

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

DURHAM SCHOOL SERVICES, L.P.¹

Employer

and

Case 19-RC-14842

TEAMSTERS LOCAL UNION NO. 38,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS²

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 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record³ in this proceeding, the undersigned makes the following findings and conclusions.⁴

I. SUMMARY

The Employer is engaged in the business of providing bus transportation services for school districts out of a facility in Everett, Washington. At issue in this case is the appropriate date that the Board should conduct an election in the petitioned-for-unit of school bus drivers. Employer argues that in light of anticipated annual turnover of up to 20% of the unit drivers, the election should not occur until the fall. Petitioner contends that an immediate election is appropriate and should be conducted before the end of the current school year.

Based on the record evidence, the parties' contentions and arguments, and Board policy, I find that it is appropriate to conduct the election before the end of the current school year. Accordingly, I have directed an election unit comprised of the approximately 100 full-time and regular part-time school bus drivers ("the Unit") employed at Employer's Everett, Washington facility to occur during the current school year, which ends on or about June 20, 2006.

¹ Employer's name appears as corrected at the hearing.

² Petitioner's name appears as corrected at the hearing.

³ Employer and Petitioner filed timely briefs, which were duly considered.

⁴ The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer. 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.

Below, I have provided a section setting forth the evidence, as revealed by the record in this case, relating to Employer's operations and anticipated turnover in the Unit. Following the "Evidence" section is my analysis of the applicable legal standards in this case, my conclusion, and a section directing an election in the Unit.

II. EVIDENCE

A. Employer's Operations

Employer is engaged in the business of providing school bus transportation services. It operates a facility in Everett, Washington, and contracts with the Everett School District to provide bus transportation services in that district during the school year, and limited services during the summer months. Senior Vice President Chuck Moore and General Manager Kirk Tostenrude head up Employer's Everett operation.

Employer employs three classifications of drivers, who are collectively referred to as "school bus drivers"; cover drivers, routed drivers, and substitute drivers. Cover drivers are standby drivers who are the first drivers called in to replace the regular drivers when they call in sick or are otherwise absent. The cover drivers are guaranteed 6 and ½ hours of pay per day regardless of whether they work. Routed drivers drive the same bus route every day and average 6 and ½ hours of work each day in the Everett District. The substitute drivers do not work every day, but sign up for optional work such as field trips, athletic trips, and charter trips. Some of the school bus drivers perform dispatch and training functions as part of their regular duties. The parties stipulated that none of the drivers who perform dispatch and training functions possess any of the indicia of a supervisor set forth in Section 2(11) of the Act.

Stacey Kloster, Employer's operations supervisor, testified that Employer seeks to employ 105 to 110 school bus drivers. She noted that during the current 2005-2006 school year, the average number of drivers employed by Employer has been 102 or 103. As of the hearing date, Employer employed 99 drivers.

The parties stipulated that an appropriate unit includes all full-time and regular part-time school bus drivers employed by Employer out of its Everett facility, but excludes all office clerical employees, dispatchers, managerial employees, mechanics, guards, and supervisors as defined by the Act.

B. Turnover

The school bus drivers receive layoff slips from Employer at the end of the school year and start back up on the employment rolls beginning with an in-service meeting the following August.⁵ The in-service meeting for the next school year is scheduled for August 21. While the school bus drivers are on layoff status, they collect medical benefits based on the premiums they paid during the school year, and some collect unemployment benefits.

Turnover of Employer's school bus drivers occurs from year to year primarily due to drivers securing other employment or retiring. Employer introduced into evidence records from the current and prior two school years showing which drivers were employed as of various dates during the school year. Kloster testified that turnover of approximately 20% occurred from one year to the next, and further testified that 12% to 13% of that turnover occurs during the summer

⁵ Although there was more summer work in prior years, drivers currently drive seven regular routes for 3 weeks of summer school, and seven charter routes for about 6 to 8 weeks of the summer.

months between the end of the school year and the start of the next one. On the other hand, driver witnesses called by Petitioner testified that turnover among drivers during the summer months is closer to 2% to 5%. Based on the record I find that, even accepting the Employer's testimony over that of employee witnesses, turnover, although uncertain, can reasonably be expected to be no more than between 12% to 13% during the period between June and August. Moreover, turnover, albeit at a lesser rate, occurs throughout the year.

III. LEGAL ANALYSIS

The Board's longstanding practice is to leave the selection of the time and place of elections to the sound discretion of the Regional Director. *Halliburton Services (Coffeyville, Kansas)*, 265 NLRB 1154 (1982). In exercising that discretion, I am guided by several sections of the Board's Casehandling Manual (Part Two-Representation Proceedings) with respect to the conduct of initial representation elections. Section 11300 of that manual provides that as a general matter, "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." That 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." Applying the above criteria, I find that an immediate election should be directed.

The objective of conducting a prompt election, and the Petitioner's desire that I do so, favor the direction of an immediate election. Although Employer argues that I should direct the election to occur next fall due to anticipated employee turnover, I reject that reason as I find it an insufficient justification for delaying the election, even accepting the Employer's estimate that turnover of up to 12% to 13% will occur during the summer.⁶ Moreover, given the circumstances of this case, delay will not increase employee participation in the election. Rather, it would simply make different individuals eligible to vote. As the Board observed in *Saltwater, Inc.*, 324 NLRB 343, 343-344 (1997), moving the election back several months, as urged by the employer, would not increase the voting participation of the employees in the unit; "rather, it simply would enfranchise and/or disenfranchise different individuals." Moreover, an immediate election conducted by or before the last day of the present school year will facilitate full employee participation in the election process because drivers will be present to vote. Compare *Tusculum College*, 199 NLRB 28 (1972) (as faculty members voting in election had completed their work and would not be present until fall, election directed to be held in fall after commencement of classes).

