**UNITED STATED OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **NP TEXAS LLLC D/B/A TEXAS STATION GAMBLING HALL AND HOTEL,** | ) | |
| **Employer,** | ) | |
| | ) | **CASE 28-RC-261253** |
| **and** | ) | |
| **LOCAL JOINT EXECUTIVE BOAD OF LAS VEGAS A/W UNITER HERE INTERNATIONAL UNION,** | ) | |
| **Petitioner.** | / | |

**PETITIONER'S OPPOSITION TO THE EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

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July 15, 2020

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## I. INTRODUCTION

The Employer has sought and obtained an election delay on the basis of its decision to temporarily shut down its hotel-casino in Northern Las Vegas, Nevada. For the Board to overturn the Regional Director's decision and direction, the Employer must show that there were substantial issues warranting review. However, the Employer has conflated the Board's legal standards.

Contrary to the Employer's argument, the Employer has the burden of proving a fundamental change to its business if it wants the petition dismissed. As the Regional Director found, the Employer did not meet that burden. Meanwhile, the Regional Director appropriately found that laid-off employees have a reasonable expectancy of recall. Finally, the Regional Director used its discretion to order an election among a substantial and representative complement of an appropriate unit. In sum, the Petitioner asks the Board to deny the Employer's Request for Review of the Regional Director's Decision and Direction of Election.

## II. BACKGROUND FACTS

The facts in this case are largely undisputed. The Employer, part of Station Casinos, owns and operates a hotel-casino in North Las Vegas, Nevada. It is a long-running operation. The three employee witnesses, for example, have worked at Texas Station for 13, 16, and 19 years, respectively. Unfortunately, COVID-19 interrupted the hotel-casino's operations. As a result, Station Casinos made the decision to close Texas Station temporarily. In the Employer's own words: "the Employer has not permanently closed and has never suggested otherwise. In fact, the evidence reflects that the Employer hopes to be able to reopen at some point in the future." (Texas RFR, p. 13.)

## III. ARGUMENT

After the Petitioner sought an election among the Employer's employees, the two questions before the Regional Director were: (1) is there of representation?; and (2) if so, who is eligible to vote? The Regional Director decided both of those questions based on the evidence presented at the pre-election hearing.

### A. The Employer Did Not Meet the Standard for Dismissing the Petition.

Under the National Labor Relations Act, when an eligible person or group files a representation petition, the Board must investigate whether a question of representation exists. 29 U.S.C. § 159(c)(1). That includes holding "an appropriate hearing." *Id.* In this case, the Board found a question of representation affecting commerce. (DDE, p. 11.) The Employer does not dispute that finding. According to the Act, if "such a question of representation exists," then "the Board shall direct an election by secret ballot and certify the results thereof." *Id.*

There is "a narrow exception to this statutory mandate," and that is that the Board will not order an election under "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, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business." *Retro Envtl., Inc.*, 364 NLRB No. 70, at p. 4 (2016). Despite the Employer's complaint that it had nothing to prove, (Texas RFR, pp. 12-13), the Employer does have the burden of proving that its business operations are ceasing or have ceased. *Id.* at p. 1.

By the admission of the Employer, the Employer's business is not ceasing. It will reopen Texas Station "in the near future" as part of Station Casinos' phased reopening plan. (Texas RFR, pp. 4-5, 13.) While operations have currently ceased due to the unprecedented interruption

of the COVID-19 pandemic, the Regional Director found no evidence of a fundamental change to the Employer's business. (DDE, p. 5.) Instead, the Regional Director took the Employer at its word that the current cessation of operations is only temporary. Evidence of cessation that is conditional or tentative is insufficient to dismiss a petition. *Canterbury of Puerto Rico, Inc*., 225 NLRB 309 (1976).

