

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

CITIZEN 360 CONDOMINIUM

Employer

And

Case 02-RC-257691

SEIU, LOCAL 32BJ

Petitioner

DECISION AND DIRECTION OF ELECTION

Citizen 360 Condominium (the Employer) is engaged in the business of operating a residential apartment building. SEIU Local 32BJ (the Petitioner) seeks to represent a bargaining unit of all full-time and regular part-time building service employees employed at the Employer's facility, located at 360 East 89th Street, New York, New York, excluding all other employees, professional employees, guards, and supervisors as defined by the Act.¹

The only matter in contention is whether to conduct a manual or mail ballot election.²

In that regard, the Petitioner contends that the election should be conducted via mail ballot because 1) it is the most expeditious manner in which to proceed, 2) it is the safest method and, 3) it will enfranchise the most petitioned-for employees.

The Employer argues that a mail ballot election is inappropriate because 1) the USPS system is impaired, thereby rendering a mail ballot election unreliable, 2) a swift election under current circumstances will leave employees unable to consult with one another as to whether they would prefer to be represented by the Union and, 3) additional exposure to COVID-19 is negligible because the unit members have already been exposed to anyone in the building who is carrying the virus. Regarding the logistics of a manual election, the Employer proposes that it could deep clean the voting area and that the voting would take place in a well-ventilated room large enough to allow for social distancing. The Employer also proposed that all parties involved could wear gloves, and that the Board agent could sterilize the ballot box, thereby mitigating the risk of infection.

¹ The parties stipulate, and I find, that this bargaining unit is appropriate.

² The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before Hearing Officer Audrey Eveillard of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer.

For the reasons set forth below, I find that conducting a mail ballot election is required under the present circumstances.³

Facts

Public health is imperiled by the person-to-person spread of COVID-19 during the pandemic. As one of the nation's epicenters, NYS and NYC have placed restrictions on which businesses may remain open and which employees may commute to their usual workplace. The petitioned-for unit employees are among the workers who continue to perform their usual duties at their usual place of business. New York State's official guidance for determining whether a business is subject to a workforce reduction under recent executive orders, designates as an essential business or entity:

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including... building cleaners or janitors... general maintenance whether employed by the entity directly or a vendor...

Accordingly, the employees in the proposed unit are considered essential workers, and therefore, are required to report to the Employer's facility to work.

As further background, on April 2, 2020, Governor Cuomo issued Executive Order 202.14 continuing temporary suspension and modification of laws relating to the disaster emergency. It states in part:

By virtue of Executive Orders 202.3, 202.4, 202.5, 202.6, 202.7, 202.8, 202.10, 202.11, and 202.13 which closed or otherwise restricted public or private businesses or places of public accommodation, and which required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations, games, meetings or other social events), all such Executive Orders shall be continued...

Thus, any "gatherings" of each parties' observers, the Board agent and representatives of the parties for the pre-election preparation and conference; the observers, Board agent and voters waiting in line to vote during the course of the election; and the observers, Board agent and parties' representatives assembled for the vote tally, would arguably be contrary to state law.

The record demonstrates that although the proposed unit employees continue to work, their schedules are currently in such a state of flux that neither the Employer's nor the Petitioner's witnesses could describe those schedules with any degree of certainty. The Employer's representative stated that staffing "changes on a day-to-day basis... There aren't fixed shifts, per se."

³ Because the charge in Case No. 02-CB-258951, was filed on April 9, one full business day before the April 13 hearing in this matter, and is currently pending investigation, I will proceed with the mail ballot election as scheduled, expedite the investigation to allow for a determination of possible merit of the charge, and in my discretion determine whether it is appropriate to impound the ballots until after disposition of the charge. See CHM 11731.6.

Relatedly, neither party could propose a time frame during which all (or most) petitioned-for employees would be present and able to vote in the designated polling area in the workplace. Only one potential voter lives in the building. Therefore, voters who are not working during the course of the voting period would be forced to further expose themselves to COVID-19 by making an extra trip to their workplace. Still worse, voters making extra trips to the polling place would not only expose themselves to infection, but could potentially pass their own infection to other essential employees utilizing public transportation at that time. Sadly, the record reveals that at least three employees in the proposed unit have missed work due to infection with COVID-19. The record also contains a learned treatise of the stability of SARS-CoV-2 on various surfaces published on March 17, 2020, by the New England Journal of Medicine. The study concluded that the virus may remain viable on cardboard for 24 hours. During a manual election the observers share the same voter list to check off the names of arriving voters; all voters use the same cardboard voting booth, share the same pencil to mark their ballots; deposit their ballots in the same cardboard ballot box; the Board agent must handle all the paper ballots during the count that takes place immediately after the close of the polling; following which the Board agent and all parties' representatives sign the same Tally of Ballots. The potential for infection through these additional contacts is significant.

Finally, the Employer's representative was unable to proffer any evidence that each eligible voter, observer, party representative, and each member of their respective households, has not tested positive for COVID-19. The record contains only anecdotal, hearsay evidence that USPS is not currently operating in an efficient manner. To the contrary, the record indicates that USPS sends postal alerts for service disruptions, of which there appear to be very few. Notably, anyone whose local post office is closed can collect their mail at a nearby post office.

