

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

THE NEWS JOURNAL (WILMINGTON),
a division of Gannett Satellite Information Network,
LLC, a subsidiary of Gannett Media Corp.,

Case No. 04-RC-257224
Region 4

Employer,

and

THE NEWSGUILD OF GREATER PHILADELPHIA,
Communications Workers of America, Local 38010,

Petitioner.

**MEMORANDUM OF LAW IN SUPPORT OF REQUEST FOR REVIEW BY
PETITIONER THE NEWSGUILD OF GREATER PHILADELPHIA**

In support of its Request for Review, Petitioner, the NewsGuild of Greater Philadelphia (the “Union”), by and through counsel, submits this Memorandum of Law. In summation, the Acting Regional Director for Region 4 has abused his discretion by superficially scheduling an infeasible manual election, instead of revoking the parties’ Stipulated Election Agreement and holding a pre-election hearing. The Acting Regional Director’s decision to set an arbitrary election date that will invariably have to be postponed due to the ongoing Covid-19 pandemic undermines the Act.

I. BACKGROUND¹

On March 2, 2020, the Union filed a representation petition seeking to represent a bargaining unit of certain employees employed by the News Journal (Wilmington), a division of Gannett Satellite Information Network, LLC, a subsidiary of Gannett Media Corp (the

¹ This is not intended to be a complete recitation of the facts, as additional facts are included in the argument section of this brief below.

“Employer”). On March 9, prior to a scheduled pre-election hearing, the parties reached a Stipulated Election Agreement on the terms of an election for the petitioned-for bargaining unit (the “Agreement”).² Incorporated into the Agreement is an Eligibility Agreement, which provided a complete list of employees who could vote in the election and which employees could vote with and without challenge. On March 10, 2020, the Acting Regional Director for Region 4 approved the Agreement and scheduled a manual election to take place on March 31 at the Employer’s place of business.

On March 17, 2020, the Region informed the parties that the March 31 election was being postponed indefinitely due to public health and safety concerns. The parties were also informed that the election would be rescheduled when a manual election could be safely conducted, but they could, alternatively, voluntarily agree to conduct the election by mail ballot. The Employer declined to agree to a mail ballot election.

On March 19, 2020, the Board announced that it was suspending all elections, including mail ballot elections, until at least April 3, due to “the extraordinary circumstances related to the COVID-19 pandemic.” In response, on the same day, the Union filed a Motion asking the Region to revise the Agreement and order a mail ballot scheduled “on April 6, 2020, or as soon thereafter as practicable.”³ In a March 27, 2020 Order, the Acting Regional Director denied the Union’s Motion and reasoned that he does not have discretion to alter the method for conducting the election as stated in the Agreement.⁴

Then, an April 1, 2020 Press Release informed the public that “the Board will ... resume conducting elections beginning Monday, April 6, 2020.”⁵ In response, the Union filed another

² A true and correct copy of the Stipulated Election Agreement and Eligibility Agreement is attached as Exhibit “A.”

³ A true and correct copy of the Union’s Motion for Mail Ballot Election is attached as Exhibit “B.”

⁴ A true and correct copy the March 27, 2020 Order is attached as Exhibit “C.”

⁵ Press Release, NLRB Resumes Representation Elections (Apr. 1, 2020), *available at* <https://nrlb.gov/newsoutreach/>

Motion asking the Region to revoke the Agreement and hold a telephonic or in-person pre-election hearing to determine if the Region should conduct a mail ballot election.⁶ On April 21, 2020, the Region issued an Order denying the Union's request to set aside the Agreement and conduct a telephonic pre-election hearing.⁷ Instead, in his Order, the Acting Regional Director *sua sponte* scheduled a manual election for June 16th, 2020. However, the Region admits that "the duration and extent of the pandemic is not entirely predictable and accordingly, there is no guarantee that the election can be safely conducted on the rescheduled date."⁸

II. RULE

Under NLRB Rule § 102.71, the Board may grant a request for review from a Regional Director's action if the action is, on its face, arbitrary or capricious.

