

**Steppenwolf Theatre Company and Theatrical Stage Employees Union, Local No. 2, I.A.T.S.E. and United Scenic Artists, Local USA-829, I.A.T.S.E., Joint Petitioners.** Case 13-RC-20942

June 18, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On April 3, 2003, the Regional Director for Region 13 issued a Decision and Direction of Election in the above-entitled proceeding. She found that a unit of all full-time and regular part-time production employees including carpenters, electricians, scenic artists, properties employees, sound employees, costume/wardrobe employees, and running crew employees, employed by the Employer, is an appropriate unit and that, applying the eligibility formula articulated by the Board in *Juilliard School*, 208 NLRB 153 (1974), part-time employees who have worked on at least two productions for a total of 40 hours during the year prior to the eligibility date or who have worked a total of 120 hours during the past 2 years are eligible to vote. She also found that the Employer's department heads are supervisors as defined in Section 2(11) of the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, Joint Petitioner Local 2 (the Union) filed a timely request for review, maintaining that the Regional Director erred in applying the *Juilliard School* eligibility formula and that the proper formula to apply is the formula articulated by the Board in *Davison-Paxon Co.*, 185 NLRB 21 (1970).<sup>1</sup> The Union also maintained that the Employer's department heads are not supervisors as defined in Section 2(11) of the Act.

By Order dated May 7, 2003, the Board granted the Union's request for review solely with respect to the Regional Director's application of the *Juilliard School* eligibility formula.<sup>2</sup> The election was conducted as scheduled on May 6, 2003, and the ballots were impounded.

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

<sup>1</sup> The *Davison-Paxon* formula allows any unit employee who has averaged 4 hours per week in the 3-month period preceding the Decision and Direction of Election to be eligible to vote.

<sup>2</sup> The Board also found that the Union's request for review raised substantial issues with regard to the Regional Director's finding that the Employer's department heads are supervisors as defined in Sec. 2(11) of the Act. The Board concluded, however, that the issue could best be resolved through use of its challenge procedure. Accordingly, the Regional Director's Decision was amended to permit the Employer's department heads McGarvie, Lichon, and Lederle to vote under challenge and the Union's request for review was denied in this respect.

Having carefully considered the entire record in this proceeding with respect to the issue on review, we find, contrary to the Regional Director, that the proper eligibility formula to apply in this case is the *Davison-Paxon* formula.

Facts

Steppenwolf Theatre Company (the Employer) is a prominent nonprofit regional theater company located in Chicago, Illinois. Committed to the principle of ensemble performance through the collaboration of a company of actors, directors and designers, the Employer produces an annual season that runs 12 months with performances taking place 48 to 50 weeks per year. In 2002, the Employer produced 14 different shows staged in three different theaters. The Mainstage Theatre, a 510-seat venue, hosts five productions a season, each running eight performances a week for 8 to 9 weeks. The Studio Theatre seats 180 persons and hosts four productions a season that run for at least 4 weeks each. With a seating capacity of 100, the Garage Theatre is the Employer's smallest venue and hosts up to four productions a season that run 4 to 5 weeks each. In addition, the Employer stages two productions per year that are educational in nature for its Arts Exchange program for high school students. Arts Exchange shows run about 4 to 5 weeks and are performed in the Mainstage Theatre.

The Mainstage and Studio Theatres are located at the Employer's 1650 N. Halstead Street location, which also includes the Company's box office and telemarketing operations. The Garage Theatre is located in a parking facility a few blocks away at 1624 N. Halstead Street. The Employer's administrative offices and rehearsal hall are located at 758 West North Avenue.

The Employer operates on a budget of \$10 million per year, \$6 million of which is generated by ticket sales, and the remainder of which is derived from charitable contributions. The theater currently enjoys a base of some 23,000 subscribers who purchase tickets for an entire season of performances.

In order to keep up with the workload generated by 14 annual productions totaling some 500 performances, the Employer employs a permanent, full-time production staff of 19 employees. This full-time staff is spread across seven different departments: carpentry, scenic artists, properties, wardrobe/costumes, electricians, sound, and "running crew," and performs the bulk (70 percent) of the work necessary to produce the technical elements of each production. The functions of each department as they relate to the theatrical productions are essentially implicit in their titles. The carpentry department is responsible for building the sets for each production. The scenic artists paint the sets. The property department is

responsible for obtaining and/or building the props necessary for rehearsals and performances. The wardrobe department is responsible for costumes during the performances, including any quick costume changes. The electrical department is responsible for hanging and focusing lights in the theaters. The sound department sets and adjusts the sound in the theaters. The running crew is responsible for moving scenery and working lights, sound, and stage carpentry during performances.

