

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

RIETH-RILEY CONSTRUCTION CO., INC.

Employer

and

RAYALAN A. KENT

Petitioner

Case 07-RD-264330

and

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO¹**

Union

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether the Region should conduct an election for certain employees of the Employer, who are employed at jobsites throughout the State of Michigan, by manual or mail ballot. The Employer and Petitioner argue a manual election is appropriate and it can be conducted safely despite the continuing COVID-19 pandemic.² The Union contends the petitioned-for employees are geographically scattered, and that the ongoing strike, which involves petitioned-for employees, and the COVID-19 pandemic support conducting a mail ballot election.

The Employer is engaged in road construction at various work projects throughout the State of Michigan. The Petitioner seeks to remove the Union as the exclusive collective-bargaining representative of a unit of operating engineers employed by the Employer. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):³

¹ Parties' names appear as stipulated during the hearing. The Employer moved to amend the petition and all the formal papers to reflect the correct names and I hereby grant that motion.

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

³ I find that the Unit is coextensive with the existing bargaining unit as described in the expired MITA contract. *Mo's West*, 283 NLRB 130, 130 (1987), citing *Campbell Soup Co.*, 111 NLRB 234 (1955); see also, *USC Norris Cancer Hospital*, 21-RD-002890 (unpublished 2012).

All full-time and regular part-time employees employed in the State of Michigan by Rieth-Riley Construction Co., Inc. for airport construction work (exclusive of building), railroad track and trestle construction (exclusive of such work inside the property line of an industrial plant covered by the Associated General Contractors of Michigan, Detroit Metro CBA) and all highway work including roads, streets, bridge construction, parking lots, and asphalt plants, in the following classifications: asphalt plant operator, crane operator, dragline operator, shovel operator, locomotive operator, paver operator (5 bags or more), elevating grader operator, pile driving operator, roller operator (asphalt), blade grader operator, trenching machine operator (ladder or wheel type), auto-grader, slip form paver, self-propelled or tractor drawn scraper, conveyor loader operator (Euclid type), endloader operator (1 yard capacity and over), bulldozer, hoisting engineer, tractor operator, finishing machine operator (asphalt), mechanic, pump operator (6" discharge or over, gas diesel, powered or generator of 300 amp or larger), shouldering or gravel distributing machine operator (self-propelled), backhoe (with over 3/8 yard bucket), side boom tractor (type D-4 equivalent or larger), tube finisher (slip form paving), gradall (and similar type machine), asphalt paver (self-propelled), asphalt planer (self-propelled), batch plant (concrete-central mix), slurry machine (asphalt), concrete pump (3" and over), roto mill, swinging boom truck (over 12-ton capacity), hydro demolisher (water blaster), farm type tractor with attached pan; but excluding guards and supervisors as defined in the Act, and all other employees.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,⁴ 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.

I. BACKGROUND

The Employer is engaged in road construction and has work projects throughout the State of Michigan with “the exception of the metro-Detroit area and for the most part, the Upper Peninsula,” according to its Regional Vice President for Michigan Operations (Vice President).⁵ The Employer maintains 13 asphalt plants and “probably nine different offices” in Michigan. According to the Vice President, the Employer’s operating engineers have historically commuted between 30 and 120 minutes to their jobsites, which is a common practice for the construction industry in Michigan. Some, but not all, of those employees report to various facilities to retrieve vehicles and equipment, while others simply report directly to their respective worksites. The employees primarily work one daytime shift starting at daylight and ending between 8 to 14 hours later, depending on the project.

⁴ 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)).

⁵ The Employer’s Vice President was the only witness presented at the hearing.

The Employer has recognized the Union as the exclusive collective-bargaining representative of the Unit based on Section 9(a) of the Act since 1993. The Employer and Union were parties to a series of multiemployer collective-bargaining agreements including, most recently, the Michigan Infrastructure and Transportation Association Agreement (MITA) that expired in 2018.

