STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 07-E-01
Issued: February 12, 2007

In Re:	
CHALLENGE OF BALLOTS IN THE DECERTIFICATION/BARGAINING AGENT ELECTION FOR THE MSAD #5 BUS DRIVERS' BARGAINING UNIT	EXECUTIVE DIRECTOR'S DECISION

PROCEDURAL HISTORY

On November 8, 2006, Ms. Brenda Calderwood (Petitioner), a representative of the MSAD #5 Pupil Transportation Association (Association), filed a Petition for Decertification/Bargaining Agent Election with the Maine Labor Relations Board (Board). The Petition sought to decertify the incumbent collective bargaining agent for the MSAD #5 bus drivers' bargaining unit, Teamsters Union Local 340 (Teamsters) and to certify the Association as the collective bargaining agent. The Petition described the bargaining unit as all employees of the MSAD #5 Board of Directors who have completed six months of continuous employment in MSAD #5 in the position of bus driver; the Petitioner stated that there were eight full-time bus drivers in the unit. The Petition was duly served upon Mr. Carl Guignard, Trustee and Business Agent for the Teamsters, and upon Superintendent Alan Pfeiffer for the MSAD #5 Board of Directors (MSAD #5 or Employer). No response or objection was filed to the Petition, and the Board issued an election scheduling letter and notice on November 17, 2006. This election scheduling letter identified the following dates relevant to the election: the Employer was required to submit the list of eligible voters by November 22, 2006; disputes with the eligible voter list were required to be submitted by November 29, 2006; the ballots were

to be mailed on December 7, 2006; and the ballots were to be counted on December 21, 2006.

The Board received the voter list from the Employer on November 20, 2006; it was entitled “Bus Drivers Seniority List 2006-2007" and contained the names of ten employees, including the names of the two employees who are the subject of the voter eligibility challenge to be resolved in this proceeding, Herman Thayer and Barbara Witham. On November 28, 2006, the Petitioner advised in writing that she was disputing the placement of Mr. Thayer and Ms. Witham on the eligible voter list. In keeping with the election scheduling letter, a telephone conference call was conducted by the hearing examiner on November 30, 2006, in order to attempt to resolve the challenge. Participating in the conference was Superintendent Pfeiffer, the Petitioner, and the Employer’s business manager. Mr. Guignard was advised about the conference and contacted in order to participate, but was not available to participate. As the result of the conference, the hearing examiner made the tentative determination that Ms. Witham was an eligible voter and should be sent a ballot and that Mr. Thayer was not an eligible voter and should not be sent a ballot. This tentative determination was summarized in a letter sent to the parties on November 30, 2006; the parties were advised in the letter that any voter could be challenged in keeping with the Board Rules.[1]

On December 7, 2006, the ballots were mailed to nine employees (all employees on the original list with the exception of Mr. Thayer). On December 13, 2006, Mr. Thayer contacted the Board and asked that a ballot be sent to him. In keeping with

[1]This tentative determination was made only to initially define who should be sent a ballot; it was not binding nor does it mandate any outcome here. The parties continued to be free to challenge any voter for cause and, if the challenged ballots were sufficient in number to affect the election result--as happened here--the executive director must resolve the challenge pursuant to Chapter 11, § 50 of the Board Rules.

Board practice, a ballot was sent to him which was to be considered a "challenged" ballot if returned. Mr. Thayer returned his ballot and it was marked as challenged. On December 15, 2006, Mr. Guignard advised the Board in writing that the Teamsters wished to challenge the ballot of Ms. Witham. Ms. Witham returned her ballot and it was marked as challenged. On December 21, 2006, the hearing examiner conducted the ballot count. None of the parties sent an election observer to the count. All ten ballots were returned to the Board as of the date of the count. The hearing examiner opened eight ballots and set aside the two challenged ballots in keeping with the Board Rules. All eight were valid ballots, and the resulting count was four votes for the Teamsters and four votes for the Association. As neither bargaining agent received the majority of valid votes cast, and the challenged ballots were sufficient in number to affect the result of the election, the hearing examiner was unable to certify a bargaining agent or to complete the election report. These facts were summarized in a letter dated December 22, 2006, from the hearing examiner to the parties. In this letter, the parties were asked to participate in another telephone conference, with the intent that sufficient facts could be stipulated in order to allow the hearing examiner to resolve the two challenged ballots. Mr. Guignard advised the Board that he did not believe the matter could be resolved through stipulations, and requested that a hearing be conducted. A hearing was scheduled to resolve the two challenges on February 2, 2007 (the first date of Mr. Guignard's availability), and notice of this hearing was issued on January 10, 2007.

