

**Trump Taj Mahal Associates, a New Jersey Limited Partnership d/b/a Trump Taj Mahal Casino Resort and International Alliance of Theatrical Stage Employees, Local 917 and International Union of Operating Engineers, Local 68A, Joint Petitioners.** Case 4-RC-17578

February 11, 1992

DECISION ON REVIEW AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDA BAUGH

On April 19, 1991, the Regional Director for Region 4 issued a Decision and Direction of Election in the above-entitled proceeding. He found that the petitioned-for unit of all full-time and regular part-time entertainment and audio-visual technicians, including lead technicians and "casuals" employed by the Employer, is an appropriate unit, and that casual employees who have worked an average of 4 hours or more per week for the last quarter prior to the eligibility date are regular part-time employees and, thus, included in the unit.<sup>1</sup>

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that: (1) a unit consisting of all entertainment department employees, including ushers, ticket takers, and box office clerks is the only unit appropriate for collective-bargaining purposes; and (2) the petitioned-for unit improperly includes casual employees as they work on a sporadic and intermittent basis with no reasonable expectation of continued employment. The Petitioner filed an opposition brief. On May 20, 1991, the Board<sup>2</sup> granted the Employer's request for review solely with regard to the unit inclusion and eligibility of the Employer's "casual" technicians. The election was held as scheduled on May 20, 1991, and the ballots were impounded pending the Board's Decision on Review. The Employer and the Petitioner filed briefs on review in support of their positions.<sup>3</sup>

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

The Board has considered the entire record in this case with respect to the issue on review and has decided, for the reasons set forth below, to affirm the Regional Director's decision.

<sup>1</sup>It is clear that the Regional Director applied the Board's traditional eligibility formula for on-call employees as set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970).

<sup>2</sup>Members Oviatt and Raudabaugh; Member Devaney dissenting.

<sup>3</sup>The Employer has requested oral argument. The request is denied as the record, request for review, and briefs adequately present the issues and the positions of the parties.

The Employer has operated a hotel and casino, Trump Taj Mahal Casino Resort (the Taj), in Atlantic City, New Jersey, since April 2, 1990. The entertainment department at the Taj includes stage technicians, convention lounge technicians, and entertainment event technicians. Stage technicians are responsible for load-in, load-out, set up and operation of lighting, audio, and stage equipment; operation of the dressing rooms; set up of movable staging; convention power distribution; and rigging and hanging of anything suspended from the ceiling. Convention lounge technicians provide audio and visual support to convention and trade show clients, and maintain the hotel's main music and paging system and the stage operation of lounges, including the audio and visual lighting for those areas. Entertainment events technicians are responsible for the scenery for convention clients and in-house parties.

The Employer maintains a list of approximately 40 on-call or "casual" employees who perform technical functions, and who are called upon on an intermittent basis to perform the same functions as regular technical employees when there are not enough regular employees to perform the work. The Employer maintains this casual list because the casino industry is regulated by the New Jersey Casino Control Commission, which requires employees to be licensed. Casual employees are also required to be "badged" by the Employer. Thus, the Employer must be able to draw from a pool of technicians who have already met certain procedural and technical requirements in order to satisfy short-term labor needs.

During the first 11 months of operation, the Employer operated its entertainment department with three full-time stage technicians and five full-time convention lounge technicians, and did not employ any part-time technicians. About March 1, 1991, the Employer increased its staff to 28 full-time technicians and 10 regular part-time technicians by hiring those employees from the casual list. The Employer selected for hire from the casual list those employees who had worked the most hours at the Taj and who had the necessary skills for the particular job. A number of casuals who had worked a considerable number of hours in the past still remained on the casual list thereafter.

The Regional Director found that the 1990 list of casual employees entitled "entertainment technicians"<sup>4</sup> shows that those employees worked from 30 to 952 hours during that year. The 1991 list, which covers the period from January 1 to February 20, 1991, shows that the casual entertainment technicians worked between 0 and 271 hours. The 1990 "convention lounge technician" casual list shows that they worked from 4 to 1524 hours during 1990, and during the January 1 to February 20, 1991 period they worked 0 to 287 hours. The Regional Director found that during

<sup>4</sup>The record reveals that this is a list of stage technicians.

1990 the casuals worked on an average of 379 hours during the year or approximately 7 hours per week, and during early 1991, the so-called casuals worked on an average of 119 hours or approximately 17 hours per week.

