

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**RISING GROUND**

**Employer**

**and**

**Case 02-RC-264192**

**WAREHOUSE PRODUCTION SALES  
AND ALLIED SERVICE EMPLOYEES  
UNION LOCAL 811 AFL-CIO**

**Petitioner**

**ORDER DIRECTING MAIL BALLOT ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit agreed upon by the parties in the Stipulated Election Agreement (“SEA”) executed and approved on August 18, 2020.<sup>1</sup> found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Warehouse Production Sales and Allied Service Employees Union Local 811 AFL-CIO (“Petitioner”).

The only matter in contention is whether to conduct a manual or mail ballot election.<sup>2</sup>

Rising Ground (“Employer”) has expressed a preference for a manual election, primarily based on the Board’s preference for manual elections. The Employer has also suggested that the United States Postal Service might fail to deliver mail ballots to employees. The Employer also raises the argument that as of August 21, 2020, the number of COVID-19 cases across the New

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<sup>1</sup> Pursuant to the Stipulated Election Agreement, the following unit is 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 Direct Support Professionals employed by the Employer at its facility located at 1035 East 233<sup>rd</sup> Street, Bronx, NY.

**EXCLUDED:** All other employees, including per-diem employees, guards, professional employees and supervisors as defined by the Act.

The parties agreed that Brandon Brown’s eligibility remains unresolved and he may vote under the challenge procedure if he so desires.

<sup>2</sup> The petition in this case was filed under Section 9(c) of the Act. The parties in lieu of a hearing, were provided an opportunity to present evidence on the issue of conducting a mail ballot election through position statements and documentary evidence. The Employer provided its position. See attachment. The Petitioner did not submit a position but did indicate their preference for a mail ballot election in Section 11 of the petition it filed herein. I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act.

York City area averages about 300 per day and that the number of cases has remained low and steady for the past few weeks.

I have carefully considered the position and arguments presented by the parties. As discussed below, despite the preference of the Employer and even though a manual election might be the prudent course in the absence of the COVID-19 pandemic, I have determined that it is appropriate to direct that a mail ballot election be conducted. This is the safest and most appropriate method of conducting a prompt election in view of the extraordinary circumstances presented by the pandemic.

### *Facts*

The current COVID-19 pandemic has thus far caused approximately 814,000 deaths worldwide. As of August 25, 2020, New York State reported 32,489 deaths with New York City accounting for 23,662 deaths, an unquestioned epicenter of the pandemic in the state.

There is no vaccine to prevent COVID-19, and there are limited methods to treat those made severely ill by COVID-19. The virus is thought to spread mainly from person-to-person when individuals are in close contact with one another and through respiratory droplets produced when an infected person coughs, sneezes or talks. It appears that COVID-19 can be spread by people who are completely asymptomatic or pre-symptomatic.

On June 22, 2020, the Centers for Disease Control, issued guidance for Election Polling Locations and Voters. The Centers for Disease Control's guidance states that 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. The guidance suggests that the best option for reducing risk of COVID-19 transmission in election polling settings is to have a wide variety of voting options, such as mail-in methods of voting; early voting; drive-up voting; longer voting periods; etc.

As a result of this virtually unprecedented public health crisis, federal, state, and local governments have placed restrictions on whether people may gather together and whether businesses may open. On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern; on January 31, 2020, United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to COVID-19. On March 7, 2020, Governor Andrew Cuomo issued Executive Order No. 202 Declaring a Disaster Emergency in the State of New York. Since that time, Governor Cuomo has issued multiple Orders Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency. Governor Cuomo's succeeding Executive Orders extended previous suspensions and modifications of laws related to the pandemic. These Executive Orders also delayed tax deadlines and canceled elections.

Although New York is in a less precarious position in late summer than it was in the spring, the Centers for Disease Control continues to recommend that all tasks that can be performed remotely (for example, banking) be performed remotely. According to both the CDC and government task forces, it remains absolutely essential that those who feel ill isolate themselves at home, and the CDC recommends that anyone who has had any contact with someone who has tested positive for COVID-19 should self-quarantine.

