

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

PRIMECARE MEDICAL, INC.

Employer

and

Case 04-RC-256701

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 773**

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The sole issue in this case is whether, in light of the continuing COVID-19 pandemic,¹ the Region should conduct an election for healthcare workers who are employed in a county prison by manual or mail ballot. The Petitioner urges that in order to ensure the safety of all of the participants in the election, a mail ballot election must be conducted. The Employer argues that a manual election is appropriate and that it is possible to conduct a manual election safely in this case.

PrimeCare Medical, Inc. (the Employer) provides healthcare services to county jails, prisons, and juvenile detention centers throughout the Northeastern United States, including at the Monroe County Correctional Facility (MCCF) in Stroudsburg, Pennsylvania.² International Brotherhood of Teamsters, Local 773 (the Petitioner) seeks to represent a unit of approximately 16 Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Medical Assistants employed by the Employer at MCCF. On February 28, 2020,³ the Regional Director for Region Four of the National Labor Relations Board (the Board) approved a Stipulated Election Agreement in this case, in which the parties agreed to a manual election at MCCF on March 18. However, on March 17, the Region postponed the March 18 election due to public health and safety concerns related to the COVID-19 pandemic. On April 13, the parties entered into a new Stipulated Election Agreement providing for a manual election to be held at MCCF on July 7, but on June 5, the

¹ Throughout this decision, the terms “COVID-19,” “COVID,” and “Coronavirus” are used interchangeably.

² Stroudsburg is located in the “Poconos Region” of Pennsylvania, which is a well-known recreation destination in the winter and summer months, especially from New York City and Philadelphia. https://en.wikipedia.org/wiki/Pocono_Mountains.

³ All dates are in 2020 unless otherwise indicated.

Region concluded that due to the ongoing COVID-19 pandemic and related safety concerns, and in particular, because the petitioned-for employees are employed as nurses and medical assistants at a residential correctional facility, it was not advisable to conduct a manual election on July 7 as scheduled. Thereafter, on June 10, in order to ensure the safety of the voting employees, the parties and their representatives, Board personnel, and the general public, the Acting Regional Director revoked his approval of the April 13 Stipulated Election Agreement and set this case for hearing.

A hearing was held on June 18 by videoconference before a hearing officer of the Board. Prior to the hearing, the parties stipulated that the petitioned-for unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; and that since the RNs are professional employees within the meaning of Section 2(12) of the Act, they should vote in a self-determination election, pursuant to *Sonotone Corp.*, 90 NLRB 1236 (1950). The parties stipulated to the following two appropriate units (collectively called the Unit):

VOTING GROUP - UNIT A (PROFESSIONAL UNIT):

INCLUDED: All full-time and regular part-time Registered Nurses employed by the Employer at the Monroe County Correctional Facility.

EXCLUDED: All other employees, Licensed Practical Nurses (LPNs), Medical Assistants, Health Services Administrators, Charge Nurses, Doctors, Dentists, Nurse Practitioners, Physicians Assistants, Mental Health Clinicians, managers, guards and supervisors as defined in the Act.

VOTING GROUP - UNIT B (NON-PROFESSIONAL UNIT):

INCLUDED: All full-time and regular part-time Licensed Practical Nurses and Medical Assistants employed by the Employer at the Monroe County Correctional Facility.

EXCLUDED: All other employees, Registered Nurses, Health Services Administrators, Charge Nurses, Doctors, Dentists, Nurse Practitioners, Physicians Assistants, Mental Health Clinicians, managers, guards and supervisors as defined in the Act.

Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Acting Regional Director, the parties were permitted to present their positions as to the mechanics of this election by oral argument at the hearing and in post-hearing briefs. I have carefully considered those positions and arguments, and for the reasons discussed below, I find that a prompt mail ballot election is appropriate given the extraordinary circumstances presented by the continuing COVID-19 pandemic.

