artist; Senior Artist; Senior Animator; Senior Tools Software Engineer; Senior Technical Artist; Senior User Experience Designer; Senior Audio Designer; Senior Concept Artist; Senior Producer (Developer); Senior System Administrator; Senior Level Designer; Senior FX Artist; Senior Audio Engineer; Expert Game Designer; Senior Software Engineer; Expert Audio Designer; Expert FX artist; Expert Animator; Expert User Exp. Designer; Expert Motion Capture Technician; Senior Expert Engine Engineer; and Principal Artist.

QA testers, like other Raven Studio employees, are eligible for a quarterly bonus program. It is unclear from the record if the QA testers' bonus is equivalent to that of other employees in the studio. All Raven Studio employees are eligible to receive swag like shirts or credits to spend at the company's store. Like all regular employees, QA testers are also eligible for what is referred to as "crunch perks." This benefit is given to employees to cover meal expenses when required to work overtime.

¹⁵ There are additional currently unfilled positions that are salaried. Those positions include: Expert Concept Artist; Expert Level Designer; Expert Lighting Artist; Expert Systems Administrator; Senior Video Editor; and Senior UI Artist.

3. Shifts

Raven Studio employees' core hours are 9 a.m. to 5 p.m., Monday through Friday. The hours may fluctuate depending on the work and it is unclear how often that occurs.

4. QA Avatar

There are no uniforms at the Employer, though QA testers are assigned a Raven QA avatar. QA testers were expected to use that avatar so as to be quickly identified as part of Raven QA. It is unclear whether this expectation will remain now that QA has been embedded within different departments. No other departments use department-specific avatars.

5. Employer's Facility

There was no finalized plan to return to the office as of the time of the hearing. However, once that occurs, embedded testers will sit with their assigned departmental team. QA testers are not required to use a particular break room or conference room, though prior to the pandemic they typically used the second-floor break room and the conference room closest to where they were seated.

Not all of Raven Studio employees work out of the Middleton facility, as some employees are permitted to work remotely on a permanent basis. There are currently no permanently remote QA testers.

J. History of Collective Bargaining

There is no history of collective bargaining at Raven Studio.

II. ANALYSIS

A. The Employer's Organizational Changes Do Not Require Dismissal of the Petition.

In its brief, the Employer argues that the Petition must be dismissed under what it refers to as a "workforce in flux" doctrine. Alternatively, the Employer argues that I must give deference to its "anticipated structure" once the transition to an embedded model of QA is complete. Board law is clear that dismissal of the petition is not appropriate in the circumstances presented by this case. Furthermore, deference to an anticipated model of organization is not possible or appropriate for reasons I describe below.

When a petition is filed, the Act directs the Board to investigate the petition. If a question of representation exists, the Act mandates that the "Board shall direct an election and certify the results thereof." The Board has recognized a narrow exception to this mandate. The Board will dismiss an election petition, even though a question concerning representation exists, when cessation of the employer's operations is

imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business. See, e.g., *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4 (2016); *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-647 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973). The party asserting an imminent cessation of operations bears the burden of proving that cessation is both imminent and definite. *Hughes Aircraft Co.*, 308 NLRB at 83. In this case, there is no evidence suggesting that the Employer intends to cease its operations, sell its operations, or fundamentally changes the nature of its business.

The Employer's reorganization of QA testers is simply not comparable to those situations where the Board has found that an election "will serve no purpose." *Retro Environmental*, 364 NLRB No. 70 (2016), slip op. at 6. None of the cases cited by the Employer suggest that dismissal of the petition is appropriate. Rather, all cases cited by the Employer relate to the cessation of an employer's operation or the elimination of the petitioned-for job in its entirety.¹⁶ Such circumstances are not akin to the Employer's reorganization of QA testers into different departments where the QA testers continue to perform the same work and serve the same primary function as they did prior to the embedding process.

The Employer further argues that even if the petition is not dismissed, I am compelled to look into the future and view all the facts from the perspective of a "fully implemented embedded testing model." The Employer cites to no Board cases which support this proposition. As a practical matter, I cannot do so because the record is not clear about what a "fully implemented embedded testing model" means for QA testers. While there was conjecture about the future role of embedded QA testers, that was not corroborated by what embedded QA testers have been told about their new roles, their experiences as of the time of hearing, or the Employer's job description for embedded testers. I cannot speculate on the future of embedded QA testers in a process that by all accounts is still being worked out. Instead, I will base my decision on the evidence of embedded QA testers' reality.

