

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

EXPOSITION STORAGE SERVICES, LLC

Employer

and

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS,
LOCAL UNION NO. 631 affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Petitioner

Case No. 28-RC-109730

**TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL
UNION NO. 631'S ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS**

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PETITIONER'S ANSWERING BRIEF

Pursuant to Rule 102.69(d) of the Rules and Regulations of the National Labor Relations Board, the Petitioner Teamsters Local 631 (“Petitioner”) files its Answering Brief in Response to the Exposition Storage Services, LLC (“Employer”)’s Brief in Support of Exceptions to the Hearing Officer’s Report and Recommendation on the Challenged Ballots (“Report”).

For the reasons hereafter explained, the Employer provides no persuasive reason to reject the Hearing Officer’s Report. The Employer ignores most of the salient facts and its legal analysis is at loggerheads with established Board law. The Board should reject them and adopt the Hearing Officer’s Report.

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On July 23, 2013, the Petitioner filed a petition for a representation election seeking to represent all full-time and part-time carpet preparers and carpet cleaners employed by the Employer at its Las Vegas facility. (JX 1.) On July 30, 2013, the Petitioner and the Employer entered into a stipulated election agreement that defined the bargaining unit as “[a]ll full-time and regular part-time casual and seasonal carpet preparers and carpet cleaners employed by the Employer in Las Vegas, Nevada.” (JX 2). The stipulated agreement defined eligibility as “employees in the above unit who were employed during the twelve-month period ending Sunday, July 28, 2013, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.” (JX 2.) On August 29, 2013, the Board held a representation election in which employees voted in favor of representation by the Petitioner by a margin of three to two, with the Petitioner challenging the eligibility of four additional voters: Trey Bubak, Michael Forrest, Keeter Galusha, and Roberto Soto. On September 23, 2013, a hearing was convened before a Hearing Officer at which the parties adduced evidence

concerning the eligibility of the challenged voters. Following the hearing, both the Employer and the Petitioner filed post-hearing briefs.

On December 6, 2013, the Hearing Officer issued his Report. He sustained the challenges as to each of the four challenged voters, and recommend that the Petitioner be certified as collective bargaining agent. On January 14, 2014, the Employer filed the present exceptions.

FACTS

I. OVERVIEW OF THE EMPLOYER’S BUSINESS

The business of the Employer is to clean and prepare carpets for installation at trade shows held at convention centers in Las Vegas. The Employer operates out of a warehouse in Las Vegas that it shares with an entity called Xpert Exposition Services (“XPert”). XPert is a general contractor that designs and installs trade show displays in Las Vegas. Roughly 75 percent of the Employer’s business is with XPert, and the two companies share common ownership. The other roughly 25 percent of the Employer’s business is with other general contractors in Las Vegas. (Tr. 33:8-19.)

The Employer’s business is driven by the contracts that it is successful in signing with general contractors, including XPert. As a result, the Employer experiences fluctuations in business levels, and accordingly, in its demand for labor. While the Employer claims there is a “seasonal” demand for labor, in reality—as discussed below at pages 10-12—the Employer’s labor demand is not “seasonal” but merely variable. (Tr. 153:1-6.)

The Employer employs what it calls “carpet preparers” at its warehouse whose job it is to clean and prepare the carpet for installation. The Employer describes these employees as “temporary” employees whom it claims it schedules on an as-needed basis in accordance with business demand. (Tr. 43:16-44:7.) During the election held on August 29, 2013, the Petitioner

challenged the eligibility of four of these voters based on their pattern of employment. None of these employees had worked as a carpet preparer for the Employer for at least nine months prior to the July 28, 2013 eligibility date, and none of them had been re-hired as of that date.¹

II. EMPLOYMENT HISTORY OF THE CHALLENGED VOTERS

The employment history of each challenged voter is as follows:

A. Trey Bubak

The Employer hired Bubak on September 15, 2012. He worked as follows over the next three months:

<i>Check Date²</i>	<i>Regular Hours</i>	<i>Overtime Hours</i>
9/21/2012	15.50	3.00
9/28/2012	40	33.50
10/5/2012	40	28.75
10/12/2012	11	
10/19/2012	40	10
10/26/2012	40	
11/2/2012	36.50	
11/9/2012	32	
11/16/2012	38.75	
11/23/2012	40	7.50
11/30/2012	24	
12/14/2012	32.75	3
12/21/2012	36.75	
1/18/2013*	24	

*Note: these hours were not spent working as a carpet preparer, but rather performing custodial work on-site at trade shows. (Tr. 133:4-7.)

(EX 9-10.)

¹ The work of the carpet preparers is performed solely at the warehouse. (Tr. 34:15-20.) The Employer also employs custodial workers who clean at show sites. (Tr.38:2-8.) This is not the classification of workers that the Petitioner seeks to represent. Employees who have been employed as carpet preparers have also picked up hours working as custodial workers. (Tr. 38:22-38.)

