Kansas City Repertory Theatre, Inc. *and* Kansas City Federation of Musicians, Local 34–627, A.F.M., Petitioner. Case 17–RC–12647

November 16, 2010

DECISION ON REVIEW AND ORDER[1]

BY MEMBERS BECKER, PEARCE, AND HAYES

On December 28, 2009, the Regional Director for Region 17 issued a Decision and Direction of Election (pertinent portions are attached). He found that the petitioned-for unit of musicians was an appropriate unit for collective bargaining. In determining voter eligibility, the Regional Director applied the *Juilliard* eligibility formula.[2]

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review. The Employer contends that the musicians are not eligible to vote because the requested unit consists entirely of temporary or irregularly employed casual employees who do not have any established pattern of regular employment or any reasonable or substantial expectation of continued or future employment, and thus no eligibility formula is appropriate. On May 24, 2010, the Board granted the Employer's request for review. The Employer filed a brief on review. After carefully reviewing the entire record, including the brief on review, we have decided to affirm the Regional Director's decision.

To begin, the Employer's request for review relies solely on cases that hold that temporary or intermittent employees cannot vote in an election taking place in a unit including full-time or regular part-time employees with whom the temporary or intermittent employees do not share a community of interest.[3] The cases cited by the Employer are inapposite here because all of the employees in the petitioned-for unit work intermittently, and the Employer does not argue that they do not share a community of interest with one another. The logical consequence of the Employer's argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act. Although the employees in the petitioned-for unit work intermittently, in many industries employees with little or no expectation of continued employment with a particular employer engage in stable and successful collective bargaining—for example, actors and construction workers, to name just two such groups.[4] We believe the Act vests in such employees, rather than in the Board, the decision whether they will benefit from collective bargaining. See *Management Training Corp*., 317 NLRB 1355 (1995). Accordingly, we find that the employees in the petitioned-for unit had a right to petition and the Regional Director properly processed that petition.

The only issue remaining is whether the Regional Director applied a proper eligibility formula. Here, the request for review does not argue that a different eligibility formula should be applied. Rather, the request for review merely contends that the petitioned-for unit consists of temporary employees who are not eligible to vote under any of the Board's eligibility formulas. Thus, we find that the Employer has not shown that the Regional Director's use of the *Julliard* formula was unreasonable under the circumstances presented.

For all of the above reasons, we conclude that the Regional Director applied an appropriate eligibility formula to determine whether the employees in the petitioned-for unit were eligible to vote. Accordingly, the Regional Director's Decision and Direction of Election is affirmed.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action, including the opening and counting of the ballots cast in the January 22, 2010 mail ballot election.

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

[2] *Juilliard School*, 208 NLRB 153, 155 (1973). Under this formula, all musicians employed by the Employer on two productions for a total of 5 working days over a 1-year period or 15 days over a 2-year period would be included in the unit.

[3] See *Columbus Symphony Orchestra, Inc*. 350 NLRB 523 (2007); *Wadsworth Theatre Management*, 349 NLRB 122 (2007); *Steppenwolf Theatre Co*., 342 NLRB 69, 71 (2004); *Marian Medical Center*, 339 NLRB 127, 128 (2003); and *Trump Taj Mahal Casino*, 306 NLRB 294 (1992), enfd. 2 F.3d 35 (3d Cir. 1993).

[4] Our dissenting colleague relies exclusively on *DIC Entertainment, L.P.*, 328 NLRB 660, 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001), and *American Zoetrope Productions, Inc.*, 207 NLRB 621, 622 (1973). However, in both of those cases, like here, the Board adopted eligibility formulas reasonably calculated to permit those employees to vote who shared a community of interest given the particular nature of their employment. In other words, in both of those cases, the Board issued or declined to review the issuance of a direction of election. Neither the Employer nor our dissenting colleague cites any case in which a petition for an election was dismissed solely on the grounds that the employees seeking representation were temporary employees. Moreover, in the two cases cited in the dissent, the only evidence that employees had an "expectancy of future employment" was that some employees were rehired by the employer within a reasonable period of time. Similarly here, although the Employer does not maintain a recall list, there is evidence that some employees have been hired for multiple productions and one employee was hired during more than one production season. Finally, although some musicians may work only on one production, the productions here include 25–45 performances and run approximately 1 to 2 months.