III. ARGUMENTS

A. The Acting Regional Director abused his discretion by superficially rescheduling the election for an arbitrary and unworkable date. The Region's actions effectively amount to suspending the election indefinitely.

1. The June 16, 2020 election date is arbitrary.

The Acting Regional Director correctly states that "the Agreement contains an express provision for rescheduling the election if postponement is necessary, i.e., 'If the election is postponed, the Regional Director, in his or her discretion, may reschedule the date, time and place of the election.'" Order 3. However, the Acting Regional Director has not actually rescheduled the election, but, instead, has left this representation matter in a perpetual state of "wait-and-see." The Acting Regional Director scheduled a representation election for June 16, 2020 and reasoned this date "is the earliest Tuesday on which the Region believes that it will be safe to conduct a manual

news-story/nlr-resumes-representation-elections.

⁶ A true and correct copy of the Motion is attached as Exhibit "D."

⁷ A true and correct copy of the Region's April 21, 2020 Order is attached as Exhibit "E."

⁸ *Id.* at 3.

election.”⁹ Ex, D, Order 3. However, he provided no reason why a manual election can be conducted safely by mid-June. The Union is aware of no guidance from the Board, any government agency, or other reputable source projecting that conditions will improve enough by mid-June to allow a manual election to be conducted safely. While the undersigned would be ecstatic if it will be safe for people to congregate by mid-June, so far, he has no reason to believe social distancing precautions and local Stay-at-Home orders will be relaxed by June 16, 2020.

In fact, the Region’s Order itself signals little confidence that an in-person election will take place on June 16, 2020. The Acting Regional Director admits that “[o]bviously, the duration and extent of the pandemic is not entirely predictable and accordingly, there is no guarantee that the election can be safely conducted on the rescheduled date.” Id. This begs the question: what is the point of setting a manual election date when there is no way to reasonably predict if the election will proceed as scheduled? In addition, if the pandemic is somewhat predictable, what facts did not Acting Regional Director rely on to predict a manual election can be conducted safely by June 16th?

The Acting Regional Director also stated, “the Region will make every effort to conduct a manual election on that date, so long it will not seriously jeopardize the safety of the parties, the voters, and Regional personnel.” Id. This statement begs the questions: what safety measures could the Region employ on June 16th that it could not use during the initial election date? The answer clearly is that the Region will not be able to conduct a manual election without seriously putting employees and its own staff at risk of infection.

⁹ When negotiating the Stipulated Election Agreement, the parties informed the Region that Tuesday is the preferred day of the week to conduct an election because all unit employees attend a meeting at that day.

2. The Acting Regional Director must articulate facts used to make his decision.

The Board's case law indicates that, when exercising his broad discretion, a Regional Director must consider certain factors and articulate facts guiding his decision. For example, when considering if a mail ballot election should be conducted, the Board permits a Regional Director broad discretion but requires him to consider the factors discussed in San Diego Gas & Electric, 325 NLRB 1143, 1145 (1998).¹⁰ In other words, it is not an exercise of discretion to pick a date randomly or with no explanation. Aside from the fact that June 16th is a Tuesday, the Acting Regional Director did not articulate, and the Union cannot surmise, the facts guiding his decision that a manual election can be conducted safely by this date. The Acting Regional Director merely states "the Region believes that it will be safe to conduct a manual election" on June 16th and that "a manual election, the Board's preferred election method, can likely be completed safely as soon, if not sooner, than a mail ballot election." Ex. D, Order 3. To the contrary, the overwhelming consensus from rebuttable sources indicates that conditions will not improve in mid-June to the point that an in-person election that be conducted safely.¹¹

Therefore, the Acting Regional Director did not truly exercise his discretion to reschedule the election. Instead, he issued a non-decision that in no way resolves when the election actually will take place. As a result, the Acting Regional Director's Order amounts to a perpetual

¹⁰ San Diego Gas & Electric, 325 NLRB at 1145 ("When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress").

