

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15**

AM/NS CALVERT, LLC

Employer/Petitioner

and

Case 15-RM-246203

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY
ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION**

Union

DECISION AND DIRECTION OF ELECTION

On August 8, 2019, AM/NS Calvert, LLC (Employer/Petitioner) filed a petition under 9(c) of the National Labor Relations Act (the Act), as amended, seeking to determine if a majority of the hourly full-time and regular part-time production and maintenance employees working at its Calvert, Alabama facility (Employer’s facility) wished to be represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Union).¹ The parties have stipulated, and I find, that the agreed upon unit described above is appropriate for purposes of collective bargaining.

I. PROCEDURAL BACKGROUND

Shortly after the Employer filed the instant petition, the Union filed two unfair labor charges that resulted in this petition being blocked until February 2020² when the Union

¹ The Employer and Union have agreed that out of 1047 employees, 892 are eligible voters, and 155 employees would vote subject to challenge.

² Hereinafter all dates occurred in 2020, unless otherwise noted.

requested that the Region resume processing the petition. On March 10, I approved a Stipulated Election Agreement providing for a manual election to be held at the Employer's facility on March 23 and 24. However, on March 19, citing the ongoing COVID-19 pandemic, the National Labor Relations Board (the Board) issued a general order suspending all representation elections until April 3. Consequently, the scheduled election was cancelled.

Thereafter, and following the Board's issuance of an order resuming elections, I issued a Notice to Show Cause on April 23 regarding two issues: 1) why a hearing would be necessary to determine why I should not order a mail-ballot election and 2) why I should not order a mail-ballot election pursuant to the parties stipulated election agreement and the continued extraordinary situation related to the COVID-19 pandemic. Based on my consideration of the responses to the Notice to Show Cause, on June 6, I issued an Order Directing Mail Ballot Election. Subsequent to that Order, the Employer filed a Motion for an Emergency Stay with the Executive Secretary's office and a Request for Review on June 22, and on June 30 the Board remanded the petition back to the Region for further processing.

In accordance with the Board's June 30 Order remanding the case back to the Region, on July 6 I issued an Order Revoking Stipulated Election Agreement and Issuing Notice of Representation Hearing. A hearing was held telephonically on July 20 before a hearing officer of the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned, and I hereby make the following findings.

II. ISSUE TO BE DECIDED

The only issue presented in this matter, as discussed in more detail below, is how and when the election should be conducted. Election voting method is not a litigable issue at a pre-election hearing, but in light of the challenges caused by the COVID-19 pandemic, I allowed the

parties to present their positions as to the mechanics of this election by oral argument at the hearing. I have carefully considered the record evidence, as well as the positions and arguments presented by the parties on this single issue. For the reasons discussed below, I find that a prompt mail ballot election should be conducted in light of the continuing extraordinary circumstances presented by the COVID-19 pandemic.

III. FACTS

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. The COVID-19 virus is infecting people and spreading easily from person to person. Indeed, since July 13, the United States has seen a 7-day moving average with at least 60,000 cases *per day*, and 66,000 cases *per day* since July 18.³ 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.⁴ The CDC states:

[t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet). COVID-19 seems to be spreading easily and sustainably in the community (“community spread”) in many affected geographic areas.⁵

Additionally, “COVID-19 can be spread by people who do not have symptoms and do not know that they are infected.” *Id.* Importantly, the CDC has instructed that cloth face coverings are not a substitute for proper social distancing.⁶ The CDC further states that it is unlikely that the coronavirus will be spread from domestic or international mail, products or

³ <https://www.cdc.gov/covid-data-tracker/#trends> (last visited on July 28, 2020).

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

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

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

packaging.⁷ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “[a]fter 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.”⁸

As of July 28, the pandemic has resulted in at least 79,129 confirmed COVID cases, along with 1,446 confirmed deaths, in the State of Alabama where a manual election in this case would be held.⁹ On March 13, Alabama Governor Kay Ivey declared a state public health emergency in the State, and shortly thereafter the Alabama State Health Officer issued a series of Stay at Home orders suspending certain public gatherings to protect Alabamians and to mitigate the spread of COVID-19 by decreasing the opportunities for transmission of the virus and in an effort to decrease the risk of community spread. On May 8, 2020, the Alabama State Health Officer issued a Safer at Home order, and the State moved into Phase One of reopening. That Order is still in effect.

