UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

SEA WORLD OF FLORIDA, LLC

Employer

and

Case 12-RC-257917

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

On March 11, 2020,[1] International Union, Security, Police and Fire Professionals of America (SPFPA) (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a group of employees of Sea World of Florida, LLC (the Employer),[2] a corporation engaged in the business of providing family entertainment, lodging, and retail services at its resort complex located in Orlando, Florida.

A hearing was held by telephone on May 13 and by videoconference on June 24.[3] At the hearing the parties reached stipulations with respect to the unit description and other litigable

[1] All dates herein are in 2020, unless specified otherwise.
[2] The Employer's name appears here as amended at hearing.
[3] On March 12, I issued an order scheduling a hearing for March 20, which was postponed indefinitely on March 17 in view of health concerns with the COVID-19 pandemic. On March 19, the National Labor Relations Board (the Board) issued a notice that all Board-conducted elections would be suspended through April 3. On April 1, the Board announced that it would resume conducting elections on April 6, and that the General Counsel of the Board had advised that appropriate measures were available to permit elections to resume in a safe and effective manner, as determined by Regional Directors. On April 30, I issued an Order rescheduling the hearing by telephone. On May 4, the Employer filed a motion to postpone the hearing until an in-person hearing could be held, and on May 5, the Petitioner opposed that motion. On May 11, the Employer filed a request for review of my order rescheduling hearing before the Board. The case was remanded by the Board on May 11 for further proceedings consistent with *Morrison Healthcare*, 369 NLRB No. 76 (May 11, 2020). A telephonic hearing was held on May 12, to obtain the parties' positions regarding the nonlitigable issue of the method of voting. On June 16, I issued an order reopening the hearing by videoconference for the purpose of determining the parties' positions and giving the parties an opportunity to provide evidence, including witness testimony, as to the voting eligibility of the employees in the petitioned-for unit who were on leave (furlough).

issues.[4] The parties stipulated, and I find, that the following unit is appropriate, and that security investigators may vote subject to challenge as follows:[5]

> All full-time and regular part-time security officers and senior security officers employed by the Employer at its locations in Orlando, Florida; excluding assistant supervisors, captains, locksmiths, locksmiths II, security ambassadors, security dispatchers, sergeants and supervisors as defined by the Act.
>
> OTHERS PERMITTED TO VOTE: The parties have agreed that security investigators may vote in the election, but their ballots will be challenged because their eligibility has not been resolved. No decision has been made regarding whether the individuals in this classification or group are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The only two issues for decision are whether employees on furlough status are eligible to vote, and whether a manual or mail ballot election should be conducted.

The Petitioner contends that furloughed employees are eligible to vote. The Petitioner seeks a mail ballot election and takes the position that it is not safe to conduct in-person manual elections because of the COVID-19 pandemic. The Petitioner argues that although social distancing helps prevent the spread of COVID-19, it is not a guarantee against contracting the disease. The Petitioner is concerned that if found eligible to vote, employees on leave of absence would elect not to participate in a manual election because of safety concerns related to COVID-19. Additionally, the Petitioner argues that employees who are currently working are dispersed among the Employer's three Orlando parks, Sea World, Discovery Cove and Aquatica, and are

---

[4] The parties stipulated, and I find, based on the following stipulated facts, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act. The Employer is a Florida limited liability company with an office and place of business located at 6240 Sea Harbor Drive, Orlando, Florida. The Employer is engaged in the business of providing family entertainment, lodging, and retail services at its resort complex. During the past twelve months, in conducting its business operations described above, the Employer derived gross revenues in excess of $500,000 and purchased and received at its Orlando, Florida facilities, goods valued in excess of $50,000 directly from points located outside the State of Florida. The parties further stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

[5] The parties initially executed a written stipulation including the unit, and they amended that stipulation on the record. Security investigators investigate fraud and theft, engage in undercover work, and work with the Sheriff's Department.

spread over three work shifts, and accordingly they are scattered, making a mail ballot appropriate.

The Employer contends that employees in furlough status are not eligible to vote because they do not have a reasonable expectation to be recalled in the near future. The Employer further argues that voting should be conducted manually based on the Board's longstanding policy favoring manual elections, and proposes to hold the election in a 12,000 square foot building that would allow for social distancing. It has proposed to use floor markings to ensure that employees, observers and the Board agent maintain appropriate distance, and has offered to provide all participants with masks, gloves and hand sanitizer, and to implement an enhanced cleaning protocol. The Employer further proposes a total of nine hours of polling time, from 5:00 a.m. to 8:00 a.m.; 12:00 p.m. to 3:00 p.m.; and 5:00 p.m. to 8:00 p.m., which, it asserts, would ensure that only eight to nine employees vote per hour, with one voter every six to seven minutes.

