

PRELIMINARY STATEMENT

In accordance with Section 102.67 of the National Labor Relations Board's (the Board) Rules and Regulations, Consolidated Networks Corporation (Employer or CNC) requests review of the Regional Director's January 8, 2021 Decision Adopting the Hearing Officer's Recommendations and Issuing Certification of Representative (the Decision). Additionally, the Regional Director contemporaneously issued a Certification of Representative (the Certification) certifying the International Association of Machinists and Aerospace Workers, District Lodge 725 (Petitioner or the Union).

Substantial questions of law and policy are raised by CNC's Request for Review. First, the Regional Director failed to apply applicable precedent establishing that "special circumstances" warranted deviating from the customary *Davison-Paxon* eligibility formula when assessing whether employee James Overton is a regular part-time employee in the voting unit. Moreover, in the absence of reported Board precedent, the instant case provides an opportunity for the Board to determine whether travel restrictions implemented in response to a pandemic constitutes "special circumstances" to deviate from the *Davison-Paxon* eligibility formula. See Board's Rules and Regulations, Section 102.67(d)1(i)-(ii).

Here, the Regional Director's Decision finding Overton ineligible to vote effectively disenfranchises Overton simply because he was unable to work at his worksite due to travel restrictions imposed in the wake of the COVID-19 pandemic. Overton worked sufficient hours to be considered a regular part-time employee before and after his hiatus from the voting unit caused solely by pandemic-related travel restrictions that prevented him from traveling from his residence in Montgomery, Alabama to the Stipulated Unit's worksite at Fort Irwin, California. Accordingly, CNC requests that the Board grant review of the Decision, overrule Petitioner's challenge to

Overton's ballot, vacate the Certification, and remand the case to the Regional Director to open and count the determinative challenged ballots.

BACKGROUND AND PROCEDURAL HISTORY

CNC designs, installs, and oversees the administration of communication networks and systems. Relevant to this case, CNC serves as a subcontractor to prime contractor Lockheed Martin (Lockheed) on a federal contract administered by the U.S. Department of the Army at Fort Irwin, California. Fort Irwin is home to the National Training Center (NTC). The NTC is one of several combat training centers used by Army warfighters for training rotations where they engage in exercises and simulations that will prepare the warfighters for overseas deployment. There are approximately 10 rotations in a typical calendar year with each rotation lasting approximately three weeks. Both during and between rotations Stipulated Unit employees maintain and sustain the NTC Information System (NTC-IS), which is also commonly referred to as the "Training Network" or "ATMP Network."

On July 29, 2020,¹ the Petitioner filed the instant petition. The Employer and Petitioner entered into a Stipulated Election Agreement (the "Stipulated Agreement") providing for a mail-ballot election in the following voting unit (the "Stipulated Unit"):

Included: All full-time and regular part-time Senior Network Administrators, System Administrators in Information Technology, Instrumentation System Administrators, Database Administrators, and Information System Administrators employed by the Employer at its operations located at Fort Irwin, California.

Excluded: All other employees, drivers, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

The Stipulated Agreement established an eligibility cutoff date of August 15 but did not specify an eligibility formula.

¹ All dates herein occur in 2020 unless otherwise specified.

The election began on September 10 when ballots were mailed to employees. At the count, Petitioner challenged Overton's and James Kwak's ballots. First, Petitioner challenged Overton's ballot on the basis that he was not regularly employed in the stipulated unit as of the August 15 eligibility cutoff date. Second, Petitioner challenged Kwak's ballot on the basis that he apparently contacted the Regional Office seeking to withdraw his cast ballot prior to the counting of ballots. The Tally of Ballots showed the vote to be 4-2 in Petitioner's favor, with two determinative challenged ballots.

The Regional Director determined that the challenged ballots raised substantial, material issues of fact and ordered a post-election hearing to resolve the determinative challenges. Administrative Law Judge (ALJ) Andrew Gollin served as Hearing Officer at the November 18 hearing.

The Hearing Officer issued his Report and Recommendations on Challenged Ballots (the "Report") on December 8. First, the Hearing Officer recommended overruling Petitioner's challenge to Kwak's ballot.² (Report at 6.) Second, the Hearing Officer recommended sustaining Petitioner's challenge to Overton's ballot.

