UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

AUDIO VISUAL SERVICES GROUP, LLC

Employer

and **Case 32-RC-257578**

IATSE LOCAL 611, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER

This matter is before me on remand from the National Labor Relations Board (Board).

Following a hearing on April 21-23, 2020 (initial hearing), I issued a Decision and Order (initial Decision) in this matter on June 2, 2020.[1] Following a request of review by UNITE HERE Local 2850 (Petitioner or Union), on October 26 the Board issued a Decision and Order (Board Decision) finding the petitioned-for multifacility unit of employees at the Monterey, California jobsites of Audio Visual Services Group, LLC (Employer) an appropriate unit for bargaining and remanding the case for further appropriate action.

Upon remand it was determined that all the employees in the petitioned-for unit had been laid off as a result of the Covid-19 pandemic. While Petitioner does not dispute that the petitioned-for employees are currently laid off, it maintains this is a temporary status related to the Covid-19 pandemic, and because the employees have a reasonable expectancy of reemployment in the near future an election should be held. The Employer contends no reasonable expectation of reemployment exists when, under the circumstances of the Covid-19 pandemic, it cannot know when, or whether, employees will return to work.

A hearing officer of the Board held a videoconference hearing limited to this issue on December 3-4 and 10 (second hearing). Both parties filed briefs with me after the conclusion of the second hearing. As explained below, based on the record, the briefs, and the relevant Board law, I find the petitioned-for unit to be an appropriate unit, but because all of the members are

[1] All dates 2020 unless otherwise indicated.

laid off without a reasonable expectancy of reemployment in the near future I have dismissed the Petition.

RECORD EVIDENCE

A. BACKGROUND

The Employer is a global event technology services company that provides event technology and audiovisual services for meetings and other events, primarily held at hotels, resorts, and convention centers, among other venues. The Employer's customers include event organizers, corporations, trade associations, producers, and meeting planners.

The technicians in the petitioned-for unit are employed at three jobsites in Monterey: the Monterey Conference Center, the Asilomar Hotel and Conference Grounds, and the Hyatt Regency Monterey Hotel and Spa. A fourth entity, the InterContinental Clement Monterey, contracted with the Employer at the time of the initial hearing but declined to renew its agreement in the period between the initial and second hearing.

As described fully in the initial Decision and the Board's Decision, the technicians at issue have a home jobsite, the locations mentioned above, but they will be assigned to other jobsites on occasion. At times, technicians from outside the immediate area may also be called to work events in at the Monterey locations. Each of the of the jobsites at issue typically has its own Director of Event Technology (DET) that supervises the employees working at that particular jobsite, and the DETs in turn report to the Regional Vice-President for the Northern California Region.

B. THE COVID-19 PANDEMIC AND FURLOUGHS

The Employer's business, closely related to the hotel industry and reliant on group events and other productions, was immediately and profoundly impacted by the Covid-19 pandemic. In March, as quarantine measures were put in place and events were cancelled across the United States, the Employer furloughed its technician workforce, around 7,000 employees. This included all the employees in the petitioned-for unit.

i) Communication to Employees

(1) March 30 Communication

A document dated March 30 was sent to the furloughed employees. The document included a one-page letter from human resources and a two-page document titled "Team Member Furlough QA."

The letter states that because of the recent dramatic downturn in business the employee is being placed on "furlough (temporary leave of absence), effective March 30, 2020, until business levels return." The letter continues that "we anticipate the furlough period to last at least 30 days, but are hopeful it will be shorter." The letter then defines a furlough, stating that it uses this term, instead of layoff, "because we expect you to return to work as soon as business levels warrant."

The letter then adds, for this reason, employee benefits such as medical, prescription, dental and life insurance, would automatically continue during the furlough period and the Employer would pay the premiums for at least 30 days. Additionally, employees were informed "[u]pon actively returning to work, you will be automatically re-enrolled in your prior benefit coverages." The following paragraph of the letter informs employees that they may first be called back to work on a part-time basis, but once business volume returns to normal and employees are called back in a full-time capacity the furlough period will not be considered a break in service.

