UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

NANA MANAGEMENT SERVICES, LLC

Employer

and

LABORERS LOCAL 942, AFFILIATED WITH THE ALASKA DISTRICT COUNCIL OF LABORERS AND THE LABORERS INTERNATIONAL UNION OF NORTH AMERICA[1]

Petitioner

Case 19-RC-264750

DECISION AND DIRECTION OF ELECTION

On August 14, 2020,[2] Laborers Local 942, affiliated with the Alaska District Council of Laborers and the Laborers International Union of North America (Petitioner), filed a petition pursuant to Section 9(c) of the National Labor Relations Act (Act), seeking to represent employees employed by the Employer at the Pioneer Home in Fairbanks, Alaska (Fairbanks Pioneer Home). On September 10, a hearing officer of the National Labor Relations Board (Board) held a hearing in this matter and the parties subsequently filed briefs with me.

Only one litigable issue was raised by the parties, the supervisory status of the one lead employee. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit) but disagree whether the lead is a supervisor within the meaning of Section 2(11) of the Act:

> **INCLUDED:** All full-time and part-time employees employed by the Employer and working at the Pioneer Home in Fairbanks, Alaska.
>
> **EXCLUDED:** Per diem employees, and guards and supervisors as defined in the Act.

There are approximately 22 employees in the Unit, including one lead employee. The Employer argues the lead responsibly directs other employees and participates in their discipline using independent judgment while the Petitioner maintains the lead does not possess the necessary supervisory indicia. As the Employer's contention concerns whether a certain individual should be excluded from the unit of 22 employees, it involves the voting eligibility of less than 5% of

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[1] The parties' names appear as stipulated at hearing.

[2] All dates are in 2020 unless otherwise noted.

the Unit; therefore, I precluded litigation of this issue under Section 102.64(a) of the Board's Rules and Regulations.[3]

The Employer also argues a manual election is appropriate while the Petitioner had proposed a mail ballot election. 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 documentary evidence, and file post-hearing briefs regarding the mechanics of this election.[5] I have carefully considered the record, including those positions and arguments. As explained below, I find that, in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, a prompt election by mail is appropriate.

I. THE POSITIONS OF THE PARTIES

A. The Petitioner

The petition is for a mail ballot election. At hearing, the Petitioner stated it did not have a strong preference on the method of the election.

B. The Employer

The Employer provides commercial food and facility management services. Around 2019, the Employer contracted with Alaska Department of Health and Social Services (DHSS) to provide food, housekeeping, and laundry services to the Fairbanks Pioneer Home, a state-run long-term residential care facility for the elderly. According to DHSS, the Fairbanks Pioneer Home has a "license for 93 residents and the average age is 87. ... The Home is staffed with approximately 130 dedicated employees."[6] It is not clear whether the Employer's 22 workers are considered part of the staff by DHSS.

The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains the risk can be mitigated, and it is capable of taking steps which would ensure a safe manual election. In this regard, the Employer notes it operates in the healthcare industry.

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[3] On May 30, the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-CV-0675, finding five aspects of Section 102 of the Board's Rules and Regulations, issued in December 18, 2019 amendments to the Board's representation rules, were unlawfully promulgated. They are therefore not currently in effect. Rather, the prior versions of those rules remain in force. This included Section 102.64(a).

[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] Neither party's post-hearing brief addressed the mechanics of the election; instead, each party chose to submit argument and evidence regarding the supervisory issue, which I precluded from litigation.

[6] "Fairbanks Pioneer Home, Services." DHSS. http://dhss.alaska.gov/daph/Pages/fairbanks/default.aspx (accessed September 24, 2020). I take administrative notice of DHSS Fairbanks Pioneer Home website, pages linked therein, and the DHSS Alaska Pioneer Homes website, in general. http://dhss.alaska.gov/daph/Pages/default.aspx (accessed September 24, 2020).