The Hearing Officer analyzed whether Overton was a full-time or regular part-time employee employed by CNC "at its operations located at Fort Irwin, California," as set forth in the Stipulated Unit. The Hearing Officer concluded that while Overton is a full-time Senior Network Administrator, he does not hold that full-time position at Fort Irwin. (Report at 8.)

² The challenge to Kwak's ballot is no longer contested following the Hearing Officer's recommendation to overrule Petitioner's challenge to his ballot, and the Regional Director's pro forma adoption of that recommendation in the absence of Petitioner exceptions to that recommendation. (Decision at 2.)

The Hearing Officer then erroneously concluded Overton is not a regular part-time employee in the Stipulated Unit. The Hearing Officer strictly applied the *Davison-Paxon* eligibility formula. In doing so, he calculated that Overton worked only 37 hours at Fort Irwin in the 13-week period preceding the August 15 eligibility cutoff date, for a quarterly average of 2.86 hours per week.

The Hearing Officer rejected CNC's argument that "special circumstances" warranted deviating from the *Davison-Paxon* formula. Initially, he found that Lockheed had, in fact, had restricted air travel for its employees and subcontractor employees on the onset of the COVID-19 pandemic in mid-March, and that these restrictions were in place through July. (Report at 4.) Additionally, he found that CNC too implemented travel restrictions for its employees. (Id.) It is undisputed that Overton was, thus, unable to travel to work at Fort Irwin between mid-March and July 2020 due to the pandemic-related travel restrictions implemented by CNC and Lockheed. CNC argued that this pandemic-caused hiatus constituted "special circumstances" and should be omitted from the calculation to determine if Overton is a regular part-time employee in the Stipulated Unit. The Hearing Officer erroneously concluded that there were no "special circumstances" in this case because all Stipulated Unit employees except Overton had a regular pattern of employment at Fort Irwin, including during the period of the pandemic-related travel restrictions. (Report at 8, fn. 6.)

CNC filed exceptions to the Hearing Officer's Report and Recommendations with the Regional Director. On January 8, 2021, as detailed below, the Regional Director erroneously adopted the Hearing Officer's recommendation and sustained Petitioner's challenge to Overton's ballot, therefore concluding that Overton is ineligible to vote in this election. The Regional Director simultaneously issued a Certification of Representative.

SUMMARY OF RECORD TESTIMONY³

A. CNC's History at Fort Irwin

Prior to 2019, CNC provided information systems administration and information security operations personnel at Fort Irwin to Raytheon Company (Raytheon) on the Army's Warfighter FOCUS contract. (Tr. 224-226.) Following a contract recompetitively issued by the Government, Lockheed was awarded a contract for the Army's Training Aids, Devices, Simulators, and Simulations Maintenance Program (hereinafter ATMP Contract). (Tr. 225-26; Pet. Ex. 2.) In effect, work previously performed under the Warfighter FOCUS contract was split into two contracts: the ATMP Contract, administered by Lockheed, and the TSC Contract, administered by Raytheon. (Tr. 225-226.)

Because Lockheed was awarded the ATMP Contract, CNC initially lost its information systems administration work at Fort Irwin, effective January 1, 2019.⁴ (Tr. 225.) But on September 16, 2019, Lockheed contracted with CNC to provide system and network administration services like those that CNC previously provided to Raytheon on Warfighter FOCUS. (Tr. 27.)

B. James Overton's Employment History at Fort Irwin

James Overton has been employed by CNC as a Senior Network Administrator since 2014. (Tr. 141.) Prior to 2019, Overton routinely supported CNC's operations on the Warfighter FOCUS contract at Fort Irwin. Specifically, he supported rotations and installed, configured, and integrated

³ References to the hearing transcripts are cited as "Tr." Exhibits received into evidence at the hearing are referenced as follows: Board exhibits are identified as "Bd. Ex.," CNC exhibits are identified as "ER Ex.," and Petitioner exhibits are identified as "Pet. Ex."