Around July 2019, employees in the petitioned-for unit went on strike. About half of the petitioned-for employees remained on strike as of the date of the preelection hearing in this case.⁶

II. POSITIONS OF THE PARTIES

A. The Employer⁷

The Employer proposes a manual election consisting of 2-hour sessions, from 4:30 p.m. to 6:30 p.m., on September 23 and 24 in the repair and wash bays at its facilities in Grand Rapids, Kalamazoo, Mason, and Petoskey, for a total of eight 2-hour sessions. It contends that despite the multiple facilities and transient nature of the work, its proposal would appropriately provide all eligible employees with the opportunity to vote. The Vice President, the Employer's only witness, testified that jobsites for those facilities were "no more than 45 miles in any direction," and he guessed that 20% of employees need to retrieve company vehicles from those facilities before going to the jobsites. He also estimated that employees would start work around 7:00 a.m. to 7:20 a.m. on September 23 and 24, then work between 8 and 14 hours.⁸ The record does not indicate whether "starting" work is retrieving a company vehicle from a facility or reporting to a jobsite or both. In either event, according to the Employer, its proposed plan

⁶ The Petitioner previously filed a petition to decertify the Union in Case 07-RD-257830; however, that petition is currently blocked by Case 07-CA-234085, where Complaint issued for unfair labor practices violating Section 8(a)(5) of the Act under the Board's previous blocking policy. NLRB Casehandling Manual (Part Two) Representation Proceedings, Secs. 11730-11734 (2017). The instant petition was filed on August 7, 2020, after the Board's new blocking charge rule took effect on July 31. See Sec. 103.20 of the Board's Rules and Regulations.

⁷ The Employer also argues the format for a Board-conducted election is a litigable issue and burdens of proof apply. In support of its argument, the Employer cites *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 fn. 1 (1998) (Hurtgen and Brame, concurring). However, the *Nouveau Elevator* Board majority simply stated that "the applicable presumption favors a manual, not a mail-ballot election" (emphasis added) and made clear that "[i]t is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Id.* at 471 (citing *San Diego Gas & Electric*, 325 NLRB 1143, 1144 fn. 4 (1998); *National Van Lines*, 120 NLRB 1343, 1346 (1958)). The only subsequent mention of a "presumption" regarding the method of election that I have found is in an unpublished dissenting opinion referencing *Nouveau Elevator*. See *Covanta Honolulu Resource Recovery Venture*, 20-RC-140392 at fn. 1 (unpublished 2015) (Member Miscimarra, dissenting). In fact, myriad Board decisions highlight the Regional Director's discretion to determine the details of the election and, *once the decision has been made*, the burden lies on the party seeking to alter the determination by showing the Regional Director abused her discretion.

⁸ While the Employer stated nightshift work happens occasionally, the Vice President testified that he did not believe such work would materialize before the Employer's proposed manual election dates.

would provide all eligible voters a reasonable opportunity to participate and cast a ballot in person.

While no arguments were made nor evidence presented at the hearing regarding the issue, the Employer further argues in its post-hearing brief that a manual election is necessary to ensure that Board personnel supervise the casting of ballots to minimize the risk of coercion by Union personnel. It specifically points to allegations of union misconduct in the past, some of which is the subject of ongoing unfair labor practice litigation. It argues that those prior instances of alleged misconduct render a mail-ballot election inappropriate. It cites *Mission Industries*, 283 NLRB 1027 (1987) (mail-ballot elections are “more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees’ voting.”)

Lastly, the Employer maintains that the ongoing pandemic does not present an obstacle to safe in-person voting, as it follows the CDC guidelines and is willing to abide by the Suggested Manual Election Protocols memorandum issued by General Counsel Peter Robb (see GC 20-10, below.) It argues that it will hold the elections in empty shipping bays that will be cleared and cleaned prior to the election and will provide ample space to maintain social distancing. As the bays contain separate entrances and exit garage doors, the Employer notes there is ample ventilation and air circulation and the opportunity for one-way voter traffic. It also offers the option of conducting the election via “drive-through voting.”⁹