I. FACTUAL OVERVIEW

A. The COVID-19 Pandemic Generally

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been 2.4 million confirmed cases of COVID-19 in the United States, and 124,393 deaths.⁴ 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.⁵ The CDC recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, and social distancing. The CDC further states that the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes.⁶ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."⁷ Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its "Considerations for Election Polling Locations and Voters" states that officials should consider alternative voting methods where permitted, and that "[i]ncreasing mail voting...could help mitigate the impacts of COVID-19...."⁸

B. The COVID-19 Pandemic in the Commonwealth of Pennsylvania

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Pennsylvania imposed strict guidelines early in the pandemic. In March, Pennsylvania issued a Proclamation of Disaster Emergency, directed the closure of all non-life sustaining businesses, and ultimately issued a statewide Stay-at-Home order.⁹

On April 20, Pennsylvania Governor Tom Wolf announced a plan for the phased reopening and easing of restrictions using a system of colored phases – red, yellow, and green – to apply to individual counties as they reached milestones in lowering their incidence of positive cases.¹⁰ Monroe County moved into the "green phase" of reopening on June 19. Under that phase, all businesses must continue to adhere to both CDC and Pennsylvania Department of Health guidance. Public health experts continue to advise individuals to avoid unnecessary social contact and to conduct business remotely when possible in order to avoid spikes in cases in the coming weeks.¹¹

⁴ *Coronavirus in the U.S.: Latest Map and Case Counts*, NEW YORK TIMES, June 23, 2020 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> .

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself> .

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

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

⁹ The first Stay-at-Home Order issued on March 23 and was based upon community-specific incidence of positive testing, included the urban areas of Philadelphia (Philadelphia, Bucks, Chester, Delaware, and Montgomery Counties), Pittsburgh (Allegheny County), and Monroe County, where the Employer is located.

¹⁰ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

¹¹ Joel Achenbach, *Coronavirus hot spots erupt across the country; experts warn of second wave in South*, WASHINGTON POST, May 20, 2020,

Congregate care restrictions remain in place, and prison and hospital restrictions are determined by the individual facilities.

Pennsylvania currently ranks eighth in the nation in confirmed COVID-19 cases with 88,141 cases and 6,557 deaths. 1,346 of those confirmed cases and 109 of those deaths were in Monroe County. Monroe County has reported 8,130 cases per million people, which is higher than both the national average of 7,244 per million and the Pennsylvania average of 6,541 per million.¹²

Although Pennsylvania has decreased its rate of new cases substantially from its peak, other states, such as California, Texas, Florida, Georgia, Arizona, North Carolina, Louisiana, and Ohio, have now become “hot spots” with case counts increasing significantly every day.¹³ Many of these states, such as California, had previously loosened restrictions, as cases in those states had seemingly decreased.¹⁴ In the past two days, the United States has set daily records for the number of new COVID cases.¹⁵ And in Pennsylvania, Monroe County itself is one of only 16 counties that have seen an increase in COVID cases over the last 14 days.¹⁶ Those 16 counties have contributed to an overall increase in the number of COVID cases in Pennsylvania in the past week.¹⁷

C. COVID-19 in Prison Populations Generally

According to the CDC¹⁸, prison populations are at higher risk for contracting COVID-19 because incarcerated persons live, work, eat, study, and recreate within congregate environments, heightening the potential for COVID-19 to spread once introduced. Incarcerated persons obviously may not easily leave their facilities, and there are many opportunities for COVID-19 to be introduced into a prison, including daily staff ingress and egress; transfer of prisoners between

https://www.washingtonpost.com/health/coronavirus-hot-spots-erupt-across-the-country-experts-warn-of-possible-outbreaks-in-south/2020/05/20/49bc6d10-9ab4-11ea-a282-386f56d579e6_story.html.

¹² <https://www.cdc.gov/covid-data-tracker/#county-map>; <https://www.cdc.gov/covid-data-tracker/#cases>.

¹³ <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>, supra.

¹⁴ John Myers, Taryn Luna and Phil Willon, Newsom eases California reopening rules, allowing more counties to restart their economies, L.A. TIMES, May 18, 2020, <https://www.latimes.com/california/story/2020-05-18/newsom-reopening-coronavirus-benchmark>

¹⁵ <https://www.washingtonpost.com/nation/2020/06/25/coronavirus-live-updates-us/>

¹⁶ <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

¹⁷ <https://www.npr.org/sections/health-shots/2020/03/16/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>