⁴ CNC continued as a subcontractor to Raytheon on the TSC Contract and provided employees to staff the Security Operations Center (SOC). The TSC Contract supports the "Administrative Network" or "52nd ID Network." (Tr. 225-227.) These employees are not at issue in this case.

systems into the Warfighter FOCUS network. (Tr. 144-145.) In 2018 and 2019, Overton was reassigned and support a CNC contract with another prime contractor, Perspecta, at Hanscom Air Force Base in Massachusetts. (Tr. 147-148) At all relevant times, Overton has lived in Montgomery, Alabama. (Tr. 152)

Following the completion of CNC's contract with Perspecta, CNC reassigned Overton back to its Fort Irwin operations in late-2019. (Tr. 148.) Managing Partner Ed Kusbel testified that he determined that Overton would be reassigned to the Fort Irwin ATMP Contract to bolster a relatively inexperienced workforce and help CNC make a positive initial impression on Lockheed, a new CNC customer, during the first rotation of the year in early-February 2020. (Tr. 229.)

On January 9, Employer manager Bill Nault directed CNC Security Officer Mindy Wolf to begin processing a common access card ("CAC Card") for Overton on the ATMP Contract at Fort Irwin. Once approved, the CAC Card would permit Overton to access the Fort Irwin base. (ER. Ex. 2; Tr. 149.) To expedite processing of the CAC Card, Nault advised Wolf that CNC wanted Overton to begin working on the ATMP Contract at Fort Irwin "in February or sooner." (Id.) Two weeks later, Nault e-mailed Overton to advise that CNC would be scheduling him to work from January 27 through February 7 to support the training rotation scheduled around those dates. (ER. Ex. 3.) Overton, however, was unable to travel to Fort Irwin to work on that rotation because he had been summoned for jury duty in Alabama on February 3. (Id.)

Overton did, however, work at Fort Irwin during the March rotation. (ER. Ex. 5, p. 3; ER. Ex. 6, pp. 2-3.) This was the next rotation after the rotation that Overton was unable to work due to jury duty. During the March rotation, Overton worked 88.07 hours.⁵ (ER. Ex. 6, pp. 2-3.)

On March 17, Overton left Fort Irwin and traveled back to his residence in Montgomery, Alabama. (Tr. 152.) Overton's departure occurred one day earlier than planned and was precipitated by the rapidly escalating COVID-19 pandemic sweeping the country at that time. (Tr. 152-153.) Due to the unprecedented and extraordinary pandemic, and pandemic-related travel restrictions implemented by both CNC and Lockheed, Overton did not return to work at Fort Irwin until August 11. (Tr. 157.)

C. Lockheed and CNC Impose Pandemic-Caused Travel Restrictions Affecting Overton

In mid-March, Lockheed imposed travel restrictions on its own employees and subcontractor employees, including CNC personnel. (ER. Ex. 4.) In addition, Lockheed Site Director Kurt Pinkerton notified Mr. Kusbel that Lockheed would not permit site access to subcontractor personnel who must travel to California from outside the state. (Tr. 230.) Accordingly, Overton was not permitted to travel to and work at Fort Irwin. In addition, for safety reasons during the pandemic, Mr. Kusbel prohibited CNC employees from engaging in air travel for business until mid-summer. (Tr. 230-231.) At the end of July, Lockheed lifted its out-of-state travel restrictions, allowing Overton the ability to work the August 2020 rotation. (Tr. 230.)

It is undisputed that between March 17 and August 11, Overton worked from CNC's Montgomery, Alabama office. Mr. Kusbel assigned Overton to work on a communications kit called a STEP Box while he was in Alabama and unable to travel to Fort Irwin during the COVID-

⁵ This calculation is inclusive of hours worked between March 6-16. Overton's travel days to and from Fort Irwin were March 5 and March 17, respectively. (Tr. 150-151.)

19 pandemic and during the effective period of Lockheed's and CNC's pandemic-related travel restrictions. (Tr. 231-233.)⁶

D. Overton Returns to Fort Irwin After Travel Restrictions Are Lifted by Lockheed and CNC

On August 11, Overton traveled to Fort Irwin and worked the August training rotation with other Stipulated Unit employees from August 12 to August 23. (Tr. 167.) During this rotation, Overton worked 94.83 hours, 37 hours of which occurred before the August 15 eligibility cutoff date and 57.83 hours occurred after the eligibility date. (ER Ex. 6, p. 7.)

