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**Aspirus Keweenaw and Michigan Nurses Association,
Petitioner.** Case 18–RC–263185

November 9, 2020

DECISION ON REVIEW AND ORDER REMANDING

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL,
AND MCFERRAN

Since the onset of the Covid-19 pandemic, the National Labor Relations Board has endeavored to maintain continuity of operations in order to carry out its statutory mission under these unprecedented circumstances. This has included conducting representation elections, where the Board has permitted the expanded use of mail-ballot elections in a series of unpublished orders.

While the Covid-19 pandemic indisputably warrants mail-ballot elections in appropriate circumstances, the Board’s existing precedent strongly favors manual elections. Manual elections permit in-person supervision of the election, promote employee participation, and serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so. These reasons remain valid today and continue to support the Board’s longstanding preference for manual elections. Additionally, although Regional Directors are afforded discretion in determining whether a manual or mail-ballot election is appropriate, that discretion must be exercised within the guidelines and parameters established by the Board, which include its preference for manual elections. Accordingly, as in the past, we issue this published order to set forth the guidelines and parameters applicable to determining the propriety of a mail-ballot election under the current circumstances.

On August 17, 2020,¹ the Regional Director issued a Decision and Direction of Election directing a mail-ballot election due to “the extraordinary circumstances presented by the COVID-19 pandemic at this time.” Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, the Employer filed a timely request for review of the Regional Director’s Decision and Direction of Election, contending that the Regional Director abused her discretion in directing a mail-ballot election; the Employer also requested a stay of the election. On August 25, the Board issued an order staying the election and granting the request for review, as it

¹ All dates 2020 unless otherwise noted.

raised substantial issues warranting review.² Thereafter, the Employer filed a brief on review.

Having carefully considered the entire record in this proceeding, including the brief on review, we take this opportunity to provide guidelines regarding the circumstances that would normally suggest the propriety of a mail-ballot election in light of the Covid-19 pandemic. As discussed in more detail below, although we reaffirm the Board’s longstanding policy favoring manual elections, we outline six situations that suggest the propriety of mail ballots due to the Covid-19 pandemic. When one or more of these situations is present, a Regional Director should consider directing a mail-ballot election. Because this guidance should be applied to present conditions to determine the propriety of a mail-ballot election in this case, we remand this case to the Regional Director.

Background

The Employer (the Hospital) operates an acute-care hospital in Laurium, Michigan, located in Houghton County, which is in Michigan’s Upper Peninsula. On July 17, the Petitioner filed a petition to represent a unit of approximately 69 registered nurses at the Hospital. In lieu of a hearing, and because the only disputed issue was whether the election should be conducted manually or via mail ballot,³ the parties signed a “stipulated record” on August 3. Subsequently, the Employer submitted a statement of position requesting a manual election; the Petitioner did not submit a statement of position.

The Employer argued that a manual election was warranted based on the Board’s preference for manual elections, the relatively low level of Covid-19 cases in Houghton County and the Upper Peninsula, the safety measures it had implemented at its facility (as well as its willingness to comply with the suggested manual election protocols set forth in General Counsel Memorandum 20-10 (GC Memo 20-10)), the fact that Region 18 was no longer under mandatory telework, and the absence of “lockdown orders.”

The Regional Director, however, concluded that a mail-ballot election was warranted based on the extraordinary circumstances presented by the Covid-19 pandemic. First, she cited the current state of the pandemic in Wisconsin (the location of the Board Agent who would conduct the election and through which s/he would travel) and Michigan, with particular attention to Houghton County and the Upper Peninsula. She also commented that the state of the pandemic was especially concerning

² 370 NLRB No. 13 (2020).

³ Election arrangements, including election type, are non-litigable matters. See Board’s Rules and Regulations Sec. 102.66(g)(1).

given that the Upper Peninsula is a rural area with limited hospital capacity.

Next, the Regional Director relied on Federal, State, and local guidance, including the U.S. Centers for Disease Control and Prevention's (CDC) recommendation to limit in-person contact "as much as possible" and Michigan Governor Gretchen Whitmer's executive orders recommending that any work capable of being done remotely in the Upper Peninsula be performed remotely. Further, the Regional Director observed that a manual election would require travel by the Board agent and party representatives, in contrast to CDC advice to avoid travel and Wisconsin Department of Health Services' recommendation that "Wisconsinites cancel or postpone all travel, including travel within the state."

The Regional Director also considered the fact that this election involves healthcare workers at an acute-care hospital with greater exposure to Covid-19 who could amplify outbreaks should they become ill. And finally, the Regional Director cited "uncertainties" a mail-ballot election would avoid, including the possibility of asymptomatic or presymptomatic individuals participating in the election and exposing others to the virus; the possibility that voters would be deprived of their vote in a manual election should they test positive for, display symptoms of, or have to be quarantined due to Covid-19; and the uncertainty over when the foregoing guidance and circumstances might change. The Regional Director acknowledged the Employer's willingness to abide by GC Memo 20-10 and the other protective measures the Employer had offered to take, but nevertheless concluded that safety concerns favored a mail-ballot election, given that such an election would not subject Board Agents, parties, voters, or the public to any additional risk.⁴

Discussion

The Historical Use of Mail Ballots in Representation Elections

"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 by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). Within the guidelines it has established, the Board in turn has delegated to the Regional Directors discretion over the arrangements for an election, including whether it should be conducted by manual balloting or mail ballot. *Halliburton Services*,

⁴ The Regional Director also noted that there was no contention that the addresses of eligible voters were not known or up to date, that there was no evidence that mail service in Wisconsin and Michigan has been disrupted, and that the Region had already successfully conducted a number of mail-ballot elections during the pandemic.

