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NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel and Local Joint Executive Board of Las Vegas, Petitioner. Case 28–RC–261253

August 31, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On May 28, 2020,¹ the Petitioner filed a petition to represent a unit of employees at the Employer’s casino and hotel in Las Vegas, Nevada (the Texas Station Casino). On July 2, the Regional Director issued a Decision and Direction of Election, directing a mail-ballot election and scheduling the ballots for mailing on July 23. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, as amended, the Employer filed a request for review, along with a request to stay the election. On July 13, the Board issued an order staying the election.

The issue in this case is whether the Regional Director erred in scheduling an election during a time in which the Employer has indefinitely suspended its operations and laid off all of its employees, due to the Coronavirus Disease 2019 (COVID-19) pandemic. For the reasons stated below, the Employer’s request for review of the Regional Director’s Decision and Direction of Election is granted, as it raises substantial issues warranting review. Upon review, we find that the Employer’s laid-off employees have no reasonable expectation of recall and are therefore ineligible to vote. Thus, there are no eligible voters at this time. Under such circumstances, we conclude that the best course of action is to dismiss the petition, without prejudice and subject to reinstatement when the Employer resumes its operations.

A. Facts

On March 18, the Governor of Nevada issued an emergency directive, directing all of the state’s casinos to cease operations until April 16. In accordance with this directive, the Employer’s parent company, Station Casinos, alerted its employees that it would be temporarily closing all 20 of its Las Vegas properties. While some of the petitioned-for employees continued working through the end of March in order to prepare the casino for an extended shutdown, most of the petitioned-for employees had their last day of work on or about March 18. At that time, some employees’ managers or supervisors informed them that

they would likely be recalled probably at the end of April or in early May pursuant to the recall provisions of the Employer’s Reduction-in-Force policy. The policy states that “if a laid off Team Member returns to a position within the Company within 90 days, the Team Member will be reinstated with his or her original hire date.”

The casino, however, did not reopen before August 1. The Governor extended the casino closure order on March 31, and then again on April 29; with the second extension, the Governor ordered gaming operations to remain closed through May 15, and until the Nevada Gaming Control Board determined that operations could safely resume. In response to these orders, on May 1, Station Casinos issued a letter to all of its employees, outlining a reopening plan. Under the first phase of its reopening plan, Station Casinos would reopen several of its properties (collectively the Phase One Properties). The non-Phase One Properties, including Texas Station Casino, would remain closed, and Station Casinos would “look at reopening them once we have had a chance to assess how our business is performing in a post COVID-19 world.” The letter stated that there would be meaningful staffing-level reductions but that it was “hopeful . . . that Las Vegas will rebound swiftly and allow us to rehire many of our valued team members when we emerge on the other side of this crisis.” It concluded by observing that “[e]ach team member will separately receive a communication with respect to his or her employment status.”

For the petitioned-for employees at Texas Station Casino, this “separate communication” was a May 1 termination letter. The letter explained that “[t]he Company’s casino operations in Nevada have been temporarily closed for business since the [Governor’s] order became effective[,] and the uncertainties facing the Company prevent us from predicting whether or when we can resume normal operations.” The letter further explained that, due to these circumstances, Station Casinos “made the difficult decision to temporarily close its Texas Station casino effective May 1, 2020, and your employment will end at that time.” Consistent with its practices and policies for terminated employees, the Employer paid out unused vacation, accrued vacation, and floater days to the terminated employees; required those employees to return their uniforms; cleaned out their lockers and allowed them to reclaim the contents; and helped them process unemployment claims by taking the position that the employees had been permanently terminated. Full-time employees would have their medical, dental, and vision benefits extended through September 30, and the employees were paid through May 16.

¹ All dates 2020 unless otherwise noted.