In conclusion, I reject the Employer's contention that the petition should be dismissed. There was no evidence that QA testers are being eliminated or that their role would fundamentally change with the embed process. Even as newly embedded QA testers, I find that there is sufficient evidence about their current roles which allows me to decide the appropriateness of the unit without having to rely on speculation about

¹⁶ *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992) (employer's imminent cessation of its security operations through subcontracting permits dismissal of the petitions seeking to represent the employer's security personnel); *Martin Marietta Aluminum, Inc.* 214 NLRB 646 (1974) (finding an election is not appropriate based on Employer's imminent cessation of operations); *American Bottling Co. v. NLRB*, 992 F.3d 1129 (D.C. Cir. 2021) (affirming Board's conclusion to conduct an election after the employer failed to prove that its *elimination* of a classification was certain and imminent); *Retro Environmental*, 364 NLRB No. 70 (2016) (reinstating a petition based on finding that joint employer's plans to cease operations were not imminent or definite).

potential changes that may occur in the future. The weight of the evidence simply does not support that any potential changes would fundamentally alter the QA tester position.

B. Appropriate Unit

The Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be *an* appropriate one. *Wheeling Island Gaming, Inc.* 355 NLRB 637, 637 fn. 2 (2010), citing *Overnite Transportation Company*, 322 NLRB 723, 723 (1996). “The Board’s inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends.” *The Boeing Company*, 368 NLRB No. 67, slip op. at 3 (2019). If the petitioned-for unit is not appropriate, the Board may examine alternative units suggested by the parties, or it may select a unit different from the proposed alternative units. See e.g., *Bartlett Collins Company*, 334 NLRB 484, 484 (2001); *Overnite Transportation*, 322 NLRB at 723.

Typically, to determine whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See, *Wheeling Island Gaming*, 355 NLRB at 637 fn. 2. Additionally, the Board analyzes “whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from the unit to warrant a separate bargaining unit.” *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), slip op. at 11 (emphasis in original). In making these determinations, the Board considers whether the employees: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *PCC Structurals*, 365 NLRB at 11, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002). The Board considers all the factors together, as no single factor is controlling. *Airco, Inc.*, 274 NLRB 348, 348 (1984). The Board has made clear that it will not approve of fractured units—that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556, 556 (1999).

Where, as here, a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is necessary to apply the three-step analysis set forth in *Boeing*, 368 NLRB at 2: (1) whether the petitioned-for employees share an internal community of interest; (2) whether the petitioned-for employees are “sufficiently distinct” from the excluded employees; and (3) consideration of any industry-specific guidelines. Steps one and three of *Boeing*, the requirement that any appropriate unit have an internal community of interest, and that consideration must be given to the Board’s decisions on appropriate units in the particular industry involved, reference broad principles that are generally applicable to unit determinations. Step two considers “whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *Id.* at 4 (community of interest inquiry must include

examining whether employees excluded from the unit “have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.”) (emphasis added).

Undertaking the *Boeing* three-step analysis and applying the traditional community of interest test under *PCC Structural*, I find that the petitioned-for unit of QA testers is appropriate.

1. Shared Interests Within the Petitioned-For Unit

As stated above, the first step under *Boeing*'s three-part test is identifying the shared interests among members of the petitioned-for unit. 368 NLRB No. 67, slip op at 3. The manner of identifying shared interests is the same as those articulated in *PCC Structurals*. *Id.* The traditional community of interest standard is not satisfied if the interests shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. *Id.*

All QA testers have the same basic skill set. All QA testers' main function is to test the game, identify and record bugs, and validate bug fixes. They have frequent contact with one another, including maintaining their own dedicated QA Slack channel, Zoom room, and daily QA stand-up meetings. QA testers often play the game with one another while testing. Embedded QA employees may interchange with one another and may be called upon to assist as needed outside their assigned department. Furthermore, even under the dual-reporting structure, all QA testers share the same QA manager.

QA testers generally earn less than all other classifications at Raven Studio and, while the exact number is unknown, it appears many are paid the same hourly rate. QA testers are subject to the same employment policies and work approximately the same hours. I find QA testers share an internal community of interest and that the first prong in the *Boeing* analysis has been sufficiently met.

