

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1

GLOBAL SCENIC SERVICES, INC.

Employer

and

THEATRICAL STAGE EMPLOYEES, AFL-CIO,
UNITED SCENIC ARTISTS, LOCAL USA 829

Petitioner¹

Case No. 01-RC-111476

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of scenic artists and temporary scenic artists in the Employer's painting department at its Bridgeport, Connecticut facility. There are only two full time employees in the painting department: "charge" scenic artist Andrew Stone and scenic artist Eric Coleman. When the workload demands, the Employer hires temporary scenic artists who work until they are no longer needed. The Employer contends that the petition should be dismissed because Stone is a statutory supervisor and none of the temporary employees satisfies the Board's *Davison-Paxon* formula for voting eligibility, leaving a one person unit that cannot be certified by the Board. The Petitioner contends that Stone is not a statutory supervisor and that the Board's entertainment industry eligibility standard would enable several of the temporary employees to vote in the election. For the reasons set forth below, I find that the Employer has failed to satisfy its burden of establishing Stone's supervisory status, and that it is appropriate to direct an election at this time utilizing the Board's *Davison-Paxon* formula.

This case arises out of a petition filed under Section 9(c) of the National Labor Relations Act, as amended (the Act). The parties were provided an opportunity to present evidence on the issues raised by the petition at a hearing held before a hearing officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; the

¹ The Union's name appears as corrected at the hearing.

Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner is a labor organization within the meaning of the Act; and a question affecting commerce exists concerning the representation of certain employees of the Employer.

I. Background Facts

The Employer manufactures custom scenery for a variety of venues, approximately half of which is for live productions such as Broadway plays and fashion shows, and the other half is for static displays such as museums and store windows. The petitioned-for scenic artists are responsible for painting scenery and backdrops and carving and painting sculptures from foam. The bulk of the Employer's employees, consisting of carpenters, electricians and welders, are represented by IATSE Local 74.

II. Stone's Supervisory Status

A. Facts

All of the evidence proffered by the Employer regarding Stone's duties and responsibilities is based upon the testimony of the Employer's owner, Warren Katz. According to Katz, Stone interviews all applicants for employment in the painting department because he has the technical knowledge as to what is required for any particular project. The director of operations and the CFO also interview all applicants. However, other than interviewing applicants, there is no evidence in the record as to what role Stone plays in selecting applicants, whether he makes a recommendation, and whether such recommendations are followed.

Katz further testified that Stone is responsible for "staffing" each project, based upon the number of "man-days" budgeted for the project. Based on that number, Stone may call in temporary scenic artists from a list he maintains, which Katz speculated consists of employees who worked for the Employer in the past as well as prospective new employees. Although Katz generally testified that Stone calls employees from the list in a certain order, he did not testify as to how the order is determined or by who, and he "assumed" that the selection of the temporary employee has something to do with the skill set of the employees needed for the particular project. However, Michael Micinilio, who has worked for the Employer as a temporary scenic artist, testified that he and Kate Rader (another temporary employee), along with Stone and Coleman, comprise the core group of scenic artists who generally work for the Employer on all projects.

Although Katz generally testified that Stone, pursuant to the budget he is given, also determines when temporary employees are laid off and that he does so without checking with anyone, he was unable to specify how Stone determined when and who to layoff. Moreover, the temporary scenic artists are told when they are hired how long it is expected that they will be employed, although the record does not accurately reflect who makes that determination.

Although Katz generally testified that Stone assigns overtime to employees, he did not state whether Stone can require employees to work overtime. He also provided no testimony as to how Stone determines whether employees will work overtime. Employee Micinilio testified that Stone has asked him, but never required him, to work overtime.

Although Katz generally testified that Stone can direct the work of the scenic artists and move them from one assignment to another, and that he uses independent judgment in doing so, he provided no specific facts or details in support of these assertions. Employee Micinilio testified that both Stone and Coleman instruct him on what needs to be done each day, most often Stone. These instructions include technical directions on how to complete the project, for instance, how to best replicate the paint finish on a surface.

Although Katz generally testified that Stone has the authority to release employees early, he again provided no specific facts or details in support of these assertions or whether it has ever occurred.

With respect to the discipline and discharge of employees, Katz generally testified that Stone has disciplined Coleman on "numerous occasions" for being late and for missing work calls, and that Stone has fired employees. Once again, no specific facts or details were provided in support of these assertions.

