

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18 - SUBREGION 30**

OMNI GLASS & PAINT, LLC

Employer

and

**PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL #7, AFL-CIO**

Petitioner

Case 18-RC-259116

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on April 22, 2020.¹ The parties waived their right to a pre-election hearing and stipulated that the sole issue is whether the election should be conducted in person or by mail ballot, which is a non-litigable matter.² The Board has delegated its discretion in determining such arrangements to Regional Directors. *San Diego Electric*, 325 NLRB 1143, 1144 (1998). Petitioner argues for an election by mail ballot and the Employer argues for a manual election. In carefully considering the arguments made by the parties on this issue, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the COVID-19 pandemic.

CONCLUSIONS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.³
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

¹ All dates are in 2020, unless otherwise noted.

² See Representation Proceedings Casehandling Manual, Section 11301.4 (“In the event a hearing is held during the course of processing the petition, the Hearing Officer will explore the parties’ positions regarding election arrangements, but parties shall not be permitted to litigate this issue,” citing *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954)).

³ The Employer is engaged in the business of providing commercial painting and glass services out of its Oshkosh, Wisconsin facility. In the last twelve (12) months, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Wisconsin.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time glazing fabricators, including saw operators, glass fabricators, and panel fabricators, employed by the Employer at the Employer's glazing fabrication facility in Oshkosh, Wisconsin; excluding all other employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Painters and Allied Trades District Council #7, AFL-CIO. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

1. Employer Operations

The Employer maintains a shop in Oshkosh, Wisconsin, which employs ten employees in the proposed bargaining unit who fabricate glass panels at the Employer's facility.

2. Positions of the Parties

Petitioner requests a mail ballot election in this matter based on the extraordinary circumstances presented by the COVID-19 pandemic. In support of its position, it notes that Wisconsin is currently under a "Safer at Home" Order which limits in-person contact and travel to certain essential activities. It argues that the Board could not guarantee the safety of Board personnel, party representatives, employees or the public if a manual election were held and that a mail ballot election is the safest option. It further asserts that it would be more expeditious to order a mail ballot election now, rather than running the risk of having to reschedule a manual election because of the evolving nature and uncertainty about COVID-19 at this time.

The Employer argues for a manual election. It asserts that none of the traditional factors favoring a mail ballot as identified in *San Diego Electric*, 325 NLRB 1143 (1998), are present in this matter and that manual elections are favored by the Board. It argues

that the Employer and those involved with conducting an election would not be subject to the “Safer at Home” Order, as its designation as an essential operation would extend to the Board conducting a manual election at its facility. It argues that the presence of non-employee outside parties (such as the Board Agent) “does not increase the risk at all” and that the confirmed number of COVID-19 cases in Winnebago County, where the Employer is located, is very small in comparison to those in New York, Wuhan or Milan. It suggests that the pandemic has now peaked, reducing the risk to those involved with the manual election and proposes various safety measures that could be taken at the manual election. It also argues that a mail ballot election presents its own safety and logistical uncertainties.

3. COVID-19 is an extraordinary circumstance, requiring special consideration.

I have carefully considered both parties’ positions in this matter and I agree that this unit would be appropriate for a manual election in normal circumstances. Unfortunately, we are not under normal circumstances and there is much unpredictability regarding the current COVID-19 situation, including safety measures, whether it has peaked, how long it will last, and when we may return to normal circumstances. COVID-19 is an “extraordinary circumstance” which compels me to consider factors outside the traditional framework when deciding the form an election should take. In *San Diego Gas and Electric*, above, the Board set forth guidelines that should generally be used in determining whether to conduct an election by mail, including the extent of employee dispersion, whether it be geographically or by work schedule, and the presence of striking or locked out employees. However, the Board recognized that it would not expect Regional Directors to consider these factors in “extraordinary circumstances.”

