

CAREN P. SENCER, Bar No. 233488
DAVID W. M. FUJIMOTO, Bar No. 299316
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1375 55th Street
Emeryville, California 94608
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: nlrbotices@unioncounsel.net
csencer@unioncounsel.net
dfujimoto@unioncounsel.net

Attorneys for Petitioner INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, DISTRICT
LODGE 725

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 31

CONSOLIDATED NETWORKS
CORPORATION,

Employer,

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 725,

Petitioner.

No. 31-RC-263768

**PETITIONER INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT
LODGE 725'S OPPOSITION TO THE
EMPLOYER'S REQUEST FOR
REVIEW OF THE REGIONAL
DIRECTOR'S DECISION ADOPTING
HEARING OFFICER'S
RECOMMENDATIONS AND ISSUING
CERTIFICATION OF
REPRESENTATIVE**

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I. INTRODUCTION

The Employer Consolidated Networks Corporations' ("Employer") Request for Review ("Request") is based on section 102.67(d)(1)(i)-(ii) (Request at 1) alleging that the Regional Director departed from precedent and that there is an absence of precedent such that the Board should grant review. As such, it does not challenge the factual findings made in the Regional Director's Decision to Adopt the Hearing Officer's Recommendations and Issue Certification of Representative ("Decision"). Among the unchallenged factual findings is the finding that the pandemic-related travel restrictions were not the cause of James Overton's ("Overton") absence at Fort Irwin between March and August and, subsequently, were not the cause of him working insufficient hours to qualify as a regular part-time employee. Therefore, those restrictions cannot constitute special circumstances justifying a departure from the *Davison-Paxon* formula and the Regional Director properly applied governing precedent in so concluding. Even if the Board considers the Employer's Request as properly being also based on section 102.67(d)(2), the Regional Director's factual findings are supported by the record evidence.

The Employer did not support with any argument its bald assertion that its Request for Review is justified by a lack of precedent on whether pandemic-related travel restrictions constitute special circumstances justifying an alternative to *Davison-Paxon*. Instead, the Employer focused the entirety of its argument on the incorrect contention that the Regional Director did not apply precedent. Since the factual finding that travel restrictions did not cause Overton's insufficient hours stands, this case does not present the issue of whether pandemic-related travel restrictions constitute special circumstances to justify an alternative to *Davison-Paxon*. Even if this case properly presented this question, due to the lack of tenure and regularity of employment both before and after Overton's absence from Fort Irwin to work on the STEP Box (*Infra* at 3), these travel restrictions would not warrant special circumstances in this case.

II. ARGUMENT

A. **THE EMPLOYER DOES NOT CHALLENGE THE REGIONAL DIRECTOR'S FACTUAL FINDINGS, INCLUDING THAT THE PANDEMIC-RELATED TRAVEL RESTRICTIONS WERE NOT THE REASON THAT OVERTON WORKED AN INSUFFICIENT NUMBER OF HOURS AT FORT IRWIN**

The Employer's Request for Review is based on an alleged departure from precedent or an absence of precedent regarding "whether travel restrictions implemented in response to a pandemic constitutes 'special circumstances' to deviate from the *Davison-Paxon* eligibility formula." (Request at 1—citing 29 CFR § 102.67(d)(1)(i)-(ii)). The Employer's Request is not based on an assertion that the Regional Director's "decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party" under section 102.67(d)(2) of the regulations (*See generally id.*;). To be sure, "With respect to the ground listed in paragraph (d)(2) of this section . . . the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument." 29 CFR § 102.67(e).

While the Employer found it curious that the Regional Director "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," (Request at 9) it failed to cite to the transcript as required by section 102.67(e) in order to bring a request for review based on section 102.67(d)(2). Therefore, the Employer does not challenge the Regional Director's factual findings that "the evidence does not support finding that the pandemic-related travel restrictions were the reason that Overton did not work sufficient hours at Fort Irwin . . . 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) or that "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 during the time leading up to the August 15 eligibility date." (*Id.* at 7). As such, the Regional Director's factual findings on this issue remain unchallenged.