The Employer proposes conducting a manual election outdoors underneath a tent, so participants will not have to enter the facility's residential space, for a 2-hour period around employees' shift change on two separate days. The Employer did not propose a location for the tent. It will accommodate all the procedures set forth in General Counsel Memorandum 20-10, Suggested Manual Election Protocols (GC 20-10). Specifically, the Employer offers:

- A spacious, covered, outdoor polling area, sufficient to accommodate six-foot distancing, which will be marked to ensure separation for observers, Board agent, and voters;
- A separate entrance and exit for voters, with markings to depict safe traffic flow throughout polling area;
- Separate tables spaced six feet apart so the Board agent, observers, ballot booth and ballot box are at least six feet apart;
- Markings for social distancing;
- 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 Board agent from voters and voters from each other, pre-election conference and ballot count attendees, as well as personal protective equipment (PPE), including masks, hand sanitizer, gloves and wipes for observers;
- Inspection of the polling area by the Board agent and parties at least 24-hours prior to the election;
- Polling times procedures for releasing voters will be sufficient to accommodate social distancing/cleaning requirements, without endangering participants by unnecessarily elongating exposure among Board agents and observers;
- One representative for each party who can attend the pre-election conference and the ballot count;
- Multiple voter lists to maintain social distancing;
- Only one voter will approach the observers' table(s) and election booth at a time to ensure social distancing;
- After clearance by the observers, the Board agent will place an individual ballot on table for the voter and then step back to maintain social distance; and,
- Voting will include use of cardboard booths, and the Board agent can disinfect the booth before it is returned to the Regional Office and before any other employees handle it.

In addition, the Employer will provide the certifications listed in GC 20-10.

The Employer states ballots will need to be trilingual, as about "10% of employees speak only Tagalog, two only speak Spanish, and both the Tagalog and Spanish speakers do not read or understand English well and require translation." It notes that it sometimes provides documents in all languages and provides translation services whenever it provides important documents in English only. The Employer argues a manual election with trilingual ballots is the optimal way to thwart the threat of voter disenfranchisement.

The record does not contain the number of employees at the facility who have tested positive for COVID-19 or whether any employees have missed work due to quarantining or isolating based on symptoms of, or exposure to, COVID-19. There is no record evidence regarding the number of residents or other personnel at Fairbanks Pioneer Home who have tested positive or if any visitors to the facility have been positive for COVID-19. Nor does the record disclose what safety protocols employees and Fairbanks Pioneer Home currently follow with regard to COVID-19.

II. BOARD LAW AND RECENT CASES

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, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (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 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958)). "It 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." *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; 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. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.[7] 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. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law indicates Regional Directors may use discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and Regional Directors should tailor the method of conducting an election to "enhance the opportunities of all to vote." Id. at 1144.

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[7] I note the provisions of the Casehandling Manual are not Board directives or 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)); *San Diego Gas*, above at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

The Board recognized the ongoing COVID-19 pandemic to constitute "extraordinary circumstances" and reaffirmed Regional Directors' discretion regarding election mechanics in its April 17 "COVID-19 Operational Status Update."[8] 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 continued to affirm the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above,[9] and its recent Orders[10] explain:

> The Board will continue considering 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.

As the Board's Orders instruct, I analyze the instant petition using the prevailing circumstances in the region.[11]

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[8] https://www.nlrb.gov/news-outreach/news-story/covid-19-operational-status-update.

[9] 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).

[10] See *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (denying review of Regional Director's decision to order a mail ballot election); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *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-257047 and 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) (same).

[11] The Board has granted review and issued a stay of directed mail ballot elections in four cases; however, it has not cited factors outside of *San Diego Gas*, established a different standard for analyzing petitions filed during the COVID-19 pandemic, or issued a ruling in those cases that impacts my conclusions and findings herein. See *Airgas USA, LLC*, 16-RC-262896 (unpublished September 24, 2020); *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014 (unpublished September 16, 2020); *Draper Valley Farms*, 370 NLRB No. 20 (September 9, 2020); *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020).

III. ANALYSIS

A. Prevailing COVID-19 Circumstances

The impact of the COVID-19 pandemic in the United States since March has been well documented. As of September 23, COVID-19 has created a public health crisis responsible for over 200,000 deaths in this country, with the total number of confirmed cases approaching 7 million and surging in some areas of the country.[12] The United States Centers for Disease Control and Prevention (CDC) explains that a person may become infected when an "infected person coughs, sneezes or talks" or by "touching a surface or object that has the virus on it, and then by touching their own mouth, nose, or possibly eyes."[13] The CDC also warns: "**It is important to realize that you can be infected and spread the virus but feel well and have no symptoms**" (emphasis in original).[14]

In assessing the local conditions, I must consider the state of the pandemic in Alaska, particularly the Fairbanks area where employees work and the Anchorage metropolitan area, including Matanuska-Susitna Borough, where the lone Board agent in Alaska is located and would be required to travel. I also consider the state of the pandemic in the Seattle metropolitan area, where other Region 19 Board agents are located and from where they would be traveling should the Region's only Alaskan agent be unable or unavailable to conduct the election.

