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Rush University Medical Center *and* Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees Union Local 743 affiliated with The International Brotherhood of Teamsters, Petitioner. Cases 13–RC–272731

April 27, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

The Employer's Request for Review of the Acting Regional Director's direction of a mail-ballot election is granted as it raises substantial issues warranting review with regard to the appropriateness of mail-ballot elections during the COVID-19 pandemic. The Board's recent decision in *Aspirus Keweenaw,* 370 NLRB No. 45 (2020), set forth clear standards to be applied in making such determinations.

As more fully set forth in the Acting Regional Director's mail-ballot determination (pertinent portions of which are attached), the Employer is a large acute care hospital located in Chicago, Illinois with approximately 11,000 employees. The approximately 60 petitioned-for phlebotomists report to the Employer's facility daily as part of their regular duties. As of March 5, 2021, approximately 74 percent of the Employer's work force had been vaccinated against Covid-19. The Employer uses extensive Covid-19 testing and disease control practices, and, during the 14 days preceding March 5, only eight of the Employer's 11,441 employees had tested positive for Covid-19. As of March 9, 2021, approximately 24 confirmed Covid-19 patients were being treated in the hospital. The Employer's proposed manual election arrangements called for five voting sessions spread over 2 days, each 60–75 minutes long. The Employer and Petitioner initially stipulated to a manual election, but the Acting Regional Director did not accept the parties' stipulation.

In *Apirus,* the Board identified six factors for regional directors to consider in determining whether a mail-ballot election is appropriate due to the extraordinary circumstances presented by the COVID-19 pandemic. Those six circumstances are: (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 reasonably 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. The Acting Regional Director found that factors 1–4 do not support a mail-ballot election, and no party disputes this finding. Instead, the Employer contends that the Regional Director erred in directing a mail-ballot election based on factors 5 (current outbreak) and 6 (other similarly compelling circumstances). For the reasons that follow, we find merit in this contention.

In *Aspirus*, the Board recognized that a "current Covid-19 outbreak" at the facility where the manual election would occur poses potential health and safety issues for everyone who participates in the election. *Aspirus,* slip op. at 7. In applying this factor, the Acting Regional Director found that,

> while only a small percentage of the whole of [the Employer's] employees and patients [have] COVID-19, which would likely be insufficient to deem it an outbreak, there is and will still continue to be a COVID-19 presence at its hospital campus in the near future, and its employees will no doubt have direct contact with its COVID-19 patients. It follows that given the vulnerability of exposure to COVID-19 in the hospital setting, there is the possibility that employees may be exposed to COVID-19 such that, while they may not test positive for COVID-19, they would still be subject to a period of quarantine, which could cause eligible employees to potentially be in quarantine during any in-person election. Accordingly, I find that a mail ballot election is appropriate based on these considerations alone.

Contrary to the Acting Regional Director's analysis, the *Aspirus* current outbreak factor is not satisfied by evidence that Covid-19 is present at a facility. See *Aspirus,* slip op. at 7 fn. 35 ("[T]he Regional Director should not rely solely on the hypothetical possibility that an employee might become infected in the period between the direction of election and the election itself."). Instead, the Regional Director should determine whether the Covid-19 cases at the facility would reasonably be expected to affect the conduct of a manual election. Relevant considerations in this regard include whether (1) the number or physical location of such Covid-19 cases, or the likelihood that those cases will result in unit employees being exposed to Covid-19, indicates that a manual election would pose a threat to health or safety; or (2) current Covid-19 cases among unit employees would result in their

disenfranchisement by a manual election. Cf. *North American Plastics Corp.,* 326 NLRB 835 (1998) (rejecting manual election on the employer's premises where employer would not permit on its premises to vote laid off employees who were eligible as alleged discriminatees).[1]

The Board recognized in *Aspirus* that the five situations enumerated in that decision were not exclusive or exhaustive. Accordingly, *Aspirus* states that, if a Regional Director "directs a mail-ballot election based on other circumstances related to the Covid-19 pandemic, the Board will consider at that time whether those circumstances similarly warrant an exception to its preference for manual elections." Here, the Acting Regional Director found that "the uncertainty of added risks with the recently emerging [Covid-19] 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 is sufficient to conduct the election entirely by mail, rather than a manual election in a hospital environment."

As the Acting Regional Director noted, the United States Centers for Disease Control and Prevention has determined that new Covid-19 variants are present in the United States and that some of these variants are potentially more communicable or cause more severe disease.[2] We acknowledge the seriousness of the concerns articulated by the Acting Regional Director and share his determination that Board elections be conducted in a manner that is consistent with the health and safety of all participants. However, no changes in prevention strategies have been recommended by the CDC based on the variants currently in circulation. Such changes are only recommended for "variants of high consequence," and no such variants have been identified by the CDC to date. Id. The Acting Regional Director also did not find that any other relevant entity has made such recommendations. We therefore conclude that the CDC's determination that new variants exist does not, as of this date, constitute a "similarly compelling circumstance" within the meaning of *Aspirus* factor 6.

