UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

TRACY AUTO, L.P. dba TRACY TOYOTA

Respondent

and **Cases 32-CA-260614**
32-CA-262291
32-RC-260453

MACHINISTS AND MECHANICS LODGE NO. 2182, DISTRICT LODGE 190, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Charging Party

OPPOSITION (JOINT) TO BOARD'S AND PETITIONER'S MOTIONS TO CONDUCT HEARING BY VIDEOCONFERENCE

Pursuant to Sections 102.16 and 102.24 of the Rules and Regulations of the National Labor Relations Board (the Board), Respondent opposes the Motion of Counsel for General Counsel to hold the hearing the above-consolidated matters by video conference for the reasons set forth herein and requests that this motion be lodged as an objection to conducting said hearing by videoconference.

INTRODUCTION

THE UNFAIR LABOR PRACTICE CONSOLIDATED CASES

Contrary to the modern trend of labor practices, on the very day that the Petition for election was filed and before the Respondent was even served with the Petition for election, the Union (Petitioner) brought fifteen workers to the General Manager of the dealership mid-morning on Friday, May 15, 2020 during the workers' shift, led by their foreman (statutory

supervisors) Tyrome Jackson and Kevin Humeston.[1] These 2(11) supervisors demanded recognition of the union on the spot in front of each and every voter in the proposed unit (technicians at Tracy Toyota) and when recognition was not immediately given their supervisors removed the workers from the job site in the middle of their shift and did not return to work, but instead the following Tuesday began picketing.

Again, at the time of the demand for recognition, the Employer had not even received a copy of the Petition and did not know that one had been filed with the NLRB. After walking out on May 15, the General Manager notified the strikers that replacement workers would be hired immediately. The technicians did not show up for work on thereafter on Saturday or Monday (as scheduled) and remained off work on Tuesday May 19 whereupon the technicians began picketing in front of the dealership, and remained off work until May 22, 2020. At no time did the Employer lock the technicians out. Here is what happened day-by-day that leads up to the various issues that will be presented at the hearing.

SATURDAY, MAY 16, 2020

May technicians were scheduled to work but again did not show up for work following the Friday, May 15 commencement of the strike.

A new hire, Adan Cordova commenced work on started on Saturday as a permanent replacement.

SUNDAY, MAY 17, 2020

No technicians on duty.

[1] While the Petitioner and the Counsel for the General Counsel now dispute that these two foremen were statutory supervisors, the Petitioner challenged their foreman replacement as a 2(11) supervisor for election purposes. One of the main issues to be tried in this representation portion of this hearing is the supervisory status of these two persons, which will take significant time and will involve significant documentation showing their status as supervisors.

MONDAY, MAY 18, 2020

Jae Lee informs the technicians that the dealership had no choice but to commence hiring permanent replacement technicians. Jae Lee informs the technicians that if they are replaced, they will be placed on a preferential recall list. Jae Lee invites employees to return as soon as possible to avoid being replaced. See Memo dated May 18, 2020.

That afternoon, three more applicants, Steve Lopez, Rathana Soung and Oscar Jimenez accept job offers as permanent replacement technicians.

Jesse Juarez sends email at 8:20 p.m. telling Jae Lee he made the wrong choice and if he thinks he can replace the technicians then go right ahead and do so.

TUESDAY, MAY 19, 2020

Striking workers start a picket line in front of the dealership and are successful at turning away customers that are coming in to the Respondent's Service Department. Petitioner uses picket signs to scare arriving customers that COVID-19 procedures are not being implemented.

David Caro, Emmanuel Elagdon, Edgar Sanchez and David Hignite accept job offers as permanent replacement technicians.

WEDNESDAY, MAY 20, 2020

Josh Spier and Rene Cabrera accept job offers as permanent replacement technicians and are placed in the Foreman positions. No technicians were hired from outside the dealership after May 20, 2020.

