

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

CURALEAF MASSACHUSETTS, INC.

Employer

And

Case 01-RC-259277

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 328**

Petitioner

DECISION AND DIRECTION OF ELECTION¹

Curaleaf Massachusetts, Inc. (the Employer) is engaged in the business of operating a cannabis dispensary. United Food and Commercial Workers Union, Local 328 (the Petitioner) seeks to represent a bargaining unit of all full time and regular part time marketing coordinators, lead dispensary associates, dispensary associates including those performing admissions duties, compliance leads, lead packaging associates, and packaging associates employed at the Employer's Hanover, Massachusetts location but excluding dispensary managers, assistant dispensary managers, confidential employees, managers, guards, and supervisors as defined in the Act.

The Employer takes the position that the sole marketing coordinator does not share a community of interest with the other petitioned-for employees. I have deferred litigation of this matter and determined that the marketing coordinator shall vote subject to challenge. Otherwise, the parties stipulate, and I find, that the following bargaining unit is appropriate under the Act:

All full time and regular part time lead dispensary associates, dispensary associates, including those performing admissions duties, compliance leads, lead packaging associates, and packing associates employed at the Employer's Hanover, Massachusetts location.

¹ 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 a Hearing Officer 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.

Excluding all dispensary managers, assistant dispensary managers, confidential employees, managers, guards and supervisors, as defined by the Act.

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

The Petitioner argues that a mail ballot election is not only safer than a manual election but the only legal method by which an election can be held while the Commonwealth of Massachusetts is under a stay-at-home advisory due to the COVID-19 pandemic.

The Employer argues that a mail ballot election is inappropriate and prefers that the Region postpone any election until after Massachusetts resumes normal operations. If an election is to be held immediately, the Employer proposes that a manual election should be held in a vacant office space some three miles from the employees' work location so as to minimize the exposure of its customers and all parties to COVID-19.

Facts

During the pandemic, the Commonwealth of Massachusetts has issued a stay-at-home advisory, as has the Centers for Disease Control. All but essential businesses have been required to cease operations. Except with regard to "delivery of COVID-19 Essential Services," gatherings of more than 10 people are prohibited.

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.

As the Employer operates a medical marijuana dispensary, it is classified as a health care provider and remains open, like other pharmacies, to provide critical medication to patients. The bargaining unit at issue is therefore comprised of "essential workers" who continue to commute to and from their usual workplace and perform their usual job duties during the pandemic. Although the employees' schedules have remained essentially unchanged, some employees have required leave due to pandemic-related caregiving obligations. Additionally, the members of the bargaining unit, like all essential workers, are at a high risk of becoming infected with COVID-19 themselves and several have become ill. Many of the customers who visit the dispensary each day are particularly vulnerable to fatal complications from COVID-19 due to underlying medical conditions including cancer, HIV, AIDS, hepatitis C, ALS, Crohn's disease and Parkinson's disease.

The Employer proposes that the Region conduct a manual election in a vacant, large office space on the second floor of a corporate office building located 3.2 miles from the dispensary at which bargaining unit employees work. The Employer's own corporate office is in this building. The proposed space measures 1307 square feet, allowing for social distancing, and the Employer has offered to prepare 35 separate Ziploc bags containing one facemask, one pair

of gloves, and one pencil for each eligible voter, thereby mitigating the risk that voters might pass COVID-19 to one another by sharing election materials. The Employer states that because eligible voters use vehicles to get to the dispensary, they would have “no issue” driving to an off-site polling location.

The Employer objects to a mail ballot election on the ground that employees may not receive their ballots due to changes in living arrangements or mail collection during the pandemic. Next, the Employer asserts that mail ballot elections are inherently unreliable. Finally, the Employer expresses a concern that employees will be unable make an informed decision about whether they wish to be represented by the Petitioner while the ability to communicate face-to-face is limited. Thus, the Employer prefers that the election be postponed until Massachusetts has resumed normal operations.

Analysis

A manual election held at the Employer’s premises could potentially endanger the most vulnerable members of the public, and indeed neither party has proposed that a manual election ought to be held at the Employer’s premises. Instead, while the Union prefers a mail ballot, the Employer prefers that a manual election be held several miles from the bargaining unit employees’ usual work location.

The NLRB Case Handling Manual makes it plain that in the absence of good cause to the contrary, the election should be held on the Employer’s premises. Circumstances indicating the possibility of an offsite election at a neutral location include the involvement of striking employees and pervasive employer unfair labor practices. The regional director must evaluate any alternative site proposed by other parties to the election, as well as other readily available sites. In evaluating these sites, the regional director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site. See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1819–1823 (2011); *Austal, USA, LLC*, 357 NLRB 329 (2011).