I have carefully considered the parties' respective positions. I find that the employees remaining in furlough status who have not been notified of their recall by the Employer as of the payroll eligibility date for the election do not have a reasonable expectation of recall, and therefore are not eligible to vote. I also conclude that a mail ballot is the safest and most efficient way to conduct the election for the reasons stated herein.

I. FACTS

The Employer runs three theme parks, Sea World, Aquatica, and Discovery Cove, in the Orlando, Florida area. The Employer's Security Department is responsible for securing the assets in the parks and making sure guests have a safe environment when visiting the

parks.[6] At the time of the filing of the representation petition by the Union on March 11, there were 64 security officers, 11 senior security officers, and five security investigators working in the Security Department.[7]

A. The COVID-19 outbreak and temporary closing of the Employer's operations

On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. The Centers for Disease Control and Prevention (CDC), an agency of the United States Government states:[8]

> [t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).

On March 16, the Employer temporarily closed all three parks due to the coronavirus pandemic. At that time the Employer announced to the public that it was temporarily closing through the end of March.[9] The Employer then furloughed a total of 38 security officers and senior security officers (referred to at times hereafter collectively as security officers), and three security investigators. Two security investigators and 37 security officers remained active working for the Employer. Chris L. Kelley, Employer's Administrative and Compliance Captain (referred to at times herein as Captain Kelley), who reports to Corporate Director of Security, Rick Schwein, was called as a witness by the Employer. Kelley was the only witness at the hearing. Kelley testified that he was not

---

[6] The parties stipulated, and I find, that persons in the job classifications of assistant supervisor, captain and sergeant in the Security Department are supervisors under Section 2(11) of the Act, with authority to hire, fire, and discipline employees. The parties further stipulated, and I find, that the locksmith 2, security ambassador and security dispatcher classifications should be excluded from the unit.

[7] There is no distinction between the job duties of security officers and senior security officers. The only distinction is the amount of experience.

[8] See https://www.cdc.gov/coronavirus/2019-ncov/faq.html.

[9] https://twitter.com/SeaWorld/status/1238529008456871940.

involved in the Employer's deliberation and selection process of employees to be furloughed initially, but he believes the selection was based on employee seniority per shift.

Because of the COVID-19 pandemic, on April 1, Florida Governor Ron DeSantis issued Executive Order Number 20-91 restricting Florida residents' movements outside of the home to those necessary to obtain or provide essential services or conduct essential activities.[10] The order defined "essential services" as those detailed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce.[11] Under the Governor's Executive Order amusement or theme parks were not among the commercial businesses allowed to remain open.

Beginning on or about April 6, the Employer began implementing a series of additional furloughs. Kelley participated in the decision-making process regarding these additional furloughs, and the Employer based its furlough decisions on factors that included whether the security employees were flexible and could work multiple posts with little supervision. Although the parks were closed, the Employer still had gates that were manned by security personnel, including employee entrances and the Shamu Stadium, where whales are kept. The Employer also instituted a mobile security unit that patrolled the three parks, a Human Resources unit, and surrounding buildings. With this second furlough, a total of 22 security employees remained active, with 53 in furlough status.

On April 29, Governor DeSantis issued another Executive Order related to the pandemic, Number 20-112, which implemented the State of Florida's Phase 1 plan for re-opening its

[10] All of the Governors Executive Orders referenced herein can be found at https://www.flgov.com/2020-executive-orders/. See also #2020-92 Executive Order amends Executive Order 20-91 re: Essential Services and Activities During COVID-19 Emergency

[11] https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce.

economy effective on May 4.[12] Executive Order 20-112 was modified by Executive Order 20-123 issued on May 14, providing for full Phase 1 reopening, pursuant to which amusement parks were called upon to submit re-opening plans with an expected reopening date endorsed by the local government in their jurisdiction.[13] On May 27, the Employer, by Interim Chief Executive Officer Marc Swanson, President Kyle Miller, and Vice President of Operations Brad Gilmour, presented its reopening plan before the Orange County Economic Recovery Task Force. Thereafter, on June 3, Governor DeSantis issued Executive Order 20-139, implementing the Florida Phase 2 plan for recovery from the pandemic.[14]

B. The Employer's reopening

The Employer reopened its parks on June 11, at a limited capacity of 30 to 35 percent. Additionally, as of the date of the hearing on June 24, the Sea World and Aquatica parks were open five days per week instead of their normal operations of seven days per week, and the Discovery Cove park was open four days per week instead of its normal operations of five days per week. Captain Kelley believes that each park has about 3,000 to 5,000 visitors each day.

