

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

FLYNN ARCHITECTURAL FINISHES, INC.

Employer

and

Case 05-RC-258064

INTERNATIONAL UNION OF PAINTERS AND
ALLIED TRADES, AFL-CIO, DISTRICT
COUNCIL 51, LOCAL 890

Petitioner

DECISION AND DIRECTION OF ELECTION

Flynn Architectural Finishes, Inc. (“the Employer”) is engaged in the business of providing architectural metal, wood, and stone restoration services to commercial customers. International Union of Painters and Allied Trades, AFL-CIO, District Council 51, Local 890 (“the Petitioner”) seeks to represent a bargaining unit of all metal, wood, stone, and marble refinishers, including all foremen, technicians, and helpers employed by the Employer, excluding all other employees, including all office staff, guards, managers, and supervisors as defined under the Act.¹ A hearing was held April 14, 2020² before a hearing officer of the National Labor Relations Board (the Board).³

¹ The parties stipulate, and I find that this bargaining unit is appropriate.

² All dates herein are in 2020, unless specified otherwise.

³ The petition in this case was filed under Section 9(c) of the National Labor Relations Act, as amended (the Act). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated the undersigned its authority in this proceeding. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a corporation with an office and place of business in Silver Spring, Maryland, and has been engaged in the business of providing architectural metal, wood, and stone restoration services to commercial customers. In conducting its operations during the 12-month period ending March 31, 2020, the Employer performed services valued in excess of \$50,000 in states other than the State of Maryland.
3. I further find, as also stipulated by the parties, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
4. The parties stipulated, and I also find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. A 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.

I. Issues and Positions of the Parties:

The only matter in contention raised during the hearing was whether to conduct a manual or mail ballot election.⁴ The parties were advised that the determination over the method of election rests within the discretion of the Regional Director, and therefore, it was not an issue subject to litigation during the hearing. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2.

Notwithstanding, the parties were afforded an opportunity to present evidence regarding the feasibility of conducting a manual election considering the spread of coronavirus and COVID-19 in the United States, as well as stating for the record the parties' positions with respect to this matter. The parties are not in agreement with the method of election. The Petitioner's position is that, because of the COVID-19 pandemic, currently it is not safe to conduct in-person manual elections. The Employer, on the other hand, argues that a mail ballot is not appropriate because petitioned-for unit employees are not scattered in a wide geographic area, there are no variations among their shifts and/or starting times, and there is no strike, lockout, or picketing in progress. In this regard, the Employer proposes a one-day manual ballot for a two-hour period to be held at the Employer's facility in an office which is about 20 by 24 feet in width and length. The Employer proposes that it could clean the voting area and provide personal protective equipment, gloves and masks, to all participants, and that the room is large enough to allow for social distancing. The Employer further indicated that it also owns a well-ventilated warehouse that is approximately 4,000 square feet in size and is empty and can be used for a manual election, though it is currently rented to a third party that was not part of the proceedings.

For the reasons set forth below, I find that conducting a mail ballot election is required under the present circumstances.

⁴ During the hearing, the Employer renewed its objection, stated in its Statement of Position, to the deadline I required for the Employer's Statement of Position. I issued the original Notice of Representation Hearing in this case on March 17, 2020. The previous day, March 16, the National Labor Relations Board announced that, in response to the ongoing coronavirus pandemic, it was implementing agency-wide telework until at least April 1. Accordingly, the Notice of Representation Hearing set the hearing for a date, time, and place to be determined, with the Statement of Position due by noon on what would have been the seventh day following the issuance of the Notice of Representation Hearing—March 24. The Employer filed its Statement of Position and, to the best of my knowledge, did not seek leave to amend it. I understand the Employer's argument to be that it was not required to file its Statement of Position until a Notice of Representation Hearing issued that included "a time and place fixed therein." Board Rules and Regulations, Sec. 102.63(a)(1). As the Employer filed a Statement of Position, did not seek leave to amend it, and offered nothing in the way to show any prejudice, I reject its objection as moot.

