

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

GREENWASTE RECOVERY, INC.

Employer

and

Case 32-RC-260301

**TEAMSTERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. SUMMARY

The petition in this matter was filed by Teamsters Local 350, International Brotherhood of Teamsters (Petitioner) on May 12, 2020,¹ under Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking an election to represent a unit of drivers and driver helpers employed by GreenWaste Recovery, Inc. (Employer) at its recycling and diversion facility located in San Jose, California (Employer's facility). There are approximately 83 employees in the petitioned-for unit sought.

A telephonic hearing on the petition was held on May 26 before a Hearing Officer of Region 32 (Region 32 or the Region) of the National Labor Relations Board (the Board). No issues were litigated at the hearing. The only matter addressed at the hearing was whether to direct a manual or mail ballot election given the current extraordinary circumstances arising from the COVID-19 pandemic.²

As to the sole matter addressed at the hearing, the Employer objects to a mail ballot election, contending that a manual election can be safely conducted with the precautions and procedures outlined by the Employer and that a manual election is particularly appropriate given alleged literacy issues with approximately 20 out of approximately 83 employees in the petitioned-for unit. Petitioner prefers a mail ballot election at the earliest practicable date and contends that the petitioned-for unit is fully capable of voting in a mail ballot election.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary

¹ All dates hereafter are in 2020 unless otherwise indicated.

² On May 11, the Board issued its Decision in *Morrison Management Specialists, Inc. d/b/a Morrison Healthcare*, 369 NLRB No. 76 (2020) (*Morrison Healthcare*). In *Morrison Healthcare*, the Board held that representation hearings that involve witness testimony should be conducted by videoconference, not telephonically. *Id.*, slip op at 1. Consistent with *Morrison Healthcare*, since there were no issues litigated at this hearing, there was no need for witness testimony, and the hearing was conducted telephonically.

circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail ballot election commencing on the earliest practicable date.

II. FACTUAL OVERVIEW

A. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on daily life has been profound. As of June 30, 2,545,250 people in the United States have been infected with COVID-19 and 126,369 people have died from it.³ The Centers for Disease Control and Prevention (CDC) has determined that the best way to prevent the illness is to avoid being exposed to the virus. *How to Protect Yourself and Others*.⁴ Many of the measures recommended by CDC to prevent the spread of the virus are well-known at this point: maintain a six-foot distance between individuals, work or engage in schooling from home, avoid social gatherings, avoid discretionary travel, and practice good hygiene. *Id.*

The CDC has also recently issued COVID-19 guidance for businesses, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020*,⁵ (Interim Guidance) containing recommendations to establish policies and practices for social distancing to reduce the transmission of COVID-19, including: increasing physical space between employees at the worksite by modifying the workspace; using signs, tape marks, or other visual cues such as decals or colored tape on the floor, placed six feet apart, to indicate where to stand when physical barriers are not possible; implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events in accordance with state and local regulations and guidance); closing or limiting access to common areas where employees are likely to congregate and interact; and delivering services remotely (e.g., phone, video, or web).

With respect to travel, the Interim Guidance also suggests that employers limit non-essential travel and consider resuming non-essential travel in accordance with state and local regulations and guidance. As for meetings and gatherings, the Interim Guidance suggests that employers minimize risks to their employees by using videoconferencing or teleconferencing when possible for work-related meetings and gatherings; canceling, adjusting, or postponing large work-related meetings or gatherings that can only occur in-person in accordance with state and local regulations and guidance; and when videoconferencing or teleconferencing is not possible, hold meetings in open, well-ventilated spaces continuing to maintain a distance of six feet apart and wear cloth face coverings.

The CDC has also issued recent guidance for employers whose employees work in office buildings, *COVID-19 Employer Information for Office Buildings*⁶ (Office Guidance), including encouraging that employers establish policies and practices for social distancing by reminding employees that “people may be able to spread COVID-19 even if they do not show symptoms.”

³ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>.

This Office Guidance suggests that employers consider “all close interactions (within 6 feet) with employees, clients, and others as a potential source of exposure.”