The reopening of the park resulted in the recall of some security employees on or about June 7. The number of employees recalled on June 7 is not in the record. Kelley testified that after that recall of June 7, the Employer recalled additional security employees who had been on furlough. In selecting employees for recall to work on these occasions, the Employer continued to prefer employees who are capable of working multiple security posts.[15] Kelley further testified that the Employer needs at least 65 security employees in order to fully reopen, but it has faced difficulties reaching that level of staffing. As of June 23, there were a total of 32

[12] https://twitter.com/GovRonDeSantis/status/1268987811639840769; https://www.flgov.com/2020-executive-orders/. #2020-112 Executive Order re: Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery
[13] #2020-123 Executive Order re: Full Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery
[14] #2020-139 Executive Order re: Phase 2: Safe. Smart. Step-by-Step. Plan for Florida's Recovery
[15] The record does not reflect the skills necessary to work different posts.

security officers who the Employer considered active employees, some of whom had not yet actually returned to work, but who had been authorized to return to work. Another seven security officers who had been called to return to work were still classified as furloughed at that time because they were in the process of completing paperwork and had not yet been authorized to begin working. The parties stipulated, and I find, that these 39 security officers, including the ones in the onboarding process, are eligible to vote. In addition to those 39, there were three other security officers who the Employer had attempted to contact to ask them to return to work, but who the Employer had not been able to contact as of the date of the hearing. Another two security officers who had been contacted for the purposes of recall to work had informed the Employer that they could not return to work at that time for medical reasons. Five of the security officers who had worked before the furloughs have resigned from their jobs. According to Kelley, as of June 24, the Security Department was operating with about 50 percent of its pre-pandemic staff, and employees were being required to perform certain additional duties.[16] He further testified that the number of employees working in the Security Department at that time should be sufficient if the parks increased the level of operations to fifty percent of their normal capacity.

To the knowledge of Captain Kelley, the Employer has not determined when it will be able to fully reopen, or even reopen to 50 percent of capacity. However, Kelley testified that he has not been involved in reopening decisions or been privy to discussions about such matters until after those decisions have been made. Those decisions, as well as the number of employees to be recalled, are made by the Employer's President and Human Resources personnel.

[16] Kelley did not provide details regarding the additional duties that employees are being required to perform. By "additional duties" he may have meant that an individual security officer is now required to cover multiple posts.

C. Employer communications with furloughed employees regarding likelihood of recall

The Employer uses a computer communication system called SeaPort to communicate with its employees. Employees can sign into the system from their phones or a computer. The information in the system includes the employee's schedule, benefits and leave. Sea Port also provides access to additional information of interest to employees. Furloughed employees have access to the SeaPort system. When employees are separated from employment, their access to the system is terminated.

According to Captain Kelley, the Employer posted a sheet with frequently asked questions and answers (FAQs) about furlough status on SeaPort shortly after the March furloughs. The FAQs are addressed to all of the Employer's employees, not just security officers. The document states that the furloughs impacted the majority of the Employer's employees because most of the parks (like those in Orlando) are in cities that were then under some type of "stay at home" government order issued in response to the COVID-19 pandemic.[17] In the FAQs the Employer encouraged employees to check SeaPort regularly "for the latest updates regarding this temporary furlough, and future plans for reopening your local park." The FAQs further explained that employees being recalled from furlough would learn about the recall by phone or email; recalled employees should confirm their availability and start date; and once recalled employees returned to work they would be eligible to receive benefits. In the FAQ sheet the Employer also advised employees that they did not need to return

[17] The FAQs refer to a furlough notification to employees sent by mail. Kelley believed the Human Resources Department sent a furlough package to employees, but he was not aware of its contents.

their uniform or badge during the furlough, and should keep the "uniform and badge at home for future shifts once our parks reopen."[18]

With respect to tenure, or seniority, the FAQs states that furloughed employees will keep, and continue to accrue, their tenure with the company, and will continue to access the same benefits in which they were enrolled upon their return to work in the same capacity. Furloughed employees showed on the payroll system as being in inactive status, which allows them to opt to continue their pre-furlough healthcare insurance coverage while in furlough status under the Consolidated Omnibus Budget Reconciliation Act (COBRA). In the FAQs salaried employees were informed that they would receive their last paycheck on May 31, including pay for the period from March 16 to March 31, and hourly employees were informed that they would receive their last paycheck on April 17, including pay for the period from March 30 to April 12.

The FAQ sheet also refers to availability of paid time off (PTO) and "optional holiday time" during the "temporary closure." The sheet indicates that employees may review their PTO accruals and receive accrued PTO through SeaPort during the temporary closure or choose to save it for later. Optional holiday time balances could be reviewed but not redeemed during furlough, and are to be reactivated upon recall to work if an employee is recalled.

