UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOUSING WORKS INC.
Employer

and Case 29-RC-256430

RETAIL, WHOLESALE AND
DEPARTMENT STORE UNION, UFCW
Petitioner

DECISION ON REVIEW AND ORDER REMANDING

On February 18, 2020,[1] the Petitioner filed a petition to represent a unit of employees at the Employer's facilities in New York, New York. On March 3, the parties entered into a stipulated election agreement (the Agreement), which the Regional Director approved on March 4. Subsequently, the Employer requested to withdraw from the Agreement due to changes in its business resulting from the Coronavirus Disease 2019 (COVID-19) pandemic, but on July 9 the Regional Director issued an Order Denying Employer's Request to Withdraw From the Stipulated Election Agreement and Rescheduling Election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a request for review, along with a request to stay the election. On July 29, the Board issued an order staying the election.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons stated below, the Employer's request for review of the Regional Director's order is granted, as it raises substantial issues warranting review. Upon review, we

[1] All dates are in 2020 unless otherwise noted.

find that the Regional Director should have permitted the Employer to withdraw from the Agreement due to unusual and special circumstances related to the pandemic. Accordingly, we reverse the Regional Director and approve the Employer's request to withdraw from the Agreement.

The Employer provides services to homeless and low-income individuals who are living with HIV/AIDS or are at risk of infection. Those services include operating a number of thrift stores, a bookstore, and homeless shelters in the New York City area.

As set forth in the Agreement, the stipulated unit included of a range of enumerated professional and non-professional classifications working at some 36 listed locations—including 14 thrift shops—and excluded, inter alia, persons working at any location not specifically included. The Agreement further provided for a mail-ballot election, and the ballots were scheduled to be mailed on March 20. But on March 19 the Board announced that it was suspending all elections (including mail-ballot elections) through April 3 due to the COVID-19 pandemic, and the Region therefore issued an order suspending the election. On April 1, the Board announced that elections would resume beginning April 6. On April 5, the Employer submitted a request to withdraw from the Agreement, alleging that material terms underlying the Agreement had changed due to the current extraordinary circumstances caused by the pandemic. On April 28, the Regional Director issued a Notice to Show Cause to "seek evidence to determine whether material terms underlying the Agreement have changed and, if so, whether those changes impact the Agreement."

In its response to the Notice to Show Cause, the Employer provided a sworn attestation from its President, Matthew Bernardo, dated May 12, 2020. Bernardo described in detail changes in the Employer's business operations, after the Agreement's approval, as a result of the

COVID-19 pandemic. In addition, on July 7, the Employer provided a supplemental letter to the Region further detailing its significant operational changes and development of new business lines because of COVID-19.

Specifically, since the execution of the Agreement, the Employer has expanded its services to add five new work locations in New York City because of COVID-19. The Employer started operating a homeless shelter for residents infected with COVID-19, assumed health care operations at three additional COVID-19 homeless isolation shelters, and assumed the operation of a stabilization center to care for and provide life services to homeless New York City residents displaced because of COVID-19. The Employer has also begun to provide COVID-19 testing at multiple locations. These new operations have resulted in the Employer employing approximately 230 new employees in classifications covered by the Agreement but who are excluded from the unit. The Employer has also scaled back many of the operations formerly staffed by unit employees, including permanently closing three of its (included) thrift stores, repurposing its approach to operating its bookstore, temporarily closing the other thrift stores due to state orders, and reevaluating their long-term viability. Additionally, the Employer has permanently laid off or furloughed 196 employees and has stated that it plans to permanently lay off more employees. Most, if not all, of these changes were implemented beginning in late March.

On July 9, the Regional Director denied the Employer's request to withdraw from the Agreement, finding there were no "unusual or special circumstances" that warranted approving the request. The Regional Director's order directed that the ballots be mailed on July 31, more than four months after the Agreement was approved.

It is undisputed that regional directors have the authority to revoke approvals of stipulations for cause before an election. See *Super Valu Stores, Inc.*, 179 NLRB 469, 469 (1969). Since the onset of the COVID-19 pandemic, the Board has in several cases denied review of Regional Directors' decisions to revoke approval of stipulated election agreements due to the COVID-19 pandemic and the need to ensure the safety of parties and Board personnel. See, e.g., *NorthShore University HealthSystem d/b/a NorthShore Home and Hospice Services*, 13-RC-257168 (April 23, 2020) (not reported in Board volumes).

The Board has not previously been asked to pass on this related, but distinct, issue of whether operational changes occasioned by the COVID-19 pandemic should permit a party to withdraw from a stipulated election agreement.[2] Where a party requesting to withdraw from a stipulated election agreement makes an affirmative showing of unusual circumstances, the request to withdraw should be approved. *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 (1979). We find that the Employer has made such a showing here.