Analysis

The Board, in *San Diego Gas and Electric*, 325 NLRB 1143 (1998), reviewed the circumstances under which it may be appropriate to direct a mail ballot election. The Board's longstanding policy has been that, as a general rule, representation elections should be conducted manually. Recognizing, however, that there are some circumstances that would make it difficult for eligible employees to vote in a manual election, the Board has vested Regional Directors with broad discretion to determine the method by which elections shall be conducted. Under the guidelines set forth in *San Diego Gas*, a mail ballot election may be appropriate where eligible voters are "scattered" because of their job duties in terms of geography and/or varied work schedules, so that all employees cannot be present at a common location at common times to vote manually. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

Here, the employees' schedules are presently so erratic that no party at the hearing was able to propose a time or times at which most employees would be able to exercise their right to vote in a manual election. During the COVID-19 crisis, employees are "scattered" in ways both typical (varied schedules) and unusual (stay-at-home orders). However, the impracticality of

scheduling a manual election where employees' working hours are unknown is but one factor in my decision.

More importantly, no party was able to propose a date to conduct a manual election because, as the Employer's representative stated, "it's just not business as usual." In fact, it is impossible to guarantee the safety of voters, observers, party representatives, and Board agents whose presence would be required at a manual election. The safety of voters and Board agents is, of course, paramount. The Employer argues that because the voters have already been exposed to one another and their workplace, the further exposure that might stem from all involved traveling to the election is of little import. I disagree. Although the measures suggested by the Employer may alleviate some concerns about the potential for infection at the facility on the day of a manual election, the fact remains that COVID-19 is highly contagious and may be contracted by any participant en route to the election. I find it significant that each trip outside one's home risks further exposure; this may, in and of itself, potentially have a coercive effect on employees' willingness to exercise their Section 7 rights. An employee who is not scheduled to work on the day of the election should not be forced to decide between voting and minimizing exposure to infection. There is also a significant potential of infection through the gathering and close contact between all the manual election participants and their touching of common items in the voting place described above.

Contrary to the Employer's protestations, a mail ballot election has no apparent significant drawbacks. There is no indication that the United States Postal Service is unable to deliver mail. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. The voting by mail instructions to voters can advise sealing the ballot in the return envelope by means other than saliva. The count of mail ballots could be scheduled well after the ballot return due date, thereby reducing the virus' viability possibly contained on the paper ballot. The Employer's suggestion that employees will not be able to discuss the prospect of unionization during the pandemic seems highly unlikely; even under normal circumstances, employees tend to communicate by telephone, email, text message, social media, and other electronic means. Such modes of communication with the unit employees are equally available to the Employer and the Petitioner.

Given the extant conditions, the Region's use of mail balloting has a strong comparative advantage in avoiding negative effects on employees' ability to fairly and fully express their desires on the question of representation.

Finally, ordering a mail ballot election comports with the Agency's core mission – to give workers the opportunity to vote. Congress enacted the NLRA in 1935 to protect the rights of employees; to encourage collective bargaining; and to curtail certain practices which can harm the general welfare of workers, businesses, and the United States economy. The Act itself emphasizes the need to safeguard commerce from injury, impairment, or interruption:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and

promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

The Board has long taken the position that it can best prevent economic instability by settling questions concerning representation as quickly as possible. The current rule governing representation cases, which became effective in 2015, makes note of the importance of a swift resolution:

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel and the agency’s regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency... The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

Likewise, the new rule soon to take effect, also emphasizes the holding in *A.J. Tower* that employees’ votes ought to be recorded speedily:

Within this general framework, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331...

As noted above, the Supreme Court has identified speed in recording employees’ votes as one interest the Board’s representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board’s and Congress’s emphasis on the need for expedition in representation cases.

During the current pandemic, the need to act swiftly to prevent further disruption to the economy is all the more evident. Recent news reports suggest that the public health crisis is

increasingly leading to labor unrest as essential workers grow ever more concerned about their safety at their places of work. Conducting Board elections “on the earliest date practicable” is crucial to maintaining industrial stability and reinforcing the foundation necessary for the economy’s swift recovery.

I conclude that, under these circumstances, a mail ballot election is appropriate because it will enfranchise employees whose schedules are at best unpredictable. Undoubtedly, a mail ballot election will better protect the health and safety of voters, Agency personnel, the parties’ representatives, and the public during the current health crisis. Failure to order a mail ballot election undermines the Board’s duty to safeguard commerce and the United States economy by swiftly tallying employees’ votes.

Conclusion

The National Labor Relations Board will conduct a secret mail 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 SEIU Local 32BJ.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On Thursday, April 30, 2020, ballots will be mailed to voters by National Labor Relations Board, Region 02. 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.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 02 office by close of business on Friday, May 22, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Thursday, May 7, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 02 Office at (212) 776-8633 or our national toll-free line at 1-844- 762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director, at 10:00 am on Thursday, June 4, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, 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 **APRIL 21, 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

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed no later than **12:01 a.m. on Monday, April 27, 2020**. If the Employer does not receive copies of the notice by Thursday, April 24, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

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.

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: April 17, 2020



John J. Walsh, Jr.
Regional Director
National Labor Relations Board
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