

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

TOUCHPOINT SUPPORT SERVICES, LLC¹

Employer

and

Case 07-RC-258867

**MICHIGAN COUNCIL 25, AMERICAN FEDERATION
OF STATE, COUNTY, AND MUNICIPAL
EMPLOYEES (AFSCME), AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (“Board”) to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.

I. ISSUES AND PARTIES’ POSITIONS

The Employer provides food and support services to Ascension Providence Hospital, a large acute-care hospital located in Southfield, Michigan (Ascension or Southfield facility). The Petitioner seeks to represent a unit of approximately 84 housekeepers and support services-utility employees employed by the Employer at Ascension.³

The only matter at issue is whether the election should be conducted by manual or mail ballot method.⁴ Petitioner asserts that a mail ballot is the safest way to conduct an election in the context of the COVID-19 pandemic.

The Employer's position is that voting should be conducted entirely by manual ballot, with a Board agent present, based on the Board's longstanding policy favoring manual balloting as set forth in the Board’s *Casehandling Manual Part Two: Representation Proceedings* (CHM), Section 11302.1. The Employer argues that the circumstances herein do not warrant a departure

¹ The Employer’s name appears as amended at the hearing.

² Petitioner’s name appears as amended at the hearing.

³ As amended by the Petitioner and stipulated by the parties at the hearing.

⁴ During the hearing, the Employer also raised the issue that three of the petitioned-for employees employed as “leads” should be excluded from the unit as supervisors under Section 2(11) of the Act. Petitioner agrees that these three unidentified leads should be excluded as statutory supervisors.

from the usual procedure, and that a manual election can easily be held given that the pool of voters is relatively small, and all voters work at a single-site facility and could vote at the same place in a relatively short period of time. The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains that the risk can be mitigated and that it will take steps necessary to have a safe manual election.⁵ In this regard, the Employer indicates that it is able to provide a well-ventilated area that will allow room for social distancing. The Employer further submits that there are similar risk factors present in holding a mail ballot election in relation to the COVID-19 pandemic, including the same exposure to and transmission of the coronavirus via its presence on mail (likely by a Regional staff employee handling the mail ballots before they are mailed or by a postal worker processing such mail) that would be found in-person.

The Employer also argues there are additional and separate risk factors present in conducting a mail ballot election which weigh in favor of a manual election. First, the petitioned-for employees may not be residing at their usual residence where mail is delivered due to their potential virus exposure as essential health care workers to others, or they may be “quarantining” their mail for several days due to exposure concerns. Additionally, the Employer contends that the United States Postal Service (USPS) is impaired with significant delays in the midst of the COVID-19 crisis, thereby rendering a mail ballot election unreliable. The Employer submits that as a result, there is strong chance that employees will be disenfranchised because their mail ballots may not be timely delivered or never received, and thus never counted.

Finally, the Employer argues that there has been no showing that a mail ballot election will be safer than a manual election, particularly where the parties have not been advised in advance of safeguards taken by Regional staff with regard to current election processes. In this regard, the Employer raises concerns about identification and screening of Regional staff who will participate in the preparation, mailing and time-stamping receipt of the ballots during a time when Regional staff are operating largely on an at-home basis.

Although election arrangements, including the voting method, are not litigable matters at a pre-election hearing,⁶ the positions of the parties were solicited for consideration at an April 16, 2020,⁷ telephonic hearing before a hearing officer of the Board. As discussed below, based on the record and relevant Board standard and law, I conclude that under the circumstances of this matter and based on the Board’s announcement to resume elections in a safe and effective manner, the only feasible means for a timely, safe, and effective election is by mail.

⁵ I note that a manual election in this case would be held at a third-party facility (the hospital) and the record does not demonstrate that the hospital has provided assurances that such election could be conducted in a safe manner.

⁶ See, *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

⁷ All dates are in 2020 unless otherwise indicated.

