

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

In the Matter of)	
)	
ATLAS PACIFIC/GULFTECH)	
)	
Employer,)	Case No. 27-RC-258742
)	
and)	
)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER,)	
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL)	
AND SERVICE WORKERS INTERNATIONAL UNION)	
AFL-CIO, CLC)	
)	
Petitioner,)	
_____)	

**PETITIONER'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW AND
EMERGENCY MOTION**

Respectfully submitted on this 28th day of
April, 2020

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BACKGROUND

Pursuant to the National Labor Board's ("Board") Rules and Regulations 102.67, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC, ("USW" or "the Union") hereby responds to Atlas Pacific's ("Employer") Request for Review in the above captioned case. On April 3, 2020, the Union filed a petition to represent the employer's production and maintenance employees at its Pueblo, Colorado facility. The Union requested a mail ballot election in its petition. The Employer would not stipulate to the mail ballot. This was the only issue not agreed upon.

Due to the current Coronavirus pandemic, Region 27 of the NLRB conducted a telephonic hearing on April 13, 2020 in lieu of an in-person hearing. Since the question of the mail ballot election was the only issue, Regional Director Paula Sawyer ("RD") correctly limited the parties to putting their respective positions on the record. On April 20, 2020, the RD directed a mail ballot election. On April 24, 2020, the Employer Requested Review of the RD's Decision and Direction of Election and filed an Emergency Motion to Stay the Election.

The Union strongly opposes the Employer's Motion since the current election rules provide that Requests for Review almost always be dealt with post-election and there is no basis for an exception to these rules ore the delay in the employees' rights to an election that would result. The Union further offers the following response to its Request for Review.

UNION'S RESPONSE

The Employer added no new argument in its Request for Review to those it presented at the telephonic hearing. The Employer provides no legitimate basis for not having a mail ballot

election under the current universally recognized public health crisis. Instead, it incorrectly states that the RD abused their discretion in directing a mail ballot election because there was no prior case precedent providing for one during a national pandemic. What the Employer fails to address is that there could not be such a prior case since there has not been a national pandemic remotely near this magnitude involving a serious virus this contagious in at least 100 years.

There is no dispute that the Board has delegated to the Regional Directors discretion in determining whether an election should be conducted by manual balloting or mail ballot. See *San Diego Gas and Elec.*, 325 NLRB 1143 (1998); *Nouveau Elevator Industries, Inc.*, 326 NLRB 470 (1998). In *National Van Lines*, where an employer challenged a Regional Director's direction of a mail ballot election, the Board stated:

[Circumstances] surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions. Because of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections shall be conducted. Only where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him to conduct representative elections will the Board nullify an election and prescribe other election standards. 120 NLRB 1343, 1346 (1958)

As the Union presented during the telephonic hearing, this is a clear case where the RD should exercise their discretion to direct a mail ballot election or several reasons. First and most importantly, we are in the midst of a public health crisis of a level not seen in this country in 100 years. On its website, the Center for Disease Control has advised that for public safety including the safety of their employees and their families, businesses that remain open should:

Actively encourage sick employees to stay home:

- Employees who have symptoms (i.e., fever, cough, or shortness of breath) should notify their supervisor and stay home.
- Sick employees should follow CDC-recommended steps. Employees should not return to work until the criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.

- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and follow CDC recommended precautions.

Identify where and how workers might be exposed to COVID-19 at work:

- See OSHA COVID-19 external icon webpage for more information on how to protect workers from potential exposures and guidance for employers pdf icon external icon, including steps to take for jobs according to exposure risk.
- Be aware that some employees may be at higher risk for serious illness, such as older adults and those with chronic medical conditions. Consider minimizing face-to-face contact between these employees or assign work tasks that allow them to maintain a distance of six feet from other workers, customers and visitors, or to telework if possible.

Separate sick employees:

- Employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.
- If an employee is confirmed to have COVID-19 infection, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). The employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure.

In short, if any employee shows any sign of respiratory illness the Employer should strongly encourage if not require them to stay home until they are well clear of their illness. Particular attention is to be paid to older employees or employees with underlying health conditions. On March 26, the Governor of Colorado similarly issued a stay at home order for all individuals except for the performance of essential tasks or the performance of essential work. Regardless of any modification the Governor may or may not make at a later date, the concerns both he and the CDC have laid out will continue for the foreseeable future.