According to the Vice President, the Employer has a COVID-19 preparedness and response plan that mirrors interim guidance from the United States Centers for Disease Control and Prevention (CDC) updated on May 6, 2020.¹⁰ The Employer introduced the CDC’s interim guidance as evidence but did not provide its preparedness and response plan. The Employer’s supervisors give weekly safety briefings, known as “toolbox talks,” where its response and preparedness plan has been discussed. Specifically, the Employer regularly instructs employees that they should be self-assessing for COVID-19 before coming to work, staying home if they have symptoms, and stressing the importance of personal protective equipment (PPE) and good hygiene. The record does not disclose if the Employer regularly provides PPE to the employees or requires its use. The Employer further offers to quarantine the polling places for 14 days prior to a manual election and/or conduct the election via “drive-through voting.” The Employer further commits to abiding by the standards set out in GC 20-10 and to provide the requisite certifications, sanitizing procedures, space and equipment necessary for in-person voting, including plexiglass, glue sticks, tables, floor markings and disposable single-use pencils.

The Employer does not test its employees for COVID-19 or screen for symptoms, relying on employee self-reporting and supervisor observation. Since March, the Employer knows of at

⁹ No specific details were provided by the Employer as to what was meant by “drive through voting” other than the bays suggested for use as polling sites were so large that they could accommodate voters driving in and casting their ballots from their cars. There was no evidence or guidance from the Employer as to how this would conform with the Board’s standard procedures regarding manual elections.

¹⁰ All dates are in 2020 unless otherwise indicated.

least three workers who have tested positive. The most recent tested positive the week before the preelection hearing (with his last day of work on August 19) and another tested positive just after July 4. At least two other employees missed work because of symptoms but tested negative. None of the confirmed positive cases were in the petitioned-for unit, but ongoing contact tracing revealed the most recent positive person may have been in contact with a Unit employee. It is unknown how many nonemployees or individuals employed by other companies work at the jobsites with the petitioned-for employees.

B. The Petitioner

The Petitioner asserts a manual election, including a drive-through election, as detailed by the Employer, is appropriate because the four proposed facilities are “well within the distance employees already drive for work.” It contends the ongoing 13-month strike has no impact on the propriety of a manual election because there is no active picketing so no employees would have to cross a picket line to vote. It also notes all parties, particularly the Employer, will comply with the suggested election protocols in GC 20-10.

C. The Union

The Union argues the instant petition should be blocked by “the outstanding unfair labor practices which are being litigated ... in Case 07-CA-234085” and, if an election is ordered, a certification of results should not issue pursuant to the Board’s blocking charge rule, which took effect on July 31. See Sec. 103.20 of the Board’s Rules and Regulations;¹¹ see also 85 Fed. Reg. 20156 (2020) (postponing the effective date of the blocking charge rule to July 31).

The Union maintains a mail-ballot election is appropriate both because the employees are scattered geographically and because there is an ongoing strike. It argues petitioned-for employees work on jobsites throughout the Michigan that may be hundreds of miles from any of the Employer’s proposed facilities and that striking employees may have temporary interim employment that would restrict their ability to vote during the sessions proposed by the Employer. It also highlights that the extraordinary circumstances of the COVID-19 pandemic further support a mail ballot, as the Employer conducts only minimal monitoring of its current workforce while striking employees are not monitored at all by the Employer.

III. BOARD LAW AND ITS APPLICATION TO THE INSTANT CASE

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

¹¹ Subsection (d) states: “For all charges described in paragraphs (b) or (c) of this section, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.” However, the Board has not indicated whether Regional Directors, Administrative Law Judges, or the Board itself will make the determination of a charge’s effects on an election petition.

(2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145. “[W]hatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346).

The Board’s longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.¹² 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. 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.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, above at 1145.

The instant case satisfies not one but two of the specific situations that normally suggest the use of mail ballots in *San Diego Gas*. First, the approximately 161 eligible voters are scattered geographically throughout Michigan. The Employer’s Vice President testified that six of its 13 asphalt plants are 50 miles or more from the proposed centrally located facilities, with one being 90-100 miles. Moreover, he indicated no more than 30 employees, on average, are currently working out of these facilities. The location and distance from the proposed polling places of the remaining 161 eligible voters in its statement of position is unknown.¹³

¹² 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. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *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).