The United States and the states of Alaska and Washington are currently in declared states of emergency due to COVID-19. As of September 23, Alaska and Washington had similar positive case rates (per 100,000 people), ranking 48th and 46th, respectively, among U.S. states and territories.[15] Alaska had 8,081 confirmed cases, with 5,213 active and 46 deaths. While the Fairbanks North Star Borough, where the Pioneer Home at issue is located, had 1,071 cases, including 786 active and 10 deaths, the Anchorage metropolitan area, where the Alaskan Board agent is located and would be traveling from, account for nearly 60% of that state's cases, over 60% of its active cases, and two-thirds of its deaths.[16] Washington State had 84,238 confirmed cases and 2,080 deaths related to COVID-19. The Seattle metropolitan area of King, Snohomish,

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[12] "CDC COVID Data Tracker." U.S. Centers for Disease Control and Prevention (CDC). https://www.cdc.gov/covid-data-tracker/#cases (accessed September 24, 2020).

[13] "Frequently Asked Questions" (updated September 18, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/faq.html (accessed September 24, 2020).

[14] "Overview of Testing for SARS-CoV-2 (COVID-19)" (updated September 18, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html (accessed September 24, 2020).

[15] "CDC COVID Data Tracker," above (accessed September 24, 2020).

[16] "Alaska Coronavirus Response Hub, AK COVID-19 Cases Dashboard." Alaska Department of Health and Social Services (DHSS). https://coronavirus-response-alaska-dhss.hub.arcgis.com/ (Anchorage Municipality reported 4,191 cases, with 2,818 active and 28 deaths; Matanuska-Susitna Borough reported 607 cases, with 375 active and two deaths) (accessed September 24, 2020).

and Pierce counties, where other Region 19 Board agents are located and would be traveling from, account for 43% of that state's cases and over 56% of its deaths.[17]

On April 17, the date of the Board's Operational Status Update, the Fairbanks North Star Borough had a total of 75 confirmed cases and reported only seven new case between April 11 and June 1. However, since June, the Fairbanks area has reported new cases every day, with the highest number of new cases, 31, occurring on September 10 and 24. Anchorage and Matanuska-Susitna have seen similar sustained increases. It has a rolling 7-day average of 13 new cases per day, well above the less than one new case a day in April and May. On April 17, Anchorage reported four new cases taking it to a total of 171 while Matanuska-Susitna had a total of 18 and reported zero new cases from April 11 to 17. By June, both Anchorage and Matanuska-Susitna began reporting new cases daily, with Anchorage peaking at 148 on July 25, Matanuska-Susitna peaking at 18 on July 31, and the combined Anchorage metropolitan area reporting a rolling 7-day average of about 20 new cases per day, well above the virus's near nonexistence in April.

On September 23, CDC Director Dr. Robert Redfield testified to Congress that the preliminary results of government studies show "a majority of our nation, more than 90% of the population, remains susceptible. It varies in different geographic parts from states that have less than 1% with evidence of previous infection to ... one as high as 24%."[18]

It is not possible for me to know if these numbers represent an increase in the number of infections, a reflection of more widespread testing or better reporting; however, it is sufficient to establish that there continues to be significant community spread of COVID-19. The steady presence of COVID-19 in Fairbanks, currently under high alert and where the election would be held, and the areas where Board agents are located and must travel to conduct a manual election indicate a risk of transmission and infection for the voting group of employees, other personnel at the Fairbanks Pioneer Home and its residents, who are a vulnerable and high-risk population, Region 19 personnel, and the general population of Alaska. A mail ballot avoids these risks.

B. Current Federal, State, and Local Directives

The CDC explains that COVID-19 is primarily spread from person to person,[19] and highlights the "**best way to prevent illness is to avoid being exposed to this virus**" (emphasis

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[17] "COVID-19 Data Dashboard." Washington State Department of Health. https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard (King County reported 21,760 cases and 759 deaths, Snohomish County reported 6,785 cases and 211 deaths, and Pierce County reported 7,736 cases and 198 deaths) (accessed September 24, 2020).

