

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18**

ASPIRUS KEWEENAW

Employer

and

MICHIGAN NURSES ASSOCIATION

Petitioner

Case 18-RC-263185

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on August 3, 2020.¹ The parties waived their right to a pre-election hearing and stipulated that the sole issue is whether the election should be conducted in person or by mail ballot, which is a non-litigable matter.² The National Labor Relations Board (Board) has delegated its discretion in determining such arrangements to Regional Directors. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). The Employer argues for a manual election. The Petitioner did not submit a position on the issue. In carefully considering the arguments made by the Employer, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the COVID-19 pandemic at this time.

CONCLUSIONS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.³
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

¹ All dates are in 2020, unless otherwise noted.

² Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

³ The Employer is engaged in the business of providing healthcare services at its Laurium, Michigan facility. The parties stipulated that during past year, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Michigan and had annual gross revenues in excess of \$250,000.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time and occasional registered nurses⁴ and house supervisors employed by the Employer at its facility located at 205 Osceola Ave., Laurium, Michigan, 49913; but excluding all other employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Michigan Nurses Association. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

1. Employer Operations

The Employer operates an acute care hospital located in Laurium, Michigan, located in Houghton County in Michigan's Upper Peninsula. The Employer employs approximately 58 employees in the bargaining unit, consisting of registered nurses and house supervisors.

2. The Employer's Position

The Employer argues for a manual election. It points out that manual elections are normally favored by the Board. In asserting that a manual election is appropriate in this case, the Employer cites to the relatively low level of COVID-19 cases in Houghton County and the Upper Peninsula of Michigan. It also explains that it has implemented various safety measures for staff and visitors to the facility lowering the risk of transmission, including, but not limited to, denying entrance to its facility for persons not wearing a face covering or, if in the Employer's assessment, they display symptoms of COVID-19 or have a fever. The Employer further asserts that because the Region is no longer under mandatory telework and there are no applicable lockdown

⁴ The parties agreed that occasional registered nurses will only be eligible to vote if they have worked a minimum of 120 hours in either of the two quarters immediately preceding the eligibility date. See *Marquette General Hospital, Inc.*, 218 NLRB 713 (1975).

orders in effect, there are no extraordinary circumstances that would warrant a mail ballot election. Finally, the Employer states that it would comply with suggestions included in General Counsel Memorandum 20-10 entitled “Suggested Manual Election Protocols” (GC 20-10), thereby reducing the risk of COVID-19 transmission during the election.

3. Applicable Framework When Considering a Mail Ballot Election

The Board’s decision in *San Diego Gas*, above at 1145 (1998), recognizes that Board elections should, as a general rule, be conducted manually and specifies well-settled guidelines for determining whether a mail ballot election would normally be appropriate. However, in *San Diego Gas*, the Board also recognized that “there may be other relevant factors that the Regional Director may consider in making this decision” and that “extraordinary circumstances” could permit a Regional Director to exercise his or her discretion outside of the guidelines set forth in that decision. *Id.*

Consistent with the recognition of the discretion afforded to Regional Directors in extraordinary circumstances in *San Diego Gas*, 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.

Recently, the Board has affirmed that it will continue to consider whether manual elections should be directed based on the circumstances prevailing in the Region charged with conducting the election even if the Region is no longer operating under mandatory telework. See *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) and *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020).⁵ As I describe below, I find that the COVID-19 pandemic is an extraordinary circumstance based on the current state of the COVID-19 pandemic in the relevant

⁵ Contrary to the Employer’s contention that the Board relied “on the extraordinary federal, state, and local directives *that have limited nonessential travel, and required the closure of nonessential businesses*” (emphasis added) and mandatory telework in denying review in *Brink’s*, its decision in that case and subsequent denials of review relied solely “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.”

area, state and federal guidance, the nature of the Employer's operations as an acute care hospital, and the ongoing uncertainties created by COVID-19 at this time.