II. PROCEDURAL MATTERS

The Employer's Renewed Motion for an In-Person Hearing

During the hearing, the Employer renewed its April 14, Motion for an In-Person Hearing which I denied by Order dated April 15. The Employer did not raise any new arguments in support of its renewed motion at the hearing. The Employer's renewed motion is denied based on my April 15, Order Denying Employer's Motion for an In-Person Hearing.

Petitioner's Request to Reopen the Record

During the hearing, Petitioner stated that it did not wish to proceed to an election in the event a manual, as opposed to a mail ballot, election is directed. After the hearing closed, Petitioner provided written notice to reopen the record for the purpose of clarifying its position that it does wish to proceed to an election should a manual election be directed. I take administrative notice of Petitioner's April 17 notice to reopen the record. I also take administrative notice of the Employer's April 21 written objections to Petitioner's notice to reopen the record. In requesting to reopen the record, Petitioner does not request to submit additional evidence into the record, nor does it request to change or withdraw from any stipulation reached. Rather, Petitioner's request is merely to clarify its position as to how it wishes to proceed should a manual election be ordered. Thus, over the Employer's objections, I grant Petitioner's request to reopen the record solely for the purpose of accepting Petitioner's clarification of its position that it does wish to proceed to an election should a manual election be directed.⁸

Employer's Request to Reopen the Record

I further take administrative notice that the Employer, in its response to the Petitioner's Motion to reopen the record, made a mirror motion in order to present additional evidence regarding the unreliability of the USPS service based on its experiences receiving mail from the Regional Office.

Unlike Petitioner's motion, however, the Employer seeks to add new evidence to the record regarding the efficacy of the USPS as a reason for avoiding a mail ballot election instead of clarifying a misstatement on the record. As I believe such evidence is unnecessary, I deny the Employer's motion. I do, however, take administrative notice of the fact that mail is occasionally delayed, particularly under the current circumstances. As stated further below, I believe that allowing extra time for the sending and receiving of ballots will allay those concerns and that no further evidence on the subject is necessary.

⁸ Having accepted Petitioner's clarification, I hereby close the record.

III. THE BOARD'S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998) (citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)). This discretion includes the ability to direct a mail ballot election where appropriate. *Id.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines*, supra at 1346.

Section 11301.2 of the Board's CHM provides, in part:

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

This CHM Section sets forth several types of conditions favoring mail ballot elections, including situations where eligible voters are "scattered," geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section states that "[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director." (emphasis added) (citing *San Diego Gas and Electric*, supra).

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the CHM indicates, and the Board has held, that the Regional Director may use discretion to order a mail ballot election where conducting an election manually is not feasible and that under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *San Diego Gas and Electric*, supra at 1144-1145.

IV. DETERMINATION

The circumstances surrounding the COVID-19 pandemic are extraordinary. On March 13, President Trump issued his Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. Detroit and its surrounding metropolitan areas in Southeast Michigan have been strongly affected by the virus with multiple confirmed cases and deaths. On March 23, the Governor of Michigan issued stay-at-home Executive Order No. 2020-21, suspending non-essential activities (effective March 24 through April 13). Thereafter the Governor issued Executive Order No. 2020-42, extending the stay-at-home order

through April 30, and Executive Order No. 2020-59,⁹ extending the stay-at-home order through May 15. These stay-at-home orders have progressed from setting forth social distancing directives which prohibit gatherings of 10 or more persons, consistent with the recommendations of the Centers for Disease Control and Prevention (CDC), to ordering all citizens to stay at home except for travel related to essential activities, observe social distancing and face covering requirements, and prohibiting all indoor and outdoor public or social gatherings of any number of people outside of a single household. These heightened guidelines are based on the continued high rates of the coronavirus cases and subsequent deaths in the State of Michigan. While these state guidelines are currently extended to May 15, it is impossible to forecast how long the pandemic will last or how long there will be restrictions on travel or social interaction.

On March 19, the Board initially responded to the pandemic by ordering the temporary suspension of all Board-conducted elections through April 3. On April 1, the Board announced that it would not extend its temporary suspension of Board-conducted elections past April 3 and would instead resume conducting elections beginning on April 6. The April 1 Announcement specifically noted that “conducting representation elections is core to the NLRB’s mission” and further stated that “appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Director.”

