

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

SEMINOLE ELECTRIC COOPERATIVE, INC.

Employer

and

Case 12-RC-256815

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 108, AFL-CIO**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

International Brotherhood of Electrical Workers, Local 108, AFL-CIO, (the Petitioner) seeks to represent a unit of all full-time system coordinators, including associate system coordinators, system coordinators I, and system coordinators II employed by Seminole Electric Cooperative, Inc. (the Employer), excluding all other employees, office clerical employees, managers, guards and supervisors as defined by the National Labor Relations Act (the Act).¹ There are 10 employees in the unit sought by Petitioner. The parties have stipulated, and I find, that the agreed upon unit set forth above is appropriate for the purposes of collective-bargaining.

A hearing was held telephonically on May 4, 2020,² before a hearing officer of the National Labor Relations Board (the Board). The only issue presented in this matter, as discussed in more detail below, is how and when the election should be conducted. The

¹ The parties stipulated, and I find, that at all material times the Employer has been a Florida corporation with facilities throughout the State of Florida, including an office and place of business located at 16313 N. Dale Mabry Highway, Tampa, Florida, where it is engaged in business as a public utility. During the past 12 months, in the course and conduct of its business, the Employer derived gross revenues in excess of \$250,000 and purchased and received at its Florida facilities goods valued in excess of \$50,000 directly from points located outside the State of Florida; thus the Employer is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act and is subject to the jurisdiction of the Board. Finally, the parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

² Hereinafter all dates occurred in 2020, unless otherwise noted.

Petitioner seeks a mail ballot election, whereas the Employer prefers a manual election. I have carefully considered the positions and arguments presented by the parties. For the reasons discussed below, I find that a prompt mail ballot election is appropriate given the extraordinary circumstances presented by the COVID-19 pandemic.

I. PROCEDURAL BACKGROUND

The instant petition was filed by Petitioner on February 21. On March 4, the parties executed a Stipulated Election Agreement, which I approved on that date, providing for a manual election to be conducted on March 24 at the Employer's premises. Shortly thereafter, the World Health Organization (WHO) declared that the increasing spread of the novel coronavirus is a pandemic, and the Governor of Florida declared a state of emergency. Accordingly, on March 18, I issued an Order postponing the election due to the safety and health concerns related to the COVID-19 pandemic. The parties did not agree on a proposed amendment of the Stipulated Election Agreement to provide for a mail ballot election.

On April 23, I revoked the Stipulated Election Agreement, finding that a manual election, at that time, would endanger the health and safety of the Employer's employees, the parties, Board personnel, and the public-at-large because of the rapid spread of the novel coronavirus. As discussed in more detail below, a safer-at-home order had been issued in the State of Florida limiting travel within the State. In addition, I ordered a hearing regarding the method of conducting an election.

II. FACTS

At the outset, I take administrative notice of the pandemic health situation that exists in the United States, and continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. As referenced above, on March 11, the COVID-19

outbreak was characterized as a pandemic by the WHO and the Governor of Florida declared a state of emergency. On April 29, the Governor issued Executive Order Number 20-112, for the State of Florida's Phase 1 plan for re-opening its economy. While it permits certain types of business to reopen partially, this Order continues to prohibit groups of people greater than ten from congregating, orders all persons in Florida to avoid nonessential travel, and further recommends that all persons in Florida continue to limit their personal interactions outside the home. Further, Executive Order 20-112 directed all businesses that remained open during non-essential business closures to follow safety guidelines issued by the CDC and continue the use of employee screening or use of personal protective equipment if necessary. For businesses that will re-open, the Governor has directed that they ensure proper social distancing and take the appropriate precautionary measures. Subsequently, on May 8, the Governor extended the state of emergency in Florida that has been caused by the coronavirus for 60 days.

I also take administrative notice of the information, guidance and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States government.³ The CDC states:

[t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).