The Regional Director concluded that casual employees who work an average of 4 hours per week are regular part-time employees and should be included in the unit. The Employer's request for review contends, inter alia, that the petitioned-for unit improperly includes casual employees as they work on a sporadic and intermittent basis with no reasonable expectation of future employment. The Employer contends that it will have less need for casual employees in the future because of its increase in regular staff.<sup>5</sup>

In determining whether on-call employees should be included in the bargaining unit, the Board considers whether the employees perform unit work, and those employees' regularity of employment. Here, it is undisputed that the employees denominated "casuals" perform unit work. The Board has found that regularity can be satisfied when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. See, e.g., *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). Under the Board's longstanding and most widely used test for voting eligibility, applied in this case by the Regional Director, an on-call employee is found 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. See, e.g., *Davison-Paxon Co.*, supra at fn. 1.<sup>6</sup> Although no single eligibility formula must be used in all cases, the *Davison-Paxon* formula applied by the Regional Director is the one most frequently used, absent a showing of special circumstances.

Our dissenting colleague proposes a formula that includes recurrency of employment as a factor in determining eligibility and requires that employees not only average 4 hours per week during the last quarter, but that they also work for some period during at least one-half of the weeks in that quarter. The Board has consistently applied the *Davison-Paxon* formula to establish regularity of employment and our experience shows it to be a reliable test for on-call employees.

<sup>5</sup>The Employer does not expressly seek review of the eligibility formula used by the Regional Director, or suggest that an alternative formula be used.

<sup>6</sup>See also *May Department Stores Co.*, 175 NLRB 514 (1969); *Allied Stores of Ohio*, 175 NLRB 966 (1969); *V.I.P. Movers*, 232 NLRB 14 (1977); *West Virginia Newspaper Publishing Co.*, 265 NLRB 446 (1982); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990); *Northern California Visiting Nurses' Assn.*, 299 NLRB 980 (1990).

Member Oviatt does not apply the 4-hour average routinely to on-call nurses. The 4-hour average is not at issue here.

Our colleague offers no empirical evidence to challenge that existing formula and justifies the new formula he sets forth in his dissent by predicating that recurrent employment is a necessary element of that determination. Even assuming for argument's sake that additional evidence of regularity or recurrency would be necessary in this case to demonstrate that the casual employees have a continuing interest in the working conditions of the Employer, we find that the facts show that as a group the on-call employees here have worked on a regular basis and have such a continuing interest.

The casual employees in this case are on an established list drawn from a limited pool of employees, who must be, and have been, approved by the Casino Control Commission and then "badged" by the Employer. The Employer has regularly called the employees on the list, and the casual employees have averaged a substantial number of work hours since the opening of the Taj in April 1990. Moreover, the employees hired in March 1991 for full-time and regular part-time positions were selected from the casual list, based on the number of hours they had worked and their particular skills. This selection process itself provided a reasonable basis for other casual employees on the list to anticipate offers of full-time or regular part-time employment as these positions become available in the future. Thus, these "casual" employees have worked on a regular basis and share a continuing interest in the working conditions of the Employer. Further, these employees are on the Employer's list, which it has not purged; they are not merely a collection of employees who happen to have worked for that Employer at one time or another. Under these facts, the eligibility formula applied by the Regional Director is in our view sufficient to determine which of these casual employees have been called with sufficient regularity during the last quarter to warrant their inclusion in the unit.<sup>7</sup>

We further note that the request for review here does not expressly raise the issue of whether a different eligibility formula should be applied. Instead, the request for review merely contends generally that because the newly hired full-time and regular part-time employees will diminish the need for use of casuals in the future, the petitioned-for unit improperly includes casual employees who work on a sporadic and intermittent basis with no reasonable expectation of continued future employment. Thus, as the request for review does not specifically allege that the Regional Director

<sup>7</sup>If a recurrency test as proposed by our dissenting colleague were to be applied in some cases, the party requesting review would have the threshold burden of showing that the casual employees do not work on a regular, recurrent basis, and that a different eligibility formula than that ordinarily applied by the Board is warranted. We note that the Employer has not met this burden in the present case.

applied the wrong formula, or argue that a different formula is necessary, the Board is not obligated to reach the issue of whether a proper formula was applied in this instance, and on the state of this record we do not consider it prudent to apply a different formula.

Moreover, our dissenting colleague's test, if applied here, would potentially include employees who have not worked many hours over the quarter prior to the eligibility date, as compared to other excluded employees on the list who might have worked many hours. For example, an employee working 46 hours in 1 week who then works 1 hour each week for 6 additional weeks, totaling 52 hours in the quarter preceding the eligibility date, would be included under this formula, while an employee who works 40 hours per week for only 6 weeks, totaling 240 hours during the same period, would be excluded. Thus, we think our colleague's proposed formula does not fairly measure an employee's regularity and continuing interest in employment.