A second written communication regarding the furlough, an undated letter addressed to all employees (referred to as "ambassadors" by the Employer), not just Security Department employees, was offered in evidence by the Employer and admitted in evidence, even though no witness testified with personal knowledge that the letter was distributed to

[18] The uniform includes shirts, with an embroidered badge, shorts or pants, a belt, a hat, raingear and a jacket. The Employer maintains an inventory of uniforms, which are barcoded. Unlike furloughed employees, separated employees must return their uniforms and ID badges to the Employer.

the Security Department employees or other employees. Captain Kelley testified that he assumed that the letter had been distributed through the SeaPort system or by some other means, but he acknowledged that he had no personal knowledge about the distribution of the letter.[19] The letter states that while the Employer was working on reopening its parks, it wanted to keep employees updated on the "return-to-work process." It explains that the process would "happen in waves based on the projected capacity levels and staffing requirements." It adds that the Employer was "very much looking forward" to the return of all of its employees, and asked employees to inform the Employer if they were not interested in returning to work. According to the letter, when employees are contacted for recall they will be expected to undergo an onboarding procedure, but the onboarding process will not affect employee tenure in any way. Like the FAQ sheet, the letter specifies that recalled employees will retain their original date of hire for purposes of all service awards, benefits and similar matters. Finally, the letter states that it can't wait to "SEA" everyone again and asks employees who had not received a notification to return to work, for their "continued patience as the needs for specific functional work groups evolve."

During the second wave of furloughs in April, Captain Kelley was present at three or four meetings held with security employees at which the employees were informed that they were being furloughed. According to Kelley, at these meetings the employees were told by a vice president of the Employer that they were being placed on furlough for an undetermined amount of time.

In addition, Kelley testified that he has called furloughed security officers to make sure they are doing okay, and to give them an update. On those occasions, he has told the

[19] As noted above, the FAQ sheet refers to a mailed furlough notification. It is unclear whether or not the undated letter is that notification.

furloughed employees that the Employer has no idea when it will recall employees, and that it all depends on what the park does (i.e. the level of business) and the pandemic. Kelley did not name any particular furloughed security officer with whom he had such communications. Although requested to do so at the hearing, the Employer did not make available a higher ranking official than Captain Kelley, who could testify with direct knowledge about any plans that may have been regarding the extent of future operations, or about the absence of any such plans.

D. Past experience with layoffs and recalls, and future plans

The record does not reflect whether the Employer has had any past experience with layoffs/furloughs and/or recalls among its Security Department employees or its other employees. In addition, it appears that the Employer's decisions regarding future operations, including any potential increase in the volume of business and/or plans to recall furloughed employees, are dependent on the situation with the coronavirus pandemic, including both the extent of spread of the virus, and the extent of government orders and authorizations to operate. Although there may have been further recalls or other changes in the Employer's Security Department workforce since the hearing in this matter, there is no record evidence that dispositively establishes whether the Employer has specific plans as to whether or when it will increase its operations and/or recall any furloughed security officers other than the 39 who the parties agree are eligible to vote.[20] Captain Kelley testified that he was unaware of any such plans, that such decisions would be made by the Employer's president, and that he has not been asked about further recall selections.

[20] Of course, additional security officers may have been recalled since the hearing on June 24.

E. The current status of the pandemic in Florida and Orange County

On September 4, Governor DeSantis issued Executive Order 20-213, extending the state of emergency previously declared in response to the COVID-19 pandemic for an additional 60 days.[21] Therein, he noted that Florida remains in Phase 2 of its recovery, but that the impact of COVID-19 poses a continuing threat to the health, safety and welfare of the State of Florida and its residents. Likewise, on September 4, Orange County Mayor Jerry L. Demings extended the local state of emergency declaration in Orange County Executive Order 2020-37.[22]

According to the CDC, to date Florida has had 640,978 Covid-19 cases, and it has the second highest number of COVID-19 cases among the 50 states of the United States.[23] The State of Florida Department of Health reports the current statewide number of cases as 650,092 and the current number of deaths resulting from COVID-19 (residents and non-residents) at 12,067.[24] The CDC reports that as of September 7, the seven-day moving average number of new cases in Florida is 3,478,[25] and the John Hopkins School of Medicine Coronavirus Resource Center (Johns Hopkins) reports that as of September 6, the three-day moving average number of new cases daily in Florida was 2,686.[26] The seven day and three day daily averages have dropped from the peak number of Florida's daily new cases in mid-July, but remain significantly greater than the daily number of cases in Florida from mid-March through mid-June.[27] Johns Hopkins also reports that Florida's daily COVID-19 testing positivity rate is 13.32 percent at present. A daily positivity testing rate over five percent is considered too high by the

---

[21] #2020-213 Executive Order extends Executive Order 20-52-COVID-19.
[22] https://www.orangecountyfl.net/EmergencySafety/Coronavirus/ExecutiveOrders.aspx#.X1J5oMhJFPZ. EO 2020-37
[23] https://covid.cdc.gov/covid-data-tracker/#cases; All cited web pages citing COVID-19 statistics and information cited were last viewed on September 8, 2020.
[24] https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429
[25] https://covid.cdc.gov/covid-data-tracker/#trends
[26] https://coronavirus.jhu.edu/data/new-cases-50-states/florida.
[27] https://coronavirus.jhu.edu/data/new-cases-50-states/florida.