A recent report published by the CDC, *COVID-19 Pandemic Planning Scenarios*⁷ (CDC Planning Report), contains a best estimate that 35% of individuals infected with COVID-19 are asymptomatic, meaning that they never exhibit symptoms during the course of their COVID-19 infection, yet they are just as infectious as symptomatic individuals. This CDC Planning Report further estimates that the mean time from exposure to symptom onset of COVID-19 is approximately six days.

Further, although not directly addressing Board elections, I note that the CDC has specifically issued guidance on elections, *Recommendations for Election Polling Locations*⁸ (CDC Election Guidance), stating that officials should encourage mail-in voting. This CDC guidance provides as follows:

Actions for elections officials in advance of election day

Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

- Encourage mail-in methods of voting if allowed in the jurisdiction.

Many state and local governments have also issued restrictions tailored to the situation in specific communities. Since the start of California’s statewide stay-at-home order (State Order) issued on March 19, California has moved forward on its four-stage Resilience Roadmap for modifying its State Order.⁹ Since May 7, California has been in early Stage 2, where retail, related logistics and manufacturing, office workplaces, limited personal services, outdoor museums, child care, and essential businesses can open with certain modifications.

Additionally, on May 8, California Governor Gavin Newsom issued Executive Order N-64-20¹⁰ (Executive Order) to protect Californians’ public health by mailing every registered voter a ballot ahead of the November general election (November election). This Executive Order states that to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes.

At the local level, the Employer’s facility is in San Jose, California, located in Santa Clara County (the County). The County’s most recent Shelter-in-Place Order¹¹ (County Order) issued on June 5, several additional businesses and activities to resume, but it still requires

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

⁹ See <https://covid19.ca.gov/roadmap/#stage-4>.

¹⁰ See <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/>.

¹¹ See <https://www.sccgov.org/sites/covid19/Pages/public-health-orders.aspx#explained>.

everyone in Santa Clara County to continue sheltering in place. All County residents must comply with the restrictions in both the County Order and the State Order, and if the restrictions in the two orders are different, County residents must comply with the stricter of the two orders. Failure to follow the County Order is a crime (a misdemeanor).

The County Order also requires all businesses located within the County to complete a Social Distancing Protocol (Protocol) to protect their employees and the public from risk of COVID-19 when they are working at or visiting a business, including certifying to affirm that: all information in the Protocol is true and accurate to the best of their knowledge; all employees will be provided a copy of the Protocol and receive trainings as required in the Protocol; copies of the COVID-19 PREPARED Sign, Social Distancing Protocol Visitor Information Sheet, and signage will be posted as required by the Protocol; and all applicable measures are being implemented as set forth in the Protocol. Additionally, the County Order mandates that all residents wear face coverings whenever present at a business, including employees and customers, and businesses must post signs directing individuals to wear a face covering when present at their facilities.

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. The Santa Clara County Public Health website reports that as of June 30, there were 4,162 confirmed cases of COVID-19 in Santa Clara County and 155 Santa Clara County residents have died from COVID-19.¹²

B. The Employer's Ongoing Operations

The Employer, which is engaged in the business of refuse collection and recycling, is an essential business that has remained operational during the COVID-19 pandemic. As a result, its drivers and driver helpers continue to report for work and perform their regular duties, albeit with at least some changes in regular operations to incorporate social distancing and sanitizing to the extent possible at the Employer's facility. As an essential business, the Employer has been allowed to continue its regular operations, based on its adoption and adherence to the Protocol prescribed by the County.

According to the Employer, it is complying with its Protocol by taking numerous precautions. All of its employees who can perform their jobs from home are doing so, and are not coming to the Employer's facility. Further, the Employer supplies all of its employees who must continue working at the Employer's facility with N95 or surgical masks and, where needed for their jobs or desired, an unspecified type of sanitary gloves. The Employer also has liberally positioned unspecified types of hand sanitizer and other disinfectants around its site. Additionally, the Employer's employees are instructed and are frequently reminded through signs posted throughout the Employer's facility in English and Spanish posted to maintain a six foot separation from one another, wear their masks, frequently wash their hands, and avoid touching their faces. The Employer has also instructed its employees not to report to work if they are ill.

