

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

CLEAN EARTH ENVIRONMENTAL SOLUTIONS, INC.¹

Employer

and

CASE NO. 22-RC-262351

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 560**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On June 30, 2020, International Brotherhood of Teamsters, Local 560 (the Petitioner), filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees of Clean Earth Environmental Solutions, Inc. (the Employer), at its facility located at 50 Howard Street, Piscataway, New Jersey. A hearing was held before a hearing officer of the National Labor Relations Board (the Board) via teleconference on July 21, 2020. The Employer's post-hearing brief was timely submitted and has been carefully considered. The Petitioner did not file a post-hearing brief.

The sole issue in this matter is whether to conduct a manual or mail-ballot election given the constraints of the COVID-19 pandemic. At hearing, the hearing officer permitted the parties to give their positions on the election method. Both parties assert that, by taking precautions that the Employer has offered, a manual election is an appropriate method. The Petitioner, in the alternative, is amenable to a mail-ballot election. As further discussed below, I have determined that the Board will conduct this election by mail ballot.

To provide context for my discussion of this matter, I begin with my findings. I then explain the relevant Board law concerning the mechanics of elections. Next, I summarize the parties' positions. Finally, I conclude by applying Board law to the facts of this case.

¹ The parties' full and correct names appear as amended.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find as follows:

1. The hearing officer's rulings made at 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 herein.²
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
7. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

INCLUDED: All full-time and regular part-time technicians, environmental specialists, drivers and warehouse technicians employed by the Employer at its 50 Howard Street, Piscataway, New Jersey facility.

EXCLUDED: All office clerical employees, confidential employees, professional employees, dispatchers, sales employees, managers, guards and supervisors as defined in the Act, and all other employees.

II. BOARD LAW

It is well settled that the Board leaves to the discretion of its Regional Directors decisions on the mechanics of an election, including the method. *Ceva Logistics U.S., Inc.*, 367 NLRB 628,

² The parties stipulated that "Clean Earth Environmental Solutions, Inc., a Delaware corporation, is engaged in providing full-service, sustainable disposal and recycling solutions for numerous waste streams for industrial and retail clients from its Piscataway, New Jersey facility, the only facility involved herein. During the preceding twelve months, the Employer, in the course and conduct of its business operations, has purchased and received goods and supplies at its Piscataway, New Jersey facility, valued in excess of \$50,000 directly from businesses located outside the State of New Jersey."

I note that the parties' executed stipulations, which constitute Bd. Exh. 2, erroneously cite the case number in this matter as Case 22-RC-261850. The parties, having already executed the stipulations prior to the hearing, did not object to their admittance into the record. I find that the stipulations were properly admitted, and the incorrect case number on these stipulations was merely an oversight.

628 and cited cases (2011). In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the Board articulated certain guidelines for its Regional Directors to take into account when deciding whether to conduct a mail-ballot election. In addition to those guidelines, the Board recognized that its Regional Directors may consider “other relevant factors” and that “extraordinary circumstances” may permit a mail-ballot election for reasons other than those the Board explained in its guidelines.

Although the Board has expressed a general preference for manual balloting, it has never hesitated to ballot by mail when the circumstances warrant it. Indeed, the Board’s preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees’ representational desires. The Board noted as follows in *London’s Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997):

[W]hile we agree with our dissenting colleague that the Agency has a proud long tradition of conducting elections by manual balloting and that most elections have been and are conducted manually, it has an equally long history of conducting elections by mail. From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, for example, *Lykes Bros. S.S. Co.*, 2 NLRB 102, 108, 111 (1936); *United Press Assns.*, 3 NLRB 344, 352 (1937); *Pacific Greyhound Lines*, 4 NLRB 520, 539 (1937); *Pacific Lumber Inspection Bureau*, 7 NLRB 529, 534 (1938); *Salt River Valley Water Users Assn.*, 32 NLRB 460, 472 (1941); *Continental Bus Systems*, 104 NLRB 599, 601(1953); and *National Van Lines*, 120 NLRB 1343 (1958).