265 NLRB 1154, 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958).

The Board's current principles governing manual versus mail-ballot determinations are as follows.⁵ First, the Board has a long and proud tradition of conducting elections by manual balloting. *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1057 (1997). Given the value of having a Board agent present at the election—a circumstance which is not possible in mail-ballot elections—the Board's longstanding policy is that representation elections should, as a general rule, be conducted manually, either at the employees' workplace or some other appropriate location. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Under this policy, the applicable presumption favors a manual, not mail-ballot, election. *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998).

The Board's recent experience further supports this longstanding policy. Internal Board statistics reflect that from October 1, 2019 through March 14, 2020, the Board conducted 508 manual elections in which 85.2 percent of eligible voters cast a ballot; during that same period, the Board conducted 48 mail-ballot elections in which only 55.0 percent of eligible voters cast a ballot. Similarly, from March 15 through September 30, the Board conducted 46 manual elections in which voter turnout was 92.1 percent and 432 mail-ballot elections in which turnout was 72.4 percent. Although these statistics reflect that the mail-ballot participation rate has increased during the Covid-19 pandemic, they also reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate (30% lower before March 15, 20% lower since). Thus, in addition to the value of having a Board agent present, manual elections tend to promote greater participation in the election process.⁶

Second, a Regional Director's discretion in this area "is not unfettered and is to be exercised within certain guidelines." *San Diego Gas*, supra at 1144. Under *San Diego Gas*, at least three situations

⁵ The Board is open to addressing the normal criteria for mail-balloting in a future appropriate proceeding. We note, however, that by their nature mail-ballot determinations that rely on circumstances created by the Covid-19 pandemic do not involve the normal criteria for mail-balloting.

⁶ The statistics set forth above are derived from data furnished by the General Counsel's Division of Operations Management.

To be clear, although the generally lower voter turnout in mail-ballot elections supports the Board's historic preference for manual elections, it is not a relevant consideration in assessing whether a Regional Director has abused his or her discretion by directing a mail-ballot election in a specific case. We also recognize that the very circumstances that ordinarily support conducting a mail-ballot election may affect voter participation.

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.

Id. at 1145 (internal footnote omitted). If any of these situations exist, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. Id. Although a Regional Director may consider other relevant factors in determining election type, “in the absence of extraordinary circumstances,” Regional Directors are normally expected to exercise discretion within the foregoing guidelines. Id.

Third, within the parameters established by the Board, a Regional Director has discretion to conduct an election by mail ballot, given that the Board’s election standards must be adapted to the “peculiar conditions” of each case. *National Van Lines*, supra at 1346. A Regional Director’s determination to conduct an election manually or by mail is subject to an abuse-of-discretion standard. Id.; *San Diego Gas*, supra at 1144 fn. 4.; see also *Nouveau Elevator*, supra at 471 (upholding a Regional Director’s direction of a manual election, even though the Board itself might have directed a mail-ballot election, absent a showing that the direction constituted an abuse of discretion).

The Impact of the Covid-19 Pandemic on Representation Elections

Prior to the Covid-19 pandemic, the Board had no occasion to further define the “extraordinary circumstances” referenced in *San Diego Gas*, let alone to articulate guidelines for Regional Directors to use in determining election method under such circumstances. The onset of the pandemic, however, requires the Board to provide such guidance.

Like the pandemic itself, the Board’s approach to conducting elections during this time has evolved. Following the closure of Board headquarters on March 12 and three regional offices on March 15 due to possible Covid-19 exposure, on March 16 the Board instituted mandatory Agency-wide telework until at least April 1.⁷ Then, on March 19, the Board suspended all representation elections, including mail-ballot elections, through and including April 3 “[d]ue to the extraordinary circum-

stances related to” the pandemic, deeming this action necessary to ensure the health and safety of Board employees as well as members of the public involved in the election process.⁸ This suspension also provided the General Counsel with the opportunity to fully review the logistics of the election procedures in light of the unprecedented situation.

On April 1, the Board announced that the General Counsel had advised that appropriate measures were available to permit elections to resume in a safe and effective manner “which will be determined by the Regional Directors” and that, accordingly, elections could resume on April 6.⁹ Similarly, on April 17, the Board issued an operational status update advising the public that representation petitions were being processed and elections conducted by regional offices. It also stated that:

Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.¹⁰

Following the resumption of elections on April 6, Regional Directors began directing an unprecedented number of mail-ballot elections. In virtually all such determinations, the Regional Directors reasoned that Covid-19 presented “extraordinary circumstances” within the meaning of *San Diego Gas*. The Board’s first opportunity pass on such a determination was *Atlas Pacific Engineering*, 27–RC–258742, 2020 WL 2374506 (May 8, 2020) (not reported in Board volumes). In denying review of the Regional Director’s mail-ballot determination in that case, the Board stated it was relying on “the extraordinary Federal, State, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework.”¹¹ Board orders denying review of mail-ballot

⁸ See <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>.

⁹ See <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>.