World Health Organization because it suggests there is actually a higher COVID-19 transmission rate than the rate being reported, since there are likely more people with coronavirus in the community who have not been tested yet.[28] According to Johns Hopkins, on September 5, Florida had 3,656 new coronavirus cases and 61 new deaths from COVID-19.[29]

To date, Orange County, Florida, where the Employer's parks are located, has had 37,152 confirmed COVID-19 cases, which is the 23rd highest number of cases among all 3,141 counties and county equivalents in the United States.[30] Orange County has also had 387 COVID-19 deaths.[31]

II. ANALYSIS

A. Board law on voting eligibility of laid off employees.

It is well established that temporarily laid off employees are eligible to vote in a representation election, and the voting eligibility of laid-off employees, i.e. whether the layoff is to be considered temporary, depends on whether objective factors support a reasonable expectation that the laid off employees will be recalled in the near future, as of the time of the payroll eligibility date. *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991); *Higgins, Inc.*, 111 NLRB 797, 799 (1955). The objective factors considered by the Board include the past experience of the employer, the employer's future plans, circumstances surrounding the layoff, and what employees were told as to the likelihood of recall. *Apex Paper Box*, supra; *Foam Fabricators*, 273 NLRB 511, 511-512 (1984). A party seeking to disenfranchise an employee from voting has the burden of establishing that the individual is, in fact, ineligible to vote. *Laneco Construction*

---

[28] https://coronavirus.jhu.edu/testing/testing-positivity; https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html.
[29] https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/florida/0.
[30] https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/florida/0; https://www.usgs.gov/faqs/how-many-counties-are-united-states?qt-news_science_products=0#qt-news_science_products.
[31] https://coronavirus.jhu.edu/data/state-timeline/new-deaths/florida/0;

Systems, 339 NLRB 1048 (2003), citing *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998) [quoting *Golden Fan Inn*, 281 NLRB 226, 230, fn. 24 (1986)]. Accordingly, the Employer has the burden of proving that the remaining furloughed employees are ineligible to vote in the instant case.

In *Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005), at the time of a layoff for lack of work, the employer informed an employee being laid off that once the Employer had additional hours of work available, it would schedule the employee to work again, but did not tell the employee a definite or approximate date of recall. The Board held that as of the payroll eligibility date, the employee had a reasonable expectation of recall and found that the employer's statement reasonably suggested that the employee would be recalled. Additionally, in finding the employee eligible to vote, the Board found it significant that the employer said nothing to indicate that the layoff was anything but temporary, and noted that there were no documents in the employee's personnel file indicating that he was terminated. The Board held that the lack of a specific date of future recall was not determinative, citing *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983), for the proposition that a "laid-off employee need only have a reasonable expectancy, not a definite date, of recall." 344 NLRB at 583. The *Pavilion at Crossing Pointe* Board noted that the layoff in question was the result of a temporary downturn in occupancy distinguished the facts therein from other situations such as a long-term downsizing of an employer's work force, the closing of a facility, or a facility that was almost destroyed by fire with no plans to rebuild (citations omitted). 344 NLRB at 583-584. Finally, the Board found the employer's maintenance of the laid off employee on its employee telephone list and payroll, and completion of the employee's timecards during the layoff, were actions that supported a finding that there was a reasonable expectation of recall. 344 NLRB at 584.

In *Foam Fabricators*, 273 NLRB 511, the employer laid off an employee several months after hiring him to work in a newly created department, after losing its major purchase order for that department and closing the department. The only notification to the employee was that the employer had experienced a noticeable reduction in the volume of new orders necessitating a reduction of work and it was impossible to forecast the duration of his layoff. The Board concluded that the employee did not have a reasonable expectancy to return to work because there was no way for the company to foresee that it would lose its major purchase order for the product the employee had been hired to produce, and there was also no way for the company to accurately predict whether or when it would again reopen the department. 273 NLRB at 512. The Board held that vague statements by the employer as to the possibility of the employee being rehired did not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment. Id. It noted that the employer's hope that it could reopen the department was never disclosed to the employee and was "only" informed that it could not forecast the duration of the layoff. Id.