Stone is paid \$25.25 per hour, whereas Coleman is paid \$18.18 per hour. The temporary scenic artists are paid \$20 an hour and do not receive benefits. Stone has 100% of his health care paid by the Employer, whereas Coleman has only 50% of his health insurance paid by the company. In all other respects, Stone receives the same benefits as Coleman. Stone, but not Coleman, attends production meetings concerning new jobs that are coming in or are being bid on by the Employer. There is no evidence in the record of what is discussed in these meetings or of Stone's role in attending them.

B. Analysis and Conclusion

It is well-established that the burden of proof rests upon the party alleging that an individual is a supervisor. *Oakwood Healthcare Inc.*, 348 NLRB 686, 694 (2006); accord *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare Inc.*, supra. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. *Id.*, at 688; *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Indeed, a lack of evidence is construed against the party asserting supervisory status. *The Wackenhut Corp.*, 345 NLRB 850, 854 (2005).

The Employer asserts that Stone is a supervisor based upon his involvement in hiring, laying off, recalling, directing, assigning overtime, granting time off, disciplining and discharging employees. As described in detail below, I find that the Employer has failed to satisfy its burden of establishing that Stone possesses and exercises any of this supervisory authority within the meaning of Section 2(11) of the Act.

With regard to hiring, the record merely reflects that Stone is one of several individuals, including higher management, who interview applicants. There is no evidence beyond this as to what his role is in the hiring process, or that Stone has ever effectively recommended any applicants for hire. The mere participation in the hiring process, particularly where higher management officials participate in the process, does not warrant a finding of supervisory status. *Springfield Terrace LTD*, 355 NLRB No. 168 (2010). Moreover, an assessment of an applicant's technical ability to perform the work does not constitute an effective recommendation for hire. *GRB Entertainment, Inc.*, 331 NLRB 320, 321 (2000).

With regard to Stone's role in "hiring" temporary scenic artists, the record merely shows that Stone calls employees from a list, but there is no evidence, beyond Katz'

speculation, of who is on the list or how they got there. There is also no evidence as to how Stone selects employees from the list, other than Katz' speculation that it's based on the employees technical ability to do the job. Moreover, it appears that temporary employees' Micinilio and Rader are the core temporary employees who are always called first.

With regard to layoffs, the evidence shows that the temporary employees are informed of the approximate length of their employment when they are hired, which is apparently based upon the budget for the project. Thus, when the budget runs out, it appears that Stone informs them of their layoff. In so doing, it appears that he is merely implementing a previously made determination that clearly does not require the use of independent judgment. See *Shaw, Inc.*, 350 NLRB 354, 355 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006). To prove independent judgment, it must be shown that, when the putative supervisor makes a decision exercising that supervisory authority, that decision is free of the control of others and not dictated or controlled by detailed instructions including the verbal instructions of a higher authority. *PPG Aerospace Industries*, 353 NLRB No. 23 (2008).

With regard to directing employees, there is some limited evidence that Stone instructs employees as to what job they should be doing each day, including technical instructions. However, there is no evidence that Stone utilizes any independent judgment in directing the work of others, or that he is held accountable if such work is not performed properly. Under such circumstances, the Employer has clearly failed to meet its burden of establishing that Stone "responsibly directs" employees utilizing independent judgment within the meaning of Section 2(11). See *Oakwood*, supra, at 691; *Golden Crest Healthcare Center*, supra, at 731; *Star Trek: The Experience*, 334 NLRB 246 (2001); *Musical Theater Association*, 221 NLRB 872 (1975).

With regard to assigning overtime, granting time off, disciplining and discharging employees, the Employer proffered conclusionary testimony that lacked any detail regarding Stone's purported authority in these areas. Under such circumstances, the Employer has clearly failed to meet its burden of establishing that Stone has the authority to assign overtime, grant time off, discipline or discharge employees utilizing independent judgment within the meaning of Section 2(11) of the Act.²

² The Employer's reliance on certain secondary indicia of supervisory status, including rates of pay, benefits and attendance at management meetings, cannot confer supervisory status on Stone in the absence of the primary indicia of supervisory status enunciated in Section 2(11) of the Act. See *Golden*