Jae Lee sends out a memo to all technicians in the afternoon and informs technicians that if they want to return to work that all that is needed is an offer by the technician to return to work unconditionally. Lee again tells strikers that the dealership is hiring permanent replacements so

they should return to work sooner rather than later. Jae Lee confirms that the dealership is following COVID-19 guidelines and states that it is untrue that the dealership is not. Lee again confirms that striking technicians must make an unconditional offer so that they are not replaced in the interim.

THURSDAY, MAY 21, 2020

At about 11:15 a.m. a group of technicians, against led by 2(11) supervisors (Foreman) Tyrome Jackson and Kevin Humeston enter the dealership to speak with General Manager Jae Lee. The technicians were outside picketing during the morning. Kevin Humeston (striking technician and former Shop Foreman) informed Jae Lee that the technicians were there to find out whether they can come back to work and whether the dealership will accept the union so that they can come back to work. Jae Lee asked Kevin and the others whether the offer to return was unconditional. Tyrome Jackson (striking tech and former Shop Foreman) then asked, "Will the company accept that the technicians are part of the union?" This was done in front of all proposed voters with the exception of one technician that had already crossed the picket line and return to work. Jae Lee told them again that the dealership will not accept the union at this time. Jae Lee asked again whether they would offer unconditionally to return to work. Kevin Humeston, former Shop Foreman, interrupted and said, "are you going to respond to our emails yesterday?" Kevin told Jae Lee that the technicians would have to think about whether they would unconditionally offer to return to work and they left.

At 12:50 p.m. the technicians came back to the conference room again led by Tyrome Jackson and Kevin Humeston. Tyrome said "We all want to come back tomorrow." Jae asked them whether they were all making an unconditional offer to return to work. After a pause, another technician said "Yes, that is what he said," directing his comment to Tyrome and

referring to someone else having told them that. Tyrome then said, "Yes we are." Jae told them he would be getting back with them shortly.

Jae Lee later that day wrote a letter to all technicians which technicians were to start immediately the next day and which technicians would be on a priority recall list. Four technicians were recalled immediately so that the dealership would have 15 total techs working just as it had prior the strike.

FRIDAY, MAY 22, 2020

Four striking technicians were immediately recalled. One technician that was striking had previously returned to work, and four more striking technicians were recalled to work commencing Friday, May 22, 2020. So, of the original 15 technicians that went on strike, 5 had been placed back to work and 10 new technicians were hired on or before May 20, 2020.

OBJECTIONS TO CONDUCT OF ELECTION AND CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Case 32-RC-260453 relates to Objections to Conduct of Election and Conduct Affecting the Results of the Election (the "Objections"). Specifically, the Objections address Union representative Jesse Juarez calling out the name, address and telephone number of replacement worker Josh Spier to the general public in front of all eligible voters, and related other misconduct after the filing of the Petition and leading up to the election.

The Objections also relate to the improper campaigning activities of the Tyrome Jackson and Kevin Humeston as 2(11) supervisors tainting the eligible voters through their pro-union campaigning and strike activities.

As more fully set forth below, these allegations and the defenses to each based on business justifications and circumstances outside the control of Respondent make this hearing too complex and too difficult to be held by videoconference.

In the alternative, if the Judge finds that a videoconference is justified, the judge must set reasonable time frames and dates for the hearing, to allow Respondent to prepare the evidence and witnesses so that they can be presented remotely by video conference and to protect against witness assistance during the hearing and collaboration of witnesses off-screen.

LEGAL ARGUMENT

A. THE JUDGE MUST CAREFULLY WEIGH THE FACTORS SET FORTH BY THE BOARD IN DETERMINING WHETHER A VIDEOCONFERENCE HEARING IS JUSTIFIED--THE EXISTENCE OF THE COVID-19 PANDEMIC IS NOT ENOUGH.

