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

Grandview, MO

DURHAM SCHOOL SERVICES, INC.

Employer

and Case 17-RC-079167

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 838

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 May 3, 2012, before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether the petitioned-for unit of employees constitutes an appropriate unit for the purpose of collective bargaining and whether it is appropriate to hold an election at the present time due to the nature of the Employer's business operations. At the close of the hearing, the parties[1] were afforded the opportunity to file briefs addressing the issues raised during the hearing. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon review of the entire record in this proceeding, including the parties' briefs, the undersigned makes the following findings:

[1] The parties' names appear as amended during the hearing.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 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.[2] The Petitioner is a labor organization which claims to represent certain employees of the Employer, and 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.

A. ISSUES

The Petitioner seeks an election in the following unit:

All full-time and regular part-time school bus drivers and monitors/aides employed by the Employer at its 12100 Grandview Road, Grandview, Missouri facility, but excluding all office clerical employees, professional employees, dispatchers, assistant dispatchers, lot/yardmen, mechanics, managers, guards and supervisors, as defined by the Act and all other employees.

The parties stipulated that the above described bargaining unit is appropriate, with the sole exception that the Employer contends that trainers are supervisors within the meaning of Section 2(11) of the Act and therefore are excluded from the unit. The Union takes the position that the trainers are not supervisors and are appropriately included in the unit.

The Petitioner further contends that a manual election should be held prior to the end of the 2011-2012 current school year in late May 2012, and if the conduct of such an election is not possible, the Petitioner contends that it is preferable to conduct the election by mail ballot rather than delaying the conduct of the election until after the start of the 2012-2013 school year in the fall. In contrast to the Petitioner's position, the Employer contends that the election should be

[2] At the hearing, the parties stipulated to the following commerce facts: the Employer is a Delaware corporation engaged in the business of providing full-service student transportation to school districts with an office and place of business in Grandview, Missouri. During the preceding 12 months, a representative period, from its operations at this location, the Employer derived gross revenues in excess of $250,000 and purchased and received goods and materials in excess of $5,000 directly from points outside the State of Missouri.

delayed until after the start of the 2012-2013 school year in the fall and that it is not appropriate to hold a mail ballot election.

As discussed below, based on my review of the evidence, the parties' arguments, and relevant Board precedent, I make the following findings. The evidence is not sufficient to show that the trainers are supervisors within the meaning of Section 2(11) of the Act and I further find that the inclusion of trainers in the petitioned-for unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. I also find that it is appropriate to conduct an election as soon as practical rather than delaying the conduct of the election until the fall after the start of the 2012-2013 school year. The manner of the conduct of the election (manual or mail ballot) will be determined administratively and will be specified in a separate letter that the Regional Office will issue subsequent to issuance of this Decision.

Accordingly, I am directing an election in the following appropriate unit:

All full-time and regular part-time school bus drivers, monitors/aides, and trainers employed by the Employer at its 12100 Grandview Road, Grandview, Missouri facility, but excluding all office clerical employees, professional employees, dispatchers, assistant dispatchers, lot/yardmen, mechanics, managers, guards and supervisors, as defined by the Act and all other employees.

There are approximately 100 employees in the bargaining unit.

B. FACTS

From its Grandview, Missouri facility, the Employer provides school-bus transportation services to public school children, including special needs children, in the Hickman Mills, Missouri School District and the Grandview, Missouri School District pursuant to contracts with the school districts. During the current 2011-2012 school year, which runs from August 2011

through about May 23, 2012, the Employer's employee complement at its Grandview facility has consisted of about 70 drivers, 30 monitors, and 4 trainers. The routes for the regular school year in the Grandview School District, end about May 15 to 17, 2012 and the routes for the regular school year in the Hickman Mills School District, end about May 23, 2012.

At the end of the regular school year, the Employer's employees fill out forms stating whether they are available for summer work assignments, and whether they plan to return in the fall to work during the next regular school year. This information is used to offer employees summer work when it is available. Generally, the Employer receives contracts from the school districts for a reduced level of summer transportation work. However, at the time of hearing, it was not known whether the Employer would receive contracts for summer work or the amount of work the summer contracts might entail. The record does not show how many employees have been available for work and have performed summer work for the Employer in recent years. In prior years the Employer filled slots for summer work by initially asking for volunteers, and in the absence of a sufficient number of volunteers, the Employer assigned summer work on the basis of least seniority. At the end of the regular school year, employees are not terminated but rather are temporarily laid off and receive unemployment benefits throughout the summer. There is no record evidence that employees receive benefits from the Employer when they are on lay off status. Typically about 80 to 85% of the employees laid off in the spring at the end of the school year return to work for the Employer in the fall at the commencement of the new school year. The Employer does not formally recall laid off employees in the fall, and rather the laid off employees who wish to return to work in the fall simply contact the Employer in late summer and indicate they are returning to work for the new school year. Laid off employees retain their

seniority whether they work in the summer or not. When the regular school year resumes in the fall, driver routes are adjusted in the first weeks of the school year, which can affect the number of drivers and monitors employed.