¹² See <https://www.sccgov.org/sites/covid19/Pages/dashboard.aspx>.

III. POSITION OF THE PARTIES

A. Parties' Factual Stipulations

At the hearing, the parties stipulated, and I find the following facts with respect to the petitioned-for unit:

1. Approximately 70 out of approximately 83 employees in the petitioned-for unit have current commercial driver's licenses (CDLs).
2. The Employer uses a written application for its petitioned-for unit employees to apply to work for the Employer.
3. Each workday, petitioned-for unit employees complete pre- and post-trip inspection forms entitled "Daily Driver's Inspection & Vehicle Condition Report" (inspection reports) and when necessary, also complete written repair forms for "small miscellaneous repairs only" (repair forms).
4. The Employer communicates with the petitioned-for unit employees in writing, among other ways.
5. The Employer maintains a written Employee Handbook (Handbook) that it has distributed to the petitioned-for unit employees and requires all employees to sign and date an acknowledgement of receipt of the Handbook, entitled "Confirmation of Receipt," (Confirmation). Employees must sign and date this written Confirmation in English or in Spanish. Before the employee signature block, the English Confirmation states as follows:

I have received my copy of GreenWaste's Employee Handbook, revision date May 9, 2018. I understand that it is my responsibility to read and familiarize myself with the policies and procedures contained in the handbook.

I understand that any and all policies and procedures contained in this handbook can be changed by GreenWaste at any time except for those mandated by law.

My signature certifies I understand and will follow the contents of this handbook.

B. Petitioner's Position

1. Mail Ballot Election is Necessary due to COVID-19

Petitioner maintains that a mail ballot election is necessary because of the extraordinary circumstances of the current COVID-19 pandemic and its associated restrictions. According to Petitioner, a mail ballot election will allow the election to be conducted safely and without any unnecessary risk during this health crisis, particularly considering the reality of pre-symptomatic transmission and uncertain nature of COVID-19.

Petitioner notes that on March 19, California imposed its State Order requiring Californians to shelter-in-place, and the County Order continues to require individuals in the County to shelter-in-place, prohibits all gatherings, and requires all workers who are able to work from home to do so. Petitioner's position is that a manual election is inconsistent with the County Order at present. Petitioner acknowledges that while the drivers and driver helpers in the petitioned-for bargaining unit are essential employees and cannot perform their job remotely, voting in this election can be done by mail instead of manually.

Petitioner contends that against the extraordinary backdrop of the COVID-19 pandemic, a mail ballot election is the appropriate and safest way to proceed at this time. Petitioner notes that the Board has approved mail ballot elections in other cases due to the COVID-19 pandemic.¹³

Petitioner opposes a manual election because it requires observers, the Board agent, and party representatives to gather at a pre-election conference, including checking of the voter list and inspection of the voting area. Further, a manual election requires the Board agent and the observers to be present in the same voting area for the duration of the proposed 5.5 hours of manual polling times. While the manual polls are open, the observers to share a voter list and each voter to mark each ballot in a shared voting booth and place the ballot in a shared ballot box. Additionally, the Board agent or observers may need to use a restroom at the Employer's facility. Finally, the Board agent, observers, party representatives, and typically eligible voters will gather for the ballot count after the manual election polls have closed.

Petitioner posits that all of these gatherings necessary to conduct a manual election cause potential and unnecessary risk, and it is not possible for the Board agent or the Employer to completely police voters' compliance with such precautions both inside and outside the voting area. Petitioner maintains that the protective measures proposed by the Employer do not eliminate this risk and a mail ballot election presents a safer way of proceeding.

Finally, Petitioner notes that due to the COVID-19 pandemic, the State of California, pursuant to its Executive Order, has moved to an all-mail election for the November election, consistent with CDC Election Guidance that mail-ballot voting be used where allowed.