The Employer's facility located in Bronx NY, is a group home for individuals with developmental disabilities. The Employer's residential program is run in accordance with the program's oversight body, the New York State Office for People with Developmental Disabilities ("NYOPWDD"). The Employer asserts that there are no confirmed or suspected cases of COVID-19 among its staff or residents at its facility. Additionally, the Employer's staff reviews and completes health certifications each day before the start of their shift, which includes daily temperature checks and monitoring for any COVID-19 symptoms. The Employer states that the residence is cleaned every eight hours in a manner which exceeds CDC guidelines and is in accordance with NYOPWDD. The Employer does not mention COVID-19 testing procedures for its staff or residents.

According to the Employer, the proposed bargaining unit of about 10 employees, should vote over a two-day period. The Employer proposes releasing employees one at a time to vote and the location of the election should occur in an outdoor area of the Employer's facility which is a 30-foot by 25-foot patio area. The Employer would provide tables, chairs, and a tent or canopy for the voters, observers and Board agent. The Employer does not provide for an alternative location should there be inclement weather.

### *Analysis*

Whether an election is to be conducted by mail, manually, or some other method is an administrative matter to be determined by the Regional Director. *National Van Lines*, 120 NLRB 1343 (1958). Traditionally, most Board elections are conducted by manual voting, and there is a presumption in favor of conducting elections in this manner. *See* Section 11301.2, *Board Casehandling Manual, Part Two, Representation Proceedings*. However, when certain factors are present, this presumption may be overcome. In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board recognized that mail ballot elections are appropriate under specific, well-settled guidelines, such as where employees are scattered or where there is a strike, lockout, or picketing in place. The Board further found that a Regional Director may consider additional relevant factors when contemplating when to conduct a mail ballot election and that "extraordinary circumstances" could permit a Regional Director to do so. *See San Diego Gas & Electric*, 325 NLRB at 1145. The Board has recognized that the COVID 19 pandemic presents such an extraordinary circumstance. *See, e.g., Atlas Pacific Engineering Co.*, Case 27-RC-258742 (NLRB May 8, 2020).

The Employer asserts that based on GC Memorandum 20-10, it can exceed precautions to reduce risk and the current status of the pandemic in the area, that the overall risk of holding a manual election would be, at most, *de minimus*. The Employer argues that an election can be held safely in its proposed outdoor location and would provide for sanitizing agents, protective glass

and personal protective equipment. The Employer proposes further that in order to space out voters, there could be two polling times and voters could be released one at a time to vote. The Employer does not provide for the amount of time for each polling period, or the voting release schedule for each employee. Additionally, the Employer does not provide for an alternate voting location should inclement weather make the outdoor location unusable. The Employer does not provide for actual COVID-19 testing of its staff or residents who live at the facility where the proposed bargaining unit works.

Memorandum GC 20-10 requests an employer's written certification of 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. Memorandum GC 20-10 also requests each party, party representative and observer participating at the pre-election conference, serving as an election observer, or participating in the ballot count, to self-certify in writing. However, Memorandum 20-10 does not provide an enforcement mechanism for failure to comply with certain of the suggested self-certifications, other than the Regional Director or designee canceling the election, which would substantially delay resolution of the question concerning representation. Moreover, following the issuance of Memorandum GC 20-10, the Center for Disease Control issued an update including a definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission). The Center for Disease Control's "current best estimate" is that 50% of COVID-19 transmission occurs while people are presymptomatic and 40% of people with COVID-19 are asymptomatic<sup>3</sup> and would neither be identified nor have sought testing.

Despite the safety measures proposed by the Employer, I have determined that an in-person manual election under these circumstances poses significant and unnecessary risks to the health and safety of Board agents, party representatives, voters, observers, and the public. The conduct of a manual election invariably requires participants to come within fewer than six feet of one another, while social distancing guidelines provided by Federal, State and Local authorities recommend that individuals remain at least six feet apart. Although certain safety measures, if obeyed by everyone and carried out to perfection, might limit some close interaction and mitigate some of the unnecessary risks associated with conducting a manual election here, the Board's mail-ballot process all but eliminates the inherent safety risks and equally ensures that employees can conveniently and freely exercise their rights to vote or refrain from voting in secret. The State of New York has requested that work be performed remotely where possible. It is unquestionably possible to perform a fair election which enfranchises all voters via mail ballot.