II. Facts:

At the outset, I stress, and take administrative notice of, the pandemic health situation that exists in the United States, and continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. The virus that causes COVID-19 is infecting people and spreading easily from person-to-person. On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. This situation poses a serious public health risk, and the federal government is working closely with state, local, tribal, and territorial partners as well as public health partners, to respond to this situation. The Center for Disease Control (CDC) has also issued guidelines or recommendations to help respond to this emerging public health threat, including avoidance of gatherings of more than ten people, the use of cloth face covering and social distancing, among other recommendations.

On March 5, 2020, the Governor for the State of Maryland, Lawrence J. Hogan, Jr., proclaimed a state of emergency and existence of catastrophic health emergency, to control and prevent the spread of COVID-19 within the state. The order was renewed on March 17, 2020 and renewed again on April 10, 2020. As the COVID-19 crisis continued its escalation in the mid-Atlantic region encompassing Maryland, Virginia, and the District of Columbia, Governor Hogan issued on March 30, 2020, a Stay at Home order to protect public health and safety, placing restrictions on business and individuals in the state.⁵ The Employer indicated that its business is considered an essential service under the Governor's order and has continued to operate. Therefore, employees have continued to work and report at the Employer's facility to work.

In addition, on April 10, 2020, Governor Hogan issued an order requiring use of face coverings under certain circumstances and requiring implementation of certain physical distancing measures, recognizing that the current available scientific evidence and best practices support limitations on large gatherings and physical distancing to prevent exposures and transmissions, to protect and save lives, and noting that individuals in the state should refrain from congregating.⁶

The petitioned-for unit consists of about 28 employees that work in the greater Washington, D.C. metropolitan area. Under normal circumstances, before the COVID-19 pandemic, employees would go to the Employer's facility weekly on Mondays at 4:30 p.m. to pick on work orders, drop off timecards, and pick up materials. To prevent the spread of COVID-19, the Employer has put some new practices into place, which includes changing the employees' Monday visits to the work site. To avoid crowds, employee visits are now spread between Monday, Thursday and Friday, and they must select different slots among those three days to get their work orders, drop off timecards and pick up materials. The rest of the time, the employees work on site, mostly at commercial buildings, as has been the practice before the pandemic. The Employer representative indicated that it has no knowledge of any eligible voter or member of their respective households that has tested positive for COVID-19.

⁵ Order Number 20-03-30-01.

⁶ Order Number 20-04-15-01.

Although the Employer proposes that social distancing guidelines can be followed during a manual election at its facility, a manual election requires the participation of voters, approximately 28 in this case, observers, party representatives and a Board agent. Additionally, a manual election requires that observers share the same voter list to check off the names of arriving voters. In a manual election, all voters use the same cardboard voting booth, share the same pencils to mark their ballots, and deposit their ballots in the same cardboard box. Likewise, the Board agent must handle all the paper ballots during the counting that takes place immediately after the close of the polling, and the Board agent and all parties' representatives sign the same Tally of Ballots.

III. Analysis

The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011) (finding that the Regional Director acted within his discretion when he directed an election on a day on which employees were scheduled to attend a meeting at the Employer's facility, but were not scheduled to work); *San Diego Gas & Electric*, 325 NLRB 1143, 1144-1146 (1998) (identifying that a Regional Director has broad discretion in determining the arrangements for an election); *Manchester Knitted Fashions*, 108 NLRB 1366 (1954) (stating that the Regional Director has the discretion to determine the time and place for an election). The Board has specifically found that the Regional Director has the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998) (stressing that the Regional Director has broad discretion in determining the method by which an election is conducted and that such a decision should not be overturned unless clear abuse of discretion can be demonstrated).