I also reject Employer's contention that I should wait until the fall because the drivers working next fall who are affected by the election's outcome should be the ones who cast the ballots, and not the drivers who may quit or retire over the summer. Employer's argument is tantamount to arguing that employees whose employment may cease during the summer should be ineligible to vote because the election's outcome will not affect them. Such argument is inconsistent with decisions of the Board, which "does not determine voter eligibility on the basis of after-the-fact considerations." *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 fn. 15 (2003). Thus, the Board finds that even employees who have expressed an intention to quit

⁶ As noted above, Kloster testified that turnover among drivers of 12% to 13% occurred during the summer months between the end of one school year and the start of the next one. Thus, even assuming that I rely on Kloster's testimony over that of Petitioner's witnesses, the appropriate turnover percentage would appear to be 12% to 13% as Employer seeks to move the election date from June to September.

after an election are eligible to vote. See, e.g., *Harold M. Pittman Co.*, 303 NLRB 655 (1991). Moreover, even under Employer's scenario, some of the drivers next fall will not continue to work for Employer. Thus, those drivers' replacements will be affected by the election's outcome even though they did not have the opportunity to cast a ballot. The Board recognized as much in *Saltwater, Inc.*, 324 NLRB at 343: "That eligible workers who may not have a continuing interest in working for the Employer may vote to determine the representation rights of future employees does not require rejection" of the Regional Director's eligibility formula.

Cases cited by Employer in its brief do not compel a different conclusion. For instance, the Regional Director's determination in *Community Bus Services*, 8-RC-16394, (June 18, 2002) on which the Employer relies heavily, is factually inapposite to the situation here. In that case, the school year had ended and only 3 of the 74 unit employees remained at the time of the hearing. Thus, an immediate election would have disenfranchised 71 of the 74 unit employees. By contrast, the Unit's size here has remained constant (99 of the 102 to 103 drivers remain at the time of the hearing) and it is possible to conduct an immediate election during the current school year before the drivers are temporarily laid off until the fall. For the same reason, *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978), in which the employer's operations were severely curtailed resulting in a decrease of employees from 60 to 25 at the time of the hearing, is inapposite to the facts present here.

I am also not persuaded by Employer's reliance on *Kelly Brothers Nurseries, Inc.*, 140 NLRB 82 (1962), which concerned a seasonal employer whose workforce increased significantly from a low of 30 employees to a high of 153 employees during the spring shipping season. In accordance with its usual practice with respect to seasonal employers, the Board directed that the election occur at some point during the seasonal peak of employment. Here, to the extent that Employer might be viewed as a seasonal employer, the Unit's size remains fairly constant throughout the school year and then drops significantly during the summer months when the drivers are temporarily laid off. As I am not directing an election during this summer period of low employment when drivers are laid off, but am directing an election when the size of Unit's employee complement is approximately the same as during the rest of the school year, I find that *Kelly Brothers Nurseries* is fully consistent with my determination here.⁷

There is also no merit to Employer's contention that I would abuse my discretion by improperly accelerating the election date. As the Board's Casehandling Manual directs, I should conduct an election as soon as practical and should schedule the election to occur 25 to 30 days after the date of my decision. By directing an election before the end of this school year, I am only seeking to achieve those objectives set forth in the Board's policy manual. Moreover, the cases cited by Employer do not establish that I have abused my discretion because they are clearly inapposite. Both *St. John of God Hospital, Inc.*, 260 NLRB 905 (1982), and *Bryant Electric Company, Inc.*, 216 NLRB 933 (1975), are unit expansion cases in which Regional Directors had directed immediate elections even though the units involved were scheduled to increase by approximately 400% within a few months. Employer has not presented any evidence here that it intends to increase the size of the Unit significantly between now and the fall, as opposed to merely replacing a small percentage of those drivers who choose to leave. Finally, I find *Glenn McClendon Trucking Co., Inc.*, 255 NLRB 1304 (1981), clearly distinguishable. The Board sustained an election objection in that case because 3 voters were disenfranchised because they were working elsewhere during the 30 minutes that the Regional

⁷ Employer's reliance on *Industrial Forestry Association*, 222 NLRB 295 (1976), is misplaced for the same reason. The Regional Director in that case had directed an election to occur during a low point of employment when the employer's workforce had shrunk from 33 to 6 employees.

Director had scheduled the polls to be open and their votes could have affected the outcome of the election, which was decided by one vote. By contrast, my determination here does not disenfranchise any of the Unit employees currently employed.

Accordingly, I find that, under all of the circumstances present, an immediate election would be fully consistent with the agency's objectives in processing election petitions and thus should be directed among Employer's school bus drivers in the stipulated Unit.

IV. CONCLUSION

In view of the above, the record as a whole and the parties' briefs and arguments, I shall direct an election in the following Unit of employees no later than before the end of the current school year.

All full-time and regular part-time school bus drivers employed by Employer out of its Everett facility, but excluding all office clerical employees, dispatchers, managerial employees, mechanics, guards, and supervisors as defined by the Act.

There are approximately 100 employees in the Unit.

V. 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 those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, 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 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 TEAMSTERS LOCAL UNION NO. 38, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

A. List of Voters

In order to assure 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, on or before May 30, 2006. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. 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 to (206) 220-6305. Since the list will be made available to all parties to the election, please furnish a total of **four** copies, unless the list is submitted by facsimile, in which case no extra copies need be submitted.

B. Notice of Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 5 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. 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. This request must be received by the Board in Washington by 5 p.m. EST on June 6, 2006. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.

DATED at Seattle, Washington, this 23rd day of May 2006.

/s/ [Richard L. Ahearn]

Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174