Since the onset of the Covid-19 pandemic, the National Labor Relations Board has endeavored to maintain continuity of operations in order to carry out its statutory mission under these unprecedented circumstances. *Aspirus Keweenaw and Michigan Nurses Association*, Case No. 18–RC–263185 (Nov. 9, 2020). However, that statutory mission does not outweigh or take precedence over due process. And in the case of due process for the employer, the Board has looked at when the pandemic can upset the normal in-person proceedings under the Act and give way to the pandemic.

Counsel for the General Counsel argues that the "Board has held that in the context of the COVID-19 pandemic, an ALJ may order a videoconference hearing as part of its responsibility to "regulate the course of the hearing" pursuant to Section 102.35(a)(6) of the Board's Rules and Regulations in order to "directly advance[] the Act's central goal of resolving unfair labor practice disputes without inordinate delay." Counsel for the General Counsel cite to *William*

Beaumont Hospital, 370 NLRB No. 9, slip op. at 2 (August 13, 2020) for this principle but Counsel stops there in addressing the Board's standard to be applied in determining this important issue and simply argues that COVID is dangerous to people and that this is not a complex case. Counsel spends the remaining portion of the brief arguing why the Respondent's counsel has not shown that there is not "good cause" for holding a videoconference hearing. Counsel's arguments miss the mark.[2] It is Counsel for the General Counsel that bears the burden of showing compelling reasons for the videoconference hearing and that sufficient protections are in place. In this regard, Counsel argues that Covid-19 is dangerous, that Respondent has not raised any issues and that simply having a computer and good internet somehow meet the burden Counsel and Petitioner must show to have the consolidated cases heard by videoconference. Counsel also fails to explain adequately the Board's full explanation of what needs to be shown to hold a videoconference hearing.

The Board, in deciding *William Beaumont Hospital,* held that the COVID-19 pandemic is a compelling reason to depart from the normal in-person proceedings, but it also specifically held that the basis for its decision was based on the Board's prior holdings in representation cases:

> In Morrison Healthcare, 369 NLRB No. 76 (2020), the Board recently found that the current Coronavirus Disease (COVID-19) pandemic constitutes "compelling circumstances" warranting a remote pre-election hearing in a representation case. which permits a witness in an unfair labor practice case to testify by video. The Board imported the general Section 102.35(c) framework to representation cases, allowing for videoconference hearings "on a showing of good cause based on **compelling circumstances and under appropriate safeguards**." Morrison, 369 NLRB No. 76, slip op. at 1.

Id at 1 (emphasis added).

[2] Petition files a Motion on the same basis as Counsel for the General Counsel and rehashes the same arguments in its brief. For this reason, Respondent has filed a joint Opposition to both Motions.

Counsel states that there are at least 13 witnesses on the case in chief and more witnesses to be called by Respondent. Counsel then argues that the existence of multiple witnesses (which was raised in the pre-hearing conference call by Respondent) weights in favor of a videoconference hearing. Counsel's argument directly contradicts the Board's recent ruling on the subject:

> Certainly, the trial judge has the discretion to determine whether the case is too complex; cumbersome; or witness-, document-, and fact-heavy to be heard remotely.

Id at 2 (emphasis added).

Here, the hearing involves three consolidated cases to be heard together. This alone raises the complexity and length of the hearing and as explained below justifies holding the conference in-person and/or having additional time to prepare and procedures as to whether and when witnesses will testify.

B. THE HEARING WILL BE ON THREE SEPARATE CASES AT THE SAME TIME—RESPONDENT AND THE BOARD'S ARGUMENTS THAT THIS IS A SIMPLE HEARING ARE SIMPLY NOT TRUE.

The hearing on this matter is based on the consolidation of two Unfair Labor Practice Cases: Cases 32-CA-260614 and 32-CA-262291. The hearing on this matter also includes an evidentiary hearing on the Regional Director's Decision On Objections, Notice Of Hearing And Order Consolidating Cases For Hearing in Case 32-RC-260453. In essence this hearing is an evidentiary trial on numerous issues.

