

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

**REGION 32 REMINGTON LODGING &  
HOSPITALITY, LLC d/b/a COURTYARD BY  
MARRIOTT OAKLAND AIRPORT**

**Employer**

**and**

**Case 32-RC-259953**

**UNITE HERE LOCAL 2850**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Remington Lodging & Hospitality, LLC d/b/a Courtyard by Marriott Oakland Airport (Employer) operates a hotel in Oakland, California. Petitioner UNITE HERE Local 2850 (Petitioner or Union) seeks to represent a unit of approximately 11 classifications employed at the hotel.

The Employer does not oppose the unit sought by Petitioner, but maintains it currently only employs 15 employees in the petitioned-for classifications. It further maintains that it employs no employees in some of the classifications Petitioner seeks to include. In contrast, Petitioner maintains that the Employer employs approximately 50 or more employees in the petitioned-for classifications. While some of these petitioned-for employees are currently laid off, they have a reasonable expectancy of reemployment in the near future and should be able to vote in an election. The parties also disagree regarding the method of election, with Petitioner proposing a mail ballot election and the Employer seeking a manual election.<sup>1</sup>

A hearing officer of the National Labor Relations Board (Board) held a videoconference hearing in this matter on September 16 and 17, 2020.<sup>2</sup> Both parties filed briefs with me after the conclusion of the hearing. As explained below, based on the record, the briefs, and the relevant Board law, I find, in agreement with the Employer, that the laid off employees at issue do not have a reasonable expectancy of reemployment in the near future. Accordingly, they are ineligible to vote in the instant election. As the appropriateness of the unit sought is not at issue, I have directed the

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<sup>1</sup> On brief, the Employer identified as an issue the question of whether the Union has a sufficient showing of interest. However, this is an administrative matter and not an appropriate subject of litigation to be addressed in this Decision.

<sup>2</sup> All dates 2020 unless otherwise indicated.

petitioned-for election. Because of the current COVID-19 pandemic, I have directed the election take place by mail.

## **RECORD EVIDENCE**

### **A. BACKGROUND**

The Employer operates a 156-room hotel located adjacent to the Oakland Airport in Oakland, California (the hotel). Various entities within the Employer's corporate structure own and operate the hotel, which operates under Courtyard by Marriott branding.<sup>3</sup> The General Manager, the most senior manager employed at the hotel, reports to Remington's Vice-President of Operations. A front office manager, executive housekeeper, and chief engineer are also employed in management roles at the hotel.

Prior to the current pandemic approximately 50 employees were employed at the hotel in a variety of classifications responsible for cleaning the hotel's rooms, operating the front desk, maintaining the building, and operating the hotel's bistro, a takeout restaurant with a limited menu located in the lobby. Located adjacent to the Oakland airport, the hotel caters primarily to business travel associated with the airport and large corporate events, by area employers such as Oracle and Salesforce, that utilized a large percentage of the available accommodations in Oakland.

### **B. THE COVID-19 PANDEMIC AND FURLOUGHS**

In March, at the beginning of the COVID-19 pandemic, a combination of greatly reduced travel by the population as a whole, and steps taken to prevent the spread of the virus, had a profound impact on the Employer's business. The Governor of the State of California declared a state of emergency on March 4, and on March 19 issued California's "stay-at-home" order.<sup>4</sup> It is undisputed that occupancy plummeted over a very short period in early March.

On March 27, in response to ongoing low occupancy, Remington implemented temporary furloughs at the hotel, as part of a larger furlough of employees across its properties. All employees except four, the general manager, a front office manager, a floor supervisor, and one room attendant were furloughed. At that time, managers and supervisors made statements to employees that, hopefully, all employees would be

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<sup>3</sup> It is not necessary to detail all of the entities involved in the Employer's ownership and operation of the hotel. However, the case does involve two layers of the Employer's management: local and corporate. Where necessary in describing the events at issue "the hotel" refers to the local, "Remington" refers to the corporate.

