

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

**JOHNSON CONTROLS, INC.,**

**Employer,**

**and**

**Case No. 16-RC-256972**

**SMART- SOUTHWEST GULF COAST  
REGIONAL COUNCIL,**

**Petitioner.**

**JOHNSON CONTROLS, INC.'S  
REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S ORDER**

Respectfully submitted,

*/s/ Jeremy Moritz*

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Counsel for Johnson Controls, Inc.

Pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, Johnson Controls, Inc. (the “Company”) requests review of the Regional Director for Region 16’s *Order to Postpone Hearing* dated April 23, 2020 (“*Order*”), setting a representation case hearing to be conducted “telephonically or by video” commencing at **9:00 AM Central Time on Monday, May 4, 2020**. (See Attachment 1.)

The following compelling reasons require the National Labor Relations Board (“NLRB” or “Board”) to grant this Request:

- A substantial question of law or policy is raised because the *Order* presents a departure from officially reported Board precedent, to the extent it requires the parties to participate in a telephonic or videoconference representation case hearing.
- To the extent the *Order* rests on valid interpretations of existing Board precedent, there are compelling reasons for reconsideration with respect to important Board rules and policy.

In support of its Request, the Company adopts in its entirety the relevant rationale and argument set forth in the *Employer’s Motion Objecting to Telephonic Representation Hearing* dated April 27, 2020 in *Morrison Healthcare*, 12-RC-257857, which the Company submits applies equally to the instant case. (See Attachment 2.)

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**CONCLUSION**

For all of these reasons, the Company respectfully requests that the Board grant this *Request for Review of the Regional Director's Order*, vacate the *Order*, and stay the hearing that is currently set to commence on Monday, May 4, 2020 at 9:00 AM Central Time.

Dated this 1st day of May 2020.

Respectfully submitted,

/s/ Jeremy Moritz  
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**ATTACHMENT 1**

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

<b>JOHNSON CONTROLS, INC.</b>  <b>Employer</b>  <b>and</b> <b>SMART – SOUTHWEST GULF COAST REGIONAL COUNCIL</b>  <b>Petitioner</b>	<b>Case 16-RC-256972</b>
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**ORDER TO POSTPONE HEARING**

**IT IS HEREBY ORDERED** that the hearing in the above-entitled matter is rescheduled from May 1, 2020, at 9:00 AM to 9:00 AM on **Monday, May 4, 2020**, and on consecutive days thereafter until concluded, a hearing will be conducted **telephonically or by video**<sup>1</sup> before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon Central time on May 1, 2020**. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Central time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 30, 2020



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TIMOTHY L. WATSON  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 16  
819 Taylor St Rm 8A24  
Fort Worth, TX 76102-6107

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<sup>1</sup> Details will be provided at a later date.

**ATTACHMENT 2**





Nothing in the Act, the Board's Rules, nor any procedural manual supports conducting a representation case hearing in which none of the participants are present in a single room, let alone a situation where they do not even have the opportunity to observe each other. The absence of any support for this unprecedented procedure is not surprising. The very concept of a hearing conducted entirely by telephone is utterly alien to the Act. This is underscored by Board rule §102.64(b) which states that hearings shall be open to the public – a de facto impossibility in a hearing conducted through a pre-arranged telephonic invitation.

## **II. The Board Has Consistently Restricted the Use of Remote Participation in Hearings.**

On occasion, the Board has considered allowing remote participation in hearings (i.e., not in-person), but approval has been sparingly granted, and for good reason. Furthermore, while the Board may allow video proceedings in certain circumstances, it does not appear to have permitted telephonic proceedings. The issue usually arises in the context of video hearings in an unfair labor practice proceeding. In MPE, Inc., 09-CA-084228 and 09-CA-084595 (January 29, 2015), the Board agreed with the Administrative Law Judge who rejected the use of a proposed mode of video testimony.”<sup>1</sup> The Board's rationale for restricting remote video testimony was summarized well by Administrative Law Judge Mara-Louise Anzalone in Columbia Sussex Corp.:

... Section 102.35(c) of the Board's Rules & Regulations (based on Fed. R. Civ. P. 43) indicates a *strong preference for in-person testimony* and provides that video testimony may be permitted only where the requesting party demonstrates good cause based on compelling circumstances. See Section 102.35(c); see also Fed. R. Civ. P. 43, 1996 Advisory Committee Notes ([t]he very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. “*The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition*”).

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<sup>1</sup> However, in MPE, Inc., the Board granted the General Counsel's motion, allowing a single witness who was incarcerated in a federal prison to electronically testify utilizing a different technology used by the Bureau of Prisons and subject to the safeguards inherent in that environment.

Columbia Sussex Corp., 19-CA-215741 (ALJ Order, Feb. 15, 2019) (emphasis added). Likewise, in Oncor Electric Delivery Co., 364 NLRB No. 58 (July 29, 2016), the Board upheld an administrative law judge's decision to permit remote video testimony of one witness at trial. The judge said:

Clearly, the general principle is that *testimony should be live*, so that the judge and counsels are in the best position to observe the witness. However, exceptions can be warranted. Thus, Federal Rule of Civil Procedure 43(a) provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." ... "*Safeguards must be adopted to ensure accurate identification of the witness and the protection against influence by persons present with the witness.*"

Oncor, slip op. at 8 (emphasis added). Judge Sandron found the circumstances of that witness' testimony satisfied those safeguards: the witness was not an alleged discriminatee, not a direct witness to any events alleged in the complaint and was limited to background evidence regarding workplace technology necessary to understanding the facts of the case. Moreover, the witness testified from a NLRB regional office, and *a Board agent was present throughout*. Id.

In sum, the Board has permitted remote participation by specific individuals in a limited number of cases, and at that, where there are robust protections and precautions safeguarding the integrity of the hearing. Virtually none of those protections will be present for the telephonic hearing contemplated in this matter. While the Employer in no way concedes that a video format would be permissible under Board law and practice or otherwise appropriate, conducting a purported official hearing by teleconference is totally at odds with basic due process and fairness concepts and otherwise should not be permitted.

**III. The Multiplicity of Locations Poses Practical Barriers to a Fair Hearing.**

The fact that the Hearing Officer, court reporter, an uncertain number of party representatives and counsel, and potentially other unseen participants would each join remotely – from separate locations – exponentially multiply the practical and due process issues inherent in a telephonic hearing. In addition, the scattering of participants means there will be *no* control over the locations from which each telephonic participant is speaking. The potential for undue influence or other interference at each location will be – and cannot be – checked. The safeguards noted by Judge Sandron in Oncor – to ensure accurate identification of participants and the protection against influence by those present with participants – will not only not exist, but the risks will be multiplied.

**IV. Conclusion.**

For the foregoing reasons, a hearing conducted by telephone falls far short of minimal standards for a full, open, and fair hearing. The current COVID-19 crisis does not justify trampling basic procedural due process and other rights in the name of convenience or expediency. The Regional Director should cancel the telephone call and reschedule an in-person hearing for the soonest date possible.

Respectfully Submitted,

By: /s/ Christopher M. Repole  
Thomas V. Walsh  
Christopher M. Repole

ATTORNEYS FOR MORRISON  
HEALTHCARE

Dated: April 27, 2020  
New York, New York