On May 7, the Governor issued another directive, stating that gaming operations would remain closed through Nevada's first phase of reopening, effective through May 30. On May 19, the Chief Financial Officer (CFO) of Red Rock Resorts, a publicly traded company that manages Station Casinos, announced Station Casinos' plans with respect to the Phase One Properties, as outlined above. The CFO stated that "[w]e 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," and that "casinos will be permitted to reopen in the coming weeks." With respect to Texas Station Casino and other non-Phase One Properties, the CFO stated that "we will look at reopening these properties once we have had a chance to fully assess how our first-to-open properties are performing post-crisis, as well as the recovery of the Las Vegas market and the economy as a whole."

On May 27, the Governor ordered the Nevada Gaming Control Board to promulgate requirements for a phased and incremental resumption of gaming operations, with openings commencing no sooner than June 4. Station Casinos immediately announced that it would reopen its Phase One properties on June 4, as it had planned. Station Casinos made no announcements or remarks with respect to reopening Texas Station Casino or the other non-Phase One properties. As of June 11, the marquee outside the Texas Station Casino read, in part, "STAY SAFE, WE'LL BE BACK!"; around June 15, the Texas Station Casino website began to display a pop-up window that stated "[w]e are temporarily closed and currently not taking reservations. We look forward to opening soon and welcoming you back."

As of the June 16 hearing in this case, none of the four non-Phase One Properties had reopened to the public. At the hearing, the Executive Vice President (EVP) and Chief Legal Officer (CLO) of Red Rock Resorts and Station Casinos LLC, Jeffrey Welch, stated unequivocally that "[t]here is no current plan to reopen Texas Station." Welch testified that there was no timetable in place for reopening any of the non-Phase One Properties, and that he did not "anticipate that a decision will be made about what to do about Texas Station for quite some time." According to Welch, "the decision on Texas Station . . . would be the last decision that we would make," and was "likely to be at the very tail end of our decision-making process." While he acknowledged being "not displeased" with respect to the reopening of the Phase One Properties, and noted that there appeared to be a lot of "pent-up demand" for casinos to reopen, he stated that any reopening decision would involve a multi-factor analysis, including the performance of any reopened casino; the state of the

economy as a whole; how Las Vegas, in particular, was doing; and whether there was any "backsliding" with respect to the ongoing health crisis. Under these circumstances, it was Welch's view that "[i]t is possible that we will open one or more of those properties [non-Phase One casinos]," but that "[i]t is also possible that one or more of those properties will never reopen." He further testified that there was "no reasonable likelihood," "whatsoever," that Texas Station Casino would reopen in 2020. As of our decision today, Texas Station Casino remains closed.

B. Analysis

"It is well established that temporarily laid-off employees are eligible to vote," and that "[t]he voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff." *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). These factors include "the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall." *Id.* In order for employees to be eligible to vote, a reasonable expectation of recall must exist at the time of the payroll-eligibility period, regardless of whether the employees have been recalled by the date of the election. *Id.* Permanently laid-off employees—i.e., those laid off with no reasonable expectation of recall—are not eligible to vote. *Id.* at fn. 2.

Here, the Regional Director concluded that "the petitioned-for employees are laid off employees with the reasonable expectation of recall." In this regard, he observed that "[t]he Employer's public statements, e.g. the marquee outside Texas Station, the statements made during the quarterly earnings call, supervisors' statements to individual employees, the Employer's human resources policies, and the testimony of the Employer's own witnesses shows that the Employer has not permanently closed its Texas Station casino and that it may reopen depending on" several factors, including the performance of the Phase One Properties. The Regional Director further observed that "the Employer has not announced and/or does not have current plans to fundamentally change the nature of its business at Texas Station," and that "the employees may reapply for work with the Employer, even after the 90-day recall period."

