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

ADAMS PUBLISHING GROUP LLC d/b/a
BOZEMAN DAILY CHRONICLE

Employer

and

Case 19-RC-291940

DENVER NEWSPAPER GUILD -
COMMUNICATION WORKERS OF AMERICA,
LOCAL 37074

Petitioner

DECISION AND DIRECTION OF ELECTION

Adams Publishing Group d/b/a Bozeman Daily Chronicle publishes a newspaper in Bozeman, Montana. On March 8, 2022, Denver Newspaper Guild – Communication Workers of America, Local 37074 (Petitioner) filed a representation petition seeking to represent approximately 9 employees employed at the Employer’s Bozeman facility.

The appropriateness of the petitioned-for bargaining unit is not in dispute, the only issue is the method of election. On March 28, the Employer and Petitioner entered into a stipulation in lieu of a hearing on this matter. Pursuant to the stipulation, the Employer and Petitioner were permitted to submit written statements regarding their position on the method of election no later than April 6. The Employer did so, maintaining a manual election is mandated by Board precedent and the current realities of the COVID-19 pandemic.

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

I. METHOD OF ELECTION

A. The COVID-19 Pandemic

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last year. Despite unprecedented efforts to limit transmission, to date approximately 80

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1 The names of the parties appear as amended by stipulation.
2 All dates 2022 unless otherwise indicated.
million people in the United States have been infected with COVID-19 and almost 1 million people have died.³

The Centers for Disease Control and Prevention (CDC), has determined “[l]imiting close face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19).”⁴ According to the CDC, “[a]ttending events and gatherings increases your risk of getting and spreading COVID-19.”⁵ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid crowds, practice good hygiene, maintain at least a 6-foot distance between individuals, and use masks when around other people.⁶

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. The Board has traditionally conducted in-person, manual elections and used mail-ballot elections in limited circumstances. In 2020, in *Aspirus Keweenaw*, the Board addressed the circumstances where the pandemic may dictate appropriate use of mail-ballot elections. As the pandemic has ebbed and flowed over the years since *Aspirus* the result has been an increase in the use of the mail-ballot procedures. *KMS Commercial Painting, LLC*, 371 NLRB No. 69, slip op. at 1 (2022) (304 mail ballot elections taking place in fiscal year 2022). Mail-ballot procedures have allowed the Board to continue conducting elections even in the face of high COVID-19 transmission rates. As the Board stated in *KMS*, “during the pandemic, the Board’s mail ballot procedures have served the Board’s mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process.” *Id.*

**B. Board Standard**

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.

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. 11301.2.⁷ However, a Regional Director may reasonably conclude, based on

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⁷ 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
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.

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, 2020, 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 (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.

Id. slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” Id. slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” Id. slip op. at 3 (citing National Van Lines, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. Aspirus, 370 NLRB No. 45, slip op. at 3 (citing San Diego Gas & Electric, 325 NLRB at 1144 n. 4). Finally, in Aspirus, the Board noted that a 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).
Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her or his discretion. Aspirus, 370 NLRB No. 45, slip op. at 8.

C. Position of the Parties

The Employer contends that an in-person, manual election is the preferred method of conducting a Board election and given the current state of the COVID-19 pandemic a manual election can be conducted safely. It proposes a manual election take place in the main conference room of the Bozeman facility on April 13, 2022, from 10:00 to 10:30 a.m. The Employer agrees to comply with the procedures set forth in Memorandum GC 20-10 for that election.

In support of this proposal the Employer notes the Board’s historical reliance on in-person elections. Further, the Employer contends all the Aspirus factors favor a manual election, and specifically that the current testing positivity rate in Gallatin County, Montana, where the Employer’s facility is located, is 4.4% and trending downward. However, the Employer does not cite a source for this information. The Employer also argues the short polling period proposed, 30 minutes, and the relatively small number of employees involved, minimizes any risk associated with a manual election.

Petitioner has not provided a substantive argument in favor of a mail-ballot election but has stated by its pre-hearing filing its position that a mail-ballot election is appropriate under the circumstances.

II. DETERMINATION

Several of the Aspirus factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by Memorandum GC 20-10, and there is no evidence of a current outbreak at the Employer’s facility. Ultimately, I have determined that a mail ballot election is appropriate in this case due to the remaining factor: the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing, or the 14-day testing positivity rate in Montana is 5 percent or higher.

The Board in Aspirus directed Regional Directors to, in considering these statistical factors, utilize the data published by Johns Hopkins University, or from official state or local government sources. The Board further stated where county level data is not available, Regional Directors should look to state level data.

The first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing. The Montana Department of Public Health & Human Services publishes COVID-19 data, including county level data, but not in a manner that allows the necessary 14-day analysis.\(^8\) 14 days of Gallatin County data is available from the Johns Hopkins University & Medicine Coronavirus Resource

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\(^8\) [https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b](https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b) (last viewed April 7, 2022).
Center; as of April 7, Johns Hopkins reports a -14 day case count in Gallatin County of 2 cases and a -1 day case count of 20 cases, a tenfold increase over the last 14 days. The data from the intervening dates is consistent, with a median of 5.5 cases. As such, I conclude the 14-day trend in confirmed COVID-19 cases in Gallatin County is increasing.

Regarding the second contingency, whether the 14-day testing positivity rate in Montana is 5 percent or higher, this data is not published by the Montana Department of Public Health & Human Services, or it is not readily available. It is not apparent where the Employer obtained the data it references regarding a 4.4 percent positivity rate in Gallatin County. Johns Hopkins does not report 14-day testing positivity data at a county level, but it does report this data at the state level. As of April 7, Johns Hopkins reports a testing positivity of 1.27 percent, below the 5 percent threshold in Aspirus.

Aspirus directs that a mail ballot election may be appropriate where either one of the two contingencies described above are met. Here, the 14-day trend in Gallatin County is increasing, and I find this is a sufficient basis to order a mail ballot election consistent with Aspirus.

III. CONCLUSION

Based on 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, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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 §9(c)(1) and §§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 §9(b) of the Act:

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10 https://coronavirus.jhu.edu/testing/testing-positivity (last viewed April 7, 2022).
11 The parties stipulated to the following commerce facts:

The Employer, a State of Delaware limited liability company, with an office and place of business in Bozeman, Montana, is engaged in the business of publishing a newspaper. During the last twelve months, a representative period, the Employer had gross revenues valued in excess of $200,000, and purchased and received at its facilities within the State of Montana, goods and services valued in excess of $5,000 directly from suppliers outside the State of Montana.
INCLUDED: All full-time and regular part-time Bozeman Daily Chronicle Editorial Department Reporters and Photojournalists employed by the Employer at its facility located at 2820 W. College Street, Bozeman, Montana, 59718.

EXCLUDED: All other employees, confidential employees, managers, and guards and supervisors as defined by the 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 Denver Newspaper Guild - Communication Workers of America, Local 37074.

A. Election Details

The election will be conducted by mail. On Monday, April 25, 2022, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. 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, May 2, 2022, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at 206-220-6300 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by 1:00 p.m. on Tuesday, May 17, 2022. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on Tuesday, May 17, 2022, at 1:00 p.m. with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Regional Office, the Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the issuance of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

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 by mail as directed above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board’s designated office; (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 Tuesday, April 12, 2022. 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.nlrb.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.nlrb.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 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.nlrb.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

- 8 -
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 Seattle, Washington on the 8th day of April, 2022.

Ronald K. Hooks
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