An evidentiary hearing on the ballot challenges was held by the undersigned hearing examiner on February 2, 2007, at the Board's hearing room in Augusta, Maine. In attendance at the hearing were Mr. Guignard, representing the Teamsters, and Ms. Calderwood, representing the Association. No representative

for the Employer appeared at the hearing.[2] The Teamsters presented Roy Grotton, shop steward and trip coordinator, as its witness. Ms. Calderwood presented herself as the witness for the Association. The parties were given the opportunity to examine and cross-examine witnesses and to offer evidence. The parties presented oral arguments at the close of the hearing.

JURISDICTION

The jurisdiction of the Executive Director or his designee to conduct elections and, as part of an election, to resolve a challenge to ballots, lies in Title 26 M.R.S.A. § 967(2) and Chap. 11, § 50 of the Board Rules. The subsequent references in this decision are all to Title 26, Maine Revised Statutes Annotated, unless otherwise noted.

EXHIBITS

The following administrative exhibits were admitted into evidence without objection of the parties, except that Mr. Guignard objected to the employer's characterization of its voter list (Administrative Exh. No. 4) as a seniority list:

Exhibit No.	Title/Description
Admin. Exh. 1	11/8/06 decertification/bargaining agent election petition
Admin. Exh. 2	11/8/06 service letter
Admin. Exh. 3	11/17/06 election scheduling letter and notice
Admin. Exh. 4	11/17/06 voter list
Admin. Exh. 5	11/27/07 letter of Calderwood
Admin. Exh. 6	11/30/06 letter of hearing officer to parties
Admin. Exh. 7	12/7/06 voter letter
Admin. Exh. 8	12/15/06 letter of Guignard

[2]The Employer, through its attorney, submitted a letter on the day of the hearing stating the employer's "position" on the challenge. The letter was admitted into evidence over the objection of the Teamsters (Employer's Exh. No. 1).

Admin. Exh. 9	12/22/06 letter of hearing officer to parties
Admin. Exh. 10	1/10/07 ballot challenge hearing letter and notice

The following Teamsters' exhibits were admitted into evidence despite the Association's objection as to relevance:

Exhibit No.	Title/Description
Teamsters' Exh. 1	Law re: school bus operation
Teamsters' Exh. 2	Law re: school bus markings
Teamsters' Exh. 3	Time cards (8)
Teamsters' Exh. 4	Fall transport schedule (2 p.)
Teamsters' Exh. 5	Seniority list

The employer, though its attorney, submitted a letter stating its "position" regarding the eligibility of the two employees in question (Employer's Exh. No. 1). The letter was admitted into evidence despite the Teamsters' multiple objections. The parties agreed to admit as a joint exhibit the collective bargaining agreement which expired on June 30, 2006. The Association did not offer any documents into evidence.

STIPULATIONS

The parties stipulated to the following facts:

1. Barbara Witham was first employed by MSAD #5 in 2001 as a cafeteria employee, a school-year position. She is still employed by MSAD #5.

2. Herman Thayer was first employed by MSAD #5 in March, 1993, as a bus mechanic. He is still employed by MSAD #5.

3. Both Ms. Witham and Mr. Thayer were employed by MSAD #5 on the last pay date prior to the filing of the petition in this matter and were employed on the date of the election.

