

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

**TLP MANAGEMENT SERVICES LLC,
A SUBSIDIARY OF TRANSMONTAIGNE
OPERATING COMPANY L.P.¹**

Employer

and

Case 19-RC-271674

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

TLP Management Services LLC, a subsidiary of TransMontaigne Operating Company L.P. (Employer), operates a petrochemical tank storage and transfer facility in Tacoma, Washington. On January 21, 2021, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, AFL-CIO (Petitioner) filed the instant Petition seeking to represent a bargaining unit consisting of approximately 31 employees employed at this facility.

The appropriateness of the unit is not in dispute. The only issue in this case is the method of election. The Employer and Petitioner agreed to a Stipulated Record, in which the parties agreed to submit for my consideration written positions as to the method of election in this matter. The parties timely filed their written positions, in which Petitioner seeks a mail election and the Employer seeks a manual election.

The Board has delegated its authority in this proceeding to me under § 3(b) of the Act. Applying the Board's recent *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), decision to the circumstances in the instant case, I am directing a mail-ballot election.

I. METHOD OF ELECTION

The Employer operates a petrochemical tank storage and transfer facility in Tacoma, Washington, which is located in Pierce County. It is uncontested that the petitioned-for employees have been reporting to work in person throughout the COVID-19 pandemic.

The COVID-19 pandemic has had a profound impact on daily life in the United States since around March 2020. Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted on the way the Board conducts its elections. The Centers

¹ All names appear as amended in the Stipulated Record.

for Disease Control and Prevention (CDC) notes that COVID-19 is “spread mainly through close contact from person to person,” and can be spread through respiratory droplets by individuals within 6 feet or through airborne transmission to individuals “who are further than 6 feet away from the person who is infected or after that person has left the space.”² According to the CDC, the most important ways to slow the spread of COVID-19 are wearing a mask, staying at least 6 feet away from others, and avoiding crowds, as “the more people you are in contact with, the more likely you are to be exposed to COVID-19.”³

Although it has not directly addressed Board elections, the CDC has issued guidance on elections and voting. Specifically, the CDC underscores that “the more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.”⁴ The CDC recommends a number of ways to reduce the risk of COVID-19 with elections, including that “where available ... offer alternative voting methods that minimize direct contact and reduce crowd size,” such as “alternatives to in-person voting.”⁵

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures 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. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.*, 325 NLRB at 1144-45. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines*, 120 NLRB at 1346.

The Board’s longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.⁶ 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. *Id.* 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 unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

² CDC, *Ways COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last viewed February 22, 2021).

³ CDC, *Protect Yourself*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed February 22, 2021).

⁴ CDC, *Elections and Voting*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last viewed February 22, 2021).

⁵ *Id.*

⁶ I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region's, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The 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. The employer fails or refuses to commit to abide by *GC Memo 20-10*, "Suggested Manual Election Protocols;"
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

After careful examination of the record, the parties' respective positions, and the current state of the COVID-19 virus in Pierce County, Washington, where the facility is located, I have determined that a mail-ballot election is appropriate. I have made this determination because the 14-day testing positivity rate in Pierce County is above 5 percent, and the COVID-19 variants currently spreading in the United States, including in Washington State, constitute the compelling circumstances. In reaching this decision, I have applied the six considerations set forth in *Aspirus Keweenaw*, *supra*, to the facts of this case.

Applying these factors, I first note that the Regional office in Seattle, Washington, is not currently in mandatory telework status. I have addressed the second factor below as it is determinative in this case. Regarding the third factor, I find no state, county or local measure

regarding maximum gathering size would be implicated by a manual election.⁷ Fourth, I find the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*. Fifth, there is no evidence that a COVID-19 outbreak is ongoing at the Employer's facility. Regarding the sixth factor, I address the compelling circumstances of the COVID-19 variants below. Based on the above, I conclude the method of election here is a question of the extent of COVID-19 in the community and the evolving nature of the COVID-19 pandemic.

In addressing the second consideration – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

Here, regarding the first part of the second consideration, the John Hopkins University COVID-19 Status Report for Pierce County, Washington, on February 22, 2021, reports a (-1) value of zero cases, possibly because February 21 was a Sunday and because the chart shows a similar drop to zero cases a week before. When examining the last 14 days, the Status Report shows a (-2) value of 91 cases reported two days prior to February 22 and (-14) value of 339 cases 14 days prior, with significant fluctuation in the middle, including, as mentioned earlier, a drop to zero reported cases over the weekend.⁸ As I do not find the 14-day trend to be a basis for holding a mail ballot election, I note only that there appears to be a downward trend overall in cases, with some fluctuation.