III. The Appropriate Eligibility Formula

As noted above, the parties disagree on the eligibility formula to be applied to the temporary scenic artists. The Employer contends that the *Davison-Paxon*³ formula is appropriate in this case and that there are no unique circumstances that warrant deviating from it. The Petitioner contends that the formula set out in *DIC Entertainment, LP*, 328 NLRB 660 (1999) should be applied here based upon the unique circumstances presented in this case relating to the nature of the Employer's business and the irregular employment patterns of the temporary scenic artists. Under that formula, the Petitioner asserts that voters should be eligible to vote if they worked on at least two productions, or alternatively 15 working days, over the 12 months preceding the decision and direction of election. The Petitioner asserts that the freelance employees in *DIC* are similar to the Employer's temporary scenic artists, who are also called in to work on a day to day or production by production basis. The Petitioner further argues that applying the *Davison-Paxon*⁴ eligibility formula here would result in the disenfranchising of all of the Employer's temporary scenic artists, despite the fact that they have a real continuing interest in the Employer's terms and conditions of employment.

The Board's election eligibility formulas are designed "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real 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). The Board's longstanding and most widely used formula to determine voting eligibility for part time or on-call employees is set out in *Davison-Paxon*, under which an employee is considered 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 eligibility date. *Davison-Paxon*, *supra*, at 23-24; *Steppenwolf Theater*, 342 NLRB 69, 71 (2004). The Board has made it clear that the *Davison-Paxon* formula should be followed absent a showing of special circumstances. *Trump Taj Mahal Casino*, *supra*. The Board has found special circumstances in cases involving the entertainment industry where irregular patterns of

Crest, *supra*, at n. 10; *DIRECTV*, 357 NLRB No. 149 at 4 (2011); *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

³ 185 NLRB 21 (1970).

employment may exist, and has fashioned eligibility formulas to meet those circumstances. See, e.g., *DIC Entertainment*, supra; *Julliard School*, 208 NLRB 153 (1974); *American Zeotrope Productions*, 207 NLRB 621 (1973); *Medion, Inc.*, 200 NLRB 1013 (1972). More recently, the Board applied the standard *Davison-Paxon* formula to entertainment industry employers who operate on a year round basis. See *Steppenwolf Theatre*, 342 NLRB 69 (2004); *Wadsworth Theatre Management*, 349 NLRB 122, 123 (2007); *Columbus Symphony Orchestra*, 350 NLRB 523 (2007).

Based upon the foregoing, I find that there are no special circumstances here that warrant deviating from the *Davison-Paxon* formula. The Employer is not in the entertainment industry, but rather is a supplier of products to the entertainment industry, and only half of its business is with the entertainment industry. Even if it were considered in the entertainment industry, the Employer is a year round operation that, like many employers, is subject to some variations in the amount of work that it does. Such routine variations in workload do not constitute the sort of special circumstances that the Board now requires to deviate from the *Davison-Paxon* formula. See, e.g., *Columbus Symphony Orchestra*, supra. Thus, to be eligible to vote, the temporary scenic artists must meet the eligibility criteria set forth in *Davison-Paxon*, supra.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act⁵:

All full-time and regular part-time scenic artists and temporary scenic artists employed by the Employer at its Bridgeport, Connecticut facility; but excluding all other employees, managerial employees, confidential employees, office clerical employees, and guards, professional employees, and supervisors as defined in the Act.

⁵ There is no merit to the Employer's claim that an election cannot be directed at this time because Stone has advised the Employer that he intends to "move on" following the completion of his present project, which is scheduled to be completed sometime in September, and that Stone has mentioned to the director of operations that there will be things he will miss when he leaves the Employer. There is no evidence that Stone is definitely leaving by a date certain, but even if such evidence existed, Stone would remain an eligible voter until he actually terminated his employment. *Grange Debris Box & Wrecking Co.*, 344 NLRB 1004 (2005). Moreover, there is no record evidence that if Stone leaves, he would not be replaced by another employee.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate herein at the time and place set forth in the notices of election to be issued subsequently.

Eligible to vote: those employees 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 in the military services of the United States, ill, on vacation, or temporarily laid off; and employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements.

Ineligible to vote: 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 strike's commencement 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.

The eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by Theatrical Stage Employees, AFL-CIO, United Scenic Artists, Local USA 829.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses that 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 seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, on or before September 24, 2013. No extension of time to file this list shall be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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 on Remand may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, or electronically pursuant to the guidance that can be found at the Agency's Website at www.nlr.gov. Select the **E-Gov** tab and click on **E-Filing**, then select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file the document. This request must be received by the Board in Washington by October 1, 2013.

Dated at Boston, Massachusetts this 17th day of September, 2013


Jonathan B. Kreisberg, Regional Director
National Labor Relations Board
Region 1