4. Current State of the Pandemic in the Relevant Area

COVID-19 has created a public health crisis, responsible for upwards of 165,000 deaths in this country. Currently, the daily number of new COVID-19 cases nationwide continues to be significantly higher than what it was at the time the Board issued its April 17 announcement. In assessing the local conditions, I must consider the state of the pandemic in Wisconsin, where the Board Agent who would be conducting the election is located, and through which the Board Agent would be travelling, as well as Michigan, with particular attention to the Upper Peninsula and Houghton County where the Employer is located.

Over July and continuing through August, Wisconsin experienced a huge surge in new COVID-19 cases, having reached record highs in both new daily cases and the rolling seven-day average of new COVID-19 cases as recently as late July, without any significant or sustained decline through August.⁶ Michigan has also seen a recent surge of COVID-19 cases.⁷ On July 29, Michigan Governor Gretchen Whitmer issued Executive Order 2020-160, which recognized that while progress had initially been made in Michigan's fight against COVID-19, the state was seeing a resurgence of the virus. It notes that over the month of July, cases rose from a rolling seven-day average of 354 cases per day at the beginning of the month to 692 cases by the end of July, a two-fold increase. In support of implementing additional restrictions, Governor Whitmer noted, "We cannot afford to relax our vigilance if we hope to restart our economy, open our schools, and avoid a second wave."⁸

The Employer argues that Michigan's Upper Peninsula and Houghton County have largely been spared from COVID-19, as evidenced by various executive orders containing more lenient restrictions for the Upper Peninsula area. However, the most recent July 29 executive order actually expanded certain restrictions to the Upper Peninsula, indicating a need for greater vigilance even in the Upper Peninsula. While COVID-19 cases have been relatively low in the area, this appears to be shifting. Unlike much of Michigan which saw a giant surge in COVID-19 cases in the spring, Michigan's

⁶ "Wisconsin Coronavirus Map and Case Count." New York Times. <https://www.nytimes.com/interactive/2020/us/wisconsin-coronavirus-cases.html> (accessed August 13, 2020).

⁷ "Michigan Coronavirus Map and Case Count." New York Times. <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (accessed August 13, 2020).

⁸ "Executive Order 2020-160: Amended Safe Start Order." The Office of Governor Gretchen Whitmer. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-535195--,00.html (accessed August 13, 2020).

Upper Peninsula has only recently seen its surge of cases beginning in July and continuing through August.⁹ As recently as July 28, the area experienced its highest daily number of new cases to date.¹⁰ While Houghton County began last month with just 14 cases, it ended the month with 43 cases, experiencing an increase of over 200 percent. Additionally, several nearby counties are seeing an uptick in new COVID-19 cases, with neighboring Ontonagon County now listed as one of three counties in the Upper Peninsula with a heightened status of “Accelerated Spread” by the Harvard Global Health Institute.¹¹ This is especially concerning given the Upper Peninsula is a rural area with limited hospital capacity.¹²

5. Federal, State and Local Guidance

The U.S. Center for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person and that a person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes.”¹³ Guidance issued by the CDC recommends “limit[ing] in-person contact as much as possible.” Governor Whitmer’s July 29 executive order 2020-160, as amended by Executive Order 2020-161, recommends that any work that is capable of being done remotely in the Upper Peninsula should be performed remotely.

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. The Board Agent, observers and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Employer’s proposal for an election includes four and half hours of polling, staggered over three polling sessions. That time does not include the pre-election conference, the time it takes to set up and take down the

⁹ State of Michigan, Coronavirus, Michigan Data, Cumulative Trends available at https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (accessed August 13, 2020 and filtered by “Preparedness Region 8,” which represents Michigan’s Upper Peninsula).

¹⁰ *Ibid.*

¹¹ Harvard Global Health Institute, COVID Risk Level Map, available at <https://globalepidemics.org/key-metrics-for-covid-suppression/> (accessed August 13, 2020).

¹² State of Michigan, Coronavirus, Statewide Available PPE and Bed Tracking, available at <https://www.michigan.gov/coronavirus/0,9753,7-406-98159-523641--,00.html> (accessed August 13, 2020).

