

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

MILLENNIUM TOWER RESIDENCES

Employer

And

Case 02-RC-258153

**SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 32BJ**

Petitioner

DECISION AND DIRECTION OF ELECTION

Millennium Tower Residences (the Employer) is engaged in the business of operating condominium housing. Service Employees International Union, Local 32BJ (the Petitioner) seeks to represent a bargaining unit of all building service workers employed at the Employer's facility, located at 30 West St., New York, New York, excluding all other employees, office clerical 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

The Petitioner contends that the election should be conducted via mail ballot because it is the safest and swiftest manner in which to proceed during a global pandemic.

The Employer contends that the election can and should be held safely via manual ballot. The Employer proposes that the election be held in a 1600 square foot fitness center on the Employer's premises. The space has two entrances and sufficient space to allow for social distancing. The Employer further proposes three voting sessions over a period of two days so that none of the 16 bargaining unit employees are likely to need to make an extra trip to work in order to vote and so that there would be little chance of crowding at the polling area. The Employer also suggests that the bargaining unit is small enough to allow each voter to be given his or her own pencil to eliminate any danger of transmission of COVID-19 via shared writing utensils.

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 Nicole Lancia, 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.

Specifically, the Employer proposes the following voting sessions:

- Friday, May 22, 2020, 2:00 p.m. to 4:00 p.m.
- Tuesday, May 26, 2020, 6:30 a.m. to 8:00 a.m.
- Tuesday, May 26, 2020, 2:00 p.m. to 4:00 p.m.

The Employer notes that the election could be rescheduled should stay-at-home orders preclude the election from being held on a proposed or directed date.

Facts

New York City is one of the epicenters of the nation's current COVID-19 outbreak. Because public health is imperiled by the person-to-person spread of COVID-19, both New York State and New York City have placed restrictions on which businesses may remain open and which employees may commute to their usual workplace. 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...

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

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...

A manual election requires a series of "gatherings" of, in various combinations, the parties' observers, the Board agents, representatives of the parties, and voters. These "gatherings" would arguably be contrary to current state law.

The Employer's logistical suggestions would lessen the size of the "gathering" during actual voting, although not the gatherings that constitute the pre-election conference and the post-election ballot count. The Employer's logistical suggestions such as providing each voter their own pencil to mark their ballot to eliminate any danger for virus transmission, also lessen the risk to voter safety; however, a manual election would still require observers, party representatives, Board agents, and any voters who did not vote during their shifts to travel via public transit to a location they would not normally visit at a time when NYS and NYC have urged all members of the public to avoid doing so. 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 previously handled by the voters 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. Additionally, the possibility that any manual election scheduled after the expiration of Executive Order 202.14 would need to be rescheduled to comply with future Executive Orders introduces uncertainty and potential delay to the process.

Although the Employer stated its preference for a manual election, it did not put forward any specific reason that a mail ballot election would be inappropriate, inefficient, or unsafe in this particular case.

Analysis

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board set out the circumstances under which it may be appropriate to direct a mail ballot election. Recognizing 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.

The Employer has proposed that a manual election should take place in three sessions over the course of two days in order to allow the approximately 16 voters (who are somewhat "scattered" by their work schedules) to vote conveniently. However, unprecedented societal conditions have "scattered" employees in a new way. Employees may not wish to enter a voting area—however carefully prepared it may be—if they perceive it as a needless risk of COVID-19 infection. The health of the observers, party representatives, and Board agents is also a concern. 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.

Additionally, under the current circumstances, there is an unusually high possibility that any scheduled manual election would need to be postponed should a new Executive Order or another development related to COVID-19 require it. Such uncertainty and delay are not necessary when an alternative method of holding an election is at hand.

Preventing needless delay is all the more important during the current pandemic. 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 as quickly as possible is crucial to maintaining industrial stability and reinforcing the foundation necessary for the economy's swift recovery.

The NLRA was enacted by Congress in 1935 in part to curtail certain practices which can harm the United States economy; as such, it 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. Both the current rule governing representation cases, which became effective in 2015, and the new rule, soon to take effect, explicitly point to the Supreme Court's holding in *National Labor Relations Board v. A. J. Tower Co.*, 329 U.S. 324 (1946). *A.J. Tower* holds that

...the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.

A mail ballot election is the surest way to record employees' votes efficiently and speedily under current circumstances. 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. Therefore, I conclude that, under the circumstances, a mail ballot election is appropriate.

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 Service Employees International Union, 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 **May 8**, 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 **May 29**, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **May 18**, 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 **June 12**, 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(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 **May 1, 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 **June 9, 2020**. If the Employer does not receive copies of the notice by **June 4, 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 29, 2020



John J. Walsh, Jr.
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