² Throughout this brief, references are made to certain work weeks based on evidence of the “check date” corresponding to that work week. Breedlove testified that the checks were issued on the Friday following the work week that had ended on the previous Sunday. The work week commenced on the previous Monday, that is, 11 days prior to the check date. (Tr. 130:10-25)

As the Hearing Officer correctly found (Report, p. 13), it was not because Bubak was a “seasonal” employee whose “season” had come to an end that he stopped working as a carpet preparer in December 2012. Rather, the Employer stopped offering work to Bubak in December 2012 after it hired Drew and Germaine Richardson on December 4 and 5, 2012 respectively. Drew and Germaine are the sons of employee Andy Richardson, who is a foreman for the company. (Tr. 41:15-21.)³

According to the Employer’s manager and human resource officer Robert Breedlove, Andy Richardson “deceived” him by claiming that Bubak lacked transportation—a deception that Breedlove supposedly discovered during the week of January 10, 2013 after a conversation with Bubak. But whatever the circumstances, the Employer stopped employing Bubak after it had replaced him with Richardson’s sons. (Tr. 131:9-25.) Breedlove made no commitment to recall Bubak. At most, according to his testimony, Breedlove told him vaguely sometime during the week of January 10, 2013 when Bubak was working as an extra custodial worker at a show: “We’d like to have you back for the busy season.” (Tr 101:8-10; 133:4-7.) The Hearing Officer did not credit Breedlove’s testimony on this and other points, and the Board should sustain that credibility finding. (Report, p. 7, n. 3.) But even if one were to accept Breedlove’s testimony as true, his non-specific assertion that the Employer would like to have Bubak at some indeterminable point in time was insufficient to create an expectation of “recall.” The Employer had no subsequent communication with him until after the eligibility date and shortly before the election, despite the fact (discussed below), that it hired a new employee in the interim. (Tr. 144:5-8.)

³ Although Andy Richardson was sometime referred to as a “supervisor,” neither party took the position that he was a supervisor as defined by section 2(11) of the Act, and that was not an issue presented in the case. (Tr. 41:15-21.)

All in all, Bubak worked zero hours as a carpet preparer between the week starting December 10, 2012 and the date of the election on August 29, 2013. (EX 4.) Bubak had never undergone a nine-month break in employment at any time during his brief tenure of employment. To the contrary, he worked at least 11 hours in every week in which he had been employed with the exception the week of December 7, 2012 (and there is no evidence that his lack of employment during that week was due a lack of work.) Breedlove admitted that the Employer had no evidence that Bubak would have known that he was only any “call-list” that the Employer allegedly maintained. (Tr. 117:14-25.)

Bubak voted in the election on August 29, 2013. He did not actually start working for the Employer until the week starting September 2, 2013. Breedlove testified that he did not call Brubak to return to work. Rather, Breedlove asserted that in mid to late August 2013, he called Forrest to inquire about Forrest’s willingness to return to work. (Tr. 134:3-135.) Forrest allegedly indicated that Bubak was unsatisfied with his current job and might be willing to return. (Tr. 133:9-134:15.) Bubak showed up at some point thereafter seeking work. (Tr. 134:8-12.) The foregoing is inconsistent with the Employer’s assertion that Bubak was on an alleged call-list, and that it had a protocol for recalling “laid off” employees.

B. Michael Forrest

According to evidence presented at hearing, the Employer hired Forrest on February 5, 2011. (EX 1.) His employment history is as follows:

Check Date	Regular Hours	Overtime Hours
2/11/2011	13.50	
2/18/2011	5	
4/8/2011	9.50	
7/1/2011	13.50	
7/8/2011	8	
7/15/2011	14	

Check Date	Regular Hours	Overtime Hours
7/22/2011	19.50	
7/29/2011	16	
9/16/2011	13	
12/2/2011	8	
4/13/2012	14.50	
8/10/2012	6	
8/17/2012	2.75	
9/14/2012	13.50	
9/21/2012	23.50	6.50
9/28/2012	12.50	
10/5/2012	16	1.75
1/18/2013	24	

(EX 8-10.) Breedlove testified that Forrest was employed both as a carpet preparer and as an on-site janitorial worker, and that he was employed in the latter capacity during the January 2013 hours listed above. (Tr. 103:18-19, 104:4-7.) Therefore, the Employer had not employed Forrest as a carpet preparer since at least the week of September 24, 2012, and his sporadic employment prior to that date was not only as a carpet preparer. Breedlove explained that Forrest stopped working in 2012 because of “transportation-related” issues. (Tr. 103:11-16; 135:19-136-5.) That is, Forrest did not stop working because he was a “seasonal” employee whose “season” had come to an end; rather, Forrest was unable or unwilling to come to work. Breedlove had no conversation with Forrest that would create any foreseeable expectation that he might be “recalled,” and there was no evidence that Forrest was aware he was any “call list.” (Tr. 117:14-25; 133:21-134:2; 141:19-142:1.) Forrest had *never* undergone an eleven-month hiatus in employment before, and the Employer had never gone nearly a year without communicating with him. Based on the foregoing, the Hearing Officer correctly found that “[t]here is no reason for Forrest to believe there were any possibilities for future employment where he had worked sporadically throughout 2011 and 2012, and left for transportation reasons as opposed to leaving because the work had dwindled at the conclusion of any season.” (Report, p. 14.)

Breedlove testified that he called Forrest back to work in mid to late August 2013, right before the election. (Tr. 133:14-134:2.) Breedlove had had no conversation with Forrest since the last time he had been employed. (Tr. 141:19-142:1.) Forrest was paid a single hour at an overtime rate during the week of August 19, 2013. (EX 5.) This presumably was for the day he came in to meet with Breedlove, or possibly the day he came to vote at the election. Thereafter, Forrest worked a single eight-hour day during the week of September 2, 2013, and worked 31.50 hours during the week of September 9, 2013.

C. Keeter Galusha

The Employer hired Galusha on September 6, 2012 and he worked for three weeks:

Check Date	Regular Hours	Overtime Hours
9/14/2012	13.50	
9/21/2012	40	26.50
10/5/2012	40	9

Galusha stopped working during the week that ended September 23, 2012 because he “did not get along with Mr. Richardson,” and because “he . . . was pursuing other employment.” (Tr. 138:3-7.) Like the others, therefore, Galusha did not leave because he was a seasonal employee whose “season” had come to an end. He quit because he was dissatisfied with the job. Breedlove had no conversation with Galusha at the time Galusha quit that would create any foreseeable expectation that he might be “recalled,” and there was no evidence that he was aware that he was on any “call list.” (Tr. 138:8-11.)