Clearly, the COVID-19 pandemic is an extraordinary circumstance. I need not detail the rising number of confirmed cases (which remain on the rise in Wisconsin), the tens of thousands of deaths and the many uncertainties surrounding this pandemic. The Board has already indicated it considers COVID-19 an “extraordinary circumstance.” In each of its three news releases concerning the impact of COVID-19 upon representation elections, the current Board used the *San Diego Board’s* exact wording-- “extraordinary circumstances”-- to describe the COVID-19 pandemic.⁴ In its latest news release on April 17, the Board stated:

⁴ National Labor Relations Board, News Releases, *National Labor Relations Board Suspends Representation Elections Through April 3, 2020* (March 19, 2020) (available at: <https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>): “Due to the *extraordinary circumstances* related to the COVID-19 pandemic, the National Labor Relations Board today approved the suspension of all representation elections, including mail ballot elections, for the next two weeks effective immediately, through and including April 3, 2020.” (emphasis

Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

Each of the considerations identified by the Board, including existing Board precedent as applied to the matter now before me, favor the use of mail ballots.

4. A mail ballot election is necessary to ensure the safety of the Board Agent, party representatives, voters and the public.

A mail ballot election is the safer option for voters, parties, the Board Agent, and the public. A manual election requires the physical presence of a Board Agent, voters, observers for each party and party representatives. Manual election procedures require personal interaction. Observers share the same list in marking off voters, voters share the same voting booth and deposit ballots in the same cardboard box. The Board Agent hands ballots to each voter and at the conclusion of voting, the Board Agent conducts the count in the presence of others which requires the agent to handle each of the paper ballots previously handled by the voters.

Directing a manual election in this matter would run in direct contradiction to guidance issued by the U.S. Center for Disease Control and Prevention (CDC), which recommends “limit[ing] in-person contact as much as possible.”⁵ The CDC explains that COVID-19 is primarily spread from person to person and that a person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface

added); National Labor Relations Board, News Releases, *NLRB Resumes Representation Elections* (April 1, 2020) (available at: <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>): “On March 19, 2020, because of the *extraordinary circumstances* related to the COVID-19 pandemic, the NLRB had ordered the temporary suspension of all Board-conducted elections through April 3, 2020.” (emphasis added); National Labor Relations Board, News Releases, *COVID-19 Operational Status Update* (April 17, 2020) (available at: <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>): “In doing so, Regional Directors will consider the *extraordinary circumstances* of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.” (emphasis added).

⁵ U.S. Center for Disease Control and Prevention, COVID-19 Guidance Documents, Coronavirus disease 2019 (COVID-19) Factsheet – CDC, *What you should know about COVID-19 to protect yourself and others* (available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>)

or object that has the virus on it, and then by touching your mouth, nose or eyes.” Similar guidance has been put forth by Winnebago County, where this election would take place.⁶ Given this guidance, holding a manual election under the circumstances presented here would needlessly increase the likelihood of spreading COVID-19.

I do not share the Employer’s optimism and certainty as to the safety of conducting a manual election at this time. The Employer cites to no guidance which suggests that limiting in-person contact is no longer recommended or needed to combat the spread of COVID-19. One need not look further than the headlines to see that workplaces are a major source of transmission in the state at the moment.⁷ Indeed, by proposing a variety of safety measures, the Employer must acknowledge there are inherent risks in personal contact during this pandemic. While I have carefully considered each of the safety precautions suggested by the Employer, the safest course at this time is to follow accepted guidance to limit in-person contact, especially in light of the many uncertainties related to transmission of the virus and efficacy of such safety measures.⁸

In contrast, mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact. Contrary to the Employer’s contention, Regional personnel are already handling mail sent to the Subregional office from the general public using appropriate safety precautions and thus there is little additional risk to conducting a mail ballot election. Even in the midst of this pandemic, the Region has already successfully conducted mail

⁶ Winnebago County Health Department, *COVID-19 (Coronavirus)*, <https://www.co.winnebago.wi.us/health/divisions-program-areas/communicable-disease/covid-19-coronavirus> (accessed April 30, 2020) (“Staying home, social distancing and hand washing are crucial to slowing the spread. The entire community is urged to support these efforts. Slowing spread of COVID-19 is necessary to keep from overwhelming our health care system and protecting those most at risk of serious illness.”)

