

MARR JONES & WANG
A Limited Liability Law Partnership

RICHARD M. RAND, ESQ.
Pauahi Tower
1003 Bishop Street, Suite 1500
Honolulu, Hawaii 96813
Telephone: (808) 536-4900
Facsimile: (808) 536-6700
rrand@marrjones.com

Attorney for Employer
HITACHI RAIL HONOLULU JV

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HITACHI RAIL HONOLULU JV,

Employer,

and

HAWAII TEAMSTERS AND ALLIED
WORKERS, LOCAL 996,

Petitioner.

Case No. 20-RC-269153

EMPLOYER HITACHI RAIL HONOLULU
JV'S REQUEST FOR REVIEW;
APPENDICES "A" AND "B";
CERTIFICATE OF SERVICE

EMPLOYER HITACHI RAIL HONOLULU JV'S REQUEST FOR REVIEW

Pursuant to pursuant to §102.67 of the NLRB's Rules and Regulations Hitachi Rail Honolulu JV ("Employer") hereby requests that the NLRB review the action of the Regional Director for Region 20 and in particular the Decision and Direction of Election issued on December 14, 2020 to conduct the election by mail ballot as opposed to a manual ballot.

I. STATEMENT OF FACTS

The parties in this case entered into a Stipulated Election Agreement on December 8, 2020 in which they agreed to an appropriate unit of: All full-time and regular part-

time Train Controllers, Engineering & Fault Controllers, and information Controllers, but excluding all other employees, business office clerical employees, professional employees, managerial employees, confidential employees, guards, and supervisors as defined by the Act. The parties agreed that employees who are classified as Control Center Supervisors may vote in the election but their ballots will be challenged since their eligibility has not been resolved.

The parties reserved for resolution by the Regional Director the issue of whether there should be a manual ballot election or mail ballot election. The parties were permitted to submit position statements regarding their preference on the method of the election.

The Employer submitted its position statement in accordance with the Regional Director's direction in the Election Agreement. (Appendix A) The Petitioner did not submit a statement of position. In its statement of position, the Employer discussed the factors set forth by the NLRB in *Apirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020) in which the Board reaffirmed its long-standing policy favoring manual ballot elections. In *Apirus Keweenaw*, the Board identified six criteria which would be used to determine whether a mail ballot election would be directed. One of those six criteria involves the teleworking status of the NLRB's office, the remaining five focus on the metrics of COVID-19 cases at the Employer's facility and in the community.

In its submission the Employer identified the appropriate sources for measuring whether the trend in new confirmed cases was increasing within the City and County of Honolulu which was the relevant geographic area. The Employer also provided links to sources for the positivity rate. <https://health.hawaii.gov/coronavirusdisease2019/what-you-should-know/current-situation-in-hawaii/#summary-metrics>

Significantly at that time the positivity rate for the City and County of Honolulu (Oahu) was 2.2% and the 14-day average new case count was 66 which was a 22% decrease. In *Apirus Keweenaw*, the Board stated that a positivity rate above 5% would require a mail ballot election. Here the positivity rate at the time was only 2.2%.

The Employer addressed the remaining *Apirus Keweenaw* factors specifically whether the Employer could provide a space which allowed for social distancing and the status of positive cases at its facility. The Employer submitted the Declaration of Christopher White who stated that the Employer had no positive COVID-19 cases at the Employer's facility and no employees were awaiting the results of a test. White attached a diagram showing where a manual ballot election would be held allowing employees to vote while maintaining distancing. In this regard we note that the petitioned for unit only contained 18 employees with four employees in dispute as supervisors.

The Employer also noted the requirements of General Counsel Memo 20-10 and the fact that those requirements had been incorporated into the Election Agreement. In addition the Employer acknowledged the GC Memo 21-01 which was issued in response to *Apirus Keweenaw*, but noted that it did not add any substantive requirements above those identified by the Board in *Apirus Keweenaw*.

The Regional Director issued her Decision and Direction of Election on December 14, 2020. (Appendix B) In that Decision the Regional Director acknowledged that the Board's long-standing policy was that the election should typically be conducted manually. In analyzing the six *Apirus Keweenaw* factors the Regional Director focused on an *increase* in the positivity rate in Honolulu County from November 28 to December 11 of 6% but stated that the positivity rate was 2.3%. Specifically the Regional Director stated "The 14 day average

positivity rate Honolulu County has increased by 6% from November 20 to December 11; the most recent two-week analysis. *Although Honolulu County's website indicates that the average positivity rate has been at 2.3% for the past two weeks*, the yo-yo figures show that positivity rate rose during the latter part of the two week period.” (DDE at 3-4 emphasis added, footnotes omitted) The Regional Director noted that the figures reflected “dramatic increases and decreases in any given day, but they have trended up as of late, and since November 28.” DDE at 4, footnote omitted.

