

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ATLAS PACIFIC ENGINEERING COMPANY,

Employer

and

Case 27-RC-258742

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

Petitioner

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO (Petitioner) on April 3, 2020, under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of employees employed by Atlas Pacific Engineering Company (Employer) at its Pueblo, Colorado facility (Employer's facility). There are approximately 90 employees in the unit sought.

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing, but the positions of the parties were solicited for consideration at an April 13, 2020, telephonic hearing before a hearing officer of the National Labor Relations Board (Board).

The question before me is how best to conduct this election given the reality of the COVID-19 pandemic. The impact of COVID-19 on daily life has been profound. Many of the measures recommended by the Federal and state governments to prevent the spread of the virus are well-known at this point: maintain a 6-foot distance between individuals, work or engage in schooling from home, avoid social gatherings, avoid discretionary travel, and practice good hygiene. *The President's Coronavirus Guidelines for America*; Centers for Disease Control and Prevention, *How to Protect Yourself and Others*.

In addition, many state and municipal governments have issued restrictions tailored to the situation in specific communities. On March 19, 2020, *Colorado Public Health Order 20-22* closed bars, restaurants, gyms and similar facilities until April 30, 2020, to prevent large groups from gathering. On April 9, 2020, *Colorado Public Health Order 20-24* directed all individuals to stay at home whenever possible, leaving only to perform necessary activities, such as caring for family members, obtaining necessary supplies, or working in a "critical business," until April 26, 2020.

Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19 the impact of the virus has continued in Colorado and throughout the United States. The Sheriff's Office of Pueblo County and the Pueblo Department of Public Health & Environment report that, as of April 19, 2020, 86 confirmed cases of COVID-19 exist in Pueblo County. Seven Pueblo County residents have died from COVID-19.

The Employer, which manufactures food processing machinery, is a critical business in the food supply chain. As a result, employees continue to report for work and perform their regular duties, albeit with at least some changes in regular operations to incorporate social distancing to the extent possible. The Employer's facility in Pueblo is located about 120 miles south of Denver, Colorado, where the Region 27 office is located.

POSITIONS OF THE PARTIES

Petitioner maintains that a mail ballot election is necessary because of the realities of the current COVID-19 pandemic and associated restrictions. First and foremost, a manual election requires at least some gathering of people, voters, Board agents, and observers. While measures can be taken to limit interaction and make these interactions as safe as possible, this is ultimately not an essential gathering because the mail ballot procedure exists.

Second, beyond the concerns associated with gathering, a manual election requires travel of individuals such as Board Agents and party representatives, in and out of Pueblo, an unnecessary risk to the communities involved. Third, Petitioner notes the Board's procedures for a manual election are well-established and involve steps that are problematic under the current circumstances, with numerous close contact activities such as voters using a ballot booth, observers jointly maintaining a voter list, and a challenged ballot procedure that involves an exchange of materials between the voter and a Board agent. To simply try to modify these procedures in the interest of safety during a manual election would create a "logistical nightmare," in the words of Petitioner.

The Employer's position is that voting should be conducted entirely by manual ballot, based on the Board's longstanding policy favoring manual balloting. The Employer does not reject the contention that the present pandemic requires special considerations. However, it maintains that the risk can be mitigated and that it will take steps necessary to have a safe manual election. These include but are not limited to: proposing a long voting period that will allow voters time for spacing and avoid congregating; conducting balloting in a large room that will allow room for social distancing; placing the tables used by the observers and Board agent, the voting booth used by the voters, and the ballot box 6-feet apart; providing hand sanitizer, gloves, and masks for all participants; requiring employees to wear masks and sanitize during the election; releasing employees to vote in small groups to prevent crowding; and deep cleaning the polling place prior to voting. At hearing the Employer introduced photographs showing the room in which it proposed holding the election, demonstrating how tables and the voting booth could be arranged in a manner to maintain social distancing; a hallway marked with 6-foot indicators demonstrating how voters could wait; and signs in the workplace reminding employees of the need for proper social distancing. The Employer additionally notes its employees have been working for several

weeks in the current environment and are well-versed in social distancing and other cautionary measures.

The Employer argues that, considering the above precautions, and because its employees continue to report to the Employer's facility daily, there is no basis to deviate from the Board's preference for manual elections. To bolster this point, the Employer argues that a mail ballot election essentially creates a one-sided restriction, as a union is free to conduct home visits, but an employer is not, as such visits are per se objectionable.¹ In essence, to order a mail ballot election in the instant case would place a restriction only on the Employer without a reasonable basis, as safety and public health concerns have been sufficiently addressed.