Breedlove did not contact Galusha to return to work. Rather, Galusha apparently learned from a relative who works for the Employer that there was a chance to work. (Tr. 138:11-19.) Galusha came in and met with the Employer about returning, a meeting for which, oddly, the Employer paid him a full 8 hours. (Tr. 108:16-24; EX 6.) Galusha declined the offer of work

because he had another job. (Tr. 108:-22-24.) Galusha voted in the union election despite that he had no intention of working and despite the fact that—as a non-employee—it would be unclear how he even might know about the election. Galusha has not worked for the Employer after the election.

D. Roberto Soto

The Employer hired Roberto Soto on January 21, 2012. His employment history was as follows:

Check Date	Regular Hours	Overtime Hours
1/27/2012	6.50	
4/12/2012	33	
4/20/2012	12.25	
6/8/2012	19.50	
6/15/2012	6.25	
8/3/2012	30	
8/10/2012	40	
9/14/2012	13.50	
9/21/2012	40	7.75
9/28/2012	12.50	
10/5/2012	40	11
10/19/2012	11	
10/26/2012	4	
11/23/2012	17	
12/7/2012	18.50	2.50
12/21/2012	10.50	

Soto’s last week of work during the week of December 10, 2012. During that week, according to his own testimony, he “quit” working for the Employer. (Tr. 77:11-14.) At the time he quit, the Employer still had work available to him, and therefore he was in no sense “laid off.” (Tr. 78:6-8.) Rather, he quit together with his girlfriend Courtney Richter, saying at the time that “we’re not going to come back to work.” (Tr. 77:11-12.) Soto acknowledged that he had no foreseeable expectation that he would come back to work at the time he quit, nor did he

have any conversation with the Employer that would suggest any understanding that he might be “recalled.” (Tr. 78:4-12) Breedlove acknowledged that there was no reason for Soto to think he was on any “call list.” (Tr. 117:14-25.) As shown above, Soto had never gone an 8-month hiatus in employment, but instead had been employed on a generally steady basis until his resignation.

Although Soto did not explicitly acknowledge the fact, it is beyond dispute that he quit because his girlfriend had some dispute with management. According to Neely, the Employer fired Richter. (Tr. 68:22-69:1.) Breedlove denied that he “explicitly terminated” Richter, but he acknowledged that there were “disciplinary issues” and that “we obviously did not plan on calling her back.” (Tr. 137:13-19.) The Hearing Officer correctly credited Neely’s testimony, and rejected Breedlove’s testimony that the Employer did not fire Richter. (Report, p. 8, n. 5.)

The Employer argues that Soto did not “quit,” but left because he “wouldn’t get set hours” (Employer’s Brief in Support of Exceptions, p. 8.) Regardless whether Soto was interested in pursuing different work (which he never ended up finding, Tr. 75:23-24), it is clear that he quit because of the incident involving Richter. In either event, when he left, he did so with no expectation of recall. He admits that he had no conversation with the Employer about returning to work on the day that he and Richter walked off; the Employer admits to having no conversation with him that would create any expectation of his returning, or in fact any conversation of any type with him between December 2012 and August 2013. (Tr. 78:9-12; 117-14-25; 141:17-21.) The Hearing Officer correctly found: “Soto could not have believed there was future employment when he quit on the same day that his girlfriend was fired. Further, his sporadic work history and lack of Employer communication regarding future employment would not provide any indication of any seasonal or recurring work, especially after he quit.” (Report, p. 14.)

III. THE EMPLOYER'S EVIDENCE THAT THE THIRD AND FOURTH QUARTER OF EACH YEAR IS ITS "BUSY SEASON"

The Employer claims that it has a busy season that falls during the third and fourth quarter every year and for which it engages in "seasonal" hiring. Breedlove testified: "In Las Vegas, which is where most of our business is at ESS, the third and fourth quarters are the busiest times. The seasonality of that business moves in tandem with our seasonality, really drives it. So, ever since coming out of our early growth phase, it's been Quarters 3 and 4 that are significantly higher in business volume." (Tr. 105:13-19.) The Employer contends that it hired Bubak, Forrest, Galusha and Soto in 2013 in anticipation of this busy "season," and they were eligible to vote as "seasonal" employees who had a foreseeable expectation of recall during the third quarter.

The Employer's hiring demands are not properly characterized as seasonal, but merely as variable. Thus, while the third and fourth quarters were busy in 2012 and were projected to be so again in 2013, the Employer conceded that this was due to the mere happenstance that it has secured work during these quarters. Breedlove agreed that "there's not a particular season that [the company] count[s] on every year that's going to be [the] busy season. It is rather [the] case that you can count on the fact that [] business fluctuates and is going to be busier at any time in any given year." (Tr. 153:1-6.) Breedlove admitted that he had no idea when the busy "season" would be during 2014, 2015, or any other year: "I don't know what's going to happen a year from now." (Tr. 147:18-20.). Neely admitted exactly the same, conceding that there was no way of knowing which of the quarters in 2014, if any, would be a busy "season." (Tr. 47:22-49:1.) Rather, business demands may change "month-to-month." (Tr. 48:23.)

The Employer's own documents show this to be so. Union Exhibit 2 is an analysis that the Employer prepared showing its hourly labor hours from the fourth quarter of 2010 through

the second quarter of 2013. It shows that the third and fourth quarters of 2011 (as measured by total hours worked) was the Employer's *least* busiest season in 2011. Neely confirmed that the data accurately reflected the Employer's business trend during 2011. (Tr. 47:1-13.) Breedlove contended that 2011 was anomalous because the Employer incurred one-time labor needs during the start-up phase that did not reflect its true employment cycle. Even if that is the case, the data does not support any conclusion that the third and fourth quarters of 2011 constituted any kind of "busy" season.

