

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 8**

BORGERS OHIO, INC.

Employer

And

**CHICAGO & MIDWEST REGIONAL
JOINT BOARD, WORKERS UNITED, AN
AFFILIATE OF SEIU**

Petitioner

Case 08-RC-272130

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing was conducted by video conference on February 24, 2021¹, before a hearing officer of the National Labor Relations Board (Board). The sole issue in this proceeding is whether to conduct an election manually or by mail ballot. The Employer, Borgers Ohio, Inc., contends that the election should be conducted manually, and the Petitioner, Chicago & Midwest Regional Joint Board, Workers United, an affiliate of SEIU, also favors a manual election.

At the hearing, the parties reached stipulations with respect to all litigable issues, including the composition of the voting unit. Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Regional Director, the parties were permitted to make oral arguments at the hearing and file post-hearing briefs regarding their positions as to the mechanics of the election. The Employer availed itself of the right to file a brief. After reviewing and considering the arguments of the parties, for the reasons discussed below, I find that a mail-ballot election is appropriate.

I. FACTUAL OVERVIEW

The Employer operates a facility in Norwalk, Ohio where it manufactures textile products for the automotive industry. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):

All full-time and regular part-time production and maintenance employees employed by Borgers Ohio, Inc. at its manufacturing plant located at 400 Industrial Parkway, Norwalk, Ohio 44857, including employees in the Production, Quality, Logistics, Maintenance and Engineering departments; but excluding all temporary/agency

¹ All dates are 2021 unless otherwise stated.

employees, office clerical employees, all professional employees, guards, and supervisors as defined in the National Labor Relations Act.

The petitioned-for Unit is comprised of approximately 240 employees working three different shifts 5 days a week: 6:00 am – 2:00 pm; 2:00 pm – 10:00 pm; and 10:00 pm – 6:00 am. Employees have been reporting to work at the Employer’s facility since about July 2020, after a short hiatus in production operations following state orders.

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been more than 28 million confirmed cases of COVID-19 in the United States and over 517,000 deaths.²

The State of Ohio has reported to date 976,230 COVID-19 cases and 17,502 deaths.³ The State’s Department of Health (ODH) reports that as of March 3, the 7-day moving positivity rate for the state was at 3%.⁴ The last time the state reported the 7-day positivity rate at 5% or higher was on February 23, after which time it has seen a daily decline.⁵ The ODH has put in place the Ohio Public Health Advisory System, which is a color-coded system designed to supplement existing statewide orders through a data-driven framework to assess the degree of the virus’ spread.⁶ The colors range from minimal community transmission in yellow (level 1), moderate transmission in orange (level 2), higher transmission in red (level 3) and substantial transmission in purple (level 4). This system provides guidance to Ohioans as to the severity of the problem in the counties in which they live. It particularly notes that over 60% of Ohioans are considered high-risk based on CDC guidance, which means that they are an increased risk of severe illness and should take every precaution to guard against contracting COVID-19. The Ohio Public Health Advisory System is updated every Thursday and published in the DOH’s website. In the advisory reported on March 4, Huron County, where the Employer’s facility is located, is in level 3-red.⁷ Level 3 guidelines specifically indicate that there is a “very high exposure and spread” and activities should be limited as much as possible, including “a decrease in-person interactions with others, consider necessary travel only and limit attending gatherings of any number.”

Huron County Public Health Department issued its most recent COVID-19 weekly update on March 5, 2021; the update is published every Friday.⁸ According to the update, “as of March 4, 2021, Huron County remains an Alert Level Red.” It also added that as of March 1, the County “ranked 19/20 in the top 20 high incidence counties in Ohio for COVID-19.”

Under the Centers for Disease Control (CDC) “Integrated County View”, Huron County reports a 7-day moving positivity rate of 9.38%, which puts it at the highest level of transmission under CDC guidelines.⁹

² COVID Data Tracker Maps, charts, and data, [CDC COVID Data Tracker](#) , March 5, 2021.

