UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 17

Kansas City, Missouri

KANSAS CITY REPERTORY THEATRE, INC.
Employer

and Case 17-RC-12647

KANSAS CITY FEDERATION OF
MUSICIANS, LOCAL 34-627, A.F.M.
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on December 16, 2009, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the unit of musicians sought by the Petitioner constitutes an appropriate unit for the purpose of collective-bargaining.[1] No other issues were raised in this matter.

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

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[1] Upon review of the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. Commerce facts: Kansas City Repertory Theatre, Inc. is a State of Missouri corporation engaged in the business of providing live professional theatrical productions at its facilities located at 4949 Cherry, Kansas City, MO 64110 and 1 HR Block Way, Kansas City, MO 64105. During the past year, a representative period, the Employer in the course and conduct of its business operations purchased and received goods valued in excess of $50,000 directly from sources located outside the State of Missouri. During this same period, the Employer derived gross revenues in excess of $500,000.

c. The labor organization involved claims to represent certain employees of the Employer.

d. 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.

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 Company*, 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 nine and a half to ten minute 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, 2009 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 non-musical 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 ten 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, 2009 through October 11, 2009 and Doss worked on the same production beginning August 18,

[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.

2009 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 *Christmas 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 Company*, 342 NLRB 69 (2004); *Wadsworth Theatre Management*, 349 NLRB 122 (2007); *Columbus Symphony 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 one year period); *DIC Entertainment, L.P.*, 328 NLRB 660 (1999), enfd. 238 F.3d 434 (D.C. Cir. 2001)(two productions totaling five days in a single year or at least 15 days over a one 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* two-year standard would allow for all ten 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 Company*, 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 four 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 five working days over a

one-year period, or 15 days over a two-year period have a community of interest warranting their inclusion in the voting unit.[4]

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. 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 who are employed in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Kansas City Federation of Musicians, Local 34-627, A.F.M.

[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.

VI. ELECTION NOTICES

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

In order to insure 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 directed that two copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director for Region 17 within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make this list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before January 4, 2010. No extension of time to file this

list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of two copies, unless the list is to be submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall by department, etc.) If you have questions, please contact the Regional Office.

VIII. 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 January 11, 2010. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov, but may not be filed by facsimile.

SIGNED at Overland Park, Kansas, this 28th day of December 2009.

/s/ Daniel L. Hubbel

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