In 2012, according to Union Exhibit 2, the Employer's busiest season was the third and fourth quarters of the year. In the fall of 2012, the Employer had three major shows: the Mr. Olympia Show, the Las Vegas Souvenir Show and the NFR Cowboy Christmas Gift show. As it happened, the Employer was successful in getting all three shows again in the fall of 2013. But Breedlove and Neely admitted that they have no idea whether the Employer will be busy in the third or fourth quarter of 2014. None of the three shows that made the employer busy in 2012 and 2013 are locked in for 2014. (Tr. 146:22-147:20.)

Based on the foregoing, the Hearing Officer correctly characterized the nature of the Employer's business cycle as non-seasonal:

The amount of work performed by the Employer is completely dependent on the general service contractors' needs, which results in an uncertain projection for peak work from year to year. (Tr. 48:1-12; 49: 24-25, 50:1; 65:8-25, 66:1.) Its three biggest relevant shows to date include the Mr. Olympia Show during the last week of September, the National Finals Rodeo (NFR) Cowboy Christmas Gift Show scheduled for December, and the Las Vegas Souvenir Show set for the week of September 18. (Tr. 104:18-20, 25, 105:1-3; 139:7.) Each of the three shows takes place around the same time of year, but the Employer was contracted only for single occurrences of these shows as opposed to repetitive occurrences, and had no definite contracts for the 2014 occurrences of any of these shows at the time of the hearing. (Tr. 56:17-24; 57-20-25, 58:1-10, 105:4-5; 146:9-16; 152:20-25, 153:1-6.) For 2013, the Employer was not aware that it would be busy for its claimed peak period until late August. (Tr. 62:21-23; 108:11-19.) The

Employer could not predict whether it would be busy in 2014, during what portions of 2013 it would have the most work, and acknowledged that its work fluctuates. (Tr. 147:9-20; 153:1-6.)

IV. THE EMPLOYER'S LACK OF AN ESTABLISHED "CALL-BACK" PRACTICE

The Employer contends that it has a practice of calling employees back to work when they are needed in response to its fluctuating labor requirements. It described the document in evidence as Union Exhibit 2 as the "call list" that it maintains for this purpose. (Tr. 112:9-113-12.) According to Breedlove, the list supposedly consists of the names that of employees the Employer "tr[ies] to get back into the warehouse first" when there are "business fluctuations dues to seasonality." (Tr. 113:1-3.)

Four pieces of undisputed evidence militate strongly against the Employer's position that it called the challenged voters to work under some established call-back policy.

First, each employee left his employment under circumstances that could not have given rise to any foreseeable expectation of recall. If the employee did not explicitly quit (as Soto did), he left either because he was dissatisfied with the job, had some conflict with management, could not get to work, or was replaced by other employees. None of the employees left with any understanding or reason to understand that they were only temporarily laid off owing to a lack of work and subject to recall.

Second, Breedlove admitted that it has no evidence that any of the challenged voters knew that they were on a "call list," or that they had any foreseeable expectation of being recalled based on any "recall" policy. (Tr. 117:14-25.) Breedlove specifically acknowledged: "I can't attest to any of the employees' knowledge about their presence on this list." (Tr. 117:14-15.) The Employer does not post, distribute or otherwise maintain Union Exhibit 2 in a manner that would notify employees that they are subject to recall. Breedlove testified: "This isn't

something I publish.” (Tr. 117:15-16.) Breedlove admitted that there is “no explicit policy” concerning a preference to recall employees. (Tr. 158:3). In fact, it is clear that Union Exhibit 2 is not a “call list” *per se*. Rather, the Employer simply maintains data on its computer concerning people whom it has hired in the past, and professedly considers them all eligible for possible rehiring should labor demands dictate. Union Exhibit 2 was created merely for the purpose of this election.

Third, it is clear that whatever expectation of recall that the challenged votes may have had at some point within their prior period of employment, any such expectation could not have applied to the many-month hiatus between their last date of employment and their recall in August or September 2013. There is no evidence that the Employer had *ever* recalled any employee after such a long hiatus. While Breedlove testified that employees are “accustomed” to having short periods of unemployment between work periods (Tr. 115:20), there was no evidence that employees were accustomed to being recalled after nine-plus months because that had never happened before to *any* employee (and not just these). Breedlove’s own example of how the so-called “call-back” rule worked made clear this important distinction. He testified that “They come in, they work their hours, we’ll say, all right, come back next Tuesday at such-and-such time, we’ll have more work for you.” (Tr. 115:20-22.) Breedlove did not suggest that he had ever told employees, “all right, come back in *next year* at such-and-such time, we’ll have more work for you.” In fact, Breedlove admitted that he had no contact with any of the challenged voters from the time they quit in 2012 and the time he rehired them in late August or September 2013. (Tr. 141:17-143-11; 144:4-8.)

