

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

REVIERA ENTERPRISES, INC.

Employer

and

Case 05-RD-271026

CHRIS NAEMEKA

Petitioner

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 77 a/w INTERNATIONAL
UNION OF OPERATING ENGINEERS, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

Reviera Enterprises, Inc. (Employer) is engaged in the business of performing sewer-line-cleaning services for public and private utilities throughout the United States, including from its facilities in Forestville and Baltimore, Maryland, the only two locations involved herein (collectively, “the Employer’s facilities”). Chris Naemeka (Petitioner) filed the instant petition with the National Labor Relations Board (Board) under Section 9(c) of the National Labor Relations Act (Act), seeking to decertify the International Union of Operating Engineers, Local 77 a/w International Union of Operating Engineers, AFL-CIO (Union) as the exclusive collective-bargaining representative of approximately 32 employees employed at the Employer’s facilities. The sole issue in this proceeding is whether the decertification election should be conducted manually or by mail. The Petitioner and the Employer assert that the election should be conducted manually, notwithstanding the ongoing pandemic. Conversely, the Union argues that a mail ballot election is the safest method for voting in this case.

A hearing officer of the Board heard this case by videoconference on January 27, 2021,¹ where the parties entered into several stipulations.² The parties were advised that the

¹ All dates herein are in 2021, unless specified otherwise.

² Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated the undersigned its authority in this proceeding. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings, made at the hearing, are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a corporation with an office and place of business in Forestville, Maryland, and is engaged in the business of performing sewer-line-cleaning services for public and private utilities at various locations throughout the United States, including from its facilities currently located at 7600 Penn Belt Drive, Forestville, Maryland and 6801 Moravia Park Drive, Baltimore, Maryland, the only locations involved in this proceeding. In conducting its operations during the 12-month

determination over the method of election would not be litigated. The determination over the method of election rests within the discretion of the Regional Director, and therefore, it was not an issue subject to litigation during the hearing. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (“Casehandling Manual”). Notwithstanding, the parties were afforded an opportunity to present evidence regarding the feasibility of conducting a manual election considering the continuing spread of coronavirus and COVID-19, as well as stating for the record the parties’ positions with respect to this matter. All parties waived their right to file post-hearing briefs.

I have reviewed the evidence, the arguments and positions presented by the parties, currently available local COVID-19-related data, as well as the applicable legal precedent. As will be discussed in detail below, I find that conducting a mail ballot election is necessary under the present circumstances.

I. FACTUAL OVERVIEW

A. The Bargaining Unit.

On December 2, 2019, the Union was certified as the exclusive collective-bargaining representative of the following unit (Unit) in Case 05-RC-250718:

All full-time and regular part-time CCTV inspectors, CCTV inspector assistants, CCTV inspection coordinators, CCTV inspecting coordinators, CCTV/MH inspectors, CCTV/MH data processors, CCTV data processor assistants, cleaning truck operators, and sewer cleaning truck repair employees at the Employer’s facilities currently located at 7600 Penn Belt Drive, Forestville, Maryland, 20747 and 6801 Moravia Park Drive, Baltimore, Maryland, 21337; excluding office clerical employees, professional employees, managers, guards, and supervisors as defined in the Act.³

The parties stipulated that the bargaining unit involved in this proceeding is the Unit certified in Case 05-RC-250718, and as described above. The parties also stipulated that there is no collective-bargaining agreement covering any of the employees in the Unit, and there is no contract bar or other bar to an election in this matter.

period ending December 31, 2020, the Employer performed services valued in excess of \$50,000 in States other than the State of Maryland.

3. I further find, as also stipulated by the parties, that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
4. The parties additionally stipulated, and I find, that the Union is a labor organization within the meaning of the Act.
5. 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.

³ The parties stipulated, and I find, that the Unit is an appropriate unit within the meaning of Section 9(b) of the Act.

B. Local COVID-19 Data.

The Employer’s Baltimore facility is located within Baltimore City. Baltimore City has experienced 38,120 confirmed cases of COVID-19 since the beginning of the pandemic; 822 of those cases have resulted in death. The following chart shows the most recently published 14-day confirmed cases count in Baltimore City (as of February 3).