FINDINGS OF FACT

1. The collective bargaining agreement (CBA) between MSAD #5 and the Teamsters effective July 1, 2003, to June 30, 2006, contains the following recognition clause:

ARTICLE 1 - RECOGNITION

> The MSAD #5 Board of Directors (hereafter the "Board") recognizes Teamsters Local #340 Bus Drivers Unit (hereafter the "Union") as the sole and exclusive bargaining agent for the purpose of negotiating benefits, wages, hours of work and working conditions for a unit consisting of those employees of the Board who have completed six (6) months of continuous employment in MSAD #5 in the position of bus driver, excluding all temporary, seasonal, on-call employees or supervisory personnel.

2. In order to legally drive a school bus in Maine, the bus driver needs a CDL (school bus operator endorsement) driver's license, as outlined in Title 29-A M.R.S.A. § 2303.

3. Maine law defines a "school bus" as a "commercial motor vehicle used to transport preprimary, primary or secondary school students from home to school, from school to home or to and from school-sponsored events." "School bus" does not include a bus used as a common carrier or a private school activity bus. Title 29-A M.R.S.A. § 2301(5).

4. Maine law requires a variety of markings, lights and mirrors on school buses, including certain size printed letters identifying it as a school bus, certain color of glossy yellow paint, certain signal lights and mirrors, and a system of stop arms. Title 29-A M.R.S.A. § 2302.

5. Herman Thayer has been employed as the bus mechanic for MSAD #5 since 1993. He works 40 hours per week, and is a year-round employee.

6. The work that Mr. Thayer primarily performs for the employer is servicing the buses.

7. Mr. Thayer has a CDL license. He has, at times, driven a school bus for the employer on an as-needed basis. For instance, in some past school years, he has driven a "shuttle" bus between schools when there was a large middle school student population. He has not been needed to drive this shuttle in the 2006-2007 school year because the student population no longer warrants it.

8. During the 2006-2007 school year, Mr. Thayer has occasionally driven the bus on an as-needed basis for the employer. He does not drive (and has never driven) a regular bus route transporting students between home and school.

9. Three times each year, regular bus drivers can elect to be placed on a seniority rotation for "extra trips" (trips of longer than three hours' duration for sports, field trips, and extracurricular events) pursuant to Article 15 of the CBA. The shop steward gives the forms used to request the extra trip seniority rotation (Appendix B of the CBA) to all the regular bus drivers. The form is to be completed indicating whether or not the driver wishes to be placed on the rotation. The shops steward does not give this form to Mr. Thayer, nor has Mr. Thayer ever requested to be placed on the extra trip rotation.

10. Mr. Thayer performs his mechanic work in a bus bay located in the back of the high school. Nearby is a "pen" where the buses are parked when not in use. The bus bay area also contains a break room for the bus drivers and the punch clock for bus drivers. Mr. Thayer has frequent contact with all the bus drivers in this work area.

11. Early in his employment, Mr. Thayer received the same health insurance benefits as other administrative (non-union) employees. More recently, he began receiving the same health insurance benefits as employees under the bus drivers' CBA.

12. Brenda Witham has been employed by MSAD #5 since 2001, when she was hired as a cafeteria employee. At some point during

her employment, Ms. Witham suffered a work-related injury. As the result of the injury, she could not perform the regular duties of her cafeteria position. At the beginning of the 2006-2007 school year, Ms. Witham began driving a seven-passenger van for MSAD #5. The van is not marked or painted in any special way, nor is it outfitted with any special light system. Ms. Witham's job is to transport certain students with special needs, often taking them to locations outside of the school district, such as to neighboring school districts with programs suitable to these students.

13. The driver of the van is only required to have a Class C driver's license. Ms. Witham does not have a CDL license. She has not been eligible to participate in the extra trip seniority rotation.

14. Since she began driving the van, Ms. Witham has been supervised by the Director of Special Services. Her day-to-day work (which students to pick up, where to take them) is determined within the Special Services department. Her time card and payroll are also handled by this department.

15. Ms. Witham is employed during the school-year only. She works part-time hours as the van driver.

16. It is unclear how long Ms. Witham will perform services as a van driver; this is dependent on the needs of the school district.

17. Ms. Witham has some interchange with the bus drivers. The van that she drives is parked in the "pen" where the buses are parked.