Since the State of Alabama began its phased reopening of the economy, like many states it has seen a noticeable spike in the number of confirmed cases. As of July 28, there have been 23,415 confirmed new COVID cases within the last 14-days. Moreover, Washington County, where Calvert is located, and the three bordering counties — Clarke, Baldwin, and Mobile — are currently within the “High” range of rate transmission according to the State of Alabama’s color-coded health guidance system. Washington County, where the Employer’s facility is located, has recorded 278 confirmed COVID cases and 10 deaths. Clarke County has confirmed 440 COVID cases and 13 deaths. Baldwin County has seen 2,727 confirmed COVID cases and 43

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

⁹ <https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/6d2771faa9da4a2786a509d82c8cf0f7> (last visited on July 28, 2020).

deaths. And Mobile County has recorded 7,361 confirmed cases and 176 deaths. According to the Alabama Public Health Department, counties that are in the “High” transmission risk category should avoid groups of more than 20 people, limit out-of-state travel and in-person meetings, avoid taking non-essential trips, and work from home when possible.¹⁰

Additionally, conducting a manual election in this case will necessitate the participation of many Board Agents, most of which will travel from the State of Louisiana. Current information shows that 109,917 cases of COVID-19 have been reported in Louisiana, with 3,674 of those cases resulting in death.¹¹ Moreover, as of July 28, 10,011 cases have been reported in Orleans Parish, where Region 15’s office is located, with 552 of those cases resulting in death.¹² Indeed, on July 24, New Orleans Mayor LaToya Cantrell announced new restrictions being put into place in order to suppress the increasing community spread that is taking place since the city began Phase Two of its economic reopening.¹³

IV. POSITIONS OF THE PARTIES

A. The Employer/Petitioner’s Position

The Employer argues that the instant election can be safely held at its facility such that only a manual election is appropriate in this case. To begin, the Employer argues that none of its employees have been suspected of having COVID-19 or diagnosed with illness. In order to screen symptomatic cases, the Employer is, and has been, performing temperature checks on all individuals coming onto its site using a contactless forehead thermometer, and has instituted a policy that individuals who register a temperature of 100 degrees or more are not allowed on premises and are taken for a further temperature check using a traditional single-use

¹⁰ <https://www.alabamapublichealth.gov/covid19/guidance.html>

¹¹ <http://ldh.la.gov/Coronavirus/> (last visited July 28, 2020)

¹² <https://experience.arcgis.com/experience/746f03e88d204a2b82a7b958ea744bba/> (last visited July 28, 2020)

¹³ <https://ready.nola.gov/incident/coronavirus/mayor-cantrell-announces-new-restrictions-to-help/>

thermometer. Since the screening was implemented, the Employer represents that 6 employees have failed the temperature check.

The Employer has proffered a manual election plan that it argues can keep all election participants safe. In that regard, the Employer has proposed conducting the election in its parking lot in large, open air tents. Ground markings at least six-feet apart will be implemented. As it does daily, temperature checks will be used to screen individuals registering a temperature of above 100 degrees. Furthermore, proper personal protective equipment will be utilized, with all participants wearing a mask or face shield, the Board Agents and election observers being stationed behind plexiglass barriers, and ample use of hand sanitizer and the cleaning of common touch surfaces. In addition, writing utensils needed by voters to vote will be single use. Based on its proffered election plan, the Employer argues that it can meet or exceed every condition raised in the General Counsel's recent memorandum discussing manual elections during this pandemic.¹⁴

Finally, the Employer also submits that a mail ballot election risks disenfranchising a number of potential voters. Citing to certain case law, the Employer argues that mail ballot elections produce lower voter participation, are ripe for coercion of voters, and without direct Board Agent oversight of the voting process, cannot be adequately supervised and fairly conducted. In support of this argument, the Employer, through offers of proof, proffered statements from two bargaining unit employees that discussed employee concern about coercion and intimidation from the Union if this matter is conducted via mail, and concern that votes in a mail ballot process will not be kept confidential.