⁷ Perez, Maria, *COVID-19 crisis intensifies at Wisconsin food plants: 1 dead, 100 more test positive*, Milwaukee Journal Sentinel (April 28, 2020).

⁸ See, e.g., Lu J., Gu J., Li K., Xu C., Su W., Lai Z., et al. *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*. Emerg. Infect. Dis. 2020 Jul [accessed April 30, 2020] (available at: <https://doi.org/10.3201/eid2607.200764>) (COVID-19 suspected to have spread by presymptomatic individual in restaurant to patrons sitting at other tables through droplet transmission by air-conditioned ventilation); Reuters Fact Check, *Partly false claim: Wear a face mask; COVID-19 risk reduced by up to 98.5%*, Reuters (April 23, 2020) (“The U.S. Centers for Disease control and Prevention (CDC) told Reuters via email that wearing masks is recommended as a way of strengthening social distancing, but they do not have data to measure how this affects the risk of transmission. ‘Currently we are not finding any data that can quantify risk reduction from the use of masks,’ a CDC spokesperson told Reuters.”).

ballot elections. Although an in-person count may be infeasible for the indefinite future, arrangements can be made for a virtual remote count that provide all the safeguards of a traditional count.

5. A manual election would contravene the “Safer at Home” Order

Wisconsin is subject to a “Safer at Home” order for all Wisconsin residents, which was extended through May 26, 2020. That order requires Wisconsin residents to stay at home unless performing certain essential activities. It also provides that all non-essential travel within Wisconsin is prohibited. To run a manual election would require the Board Agent and party representatives to leave their homes and travel to Oshkosh, Wisconsin and have personal interaction with parties, voters and observers. I cannot deem a manual election in these circumstances to be “essential,” when a mail ballot election is both feasible and safe.⁹

6. Ordering a mail ballot election under these circumstances is supported by existing Board precedent.

My determination that a mail ballot election is appropriate given the circumstances is consistent with Board precedent. In *National Van Lines*, 120 NLRB 1343 (1956), the Board noted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

Consistent with Board precedent, I must exercise my discretion with the understanding that unit employees are currently working in the midst of the COVID-19 pandemic and that COVID-19 is spread by in-person contact. Given that “peculiar condition,” in exercising this discretion, I must protect the health and safety of all involved and the integrity of the election process. As such, I find that a manual election in this matter is not appropriate at this time due to safety concerns and local government directives related to the COVID-19 pandemic. Further, there is no known time in which such safety concerns and/or government directives will end. As a result, a mail ballot election will allow for holding of the election “at the earliest date practicable” consistent with the Board’s Rules and Regulations Section 102.67(b).

As discussed above, I have concluded that a mail ballot election can be held successfully without any additional safety risks to participants. Furthermore, I find that a

⁹ Even if the “Safer at Home” Order would not prohibit the holding of a manual election at the Employer, the Order is, at the very least, guidance issued by the State of Wisconsin, which the Board indicated I am to consider.

mail ballot election would meet the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known and up to date. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Wisconsin, the state in which the mail ballots will be sent and received, has been disrupted. Additionally, I note the mail ballot procedure would allow each eligible employee equal opportunity to vote even if they are quarantined due to exposure to COVID-19. For these reasons, a mail ballot election strikes the balance of ensuring a fair and free choice in the election process and the safety of all participants by avoiding their exposure to the risks inherent in a manual election in the midst of this pandemic.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Subregion 30, on May 11, 2020, at 4:30 p.m. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 30 office by close of business at 4:30 p.m. on May 27, 2020. The mail ballots will be counted at the Subregion 30 office located at 310 W. Wisconsin Avenue, Suite 450W, at 3:30 p.m. on June 3, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by May 18, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Subregion 30 office in order to arrange for another mail ballot kit to be sent to that employee.

To ensure the safety of the Board Agent and the public, the count shall be conducted virtually. Additional instructions will follow.

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.

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 cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **May 4, 2020**.¹⁰ 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.

¹⁰ Petitioner waived the full ten-day period in order to proceed with an election on May 11, 2020.

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

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 accompanying 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.

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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.

Dated April 30, 2020

/s/ Jennifer A. Hadsall

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Attachments