¹⁰ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

¹¹ The Board also remarked that the Regional Director’s principal concern in directing a mail-ballot election appeared to be the safety of Agency personnel and that it shared these concerns, although it also noted that internal Agency considerations had not previously been found to constitute extraordinary circumstances that would warrant

⁷ See <https://www.nlr.gov/news-outreach/news-story/nlr-announces-agency-wide-telework-until-april-1>.

determinations in subsequent weeks contained the same language.¹²

By mid-June, most Regions (as well as Board headquarters) were no longer on mandatory telework, although most Agency employees continued teleworking on a permissive basis. Anticipating that it would soon be possible to more frequently conduct manual elections safely in at least some localities, on July 6, the General Counsel issued GC Memo 20-10, which set forth suggested protocols for conducting manual elections safely and efficiently. That memo reiterated that Regional Directors have the authority

to make initial decisions about when, how, and in what manner all elections are conducted. They have made, and will continue to 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 memo also recognized that the pandemic was evolving, that circumstances accordingly could change, and that ultimately “the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director.”

Given these changes to the Agency’s operating status and the guidance available to Regional Directors, the Board’s approach to requests for review of mail-ballot determinations also evolved. Thus, in cases where the Board denied review of mail-ballot determinations made after the expiration of mandatory telework and the issuance of GC Memo 20-10, the Board stated that it was relying “on the extraordinary circumstances resulting from the Covid-19 pandemic” and would “continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth” in GC Memo 20-10.¹³ Up to the present, this has remained the Board’s approach in those cases in

conducting a mail-ballot election outside of the guidelines specified in *San Diego Gas*.

¹² In addition, in responding to arguments that mail-ballot determinations could result in disenfranchisement of voters if ballots were delayed in the mail, the Board indicated in several cases that “such concerns could be relevant to whether a mail-ballot election is appropriate,” but declined to find an abuse of discretion on such a basis. See, e.g., *Touchpoint Support Services, LLC*, 07–RC–258867, 2020 WL 2527091 (May 18, 2020) (not reported in Board volumes).

¹³ See, e.g., *Brink’s Global Services USA, Inc.*, 29–RC–260969, 2020 WL 4004648 (July 14, 2020) (not reported in Board volumes).

which it has denied review of mail-ballot determinations.¹⁴

As the foregoing account illustrates, the guidance available to Regional Directors as to whether to direct a mail-ballot election has, to date, been limited and relatively general. Such an approach was warranted while the emergency situation unfolded. But the pandemic has continued to evolve since July, with parts of the country reopening at various stages and some employees physically returning to work. Moreover, guidance from public health agencies has also evolved as more is learned about how the virus spreads. Consistent with the foregoing, there are many circumstances in which a mail-ballot is unquestionably the safest means of conducting an election, and we are mindful that there remain new outbreaks and resurgences in areas seeking to reopen. There are also now circumstances, however, in which manual election can be safely conducted. We note that some Regional Directors have gradually resumed directing (or approving stipulations providing for) manual elections.¹⁵ Further, the Board’s experience in this area now encompasses over two dozen cases in which parties have sought review of mail-ballot determinations based on a wide range of potentially relevant considerations.

Use of Mail Ballots in Representation Elections During the Covid-19 Pandemic

In view of changing pandemic conditions and the Board’s increasing experience in this area, as well as its longstanding preference for manual elections, we have decided to 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. Specifically, we find that, when deciding whether to conduct a mail-ballot election or a mixed manual-mail ballot election due to the Covid-19 pandemic, Regional Directors should take into consideration the following situations. If one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.

- (1) The Agency office tasked with conducting the election is operating under “mandatory telework” status

As described above, the regional offices (including the subregional and resident offices) tasked with conducting the Board’s representation elections previously were on mandatory telework due to the Covid-19 pandemic. The goal of mandating telework was to reduce interpersonal

¹⁴ See, e.g., *Savage Services Corp.*, 21–RD–264617, 2020 WL 5878267 (Oct. 1, 2020) (not reported in Board volumes).

¹⁵ Internal Board statistics indicate that, as of October 17, approximately 50 manual elections have been held since March 15.

contact that might lead to the spread of the virus. Accordingly, it was appropriate for Regional Directors to direct mail-ballot elections where the Agency offices at issue were in mandatory-telework status, and—as noted above—the Board denied review of Regional Directors’ mail-ballot determinations in those cases.¹⁶

Since mid-June, the Agency’s offices have all been on permissive, rather than mandatory, telework. The presence and severity of Covid-19 in any given geographical area can surge or resurge relatively rapidly, however, and even where infection rates are otherwise low, the presence of a single potentially-infected individual at a Regional Office may require mandatory telework while the employee is tested and the office is cleaned.¹⁷ Thus, it remains possible that a given office could again be placed on mandatory telework in response to the pandemic. Should that eventuality come to pass, the same considerations that warranted denying review in previous cases in which the office responsible for conducting the election was on mandatory telework will once again suggest the propriety of a mail-ballot election.

(2) Either the 14-day trend in the number 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

In many cases, including this one, Regional Directors have considered both broad and narrow trends regarding Covid-19 cases—such as nationwide, state, and/or county-level statistics—in directing mail-ballot elections.¹⁸ Similarly, Regional Directors have relied on statistics with varying degrees of temporal proximity to the date of an election.¹⁹ Although statistical data regarding infec-

tion rates may often have some bearing on the appropriateness of a mail-ballot election, the type, scope, and age of that data may limit a given statistical measure’s relevance. For example, given the significant variations in the prevalence of Covid-19 from locality to locality, broad trends like statewide statistics may be of questionable use in assessing the safety of conducting a manual election at a specific facility, at least when more localized data is available. Likewise, the total number of cases in a given locality since the pandemic’s onset may offer only limited insight into current conditions in that locality.

