

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

FOX ASSOCIATES, LLC¹

Employer

and

Case 14-RC-12710

THEATRICAL WARDROBE UNION LOCAL NO.
805 OF THE INTERNATIONAL ALLIANCE OF
THEATRICAL AND STAGE EMPLOYEES²

Petitioner

REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION

The Employer, Fox Associates, LLC, operates a theater for performing arts. The Petitioner, Theatrical Wardrobe Union Local No. 805 of the International Alliance of Theatrical and Stage Employees, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all make-up and hair workers employed by the Employer at the Fox Theatre, located in St. Louis, Missouri.³ A hearing officer of the Board held a hearing and both parties filed briefs with me, which I have carefully considered.

As evidenced at the hearing and in the briefs, the only issue raised here is the appropriate formula to apply in determining voter eligibility. The Employer argues that the 11 individuals on its call list should be eligible to vote. The Petitioner maintains that those individuals eligible to vote are those employed on two productions for a total of 5 working days over a 1-year period or 15 days over a 2-year period, as stated in *Juilliard*

¹ The Employer's name appears as amended at hearing.

² The Petitioner's name appears as amended at hearing.

³ Both parties agree to the inclusion of these positions in the appropriate unit.

School, 208 NLRB 153 (1974), or approximately 6 individuals. As discussed more fully below, I find it appropriate to apply the entertainment industry formula as set forth in *Juilliard School*.

I. OVERVIEW OF OPERATIONS

The Employer presents live entertainment, including touring Broadway plays and musicals, at the Fox Theatre in St. Louis, Missouri. The Employer's theatrical season varies; typically, it is from August/September through May/June, with exceptions. Most shows last 1 to 2 weeks, but a large production may last as long as 3 weeks, and recently the Employer has started doing weekends of four shows, known in the industry as split weeks.

Touring theatrical companies that do not employ their own hairdressers utilize the Employer's hairdressers. A show rider to the contract between the Employer and the touring production details the number and type of local employees required for each show, including make-up and hair workers, collectively referred to as hairdressers. About 2 to 3 weeks before each show, the Employer's production manager confirms with the show's production manager the type and number of the Employer's on-call employees that are required.

Touring theatrical companies, however, do not always request a local hairdresser and weeks, even months, pass between shows that utilize the Employer's hairdressers. The Employer's hairdressers worked in about eight productions during the 2005-2006 season over the course of 15 weeks from September 18, 2005 through May 28, 2006. Hairdressers worked at least eight productions during the 2006-2007 season over 20 weeks from October 20, 2006 through July 29, 2007. So far this 2007-2008 season, hairdressers have worked about 6 productions during 13 weeks between October 1, 2007 and May 11, 2008. Typically, one to three hairdressers work each week,

sometimes more depending upon the show. Hairdressers typically work between 4 to 5 hours each day they are working, but longer hours are not uncommon.

The Employer maintains a call list of 11 hairdressers whom it has employed on an on-call basis during the past 4 to 5 years. Work is first offered to the hairdresser at the top of the call list. This hairdresser serves as the Employer's contact with the touring company to determine the hairdressing skills specific to the upcoming show. Then, working down from the top of the call list, additional hairdressing positions are filled by available hairdressers possessing the required skill set.

II. ELIGIBILITY OF ON-CALL HAIRDRESSERS

The Board's election eligibility formulas are designed "to permit optimum employee enfranchisement and free choice without enfranchising employees who have 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 (3rd Cir. 1993). In many instances, on-call employees are found to lack a real and continuing interest in the Employer's terms and conditions of employment because they do not regularly work a sufficient number of hours. The Board's formulas for determining voter eligibility, therefore, must distinguish between those on-call employees who work so infrequently that they lack a sufficient ongoing interest in the Employer's terms and conditions of employment from those whose recurring, yet irregular employment demonstrates a community of interest with unit employees.

The Board's longstanding and most widely used formula for determining voter eligibility of 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 that employee regularly averages 4 or more hours of work per week for the last quarter prior to the election eligibility date. *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). The Board states that the *Davison-Paxon*

formula is to be used, absent a showing of special circumstances. *Trump Taj Mahal Casino*, 306 NLRB at 296. Neither party contends that the *Davison-Paxon* formula should be applied.⁴ Here, the Employer's on-call employees do not work each week or even each month.