¹¹ See, e.g. *As States Move to Reopen, Trump Administration Privately Predicts Deaths Will Rise*, N.Y. TIMES (last updated May 4, 2020), available at <https://www.nytimes.com/2020/05/04/us/coronavirus-live-updates.html#link-7b42d0f5>; *Coronavirus deaths will rise to 3,000 daily by June 1, U.S. government report projects*, WASH. POST (last updated May 4, 2020), available at <https://www.washingtonpost.com/nation/2020/05/04/coronavirus-update-us/?outputType=amp>; Zachary Evans, *Internal CDC Models Project 3,000 Daily COVID Deaths by June 1*, NAT. REVIEW (last updated May 4, 2020) available at <https://www.nationalreview.com/news/internal-cdc-models-project-3000-daily-covid-deaths-by-june-1/>.

suspension of the election, in contradiction to the Board's Apr. 1, 2020 Press Release informing the public that "the Board will ... resume conducting elections beginning Monday, April 6, 2020."

The Stipulated Election Agreement does not give the Acting Regional Director discretion to indefinitely suspend the election, only to reschedule it.

B. The Acting Regional Director's decision to schedule a manual election is unreasonable because a manual ballot election would risk infecting employees and the Board agents conducting the election, as well as jeopardizing the health of the public at large.

A manual election continues to be scheduled, despite the fact that, at the time this Request for Review was filed, over 248, 000 of deaths from COVID-19 have been reported in the United States.¹² Delaware River area has been significantly affected by the coronavirus, with new confirmed cases and deaths every day. When this Request for Review was filed, Delaware had reported over 5,000 cases of COVID-19.¹³

The virus is believed to spread through presymptomatic and asymptomatic individuals. Sending a Board agent to conduct the election would risk the exposure of everyone at the facility. Eligible voters along with other employees who may come into contact with these participants, Board agents, and party representatives would risk exposure to the virus and spreading it to the community and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

A manual election requires close proximity for the duration of the election between Board agents, election observers, and voters. Employees use the same pens or pencils while voting in an

¹² Johns Hopkins University & Medicine Coronavirus Resource Center <https://coronavirus.jhu.edu/map.html> (last accessed May 4, 2020).

¹³ Delaware Public Health announces 170 new positive cases, 9 more deaths related to COVID-19 <https://news.delaware.gov/2020/05/03/delaware-public-health-announces-170-new-positive-cases-9-more-deaths-related-to-covid-19/> (May 3, 2020).

enclosed booth before placing their ballots in a sealed box; each of these ballots is individually handled by the Board agent conducting the election, and available for inspection by the party representatives. Before voting, voters are required to give their names to party observers, who then check the name off of the same voter list. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families, and the community.

The Employer may counter that the Region likely will postpone the election after June 16th to avoid the dangers of a manual election. However, such argument reinforces that the June 16th election date is superficial, and no interested party reasonably believes a manual election will actually be conducted on that date.

C. Conducting a telephonic or videoconference hearing would not prejudice the Employer.

Besides the date, time, and manner of the election, the only other issues that are in dispute involves whether certain employees are part of the agreed upon description of the bargaining unit. In the “Eligibility Agreement,” the parties already have narrowed the voter-eligibility challenges to six (6) employees. Challenges regarding an employee’s eligibility to vote typically are issues litigated at the post-election stage, as stated in Board Regulation § 102.64 (“Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted”). Depending on the outcome of the election, litigation over the eligibility of the six (6) employees may not need to take place at all. The Region’s concern over whether a telephonic hearing would meet the needs of a formal proceeding could moot if it would simply allow the election to proceed.

Furthermore, in the undersigned’s discussion with the Employer’s counsel and the Region’s Field Attorney, no disputes over the facts emerged. Instead, all of the parties’ disputes

involve legal determinations regarding whether certain employees qualify as full-time regular employees. For example, the parties disagree as to whether three “fellows” are part of the bargaining unit.¹⁴ The Employer contends that they are temporary employees and, therefore, outside of the unit, while the Union contends that they are not temporary employees. While the parties will disagree as to how the law applies to the facts,¹⁵ they likely will not dispute factual issues, such as whether a fellow has a written agreement specifying a termination date.