¹⁸ <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>; Brie Williams, Cyrus Ahalt, David Cloud, Dallas Augustine, Leah Rorvig, David Sears, *Correctional Facilities in the Shadow of COVID-19: Unique Challenges and Proposed Solutions*, HEALTH AFFAIRS, March 26, 2020 <https://www.healthaffairs.org/doi/10.1377/hblog20200324.784502/full/> and Joan Stephenson, PhD, *COVID-19 Pandemic Poses Challenge for Jails and Prisons*, JAMA HEALTH FORUM, April 7, 2020 <https://jamanetwork.com/channels/health-forum/fullarticle/2764370>

facilities, to court appearances, and to outside medical visits; and visits from legal representatives. Some facilities also have high turnover, admitting new entrants daily who may have been exposed to COVID-19 in the surrounding community or other regions. The ability of prisoners to exercise disease prevention measures such as frequent handwashing may also be limited and is determined by the supplies provided in the facility and by security considerations. Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants. Once diagnosed, options for medical isolation of COVID-19 cases in prisons are limited and vary depending on the type and size of facility.

Even as COVID cases in certain regions have recently declined, they have increased in prison populations. As noted in a recent *New York Times* article published on June 16 entitled “Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide,”¹⁹ cases of the coronavirus in prisons across the United States have soared in recent weeks. The number of prisoners known to be infected has doubled during the past month (mid-May to Mid-June) to more than 68,000, and prison deaths tied to the coronavirus have also risen, by 73 percent since mid-May. As of now, correctional institutions present the largest known clusters in the United States, and an increase in cases appears both imminent and unavoidable due to inadequacies with testing, quarantine, or medical isolation in prison systems, as well as because so many prisoners are asymptomatic and are therefore not subject to testing. To underscore that point, at the end of April, officials in Montgomery County, Pennsylvania, which is adjacent to Philadelphia, tested all of its 948 prisoners for coronavirus and found that 177 of them – or roughly 18 percent – were positive, a rate of infection over 30 times greater than it had identified prior to testing. Of those 177 positive results, 171 of them were asymptomatic.²⁰

D. COVID-19 at MCCF

Through a prepared statement from CEO Thomas Weber dated June 17, the Employer contends that no Unit employees at MCCF have, to Weber’s knowledge, tested positive for COVID-19 to date. Weber concedes, however, that one traveling Nurse Practitioner employed by the Employer to visit MCCF tested positive for COVID-19 in March. The Employer states that it will not permit this individual to be present at MCCF on the date of the election. The record does not clearly indicate whether any prisoners at MCCF have tested positive for COVID-19. When the Hearing Officer asked the Employer’s counsel at the hearing whether prisoners were tested on a regular basis, counsel responded, “They are, because we haven’t had any who tested positive. So it’s my understanding that that is done.” This statement appears to have been counsel’s surmise, not a factual account.

E. COVID-19 and Healthcare Workers Generally

¹⁹ <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>

²⁰ Jeremy Roebuck and Allison Steele, *Montgomery County’s jail tested every inmate for COVID-19 – and found 30 times more cases than previously known*, PHILADELPHIA INQUIRER, April 28, 2020 <https://www.inquirer.com/news/coronavirus-testing-montgomery-county-jail-asymptomatic-philadelphia-prisons-20200428.html>

Healthcare workers are among employees at the highest risk of contracting COVID-19. As of May 24, an estimated 168,000 health care workers in the United States had the virus. Of those, Pennsylvania ranked among the states with the highest number of reported cases with 4,600.²¹ At least 679 healthcare workers in the United States have died from the virus.²² According to the United States Department of Labor, Occupational Safety and Health Administration, healthcare workers who provide care to members of the general public not known or suspected to have COVID-19 are still at medium risk of infection.²³

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

Section 11301.2 of the Board's Casehandling Manual (Representation) provides, in part:

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual Section sets forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are "scattered," either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section states that "[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director," citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that the regional director may use discretion to order a mail ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the regional director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *ibid.*

On April 17, 2020, the Board issued an announcement regarding the COVID-19 pandemic titled, "COVID-19 Operational Status," which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

²¹ <https://www.registerednursing.org/cdc-estimates-nurse-healthcare-worker-covid19-cases-likely-understated/>

²² <https://www.theguardian.com/us-news/2020/jun/17/covid-19-coronavirus-healthcare-workers-deaths>