With respect to the date of any possible manual election, Petitioner emphasizes that the election should be held as soon as practicable and therefore should not be postponed to June 19, as proposed by the Employer. In order to ensure that the election occur as soon as practicable, at the hearing, Petitioner agreed to waive the entire 10-day time period it is entitled to have the voter list before the election.

2. Petitioned-for Unit is Capable of Voting by Mail Ballot

With respect to the Employer's representations regarding the literacy of the petitioned-for bargaining unit, Petitioner asserts that such representations are unfounded and do not compel a manual election. First, Petitioner notes that a mail ballot itself does not require an extensive

¹³ At the hearing, Petitioner cited *Atlas Pacific Engineering Company*, 27-RC-258742 (Order Denying Request for Review, May 8, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867 (Order Denying Request for Review, May 18, 2020); and *Johnson Controls, Inc.*, 16-RC-256972 (Order Denying Request for Review, May 18, 2020).

amount or difficult reading. The mail ballot will be printed in English and Spanish. The mail ballot, just like a manual ballot, requires employees to simply mark yes or no in response to the question of whether or not they wanted to be represented by Petitioner.

Second, Petitioner asserts that all eligible voters will have at least two weeks to mark and return their mail ballots, and there will be notices posted in English and Spanish containing instructions for all eligible voters about voting in the mail ballot election. Petitioner contends that these long-established Board mail ballot procedures will maximize employee enfranchisement for this election.

Moreover, Petitioner disputes the accuracy of the Employer's assertion that approximately 20 of the approximately 83 employees in the petitioned-for unit are illiterate. The parties stipulated, and I find that the Employer requires its employees to complete written applications to apply to work for the Employer. The parties further stipulated, and I find that the Employer communicates with the petitioned-for unit employees in writing, among other ways.

Additionally, the parties stipulated, and I find that 70 out of 83 of the petitioned-for unit employees possess CDLs. According to Petitioner, to obtain CDLs, commercial drivers must pass written tests and use pre-trip written forms during their required skills tests. Petitioner contends that these written requirements for commercial drivers to obtain CDLs reflect that at least 70 out of the 83 employees in the petitioned-for unit of employees that possess CDLs have sufficient literacy to mark and return their mail ballots.

Further, the parties stipulated, and I find that the Employer requires the petitioned-for unit employees to sign and date a Confirmation of the Employer's Handbook, written in English or Spanish. This Confirmation requires each employee to acknowledge, in writing, that the employee understands that it their responsibility "to read and familiarize myself" with the policies and procedures contained in the Handbook. The Confirmation further states the employee's "signature certifies I understand and will follow the contents of this handbook."

The parties also stipulated, and I find that the petitioned-for unit employees must fill out daily inspection reports at the beginning and end of their shifts. Further, the parties stipulated, and I find, that when necessary, the petitioned-for unit employees must complete written repair forms. In addition to these daily inspection reports and repair forms, according to Petitioner, the employees must complete a written daily log or worksheet, where they record their truck number, the odometer, fuel amount, and start and stop times for lunch. Further, Petitioner asserts that the Employer regularly gives its employees written work orders that provide specific written instructions that the employees must follow on their routes to modify the routes in some way, like removing or replacing a can or doing an additional courtesy pickup. Petitioner notes that employees must also complete written can audits, follow written driving instructions when they are on their routes, and understand written documents provided by the Employer.

According to Petitioner, the petitioned-for unit employees disagree with the Employer's assertion that they are incapable of conducting this election by mail, and Petitioner disputes that the Employer's assertions regarding the literacy of the petitioned-for unit are sufficient to

warrant a manual election under the extraordinary circumstances present during the COVID-19 pandemic.

C. Employer's Position

1. Manual Election at the Employer's Facility

The Employer argues that voting should be conducted entirely by manual election, based on the Board's longstanding policy favoring manual elections. According to the Employer, when elections are conducted by mail ballot, the Board cannot be certain that "laboratory conditions" are maintained once the ballots are mailed.