¹⁴ [Suggested Manual Election Protocols](#), General Counsel Memorandum 20-10.

B. The Union's Position

The Union submits that this matter should be conducted via mail-ballot. In its view, a mail-ballot election is the safest method for voting in this case given the increasing cases of COVID-19 in the State of Alabama. Further, the Union cites to extent case law, as well as recent COVID-19-related Board decisions, upholding a Regional Director's discretion to determine the method by which elections should be conducted.

Moreover, the Union disagrees that the Employer's proposed manual election details will result in a safely run election. According to the Union, conducting a manual election outside during the Summer in southern Alabama, where extreme heat and humidity, thunderstorms, and rainy conditions are prevalent, raises its own practical concerns unrelated to the pandemic, such as what happens if a severe weather incident occurs, or election participants need to use the restroom. In this regard, I note that the average August temperature in this area is approximately 90 degrees. It further questions the Employer's plan as the details for dealing with challenged ballots, are, in its view, lacking given the significant chance that dealing with challenged voters may result in the inability of the Board Agent(s) and observers to maintain proper social distance. Additionally, the Union points to the need for a release schedule requiring Board Agents and observers to travel around the exceedingly large facility to release voters, and the likely inability of those participants to maintain proper social distancing.

Lastly, the Union disputes that a mail ballot election would disenfranchise voters. If, immediately preceding the election, voters test positive for the virus, or contract another illness that causes a temperature above 100 degrees, voters would be unable to vote in the election. Thus, the Union argues that holding a manual election actually raises the risk of disenfranchising voters versus a mail-ballot election.

V. ANALYSIS AND FINDINGS

A. Board Law and Guidance

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.

On April 17, 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. 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.¹⁵

Furthermore, and as referenced above, the General Counsel recently issued guidance as it pertains to manual elections being conducted during this pandemic. In his memorandum, the General Counsel provides suggested manual election protocols for conducting manual elections in this current environment. Importantly, the General Counsel reaffirmed, on multiple occasions in his four-page memorandum, that Regional Directors have authority delegated by the Board to

¹⁵ *Atlas Pacific Engineering Company*, 27-RC-258742, at fn. 1 (May 8, 2020).

make initial decisions about when, how, and in what manner all elections are conducted.

According to the General Counsel, Regional Directors:

have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

B. A Mail-Ballot Election is Warranted

The circumstances surrounding the COVID-19 pandemic are nothing but extraordinary.

Like the rest of the United States, Alabama has been strongly affected by the virus, and the number of daily confirmed cases has been steadily rising for multiple weeks. Given the extraordinary circumstances caused by the continuous spreading of COVID-19 that still exist in the State of Alabama and the entirety of the United States, I find it appropriate to exercise my discretion to direct a mail ballot election in this case. Not only do I derive such discretion from extant case law, the Board and General Counsel have specifically emphasized Regional Director's discretion in directing elections during these unprecedented times.

In so finding, I have considered the Employer's proffered plan to safely run a manual election at its facility, and while I acknowledge and appreciate the careful consideration paid to this issue by the Employer, I find that its election arrangements are inadequate under these extraordinary circumstances. While various precautions would be taken by the Employer to attempt to ensure safety, a manual election would place around 1,047 employees, observers, and Board Agents in very close proximity to each other for a substantial period of time over the course of several days. 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 the pre-election conferences, including the check of the voter list and the parties' inspection of the voting areas.

The Board Agents and observers would then share a voting area for the duration of the proposed manual election, an exposure sufficient to risk exposure to the virus. The observers would need to check in voters on the voter list, and the Board Agents would provide a ballot to each voter. While it is contemplated that all participants will wear masks and face coverings, there are circumstances recognized by the Governor of Alabama where face coverings cannot be worn, for instance for individuals with medical issues, and thus it is entirely possible that at some point in this election, certain participants will be gathered within 6 feet of each other without facial coverings. Furthermore, given the volume of voters in this case, should voters fail to heed the 6-foot markers or proper social distancing guidelines, there is a distinct risk of many voters—larger than the 20-person threshold suggested by the State of Alabama—congregating in a small space. In either circumstance, the risk of exposure to all participants is significant.