³ [Overview | COVID-19 \(ohio.gov\)](#) last visited March 5, 2021.

⁴ [Testing | COVID-19 \(ohio.gov\)](#) last visited March 5, 2021.

⁵ [Testing | COVID-19 \(ohio.gov\)](#) last visited March 5, 2021.

⁶ [Ohio Public Health Advisory System | COVID-19](#)

⁷ Id. See also [Coronavirus 2019 \(COVID-19\) \(huroncohealth.com\)](#) last visited March 5, 2021.

⁸ [Coronavirus 2019 \(COVID-19\) \(huroncohealth.com\)](#) last visited March 5, 2021.

⁹ [CDC COVID Data Tracker](#) last visited March 5, 2021.

Ohio has a vaccination distribution plan in place with a phased approach that prioritizes the most vulnerable citizens, those in the healthcare field and school staff. By March 5, 16.01% of the population in Ohio had been vaccinated.¹⁰

II. POSITIONS OF THE PARTIES

The Employer advocates for a manual election, emphasizing the Board's longstanding policy favoring such elections. Additionally, the Employer asserts that there are problems with reliability in mail-ballot elections, citing several objections that have been filed in other Regional offices. It argues that mail ballot elections propend to voter disenfranchisement because of delivery delays by the United States Postal Service. The Employer provided data for on-time delivery for the United States Postal Service, noting that in the Midwest Region (which includes Northeast and Northwest Ohio) on-time delivery was 83.8% for two-day mail and only 58.2% for three-to-five day mail during the months of October, November, and December 2020.

The Employer argues that the number of new daily cases in Ohio has dropped 82% in the last three months, resulting in the lifting of many governmental restrictions. With respect to the prevalence of COVID-19 in Huron County, Ohio, the Employer maintains that the Region should not focus on the positivity rate. Instead, it argues that although the positivity rate is above 5%, there has been a recent decline in the numbers and argues that a positivity rate above 5% should not be the only consideration to order a manual election. The Employer notes that no mass outbreaks have occurred at the facility, with only 10 positive cases since March 2020.¹¹

The Employer notes that under the COVID-19 response plan that it implemented at its facility, employees are required to wear masks and maintain appropriate social distancing at all times. The Employer performs temperature checks daily and established stations with hand sanitizers for employees. In addition, there are barriers at work stations and the facility is disinfected every Friday with an additional deep cleaning taking place monthly.

Furthermore, it argues that the recent distribution of vaccines should be considered in favor of a manual election, noting that as of March 4, nearly 7 percent of the Huron County residents had completed the vaccine regiment and 12 percent had started the vaccination process.

Finally, the Employer offered to comply with the guidelines suggested by the General Counsel Memorandum 20-10 regarding conducting manual elections amidst the pandemic and argued that it can safely accommodate a manual election in its facility in a large room with high ceilings and increased ventilation. Specifically, the room measures 60 feet by 84 feet and has a 24 foot high ceiling. The room also has two louvres that can be opened for increased ventilation and has two doors that open directly to the outside of the building, including a one-person door and a large overhead door.

The Petitioner agreed with the Employer's position that a manual election is appropriate in this case, but also recognized that the type of election is left to the discretion of the

¹⁰ [COVID-19 Vaccination Dashboard | COVID-19 \(ohio.gov\)](#) last visited March 5, 2021.

¹¹ There was one positive case in the 14 days preceding the date of the hearing.

Regional Director.

III. ANALYSIS OF BOARD LAW AND APPLICATION

The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *CEVA Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998).

Section 11301.2 of the Board's Casehandling Manual (Representation) provides, in part:

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Casehandling Manual indicates that a Regional Director may use discretion to order a mail-ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *San Diego Gas and Electric*, 325 NLRB 1143 (1998). As the Board noted in *London's Farm Dairy*, 323 NLRB 1057 (1997), "[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." Indeed, the Board has previously rejected arguments that mail-ballot elections are inherently less secure and that they would likely result in voter coercion. See *San Diego Gas & Electric*, supra at 1146 (1998); *London's Farm Dairy*, 323 NLRB at 1058. There are well-established procedures for conducting effective mail-ballot elections set forth in the Casehandling Manual at Section 11336, et seq.