With respect to a proposed date and times for a manual election, the Employer proposes a manual election be conducted on Friday, June 19, from 4:00 a.m. to 7:00 a.m., and from 12:00 p.m. to 2:30 p.m. For this manual election, the Employer proposes taking additional COVID-19 precautions. The Employer proposes a voting area at the Employer's facility, inside an office building, in an approximate 21 feet, 8 inches long by 14 feet wide upstairs conference room (voting area). According to the Employer, this voting area is the same voting area the Region used during a manual election it conducted in 2016. The Employer asserts that the voting area is isolated from other employees, and voters would be routed one-way, so as to ensure that a six foot distance is maintained at all times.

With respect to the eligible voters' access to the voting area, the Employer proposes that they will enter the building through one entrance, walk upstairs to the voting area, enter the voting area, vote, and leave by another exit from the voting area and go down different stairs to leave the building by a separate entrance. Additionally, the Employer proposes that the path into, inside, and out of the voting area will contain floor markings six feet apart to ensure that any voters in line maintain the appropriate six-foot distance from one another. Further, the Employer states that it will admonish its employees who feel unwell or are exhibiting symptoms of COVID-19 to not come to work and not to attempt to vote. Additionally, if agreed by the Region and the Petitioner, the Employer offers to obtain electronic thermometers to test employees arriving to work on the date of the manual election to insure no one has a temperature to suggest any illness.

To avoid long lines of voters, the Employer proposes that eligible voters be released in stages during its two proposed polling periods set forth above. By staggering the release of the drivers and helpers, the Employer contends it should be possible to minimize the length of lines, and avoid employees congregating on the way to the voting area. The Employer proposes to set up the voting to have one entry in the front, and one exit in the back. The Employer also offers to separate three tables six feet apart from one another inside the voting area, one for the Board agent and one for each of the observers. The Employer further offers to put Plexiglas partitions in front of each table to add to the separation of both observers and the Board agent from the voters. The Employer states it will provide an abundant supply of N95 and surgical masks and an unspecified type of sanitary gloves for the Board agent and both observers, as well as unspecified types of hand sanitizer, sanitary wipes and disinfectants for all election participants. If necessary, the Employer suggests that the voting booth could be sanitized after each voter has

used it. Finally, the Employer proposes to provide a separate pencil or pen for each voter, so there is no need for reuse.

With these precautions, the Employer contends that a manual election should be no more hazardous than other essential activities, such as working for an essential business like the Employer or shopping at a grocery store. Additionally, the Employer asserts a manual election will allow the Board to ensure the maximum opportunity for all eligible voters to vote, including its employees alleged to have limited literacy.

2. Employer's Representations regarding its Employees' Literacy

Beyond the Employer's preference for a manual election, the Employer represents that approximately one quarter of the petitioned-for unit, consisting of approximately 20 out of approximately 83 employees, "is either only marginally literate, or nearly completely illiterate, in any language." According to the Employer's Statement of Position, approximately six of its employees "are actually virtually illiterate, never having learned to read or write, either in Spanish or English." The Employer asserts that another 14 of its employees "are functionally illiterate," that "may be able to read at a limited, very rudimentary level in Spanish or, in a few cases, English," but "have great difficulty comprehending or understanding anything more than the simplest, written instructions." The Employer claims that these employees occasionally bring written documents they have received at home to work to have the Employer read and explain the contents to these employees.

The Employer represents that the typical Board instructions accompanying its mail ballots would "be beyond the comprehension of 20 members of the bargaining unit" and as much as "twenty percent of the electorate may thus have their votes suppressed." The Employer also suggests that eligible voters might discard the mail ballot as junk mail.

Conversely, the Employer contends in its Statement of Position that a manual election has a "simpler and more obvious" process, notably admitting that its alleged 20 employees with literacy issues "generally can recognize simple words, such as 'Yes' and 'No' (in either English or Spanish), just as they've had to learn to recognize such simple words as 'Stop' and 'Yield' to obtain their driver's licenses." The Employer also acknowledges that by the election, based on discussions with the Employer, the Petitioner, and other employees, all eligible voters "will know there is an election, will know what it is about, and will know how to mark their ballots to signify their preference."