Mr. Kusbel's testified without contradiction that he intended for Overton work on every training rotation at Fort Irwin in 2020. (Tr. 229.) Indeed, the Hearing Officer acknowledged that this testimony "was not refuted." (Report at 2, fn. 5.) Moreover, CNC's actions corroborate Mr. Kusbel's testimony. Following Overton's early-2020 reassignment to Fort Irwin, and prior to the onset of the COVID-19 pandemic and related travel restrictions, CNC directed Overton to work both the February and March training rotations at Fort Irwin, which were the only rotations occurring after Overton's reassignment. Overton was unable to work the February rotation due to scheduled jury duty in Alabama on February 3. But Overton worked approximately 87 hours during the March rotation. Moreover, once the pandemic-related travel restrictions were lifted at the end of July, CNC assigned Overton to work the first scheduled training rotation – and only training rotation prior to the August 15 eligibility date – following Lockheed's rescission of the pandemic-related travel restrictions. Thus, CNC assigned Overton to work at all Fort Irwin training rotations that occurred after Overton's reassignment and before the August 15 eligibility

⁶ At this time, CNC does not argue that this constituted bargaining unit work.

date, and for which he was not affected by Lockheed's and CNC's pandemic-related travel restrictions.

REGIONAL DIRECTOR'S DECISION

The Regional Director concluded that Overton is neither a full-time nor a regular part-time employee and was therefore ineligible to vote in the election. (Decision at 5-7.) Accordingly, the Regional Director sustained Petitioner's challenge and issued a Certification of Representative. (Id. at 7-8.) The instant Request for Review addresses only the Regional Director's erroneous conclusion that Overton is not a regular-part time employee in the Stipulated Unit. Specifically, the Regional Director's Decision erred by concluding that "special circumstances" did not warrant deviation from the standard *Davison-Paxon* formula.

The Regional Director curiously found that Overton's reduced hours at Fort Irwin from mid-March through July was not an anomaly caused by the pandemic-related travel restrictions imposed by CNC and Lockheed. (Id. at 5-6.) The Regional Director disregarded that the pandemic-related travel restrictions deprived Overton of the ability travel from Alabama to California to work at Fort Irwin. The Regional Director seemingly ignored the undisputed fact that Overton was assigned to work both training rotations following his reassignment to Fort Irwin and prior to the onset of the COVID-19 pandemic. Indeed, Overton worked 87 hours between Nault's January 9 initiation of the CAC Card process to obtain Overton's access at Fort Irwin, and his March 17 departure from Fort Irwin as the pandemic was ravaging the nation. Overton was also assigned to work and did work the first and only training rotation after the pandemic-related travel restrictions were lifted and prior to the August 15 eligibility date. During that two-week period, Overton worked 37 hours – and additional 57.83 after the August 15 eligibility date during the same August training rotation.

To reach the conclusion that Overton's zero work hours at Fort Irwin between his March 17 and July 31 was not an anomaly, the Regional Director oddly focused on Overton's post-eligibility date employment at Fort Irwin. While finding that Overton's post-eligibility date work hours to the analysis of whether Overton was an eligible regular part-time employee, the Regional Director concluded that his post-eligibility date employment was relevant to determine whether his mid-March through July employment at Fort Irwin was anomalous. (Decision at 5-6.) The Regional Director employed this flawed reasoning even though the Petitioner, not CNC, bears the burden of establishing Overton is not eligible to vote in the election, and neither CNC nor Petitioner sought to elicit testimony at hearing regarding why Overton did or did not work weeks and months after the established eligibility date.