Additionally, the Board has recently denied employers’ requests for review with respect to this issue in other cases. Three such cases follow:

1. In *Atlas Pacific Engineering Company*, Case 27-RC-258742 (May 8, 2020), the Board, in denying the employer’s request for review, stated that the COVID-19 pandemic constituted extraordinary circumstances warranting a mail ballot where federal, state, and local government directives had limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting the election should remain on mandatory telework.
2. In *Johnson Controls, Inc.*, Case 16-RC-256972 (May 18, 2020), the Board denied review of that region’s decision to conduct a mail-ballot election, even though the employer had zero COVID-19 cases; daily screened all individuals accessing the facility for symptoms; mandated face coverings and social distancing; and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves.
3. In *Brink’s Global Services USA, Inc.*, Case 29-RC-260969 (July 14, 2020), the Board addressed a mail-ballot determination in the context of the pandemic and with consideration of General Counsel Memorandum GC 20-10 (issued July 6, 2020). In denying review, the Board stated at footnote 2 that it “will continue to consider whether manual elections should be directed based on the circumstances

then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”

III. POSITIONS OF THE PARTIES

A. The Employer’s Position

The Employer asserts that, with the appropriate precautions, a manual election is the most appropriate method for conducting the election. At hearing and on brief, the Employer detailed the steps it would take to ensure the safety of all participants in the election process. These proposed steps conform to the suggested manual election protocols laid out in General Counsel Memorandum GC 20-10 (issued July 6, 2020).

Citing to statistics from the New Jersey Department of Health,³ the Employer states that cases of COVID-19 peaked in March and April and have dramatically decreased since then. The Employer notes that New Jersey has continued to implement reopening procedures,⁴ which include an increase in outdoor gathering capacity limits to 500 people⁵ and the Piscataway Township Schools continued planning for an in-person school semester.⁶

Specific to its own operations, the Employer noted on brief that, as of July 28, 2020, it had no positive cases of COVID-19 among its employees. The Employer also notes that its employees took part in two Board elections in the past—one in October 2018 and a subsequent rerun election in November 2018—so its employees are familiar with manual-election procedures.

At hearing, the Employer proposed a four-hour voting session for a manual election without providing specifics as to the beginning and ending times. On brief, the Employer clarified its proposal, suggesting two separate two-hour voting sessions: one from 5 a.m. to 7 a.m. and one from 9 a.m. to 11 a.m. During the two-hour period between voting sessions, the Employer proposed to sanitize and disinfect the voting area.

B. The Petitioner’s Position

The Petitioner stated at hearing that it sought to proceed to an election as soon as possible, desiring a manual election as long as the Employer complied with the precautions that it had

³ Bd. Exh. 6.

⁴ Emp. Exh. 1a.

⁵ The Employer cites to, and I have taken administrative notice of, New Jersey Governor Philip Murphy’s Executive Order No. 161. Furthermore, I have taken administrative notice of all other executive orders by Governor Murphy as I cite to them in this decision.

⁶ Emp. Exh. 1d.

represented. Absent a manual election, the Petitioner was also amenable to a mail-ballot election. As noted above, the Petitioner did not file a brief in this matter.

IV. DISCUSSION

Although the Board's longstanding policy is that elections should generally be conducted manually, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. NLRB Casehandling Manual Part Two Representation Proceedings, Sec. 11301.2. This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, where voters are "scattered" in time due to their schedules, strike situations, or other extraordinary circumstances. *San Diego Gas*, above at 1145. The issue in the present matter deals with the fourth type of situation: whether the public health concerns presented by the COVID-19 pandemic constitute extraordinary circumstances warranting a mail-ballot election. While the Employer has offered certain measures to ameliorate those public health concerns, and although these measures comply with the General Counsel's recent memorandum on suggested manual election protocols, I find that a mail-ballot election is the only appropriate method for this case.

First, I note that the current pandemic conditions in New Jersey do not favor a manual election. New Jersey has been one of the hardest hit states with respect to the number of positive COVID-19 cases. According to the Centers for Disease Control and Prevention, New Jersey is the state with the fifth highest number of confirmed cases.⁷ As of this decision's writing, the New Jersey Department of Health places the total number of positive cases at 181,660 with 13,944 confirmed deaths. The county in which the Employer's facility is located, Middlesex County, accounts for 17,673 of those positive cases and 1,198 of those confirmed deaths.⁸ During the week immediately preceding the issuance of this decision, the New York Times added New Jersey to its front page list of states where COVID-19 cases are rising fastest. It is also telling that New Jersey's governor has limited the State's Stage 2 reopening by prohibiting indoor dining.⁹

As pointed out by the Employer, New Jersey has continued its reopening process. However, and despite the state's apparent downward trend of new cases, Governor Murphy stated in Executive Order No. 162 (issued July 2, 2020) that "the Public Health Emergency... continues to exist throughout the State of New Jersey." More recently, in his Executive Order No. 164 (issued July 13, 2020), Governor Murphy stated that "the COVID-19 emergency and its impact are likely to extend for an as-yet-undetermined period of time." Additionally, the New Jersey Department of

⁷ See <https://www.cdc.gov/covid-data-tracker/#cases> (last visited 7/29/2020). Although New Jersey appears sixth in the CDC's list, the CDC has counted New York City—which neighbors Middlesex County, where the Employer's facility is located—as its own territory, placing it fourth on its list, ahead of the State of New York.