18. The Employer maintains at least one other van like the one that Ms. Witham drives. The van is sometimes used by school employees (teachers, coaches) in order to drive students to events and programs.

19. At some point in a past school year, Walter Yattaw (a regular bus driver since 2001) left his bus driver position and

agreed to perform the van driving position. Eventually, the van driving position was no longer needed due to changing student needs, and Mr. Yattaw returned to his regular bus driver position without loss of seniority under the CBA.

20. Roy Grotton has been employed by MSAD #5 since 1986 as a bus driver. He was most recently employed as the head bus driver, but this position title was eliminated and, in the 2006-2007 school year, Mr. Grotton's title has been changed to trip coordinator. As trip coordinator, Mr. Grotton ensures that all regular and extra bus routes are filled by a bus driver.

21. Mr. Grotton is effectively the supervisor of the bus drivers and of Mr. Thayer. He turns in time cards for the bus drivers (regular and substitute) and for Mr. Thayer to payroll.

22. Mr. Grotton is the Teamsters' shop steward and has been involved in negotiating several collective bargaining agreements for the bus drivers' unit.

23. Article 17 of the CBA provides that a seniority list is to be established naming all employees covered by the agreement. This list is to be updated January 1st of each year, with a copy sent to the "Union and to the steward," and posted on bulletin boards. In practice, the seniority list is not always updated on a yearly basis, and it is not clear who creates the seniority list (the Employer or the Teamsters). In the week prior to the conduct of this hearing, Mr. Grotton created a new "seniority list" (Teamsters' Exh. No. 5) that contained eight names, including Mr. Thayer but excluding Ms. Witham. This list did not contain the name of Ronnie Jones, a bus driver who resigned right around the time of the election. Prior to the creation of this list, Mr. Grotton last created a list several years ago, after the employment of a new bus driver. This list was posted on the employee bulletin board but is now gone.

24. In response to the request that the Employer furnish a list of the names and addresses of employees in the bargaining

unit who were eligible to vote, the Superintendent supplied a list that he identified in the cover letter as all "bus garage employees." The list itself was entitled "Bus Drivers Seniority List 2006-2007" (Admin. Exh. No. 4). This list contained ten names, including both Mr. Thayer and Ms. Witham. It is not clear that this list was ever furnished to the Union and the steward as a "seniority list" pursuant to the CBA, or whether it was posted on bulletin boards as provided in the CBA.

DISCUSSION

The issue presented here is whether either Mr. Thayer or Ms. Witham were eligible to vote in the decertification/ bargaining agent election conducted between December 7, 2006, and December 21, 2006, for the MSAD #5 bus drivers' bargaining unit. I conclude for the reasons that follow that neither Mr. Thayer nor Ms. Witham were members of the bargaining unit at the relevant times; therefore, neither was eligible to vote in the election.

Section 967(2) of the Maine Public Employees Labor Relations Law ("MPELRL") provides the following regarding the conduct of elections:

> **2. Elections.** The executive director of the board, or a designee, upon signed request of a public employer alleging that one or more public employees or public employee organizations have presented to it a claim to be recognized as the representative of a bargaining unit of public employees, or upon signed petition of at least 30% of a bargaining unit of public employees that they desire to be represented by an organization, shall conduct a secret ballot election to determine whether the organization represents a majority of the members in the bargaining unit.

The procedures for a decertification election are the same as for a representation election. The law makes clear that elections are to be conducted amongst members <u>of a bargaining unit</u> who are

public employees; employment in the relevant bargaining unit is, therefore, an essential element of being an eligible voter.

The process of an election (from petition to ballot count) can often take several months. The MPELRL does not itself clarify at what points during the election process a voter must be a member of a bargaining unit in order to participate in an election--for instance, is an employee who is hired into a bargaining unit just prior to the ballot count an eligible voter? The Board Rules address this question. Chapter 11, § 44 of the Board Rules provide that it is the obligation of the employer to deliver the list of eligible voters as follows:

> **§44. Voter List.** At least 15 calendar days prior to the election or prior to the distribution of ballots for any election to be conducted by mail, the employer shall actually deliver to each labor organization that is a party to the proceeding and to any individual petitioner a list of the names and addresses of the employees in the unit who are employed at the time of the submission of the list and who are otherwise eligible to vote under Rule 43 of this Chapter.