To best assess whether safety needs dictate a mail-ballot election, Regional Directors should generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted. Thus, a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.²⁰

Regarding the 14-day trend in the number of new confirmed Covid-19 cases, the President’s “Guidelines for Opening Up America Again” uses this measure to evaluate whether pandemic conditions in an area are improving, deteriorating, or remaining stable.²¹ County-level 14-day-trend information is also readily accessible online.²²

Regarding the 14-day “percent positive” or “positivity rate,” this statistic is based on the number of positive and total tests in the locality, as opposed to raw numbers of confirmed cases, and therefore is at least suggestive of transmission rates in the locality among people who have not been tested.²³ The World Health Organization (WHO) adopted this measure in its May 12 guidelines for “reopening”—and also articulated the 5 percent

¹⁶ See, e.g., *Atlas Pacific Engineering*, supra; *Touchpoint Support Services, LLC*, supra.

¹⁷ See, e.g., <https://www.nlr.gov/news-outreach/news-story/temporary-closure-of-two-regional-offices-due-to-possible-covid-19>; <https://www.nlr.gov/news-outreach/news-story/updates-on-nlr-office-closures>.

¹⁸ See, e.g., *TDS Metrocom, LLC*, 18–RC–260318, 2020 WL 3451872 (June 23, 2020) (not reported in Board volumes) (Decision and Direction of Election dated May 29, 2020) (Regional Director cited recent increase in cases and deaths at the state level); *PACE Southeast Michigan*, 07–RC–257046, 2020 WL 4584253 (Aug. 7, 2020) (not reported in Board volumes) (Decision, Order Severing Cases and Direction of Election dated July 17, 2020) (Regional Director relied on national, state, and local trends); *Daylight Transport, LLC*, 31–RC–262633, 2020 WL 4901763 (Aug. 19, 2020) (not reported in Board volumes) (Decision and Direction of Election dated Aug. 12, 2020) (Regional Director cited an “ongoing surge” in confirmed cases at the county level).

¹⁹ See, e.g., *Perdue Foods, LLC, d/b/a Draper Valley Farms*, 370 NLRB No. 20 (2020) (citing longer-term data) (Decision and Direction of Election dated Aug. 31, 2020); *ClarkWestern Dietrich Building Systems, LLC*, 01–RC–264014, 2020 WL 5576848 (Sept. 16, 2020)

(not reported in Board volumes) (relying on total rates of infection) (Decision and Direction of Election dated Aug. 31, 2020); *SunSteel, LLC*, 19–RC–261739, 2020 WL 4501460 (Aug. 4, 2020) (not reported in Board volumes) (relying on statewide increase in cases in the month before the decision) (Decision and Direction of Election dated July 21, 2020); *PACE Southeast Michigan*, supra (citing increase in cases in the tri-county area where the employer’s facilities are located during the 14-day period before the decision).

²⁰ For either statistic, the 14-day period should be measured from the date of the Regional Director’s determination, or as close to that date as available data allow. We acknowledge that some flexibility may be required on this count, particularly with respect to the positivity rate.

²¹ See generally <https://www.whitehouse.gov/openingamerica/>.

²² County-level data should be accessed at <https://coronavirus.jhu.edu/us-map>.

²³ See <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html>.

threshold—and Johns Hopkins University tracks this measure on a state-by-state level.²⁴ At least some states also track this measure on a county-level basis.²⁵

If either of these measures is met, this suggests that the virus is spreading in that locality, and the interest in public safety will ordinarily indicate the propriety of a mail-ballot election.

Regarding both of the above measures, we recognize there may be some instances where the use of either broader regional data or narrower intracounty data is more relevant to a particular case.²⁶ For example, if some or all of the work force comes from areas outside the county, it may be appropriate to consider data from those other areas; conversely, where the county covers a large geographic area or has widely varying Covid-19 rates, city-level or other intracounty data may be more relevant than countywide data. Although we have identified county-level data as our preferred metric, we do not mandate that Regional Directors use any particular geographic level of data where better, more applicable, data exists, and we encourage the Regional Directors to cite with explanation the best available geographic statistical measure in making their determinations.

The question of whether geographically broader or narrower statistical measures provide a better basis for making a mail-ballot determination will necessarily be determined on the specific facts of each case. Regional Directors should include in their decision the most recent available county-level data regarding the 14-day trend. The decision should also include the most recent county-level testing positivity rate, where available or, if not available, the most recent state-level testing positivity rate. A Regional Director's direction of a mail-ballot election based on these measures, consistent with the principles stated above, will be sustained, unless a party contending that the Regional Director should have relied on a different geographic measure presented that data to the Regional Director as part of its submission regarding election arrangements and establishes that the Regional Director's reliance on the geographic measures cited above was an abuse of discretion.²⁷

²⁴ See <https://coronavirus.jhu.edu/testing/testing-positivity>.

²⁵ See, e.g., Georgia Department of Public Health County Indicator Report (10/19/2020), available at https://countyindicatorreport.s3.amazonaws.com/county_indicator_report_probable_10192020.html#laboratory-tests. County-level positivity rate data should be obtained from official state or local government sources. In cases where county-level data are not available, Regional Directors should look to state-level data for the state in which the facility is located. See fn. 25.