The Employer builds and produces each element of its theatrical productions in an “assembly line” fashion. The creation of the physical elements of a production begins with the construction of the set at its 67,000 square foot shop facility at 1010 North Kolmar Avenue. At the same time, the properties department builds or acquires the props needed for the production. Sets take between 2 to 6 weeks to build, depending on which performance space the production will occupy. The completed sets and all accompanying physical elements of the stage, lighting, sounds, props, costumes, and scenery are then installed in the theater. This process is referred to as “load-in.” Lights are hung and focused by electricians, the sound department employees set and adjust the sound equipment to create the soundscape of the production, props are brought into the theater, and the wardrobe department begins to set up their use of the stage. Immediately prior to a load-in, production employees must “strike” and “load-out” all of the physical elements from the show previously occupying the space. The Employer carefully times strikes and load-ins so that they never occur in more than one production space at a time.

Due to budgetary constraints that prevent a larger full-time staff and because of the numerous tasks involved in the various productions, the Employer utilizes the assistance of part-time employees (also referred to as “over-hires”) to supplement its regular workforce. Part-time employees are drawn from an informal pool of employees that have previously worked for the Employer. These part-time employees perform about 30 percent of the work necessary to produce the technical elements of a production. Some part-time employees work 1 or 2 days and then are not needed for a period of time, while others may work more hours per week or are used on a more frequent basis.<sup>3</sup>

Part-time employees are used frequently during the strike and load-in processes. In the electric department, part-time employees are used to strike and rehang lights, and then to perform light focus for newly installed shows. Typically, four to eight part-time employees are

called in for these tasks, which occur on 2 to 3 days over the course of a week. The work call (shift) for the electricians is generally between 8 and 10 hours. Also utilized regularly for set strikes and load-ins are part-time carpenters. Typically, two part-time carpenters will work for about 2 weeks at a time on a strike and load-in. The work call for the carpenters is generally between 10 and 12 hours. Part-time employees also serve as “running crew.”<sup>4</sup> Crew members work the entire run of a show. There are between two and eight crew members for each show, depending on the size of the production. The running crew begins work an hour and a half before the curtain rises and works approximately 4 hours. A Mainstage production performs eight shows a week. Thus, a member of the running crew on a Mainstage show works approximately 32 hours a week for the run of the show—8 weeks. A Studio or Garage production performs five shows per week. Thus, a member of the running crew there works at least 20 hours a week for 4 to 5 weeks at a time.

Other departments also use part-time employees. The properties department uses part-time employees only occasionally, when a special project requires it or when there is an unusually large load-in or strike. It has never used more than one part-time employee at a time during the last 3 years. By contrast, the scenic arts department only employs part-time employees. They typically work 30 to 40 hours a week, but not necessarily 52 weeks a year. The same two persons have worked as part-time employees in the scenic arts department for the last several years. Occasionally, depending on the workload, additional scenic artists work for a short period of time. Finally, in addition to those carpenters engaged solely for load-ins and strikes, the workload in the carpentry department requires the presence of two other part-time carpenters for 48 to 50 weeks per year. These carpenters work 40 hours a week, 30 to 35 weeks per year.

The record shows that many part-time employees repeatedly work for the Employer and that part-time employees have filled vacancies on the full-time staff.<sup>5</sup> The part-time employees work with the full-time employees in the same locations, do the same jobs, utilize the same skills, and use the same tools and materials as the full-time employees.

#### Analysis

In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks “to permit optimum employee enfranchisement and free choice, with-

<sup>3</sup> The payroll records submitted by the Employer show a wide variance in both the frequency of work and the total number of hours worked by part-time employees.

<sup>4</sup> The Employer does not employ any full-time running crew employees. It hires its running crew on a production-by-production basis.

<sup>5</sup> At least nine of the Employer’s current full-time production employees initially worked for the Company in a part-time capacity.

out 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’s longstanding and most widely used formula for voting eligibility for part-time or on-call employees is the *Davison-Paxon* formula, under which 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 Co.*, 185 NLRB 21, 23–24 (1970).