Even with the Employer's proposed precautions, a large number of challenged ballots are expected in this election. This will necessitate the Board Agents, observers, and challenged voters to work closely and collaboratively to complete the challenged envelope and to ensure that the challenged ballot is placed into that envelope. Further, at the conclusion of the election, multiple Board Agents would need to aid in the vote count in the same voting space, with the observers, party representatives, and other employees who wish to attend. The vote count alone in this case will take multiple hours.

In addition to the above, a manual election will require travel on the part of at least twelve Board Agents, the majority of whom are based out of the Region 15 office in New Orleans. As noted earlier, New Orleans has been a known hot-bed for infections since mid-

March 2020. Due to the number of agents required to conduct this election manually, the election could not be fully staffed from the Regional Office in New Orleans. As such, Board agents from Region 15's Memphis and/or Little Rock office would be required to travel to Alabama, and the Region would likely also need to send agents from Region 10's Birmingham Office in order to fully staff this election.

The Employer's facility is located hundreds of miles from each of these offices, thereby requiring anywhere between 2.5 and 7.5 hours of travel one-way depending on the Regional office from which the agent is traveling. Furthermore, since carpooling is at odds with CDC guidelines regarding social distancing, Board agents would need to travel in separate vehicles at great expense to the Agency. As noted above, this is a large and complex election spanning multiple days which would require Board agents to spend three nights in a hotel given that the election would end at 9:30 p.m. and then the count would need to take place immediately after, thereby exposing each agent to hotel workers and restaurant employees and exposing these hotel and restaurant employees to a dozen Agents coming from multiple states across the southeast, including Louisiana where there are over 100,000 confirmed COVID-19 cases. Holding a mail ballot election, and minimizing travel, would be the safest option as non-essential travel should generally be avoided at this time.

The Employer also contends that it can meet, and exceed, the guidance provided by the General Counsel in Memorandum 20-10 for conducting manual elections. First, I note that the General Counsel's "Suggested Manual Election Protocols" provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate. It is not a checklist whereby a party is entitled to a manual election if it can meet these requirements. As

the General Counsel states multiple times in his memo, the manner of election is a question of discretion delegated by the Board to the Regional Directors.

To be sure, this case is a prime illustration for why Regional Directors are afforded the requisite authority to determine whether an election can be conducted safely—the very first protocol discussed by the General Counsel says “[p]olling times procedures for releasing voters must be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board Agents and observers.” An election of this size, even before the pandemic, necessarily required long voting periods over multiple days that would require long windows of interaction between Board Agents and observers. With consideration of the pandemic, in order to accommodate nearly 1,100 voters and the continuous sanitization of common touch surfaces after each voter, those same lengthy voting periods conducted over the course of several days will need to be further elongated which will unquestionably result in additional Board Agent and observer exposure. All of which is unnecessary and avoidable given the mail-ballot alternative.¹⁶

Moreover, the policies and protocols implemented by the Employer in response to the pandemic further highlight the potential for voter disenfranchisement or disruption to the election. Any employee or visitor, including Union representatives or the Board Agent(s) assigned to conduct the election who register a temperature of greater than 100 degrees, would be denied entrance to the Employer’s facility and would be unable to participate in the election.¹⁷

¹⁶ The Employer presented as evidence in this case a video whereby it conducted a short, mock election using the various protocols it proposes in this case. While I appreciate the Employer’s time and energy paid to this issue, a mock election with a few participants in a controlled and staged environment on a sunny day is entirely different than one with over a dozen Board Agents, multiple voting booths, multiple sets of observers, complicated release schedules necessitating travel throughout the facility by Board Agents and observers, countless voters congregating in line and waiting to vote, and the potential for inclement weather.