Chapter 11, § 43 of the Board Rules provides:

> **§43. Voter Eligibility.** The employees eligible to vote are those who were employed on the last pay date prior to the filing of the petition, who are employed on the date of the election, and who meet the applicable requirements defining covered employees set forth in 26 M.R.S.A. §§ 962(6)[3], 979-A(6), 1022(11), 1282(5), or 1322(2). Employees not working on election day because of illness, vacation, leave of absence or other reason are eligible to vote if they have a reasonable expectation of continued employment. . . .

Reading the law and the Board Rules together, then, an employee must meet all three of the following criteria in order to be eligible to vote: (1) be employed in the relevant bargaining unit on the last pay date prior to the filing of the petition;

[3]This provision of the law defines "public employee."

(2) be employed in the relevant bargaining unit on the date of the election; and (3) meet the definition of a "public employee" in the applicable law.

The parties in the present matter have stipulated that both Mr. Thayer and Ms. Witham were employed by MSAD #5 on the last pay date prior to the filing of the petition and on the date of the election. No argument has been presented that these two employees are not "public employees" as defined in the MPELRL.[4] Therefore, the only issue in dispute is whether the two employees are in the bargaining unit.

The focus of this inquiry naturally rests on the language of the collective bargaining agreement between the Employer and the Teamsters, as this reflects the most up-to-date description of the parties' agreement on the composition of the bargaining unit. Article 1 (Recognition) of the 2003-2006 CBA provides:

ARTICLE 1 - RECOGNITION

> The MSAD #5 Board of Directors (hereafter the "Board") recognizes Teamsters Local #340 Bus Drivers Unit (hereafter the "Union") as the sole and exclusive bargaining agent for the purpose of negotiating benefits, wages, hours of work and working conditions for a unit consisting of those employees of the Board who have completed six (6) months of continuous employment in MSAD #5 in the position of bus driver, excluding all temporary, seasonal, on-call employees or supervisory personnel.

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[4]One of the exceptions to the definition of "public employee" is § 962(6)(F), employees who have been employed less than six months. Ms. Witham has been employed by the Employer in excess of six months, but has not been employed as the van driver for six months. None of the parties to this voter eligibility proceeding argued that Ms. Witham is not eligible to vote because she is not a public employee. Both the Petitioner and the Employer advocated that Ms. Witham be found eligible to vote. Mr. Guignard stated at the hearing that his argument that Ms. Witham should not be found eligible to vote lies in whether or not her work as a van driver--a position he also argues is temporary--places her in the bargaining unit, not in the fact that she has worked as a van driver less than six months. Tr. at 71-72.

In the clear and unambiguous language of the CBA, therefore, employees in the position of "bus driver" are in the unit; other employees are not in the unit, including those employees who are temporary, seasonal, on-call or supervisory personnel.

There is no dispute here that Mr. Thayer's position is as a mechanic. This is the position into which he was hired and which he performs for the employer, basically on a full-time basis. While Mr. Thayer has a CDL license and has worked as a bus driver on an as-needed basis, this bus driving has been "temporary" or "on-call," thus excluded by the language of the recognition clause. Because Mr. Thayer is employed as a mechanic and not as a bus driver, he is not included in the bargaining unit.

Is there any basis upon which the hearing examiner could "read" the recognition clause or reform the recognition clause so that the position of mechanic is included along with the position of bus driver? The hearing examiner does not believe so, in the face of the unambiguous language of the CBA. First and foremost, it is "black letter" law that if the language of a contract, including a CBA, is plain and clear, there is no need to resort to rules of interpretation and extrinsic evidence to discern the parties' intent, and that plain and clear meaning should be applied. See e.g., NLRB v. Electric Workers Local 11, 772 F.2d 571, 575 (9th Cir. 1985). The fact that the parties do not now (apparently) agree whether the position of mechanic is included in the bargaining unit does not alter the fact that the language of the recognition clause is clear.