MEMBER HAYES, dissenting.

I would reverse the Regional Director and dismiss the petition seeking a unit of only the Employer's musicians. In the entertainment industry, where, as here, petitioned-for units may consist entirely of employees that have an irregular or sporadic pattern of employment, the Board devises formulas that deem eligible to vote those employees that have a "real continuing interest in the terms and conditions of employment offered by the employer." *DIC Entertainment, L.P.*, 328 NLRB 660, 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001) (quoting *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 296 (1992)). That is, employees in these circumstances are eligible to vote only if they "have a reasonable expectancy of future employment with the Employer." *American Zoetrope Productions, Inc.*, 207 NLRB 621, 622 (1973).

The evidence here fails to establish that the petitioned-for musicians have a reasonable expectation of future employment with the Employer. Rather, the evidence shows that the number of productions requiring musicians is limited and few musicians have ever performed in more than one of these productions. The Employer puts on seven to eight productions each season. During the past three seasons, it has only required the use of musicians during one production each season. The styles and skill sets required of these musicians vary from production to production. Indeed, only one musician has ever performed in more than one season. During the current season, although the Employer, for the first time, put on back-to-back productions requiring musicians, only a few musicians appeared in both productions. Moreover, the Employer lacks a single, standardized means for recruiting musicians, such as a call or hiring list of previously employed musicians. Given this minimal evidence of rehire, even those few musicians who happened to have performed during two productions this season cannot reasonably expect to work in the future for the Employer. Contrary to the Regional Director, there is thus no reason to apply an eligibility formula here.

The term "temporary employee" is somewhat confusing here. Such an employee is hired on a date certain with the understanding that the job will end on a date certain, or at least at some time in the foreseeable future. In some instances, a person may have a reasonable expectation of being hired again and again on the same temporary basis, i.e., each job period is for a limited term. That pattern of reemployment is not unusual in certain industries, including the entertainment industry. This was, in fact, the employment pattern of the "per diem" employees in *The Juilliard School*, 208 NLRB 152 (1974). In *Juilliard*, the Board stated that "the record shows that many of these employees work for periods of time which indicate repetitive employment and which permit them reasonably to anticipate reemployment in the near or foreseeable future. The Employer hires from the same labor market and some of these 'per diems' work for as long as 35 weeks. Although it uses no rehire list, we find that the Employer makes a practice of hiring employees who are experienced with the facilities at Juilliard and have proven through past performance their capacity to perform their job functions." Id. at 154.

In the factual context of *Juilliard*, a bargaining unit consisting entirely of "temporary employees" is viable, and an appropriate formula can be applied to determine who among the group of recurring hires worked often enough to be deemed eligible to vote. The temporary employees in the present case are of a different kind, however. Virtually all of the live musicians work once, for a limited time on a particular stage production, and never return to work for the Employer again. Their status is no different from temporary employees in many other industries who have no expectation of reemployment with a particular employer, no community of interests with permanent employees of that employer, and no continuing community of interest among themselves relative to that employer's workplace. I question whether parties can engage in stable and successful collective bargaining for a unit consisting solely of such employees. Thus, under these circumstances, I would dismiss the petition.

APPENDIX

DECISION AND DIRECTION OF ELECTION

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I. DECISION

For the reasons detailed herein, I conclude that the nature of the Employer's operations warrants the use of an alternative eligibility formula as set forth in *The Julliard School*, 208 NLRB 153 (1974), and pursuant to that formula, a bargaining unit of musicians employed by the Employer does constitute an appropriate unit for the purpose of collective-bargaining.