In making their positions known at hearing, both parties made representations regarding their own conduct, and the conduct of the other party, in complying with Federal and Colorado social distancing guidelines. I have not considered these assertions in making my decision. Outside of the Employer's demonstration of how it would prepare for a manual election, I do not find the proffered exhibits and representations relevant as the hearing conducted was held solely for the purpose of obtaining the parties' positions on the mechanics of the election.

THE BOARD'S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure 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.* 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* 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. 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.* The casehandling manual addresses the most common situation where a mail ballot is utilized: where employees are "scattered," working in different geographic areas, working in the same area but traveling on the road, working different shifts, or working combinations of full-time and part-time schedules. *Id.* This scattering of

¹ In support of its arguments the Employer cites to the Board's decision in *Grill Concepts*, an unpublished 2019 decision in case 31-RC-209589. Procedurally, I note this is an unpublished decision lacking precedential value. Substantively, that decision addresses whether a party allegedly offering to physically assist voters with mail ballots was objectionable conduct. That is not the procedural posture of this case or otherwise an issue.

employees was also the issue in *San Diego Gas & Elec.*, and in that case the Board identified a specific test for use under these circumstances.

On April 17, 2020, the Board issued an announcement, "COVID-19 Operational Status," which states, in part:

Representation Elections — Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

DETERMINATION

The instant case raises the issue of whether to direct a manual or mail ballot election based on public health concerns, and specifically whether the circumstances of the COVID-19 pandemic, in Pueblo at the time of my decision, make a mail ballot appropriate. Before turning to that question, I note there is no contention that the employees in question are scattered by location or schedule. Absent public health concerns this would almost certainly not be an election where a mail ballot would be considered.

However, for the reasons articulated earlier, this election will not be held under normal circumstances. Guidelines currently in place at the Federal level recommend avoiding unnecessary social contact and conducting business remotely when possible. Similarly, public health orders in place in Colorado make it clear that gathering is discouraged unless absolutely necessary. The essential nature of a business in the front range of Colorado has not shielded certain businesses from the spread of COVID-19 and its disruptions. Dozens of residents of Pueblo County are ill with COVID-19, and others have died. The Employer's employees are at the workplace because their work is critical to the food supply, and because of the nature of the work no option exists to perform their work remotely. While the mail ballot procedure may not be the Board's preferred procedure, it is one of the Board's procedures for conducting an election. Under the present circumstances I find it appropriate to order a mail ballot election.

The unit consists of approximately 90 employees. Any manual election will potentially result in 90 interactions between the voters, observers, and the Board Agent or Agents that can be avoided if a mail ballot is used. While each employee is already in contact with some other employees in the workplace, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among themselves. The selected employee observers and the assigned Board agent would certainly encounter all of the unit employees at a manual election who would choose to vote. This increased interaction may be minimal, an employee standing in a line that would

not normally be necessary, or may be major, such as an ill employee reporting to work. The Board's manual procedures do not contain an absentee ballot or remote option, so an employee must appear at the polls to vote. It is not inconceivable that an employee who is not working due to illness, considered not working due to mild illness, or has self-quarantined due to exposure to someone who is ill, might report to work to avoid disenfranchisement in a manual election.

It is reasonable to conclude that a manual election would result in travel of the Board agent or agents, if no other party. The Employer's facility is a significant driving distance from Denver and the nearest major airport, Denver International Airport. Under the Employer's proposed schedule, a pre-election conference would typically be scheduled no later than 5:30 a.m. on the day of the election and there would be a five-hour break between polling sessions, followed by a count until about 5:30 p.m. Non-essential travel is to be generally avoided at this time. Although there is no Federal rule or requirement that strictly prohibits holding a manual election, I find that holding a mail ballot election, and minimizing travel and the contact between individuals, is in the spirit of the current Federal recommendations.

In reaching this conclusion I do not find that a manual election is impossible, or that mail ballot elections are the only appropriate option. I only find that in the particular circumstances of this case, with the number of employees involved, the location of the Employer's facility likely necessitating travel, and the circumstances in Pueblo County at this time, it is the appropriate option.