.... the virus has also been detected in asymptomatic persons.⁴

The CDC also recommends the avoidance of gatherings of more than ten people, the use of cloth face coverings and social distancing, among other recommendations. Relevant to a mail

³ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>.

ballot election, the CDC further states that it is unlikely that the coronavirus will be spread from domestic or international mail, products or packaging.⁵

As noted above, the Employer's corporate office is in Tampa, Florida in Hillsborough County. The Employer also has a backup control facility in Pasco County, Florida, approximately 30 minutes north of the corporate office. Due to the COVID-19 pandemic, employees in the petitioned-for unit, who typically report to the corporate office in Tampa, were relocated to the Pasco County facility as part of the Employer's social distancing plan. As of the May 4 hearing, the employees who were temporarily moved to the Pasco County facility were due to return to work at the Tampa office on May 8, subject to change.

The petitioned-for employees work staggered 12-hour shifts. At the time of the May 4 hearing, the Employer's employees were not wearing masks at work. At that time, the Employer was not aware of any employees or family members of employees that have tested positive for COVID-19.

III. POSITION OF THE PARTIES

The Petitioner argues that a mail ballot election is appropriate in these extraordinary circumstances, and that the mail ballot should follow typical Board procedures for conducting elections by mail. Moreover, the Petitioner raises concerns related to a manual election being held during a pandemic, including whether employees will feel comfortable showing up to vote, the safety of all participants, and whether proper social distancing can be maintained where all voters and participants will necessarily share the same space. In further support of its argument for a mail ballot election, the Petitioner notes the uncertain future surrounding the COVID-19

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>

pandemic. Finally, the Petitioner maintains that the counting of ballots should be accomplished through video meeting technology such as Skype or FaceTime.

The Employer asserts that it is appropriate to conduct a manual election notwithstanding the COVID-19 pandemic. To begin with, the Employer argues that mail ballot elections lack the inherent control of a manual ballot election, where the election is supervised by a Board agent who controls the ballots, the voting environment, and ballot box, and who conducts the vote count in-person immediately after the voting period has ended, whereas a mail ballot involves uncertainties surrounding mail processing and distribution. Further, in the Employer's view, the circumstances here are not akin to the generally recognized situations that make mail ballot elections appropriate, such as when employees are scattered due to their work locations or work schedules, or where a strike, picket, or lock-out would interfere with an in-person election. Additionally, the Employer claims that a mail ballot election effectively silences an employer because it cannot hold meetings with employees during the voting period.

The Employer acknowledges the extraordinary circumstances facing the State of Florida and the United States as a whole, but argues that a manual election can be held safely at the Employer's facility. It proposes to use a large conference center that is adjacent to the main facility and that has a separate entrance apart from the reception area of the main facility. The conference center has the capability to be broken up by movable walls and is not currently being used. Because of its size, the Employer maintains that the conference room is particularly well-suited for enforcement of the CDC's social distancing guidelines. Additionally, the Employer proposes an hour-long voting period to permit sufficient time for employees to maintain physical separation. Finally, the Employer argues that a manual election should not to be held until the

first or second week of June, in part to allow additional time for the Governor's phased re-opening guidelines to take effect.

If a mail ballot election is directed, the Employer asserts that a three-week voting period is needed to account for any delays with mail processing and distribution. Regarding the mechanics of the mail ballot vote count, the Employer prefers an in-person count to a video count.

IV. 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 is 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).

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. 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). Although the Board expects Regional Directors to exercise their discretion within the guidelines outlined above, it also recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, 325 NLRB at 1145.

The Board 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.⁶ Given the

⁶ As was the case with the Board agents in the Board's Denver Colorado office in *Atlas Pacific Engineering Company*, Case 27-RC-258742, the Board agents assigned to the Region 12 office in Tampa, Florida, who will conduct the election herein, are mandated to telework.

extraordinary circumstances caused by the spread of COVID-19 that still face the State of Florida, I find it appropriate to exercise my discretion to direct a mail ballot election.