The QA document similarly begins by distinguishing a "furlough" from a "layoff." The document explains that a layoff is a "permanent separation from the company." This section further states, in full:

> [i]f you returned to work for the Company after a layoff, you would need to be rehired and your absence may be treated as a break in service, possibly resulting, for example, in reduced vacation benefits and a waiting period for health insurance. When you return from the furlough, your absence will not result in a service break. In addition, while on furlough, you remain eligible for company benefits including, health, vision, prescription drug, dental and voluntary benefits, as further described below.

The following paragraphs address unemployment and benefit issues.

The final section of the QA document is identified as "Return from Furlough." This section explains that if employees are offered limited work and decline, they will remain on furlough until a full-time schedule is available. Employees are notified that once they are offered a return to full-time employment, they have 48 hours to accept or they will be considered a voluntary resignation. One of the final questions on the document is as follows:

> Q. How long will I remain on furlough before it becomes a permanent layoff?
>
> A. We do not expect the fall off in business to be permanent, and it may well be short lived. If circumstances change, we will contact you as soon as possible with updated information.

The QA document also states that the Employer wants all employees to maintain their employment, but if they choose to leave their employment, they should contact a human resource manager.

(2) May 20 Email

On May 20, the Employer's president sent an email to impacted employees extending the furlough through June 30. The email additionally confirms that the Employer will continue to pay both the Employer and employee portion of benefit premiums during the furlough, and updates employees on training that can be accessed electronically during the furlough.

(3) July 20 Email

On July 20, an email to employees on furlough notified them the Employer's benefit subsidy would expire August 1. While the Employer would continue to pay the Employer portion,

employees who wished to continue coverage would be required to pay the employee portion of premiums, 25 percent. The email further stated that employees would be sent an enrollment packet from the Employer's third-party administrator that would explain this process.

(4) August 24 Communication

An August 24 letter indefinitely extended the furlough period, stating, "[i]n order to maintain our reduced operating costs, the Company is extending the furlough period (temporary unpaid leave of absence) effective August 24, 2020." The letter reiterated that, should employees elect to continue benefit coverage, they will be paying the employee share of the premium. The August letter also again made the points addressed in the March letter, stating that employees would be notified if the Employer was able to increase staffing, the furlough would not be considered a break in service, and that they may be contacted regarding a return to work on a part-time basis.

There is no evidence of additional communication with the furloughed employees after the August 24 letter. The Employer introduced evidence at the hearing that many employees, both in the petitioned-for unit and overall, declined to continue their benefit coverage once it became necessary to pay the employee share on August 1. At the time of the hearing four employees in the petitioned-for unit maintained their benefit coverage.

ii) Past Experience and Future Projections

The Employer acknowledges that it has experienced business slowdowns in the past but maintains it has typically responded by reducing employee hours. To the extent the record contains evidence regarding past slowdowns this assertion is generally supported. However, there is no evidence that the Employer has ever experienced a complete collapse of the event industry as has been caused by the Covid-19 pandemic. At hearing the Employer presented evidence that between the start of the pandemic and the date of the hearing, a period of about 10 months, it's work declined approximately 99 percent from anticipated volume. In addition to the thousands of technicians placed on furlough the Employer has also furloughed many of its DETs and managerial employees. One DET remained employed in Monterey through the date of the hearing, and the volume of work has been sufficiently low that this individual has performed all or almost all of the work, while also being available to perform work in surrounding areas, such as the Employer's Half Moon Bay location. Because business has continued to decline, this remaining Monterey DET was scheduled to be furloughed on January 1, 2021.