Moreover, this matter does not involve disputes and accusations requiring credibility determinations best suited for an in-person hearing. For the most part, credibility determinations are needed in hearings concerning unfair labor disputes and other matters involving disagreements over facts. In Westside Painting, Inc., the Board stated the following:

Board law "expresses a strong preference for live oral testimony. ... We agree with the court that there are "manifold benefits that live oral testimony offers." Id. Most importantly, live oral testimony enables the judge to observe the demeanor of the witness to determine the witnesses' veracity. As the Board stated in its landmark decision in *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), one of the most frequently cited Board cases, "the demeanor of witnesses is a factor of consequence in resolving issues of credibility."

328 N.L.R.B. 796, 797 (June 24, 1999) (internal citations omitted).

However, Westside Painting, Inc involved “[t]he examination of witnesses in unfair labor practice cases.” Id. The employees in this matter do not share a similar motivation to testify falsely. Their testimony would not involve something as adversarial as whether a party violated the Act, but innocuous facts, such as their job duties. It would be incredulous to argue that the parties and

¹⁴ The three “fellows” (Ira Porter, Nicholas Perez, and Jeffrey Neiburg) are included in the “Employee Voters Who May Vote Subject to Challenge” list of the Eligibility Agreement attached to the Election Agreement.

¹⁵ “The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. Marian Medical Center, 339 NLRB 127 (2003). If the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. Personal Products Corp., 114 NLRB 959 (1955).” NLRB, *An Outline of Law and Procedure in Representation Elections* 258 (Aug. 2012), *available at* https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf

hearing officer would need to intensely cross-examine and interrogate such witnesses in order to get at the truth. Instead, a pre-election hearing in this matter is only needed to present the undisputed facts before the Region, not to actually resolve what the facts are.

D. Conducting a telephonic or videoconference hearing conforms to the Board's decision to lift the suspension of representation elections.

In response to the Union's request to hold a telephonic pre-election hearing, the Region reasons that a "telephonic hearing would be safer but would require the use of technology that may not fully meet the needs of a formal proceeding in every situation, especially where there may be multiple contested issues, as in this case." Undoubtedly, the Board was fully cognizant of the Covid-19 pandemic and the safety challenges present when it issued its April 1 Press Release. It is nonsensical that the Board would lift the suspension of elections while not permitting pre-election hearings to be conducted telephonically or by videoconference. By refusing to conduct a remote hearing, the Acting Regional Director effectively has extended the suspension of elections in Region 4.

The Region's position also has destructive repercussions on employees' right to select their bargaining representative. Due to the Region's decision to not hold pre-election hearings until the Covid-19 pandemic is over, an employer could indefinitely prevent a representation election by refusing to sign a stipulated election agreement.

IV. CONCLUSION

The Union realizes that the Agreement and case law provide the Acting Regional Director broad discretion when determining the terms of the election. In addition, the Covid-19 pandemic presents the Region with daunting challenges in carrying out its responsibility to conduct elections. In the April 7 Press Release, Chairman John F. Ring stated: "Conducting representation elections is

core to the NLRB’s mission, and ensuring elections are carried out safely and effectively is one of our primary responsibilities.” The Union does not wish to downplay the importance of the word “safely” in that statement. On the other hand, the Chairman also indicated that the Board should ensure elections “are carried out.” The Union is skeptical that a manual election will be carried out on June 16, 2020 and any reasonable observer of the pandemic’s progress would agree. Instead of allowing the Region to set arbitrary election dates that will be inevitably postponed, the Union asks the Board to order the Acting Regional Director to take a proactive approach to fulfilling the NLRB’s mission. The Board should order the Acting Regional Director to revoke the Agreement and hold a telephonic or videoconference pre-election hearing. Alternatively, the Board should remand this matter and order the Acting Regional Director to articulate the facts guiding his decision that a manual election can be safely conducted on June 16, 2020.

Respectfully submitted,

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