2. Shared Interests Between QA Testers and Disputed Classifications

a. Departmental Organization

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. *Buckhorn, Inc.*, 343 NLRB 201, 202 (2004), citing *American Cyanamid Company*, 131 NLRB 909 (1961). Thus, for example, generally the Board would not approve a unit consisting of some, but not all, of an employer's production and maintenance employees. See *Check Printers, Inc.*, 205 NLRB 33 (1973). However, in certain circumstances the Board will approve a unit even though other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1289-1291 (2000). After implementation of the embed model, QA testers are now spread out over several departments within Raven Studio. However, the expectation is that embedded testers will not be exclusive to their department. Rather, embedded testers may work with other departments as required. For example, the QA tester currently embedded

within the animation department is still expected to work with the art department, the production department, and the audio department. QA testers also have a dual-reporting structure where they remain supervised by a shared QA manager, as described below. I find that this factor is neutral as to question of whether the petitioned-for QA testers share a community of interest with excluded employees.

b. Distinct Skills and Training

This factor examines whether the excluded employees can be distinguished from petitioned-for employees based on duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in the unit. Evidence that excluded employees must meet similar requirements to obtain employment, that they have similar job descriptions, that they receive similar employer training, or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603, 604-05 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Serv.*, 313 NLRB 657 (1994).

QA testers undergo a three-day training dedicated to QA testing work. No other employees must complete such training. All employees in excluded classifications have additional requirements to obtain employment that exceed those of a QA tester. For example, nearly all of the excluded classifications require certain years of experience in the job for which they are applying. There are no such experience requirements for a QA tester. Several of the excluded classifications require a bachelor's degree. Many of the excluded positions require that the employee be proficient in different programs used in the video game industry, whereas QA testers need only be proficient in Microsoft Word and Excel. Many of the excluded classifications require that the applicant provide a portfolio of their creative work, pass a test, or have experience with programming or scripting languages. There are no comparable requirements for QA testers. Overall, I find that this factor weighs strongly in favor of finding that QA testers have a distinct community of interest.

c. Distinct Job Functions

This factor examines whether the disputed employees can be distinguished from one another based on job functions. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions. *Casino Aztar*, above.

The Employer's proposed studio-wide unit at Raven Studio includes a plethora of positions—from community manager to narrative designer. There is no evidence that indicates any employees among the excluded positions are dedicated to testing the

game.¹⁷ There is no evidence that other positions are assigned to test the game or verify bug fixes. While there may be periodic instances in which employees in other classifications record a bug in Jira or test the content that they are creating, QA testers' work does not regularly overlap with those of other classifications. Likewise, QA testers do not perform the work of those outside their classification. Given the totality of the evidence on this factor, I find that QA testers are sufficiently distinct from employees excluded from the proposed unit with respect to their function and that this factor weighs in favor of finding a unit of QA testers to be appropriate.

d. Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. For example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Evidence that employees work together on the same matters, *have frequent contact with one another, and perform similar functions* is relevant when examining whether functional integration exists for community of interest purposes. *Transerv Systems*, 311 NLRB 766, 766 (1993) (emphasis added). On the other hand, if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.

All employees at Raven Studio are working on either Warzone or the latest campaign in the Call of Duty franchise. The Employer's workflow requires collaboration between various departments and each position serves an essential and necessary role in that production process. In that process, QA testers must test the game for bugs and ensure that bugs have been adequately fixed by employees in excluded classifications. Thus, in the broadest sense, the QA testers are functionally integrated into the overall process of producing video games.

However, QA testers continue to serve a separate and distinct function in the development process, which sets them apart from other classifications of employees, including those within their embedded department. Even if physically working beside an employee in an excluded classification, the work of a QA tester is distinct. If other employees are needed to test a certain feature, QA testers work with other QA testers to do so. QA testers do not assist excluded employees in taking action to fix the bug until after it has been resolved, when a QA tester must test the game to verify that the bug has been fixed. Furthermore, QA testers' contact with every employee across the over 80 classifications the Employer asserts must be included is rare or sporadic.

¹⁷ The Employer entered into evidence a job description for a "QA Engineer" which has certain QA functions at the Employer, but no one occupies that position at Raven Studio. Accordingly, I do not pass on that position's inclusion or exclusion.

