

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 12**

**GANNETT MHC MEDIA, INC., a wholly owned
subsidiary of GANNETT MEDIA CORP. d/b/a
FORT MYERS NEWS-PRESS AND SCRIPPS NP
OPERATING, LLC, a wholly owned subsidiary of
GANNETT MEDIA CORP. d/b/a NAPLES DAILY
NEWS**

Employer

and

Case 12-RC-256899

**THE NEWSGUILD-COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

On February 24, 2020,¹ The NewsGuild-Communication Workers of America, AFL-CIO (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a group of employees of Gannett MHC Media, Inc., a wholly owned subsidiary of Gannett Media Corp. d/b/a Fort Myers News-Press and Scripps NP Operating, LLC, a wholly owned subsidiary of Gannett Media Corp. d/b/a Naples Daily News (the Employer),² a corporation engaged in the business of operating newspapers and an online news media company in Florida.

On March 4, I approved a Stipulated Election Agreement between the parties providing for manual elections to be held at the Employer's Fort Myers and Naples facilities on March 25 in each of the following units:

¹ All dates herein are in 2020, unless otherwise specified.

² The Employer's name appears here as amended at the hearing.

Unit A: All full-time and regular part-time newsroom employees employed by the Employer at its locations in Naples and Fort Myers, Florida; excluding all other employees, digital optimization employees, managers, guards, and supervisors as defined by the Act.

Unit B: All full-time and regular part-time digital optimization employees employed by the Employer at its locations in Naples and Fort Myers, Florida; excluding all other employees, newsroom employees, managers, guards, and supervisors as defined by the Act.

On March 17, I postponed the scheduled elections in Unit A and Unit B indefinitely because of safety concerns related to the COVID-19 pandemic. On March 19, the National Labor Relations Board (the Board) issued a notice that all Board-conducted elections would be suspended through April 3. Then, on April 1, the Board announced that it would not extend the temporary suspension of elections and would resume elections on April 6, and that the General Counsel of the Board had advised that appropriate measures were available to permit election to resume in a safe and effective manner, as determined by the Regional Directors. Following the filing of a motion by the Petitioner and an opposition thereto by the Employer, on April 27, I issued an Order denying the Petitioner's motion to order a mail ballot election and revoking approval of the Stipulated Election Agreement, and a Notice of Rescheduled Hearing. A telephonic hearing was held on May 7 before a hearing officer of the National Labor Relations Board.

At the hearing the parties reached stipulations with respect to all litigable issues.³ As the parties stipulated, I find, that Unit A and Unit B, as described in the revoked Stipulated Election

³ The parties stipulated, and I find, based on the following stipulated facts, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. The Employer is a Delaware corporation with offices and places of business located at 1100 Immokalee Road, Naples, Florida and 4415 Metro Parkway, Suites 100 and 300, Fort Myers, Florida. The Employer is engaged in the business of operating newspapers and an online news media company. During the past twelve months, in conducting its business operations described above, the Employer has held membership in or subscribed to various interstate news services, advertised various nationally sold products, and derived gross revenues in excess of \$200,000 and has purchased and received at its Naples, Florida and Fort Myers, Florida facilities goods valued in excess of \$50,000

Agreement, are appropriate units for the purposes of collective-bargaining.

The only issue for decision in this case is whether manual or mail ballot elections should be held. The Petitioner takes the position that because of the COVID-19 pandemic, it is not currently safe to conduct in-person manual elections. Additionally, the Petitioner argues that the employees in the units are all working remotely, from their homes, rather than at the Employer's premises, and therefore they are scattered, making a mail ballot appropriate. The Employer represented that it does not prefer either method of election and that its top priority is the well-being of the employees and the integrity of the election procedure, but expressed apprehension about both methods of election. With respect to manual elections, the Employer expressed concerns about the Board's ability to ensure that social distancing is maintained and a congregation of voters at the polling places does not occur, the election observers are kept safe, the voting area is kept clean, and employees who may not feel safe participating in a manual election are accommodated. Regarding mail balloting, the Employer expressed concerns with the Board's ability to count votes in a timely fashion, to permit observers to safely participate in the ballot counts, and to make certain that employees timely receive their ballots.

I have considered the parties' respective positions, and find that a mail ballot is the safest and most efficient way to conduct the elections in these cases for the reasons stated herein.

I. FACTS

At the outset, I take administrative notice of the pandemic health situation that currently exists in the United States, and that continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. The virus that causes COVID-19 is infecting people and spreading easily from person-to-person. On March 11, the COVID-19

directly from points outside the State of Florida. The parties also stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

outbreak was characterized as a pandemic by the World Health Organization. On March 13, the President of the United States proclaimed that the COVID-19 outbreak in the United States constituted a national emergency. This situation poses a serious public health risk.