¹⁷ Temperature screening, implemented in response to the pandemic, would also deny entry to any voter or participant who may be experiencing an illness unrelated to COVID-19. A temperature of 100 degrees, in a pre-COVID-19 voting environment, would not prevent a voter from accessing the polling site. Now, however,

An employee who is ill or manifesting symptoms unrelated to COVID-19 may opt to remain at home, and not vote, due to fear of failing the Employer's screening protocol. Alternatively, given the importance of the election, the ill employee may feel compelled to report to the facility in order to allow his voice to be heard in the election, thereby endangering all election participants. While the Employer plans to screen employees when they arrive to work on the day of the election, these screening procedures are not infallible and may result in a COVID-infected employee, particularly those that are asymptomatic, entering the facility. These scenarios may not only result in voter disenfranchisement, or the potential transmission of the virus by asymptomatic employees or ill employees without a fever, but also the last-minute cancellation of the election should the affected person(s) be the Board Agent(s) tasked with conducting the election.

The above is not meant to penalize the Employer for instituting necessary, and in some instances required, protocols in an effort to ensure the safety of its employees and visitors. It is certainly no fault of the Employer that this petition is being processed during a pandemic that has necessitated the implementation of protocols and policies which, by their very nature, call into question the propriety of manual elections at this time. On the contrary, it is meant to stress the unique and unpredictable nature of this pandemic, and the resultant risks of proceeding to a manual election in these extraordinary times, all of which can be alleviated with a mail ballot election. Voting by mail ballot in this case eliminates any concern that employees, Union representatives, or the Board Agent(s) assigned to conduct the election would be denied entry to the Employer's facility on the date of the election. A mail ballot election will allow all petitioned-for employees the opportunity to vote.

conducting a manual election in the midst of this pandemic not only risks the disenfranchisement of individuals affected by COVID-19, but also those not currently infected with the virus.

The Board recognized in *San Diego Gas & Electric*, supra, that extraordinary circumstances may be cause for a Regional Director to direct voting by mail ballot in situations other than the three outlined by the Board in that decision. What makes the current pandemic truly an “extraordinary circumstance” is the day-to-day uncertainty and rapidly evolving environment in which we find ourselves. As businesses have reopened and people around the State of Alabama have reentered a less-restricted public life, community spread of COVID-19 has increased. This up-tick in community spread has led to state-wide mask-mandates, continuation of mandatory 14-day quarantines for positive COVID cases, prohibition on all non-work related gatherings of any size that cannot maintain a consistent six-foot distance between persons, and the continued restrictions on business that have reopened. As discussed above, this election necessitates the gathering of nearly 1,100 individuals at a time, and in a County, where it is recommended that gatherings be restricted to 20 people or fewer due to the high-risk-of-transmission assessment of the Alabama Department of Health.

The Employer argues that the election is being conducted in Calvert, not in Alabama as a whole, but as we have seen globally, the coronavirus does not recognize borders. Washington County may not have the sheer volume of COVID-19-confirmed cases that other parts of the State have seen, however, the Employer’s facility is a gathering point for approximately 1,500 to 1,600 employees who reside in various parts of the State, and as the statistics cited in this Decision show, counties surrounding Washington County have a much larger volume of COVID-19 cases. To ignore that data, and focus solely on the location of the plant, is short-sighted and irresponsible given the very large number of employees, party representatives, and Board Agents who would participate in this election.

