

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

WHITEHAWK WORLDWIDE

Employer

and

Case 28-RC-264073

**INTERNATIONAL UNION, SECURITY,
POLICE & FIRE PROFESSIONALS OF
AMERICA (SPFPA)¹**

Petitioner

DECISION AN DIRECTION OF ELECTION

Whitehawk Worldwide (the Employer) is a security contractor providing services to the United States Department of Homeland Security at a detention facility in El Paso, Texas. International Union, Security, Police & Fire Professionals of America (SPFPA) (the Petitioner) seeks, by the instant petition, to represent a unit of approximately 20 officers employed at this El Paso facility.

The only matter at issue is whether the election should be conducted manually or by mail ballot. The Petitioner seeks a mail ballot election, while the Employer contends I should direct a manual election. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. See *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (2019).

In order to allow each party to state their position regarding the manner of election a hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing in this matter on August 24, 2020. As explained below, I have determined, in agreement with the Petitioner, that because of the extraordinary circumstances presented by the ongoing COVID-19 pandemic, the Board will conduct this election by mail ballot.

I. BACKGROUND

As with many jurisdictions in the United States, in March of this year, El Paso County, where the El Paso facility is located, put in place restrictions on the activities of residents, declaring a “local disaster due to public health emergency,” and a stay-at-home order.² As part of

¹ The names of the parties appear as amended at hearing.

² http://epcounty.com/documents/El_Paso_County_DD.pdf;
[http://www.epcounty.com/documents/STAMPED%20Stay%20Home%20Work%20Safe%20Order%20No.%207_AMD1_\(FINAL%204.1.2020\).pdf](http://www.epcounty.com/documents/STAMPED%20Stay%20Home%20Work%20Safe%20Order%20No.%207_AMD1_(FINAL%204.1.2020).pdf)

these restrictions, non-essential businesses were required to cease operation and non-essential travel was prohibited. The El Paso facility has continued in operation throughout as an essential Federal facility.

In subsequent months, these orders have been amended to allow some reopening of non-essential businesses and easing restrictions on movement and travel.³ However, COVID-19 continues to be present in El Paso County and in community transmission, and to date El Paso County has recorded almost 20,000 confirmed cases of COVID-19 and 400 deaths.⁴

II. POSITIONS OF THE PARTIES

The Petitioner argues a mail ballot election is appropriate due to the extraordinary circumstances presented by the COVID-19 pandemic. The Petitioner argues that holding a manual election would needlessly endanger the employees, Board agents, and other participants in such an election. The Petitioner also notes that, due to the around-the-clock nature of the employees' schedules, a mail ballot election may be appropriate even absent the current pandemic.

The Employer contends that a manual election should be held as a mail ballot election is susceptible to fraud. Regarding concerns related to the COVID-19 pandemic, the Employer maintains that, if participants wear masks and practice social distancing, a manual election will be sufficiently safe. The Employer has not put forth any additional details regarding a manual election or offered any further precautionary measures to prevent the spread of COVID-19.

The Employer is clear that a manual election cannot be held at the Department of Homeland Security facility in El Paso where the petitioned-for employees are employed. The Employer proposes to hold the election at its office in Burleson, Texas, approximately 600 miles from El Paso. The Employer is also apparently amenable to holding an off-site election at a location closer to the El Paso facility, but has made no proposal to do so, or provided any details regarding how this could be accomplished.

III. DETERMINATION

A. Applicable Standards

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. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to

³ <http://www.epcounty.com/documents/2nd%20AMENDMENT%20to%20Order%20No8-5-7-20%20FINAL.pdf>; <http://www.epcounty.com/documents/3rd%20Amendment%20Order%20No%20%209.pdf>

⁴ https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#mobility

direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. 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. *Id.* 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*, supra at 1145.

On May 8, 2020, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated "extraordinary circumstances" beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, 2020, the General Counsel issued a Memorandum GC 20-10, "Suggested Manual Election Protocols," in which he reiterated that Regional Directors have the authority, delegated by the Board, to make "initial decisions about when, how, and in what manner all elections are conducted." The General Counsel further noted Regional Directors have, and will:

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 locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement. The memorandum concludes with additional notes regarding the assignment and travel of Board agents.

B. Analysis

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. The Employer has argued that the potential for fraud is its basis for opposing a mail ballot election, and this risk is one of the reasons the Board has traditional preferred manual elections. However, the Board has not dictated that manual elections must

always take place, under extraordinary circumstances a mail ballot election may be appropriate. I find this is one of those cases.⁵

It is apparent from the Centers for Disease Control and Prevention (CDC) information that El Paso County has experienced significant COVID-19 transmission, with approximately 20,000 cases to date. As such, the risk of directing a manual election and requiring employees, Board agents, and others to congregate is apparent.⁶ In response, the Employer has provided no details about how a safe manual election could be conducted despite this risk. The only detail it provides is that the manual election it proposes cannot be held at the employees' workplace; the typical location for a manual election.

