

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

**AKZO NOBEL COATINGS, INC.**

**Employer**

**and**

**LOCAL 155, INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS OF  
AMERICA (UAW), AFL-CIO<sup>1</sup>**

**Case 07-RC-263442**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), a hearing was conducted before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether, in light of the continuing COVID-19 pandemic,<sup>2</sup> the Region should conduct an election for certain employees of the Employer, who are employed in Pontiac, Michigan, by manual or mail ballot. The Employer argues it is possible to conduct a manual election safely. The Petitioner supports whatever method does not delay resolution of the question concerning representation.

The Employer produces automotive and aerospace coatings at its facility in Pontiac, Michigan. Petitioner seeks to represent a unit of production, maintenance, quality, and shipping and receiving employees. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):

**Included:** All full-time and regular part-time production employees, maintenance employees, maintenance techs, quality employees, quality techs, shipping and receiving employees.

**Excluded:** All temporary employees, managers, clerical employees, and guards, and supervisors as defined by the Act.

**Others Permitted to Vote:** At this time, no decision has been made regarding whether employees classified as Team Leaders are included or excluded from the bargaining unit, and individuals in that classification may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

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<sup>1</sup> Parties' names appear as stipulated during the hearing.

<sup>2</sup> Throughout this decision, the terms "COVID-19," "Covid," and "coronavirus" are used interchangeably to describe the novel coronavirus.

There are approximately 107 individuals in the petitioned-for unit, including 12 team leaders.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,<sup>3</sup> the parties were permitted to present their positions, as well as witnesses and documentary evidence, and file post-hearing briefs regarding the mechanics of this election. I have carefully considered the record, including those positions and arguments, and for the reasons discussed below, I find that a prompt mail ballot election is appropriate in this case given the extraordinary circumstances presented by the continuing COVID-19 pandemic.

## **I. POSITIONS OF THE PARTIES**

The Employer contends that, despite the ongoing pandemic, a manual election can be conducted safely at its facility in Pontiac, Michigan. The facility consists of a 112,000 square foot warehouse and a 38,000 square foot main plant. The Manufacturing Director for North America testified the Employer's current COVID-19 protocols include practicing social distancing, wearing masks, providing hand sanitizer, disinfectant wipes, disinfectant sprays in all common areas including lunchrooms and locker rooms, and staggering start times, end times, and breaks. Supervisors usually clean common areas after breaks. The Employer provides personal protective equipment (PPE), including gloves, masks, and face shields, if necessary, and the ability to sanitize fork-lift trucks prior to use by a new employee. According to the Manufacturing Director, employees are screened using a CDC questionnaire which includes asking employees if they are exhibiting any symptoms or have been in contact with anyone that's tested positive for COVID-19, or if they are self-isolating. The Employer knows of only two positive COVID-19 cases at the facility, one which occurred in late March and the other in early April.

The Employer proposes that, in addition to following the COVID-19 guidelines above, it would abide by the Suggested Manual Election Protocols memorandum issued by General Counsel Peter Robb (see discussion of GC Memorandum 20-10 in Election Guidelines, below).

The Employer proposes a manual election consisting of two 2-hour sessions, from 5:00 a.m. to 7:00 a.m. and 1:00 p.m. to 3:00 p.m., on September 2, 2020,<sup>4</sup> in either its main lunchroom or in a tent outside its facility,<sup>5</sup> in an effort to maximize ventilation and air

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<sup>3</sup> Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

<sup>4</sup> All dates are in 2020, unless otherwise noted.

<sup>5</sup> The proposal of the usage of a tent was theoretical in that the Employer did not currently have in its possession a tent to conduct an election. The Employer indicated a willingness to rent a tent and place it outside, but did not specify the type, size or location of a tent, or other details necessary for appropriate consideration of this option, such as whether it could guarantee a tent could be procured by the date of the election, when the tent would be made available for inspection, the logistics of where employees would park if the tent were placed in the Employer's parking lot, how it would ensure voter privacy in the event a tent was used, whether the tent would be appropriate for inclement weather, whether and how the tent would be disinfected prior to or during the election, and whether the tent could meet the suggested manual election protocols in GC Memorandum 20-10.

circulation. The Employer is amenable to any single-day election at the above-specified times, taking place on a Thursday or a Friday between September 2 and October 2.

