

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

SDH EDUCATION WEST, LLC

Employer

and

AN INDIVIDUAL

Case 13-RD-258697

Petitioner

and

**SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 1**

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (“Board”) to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.¹

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
- b. 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.
- c. The Union is a labor organization within the meaning of the Act.
- d. The parties do not contend there is any contract bar to this proceeding.
- e. 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.

I. ISSUES AND PARTIES' POSITIONS²

The Employer, a subsidiary of Sodexo America, LLC,³ provides food services to the Lake Park High School District No. 108 located in Roselle, Illinois (Lake Park facility or Lake Park). The Petitioner seeks to decertify the Union as the exclusive collective bargaining representative of all cooks, bakers, grill cooks, cashier/food service workers, food service workers, and utility persons employed by the Employer at the Lake Park facility. The primary question presented in the instant case is whether the processing of this petition is not appropriate because the Employer will soon be ceasing operations involving the unit employees. The Employer contends that an election should not be ordered because it will end its operations at the Lake Park facility in the near future and terminate all unit employees by June 30, 2020.⁴ The Petitioner asserts that an election should be held because the cessation of the Employer's operations at the Lake Park facility is not complete. The Union does not oppose the Employer's position.

II. DECISION

As explained below, based on the record and relevant Board law, I conclude the petition must be dismissed because the record establishes that cessation of operations in the unit proposed for decertification is imminent and certain.

III. STATEMENT OF FACTS

The Employer has recognized the Union as the exclusive collective bargaining representative of the unit employees for about the past 12 years. This recognition has been

² Following the hearing, the Employer timely filed a brief, which I have carefully considered.

³ The Employer's name and Sodexo America, LLC are used interchangeably herein.

⁴ All dates are in 2020 unless otherwise indicated.

embodied in successive collective bargaining agreements (CBAs), the most recent of which is effective from July 1, 2017 through June 30. The Employer and Lake Park have been parties to successive food service management agreements (Agreements) dating back to July 1, 1998 and amended most recently on November 15, 2017. Like the CBA between the Employer and the Union, the agreement between the Employer and Lake Park will expire on June 30. By letter dated February 25, Lake Park notified the Employer that per their Agreement it intended for the Agreement to expire or terminate, as applicable, on June 30 and that the Agreement would not be renewed for an additional term. Petitioner filed the instant petition on April 2 and a hearing was held on April 13.

IV. BOARD LAW

The Act directs the Board, upon the filing of a representation petition, to investigate whether a question of representation exists by holding an appropriate hearing, and if it does exist, to direct an election and certify the results thereof. 29 U.S.C. Section 159 (c)(1). The Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose: it will dismiss an election petition when cessation of the employer's operations is imminent and certain, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business. *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 4 (2016); *Hughes Aircraft Company*, 308 NLRB 82, 83 (1992); *Larson Plywood Company, Inc.*, 223 NLRB 1161, 1161 (1976); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 646-647 (1974).

The party asserting a cessation of operations bears the burden of proving that cessation of operations is both imminent and certain. *Retro Environmental, Inc.*, above at 4 (other citations omitted). The Board requires concrete evidence such as announcements of business closure to the

public and the employees, termination of employees, or other evidence that the Employer has definitively determined the sale, cessation, or fundamental change in the nature of its operations. *Hughes Aircraft*, above at 83; *Martin Marietta Aluminum*, above at 646-647. Factors considered in determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition include: the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to effectuate the change, and whether the employees have been notified. *Hughes Aircraft*, above at 82-83; *Davey McKee Corporation*, 308 NLRB 839, 840 (1992); *Larson Plywood*, above at 1161. For example, the Board has held that where an employer's operations are scheduled to terminate within three to four months, no useful purpose is served by directing an election. *Davey McKee*, above at 840. In *Hughes Aircraft*, above, the subcontracting and elimination of unit work within 90 days was found to be definite and imminent based upon evidence of the employer's solicitation of bids, meetings with and execution of agreements with subcontractors, and notification to employees of the timeframe of their anticipated layoff. In *Martin Marietta Aluminum*, above, evidence that the employer sought a purchaser for its plant, announced closure of the plant to employees and the media, discharged employees, stopped taking orders, and terminated existing contracts supported a finding that plant closure was definite and imminent. In *Larson Plywood*, above, the record established that the employer intended to liquidate its entire business within 90 days. In *Douglas Motors Corp.*, 128 NLRB 307, 308 (1960), the evidence showed that the employer intended to subcontract all of its operations within six months.