We disagree with the Regional Director. "In the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectancy of recall exists." *Id.* at 69; see also *Foam Fabricators*, 273 NLRB 511, 512 (1984); *Tomadur, Inc.*, 196 NLRB 706, 707 (1972). The Board has observed

that “[w]hen the employer has had a past history of layoffs and recalls it is somewhat easier to determine exactly what would be a reasonable expectancy of reemployment in the near future,” such that “[i]f the business pattern follows a cyclical or seasonal term and employees who are laid off are usually rehired, the prediction can be made with some accuracy.” *Foam Fabricators*, supra at 512. But, if the employer has no reasonable way to predict when it will recall employees—especially where the employer is facing a situation for which it has no past practice or where the employees at issue were hired for a specific, non-seasonal project—the Board will find that the employees at issue are not eligible to vote. See *id.*; see also *S&G Concrete Co.*, 274 NLRB 895, 896 (1985). Under such circumstances, “[v]ague statements by the employer as to the ‘chance’ or ‘possibility’ of the employee being rehired do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment.” *Foam Fabricators*, supra at 512; see also *Sol-Jack Co.*, 286 NLRB 1173, 1173–1174 (1987); *S&G Concrete*, supra at 897 (“[W]hen the other factors involved do not support a laid-off employee’s having a reasonable expectancy of recall, verbal statements indicating possible recall will not overcome the totality of the evidence to the contrary.”).

Here, the Employer has not indicated, and there is no basis for finding that it could have indicated, when it will resume operations and/or recall the employees at issue. While the Employer’s managers may have made statements suggesting that the laid-off employees would be recalled in late April, they made these statements in early March. By the time the employees were laid off on May 1, it was clear that the Employer had no idea of when (or whether) the Texas Station Casino would reopen and resume operations. Nor does the Employer have any “past practice” relating to laying off employees in the face of an unprecedented pandemic. Moreover, the Employer continues to have no set timeframe for when—if ever—Texas Station Casino will reopen. Under such circumstances, the totality of the evidence indicates that the Employer cannot reasonably predict when Texas Station Casino will

reopen or whether (much less when) any of the laid-off employees will be recalled or rehired. Combined with the May 1 termination letters to employees, there is no basis for finding that any unit employees have a reasonable expectation of recall at this time. Under Board precedent, the vague and hopeful statements cited by the Regional Director, such as those on the Employer’s website and marquee, are not sufficient to find otherwise.

In short, under Board precedent, none of the petitioned-for employees currently has a reasonable expectation of recall, and Employer therefore has *no eligible voters* that could vote in any election to be held in the foreseeable future. Thus, as a practical matter, the Board cannot hold an election at this time,² and at this juncture and on this record any prediction for when there may once more be eligible voters in this unit would be unduly speculative. Accordingly, we shall dismiss the petition, without prejudice and subject to reinstatement when the Employer resumes operations.³

ORDER

IT IS ORDERED that the petition is dismissed.
Dated, Washington, D.C. August 31, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² We agree with the Regional Director that the Board’s cessation-of-operations precedent ordinarily would not warrant a dismissal here. Under that line of cases, the Board will dismiss a 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 Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 4 (2016). Here, however, there is no dispute that, at a minimum, the Employer hopes to resume operations in the future without substantially altering its business. In that event, the unit would continue to exist, and should employees select the Union as their exclusive representative, there would be ample opportunity for bargaining. Thus, this case is distinguishable from typical

cessation-of-operations cases in which the employers were permanently shutting down their operations and effectively erasing the bargaining units, with no possibility of returning. Rather, a temporary-closure situation like this presents a different question: whether the employer’s closure is sufficiently indefinite so as to remove any reasonable expectation of recall in the foreseeable future, rendering all of the laid-off employees ineligible to vote. Because we conclude that the Employer’s closure is sufficiently indefinite to remove any reasonable expectation of recall at this juncture, there are no presently eligible voters for which an election can be held.

³ See, e.g., *Cal-Neva Lodge*, 235 NLRB 1167, 1167 (1978); *Todd-Galveston Dry Docks, Inc.*, 54 NLRB 625, 626 (1944).