Accordingly, the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining with in the meaning of Section 9(b) of the Act:

> All musicians employed by the Kansas City Repertory Theatre, Inc. at its venues located at 4949 Cherry, Kansas City, MO 64110 and 1 HR Block Way, Kansas City, MO 64105, on two productions for a total of five working days over a one-year period, or 15 days over a two-year period, but EXCLUDING the artistic director, music director, administrative and/or managerial employees, and supervisors as defined by the Act, and all other employees.

II. ISSUE

The Petitioner seeks a bargaining unit of all musicians currently employed by the Employer for the 2009–2010 season. The Petitioner maintains that the petitioned-for employees constitute an appropriate unit through the use of the Board's traditional eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970), or the alternative formula established in *The Julliard School*, 208 NLRB 153 (1974), due to the "unique conditions" found within the Employer's industry. The Employer asserts that the requested unit is inappropriate, regardless of the eligibility formula utilized, because the petitioned-for unit consists of temporary or irregularly casual employees who have no reasonable expectation of continued employment.

At the close of the hearing the parties were invited to submit briefs on the issues raised herein.

III. OVERVIEW OF OPERATIONS

The Employer, a Missouri corporation, operates two theatres in Kansas City, Missouri at which it provides live professional theatrical performances. The Employer's Spencer Theatre is located at 4949 Cherry on the campus of the University of Missouri-Kansas City and its Copaken Stage is located in the Power & Light District in downtown Kansas City. The Employer's staff operates year-round planning and producing shows. Since at least its 2006–2007 season, the Employer puts on 7 to 8 productions each year covering a 9–1/2 to 10-month period. Each season is different from the previous one with presentations of new performances. Each production includes approximately 25 to 45 performances. In addition to its performances, the Employer also holds actor forums, meetings with creative teams, educational activities with student talk-backs with audience members, and special event nights.

The Employer has a board of directors, with an artistic director that serves as the head of the theatre. Under the artistic director are the managing director, who supervises all administrative employees, and the producing director, who supervises the production employees. The Employer utilizes anywhere between 30 to 60 employees on its production side to put on a show, depending on the size of the production. This includes, but is not limited to, directors, writers, actors, performers, stagehands, set directors, costume personnel, and backstage help.

During each performance season of 2006–2007, 2007–2008, and 2008–2009, the Employer conducted one musical production in which it hired musicians. In the current 2009-2010 season, the Employer has conducted two such musical shows. *Into the Woods* ran from September 11 through October 14, 2009. *A Christmas Story, the Musical (*hereafter referred to as *Christmas Story)*, began on November 15, 2009 and is scheduled to end on January 3, 2010. The Employer also plans on performing a third musical this season, *Venice*, scheduled to run from April 9, 2010 to May 9, 2010.

The Employer hires musicians on an "as needed" basis, because not all of its productions require the use of musicians. For example, a show might be a nonmusical production or the Employer might utilize recorded music or music provided by the show's actors. The Employer uses a number of methods in determining whether to hire musicians and which musicians to hire. The Employer has used a creative team (the individuals who created the musical piece), local auditions, recommendations from the musical director, and consultants in order to identify musicians that compliment a particular musical composition. The styles and skill sets required of its musicians varies from show to show. The Employer does not give preferences or maintain a hiring list of those musicians it has hired for previous performances. It uses both local musicians as well as musicians from around the country.