The Employer's overall operations at its Grandview facility are overseen by Daryl Huddleston, General Manager. In addition, Patrick Daye is Operations Supervisor and Louise Carter is Safety and Training Supervisor at the facility. The parties stipulated that Huddleston, Daye, and Carter are supervisors within the meaning of the Act with the authority to hire, fire, discipline or effectively recommend these actions, and I find that they are supervisors within the meaning of Section 2(11) of the Act and are therefore excluded from the bargaining unit found appropriate herein.

Safety and Training Supervisor Carter oversees safety programs and training of employees and is assisted by four trainers including classroom trainer, Churon Duncan, and three behind-the-wheel trainers, Brandon Brown, Lilly Hardy, and Darryl Redmon. The trainers also have assigned routes that they drive.

Training is done primarily for applicants who did not work with the employer the prior year. Charon Duncan, as classroom trainer, conducts classes for applicants. Written material is provided and applicants are tested and graded. The tests are standardized multiple choice tests developed by the Employer, not by Duncan, and the Employer provides the classroom trainer with standard answer keys to the tests. The behind-the-wheel trainers work with applicants to prepare them for the driving test administered by the Highway Patrol. Highway Patrol officers conduct the actual driving tests which determine whether applicants have passed the behind-the-wheel test. Although there was general record testimony that trainers can effectively recommend

whether an applicant should be hired, there was also evidence that those applicants who pass the classroom tests and behind the driving tests are routinely hired to drive routes. The behind-the-wheel trainers also conduct ride-alongs during the year with the drivers and monitors. Although there was general evidence that a ride-along could result in the issuance of coaching or discipline to drivers, there was no evidence that any trainer has recommended discipline; that such recommendation, if made, would entail the exercise of independent judgment by a trainer; or that any such recommendation has been accepted without independent investigation by Safety and Training Supervisor Carter.

C. ANALYSIS

1. Trainers

The evidence is not sufficient to show that the trainers are supervisors within the meaning of the Act. The burden of establishing supervisory status rests on the party asserting that status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities* 535 n. 8 (1999). Conclusionary statements without supporting evidence do not establish supervisory authority. *Voltair Contractors, Inc.,* 341 NLRB 673 (2004).

In *Webco Industries, Inc*., 90 Fed. Appx. 276, 2003 WL 22954295 (10th Cir. 2003), a trainer was found not to be a supervisor when the evidence did not provide a direct link between his job duties and company decisions to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees. He performed only the kind of minor oversight duties envisaged by legislative history as insufficient to establish supervisory status. *Webco Industries*, supra, 90 Fed Appx. at 282.

Giving classroom training and doing behind-the-wheel instruction, and doing ride-alongs with employees is not sufficient to show that any of the four trainers have and exercise supervisory authority within the meaning of Section 2(11) of the Act. The test administered by the classroom trainer is standardized and there is no showing that the classroom trainer exercises any independent judgment with regard to the test. Further, there is insufficient evidence that any of the trainers exercise independent judgment to effectively recommend the hiring or the discipline of employees. Although the Employer argues that if the trainers are not supervisors, there are too few supervisors for the number of employees, the ratio cannot substitute for specific evidence that trainers have supervisory authority.

Based upon the evidence of record, the arguments of the parties, and applicable case law, I conclude that the four trainers are rank and file employees who share a community of interest with drivers and monitor/aides and should be included in the unit.

2. Timing and Method of Election

The practice of the Board is to leave the selection of the time and place of the election to the sound discretion of the Regional Director. *Halliburton Services (Coffeyville, Kansas)*, 265 NLRB 1154 (1982). The Board's Casehandling Manual (Part Two—Representation Proceedings) provides guidance in the exercise of that discretion. Section 11300 of that manual provides that "...the prompt resolution of questions concerning representation is a primary objective of the Act. If an election is to be held, the Regional Director should exercise discretion in achieving the objective of conducting the election as soon as practical after a petition is filed." Section 11302.1 directs that the "date selected should be one that balances the desires of the parties and operational considerations, along with the desirability of facilitating employee

participation and the prompt and timely conduct of the election." This section also states that when the Regional Director directs an election, "the election normally should not be scheduled prior to the 25th day thereafter, unless the right to file a request for review has been waived, nor later than the 30th day thereafter."