The Agency has an alternative method of conducting an election via mail ballot. A mail ballot has no apparent significant drawbacks. Contrary to the Employer's protestations that the

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<sup>3</sup> "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020), Table 1, Scenario 5, Current Best Estimate. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

Postal Service might fail to deliver ballots to voters, a mail ballot election has no apparent significant drawbacks. 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 mail ballot voting kit. More importantly, a mail ballot election will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to this virus and, thereby, maximize participation. Additionally, given the current rapidity of changes to both recommended and mandatory virus countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. For example, should the Board agent directed to conduct a manual election arrive at the Employer’s premises running a low fever, the election would be unexpectedly postponed. If a group of the Employer’s employees were exposed to COVID-19 several days before the election, they would be forced to forfeit their right to vote in order to quarantine themselves. Should the Board agent discover on the day of the election that any party or voter has not fully complied with the suggestions outlined in GC Memorandum 20-10, the Regional Director or designee may have to cancel the election. A mail-ballot election provides the certainty of process and procedure to conduct an election within a prompt period and in an effective manner.

Finally, I take administrative notice of the following: A comprehensive analysis of the level of voter turnout measured as a percentage of overall eligible voters who cast ballots in manual elections and in mail ballot elections in Region 02 demonstrated persuasively that there is no significant diminution or difference between the two election methods.<sup>4</sup>

<sup>4</sup> Here are the relative levels of voter turnout between recent mail ballot elections conducted during the COVID-19 pandemic, and manual ballot elections conducted prior to the pandemic:

**TALLIES FROM MAIL BALLOT ELECTIONS CONDUCTED SINCE MID-MARCH**

CASE	CASE NO	ELIG	Y	N	CH	V	TOTAL	
City Bar	02-RC-257605	8	6	0	0	2	8	<b>100%</b>
Citizen 360	02-RC-257691	11	7	0	0	1	8	<b>73%</b>
Millennium	02-RC-258153	16	9	0	3	0	12	<b>75%</b>
Safe Passage	02-RC-258334	28	22	1	1	0	24	<b>86%</b>
Pageant	02-RC-259301	27	15	3	5	0	23	<b>85%</b>
Hearst	02-RC-252592	531	241	83	109	20	453	<b>85%</b>
<b>Total</b>	<b>528 votes/621 eligibles</b>	<b>=</b>	<b>85.0%</b>					

**TALLIES FROM MANUAL ELECTIONS CONDUCTED PRIOR TO MID-MARCH 2020**

CASE	CASE NO	ELIG	Y	N	CH	V	TOTAL	
Cent. for Fam	02-RC-255677	70	47	12	1	0	60	<b>86%</b>
Planned Build	02-RC-255027	8	7	1	0	0	8	<b>100%</b>
BLDG	02-RC-254865	5	4	1	0	0	5	<b>100%</b>
LB Thomas	02-RC-254325	3	0	2	1	0	3	<b>100%</b>
MD Partners	02-RC-254354	22	7	9	1	0	17	<b>77%</b>
Dachnowicz	02-RC-254110	27	16	8	1	0	25	<b>93%</b>
34 St Partner	02-RC-252689	65	56	2	0	0	58	<b>89%</b>

*Conclusion*

The National Labor Relations Board will conduct a secret mail 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 Warehouse Production Sales and Allied Service Employees Union Local 811 AFL-CIO.

**A. Election Details**

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On September 8, 2020, ballots will be mailed to voters by the National Labor Relations Board, Region 02. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their ballots so they will be received in the National Labor Relations Board, Region 02 office by close of business on September 29, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by September 15, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 02 office at (212) 776-8620, or by contacting Region 02 at Tanya.Khan@NLRB.gov.

Due to the extraordinary circumstances of COVID-19 and the directions of state and local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, the ballot count will take place on a date to be determined by the undersigned Regional Director during the period from October 6, 2020 to October 13, 2020, inclusive. The Region will provide notice to the parties of the scheduled date for the count at least 24 hours prior to the count. For the same reasons, the parties further agree that the count will take place virtually on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director. The parties further agree that each party will be allowed to have one observer attend the virtual ballot count.

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

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**Total**                    **173 votes/200 eligibles = 87%**

## **B. Voting Eligibility**

As previously noted in the SEA, eligible to vote are those in the unit who were employed during the payroll period ending Friday, 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure is Brandon Brown, whose eligibility remains unresolved as agreed to by the parties and specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

As required by Section 102.67(1) 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 28, 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).

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](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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

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

#### **D. Posting of Notices of Election**

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed no later than 12:01 a.m. on September 5, 2020. If the Employer does not receive copies of the notice by September 2, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

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

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

#### **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 must be E-Filed through the Agency's website and may not be filed by facsimile. 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: August 26, 2020



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