Accordingly, we reverse the Acting Regional Director's direction of a mail-ballot election and remand this case for further proceedings consistent with this decision, taking into account any changed circumstances since his decision issued. See *Aspirus,* slip op. at 8.[3]

Dated, Washington, D.C. April 27, 2021

Marvin E. Kaplan, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, concurring in the result.

As most of us who have spent the past year anxiously awaiting good news about the pandemic can attest, COVID-19 has been and remains dangerously unpredictable. This case demonstrates how the Board's *Aspirus* framework for determining the appropriateness of mail ballots during the COVID pandemic can be "overtaken by events."[4] The recent uptick in COVID positivity at the Employer's locality and elsewhere, even as many hoped for a sustained decline, demonstrates that a snapshot of current conditions (the main focus of the *Aspirus* framework) is an imperfect way to assess safety concerns for an election that may take place weeks later in a constantly changing environment. Today's decision suggests that a manual ballot should have been ordered initially. Yet, had the Acting Regional Director done so, such an in-person gathering might have occurred even as local cases rose. The abiding threat of a pandemic that "does not stand still"[5] is one reason I continue to believe a default preference for mail ballots for the duration of the COVID pandemic is warranted.

Accordingly, while I would not have stayed the mail-ballot election, and while I would deny the Employer's request for review, I agree that it is appropriate to remand the case to the Acting Regional Director to reconsider the mail-ballot determination in light of any changed circumstances, including the current local positivity level.

[1] As stated in *Aspirus,* supra, slip op. at 7, this inquiry includes individuals present within the facility who have tested positive for Covid-19 within the preceding 14 days (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days).

[2] See https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/variant-surveillance/variant-info.html (last visited 4/15/21).

[3] In particular, the Acting Regional Director should consider whether current local Covid-19 testing positivity rates now support a mail-ballot election pursuant to *Aspirus* factor 2. See https://www.chicago.gov/city/en/sites/covid-19/home/covid-dashboard.html.

We deny as moot the Petitioner's Motion for Reconsideration of the Board's March 24, 2021 Order staying the election. The stay is lifted as today's order.

[4] 370 NLRB No. 45 (2020), slip op. at 9 (concurring opinion).

[5] Id., slip op. at 10.

Dated, Washington, D.C. April 27, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

ACTING REGIONAL DIRECTOR'S LETTER TO THE PARTIES

Upon an administrative investigation and after careful consideration of the circumstances in the above-captioned case where the Region has directed an election, I have determined that due to circumstances involving the COVID-19 pandemic, a secret ballot election be conducted by U.S. mail.

In the instant case, the Employer argues that a manual election is appropriate, whereas the Union will agree to either a mail or manual election.

Background

The Employer is an acute-care research and teaching hospital, with its largest hospital campus in Chicago, Illinois, where the bargaining unit of phlebotomists are located. The phlebotomists draw and prepare blood for medical testing and other related purposes, and due to the nature of their work, they have been required to perform their work in person throughout the COVID-19 pandemic on the Employer's hospital campus.

COVID-19 Pandemic

The COVID-19 pandemic remains a dangerous public health situation and it 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 affected the way the Board conducts its elections. The Centers 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."[1] 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."[2]

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."[3] 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."[4]

NLRB Elections Process in the Pandemic

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 1144–1145. 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.

After a brief pause in elections early in the pandemic, on April 1, 2020, the NLRB announced that it would not extend the suspension of elections past April 3 and would "permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors." 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, 2020, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10,* setting forth detailed suggested manual election protocols.

[1] CDC, *Ways COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last viewed February 26, 2021).

[2] CDC, *Protect Yourself*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last viewed February 26, 2021).

[3] CDC, *Elections and Voting*, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (last viewed February 26, 2021).

[4] Id.

The Board's Decision in *Aspirus Keweenaw*

In *Aspirus Keweenaw*, 370 NLRB No. 45 (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.

Analysis

After examining the factors as they pertain to the instant case, and the current state of the COVID-19 pandemic, I have determined that a mail-ballot election is appropriate. I have made this determination because COVID-19 remains widespread and continues to have a presence at the Employer's hospital campus, and because the COVID-19 variants currently spreading in the United States, including in the state of Illinois, constitute 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 Chicago, Illinois, is not currently in mandatory telework status.

For the second factor, the 14-day trend in Cook County where the Employer's hospital campus is located does not appear to be increasing and the 14-day testing positivity rate is below the 5 percent threshold.[5]

Regarding the third factor, all Regions in Illinois are in Phase 4 of the State of Illinois's Coronavirus Response Plan in which gatherings of 50 people or fewer are permitted.[6] There are 62 bargaining unit employees on the list provided by the Employer along with its Statement of Position, so with an in-person election, there would need to be an established limit on those entering the room, which almost certainly could be achieved.