I reject out of hand the possibility of holding a manual election at the Employer's facility in Burleson, as a 600-mile distance between the workplace and the polling location effectively disenfranchises all voters.

Assuming for the sake of argument the Employer is proposing an offsite election in the El Paso area, the lack of any details makes it impossible to consider the public health concerns at issue. Without any information regarding the location, the polling place, ventilation, ingress and egress, and the amount of time necessary for polling periods, I cannot even begin to consider the risk posed by what the Employer is suggesting, the entire proposal is simply too hypothetical. The Employer suggests that if face covering and social distancing are in place the election will be sufficiently safe, but many of the Board's manual election procedures require close proximity and the sharing of materials that make social distancing very difficult. Indeed, this is one of the topics addressed in Memorandum GC 20-10.

Further, I am unable to make any assessment regarding risk when no information is provided regarding COVID-19 infection among the employee population generally, or the degree to which it is present in the El Paso detention facility where the petitioned-for employees' work. Given the increased risk of COVID-19 transmission among the population of correctional and detention facilities this would appear to be a significant potential risk that must be addressed in proposing any manual election involving the petitioned-for employees.

The Board has made clear whether to conduct a manual or mail ballot election is a question of discretion. Here, the Employer's lack of any proposal or information regarding where or how to conduct an offsite manual election prevents me from considering this as a realistic, safe option. I find the documented prevalence of COVID-19 in El Paso County, and the well-documented risks associated with in-person contact and COVID-19 transmission, create an extraordinary circumstance that makes a mail ballot election appropriate. The Board has an established procedure that avoids the risk of in-person contact, its mail ballot procedure. While the mail ballot procedure may not be the Board's preferred procedure, it is one of the ways in

⁵ Regarding the Petitioner's argument that a mail ballot would be appropriate even absent the pandemic I do not find that a 24-hour schedule necessarily leads to the conclusion that employees are "scattered." It is not uncommon for the Board to accommodate this type of schedule with multiple polling sessions in a manual election.

⁶ A manual election would also require at least one Board agent travel to El Paso.

which the Board conducts an election when circumstances dictate. Under the present circumstances, I find it prudent to order a mail ballot election.

IV. CONCLUSION

Based on the record, the arguments of the parties and relevant Board law, I find that the record establishes a mail ballot election is appropriate in the petitioned-for bargaining unit of security officers, an appropriate unit. I have directed an election accordingly below.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁷
3. 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.
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) and (7) 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 armed and unarmed security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, employed by the Employer at the Department of Homeland Security migrant family care center El Paso, Texas; excluding all office clerical employees, professional employees and supervisors as defined by the Act.

⁷ During the hearing the parties stipulated to the following commerce facts:

The Employer, North Texas Investment Group d/b/a Whitehawk Worldwide (Employer) is a Texas corporation with an office and place of business in El Paso, Texas, where it is engaged in the business of providing security services for the United States Department of Homeland Security. In conducting its operations during the 12-month period ending July 31, 2020, the Employer performed services valued in excess of \$50,000 directly to the United States Government. Based on its operations, the Employer derives substantial amounts of revenue from Federal funds. During the 12-month period ending July 31, 2020, the Employer purchased and received at its El Paso, Texas facility goods and materials valued in excess of \$5,000 directly from points outside the State of Texas.

V. 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 **INTERNATIONAL UNION, SECURITY, POLICE & FIRE PROFESSIONALS OF AMERICA (SPFPA)**.

A. Election Details

I have determined that a mail ballot election will be held.⁸ The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on Monday, September 14, 2020**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, September 21, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Regional Office at **(602) 640-2160** or our national toll-free line at **1-866-667-NLRB (1-866-667-6572)**.

The returned ballots must be received by the Region 28 office by **5:00 p.m. on Monday, October 5, 2020**. **All ballots will be commingled and counted at the Regional Office at 1:00 p.m. on Wednesday, October 7, 2020.**⁹ In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in 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.

⁸ The Petitioner has waived 5 of the days it is entitled to have the voter list described below.

⁹ If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period of time before the count, the parties will be provided information on how to participate in the count by videoconference.

C. 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 **September 8, 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.

D. 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. 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 why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. 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 at Phoenix, Arizona on the 3rd day of September 2020.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director