

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

Roseland Community Hospital

Employer

Case 13-RC-259788

**Service Employees International
Union (SEIU) Healthcare Illinois &
Indiana**

Petitioner

EMPLOYER'S EMERGENCY MOTION TO STAY THE ELECTION

Roseland Community Hospital ("Roseland," or "Employer"), pursuant to Section 102.67(j) of the National Labor Relations Board's (NLRB" or "Board") Rules and Regulations, hereby respectfully requests the Board to grant an emergency stay of the election in the above captioned matter for fifteen (15) Mental Health Associates and Intake Coordinators, which is currently set to be held by a mail-ballot¹ beginning on Tuesday, June 16, 2020 pending the Board's ruling on Employer's Request for Review (the "Request"). As more fully explained in the Request, the Employer is an acute care, safety net hospital in the Pullman neighborhood of Chicago.

Section 102.67(j)(1) of the NLRB's Rules and Regulations allows a party requesting review to also move to stay some or all of the proceedings, including the election. 29 C.F.R. § 102.67(j)(1). "Relief will be granted only upon a clear showing that it is necessary under the

¹ See Regional Director's June 10, 2010 determination letter, June 10, 2020 decision and direction of a mail ballot election, and a Notice of Election (attached, respectively, as Exhibits 4, 5, and 6 to Employer's Request for Review which is being contemporaneously filed with this Emergency Motion to Stay). The mail ballots were directed to be sent starting six days after the date of the Direction.

particular circumstances of the case.” Id. at § 102.67(j)(2). In light of the extraordinary and unique circumstances of this case and absence of binding Board precedent, a stay is necessary to effectuate the Board’s critical role in assuring employee free choice under Section 7 of the Act. The Regional Director’s error in refusing to honor the parties stipulated manual ballot election agreement and instead ordering a mail ballot only election cannot be remedied in post-election proceedings as the election already will be complete.

Background. On April 30, 2020, Petitioner filed a petition seeking to represent all regular full and part time Mental Health Associates and Intake Coordinators at the Employer (the “Employees”). See Exhibit 1 to the Request. The voting unit consists of Roseland’s 15 regular full and part time Employees working on site at Roseland throughout the pandemic. Roseland is an acute care hospital and the 15 Employees and the two election observers are also employees. On May 29, 2020, the Parties entered into a stipulation by which a manual ballot election was to be held on June 11, 2020, at one of two incredibly safe locations on the Employer’s Property. See Exhibit 2 to the Request. Under the Stipulation the Regional Director was to choose which of two agreed upon locations the manual ballot election would be held. See Stipulation Exhibits. Those exhibits contain protocols for safely conducting the election under applicable guidelines.

Because the unit is so small, under the Stipulation the election was to be held during a two hour window overlapping the 12-hour shifts of the Employees. One of the two locations was a large tent in the far end of Roseland’s parking lot. The second location was a large multi-purpose room in Roseland that was accessible for the voters and others participating in the election only through an exterior door to the outside immediately adjacent to the door into the

multipurpose room of the election situs. Both election sites would be sanitized by trained Roseland staff immediately before the election.

The day before the Parties' stipulated election date of June 10, 2020, the Regional Director finally issued the Direction and a Notice of a Mail Ballot only election (the "Direction") and an accompanying letter purporting to justify his refusal to honor the parties' stipulation (the "Letter"). See Exhibits 4 and 5. In refusing to honor the parties' Stipulation, the Regional Director failed to follow Board precedent pertaining to stipulations,² the appropriate use of mail ballot procedures and longstanding presumption in favor of manual ballot elections.³

The Direction and Letter ignore the nature of the Hospital's and its employees' ongoing, safe operations of the Employees and others during the pandemic,⁴ the nature of Phase 1, 2 and 3 components of stay at home orders in Chicago and Illinois,⁵ and the state of the various governmental stay at home orders at and prior to the direction of election.⁶ On May 28, 2020, the Employer filed the attached proffer of evidence with regard to holding a manual ballot election in this case. See Exhibit 3 to the Request. The Direction and Letter also ignore

² Cf. *T & L Leasing*, 318 NLRB 324 (1995); *Super Valu Stores*, 179 NLRB 469 (1969).

³ *San Diego Gas and Electric*, 325 NLRB 1143, 1146 (1998).

⁴ The Employees, the designated election observers, and cleaning crews have been and are regularly and safely working at the Hospital during the pandemic as essential workers; they are trained in infectious disease control and prevention protocols and proper sanitization measures, and have been issued and have available to them all appropriate PPE.

⁵ From the inception of the governmental orders, the Employees, observers, Board Agents, and everyone else in Chicago already had the right to go to Walmart, Costco, Walgreens, and at least thousands of other retailers and other essential businesses (laundries, cleaners, etc.) open for business (many with long lines to get in). Notably, in contrast to Roseland, virtually none of the numerous open businesses and their employees and patrons has any Covid-19 or other infectious disease training or appropriate personal protective equipment ("PPE").

