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Morrison Healthcare and SEIU United Healthcare Workers East, Petitioner. Case 12–RC–257857

May 11, 2020

ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On March 11, 2020, the Petitioner filed a petition to represent a unit of employees at the Employer’s hospital. The Regional Director initially scheduled a preelection hearing for Thursday, March 19. On March 17, the Regional Director postponed the hearing indefinitely, “in view of current health concerns with COVID-19.” Subsequently, on April 22, the Regional Director issued a notice of representation hearing, rescheduling the postponed hearing for Thursday, April 30, and stating that it would be a “telephonic” hearing. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, as amended, the Employer filed a request for review.¹ On April 30, 2020, the Board issued an order staying the hearing.

The issue in this case is whether the Regional Director erred in scheduling a telephonic preelection hearing. For the reasons stated below, the Employer’s request for review of the Regional Director’s notice of representation hearing is granted, as it raises substantial issues warranting review. Upon review, we clarify that representation-case hearings that involve witness testimony should be conducted by videoconference, not telephonically. The Board’s April 30, 2020 stay order is lifted as of today’s order.

Section 102.35(c) of the Board’s Rules, which pertains to hearings in unfair labor practice cases, states that “[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.” The provisions relating to representation hearings do not contain a similar provision: they neither restrict or condone witness testimony or hearings conducted via telephone or by videoconference. We can discern no reason to adopt a more restrictive approach to the use of videoconference hearings in representation cases, and so they will be allowed on a showing of good cause based on compelling

circumstances and under appropriate safeguards.² As for telephonic conferences, we will permit them only where compelling circumstances exist and no witness testimony is involved.

The Board’s experience with remote testimony in unfair labor practice hearings is instructive with respect to delineating the use of video and telephonic hearings in representation cases. With respect to telephonic hearings, in *Westside Painting, Inc.*, 328 NLRB 796 (1999), the Board declined to adopt a then-recent change to the Rules of Federal Procedure which “provid[ed] for the contemporaneous transmission of testimony from remote locations ‘for good cause shown in compelling circumstances and upon appropriate safeguards.’” *Id.* at 797 fn. 7. The Board observed that its extant Rules provided for only one exception from live, oral testimony—depositions—and explained that “[d]uring the almost 65-year period that Rule 102.30 or its predecessor have been in effect, there is not a single Board case permitting the use of telephone testimony.” *Id.* at 797. It further explained that a telephonic hearing would create several important due process and procedural concerns, as “[t]he opportunity to observe the demeanor of a witness is particularly important in Board proceedings because . . . a judge is often presented with situations where there is conflicting testimony and credibility determinations are central to the resolution of the case,” and “the use of telephone testimony may impair a party’s right of cross-examination and raise fundamental questions about the fairness of the hearing” because witness could have documents (or even another individual) guiding their testimony without the Board’s knowledge. *Id.*

Subsequently, the Board adopted Section 102.35(c) of the Board’s Rules which, as indicated, permits video testimony in unfair labor practice cases, and has found that the use of videoconference software adequately addresses the concerns raised in *Westside Painting*, as “the importance of the judge and the parties being able to observe the witness for credibility” and “due process” are preserved where the use of modern videoconference technology “enable[s] the observation of the witness at all material times.” *EF International Language Schools*, 363 NLRB No. 20, slip op. at 1 fn. 1 (2015).

Based on these considerations, we find that, where the hearing involves witness testimony, a preelection telephonic hearing continues to raise most of the concerns elucidated in *Westside Painting*. Although credibility

¹ We have treated the Employer’s “Motion Objecting to Telephonic Representation Hearing” as a request for review.

² We recognize that the safeguards set forth in Sec. 102.35(c) address the taking of a single witness’s testimony via video transmission in an

otherwise in-person hearing, and they consequently may not apply in all respects to a hearing conducted entirely via video conference. We leave it to the hearing officer in the first instance to impose appropriate safeguards, informed but not controlled by those listed in Sec. 102.35(c)(2).

determinations are not made in preelection hearings,³ the potential impairment of cross-examination, or the inability to detect whether testimony is being guided by documents or coached by another individual, remain salient. Due to these concerns, we hold that Regional Directors shall not direct telephonic hearings when witness testimony will be taken. Regional Directors may, however, conduct videoconference hearings in representation cases: as discussed above, video testimony may be used, in appropriate circumstances, without infringing the parties' due process rights and does not implicate the concerns presented by telephonic testimony.

All of the concerns raised by telephonic hearings, however, are limited to potential issues with witness testimony, and such concerns are not present where there is no witness testimony. In the representation-case context, preelection hearings may not always involve witness testimony: for example, Regional Directors may hold hearings in which the parties merely state their positions on nonlitigable matters such as election details. We therefore hold that where compelling circumstances exist, and where a hearing does not include witness testimony, the Regional Director may proceed with a telephonic preelection hearing.⁴

Turning to the present case, we find that, at the time the Regional Director issued his April 22, 2020 notice of

representation hearing and continuing to date, the current Coronavirus Disease (COVID-19) pandemic constitutes "compelling circumstances" warranting a remote preelection hearing. To the extent that the hearing will involve witness testimony, we direct the Regional Director to conduct it by videoconference. If, however, the hearing will not involve witness testimony, it may proceed telephonically.

Accordingly, we remand this case to the Regional Director for further proceedings consistent with this Order.

Dated, Washington, D.C. May 11, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ See *Marian Manor for the Aged & Infirm, Inc.*, 333 NLRB 1084, 1084 (2001).

⁴ Nothing in our decision should be read as limiting the ability of parties to agree to a telephonic hearing, provided that "compelling circumstances" exist.