

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18 - SUBREGION 30**

TDS METROCOM, LLC

Employer

and

**COMMUNICATIONS WORKERS OF
AMERICA, DISTRICT 4**

Petitioner

Case 18-RC-260318

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on May 20, 2020.¹ The parties waived their right to a pre-election hearing and stipulated that the sole issue is whether the election should be conducted in person or by mail ballot, which is a non-litigable matter.² The Board has delegated its discretion in determining such arrangements to Regional Directors. *San Diego Electric*, 325 NLRB 1143, 1144 (1998). The Employer argues for a manual election, while Petitioner defers to my discretion on the issue. In carefully considering the arguments made by the Employer on this issue, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the COVID-19 pandemic.

CONCLUSIONS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.³

¹ All dates are in 2020, unless otherwise noted.

² See *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

³ The Employer is engaged in the business of providing telecommunications services out of its Schofield, Wisconsin facility. The parties stipulated that in the last twelve (12) months, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Wisconsin. I further take administrative notice of the Employer's publicly available financial information and find that its gross annual volume of business exceeds \$100,000.

2. 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.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Field Service Technicians (FST), FST-Network, FST-Network Specialist, and Assistant-Field Services employed by the Employer at its facility in Schofield, Wisconsin; but excluding all office clerical employees, confidential employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Communications Workers of America, District 4. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

1. Employer Operations

The Employer maintains a facility in Schofield, located in Marathon County, Wisconsin. The Employer employs nine employees in the proposed bargaining unit. Those employees primarily work within a 35-mile area within Marathon County, performing internet, television and phone installation, repair and related services. Employees work both inside and outside of customer homes. Employees report to the Employer's facility in Schofield periodically to pick up supplies and to clean their vehicles.

2. The Employer's Position

The Employer argues for a manual election. It asserts that none of the traditional factors favoring a mail ballot as identified in *San Diego Electric*, 325 NLRB 1143 (1998), are present in this matter given that employees regularly report on certain days to the Employer's facility. It points out that manual elections are normally favored by the

Board. Additionally, the Employer cites to various safety measures it has implemented to protect its field employees who must, by virtue of their work, come into regular contact with customers. This includes promoting social distancing, daily employee health and COVID-19 exposure self-assessments, requiring employees wear masks when not able to maintain physical distance, and promoting important hygiene practices, such as regular handwashing. The Employer points out that in Marathon County, where the Employer is located, there have been a limited number of cases compared to other parts of the state. Finally, the Employer also suggests various safety measures which could be implemented for the manual election to reduce the risk of COVID-19.

3. Under the Extraordinary Circumstances Presented by COVID-19, I Find that a Mail Ballot Election Is Appropriate.

I have carefully considered the Employer's position in this matter. COVID-19 is an "extraordinary circumstance" which compels me to consider factors outside the traditional framework when deciding the form an election should take. In *San Diego Gas and Electric*, above, the Board set forth guidelines that should generally be used in determining whether to conduct an election by mail, including the extent of employee dispersion, whether it be geographically or by work schedule, and the presence of striking or locked out employees. However, the Board recognized that it would not expect Regional Directors to consider these factors in "extraordinary circumstances." I find the COVID-19 pandemic to be an extraordinary circumstance based on the ongoing federal, state and local health guidance and the fact that the Regional Offices remain on mandatory telework.

A manual election requires the physical presence of a Board Agent, voters, observers for each party and party representatives. Manual election procedures require personal interaction. Observers share the same list in marking off voters, voters share the same voting booth and deposit ballots in the same cardboard box. The Board Agent hands ballots to each voter and at the conclusion of voting, the Board Agent conducts the count in the presence of others which requires the agent to handle each of the paper ballots previously handled by the voters. Directing a manual election in this matter would run in direct contradiction to guidance issued by the U.S. Center for Disease Control and Prevention (CDC), which recommends "limit[ing] in-person contact as much as possible."⁴ The CDC explains that COVID-19 is primarily spread from person to person and that a person may become infected when an "infected person coughs, sneezes or talks" or by "touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes." Given the availability of a mail ballot

⁴ U.S. Center for Disease Control and Prevention, COVID-19 Guidance Documents, Coronavirus disease 2019 (COVID-19) Factsheet – CDC, *What you should know about COVID-19 to protect yourself and others* (available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>)

election, ordering a manual election under the circumstances would be in direct contradiction to federal guidance.

Furthermore, the considerable amount of travel by the Board Agent, potentially requiring an overnight stay, would also contravene outstanding guidance. Locally, Marathon County's Order #1 recommends compliance with CDC and Wisconsin Department of Health Services guidance. The CDC continues to maintain that "[b]ecause travel increases your chances of getting infected and spreading COVID-19, staying home is the best way to protect yourself and others from getting sick" (emphasis in original).⁵ The State of Wisconsin specifically directs against such travel: "COVID-19 is still spreading across our Wisconsin communities. Staying home is the best way to protect yourself and others from getting sick. We recommend Wisconsinites cancel or postpone all travel, including travel within the state."⁶ This guidance merits special weight given the recent record-breaking uptick in COVID-19 deaths and confirmed COVID-19 cases in Wisconsin.⁷ Finally, the Region's two offices remain under mandatory telework, which is based on the Agency's assessment of current COVID-19 pandemic conditions in the local area.

I further find that a mail ballot election would meet the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known and up to date. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Wisconsin, the state in which the mail ballots will be sent and received, has been disrupted. Additionally, I note the mail ballot procedure would allow each eligible employee equal opportunity to vote even if they are quarantined due to exposure to COVID-19.

There is no known date at which the guidance and circumstances, I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Board's Rules and Regulations Section 102.67(b).

While I have carefully considered each of the safety precautions suggested by the Employer, the safest course at this time is to follow accepted guidance to limit in-

⁵ U.S. Center for Disease Control and Prevention, Coronavirus in the United States- Considerations for Travelers available at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed May 28, 2020)

⁶ Wisconsin Department of Health Services, COVID-19 Travel available at <https://www.dhs.wisconsin.gov/covid-19/travel.htm> (accessed May 28, 2020).

⁷ Piper, Matt, *Wisconsin sees new single-day records in coronavirus deaths, cases and tests*, USA TODAY NETWORK-Wisconsin (May 28, 2020).

person contact and travel within the state. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provide all the safeguards of a traditional count.

For the above reasons, at this time, a mail ballot election is the appropriate course of action in this matter under the extraordinary circumstances presented by COVID-19.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Subregion 30, on June 5, 2020, at 4:30 p.m. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 30 office by close of business at 4:30 p.m. on June 19, 2020. The mail ballots will be counted at the Subregion 30 office located at 310 W. Wisconsin Avenue, Suite 450W, at 3:00 p.m. on June 25, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by June 11, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Subregion 30 office in order to arrange for another mail ballot kit to be sent to that employee.

To ensure the safety of the Board Agent and the public, the count shall be conducted virtually. Additional instructions will follow.

VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the payroll period ending May 23, 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.

VOTER LIST

As required by Section 102.67(I) 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 cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by June 2, 2020.⁸ 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.

⁸ Petitioner waived eight days of the ten-day period in order to proceed with an election on June 5, 2020.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

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.

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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 29, 2020

/s/ Jennifer A. Hadsall

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Attachments