

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 08**

DETREX CORPORATION

Employer

and

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO-CLC**

Petitioner

Case 08-RC-269611

DECISION AND DIRECTION OF ELECTION

Detrex Corporation (the “Employer”) is engaged in the manufacture of specialty chemicals at its Ashtabula, Ohio facility. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the “Petitioner”) seeks to represent all full-time and regular part-time production and maintenance employees, including leads, employed at the Employer’s Ashtabula facility. The parties stipulated, and I find, that the petitioned-for unit is appropriate for purposes of collective bargaining pursuant to Section 9(b) of the National Labor Relations Act (the “Act”). There are approximately 21 potential employees in the petitioned-for unit.¹

The sole issue presented in this proceeding relates to the mechanics of the election. The Employer argues that notwithstanding the ongoing Covid-19 pandemic, a manual election in this case is appropriate and can be conducted safely. On the other hand, Petitioner argues that the only appropriate method for voting in this matter is by mail.

A hearing officer of the Board held a videoconference hearing in this matter on December 29, 2020, at which the parties were given the opportunity to state their respective positions on the record. Additionally, the parties were afforded the opportunity to submit post-hearing briefs for my consideration; only the Employer availed itself of the opportunity. As explained below, due to the continued pandemic and the current local Covid-19-related data, along with the applicable Board law, I find that a mail ballot election is appropriate. Accordingly, I will direct a mail ballot election in this case, the details of which are described at the end of this Decision.

¹ The parties stipulated at hearing that there are 18 employees in the petitioned-for unit whose eligibility statuses are not in dispute. In addition, the parties stipulated that there are three additional lead employees—Michael Mason, Preston Sulin, and Dennis Varee— whose eligibility status is not agreed to and who will vote, should they choose to do so, subject to challenge.

I. FACTS

The Employer's facility is located in Ashtabula County, Ashtabula, Ohio. As of February 4, 2021², Ashtabula County has reported 4,874 confirmed Covid-19 cases, 77 of which have resulted in death.³ The daily number of confirmed cases in Ashtabula County has increased during the previous 14-day period, from 5 confirmed cases being reported on January 21, to 19 confirmed cases being reported on February 3, with a high of 34 cases reported on January 31.⁴

The Centers for Disease Control and Prevention (CDC), an agency of the federal government, reports that the current "7 Day total" positivity rate in Ashtabula County is 9.23 percent.⁵ However, using the CDC's sliding graph feature and isolating the most recently reported 14-day period from January 18 through February 1, daily data shows that the positivity rate in Ashtabula County is likely closer to 16 percent.⁶ That figure is supported by an additional Covid-19 data reporting source, Covid Act Now, which shows that the positivity rate in Ashtabula County is 15.9 percent.⁷ According to the CDC's data, the positivity rate in Ashtabula County has consistently remained above 5 percent since the beginning of November 2020.

Moreover, at the time of the hearing, one employee had recently tested positive for Covid-19, and five employees were in self-quarantine due to close contact with that employee. In its brief, the Employer stated that an additional employee tested positive at some point after the hearing. In total, since the beginning of the pandemic, four employees at the Ashtabula facility have tested positive for Covid-19. Further, at least two employees commute from outside of Ashtabula County, possibly from Youngstown, Ohio, and possibly a third employee travels from Pennsylvania. The State of Ohio is currently reporting a 7-day 9.73 percent statewide positivity rate⁸, and the Commonwealth of Pennsylvania, where at least one employee may be commuting from, is currently reporting a 7-day 10.61 percent positivity rate.⁹

II. POSITION OF THE PARTIES

The Employer urges me to direct a manual election. The Employer contends that as an essential business, it has remained open throughout the pandemic and the employees are well-versed in using personal protective equipment as part of their regular duties, and maintaining proper social distancing. In addition, the Employer notes that the location of the Employer's proposed election is a 5,000 square foot space with 30-foot-high ceilings and a large garage door that can be opened to provide for air flow throughout the space. Further, the Employer consents

² Hereinafter, all dates occurred in 2021, unless otherwise noted.

³ <https://bao.arcgis.com/covid-19/jhu/county/39007.html> (last visited February 4)

⁴ *Id.*

⁵ <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited February 4)

⁶ *Id.*

⁷ https://covidactnow.org/us/ohio-oh/county/ashtabula_county/?s=1575515 (last visited February 4). According to the Covid Act Now website, its county level testing metrics, including positive test rates, is sourced from official state and local dashboards, as well as the Centers for Medicare & Medicaid Services (CMS), which uses Health and Human Services-reported data. For more information please see: https://docs.google.com/presentation/d/1XmKCBWYZr9VQKFAWh_D7pkpGGM_oR9cPjj-UrNdMJQ/edit#slide=id.gb910f5dd03_1_0

⁸ <https://coronavirus.jhu.edu/region/us/ohio> (last visited February 4)

⁹ <https://coronavirus.jhu.edu/region/us/pennsylvania> (last visited February 4)

to complying with all recommendations outlined in General Counsel Memorandum 20-10. Thus, the Employer argues that it can ensure that a manual election is conducted safely.

Additionally, the Employer argues that Ashtabula County is not a hotspot for Covid-19. In support, the Employer argues that Ashtabula County is near the bottom of all Ohio counties in the daily cases per 100,000 reported and positivity rate, and in the middle with respect to infection rate. Accordingly, the Employer argues that the Employer's facility is not located in an area of the State that is heavily afflicted with the virus.