²⁶ Broader regional data or narrower intracounty data should be from official state or local government sources.

²⁷ Consistent with Sec. 102.66(g) of the Board's Rules and Regulations, the parties are entitled to present their position "on the type,

If, based on the specific facts of a given case, a Regional Director directs a mail-ballot election based on a different geographic measure than the county-level (or, where applicable, state-level) data discussed above, the decision should articulate the basis for relying on that measure. The Regional Director's direction of a mail-ballot election based on that measure will be sustained unless a party contending that the Regional Director should have relied on a different geographic measure presented that data to the Regional Director as part of its submission regarding election arrangements and establishes that its geographic measure is a more reliable measure of the health and safety risks associated with a manual election in the circumstances of that case.²⁸

(3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size

In order to prevent the spread of the virus, many state and local governments have enacted mandatory restrictions on gatherings. Regional Directors have relied on limitations in gathering size in directing mail-ballot elections.²⁹ Conducting a manual election that cannot reasonably be conducted without violating mandatory restrictions on gathering size would be at cross-purposes with these restrictions. We therefore conclude that it will not be an abuse of discretion if Regional Directors direct mail-ballot elections in such situations.³⁰ However, non-mandatory guidance, such as the guidance on which the Regional Director in this case relied, will not, by itself, be a sufficient reason to direct a mail-ballot election.³¹

date(s), time(s), and location(s) of the election and the eligibility period" but the hearing officer "shall not permit litigation of those issues."

²⁸ For the purposes of this decision, we need not address whether other statistics, or different measures (such as the 7-day, as opposed to 14-day, positivity rate) may also be relevant.

²⁹ See, e.g., *ClarkWestern Dietrich Building Systems, LLC*, supra (Regional Director expressed doubt that a manual election could comply with Connecticut's limitation on indoor gatherings to 25 people).

³⁰ In evaluating this factor, Regional Directors should be mindful that release schedules are an established procedure for managing the progress of voters. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Secs. 11330-11330.5. Such procedures should be considered, where appropriate, as a means of alleviating Covid-19 concerns related to maximum gathering-size restrictions.

³¹ Apart from restrictions on gathering size, many states and localities have issued health orders related to travel, including quarantine requirements. The Regional Director relied on such orders here. Board agents traveling to conduct an election are Federal Government employees performing an essential service, however. Accordingly, Regional Directors should not direct a mail-ballot election based on travel-related provisions that are not applicable to travel for that purpose. We leave open the question of how health orders purporting to restrict travel by Federal employees on essential government business should bear on a mail-ballot determination.

- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols

As discussed previously, GC Memo 20-10 sets forth suggested protocols for conducting manual elections safely and efficiently, while also expressly retaining Regional Directors' discretion to make case-by-case determinations regarding the method of election. Although the Employer in this case stated that it would abide by GC Memo 20-10's suggested protocols, in other cases that have come before the Board, employers have been unwilling to make such an unqualified commitment.³² These protocols are designed to ensure manual elections can be conducted safely and efficiently, and the memo indicates that each of its specific protocols must be included in an election agreement or decision and direction of election providing for a manual election. We shall therefore require employers who are requesting manual elections to unequivocally commit to abide by all of GC Memo 20-10's suggested protocols. An employer's failure or refusal to commit to abide by all of the suggested protocols will therefore ordinarily support the direction of a mail-ballot election.³³

In some cases, employers have proposed safety protocols beyond those specified in GC Memo 20-10. Laudable though such proposals may be, it is also crucial that the Board retain its status as the neutral facilitator of representation elections, which involves, among other things, avoiding the impression that a party, rather than the Board, has control over the election process.³⁴ Therefore, Regional Directors should be careful not to approve manual election arrangements, whether or not related to the GC Memo 20-10 protocols, that would create the impression that any party controls employee access to the Board's election processes or that would otherwise inter-

³² See, e.g., *Sea World of Florida, LLC*, 12-RC-257917, 2020 WL 5658311 (Sept. 22, 2020) (Request for Review dated Sept. 14, 2020) (denying review where employer did not actually assert that it would comply with GC Memo 20-10, but rather asserted that it would implement every "practicable" consideration in that memo and would work with the Region and the petitioner regarding any additional concerns).

³³ In keeping with this guideline, an employer requesting a manual election should provide specific details, in its initial submission to the Regional Director, about how it will comply with GC Memo 20-10's protocols. If, notwithstanding the employer's stated willingness to abide by all protocols, the Regional Director deems the employer's initial submission to be lacking in sufficient specificity, the Regional Director should offer the employer an opportunity to promptly cure any such defects. Although Regional Directors are not required to engage in extensive discussions regarding, or any negotiations over, election arrangements, they should not reject manual-election proposals based solely on technical, superficial, or inadvertent noncompliance with the GC Memo 20-10 protocols when minimal additional communication could cure the noncompliance.

³⁴ Cf. *Alco Iron & Metal Co.*, 269 NLRB 590, 591-592 (1984); *Monroe Mfg. Co.*, 200 NLRB 62, 74 (1972).

ferre with employee free choice or the fairness of the election. Indeed, if an employer insists on procedures that could reasonably give the impression that it, rather than the Board, controls access to the Agency's election processes, it will not be an abuse of discretion for a Regional Director to direct a mail-ballot election.