The Employer also contends that a mail-ballot election increases the risk of voter disenfranchisement because employees are allegedly concerned that their votes will not be kept confidential if they are completed by mail. While I can appreciate the concern of employees who will participate in this election, a mail-ballot election is no-less secret than a manual election. It is true that voters are required to sign the outside yellow envelope, however, neither the blue envelope that is placed inside that yellow envelope, nor the ballot that is placed inside the blue envelope, should have any accompanying voter identification. According to Section 11336.5(b) of the Board's Casehandling Manual, "[a]t the time scheduled for the count, the returned envelopes are treated as 'voters' approaching the checking table" as they would in a manual election. "After the yellow outer return envelopes have been checked against the [voter] list, all should be opened at once. Next, the blue ballot envelopes should be mixed thoroughly before the envelopes are opened and ballots are extracted. The ballots should be mixed again before being counted." *Id.* Given that the yellow ballots (with accompanying voter identification) are separated from the blue envelopes (with no accompanying voter identification) and then the blue envelopes are thoroughly mixed, with ballots again being mixed thereafter, there is simply no opportunity, at all, for any Employer or Union observer or vote count participant to learn the identity of any vote. The Board's involved and exceedingly specific mail-ballot procedures were instituted to ensure the confidentiality of every voter.¹⁸

Based on the risk factors discussed above, and the continued uncertainty that this pandemic creates, I have determined that voting by mail significantly decreases the risk of COVID-19 transmission among election participants and voter disenfranchisement as compared

¹⁸ Regarding confidentiality concerns, I have also determined that a mail ballot election is preferable to conducting a manual election in the Employer's parking lot where any supervisor, manager, or Employer executive could view the entirety of the election from an adjacent window.

to an in-person manual election. The Employer's remaining arguments favoring a manual election over a mail ballot election are unavailing. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." See *London Farm Dairy*, 323 NLRB 1057 (1997) (internal citations omitted). Furthermore, the Board has previously rejected arguments that mail ballot elections lack the requisite oversight and that they are ripe for voter coercion and lower voter participation. See *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, 323 NLRB at 1058. While long-standing Board policy favors manual elections, mail ballot elections continue to be an often-utilized voting method and continue to have their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

VI. ADDITIONAL FINDINGS

Based upon the entire record in this matter, including the stipulations of the parties, I also conclude and find as follows:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act based on the following stipulated commerce facts:

The Employer/Petitioner is a limited liability company incorporated in the State of Delaware with an office and place of business in Calvert, Alabama where it is engaged in the business of providing steel components. Within the past twelve (12) months, a representative period, the Employer purchased and received goods and materials at its Calvert, Alabama facility valued in excess of \$50,000 directly from points located outside the State of Alabama. Based on this, the Employer is engaged in commerce that affects commerce within the meaning of Section 2(6) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

There is no collective-bargaining agreement covering any of the petitioned-for employees, and there is no contract or other bar in existence which would preclude processing this petition to an election.

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.

The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All hourly full-time and regular part-time production and maintenance employees employed by the Employer at its Calvert, Alabama facility

Excluded: All office clerical and technical employees, Test Lab Operators and Test Lab Specialists, temporary employees, guards, professional and confidential employees and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: The parties agree that Planners and Specialists may vote in the election, but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

VII. CONCLUSION

The risks of COVID-19 are somewhat unknown and, while these employees are required to appear at work because no other alternative exists for them, there is an alternative to a manual election – a mail-ballot election. A mail-ballot election would limit and/or avoid all in-person contact between the Board agent(s), observers, and voters. Therefore, in an effort to ensure the safety of everyone during the ongoing pandemic, I believe a mail-ballot election is warranted.

VIII. DIRECTION OF ELECTION

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

wish to be represented for purposes of collective bargaining by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

Eligibility to Vote

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which 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 services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the Planner and Specialist classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

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.

List of Eligible voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 US 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before August 7, 2020. No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to 504-589-4069. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a

minimum of three (3) working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

IX. 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: July 31, 2020

/s/

**M. KATHLEEN McKINNEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 15
600 South Maestri Place – 7th Floor
New Orleans, LA 70130-3413**



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 4:30 PM (CST) on Thursday, September 3, 2020, ballots will be mailed to voters from the National Labor Relations Board, Region 15, 600 South Maestri Place – 7th Floor, New Orleans, LA 70130-3413. 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.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Friday, September 11, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 15 Office at (504)589-6362 or our national toll-free line at 1-844- 762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Region 15 Office on Thursday, October 1, 2020 at 9:00 AM (CST). In order to be valid and counted, the returned ballots must be received in the Region 15 Office prior to the counting of the ballots.