<sup>4</sup> Executive Department State of California, *Proclamation of a State of Emergency* (March 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>; Executive Department State of California, *Executive Order N-33-20* (March 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

recalled as early as April. Two letters were distributed to employees, explaining that a furlough is “a company-initiated short-term temporary unpaid leave of absence,” that furloughed employees were eligible to continue receiving benefits as long as they continued to make their employee contributions, and that they could apply for unemployment. Regarding recall, one letter stated “[w]e are hopeful this will be a short-term impact and will begin to see a return to business and leisure travel. As that occurs, we plan to contact impacted associates with opportunities for hours and work.” The other stated “[i]t is our current intent to recall you to return to your current position not later than June 1, 2020.”

However, the pandemic continued with travel in general remaining minimal and business travel almost non-existent. The hotel experienced historically low occupancy in April, although the Employer did recall one employee, the night auditor. At approximately this time Remington management began conducting a weekly webcast or call, available to employees from all Remington’s properties, where information regarding the pandemic and Remington’s business plans were shared. Petitioner maintains that, during one of these calls in April or May, a representative of the Employer stated only 10 to 20 percent of employees would be permanently laid off.

### **C. PERMANENT LAY-OFFS**

In early May, the Employer converted the temporary furloughs to permanent layoffs. By two letters, the Employer notified each affected employee that they were being permanently laid off effective immediately. The first letter stated, in relevant part:

We regret to inform you that due to the COVID-19 pandemic, it has become necessary for the company to reduce its workforce. We had hoped that we would be able to return associates sooner, however the current state of the industry has impacted many areas of our hotels.

The effective date of your lay off will be May 7, 2020. Please continue to utilize the Remingtonhotels.com webpage to keep up with the most recent news for impacted associates. We will continue to utilize that platform to share all company updates.

If you have benefit coverage with Remington, you will receive a COBRA packet in the mail that shares your potential options.

The second letter stated, in its entirety:

Good Evening, we are sharing new information related to your employment status with the company. Unfortunately, the travel industry is experiencing a very slow recovery and the forecast for hotel demand in the coming weeks is much lower than we had originally expected. Therefore, it is necessary for us to lay off your position effective today, May 7, 2020.

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Attached is a letter confirming your lay off, along with other reference materials that may be helpful as you transition to other employment. If you still have personal property in your locker or work area, please contact your General Manager to schedule a time to stop by the hotel and pick up your belongings.

Some employees did return to work in May. On May 2, two additional room attendants were recalled, and on May 5 the chief engineer was recalled, just prior to the permanent layoff. Later in the month a front desk supervisor and the bistro supervisor were rehired, although to perform work different work than their previous positions.

Starting in June the hotel began operating as lodging for some health care workers under a state-sponsored program, and in the following months it began to have occasional guests. As of the date of the hearing, occupancy remains low, and the bistro, originally closed in March, remains closed. The Employer has periodically re-hired employees as some business has returned, including two additional room attendants and a front desk agent in July, another room attendant, a laundry attendant, a floor supervisor, and a building engineer in August, and a front desk supervisor in September. When these employees were rehired, they were not required to complete a new-hire application or new-hire paperwork, but instead were only required to update their W-4 and I-9 documentation. Many of the supervisors rehired between May and September have been rehired in non-supervisory positions.<sup>5</sup>

At the time of the hearing 19 individuals were employed at the hotel, the four managers and the 15 employees in the petitioned-for unit: eight room attendants, three front desk agents, a laundry attendant, an overnight agent/night auditor, a bistro supervisor, and an engineer III.<sup>6</sup> According to the General Manager he currently has no plans to re-hire any more employees as the future is unknown in light of the pandemic, because there is no expectation business will improve soon, and the holiday season has traditionally been a slow time for the hotel due to its reliance on business travel.<sup>7</sup>