¹³ The Vice President testified to the average Unit employment of each facility and its approximate distance from the proposed polling place.

Petoskey: The Thumb Lake and Levering facilities are approximately 20 miles away and employ two employees each. The Manton and Traverse City facilities are approximately 60 miles away and employ two employees each. The Prudenville facility is approximately 90-100 miles away and employs two employees.

Grand Rapids: The Grand Rapids facility employs three employees. The Zeeland facility is less than 20 miles away and employs two to three employees. The Big Rapids facility is approximately 50 miles away and employs two employees. The Ludington facility is approximately 60-70 miles away and employs two to three employees.

Kalamazoo: The Kalamazoo facility employs two to three employees. The Benton Harbor facility is approximately 50 miles away and employs two to three employees.

Second, there is an ongoing strike, in which about half of the potential voters (approximately 80 people) are not working due to the strike and are not reporting to facilities or jobsites, as there is no active picketing. The record does not disclose the locations of, or distances to polling places for, these potential voters. Some or all of these strikers may have obtained temporary interim employment that would significantly restrict their ability to vote in a manual election despite being eligible voters.¹⁴

I also note the record indicates that the proposed polling period, from 4:30 p.m. to 6:30 p.m., would prevent some Unit employees from voting. According to the Employer, eligible voters work 8- to 14-hour shifts starting no earlier than 7:00 a.m., which means they conclude work between 3:00 p.m. and 9:00 p.m. As the record fails to reveal the specific shift lengths for any of the Employer's individual facilities or jobsites, an employee working an 8-hour shift at a centrally located facility would be available to vote at 3:00 p.m. while an employee at Prudenville working a 14-hour shift would not be able to drive the 100 miles to the polling place in Petoskey until 9:00 p.m. Therefore, to maximize employee enfranchisement, a polling period from 3:00 p.m. to 11:00 p.m. would be necessary to ensure that those employees would have access to voting.

As to the Employer's argument that a manual election is necessary to avoid potential Union interference, that concern is speculative. While the Board has noted that manual elections under Board supervision often obviate such possibilities, it has consistently affirmed that the current mail-ballot procedures and safeguards contained therein, are "designed to preserve the integrity of the election process and ensure that no reasonable doubt is raised about the fairness or validity of that process." *Mission Industries*, supra at 1027 (1987). Further, the Board has post-election mechanisms for addressing such conduct if it occurs. See, Casehandling Manual Part II, Sections 11390-11397.¹⁵

Due to geographic scatter of employees and the ongoing strike, balloting by mail will better facilitate employee participation in the election and allow all employees a convenient

Mason: The Mason facility employs two employees. The Lansing facility is less than 20 miles away and employs two employees.

¹⁴ The record contains no evidence regarding the eligibility of individual employees, including strikers.

¹⁵ In determining whether the conduct has "the tendency to interfere with the employees' freedom of choice," the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) *the proximity of the misconduct to the election*; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. (emphasis added). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

opportunity to exercise their right to vote.¹⁶ For the above reasons, I conclude a mail-ballot election is appropriate for the election in this matter.

IV. THE COVID-19 PANDEMIC

As explained above, the record evidence demonstrates that a mail ballot election is appropriate due to the geographic scatter of employees and the strike; however, the propriety of mail balloting in the instant case is further supported by the extraordinary circumstances of the ongoing COVID-19 pandemic.

A. Legal Authority and Agency Directives

Consistent with the longstanding recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a “COVID-19 Operational Status Update,”¹⁷ 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.

The Board has recognized the COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above, 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 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 *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Tredroc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020).

¹⁶ No party contends that voters are unable to read or understand the balloting procedures.

¹⁷ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

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.