IV. ANALYSIS

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due

consideration to safety considerations in the context of a pandemic.¹⁴ Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.¹⁵

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has made it clear that mail ballot elections need not be reserved only for the most extraordinary circumstances, reasoning that “neither our precedent nor common sense supports such a stringent approach to the use of mail ballots.” *Sutter Bay West Hospitals*, 357 NLRB 197, 198 (2011). Indeed, the Board has always acknowledged that circumstance may necessitate adaptations on the Board’s part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

The Board has determined that there are some instances in which a mail ballot election is appropriate because “of circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that extraordinary circumstances may warrant a departure from the specific guidelines articulated in that case. *Id.*

I acknowledge that absent public health concerns, I would not order a mail ballot election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. As noted above, current Federal, State, and County public health guidance strongly recommends discouraging gatherings, and a mail ballot election minimizes such risk. As of May 28, there were 2701 confirmed cases of COVID-19 in Santa Clara County and 140 Santa Clara County residents have died from COVID-19. The Employer’s employees remain working at the Employer’s facility because they are drivers and driver helpers that provide essential recycling services, and because of the nature of the work, no alternative exists

¹⁴ In its April 17, 2020 press release, the Board stated that Regional Directors have discretion with respect to when, where and if an election can be conducted in accordance with existing Board precedent and the Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

¹⁵ See *Atlas Pacific Engineering Company*, 27-RC-258742 (Order Denying Request for Review, May 8, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867 (Order Denying Request for Review, May 18, 2020); *Johnson Controls, Inc.*, 16-RC-256972 (Order Denying Request for Review, May 18, 2020); *Roseland Community Hospital*, 13-RC-256995 (Order Denying Request for Review, May 26, 2020); *Seminole Electric Cooperative, Inc.*, 12-RC-256815 (Order Denying Request for Review, May 28, 2020); *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (Order Denying Request for Review, May 28, 2020).

to perform their work remotely. However, the Board does have an alternative to conducting a manual election.

I find that the COVID-19 pandemic presents an extraordinary circumstance that makes conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the unit employees' union representation preferences at this time. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election.

Although the Employer has offered certain accommodations in an effort to allow for some degree of social distancing and protection during the election, manual election procedures inherently require substantial interaction. Voters, observers, and party representatives would all need to appear at the Employer's facility to participate in the election. Party representatives, the observers, and the Board agent would have to gather for approximately 15 to 30 minutes for the pre-election conference, including the check of the voter list and the parties' inspection of the voting area. The Board agent and observers would need to share a voting area in an approximately 300 square foot office at the Employer's facility for the duration of the proposed manual election spanning 5 ½ hours. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent. The Board agent must provide a ballot to each voter, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. The Board agent and observers might need to use a restroom at the Employer's facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, typically held in the same voting area, with the observers, party representatives, and other employees who wish to attend.

In these circumstances, the substantial interaction inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and other protective measures proposed by the Employer. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Despite the Employer's precautions to minimize the transmission and spread of COVID-19 at the Employer's facility, any election participant could be an asymptomatic carrier of the virus.

Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary if the employee were performing work duties, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election. The Board's manual election procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. Additionally, conducting manual elections

under the current circumstances could disenfranchise voters, as employees may be wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation.

With respect to the Employer's representations regarding the literacy level of approximately 20 out of 83 of the petitioned-for unit employees, as stipulated by the parties, I find that the Employer requires all of its employees to complete written applications to work for the Employer. As the parties stipulated, I also find that the Employer communicates with the petitioned-for unit employees in writing. Pursuant to the parties' stipulation, I find that petitioned-for unit employees complete written inspection reports daily and repair forms as necessary. Further, the parties stipulated, and I find that the Employer requires all of its employees to sign and date a written Confirmation, in Spanish or in English, in which each employee must acknowledge, in writing, that the employee understands that it their responsibility "to read and familiarize myself" with the policies and procedures contained in the Handbook. The Confirmation further states the employee's "signature certifies I understand and will follow the contents of this handbook."

