

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**

TELCO CONSTRUCTION INC.

Employer

and

Case 03-RC-247647

**LABORERS INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 210**

Petitioner

DECISION AND DIRECTION OF ELECTION

On September 5, 2019,¹ Laborers International Union of North America, Local Union No. 210 (the Petitioner) filed a petition pursuant to Section 9(c) of the National Labor Relations Act seeking to represent a unit of laborers employed by Telco Construction Inc. (the Employer). Pursuant to a Notice of Hearing, a hearing was conducted before a hearing officer on September 17. The Employer failed to appear and did not participate in this hearing. As there were no issues raised precluding the conduction of an election in this matter, I will direct an election in the appropriate unit described below.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Based on the entire record in this proceeding, I find and conclude the following:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.
2. For the reasons stated below, the Employer is an employer within the meaning of Section 2(2) of the Act and is an employer engaged in commerce within the meaning of Section 2(6) and (7) the Act.

On September 5, the Employer was served by email with a copy of the petition filed in this matter and with a notice of hearing. The record further demonstrates that on September 11, the Employer was served by email with an order rescheduling the hearing in this matter.² On September 12, the Employer filed a Statement of Position with the Region. Although this Statement of Position did not include a completed Questionnaire on Commerce Information, the Employer indicated in its Statement of Position that it met the Board's jurisdictional standards.³

Additionally, the record contains minutes from a meeting held by the Town Board of the Town of Aurora on August 26. The minutes document the Town Board approving a payment of \$250, 474.93 to the Employer for work performed at the Aurora Municipal Center. The minutes

¹ All dates hereinafter are in 2019 unless otherwise indicated.

² The order further rescheduled the due date for the Employer's Statement of Position to September 12. The record indicates that the postponement was requested by the Employer.

³ Specifically, in response to a question on the form asking if the Employer "agree[d] that the NLRB has jurisdiction over the Employer in this case," the Employer checked the box marked "Yes."

also reference a payment to the Employer in the amount of \$3,810,366 for removal of an underground storage tank at the Aurora Municipal Center. Thus, the record establishes the Employer performed services valued in excess of \$50,000 to the Town of Aurora, which itself meets the Board's monetary standard for jurisdiction.⁴

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.⁵

4. 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.

5. The following is an appropriate unit for the purposes of collective-bargaining:

All full-time and regular part-time laborers employed by the Employer at its East Aurora, New York facility, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

Although the Employer's Statement of Position conceded that the above is an appropriate unit, the Employer contended in that same document that the petitioned-for unit was comprised of a significantly higher number of employees than the approximate size of the unit listed on the petition filed by the Petitioner.⁶ The Employer's Statement of Position further asserts that "[o]nce [the larger size of the unit is established] it will reflect the Petitioner's lack of sufficient showing of interest." Jonathan Fuzak, an organizer for the Petitioner, testified that since approximately June of 2011, the Employer and the Union have had a collective-bargaining relationship governed by Section 8(f) of the Act, and that successive contracts pursuant to this arrangement cover a bargaining unit of three employees, not 19 as contended by the Employer in its Statement of Position.⁷ This collective bargaining agreement serves as the Petitioner's showing of interest. In addition, Fuzak's unrefuted testimony that the unit is confined to three employees serves as the basis for testing any other form of showing of interest submitted by the Petitioner.

6. There is no bar to conducting an election in the above unit.⁸

⁴ The Town of Aurora is, of course, exempt from the Board's jurisdiction by virtue of its status as a political subdivision. However, it is well established that "sales of goods or services to enterprises or organizations which are themselves exempted from the Board's jurisdiction" are sufficient to establish the Board's jurisdiction. *Siemons Mailing Service*, 122 NLRB 81, 85 fn. 12 (1958), and cases cited therein.

⁵ Fuzak testified that the Petitioner exists, at least in part, for the purpose of dealing with employers regarding the terms and conditions of employment for employees, including wages, rates of pay, and hours of work.

⁶ The Petitioner's petition asserted that there were three employees in the petitioned-for unit. The Employer's Statement of Position asserts that the true number of employees in this unit is 19.

⁷ Fuzak further testified that in 2016, the Employer announced an intention to end its relationship with the Petitioner but failed to follow through upon being informed of the withdrawal liability it would incur by doing so. The record does not contain copies of any of the contracts between the Petitioner and the Employer.

⁸ I note that the Employer's Statement of Position denied the presence of any such bar.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Laborers International Union of North America, Local Union No. 210.

A. Election Details

The election will be conducted by mail.⁹ The mail ballots will be mailed to employees in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 3, on **Monday, September 30, 2019**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 3 office by close of business on **Wednesday, October 16, 2019**. The mail ballots will be counted at the Region 3 office located at 130 S. Elmwood Ave., Ste. 630, Buffalo, NY 14202-2465 at 10:00 a.m. on **Thursday, October 17, 2019**.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 3 office by no later than **5:00 p.m. on Monday, October 7, 2019** in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending September 15, 2019, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an 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 that 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

⁹ The Board's general preference is that elections take place in person. However, the Board vests in Regional Directors discretion to determine whether a manual or mail ballot is appropriate. Although the Employer suggested in its position statement that it prefers a manual election, it suggested no possible dates, times or locations at which such an election should take place. The Employer's failure to cooperate by providing this information and by its refusal to appear at the hearing leave me with little choice but to direct a mail ballot election. See *Terrace Gardens Plaza, Inc.*, 313 NLRB 571, 571 (1993).

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, September 24, 2019**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be

posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice prior to **12:01 a.m., Wednesday, September 25, 2019** and copies must remain posted until the end of the election. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: September 20, 2019

/s/ Paul J. Murphy

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
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