Before turning to the question of whether to direct a manual or mail ballot election based on public health concerns, and specifically whether the circumstances of the COVID-19 pandemic make a mail ballot appropriate, I note there is no contention that the employees in question are scattered by location or schedule. Absent public health concerns this would almost certainly not be an election where a mail ballot would be considered. Under normal circumstances, a manual election could easily be held in a relatively short period of time where the pool of voters is relatively small, and all voters work at a single-site facility. However, for the reasons noted above, this election will not be held under normal circumstances; the issue is not about having a quick in-person election, but rather about having a safe election under the circumstances presented. As noted, guidelines currently in place at federal and state levels recommend avoiding unnecessary social contact and conducting business remotely when possible. The Employer’s employees are at the workplace because they are essential and their work is critical to healthcare; the nature of their work provides no option to perform work remotely. While the mail ballot procedure may not be the Board’s preferred procedure, it is one of the Board’s traditional and accepted procedures for conducting an election.

The unit consists of approximately 84 employees. Any manual election would potentially result in more than 84 interactions between the voters, observers, and the Board Agent(s), against social distancing guidelines, which could be avoided if a mail ballot is used. Board election procedures require the Board agent and observers to cooperatively observe and interact directly with voters, who stand in close proximity to each other while in the voting line and use the same voting booth, writing utensils and ballot box in the course of the election. Furthermore, there are normally numerous individuals, often both party representatives and employees, who come into close contact with each other at the pre-election conference and the

⁹ Executive orders 2020-21 and 2020-42 went into effect on March 24 and April 9, respectively, and are in the record. I take administrative notice of Executive Order 2020-59 which went into effect on April 24 after the hearing closed.

ballot count. Such interaction would necessarily run afoul of the social distancing guidelines and potentially expose numerous individuals to infection or illness.

The Board's manual procedures do not contain an absentee ballot or remote option, so an employee must appear at the polls to vote. It is not inconceivable that an employee who is not working due to illness, considered not working due to mild illness, or has self-quarantined due to exposure to someone who is ill, might report to work to avoid disenfranchisement in a manual election. Besides generally offering a well-ventilated area that will allow for social distancing the Employer does not have any carefully considered plan for how a manual election could be conducted in the circumstances presented. Under these circumstances, manual election procedures present an unacceptable risk of exposure to the virus for voters, party representatives, and Board personnel. In this case, the risk is enhanced because unit employees work at a hospital, which by its very nature presents a presumed increased risk of exposure¹⁰. In far less compelling circumstances, the Board has approved a regional director's exercise of discretion in ordering a mail ballot. *California Pacific Medical Center (St. Luke's Hospital)*, 357 NLRB 197, 197-198 (2011); *Masiongale Electrical-Mechanical, Inc.*, 326 NLRB 493, 493 (1998).

Contrary to the Employer's objections, a mail ballot election has no apparent significant drawbacks. Acknowledging the inherent risks and effect of mail delivery procedures on the outcome of a mail ballot election, there is no indication that the USPS is unable to deliver mail. 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. The return date for mail ballots could be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.¹¹ While the Employer correctly notes that the risk of coronavirus exposure cannot be completely eliminated by conducting a mail ballot election, the risk that coronavirus has been transmitted onto mail by either a Regional staff employee or postal worker appears to far less than the risk of in-person exposure to the virus inside of a hospital treating coronavirus patients. Thus, the current recommendations strongly recommend avoiding or limiting in-person contact between individuals, and as such a mail ballot election minimizes, even if it does not eliminate, risk. Additionally, the mail ballot count can be scheduled well after the ballot return due date, thereby reducing the virus' viability possibly contained on the paper ballot. Finally, with regard to the Employer's concerns about safeguards taken by Regional staff regarding the election process in light of these circumstances, although Regional staff is largely working from home, the Region is and has been fully capable of conducting its business and handling mail.