- (5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status

A current Covid-19 outbreak at the facility where the manual election would occur poses potential health and safety issues for everyone who participates in the election. GC Memo 20-10 requires that employers certify, between 48 and 24 hours before a manual election, how many individuals present in the facility within the preceding 14 days have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). These certifications, however, take place after the direction of a manual election and only shortly before the election itself. The presence of Covid-19 at the employer's facility is also directly relevant to whether a manual election should be directed in the first place. Accordingly, for the duration of the pandemic, we require that in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for Covid-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). The Employer must also supplement its initial submission and certify any changes to the facility's Covid-19 status after a manual election is directed, up to the day of the election itself. Based on these certifications, the determination that there is a Covid-19 outbreak at the employer's facility or the employer's failure or refusal to provide the required certifications will ordinarily indicate the propriety of a mail-ballot election.³⁵

- (6) Other similarly compelling considerations

While the Board has herein enumerated five situations that will ordinarily indicate the propriety of a mail-ballot election, these situations are not exclusive or exhaustive. If a Regional Director directs a mail-ballot election based on other circumstances related to the Covid-19 pandemic, the Board will consider at that time whether those

³⁵ In this regard, however, the Regional Director should not rely solely on the hypothetical possibility that an employee might become infected in the period between the direction of election and the election itself.

circumstances similarly warrant an exception to its preference for manual elections.

In sum, we find that if any of the five specific situations set forth above, or other similarly compelling considerations, are present, Regional Directors should consider directing a mail-ballot election. To be sure, Regional Directors must continue to exercise their discretion in this area; the foregoing situations do not require a mail-ballot election. Instead, we conclude only that a Regional Director who does direct a mail-ballot election under the foregoing situations will not have abused his or her discretion.

*Application of the Board's Covid-19
Mail-Ballot Guidelines*

We find it appropriate to apply the above framework in this case. In this connection, even assuming that this framework establishes a “new” standard rather than merely clarifying an existing one, “[t]he Board’s usual practice is to apply all new policies and standards retroactively ‘to all pending cases in whatever stage.’” *Cristal USA, Inc.*, 368 NLRB No. 141, slip op. at 2 (2019) (quoting *SNE Enterprises*, 344 NLRB 673, 673 (2005)). In representation cases such as this one, the Board’s established presumption is to apply a new rule retroactively unless doing so would work a manifest injustice. *Id.* In determining whether retroactive application will work a manifest injustice, the Board typically considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *SNE Enterprises*, supra.

Applying those considerations, nothing in the guidance provided in this decision conflicts with *San Diego Gas* and its progeny, nor has the Board previously detailed, with any great specificity, what factors Regional Directors should consider in deciding whether to direct mail-ballot elections in the context of Covid-19—which is itself a new and unprecedented challenge. Indeed, the Board has not heretofore issued any published decision addressing this issue. In that sense, therefore, this is an unsettled area of the law, and applying the framework set forth herein in this and other pending cases would not upset the parties’ reliance on preexisting law. See *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180–181 (3d Cir. 2002) (holding that new standard in unsettled area was properly applied retroactively). Further, providing guidance in this context will help accomplish the Act’s purposes by ensuring that parties are not unnecessarily deprived of a manual election—again, the Board’s preferred method of election—and it “will also serve the purposes of the Act by bringing immediate clarity and uniformity to this area of the law.” *NBC Universal Me-*

dia LLC, 369 NLRB No. 134, slip op. at 7 (2020). Finally, there is no basis for finding that applying the framework in this case will work any injustice.

We will therefore remand this case to the Regional Director to apply the above framework in the first instance, taking into account how circumstances have changed since her decision issued. Because the election has been stayed, the Regional Director will need to reschedule it. Further, more than two months have passed since the Regional Director’s decision. Due to the rapidly evolving nature of the pandemic, and the likelihood that the relevant circumstances have changed in the interim, it is appropriate for the Regional Director to reassess her mail-ballot determination under current circumstances. Accordingly, we remand this case to the Regional Director in order to reconsider her determination based on the guidelines set forth above and in light of any changed circumstances.

ORDER

The Decision and Direction of Election is reversed, and the case is remanded to the Regional Director for further action consistent with this Decision.³⁶

Dated, Washington, D.C. November 9, 2020

John F. Ring, Chairman

Marvin E. Kaplan Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in the result.

Every day we witness again how the Covid-19 pandemic has disrupted American life. More than 200,000 lives lost (and counting). Hospitals crowded. Schools empty. Workers at home—or at risk in the workplace. In this environment, public institutions and government agencies—including the National Labor Relations Board—must rethink some of the basic assumptions underlying the way they operate.

The Board traditionally has assumed that union-representation elections typically should be conducted in

³⁶ The Board’s August 25, 2020 stay is lifted as of today’s order.

person. But, in the face of the pandemic, tradition has had to give way. The Board's Regional Directors have increasingly ordered that representation elections be conducted by mail—and the Board has usually permitted them to do so.¹ Today's decision is intended to guide the Regional Directors in exercising their discretion to order mail-ballot elections. As things now stand, mail elections likely will remain common (but not universal) until the pandemic ends.

My colleagues deserve credit for recognizing the reality of a public health emergency. But, however well-intentioned, the majority's decision does not rise to the demands of the occasion. Indeed, at a time when the Covid-19 virus is spreading uncontrollably throughout much of the country, we should stop treating mail-ballot elections as deviations that must be justified by Regional Directors case by case. Mail-ballot elections have allowed the Board to process representation election petitions safely and effectively, virtually eliminating the public health risks inherent in manual elections. Accordingly, at least until the pandemic is over, the Board should adopt a default presumption that mail-ballot elections are appropriate, unless in a Regional Director's reasoned judgment the circumstances of a particular case require in-person voting to achieve the goals of the National Labor Relations Act: free, fair, prompt, and accurate representation elections.