⁸ See <https://covid19.nj.gov/> (last visited 7/31/2020).

⁹ See <https://covid19.nj.gov/faqs/nj-information/reopening-guidance/what-are-the-reopening-rules-for-bars-and-restaurants-what-precautions-or-policies-must-they-take> (last visited July 31, 2020).

Health continues to note on its summary findings that new illnesses occurring since about the beginning of July may not yet be reported.¹⁰

Second, while the Employer has stated its willingness to complete the certifications detailed in the General Counsel's suggestions for manual elections, which include certifying that individuals have not tested positive for and have not shown symptoms of COVID-19, the usefulness of these certifications is questionable. The CDC has stated that its "current best estimate" is that 50 percent of COVID-19 transmission occurs prior to the onset of symptoms, and that 40 percent of people with COVID-19 are asymptomatic. However, the CDC also recognizes that these estimates remains uncertain.¹¹ In a state that has experienced high numbers of individuals testing positive for COVID-19, as is the case with New Jersey, the current data on transmission of this illness without symptoms is troubling. I find that a mail-ballot election sufficiently assuages these troubles.

Third, the proposed hours for polling times that a manual election would require in this case do not favor that method. The Employer proposed a total of four hours of polling time in order to allow approximately 40 voters the opportunity to vote. Because prolonged polling hours increase the chances for contact amongst voters, observers, the parties' representatives, and Board agents, I find that the proposed safety precautions would not sufficiently ameliorate the potential health risks of a manual election.¹²

Based on the above and the record as a whole, I find that the ongoing COVID-19 pandemic presents extraordinary circumstances that make a mail-ballot election the only appropriate election method in this case.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to

¹⁰ See https://www.state.nj.us/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf (last visited 7/29/2020).

¹¹ "COVID-19 Pandemic Planning Scenarios," updated July 10, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited 7/29/2020).

¹² While the Employer stated in its brief that it would "follow, to the letter, the Board's Suggested Manual Election Protocols," I note that those protocols were issued by the General Counsel—not the Board—and are not binding on Regional Directors. As noted in the General Counsel's memorandum, "The Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted.... [T]he Board has the ultimate authority to make decisions on when, how, and in what manner elections are conducted, whether on review of Regional Director decisions or through other guidance or rules."

be represented for purposes of collective bargaining by **International Brotherhood of Teamsters, Local 560**.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **WEDNESDAY, AUGUST 12, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by close of business on **WEDNESDAY, SEPTEMBER 2, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **WEDNESDAY, AUGUST 19, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7065, or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter-in-Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually on a date to be determined by the undersigned Regional Director, during the period from **WEDNESDAY, SEPTEMBER 16, 2020, through WEDNESDAY, SEPTEMBER 23, 2020**, inclusive. The Region will provide notice to the parties of the scheduled date for the count at least 24 hours prior to the count. For the same reasons, the count will take place virtually on a platform (such as Skype, Zoom, WebEx, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

If the dates the ballots are due to be deposited by Region in the mail, or the date set for their return, or the date, time, and place of the count for the mail ballot election are postponed or canceled, the Regional Director, in his or her discretion, may reschedule such dates, times, and places for the mail ballot election.

B. Voting Eligibility

Eligible to vote are those unit employees who were employed by the Employer during the payroll period ending **SATURDAY, AUGUST 1, 2020**, including employees who did not work during that period because they were ill, on vacation, or were 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, employees engaged in an economic strike that commenced less than 12 months before the election date, 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 service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period for eligibility; (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 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 **AUGUST 5, 2020**. The list must be accompanied by a certificate of service showing service on all parties. The Region will no longer serve the voter list.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other party(ies) named in this decision (at montalbanoemail@yahoo.com). The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

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

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on AUGUST 7, 2020**. If the Employer does not receive copies of the notice by **AUGUST 5, 2020**, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on non-posting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English and Spanish, please notify the Board Agent immediately if that is necessary for this election. If special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board Agent as soon as possible.

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.

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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to

file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 3, 2020.



DAVID E. LEACH III, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 22
VETERANS ADMINISTRATION BUILDING
20 WASHINGTON PLACE, 5TH FLOOR
NEWARK, NJ 07102