²³ www.osha.gov/SLTC/covid-19/healthcare-workers.html

Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

The Board has already applied the guidelines in *San Diego Gas & Electric* to the extraordinary circumstances created by the COVID-19 pandemic in numerous unpublished Orders, including on May 8 in *Atlas Pacific Engineering Company*, Case 27-RC-258742. There, the Regional Director in Region 27 directed a mail-ballot election notwithstanding the employer's argument that a manual election could be safely conducted among engineering employees at its facility. The Board stated that in determining whether the COVID-19 pandemic constituted an extraordinary circumstance, the Regional Director properly considered the detailed plan for conducting a manual election in a safe manner proposed by the Employer. The Board then denied the employer's 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 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.²⁴

III. THE POSITIONS OF THE PARTIES

The Petitioner argued at the hearing that due to the serious safety concerns created by the COVID-19 pandemic, an extraordinary circumstance, this election should occur by mail ballot. The Petitioner described the election as a potential life-or-death situation, and specifically cited concerns that asymptomatic COVID-19 carriers might come into contact with employees and Board personnel and risk transmission to those individuals despite precautionary measures. As support, it cites the Regional Director's Order and Supplemental Direction of Election in *Mountaire Farms, Inc.*, (June 10, 2020) Case 05-CA-256888. There, the Regional Director ordered a mail-ballot election for employees in a poultry plant in Selbyville, Delaware, approximately 220 miles from Stroudsburg, Pennsylvania.

The Employer contends that despite the ongoing pandemic, a manual election can be conducted safely because, in addition to its longstanding history as a healthcare provider adhering to the CDC's "Universal Precautions," its healthcare employees at MCCF are required to undergo daily symptom checks, utilize increased sanitation, and wear masks and gloves when caring for prisoners. Thus, it posits, if all of the participants in the election have their temperature checked, wear personal protective equipment (including surgical masks and face shields), utilize hand

²⁴ *Atlas Pacific Engineering Company*, 27-RC-258742, at fn. 1 (May 8, 2020).

sanitizer, use their own Employer-provided pens, and, if the eligible voters are tested for COVID-19 prior to the election, the election can be conducted safely. In support of its argument, the Employer cites to Section 11301.2 of the *Casehandling Manual, Part Two Presentation Proceeding*, and *San Diego Gas & Electric*, supra, which state that elections should, as a rule, be conducted manually. The Employer also argues that the Board's April 17, 2020 announcement regarding the COVID-19 pandemic, titled "COVID-19 Operational Status," presents no impediment to running a manual election because the pandemic situation has improved since then. In sum, the Employer argues that the extraordinary circumstances that existed when the Board issued its statement on April 17, 2020 are no longer present, and that the current status of federal, state and local laws and guidance present no barrier to a manual election at MCCF.

IV. THE EVIDENCE CONCERNING MANUAL ELECTION ARRANGEMENTS

CEO Weber's prepared statement indicates that while visitation at the MCCF has been suspended, the Employer has obtained permission from the Warden to conduct the election in the Administrative Conference Room at MCCF. Although there was some discussion on the record concerning the testing of Unit employees, counsel for the Employer was not certain when those tests might occur or when the results could be expected. In an apparent effort to accommodate the Petitioner's concerns, the Employer, in its brief, indicated willingness to test all 16 employees prior to the election. Even if it did so, given the time lag between the test and the results, the Employer cannot guarantee that all employees will be COVID-free on the date of the election.

The record is also unclear as to whether the bargaining unit employees work at any prisons other than MCCF where they could become infected; however, I take administrative notice of an article published by the *Lebanon Daily News* on May 5 reporting that there were 11 cases of coronavirus at the Lebanon County Correctional Facility, including three of the Employer's employees who work there. In that article, CEO Weber is quoted as saying that the Employer provides medical services in several other Central Pennsylvania county jails, giving the Employer "the ability to move staff to facilities who may be short-staffed due to COVID-19 cases."²⁵

It is also far from clear that MCCF is COVID-free, and I note that CEO Weber does not so state in his prepared statement. According to the Pennsylvania Department of Corrections' website, prisoners are only tested if they exhibit COVID symptoms, and delays in obtaining test results remain a problem. Since a large percentage of the general population testing positive for COVID, including the prison population, is asymptomatic, it is possible that there are positive but unknown cases of COVID at the MCCF. In fact, the Employer has recently acknowledged that inadequate testing at its facilities is an issue. In a memorandum from CEO Weber to clients dated June 16, which is posted on the Employer's website, and of which I take administrative notice, CEO Weber states that he recognized the delay in getting test results was causing "significant operational problems." Further, in a document dated June 17 entitled "Conference Call Minutes, COVID-19 (Jail Administrators)," which is also posted on the Employer's website, and of which I take administrative notice, the Employer suggests that testing in the prisons where it operates remains