For the 2009–2010 performance season, the Employer hired musicians for *Into the Woods* and *Christmas Story* and anticipates hiring two musicians for *Venice*. The Employer hired 10 musicians to perform for the duration of *Christmas Story* until its scheduled closing date of January 3, 2010. Those musicians are Tom Aber, Stephanie Bryan, Daniel Doss, Jeff Harshbarger, Ron Hathorn, Stephen Molloy, Don Strom, Charles Wines, Sam Wisman, and Andrew Yates.[2] These individuals were hired pursuant to letters of understanding signed by each musician and the Employer's general manager. Each letter of understanding sets forth the musician's part or instrument in *Christmas Story*, the specific duration of employment for *Christmas Story* beginning November 15, 2009 and terminating on January 3, 2010, rehearsal and performance schedules,[3] and the terms and conditions of the musician's employment while employed by the Employer for that designated period of time. Of the ten musicians hired for *Christmas Story*, only Daniel Doss, Jeff Harshbarger, and Stephen Molloy have previously been employed by the Employer as a musician in one of its performances. Harshbarger and Molloy worked on *Into the Woods* from September 7 through October 11, 2009 and Doss worked on the same production beginning August 18, through October 11, 2009. Harshbarger had also been previously hired by the Employer as a musician in *A Marvelous Party* between February 22, 2008 and March 23, 2008. Although the Employer anticipates hiring two musicians for the upcoming production of Venice, it does not plan on hiring any of the current musicians performing in *Christmas Story* as *Venice* is a "hip-hop" production and will require a keyboard and drum skill set, which are a different skill set than those possessed by the musicians currently performing in *Christmas Story*. As of the date of the hearing, the Employer is considering 40 to 50 titles for its 2010–2011 season, but has not made any decisions on particular shows to be conducted, musical or otherwise. However, it does know that it will not have a repeat performance of C*hristmas Story* next season.

IV. ANALYSIS

The Board's most widely used formula for determining voter eligibility for on-call or part-time employees was set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23–24 (1970). See *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004); *Wadsworth Theatre Management*, 349 NLRB 122 (2007); *Columbus Symphony*

[2] The parties stipulated at hearing that these named individuals are not supervisors under Section 2(11) of the Act.

[3] The letters of understanding provided by the Employer at hearing in Employer's Exhibit 1 reference an enclosed rehearsal and performance schedule for *Christmas Story*. However, the schedules were not included as a part of the exhibit.

Orchestra, 350 NLRB 523 (2007). Under *Davison-Paxon*, "an employee is deemed to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Davison-Paxon* at 23–24. However, the Board has also fashioned alternative eligibility formulas to fit unique conditions of particular industries where special circumstances exist in order "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), enfd. 2 F.3d 35 (3d Cir. 1993); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001). The Board has found that "special circumstances" include irregular employment patterns, specifically within the entertainment industry. See *The Julliard School*, 208 NLRB 153 (1974) (employees were eligible to vote where they had worked on two productions for a total of 5 days over a 1 year period or at least 15 days over a 2-year period); *American Zoetrope Productions*, 207 NLRB 621 (1973) (employees worked two productions over a 1-year period); *DIC Entertainment, L.P.*, supra (two productions totaling 5 days in a single year or at least 15 days over a 1-year period).

The Petitioner takes the position that special circumstances exist here to warrant the application of the kind of formula found in *The Julliard School,* but believes the traditional *Davison-Paxon* standard is more appropriate because it would "permit optimum employee enfranchisement and free choice." Although the Petitioner believes a literal reading of *Julliard*'s 2-year standard would allow for all 10 of the current petitioned-for employees to be eligible to vote, it believes that this would unquestionably be the case under the *Davison-Paxon* formula. The Employer, in addition to its position that the petition should be dismissed because the Petitioner seeks a unit of temporary or casual employees who have no reasonable expectation of continued employment, asserts that neither *Julliard* nor *Davison-Paxon* is appropriate. With respect to *Julliard*, the Employer argues that this case is distinguishable because (1) *Julliard* involved a "degree granting, educational corporation" and not a "professional theatre; (2) *Julliard's* productions did not run for weeks at a time and involved large, highly experienced casts; (3) *Julliard* held few productions each year and each production consisted of 3 or 4 performances as opposed to the instant case where each production involves 25 to 40 performances; in *Julliard*, the union sought to represent the "entire stage department" and here it seeks only a unit of 10 musicians; (4) the unit in *Julliard* included 5 full-time employees and there are no such employees in the instant petitioned-for unit; (5) the record in *Julliard* indicated that many of the petitioned-for employees worked for periods of time which indicate repetitive employment and permitted them to reasonably anticipate future employment with the Employer; and (6) *Julliard* hired employees from the same labor market and some employees worked for as many as 35 weeks when the musicians in the current case are hired from all over the country and none of them have worked for the Employer for more than a month and a half. With respect to the use of the *Davison-Paxon* formula, the Employer submits that none of the current ten musicians would be eligible to vote because the Board excludes employees where they work on an "intermittent, sporadic basis for a temporary period of time." *Davison-Paxon* at 23.