Second, it is well known that bargaining unit descriptions for public sector bargaining units in Maine (whether in Agreements on Appropriate Bargaining Unit, unit determination reports, or CBA recognition clauses) generally list positions or classification titles to be included in the unit, and sometimes list positions or classification titles to be excluded from the unit. This is important as it places employees on notice when

their rights might be affected, as occurred here when the notice of this election (containing as it did the language from the recognition clause of the CBA) was posted for the benefit the employees. A review of Board files quickly reveals numerous examples of school support units which explicitly include the title "mechanic" as a position specifically included in the unit.[5] This fact lends weight to the conclusion that the omission of a position title, particularly a position that has been long in existence at a work place, has significance: the parties did not negotiate the inclusion of this position in the bargaining unit.

Finally, the Teamsters argue that the hearing examiner should use "community of interest" standards to find that "mechanic" should be included as the position in this bargaining unit. Here, the Teamsters refer to § 966(2):

> **2. Bargaining unit compatibility.** The executive director of the board or his designee shall decide in each case whether, in order to insure to employees the fullest freedom in exercising the rights guaranteed by this chapter and in order to insure a clear and identifiable community of interest among employees concerned, the unit appropriate for purposes of collective bargaining shall be the public employer unit or any subdivision thereof.

(Emphasis supplied).

Chapter 11, § 22(3) further elaborates the elements of community of interest (similarity in kind of work performed, common supervision and determination of labor relations policy, etc.).

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[5]The following are some of many examples of Maine school support bargaining units that explicitly include mechanics, according to Board records: Brunswick School Department (bus drivers, custodians, mechanics); Limestone School Department (bus drivers, custodians, mechanics); MSAD #43 (bus drivers, maintenance, custodians, head custodians, utility, material handlers, mechanics, mechanic's helper); MSAD #1 (custodians, bus driver/custodians, bus driver/mechanics); MSAD #3 (bus drivers, mechanics, bus aides/monitors); and MSAD #60 (bus drivers, custodians, mechanics, garage helpers).

The community of interest factors are most typically considered when a new bargaining unit is created and the parties cannot agree on unit composition (unit determination) or when there is a change, like the creation of a new position, and the parties cannot agree on whether to include the position in an existing unit (unit clarification). Here, the position of mechanic has been in existence for many years and the parties have apparently never negotiated placing the position in this unit. To determine who may properly vote in a decertification election by determining who has a "community of interest" with the positions clearly in the bargaining unit would create much possibility for mischief and unfairness; one could argue here, for instance, that Ms. Witham, and a whole host of other positions such as custodians, maintenance employees, and other MSAD #5 employees, should vote in this election on the basis that they share a community of interest with the bus drivers. This would not be appropriate. Further, the hearing examiner finds support for this conclusion in the fact that the National Labor Relations Board will not utilize community of interest factors in determining voter eligibility in a unit agreed to by stipulation, if the terms of the agreement are clear and unambiguous.[6]

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[6]Parties to representation proceedings before the NLRB may resolve issues of voter eligibility prior to election if they clearly evidence their intention to do so in writing, a stipulated election agreement. To determine whether a challenged voter is properly included in a stipulated election agreement, the NLRB applies a three-part test:

> The Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent though normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, the Board determines the bargaining unit be employing its normal community-of-interest test.

For all of these reasons, the hearing examiner finds that Mr. Thayer is not in the bargaining unit of MSAD #5 bus drivers, and therefore was not eligible to vote in this election.