In the instant case, the Employer maintains that the Regional Director did not err in applying the *Juilliard* formula because use of the formula affords the right to vote to those employees with a reasonable expectancy of future employment. The Union, on the other hand, argues that the *Juilliard* formula is overly inclusive and that application of it in this case enfranchises employees who lack a sufficient ongoing interest in the terms and conditions of employment at the Employer to be permitted an equal say with the Employer’s much more regular employees as to whether they will be represented for the purposes of collective bargaining. It proposes that the appropriate eligibility formula is the *Davison-Paxon* formula.

It is well established that the *Davison-Paxon* formula is normally applied to determine eligibility of part-time or on-call employees, absent a showing of special circumstances.<sup>6</sup> Irregular patterns of employment in the entertainment industry have sometimes presented special circumstances, leading the Board to create various eligibility formulas suited to those unique conditions.<sup>7</sup> Con-

<sup>6</sup> See, e.g., *South Coast Hospice Inc.*, 333 NLRB 198 fn. 3 (2001); *Saratoga County Chapter NYSARC*, 314 NLRB 609 (1994); *Trump Taj Mahal Casino*, supra.

<sup>7</sup> See, e.g., *DIC Entertainment*, supra (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 1 year period); *Juilliard School*, supra (employees eligible where they worked two productions for a total of 5 days over 1 year, or at least 15 days over a 2 year period); *American Zoetrope Productions*, 207 NLRB 621 (1973) (employees eligible where they worked two productions during the past year); *Medion, Inc.*, 200 NLRB 1013 (1972) (employees eligible where they worked two productions for 5 days over 1 year).

No party argues that any of these eligibility formulas crafted by the Board in other entertainment cases are applicable in this case. Those cases are, in any event, factually distinguishable. In *Medion, Inc.*, supra, the employer, unlike the present case, had no permanent staff and hired crews by the production, sometime only for 1 day’s work and then laid them all off. Similarly, in *American Zoetrope Productions*, supra, the employer, whose business consisted almost exclusively of the productions of commercials, employed most of the petitioned-for employees typically for only 1 or 2 days at a time. In *DIC Entertainment*, supra, unlike the instant case, the record was devoid of the details

of the employment history of the employees or any general employment pattern, in terms of the number of days, weeks, or months employees work on particular projects and the frequency with which they returned to work for the Employer. Consequently, in the absence of record evidence, the Regional Director modified the *Medion* formula to best suit the circumstances in the television animation industry.

contrary to the Regional Director, we do not believe that the record establishes special circumstances warranting deviation from the standard *Davison-Paxon* formula in this case.

In choosing to apply the *Juilliard* formula, the Regional Director relied on the fact that in both *Juilliard* and the present case the employers produce theatrical productions and have units composed of a core of permanent production employees (electricians, props employees, carpenters, etc.) who are supplemented by per-diem part-time employees. Additionally, she relied on the fact that the part-time production employees in both cases are called in as needed on a project-by-project basis from a fairly steady pool of employees and work alongside the full-time employees. In light of these facts, the Regional Director found that the formula found appropriate in *Juilliard* would also be appropriate in the present case.

However, on examining the record, we find that the critical consideration of the Board in *Juilliard*—“the number and length of the employer’s stage productions and the employment pattern resulting therefrom,”—is very different in this case. *Juilliard School*, supra at 155. Because the Employer is a professional theater company and not an educational institution, its production schedule is much more regular and constant than was the *Juilliard School*’s.<sup>8</sup> Although the Board’s decision in *Juilliard* does not disclose the number of productions staged by the school, it describes it as “relatively few.” Id. at 154. By contrast, the Employer mounts 14 productions a season, totaling some 500 performances over the course of 48 to 50 weeks during the year. Moreover, while *Juilliard*’s productions ran for three to four performances each, the Employer’s productions typically run five to eight performances a week for up to 8 weeks. Furthermore, the vast majority of *Juilliard*’s staff consisted of on-call “per-diem” employees. *Juilliard* had a permanent staff of only five employees who were assisted by a group of up to approximately 155 “per-diem” employees,

<sup>8</sup> The *Juilliard School* is a degree-granting educational corporation engaged in the teaching of music, drama, and dance to undergraduate and graduate students, and its productions functioned as a training vehicle for students. The Employer, on the other hand, is a professional theater company. While the theater is involved in educational outreach through its arts exchange program, its mission is to advance the vitality and diversity of American theater by nurturing artists, encouraging repeatable creative relationships, and contributing new works to the national canon.

retained on an as-needed basis. These “per-diem” employees worked in the various production departments and performed the bulk of the work needed to produce the technical elements of Juilliard’s productions.<sup>9</sup> Thus, it is clear that Juilliard relied almost exclusively on per-diem employees. By contrast, a substantial majority (70 percent) of the Employer’s bargaining unit work is performed by permanent full-time staff members.