²⁵ <https://www.ldnews.com/story/news/2020/05/05/lebanon-county-correctional-facility-coronavirus-covid-19-cases-pa/3080921001/>

inadequate as there is a delay of up to 8 to 10 days in getting results after samples are taken. That document also observes that there has an uptick in counties that were previously COVID-free and that new “pockets” of positives have been noted. Since the Employer cannot provide any assurances that the prison population, with whom the employees come into daily contact, is COVID-free, it follows that it cannot be certain that the Unit employees will be COVID-free on July 7 – the date of the proposed manual election.

V. ANALYSIS

The circumstances surrounding the COVID-19 virus are nothing but extraordinary. Like the rest of the United States, Pennsylvania has been strongly affected by the virus, and while the confirmed cases appear to have slowed, each day continues to bring more cases and deaths, and more uncertainty. Given the extraordinary circumstances caused by the COVID-19 pandemic that still exist in Pennsylvania and elsewhere in the United States, and given that the Unit employees are healthcare workers who work in a prison, where the virus is more likely to be found and to spread quickly, I find it appropriate to exercise my discretion to direct a mail ballot election.²⁶ That decision is soundly supported by Board law, including *Atlas Pacific Engineering Company*.

The Employer attempts to distinguish *Atlas Pacific Engineering Company* on the grounds that it involved employees in the engineering industry as opposed to healthcare, where employees can be trusted to employ effective COVID preventative measures, and that they were in a different geographic area, Colorado. It similarly asks that I disregard Region Five’s Decision in *Mountaire Farms, Inc.*, arguing that the incidence of COVID in Selbyville, Delaware is higher than Monroe County, and that poultry employees do not know how to don protective equipment. However, employees in poultry processing plants may have been accustomed to wearing masks and gloves while working prior to COVID, and are quite likely to wear them now, per CDC guidelines.²⁷ In any event, the Board has upheld regional directors’ decisions to direct mail ballot elections due to the current COVID-19 pandemic for employees of other health care employers, who no doubt similarly adhere to Universal Precautions. See *Roseland Community Hospital*, Case 13-RC-256995 (May 26, 2020); and *Twinbrook Health & Rehabilitation Center*, Case 06-RC-257382 (June 5, 2020). Indeed, a major reason in that a mail ballot election is appropriate in this case is because involves healthcare employees.

The Employer also asks that I focus only on current COVID statistics in Monroe County. But Monroe County directly borders Northampton, Carbon, Luzerne, Lackawanna, Wayne, and Pike Counties, and is close to Lehigh County, where Petitioner is located. Many of those counties

²⁶ There is no contention that the Unit employees are scattered by location or schedule. Absent public health concerns, this would almost certainly not be an election where a mail ballot would be ordered.

²⁷ The employer in that case similarly proposed to provide face masks, face shields, gloves, hand sanitizer, separate pencils for each voter, plastic barriers where appropriate, and visual signage regarding social distancing.

have much higher (by two to three times) case counts than Monroe County. For example, Lehigh County has had 4,164 cases and 285 deaths, Northampton County has had 3,352 cases and 262 deaths, and Luzerne County has had 2,883 cases and 174 deaths.

The Employer further argues that the situation has changed since the Board issued its statement on April 17. But while it may have improved in some areas, it has worsened in others. One thing is clear – the overall cases have increased exponentially since then. On April 17, the United States had 671,425 COVID cases and 33,286 deaths, and Pennsylvania reported 29,441 cases and 756 deaths. As of June 26, the United States had 2,424,054 cases and 124,468 deaths, and Pennsylvania reported 88,141 cases and 6,557 deaths.²⁸

Moreover, while Pennsylvania demonstrated a long-term downward trend and as a result emerged from many restrictions, it is far from certain that situation will continue. Things can change quickly with COVID, particularly in the summer months when people may visit the Poconos for vacation. In fact, that appears to be the case presently, as Pennsylvania recently reported its first five-day streak of increases of more than 450 cases since late May.²⁹ Many states that previously eased restrictions are currently experiencing dramatic increases in cases or are having “second waves.” There is, therefore, no guarantee that a manual election can be safely conducted in this case in the near future. The election has already been rescheduled twice due to the COVID-19 pandemic, and the conduct of this election by mail ballot has the benefit of eliminating the uncertainty that a manual election could be delayed a third time.