B. Prevailing COVID-19 Circumstances

The United States and the State of Michigan continue to operate under declared states of emergency.¹⁸ Despite unprecedented efforts to limit transmission, confirmed cases of COVID-19 in the United States exceeded 6.9 million, with over 200,000 fatalities as of September 25.¹⁹ Michigan has reported 132,337 cases and 7,019 deaths.²⁰ The rolling seven-day average for new cases in Michigan has dropped below 600 only once since July 14 (574 on August 21), up from a low of 182 on June 16.²¹

In assessing the local conditions, I must consider the state of the pandemic in Michigan, where petitioned-for employees reside and work and where the Board agents conducting the election are located and would be required to travel. The record does not reveal the residences of employees or their worksites, although the Employer has facilities in at least 13 different counties, some of which are regularly visited by employees for the purpose of equipment or vehicle retrieval.²²

C. 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.²³ A person may become infected when an

¹⁸ “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 September 11, 2020); “Executive Order 2020-177: Declaration of state of emergency and state of disaster related to the COVID-19 pandemic” (September 4, 2020). The Office of Governor Gretchen Whitmer. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-538955--,00.html (accessed September 11, 2020).

¹⁹ “Cases in the U.S.” (updated September 10, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (accessed September 11, 2020).

²⁰ “Michigan Data” (updated September 10, 2020). State of Michigan. https://www.michigan.gov/coronavirus/0,9753,7-406-98163_98173---,00.html (accessed September 11, 2020) (109,519 confirmed and 11,327 probable cases; 6,569 confirmed and 325 probable deaths).

²¹ “Michigan Coronavirus Count and Case Map.” *The New York Times*. <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (accessed September 11, 2020)

²² The Employer also maintains nine offices; however, the record does not disclose the locations other than an office in Lansing.

²³ 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).

“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.”²⁴ Guidance issued by the CDC highlights the “[b]est way to prevent illness is to avoid being exposed to this virus” (emphasis in original).²⁵ Moreover, the CDC’s September 8, 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).²⁶

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 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.”²⁷ 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.”²⁸

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.²⁹ Under “MI Safe Start,” the state’s 83 counties

²⁴ “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).

²⁵ “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 September 11, 2020).

²⁶ “Travel during the COVID-19 Pandemic” (updated September 8, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed September 11, 2020).

²⁷ “Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions (updated September 9, 2020), Prevention, Am I at risk for COVID-19 from mail, packages, or products?” <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed September 11, 2020).

²⁸ “Running Essential Errands” (updated August 3, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed September 11, 2020).

²⁹ “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 September 11, 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 September 11, 2020).

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 majority of regions, including several where the Employer operates, remain at Phase Four. On June 30, Governor Whitmer announced that, due to the recent spike in COVID-19 cases in Michigan, the Grand Rapids, Kalamazoo, and Lansing Regions (which includes three of the four proposed polling places) would not advance to the fifth phase of her reopening plan by the Fourth of July weekend, as she had originally planned.³⁰ After cases began increasing, Governor Whitmer closed indoor bar service across most of the state, including regions where polling places are located and the Employer operates, which constituted a move backward on reopening Michigan.³¹

Following the hearing in this case, on September 4, Governor Whitmer extended the state of emergency and state of disaster related to the COVID-19 pandemic.³² and issued new and clarified workplace safeguards.³³

D. 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

³⁰ Executive Order 2020-143 (COVID-19) (July 1, 2020). https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-533435--,00.html (accessed September 11, 2020).

³¹ “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 September 11, 2020).

³² “Executive Order 2020-177: Declaration of state of emergency and state of disaster related to the COVID-19 pandemic” (September 4, 2020), above.

³³ “Executive Order 2020-175: Safeguards to protect Michigan’s workers from COVID-19” (September 4, 2020). The Office of Governor Whitmer. https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-538728--,00.html (accessed September 11, 2020). The Michigan Department of Labor & Economic Opportunity and Michigan Occupational Safety and Health Administration issued updated guidelines for the construction industry on September 8. See https://www.michigan.gov/leo/0,5863,7-336-100207_101283---,00.html (accessed September 11, 2020).

spread of COVID-19” (emphasis in original).³⁴ 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.³⁵

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 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

³⁴ “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 September 11, 2020).