In making this determination I acknowledge that the Employer's proposal for a manual election includes certain elements that would tend to make a manual election safer. However, a manual election would still 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, providing written and verbal instructions to the observers, answering any questions from the observers, confirming arrangements for voter release, discussing any last-minute changes to the voter list, and preparing and sealing 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 have to enter the same voting booth, likely touching the same surfaces within a short period of time. The ballot count sought by the Employer would necessitate a similar gathering.

These circumstances could present difficulties in preventing the spread of the coronavirus if any of those involved are infected and, as noted, persons may be infected without knowing it because they are asymptomatic and/or have not been tested for the virus. 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. Although

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.

the Employer's plan for a manual election includes asking participants to use protective face coverings, the Employer also questioned whether the Board could require participants to do so. This demonstrates the inherent difficulties in adhering to the CDC and State of Florida guidelines regarding proper social distancing and wearing face coverings.

Whether or not such equipment is used, for the reasons noted above, it is apparent 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, which does not appear to be abating to the extent necessary to hold a safe manual election in the near future. Steps such as those suggested by the Employer that modify the usual procedures for a manual election may make a manual election somewhat safer, but even with such precautions, a manual election appears to present a substantially greater risk of spreading the coronavirus than a mail ballot election.

The Employer's remaining arguments favoring a manual election over a mail ballot election are unavailing. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." See *London Farm Dairy*, 323 NLRB 1057 (1997) (internal citations omitted). Furthermore, the Board has previously rejected arguments that mail ballot elections lack the requisite oversight and that they are ripe for voter coercion and lower voter participation. See *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, 323 NLRB at 1058. Similarly, the Board has considered, and rejected, arguments that an employer is effectively silenced and prohibited from giving mass captive audience meetings. According to the Board:

[w]e note that during the *Peerless Plywood*⁹ period, the employer and its agents remain free to continue to campaign against the union not only through mailings to employees at their houses, but also in the workplace, when they can distribute and post literature, communicate with employees one-on-one, and even continue

⁹ 107 NLRB 427 (1953).

to conduct mass meetings, as long as the meetings are on the employees' own time and attendance is not mandatory.

San Diego Gas & Electric, 325 NLRB at 1146, citing *Livingston Shirt Corp.*, 106 NLRB 400, 408 (1953).

For the foregoing reasons, I direct a mail ballot election to be conducted in accordance with the election details discussed below.

V. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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, as stipulated by the parties, 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. No collective-bargaining agreement covers the employees in the petitioned-for-unit, and no other bar exists to conducting an election.
5. A question 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, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time system coordinators, including associate system coordinators, system coordinators I, and system coordinators II employed by the Employer; excluding all other employees, office clerical employees, managers, guards and supervisors as defined by the National Labor Relations Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local 108, AFL-CIO.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At **9:30 a.m. on May 28, 2020**, ballots will be mailed to voters by the National Labor Relations Board, Region 12, from its office at **201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602-5824**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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) 228-2665** or **(813) 228-2661** or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be comingled and counted at the **Region 12 office, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida** on **June 18, 2020**, at **10:00 a.m.** In order to be valid and counted, the returned ballots must be received in the **Region 12 office** prior to the counting of the ballots. Due to the above-described extraordinary circumstances of the COVID-19 pandemic, I

further direct that the ballot count will be conducted remotely, by video technology (such as iPhone FaceTime or Skype).

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending on May 15, 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 20, 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.¹⁰ 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

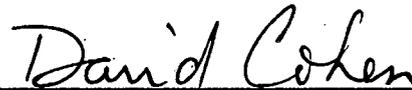
¹⁰ As noted in this Decision, the record reflects that employees in the petitioned-for unit were relocated to an Employer facility in Pasco County, Florida, and that those employees were still operating out of that location as of the hearing date. If petitioned-for employees are still reporting to the Employer's Pasco County facility, the Notice of Election should be posted in conspicuous places at that facility as well, including all places where notices to employees in the unit found appropriate are customarily posted.

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 18, 2020.



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