The Employer inappropriately relies on cases where the employer's temporary or contract work ceased permanently—as opposed to the case here, where permanent work has ceased temporarily. All the Employer's cases are thus distinguishable. For example, the *Vulcan Tin Can* Board found that the employers laid-off employees from its "substitute, and therefore temporary, program," which was a permanent layoff given that the program was temporary and complete. *Vulcan Tin Can Company*, 97 NLRB 180, 182 (1951). In *21st Century*, the Board found that the employer, who built sets for a television show for a seven-month period, had only hired the employees for one job and that the one job was complete. *See 21st Century Productions*, 187 NLRB 806, 807 (1971). For nearly identical reason, the Board found no reason to order an election at the Cal-Neva lodge, which experimented with running a show for only three months before closing the show for economic reasons. *Cal-Neva Lodge*, 235 NLRB 1167, 1167 (1978). After closing the show for economic reasons, the Cal-Neva corporate officials were not sure the lodge would continue to offer its own shows. *Id.* Similarly, the Board dismissed the petition in *Clark Construction* because the Employer's work in the geographical region on a construction bid was nearly complete and the Employer had no contracts for future work in the area. *Clark Construction Company, Inc.*, 129 NLRB 1348, 1349 (1961). In each of these cases, the employers had taken on short-term work and had no plan for continuing such work.

The key in this case, as the Regional Director found, is that there has been no fundamental change to the Employer's business. This case is more similar to the Board's decisions in cases where the employer's long-term business was interrupted. For example, in *MJM Studios of New York*, the Employer had carpentry and welding work for over a year from February 1, 2000, through at least April 15, 2001. *See* 336 NLRB 1255, 1255 (2001). The employer had several projects during that time period and, while its current projects had stalled, it was "actively seeking new projects." *Id.* at 1255-56. As a result, the Board found that "the evidence does not indicate that any reduction in the Employer's work force is the result of a 'fundamental change' in the Employer's operations." *Id.* at 1256. The Board gave weight to the fact that the Employer did "not contend that it is shifting to a different type of business operation or eliminating aspects of its current business." *Id.* Instead, the Board concluded that "the Employer continues to pursue the same type of work . . . that it performed before the planned reduction in its work force and is continuing to pursue new projects." *Id.* Because the cessation of work was only temporary, the direction of election was appropriate.

The Board has repeatedly ruled that temporary cessations of permanent work are not cause to dismiss a petition. *See Retro Envtl., Inc*., 364 NLRB No. 70, at pp. 1, 5 (reversing dismissal of petition where joint employers' projects had concluded and there were no "pending joint bids for future work," but where "there is no evidence that the Employers intended to discontinue their working relationship or that they would not continue to work together in the future"); *S. K. Whitty & Co.*, 304 NLRB 776 (1991) (directing election where employer had no commitments for future work "due to a continuing slump in construction activity," but planned to bid for future work in the geographic area); *Fish Eng'g & Const. Partners, Ltd.*, 308 NLRB 836 (1992) (same); *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997) (finding election

appropriate where the Employer was "not seeking to sell, close, or subcontract its Louisville operation. Rather, the Employer is attempting to stabilize the Louisville operation, hire a terminal manager for the facility, and increase its business in that area"). So long as the Employer has plans for future, "additional unit work," the holding an "election may serve a useful purpose." *Retro Envtl., Inc*., 364 NLRB No. 70, at p. 8, fn. 7 (Miscimarra, dissenting).

A temporary shut-down does not end a collective-bargaining relationship. "[T]he Board has emphasized the critical distinction between a temporary shutdown and an indefinite, apparently permanent, shutdown in determining whether a collective bargaining relationship survived the hiatus." *Golden State Warriors*, 334 NLRB 641, 653-54 (2001). A bargaining unit continues in existence even when no unit work is performed and no unit employees are employed. *See Finger Lakes Plumbing & Heating Co., Inc.*, 253 NLRB 406, 406 n.3 (1980); *Schmutz Foundry & Machine Co*., 251 NLRB 1494, 1497 (1980), *enf'd* 678 F.2d 657 (6th Cir. 1982).

