

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

SEAWORLD PARKS & ENTERTAINMENT,)	
)	
Employer,)	
)	
and)	Case No. 12-RC-257917
)	
INTERNATIONAL UNION, SECURITY, POLICE)	
AND FIRE PROFESSIONALS OF AMERICA)	
(SPFPA))	
)	
Petitioner.)	

**MOTION TO POSTPONE UNTIL AN IN-PERSON
HEARING MAY BE SAFELY CONDUCTED**

Pursuant to Rule 102.63 of the Rules and Regulations of the National Labor Relations Board (“the Board”), Sea World of Florida LLC¹ (“the Employer”) requests a postponement of the telephonic hearing in the above-captioned case, which is currently scheduled to begin on May 12, 2020, until such a time when in-person hearings may be safely conducted in light of the extraordinary circumstances surrounding the COVID-19 pandemic. As discussed in more detail below, extraordinary circumstances require a postponement of the representation hearing in the above-referenced case because:

- To require the Employer to participate in a telephonic hearing denies the parties due process, whereas continuing the hearing until such a time as it may safely be conducted in person furthers the Board’s objectives and promotes fairness.
- Conducting the hearing remotely violates the Employer’s right to a fair hearing, especially where the Region does not have mechanisms for conducting such hearings and Employer’s counsel does not have any understanding or rules of procedure from the Region.
- The Board has consistently restricted the use of remote participation in hearings.

¹ Employer is erroneously named “SeaWorld Parks and Entertainment” in the petition.

- As courts have recognized, hearings conducted remotely increase the tendency for fraud, security breaches, and disjointed proceedings.
- The multiplicity of locations poses practical barriers to a fair hearing.
- The uncertainty caused by the COVID-19 pandemic is temporary and neither party will be disadvantaged by a temporary delay.

For all these reasons, the hearing should be postponed until such a time when an in-person hearing may be held.

A. A Remote Hearing Denies the Parties Due Process

Although the Board must protect the right of employees to engage in protected concerted activities, it must simultaneously protect the parties' right to procedural and substantive due process and fundamental fairness. When an election petition is filed, the Board is required by statute to "investigate such petition, and if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c)(1)(B). Since the National Labor Relations Act ("the Act") was adopted, the Board has interpreted "appropriate hearing" to mean in-person hearings where parties appear before a Hearing Officer, call witnesses, introduce evidence, and cross-examine witnesses. *See* NLRB Rules & Regulations Section 102.66(a) ("Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation.") (emphasis added); OM 08-20 ("There is a strong preference for hearings in which all parties, witnesses, and the hearing officer are located in the same hearing room."). Section 102.64(b) of the Board's Rules and Regulations, for example, states that hearings shall be open to the public, which would be impossible in a prearranged remote hearing.

Despite this compelling authority, the Region's Order Rescheduling Hearing ("Order") compelling a telephonic hearing sidesteps the Board's own regulations and will result in a fundamental lack of due process not just to the Employer, but to the Union, and to the employees at issue.

B. Conducting a Remote Hearing Violates the Employer's Right to a Fair Hearing, Especially Where the Region Does Not Have Established Protocols for Such Proceedings

Courts throughout the country have recognized that, despite meaningful technological advancements, "video conferencing may violate due process or the right to a fair hearing." *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *see also United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) ("even in an age of advancing technology . . . virtual reality is rarely a substitute for actual presence") (emphasis added). While remote hearings may be appropriate to address logistical and procedural issues, they are woefully inadequate for substantive, fact-finding evidentiary hearings where witnesses present testimony and lay necessary foundation for documentary evidence.

A remote representation hearing prevents the Region from conducting a fair and "an appropriate hearing" by severely limiting the parties' ability to call and examine witnesses, properly exchange and introduce documentary evidence, and effectively cross-examine witnesses presented by the other side. Those obstacles also inevitably impair the duty of the Hearing Officer to "inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act." NLRB Rules & Regulations Section 102.64(b).

Additionally, these obstacles negatively impact counsels' ability to provide effective representation for their respective clients by hindering counsels' ability to prepare witnesses,

analyze documentary evidence and present evidence during the proceeding. *See, e.g., Rusu v. U.S. I.N.S.*, 296 F.3d 316, 323 (4th Cir. 2002) (explaining that remote hearings reduce an attorney’s effectiveness by preventing him from being able to interact as effectively with the fact-finder, opposing counsel, and/or his client).

Because of these concerns, the Board has rarely allowed remote participation in hearings. In *MPE, Inc.*, 09-CA-084228 and 09-CA-084595, 2015 WL 400660 (Jan. 29, 2015), for example, the Board affirmed the ALJ’s rejection of a proposed mode of video testimony, noting “we agree with the judge that Skype technology, in its current form, is not a viable means for taking video testimony....”² As another example, ALJ Mara-Louize Anzalone noted 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”).

Columbia Sussex Corp., 19-CA-215741 (ALJ Order, Feb. 15, 2019). Likewise, in *Oncor Delivery Co.*, 364 NLRB No. 58 (July 29, 2016), the Board upheld the ALJ’s decision, which provided in part:

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

² This matter involved testimony from a witness who was unavailable to testify in person because he was incarcerated in a federal prison. The Board’s order permitted video testimony to be taken of that witness only via “GLOWPOINT” video conference, “subject to appropriate procedural safeguards to preserve the due process rights of the parties...”

accurate identification of the witness and the protection against influence by persons present with the witness.”