Number of Confirmed Cases in Last 14 days—Baltimore City⁴													
-14 ⁵	-13	-12	-11	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1 ⁶
114	228	170	235	198	137	64	194	183	161	146	180	73	96

While the number of confirmed cases reported on February 2 is lower than the number of cases reported on January 20, in 10 of the days within the 14-day period, the number of confirmed COVID-19 cases were higher than the 114 cases reported on January 20, suggesting that the virus is still prevalent and spreading throughout Baltimore City, often at an increasing rate. Additionally, the positivity rate is currently 4.14 percent in Baltimore City.⁷

The Employer’s Forestville, Maryland facility is located in Prince George’s County. Since the beginning of the pandemic, Prince George’s County has reported 68,295 confirmed cases, with 1,238 of those cases resulting in death.⁸ The number of confirmed cases within the last 14 days in the county has steadily declined from 402 confirmed COVID-19 cases on January 20, to 193 confirmed cases on February 2.⁹ However, the positivity rate in Prince George’s County is currently 7.36 percent, and it has remained above 5 percent since approximately the beginning of November 2020.¹⁰

As the record does not indicate whether employees stationed at the Baltimore City facility live within Baltimore City—a comparatively much smaller geographic area than the surrounding counties—or commute from other localities, I find it relevant to consider the COVID-19 positivity rates for the adjacent counties. They are summarized in the chart below.

Maryland County	Most Recent Reported Positivity Rate¹¹
Anne Arundel	6.14%
Baltimore	5.11%
Carroll	6.11%
Harford	7.27%
Howard	5.62%

⁴ <https://bao.arcgis.com/covid-19/jhu/county/24510.html>

⁵ January 20.

⁶ February 2.

⁷ <https://coronavirus.maryland.gov/> (Positivity by Jurisdiction: Baltimore City; last visited February 3).

⁸ <https://bao.arcgis.com/covid-19/jhu/county/24033.html>

⁹ *Id.*

¹⁰ <https://coronavirus.maryland.gov/> (Positivity by Jurisdiction: Prince George’s; last visited February 3).

¹¹ All of the figures in this chart were sourced from <https://coronavirus.maryland.gov/> by searching each county in the “Positivity by Jurisdiction” data set.

II. POSITIONS OF THE PARTIES

The Employer argues that a manual election can be held safely at its proposed location, with a manual election ensuring maximum participation.¹² To begin with, the Employer asserts that its employees have remained employed throughout the pandemic, as they provide essential services. Accordingly, the Employer is well-versed in following COVID-19-safety protocols and CDC guidelines. Employees wear masks or face coverings, use hand sanitizer, are consistently reminded to wash their hands, and are temperature-checked. The Employer has not had any reported COVID-19 cases.

As for the mechanics of the election, the Employer proposes using an open shop/warehouse space that is approximately 1,000 square feet or more in size. The location has separate ingress and egress, and four-man crews can be released to vote at one time, with employees entering the voting area one at a time to maintain proper social distancing.

The Petitioner agrees that a manual election is appropriate in this case. According to the Petitioner, he believes a manual election will ensure the greatest participation in this election. In support, the Petitioner contends that while employees in the Unit may receive the ballots in the mail, they may not take the time to fill out the ballots and mail them back. Thus, the Petitioner asserts that a manual election will provide for the greatest participation.

Contrary to the Employer and the Petitioner, the Union urges me to direct a mail ballot election. Due to the ongoing pandemic, the Union argues that the safest method for voting here is to vote by mail, and, in the Union's view, employees will know that ballots are being mailed to them, and will participate in the election. Furthermore, the Union notes that even though the Employer is taking safety precautions, the coronavirus can evade those protocols; the Union contends that, without on-the-spot reliable rapid tests, it cannot be certain that every employee (or election participant) entering the facility is free from the virus.

