

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

SUPERVALU WHOLESALE OPERATIONS, INC.

Employer

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 120**

Petitioner

Case 18-RC-263474

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on August 11, 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 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 argues for a mail ballot election. In carefully considering the arguments made by the Employer and Petitioner on this issue, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the COVID-19 pandemic in the local area 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 wholesale warehouse and distribution of groceries and related products out of its facility in Hopkins, Minnesota. The parties stipulated that during the past twelve months, a representative period, the Employer sold and shipped goods valued in excess of \$50,000 out of its Hopkins, Minnesota facility directly to points outside the State of Minnesota.

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 operations assistants and warehouse assistants employed by the Employer at 300 2nd Ave. S. in Hopkins, Minnesota; but excluding all other employees, clerks, professionals, managers, confidential employees, and guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The 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 International Brotherhood of Teamsters Local 120. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

1. Employer Operations

The Employer maintains a facility in Hopkins, Minnesota, located in Hennepin County, out of which it warehouses and distributes groceries and other related items. The Employer employs approximately 11 employees in the proposed bargaining unit.

2. The Parties' Positions

The Employer argues for a manual election. It points out manual elections are normally favored by the Board and there are no stay-at-home orders now in effect for the relevant area. It notes the proposed on-site voting area is spacious enough to accommodate social distancing between the election participants.⁴ It also states that it will follow the guidance included in General Counsel Memorandum 20-10 entitled "Suggested Manual Election Protocols" (GC 20-10) and that it has already implemented mandatory temperature checks of employees, social distancing, and facial coverings at its facility. In support of its contention a manual election can be held safely, it states that it is not aware of any employee having contracted COVID-19 while at work. Finally, the Employer notes minimal travel by the Board Agent would be required to conduct this election.

⁴ The Employer stated its proposed polling place was at least 40-feet by 40-feet with separate entrances and exits. The record contains no information about ventilation or air circulation.

The Petitioner argues for a mail ballot election. It notes a manual election will require participants to be in the same room for the duration of the two separate two-hour polling periods as currently proposed by the Employer. It argues such a prolonged exposure in an enclosed space represents a danger to the health and safety of the election participants. It notes the Employer's COVID-19 policy does not permit any employee who is sick or displays a fever or other symptoms to enter the Employer's facility, which could deprive eligible employees of their right to vote. Additionally, it points out employees required to quarantine due to having, or being exposed to, COVID-19 would likewise not be able to vote during a manual election. The Petitioner argues that both of these scenarios are avoided with a mail ballot, which ensures all employees have ample opportunity to vote.

3. A Mail Ballot Election Is Appropriate

The Board's decision in *San Diego Gas*, above at 1145, 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. I recognize that under normal circumstances, a manual election would be appropriate in this unit. 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 a "COVID-19 Operational Status Update," which states in pertinent part:⁵

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 affirmed the ongoing COVID-19 pandemic constitutes extraordinary circumstances as contemplated by *San Diego Gas* and 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." See *Brink's Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (denying review of Regional Director's decision to order a mail ballot election); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); and *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same). As I describe

⁵ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

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 area, state and federal guidance, and the ongoing uncertainties created by COVID-19 at this time.

COVID-19 has created a public health crisis responsible for upwards of 170,000 deaths in this country. Currently, the number of new COVID-19 cases continues to climb and is surging in several areas across the country. The seven-day rolling average of new cases in Minnesota has climbed dramatically since mid-June, without any significant or sustained decline.⁶ In Minnesota, the COVID-19 pandemic appears to have significantly worsened since the Board's April 17 Operational Status Update. As of April 17, the average daily number of confirmed positive cases (based on a rolling seven-day average) in the state was 105. That number has now increased to 604. In the last seven days, Hennepin County, where this election would take place, reported 1,153 new COVID-19 cases.⁷

It is not possible for me to know how much of these numbers represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there is no seen improvement in COVID-19 conditions and that there continues to be significant spread of COVID-19 in the local area, factors which lead me to conclude there is too much risk to holding a manual election at this time.