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<sup>5</sup> At hearing the parties stipulated that Elva Castillo and Gladis Ascensio, previously employed as floor supervisors and identified as such in the Employer's position statement, are no longer employed as supervisors and are eligible to vote as room attendants. Similarly, two of the current front desk agents, Sherwin Edquid and Emoni Horton, were previously employed as front desk supervisors and are identified as such in the Employer's position statement, but are no longer performing supervisory duties and the parties stipulate these individuals are eligible to vote as front desk agents, an included classification. I accept these stipulations as supported by the record evidence. Finally, while the parties remain in dispute over the supervisory status of Overnight Agent/Night Auditor Maurice Bundy and Bistro Supervisor Maurico Rivera, they have agreed to have these individuals vote subject to challenge and address this issue in post-election proceedings if necessary.

<sup>6</sup> In its statement of position, the Employer identifies six of its current employees as "room attendants." In the record the title appears to be used interchangeably with "housekeeper," the term used by Petitioner in its petition. I have used the title room attendant in this Decision.

<sup>7</sup> The general manager made clear in his testimony that, if hiring, he prefers to rehire former employees, stating he did not want to train someone new.

No party asserts that a past practice regarding a group layoff exists that is applicable to this case.

**D. FUTURE PROJECTIONS**

Both the Employer and Petitioner introduced evidence regarding future projections for the Oakland airport and the hotel industry generally. The Employer introduced an American Hotel & Lodging Association report and a McKinsey study on the hospitality industry, while Petitioner introduced a hotel occupancy report from an industry tracking firm, a hotel industry projection report from a real estate services firm, and a report commissioned by the State of California regarding tourism projections, among other items. The record contains occupancy and average daily rate data as follows:

<b>Month</b>	<b>Range (Occupancy percentage)</b>	<b>Range (Average Daily Rate)</b>
June	26.28% - 51.28%	\$87.51 - \$109.96
July	28.21% - 53.85%	\$89.16 - \$123.00
August	25.64% - 62.18%	\$88.56 - \$109.86
September 1-15	42.95%- 60.26%	\$90.69 - \$105.56
September 16-30 (forecast)	49.00%- 54.00%	\$88.00 - \$98.00
October (forecast)	38.00%- 53.00%	\$87.72 - \$96.00
November (forecast)	38.00%- 51.00%	\$87.00 - \$93.00

The Employer maintains that meeting costs is a function of occupancy and the average daily rate exceeding a certain minimum. The average daily rate may fall below the break-even point because some rooms, such as those utilized by Marriott employees or those available from certain online booking sites, may be available below the break-even point.

In addition to projections of future business, Petitioner also placed two local ordinances in the record. City of Oakland Measure Z (Measure Z), a 2018 ballot measure addressing labor standards for hotel workers, and Oakland City Council

Ordinance 13607 (Oakland Hospitality Recall Ordinance), a local ordinance establishing a hospitality industry right to recall. Measure Z requires, for employees working at hotels with 50 or more guest rooms, an employer pay certain minimum wages, and payment of additional wages if the worker is required to clean more than 4,000 square feet of room space in an eight-hour shift. The Oakland Hospitality Recall Ordinance requires employers, who have laid off workers as a result of the COVID-19 pandemic, to rehire those workers as work returns.

COVID-19 continues to have a devastating impact on California, with 852,406 cases and 16,581 deaths as of October 12.<sup>8</sup> The California Department of Public Health monitors data related to COVID-19 for each of California's 58 counties, including Alameda County, where the hotel is located. What activities are allowed by the state, and what businesses may open and at what capacity, are linked to a rating assigned to the county on a four-level scale describing the presence of COVID-19 in the community; progressing from minimal (yellow) to moderate (orange) to substantial (red) to widespread (purple). On October 13, 2020, Alameda County announced that it had met the requirements to move from substantial (red) down to the moderate (orange) tier, but that it would not be allowing orange tier activities due to reopening in other parts of California and the number of cases rising in other parts of the United States. However, the county did make a specific exemption allowing hotels to resume booking for leisure travel.<sup>9</sup>