The issue of whether Ms. Witham is an eligible voter similarly rests on whether she is in the bargaining unit; the question in her case is whether or not she is a "bus driver." This is a somewhat closer question because Ms. Witham provides student transportation in a vehicle, a job much more "like" a bus driver than a mechanic. However, the Teamsters presented convincing evidence (not contradicted by other record evidence) that "school bus" and those who are qualified to drive a school bus have both an ordinary meaning and a legal meaning. By either definition, an unmarked general minivan, such as any family might own, cannot creditably be called a "bus." There is also meaning to the legal and licensing qualifications required of persons allowed to "drive" a bus. Under these definitions, encompassed in the clear language of the recognition clause, Ms. Witham is not a "bus driver" and she is not in the bargaining unit. This conclusion is further supported by the fact that other MSAD #5 employees (teachers, coaches) sometimes drive students in such vans. While this driving is clearly in addition to their usual job duties, it would be difficult to call them "bus drivers" while they are performing this function.

The hearing examiner declines to add to this conclusion by, as argued by the Teamsters, finding that Ms. Witham's position is "temporary" and therefore excluded from the bargaining unit due to the "temporary, seasonal, and on-call" language of the recognition clause. Although neither witness at the hearing had a great deal of knowledge about Ms. Witham's day-to-day duties, she has apparently been performing this van driving since the beginning of the 2006-2007 school year on a part-time basis.

Caesar's Tahoe and IUOE, Local 39, 337 NLRB 1096, at 1097 (2002).

The witnesses also had little information about when and for how long this van driving was performed in some previous school year or years by a regular bus driver (Walter Yattaw) who took the position until the van driving was not needed any more, and who then returned to being a regular bus driver. While the van driving position is likely dependent on the number of special needs students who need such transportation, there was insufficient evidence presented to find the work to be "temporary."

Therefore, and for the same reasons as articulated above regarding Mr. Thayer, the hearing examiner finds that Ms. Witham is not in the bargaining unit of MSAD #5 bus drivers, and therefore was not eligible to vote in this election.

Before closing the decision, the hearing examiner will briefly discuss some of the extrinsic evidence offered by the parties which she found was unnecessary to rely upon, in the face of the clear and unambiguous language of the recognition clause. A seniority list properly maintained pursuant to the terms of the CBA should be a useful indication of which employees both the Employer and the Union consider to be in the unit every year (Article 17 of the CBA). Here, this was not the case. The seniority list offered by the Teamsters (Teamsters' Exh. No. 5) appeared to be a rather self-serving document created just prior to the hearing. It apparently replaced a list on the employee bulletin board that cannot now be found. While the Employer submitted a document entitled "seniority list" as the voter list, the Employer also identified it as a list of "all bus garage employees." It apparently was prepared for purposes of this election and not delivered to the shop steward or posted on bulletin boards as a contract seniority list would be. Further, the Employer's list contained the name of Mr. Thayer who, since that time, the Employer has claimed was not in the bargaining unit. Therefore, these seniority lists were not in keeping with

the provisions of the CBA and were not helpful in determining the issue here. Some of the other evidence presented (the fact that Mr. Yattaw took the van driving position at some point and then returned to bus driving but maintained his seniority, the fact that Mr. Thayer had different health insurance coverage than the bus drivers during much of his employment until recently, etc.) was simply too ambiguous to aid in the interpretation of the meaning of the recognition clause, if the clause had needed such interpretation.

CONCLUSION

For these reasons, I hold that neither Mr. Thayer nor Ms. Witham were eligible to vote in the decertification/ bargaining agent election held for the MSAD #5 bus drivers' bargaining unit, within the meaning of 26 M.R.S.A. § 967 and Chapter 11, § 43 and § 44 of the Board Rules. Their ballots, challenged and set aside at the December 21, 2006, ballot count, shall not be opened nor counted in the election. An election certification shall be issued based upon the eight ballots opened at the December 21, 2006, ballot count, which declares that no majority was obtained and a runoff election is required.

Dated at Augusta, Maine, this 12th day of February, 2006.

MAINE LABOR RELATIONS BOARD

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Dyan M. Dyttmer
Designee of the Executive Director

Pursuant to 26 M.R.S.A. § 968(4), any party aggrieved by this determination may appeal it to the Maine Labor Relations Board. To initiate such an appeal, the party seeking appellate review must file a notice of appeal with the Board within five (5) working days of the date of issuance of this determination. See Chap. 10, § 7, Chap. 11, § 30, and Chap. 11, § 52 of the Board Rules for requirements.