³⁵ “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 September 11, 2020).

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.”³⁶ Similarly, the State of Michigan identifies symptoms as “fever, cough, shortness of breath, chills, repeated shaking with chills, muscle pain, headache, sore throat, [and] new loss of taste or smell,” along the emergency warning signs of “trouble breathing, persistent pain or pressure in the chest, new confusion or inability to arouse, [and] bluish lips or face.”³⁷

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 asymptomatic³⁸ and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC’s September 8 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.”³⁹ While the suggested protocols for 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.

³⁶ “Symptoms of Coronavirus.” CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed September 11, 2020).

³⁷ “What are the symptoms of COVID-19?” State of Michigan. <https://www.michigan.gov/coronavirus/0,9753,7-406-98810-523219--,00.html> (accessed September 11, 2020).

³⁸ “COVID-19 Pandemic Planning Scenarios” (updated September 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed September 11, 2020).

³⁹ “Travel during the COVID-19 Pandemic” (updated September 8, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed September 11, 2020).

E. COVID-19 Analysis

The circumstances surrounding the COVID-19 virus are extraordinary. In the instant case, a manual election will necessarily bring together approximately 160 eligible voters, from various parts of the State of Michigan, plus party representatives, and at least four Board agents. During the election, Board agents and observers will remain within close proximity of each other for an extended period of time and will interact with over 160 voters.

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, ballots from the multiple sessions and polling places will be transported comingled, 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, or (3) who exhibits symptoms of COVID-19 on the day of the election, whether or not those symptoms are due to virus. Under the Employer's response and preparedness plan,⁴⁰ on the day of the election, if an employee believes they have any symptoms of COVID-19,⁴¹ they should not report to worksites or to any of the Employer's facilities. All of the substantial risks outlined above are eliminated by use of the Board's mail-ballot procedures.

The record contains no evidence regarding from where people travel to the Employer's facilities or jobsites or if they carpool or rideshare, but it does indicate commutes of 30 to 120 minutes suggesting employees travel through multiple counties, some of which may be experiencing a surge in cases or designated a hotspot, where they may have to interact with other people (e.g., getting meals, fueling vehicles), increasing the chance of contracting the virus. This election would also involve travel to facilities by employees, many of whom do not regularly report to the facilities, and by Board agents, who may require overnight stays, 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

⁴⁰ The CDC's interim guidance for businesses and employers, the only record evidence of the Employer's COVID-19 protocols, provides general and aspirational suggestions but does not provide any details about steps the Employer has taken to mitigate the risk of contracting or transmitting the virus. For example, the CDC's interim guidance states "employers should implement and update as necessary a plan that: [i]s specific to your workplace, identifies all areas and job tasks with potential exposures to COVID-19, and includes control measures to eliminate or reduce such exposures." However, the record is devoid of specific areas and job tasks with the potential for exposure or control measure to eliminate or reduce such exposure.

⁴¹ If only the three symptoms listed in GC 20-10 are used there is a significantly increased risk of exposure to COVID-19. If all symptoms recommended by the CDC and State of Michigan are used there is an increased chance eligible voters will not be able to cast a manual ballot.

individuals.⁴² 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 repair and wash bays 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. Assuming a manual election is appropriate for the sake of argument, 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. Regarding the COVID-19 pandemic at this time, as I have already described, we have not reached a safe enough juncture in the pandemic, particularly in the regions in which the election would be held, not to mention the areas where employees' jobsites are located. In any manual election voters and the Board agents 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. It is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus. The fact that two of the Employer's employees have tested positive within the last two months highlights the fact the risk of exposure to somebody at the Employer's facility with COVID-19 is not just theoretical.