Regarding the second part of the second consideration, Pierce County does not appear to publish a 14-day testing positivity rate, and neither party cites to data for this factor.⁹ However, Pierce County does publish the percent of COVID-19 tests that are positive by week, which is updated weekly.¹⁰ In examining the most recent two week periods available at the time of the instant decision, I note that the positivity rate for the period of January 31 to February 6, 2021, was 6 percent, and for the period of January 24 through 30, 2021, was 6.8 percent.¹¹ When taken together to establish a 14-day overview, the positivity rate is above the 5 percent threshold established in *Aspirus Keweenaw* and demonstrates wide spread of COVID-19 in Pierce County. Additionally, in King County, which is the county immediately north of Pierce County, is grouped

⁷ Beginning on Monday, January 11, 2021, all counties in Washington are subject to the public-health measures in the state's "Health Washington" plan. See *Washington State Coronavirus Response (COVID-19)*, <https://coronavirus.wa.gov/what-you-need-know/safe-start/whats-open> (last visited February 22, 2021). In Pierce County, now in Phase 2 of that plan, indoor *social* gatherings are restricted to a maximum of 5 people from outside of a household, however that restriction is not applicable here. *Id.*

⁸ *COVID-19 Status Report*, <https://bao.arcgis.com/covid-19/jhu/county/53053.html> (last visited February 22, 2021).

⁹ *COVID-19 in Pierce County*, <https://www.tpchd.org/healthy-people/diseases/covid-19-pierce-county-cases/> (last visited February 22, 2021).

¹⁰ *Id.*

¹¹ *Id.*

with Pierce County in the Puget Sound Region in the state's "Healthy Washington" plan for recovery, and is where the Region 19 Seattle office is located, the COVID-19 test positivity rate is also 6 percent.¹² As of February 22, 2021, the positivity rate for Washington State is 3.23 percent.¹³

The Board in *Aspirus Keweenaw* stated if either factor in the second consideration was met it suggests the propriety of a mail-ballot election. Here, as the test positivity rate in Pierce County is above 5 percent, I find a mail ballot election is appropriate in this case based on the second consideration alone.

In addressing the sixth consideration – whether other compelling circumstances exist – I find it appropriate to consider recent changes in the COVID-19 pandemic, specifically the emerging variants that, according to the CDC, cause more severe disease, spread more easily between humans, require different treatments, and/or alter the effectiveness of vaccines.¹⁴ The CDC indicates that it is working to learn more about these variants and is studying them to assess how to control their spread.¹⁵ In December 2020 and January 2021, three significant variants – one from the United Kingdom, one from South Africa, and one from Brazil – were detected in the United States.¹⁶ As of the date of this decision, the United Kingdom variant has been confirmed to be circulating in Washington State.¹⁷ I find that the uncertainty of added risks with the recently emerging variants, which were not yet in the United States at the time of the Board's decision in *Aspirus Keweenaw*, constitute a compelling circumstance that further weighs in favor of a mail-ballot election.

III. CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. 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.¹⁸

¹² *Key Indicators of COVID-19 activity in King County*, <https://www.kingcounty.gov/depts/health/covid-19/data/key-indicators.aspx> (last visited February 22, 2021).

¹³ *Which U.S. States Meet WHO Recommended Testing Criteria*, <https://coronavirus.jhu.edu/testing/testing-positivity> (last visited February 22, 2021).

¹⁴ *US COVID-19 Cases Caused by Variants*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html> (last visited February 22, 2021); *About Variants of the Virus that Causes COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html> (last visited February 22, 2021).

¹⁵ *Id.*

¹⁶ *Emerging SARS-CoV-2 Variants*, <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html> (last visited February 22, 2021).

¹⁷ *King County COVID-19 Daily Summary*, <https://www.kingcounty.gov/depts/health/covid-19/daily-summary.aspx> (last visited February 22, 2021).

¹⁸ The parties stipulated to the following facts regarding commerce:

The Employer, a Delaware corporation with an office and place of business located in Tacoma, Washington, is engaged in the business of operating a petrochemical tank storage

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2. The labor organization involved claims to represent certain employees of the Employer.
3. 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.
4. 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 regular part-time production and maintenance employees and leads employed by the Employer at the Seaport Sound Terminal facility located in Tacoma, Washington.

Excluded: All other employees, office clerical employees, inventory employees, information technology employees, lab technicians, quality control employees, compliance and environmental employees, managers, professional employees, and guards and supervisors as defined in the Act.

There are approximately 31 employees in the unit.

IV. 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 **United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO**.

A. Election Details

I have determined that a mail ballot election will be held. The Petitioner has waived 8 of the 10 days it is entitled to have the voter list described below.

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by a designated official from the National Labor Relations Board, Region 19 or Sub Region 36, on Friday, March 5, 2021. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by 3:00 p.m. on Friday, April

and transfer facility. In the past calendar year, a representative period, the Employer derived gross revenues in excess of \$500,000 and purchased and received at its facility within the State of Washington goods valued in excess of \$50,000 directly from suppliers outside the State of Washington. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board.

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2, 2021. The mail ballots will be counted by a designated Board Agent of the National Labor Relations Board at 1:00 p.m. on Tuesday, April 6, 2021 with participants being present via electronic means. The parties agreed in the stipulated record that, in the event I ordered a mail ballot election, only those ballots that arrive in the Region 19 office prior to the due date, which is by 3:00 p.m. PT on Friday, April 2, 2021, will be counted and that no objections will be filed based upon any such untimely received ballots.

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 void.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 19 office by no later than 4:45 p.m. on Friday, March 12, 2021, in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending February 13, 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 Thursday, February 25, 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.**

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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.

V. RIGHT TO REQUEST REVIEW

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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.

A request for review must be E-Filed through the Agency's website and 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated this 23rd day of February, 2021.

Ronald K. Hooks

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