After the parties entered the Agreement, the Employer's business operations changed due to the COVID-19 pandemic. Those were not operational changes implemented in the normal course of business. Instead, the changes were driven by the pandemic, the full impact of which was not foreseen, or reasonably foreseeable, at the time that the parties entered into the Agreement on March 3.[3]

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[2] In prior cases involving a Regional Director's revocation of an election agreement, the revocation was prelude to the Regional Director determining whether, based on the extraordinary circumstance of the COVID-19 pandemic, the election—which the parties had previously stipulated would be conducted manually—should instead be conducted by mail ballot. In this case, the parties previously stipulated to a mail-ballot election, and the Employer does not raise the election method as an issue in its request for review.

[3] Compare *Sunnyvale*, supra at 1157 (unusual circumstances where "unforeseen" addition of intervenor whose relationship to petitioner had considerable potential to create confusion); with *Hampton Inn & Suites*, 331 NLRB 238, 238 (2000) (no unusual circumstances where "the

The changes cited by the Employer were also substantial: as described above, the Employer added new facilities, including a homeless shelter and stabilization center for New York City residents infected with or displaced due to COVID-19 and closed others; crucially, it has permanently closed at least three included thrift stores, thereby altering the scope of the stipulated unit. Further, these new facilities resulted in the Employer employing hundreds of employees in classifications covered by the Agreement but not included in the stipulated unit. Additionally, the closures have resulted in large-scale layoffs—many of them permanent—affecting nearly 200 employees, roughly one-third of the stipulated unit.[4]

This case is also unusual because of the significant passage of time between the approval of the Agreement, on March 4, and the July 31 rescheduled election date selected by the Regional Director. Normally, elections are held promptly after a stipulated election agreement is approved; in this case, the parties specified a date 16 days after the Agreement was approved.[5] If the election had been held as scheduled, employees would have voted before most, if not all, of the changes discussed herein had been implemented. The unit established by the Agreement would then have been consistent with the circumstances in existence when the Agreement was signed. As shown, that is not the case now, due to the pandemic and resulting significant, unanticipated, and unavoidable passage of time.

Given the nature and scope of the unforeseeable changes to its operations and their timing in relation to the date the parties entered into the Agreement, we find that the Employer has affirmatively shown the "convergence of complications which qualifies as an 'unusual

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[e]mployer, who was represented by counsel during this proceeding, was not deprived of its right to raise any unit issues when negotiating the election agreement").

[4] The petition states that there are 600 employees in the unit.

[5] See NLRB Casehandling Manual, Part 2, Representation Proceedings, Sec. 11302.1 ("An election should be held on the earliest date practicable consistent with the Board's rules.").

circumstance.'" *Sunnyvale*, supra at 1157. It was accordingly an abuse of discretion for the Regional Director to refuse the Employer's request to withdraw from the Agreement.[6] We therefore reverse the Regional Director's Order, grant the Employer's request to withdraw from the Agreement, and remand this case for further appropriate action.[7]

ORDER

The Regional Director's Order Denying Employer's Request to Withdraw From the Stipulated Election Agreement and Rescheduling Election is reversed, and the case is remanded to the Regional Director for further action consistent with this Decision.

JOHN F. RING, CHAIRMAN

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., October 15, 2020.

[6] The result here does not contradict our holding in *Hampton Inn & Suites*, supra, cited by the Regional Director. There, the Board held that the union's filing of a petition to represent a second unit did not constitute unusual circumstances that would allow the employer to withdraw from a stipulated election agreement; unlike here, there was no evidence that the employer had substantially changed its operations in response to unforeseeable conditions in a way that affected the scope of the stipulated unit. See also *NLRB v. MEMC Electronic Materials, Inc.*, 363 F.3d 705 (8th Cir. 2004) (no unusual circumstances where union filed a separate petition for a production unit after entering a stipulated election agreement for a maintenance unit). Additionally, *T&L Leasing*, 318 NLRB 324 (1995), and *Tekweld Solutions*, 361 NLRB 201 (2014), also cited by the Regional Director, are not controlling here as they did not involve requests to withdraw from stipulated election agreements.

[7] Our decision is limited to the question of whether the Employer should be permitted to withdraw from the Agreement based on its operational changes. We express no view on whether they render the petitioned-for and/or stipulated unit (minus the permanently closed locations) inappropriate. We also do not suggest that any operational change occasioned by COVID-19 will always constitute unusual circumstances permitting a party to withdraw from an election agreement; we find only that the particular facts of this case establish unusual circumstances.