I find that the facts of this case shows a "special circumstance" more aligned with that of *Julliard School* and that the formula set forth within that decision is appropriate and applicable. The Employer is correct that the Board has previously rejected alternative formulas in cases such as *Columbus Symphony Orchestra*, 350 NLRB 523 (2007), *Wadsworth Theatre Management*, 349 NLRB 122 (2007), and *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004). But as with every case, whether special circumstances exist and warrant a different formula than *Davison-Paxon* requires a fact-driven analysis. A critical consideration in such an analysis is the employment pattern that is the result of the length and number of relevant productions put on by the employer as well as the extent that the employer relies on on-call or per diem employees to perform its work. *Steppenwolf* at 71–72. For example, in *Columbus Symphony Orchestra*, 350 NLRB 523 (2007), an alternative formula was not found appropriate because the employer had a year-round, 46-week schedule of productions for the petitioned-for unit, involving a full-time staff alongside a complement of on-call, as-needed employees. In *Wadsworth Theatre Management*, 349 NLRB 122 (2007), the petitioned-for employees performed in at least four productions lasting 4 weeks each, in addition to other regularly scheduled weekly and special events. It is not disputed that the Employer in the instant case performs 7 to 8 productions per season with each production generating 25 to 40 separate performances. However, those numbers account for all of the Employer's productions. The productions that are relevant are those in which the Employer hired and utilized *musicians*. The record evidence established that dating back to its 2006–2007 season, the Employer has retained musicians for one musical production each season, with that number increasing to three musical shows during the current 2009–2010 season. Musicians are not hired for the season, but for single productions and can result in a varying number of actual hires. For example, ten musicians are employed for *Christmas Story* while only two are anticipated for *Venice*. In *Julliard*, special circumstances were found to exist because the employer in that case conducted relatively few events each year with three or four performances at the most and they relied predominantly on per diem employees. The spirit of *Julliard* allows for the optimum employee enfranchisement and free choice that is sought by the Board in just this type of case: an entertainment industry employer with a group of employees who, but for an irregular employment pattern, would otherwise constitute an appropriate unit for the purpose of collective bargaining. Although the Petitioner submits that the *Davison-Paxon* formula is more appropriate, I disagree. Use of the 4-hour average over the previous quarter is a more restrictive eligibility formula. While all of the petitioned-for employees are currently eligible under *Davison-Paxon*, use of that formula would serve to disenfranchise those employees whom, notwithstanding their irregular employment pattern have a real continuing interest in the terms and conditions of employment offered by the Employer. Therefore, I find that application of the alternative formula set

forth in *Julliard* is warranted because of the special circumstances created by the infrequency of its musical productions and the irregular hiring pattern of musicians. Accordingly, I find, consistent with *The Julliard School*, 208 NLRB 153 (1974), that musicians employed by the Employer on two productions for a total of 5 working days over a 1-year period, or 15 days over a 2-year period have a community-of-interest warranting their inclusion in the voting unit.[4]

[4] The testimony set forth at hearing did not establish a sufficient basis for limiting the unit to only those musicians employed by the Employer for the 2009–2010 performance season.