JD(NY)-45–03
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PARK AVENUE STORAGE CORP.

AND **CASE 22-RC-12343**

TEAMSTERS LOCAL 863, AFL-CIO

***Paul L. Kleinbaum Esq*., Counsel for the Petitioner**

***Domenick Carmagnola Esq*., Counsel for the Employer**

DECISION ON CHALLENGES

I Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this matter on July 30, 2003 in Newark, New Jersey. Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following findings and conclusions.

The petition was filed on May 21, 2003 and pursuant to a Stipulated Election Agreement approved on June 5, an election by secret ballot was conducted on June 27, among all full-time and regular part-time drivers, drivers' helpers and warehousemen employed by the Employer at its Newark, New Jersey facilities during the payroll period ending June 2, but excluding all office clerical employees, guards and supervisors and defined in the Act.

The Tally of Ballots showed that three votes were cast for the Union, three against and that four votes were challenged by the Employer. The Employer's position was that the four individuals, Julio Arenas, Dwayne Dawson, Benjamin Jenkins and Radame Semidey, had been permanently laid off on June 6, 2003 and therefore were not eligible to vote because they were not employed on the date of the election. The Union takes the position that these employees were temporarily laid off and therefore were eligible voters.

Based on the record as a whole, including my consideration of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following:

II Findings and Conclusions

The Employer is engaged in the business of moving and storing household goods. A majority of its business has been to provide these services for personnel of the Armed Forces. To this end, it is required to meet certain Department of Defense, (DOD), specifications in order to be on an approved list. These requirements include proper insurances and properly maintained trucks and facilities for the storage and/or transportation of goods. While a majority of its business has been done under the aegis of the Department of Defense, the Company also provides similar services to regular citizens, mostly in the New Jersey and New York City areas.

In the operation of its business, the Employer has two storage facilities in Newark, New Jersey. It also has 5 trucks plus a pickup truck. In the period prior to the filing of the representation petition, the Company employed about 12 bargaining unit employees.

On or about April 28, 2003, the Company was inspected by agents working on behalf of the DOD. They apparently found fault with the facility and indicated that the Company would be suspended.

On May 1, 2003, the Company was served with a notice that it had been found ineligible for Storage In Transit; this being the work done for the military. The Company was notified that it had failed to comply with certain regulations.

As a result of the suspension, the Company became automatically ineligible to handle, store or transport goods for military personnel, except to the extent that it could deliver locally, goods already stored prior to the notice. All witnesses testified that during May 2003, there were no goods coming into the warehouse and that the only work done was in taking goods out of the warehouse. As a result, employees had their hours reduced.

On Friday, June 6, 2003, the four employees in question received the following memorandum, which was prepared by the Company's owner, Rich Visceglia:

> NO WORK ALL NEXT WEEK
> Due to our current situation, all moves that we had on the schedule for the month of June were taken back by the Government Transportation Office. Therefore, there is no work all next week. And if nothing changes, there probably will be no work the week after that. Check in with the office every day to see if you are needed. If anything changes, you will be told to report to work at that time. Make sure you leave all your contact phone numbers with Jeff so he can reach you on a moment's notice if things change.

This memorandum was given to these employees with their checks and they were told to give Jeffrey Brito, the general manager, their contact numbers so that they could be reached. They also were told to check in every day. They were not told that the layoffs were to be permanent or indefinite in duration.

Soon after receiving the May 1 notice, Visceglia and his manager Brito, started to figure out how to get the suspension lifted and prepared a "game plan" to that end. This entailed fixing the violations found, some of which required a good deal of work, and others, such as moving a small truck, were not so difficult. In any event, over a period of time, from May to July 2003, both Visceglia and Brito talked to people connected with the inspectors with respect to fixing the violations and planning for when a new inspection would be conducted.

It is noted that the Company had been suspended on two previous occasions in 1992 and 1996, and had gotten reinstated. (And according to Visceglia, he has never laid off any employees before). With respect to the May 1, 2003 suspension, Visceglia testified that he hoped and still hopes that he will be able to satisfy the DOD regulations and be reinstated as an approved carrier. However, as of the date of this hearing, the Company has not yet been reinspected and therefore has not been reinstated to eligibility.

None of the challenged voters have been recalled to date.

III Discussion

The Board has long held that employees must be employed both during the payroll eligibility period and on the date of the election in order to be eligible to vote in an election. *Plymouth Towing Co*., 178 NLRB 651 (1969); *Apex Paper Box Co*., 302 NLRB 67, fn. 4 (1991). The four employees in question were employed before the payroll eligibility date. But they were not employed on the date of the election.

The test as to the eligibility of laid-off employees is "whether there exists a reasonable expectancy of employment in the near future." *Higgins, Inc*., 111 NLRB 797 (1955); and *Madison Industries*, 311 NLRB 865 (1993). The eligibility of laid off employees is determined based on the facts existing on or before the eligibility date and not on the date of the election. *Osram Sylvania, Inc*., 325 NLRB No. 147 (1998). A mere assertion that an employee has been permanently laid off, in the absence of supporting evidence, and especially in the face of subsequent recall, may be insufficient to rebut the presumption that layoffs are temporary. *Intercontinental Mfg. Co*., 192 NLRB 590 (1971). On the other hand, the fact that an employee is advised that his or her lay off is temporary, is not necessarily determinative where the objective evidence establishes that the employee had no reasonable expectation of recall. *Sierra Lingerie Co*., 191 NLRB 844 (1971); *Apex Paper Box*, 302 NLRB 67 (1991).