## **ANALYSIS**

The Board's well-established rule regarding voting eligibility and laid off employees is that where the interruption in employment is temporary, an employee is eligible to vote, but where the layoff is permanent the employee is not eligible. *NP Texas*, 370 NLRB No. 11, slip op. at 3 (2020), citing *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). When the question of temporary or permanent is in dispute, the Board looks to whether objective factors support a reasonable expectancy of recall in the near future. *Id.* These objective factors include the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall. *Id.*

The Board recently addressed the issue of whether a layoff was temporary or permanent, in the context of the COVID-19 pandemic, in *NP Texas*, supra. In that case the facility at issue was one of several Las Vegas, Nevada casinos operated by the employer. *Id.*, slip op. at 1. At the start of the pandemic, Nevada required all of the employer's casinos to cease operations and most of the employer's employees were laid off at that time, with the employer's managers and supervisors informing employees

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<sup>8</sup> <https://www.Covid19.CA.Gov>

<sup>9</sup> Alameda County Office of Emergency Services, *Alameda County Statement on Orange Tier* (October 13, 2020), <https://covid-19.acgov.org/covid19-assets/docs/press/press-release-2020.10.13.pdf>.

that it was likely they would be recalled in late April or early May pursuant to the employer's reduction-in-force policy. *Id.*

However, as the pandemic continued the casino did not reopen and employees were not recalled. *Id.* On May 1 the employer sent a letter to employees stating that it had developed a two-phase reopening plan, and that it would look at reopening the second phase facilities, including the facility at issue, once the employer "had a meaningful chance to assess how our business is performing in a post COVID-19 world." The letter continued that the employer was hopeful "Las Vegas will rebound swiftly and allow us to rehire many of our valued team members," but that each employee would receive a second letter addressing their employment status. For the employees at issue, that letter was a termination letter stating it was closing the casino effective May 1. *Id.*, slip op. at 2. Consistent with its practices and policies for terminated employees, the employer paid out vacation, required employees to return their uniforms, clean out their lockers; and assisted processing unemployment claims by taking the position that the employees had been permanently terminated. Full-time employees would have their medical, dental, and vision benefits extended through September 30, and the employees were paid through May 16. *Id.*

The Board, citing to *Foam Fabricators*, 273 NLRB 511, 512 (1984) and *Tomadur*, 196 NLRB 706, 707 (1972), held that, in the absence of a past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, no reasonable expectancy of recall exists. *Id.*, slip op. at 4. Further, "vague statements by the employer as to the 'chance' or 'possibility' of the employee being rehired do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment." *Id.*

Applying these principles to the casino employees at issue in *NP Texas*, the Board concluded that the evidence demonstrated the employer had no set timeframe regarding when, if ever, the casino would reopen. *Id.*, slip op. at 5. That uncertainty, combined with the May 1 letter stating the employees' employment had ended, made it such that no reasonable expectation of recall could exist at the time the petitioned-for election. *Id.* Further, this was true even where certain statements and signs by the employer suggested an eventual hope to reopen, recall, or rehire employees, such as the March or April statements by management that they hoped to recall employees, and the marquee outside the casino reading "Stay safe, we'll be back." *Id.*

The circumstances here are similar to those in *NP Texas*. Although the hotel has not ceased operation, it has greatly curtailed its normal operations due to the COVID-19 pandemic, and its future remains uncertain. Both here and in *NP Texas*, the COVID-19 pandemic resulted in a catastrophic impact on business and a layoff of all or almost all employees. Reflecting the unknown nature of the situation, in both cases managers and supervisors were optimistic and made statements regarding their hope that employees

would be recalled soon. However, the pandemic has not been a short-term event, and in both this case and *NP Texas* a short-term layoff was followed by a permanent layoff in May. In both cases the employer continued to strike an optimistic tone regarding recovery, but employees were notified in writing that their employment status had ended. Further, actions taken were consistent with the usual practice when an employees' employment ended. In *NP Texas* this included paying out vacation, requiring employees to return their uniforms, clean out their lockers, and provide COBRA information regarding employee insurance. In this case this involved cleaning out lockers, issuing final paychecks, and providing COBRA information.