Significantly the Regional Director did *not* conclude that the positivity rate exceeded 5% or was increasing such that it would exceed 5%. Instead the Regional Director relied solely on the fact that the positivity rate in the two-week period prior to her decision reflected increases and decreases on any given day and the trend was a slight increase. Based on that factor and that factor alone the Regional Director directed a mail ballot election. She did not conclude that any of the other factors in *Apirus Keweenaw* or GC Memo 20-19 supported conducting the election by mail ballot.

Based upon the Stipulated Election Agreement, the mail ballots were mailed to the voters on December 21, 2020, were received by January 11, 2021 and counted on January 13, 2021. The results of the tally at that time were of the 22 eligible voters there were nine cast for the Petitioner, six cast against Petitioner, and four challenged ballots. The parties ultimately agreed that the four individuals who were allowed to vote subject to challenge were not eligible to vote. On January 22, 2021, a revised tally of ballots was issued showing nine in favor of the Petitioner, six against and that the Petitioner had won the election. However, the results also show that there were three eligible employees whose ballots were not returned and therefore not

counted. Those three ballots could have been dispositive since if they had all been in favor of the Employer the results of the election would have been a tie.

The Regional Director certified the Petitioner as the representative of employees in the petitioned for unit on January 25, 2021.¹

II. ARGUMENT

The Regional Director should not have directed a mail ballot election based upon the factual information available. The Regional Director was required to apply the factors set forth in *Apirus Keweenaw*. None of those, including the positivity rate, supported a manual ballot election. The Regional Director relied solely on what she extrapolated to be an increase in the positivity rate over a two week period. Regardless, the Regional Director's only reference to an actual positivity rate was an "average positivity rate of 2.3% for the past two weeks."

However, in *Apirus Keweenaw* the NLRB established a clear standard for factor 2:

Thus, a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.

Apirus Keweenaw, slip op at 5 (footnote omitted)

The Regional Director found neither that the 14-day trend in case counts was increasing nor that the 14-day testing positivity rate was greater than 5%. Instead she melded the two and observed that the 14-day positivity rate was increasing slightly but was remained well below 5%. The Regional Director relied on that alone to conclude that a mail ballot election was required. There was no other support in the Regional Director's decision for the mail ballot election other than the 14- day positivity rate in the City and County of Honolulu was slightly

¹ The Regional Director did not wait five business days to allow the Employer to file objections to the conduct of the election.

increasing although it had been up and down but was still significantly below 5%, 2.3%. The Regional Director stated that the positivity rate has increased by 6% which is disingenuous at best. The Regional Director did not mean that the positivity rate was 6% rather over the 14-day period from November 20 to December 11 according to her the positivity rate itself increased by 6% which still resulted in an average positivity rate of 2.3% well below the 5% threshold established by the Board in *Apirus Keweenaw*.

We submit that the Regional Director's decision to hold a mail ballot election was completely erroneous and unsupportable in light of *Apirus Keweenaw*. The DDE failed to consider the factors set forth in *Apirus Keweenaw*, because the Regional Director latched on to the only metric she could possibly use to justify her decision a slight uptick in the positivity rate not that the positivity rate was anywhere near the 5% threshold established by the Board in *Apirus Keweenaw*. Indeed, most local governments would be proud to have a positivity rate of 2.3% which was the rate at the time the Regional Director issued her decision. Slight increases in a positivity rate could reflect increased testing or other factors instead of us the implication that the Regional Director made which was that the positive case numbers on Oahu were increasing at some alarming rate. They were not at that time.

In *Apirus Keweenaw*, the NLRB established that a 5% positivity 14-day rate would justify a mail ballot election. That was to a binary measure to enable Regional Directors to quickly determine whether the positivity rate alone in the particular geographic area where the election would be held would warrant holding a mail ballot election. A Regional Director can quickly determine that if the positivity rate exceeds 5% no other factors need be considered. However, when as here the positivity rate was well below 5% the Regional Director was required to examine the other *Apirus Keweenaw* factors to determine whether a mail ballot election would

be warranted. The Regional Director did not question the Employer's commitment to compliance with factors set forth in GC Memo 20-10 and noted that the local office was not on mandatory telework. Thus the only factors that really were at issue were the case counts in the positivity rate and the Regional Director simply erred when she concluded that a slight uptick in the positivity rate which remain well below the 5% set forth in *Apirus Keweenaw* in and of itself require that a mail ballot election be held.