In fact, the two Unfair Labor Practice Cases are complex not even considering the R-Case issues to be addressed. The Complaint alleges numerous different factual scenarios based on business decisions made after the unconditional offer to return from the economic recognitional strike:

6. (a) From about May 15, 2020 through the morning of May 21, 2020, persons employed by Respondent in Respondent's service department (including, but not limited to, lube technicians, service technicians and foremen) ceased work concertedly and engaged in a strike (The Strike).

(b) In the late morning or early afternoon of May 21, 2020, in an in-person meeting at Respondent's Tracy, California facility, persons employed by Respondent in Respondent's service department who remained engaged in The Strike made an unconditional offer for all of the striking employees to return to their former positions of employment.

(c) By a May 21, 2020 memorandum from Respondent General Manager Lee, Respondent communicated its acceptance of the striking employees' May 21 unconditional offer to return to work, requested four former-striking service technicians to return to work the following day and announced the creation of a "priority recall list" to be used to recall additional former-striking employees as needed

7. (a) During The Strike, from about May 15, 2020 through May 21, 2020, Respondent hired persons who it claims were permanent replacements for the service department employees engaged in The Strike.

(b) At least three (3) of the persons claimed by Respondent to have been hired as permanent replacements (being two (2) lube technicians and one (1) foreman) were hired before The Strike was announced or commenced.

(c) As a result of Respondent's hiring of three (3) service department employees before The Strike, as described above in subparagraph 7(b), Respondent's pre-strike employee complement was expanded by three (3) employees.

(d) As a result of the conduct described above in subparagraphs 7(b) and 7(c), on May 21, 2020, Respondent failed and refused to reinstate at least two (2) additional employees who engaged in The Strike.

8. (a) On about June 12, 2020, instead of recalling a striking foreman from the priority recall list, Respondent attempted to permanently promote a service technician to the position of foreman.

(b) As a result of the conduct described above in subparagraph 8(a), Respondent failed and refused to recall one (1) of the employees (being one (1) foreman) who engaged in The Strike.

9. (a) One (1) of the technicians hired by Respondent as a permanent replacement never reported to work for Respondent.

(b) By no later than early July 2020, Respondent was aware that the replacement technician referred to above in subparagraph 9(a) had effectively abandoned his position with Respondent.

(c) For a period of at least several weeks, Respondent failed to recall a striking technician to fill the position never filled by the replacement technician referred to above in subparagraphs 9(a) and 9(b).

(d) As a result of the conduct described above in subparagraphs 9(a) through 9(c), Respondent failed and refused to recall one (1) of the employees (being one (1) lube or service technician) who engaged in The Strike.

10. (a) In about mid July 2020, instead of recalling a striking service technician from its priority recall list, Respondent demoted a permanent replacement employee from a foreman position to a service technician position.

There are many issues that will be addressed regarding numerous different employees and many different business reasons for such decisions. Specifically, there were ten permanent replacements hired during the strike and before the unconditional offer to return to work. There were only fifteen original technicians working as of the day of the strike and one of the striking workers had abandoned the strike and returned to work prior to the unconditional offer to return to work. Thus, with the ten replacements (2 of which replaced the two foreman) and the already returned striker, there were only 4 positions open from the original 15 technicians that went on strike. As the allegations admit, the Respondent recalled 4 strikers immediately after they offered to unconditionally return. At that time, Respondent had the same full complement of employees that it had immediately prior the strike.

Counsel for the General Counsel and Petitioner, however, engaged in a math game to try to argue why additional strikers should have been recalled. They argue that as a result of offers of employment to at least two new hires had been made, that the employer

should have brought back 2 more strikers as the anticipated complement should have been 17, not the original 15. They then argue that because some people were moved around within the same group of 15, that additional strikers should have been recalled. The problem with this argument is that it requires an in-depth analysis of why such decisions were made and the extensive documentation to prove those business justifications unrelated to union animus.