I do not find fault with the Employer's carefully considered plan for how a manual election could be conducted. The details it has presented, including elements directed at hygiene and sanitation, social distancing, and spreading out the time between voters, will be necessary for any manual election after restrictions are relaxed. However, I do note that some of these precautions, by their very nature, introduce other problems. For example, a longer polling period lasting several hours with small groups released on a schedule may help avoid voters congregating in line while waiting to vote, but this protracted process significantly increases the time the observers and Board agent conducting the election spend in proximity to each other.² Ultimately, the Employer's employees are working at the Employer's facility because no alternative exists due to the nature of the work. Regarding a manual election, however, an alternative does exist.

The Employer also correctly notes that many aspects of the novel coronavirus that causes COVID-19 are unknown, and that risk cannot be completely eliminated by conducting a mail ballot election. While true, the current recommendations strongly recommend avoiding or limiting in-person contact between individuals, and as such a mail

² There are manual ballot procedures that also provide challenges to maintaining appropriate distancing. For example, a voter may spoil a ballot, which would require that the Board agent retrieve the ballot from the voter and provide a new ballot. The challenged ballot process requires the voter to place the challenged ballot in an envelope prepared by the Board agent and then seal and initial envelope before placing it in the ballot box. See Representation Casehandling Manual, Section 11338.3. Also, the Board agent must ensure that the observers are properly marking the voter list(s).

ballot election minimizes, even if it does not eliminate, risk.³ I also recognize that the current stay-at-home order issued by the Governor of Colorado may expire on April 26, 2020, or it may be extended in some fashion. The restrictions on Colorado's citizens is too uncertain at this time to presume it would be lifted in its entirety. Further, the Governor's order is just one factor I have taken into to consideration in directing a mail ballot.

Finally, I do not agree that the mail ballot election procedure is *only* intended to address scattered workforces. This is clearly the most common reason a mail ballot is used, and it is correct that in all the cases cited by the Employer this was the basis for directing a mail ballot. However, as stated earlier, absent the current extraordinary circumstances a mail ballot election would almost certainly not be under consideration in this case. The COVID-19 pandemic is an unprecedented situation, and I do not find that the absence of a history of applying mail ballot procedures in similar circumstances suggests a mail ballot is inappropriate during this stage of a pandemic. Ultimately, discretion allows for a response to developing or new circumstances, and the Board has stated Regional Directors retain *broad* discretion to order a mail ballot election where circumstances dictate. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) ("a Regional Director has broad discretion in determining the method by which an election is held.") Indeed, the Board in its April 17, 2020 announcement requires that I consider safety, staffing, and federal, state and local laws and guidance. I find the extraordinary circumstances are present here that require me to utilize that discretion and order a mail ballot election for the reasons stated above.

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 hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. 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.⁴

³ I note that this approach of balancing Section 7 rights with public health demands is consistent with the broader approach the Board has taken in response to the current pandemic. On March 19, due to the extraordinary circumstances related to the COVID-19, the Board suspended all elections, including mail ballot elections, until April 3, 2020. On April 1, 2020, after determining measures were in place at the Regional level to allow elections to resume in a safe and effective manner, the Board did not extend this suspension, but allowed elections to resume as determined by the Regional Directors.

⁴ During the hearing the parties stipulated to the following commerce facts:

The Employer, Atlas Pacific Engineering Company, is a limited liability company with facilities and places of business throughout the United States, including places of business in the State of Colorado, where it is engaged in the manufacture of food processing machinery. During the past 12 months, a representative time period, the Employer purchased and received at its Colorado locations goods, materials, and supplies valued in excess of \$50,000 directly from entities located outside the State of Colorado.

3. The labor organization involved claims to represent certain employees of the Employer.

4. 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.

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 fabrication, machine shop, assembly, inspector, maintenance, shipping, stores, and tool room employees employed by the Employer at its Pueblo, Colorado facility; excluding all managers, office clerical employees, professional employees, and supervisors as defined by 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 **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. As of the hearing date, Petitioner has waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **3:00 p.m., Monday, May 4, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294. 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 11, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at **(303) 844-3551** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

Ballots are due in the Denver Regional Office by 5:00 p.m. on Friday, May 22, 2020. All ballots will be commingled and counted at the Regional Office at 9:00 a.m. on Tuesday, May 26, 2020.⁵ In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

⁵ If, on the date of the count, the Regional Office is not available to the parties for the count, the count will be done remotely by a live video conference. If the Regional Director determines this is likely, the parties will be provided information on how to participate in the count by video conference.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, **April 17, 2020**, 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 **Wednesday, April 22, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

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

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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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.

Dated at Denver, Colorado on the 20th day of April, 2020.

/s/ Paula Sawyer

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