Specifically factor one of *Apirus Keweenaw*, did not justify a mail ballot election. With respect to factor 2 as noted above, there was no conclusion that the 14-day trend in the number of new confirmed cases was increasing and the 14-day positivity rate was well below 5%. The third factor was not addressed by the Regional Director and the Employer's submission demonstrated that a manual election site could be established in a way that complied with all state and local requirements. The fourth factor was addressed both in the Stipulated Election Agreement and again by the Employer in its submission along with the accompanying declaration. There were no reported positive COVID-19 cases at the Employer's facility at any time and thus the fifth factor did not warrant a mail ballot election. The Regional Director did not identify any other similarly compelling considerations after she focused on a slight uptick in the positivity rate which does not meet the criteria in *Apirus Keweenaw*, or GC Memo 20-10 to direct a mail ballot election.

The Board granted the employer's request for review in *Apirus Keweenaw* to provide guidance to Regional Directors:

Having carefully considered the entire record in this proceeding, including the brief on review, we take this opportunity to provide guidelines regarding the circumstances that would normally suggest the propriety of a mail-ballot election in light of the Covid-19 pandemic. As discussed in more detail below, although we reaffirm the Board's longstanding policy favoring manual

elections, we outline six situations that suggest the propriety of mail ballots due to the Covid-19 pandemic. When one or more of these situations is present, a Regional Director should consider directing a mail-ballot election

Slip op at 1

None of those six situations were present to justify directing a mail ballot election. The facts supported the presumptive manual ballot election and the Regional Director's reliance on a perceived slight increase in the 14-day average positivity rate was not one of the situations identified in *Apirus Keweenaw* to overcome the presumption that manual ballot election remains appropriate. Instead of following that guidance and analyzing the factors set forth in *Apirus Keweenaw*, the Regional Director relied on a factor not identified in *Apirus Keweenaw* which we submit does not justify a mail ballot election. A slight increase in a positivity rate which remained well below 5% and in fact below 3% did not justify a mail ballot election. At the time, the Regional Director was making the decision that all of the metrics presented warranted a manual not a mail ballot election. Although the Employer believed that the positivity rate was 2.2% whether it was 2.2% at that time or 2.6% the fact is it was not 5% or anywhere close to it. At the time, the Regional Director was presented with the facts the new case trend within the City and County of Honolulu was downward. The Regional Director did not conclude that the case count was increasing instead she relied on the fact that the positivity rate was slightly increasing. The fact remains that the Regional Director did not conclude that any of the six factors in *Apirus Keweenaw* were present such that a mail ballot election was appropriate.

Although the election has already been conducted in this case of the 22 eligible voters, which included the 4 challenged ballots, only 19 actual votes were cast. Three votes were not cast and had those three individuals voted they could have resulted in a tie which would mean that the Petitioner would not be certified. We believe that traditionally manual ballot

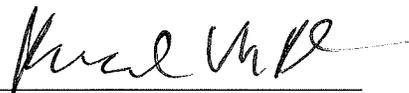
elections remain the Board's preferred way of conducting elections. In this case, that preference was cast aside by the Regional Director's focus on a factor which the Board did not authorize in *Apirus Keweenaw*, a slight increase in the positivity rate which remained below 5%.

As set forth above, Regional Director abused her discretion in not following the *Apirus Keweenaw* factors specifically in focusing on a slight increase in the positivity rate which remained below 5% to justify ordering a mail ballot election. Since manual ballot elections remain the presumptive method of conducting elections and *Apirus Keweenaw* set forth six factors for Regional Directors to consider in determining whether to conduct manual or mail ballot elections the failure to properly apply those factors requires that this matter be remanded to the Regional Director to conduct the proper analysis using the *Apirus Keweenaw* factors. The Regional Director did not find that the Employer's facility was inappropriate or that it did not commit to compliance with the mandates of GC Memo 20-10.

III. CONCLUSION

For the reasons set forth above the Employer Hitachi Rail Honolulu JV respectfully requests that the NLRB grant its Request for Review and remand this proceeding to the Regional Director to properly apply the factors in *Apirus Keweenaw* and not use a slight increase in the 14-day positivity rate to justify directing a mail ballot election.

DATED: Honolulu, Hawaii, February 3, 2021.



RICHARD M. RAND

Attorney for Employer
HITACHI RAIL HONOLULU JV