First, the strike occurred at just after the commencement of the COVID-19 pandemic. In March 2020, the COVID-19 pandemic caused Public Health Orders to be issued causing nationwide shelter-at-home restrictions. Those restrictions were thought to be temporary at the time and everyone hoped that the restrictions would be temporary. As a result, most businesses started to react and lay off workers. Those layoffs nationwide have been at the top of the news from about April, 2020 until now.

However, Tracy Toyota and most auto dealerships did not make the layoff decisions as early as most because auto dealerships were uniquely affected by the shutdowns. One aspect of the federal and state orders for shelter-at-home uniquely impacted automobile dealerships unlike many other businesses. That is, the orders permitted "critical infrastructure" businesses to remain open. Automobile servicing and repair facilities fell squarely within the definition of critical infrastructure and thus were encouraged to remain open. The sales side of the automotive dealership business did not, however, fall within the critical infrastructure exception to the shelter-at-home orders. This resulted in automobile dealerships having to operate with the service departments open, but the sales operations closed.

However, around the middle of the end of May, however, shortly after the Public Health Orders went into effect, it became apparent that while remaining open, the public was not driving as much, and hence automobile dealerships experienced a significant downturn in business traffic in the service departments. Customers just weren't coming in like they were before. This reduction in business caused almost all dealerships nationwide to make decisions for a reduction in force. Again, at this time, the only information available to all businesses was that the Public Health Orders would be temporary. In fact, the initial information indicated that the Orders may only be in effect for several weeks and things would then open back up. Thus, while dealerships across the State of California and the U.S. made decisions to do furloughs or layoffs, Tracy Toyota did not do so because its plan was to increase in size to address various issues happening in its business that it believed would allow the growth. Unfortunately, the COVID-19 pandemic (and its effect in causing a downturn on business) along with multiple other outside forces at the time, including Covid illnesses, social distancing, quarantine, medical leave of technicians, Toyota factory mandates, the effect of the picketing turning away customers, delays in construction remodeling of service department facilities, and other business impacts justified the decision to return to only have fifteen technicians in the service department in the months following the strike.

Counsel's and Petitioner's position is based on the concept that just because the Respondent planned on having 17 or 18 technicians in early 2020, that Respondent must have discontinued that plan only due to union animus. Given all the chaos caused by Covid and the other business justifications which in large part were related to Covid in one way or another (causing construction delays in the facilities expansion), Counsel and

Petitioner seek to make the issue a math equation. On the contrary, this case will necessarily have to address what was happening in terms of the business justifications for the decisions made by management on how many technicians were needed to be staffed given the uncertainty of the uncontrollable external factors affecting the Service Department. This analysis will take numerous witnesses, including managers, employees and industry professionals to explain the impact on dealership service departments. It will also take an analysis of workload before Covid-19 verses the impacts from Covid-19. It will take an analysis of other situations such as employees taking leaves of absence during Covid, mandatory quarantine requirements on an employee-by-employee basis (and anticipated return dates based on medical conditions) and employees' production levels to show that there was no need for additional technicians during the summer of 2020.

Once things started to improve and business picked up, other employees were in fact brought back by their classifications within the technician classifications and the dealership returned to a higher level of operations. Unfortunately, the Petitioner's and Counsel's math-based game, ignoring the massive changes to business during this time frame unrelated to the union, forces Respondent to offer numerous witnesses and significant documentation to show the business justifications for deciding not to expand the operations as it has previously planned to do. This complexity is completely missed by any of Counsel's or Petitioner's arguments.

C. CURRENT STATE RESTRICTIONS DUE TO COVID DO NOT PRECLUDE HOLDING AN IN-PERSON HEARING.

The Board has held that local/state restrictions involving Covid are valid considerations to determine whether an in-person hearing should take place. California has implemented a

Color-Tier system on a county by county basis to determine the restrictions on businesses and social gatherings. See Exhibit A filed herewith ("Blueprint for a Safer Economy"). This Blueprint establishes the restrictions that should be used in determining physical gatherings and business operations.