As noted, the Union simply seeks to have the election as soon as practicable and does not have a preference for the manner in which the election is conducted; however, it stated a preference for the Employer's offer to provide an outdoor tent over holding the election in a lunch room of the Employer's facility.

## II. BOARD LAW

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *Ceva Logistics US*, 357 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145.

The Board's longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.<sup>6</sup> However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Ibid.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other "extraordinary circumstances." *San Diego Gas*, above at 1145.

Consistent with the recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a "COVID-19 Operational Status Update,"<sup>7</sup> 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.

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<sup>6</sup> I note the provisions of the Casehandling Manual are not binding procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *Aaron Medical Transportation, Inc.*, 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995)). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

<sup>7</sup> <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

The Board has recognized the COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas* since at least May. See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying 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” to deny review of Regional Director’s decision to order a mail ballot election).

The Board has continually affirmed the ongoing COVID-19 pandemic constitutes extraordinary circumstances and noted 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); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same); *Tredroc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same). As such, I analyze the instant case in those terms.<sup>8</sup>

### III. PREVAILING COVID-19 CIRCUMSTANCES

Absent the present pandemic, a manual election would almost certainly be held in this case. I recognize a degree of reopening has begun, in the United States generally and in Michigan specifically. At the same time, it is undisputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is no easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains.

The United States and the State of Michigan continue to operate under declared states of emergency.<sup>9</sup> Despite unprecedented efforts to limit transmission, confirmed cases of COVID-19 in the United States exceeded 5.6 million, with over 175,000 fatalities as of August 23.<sup>10</sup>

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<sup>8</sup> It is noted that on August 25, 2020, the Board granted review in *Aspirus Keweenaw* Case 18-RC-263815 and issued a stay of a directed mail-ballot election, however, the Board has not issued a ruling on that matter that impact my findings herein.

<sup>9</sup> “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (March 13, 2020). The White House: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed August 20, 2020); “Governor Whitmer Extends Declaration of Emergency as Michigan Continues to Fight COVID-19” (August 7, 2020). Office of Governor Gretchen Whitmer. <https://www.michigan.gov/whitmer/0,9309,7-387-90499-536107--00.html> (accessed August 20, 2020).

<sup>10</sup> “Cases in the U.S.” (updated August 20, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (accessed August 20, 2020).

Michigan has reported 106,808 cases and 6,659 deaths.<sup>11</sup> The rolling seven-day average for new cases in Michigan has dropped below 600 only once since July 14, up from a low of 182 on June 16.<sup>12</sup>

In assessing the local conditions, I must consider the state of the pandemic in Michigan, where the Board agent conducting the election is located and would be required to travel, with particular attention to Pontiac in Oakland County, where the Employer is located. As of August 23, Oakland County has the second highest number of COVID-19 cases in the state, accounting for 16% of cases and over 17% of deaths. If its border counties of Wayne, Washtenaw, Macomb, Livingston, Lapeer, and Genesee are included, these numbers rise to over 63% of cases in Michigan, and nearly 82% of the state's deaths.<sup>13</sup>

#### A. Current Federal, State, and Local Directives

The United States Centers for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person.<sup>14</sup> 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,” so its guidance recommends “limit[ing] in-person contact as much as possible.”<sup>15</sup> Guidance issued by the CDC highlights the “[b]est way to prevent illness is to avoid being exposed to this virus” (emphasis in original).<sup>16</sup> Moreover, the CDC's August 9, update for travelers 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).<sup>17</sup>

The CDC's recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. The CDC further states that the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or

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<sup>11</sup> “Michigan Data” (updated August 20, 2020). State of Michigan. [https://www.michigan.gov/coronavirus/0,9753,7-406-98163\\_98173---,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html) (accessed August 20, 2020) (96,792 confirmed and 10,016 probable cases; 6,393 confirmed and 266 probable deaths).

<sup>12</sup> “Michigan Coronavirus Count and Case Map.” *The New York Times*. <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (accessed August 24, 2020)

<sup>13</sup> Ibid.