⁶ On May 5th Governor Pritzker rolled out his plan to reopen Illinois. Chicago has moved into Phase 3. Under Phase 3, besides their existing freedoms to patronize open businesses, before the proposed June 11th manual election Chicagoans were able to go to barbers and hair stylists, while their spouses and others go back to work in manufacturing, offices and previously closed retail shops or continue and expand their already relatively unrestrained shopping .

Roseland's proffered evidence demonstrating a manual ballot election can safely be conducted under the protocols in the Stipulation, and that a manual ballot election would be safer and more efficient than a mail ballot election.

The Direction is an Abuse of Discretion. The Regional Director permitted no evidence to be submitted by either party at the hearing on the method or timing or details of an election. The Board agent did not seek any clarification or other information about the method of election nor did she in any way explore any concerns about or adjustments to the Parties' safety protocols.

Illinois has moved its social distancing guidelines and requirements into the next phase, including in Chicago, and they did so much more expansively than the election protocols of the Parties' proposed manual ballot election Stipulation rejected in the Direction and Letter. Illinois and Chicago are in Phase III, with the following industries opening:

- Childcare centers and family childcare
- Non-lakefront parks (no contact sports)
- Libraries and other city services
- Office-based jobs, professional services, and real estate services
- Hotels / lodging
- Outdoor attractions (e.g., boating – not including the Playpen, non-Lakefront golf courses)
- Non-essential retail
- Personal services (e.g., hair/nail salons, barbershops, tattoo parlors)
- Restaurants and coffee shops (outdoor dining only)
- Manufacturing, construction, and warehousing
- Hospitals, dentists, community mental health centers, and Federally Qualified Health Centers
- Public transit, regional transit, taxis and rideshare
- Gyms (outdoor and 1:1 personal training only)
- Places of worship

Under Governor Pritzker's June 4, 2020 Executive Order 2020-40 "All public and nonpublic schools in Illinois serving pre-kindergarten through 12th grade students may open for limited in-

person educational purposes, such as summer school, following the completion of the regular 2019-2020 school term.” In Chicago, under the previous phase II in existence before June 2020, everyone involved in the stipulated mail ballot election could on the way to or from work at Roseland, go shopping at the local food store, go to Starbucks to get a coffee, and have innumerable other interactions with people and various surfaces and items handled by others.

Roseland is an acute care hospital and everyone involved in the election is a Hospital Employee except the Board Agent. They are all trained in infection control and working during the pandemic and have available and use the most up to date PPE and sanitizing techniques and protocols. Few people with whom the Employees would come into contact outside the Hospital have a fraction of the training and experience as the Employees in this voting unit or the observers in preventing infectious disease control, nor do those other persons wear anything but masks, and they certainly do not have the access to and training as to N-95 masks and other PPE available to and used daily by the voting unit and observers at Roseland. The Employees can have their hair cut, continue all of their expansive other Phase 1, 2 and 3 activities, on their way to or from working at Roseland—but what they can’t do under the Direction and Letter is vote at Roseland.

The Direction and Letter ignore that voting at one of the two sites under the protocols is safer than any of the above Phase 2 and 3 activities. Yet, the Regional Director with no infectious disease expertise speculates without evidence that these 15 employees cannot safely spend a few minutes putting an “X” on a paper ballot and deposit it in a cardboard ballot box. Such conjecture falls of its own weight. The result is an election that violates the Board’s presumption favoring manual ballot elections, a material delay of the vote and count by almost a month from the date chosen in the Stipulation. The Direction puts Section 7 rights of the fifteen

Employees in the hands of a board mail ballot process and U.S. Postal service that in the best of times is a gamble.⁷ In the pandemic it is worse.⁸

The denial of the RN Request, the Direction, and the other Regional Directors' refusals to direct manual ballot elections since March 18th demonstrate that *de facto* this and other Regional Directors have created a new election rule; e.g., no matter what the circumstances no manual election will be allowed to take place indefinitely during any period of the pandemic, no matter the circumstances and regardless how safe the conditions surrounding the proposed manual election, the skill and training of the voting unit members and observers in infectious disease prevention and control may be. Unfortunately, their directions are devoid of scientific evidence and facts as to the relative circumstances and efficiencies of the unique circumstances surrounding their voting unit and manual election circumstances and the safety and efficacy of the U.S. Postal Service deliveries during the pandemic.

There are no facts warranting or justifying the Regional Director's statements that any of the 15 Employees would not be able to vote if in the unlikely event one of them got Covid 19, after not having gotten it during past months of regularly working at the Hospital, shopping, and the multitude of permissible Phase 2 and Phase 3 encounters. Indeed, if they did get the virus they would be no different from the multitude of employees in past NLRB elections who happened to not be able to come to vote on election day because they got a cold, broke a leg, had a seizure, got the flu ("The US Centers for Disease Control and Prevention (CDC) has estimated

⁷ See e.g., *In Premier Utility Services, LLC*, 363 NLRB No. 159 (April 5, 2016).