Further, even when we can see an end to the current crisis, it is time for the Board to ask itself—and the public—whether it is finally time to move beyond manual elections as the default method. The Board should consider expanding and normalizing other ways to conduct representation elections on a permanent basis, including mail, telephone, and electronic voting. Other Federal agencies, such as the Federal Labor Relations Authority and the National Mediation Board, have long since adopted those election methods—it is time for the Board to bring its elections into the modern age.

¹ To recount those changes, as the gravity of the pandemic became clear in March of this year, the Board briefly suspended all representation elections—leaving workers, many of whom were experiencing acute anxiety about the safety and security of their jobs, no means to effectuate their statutory right to seek representation. On April 1, the Board resumed processing representation petitions and, explicitly recognizing the extraordinary circumstances we are in, granted the Board's Regional Directors the authority to determine when, where, and how representation elections would be conducted. Soon thereafter, Regional Directors resumed conducting elections and about ninety percent of the time conducted those elections via mail ballot. In August, the majority granted the employers' requests for review of the decision to conduct the election by mail ballot in this case and others.

I.

In *San Diego Gas & Electric*, the Board expanded the circumstances under which Regional Directors could properly order and conduct mail ballot elections. 325 NLRB 1143 (1998). The Board reiterated its traditional preference for manual elections, explained when a mail-ballot election typically would be appropriate, and left open the possibility of unspecified, “extraordinary circumstances” that also would justify a mail ballot. The Covid-19 pandemic is obviously an extraordinary circumstance. The usual rules and presumptions do not apply. And so—entirely consistent with *San Diego Gas & Electric*—it is time to stop framing the question of whether a mail-ballot election is appropriate in terms of making an exception to the manual-ballot rule. The pandemic *is* the exception.

Certainly, as an agency of the United States Government, the Board must do its part to maximize public health and safety in carrying out its mission. There has been consistent, overwhelming agreement among public health experts that unnecessary gatherings should be avoided when there are viable alternatives. A manual election, even with good-faith efforts to maintain safety, is an unnecessary gathering so long as there is a viable alternative—which a mail-ballot election typically will be.

Thus, until the pandemic ends, the strong presumption should be that a mail-ballot election is appropriate. To be sure, there may be rare cases where the circumstances make a manual or mixed manual election the only viable option—e.g., if mail service in an area is suspended or disrupted, or voting employees lack a fixed local address—or there may be other circumstances when a Regional Director determines that an in-person election is absolutely necessary to achieve the goals of the Act. But a clear instruction to Regional Directors that the default assumption is to conduct elections via mail ballot during the pandemic provides a bright-line rule that would be efficient to administer, would further public health policy, and would be easy for employees, employers, and the public to understand.

In contrast, trying to determine on a place-by-place, case-by-case basis whether a mail-ballot election is appropriate is administratively burdensome, invites litigation, and could increase health risks. The Board's expertise (and the General Counsel's) is labor law, not epidemiology or public health policy. We should be extremely reluctant then to substitute our judgment for that of real experts by attempting to craft our own standards for determining whether it is safe to hold a manual election. This is especially so when any standards the Board establishes may be quickly overtaken by events. A pandemic

does not stand still.² The majority effectively concedes that the factors it discusses cannot account for the uncertainties that may lie ahead. That is why the better course is to foster as much certainty and predictability as possible in representation elections by making mail-balloting the default, not the exception, until the pandemic ends, as determined by recognized public health authorities.³

II.

But the Board should look beyond the pandemic, too. We should recognize how the world has changed since the Board first began conducting elections in 1935 and how the pandemic has accelerated those changes. Telework, for example, was already an increasingly common feature of the American economy. Now many more businesses have their employees working remotely and say they may continue this practice permanently.⁴ The pandemic has compelled many institutions to fundamentally rethink how they do business. The time is right for the Board to ask whether our “decisions and rules are serving their statutory purposes.”⁵

In particular the Board would be well served to re-evaluate both its preference for manual elections and its related antipathy toward absentee voting. The Board’s preference for holding manual elections at an employer’s facility made sense historically: that was where the voters were, and in-person voting was the standard for pub-

lic elections.⁶ But many workers now work at home or away from any central employer facility, and public elections are increasingly conducted by mail.

Notably, the Board has taken at least a partial step toward making it easier for more employees to vote in a Board election. In a recent notice of proposed rulemaking, the Board proposed modifying the Board’s election procedures to provide absentee ballots to employees who would otherwise be on military leave.⁷ But, of course, there are other legitimate reasons why employees might be unable to vote in person—and the Board should consider what steps it might to take let those employees have a voice.⁸

The Board must also make sure that ballots reflect employee free choice. Holding an election at the workplace—a space controlled by the employer, one of the parties to the election—inherently risks jeopardizing employee free choice in a way that a neutral site does not.⁹ In addition, conducting an election in the workplace while preserving the laboratory conditions needed to protect free choice is not easy, as the many, many NLRB decisions addressing election objections illustrate.¹⁰ Although mail-balloting may present challenges of its own, it also eliminates these categories of objectionable conduct.