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All hourly full-time and regular part-time production and maintenance employees employed by the Employer at its Calvert, Alabama facility who were employed by the Employer during the payroll period ending July 18, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All office clerical and technical employees, Test Lab Operators and Test Lab Specialists, temporary employees, guards, professional and confidential employees and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE

The parties agree that Planners and Specialists may vote in the election, but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election. The Planners and Specialists employed by the Employer at its Calvert, Alabama facility who were employed by the Employer during the payroll period ending July 31, 2020.



UNITED STATES OF AMERICA
National Labor Relations Board

15-RM-246203



OFFICIAL SECRET BALLOT

For certain employees of
AM/NS CALVERT, LLC

Do you wish to be represented for purposes of collective bargaining by
**UNITED STEEL, PAPER & FORESTRY, RUBBER,
MANUFACTURING, ENERGY ALLIED INDUSTRIAL &
SERVICE WORKERS INTERNATIONAL UNION?**

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

NO

DO NOT SIGN OR WRITE YOUR NAME OR INCLUDE OTHER MARKINGS THAT WOULD REVEAL YOUR IDENTITY. MARK AN "X" IN THE SQUARE OF YOUR CHOICE ONLY. If you make markings inside, or anywhere around, more than one square, you may request a new ballot by referring to the enclosed instructions. If you submit a ballot with markings inside, or anywhere around, more than one square, your ballot will not be counted.

The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

United States of America
National Labor Relations Board

**Instructions to Eligible Employees Voting
By United States Mail**



INSTRUCTIONS

1. MARK YOUR BALLOT IN SECRET BY PLACING AN X IN THE APPROPRIATE BOX. DO NOT SIGN OR WRITE YOUR NAME OR INCLUDE OTHER MARKINGS THAT WOULD REVEAL YOUR IDENTITY.
2. IF YOU SUBMIT A BALLOT WITH MARKINGS INSIDE, OR ANYWHERE AROUND, MORE THAN ONE SQUARE, YOUR BALLOT WILL NOT BE COUNTED. YOU MAY REQUEST A NEW BALLOT BY CALLING THE REGIONAL OFFICE AT THE NUMBER BELOW.
3. IT IS IMPORTANT TO MAINTAIN THE SECRECY OF YOUR BALLOT. DO NOT SHOW YOUR BALLOT TO ANYONE AFTER YOU HAVE MARKED IT.
4. PUT YOUR BALLOT IN THE BLUE ENVELOPE AND SEAL THE ENVELOPE.
5. PUT THE BLUE ENVELOPE CONTAINING THE BALLOT INTO THE YELLOW ADDRESSED RETURN ENVELOPE.
6. SIGN THE BACK OF THE YELLOW RETURN ENVELOPE IN THE SPACE PROVIDED. TO BE COUNTED, THE YELLOW RETURN ENVELOPE MUST BE SIGNED.
7. DO NOT PERMIT ANY PARTY – THE EMPLOYER, THE UNION(S), OR THEIR REPRESENTATIVES, OR AN EMPLOYEE-PETITIONER – TO HANDLE, COLLECT, OR MAIL YOUR BALLOT.
8. MAIL THE BALLOT IMMEDIATELY. NO POSTAGE IS NECESSARY. For further information, call the Regional Office at:

(504) 589-6362

TO BE COUNTED, YOUR BALLOT MUST REACH THE REGIONAL OFFICE

BY Friday, September 25, 2020

RIGHTS OF EMPLOYEES

Under the National Labor Relations Act, employees have the right:

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of their own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for non representational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both employers and unions to know what is expected of them when it holds an election.

If agents of either unions or employers interfere with your right to a free, fair, and honest election, the election can be set aside by the Board. Where appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in the setting aside of the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes.

The National Labor Relations Board protects your right to a free choice

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law. The National Labor Relations Board as an agency of the United States Government does not endorse any choice in the election.



NATIONAL LABOR RELATIONS BOARD
an agency of the
UNITED STATES GOVERNMENT



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (504)589-6362 or visit the NLRB website www.nlr.gov for assistance.