⁸ Two days before the Direction the President of the National Association of Letter Carriers wrote: "Today, over 5,600 postal employees are under quarantine from the virus....About 900 of the currently quarantined postal employees have tested positive for the virus, and approximately another 400 are presumed to be positive.....about thirty percent are letter carriers. Sadly, 67 postal employees have passed away from the virus, including 14 city letter carriers....."

29 million influenza (flu) cases reached the US in the 2019-2020 season”⁹), etc. These non-Covid 19 illnesses are far more likely to prevent voters from voting during the pandemic than Covid 19. Following the Regional Director’s logic with respect to the possibility of a voter missing the election because of illness, the Board must simply eliminate manual ballot election option altogether and forever, because the likelihood of one or more employees missing an election for some unforeseen circumstance or illness unrelated to Covid 19 quarantine is materially more likely than any of the Employees not voting on June 11th because of Covid 19.

Despite the Regional Director’s lip service to Section 7 rights and celerity in holding an election, the Parties’ proposed June 11th manual election ballot count would be over some three weeks before the “virtual” count in the Regional Director’s mail ballot election. The Regional Director speculates and assumes the improbable, that a mail ballot election and its virtual vote count, with no pandemic track record, would present no safety concerns or voting irregularities. As shown in the Request and RN Request, the Regional Director’s speculation unsupported by facts, and is certainly unsupported by science and fact based evidence. Despite the information unequivocally supporting the Parties’ position that a manual ballot election is the safest and most efficient way to conduct the election, the Regional Director nevertheless directed an exclusive mail-ballot election.

In the Letter, the Regional Director reaches speculative conclusions regarding the pandemic, national/state/local orders regarding the pandemic, and which manner of election, in

⁹ The US Centers for Disease Control and Prevention (CDC) has estimated 29 million influenza (flu) cases have reached the US in the 2019-2020 season. According to the latest *FluView* data, there have been 280,000 hospitalizations for influenza recorded as of February 15, 2020. This figure is consistent with hospitalization rates at this point in time during recent seasons.... <https://www.mdmag.com/medical-news/flu-cases-near-30-million-in-the-us-cdc-reports#:~:text=The%20US%20Centers%20for%20Disease,slightly%20week%2Dover%2Dweek>.

his non-expert, lay person's macro view would result in less exposure to the voting employees in this unit. In the end, the Regional Director disregards the proffered facts demonstrating the proposed manual ballot election is safer, more expeditious and efficient, and in contrast, there are no facts supporting a conclusion that "extraordinary circumstances" exist at Roseland that warrant the Regional Director in disregarding the manual ballot election presumption.

The purpose of the Act is to assure each employee has the fullest freedom in exercising their guaranteed rights under the Act. If this election is allowed to proceed via mail-ballot election, the risk of employees being denied their statutory rights to participate in the election is increased relative to the proposed manual ballot election protocols. See, e.g., *San Diego Gas and Electric*, 325 NLRB 1143, 1146 (1998) ("The Board's experience with representation elections has shown that the voter participation rate is generally higher in elections conducted manually than in mail ballot elections."); *See also In Premier Utility Services, LLC*, 363 NLRB No. 159 (April 5, 2016)(union was certified based on 34 votes out of 101 eligible voters (33%) because of the mail ballot process. And that was not during a pandemic.)

CONCLUSION There is a clear showing that extraordinary relief is required in this case.

Roseland requests the Board to stay the scheduled election until it can review the Decision.

Dated this 14th day of June, 2020.

Respectfully submitted,



Mark E. Furlane, Attorney for Employer
Berger, Newmark and Fenchel P.C.
1753 N. Tripp Ave.
Chicago, IL 60639
Direct: 312-704-7223
Fax: 773-360-7393
mfurlane@bnf-law.com

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2020, a true and correct copy of the foregoing **EMPLOYER'S EMERGENCY MOTION TO STAY THE ELECTION** was e-filed with the National Labor Relations Board and was served upon the following:

Office of the Executive Secretary
National; Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Via E-Filing

Peter Sung Ohr
Regional Director
National Labor Relations Board
Region 13 – Chicago
Dirksen Federal Building
219 South DearboEmployees Street, Suite 808
Chicago, Il 60604

Via E-Filing

Christina Mols
Labor Management Relations Examiner
National Labor Relations Board
Region 13 – Chicago
Dirksen Federal Building
219 South DearboEmployees Street, Suite 808
Chicago, Il 60604

Via E-Mail

Heather McNabola, Field Director
Service Employees InteEmployeeesational Union Healthcare Illinois
& Indiana Representative
2229 South Halsted Street
Chicago, IL 60608
heather.mcnabola@seiuhcil.org

Via E-Mail

George A. Luscombe III
Petitioner's Counsel
DOWD, BLOCH, BENNETT,
CERVONE, AUERBACH & YOKICH
8 South Michigan Avenue | 19th Floor | Chicago, IL 60603
Phone 312.372.1361 | Fax 312.372.6599
gluscombe@laboradvocates.com

Via E-Mail

By: 
Mark E. Furlane, Attorney for Employer