Recently, the Board analyzed the eligibility of laid off employees to vote in the circumstances of the COVID-19 pandemic. In *NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel*, 370 NLRB No. 11 (August 31, 2020), the employer had indefinitely suspended its casino operations and laid off all of its employees, after the Governor of Nevada issued an emergency directive ordering the state's cessation of gaming operations due to COVID-19. The employer closed all 20 of its properties in the state, including the property where the petitioned-for employees worked. Although employees were advised in early March 2020 that they would likely be recalled, they received a termination letter that explained that it was unpredictable whether or when the employer would resume normal operations and terminated the employee's

employment effective May 1. Consistent with its practices for terminated employees, the employer paid out unused vacation, accrued vacation, and floater days to the terminated employees, required them to return their uniforms, cleaned out their lockers and allowed them to reclaim the contents, and helped them process unemployment claims. Although the employer reopened several of its properties, the facility where the petitioned-for employees worked remained closed at the time of the hearing, with no plan to reopen. 370 NLRB No. 11, slip op at 2. The Board held that in the absence of evidence of a past practice regarding layoffs, where laid off employees are given no estimate as to the duration of the layoff or any specific indication as to when, if at all, they will be recalled, no reasonable expectancy of recall exists. Id. The Board noted that when an employer has no reasonable way to predict when it will recall employees, and makes only vague statements as to the possibility of a recall, there is no basis for finding that any employees in the petitioned-for unit had a reasonable expectancy of recall. 370 NLRB No. 11, slip op. at 3, citing *Foam Fabricators*, 273 NLRB at 512; *Sol-Jack Co.*, 286 NLRB 1173, 1173-1174 (1987); and *S & G Concrete Co.*, 274 NLRB 895, 896 (1985); see also, S & G Concrete, 274 at 897 and fn. 13 and 14. In *Sol-Jack* there was a shrinking market for the employer's product, declining sales, a lack of overtime for the remaining employees, the employer financial condition was deteriorating, and the employer disavowed its intent to recall the laid off employee by the date of the election. 286 NLRB at 1174. In *S & G Concrete*, the employer had lost substantial business to competitors. 274 NLRB at 896-897.

B. Furloughed employees who have not been notified of their recall by the payroll eligibility date do not have a reasonable expectation of recall in the near future and are not eligible to vote.

As the Board found in *NP Texas*, the situation with the pandemic and any future increase in the Employer's business in this case is unpredictable. In addition, the record contains no

evidence regarding previous instances of layoffs by the Employer, as in *NP Texas*. However, there are also significant differences between the instant case and cases such as *NP Texas* and *Foam Fabricators*. As noted above, the Employer initially furloughed employees for what it anticipated would be the period from March 16 through the end of the month, but was later forced to remain closed until June 11, because of the pandemic and the stay-at-home order issued by the Governor. On June 11, the Employer reopened to the public, albeit, under decreased capacity, after recalling a portion of its security officers on June 7. As of June 23, a total of 32 security officers had been recalled and authorized to return to work, and another seven security officers had been called to return to work and were in the process of completing paperwork but had not yet been authorized to begin work. As noted, the parties have stipulated that these 39 security officers are eligible to vote, and I find that they are eligible to vote because they have been recalled or have a reasonable expectancy of recall in the near future. These 39 constitute slightly more than half of the Employer's pre-pandemic force of 75 security officers. Of the remaining 36 furloughed employees, five have resigned, leaving approximately 31 in furlough status who had not been notified of their recall at the time of the hearing. If by August 26, the payroll period eligibility date for the election directed herein (see infra), the Employer notified any of those remaining furloughed employees that they are being recalled, I find that those employees who have been so notified also have a reasonable expectancy of recall in the near future, even if they have not yet returned to work. Accordingly, consistently with the parties' stipulations, I find that any such employees are in temporary layoff status and are eligible to vote.

With respect to those of the approximately 31 security officers who remain furloughed and who were not notified by the Employer on or before August 26 that they are being recalled, I

find insufficient evidence to establish a reasonable expectancy of recall in the near future, and therefore any such employees are not eligible to vote. There is evidence that the Employer has distributed one or two written communications to employees concerning the furlough situation, the FAQs and/or the undated letter.[32] These documents were distributed before the Employer started recalling furloughed security officers on or about June 7. As noted, in those documents the Employer informed employees the closure was temporary and it hoped to reopen, that the recalls would be done in waves, and that it was looking forward to the return of all employees. In addition, contrary to the situation in the recent *Texas Station* case, the furloughed security officers of the Employer have not been informed that they were terminated. To the contrary, the Employer informed the furloughed employees that not only are the layoffs temporary, but that the employees will keep and continue to accrue tenure (i.e. seniority) during the furlough and will retain all benefits without changes upon their return to work. The furloughed security officers have also been instructed to keep their uniforms and identification in order to be ready to work in the future. The Employer has asked them to be patient if they have not received a notification to return to work and to inform the Employer if they are no longer interested in returning to work. Captain Kelley has also periodically checked on the furloughed employees to maintain contact with them, and has told them that he does not know when they can return to work, because it depends of the circumstances of the Employer's operations and the pandemic. All of these measures are designed to facilitate the eventual return to work of the furloughed employees if they are needed by the Employer.