Finally, the Board has been flexible in carrying out its responsibility to devise formulas suited to unique conditions in the entertainment industry, as in other specialized industries, to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation. See, e.g., *Medion, Inc.*, 200 NLRB 1013 (1972); *American Zoetrope Productions*, 207 NLRB 621 (1973); *Juilliard School*, 208 NLRB 153 (1974). In *Juilliard*, the Board determined that "casual" employees who would not have been eligible under a standard formula worked on a repetitive basis and had a continuing interest in employment. Therefore, the Board devised an inclusive—not exclusive—eligibility formula 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. We find that the *Davison-Paxon* formula applied in this case by the Regional Director also allows for optimum employee enfranchisement and free choice, but without permitting individuals to vote who have no real continuing interest in the terms and conditions of employment at the Taj.

For the reasons stated above, we conclude that the Regional Director applied an appropriate eligibility formula to determine whether employees on the casual list maintained by the Employer should be included in the unit. 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 May 20, 1991 election.

MEMBER RAUDABAUGH, dissenting in part.

I would grant review with respect to the proper formula for determining the eligibility of on-call casino technical employees and would direct the use of a formula that includes recurrency of employment as a factor in determining eligibility.

The Employer maintains a list of about 40 individuals who perform technical functions. It calls persons from the list when there are not enough regular employees to do the work. When called to work, these individuals perform the same duties as the regular technicians. The Regional Director found that those on the "entertainment technicians" casuals list worked from 30 to 952 hours during 1990, and between 0 and 271 hours from January 1 to February 20, 1991. He found that those on the 1990 "convention lounge technician" casual list worked from 4 to 1524 hours during 1990, and from 0 to 287 hours from January 1 to February 20, 1991. The Regional Director noted that those on the list were called to work on an intermittent and irregular basis. He nevertheless concluded that they should be found to be regular part-time employees if they had worked for an average of 4 hours per week for the last quarter prior to the eligibility date.

The Regional Director applied a formula long used by the Board for determining whether an on-call employee has sufficient regularity of employment with an employer to demonstrate a continuing interest in the working conditions of that employer, which interest would warrant their participation in a representation election involving that employer.<sup>1</sup> However, I do not believe that the formula adequately serves its stated purpose. The purpose of the test is to determine which, if any, of the on-call employees share with the full-time employees a continuing interest in the working conditions of the Employer. In my view, the fact that an employee averaged 4 hours per week during the last quarter prior to the eligibility date does not per se establish a continuing interest in the working conditions of the employer. For example, if the employee worked 52 hours during the first week of a 13-week quarter, he/she would be eligible under the extant formula. In my view, if the employee did not work again during the quarter, the 52 hours of work would not, by itself, constitute a sufficient basis for inclusion in the unit. The missing factor is recurrency of employment. Hence, I would require that employees average 4 hours per week during the last quarter *and* I would require that they work for some period during at least one-half of the weeks in that quarter. In my view, this pattern of employment in the workplace is a necessary pre-

<sup>1</sup>Under the formula, employees are eligible to vote if they regularly average 4 or more hours per week for the quarter prior to the eligibility date. See, e.g., *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1978); *Allied Stores of Ohio*, 175 NLRB 966, 969 (1969); and *Mays Dept. Stores Co.*, 175 NLRB 514, 517 (1969).

requisite for finding that an employee has a continuing interest in the working conditions of an employer.<sup>2</sup> Accordingly, I would direct the use of the aforementioned formula in the instant case.

As noted above, my colleagues in the majority base their conclusion upon the so-called *Davison-Paxon* formula. That formula, in turn, was based on two cases, *May Department Stores*, supra, and *Allied Stores of Ohio*, supra. In *May Department Stores*, the Board simply noted that some of the “pink card” employees were regularly scheduled to work for at least 4 hours per week. Without further explication, and based solely on this fact, the Board said that any “pink card” employee who regularly averaged 4 hours per week in the

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<sup>2</sup>If the employer hires in a seasonal pattern, different considerations would be brought to bear.

preceding quarter would be eligible to vote. In *Allied*, the Board, without any explication or citation, applied the “4-hour” test to “status three” employees.

It was on these slender reeds that the *Davison-Paxon* “formula” was built. It seems to me that principles of law should be based on more substantial grounds. The rote citation to *Davison-Paxon* simply compounds the original flaw.

In addition, my colleagues point out that, under my formula, one employee would be eligible to vote, and another would not, even if the first one worked more hours than the second one. However, even under *Davison-Paxon*, the sheer number of hours is not the sole determining factor. The *regularity* of employment is also a factor. Hence, my formula seeks to combine the number of hours of employment *and* the regularity of employment.