Irregular patterns of employment in the entertainment industry, where employees are often hired on a production-by-production basis, have presented special circumstances resulting in the creation of various eligibility formulas uniquely suited to those conditions. *Medion, Inc.*, 200 NLRB 1013, 1014 (1972) (employees in the film industry were eligible where they worked two productions for 5 days over 1 year); *American Zoetrope Productions, Inc.*, 207 NLRB 621, 623 (1973) (employees in the motion picture industry were eligible where they worked two productions during the past year); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001) (employees in television animation industry were eligible where they worked on at least two productions for at least 5 working days during the last 12 months, or who worked at least 15 days in those 12 months); cf. *Columbus Symphony Orchestra, Inc.*, 350 NLRB No. 49, slip op. at 3 (2007) (Board found no "special circumstances" and applied the *Davison-Paxon* formula to on-call employees of a symphony orchestra with a year-round, 46-week schedule of performances).

Here, both parties propose the use of an alternative eligibility formula. The Employer submits that *Flexo Products Corp.*, 7 NLRB 1163 (1938), addresses circumstances, like here, where all bargaining-unit employees work on an intermittent and irregular basis. In *Flexo*, the Board included in a production and maintenance unit of all employees on the employer's payroll and employees on the call list whom the

⁴ The Employer states on brief that only three employees who worked more than 48 hours in the quarter prior to the filing of the petition on May 9, 2008 would be eligible to vote under the *Davison-Paxon* formula.

employer would call in the future when needed. I find that *Flexo*, a case that did not involve the entertainment industry and has not been cited by the Board since 1940, is not applicable here. Indeed, following *Flexo* would lead to the inclusion of a person who has worked less than 1 full day in the last 4 years and two individuals who have not worked for the Employer for over 2 years. Clearly such individuals lack the regularity of employment that would give them a community of interest with unit employees. The Board's more recent decisions, particularly in the entertainment industry, have embraced a more cogent formula for determining the eligibility of intermittent or on-call employees.

I find, as contended by the Petitioner, that the alternative eligibility formula appropriate here is the one applied by the Board in *Juilliard School*, 208 NLRB 153 (1974). There, the union sought a unit of stagehands comprised mostly of per diem employees who worked three to four productions during the theater's October to May season. Considering the number and length of the employer's productions, and the resulting employment pattern, the Board found that the most useful eligibility formula should encompass employees who had worked on at least two productions for a total of 5 working days over a 1-year period or at least 15 days over a 2-year period. *Id.* at 155. Considering the number and length of the Employer's productions at the Fox Theatre, and the intermittent nature of the resulting employment pattern, "optimum employee enfranchisement and free choice" can best be achieved by applying the *Juilliard School* eligibility formula. *Trump Taj Mahal Casino*, 306 NLRB at 296; cf. *Steppenwolf Theatre Company*, 342 NLRB 69, 71-72 (2004) (employer presented 14 productions a season, totaling some 500 performances over the course of 48 to 50 weeks per year and used full-time staff to perform the vast majority of work, supplemented with a corps of part-time employees who worked frequent, substantial hours).

Accordingly, on the basis of the irregular pattern of employment and my responsibility to protect and give full effect to the voting rights of those employees who

have a reasonable expectancy of further employment with the Employer, I find that it is appropriate to apply the formula set forth in *Julliard School*, supra, to determine voter eligibility among the Employer's make-up and hair workers.

III. CONCLUSIONS AND FINDINGS

Based on 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 in this case.
3. The Petitioner 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:

All make-up and hair workers employed by the Employer at the Fox Theatre located at St. Louis, Missouri, EXCLUDING office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Theatrical Wardrobe Union Local No. 805 of the International Alliance of Theatrical and Stage Employees. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who worked on at least two productions for a total of 5 working days over a 1-year period or at least 15 days over a 2-year period before the issuance of this Decision, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in any 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 which 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. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the date of the issuance of this Decision; (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.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for the unit,

containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in Region 14, 1222 Spruce Street, Room 8.302, St. Louis, Missouri, on or before **July 30, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (314) 539-7794. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need to be submitted. If you have any questions, please contact Region 14.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. E-FILING

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website at www.nlr.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., (EDT) on **August 6, 2008**. The request may **not** be filed by facsimile.

Dated: July 23, 2008
at St. Louis, Missouri

Ralph R. Tremain, Regional Director
National Labor Relations Board, Region 14