Overall, I find that this factor is inconclusive based on QA testers' distinct role in the production process and the lack of evidence establishing significant contact between QA testers and employees in excluded classifications.¹⁸

e. Frequency of Contact Among Employees

In examining the amount of work-related contact among employees, it is important to compare the amount of contact employees in the unit sought by a union have with the employees the employer seeks to add to the unit. See for example, *Casino Aztar*, 349 NLRB 603, 605-606 (2007). The record established contact between all employees at Raven Studio to varying degrees. The nature and frequency of this contact varies depending on the project and the stage of development. The embedded QA testers have not yet had a significant amount of contact with those outside their classification, even within their embedded department. QA testers attend department specific stand-up meetings now that they are embedded. While embedded QA testers are expected to sit with their department when returning to work in-person, they have been working remotely and continue to interact with other QA testers through the QA Zoom room and QA Slack channel, as discussed above. Overall, I find that while there is contact between QA testers and other classifications, it has not been established that the frequency of that contact is significant. Therefore, I find that this factor is neutral as to whether QA testers share a community of interest with those in the excluded classifications.

f. Interchange

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” *Hilton Hotel Corporation*, 287 NLRB 359, 360 (1987). The Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resource Associates*, 301 NLRB at 401 (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1081)). Lack of significant employee interchange between groups of employees is a “strong indicator” that employees enjoy a separate community of interest. *Id.* at 401. Also relevant for consideration with regard to interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, “[t]he Board does not find

¹⁸ The Employer's assertion in its brief that the “Board has repeatedly recognized that quality assurance and/or quality control employees are *inherently functionally integrated with production employees*” (emphasis in original) is inaccurate. A review of the cases cited by the Employer disclose that no such definitive conclusion was ever reached by the Board. While the Board has recognized the importance of quality assurance employees to the production process generally, it does not follow that this community of interest factor has been predetermined by the Board or that quality assurance employees must be included in a larger unit. For example, in both *Lundy Packing Co., Inc.*, 314 NLRB 1042 (1994), and *Penn Color, Inc.*, 249 NLRB 1117 (1980), the Board found that quality control employees *need not* be included in the larger petitioned-for production and maintenance units. While I do not base my decision on those cases as they pre-date the *Boeing* standard, the Board's holdings in those cases demonstrate that there is no rule as it relates to quality control employees and their inclusion or exclusion from broader units.

evidence of one-way or permanent interchange particularly persuasive.” *Lehigh Valley Hospital*, 367 NLRB No. 100, slip op. at 8 (citing *Dennison Mfg. Co.*, 296 NLRB 1034, 1037 (1989); *Safeway Stores*, 276 NLRB at 949). Furthermore, the existence of permanent transfers is not as important as evidence of temporary interchange. *Hilton Hotel Corporation*, 287 NLRB at 359.

While there have been one-way permanent transfers of QA testers to positions outside of QA, there is no evidence of any other classification of employee transferring into the role of QA tester. Also, there is no temporary interchange of QA testers and employees in any other classification. I find that this factor weighs strongly in favor of finding a that QA testers share a distinct community of interest.

g. Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wages and are paid in a similar fashion (for example hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies, and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not have sufficient interchange, or work in a physically separate area. *Overnite Transportation Company*, 322 NLRB 347, 350 (1996). Similarly, sharing a common personnel system for hiring, background checks, and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corporation*, 321 NLRB at 1146.

QA testers share the same personnel policies and benefit package as the excluded employees. They also share a common core schedule with other employees. However, QA testers’ terms and conditions of employment are different from those in the excluded classifications in significant ways. First, QA testers are among the lowest paid employees at Raven Studio. Only QA Tester IV overlaps with a pay band for entry level artist—and even so, the actual pay for that position is unknown. The vast majority of QA Testers are classified as QA Functional Tester II and appear to be making \$18.50 an hour, well below the minimum of any other position. Additionally, QA testers are paid hourly, whereas many of the excluded employees are paid on a salaried basis and are considered to be FLSA-exempt by the Employer. Based on this, I find that this factor weighs strongly in favor of finding that QA testers are sufficiently distinct from the excluded employees.

h. Common Supervision

Another community of interest factor the Board considers when evaluating the appropriateness of a petitioned-for unit is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of employees’ supervisors who have the authority to hire, fire, or discipline employees (or

effectively recommend those actions) or supervise the day-to-day work of employees, including rating performance, directing, and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resource Associates*, 301 NLRB at 402. Common supervision weighs in favor of placing the employees in dispute in one unit but separate supervision does not mandate separate units. *Casino Aztar*, 349 NLRB 603, 607, fn. 11 (2007). However, the fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact, or functional integration. *United Operations*, 338 NLRB 123, 125 (2002).