The Regional Director further concluded that no "special circumstances" warranted deviating from the *Davison-Paxon* formula because "Overton's travel to and work at Fort Irwin has not materially increased since the travel restrictions were lifted at the end of July." This conclusion is as demonstrably wrong as the process to reach the conclusion is strained. The Regional Director proceeded to compare Overton's work at Fort Irwin "between March and July" to his work at Fort Irwin after the travel restrictions were lifted at the end of July. In so doing, the Regional Director included Overton's pre-pandemic travel to Fort Irwin in early-March. CNC does not contend that "special circumstances" arose prior Lockheed's pandemic-related travel restrictions. Thus, it was inappropriate for the Regional Director to use Overton's pre-pandemic work at Fort Irwin to assess whether his work hours during the COVID-related travel restrictions was an anomaly. In fact, Overton's travel to and work at Fort Irwin substantially increased after travel restrictions were lifted relative to the period during which the restrictions were in place. Indeed, it is undisputed that Overton worked more than 100 hours in the six (6) weeks following

the rescinding of the travel restrictions in late-July. Accordingly, the Regional Director’s finding was clearly in error:

[T]he evidence does not support finding that the pandemic-related travel restrictions were the reason that Overton did not work sufficient hours during the time leading up to the August 15 eligibility date to establish he was a regular part-time employee given that Overton’s travel to and work at Fort Irwin did not materially increase after the travel restrictions were lifted.

(Decision at 6.)

The Regional Director further concluded that the COVID-19 pandemic and ensuing travel-related restrictions imposed by CNC and Lockheed, did not constitute “special circumstances” warranting deviation from the *Davison-Paxon* formula. (Decision at 7.) The Regional Director reached this conclusion despite the many Regional Director decisions finding that the COVID-19 pandemic constitute “extraordinary circumstances” necessitating a mail-ballot election. In reaching this conclusion, the Regional Director reiterated that a pandemic does not constitute “special circumstances” warranting deviation from the *Davison-Paxon* formula where “the evidence is insufficient to find that the pandemic-related travel restrictions were the reason that Overton did not work a sufficient number of hours at Fort Irwin to satisfy the *Davison-Paxon* formula...” (Id.)

Finally, the Regional Director declined to find “special circumstances” warranting deviation from the *Davison-Paxon* formula all Stipulated Unit employees except for Overton had a regular pattern of employment at Fort Irwin. The Regional Director conspicuously failed to note that Overton is the only employee, contested or otherwise, who resides outside the State of California; and, thus, was the only employee subject to the pandemic-related travel restrictions.

ARGUMENT

In determining whether an individual is a regular part-time employee, the Board considers the length and regularity of his employment. *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004). The standard often used by the Board to determine regularity of part-time employment is whether the employee worked an average of four (4) or more hours per week in the 13-week period preceding the eligibility date. *Arlington Masonry Supply Co.*, 339 NLRB 817, 819 (2003), citing *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970).

But the Board has rejected rigid application of eligibility tests and showed flexibility in devising and applying them to afford employees within a continuing interest in employment the optimum opportunity for meaningful representation. *Trump Taj Mahal*, 306 NLRB 294, 296 (1992). For example, where employees have experienced lengthy breaks in employment from the voting unit, the Board has looked to the periods both before and after the hiatus to assess whether the employee had sufficient employment to be counted as a regular part-time employee. *Pat's Blue Ribbons*, 286 NLRB 918, 919 (1987).

Contrary to the Regional Director's Decision adopting the Hearing Officer's recommendations, application of a modified formulas is not limited to instances where employees have an irregular or sporadic patter of employment based on their work or industry. Rather, the Board has long recognized that hiatuses in employment within the unit render ineffective a standard application of the *Davison-Paxon* formula. Where an employee has a hiatus from the voting unit, the Board calculates the employee's weekly average over 13 weeks that include the time between the employee's return to work and the election, and the time before the hiatus. *A L Investors Orlando, LLC d/b/a The Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005).

Special circumstances exist in this case to warrant deviating from the standard *Davison-Paxon* formula and utilizing a modified time period to calculate Overton's average weekly hours.

On March 17, Overton left Fort Irwin at the onset of the COVID-19 pandemic. Due to Lockheed's and CNC's pandemic-related travel restrictions, Overton was unable to return to Fort Irwin until August 1, at the earliest. It is undisputed that Overton worked zero hours at Fort Irwin between March 17 and July 31. It is equally undisputed that Overton worked over 87 hours in the first two-plus months of 2020 following his reassignment. And it cannot be credibly disputed that Overton worked 37 hours in the first two weeks of August, more than 94 hours over the entire month of August, and exceeding 100 hours in the first six weeks after the pandemic-related travel restrictions.