Petitioner does not address *NP Texas* on brief, but from its arguments it can be surmised that it maintains the instant case differs because: (1) the data regarding the Employer's business and forecast for future business, and (2) the existence of Measure Z and the Oakland Hospitality Recall Ordinance. Before turning to those points, I note that I find the circumstances here are unique because of the impact of the COVID-19 pandemic. As such, arguments based on other expectation of recall cases involving entirely different circumstances, such as *MJM Studios of New York*, 336 NLRB 1255 (2001), cited by Petitioner, are attenuated and I do not find these comparisons probative when compared to the extremely similar circumstances presented by *NP Texas*.

Petitioner's first argument is that future hiring needs can be extrapolated from the data regarding the Employer's present and future business, as well as industry projections. In short, occupancy at the hotel has been trending up, third party observers of the hospitality sector predict this trend will continue, and data such as increased traffic at the Oakland airport and the Employer occupancy projections support this projection. The Employer responds to this argument by also pointing to third party sources and other data points and suggests that, while a recovery will likely continue, it may be so slow and incremental as to barely constitute a recovery.

I am not in a position to balance the relative merits of these arguments, nor can I ascertain whether the economy at large, and the hospitality industry specifically, will face a V-shaped recovery, a protracted recovery, or something else entirely. Much about the COVID-19 pandemic is unknown, and the economic impact of the next few months can only be an educated guess. It is correct that factors such as the circumstances surrounding the layoff are part of the Board's analysis – and here the pandemic that caused the layoff is clearly part of these circumstances – but I do not find it necessary or advisable to base an expectancy of recall analysis on an educated guess of future economic activity. Instead, the Board has stated in the absence of a past practice regarding layoffs, as here, where an employee is given “no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled,” no reasonable expectancy of reemployment in the near future exists. That is the case here and I do not find Petitioner's argument alters this analysis.



Petitioner's second argument is that the existence of Measure Z and the Oakland Hospitality Recall Ordinance create a reasonable expectancy of reemployment in the near future. Petitioner argues that, because compliance with Measure Z prevents the Employer from utilizing a reduced workforce when occupancy increases, and the Oakland Hospitality Recall Ordinance requires the Employer to rehire its former employees as need increases, the employees must return to work in the coming months. I find, by this argument, Petitioner essentially asks me to infer an "estimate as to the duration of the layoff" or a "specific indication" of when recall will occur from these local ordinances. As an initial matter, this inference runs afoul of the problem identified in the previous section, it presumes a continued recovery and continually increasing occupancy.<sup>10</sup> Second, even assuming the ordinances operate in the manner Petitioner argues, there is no indication in the Board's case law that an inference of this type, as compared to the actual words or actions of the employer, can fulfill this part of the Board's test. Again, I do not find this argument changes my finding that no reasonable expectation of reemployment in the near future exists.

It is undisputed that no past practice regarding layoffs exists. I find the record demonstrates the permanently laid off employees have been given no estimate as to the duration of their layoff, nor any specific indication as to when, if at all, they will be recalled, and as such no reasonable expectancy of recall exists. Accordingly, these employees are ineligible to vote in the election.

## **METHOD OF ELECTION**

### **A. THE COVID-19 PANDEMIC**

As addressed previously in this Decision, the COVID-19 pandemic has had a profound impact on daily life in the United States, and a severe economic impact. The Centers for Disease Control and Prevention (CDC), has determined "[t]he best way to prevent illness is to avoid being exposed to the virus," as there is currently no approved vaccine or antiviral treatment, and "[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19."<sup>11</sup> According to the CDC, "[t]he virus that causes COVID-19 is spreading very easily and sustainably between people" and "the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread."<sup>12</sup> Many of the measures

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<sup>10</sup> I additionally note the data relied on in part by Petitioner, the Employer's occupancy forecast, does not appear to show a significant increase in occupancy. While the lower end of the occupancy range has increased somewhat in August and September the numbers seem generally consistent. Petitioner has not articulated a specific reading of the data that reflects a significant increase in demand.