In the State of Florida, on March 9, the Governor of Florida issued Executive Order 20-52 declaring a state of emergency for the entire state as a result of COVID-19, and on April 3, the Governor issued Executive Order 20-92 directing all persons in Florida to limit their movements and personal interactions outside their home only to those necessary to obtain or provide essential services or conduct essential activities. On April 29, the Governor announced a phased reopening, and the first phase began on May 4. Phase one maintains current Centers for Disease Control and Prevention (CDC) recommendations to prevent the spread of COVID-19, including continuing social distancing while in public, avoiding groups of 10 or more, avoiding nonessential travel, and using face masks in public when individuals can't maintain six feet away from others.⁴ Moreover, it appears that there will be significant health risks from gatherings of people as a result of the ongoing COVID-19 pandemic in Florida, and throughout the United States and globally, for a significant period of time into the future.

With respect to the mail, the CDC finds that it is unlikely for the coronavirus to be spread from mail, products or packaging. To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises that after handling the mail, individuals should wash their hands with soap and water or use hand sanitizer.⁵

Since about mid-March, because of the COVID-19 crisis, the employees in Units A and B have not reported to the Employer's worksites in Naples or Fort Myers., but instead are working remotely from their respective homes. There are approximately 45 employees in Unit A and

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

approximately 6 employees in Unit B. The Employer did not suggest a site or sites for manual elections to be held.

II. ANALYSIS

The determination of the method of election is within the discretion of the Regional Director, so long as consideration is given to the relevant factors, and it is not an issue that subject to litigation at a representation hearing. See *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions*, 108 NLRB 1366 (1954); see also, NLRB Casehandling Manual (Part Two), Representation Proceedings, Sections 11228, 11301.2, and 11301.4. The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.* 357 NLRB 628 (2011). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998).

Specific to instances where mail or mixed manual-mail ballot elections are being contemplated, the Board has stated:

[w]hen 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.

San Diego Gas & Electric, 325 NLRB 1143, 1145 (1998). The Board further defined scattered "to apply in any situation where all employees cannot be present at the same place at the same time." *San Diego Gas & Electric*, 325 NLRB at 1145, fn. 7. A Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election

will not be overturned “unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, 325 NLRB at 1144, fn.

4. Although the Board expects Regional Directors to exercise their discretion within the guidelines outlined above, it recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, 325 NLRB at 1145. The Board stated in *San Diego Gas & Electric* that the term “scattered” should include all situations where employees cannot be present at the same place at the same time, which is precisely the case here. The employees in the petitioned-for-units cannot be expected to assemble at a specific place and time due to the COVID-19 pandemic and the fact that they are working from their homes in order to stay safe during the pandemic. Exercising my discretion to direct a mail ballot here falls squarely within the Board’s directives in *San Diego Gas & Electric*, supra.

The Board has already applied the guidelines in *San Diego Gas & Electric* to the extraordinary circumstances created by the COVID-19 pandemic in an unpublished Order issued in *Atlas Pacific Engineering Company*, Case 27-RC-258742 on May 8. In that case the Regional Director directed a mail ballot election notwithstanding the employer’s argument that a manual election could be safely accomplished at its facility. The Board denied the employer request for review of the Regional Director’s Decision and Direction of Election, stating:

[i]n finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework. Mandatory telework in the regional office is based on the Agency’s assessment of current COVID-19 pandemic conditions in the local area. Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.

Due to the current environment caused by the pandemic, the Board found that the Regional Director did not abuse her discretion in relying on the “extraordinary circumstances” language of the Board’s decision in *San Diego Gas & Electric* to order a mail ballot.

In deciding the method of election, I need to consider factors such as safety, federal, state and local laws and guidance. In this regard, the State of Florida has guidance in effect that calls for continue social distancing, avoidance of groups of 10 or more, and nonessential travel. The Employer’s complement of approximately 51 total employees in the two units is currently teleworking. Thus, these employees are “scattered” and are not present at a common location. Additionally, holding a manual election would require the employees to travel from their current telework locations to the Employer’s facilities or to another building or buildings. This would not only pose an inconvenience, it could also disenfranchise some voters from participating in the election.⁶