Fourth, even when presented with a need for employees, the Employer did not attempt to recall any of the challenged employees. On July 24, 2013, the Employer hired Walter Ezquivel. According to Breedlove, “the ops team notified us that we needed someone and I hired the first

recommended person we could find.” (Tr. 149:16-17.) At the time that it hired Ezquivel, the Employer made no attempt to hire Bubak, Forrest, Galusha, or Soto instead of Ezquivel. Breedlove admitted that “I made no attempts at direct contact at that time.” (Tr. 143:7-11.) That is so despite the all four challenged employees appear on the Employer’s so-called “call-list,” which, according to Breedlove, is a list of “who we try to get back into the warehouse first.” (Tr. 113:2-3.) Breedlove admitted that he had no reason for not having called them if truly they were on his “call-list.” To the extent he answered the question, instead of avoiding it, he merely testified in effect that he was busy doing other things. (Tr. 158:8-161-16). This was so despite that Bubak was supposedly “one of our best employees.” (Tr. 100:18.) It was so despite that Galusha was supposedly a “lead” employee who had the ability to manage the work of other employees. (Tr. 108:8-10.) Apparently, despite these qualities and their preferential position on the so-called “call list,” it did not occur to the Employer to contact these employees when it hired Ezquivel as a brand new employee.

In like manner, the Employer had no explanation for its failure to contact any of these employees to inquire about their availability sooner despite the claim of a regular “busy season” in the fall. In fact, the Employer admitted that it was not certain it was even going to hire its own workforce, but considered contracting out the work. (Tr. 108:16-20.) It did not contact these employees until *after* the election agreement was signed and until just before the election. While the Employer obviously did not admit to rehiring these employees for the specific purpose of having them vote in the election, the timing of the events is extraordinary. At any rate, one need not delve into motivations. Under the Board law cited below, the newly re-hired employees are not eligible to vote.

LEGAL ANALYSIS

The starting point for determining the eligibility of the challenged voters is the terms of

the stipulated election agreement. The agreement states as follows:

UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time casual and seasonal carpet preparers and carpet cleaners employed by the Employer in Las Vegas, Nevada.

EXCLUDED: All other employees, clerical employees, guards and supervisors as defined in the Act

Those eligible to vote in the election are employees in the above unit who were employed during the twelve-month period ending Sunday, July 28, 2013, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

The Board applies a three-part test to determine if a challenged voter is properly included in or excluded from a stipulated bargaining unit. First, the Board must determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms, the Board will simply enforce the agreement. Second, if the stipulation is ambiguous the Board will seek to determine the parties' intent through normal contract interpretation. Third, if the parties' intent still cannot be discerned, the Board will determine the proper bargaining unit by employing its traditional community-of-interest analysis. *Columbia Coll. & Illinois Educ. Ass'n (Iea)*, 346 NLRB 726, 727 (2006); *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002).

The election stipulation in this case makes clear what the relevant considerations are with respect to the four challenged voters. In order to be eligible to vote in the election, an employee must either be a “full-time [or] regular part-time casual and seasonal carpet preparer,” and, in addition, the employee must have been employed within the twelve-month period ending July 28, 2013. As discussed below, none of the challenge votes are qualified under this language.

Two initial comments about this language are in order. First, the “inclusion” clause and the “eligibility” clause must be read together. That is, the mere fact that an employee may have worked at some point during the twelve months preceding July 28, 2013 does not render him “included” in the bargaining unit if his pattern of employment does not also qualify him as a “full-time [or] regular part-time casual and seasonal” carpet preparer. This conclusion is obvious from the text of the agreement. It is further dictated by the fact the parties included among eligible employees *only* those employees who have been “temporarily laid off.” By referencing employees who have been “temporarily laid” off—a term of art that is defined by Board cases to require a foreseeable expectation of recall, *see infra*—the parties *excluded* those employees who may have been employed during the twelve-month window period but who were laid off without a foreseeable expectation of recall.

Second, there is certain ambiguity in the phrase “regular part-time casual and seasonal” employment. The terms “regular part-time casual” could be read to apply to the seasonality of the employment, such that the Board’s caselaw on “seasonal” employment applies without more. That is apparently how the Hearing Officer read it, as he focused his inquiry on the “seasonal” (or rather the non-seasonal) nature of the challenged voters’ employment.

Alternatively, the phrase “regular part-time casual” may be read to refer to a separate rubric of employees. This calls into play the distinction between regular part-time employees (*i.e.*, “regular part-time casuals,” as it is stated in the stipulation) versus irregular casuals who are not “regular part-time” employees. If one reads it in this manner, then the eligibility of the challenged voters must be analyzed with reference to the Board’s test for “regular part-time” employment. *See Davison-Paxon Co.*, 185 NLRB 21 (1980); *see discussion infra*.

What one cannot reasonably argue is what the Employer argues here: that by using the term “casual,” the parties intended to include *irregular casual* employees whose employment

pattern does not constitute “regular part-time” employment. In arguing that the parties agreed to include “casual” employees as eligible, the Employer ignores the phrase “regular part-time” that precedes the term “casual.” (See Employer’s Brief in Support of Exceptions, p. 14.) While it puts the word “casual” in boldface and italics, as if that should prove the point, the Employer simply pretends the words “regular part-time” are not there. But the stipulation says “*regular part-time* casual.” That means that the challenged voters must meet the Board’s test for “regular part-time” employment in order to be eligible. See *Trump Taj Mahal Casino*, 306 NLRB 294 (1992) (analyzing eligibility of “*casual*” employees in tradeshow convention industry, and applying the “regular part-time” test set forth in *Paxon-Davison*). They do not meet that test.⁴

I. THE EXCELSIOR LIST DOES NOT PRECLUDE CHALLENGES TO VOTER ELIGIBILITY

Before addressing the eligibility of the challenged voters, the Petitioner will dispense with the Employer’s argument that the parties stipulated to the eligibility of any employee in advance of the election.

At pages 4 to 5 of its Brief in Support of Exceptions, the Employer posits an account of the facts surrounding the creation of Union Exhibit 2. (See Employer’s Brief in Support of Exceptions, pp. 4-5.) According to the Employer’s brief,

The Employer presented the Union with a list of those employees that it deemed to be part of the appropriate unit, representing the employees that the Employer intended to recall during the busier season in the fall. (U. Ex. 2). Notably, the names of each of the challenged voters were included on this list. With the exception of one employee on the list, Ms. Courtney Richter, who had just recently been terminated, the Union agreed that the other employees were appropriate members of the unit.