In addition to the evidence demonstrating the almost complete collapse of business in 2020, the record contains extensive information regarding how the Employer tracks potential future business. The record establishes that the forecast for 2021 is similarly bleak, with few confirmed events. At present, the Employer is reasonably confident that two events will take place in Monterey this year, scheduled for August and September respectively. This volume of work is so low that the Employer anticipates the August and September events will be performed by DETs from markets surrounding Monterey, such as Half-Moon Bay, San Jose, or Santa Clara, California.

The Employer continues to solicit work, but the nature of the events industry makes it likely no significant market recovery will occur while the pandemic continues. The Covid-19 pandemic continues to be widespread in California. As of January 14, 2021, the 14-day positivity rate in California remains above 13 percent, reflecting serious and ongoing transmission.[2] In Monterey County specifically, where the facilities at issue are located, the situation is even more dire, with a 14-day positivity rate reported at 24.4 percent on January 14, 2021.[3]

ANALYSIS

i) The Board's Standard

The Board's well-established rule regarding voting eligibility and laid off employees is that where the interruption in employment is temporary, an employee is eligible to vote, but where the layoff is permanent the employee is not eligible. *NP Texas LLC*, 370 NLRB No. 11, slip op. at 3 (2020), citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). When the question of temporary or permanent is in dispute, the Board looks to whether objective factors support a reasonable expectancy of recall in the near future. *Id*., see also *Monroe Auto Equipment*, 273 NLRB 103 (1984). These objective 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.*

The Board recently addressed the issue of whether a layoff was temporary or permanent in the context of the Covid-19 pandemic in *NP Texas*, supra. In that case, the facility at issue was one of several Las Vegas, Nevada casinos operated by the employer. *Id*., slip op. at 1. At the start of the pandemic, Nevada required all of the employer's casinos to cease operations and most of the employer's employees were laid off at that time, with the employer's managers and supervisors informing employees that it was likely they would be recalled in late April or early May pursuant to the employer's reduction-in-force policy, under which employees would retain their original hire date if recalled within 90 days. *Id*.

However, as the pandemic continued the casino did not reopen and employees were not recalled. *Id*. slip op. at 1. On May 1, the employer sent a letter to employees stating that it had developed a two-phase reopening plan, and that it would look at reopening the second phase facilities, including the facility at issue, once the employer "had a meaningful chance to assess how our business is performing in a post COVID-19 world." The letter continued that the employer was hopeful "Las Vegas will rebound swiftly and allow us to rehire many of our valued team members," but that each employee would receive a second letter addressing their employment status. For the employees at issue that letter was a termination letter stating it was closing the casino effective May 1. *Id*., slip op. at 2. Consistent with its practices and policies for terminated employees, the employer paid out vacation, required employees to return their uniforms, clean out their lockers; and assisted processing unemployment claims by taking the position that the employees had been permanently terminated. Full-time employees would have

[2] https://coronavirus.jhu.edu/testing/testing-positivity
[3] https://covid19.ca.gov/state-dashboard/

their medical, dental, and vision benefits extended through September 30, and the employees were paid through May 16. *Id.*

The Board noted where layoffs follow a cyclical or seasonal pattern it is generally possible to assess the likelihood of reemployment with some accuracy. *Id*., slip op. at 4, citing *Foam Fabricators*, 273 NLRB 511, 512 (1984). However, when facing a situation where an employer has no reasonable way to predict when it will recall employees, such as a situation where it has no past practice and no knowledge of when circumstances will support recall or reemployment, no reasonable expectancy of recall exists. Further, under these circumstances, "vague 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." *Id*., citing *Foam Fabricators*, supra; *Sol-Jack Co.*, 286 NLRB 1173, 1173-1174 (1987); *S&G Concrete*, 274 NLRB 895, 897 (1985).