On July 6, 2020, the Board's General Counsel issued GC 20-10 to provide guidance for conducting manual elections during this pandemic. The memorandum detailed numerous manual election protocols to minimize the risk of COVID-19 transmission. It also reaffirmed that Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted.

Thereafter, on November 9, 2020, 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 backdrop of Covid-19." *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4. The Board 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 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.

The Board did not give increased weight to any of the factors and specifically found that only one factor need be present. *Id.* The Board stated that, “[i]f one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Id.*, slip op. at 4. The Board stated that a Regional Director who exercises his or her discretion to direct a mail-ballot election when *one* or more of these situations exists will not have abused this discretion. *Id.*, slip op. at 8. Thus, contrary to Employer’s assertions, the Board specifically indicated that only one of the enunciated factors need be present.

The second parameter enunciated by *Aspirus Keweenaw* is the presence of either a 14-day trend of increasing cases, or a 14-day testing positivity rate above 5%, in the county where a manual election would be held. The recent trend in Ohio and in Huron County is for a decreasing, not an increasing, number of cases. However, as discussed above, the positivity rate in Huron County is 9.38% and the county is under the state of Ohio’s red alert, which considers that there is a “very high exposure and spread” of the virus. Therefore, although other factors discussed in *Aspirus Keweenaw* may allow for a manual election, the spread of the virus, as indicated by the positivity rate and the government alerts with respect to the county, indicates that a mail-ballot election is clearly the safer choice.

Accordingly, considering the above, and based on the most recent data demonstrating that the COVID-19 testing positivity is above 5% in the relevant county, I find that a mail ballot election is warranted in this case. I have considered the Employer’s position that mail delays could decrease voter participation and impact the validity of the election. I note that mail ballot elections include procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. Further, given the concerns raised by the Employer, the voting period has been extended to allow sufficient time for voters to return their ballots.

IV. CONCLUSION

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

1. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties¹², and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹² The Employer is an Ohio corporation with a facility located at 400 Industrial Parkway, Norwalk, Ohio 44857,

2. 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.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.

5. The following employees of the Employer constitute a unit appropriate for the purpose 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 employed by Borgers Ohio, Inc., at its manufacturing plant located at 400 Industrial Parkway, Norwalk, Ohio 44857, including employees in the Production, Quality, Logistics, Maintenance and Engineering departments.

Excluded: All temporary/agency employees, office clerical employees, all professional employees, guards, and supervisors as defined in the National Labor Relations Act.

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 Chicago & Midwest Regional Joint Board, Workers United/SEIU.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **4:45p.m. (EST) on March 22, 2021** by personnel of the National Labor Relations Board, Region 8.¹³ 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 do not receive a ballot in the mail by **March 29, 2021**, should communicate immediately with the National Labor Relations Board by calling Board Agent Roberta Montgomery at (216)303-7371, the Region 8 Office at (216)522-3715, or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

where it manufactures textile products for the automotive industry. During the past 12 months, a representative period, the Employer shipped and sold goods valued in excess of \$50,000 directly to points outside the State of Ohio.

¹³ The Union has agreed to waive the 10-day requirement for the voter list.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 8 Regional Office by **April 21, 2021**. The mail ballots will be commingled and counted on **April 28, 2021 at 1:00 p.m. (EST)**, either in person or by videoconference, after consultation with the parties. In order to be valid and counted, the returned ballots must be received by the Region 8 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

The Notice of Election and Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail will be published in English and Spanish, and the ballot will be bilingual.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending March 6, 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(1) 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 March 11, 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 in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice will be published in English and Spanish and 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.

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: Tuesday, March 9, 2021



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