<sup>11</sup> CDC, *Protect Yourself* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Department of Homeland Security, *Predicting the Decay of SARS-CoV-2 in Airborne Particles* (July 16, 2020), <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet>.

<sup>12</sup> CDC, *How it Spreads* (updated October 5, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.<sup>13</sup>

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”<sup>14</sup> The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>15</sup> To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”<sup>16</sup>

## **B. BOARD’S STANDARD**

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

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<sup>13</sup> CDC, Protect Yourself (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>14</sup> CDC, Considerations for Election Polling Locations, (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”); see also California Office of the Governor of the State of California, *Executive Order N-64-20* (May 8, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”).

<sup>15</sup> CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated October 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

<sup>16</sup> CDC, *Running Errands* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, supra at 1145.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated "extraordinary circumstances" beyond the considerations described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols." *Memorandum GC 20-10*. In that memo the General Counsel reiterated that Regional Director's have the authority, delegated by the Board, to make "initial decisions about when, how, and in what manner all elections are conducted." The General Counsel further noted Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement. The memo concludes with additional notes regarding the assignment and travel of Board Agents.

### **C. DETERMINATION**

The Employer proposes holding a manual election in the conference room of the hotel with a single polling period due to the relatively small number of employees participating. The conference room has two doors that open to a hallway, which then in turn opens into the lobby of the hotel. Although the square footage of the conference room is not in the record, the Employer suggests it is large enough to contain the requirements of a manual election, a voting booth, ballot box, and tables for observers and the Board agent, separated by a six-foot distance. The Employer further proposes

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opening an unused guest room on the first floor to serve as a dedicated restroom for the board agent and observers participating in the election.

Regarding whether a manual election can be conducted safely, the Employer notes that its facility is regularly cleaned according to Marriott guidelines, which were created to follow the Centers for Disease Control and Prevention recommendations. Further, its employees are required to wear masks while indoors, as are guests consistent with California's masking requirement. Employees are given temperature checks three times per shift, and employees have received training on the importance of hand hygiene, the need to use the hand sanitizer stations in the hotel, and other best practices to avoid the spread of COVID-19.

The Employer acknowledges that one employee has had a confirmed case of COVID-19, and a guest reported a positive test after staying at the hotel. However, neither of these cases occurred within the 14 days prior to the hearing.

In making a determination whether to conduct a manual or mail ballot election it is necessary to balance the Board's preference for an in-person election and the public health concerns raised by the current pandemic. If this case did not arise during a pandemic, I would almost certainly not direct a mail ballot election, as the employees are not scattered over a large geographic area or over time by way of their schedules. I agree with the Employer that, given the relatively small number of voters, a manual election could likely be conducted here in one session, or two relatively short sessions. I am also mindful that the COVID-19 situation has improved in Alameda County recently, with the county passing the threshold where it could enter the orange phase of California's reopening plan.

However, as noted in the Alameda County statement of October 13, a large reason why the COVID-19 situation has improved recently is because of continued efforts by residents to adhere to Health Officer Orders and guidance. COVID-19 continues to be spread by person-to-person contact, and the risk associated with gatherings that generate this contact remains large. In regard to the Board specifically, manual election procedures continue to require substantial interaction, and that interaction generates risk. While here the Employer has made some effort to comply with GC 20-10 in a way that would minimize risk, it has not presented a comprehensive proposal, and even if it did so the Employer could not completely eliminate the risk associated with gathering voters for a manual election.