[18] "CDC Director Redfield Says 90% U.S. Population Susceptible to Coronavirus Infection" (September 23, 2020). C-SPAN. https://www.c-span.org/video/?c4909117/cdc-director-redfield-90-us-population-susceptible-coronavirus-infection (accessed September 24, 2020).

[19] 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 September 24, 2020).

in original).[20] Social distancing guidance from the CDC's COVID-19 factsheet instructs people to "limit in-person contact as much as possible."[21] Moreover, its September 17 update for travelers continues to maintain: "Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**" (emphasis in original).[22]

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."[23] 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."[24]

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. In response to the virus, Alaska established COVID-19 Alert Levels and, after a period of closure for non-essential businesses, implemented the Reopen Alaska Responsibly plan providing more detailed guidance. Guidance for the current phase of Reopen. The general guidance for Reopen Alaska Responsibly mirrors that of CDC, reemphasizing the "**best way to prevent illness is to avoid being exposed to this virus**" (emphasis in original) and reiterating the CDC recommendation for long-term care facilities, such as the Pioneer Home, to "[i]mplement[] visitor restrictions to restrict all visits except for certain compassionate care reasons."[25] The alert levels are based on "the number of new cases of COVID-19 per 100,000 residents per day averaged over the past 14 days in each region."[26] While the Matanuska-Susitna Borough was designated low alert on September 23, Anchorage and the Fairbanks North Star

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[20] "How to Protect Yourself & Others" (updated September 11, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (accessed September 24, 2020).

[21] https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf (accessed September 24, 2020).

[22] "Travel during the COVID-19 Pandemic" (updated September 17, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (accessed September 24, 2020).

[23] "Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?" (updated September 18, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/faq.html (accessed September 24, 2020).

[24] "Running Essential Errands" (updated September 11, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html (accessed September 24, 2020).

[25] "Reopen Alaska Responsibly, Phase III/IV Guidance." State of Alaska. https://covid19.alaska.gov/wp-content/uploads/2020/05/05212020-Phase-III-IV-Guidance.pdf (accessed September 24, 2020).

[26] "Alaska COVID-19 Alert Levels." DHSS. http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/alertlevels.aspx (High is greater than 10 cases per 100,000, Intermediate is 5-10 cases, and Low is less than 5 cases) (accessed September 24, 2020).

Borough were on high alert, which is described as "[w]idespread community transmission with many undetected cases and frequent discrete outbreaks."[27]

Starting on August 11, all non-Alaska residents entering Alaska from another state are required to submit a travel declaration and self-isolation plan and negative COVID-19 test results from within 72 hours of departure to Alaska.[28] Washington State and the Seattle metropolitan area do not require a formal quarantine for travelers but require them to "[o]bserve all Safe Start restrictions and limit travel between counties," limit social gatherings to no more than 5 people per week per household, and "[l]imit close contact to a small group of people."[29]

On August 24, Alaska issued Recommended Guidance for Congregate Residential Settings, such as the Pioneer Homes; however, the record evidence does not indicate in which phase Fairbanks Pioneer Home is, nor does it include any information from which the phase and mitigation steps that should be in place could be ascertained.

Federal, state, and local guidance continues to highlight the best way to prevent illness due to COVID-19 is to avoid being exposed to the virus and recommend limiting in-person contact. In addition, Alaska guidance for long-term care facilities and based on COVID-19 alert levels provides for restricting access and occupancy to businesses when certain thresholds are reached. Fairbanks, where the election would take place, and Anchorage, through which the Board agent conducting the election must travel, are currently on high alert. As noted above, the status of Fairbanks Pioneer Home is not known. See Sec. I.B. in this decision.

C. 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

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[27] Ibid.

[28] "Health Mandate 010: International and Interstate Travel" (August 5, 2020). State of Alaska. https://covid19.alaska.gov/health-mandates/ (accessed September 24, 2020).

[29] "Travelers & Commuters." Washington State Coronavirus Response. https://coronavirus.wa.gov/travelers-commuter (accessed September 24, 2020).

spread of COVID-19" (emphasis in original).[30] Alaska did not change its protocols for voting because it already permits no-reason absentee voting and offers several options for remote voting—By-Mail Voting, Early Voting, Absentee In-Person Voting, Special Needs Voting and Electronic Transmission Voting.[31] However, in recognition of the CDC's recommendations, Alaska mailed absentee ballot applications to all registered voters over 65 years old.[32]

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

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[30] "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 24, 2020).