¹³ “Frequently Asked Questions, Spread” (updated August 4, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed August 13, 2020).

election site or the count. Taken as a whole, this amounts to substantial in-person contact. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal and state guidance, all of which advise avoiding in-person contact. This guidance is even more critical given the growing spread of COVID-19 in the local area.

The election would also require travel to the facility by a Board Agent and party representatives, which by virtue of its significant distance from the Regional office, would require two overnights to accommodate the Employer's proposed three polling sessions. The CDC continues to maintain that "[b]ecause travel increases your chances of getting infected and spreading COVID-19, **staying home is the best way to protect yourself and others from getting sick**" (emphasis in original).¹⁴ The State of Wisconsin's Department of Health Services recommends "Wisconsinites cancel or postpone all travel, including travel within the state."¹⁵ It further warns that travel is "risky" and that "the level of COVID-19 spread in the area you want to travel to may change quickly." Given that a manual election would necessitate travel by a Board Agent both from and through Wisconsin, ordering a manual election at this time would be contrary to the statewide guidance.

6. COVID-19 and Healthcare Workers

I also must consider the fact that this election involves healthcare workers at an acute care hospital who, by virtue of their work, have more exposure both to COVID-19 and may amplify outbreaks should they become ill. A mail ballot election eliminates any potential risks presented by a manual election and protects all the participants in the election, as well as the patients and the community served by the employees.

7. Current Uncertainties of a Manual Election Caused by COVID-19

Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, it is now well-established, although the exact percentage is uncertain, that a significant percentage of individuals infected with COVID-19 will remain asymptomatic and display no symptoms.¹⁶ It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals

¹⁴ "Travel during the COVID-19 Pandemic" (updated August 9, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed August 13, 2020).

¹⁵ "COVID-19: Travel." Wisconsin Department of Health Services. <https://www.dhs.wisconsin.gov/covid-19/travel.htm> (accessed August 13, 2020).

¹⁶ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (accessed August 13, 2020).

could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board Agent, who, along with the observers, will be in the voting area for a sustained period of time. A mail ballot election eliminates this risk.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election. This is a particularly important consideration in a unit of healthcare workers, who are at higher risk of falling ill. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election “at the earliest date practicable” consistent with the Board’s Rules and Regulations Section 102.67(b).

In its position statement, the Employer proposed various safety measures to mitigate the threat of COVID-19, including, but not limited to: disinfecting the voting area; providing disposable pencils; providing masks to all election participants; erecting plexiglass barriers; and performing temperature checks before anyone participating in the election can enter the facility. It also agrees to abide by the suggestions made in GC 20-10. I have carefully considered the Employer’s suggestions and the suggestions in GC 20-10. However, ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion and is a decision I must make on a case-by-case basis. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic to hold a manual election in this case even with the proposed safety measures. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel.

A mail ballot election would also meet the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known or up to date. Any mail ballot election, held at any time under any circumstances, includes and ensures procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Wisconsin and Michigan, where the mail ballots will be sent and received, has been disrupted. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and

their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Subregion 30 on August 24, 2020, at 4:30 p.m.¹⁷ Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 30 office by close of business at 4:30 p.m. on September 9, 2020. The mail ballots will be counted at the Subregion 30 office located at 310 West Wisconsin Avenue, Suite 450 West in Milwaukee, Wisconsin at 11:00 a.m. on September 14, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by August 31, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Subregion 30 office in order to arrange for another mail ballot kit to be sent to that employee.

To ensure the safety of the Board Agent and the public, the count shall be conducted virtually. Additional instructions will follow.

VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the weekly payroll period ending August 14, 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.

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.

¹⁷ The Union has waived all ten days of the ten-day eligibility list period contingent on having the voter list for at least three days prior to the start of the election, which commences when the ballots are dispatched.

VOTER LIST

As required by Section 102.67(I) 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 cellphone 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 19, 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 parties named in this decision. 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.

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 10 business 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.¹⁸ 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.

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

¹⁸ Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.

Aspirus Keweenaw
Case 18-RC-263185

Dated: August 17, 2020.

/s/ Jennifer A. Hadsall

Jennifer A Hadsall, Regional Director
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Attachment