Based on my above-noted factual findings resulting from the parties' factual stipulations, I find that the petitioned-for unit employees are capable of marking and returning mail ballots, written in both English and Spanish, that simply require them to mark the mail ballots "Yes" or "No" to indicate their choice regarding representation by the Petitioner and to sign and return the returned mail ballot envelopes. The issue of an eligible employee's literacy is the same whether the election is conducted manually or by mail. *N. Am. Plastics Corp.*, 326 NLRB 835, 838 (1998). As the Employer admits in its Statement of Position, its alleged 20 employees with literacy issues "generally can recognize simple words, such as 'Yes' and 'No' (in either English or Spanish)" and that, based on discussions with the Employer, the Petitioner, and other employees, all eligible voters "will know there is an election, will know what it is about, and will know how to mark their ballots to signify their preference."

I note that if any eligible voter has difficulty with any aspect of this mail ballot election, the eligible voter may call the Regional Office for assistance, as is customary procedure for all Board mail ballot elections. Specifically, as referenced in Section 11336.2(c) of the Board's *Casehandling Manual, Part 2, Representation Cases* (January 2017), all eligible voters in mail ballot elections are provided a mail ballot kit (the kit). The kit contains Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail (Instructions). Inserted on the bottom of the Instructions is the name of a designated Regional Office employee, the return address, and the designated Regional Office employee's telephone number. The designated Regional Office employee named in the Instructions as the contact person will be readily available for any eligible voters to contact with any questions about the mail ballot election. Further, since both parties have requested election Notices and ballots in Spanish and English and the Region is providing Spanish and English election Notices and mail ballots for this election, the Region will make sufficient arrangements to deal appropriately with all inquiries from any Spanish speaking eligible voters. The kit further contains a blue mail-ballot envelope and a yellow postage-paid return envelope addressed to the Regional Office. These returned

envelopes are treated as prospective voters for purposes of identification and challenges at the mail ballot count.

Since the Employer prefers a manual election, I do not take my determination to conduct a mail ballot election lightly. I do not find that a manual election is impossible, or that a mail ballot election is the only appropriate option. However, I have determined that, under the current circumstances, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. In fact, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages mail-in methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board's duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees' union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency's obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

V. CONCLUSION

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

1. The parties stipulated and I find that the Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁶
2. The parties stipulated and I find that 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. The parties stipulated and I find that there is no history of collective bargaining between these parties in the proposed bargaining unit identified above and there is no contract or other bar in existence to an election in this case.
4. 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.

¹⁶ GreenWaste Recovery, Inc., a California corporation, with an office located in San Jose California, and facilities located in San Jose, Watsonville, and Marina, California is engaged in the business of refuse collection and recycling. During the past twelve months, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000. During the same period, the Employer purchased and received goods valued in excess of \$5,000 which originated outside the State of California.

5. The parties stipulated and I find the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time drivers and driver helpers employed by the Employer at or out of its facility located in San Jose, California.

Excluded: All other employees, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 83 employees.

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 **TEAMSTERS LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 32, on July 8, 2020. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 32 office by close of business on **July 29, 2020**. In order to be valid and counted, the returned ballots must be received at the Region 32 office prior to the counting of the ballots.

All ballots will be commingled and counted at a location to be determined by the Regional Director at **10:00 a.m. on July 31, 2020**.¹⁷ The parties will be permitted to participate in the ballot count, which may be held by videoconference. No party may make a video or audio recording or save any image of the ballot count.

Any person who has not received a ballot by **July 15, 2020**, should immediately contact the Region 32 office at (510) 637-3300, or contact Board Agent Nicholas Tsiliacos at (510) 671-3046 to request a ballot.

¹⁷ If, on the date of the count, the Region 32 office is closed, or the staff of the Region 32 office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period of time before the count, the parties will be provided information on how to participate in the count by videoconference.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Sunday, June 28, 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 who are present in the United States may vote.

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 **Thursday, July 2, 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.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must 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.

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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 at Oakland, California this 30th day of June 2020.

A handwritten signature in black ink that reads "Valerie Hardy-Mahoney". The signature is written in a cursive, flowing style.

Valerie Hardy-Mahoney, Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224