The U.S. Centers 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 creating droplets that can land in the mouths or noses of people nearby or be inhaled into the lungs.⁸ Guidance issued by the CDC states that the “[b]est way to prevent illness is to avoid being exposed to this virus” (emphasis in original).⁹ This guidance is echoed by the State

⁶ Minnesota Coronavirus Map and Case Count, *New York Times*. Retrieved from <https://www.nytimes.com/interactive/2020/us/minnesota-coronavirus-cases.html> (accessed August 19, 2020).

⁷ Id. (with data filtered by Hennepin County).

⁸ “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 19, 2020).

⁹ “How to Protect Yourself & Others” (updated July 31, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed August 19, 2020).

of Minnesota's Department of Health, which recommends teleworking and staying at home as much as possible at this time.¹⁰

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Specifically, it instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “**[c]onsider voting alternatives available in your jurisdiction that minimize contact.**” Voting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19” (emphasis in original).¹¹ Similarly, Hennepin County and the City of Hopkins, where the Employer's facility is located, reiterate the CDC's recommendation for voters to vote by mail.¹²

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 Board Agent and observers must be present in the same space for the duration of the election period. In this regard, the currently proposed four-hour voting period (over two separate polling sessions) is an extended time period for the Board Agent and observers to spend together. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the guidance which advises against in-person contact, which a manual election necessitates. This guidance is even more critical now given the sustained surge of COVID-19 in the local area at this time.

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 certain individuals infected with COVID-19 will remain asymptomatic and display no symptoms. It may take several days for a person who has been infected to start

¹⁰ “Protect Yourself and Others: COVID-19.” Minnesota Department of Health. <https://www.health.state.mn.us/diseases/coronavirus/prevention.html#slow> (accessed August 19, 2020).

¹¹ “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed August 19, 2020).

¹² “COVID-19 response.” Hennepin County Minnesota. <https://www.hennepin.us/residents/elections/absentee-voting> (accessed August 19, 2020) (“Voters are encouraged to vote absentee by mail”). “Will voting be affected by COVID-19?” City of Hopkins. <https://www.hopkinsmn.com/Faq.aspx?QID=197> (accessed August 19, 2020) (“To minimize direct contact with others, the CDC encourages you to vote by mail”).

displaying symptoms, even though they are contagious prior to display of symptoms (pre-symptomatic transmission).¹³ As a result, despite the proposed screening and safety measures, infected individuals could participate in the election, unknowingly exposing coworkers, 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. 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 Section 102.67(b) of the Board’s Rules and Regulations.

While the Employer proposes various safety measures to mitigate COVID-19, including abiding by the suggestions included in GC 20-10, I have determined that we have not yet reached a safe enough juncture in the pandemic at this time to move forward with a manual election. I have determined the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact.

A mail ballot election would also meet the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. I note that neither party has argued the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention 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 Minnesota, the state in which 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

¹³ “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 19, 2020) (The CDC’s “current best estimate” is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic).

limiting in-person contact and travel.¹⁴ 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, Region 18, on August 27, 2020, at 4:30 p.m.¹⁵ Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 18 office by close of business at 4:30 p.m. on September 14, 2020. The mail ballots will be counted at the Region 18 office located 212 3rd Avenue South, Suite 200 in Minneapolis, Minnesota at 2:00 p.m. on September 17, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by September 3, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Region 18 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 may 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 15, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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 19, 2020) ("Because 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)). Linked to by "Travel." Minnesota COVID-19 Response. <https://mn.gov/covid19/for-minnesotans/get-help/travel.jsp> (accessed August 19, 2020).

¹⁵ The Union has waived eight days of the ten-day eligibility list period in order to proceed with the election on the date scheduled.

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.

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 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 24, 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.

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. 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. 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.

Supervalu Wholesale Operations, Inc.
Case 18-RC-263474

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.

Dated August 20, 2020.

/s/ Jennifer A. Hadsall

Jennifer A. Hadsall, Regional Director
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Attachment