Even under the embedded model of QA, QA testers are all commonly supervised by the QA manager. The QA manager is to perform any necessary discipline of QA testers. The QA manager is expected to perform the testers' evaluations in conjunction with input from the department lead of the embedded QA tester. QA testers continue to report to the QA manager with questions related to testing or validation. The QA manager is in charge of time-keeping functions for QA testers. QA testers may receive their work assignment from a number of sources—including the lead from their embedded department, the production department, or the QA manager. None of the employees in the excluded classifications are supervised by the QA manager. While QA testers are now considered “dual reports” to both their designated lead in their embedded department and to the QA manager, I find that QA testers' shared supervision under the QA manager weighs in favor of finding them sufficiently distinct from employees excluded from the proposed unit.

i. Summary

In conclusion, I find that the following factors support the conclusion that QA testers share a community of interest sufficiently distinct from the excluded classifications of employees: distinct skills and training; distinct job function; interchange; terms and conditions of employment; and common supervision. Taken as a whole, I find that these factors establish that QA testers have a meaningfully distinct collective-bargaining interest which outweighs the similarities shared with the excluded employees.

3. Industry-Specific Guidelines for Appropriate Units

There is no industry-specific guideline for video game employers.¹⁹ To the extent the Employer argues that a plantwide unit is presumptively appropriate and that Petitioner bears a heightened burden to overcome that presumption, that argument was specifically rejected by the Board in *Boeing*. 368 NLRB No. 67, slip op. at 6 (2019). It is

¹⁹ The Employer argues that I should take notice of a different employer's voluntary recognition of a union for a studio-wide unit of video game employees. The Employer's request for special permission to appeal the Hearing Officer's ruling in this regard is rejected as untimely. Nevertheless, I have reviewed the Hearing Officer's ruling as part of the entire record in this matter, and the Hearing Officer's ruling is affirmed. An agreement for voluntary recognition does not establish an industry-specific guideline and is not relevant to my determination in this matter.

well-established that “the appropriateness of an overall unit does not establish that a smaller unit is inappropriate.” *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964).

III. CONCLUSION

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.²⁰
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time QA functional testers.

Excluded: All other employees, guards and supervisors as defined by the Act.

Those eligible shall vote whether they wish to be represented for the purposes of collective bargaining by Communications Workers of America, AFL-CIO.

Those eligible shall vote as set forth in the Direction of Election below.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Communications Workers of America, AFL-CIO.

²⁰ The parties stipulated that the Employer is a Delaware corporation, with a studio located at 8496 Greenway Boulevard in Middleton, Wisconsin. During the past 12 months, a representative period, the Employer derived gross revenues in excess of \$50,000 and purchased and received goods valued in excess of \$50,000 at its Middleton, Wisconsin facility directly from points located outside the State of Wisconsin.

A. Election Details

I direct that the election be conducted by mail ballot, in accordance with the positions of the parties.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Sub-Region 30, on **April 29, at 3:30 p.m.**²¹ Voters must sign the outside of the envelope in which the ballot is returned. **Any ballot received in an envelope that is not signed will be automatically void.**

If any eligible voter does not receive a mail ballot by **May 6, 2022**, or otherwise requires a duplicate mail ballot kit, he or she should contact the Regional office to arrange for another mail ballot kit to be sent to that employee.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Sub-Region 30 office, by close of business, **4:30 p.m., on May 20, 2022.**

The mail ballots will be commingled and counted at the Sub-Region 30 office located at 310 West Wisconsin Avenue, 450W in Milwaukee, Wisconsin at **2:00 p.m. on May 23, 2022.** The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 16, 2022**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the above unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote by mail as described above.

²¹ Petitioner waived all ten days of the 10-day voter list period.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **April 26, 2022**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10

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business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: April 22, 2022



JENNIFER A. HADSALL
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 18
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Attachment.