The Employer argues, in the alternative, that if a manual election cannot be held safely at the current time then it should be scheduled once the pandemic subsides. However, CHM Section 11302.1 states that "[a]n election should be held on the earliest date practicable consistent with the Board's rules." There currently is no clear indication as to how widespread the virus will become or how long its effects will last; there is no end in sight at this time. I therefore find that waiting until it is safe to schedule a manual election would result in an

¹⁰ There is no evidence on the record that the third-party hospital is willing to conduct a manual election even if the parties agreed.

¹¹ I do not agree with the Employer that extending the return date for mail ballots would result in lost or stolen ballots or improper time-stamping of ballots returned to the Regional office.

unreasonably lengthy delay of the election¹² and that a mail ballot election is the most effective means of conducting an election within a reasonable period of time. As the Regional Office cannot safely hold a manual election at any time in the foreseeable future, the best way to maximize employee participation and conduct this election in a reasonably prompt and effective manner is by mail ballot.

V. CONCLUSION

A manual election cannot be held safely at this time and there is no indication when a manual election could be safely held. Waiting until it would be safe to conduct a manual election would further and unnecessarily delay the election. As such, and under these circumstances, I find that a mail ballot election is the most appropriate method of ensuring the safety of the individuals involved while maintaining an opportunity for employees to select whether they wish to be represented by the Union in an expeditious manner.

Based upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce¹³ within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.¹⁴
4. 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.
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 housekeepers and support services-utility employees employed by the Employer at Ascension Providence Hospital located at 16001 West Nine Mile Road, Southfield, Michigan; *but excluding* all transport employees, food service employees, managers, professional employees, guards and supervisors as defined by the National Labor Relations Act, and all other employees.

¹² The petition was filed on April 7.

¹³ The parties stipulated to the following commerce facts: During the calendar year ending December 31, 2019, the Employer, in conducting its operations purchased and received at its Southfield, Michigan facility goods valued in excess of \$50,000 directly from points outside the State of Michigan.

¹⁴ Both parties stipulated that the Petitioner is a labor organization within the meaning of the Act.

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 **MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), AFL-CIO.**

A. Election Details

I have determined that a mail ballot election will be held.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **4:45 p.m. on Tuesday, May 19, 2020**, ballots will be mailed to voters by an agent of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot 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 **May 29, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 7 Office at **(313) 226-3200** or our national toll-free line at **1-844-726-NLRB (1-844-726-6572)**.

Ballots are due in the Detroit Regional Office by 4:45 p.m. on June 19, 2020. All ballots will be commingled and counted by an agent of the National Labor Relations Board at 2:00 p.m. on June 26, 2020. If the Regional Director determines that it is unsafe for the parties to participate in an in-person count at the Regional Office, or any party prefers not to physically attend the count, the parties will participate by using Facetime to observe the count. In the case of a video count, the tally of ballots will be served on any non-physically present parties via email immediately following the count. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, **May 2, 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 **Wednesday, May 6, 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.

Pursuant to Section 102.5 of the Board's Rules and Regulations, the list must be filed electronically by submitting (E-Filing) it through the Agency's website (www.nlr.gov), unless the Employer provides a written statement explaining why electronic submission is not possible or feasible. The Employer must also electronically serve the list on the other parties. To file electronically, go to **www.nlr.gov**, click on **E-File Documents**, enter the **NLRB case number**, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list is on the sending party.

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 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(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **Monday, May 18, 2020**.

A request for review must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules does not permit a request for review to be filed by facsimile. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. A certificate of service must be filed with the Board together with the request for review. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](https://apps.nlr.gov/myAccount/assets/E-Filing-System-User-Guide.pdf) (<https://apps.nlr.gov/myAccount/assets/E-Filing-System-User-Guide.pdf>)

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **Monday, May 18, 2020**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on Monday, May 18, 2020**.

Filing a request for review electronically may be accomplished 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. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could

not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

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 at Detroit, Michigan on this 4th day of May 2020.



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