Because the Regional Director considered the Employer’s industry to be the most significant factor in applying the *Juilliard* formula,<sup>10</sup> she failed to consider the Employer’s substantially greater size and the regularity of its operations, the use of full-time staff to perform the vast majority of work, and the much higher number of hours worked by many individuals in its part-time staff, all factors rendering the formula applicable to the small infrequent operations of the Juilliard School inappropriate in the present case.<sup>11</sup> Applied here, the *Juilliard* formula is overly inclusive, including those with only the most peripheral interest in the Employer’s terms and conditions of employment.<sup>12</sup>

<sup>9</sup> There were between 1 and 60 employees in the costume shop; between 1 and 12 employees in the properties department; between 1 and 20 employees in the electrics department; between 1 and 60 employees in the carpentry department scene shop; and between zero to six scenic painters. *Juilliard School*, 208 NLRB at 153–154.

<sup>10</sup> The fact that both the Employer and Juilliard operate theaters is not conclusive. Contrary to the Employer’s contentions, the Board did not announce in *Juilliard* a formula to be used in all future theater cases, but rather explicitly tailored a formula to the unique facts of that case.

<sup>11</sup> The Regional Director also contrasted the Employer’s operations with a retail sales operation (the business at issue in *Davison-Paxon*) that was relatively continuous. In retail sales, the need for supplemental “on-call” employees varies from time to time but was possible to occur at any given time. According to the Regional Director, the Employer’s need for part-time employees could only occur during certain periods of time, and can vary by department and scale of the show. We recognize that the Employer’s need for part-time employees can vary depending on the size and scale of the show and that part-time employees are used most often during the strike and load-in phase. However, we find that, similar to retail sales and other industries requiring part-time supplemental staff, the Employer’s operations are continuous, as it produces 14 productions over the course of 48 to 50 weeks per year, and its need for part-time employees may occur at any given time. The two part-time carpenters who work continuously in the scene shop exemplify this need.

<sup>12</sup> The *Juilliard* formula would permit part-time employees to vote who have worked as few as 40 hours during the entire year, or less than 2 percent of the hours worked by the permanent full-time staff. The facts here do not justify such an expansive formula.

The Employer provides a few isolated examples of employees who worked on several productions throughout the course of a year but will be disenfranchised as a result of the application of the *Davison-Paxon* formula. However, “[a]n election necessarily occurs at a single moment in an employer’s otherwise fluid work force history.” *Steiny & Co.*, 308 NLRB 1323, 1325 (1992). We recognize, as the Board did in one of its earliest decisions establishing an eligibility formula, that

As mentioned above, the Employer employs a substantial permanent, full-time staff, supplemented in part with a corps of part-time employees who themselves work frequent, substantial hours, and supplemented further with additional part-time employees who tend to work only a few days a year. These latter employees have no real continuing interest in the terms and conditions of employment at the Employer. The *Davison-Paxon* formula allows for optimum employee enfranchisement by distinguishing between these two groups of part-time employees, allowing only the former to vote in the election.

Accordingly, we reverse the Regional Director’s application of the *Juilliard* formula and remand this proceeding to the Regional Director for application of the *Davison-Paxon* formula.<sup>13</sup>

#### ORDER

This proceeding is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

“absolute accuracy [in determining eligibility] is probably unattainable here.” *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938).

<sup>13</sup> Chairman Battista notes that *Davison-Paxon* is the formula that is used for on-call employees, absent special circumstances. See the discussion, *supra*. This formula has been applied in cases involving the entertainment industry. See *Trump Taj Mahal Casino*, *supra*. It is far from clear what “special circumstances” will warrant a departure from *Davison-Paxon*. Indeed, in the entertainment industry cases cited in n.7 *supra* (in which *Davison-Paxon* was not applied), the Board does not even mention *Davison-Paxon*. Perhaps, this is because the issue in those cases was *not Davison-Paxon* vs. a special formula. Rather, it was which of two special formulas to use. By contrast, the instant case does raise the issue of *Davison-Paxon* vs. a special formula. For the reasons set forth in this decision, Chairman Battista is satisfied that there are no special circumstances herein warranting a departure from *Davison-Paxon*. He does not pass on whether there were special circumstances in the cases cited in fn. 7.