Notably, other Federal labor agencies have modernized their election procedures accordingly. Voting in elections held by the National Mediation Board, which conducts union-representation elections in the airline and railroad industries, is done primarily by phone or electronically, with great success.¹¹ Similarly, in 2010, the Federal Labor Relations Authority changed its voting rules to allow electronic voting. Now, its Regional Di-

² The majority recently revised the NLRB’s election procedures to state that Regional Directors should not ordinarily schedule an election until 20 business days after the direction of election, or at least 4 weeks later. The most recent explosion in Covid-19 cases demonstrates the inadequacies in forecasting the health and safety situation in any particular locale 4 weeks into the future. According to data from the *Washington Post*, in the United States on October 1, there were 46,309 reported cases and the number of new cases in most locations was steady or declining. On October 28th, there were 80,125 cases and newly reported cases were increasing almost 22% a week. While this was a (hopefully) uniquely dramatic spike in the spread of the virus, it is a vivid illustration of the limits of our ability to forecast infections rates.

³ The majority argues that manual elections are preferred because of the presence of a Board agent to supervise voting. But the Board has been administering mail ballot elections since 1935 and significant issues of impropriety have never materialized. See *San Diego Gas & Electric*, supra, 325 NLRB at 1146. The majority cites higher turnout in manual elections versus mail ballot elections. But the voter turnout for elections held during the pandemic was 92.1% for the 46 manual and 72.4% for the 432 mail-ballot elections. The significant increase in mail-ballot participation rates during the pandemic versus pre-pandemic suggests that there may be room to improve employee participation in mail ballot elections as they become normalized and the Board gains more experience administering mail ballot elections.

⁴ See, e.g., Katherine Guyot and Isabella V. Sawhill, *Telecommuting Will Likely Continue Long After the Pandemic*, April 2020, Brookings Institute, <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/>.

⁵ *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB 289, 289 (2010) (Notice and Invitation to File Briefs).

⁶ See NLRB Representation Casehandling Manual § 11302.2.

⁷ 85 Fed.Reg. 45553 (July 29, 2020). I was not a member of the Board then.

⁸ See, e.g., *Versail Mfg.*, 212 NLRB 592, 593 (1974) (discussing voter eligibility when employee is on assignment out of town during election.)

⁹ See, e.g., *2 Sisters Food Group*, 357 NLRB 1816, 1819–1821 (2011), overruled on other grounds by *The Boeing Co.*, 365 NLRB No. 154 (2017); *Performance Measurements*, 148 NLRB 1657, 1659 (1964) (continued presence of employer’s president where employees must pass to vote).

¹⁰ See, e.g., *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001) (delays in opening polls); *Butera Finer Foods*, 334 NLRB 43 (2001) (use of election observers); *Glass Depot*, 318 NLRB 766 (1995) (extraordinary events prevent employees from voting); *Milchem, Inc.*, 170 NLRB 362 (1968) (electioneering while employees are preparing to vote); *International Stamping Co.*, 97 NLRB 921 (1951) (maintenance of voter lists); *Hook Drugs*, 117 NLRB 846 (1957) (security of ballot box).

¹¹ Recent scholarship found an 85% participation rate during NMB elections held between 2010 and 2013. Michael Elsenrath, *Effects of Railway Labor Act Election Rule Changes on Voter Participation and Unionization Activity*. <https://journalssagepub.com/doi/abs/10.3141/2477-01>.

rectors have the discretion to determine whether employees vote in-person, by mail, or electronically. The Board should consider following suit to the extent that it is permitted to do so.¹²

Finally, it bears mentioning that, both before and during the pandemic, there has been a dramatic expansion of mail-balloting and early voting in public elections. Before the pandemic, various states were expanding voting by mail—including no-excuse absentee voting—and it has been popular with voters and effective at modestly increasing turnout.¹³ Today, every single state in the nation allows voting by absentee ballot in a variety of circumstances, and 35 states and the District of Columbia allow absentee voting with no excuse or based on pandemic-related concerns.¹⁴ The Board should look at these models seriously.

¹² Since 2011, the NLRB's annual budget appropriation from Congress has included a policy statement that the agency may not conduct elections electronically. *Further Consolidated Appropriations Act, 2020*, Pub. L. No. 116-94, tit. IV, § 407 (2019).

¹³ Oregon moved to mail ballots via a 1998 ballot initiative that passed 69.4% to 30.6%, a 2003 survey found 81% popularity. Priscilla L. Southwell, *Five Years Later: A Reassessment of Oregon's Vote by Mail Electoral Process*, 37 *PS: Pol. Sci. & Pol.* 89, 90 (2004). In 2018, Michigan passed a state initiative moving to no excuse mail ballots by a margin of 66.9%-33.1%.

¹⁴ See <https://www.vote.org/absentee-voting-rules/>.

III.

The National Labor Relations Board has been conducting elections for 85 years. It is justifiably proud of its traditions. But if there are better way to do things, then the Board must open to them—and not only when the United States is in the middle of a public health catastrophe. To its credit, the majority does not ignore reality. Its decision today is a good-faith effort to accommodate that reality. For all the reasons I have explained here, however, we should do more. As their other decisions demonstrate, my colleagues have been more than willing to reverse precedent across the whole sweep of labor law and practice—and, in many dissents, I have argued that they have gone much too far and in the wrong direction. Today, in contrast, they do not go far enough.

Dated, Washington, D.C. November 9, 2020

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD