

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**STA OF OREGON, INC.<sup>1</sup>**

**Employer**

**and**

**Case 19-RC-265444**

**TEAMSTERS LOCAL UNION NO. 206**

**Petitioner**

**DECISION AND ORDER**

A petition was filed on August 31, 2020<sup>2</sup> by Teamsters Local Union No. 206 (Petitioner) seeking to represent certain employees of STA of Oregon, Inc. (Employer). A hearing was held on September 21 by videoconference before a Hearing Officer of the National Labor Relations Board (the Board). The parties waived the filing of post-hearing briefs and argued their respective positions at the end of the hearing.

The petitioned-for unit is as follows:

***Included:*** All full-time and regular part-time bus drivers employed by the Employer out of its Lake Oswego, Oregon facility.

***Excluded:*** All other employees, including dispatchers, shop personnel, safety supervisors, operations managers, office clerical employees, managers, guards and supervisors as defined by the Act.

There are approximately 64 employees in the petitioned-for unit.

The parties stipulated to a mail-ballot election and requested that it be held at the earliest possible date. The issue to be determined is the voting eligibility of the employees in the petitioned-for unit who were laid off on March 13 as a result of the COVID-19 pandemic. Inasmuch as the party seeking to disenfranchise employees from voting has the burden of

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<sup>1</sup> The parties stipulated, and I find, that the petition and other formal documents in the matter should be amended to reflect the correct names of the parties.

<sup>2</sup> All dates hereinafter are in 2020 unless indicated otherwise.

establishing that those individuals are in fact ineligible to vote, the Employer was asked to present specific detailed evidence in support of its position, and not general conclusory statements.

For the reasons set forth below, I find that the laid-off employees, who comprise the entirety of the petitioned-for unit, do not have a reasonable expectation of recall in the foreseeable future and I am therefore dismissing the petition.

### **THE EMPLOYER’S OPERATION AND THE IMPACT OF COVID-19**

The Employer is a national transportation company with a facility in Lake Oswego, Oregon, which has a contract through 2024 with the Lake Oswego School District (District) to provide transportation services for its students enrolled in elementary through high school.<sup>3</sup> Generally, the District’s school year would begin just before Labor Day and end in mid-June. The Employer occasionally contracts to provide summer school transportation in July; however, most of the drivers are laid off for the summer months and collect unemployment or perform other driving work until the new school year begins in the fall.

In early August, before the beginning of each school year, the District would advise the Employer about how many students had registered for bus transportation along with the students’ names, grade levels, addresses, and schools. Based on that information, the Employer would develop the bus routes by mid-August. The Employer would then have a startup meeting and provide the drivers with any preliminary training that they needed; for example, drivers must receive first aid training every two years and “core training” every four years. The employees are paid for these meeting and trainings.<sup>4</sup> The drivers would then have a “dry run” of their routes prior to the first day of school or the first day their route is scheduled, whichever came first.

This year, however, as a result of the COVID-19 pandemic, the drivers learned on about March 13 from both the District and the Employer that they would cease driving the week before Spring Break inasmuch as the District was no longer having live instruction and no longer needed transportation services for the students. The drivers were further instructed to take sick leave during the week-long Spring Break and told to expect to return to work on about April 2.

The Employer claims that it laid off all 64 employees on March 13, and initially asserted that it sent them a letter to this effect on about March 17. However, the Employer was unable to produce an authenticated copy of this letter at the hearing and eventually withdrew its proffer. A driver witness testified that he never received any layoff letter from the Employer, and the Employer’s General Manager subsequently testified that she called the drivers but did not describe the date or content of her conversations.

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<sup>3</sup> Lake Oswego is a suburb approximately 10 miles south of Portland, Oregon. According to its website, the Lake Oswego School District encompasses 10 primary and secondary schools with a total enrollment of about 7,000 students. [www.losdschools.org](http://www.losdschools.org).

<sup>4</sup> “Core training” consists of learning rules and regulations specific to the industry.

The Employer stayed in contact with the drivers during the period they were not driving, sending updates, information about COVID-19, and about a possible start-up meeting that was eventually cancelled as the school reopening date was further delayed.

The Employer was subsequently advised by the District that its goal was to begin in-person schooling and resume transportation services on about August 31 – a date which was subsequently changed to September 8 and then most recently to November 2. The Employer informed the returning drivers of these anticipated start-up dates as they were changed.

In anticipation of each of these reopening dates, the Employer began some of the preliminary trainings needed to resume the routes on short notice.<sup>5</sup> Consequently, some of its employees have worked since March 13, insofar as six of them attended a first-aid class on August 18 and seven more on August 20, and six others have attended “core training.” Also, ten employees helped to move buses on September 16 due to an evacuation necessitated by the wildfires in Oregon.<sup>6</sup> As noted above, all who participated were paid for these activities. No “dry runs” have yet taken place, but as of the time of the hearing they were being scheduled to begin the following week. However, they have to be based on last year’s routes since the new routes have not yet been created. If there are a large number of changes from last year’s routes, additional “dry runs” may have to be performed before actual transportation resumes. Moreover, the routes may be affected by state and local COVID-19 guidelines.

As previously noted, the Employer has been regularly communicating by e-mail and text message with the drivers regarding the anticipated start dates and to schedule trainings accordingly. It anticipates approximately 57 drivers to return to work when in-person schooling is resumed by the District. Most of these drivers have previously driven for the Employer and typically between 90-94% of them return each year. The Employer confirmed that the accrued sick days from the start of the year would be carried over when the employees return to work.<sup>7</sup> Several of the Employer’s drivers confirmed that they felt prepared to return to work on November 2.

Also in anticipation of the resumption of in-person instruction on November 2, the Employer has been recruiting for new drivers to replace those who indicated that they would not be returning this year.<sup>8</sup> Potential recruits are advised by the Employer that there is no set return date, although it hoped that it would be November 2.

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<sup>5</sup> The Employer clarified that these trainings only have to be given when needed annually, and not repeated every time a new prospective reopening date is announced by the District. Also, certain employees must have physical exams depending on their health or existence of certain conditions like sleep apnea.

<sup>6</sup> One of the Employer’s dispatchers called these employees based on seniority for this special assignment.

<sup>7</sup> The employees do not accrue any paid vacation.

<sup>8</sup> Typically, drivers are asked at the end of the school year in June whether they will be returning in the fall so that the Employer can plan its staffing needs accordingly.

The Employer confirms that it regularly recruits for drivers at all its facilities, inasmuch as there is a shortage of these specialized drivers. However, the ambiguity surrounding the ongoing COVID-19 pandemic and school reopening has made recruiting more challenging. Additionally, the current uncertainty – and perhaps the uncertainty related to potential exposure to the COVID-19 virus – has also created higher attrition rates in other districts where the Employer provides transportation services.

**THE EMPLOYER’S POSITION ON THE DRIVERS’  
ELIGIBILITY TO VOTE**

The Employer asserted in its Statement of Position that the petition is untimely as the Employer has no eligible voters because all individuals in the petitioned-for unit have been laid off indefinitely since on or about March 13, 2020, and at present there is no anticipated return to work date. Thus, the Employer requests that the instant petition be dismissed, subject to reinstatement when operations are resumed.

**THE PETITIONER’S POSITION ON THE DRIVERS’  
ELIGIBILITY TO VOTE**

The Petitioner, in its Responsive Statement of Position, asserts that each employee in the petitioned-for unit who has been provided notices from the Employer with an anticipated return to work date and/or has been in on-going communication with the Employer with regard to the completion of return to work paperwork, required physical examinations, first-aid training, and core class training, should be eligible to vote.

The Petitioner further asserts that despite the Employer’s claims that no employees have an anticipated return date, the Employer has been providing classes and training for individuals to be ready to return to work. Moreover, according to the Petitioner, the school district serviced by this facility has announced an anticipated return to in-person classroom instruction for early November. The Employer is also actively hiring employees to work as drivers at this facility.

Based on the foregoing, the Petitioner argues that there does not have to be a date certain for the unit employees to return to work in order to be eligible to vote; rather, there only needs to be a “reasonable expectation of return” in the near future. This test has been met, according to the Petitioner, by the Employer’s current preparation of number of employees towards an anticipated November 2 resumption date.<sup>9</sup>

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<sup>9</sup> In its Responsive Statement of Position, the Petitioner refers to the employees having completed “return to work” paperwork in anticipation of the Employer’s operations resuming on November 2 as announced by the District. However, there is no evidence in the record – testimonial or documentary – that such paperwork exists or that employees completed it.

## ANALYSIS

I have carefully considered the entire record and the respective positions of the parties, and I find that the employees in the petitioned-for unit do not have a reasonable expectation of recall and are therefore not eligible to vote. Based thereon, I am dismissing the petition.

In this regard, I take administrative notice of the fact that as of the date of this decision, there is no extrinsic evidence that suggests that the District's schools will resume in-person instruction on November 2, or on any date certain thereafter.

The Governor of the State of Oregon, in conjunction with the Oregon Health Authority (OHA), has established a set of evidence-based metrics to assist school districts in determining when they can safely reopen their buildings for in-person learning.<sup>10</sup> A review of these relevant metrics shows that they have not been met in the District.

As of early October, Clackamas County, where the Employer is located, had 203 COVID-19 cases, with 47.9 cases per 100,000 residents, and a test positivity rate of 5.8%.<sup>11</sup> The OHA suggests that grades K-3 in-person instruction can resume when the case rate is less than 10 per 100,000 residents, and the test positivity is less than 5%.<sup>12</sup> The Clackamas County website suggests that K-3 instruction might resume when there are less than 30 cases per 100,000 residents and less than a 5% positivity rate.<sup>13</sup> Currently, according to the District's "Roadmap to Reopening," Clackamas County remains at Stage 1 of the State of Oregon's reopening plan, which mandates fully remote learning with all students at home.<sup>14</sup>

Recently, on October 19, the Lake Oswego School Board of Directors at its Board meeting passed two resolutions: one requesting that the Governor reevaluate the State's COVID-19 health metric guidance and prioritize the return of students who are "disproportionately impacted by continued school closures," and another advocating that the District continue efforts to bring students to school in-person following the latest health and safety guidance.<sup>15</sup> The latest edition of the District's Newsletter dated October 23 refers to the above resolutions but does not mention or even suggest a date for the return to in-person schooling.<sup>16</sup>

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<sup>10</sup> [www.Oregon.gov/oha/erd/pages/covid-19-news](http://www.Oregon.gov/oha/erd/pages/covid-19-news)

<sup>11</sup> In July, the case rate was 31.9 per 100,000 residents, and the test positivity rate was 3.7%, thus the more recent figures are a marked increase since that time.

<sup>12</sup> Id.

<sup>13</sup> [www.losdsschools.org](http://www.losdsschools.org) – *Health metrics informing the reopening of schools.*

<sup>14</sup> Id. – *LOSD Reopening School Health & Safety Dashboard.* Stage 2 contemplates in-person schooling for K-3 and special-needs students, while Stage 3 allows for a hybrid in-person/remote schedule for K-12.

<sup>15</sup> <http://bit.ly/LOSDBoardResolutions>

<sup>16</sup> Lake Oswego School District Newsletter "*The Current*" Oct. 23, 2020. [www.losdschool.org](http://www.losdschool.org).

Thus, based upon the record herein and the foregoing public records, I conclude that the laid-off employees in the petitioned-for unit will not be returning to work on November 2, or on any date certain in the foreseeable future, as posited by the Petitioner.

It is well established that temporarily laid-off employees are eligible to vote and that their eligibility 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.

The Board recently addressed the specific issue of scheduling an election during a time when an employer has indefinitely suspended its operations and laid off all its employees due to the COVID-19 pandemic. Based upon the facts of that case, the Board granted the employer’s request for review of the Regional Director’s direction of a mail-ballot election, concluding that the laid off employees had no reasonable expectation of recall and were therefore ineligible to vote and consequently dismissed the petition. *Texas Station Gambling Hall and Casino*, 370 NLRB No. 11 (August 31, 2020).

In *Texas Station*, the employer temporarily closed all 20 of its properties pursuant to a March 18 emergency directive issued by the Governor of the State of Nevada ordering all casinos to cease operations until April 16. As a result, most of the employees in the petitioned-for unit ceased working on about March 18.

Thereafter, the employees were advised that they would likely be recalled at the end of April or early May. This did not occur because the Governor extended the casino closures several more times. In response to these orders, the employer announced an anticipated phased reopening plan for its properties. The Texas Station was not included in the first phase of the reopening, its employees were informed that the Texas Station was temporarily closing, and their employment was terminated. *Texas Station, supra*, slip op. at p.1. Although the employer subsequently reopened some of its properties, it stated that there was “no reasonable likelihood” that the Texas Station would reopen soon or even ever.<sup>17</sup>

In its analysis of the foregoing, the Board held that the Regional Director incorrectly found that the employer had not permanently closed the Texas Station and that it could reopen depending on several factors, including the performance of its other properties. In rejecting the Regional Director’s conclusion, the Board noted that “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

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<sup>17</sup> *Texas Station, supra*, slip op. at p.2.

indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectancy of recall exists.”<sup>18</sup> *Apex Paper Box, supra*, at 69. *See also Foam Fabricators*, 273 NLRB 511, 512 (1984); *Tomadur, Inc.*, 196 NLRB 706, 707 (1972).

Thus, the Board concluded that the employer’s closure was sufficiently indefinite to remove any reasonable expectation of recall at the time of the decision, and therefore there were no eligible voters for which an election could be held. *Id.* at fn. 2.

The Board in *Texas Station, supra*, in finding that the closure was indefinite, noted 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 predication can be made with some accuracy.” *Foam Fabricators, supra*, at 512.<sup>19</sup>

Unlike the employer in *Texas Station, supra*, the Employer herein has past experience with layoffs and recalls, inasmuch as the drivers are effectively laid off every summer when transportation services are no longer needed by the District. During the summer months, the drivers collect unemployment or work for other companies. Those who wish to return in the fall advise the Employer and the Employer hires new employees to fill any vacancies. When the Employer is given a definite start date and the required routes for the new school year by the District, it begins to prepare its employees to resume work.

However, unlike past years, there is no date certain or even a projected date for the employees to return to work, inasmuch as it depends entirely upon Clackamas County reaching the established COVID-19 case metrics that would allow for in-person classes and thus the need to provide transportation for the students. Further, the fact that the Employer held a number of, what turned out to be premature, trainings does not suggest otherwise, since it was relying upon the ever-changing start dates optimistically provided to it by the District. Moreover, the fact that the Employer had a past practice of seasonal layoffs and recalls has been rendered largely irrelevant by the intervening exigency of the COVID-19 pandemic. Thus, the Employer’s employees remain laid off indefinitely and are presumably able to receive unemployment and perform work for others much as they have during past hiatuses in service.

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<sup>18</sup> The Board further distinguished *Texas Station* from cases involving a cessation of operations where an employer permanently shuts down its operation and effectively “erases” the unit, with no possibility of returning. In contrast, temporary closure situations pose a different question of “whether the employer’s closure is sufficiently indefinite so as to remove any reasonable expectation of recall in the foreseeable future.”

<sup>19</sup> Contrast this to *Pavilion at Crossing Pointe*, 344 NLRB 582, 584 (2005) where an employee was laid off for lack of work but was not given a definite or even approximate date of recall. In that case, the Board held that the employee did have a reasonable expectation of recall, inasmuch as the employer said nothing to indicate that the layoff was anything but temporary, and particularly since the layoff was precipitated by a temporary downturn in business and not a long-term downsizing.

The fluctuating conditions surrounding the COVID-19 pandemic have clearly created conditions that are beyond the Employer's control that make it essentially impossible for the Employer to predict when the employees might return to work. In addition, the employees, who comprise the entire petitioned-for unit, have now been laid off for more than seven months since the schools were ordered to cease in-person learning and for nearly two months past when they would have normally returned to work notwithstanding the COVID-19 pandemic.

At this point, absent further information regarding when the District might resume in-person classes, it cannot be said that the employees have a reasonable expectation of recall in the foreseeable future. Notably, the Employer simply cannot predict when it will resume full operations or be able to recall its employees in view of the ongoing pandemic. Based upon these facts, any attempt to predict when in-person instruction might resume, particularly given the current status of the COVID-19 pandemic and the documented increase in cases, would be little more than speculation at this point. Therefore, I conclude that all of the employees in the petitioned-for unit have no reasonable expectation of recall and therefore are not eligible to vote, and accordingly I am dismissing the petition.

### **CONCLUSION**

Based upon the entire record in this case, and after carefully considering the respective positions of the parties, I conclude that an election cannot be held at this time. Accordingly, I shall dismiss the petition.

Based upon that record and in accordance with the discussion above, I conclude and find as follows:

1. 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.<sup>20</sup>
2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. No 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.

### **ORDER**

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

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<sup>20</sup> The parties stipulated, and I so find, that the Employer is a State of Oregon corporation with a facility located in Lake Oswego, Oregon, and is engaged in the business of school bus transportation. During the past calendar year, a representative period, the Employer purchased and received at its Lake Oswego facility goods valued in excess of \$50,000 directly from points outside the State of Oregon.



## RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations you may obtain a request for review of this Decision by filing a request with Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Sections 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **November 12, 2020**.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site ([www.nlr.gov](http://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 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](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. 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.

Dated at Seattle, Washington on the 29<sup>th</sup> of October, 2020.



Ronald K. Hooks, Regional Director  
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