Even long closures are deemed temporary when the employer plans to reopen operations at some point. *Golden State Warriors*, 334 NLRB at 653-54 (closure of stadium during one season for renovations did not terminate the collective bargaining relationship); *Rockwood Energy & Mining Corp.*, 299 NLRB 1136, 1139 n.11 (1990) (five year closure during which mining operations were suspended was deemed temporary); *Schmutz Foundry & Machine Co.*, 251 NLRB at 1496 (closure for one year following strike did not terminate bargaining relationship because there was no evidence that the employer intended to close business permanently); *Coastal Cargo*, 286 NLRB at 203-04 (nine month closure due to lack of work during which there was no definite date when work would resume considered temporary because employer intended to resume operations when work obtained).

The Regional Director correctly declined to dismiss the petition because the Employer failed to prove that it had "completely cease[d] to operate, s[old] its operations, or fundamentally change[d] the nature of its business." *Retro Envtl., Inc*., 364 NLRB No. 70, at p. 4. Because it is undisputed that a question of representation affecting commerce exists, the Regional Director acted appropriately by directing an immediate election.

**B. The Employees Have a Reasonable Expectation of Recall Upon Reopening.**

Stations Casinos admitted that it has plans to reopen Texas Stations as the Las Vegas market recovers. When the property reopens, the employees can reasonably expect to be recalled or rehired.

Undisputedly, the test for evaluating the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005); *Madison Industries*, 311 NLRB 865, 866 (1993) (citing *Apex Paper Box Co.*, 302 NLRB 67 (1991) as the appropriate test). "In determining whether employees have a reasonable expectation of recall, the Board examines several factors, including what the employees were told about the likelihood of recall, the circumstances surrounding the layoff, and the employer's past experience and future plans." *Id.* A mere assertion of permanent layoff is insufficient to rebut the presumption that layoffs are temporary. *Intercontinental Mfg. Co*., 192 NLRB 590, 590 fn. 4 (1971).

Based on the Employer's future plans, the employees have a reasonable expectation of recall. As explained in detail above, the Employer's current closure is temporary and the Employer plans to reopen the hotel-casino after the effects of the pandemic subside. (Texas RFR, p. 13.) So far, the Chief Operating Officer of Station Casinos has been "incredibly pleased with the positive response and turnout" to the reopening of several Station Casinos properties on June

4, 2020. (Petitioner Ex. 5.) Station Casinos plans to reopen all of its hotel-casinos in phases. (Texas RFR, p. 5; Employer Ex. 4.) Based on the Executive Vice President's testimony, Texas Station and its sister property across the street, Fiesta Rancho, will reopen in the last phase. (Texas RFR, p. 8.) On the Texas Station reservation website, a notice states: "We are temporarily closed and currently not take reservations. We look forward to opening soon and welcoming you back" (Texas RFR, p. 16; Petitioner Ex. 2.) Station Casinos further told investors, "We remain hopeful that Las Vegas and our business will rebound quickly and allow us to rehire many of these valued team members when we emerge on the other side of this crisis." (Texas RFR, p. 17, fn.22; Employer Ex. 8, p. 2.) This emphasized that the Employer's plan is to rehire employees upon reopening.

These public statements are strong evidence of the Employer's future plans. In its Request for Review, the Employer asks the Board to ignore this evidence—and its marquee outside the Texas Station property which reads: "Stay safe, we'll be back!"—on the basis that those messages are intended for customers and not employees. This argument should be rejected for two reasons. First, this is evidence of the Employer's future plans, which is one of the factors in determining employees' reasonable expectancy. Second, the Employer's argument is premised on the fact that it misleads customers and investors about its future plans to ward off market competition. For the Employer's legal sake, the Union assumes that the Employer does not lie to its customers and investors about its future plans. Besides, the Employer's desire to maintain its place in the market further evidences its desire to stay in the hotel-casino market. (Texas RFR, p. 16 & fn. 21.)

