

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

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**ASPIRUS KEWEENAW**

**Employer,**

**Case No. 18-RC-263185**

**and**

**MICHIGAN NURSES ASSOCIATION**

**Petitioner**

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**EMPLOYER’S BRIEF IN SUPPORT OF REVERSING AND VACATING THE REGIONAL  
DIRECTOR’S DECISION AND DIRECTION OF MAIL-BALLOT ELECTION**

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NOW COMES Aspirus Keweenaw Hospital (“Aspirus”), by its attorneys, Michael Best & Friedrich LLP, pursuant to Section 102.67 of the National Labor Relation Board’s (“Board”) Rules and Regulations, and respectfully submits this Brief in Support of Reversing and Vacating the Regional Director’s Decision and Direction of a Mail-Ballot election, dated August 17, 2020 (“Order”).

**INTRODUCTION**

The Board should reverse and vacate Regional Director Jennifer A. Hadsall’s Order because she abused her discretion in directing a mail-ballot election. In reversing the Regional Director’s order, Aspirus respectfully requests the Board order an in-person, manual election to be held at Aspirus Keweenaw Hospital consistent with Aspirus’ attested current virus control measures and ability to implement additional measures as necessary to ensure a safe voting environment for all participants—a voter group of highly trained RN’s who have worked safely for months since COVID-19 came to the UP.

This Brief contains supplemental facts and arguments to support Aspirus’ position that the Regional Director abused her discretion in ordering a mail-ballot election. Aspirus hereby incorporates and reattaches all the facts, arguments, and testimony contained in its Request for Review and supporting exhibits, filed August 20, 2020 with the Board, as if set forth fully in this Brief. (Exhibit A). *See* 29 CFR 102.67(h) (providing briefs on review “may be reproductions of those previously filed with the Regional Director

and/or other briefs which shall be limited to the issues raised in the request for review.”). Nevertheless, several key points from the record bear repeating.

The Regional Director distorted COVID-19 data in Michigan to frame the COVID-19 situation in Houghton County and the greater Upper Peninsula as unsafe to hold an in-person election at an **acute care hospital**. The COVID-19 data belies the Regional Director’s illusionary analysis, particularly with respect to the Regional Director’s failure to consider positivity rates, transmission rates, and tests administered in the relevant region where the hospital is located. The Regional Director’s failure to consider so many salient factors is textbook abuse of discretion.

That the Regional Director extrapolated COVID-19 data in the Upper Peninsula, with no identifiable statistical process or reasonable evidentiary basis, to portray an unsubstantiated “surge” in positive COVID-19 cases in the region further compounds the severity of the Order’s baseless “evidentiary” foundation. The Order also contains inaccurate analysis of Michigan Governor Gretchen Whitmore’s most recent executive orders, which confirm Houghton County and the wider Upper Peninsula are the safest regions in Michigan with respect to COVID-19 metrics and, consequently, are subject to the fewest limitations. As discussed below, these facts have not changed since Aspirus filed its Request for Review. The Minneapolis-based Regional Director applied her densely populated lens of her urban environs to a low density, very low COVID positivity rate region of the country, resulting in unlevel, undeveloped, and unsupported conclusions on the state of COVID-19 where the hospital is located.<sup>1</sup>

The Regional Director not only misrepresents the COVID-19 situation on the ground, she spends significant time criticizing Aspirus’ sound plan for a safe in-person election. Again, the Regional Director’s position is contrived, lacks evidentiary support, and fails to account for, let alone weigh, reasonable factors justifying an in-person election. The leading offense, which influences her other strawman criticisms, is

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<sup>1</sup> The Upper Peninsula of Michigan, spanning 16,377 square miles (or roughly 20% of the entire state of Minnesota), contains 3% of Michigan’s total population. *See* <http://www.census.gov/geo/maps-data/data/gazetteer2010.html> (last accessed Sept. 3, 2020). This translates to a population density of 19 people per square mile, compared to a population density of 7,956 people per square mile in Minneapolis. *See* <https://www.census.gov/programs-surveys/popest/data/tables.2019.html> (last accessed Sept. 3, 2020).

how the Regional Director summarily surmises, without explanation or thoughtful analysis, that Aspirus' plan "amounts to substantial in-person contact". (Order, p. 6). The reality is much different. As detailed in the record, Aspirus, an acute care hospital, has presented a detailed explanation of its virus control measures and a plan to reduce the number of participants in the voting room, expand the time to vote, regularly sanitize the voting room, and stagger voters in shifts. Yet, somehow (and it is a true mystery because the Regional Director does not deign to identify how she arrived at her summary conclusion) the Regional Director believes Aspirus' well-designed plan will increase exposure threat to voters. There is no basis in fact for that belief. Aspirus is the ideal candidate to hold an in-person election, and this election represents the "appropriate proceeding" for this Board to address when a manual election, as opposed to a mail-ballot election, is more appropriate at present. See *Pace Southeast Michigan*, 2020 NLRB LEXIS 418, \* 1 fn. 1 (Aug. 7, 2020) and other Board orders denying requests for review of mail-ballot elections.