<sup>14</sup> I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (accessed August 20, 2020).

<sup>15</sup> “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 20, 2020).

<sup>16</sup> “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 20, 2020).

<sup>17</sup> “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 20, 2020).

object that has the virus on it and then touching one's mouth, nose, or eyes; however, "it is unlikely to be spread from domestic or international mail, products or packaging."<sup>18</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."<sup>19</sup>

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Michigan imposed strict guidelines early in the pandemic when, on March 23, Governor Gretchen Whitmer issued her first stay-at-home executive order suspending all nonessential activities. The stay-at-home orders thereafter extended through May 31. On June 1, Governor Whitmer rescinded the stay-at-home orders and announced the state was ready to transition to Phase Four, the "Improving" phase, of her 6-step Michigan Safe Start Plan, for the reopening and easing of restrictions in the state.<sup>20</sup> Under "MI Safe Start," the state's 83 counties were divided into eight regions. While certain regions in the state, largely in Northern Michigan and the Upper Peninsula, have advanced to Phase Five (Containing), the Detroit Region remains at Phase Four. On June 30, Governor Whitmer announced that, due to the recent spike in COVID-19 cases in Michigan, the Detroit Region (which includes the Pontiac area where the Employer's facility is located) would not advance to the fifth phase of her reopening plan by the Fourth of July weekend, as she had originally planned.<sup>21</sup> After cases began increasing, Governor Whitmer closed indoor bar service across most of the state, including the Detroit Region, which constituted a move backward on reopening Michigan.<sup>22</sup> On August 7, Governor Whitmer signed an executive order extending the state of emergency declaration related to the COVID-19 pandemic through September 4.<sup>15</sup>

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<sup>18</sup> "Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?" <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed August 20, 2020).

<sup>19</sup> "Running Essential Errands." <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed August 20, 2020).

<sup>20</sup> "Governor Whitmer Rescinds Safer at Home Order, Moves Michigan to Phase Four of the MI Safe Start Plan" (June 1, 2020). The Office of Governor Gretchen Whitmer. <https://www.michigan.gov/whitmer/0,9309,7-387-90499-530627--,00.html> (accessed August 10, 2020). See also, MI Safe Start (under the MI Safe Start Plan, the six phases to stop the spread of the COVID-19 and fully reopen the state are: (1) uncontrolled growth; (2) persistent spread; (3) flattening; (4) improving; (5) containing; and, (6) post-pandemic). <https://www.michigan.gov/coronavirus/0,9753,7-406-100467---,00.html> (accessed August 10, 2020).

<sup>21</sup> Executive Order 2020-143 (COVID-19) (July 1, 2020). [https://www.michigan.gov/whitmer/0,9309,7-387-90499\\_90705-533435--,00.html](https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-533435--,00.html) (accessed August 10, 2020).

<sup>22</sup> "Gov. Gretchen Whitmer closes Michigan indoor bar service, except for Up North." *Detroit Free Press*. <https://www.freep.com/story/news/local/michigan/detroit/2020/07/01/gov-whitmer-closes-michigan-indoor-bar-service-except-up-north/5354417002/> (accessed August 10, 2020).

## B. Election Guidance

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC 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).<sup>23</sup> Following these recommendations, Michigan mailed absentee applications to all of its 7.7 million registered voters in July for primary elections and, in August, sent postcards encouraging the use of mail ballots to the 4.4 million who did not vote in the primary elections.<sup>24</sup>

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols. While specifically noting that it is not binding on Regional Directors because the Board—not the General Counsel—has authority over matters of representation, it provides, in relevant part:

They [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.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board Agents and observers; the employer’s certification in writing that the polling area is consistently cleaned in conformity with

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<sup>23</sup> “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).

<sup>24</sup> “Michigan SOS Benson to mail millions of postcards to encourage absentee voting” (August 13, 2020). *Detroit Free Press*. <https://www.freep.com/story/news/politics/elections/2020/08/13/absentee-voting-election-michigan-benson-postcard/3364515001/> (accessed August 20, 2020).

CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board Agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel's suggestions also include the Employer's self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state "symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath." However, the CDC's "Symptoms of Coronavirus" include additional symptoms:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC also notes, "[t]his list does not include all possible symptoms."<sup>25</sup> Similarly, Oakland County provides a "Staff Screening Checklist for Businesses" that begins by asking: "Do you have any of the following symptoms: fever, cough, shortness of breath/difficulty breathing, or at least 2 of the following – chills, muscle pain, headache, sore throat, loss of taste/smell, diarrhea, or extreme fatigue?"

Subsequent to the issuance of GC 20-10, the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission). 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<sup>26</sup> and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC's August 9 update for "Travel during the COVID-19 Pandemic" continues to warn travelers: "You may feel well and not have any symptoms, but you can still spread COVID-19 to others."<sup>27</sup> While the suggested protocols for

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<sup>25</sup> "Symptoms of Coronavirus." CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed August 23, 2020).

<sup>26</sup> "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (accessed August 20, 2020).

<sup>27</sup> "Travel during the COVID-19 Pandemic" (updated August 9, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed August 20, 2020).

manual elections in GC 20-10 appear to adopt many of the CDC's in-person election recommendations for when other alternatives are not available, the Board has an acknowledged and accepted mail ballot procedure. Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns.

#### IV. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections. Manual elections are the preference of the Board, and I recognize the "potential problems" associated with mail ballot elections are some of the reasons the Board has traditionally preferred manual elections.<sup>28</sup> The Employer's brief highlights "potential problems" associated with mail ballot elections at the present time. Specifically, the Employer argues there has been diminished voter participation in mail ballot elections since March 14, compared to manual elections prior to the COVID-19 pandemic; however, it does not cite a specific source for its data. Furthermore, the Employer's argument ignores the Board's prior holding to the contrary:

[B]ecause mail ballot elections have, by design, largely been limited to situations where factors were present which were likely to inhibit voter participation if the election were conducted manually, there is no reason to believe that participation in those particular elections would necessarily have been higher had they been manual elections.

*San Diego Gas*, above at 1146. While I do not discount the concern regarding potential voter participation issues and acknowledge the potential risks of mail delivery procedures on the outcome of a mail ballot election, there is no indication the United States Postal Service in the Detroit area is unable to deliver mail or that there are any impediments to voter participation. Further, I note that any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. Additionally, the return date for mail ballots can be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.

Here, a manual election will necessarily bring together over 100 eligible voters, plus party representatives, and at least one Board agent. During the election, the Board agent(s) and observers will remain within close proximity of each other for an extended period of time and will interact with over 100 voters.

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<sup>28</sup> The Board's general preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. See, for example, *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (showing the Board has conducted mail ballot elections since its earliest days).

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board Agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange, and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the culmination of the election, the ballot count will proceed in the same area, with the possibility of many individuals present to witness the count, which will unnecessarily cause a significant risk of exposure for all involved.

There is also a significant risk of voter disenfranchisement for any voter who is (1) diagnosed with COVID-19 immediately preceding the election, (2) required to self-quarantine based on contact tracing, or (3) who shows up to the election with symptoms of COVID-19,<sup>29</sup> whether or not those symptoms are due to virus. Under the Employer's procedures for accessing the facility, on the day of the election, if employees register a temperature greater than 100 degrees, they would most likely be denied access and be unable to vote. Even more, should the Board Agent(s) tasked with conducting the election fail the temperature screen, the election would necessarily be cancelled. All of the substantial risks outlined above are eliminated by use of the Board's mail-ballot procedures.

The record contains no evidence from where, or by what means, people travel to the Employer's facility but anyone traveling in a way that brings them in direct contact with another person (e.g., carpooling, ridesharing, public transit) increases the chance of spreading the virus. This election would also involve travel to the facility by a Board agent and party representatives. Even if everyone who would participate in a manual election might appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic individuals.<sup>30</sup> Eligible voters, along with other employees who may come into contact with the Employer's participants, the Board agent, and party representatives, could risk exposure to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

I recognize the Employer has attempted to mitigate the risk to voters and its participants by proposing various safety measures to mitigate COVID-19, including conducting the election in a large room with markings for social distancing, plexiglass barriers, and a separate entrance and exit; providing masks, gloves, hand sanitizer, and disposable writing instruments and glue sticks; releasing voters gradually; and limiting the number of election observers. It also agrees to abide by the suggestions made in GC 20-10. I have carefully considered the Employer's proposals and the suggestions in GC 20-10. Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. At this time, as I have already

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<sup>29</sup> If only the three symptoms listed in GC 20-10 are used, there is a significantly increased risk of exposure to COVID-19.

