

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22**

**NORTH AMERICAN INDUSTRIAL  
SERVICES, INC.**

**Employer**

**and**

**Case 22-RC-258810**

**INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 825**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

North American Industrial Services, Inc. (the Employer) is engaged in the business of providing environmental cleanup. International Union of Operating Engineers, Local 825 (the Petitioner) seeks to represent a bargaining unit comprised of:

All full time and regular part-time operators, technicians, foremen, safety coordinators, and scheduler/planners employed by the Employer at Phillips 66 Refinery located at 1400 Park Avenue, Linden, New Jersey, but excluding all managerial employees, guards, and supervisors as defined in the Act, and all other employees.

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

The only matter in contention is whether to conduct a manual or mail ballot election.<sup>1</sup>

Although the Petitioner initially proposed a manual election, and indeed generally prefers manual elections, it has since determined that the election should be conducted via mail ballot because it is the safest and most expeditious manner in which to proceed during a global pandemic.

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<sup>1</sup> 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 Henry Powell 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. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

The Employer argues that a mail ballot election is inappropriate because mail ballot elections are inherently problematic; because mail service is presently impaired, thereby rendering a mail ballot election particularly unreliable; and because any election held under current circumstances will leave employees unable to determine whether they would prefer to be represented by the Petitioner.

The parties agree that a safe, fair manual election is not a possibility at the present time due to the COVID-19 pandemic and extant stay-at-home orders associated therewith. The Employer argues that the election should, therefore, be delayed indefinitely, while the Petitioner urges that an immediate mail ballot election be directed.

Facts

New Jersey is one of the epicenters of the nation's current COVID-19 outbreak and the State has officially declared and continued a public health emergency. Because public health is imperiled by the person-to-person spread of COVID-19, the State of New Jersey has implemented aggressive social distancing measures; and directed New Jersey residents to stay at home unless absolutely necessary. The State has also placed restrictions on which businesses may remain open and which employees may commute to their usual workplace. The petitioned-for unit employees have been designated as essential workers necessary to help maintain the national petroleum supply; therefore, they continue to perform their usual job duties at the Employer's facility.

It is worth noting that the Employer's facility is mere miles from New York City, the unquestioned epicenter of the COVID-19 outbreak in the United States. It is undisputed that a manual election at the present moment would not protect the health of voters, observers, Board agents, party representatives, or the general public. 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 and share the same pencil to mark their ballots before depositing 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; and the Board agent and all parties' representatives must sign the same Tally of Ballots. The record also contains a learned treatise of the stability of SARS-CoV-2 on various surfaces published by the New England Journal of Medicine. The study concluded that the virus may remain viable on cardboard for 24 hours. The potential for infection through contacts required by a manual election is significant.

Governor Murphy has indicated that New Jersey might "reopen" in late May 2020. There has been no definitive date set, and the Governor has already been forced to extend multiple Executive Orders restricting movement within the State. Additionally, the possibility that any manual election scheduled after the expiration of current New Jersey Executive Orders would need to be rescheduled to comply with future Executive Orders introduces uncertainty and potential delay to the process.

The Employer provided anecdotal evidence to suggest that the delivery of mail in the area surrounding its premises has been impacted by the pandemic. Specifically, the closure of the post

office in Haledon, New Jersey, approximately 37 miles north of Linden, left three New Jersey towns without mail for at least two days in April 2020.

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 employees at issue here are not “scattered” in the traditional sense. They are, however, “scattered” by COVID-19, which has rendered an immediate manual election, like so many other previously ordinary gatherings, unsafe and contrary to the spirit and letter of State measures designed to mitigate the impact of the pandemic. Crucially, 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.

The Employer argues that it would be an abuse of my discretion to order a mail ballot election in these extraordinary circumstances. I disagree. The Employer notes that I must take into account the desires of the parties. One party, the Petitioner, desires a mail ballot election because a mail ballot election offers a swift, safe alternative to a manual election. I must also take into account the efficient use of Board resources. A mail ballot election is currently the only way in which I can safely utilize the Board’s resources at all.

The Employer has proposed that a manual election should take place at an unspecified future time when it is demonstrably safe to do so. The Employer further objects to the use of mail ballots in general, pointing to the Board’s notation in *Western Wall Systems, LLC*, 28-RC-274464 (unpublished April 16, 2020) that it is “open to addressing the criteria for mail balloting in a future appropriate proceeding.” As the Board has not yet addressed those criteria, I must make my decision according to current law. Indeed, the Board has not signaled that it would hold that a mail ballot election can never be appropriate; it has only signaled that it would reevaluate the circumstances under which mail ballot elections may be appropriate. Furthermore, *Western Wall Systems* involved not a mail ballot election but a mixed manual-mail election. A mixed manual-mail election presents a unique set of complications which do not apply here.

The Employer also cites *Thompson Roofing, Inc.*, 291 NLRB 743 (1988), which holds that “mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual ballots because of the absence of direct Board supervision over the employees’ voting.” It is regrettably true that laboratory conditions are occasionally destroyed during mail ballot elections. Laboratory conditions are also occasionally destroyed during manual elections, resulting in objections and rerun elections. However, permitting employees to vote is at the heart of the Act’s mission, and ceasing all elections because a small minority of elections require rerunning would render the Act irrelevant.

Next, the Employer expresses a concern that employees will refuse to vote in a mail ballot election out of concern that the mail will be infected with COVID-19. The Employer presents no evidence that employees have expressed such concerns, and indeed the scholarly article in the record posits that COVID-19 remains on paper for only one day, thus allowing employees abundant time to return their ballots even if they prefer to “quarantine” their mail for several days. The Employer also expresses a concern that the United States Postal Service will be unable to deliver mail ballots to employees. However, a shutdown of one post office in a densely populated area (where there are many post offices in close proximity) generally does not result in a long-term disruption of mail service, and indeed it did not in the one example cited by the Employer. There is no indication that the Postal Service is presently 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 replacement ballot.

Finally, the Employer expresses a concern that unit employees will be unable to properly evaluate their desire to be represented by the Union while face-to-face communication is restricted. This seems highly unlikely, as employees are able to communicate by telephone, text message, social media, and other electronic means rather than in person at the workplace.

The Board has long taken the position that questions concerning representation must be resolved 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.

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

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 from the blow dealt it by COVID-19.

Although Governor Murphy has expressed hope that it will be safe and legal to resume normal activities in New Jersey in late May, there is no guarantee that this will be the case. The unit employees deserve an opportunity to fairly and fully express their desires on the question of representation as soon as possible. A mail ballot will allow them to do so. A manual election to be scheduled at an indeterminate time in the future will not. I take Official Notice that the conditions change and the Gov. Murphy has continued to adjust his position, and on May 4, 2020, he extended the closure of all public schools to June 30, 2020, clearly recognizing that the State is not ready to reopen.

A mail ballot election is the surest way to record employees’ votes efficiently and speedily. 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 International Union of Operating Engineers, Local 825.

### **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 22, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. 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 22 office by close of business on **June 12, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7065, 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 and 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 on a date during the period from **June 26 to July 2, 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 service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

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 **MAY 7, 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](http://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](http://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 May 19, 2020. If the Employer does not receive copies of the notice by May 15, 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.

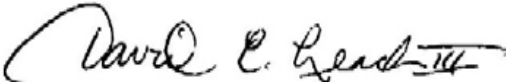
### **RIGHT TO REQUEST REVIEW**

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](http://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: May 5, 2020



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