As of the writing of this brief, San Francisco City and County is a "Red" level. See Exhibit B. This means that critical infrastructure (which includes legal services and automobile dealerships) may still operate with social distancing modifications. A quick guide to the restrictions is attached hereto as Exhibit C. Such a level permits critical infrastructure to operate with social distancing in place and allows public gatherings with appropriate social distancing safeguards. All such safeguards can be implemented to hold a hearing in person. Moreover, the NLRB is no longer on mandatory remote working, which further supports that an in-person hearing can take place. No one is suggesting that all the witnesses and parties crowd into a room, but an orderly schedule and on-call witnesses would allow witnesses to enter the hearing room one-by-one. Moreover, it is Respondent's understanding that all such hearings should be public. The Board must address how it might affect this requirement if done by videoconference and how it might control sequestered witnesses from joining publicly on videoconference without the knowledge of counsel or the judge.

As an alternative, there is a vaccine on the horizon and waiting until an in-person hearing can be held will not prejudice either side as all technicians that Counsel and Petitioner allege should have been recalled are either now recalled due to changes in the business or have other employment. The judge does not her discretion in ordering a postponement until an in-person hearing is feasible as given the status of vaccines, it will not result in an indefinite delay of this case.

Finally, if a videoconference hearing is allowed, then safeguards to protect against the issues must be put into place. It is not only a computer and good video that accomplishes this, but also a forum to protect against witness tampering, improper witness coaching, etc. So, as a final alternative, the Judge may order that any employee witnesses testify by video conference from the employer's location (in a room set up for testimony with social distancing and proper sanitizing procedures in place between each witness. Most, if not all, employee and management witnesses will be at work during the days of the hearing and simply having them come to some preassigned location to testify where Respondent's counsel can marshal each witness when it is time makes the most sense. Otherwise, witnesses will be required to miss work causing loss of wages to those witnesses, as well as economic harm to Respondent and its customers. It would cause employees to be at some other locations away from work if such is not ordered. The employer's facility can easily accommodate with proper social distancing a room for counsel (and Petitioner's counsel is also welcome to be present if she/he so desires), the employer and a witness. Proper cleaning can be done between each witness as well to avoid any issues.

In this case, the proper approach would be to postpone the hearing until it can safely be held. In the alternative, a hearing can be held in person with proper safeguards. If a hearing is to be held by videoconference, the witnesses should testify from the employer's place of business where they will be at work during hearing and can easily be brought in to testify.

For the reasons set forth above, Respondent requests that Counsel for the General Counsel's and Petitioner's Motion be denied or, if granted, modified in accordance with the conditions set forth herein.

CONCLUSION

BASED THEREON, Respondent respectfully requests that the Complaint be dismissed in its entirety, and that Respondent be awarded such other relief as is just and proper.

Respectfully Submitted,

_____

John P. Boggs
FINE, BOGGS & PERKINS, LLP

Dated: November 18, 2020

CERTIFICATE OF SERVICE

I, Kathryn M. Cherry, hereby declare and state:

1. I am engaged by the law firm of FINE, BOGGS & PERKINS LLP, whose address is 16870 West Bernardo Drive, Suite 360, San Diego, California. My email address is kcherry@employerlawyers.com. I am not a party to the cause, and I am over the age of eighteen years.

2. On November 18, 2020, I caused to be served the following document(s):

OPPOSITION (JOINT) TO BOARD'S AND PETITIONER'S MOTIONS TO CONDUCT HEARING BY VIDEOCONFERENCE

on the interested parties in this action by addressing true copies thereof as follows:

☐ **BY MAIL**: I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day, postage pre-paid, in a sealed envelope.

☒ **BY ELECTRONIC SERVICE**: by electronically mailing a true and correct copy through Fine, Boggs & Perkins' electronic mail system from kcherry@employerlawyers.com to the email addresses set forth below.

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I certify under penalty of perjury that the above is true and correct. Executed at San Diego, California on November 18, 2020.

/s/ ***Kathryn M. Cherry***

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