Based on the Employer's statements to employees, the employees have a reasonable expectation of recall. In its lay-off notice to employees, Station Casinos used the word temporary

twice. (Employer Ex. 5(b) ["The Company's casino operations in Nevada have been temporarily closed for business" *and* "the Company has made the difficult decision to temporarily close its Texas Station casino"].) The employees noticed and highlighted the "temporary" words in their notices. (Testimony of Nestor Gutierrez.) In a notice to all team members posted on its website (which the Texas Station employees could access), Station Casinos Chief Executive Officer Frank Fertitta stated that they hoped "to rehire many of our valued team members when we emerge on the other side of this crisis." (Texas RFR, p. 5; Employer Ex. 4.) Furthermore, frontline supervisors told the employees that they would be contacted when the property reopened. (Texas RFR, pp. 2, 15.)

Based on the Employer's policies and practices, the employees have a reasonable expectation of recall. Stations Casinos' Employees at this property have recall rights for 90 days based on length of service with the company. (Petitioner's Ex. 3.) Even after that, the employees can be rehired. Station Casinos has repeatedly stated its plan to rehire team members on "the other side of this crisis." (Employer Ex. 4; Employer Ex. 8, p. 2.) The Executive Vice President specifically confirmed that employees may reapply for work at Texas Station when it reopens. (Welch testimony.) The statement that employees may reapply for work enforces an expectation of recall. *See Band-Age, Inc.*, 217 NLRB 449, 449 (1975) *enf'd* 534 F.2d 1 (1st Cir. 1976) (statement that employer would take applications from anyone interested in returning to work gave employees an expectation of reemployment).

Moreover, Texas cannot discriminate against former employees in rehiring. *See Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249, 262 n.8 (1974) (stating that an employer "could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union"). Texas Station Casino's long-term

employees are the most qualified to refill those positions. An Employer's desire to shut down in the face of an RC petition and reopen non-union is not a legitimate reason under the Act to delay reopening. *See Arecibo Medical Hospice Care*, Case No. 24-CA-6598, 1993 WL 1609315 (Feb. 8, 1993) (finding the Employer had violated the Act by shutting down to prevent the Union from organizing).

Put differently, employees can reasonably expect that Stations Casinos will comply with the NLRA and not discriminate against them if they apply to return to work when Texas Station reopens. The Regional Director's decision regarding the laid-off employees was appropriate under the Board's legal precedent.

### C. There is No Dispute That the Eligible-Employee Unit is Substantial and Representative.

The Employer has not raised any issue regarding the representative nature of the employees that the Regional Director deemed eligible to vote in the election. The Employer's only concern is that it does not understand why the Regional Director decided that April 30, 2020, was the appropriate payroll date. (Texas RFR, p. 20.)

The Regional Director determined that April 30 represented the date which best represents the Employer's workforce in full operation. "In determining whether the employee complement is 'representative and substantial' so as to warrant holding an immediate election, the Board has avoided the use of hard and fast rules." *Clement-Blythe Cos*., 182 NLRB 502 (1970). As the Employer has admitted, as of April 30, all of its regular employee were on the payroll. (Texas RFR, p. 3.) That means that on that date, all classifications in the unit—a unit with the Employer stipulated was appropriate—would be represented in numbers that will best represent a substantial and representative complement of the employees who will return when the Employer resumes operations. *See MJM Studios of New York*, 336 NLRB at 1256 ("We

agree with the Regional Director that the Employer's present work force constitutes a substantial and representative complement of employees to be employed in the near future."). The Regional Director's eligibility decision should not be overturned.

## IV. CONCLUSION

The Regional Director's decisions were grounded in longstanding Board law. For the foregoing reasons, the Employer's arguments do not raise any substantial issues for review. The Employer's request to dismiss the petition should be denied and the election should proceed expeditiously, as directed by the Regional Director.

*/s/ Kimberley C. Weber*

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