Aspirus respects the fact the Board invests the Regional Director with broad discretion on whether to order a mail-ballot election under "extraordinary circumstances." *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). The Regional Director, however, is not a regional monarch; her discretion is not absolute. *Id.* at 1144 ("A Regional Director's discretion...is not unfettered."). Indeed, the Order reads more like a royal edict rather than a level, dispassionate assessment of whether a mail-ballot election is appropriate under the present circumstances. It seems clear the Regional Director possessed a myopic mindset bent on achieving her predetermined design for a mail-ballot election. It follows the Regional Director clearly abused her discretion. Therefore, the Board should reverse and vacate the Order.

### ARGUMENT

The Regional Director abused her discretion in ordering a mail-ballot election rather than an in-person election at Aspirus, an acute care hospital located in Houghton County, Michigan in the far northern reaches of the state's Upper Peninsula. Aspirus' primary factual and legal arguments are contained in its Request for Review and supporting exhibits, which Aspirus reproduces in this Brief. See 29 CFR 102.67(h). These factual and legal arguments establish that the Regional Director abused her discretion in ordering a mail-ballot election.

Aspirus presents three additional factual and legal arguments here to support its position: (1) Petitioner declined to file a brief opposing Aspirus' Request for Review and Emergency Motion to Stay, reaffirming its desire to hold an in-person election; (2) updated COVID-19 data from the relevant areas of Houghton County and the greater Upper Peninsula shows steady or improving metrics since the Regional Director ordered a mail-ballot election and Aspirus filed its Request for Review; and (3) a response to Member McFerran's dissent from the Board's Order, dated August 25, 2020, granting Aspirus' Emergency Motion to Stay and Request for Review. Together, these additional arguments, coupled with the arguments Aspirus has already presented in the record, show the Regional Director clearly abused her discretion in ordering a mail-ballot and not an in-person election as both Parties desire and the circumstances warrant.

**I. BOTH PARTIES WANT TO HOLD AN IN-PERSON ELECTION.**

In rendering the Order, the Regional Director ignored the undisputed fact that both Petitioner and Aspirus want to hold an in-person election. (Request for Review, pp. 2-3). The Regional Director simply failed to weigh this factor altogether, representing one of many cited examples of how she failed to consider, either by neglect or purposely to achieve her desired outcome, relevant and compelling reasons why an in-person election is appropriate. The controlling Board case law with respect to a regional director's discretion to order a mail-ballot election, *San Diego Gas & Electric*, confirms that "the Regional Director, in the exercise of discretion, should [] consider the desires of all the parties..." with respect to their choice of election method. 325 NLRB at 1145. The Regional Director, in exercising her discretion, failed to consider this fact, which shows clear abuse of discretion on her part.

As further support Petitioner desires an in-person election, Petitioner declined to file any opposition to Aspirus' Request for Review. *See* 29 CFR 102.67(f) (providing any party with 5 business days after the last day on which the request for review must be filed to file an opposition brief). Petitioner had the opportunity to oppose Aspirus' Request for Review, and it did not take that opportunity. In view of this fact, and in the absence of contrary evidence, it logically follows that Petitioner's original request for an in-person election still holds. Both Parties want to hold an in-person election, not a mail-ballot election.

## **II. CURRENT COVID-19 DATA CONFIRMS HOUGHTON COUNTY IS A LOW-RISK, SAFE LOCATION TO HOLD AN IN-PERSON ELECTION AT THE HOSPITAL.**

Houghton County and the greater Upper Peninsula remain the safest regions in Michigan related to COVID-19. The latest the COVID-19 data and metrics in Houghton County and the greater Upper Peninsula remain steady or improved since it filed its Request for Review. As of filing, the latest data from the state of Michigan shows Houghton County continues to boast one of the lowest positivity rates in the state—0.3% positivity rate over a 7-day rolling average. (Exhibit B). Consistent with this data, Houghton County, with an approximate population of 36,000 people, has recorded on average only 2.9 cases daily. The number of tests administered remains steady. And most importantly, Houghton County has not recorded any deaths during this time period. As for the greater Upper Peninsula Region, the positivity rate has dropped to 1.1%. The region, spanning 16,377 square miles, has recorded an average of 12.9 cases daily and zero deaths. (Exhibit C). Region 8, encompassing Houghton County and the Upper Peninsula, remains one of only two regions in all of Michigan to qualify for Phase 5 status in Michigan’s Safe Start Plan.