In the present case, the employees, via the written notice they received on June 6, 2003, were notified that their layoffs were intended to be temporary and not permanent. By its terms, they were told that due to an action by the Government Transportation Office, there would be no work all next week and probably no work for the following week as well. They were not told that their layoffs were permanent or indefinite and they were told to check in each day to see what was going on. From the employees' perspective, they certainly had, at the time of their layoffs, a reasonable expectation that they would be recalled to work in the near future.

I am also inclined to think that the Employer, at the time of the layoffs and through the date of the election, had pretty much the same thing in mind when he wrote the memorandum. He had faced two preceding suspension in 1992 and 1996 and he testified that in each instance the suspensions were lifted and the Company resumed operations. Visceglia also testified that he had never laid off employees before.

In my opinion, the Employer, as of June 6, 2003, made the determination that remedying the violations would not be a big deal and would not take too long to accomplish. Visceglia may have underestimated what had to be done or what reaction he was going to get from the government inspectors. But that does not change the manifested intention, as of June 6, 2003, to lay off these employees for at most, one or two weeks.

The Employer relies heavily on *NLRB v. Seawin, Inc*., 248 F.3d 551, (6th Cir. 2001. In that case the Court, disagreeing with the Board, held in a two to one decision that certain laid off employees were permanently laid off and therefore not eligible voters. While acknowledging that Seawin's employees were told that "hopefully" or "probably" they might return to work in two weeks to a month, the majority opinion stated:

> The NLRB has repeatedly found that a layoff under these circumstances does not give rise to a reasonable expectancy of recall by laid-off employees. *See* *Osram Sylvania, Inc.,* 325 N.L.R.B. at 760 (loss of sales is objective factor indicating that laid-off employees had no reasonable expectation of recall); *Sol-Jack,* 286 N.L.R.B. 1173 (decline in sales due to loss of major customer is an objective factor weighing against reasonable expectancy of

> recall); *Heatcraft,* 250 N.L.R.B. 58 (1980) (reduction in sales and buildup of unusually high inventory is basis for concluding that laid-off employees did not have reasonable expectation of recall in the near future). Accordingly, the undisputed evidence of a diminished customer base, decline in sales, and high inventory compellingly indicate that the laid-off employees had no reasonable expectancy of recall.
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> The Board's conclusion that there is no evidence that Seawin changed the nature or scope of its business is flatly refuted by the record. The record clearly indicates that, shortly after the layoffs, Seawin significantly increased its automation and subcontracted to have automated equipment built. In addition, Seawin installed a new computer system in order to more accurately determine its inventory needs. The Sixth Circuit has found that similar changes in a company's production process support a finding that laid-off employees had no reasonable expectancy of recall. In *NLRB v. Ideal Macaroni Co.,* 989 F.2d 880 (6th Cir.1993), the Court noted that the company's modernization of its past manufacturing operation through the installation of new machinery was not the type of change "reflective of fluctuations in the workload" that would support a finding that employees could reasonably expect to be recalled. *Id.* at 882. The Fifth Circuit in *Hughes Christensen Co. v. NLRB,* in finding that the laid-off employees had no reasonable expectancy of recall, observed that automated equipment at the plant reduced the need for many of the workers. *See* 101 F.3d at 31. Finally, in *Zatko Metal Products Co.,* 173 N.L.R.B. 27 (1968), the NLRB found that "there was considerable change in [the Company's] methods of production in the form of replacement of old machines with new, more efficient apparatus, and improvement of existing machinery by adoption of automated processes." *Id.* at 32. The NLRB concluded that the laid-off employees did not have a reasonable expectation of recall. Similarly, in the case at bar, the modernization of Seawin's production processes indicates a decreased need for the labor-intensive services of the laid-off production workers. This change in the nature of Seawin's business deprives the laid-off employees of a reasonable expectancy of recall. In sum, the financial condition of the company before the layoffs and the changes in the production process after the layoffs squarely indicate that the laid-off employees had no reasonable expectation of recall in the near future. The Hearing Officer's conclusion to the contrary ignores "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion reached." *R.P. Carbone Constr. Co.,* 166 F.3d at 818. Thus, we are not bound by the Board's finding.

In my opinion, the facts in the present case are significantly different from those in *Seawin* where the loss of business resulted from a combination of its own inefficiencies and its loss of major customers. In response to those circumstances, Seawin had to undertake a major restructuring which included a permanent reduction in its work force. In the present case, Park Ave's loss of business was the result, in part, of its own carelessness in complying with governmental regulations. But bringing itself back into compliance will not require it to restructure its business. What it will require is that it keep its premises clean, maintain fire extinguishers and keep its facility free of cigarette butts. Park Ave has faced this problem before and has met the challenge without too much fuss and without the loss of jobs. There is no reason to believe that it cannot do so again. In my opinion, the Company has not shown that

this will require substantial change in the way it operates its business or that it will require it to permanently reduce its work force.

CONCLUSION

Based on the above, it is my conclusion that as of June 6, 2003, the date of their layoffs and as of the date of the election, the four employees who were challenged, had a reasonable expectation of employment and therefore were eligible to vote. Accordingly, I recommend that their ballots be opened and counted and that a new Tally of Ballots be issued. [1]

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

[1] Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, an original and seven (7) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 22. If no exceptions are filed, the Board will adopt the recommendations set forth herein.