

**Wadsworth Theatre Management and Treasurers
and Ticket Sellers, Local 857, IATSE, Petitioner.**
Case 31–RC–08577

January 30, 2007

DECISION AND DIRECTION

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held June 7, 2006,¹ and the administrative law judge's² report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement.³ The tally of ballots shows no votes for the Petitioner, 2 votes against representation, and 6 challenged ballots,⁴ a number sufficient to affect the results. The Petitioner filed exceptions to the judge's recommendation to sustain the challenge to the ballot of William Merrick, and the Employer filed a brief in opposition to the Petitioner's exceptions.

The Board has reviewed the record in light of the exceptions and brief, and has decided to affirm the judge's findings and recommendations⁵ only to the extent consistent with this Decision and Direction.

The judge recommended sustaining the challenge to the ballot of William Merrick because Merrick did not satisfy the eligibility requirements established by the Board in *Juilliard School*, 208 NLRB 153, 155 (1974). Contrary to the judge, we find that *Juilliard School* is not the appropriate eligibility formula here. As explained below, we find that the appropriate eligibility formula is that set forth in *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970), and that, under *Davison-Paxon*, Merrick is an eligible voter whose ballot should be opened and counted.

Relevant Facts

The Employer operates two professional theatres. As of the August hearing, the Employer mounted four productions in 2006,⁶ each lasting about a month, as well as

¹ All dates hereafter are in 2006, unless otherwise specified.

² The judge sat as a hearing officer in this proceeding.

³ The unit consists of all full-time and regular part-time box office personnel.

⁴ The 6 ballots were challenged by the Board agent because the challenged voters' names did not appear on the list of voters supplied by the Employer.

⁵ In the absence of exceptions, we adopt pro forma the judge's recommendation to sustain the challenges to the ballots of Bruce Hall and Alexander Pierce, and to overrule the challenges to the ballots of Phineas Kiyomura, Linda Clouse, and Cathie Meredith.

⁶ The judge stated that the Employer ran two productions in 2006. However, the uncontradicted testimony of Erinn Tobin, the Employer's general manager, appears to show that the Employer ran two productions at one of its theatres and two productions at the other, for a total of four productions in the first 8 months of 2006.

two weekly movie series for 10 weeks each. In addition, the Employer holds special sports and arts events.

The Employer employs both full-time and part-time box office employees. The record shows that two part-time employees, Cathie Meredith and Linda Clouse, were hired to work on one production and, in 2006, were recalled by the Employer to work on additional productions.⁷

In mid-March, the Employer hired William Merrick to work in the box office for a 4-week production that ended shortly before the election. Merrick worked until late April, for a total of 172 hours in the calendar quarter preceding the eligibility date for the election, and for a total of 196 hours (approximately 24 days) as of the date of the election (June 7).

The Employer challenged Merrick's ballot, contending that Merrick was a temporary employee who did not have a reasonable expectation of future employment. The Employer contends that Merrick was hired for, and worked on, only one production.

The Judge's Findings

The judge found that Merrick's work on one production was "too tenuous" to establish that Merrick had a continuing interest in the terms and conditions of employment offered by the Employer. In addition, the judge found Merrick ineligible to vote because he failed to satisfy the eligibility requirements set forth in *Juilliard School*. Under *Juilliard School*, voting eligibility is accorded to employees who have been employed by the Employer (1) during two productions for a total of 5 working days over a 1-year period, or (2) for at least 15 days over a 2-year period. *Juilliard School*, supra, 208 NLRB at 155. The judge found Merrick ineligible under the first prong of that formula because Merrick had not worked for the Employer for two or more productions; the judge found Merrick ineligible under the second prong because he had not worked for the Employer for 2 years.

Contrary to the judge, and for reasons set forth below, we find that Merrick is eligible to vote.

Discussion

At the outset, we find that the judge erred in finding that Merrick did not have a continuing interest in the terms and conditions of employment offered by the Employer. With respect to the appropriate eligibility formula, the judge erred by applying the *Juilliard School* formula here. The Board's standard formula for determining the voting eligibility of part-time and on-call em-

⁷ The judge found that those two employees were included in the unit as regular part-time employees. There are no exceptions to that finding.

ployees is the *Davison-Paxon* formula. *Steppenwolf Theatre Co.*, 342 NLRB 69, 71 (2004). 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.” *Id.*, citing *Davison-Paxon Co.*, 185 NLRB 21, 23–24 (1970).

Steppenwolf itself concerned a professional theatre company operating a regular production schedule. In that decision, the Board stated that it would apply *Davison-Paxon* to determine the eligibility of part-time and on-call employees absent a showing of “special circumstances” warranting application of an alternative formula. *Steppenwolf*, supra, 342 NLRB at 71. The Board found no special circumstances present, and therefore applied *Davison-Paxon*. *Id.*

In *Juilliard School*, by contrast, the Board developed and applied an alternative formula to take account of special circumstances. There, the employer was a school, not a professional theatre company. As a school, it relied almost exclusively on per diem employees for its box office because it had “relatively few” productions, and each production consisted of only three to four performances. *Juilliard School*, supra, 208 NLRB at 154.

In the present case, the Employer is a professional theatre company that produces regular performances over the course of a season. The record shows that the Employer put on at least four productions in 2006, with performances running for approximately 4 weeks each. Additionally, in 2006, the Employer ran two weekly movie series every Monday, and held special sports and arts events. In view of those facts, we are not persuaded that there are any special circumstances here to warrant deviating from the *Davison-Paxon* formula.

Applying *Davison-Paxon*, we find that Merrick averaged more than 4 hours of work per week in the quarter prior to the eligibility date for the election: he worked 172 hours during that quarter. He is therefore eligible to vote, and we accordingly overrule the challenge to his ballot.⁸

DIRECTION

IT IS DIRECTED that the Regional Director for Region 31 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Phinneas Kiyomura, Linda Clouse, Cathie Meredith, and William Merrick. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

⁸ Member Liebman would also find Merrick eligible under the second prong of the formula articulated in *Juilliard School*: he worked 15 days or more during the 2-year period preceding the eligibility date.