<sup>30</sup> "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic" (May 4, 2020). *Emerging Infectious Diseases Journal* (Online Report). Centers for Disease Control and Prevention. [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article) (accessed August 20, 2020). See also, "COVID-19 Pandemic Planning Scenarios," above.

described, we have not reached a safe enough juncture in the pandemic, particularly in the city and county in which the election is to be held. In any manual election voters and the Board agent will still physically come together in a single location, even if dispersed over time and socially distanced. This represents an increased risk to all those participating which can be avoided by a mail ballot election. Even a manual election following the Employer's comprehensive plan to address these risks still involves physical interactions, congregating, and, in my view, increased risk of infection.

My decision is also based on the undisputed continued presence of the virus in the Detroit Region, particularly Oakland County, and the severity of the COVID-19 risk. In relying on these considerations, I am mindful of the Employer's position that it has operated without becoming aware of an employee testing positive for COVID-19 for over four months. While the Employer's COVID-19 protocols and those suggested in GC 20-10 may mitigate some of the risk of transmission of COVID-19, I cannot conclude that they sufficiently mitigate the risk of transmission and community spread to justify holding a manual election given the circumstances present in this case. I also note what appears to be a recent increase in cases in the Detroit area. It is not possible for me to know if this represents an increasing number of infections, a reflection of more widespread testing, better reporting, or simply a momentary spike in cases; but, it does raise the possibility that if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. A mail ballot election avoids this risk.

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 within the state. I find the circumstances at this time make it appropriate to a hold mail ballot election in this case.

## **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and for the reasons set forth above, I direct a mail ballot election to be conducted in accordance with the election details discussed below, and I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce<sup>31</sup> within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

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<sup>31</sup> The Employer, Akzo Nobel Coatings, Inc., a Delaware corporation, is engaged in the manufacturing of automotive and aerospace coatings at its factory located at 120 Franklin Road, Pontiac, Michigan. During the calendar year ending December 31, 2019, the Employer purchased and received its Pontiac, Michigan facility goods valued in excess of \$50,000 directly from points outside the State of Michigan.

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

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

**Included:** All full-time and regular part-time production employees, maintenance employees, maintenance techs, quality employees, quality techs, shipping and receiving employees.

**Excluded:** All temporary employees, managers, clerical employees, and guards, and supervisors as defined by the Act.

**Others Permitted to Vote:** At this time, no decision has been made regarding whether employees classified as Team Leaders are included or excluded from the bargaining unit, and individuals in that classification may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Local 155, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO**.

### **1. Election Details**

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 4:15 p.m. (EDT) on **Friday, September 11, 2020**, by personnel of the National Labor Relations Board, Region 7. 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 by mail and do not receive a ballot in the mail by **September 18, 2020**, should communicate immediately with the National Labor Relations Board by calling Board Agent Dan Molenda at 313-335-8034, Election Specialist Callie Clyburn at 313-335-8049, the Region 7 Office at (313) 226-3200 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 7 Regional Office by close of business, 4:45 p.m. (EST) on **October 2, 2020**. All ballots will be commingled and counted at 1:00 p.m. (EDT) on **October 9, 2020**. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots. The method for the count will require virtual participation and will be determined by the RD prior to the count.

### **Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **August 22, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## 2. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **August 31, 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](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

The list must be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The list must also be served electronically on the other parties named in this decision.

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

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

## 3. 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](http://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](http://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

Akzo Nobel Coatings, Inc.  
Case 07-RC-263442

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 27, 2020



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Terry Morgan, Regional Director  
National Labor Relations Board, Region 7  
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Detroit, Michigan 48226