Furthermore, the Case Handling Manual instructs that any election held away from the employer’s premises should be held in a public building, social hall, hotel, motel, school, church, or garage; a place normally used as a municipal voting place is particularly desirable. Final arrangements must be made by the Board agent and permission to use such property must be in writing. Rental expense, if any, should be borne by the Agency. An offer of the parties to assume the expense should be rejected since the Agency cannot accept funds from private parties, as this would be a prohibited augmentation of its appropriations, *North American Plastics Corp.*, 326 NLRB 835 fn. 3 (1998).

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board 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 extraordinary 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. The global pandemic which has thus far claimed over four thousand lives in Massachusetts alone and resulted in a complete reorganization of society presents the most extraordinary of circumstances.

Although many employees continue to work their usual schedules, other employees may be unable to travel to a polling location due to their responsibilities as caregivers or their own illness. Still more employees may be reluctant to travel from their workplace to an entirely separate location to vote while stay-at-home advisories urge them not to travel except where absolutely necessary in their capacity as essential workers. Indeed, a manual election may run contrary to the Orders of Governor Baker regardless of the location at which it is held.

Most importantly, the safety of all involved cannot be guaranteed during a manual election. Many of those infected with COVID-19 are not symptomatic and unknowingly pass their infection to those with whom they interact. There can be no assurance that the space proposed by the Employer will have been cleaned appropriately or that those who did the cleaning were not themselves infected.² Likewise, there can be no assurance that the individual who prepares the bags of protective equipment proposed by the Employer will be free from infection. In any event, the Agency cannot accept election materials from private parties and the use of Board resources required to run an off-premises manual election during a pandemic is not warranted here.

The Employer proposes that indefinite postponement of the election is preferable to a mail ballot election. I disagree. 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

² The space proposed by the Employer also requires employees to leave their normal place of work to travel to corporate headquarters, perhaps creating an inherently coercive polling location.

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 Employer argues that the instant case should not be processed in accordance with the so-called "2014 New Rules" rules because the rules shortened the time between the filing of a petition and an election in a manner contrary to Congressional intent. However, I do not have the authority to ignore the rules presently in effect. The Employer prefers new rule expected to take effect later this year, but that rule 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.

Contrary to the Employer's protestations, a mail ballot election has no apparent significant drawbacks. 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 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 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. As for the inherent unreliability of mail ballot elections, the Board has held mail ballot elections for many decades and the vast majority of these elections—like the vast majority of manual elections—have concluded without incident.

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.

I conclude that, under these circumstances, a mail ballot election is appropriate because it will 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 tally employees' votes as swiftly as possible.

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 United Food and Commercial Workers Union, Local 328.

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 Tuesday, May 26, ballots will be mailed to voters by National Labor Relations Board, Region 3, Buffalo, NY. 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 3 office in Buffalo, NY, by close of business on June 22, 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 1 Office at (617) 565-6700 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 Friday, June 26, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

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

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.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

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 **Monday, May 11, 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 prior to 12:01 a.m. on **Wednesday, May 20, 2020** and copies must remain posted until the end of the election.

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

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: May 7, 2020

A handwritten signature in cursive script, appearing to read "Paul J. Murphy".

Paul J. Murphy
Acting Regional Director



United States of America
National Labor Relations Board
NOTICE OF ELECTION



INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00p.m. on Tuesday, May 26, 2020, ballots will be mailed to voters from Region 03 of the National Labor Relations Board. 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 Tuesday, June 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 01 Office at (617)565-6700 or our national toll-free line at 1-844- 762-NLRB (1-844- 762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 03 Office by close of business on June 22, 2020.

All the ballots will be commingled and counted virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director, at 10:00 am on Friday, June 26, 2020.



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full time and regular part time lead dispensary associates, dispensary associates, including those performing admissions duties, compliance leads, lead packaging associates, and packing associates employed at the Employer's Hanover, Massachusetts location who were employed by the Employer during the payroll period ending April 25, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All dispensary managers, assistant dispensary managers, confidential employees, managers, guards and supervisors, as defined by the Act.

Others permitted to vote: At this time, no decision has been made regarding whether the marketing coordinators are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 01-RC-259277</p> <p>OFFICIAL SECRET BALLOT For certain employees of CURALEAF MASSACHUSETTS, INC</p>	
Do you wish to be represented for purposes of collective bargaining by UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 328?		
MARK AN "X" IN THE SQUARE OF YOUR CHOICE		
<p>YES</p> <input type="checkbox"/>	<p>NO</p> <input type="checkbox"/>	
<p>DO NOT SIGN THIS BALLOT. See enclosed instructions.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (617)565-6700 or visit the NLRB website www.nlr.gov for assistance.