⁴ In the unlikely event that the stipulation remains ambiguous after application of the contract maxim that all words must be given effect—particularly the words “regular part-time”—the Board must apply traditional community-of-interest factors. *Columbia Coll. & Illinois Educ. Ass’n (Iea)*, 346 NLRB at 727. “Irregular” casual employs are not includable.

This statement—offered without any reference to the reporter’s transcript of the hearing—is false. The only representations of record concerning Union Exhibit 2 is that it accurately reflects the first date of hire for the persons listed thereon. (Tr. 24:24-25:23.) It may represent the Employer’s view as to who was eligible to vote, but it does not constitute an agreement as to eligibility and there is no evidence of such an agreement. The Union did not in fact agree that any of the employees listed on Union Exhibit 2 were eligible, and there is no record evidence of such an agreement.

The Employer not only proffers facts that are not supported by the record, it fails to address Board law that explains what is necessary to establish a preclusive eligibility agreement. In *Norris-Thermador Corp.*, 119 NLRB 1301 (1958), the Board established a policy that “where the parties enter into a *written and signed agreement* which *expressly* provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will considered such an agreement, and only such an agreement, a final determination of the eligibility issues raised therein unless it is, in part or in whole, contrary to the Act or established Board policy.” (footnote omitted, emphasis in the original.) Absent such an agreement, “*eligibility lists are almost uniformly used as guides or tools in elections conducted by the Board and are not considered final and binding agreements on issues of eligibility.*” *Cavanaugh Lakeview Farms, Ltd.* 302 NLRB 921, 921 (1991) (ruling that employer’s prior deletion of challenged employees from the eligibility list did not preclude employer from arguing that employees were eligible to vote) (emphasis added); *Kirkhill Rubber Co.*, 306 NLRB 559, 560 n. 4 (1992).

Here, there was no evidence that the parties entered into any written agreement that either established or precluded challenges to eligibility. Union Exhibit 2 constitutes at most the Employer’s view as to what employees it considered eligible, but it does not constitute a binding agreement as to the eligibility of anyone under established Board law.

II. THE CHALLENGED EMPLOYEES WERE NOT ELIGIBLE TO VOTE

The touchstone in the Board’s analysis of workers who may be described variously as on-call, temporary, part-time, laid-off and in similar terms is whether the employees have a reasonable expectation of reemployment in the foreseeable future based on evidence that shows a substantial probability of re-hiring. While the Board has analyzed the terms “part-time,” “seasonal,” “temporary” as distinct rubrics, the general theme of foreseeability of reemployment based on a regular pattern of hiring remains key. Whether employees have a reasonable expectation of rehiring is measured based on facts as they exist as the eligibility date, not the election date. *See Osram Sylvania, Inc.*, 325 NLRB 758, 760 (1998) (recall of employees after the eligibility date but before the election irrelevant to reasonable expectancy of recall); *B.L.K. Steel, Inc.*, 245 NLRB 1347, 1353 (1980).

As hereafter discussed, the challenged voters do not meet the eligibility requirements announced by the Board for “seasonal” or for “part-time regular casual” employees.

A. The Challenged Voters Are Not Seasonal Employees

In deciding whether asserted “seasonal employees” are eligible voters, the Board assesses their expectation of future employment. Factors which the Board considers in finding employees to be regular seasonal employees include the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. *Macy's E.*, 327 NLRB 73 (1998) (finding employees had no expectation of seasonal re-employment, but were merely temporary casuals).

In *L&B Cooling, Inc.*, 267 NLRB 1, the Board addressed the eligibility of asserted seasonal employees employed by an employer that engaged in the business of lettuce harvesting. The Board ruled that, while the evidence established that employer had seasonal fluctuations in

its labor needs, it was not established that the challenged employees themselves had a reasonable expectation of being hired on a seasonal basis. Noting a lack of “evidence regarding actual season-to-season reemployment of the extra seasonal employees because Respondent had been in existence such a short time,” the Board ruled that “there is no pattern of seasonal employment from which we could extrapolate Respondent’s labor requirements with respect to extra seasonal employees. Therefore, we cannot conclude that Respondent’s labor requirements indicate that extra seasonal employees employed in 1980 could expect to be reemployed with Respondent in the future.” (*Id.* at 3); *see also Musgrave Manufacturing Company*, 124 NLRB 258, 259 (1959) (where record establishes repeated seasonal re-hire during previous years, seasonal employees were eligible to vote, but where evidence was “insufficient to determine whether employees laid off . . . because of the seasonal cutback in operations have a reasonable expectancy of recall,” such employees were not eligible to vote); *Maine Sugar Indus., Inc.*, 169 NLRB 186 (1968) (Board unable to find on the basis of the July recall alone that a sufficiently large number of temporary seasonal employees has a demonstrable expectation of being rehired); *compare e.g., Baumer Foods, Inc.*, 190 NLRB 690 (1971) (hiring of a substantial percentage of workforce on a yearly seasonal basis together with pattern of recalling same employees year after year gave rise to reasonable expectation of seasonal employment).