In so finding, I have considered the accommodations and arrangements offered by the Employer, including personal protective equipment, and the testing of Unit employees prior to the election, but find that they are inadequate under the circumstances. Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. All but the voters would need to gather for approximately 30 minutes for the pre-election conference, including the check of the voter list and the parties’ inspection of the voting areas. The Board agent and observers would share a voting area for the duration of the proposed manual election, spanning at least two hours, an exposure sufficient to risk exposure to the virus. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. At the conclusion, the agent would count the ballots, typically in the same voting area, with the observers, party representatives, and other employees who wish to attend.

The Employer proposes that the election be held in the Administrative Conference Room at MCCF, a room it states is approximately 20 by 18.9 feet, or 378 square feet. Although the Employer asserts that is ample room to have voting employees, election observers, and the Board Agent spread out 8 to 10 feet apart, it would appear that this is incorrect. Once furniture is

²⁸ <https://coronavirus.jhu.edu/map.html>

²⁹ Steve Novak, PA Coronavirus Updates LEHIGH VALLEY LIVE.COM, June 23, 2020 <https://www.lehighvalleylive.com/coronavirus/2020/06/pa-coronavirus-updates-82696-cases-6464-deaths-new-cases-hit-5-day-streak-not-seen-since-may-vaccine-anticipated-by-early-2021-pa-covid-19-county-case-map-62320.html>

accounted for, the safe number of people to have in the room for the two hours of the election is two.³⁰ Since there are one Board Agent, two observers, and at least one voter in the room at a time, the proposed space is inadequate for proper social distancing according to CDC and Pennsylvania Department of Health Guidelines.

I find that the most responsible measure to ensure a safe election is a mail-ballot election. A mail ballot will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, their families, and the public to COVID-19, and it will ensure that the Unit employees will have the opportunity to vote promptly. For the foregoing reasons, I direct a mail-ballot election to be conducted in accordance with the election details discussed below.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and for the reasons set forth 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, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The parties stipulated, and I find, that International Brotherhood of Teamsters, Local 773 is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees in the Unit, and there is no contract bar or other bar to an election in this matter.
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) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

VOTING GROUP - UNIT A (PROFESSIONAL UNIT):

INCLUDED: All full-time and regular part-time Registered Nurses employed by the Employer at the Monroe County Correctional Facility.

EXCLUDED: All other employees, Licensed Practical Nurses (LPNs), Medical Assistants, Health Services Administrators, Charge Nurses, Doctors, Dentists, Nurse

³⁰ <https://www.calconic.com/calculator-widgets/social-distancing-calculator/5eeb8692db67b600296bed97>

Practitioners, Physicians Assistants, Mental Health Clinicians, managers, guards and supervisors as defined in the Act.

VOTING GROUP - UNIT B (NON-PROFESSIONAL UNIT):

INCLUDED: All full-time and regular part-time Licensed Practical Nurses and Medical Assistants employed by the Employer at the Monroe County Correctional Facility.

EXCLUDED: All other employees, Registered Nurses, Health Services Administrators, Charge Nurses, Doctors, Dentists, Nurse Practitioners, Physicians Assistants, Mental Health Clinicians, managers, guards and supervisors as defined in the Act.

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 the International Brotherhood of Teamsters, Local 773.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Friday, July 10, 2020. Voters must return their mail ballots so that they will be received by close of business on August 7, 2020. The mail ballots will be counted on Friday, August 14, 2020 at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 p.m. on Friday, July 24, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending June 13, 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(l) of the Board's Rules and Regulations, the Employer must provide the Acting 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 Acting Regional Director and the parties by 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will not 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-ruleseffective-april-14-2015.

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. The list must also be served electronically on the other parties named in this decision.

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.

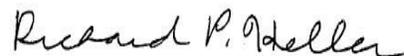
RIGHT TO REQUEST REVIEW

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 must be E-Filed through the Agency's website. 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. Responsibility for the receipt and usability of the request for review rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. 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.

Signed at Philadelphia, Pennsylvania this 26th day of June 2020



RICHARD P. HELLER

Acting Regional Director, Region Four
National Labor Relations Board