The Employer asserts that it has been unable to make plans to increase its business or recall more security officers because the pandemic is unpredictable, although the Employer

[32] As noted above, there is no probative evidence concerning the distribution of the undated letter. However, the information in the letter does not differ substantially from the information in the FAQ sheet.

failed to present evidence from a witness who would know whether or not such plans exist. Nor did the Employer proffer any documentary evidence showing internal deliberations about its future plans or its claim that it has been unable to make future plans because of the pandemic.

Although certain of the above circumstances tend to establish a reasonable expectancy of recall of the remaining furloughed employees, and the Employer has taken a number of steps to ensure that it has an experienced security workforce ready for recall in case its business level supports the recall the remaining laid off security officers, the fact remains, as in *NP Texas*, that the Employer's only statements about recall to the furloughed employees have been vague as to when or whether they will be recalled, and there is no evidence to the contrary. The fluctuating pandemic conditions that are beyond the Employer's control make it essentially impossible for the Employer or the employees to predict when a further recall will be possible. In addition, the remaining furloughed employees have been laid off for almost six months now. In these circumstances, absent more specific information from the Employer as to whether or when they will be recalled, it cannot be said that the remaining furloughed employees who have not been recalled have a reasonable expectancy of recall in the near future. Rather, it appears that the Employer cannot predict when it will resume full operations or be able to recall the remaining employees in view of the pandemic.

As stated above, for these reasons I find that the employees in the petitioned-for unit who remain in furlough status and who were not notified on or before the payroll eligibility date that they will be recalled, have no reasonable expectation of recall in the near future, and are not eligible to vote.

C. A mail ballot election is warranted in view of the extraordinary circumstances of the COVID-19 pandemic.

The determination of the method of election is within the discretion of the Regional Director, so long as consideration is given to the relevant factors, and it is not an issue that is subject to litigation at a representation hearing. See *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions*, 108 NLRB 1366 (1954); see also, NLRB Casehandling Manual (Part Two), Representation Proceedings, Sections 11228, 11301.2, and 11301.4. The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.,* 357 NLRB 628 (2011). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998).

The Board has stated:

> [w]hen deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are 'scattered' because of their job duties over a wide geographic area; (2) where eligible voters are 'scattered' in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress.

San Diego Gas & Electric, 325 NLRB 1143, 1145 (1998). The Board further defined scattered "to apply in any situation where all employees cannot be present at the same place at the same time." *San Diego Gas & Electric*, 325 NLRB at 1145, fn. 7. A Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election will not be overturned "unless a clear abuse of discretion is shown." *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, 325 NLRB at 1144, fn. 4. Although the Board expects Regional Directors to exercise their discretion within the

guidelines outlined above, it recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, 325 NLRB at 1145. The Board has upheld Regional Directors' determinations that mail ballots were warranted based on the guidelines in *San Diego Gas & Electric* because of the extraordinary circumstances created by COVID-19.[33]

Given the above-described extraordinary circumstances caused by the spread of COVID-19 cases in the State of Florida and in Orange County, I find it appropriate to exercise my discretion to direct a mail ballot election, the details of which are provided below. Manual election procedures inherently require substantial interaction among voters, observers, party representatives, and the Board agent, all of whom must be present at the Employer's facility, and each interaction increases the risk to the participants. Party representatives, the parties' observers and the Board agent need to gather for a pre-election conference, including the check of the voter list, the showing of the ballot box being assembled, the parties' inspection of the voting area, and the Board agent's instructions to the observers. The Board agent and observers would share a voting area for the duration of the proposed nine-hour manual election. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. There is no guarantee that voters would arrive at even intervals as the Employer suggests.

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, for instance in the case of a challenged ballot where the Board agent, observers, and voter must be in reasonably close proximity to each other to make the challenge, obtain information from the challenged voter to be entered by the Board agent on the challenged ballot envelope stub, pass the challenged ballot envelope and

[33] *See e.g., Atlas Pacific Engineering Company,* 27-RC-258742, fn. 1 (May 8, 2020); see also *Touchpoint Support Services, LLC*, 07-RC-258867, fn. 1 (May 18, 2020) (unpublished order); *Pace Southeast Michigan*, 07-RC-257046, fn. 1 (August 7, 2020) (unpublished order).

ballot from the Board agent to the voter, and make sure the voter encloses the ballot in the envelope and seals the envelope before dropping it in the ballot box. See Casehandling Manual Section 11338.3. In this case there is a high likelihood that there will be challenged voters because the parties have stipulated that the security investigators may vote subject to challenge.

At the conclusion of the first voting session, the party representatives and/or observers would again have occasion to meet with the Board agent to observe the ballot box being sealed and to initial across the seal. Similarly, at the start of the second voting session, the same individuals would meet to observe that the ballot box was still sealed. These procedures would be repeated at the end of the second voting session and the start of the third voting session. Finally, the party representatives and/or observers would meet with the Board agent again at the conclusion of the third and final voting session to attempt to resolve any challenged ballots and for the count of ballots.