B. IF THE BOARD ANALYZES THE EMPLOYER’S REQUEST UNDER SECTION 102.67(D)(2), THE REGIONAL DIRECTOR’S FINDINGS ARE SUPPORTED BY THE EVIDENCE

If the Board determines that the Employer’s Request is properly based on section 102.67(d)(2) , the Regional Director’s finding that the travel restrictions were not the cause of Overton’s absence at Fort Irwin is supported by the fact that “Overton traveled to Fort Irwin only twice and worked there for about three weeks (August 11-22 and September 7-11) between August and the hearing before ALJ Gollin on November 18.” (*Compare* Decision at 6 *with* Employer Ex. 6 *and* Tr. 166:20-167:13; 173:3-20). The additional finding that Overton’s minimal work at Fort Irwin was not an anomaly (Decision at 6) is supported by the record evidence that “Overton’s work at Fort Irwin during the former period (one trip for two weeks of work) [was not] materially different from Overton’s work during the latter period (two trips for three weeks of work)” (*Compare* Decision at 6 *with* Employer Ex. 6; Tr. 151:9-152:17). The evidence cited herein alone are sufficient to support the Regional Director’s findings.

Additionally, the Regional Director’s findings are supported by the fact that Overton’s work on the STEP box—conceded by the Employer to not be bargaining unit work (Request at 8, fn 6)—was the real reason for his absence at Fort Irwin. The Employer had until August to complete the STEP box (Tr. 206:13-20). Overton worked on it from March 18 to June 25 while coding his time under “overhead” (*Compare* Employer Ex. 6 *with* Tr. 239:22-240:2). Starting June 26, he began charging the Raytheon business development “BD” code for his work on it (Tr. 201:2-15). Pandemic or not, Overton was going to have to work on the STEP box to have it completed by August and Overton was going to have to perform the work in Alabama because “there was no place for [employees] to perform that [STEP box manufacturing] function within the confines of building 990 [at Fort Irwin].” (Tr. 208:25-210:1).

For all these reasons, the Regional Director’s findings are supported by the record evidence.

C. THE REGIONAL DIRECTOR APPLIED GOVERNING PRECEDENT IN FINDING THAT SPECIAL CIRCUMSTANCES JUSTIFYING A DEPARTURE FROM *DAVISON-PAXON* DO NOT EXIST

Since the Employer did not challenge the Regional Director’s factual findings, the finding that Overton’s absence from Fort Irwin was not caused by the pandemic-related restrictions stands. *Pat’s Blue Ribbons*, 286 NLRB 918, 919 (1987), cited by the Employer (Request at 12), does not apply. Whereas Judy Mathews’ leave there was caused by her pregnancy, here Overton’s absence at Fort Irwin was not caused by the pandemic-related travel restrictions. As such, the travel-related restrictions cannot constitute special circumstances justifying an alternative to *Davison-Paxon*.

Pat’s Blue Ribbons also doesn’t apply for a different reason. In that case, prior to the 9-month leave of absence “Mathews worked continuously as a shop employee from February 1985 until 22 January.” *Pat’s Blue Ribbon*, 286 NLRB at 219. As noted by the Board, her “hours in the months preceding her leave were substantial.” *Id.* Based in significant part on her tenure and regularity of employment in the unit, she was found to be a regular part-time employee. *Id.* Here, even if Overton’s absence was caused by the travel restrictions, Overton has no such tenure and regularity of employment prior to his time working in Alabama between March and August. For these additional reasons, *Pat’s Blue Ribbon* is distinguished.

A L Investors Orlando, LLC d/b/a The Pavilion at Crossing Pointe (“The Pavilion”), 344 NLRB 582, 583 (2005) also is distinguished. There, the employee in question was laid off. That was the reason for his hiatus. Here, Overton’s absence was not even a hiatus as Overton was working full-time on the STEP box for the Employer in Alabama.¹ More importantly, Overton was not absent from Fort Irwin as a result of pandemic-related travel restrictions. Therefore, the

¹ While the Union did not file exceptions or a request for review, a regular part-time analysis, such as the use of *Davison-Paxon* or an alternate formulate “does not apply to dual-function employees.” *Columbia Coll. & Illinois Educ. Ass’n*, 346 NLRB 726, 730 n. 10 (2006). Overton is “otherwise employed by the Employer on a regular full-time basis,” who would be included in the unit *if* he qualifies as a dual-function or dual-status employee. *See Syracuse Univ.*, 325 NLRB 162, 162 (1997). Since Overton fails to meet the standard for a dual-function employee, which the Employer implicitly acknowledges, he is simply ineligible to vote without the need to evaluate regular part-time status.

asserted reason for finding special circumstances is not present here as the employee's layoff was present in *The Pavilion*.