The undisputed continued presence of the virus in Michigan, particularly the Grand Rapids, Kalamazoo, and Lansing Regions where the majority of polling places are located, and the severity of the COVID-19 risk further support a mail-ballot election. Furthermore, the record reveals that there were two employees who tested positive for the virus in the Employer's facilities in the last two 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 have already determined the record evidence supports finding a mail-ballot election appropriate. Combined with current prevailing circumstances of the COVID-19 pandemic in the

⁴² "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 (accessed September 11, 2020). See also, "COVID-19 Pandemic Planning Scenarios," above.

region, the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within Michigan and hold a 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 commerce⁴³ 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.

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:

All full-time and regular part-time employees employed in the State of Michigan by Rieth-Riley Construction Co., Inc. for airport construction work (exclusive of building), railroad track and trestle construction (exclusive of such work inside the property line of an industrial plant covered by the Associated General Contractors of Michigan, Detroit Metro CBA) and all highway work including roads, streets, bridge construction, parking lots, and asphalt plants, in the following classifications: asphalt plant operator, crane operator, dragline operator, shovel operator, locomotive operator, paver operator (5 bags or more), elevating grader operator, pile driving operator, roller operator (asphalt), blade grader operator, trenching machine operator (ladder or wheel type), auto-grader, slip form paver, self-propelled or tractor drawn scraper, conveyor loader operator (Euclid type), endloader operator (1 yard capacity and over), bulldozer, hoisting engineer, tractor operator, finishing machine operator(asphalt), mechanic, pump operator (6" discharge or over, gas diesel, powered or generator of 300 amp or larger), shouldering or gravel distributing machine operator(self-propelled), backhoe (with over 3/8 yard bucket), side boom tractor (type D-4 equivalent or larger), tube finisher (slip form paving), gradall (and similar type machine), asphalt paver (self-propelled), asphalt planer (self-propelled),

⁴³ Rieth-Riley Construction Co., Inc., an Indiana corporation, is engaged in the business of road construction with places of business in the State of Michigan, and conducting its operations during the calendar year ending December 31, 2019, the company purchased and received goods valued in excess of \$50,000 directly from points outside the State of Michigan.

batch plant(concrete-central mix), slurry machine (asphalt), concrete pump (3" and over), roto mill, swinging boon truck (over 12-ton capacity), hydro demolisher (water blaster), farm type tractor with attached pan; but excluding guards and supervisors as defined in the Act, and all other employees.

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 324, International Union of Operating Engineers (IUOE), 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 2:15 p.m. (EDT) on **Monday, October 13, 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 **October 22, 2020**, should communicate immediately with the National Labor Relations Board by calling Board Agent Drew Hampton at 616-930-9174, 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 **November 2, 2020**. All ballots will be commingled and counted at 1:00 p.m. (EDT) on **November 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 be determined by the Regional Director and will require video participation.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **September 19, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either 1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or 2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who

were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.⁴⁴

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. Also eligible to vote are the employees in the unit who are engaged in an economic strike that began more than 12 months before the election date unless they have been permanently replaced. In the event the strike is found to be an unfair labor practice strike, any employees hired as replacements after the commencement of the unfair labor practice strike or conversion to an unfair labor practice strike might be deemed temporary replacements. In either case, whether the strike is an economic strike or an unfair labor practice strike, both strikers and their replacements may vote in this election if they wish to do so. 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.

3. 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. The Employer is directed to provide a separate list containing the above described information for those individuals the Employer considers ineligible to vote due to their status as strikers.

To be timely filed and served, the lists must be *received* by the regional director and the parties by **September 29, 2020**. The lists 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 lists in the required form, the lists 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 lists must begin with each employee's last name and the list must be alphabetized (overall or by

⁴⁴ The parties stipulated that the Employer was in the construction industry and agreed that the *Steiny/Daniel* formula applies in this case. See *Steiny & Co., Inc.*, 308 NLRB 1323 (1992); *Daniel Construction Co., Inc.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

department) by last name. Because the lists will be used during the election, the font size of the lists 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 lists is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The lists must 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. The lists 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 lists within the specified time or in the proper format if it is responsible for the failure.

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

4. 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. 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: September 25, 2020



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