These criteria lead to the conclusion that an immediate election should be conducted. The primary objective of prompt resolution of a question concerning representation and the desire of the Petitioner to proceed to an election without waiting until the fall support an immediate election. History shows that 80 to 85% of the employees now employed will probably return in the fall, and that an unknown percentage may be offered summer work. No party contends that employees laid off are permanently laid off – all laid off employees are encouraged to work in the summer if work is available and to resume their work in the fall term which begins mid to late August in these districts. Further, at the time of the hearing and the issuance of this Decision, a full employee complement was employed in all unit job classifications and the voter eligibility list will reflect an employment level at a peak period of employment. Further, the record establishes that most unit employees return in the fall and that the turn over rate is not substantial. Thus, the conduct of an immediate election will not disenfranchise employees as contended by the Employer.

The cases cited by the Employer in its brief do not compel a different conclusion. Here the employees who are eligible to vote in an immediate election are essentially the same as the employees who would be eligible to vote in an election held in the fall.

In *Bituma Corporation v. NLRB*, 23 F.3d 1432 (8th Cir. 1994), the court found that the Board did not abuse its discretion to hold immediate election where the employer employed

approximately 59% of its average peak employee complement, all job classifications were filled, and the next employment peak would not occur for eight months. The court noted that the Board generally considers a business not seasonal enough to warrant the postponement of an election unless the next seasonal peak would increase the employment complement by 100% at its peak. The concern is whether a substantial and representative group of employees is present. In the instant case, the full employee complement is currently employed and identifiable by the payroll cutoff date used to determine the voter eligibility list. Further, while some unit employees will be on laid off status when the election is conducted, the record establishes that these laid off employees have an expectancy of recall in the near future and would retain their eligibility to vote in the election. See *MJM Studios*, 336 NLRB 1255 (2001) and *MJM Studios,* 338 NLRB 980 (2003).

Based upon the Employer's past experience and current plans, a representative complement can be identified and will be eligible to vote in an immediate election. Under the circumstances herein, where the employee complement eligible to vote in the election can be readily identified; the layoff is for a short and known period of time that does not affect voter eligibility, substantially affect the identity of the employee complement, and does not reflect a change in or uncertainty regarding the Employer's business operations, I find that the Employer's business is insufficiently seasonal in nature to support the postponement of the election to the fall. Under all the circumstances present, I find that an immediate election is fully consistent with the agency's objectives in processing election petitions and thus should be directed among the Employer's employees in the unit found appropriate herein.

Issues regarding whether a manual, mail ballot election, or mixed mail/manual election is appropriate will be determined administratively by the undersigned Regional Director after the issuance of this Decision.

D. CONCLUSION

For the reasons set forth above, I find that the trainers are not supervisors and should be included in the otherwise agreed upon unit. I also conclude that it is appropriate to order an immediate election and to determine later, administratively, whether the election will be by manual or mail ballot or a combination of the two.

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 all employees employed in the bargaining unit during the payroll period ending immediately preceding the date of this Decision (payroll cutoff date), 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 **INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 838**.

NOTICES OF ELECTION

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.

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 undersigned 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. The undersigned shall make this list available to all parties to the election.

In order to be timely filed, such list must be received in Region 17's Office, Suite 100, 8600 Farley, Overland Park, Kansas 66212, on or before **May 21, 2012**. 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. If you have questions, please contact the Regional Office.

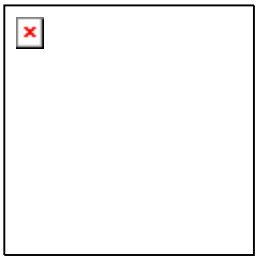
RIGHT TO REQUEST REVIEW

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 5:00 p.m. (ET) on **May 29, 2012**.

This request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov, but may not be filed by facsimile. Refer to the Attachment supplied with the

Regional Office's initial correspondence for guidance in filing electronically. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the E-Gov tab and click E-Filing. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file documents electronically will be displayed.

SIGNED at Overland Park, Kansas, this 14th day of May, 2012.



/s/ Daniel L. Hubbel
Daniel L. Hubbel, Regional Director
National Labor Relations Board
Region 17
8600 Farley, Suite 100
Overland Park, Kansas 66212