Further, as of September 4, 2020, Governor Whitmer has not issued any new executive order or directive related to the Michigan Safe Start Plan or any other new workplace safeguards for any region in Michigan. Region 8 continues to have the fewest restrictions in Michigan because of its low positive case count, positivity rate, and transmission rate. In the Board’s own words, there are no “extraordinary federal, state, and local directives that have limited nonessential travel, and required the closure of nonessential businesses” that would impact or limit Aspirus’ ability to hold an in-person election. See *Pace Southeast Michigan*, 2020 NLRB LEXIS 418, \* 1 fn. 1 (Aug. 7, 2020) and other Board orders denying requests for review of mail-ballot elections. This is hardly surprising as COVID-19 metrics have remained steady in Houghton County and Region 8 as a whole.<sup>2</sup>

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<sup>2</sup> Governor Whitmore issued Executive Order 2020-174, “Temporary restrictions on entry into health care facilities, residential care facilities, congregate care facilities, and juvenile justice facilities,” after Aspirus filed its Request for Review. (Exhibit D). This Executive Order rescinds and replaces Executive Order 2020-156 on the same subject.

### **III. MEMBER MCFERRAN DOES NOT RAISE PERSUASIVE REASONS TO AFFIRM THE REGIONAL DIRECTOR'S DIRECTION OF A MAIL-BALLOT ELECTION.**

Aspirus respectfully disagrees with Member McFerran's reasoning in her dissent to the Board's Order granting its Request for Review and Emergency Motion to Stay. Member McFerran submits: "[t]here is no basis for even suggesting, let alone concluding, that the Regional Director abused her discretion based on the threats posed by the COVID-19 pandemic." With all due respect to Member McFerran, this statement, coupled with her wholesale acceptance of the Regional Director's allegedly "thoughtful" reasoning, demonstrates the exact same myopic mindset the Regional Director demonstrated in the Order.

Aspirus addresses Member McFerran's dissent for the primary purpose of dispensing with any confusion about her citation to *National Van Lines*, 120 NLRB 1343 (1958) (incorrectly identified as a "1956" Board decision in Member McFerran's dissent) and the standard Aspirus must satisfy in order for the Board to nullify the Regional Director's decision. Member McFerran cites to *National Van Lines* in opining that Aspirus "has not met the 'high bar' of demonstrating the Regional Director's thoughtful conclusions about how to best preserve public safety constituted an abuse of discretion." *Aspirus Keweenaw*, 370 NLRB No. 13 (Aug. 25, 2020) (McFerran, dissenting) (quotations added). As an initial matter, *National Van Lines* does not set any special or heightened standard, let alone a "high bar," with respect to challenging regional orders concerning the preservation of public safety. Indeed, *National Van Lines* did not involve any facts or questions related to public safety. The case recites a lengthy procedural history concerning a mail-ballot election involving a diffuse electorate across the country. Neither party challenged the regional director's order to hold a nationwide mail-ballot election, the Board did not address the circumstances under which the regional director may order a mail-ballot election, and the Board did not establish any special standard a party must meet in order to nullify a regional director's decision.

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Executive Order 2020-174 does not qualify as an "extraordinary federal, state, and local directives that have limited nonessential travel, and required the closure of nonessential businesses." Rather, Executive Order 2020-174 reduces the categories of visitors who may enter such facilities. It does not apply to the voters or any other hospital staff. Notably, Executive Order 2020-174, like its predecessors, provides an exception for individuals entering the facility "for the purpose of performing official governmental functions." This exception permits the Board Agent to enter Aspirus for the purpose of monitoring the in-person election. Thus, Executive Order 2020-174 presents no conflict.

The controlling Board case in this matter, *San Diego Gas & Electric*, which did directly address the limited circumstances under which a regional director may order a mail-ballot election, cites to *National Van Lines* for a simple proposition that is not in dispute in this matter. Emphasizing the Board's strong preference for in-person elections, *San Diego Gas & Electric* cites to *National Van Lines* merely to establish that a party must affirmatively show the regional director "clearly abused [her] discretion" before the Board will nullify the regional director's election order and prescribe other election standards. 325 NLRB at 1144 (citing *National Van Lines*, 120 NLRB 1343, 1346 (1958)) (other citation omitted). This citation simply establishes a normal abuse of discretion standard for challenging orders for mail-ballot elections. The word "clearly" in this citation does not make the abuse of discretion standard any more onerous or set a higher bar than simply stating "abuse of discretion." The adverb refers to the fact that the party challenging the order must make an affirmative showing of abuse of discretion. It goes without saying that such a showing must be "clear" or comprehensible, understandable or whatever synonymous adjective suits.<sup>3</sup>

In short, *National Van Lines* does not present a heightened standard of review in this matter. The Regional Director clearly abused her discretion when she ordered a mail-ballot election.

### **CONCLUSION**

For the foregoing reasons, and for reasons in the record fully incorporated into this Brief, the Board should reverse and vacate the Regional Director's Order because she abused her discretion. In doing so, Aspirus respectfully requests the Board order an in-person election to be held at Aspirus Keweenaw Hospital consistent with Aspirus' attested virus control measures and capabilities.

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<sup>3</sup> Aspirus has found no Board law first finding "abuse of discretion," but then pointing to *National Van Lines* and its use of "clearly abused [her] discretion" as suggesting the Board should take some time to reconsider. To draw a comparison, attorneys who "strenuously object" are no more likely to convince a judge to grant their objection.

Dated this 4<sup>th</sup> day of September, 2020.

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