In a careful and well-reasoned analysis, the Hearing Officer explained why the Employer is not dependent upon any claimed seasonal labor. (Report, pp. 9-14). The expectation of the challenged voters to have been re-employed on a “seasonal” basis is far more tenuous than the employees in *L & B Cooling* and other cases. The Employer’s effort to bring the present facts within the scope of cases where the Board has found true seasonality is unconvincing. First, as stated above, the Employer has no established busy season. It admitted that its labor demands merely fluctuate. (Tr.153:1-6.) They can change “month-to-month.” (Tr. 48:23.) While it had

certain large shows in the fall of 2012, and would have them again in the fall of 2013, it had no idea whether it would have them in 2014. Its busy season might be the first quarter, the third quarter, the second quarter or the fourth quarter. Thus, this is not a “seasonal” workforce, but a fluctuating one. Second, the challenged voters had no reasonable expectation of re-hiring *regardless* the seasonality of the Employer’s business. They had each quit their jobs or left under circumstances that could not possibly have supported any reasonable expectation that they had a right of re-hire on some predictable basis. Third, the evidence utterly failed to establish that the Employer has hired employees on a recurring, seasonal basis so as to create some reasonable expectation of recall. The Employer has *no* seasonal recall policy, and it has *never* recalled employees on a “seasonal” basis.

Much of the Employer’s argument in support of its assertion that the challenged voters were seasonal employees relies on the testimony of Breedlove. But the Hearing Officer found that Breedlove was not a credible witness. (Report, p. 10, p. 7, notes 3, p. 8, notes 4 – 6.) He often avoided straight answers to questions, and tended towards conclusory assertions without any underlying basis. (Report, p. 10.) He was at times physically uncomfortable in trying to answer difficult questions. (Report, p. 8, note 4.) His assertions were directly contradicted by Neely, the Employer’s Vice-President. (Report, p. 8, note 5.) The Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces that they are incorrect. *Our Lady of the Resurrection Med. Ctr. Employer & Afl-Cio Council 31, Am. Fed’n of State, Cnty., & Mun. Employees, Afl-Cio Petitioner*, 13-RC-22035, 2012 WL 2951832 (N.L.R.B. July 19, 2012); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Although the Employer excepted to the Hearing Officer’s credibility findings, it makes no argument nor points to any evidence—much less a clear preponderance of the evidence—that they are not correct.

B. The Challenged Voters Are Not “Regular-Part Time Casual” Employees

The Employer argues that if the challenged voters are not “seasonal” employees, then it is because they have no foreseeable expectation of recall. Therefore, they are by necessity “casual” employees. *See, e.g., Royal Hearth Restaurant*, 153 NLRB 1331,1333 (1965)(employee was excluded because he was “casual” instead of “regular part-time.”) Because the parties assertedly agreed to include “casual” employees in the bargaining unit, the Employer contends that the challenged voters must be eligible precisely owing to their lack of foreseeable expectation of recall. That is, by limiting eligibility to “regular part-time and seasonal” employees, the parties did not limit eligibility at all. Everyone who has worked at any point in the year prior to July 28, 2013 gets a vote.

This Hail-Mary argument fails for the simple reason that—even if the term “casual” should be read to stand apart from the term “seasonal” in the parties’ stipulation—it decidedly cannot be read to stand apart from the phrase “*regular part-time*.” These terms must be given effect. In the trade show convention industry, where the term “casual” frequently describes the employment relationship of workers to employers, their “casual” employment must be “regular part time.” *Trump Taj Mahal Associates*, 306 NLRB at 295.

The Board has developed a clear standard for determining whether the regularity of employment of a part-time employee is sufficient to establish him as a regular, part-time employee—and thus eligible to vote in an election—or an irregular casual employee who is not. In order to be eligible to vote, the employee must have worked an average of 4 or more hours a week in the last quarter preceding the eligibility date. This is the so-called *Davison-Paxon* test, as set forth in the Board in *Davison-Paxon Co.*, 185 NLRB at 21; *see Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003).

Under the *Davison-Paxon* test, the employee must have worked 4 hours per week on

average during the 13-week period immediately prior to the eligibility date in order to be eligible to vote with other part-time and full-time employees. *Woodward Detroit CVS, LLC*, 355 NLRB No. 181 (Sept. 16, 2010) (citing *Hardy Herpolsheimer's*, 227 NLRB 652 (1976)) (clarifying that the “quarter” preceding the eligibility date means the prior 13 weeks).

In *Trump Taj Mahal Casino*, the Board applied the *Davis-Paxon* test in the tradeshow convention industry. *See, supra*, 306 NLRB at 294. The employer employed a cadre of “casual” employees to set up and service trade shows. During the full year prior to the election, the casual employees had worked on average 379 hours during the year, and they had worked on average 119 hours during the months preceding the month in which the election was directed. *Id.* at 295. Among such employees, the Regional Director applied the *Davison-Paxon* formula, finding that those “casual employees who have worked an average of 4 hours or more per week for the last quarter prior to the eligibility date are regular part-time employees and, thus, included in the unit.” *Id.* at 294. It is noteworthy that employees were not eligible to vote merely because they were “casual” employees who had worked *at some point* during the prior year; instead, they must also have worked with sufficient regularity within the last 13 weeks under *Davison-Paxon* to qualify for unit inclusion vote. Such regularity of employment—coupled with other factors such as the fact the employer hired its full-time and part-time employees from the casual list and the fact that casual employees had to undergo badging requirements under New Jersey law—created a reasonable anticipation of rehiring sufficient to render them eligible to vote. *Id.* at 295. That is, these casual employees were “not merely a collection of employees who happen to have worked for that Employer at one time or another.” *Id.* But that is exactly what the challenged employees are here.