Lastly, the Employer contends that the Union's challenge to a manual election in this matter is inconsistent, as one of the recent Covid-19-positive employees attended a union meeting shortly before testing positive. According to the Employer, masks were not worn at the union meeting and attendees were not socially distanced. Thus, the Employer argues that it is inconsistent for the Union to hold meetings that violate Ohio Covid-19 restrictions, while also advocating for a mail-ballot election.

The Petitioner, as mentioned above, seeks a mail-ballot election due to the ongoing pandemic. According to the Petitioner, a mail-ballot election is the safest and fairest method for conducting this election. In support of its position, the Petitioner cites to several pieces of data showing that Ashtabula County's positivity rate, as well as the State of Ohio, are both above the five percent threshold used by the Board. Further, the Petitioner references several sources indicating that Ashtabula County had elevated levels of the virus in its wastewater, and also that hospitalizations had risen in November and December 2020. Lastly, the Petitioner denies the allegations raised by the Employer related to the in-person union meeting, including that the meeting violated the State of Ohio's Covid-19 protocols.

III. APPLICABLE LEGAL FRAMEWORK

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure 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 & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). This discretion includes the ability to direct a mail ballot election in "extraordinary circumstances," and the Board recognizes that the ongoing pandemic is indeed extraordinary. *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020)

In *Aspirus Keweenaw*, the Board "set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of Covid-19." *Aspirus Keweenaw*, 370 NLRB slip op. at 4-5. In doing so, the Board reaffirmed its long-standing policy favoring manual elections, and outlined six situations that suggest the propriety of using mail ballots to conduct elections due to the Covid-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail ballot election:

(1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...(2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...(3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...(4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

Aspirus Keweenaw, 370 NLRB slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” *Id.* at 6, fn. 25.

IV. ANALYSIS

After careful examination of the parties’ positions and the applicable case law, including the Board’s recent guidelines in *Aspirus Keweenaw*, I have determined that a mail ballot election is appropriate based on the current local Covid-19-related data.

As addressed above, one metric cited by the Board that suggests the propriety of using mail ballots to conduct an election during this pandemic is an increase in the 14-day trend in the number of new confirmed cases. The 14-day trend for the number of confirmed cases in Ashtabula, Ohio—where the proposed manual election will be held and where the petitioned-for employees work—is currently increasing. An additional metric cited by the Board that suggests the propriety of directing a mail ballot election during this pandemic is a 14-day positivity rate of 5 percent or higher in the county where the involved facility is located. In the instant case, the positivity rate in Ashtabula County has been higher than 5 percent since the beginning of November 2020. Currently, the positivity rate is 9.23 percent according to the CDC. In fact, the Employer acknowledges in its post-hearing brief that the positivity rate in the county is above the Board’s 5 percent threshold. Moreover, while the Employer argues that there is no current Covid-19 outbreak at the facility, the fact that 4 employees have tested positive is significant. Two of those employees tested positive recently and 5 employees were quarantining at the time of the hearing. For the above reasons, I find that a mail ballot election is appropriate.¹⁰

V. CONCLUSIONS

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

¹⁰ I am not persuaded by the Employer’s argument that the Union’s actions in holding an in-person union meeting are relevant to my determination on whether to direct a mail ballot election. Whether the Union held an in-person meeting with petitioned-for employees, and whether that meeting led to Covid-19-positive employees, is immaterial to my determination on whether a mail ballot election is appropriate. Instead, my focus, as directed by the Board in *Aspirus Keweenaw*, is whether county-level data meets certain thresholds to warrant directing a mail ballot election.

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.¹¹

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and claims to represent certain employees of the Employer.

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.

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 production and maintenance employees, including leads, employed by the Employer at its facility located at 1100 State Road, Ashtabula, Ohio; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether "lead" employees Michael Mason, Preston Sulin, and Dennis Varee are included in, or excluded from, the bargaining unit, and these individuals may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

VI. 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 the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

¹¹ The parties stipulated, and I find, that the Employer is a Michigan corporation, with a facility located at 1100 State Road, Ashtabula, Ohio, the sole facility involved herein, and is engaged in the manufacture of specialty chemicals. During the previous twelve months, a representative period, the Employer purchased and received at its Ashtabula, Ohio facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of Ohio.

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 from the office of the National Labor Relations Board, Region 8, at **4:45 p.m. on Tuesday, February 16, 2021.**¹² 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.

The returned ballots must be received by the Region 8 office by **Friday, March 12, 2021.** All ballots will be comingled and counted via videoconference at **2:00 p.m. on Thursday, March 18, 2021.** In order to be valid and counted, the returned ballots must be received by the Region 8 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Tuesday, February 23, 2021,** or otherwise require a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Region 8 Office at (216) 303-7374 or (216) 522-3715.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending on January 30, 2021, 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 the following "lead" employees whose eligibility remains unresolved as specified above and in the Notice of Election: Michael Mason, Preston Sulin, and Dennis Varee.

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.

¹² The Union has agreed to waive the 10-day requirement for the voter list.

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 **February 9, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at 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 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. 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 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: February 5, 2021.



Jennifer A. Hadsall, Acting Regional Director
National Labor Relations Board
Region 8