[31] "COVID-19 Information for Voters and Election Officials." Alaska Division of Elections. https://www.elections.alaska.gov/Core/COVID19faq.php ("Like all years before, voters do not need a reason to request an absentee by-mail ballot") (accessed September 24, 2020).

[32] "State plans to mail absentee ballot applications to seniors, prompting calls to send them to all Alaska voters" (June 20, 2020). KTOO Public Media. https://www.ktoo.org/2020/06/20/state-plans-to-mail-absentee-ballot-applications-to-seniors-prompting-calls-to-send-them-to-all-alaska-voters/ (accessed September 24, 2020).

results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state "symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath." However, the CDC lists additional symptoms, noting "[t]his list does not include all possible symptoms":[33]

- 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

Alaska uses all CDC-listed symptoms and adds: "Increased sputum (phlegm) production."[34]

D. A Mail Ballot Election Is Appropriate

The circumstances surrounding the COVID-19 virus are extraordinary. Manual elections are the preference of the Board.[35] Absent the present pandemic, a manual election would almost certainly be held in this case. I recognize a degree of reopening has begun, in the United States generally and in Alaska (and Washington State) 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 and in-person contact remains. Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections.

Manual election procedures inherently require substantial interaction among voters, observers, party representatives, and Board agent, all of whom must be present at the Employer's facility. The Board agent, observers, and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Board agent and observers must be present in the same space for the duration of the polling period. I also note the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity. Removal of the masks by the voter during voting would

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[33] "Symptoms of Coronavirus." CDC. https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (accessed September 24, 2020)

[34] "Symptoms, What you need to know." DHSS. http://dhss.alaska.gov/dph/Epi/id/Pages/COVID-19/symptoms.aspx (accessed September 24, 2020).

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

result in potential cross-contamination, thereby rendering the process even more risky. Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread, given the number of individuals coming in and out of the voting area, the need for the passing of papers, and proximity of individuals for the purpose of providing ballots and checking off names.

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange, and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the culmination of the election, the ballot count will proceed in the same area with multiple people, which will unnecessarily cause a significant risk of exposure for all involved. This election would also involve travel to the facility by a Board agent and party representatives. Even if everyone who would participate in a manual election might appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic individuals.[36] Eligible voters, along with other employees who may come into contact with the participants, the Board agent, and party representatives, could risk exposure to the virus and spreading it to participants, Fairbanks Pioneer Home residents, who are a high-risk population, their families, and the community. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state, and local guidance, all of which advise avoiding in-person contact, which a manual election necessitates. This guidance is even more critical now given the continued high level of community spread of COVID-19 in Alaska and Washington State, should that be the origin of the Board agent conducting the election.

The Employer contends the following measures can ensure a safe and effective manual election: using social distancing measures by making sure voters are not less than six feet apart at any given time and maintaining a sanitary and disinfected place for all on the premises. See Sec. I.B., above. While the Employer has offered to provide floor markings at more than the suggested distance, there are no means for enforcing social distancing. I have also considered the feasibility and efficacy of its other proffered measures. Regarding the election itself, I have considered the use of plexiglass barriers. I have also considered the required self-quarantining and self-isolation of symptomatic or contact traced employees, use of PPE, and whether a Board

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[36] "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic" (July 2020). *Emerging Infectious Diseases Journal*. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (accessed September 24, 2020); "The implications of silent transmission for the control of COVID-19 outbreaks" (updated July 28, 2020). *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. https://www.pnas.org/content/early/2020/07/02/2008373117 ("silent disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate in COVID-19 outbreaks") (accessed September 24, 2020). See also, "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 24, 2020).

agent conducting the election could observe appropriate restrictions while traveling to the election site. I have considered limiting the number of people who may participate in the pre-election conference and the ballot count and requiring social distancing for all participants.

Regarding the Employer's proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread;[37] however, federal, state, and local guidance continues to recommend limiting in-person contact. and "[s]taying home is the best way to protect yourself and others from COVID-19."[38] The CDC acknowledges that "[t]here is much more to learn about the transmissibility, severity, and other features associated with COVID-19 and investigations are ongoing"[39] and "[w]hile more is learned every day, there is still a lot that is unknown about COVID-19 and the virus that causes it."[40] Given the uncertainty of determining an "appropriate" distance and the general unknowns of the virus itself, I cannot be sure current guidelines sufficiently mitigate risk.