III. APPLICABLE BOARD LAW

Recently, the Board implemented guidelines to be used in evaluating the propriety of a mail ballot election during this pandemic. On November 9, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it "set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the back-drop of COVID-19." *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 4. Moving forward, the Board has identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

- (1) [t]he Agency office tasked with conducting the election is operating under 'mandatory telework' status...
- (2) [e]ither the 14-day trend in the numbers of new confirmed cases of COVID-19 in the county where the facility is located is

¹² The record does not reflect whether the Employer's proposed voting location is at its Baltimore or Forestville facility.

increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...(3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...(4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

Aspirus Keweenaw, 370 NLRB No. 45 slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” *Id.* at 6, fn. 25. If “some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas.” *Id.* at 6.

III. ANALYSIS

One metric cited by the Board that suggests the propriety of using mail ballots to conduct an election during this pandemic is a 14-day testing positivity rate of 5 percent or higher in the county where the facility is located. The record does not reflect the location of the warehouse where the Employer has proposed to conduct the manual election—whether it is located at the Baltimore location or the Forestville location—so both locations will be analyzed. The 14-day testing positivity rate in Prince George’s County is currently 7.36 percent, higher than the Board’s 5 percent threshold. The data reflects that the positivity rate in Prince George’s County has been higher than 5 percent since approximately the beginning of November, 2020. Accordingly, if the Employer’s proposed warehouse is located in Prince George’s County, a mail ballot election is warranted under the criteria identified by the Board in *Aspirus Keweenaw*.

While the positivity rate is currently below 5 percent in Baltimore City, and the number of confirmed cases reported on February 2 is lower than it was on January 20, I find that the pandemic conditions in Baltimore City and the surrounding areas equally warrant directing a mail ballot election. Over the preceding 14 days, daily confirmed cases were higher in 10 of those days than they were 14 days ago. Thus, for nearly the entire 14-day period preceding the most recently published data, confirmed cases had increased. Moreover, while the positivity rate is currently below 5 percent in Baltimore City, the current positivity rate has increased from the prior 3 days when the rate was lower than 4 percent, suggesting the positivity rate is again increasing. Given the increase in confirmed cases throughout most of the prior 14-day period, and the increasing positivity rate in Baltimore City, I find that conditions within Baltimore City warrant directing a mail ballot election.

Furthermore, the record does not reflect whether employees working at the Baltimore location commute from localities outside of Baltimore City, but given its smaller geographic size and the likelihood that some employees commute from outside of the City, I find it both relevant and appropriate to consider the COVID-19 data from surrounding counties. In Baltimore and Anne Arundel counties—which geographically abut Baltimore City—the positivity rates are 5.11 and 6.14 percent, respectively, both above the Board’s 5 percent threshold. Broadening the area in consideration slightly, Carroll, Harford, and Howard counties have positivity rates of 5.62, 7.27, and 6.11 percent, respectively, again above the Board’s 5 percent threshold. Thus, it is

clear that pandemic conditions in the areas surrounding Baltimore City are serious enough to warrant a mail ballot election.

In sum, the positivity rate in Prince George's County is currently higher than 5 percent, and has been for nearly three months. In Baltimore City, the number of confirmed cases within the last 14 days has been, for nearly the entire period, higher than the number of confirmed cases at the beginning of that period, and the positivity rate is again increasing. Moreover, all counties surrounding Baltimore City are experiencing positivity rates above 5 percent. For these reasons, collectively, I find that a mail ballot election is both warranted.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 77, a/w International Union of Operating Engineers, AFL-CIO.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. Accordingly, on **Monday February 22, 2021** at 3:00 p.m., ballots will be mailed to voters by National Labor Relations Board, Region 05, from its office at 100 S. Charles Street, Bank of America Center, Tower II, Ste. 600, Baltimore, MD 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday March 1, 2021**, should communicate immediately with the National Labor Relations Board by either calling the Region 05 Office at (410) 962-2822 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Baltimore Regional Office on **Monday March 15, 2021**, at 3:00 p.m.¹³ In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

¹³ I am accommodating the possibility of delays in delivery by the United States Postal Service by the selection of the date for the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 30, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **February 8, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 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.

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.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

February 4, 2021

issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Baltimore, Maryland this 4th day of February, 2021.

(SEAL)

/s/ Sean R. Marshall

Sean R. Marshall, Regional Director
National Labor Relations Board, Region 05
Bank of America Center, Tower II
100 S. Charles Street, Ste. 600
Baltimore, MD 21201