Furthermore, both parties have expressed strong concerns about the safety of voters during a manual election because COVID-19 is highly contagious and may be contracted by any voter. A manual election would involve a pre-election in-person meeting between the Board agent, one observer from each party (if the parties chose to designate observers, which is usually the case), and possibly with the parties’ counsels or other representatives, for the purpose of the Board agent and parties examining the polling area, the Board agent setting up the voting booth, posting “Voting Place” signs, distributing badges to observers, providing written and verbal instructions to the observers, answering questions from the observers, confirming arrangements for voter release, discussing any last-minute changes to the voter list, and preparing and sealing

⁶ As was the case with the Board agents in the Board’s Denver Colorado office in *Atlas Pacific Engineering Company*, Case 12-RC-298742, the Board agents assigned to the Region 12 offices in Tampa and Miami, Florida, who might be assigned to conduct the election herein, are mandated to telework.

the ballot box in the presence of the parties.⁷ In addition, throughout the polling period, the Board agent and observers would be present, in fairly close proximity, in order to check the voter list as employees periodically arrive to vote,⁸ and multiple voters would enter the same voting booth, likely touching the same surfaces within a short period of time. After a manual election the parties and Board agent typically meet at the polling place to attempt to resolve any challenged ballots and so the Board agent may count the ballots in the presence of the parties.

These circumstances could present difficulties in preventing the spread of the coronavirus. Manual polling may also raise difficult questions about the use of face masks and/or other personal protective equipment, including whether voters or others can be required to use such equipment. It would not be possible to guarantee the safety of voters, observers, party representatives and Board agents whose presence would be required at a manual election.

I find that a mail ballot election is the safer method of voting and is well suited to effectuating the purposes and policies of the Act during the COVID-19 pandemic. Although steps could be taken to modify the usual procedures for a manual election to an extent to make it somewhat safer, even with such precautions a manual election appears to present a substantially greater risk of spreading the coronavirus than a mail ballot election.

Notwithstanding the Employer's concerns about holding mail ballot elections, there are well-established procedures for conducting effective mail ballot elections set forth in the Board's Casehandling Manual (Part Two), Representation Proceedings, at Section 11336, et seq. Although the Board has a strong general preference of conducting manual elections, it also has a long history of conducting elections by mail. "From the earliest days of the Act, the Board has permitted

⁷ See Section 11318 through 11318.4 of the Board's Casehandling Manual Part Two, Representation Proceedings.

⁸ See Section 11322.1 of the Board's Casehandling Manual Part Two, Representation Proceedings.

eligible voters in appropriate circumstances to cast their ballots by mail.” *London Farm Dairy*, 323 NLRB 1057 (1997) and cases cited therein.

There is no evidence that mail ballot elections endanger public health or that people have been infected with the novel coronavirus by the handling of mail. To the contrary, as noted above, the CDC’s guidance states that the novel coronavirus is unlikely to be spread from mail. In summary, given the extraordinary circumstances caused by the spread of COVID-19, I find it appropriate to exercise my discretion to direct a mail ballot election, the details of which are provided below.

III. CONCLUSION AND FINDINGS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction therein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. There is no contract bar, or any other bar, to conducting elections in this case.
5. Questions 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.
6. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A

All full-time and regular part-time newsroom employees employed by the Employer at its locations in Naples and Fort Myers, Florida; excluding all other employees, digital optimization employees, managers, guards, and supervisors as defined by the Act.

Unit B

All full-time and regular part-time digital optimization employees employed by the Employer at its locations in Naples and Fort Myers, Florida; excluding all other employees, newsroom employees, managers, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the units found appropriate above. Employees in each unit will vote whether or not they wish to be represented for purposes of collective bargaining by The NewsGuild-Communications Workers of America, AFL-CIO.

A. Election Details

The ballots will be mailed to employees employed in the appropriate collective-bargaining units. At **9:30 a.m. on May 28, 2020**, ballots will be mailed to voters from the **National Labor Relations Board, Region 12, 201 E Kennedy Blvd., Suite 530, Tampa, FL 33602-5824**.⁹ 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 **June 5, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at 813-228-2641 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted on **June 23, 2020, at 12:00 p.m.** In order to be valid and counted, the returned ballots must be received in the **Region 12 Tampa office** prior to the counting of the ballots. The count of ballots will be conducted remotely, by video technology (such as iPhone FaceTime or Skype), unless, in my discretion, I determine that

⁹ At the hearing the Petitioner waived 7 days of its 10-day entitlement to the voter list.

conditions at the time permit an in-person count. In that event, the parties will be afforded adequate notice of the place of the in-person count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending May 10, 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(1) 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 **May 15, 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.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region 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.

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 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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: May 13, 2020.



David Cohen, Regional Director
National Labor Relations Board, Region 12
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