As it relates to the fourth and fifth factors, I find the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*. However, to comply with the memo the Employer would be required to certify the number of individuals at its campus who tested positive for COVID-19, are awaiting the results of a COVID-19 test, are exhibiting symptoms of COVID-19, or have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. As of the 14-day period through March 8, 2021, the Employer reports that 8 of its more than 11,000 employees have been confirmed as testing positive for COVID-19 and that as of March 9, 2021, it is treating 24 COVID-19 patients. Thus, while only a small percentage of the whole of its employees and patients do not have COVID-19, which would likely be insufficient to deem it an outbreak, there is and will still continue to be a COVID-19 presence at its hospital campus in the near future, and its employees will no doubt have direct contact with its COVID-19 patients. It follows that given the vulnerability of exposure to COVID-19 in the hospital setting, there is the possibility that employees may be exposed to COVID-19 such that, while they may not test positive for COVID-19, they would still be subject to a period of quarantine, which could cause eligible employees to potentially be in quarantine during any in-person election. Accordingly, I find that a mail ballot election is appropriate based on these considerations 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

[5] This data can be obtained from https://www.dph.illinois.gov/region-metrics. The Employer is located in Chicago, the section of Cook County marked Region 11.

[6] For current phase for Chicago, see https://coronavirus.illinois.gov/s/restore-illinois-regional-dashboard. For an explanation of phase 4, see https://coronavirus.illinois.gov/s/restore-illinois-phase-4.

effectiveness of vaccines.[7] The CDC indicates that it is working to learn more about these variants and is studying them to assess how to control their spread.[8] In December 2020 and January 2021, three significant variants, which originated in the United Kingdom, South Africa, and Brazil, were detected in the United States.[9] As of the date of this decision, all three variants have been confirmed to be circulating in the State of Illinois.[10] In addition, new variants of COVID-19 are detected every week, and as COVID-19 continues to spread, mutations will continue to happen.[11] 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 is sufficient to conduct the election entirely by mail, rather than a manual election in a hospital environment.

Moreover, I do not find persuasive the Employer's argument that a majority of its staff has received the COVID-19 vaccine, thus minimizing the risk of any spread of the virus. As a preliminary matter, this argument noticeably lacks any assurances that all of the bargaining unit employees eligible to vote in a future election will have received the vaccine by the proposed date of a future election and ignores the fact that the Board Agent conducting the election and any party representatives may not yet be eligible to receive the vaccine due to the limited supply. Even assuming *arguendo* that the eligible voters were vaccinated, the CDC underscores that "scientists are still learning how well vaccines prevent [individuals] from spreading the virus that causes COVID-19 to others," as vaccinated individuals may still be exposed and carry the virus even if they do not feel sick or have symptoms.[12] Also, while the Employer asserts that its staff has been highly trained on COVID-19 prevention measures, and various types of safety gear made available to them by the Employer, it is not known whether others such as patients, visitors, contractors, or any other member of the general public that accesses the Employer's facilities have been given this particularized training. It appears that the visitor policy on signage throughout the Employer's facility requires temperature checks, and that visitors wear a provided hospital-grade mask. Importantly, even though the policy suggests that individuals inform the hospital if they have COVID-19 symptoms, it does not appear that each visitor is actually tested or certified to be COVID-19-free before entering. It follows that visitors that may have COVID-19, but who are not yet showing COVID-19 symptoms, could be allowed to access the facility. With the high traffic nature of a hospital due to many people coming and going, and it being unknown whether many individuals entering the facility have contracted COVID-19, it is not yet safe to schedule a manual election on site at the Employer's hospital campus.

Consequently, in the context of the evolving COVID-19 pandemic, given the continued presence of COVID-19 at the facility, and the uncertain nature of the emerging variants, I utilize my discretion to order a mail-ballot election. As stated in the Decision and Direction of Election, ballots will be mailed to bargaining unit employees at 5 p.m. on Wednesday, March 24, 2021. Employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by March 31, 2021, should contact the National Labor Relations Board. Ballots will be due by Wednesday, April 14, 2021. All ballots will be commingled and counted on Monday April 19, 2021, at 1 p.m. via Zoom video conference.

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[7] *US COVID-19 Cases Caused by Variants*, https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html; *About Variants of the Virus that Causes COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html.

[8] Id.

[9] *Emerging SARS-CoV-2 Variants*, https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html.

[10] https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant-cases.html

[11] https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/a-new-strain-of-coronavirus-what-you-should-know

[12] *CDC, Key Things to Know*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html (last visited March 16, 2021).