Notwithstanding the undisputed data establishing that Overton worked sufficient hours to be considered a regular part-time employee in the months preceding the pandemic-related travel restrictions and the weeks after the lifting of the travel restrictions, the Regional Director reached the opposite conclusion. This conclusion is clearly belied by the evidence establishing Overton's work hours before and after he was affected by Lockheed's and CNC's travel restrictions. Thus, approximately 11 weeks of the 13-week period prior to the August 15 eligibility date occurred while Overton was unable to travel to and work at Fort Irwin due to pandemic-related travel restrictions. These 11 weeks are not useful in determining whether Overton has a continuing interest in the terms and conditions of unit employees' employment.

Established Board law supports the conclusion that Overton's absence from working at Fort Irwin pandemic-caused hiatus that supports the finding of "special circumstances" and a modified calculation to determine whether Overton is a regular part-time employee. In *Pat's Blue Ribbons*, employee Matthews went on maternity leave from January until September. After returning to work in early-September, Mathews worked only 43 hours in the 13 weeks prior to the September 30 eligibility date. The Board reversed the Hearing Officer's sustaining of the

challenge to Mathews’s ballot, reasoning that an “accurate determination of the regularity of her employment for the quarter in which she resumed active employment...can be based only on those hours worked in September.” 286 NLRB at 919. The Board further noted that Mathews worked “substantial” hours in the months preceding her maternity leave. *Id.*

Thus, the Regional Director erred by not applying a modified formula and omitting the portion of her 13-week calculation period occurring prior to July 31. The March 17-July 31 hiatus period, which was necessitated by COVID-19 travel restrictions, should not be utilized in the Board’s calculation to determine whether Overton is a regular part-time employee in the Stipulated Unit. Instead, the Board should calculate the hours worked in the weeks after Overton returned from his hiatus. Specifically, Overton worked 37 hours in the two weeks after the pandemic-related travel restrictions were lifted. This far exceeds the 4 hours per week average necessary to be considered a regular part-time employee. Alternatively, the Board may calculate Overton’s hours worked in the two weeks preceding the eligibility date after the travel restrictions were lifted, and the 11 weeks prior to the implementation of the travel restrictions. Under such a formula, Overton worked 124 hours in the 13-week period, which is again sufficient to be considered a regular part-time employee.

CONCLUSION

The Regional Director erred in sustaining Petitioner’s challenge to Overton’s ballot and determining that he is not a regular part-time employee and therefore ineligible to vote. The Board should grant CNC’s Request for Review, concluded that “special circumstances” warrant deviating from the *Davison-Paxon* formula, and apply one of the above modified formulas – any one of which would result in the conclusion that Overton is a regular part-time employee. Moreover, the

Board should overrule Petitioner's challenge, vacate the Certification of Representative, and remand the case to the Regional Director for further processing.

Executed at Baltimore, Maryland, this 27th day of January 2021.

Respectfully submitted,

/s/ Chad M. Horton

Shawe Rosenthal LLP
One South Street, Suite 1800
Baltimore, MD 21202
P: 410-843-3480
horton@shawe.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 27, 2021, the Employer's Request for Review of the Regional Director's Decision Adopting the Hearing Officer's Recommendations and Issuing Certification of Representative has been E-filed with the Board and Regional Director, and copies thereof have been served on the following individuals via e-mail:

David Fujimoto, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501
dfujimoto@unioncounsel.net
Attorney for Petitioner

Hon. Mori Rubin, Esq.
Regional Director
National Labor Relations Board, Region 31
11500 West Olympic Blvd.
Suite 600
Los Angeles, CA 90064
mori.rubin@nlrb.gov

Executed: January 27, 2021

/s/
Chad M. Horton
SHAWE ROSENTHAL LLP
One South Street
Suite 1800
Baltimore, MD 21202
P: 410-843-3480
horton@shawe.com