As this virus surges throughout the country, there is no way to anticipate who might show such signs or have members of their household show such signs, and if CDC guidelines are being

followed, not be allowed on their worksite. There is no way to anticipate how many employees at a particular work site may show such symptoms or when they may show them. Employees could either be prevented from voting or could feel obligated to show up and vote even if they or a household member were showing signs of infection. The only way to ensure all employees will get an opportunity to safely vote is for a mail ballot to occur.

Secondly, in this environment, it is simply irresponsible to conduct a manual election at this time. A manual election not only requires that employees leave their work areas and gather in or near the polling place, but there must also be agents from all parties present for the pre-election conference, the closing and opening of each poll session and the vote count. This means that Union and Board officials and any outside employer representative may be required to travel from another community to the polling site to inspect it and for the opening and closing of polls and the count and then have to travel back to their community. The Board must have adequate personnel to set up for the election, conduct the conferences and count, and of course to run the election itself. The Union has the right to have representatives of its choosing including attorneys present despite the fact that there may be travel restrictions. Would representatives and Board agents have their temperatures checked before being allowed in the polling area? What if someone had a temperature when they arrived or at some point during the day when they were supposed to be at the polling area such as for the count?

During a manual election, in addition to the voters, there need to be observers for both parties and Board agents who conduct the election. Under normal circumstances, the observers are located right near the Board agent who handles the voter list so they are sure they are talking about and checking off the correct person. It is unclear how this could safely be achieved. Union

organizers are told by employees that the training room in the fabrication building where we understand the employer currently proposes the election to be held is not that large. Based on the employee list the Union received it may be challenging some ballots. How would any challenged ballots be handled? Who would put the ballots in an envelope and sign them? How would the ballots be exchanged and filled out? Would pens need to be exchanged? Would ballots be handed to employees? Would the Board agent change gloves after every voter? Sanitize their hands after every vote? How about the voting booth and ballot box? Would the parties be allowed to inspect them? Would they be sanitized after every person voted? Where would everything be located? How would the count occur while keeping social distance and meeting other CDC guidelines? This would be a logistical nightmare.

Finally, the Employer's proposed terms for a manual election not only do not adequately address the questions raised above, but it is unclear if they could even take place. We have been informed by multiple employees that at least one employee at the facility has recently tested positive and that the proposed polling location has been closed off with no access in response. Since this is the same area where the Employer was holding captive anti-union meetings, it has now had to conduct them directly on the shop floor.

Furthermore, the eligible voter list provided by the Employer contains almost 120 names. Even if the Employer proposes another location or opens this one up by the date of the election, part of its proposal is extended polling hours to allow less crowded voting conditions. As noted in the RD's Decision and Direction of Election, this simply means more time for Board agents and observers to be exposed to each other and whatever else may be found in the polling area. (RD Decision, p. 5). The Union had also received some reports that some supervisory offices

could be located near the proposed voting location. What would happen if the location had to be moved under these circumstances? Again, this would be a logistical nightmare and as the RD notes, an unnecessary one because the well-established mail ballot procedure exists. (RD Decision, p. 5).

In contrast, a mail ballot could be prepared by one or two Board agents following CDC guidelines and then sent out in the mail and returned and parties could even be connected via video for a count. There would be no cumbersome challenge ballot process as the challenged ballots would simply be returned and kept separate until they are resolved. This process is so much simpler and safer for everyone involved during this public health crisis, that it is difficult to see why the Employer is also not supporting it.

Even amidst this pandemic, the Board's central function is to protect the rights of employees under the Act, including the right to a Board conducted election. In this environment, a mail ballot election is the only way to allow employees to exercise their rights to a representation election in a timely and safe manner. The Union therefore reiterates its request that the Regional Director issue a direction for a mail ballot election.

Respectfully submitted,



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CERTIFICATE OF SERVICE

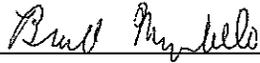
I certify that on the 28th day of April, 2020, I caused the foregoing to be filed electronically with the Office of the Executive Secretary of the National Labor Relations Board and a copy of the same to be served by email on the following parties of record:

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