I have carefully considered the Employer's protocols and proffers, including the suggestions in GC 20-10. 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) on September 10. The CDC's "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic[41] and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC's September 17update for "Travel during the COVID-19 Pandemic" continues to warn: "You may feel well and not have any symptoms, but you can still spread COVID-19 to others."[42] 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

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[37] I note the experts disagree about the distance required for safety and that guidelines are subject to change. Current CDC guidance defines "good social distance" as "about 6 feet." Notably, some scientists disagree that 6 feet is enough. "Mounting evidence suggests coronavirus is airborne – but health advice has not caught up" (July 8, 2020). *Nature*. https://www.nature.com/articles/d41586-020-02058-1 (accessed September 24, 2020); "What is the evidence to support the 2-metre social distancing rule to reduce COVID-19 transmission?" Centre for Evidence-Based Medicine, University of Oxford. https://www.cebm.net/covid-19/what-is-the-evidence-to-support-the-2-metre-social-distancing-rule-to-reduce-covid-19-transmission/ ("Smaller airborne droplets laden with SARS-CoV-2 may spread up to 8 metres concentrated in exhaled air from infected individuals .... Whilst there is limited direct evidence that live SARS-CoV-2 is significantly spread via this route, there is no direct evidence that it is *not* spread this way") (emphasis in original) (accessed September 24, 2020).

[38] "Travel during the COVID-19 Pandemic," above (accessed September 24, 2020).

[39] "Frequently Asked Questions, Spread," above (accessed September 24, 2020).

[40] "Symptoms of Coronavirus," above (accessed September 24, 2020).

[41] "COVID-19 Pandemic Planning Scenarios," above (accessed September 24, 2020).

[42] "Travel during the COVID-19 Pandemic," above. (accessed September 24, 2020).

manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status.

Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. A mail ballot election meets the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. Neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure, provided the election materials are in English, Tagalog, and Spanish, and there is no contention that the addresses of the eligible employees are not known or up to date, nor is there evidence that mail service in Alaska or the Seattle metropolitan area, where the mail ballots will be sent and received, has been disrupted. The Board's mail ballot procedures include means by which an employee who has not received a ballot in a timely manner may receive a duplicate. Mail balloting provides no additional risk to Board agents, parties, voters, Fairbanks Pioneer Home residents, or the public and is consistent with current guidance of limiting in-person contact and travel.

In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted federal, state, and local directives and guidance. Furthermore, there is no known date at which the guidance and circumstances I have described above will change, for better or worse. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Section 102.67(b) of the Board's Rules and Regulations. Based on the foregoing, I conclude the use of a mail ballot election would provide the framework for more certain election procedures and is the appropriate and most responsible measure to ensure a safe election.

IV. CONCLUSIONS AND FINDINGS

I conclude that under the extraordinary circumstances described above, the election will be held by mail ballot.

Therefore, based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[43]

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 part-time employees employed by the Employer and working at the Pioneer Home in Fairbanks, Alaska.

EXCLUDED: Per diem employees, and guards and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether lead employees are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

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 Laborers Local 942, affiliated with the Alaska District Council of Laborers and the Laborers International Union of North America.

E. Election Details

The election will be conducted by United States mail. On **Wednesday, October 21, 2020**, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. 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.

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[43] As stipulated by the parties:

The Employer, a State of Alaska limited liability company with a place of business in Fairbanks, Alaska, is engaged in the business of providing commercial food and facilities management services. Within the last 12 months, a representative period, the Employer derived gross revenues in excess of $500,000, and purchased and received goods valued in excess of $50,000 directly from points outside of the State off Alaska.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, October 28, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at (206) 220-6300 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 19 office by 12:00 p.m. (noon) PDT on Wednesday, November 18, 2020. Pursuant to the parties' stipulation, no ballots will be counted that are received after the due date. All ballots will be comingled and counted by an agent of Region 19 of the National Labor Relations Board on Friday, November 20, 2020, following the ballot count involving the same parties in 19-RC-264745 with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office, the Region will inform the parties with sufficient notice so that they may attend.

F. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **September 20, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

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.

G. 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 must also include, in a separate section of that list, the same information for those individuals who will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 2, 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.nlrb.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.nlrb.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.

H. 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 in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. English-, Tagalog-, and Spanish-language versions of the Notice of Election will be sent by the Region separately. 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.nlrb.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. A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. 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.

Although 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, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. 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 30, 2020

Ronald K. Hooks

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