Oncor, slip op. at 8. In that case, ALJ Sandron found the circumstances of that witness’ testimony satisfied those safeguards. In particular, *the witness testified from a NLRB regional office and a Board agent was present throughout. Id.* The Employer presumes that neither of those circumstances will be present in the instant case since the Board’s Order contained no such safeguards or other procedures consistent with due process and procedural fairness.

On the rare occasions when the Board has permitted remote participation in a hearing, there have been robust protections and precautions safeguarding the integrity of the hearing. The Region has not informed the parties of any such precautions in the instant case. Additionally, in this case, the Region has not established any procedures instructing counsel on the rules and procedures for the admission of evidence during a remote hearing. In a traditional hearing, the parties can challenge the admissibility of such documents and a hearing officer can review documents for authenticity and make determinations on admissibility and relevance. The Region has no procedures established advising the parties on the process and procedures for admitting evidence under the current circumstances.

C. Telephonic and Video Conferencing Increases the Potential for Disjointed Proceedings and Poses Practical Barriers to a Fair Hearing

Conducting representation hearings remotely also dramatically increases the potential for fraud, unauthorized recordings, security breaches, and inefficient and disjointed proceedings. *See, e.g., Dey v. Edward G. Smith and Assocs., Inc.*, 719 P.2d 1206, 1208 (Idaho 1986) (“Our review indicates that on several occasions there were disconnections, either deliberate or inadvertent, and that at times the proceedings were heated, argumentative, interrupted, and in effect the appeals examiner lost any control of the situation. Hence, we are unable to determine what testimony if

any was lost, and whether the decision adverse to the claimant was as a result of, and based upon, a fair hearing.”). Those areas for potential abuse are compounded where, as here, the Board has not promulgated any regulations or procedural safeguards concerning remote hearings. *See, e.g., Kirby v. Astrue*, 731 F. Supp. 2d 453, 457 (E.D.N.C. 2010) (“The use of video conferences for hearings before an ALJ raises serious questions as to a claimant’s due process rights to receive a full and fair hearing . . . The use of video conference hearings is highly suspect and should be approached with great caution and care by the ALJ conducting the hearing to ensure that a claimant receives all the benefits that he or she would receive in an in-person hearing.”) (Emphasis added.); *Knisley v. Com., Unemployment Comp. Bd. of Review*, 501 A.2d 1180, 1182 (Pa. Commw. Ct. 1985) (refusing to allow an administrative agency to conduct telephonic hearings “without first having promulgated regulations which will safeguard the minimum due process rights of the parties and also ensure that the hearings are conducted uniformly”).

Additionally, 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 multiplies the practical and due process issues inherent in a remote hearing. The scattering of participants means there will be no control over the locations from which each party is participating. The potential for undue influence or other interference at each location cannot be controlled. The safeguards noted by ALJ 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.

Although the Board conducted a pilot video testimony program in representation cases in 2008 (twelve years ago), and a committee issued certain recommendations for potentially conducting representation hearings remotely, those recommendations are incomplete, outdated

and unable to be implemented at this time. Indeed, the Board will need to significantly overhaul those recommendations before any hearings should proceed remotely. Of course, in the meantime, the COVID-19 pandemic may have subsided and all of the issues surrounding remote hearings could have been avoided if the Region reasonably postponed the hearing.

D. The Current Pandemic Would Require a Limited Postponement

Moreover, the Region's insistence on conducting the hearing remotely fails to account for the fact that the societal upheaval caused by the current COVID-19 pandemic, while significant, is expected to be temporary. In fact, many public health experts believe that the United States has already passed or will soon pass the peak of the pandemic. It is very possible, if not probable, that the Region will be able to resume conducting in-person hearings, with appropriate social distancing protections in place, in approximately 60 days. Thus, even if the representation hearing could be held remotely without resulting in a fundamental due process violation—which it cannot—the alleged need to proceed with such hearings remotely may be moot by the time the Board solves the countless logistical hurdles with remote hearings and ensures the necessary procedural protections are in place. A temporary condition, even one as severe as that caused by the present COVID-19 pandemic, does not justify violating the parties right to due process – particularly when a brief stay of the proceedings can avoid such risk.

As reflected by the Board's March 24, 2020 decision to postpone implementation of its modifications to representation cases from April 16, 2020 to May 31, 2020 and the Board's April 8, 2020 decision to postpone the effective date of the election protection final rules by 60 days – until July 31, 2020 – it is reasonable to delay the hearing in this matter by 60 days, or until a time when it is safe to proceed with an in-person hearing. The Region should continue to advance the Board's sound guidance when addressing the implications of the COVID-19 pandemic on this

matter. In this time of national crisis, it is appropriate to proceed with caution and schedule the hearing for a time when the parties can proceed in-person. An alternative approach could lead to an unsound decision based on an incomplete record that will leave this matter unresolved.

Accordingly, the Employer respectfully requests the Region postpone the hearing for 60 days, or until a time when the parties can safely participate in an in-person proceeding. Respondent observes that the circumstances present in this case appear to be similar to those in Case No. 12-RC-257857 (*Morrison Healthcare*), in which the Board has stayed the telephonic representation case hearing pending the Board's ruling on the employer's Motion Objecting to Telephonic Representation Hearing.

Counsel for the Employer reached out to counsel for the Petitioner to determine the Petitioner's position on this Motion, but counsel for the Employer has not received a response from Petitioner as of the time of filing of this Motion.

Respectfully submitted,

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

A handwritten signature in blue ink, appearing to read 'J. Merrell', is positioned above the typed name and contact information.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Motion to Postpone Until an In-Person Hearing May Safely be Conducted** was served on the following parties via email on the **4th** day of **May, 2020**: Paul D’Aurora, Field Examiner

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