I am also concerned in the instant case because at the hotel are not only employees, but also guests. I find that the history of COVID-19 at the facility is instructive in making the correct choice regarding the method of election. I recognize that the guest that had COVID-19 had not stayed at the hotel in the 14 days prior to the hearing, but it illustrates a larger point, that the public is coming and going from the Employer's facility on a daily basis, even with the reduced occupancy currently

experienced by the hotel. It is impossible for the Employer to be fully aware of whether these guests, who are living at the hotel, have COVID-19 unless they choose to be tested and choose to notify the hotel. Unlike a workplace where the Employer can require all who enter a facility to have temperature checks, complete health questionnaires, and take other preventative measures, here the Employer can only collect information on a small number of those coming and going from the hotel. No amount of preventative measures or planning regarding a manual election changes that aspect of the Employer's business.

In directing a mail ballot election, I am also mindful of the position of local authorities. As noted, although cases have declined in Alameda County to the point where it could enter a new phase under California's re-opening plan, it has declined to do so because "with reopening across California and rising COVID-19 rates in other parts of the United States, Alameda County must continue to proceed slowly to avoid another surge in cases." I find directing a mail ballot election is consistent with the position of Alameda County regarding avoiding a surge in cases.

Ultimately, the employees remain working at the hotel because they perform essential services, and due to the nature of the work, where no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election, a mail ballot. While perhaps not the Board's preferred method of election, it is nonetheless the best choice for the extraordinary circumstances presented here.

## **CONCLUSIONS**

I have determined that the unit sought by Petitioner is appropriate, and I shall direct an election among the employees in the petitioned-for unit. Based on 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 affirmed.<sup>17</sup>
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>18</sup>

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<sup>17</sup> Petitioner objects on brief to the way certain documents showing occupancy statistics were included in the record at the end of the hearing, in response to Petitioner's subpoena, but without the opportunity to examine a witness in conjunction with those documents. To the extent the hearing officer was in error I do not find it impacted on the outcome of the case given my finding that I will not infer an expectation of recall from future occupancy data or forecasts.

<sup>18</sup> During the hearing the parties stipulated to the following commerce facts:

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3. The labor organization involved claims to represent certain employees of the Employer.

4. 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.

5. The following employees of the Employer constitute a voting group appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time room attendants, house persons, laundry workers, front desk agents, shuttle drivers, bartenders, cooks, servers, dishwashers, bistro attendants, engineering/maintenance employees employed by the Employer at its facility located at 350 Hegenberger Road in Oakland, California.

Excluded: All managers, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

### **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 **UNITE HERE LOCAL 2850**.

#### **A. Election Details**

I have determined that a mail ballot election will be held. As of the hearing date, Petitioner has not waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on Tuesday, November 3, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300N Oakland, CA 94612-5224. 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.

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Delaware corporation, with a place of business located in Oakland, California, is engaged in the business of hotel management. During the last twelve months, the Employer has purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California.

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Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Tuesday, November 10, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 32 office at (510) 637-3300, or Nicholas L. Tsiliacos (510) 671-3046, and request a ballot.

**All ballots will be commingled and counted at the Regional Office on Thursday, November 19, 2020.**<sup>19</sup> In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

## **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period **ending October 14, 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.

The Overnight Agent/Night Auditor and Bistro Supervisor classifications 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 they are included in, or excluded from, the bargaining unit, for the reasons described in this Decision. The eligibility or inclusion of these classifications will be resolved, if necessary, following the 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.

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<sup>19</sup> If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

### 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. The Employer must also include, in a separate section of that list, the same information for those individuals who, according to this Decision, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **October 26, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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

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

### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where



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notices to employees in the unit found appropriate are customarily posted. English, Spanish, and Mandarin/Chinese versions of the Notice of Election will be sent by the Region separately. 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.

### **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 10 business 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 must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. 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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be

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impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California this 22<sup>nd</sup> day of October 2020.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney  
Regional Director  
National Labor Relations Board  
Region 32  
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