The Board will not dismiss an election petition based upon conjecture or uncertainty concerning an Employer's future operations, an employer's contention that it intends to cease operations or reduce its workload sometime in the future, or evidence of cessation that is

conditional or tentative. *Retro Environmental, Inc.*, above at 6, citing *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Such speculative assertions concerning the uncertainty of future operations are not sufficient to warrant dismissing the petition and withholding from employees their statutory right to choose or reject union representation. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997).

V. APPLICATION OF BOARD LAW TO THIS CASE

In reaching the conclusion that the Employer will imminently cease its operations at the Lake Park facility, I rely on the following analysis and record evidence.

1. Time until cessation of operations

The record evidence establishes that Lake Park will not renew its Agreement with the Employer, and thus the Agreement is intended to expire and terminate on June 30. There is no record evidence that the Employer will have any contracts involving the unit employees extending beyond that date. As a result, the Employer is expected to permanently cease operations at the Lake Park facility as of June 30, a date certain less than three months after the April hearing. Therefore, the remaining time before the Employer ceases operations is consistent with the above cases finding similar time spans as indicative of an imminent closure.

2. Steps taken to cease operations

The Employer has provided uncontroverted evidence of steps taken as to the ceasing of its operations at the Lake Park facility prior to the hearing in this case. In this regard, by letter dated February 25, Lake Park notified the Employer that it would not be renewing their Agreement for an additional term and that it intended for the Agreement to expire and terminate on June 30. It is also uncontroverted that as a result of Lake Park's decision to not renew its contract with the Employer, the Employer's operations and its corresponding employment of the unit employees

will cease at the Lake Park facility. There is no evidence that any employment relationship between the Employer and the unit employees will survive the cessation. See, *Larson Plywood*, above at 1161.

Although Petitioner argues that the cessation of the Employer's operations at Lake Park is not final and the employees in the unit are still employed by the Employer, the evidence shows that the Employer will not be operating at the Lake Park facility after June 30. Even though the record is silent as to what, if any, steps the Employer has taken to notify unit employees of its impending cessation of operations at Lake Park, the record evidence clearly demonstrates the imminent and certain cessation of the Employer's operations at the Lake Park facility.

VI. CONCLUSION⁵

Based on record evidence, the Employer has established that its cessation of operations at the Lake Park facility is imminent and certain, and it would not serve the purposes of the Act to process this petition. It is hereby ordered that the petition in this matter is dismissed.

⁵ In its brief, the Employer made the following supplemental arguments in support of dismissal of the instant petition each of which I find does not provide a basis for dismissal. First, the Employer argues that proceeding to an election would defeat the purposes the Board has sought to advance in its successor bar doctrine. While the record includes evidence regarding a change in the Employer's operations at the Lake Park facility, as noted above, it is silent as to what change will follow regarding the identity of a new employer. Next, the Employer notes that Lake Park closed its schools on March 13 due to the COVID-19 crisis necessitating the Employer to immediately and indefinitely lay off 80% of the unit employees, thus proceeding to an election when it lacks a substantial and representative complement of employees would not advance the Act's purposes. However, a mere reduction in the number of employees is not sufficient to postpone an election or dismiss the petition; rather, the Board will examine whether the reduction is as result of a fundamental change in the nature of the employer operations. *Plymouth Shoe Company*, 185 NLRB 732, 733; *Douglas Motors*, above at 308. At any rate, the historical nature of the Employer's operations and its employment of these unit employees normally results in an annual layoff of employees at the end of each school year. Finally, the Employer's argument pertaining to its withdrawal liability under the ERISA multi-employer pension plan rules that would result if an election is held before the expiration of the CBA on June 30 is not an appropriate basis for dismissing the petition.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **May 8, 2020**.

A request for review must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules does not permit a request for review to be filed by facsimile. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. A certificate of service must be filed with the Board together with the request for review. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide \(https://apps.nlr.gov/myAccount/assets/E-Filing-System-User-Guide.pdf\)](https://apps.nlr.gov/myAccount/assets/E-Filing-System-User-Guide.pdf)

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **May 8, 2020**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire

document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on May 8, 2020.**

Filing a request for review electronically may be accomplished 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. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Chicago, Illinois this 24th day of April 2020

/s/Peter Sung Ohr

Peter Sung Ohr, Regional Director
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