Furthermore, it appears that the unit employees work at three different locations and have varying work hours on three work shifts. Thus, although this would not be an obstacle to a manual election in the absence of the pandemic, these employees would have to travel across the Employer's property, perhaps encountering the public in their travels and thereby risking further spread of the virus, in order to vote. In addition, any furloughed employees who are eligible to vote because the Employer has notified them about their recall, but who are not yet back to work as of the date of the election, could be considered scattered because they would have to travel to get to the polls to vote. Also, a Board agent would have to travel from the Tampa, Florida area to the Employer's proposed polling place at its premises in Orlando, approximately 75 miles away,[34] and back, to conduct the proposed manual election.

[34] The distance from the Tampa Regional Office to the Employer's premises in Orlando is approximately 75 miles one way.

Although the Board has a strong general preference of conducting manual elections, it also has a long history of conducting elections by mail. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." *London Farm Dairy*, 323 NLRB 1057 (1997), and cases cited therein.

The Employer further contends that holding an election at this time impairs its ability to communicate with employees about the election. However, the Employer has had ample time to communicate with employees about the Petitioner and the election since the petition was filed almost six months ago. Moreover, nothing precludes the Employer from holding campaign meetings with unit employees who have been notified of their recall and are eligible to vote, and the Employer may use other means, such as telephone, email, video communications, and mail, to communicate with employees.

Although the Employer proposes a large polling place, and asserts that voters would arrive at even intervals in order to avoid crowding, the Employer has not explained how that could be guaranteed. Nor has the Employer sought to address its willingness to comply with many of the guidelines set forth in General Counsel's memorandum 20-10 on Suggested Manual Election Protocols, issued on July 6, after the hearing closed. In any event, as noted in GC 20-10, that memorandum is not binding on Regional Directors because the Board, not the General Counsel, has authority over representation cases. Among other measures, the memorandum proposes self-certification that individuals who will be in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting

---

https://www.google.com/maps/dir/201+E+Kennedy+Blvd,+Tampa,+FL/SeaWorld+Orlando,+7007+Sea+World+Dr,+Orlando,+FL+32821/@28.2480669,- Hillsborough County, Florida, which includes Tampa, has had 38,652 confirmed COVID-19 cases to date, 21st most among all counties in the United States, and 565 COVID-19 related deaths. https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429; https://coronavirus.jhu.edu/us-map. The Board agent's travel would involve some risk of the spread of COVID-19.

test results. The memorandum also requires the parties to provide information about the number of individuals exhibiting COVID-19 symptoms. However, the CDC's "current best estimate" is that 50 percent of COVID-19 transmission occurs while people are pre-symptomatic and 40 percent of people with COVID-19 are asymptomatic.[35] Asymptomatic persons will not likely have been tested for COVID-19 nor will they be identified as having the virus. Moreover, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay the resolution of the question concerning representation. A mail ballot election avoids these concerns.

In these circumstances a manual election would create an undue risk to the health and safety of all persons involved in the election. Accordingly, I direct a mail ballot election to be conducted. The election details are set forth below.

III. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction therein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. No collective-bargaining agreement covers the employees in the petitioned-for unit, and no other bar exists to conducting an election.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[35] "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control.html.

6. The following employees of the Employer, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   All full-time and regular part-time security officers and senior security officers employed by the Employer at its locations in Orlando, Florida; excluding assistant supervisors, captains, locksmiths, locksmiths II, security ambassadors, security dispatchers, sergeants and supervisors as defined by the Act.

   OTHERS PERMITTED TO VOTE: The parties have agreed that security investigators may vote in the election, but their ballots will be challenged because their eligibility has not been resolved. No decision has been made regarding whether the individuals in this classification or group are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union, Security, Police and Fire Professionals of America (SPFPA).

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. At 9:30 a.m. on September 22, 2020, ballots will be mailed to voters by the National Labor Relations Board, Region 12, from its office at 201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602-5824. Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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 September 30, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at (813) 228-2644 or (813) 228-2661 or

our national toll free line at 1-844-762-NLRB (1-844-762-6572). All ballots will be comingled and counted at the Region 12 office, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida on October 13, 2020, at 10:00 a.m. In order to be valid and counted, the returned ballots must be received in the Region 12 office in Tampa prior to the counting of the ballots.

Due to the above-described extraordinary circumstances of the Covid-19 pandemic, I further direct that the ballot count will take place remotely by videoconference on an electronic video platform to be determined by the undersigned Regional Director after consultation with the parties.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending on **August 26, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the patient dining supervisor classification 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(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 **September 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.nlrb.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.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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

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

D. Posting of Notices of Election

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

Failure to follow the posting requirements set forth above will be grounds for setting

aside the election if proper and timely objections are filed.

V. 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.nlrb.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: September 9, 2020.

David Cohen

David Cohen, Regional Director
National Labor Relations Board Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602-5824