Furthermore, even accepting arguendo that Overton's absence from Fort Irwin was caused by the travel restrictions, Overton did not demonstrate the tenure or regularity of employment as did the employee in *The Pavilion*. There, during the 4-month period prior to his layoff, the employee worked "2 days a week (Thursdays and Fridays), 7 hours per day, or 14 hours per week." 344 NLRB at 583. Here, Overton worked for about one 2-week period at Fort Irwin prior to the travel restrictions taking effect. That was it. This is not even close to the regularity or tenure present in *The Pavilion*. Therefore, for this additional reason, *The Pavilion* does not apply.²

D. THE EMPLOYER FAILS TO MAKE ADDITIONAL ARGUMENTS THAT THE ABSENCE OF BOARD PRECEDENT TO CONSIDER PANDEMIC-RELATED TRAVEL RESTRICTIONS WARRANTS GRANTING ITS REQUEST

The Employer cites, as a basis for its Request, the absence of Board precedent on whether "travel restrictions implemented in response to a pandemic constitutes 'special circumstances' to deviate from the *Davison-Paxon* eligibility formula." (Request at 1—citing 29 CFR § 102.67(d)(1)(ii)). Yet, it's argument is devoted entirely to contending that the Regional Director should have applied existing Board precedent, namely *The Pavilion*, 344 NLRB 582 and *Pat's Blue Ribbon*, 286 NLRB 918. It fails to make arguments that an absence of precedent on whether pandemic-related travel restrictions should be considered a special circumstance justifying a departure from *Davison-Paxon* warrants a grant of its Request (Request at 11-14).

Here, since the pandemic-related travel restrictions were not the cause of Overton's absence from Fort Irwin, this case does not properly present that question. Even if this case did present that question, as a result of Overton's lack of tenure or regular employment at Fort Irwin preceding or following his absence from Fort Irwin there is no basis to conclude under these

² Employer contradicts itself by arguing, on the one hand, that "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," (Request at 10) but on the other hand that *Pat's Blue Ribbon* and *The Pavilion* apply—both of those cases evaluated the employee's pre-hiatus employment as a part of the analysis.

facts that pandemic-related travel restrictions constitute special circumstances. And since the Employer makes no argument related to its bald assertion that a lack of precedent regarding whether pandemic-related travel restrictions presents special circumstances justifying a departure from *Davison-Paxon* warrants a grant of its Request, the Board is not required to make one for the Employer and this assertion should be rejected.

III. CONCLUSION

For these reasons, the Union respectfully requests that the Board deny the Employer's Request for Review.

Dated: February 3, 2021

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /S/ DAVID W.M. FUJIMOTO
 DAVID W. M. FUJIMOTO
Attorneys for Petitioner INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, DISTRICT LODGE
725

150157\1142287

CERTIFICATE OF SERVICE

31-RC-263768

I am a citizen of the United States and an employee in the County of Emeryville, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1375 55th Street, Emeryville, California 94608.

I hereby certify that on February 3, 2021, I electronically filed the forgoing **Opposition To The Employer's Request for Review** with the National Labor Relations Board, by using the Board's Electronic Filing system.

On February 3, 2021, I served the following documents in the manner described below:

PETITIONER INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 725'S OPPOSITION TO THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION ADOPTING HEARING OFFICER'S RECOMMENDATIONS AND ISSUING CERTIFICATION OF REPRESENTATIVE

- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Judge Andrew S. Gollin
Administrative Law Judge
National Labor Relations Board
Email: Andrew.Gollin@nlrb.gov

Chad M. Horton
SHAWE ROSENTHAL LLP
One South Street Suite 1800
Baltimore, MD 21202
Email: cmh@shawe.com

Ms. Mori P. Rubin
National Labor Relations Board, Region 31
Regional Director
11500 W. Olympic Boulevard, Suite 600
Los Angeles, CA 90064
Email: Mori.Rubin@nlrb.gov

J. Michael McGuire
SHAWE ROSENTHAL LLP
One South Street Suite 1800
Baltimore, MD 21202
Email: mcguire@shawe.com

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on February 3, 2021.



Lara Hull