The Board had applied the *Davison-Paxon* test to other workplaces where, as here, employment is subject to an employer’s fluctuating labor requirements. *See, e.g., Columbus*

Symphony Orchestra, Inc., 350 NLRB 523 (2007) (finding that “contrary to the Regional Director, ... the traditional *Davison-Paxon* voting eligibility formula, unmodified in any way, should be used in this case); *Genesis Health Ventures of W. Virginia, L.P.*, 326 NLRB 1208, 1210 (1998) (employee who had worked 2.7 hours per week over prior 13 weeks not eligible to vote); *Five Hosp. Homebound Elderly Program*, 323 NLRB 441, 442 (1997) (finding that during the 13 weeks prior to the eligibility date, employee worked a total of 54.65 hours and was therefore eligible); *Saratoga County Chapter NYSARC*, 314 NLRB 609, 610 fn. 5 (1994) (finding on-call employees ineligible because they did not average 4 hours per week during the 13 weeks before the eligibility date); *Sisters of Mercy Health Corp.*, 298 NLRB 483, 483-484 (1990) (finding that employees who averaged 6.9 hours and 5.4 hours per week for 13 weeks prior to the eligibility date were eligible).⁵

In the present case, none of the challenged voters meets the *Davison-Paxon* test for the simply and obvious reason that none of the employees worked any of the hours during the 13 weeks prior to the eligibility date. Bubak had none. (EX 4.) Forrest had none. (EX 5.) Galusha had none. (EX 6.) Soto had none. (EX 7.) Furthermore, even if the Region were to ignore the *Davison-Paxon*’s “traditional eligibility formula” for employees such as those at issue here, *see*

⁵ The Board normally looks only at regularity of employment during the quarter preceding eligibility under *Davison-Paxon*. In one case, the Board considered the regularity of an employee’s employment in a prior quarter where the employee had undergone a hiatus in employment under circumstances where, at the time the hiatus started, the employee had a concrete expectation of recall. *See Pats Blue Ribbons and Trophies*, 286 NLRB 918, 919 (1998). The Board found one voter eligible who had regular part-time employment both before and after a nine-month maternity leave, and where she went on maternity leave expecting to return. *Id.* at 919. The Board there found a second employee ineligible because—although the employee also went on a maternity leave—the facts were insufficient to establish that the employee had any foreseeable expectation of recall at the time of the hiatus. *Id.* Any attempt by the Employer to rely on pre-hiatus employment patterns in the present case fails because the Employer cannot establish that the challenged employees had any reasonable expectation of recall when they departed.

Trump Taj Mahal Casino, 306 NLRB at n. 1, the challenged voters here had none of the other indices that would indicate they had any foreseeable expectation of recall, ever. Each of them quit their jobs, or left their jobs under circumstances that gave them no reasonable basis to believe they would be recalled at any time. None of them had ever experienced an employment hiatus anywhere near 8 months, but to the contrary, had only experienced prior breaks in employment of some weeks at most. The Employer never communicated to any of the challenged voters that it had a “call list” policy, and none of the employees had any inkling they were on any “call list.” Far from being eligible to gain more hours as a result of being casual employees, *see Trump Taj Mahal Casino*, 306 NLRB at 295, the challenged employees stopped work for reasons having nothing to do with any “season” ending and did not reasonably expect to work *any* more hours.⁶

C. The Challenged Employees Were Not “Temporarily Laid Off”

Finally, although the Employer ignores the term, effect must be given to the parties’ agreement that employees are eligible to vote only if they are “temporarily laid off as of the eligibility date.” Consequently, employees are *ineligible* to vote if they were laid off on a *non-temporary* basis, even if they had some amount of employment during the twelve-month window period ending July 28, 2013. As now explained, none of the challenged voters here can be

⁶ In a few cases, the Board has based on unique circumstances decided to measure the 13 week period from the election date, rather than the eligibility date. *See e.g., Arlington Masonry Supply, Inc.*, 339 NLRB 817, 819 (2003) (using the election date as the trigger for measuring the 4 hours per week average rather than the election date where an employee was newly hired shortly before the eligibility date); *but see Mediplex of Connecticut, Inc.*, 319 NLRB 281, 299 (1995) (rejecting argument that the 13 weeks should be measured from the election date instead of the eligibility date). There are no unique circumstances that justify departing from the traditional *Davison-Paxon* formula in this case (especially since the parties stipulated to a July 28, 2013 cut-off date.) But even if the Region were to evaluate part-time status with reference to the election date, none of the employees had sufficient hours to be considered regular part-time employees at that point either.

considered “temporarily laid off” as that concept is defined under Board law. Therefore, each was ineligible to vote.

“The voting eligibility of laid-off employee depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the lay-off. The board examines several factors in determining voter eligibility, including the employer’s past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.” *Osram Sylvania, Inc.*, supra 325 NLRB at 759 (quoting *Apex Paper Box Co.*, 302 NLRB 68 (1991)). Furthermore, the date for assessing employees’ expectation of recall is measured as of the eligibility date, even if they are recalled prior to the election. “It is well established that ‘employees laid off prior to the payroll eligibility period must have had a reasonable expectation of recall as of the payroll eligibility period in order to vote in the election, regardless of whether the employees have been recalled prior to the election.’” *Osram Sylvania, Inc.*, supra, 325 NLRB at 759 (quoting *Tony’s Trailer Service*, 257 878 n. 3 (1981); see also *Apex Paper Box Co.*, supra, 302 NLRB at 68 (“the occurrence of subsequent events (including the fortuitous recall of laid-off employees prior to the election date) cannot change the expectation of recall that actually existed during the eligibility period.”))

For all the reasons stated above, each of the challenged voters had no reasonable expectation of recall as of the time they last stopped working, and thereafter during the protracted period preceding their re-hire. Each of the challenged voters left under circumstances that would create no expectation of recall whatsoever. The Employer had no established practice of recalling employees after a nine plus-month hiatus. The Employer did not attempt to recall any of the employees prior to the eligibility date for the election, even when the Employer had need to hire employees and actually hired a new employee. Thus, even if one entertains the