In *San Diego Gas & Electric*, the Board noted that it had invested its Regional Directors with broad discretion to determine the method by which elections are conducted. *San Diego Gas & Electric*, 325 NLRB at 1144. However, the Board recognized that such discretion was not unfettered, and it set forth certain guidelines over that discretion. *Id.* In doing so, the Board stated that its policy was that elections should, generally, be conducted manually, but that there were some instances in which a mail ballot would be appropriate because "of circumstances that would tend to make it difficult for eligible employees to vote in a manual election." *Id.* In clarifying the guidelines for a Regional Director's discretion to order a mail ballot election, the Board directed that a Regional Director should consider "at least" where employees are geographically or temporally scattered, or where there is a strike, lockout, or picketing in progress. *Id.* at 1145. In those cases, the Board found that a Regional Director should also consider the positions of the parties, the ability of the unit employees to read and understand a mail ballot, the availability of addresses for employees, and the most efficient use of Board resources. Considering the record, this case does not strike me as presenting the factual predicate that would, in normal times, demand that an election be held by mail ballot. However, these are not normal times, but rather extraordinary times.

In *San Diego Gas & Electric*, the Board recognized that there may be other relevant factors to consider, and that extraordinary circumstances may warrant a departure from the stated guidelines in the exercise of discretion. *Id.* at 1145. see also NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2. Extraordinary circumstances are those unusual and unforeseen deviations from the range of circumstances already considered. A pandemic of a respiratory disease spreading from person to person caused by a novel coronavirus (COVID-19) that poses a serious public health risk could not have been foreseen by the Board at the time it issued its decision in *San Diego Gas & Electric*. This is exactly the type of extraordinary circumstances in which a Regional Director can exercise his or her discretion to take into consideration other factors. I am exercising that discretion in this case to direct that the election be conducted by mail ballot.

While the Board has a long tradition, and a strong general preference, of conducting manual elections, it also has a long history of conducting elections by mail. “From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail.” See *London Farm Dairy*, 323 NLRB 1057 (1997) and cases cited therein. The efforts to slow the spread of COVID-19 have been engaged at all levels of society, and that includes the NLRB itself. Thus, I favor any method of election that avoids the risks or minimizes the potential to all parties of getting infected and/or spreading COVID-19. In this instance, the mail election is the preferable method in order to avoid all risks of exposure and transmission present in group gatherings. Although social distancing and the use of cloth face coverings also helps slow the spread of COVID-19, their use does not guarantee the safety of all participants in a manual election. It still presents some risks of exposure to infection through the gathering and close contact between all the election participants and their touching of common items in the voting places, as previously described. Furthermore, the Employer’s suggestions that employees will not open their mail, even after having knowledge of a mail ballot, seems highly unlikely and/or speculative. Although this case involves several aspects favoring a manual ballot, such as a large, well-ventilated space and an absence of individuals who have currently tested positive for this transmittable condition, I find that a mail ballot better ensures the safety of all participants. There may have been an absence of affected individuals at the time of the hearing, but that factor is undeniably subject to change by the time a manual election would be held. Thus, I am exercising my discretion to direct that this election be held by mail ballot.

IV. Conclusion:

I conclude that, under the circumstances, a mail ballot election is appropriate, as it will better protect the health and safety of voters, Agency personnel, and the parties’ representatives during the current health crisis.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Painters and Allied Trades, AFL-CIO, District Council 51, Local 890.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At 3:00 p.m. on Wednesday, May 6, 2020, ballots will be mailed to voters by National Labor Relations Board, Region 05, from its office at 100 S. Charles Street, Bank of America Center, Tower Two, Baltimore, Maryland 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballots received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, May 13, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 05 Office at (410) 962-2822 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be comingled and counted at the Baltimore Regional Office on Thursday, May 28, 2020, at 3:00 p.m. In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities included but not limited to Stay at Home orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

The parties have agreed, and I conclude, it is appropriate that the Notice of Election and ballots will be in English and Spanish.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending April 19, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by April 24, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, which will be issued shortly after this Decision, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the

end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

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, 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.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Issued at Baltimore, Maryland this 22nd day of April 2020.

(SEAL)

/s/ Sean R. Marshall

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