Applying the above, the Board concluded the employer in *NP Texas* had no relevant past practice comparable to the current layoff, caused by a complete or almost complete cessation of business due to a global pandemic. *Id.* at 5. Further, because of the nature of the pandemic, the employer did not, and could not, provide its employees an indication when it would resume operations. As a result, there was no reasonable expectation of reemployment, even if the employer made "vague and hopeful" statements about bringing employees back to work. Accordingly, the Board found dismissed the petition without prejudice and subject to reinstatement when the Employer resumed operations. *Id.*

ii) Expectation of Recall

The instant case presents a tension between the facts of *NP Texas*, which differ significantly from the instant case in one respect, and the Board's holding in *NP Texas*, directly applicable to the instant case. Below, I have first addressed the factual difference between these cases, then I have then addressed why, even with this difference, I find the holding in *NP Texas* requires dismissal of the Petition.

Regarding the facts, this case presents many similarities to *NP Texas*. The layoff here included all the petitioned-for employees and was caused by an almost complete cessation of business resulting from a global pandemic, and as such I find no applicable past practice exists. The entire bargaining unit remains laid off and the Employer, although it has stated an intent to recall employees when business improves, has not and cannot identify whether or when that will occur.

Petitioner argues that the Employer's experience during the "great recession" in 2008 presents a comparable past practice because the Employer experienced a significant drop in business. I do not agree. First, the evidence in the record does not quantify the extent to which the Employer's business declined in 2008, or the number of employees laid off. To the extent the record contains any evidence regarding the Employer's 2008 experience, it does not establish the decline in business in 2008 approached anything close to the magnitude here, an almost complete cessation of business and the entire workforce laid off.

The instant case is also similar to *NP Texas* in that, when the Employer here announced the layoff, it expressed hopes employees would soon be recalled. The Employer also indicated to employees that when they were recalled from this temporary layoff they would retain their original hire date, the same assurance provided in *NP Texas*. However, at this point the facts diverge. In *NP Texas,* the Employer followed this initial communication with the May 1 letter, explicitly notifying employees the layoff had become permanent and triggering the employer's end-of-employment procedures. Here, there is no evidence the layoff is anything but temporary; the Employer does not claim the layoffs are permanent, at hearing it introduced no evidence of an explicit or *de facto* change from a temporary furlough to a permanent lay off, and on brief it does not argue the layoffs are permanent.

The Employer, by its March 30 communication announcing the furlough, clearly and explicitly identifies a two-tiered system. The first tier is identified as a furlough, a "short term leave of absence" during which benefit eligibility and other hallmarks of employment continue. The second tier is a permanent layoff, a status the Employer explicitly identifies as a break in service that would require re-hiring if the employee returned to work. The Employer notified employees in the petitioned-for unit that they were furloughed, placed in the first tier. That has not changed since March. At points the Employer extended the furlough and modified its terms, notably requiring employees to pay their share of benefit premiums after an initial period of subsidy by the Employer. However, none of the subsequent communication to employees makes any reference to employees moving to the second tier, and the Employer continues to pay benefit premiums for those employees who elected to continue benefit coverage and pay their portion of the premium.

The distinction above distinguishes the instant case from *NP Texas*, as well as the cases cited by the Board in *NP Texas* and by the Employer on brief, including *Foam Fabricators*, supra; *Sol-Jack Co*., 286 NLRB 1173, 1173-1174 (1987); and *S&G Concrete*, supra. None of these cases feature an ongoing employment relationship of the type that exists here, where the Employer continues to pay its share of benefit premiums. Petitioner argues the lack of a permanent layoff makes the instant case more comparable to *The Pavilion at Crossing Pointe*, 344 NLRB 582 (2005). In that case, the Board concluded an employee had a reasonable expectation of recall and relied, in part, on factors that demonstrated ongoing employment, such as remaining in the employer's payroll system and on the employer's telephone list. *Id*. at 584, citing *Atlas Metal Spinning*, 266 NLRB 180, 181 (1983) (employee had a reasonable expectancy of recall, in part, because they remained on the employer's payroll and retained their health insurance, at their own expense).

While the continuing indicator of employment element in the instant case and the cases cited by Petitioner are apparent, I find the overall context is very different. *Pavilion at Crossing Point* involved a single employee temporarily laid off due to a business slowdown, and *Atlas Metal Spinning* involved an employee that had experienced multiple cyclical layoffs. The facts of these cases, involving individual employees in the context of the Employer's ongoing operations, are so different from the circumstances in this case that it is difficult to draw comparisons. Given how dissimilar these situations are from the instant case, and how similar the overall context of the layoff is to *NP Texas* – an essentially identical cessation of all business as the result of a worldwide pandemic – I find *NP Texas* controlling. In dismissing the Petition in *NP Texas,* the

Board stated the Covid-19 pandemic created a situation where the employer "…had no idea of when (or whether) the Texas Station Casino would reopen and resume operations," and 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."[4] This holding reflects the Board's traditional focus on a return to work in the near future, as compared to simply some unknown future date. See *Monroe Auto Equipment*, 273 NLRB at 105 ("The Board has traditionally held that laid-off employees are eligible to vote in a Board-conducted representation election only if they have a reasonable expectancy at the time of the election of being recalled *in the near and foreseeable future*." (Emphasis added)). The circumstances surrounding recall in this case are the same as those in *NP Texas*, while employees may return to work at some point, there is no basis to conclude they will return in the near and foreseeable future.

Petitioner makes two related arguments regarding the future of the pandemic to distinguish *NP Texas*: that a significant number of events could occur in Monterey in 2021 if the state of the pandemic improves quickly, and progress in ongoing vaccination efforts. I find these arguments speculative and unpersuasive. Regarding the first, it is certainly possible the Employer's business may return quickly in 2021, but there is no evidence indicating this will occur. Indeed, the evidence available, including both the data showing the severe state of the Covid-19 pandemic in Monterey at present and the almost complete lack of future bookings, suggests the opposite. Regarding the second argument, the process of approving, manufacturing, and dispensing a vaccine has clearly started, but at this point it is impossible to know what that means for the economic impact of the Covid-19 pandemic. While we all certainly hope that a return to normal will occur in 2021, and soon, the speed of the vaccination effort and what impact this will have on the economy is ultimately an unknown. This is particularly true here because the Employer's business is so dependent on individuals travelling to attend indoor events in groups. As such, even with the factual difference I have highlighted above, I find the circumstances of this case are similar to *NP Texas*, and accordingly it is appropriate to dismiss the instant petition.[5]

CONCLUSION

Based upon the record and in accordance with the discussion above, I find that while the petitioned-for unit is an appropriate unit, because all of the members of that bargaining unit are laid off without a reasonable expectancy of reemployment in the near future, I have dismissed the Petition.

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[4] Although the Board specifically referenced the uncertainty regarding reopening as a consideration in *NP Texas*, I note that this is not the same as requiring a party to demonstrate a date certain for recall. The Board has long held that a establishing a reasonable expectation of reemployment does not require establishing a date certain for recall or rehiring. *Atlas Metal Spinning*, supra at 181.

[5] As in *NP Texas*, because the Employer's closure here 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, and dismissal of the Petition is appropriate. *Id*., slip op. at 5, fn. 2. The dismissal is without prejudice and, when employees are again employed in the petitioned-for bargaining unit, Petitioner can again file for an election.

Further, based on the foregoing and the record as a whole, I conclude the hearing officer's rulings made at the second hearing are free from prejudicial error and are hereby affirmed. At the initial hearing, and again at the second hearing, the parties stipulated to jurisdiction, labor organization status, the lack of any contract bar and that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 2(6) and (7) of the Act. To the extent an additional finding is necessary in this Supplemental Decision I accept these stipulations and find accordingly.

ORDER

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

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 **January 29, 2021.**

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.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. 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 Oakland, California, this 14th day of January 2020.

/s/ Valerie Hardy-Mahoney

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