

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

PACE SOUTHEAST MICHIGAN

Employer

and

**LOCAL 337, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

**Case 07-RC-257046
07-RC-257047**

Petitioner

**DECISION, ORDER SEVERING CASES AND
DIRECTIONS OF ELECTIONS**

The sole issue in these cases is whether, in light of the continuing COVID-19 pandemic,¹ the Region should conduct elections for certified nursing assistants, participant care assistants, and dietary employees, and drivers who are employed at the Employer's five facilities by manual or mail ballot. The Employer argues a manual election is appropriate and it is possible to conduct a manual election safely. The Petitioner supports a manual election if it does not delay the conduct of the election.

The Employer provides healthcare and related services to older adults at five skilled nursing facilities located in Wayne, Macomb and Oakland Counties, Michigan. In Case 07-RC-257046, Petitioner seeks to represent a unit of approximately 166 certified nursing assistants (CNAs), participant care associates (PCAs), and dietary employees. In Case 07-RC-257047, Petitioner seeks to represent a unit of approximately 90 drivers. On March 5, 2020,² I approved a Stipulated Election Agreement (Agreement) in each case, in which the parties agreed to manual elections on March 26, for the drivers (Case 07-RC-257047) and March 27 for healthcare workers (Case 07-RC-257046) in training and conference rooms at each of the Employer's five facilities, for the following Units of the Employer's employees:

Case 07-RC-257046: All full-time and regular part-time Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan; 250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all drivers, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

Case 07-RC-257047: All full-time and regular part-time drivers employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan;

¹ Throughout this decision, the terms "COVID-19" and "coronavirus" are used interchangeably.

² All dates are in 2020 unless otherwise indicated.

250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

On March 16, the Employer made a motion that the Region postpone and reschedule the elections scheduled for March 26 and 27, due to public health and safety concerns related to the COVID-19 pandemic. On March 18, I ordered postponement of the elections.³ On March 19, the Board temporarily suspended all Board-conducted elections through April 3. On April 1, the Board announced that, beginning April 6, Regional Offices would resume processing elections, noting that “conducting representation elections is core to the NLRB’s mission” and further noting “appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Director.”

After my March 18, Order, due to the ongoing public health emergency, the Region sought to obtain the parties’ stipulation to amend the Agreements to provide for a mail-ballot election in lieu of a manual election.³ However, no such stipulation was reached. Thereafter, on June 25, in order to ensure the safety of the voting employees, the parties and their representatives, Board personnel, and the general public, I revoked my approval of the March 5, Agreements and set these cases for consolidated hearing.

A consolidated hearing was held on July 6, by videoconference before a hearing officer of the Board. At the hearing, the parties stipulated to the same two appropriate Units as in the March 5 Agreements,⁴ as follows:

Case 07-RC-257046: All full-time and regular part-time Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan; 250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all drivers, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

Case 07-RC-257047: All full-time and regular part-time drivers employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan;

³ The record indicates that after the Board announced the resumption of representation case elections on April 1, the parties amended the Agreements to permit the conduct of manual elections when such could be safely conducted, but these amended Agreements were not approved by the undersigned.

⁴ Board Exhibit 2 contains various stipulations entered into by the parties, including the two appropriate units. The exhibit shows the same stipulated appropriate unit for both Case 07-RC-257046 and Case 07-RC-257047. Given the contents of the other formal papers, it appears that Board Exhibit 2 contains a clerical error with respect to the unit description in Case 07-RC-257047 and I find that the parties’ intention was to stipulate to the unit that was previously agreed to in that case as reflected in Board Exhibit 1 and described herein.

250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,⁵ the parties were permitted to present their positions as well as witnesses and documentary evidence as to the mechanics of these elections at the hearing. I have carefully considered those positions and arguments, and for the reasons discussed below, I find that a prompt mail-ballot election is appropriate in each of these cases given the extraordinary circumstances presented by the continuing COVID-19 pandemic.

I. FACTUAL OVERVIEW

A. The COVID-19 Pandemic Generally

On March 13, President Donald J. Trump, issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”⁶ As of July 16, despite unprecedented efforts to limit transmission, over 138,000 deaths from COVID-19 have been reported in the United States, with over 3.3 million confirmed cases.⁷ There is currently no approved vaccine or antiviral treatment.

I take administrative notice of the information, guidance, and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States Government, regarding COVID-19.⁸ The CDC recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, and social distancing. The CDC further states that 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.⁹ To avoid the unlikely possibility of

⁵ See, *Representation-Case Procedures*, 84 Fed. Reg. 65924, 65944, fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). See also, *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1819 (2011); *Halliburton Services*, 265 NLRB 1154, 1154 (1982).

⁶ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed July 13, 2020).

⁷ Johns Hopkins University & Medicine. *Coronavirus Resource Center*. <https://coronavirus.jhu.edu/map.html> (last accessed July 16, 2020).

⁸ “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/>. (last accessed July 13, 2020).

⁹ “Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?” <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed July 13, 2020).

contracting COVID-19 through the mail,¹⁰ 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.”¹¹ 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 alternatives to in-person voting if allowed” and “[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....”¹²

B. COVID-19 and Healthcare Workers Generally

Healthcare workers are among employees at the highest risk of contracting COVID-19. According to the CDC, “Healthcare workers (HCWs) are not only at higher risk of infection but can also amplify outbreaks within healthcare facilities if they become ill. Identifying and managing HCWs who have been exposed to a patient with COVID-19 is of great importance in preventing healthcare transmission and protecting staff and vulnerable patients in healthcare settings.

C. The COVID-19 Pandemic in the State of Michigan

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Detroit and its surrounding metropolitan areas in Southeast Michigan, including Wayne, Oakland, and Macomb Counties where the Employer’s facilities are located, have been strongly affected by the virus with multiple confirmed cases and deaths. Michigan imposed strict guidelines early in the pandemic when, on March 23, Michigan Governor Gretchen Whitmer issued her first stay-at-home executive order suspending all nonessential activities. These stay-at-home orders thereafter extended through May 31. On June 1, Governor Whitmer rescinded the stay-at-home orders and announced the state was ready to transition to phase four, the “improving” phase, of her 6-step Michigan Safe Start Plan, for the reopening and easing of restrictions in the state.¹³ Under the Safe Start Plan, the state’s 83 counties were divided into eight regions. While certain regions in the state, largely in Northern Michigan and the Upper Peninsula, have advanced to phase five, Southeast Michigan (the Detroit Region), including Wayne, Oakland, and Macomb Counties, remains at phase four. As of June 30, Governor Whitmer announced that, due to the recent spike in COVID-19 cases in Michigan, Southeast and

¹⁰ “Running Essential Errands.” <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (“Although the virus can survive for a short period on some surfaces, it is unlikely to be spread from domestic or international mail”) (last accessed July 13, 2020).

¹¹ “Running Essential Errands,” above.

¹² <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 ...”) (last accessed July 13, 2020).

¹³ See <https://www.michigan.gov/coronavirus/0,9753,7-406-100467---00.html>. Under the Safe Start Plan, the six phases to stop the spread of the coronavirus (COVID-19) and fully reopen the state are: uncontrolled growth; persistent spread; flattening; improving; containing; and post-pandemic.

Central Michigan would not advance to the fifth phase of her reopening plan by the Fourth of July weekend, as she had originally planned.¹⁴ Unfortunately, the state's coronavirus cases have recently increased with an average of 222 cases per day reported between June 18-24,¹⁵ and 495 cases per day between July 8-14.¹⁶ On July 1, Governor Whitmer closed indoor bar service across most of the state, including Wayne, Oakland, and Macomb Counties, a move backward on reopening Michigan;¹⁷ and, on July 9, she increased the official risk level of the Detroit Region, where the Employer's facilities are located, from medium to medium-high risk.¹⁸

Public health experts continue to advise individuals to avoid unnecessary social contact and to conduct business remotely when possible in order to avoid spikes in cases in the coming weeks.¹⁹ Congregate care restrictions remain in place, and hospital restrictions are determined by the individual facilities. Additionally, on July 14, Governor Whitmer signed an executive order extending the state of emergency declaration related to the COVID-19 pandemic until August 11.²⁰

As of July 16, Michigan had reported 71,842 confirmed cases of COVID-19 in all 83 counties, with 6,101 fatalities statewide.²¹ Wayne, Oakland, and Macomb counties, where the Employer has facilities, account for over 40% of the confirmed cases (28,501) and 50% of the

¹⁴ See <https://www.freep.com/story/news/local/michigan/detroit/2020/06/30/gov-whitmer-puts-brakes-moving-phase-5-recovery-coronavirus/5350091002/>.

¹⁵ "Michigan's coronavirus cases tick back up as daily COVID-19 counts hit June high." *Fox 2 Detroit*. <https://www.fox2detroit.com/news/michigans-coronavirus-cases-tick-back-up-as-daily-covid-19-counts-hit-june-high> (last accessed July 13, 2020) (average of 177 cases a day between June 4-10; 159 cases a day between June 11-17; 222 cases a day between June 18-24).

¹⁶ "Michigan coronavirus cases tops 70,000." *The Detroit News*. <https://www.detroitnews.com/story/news/local/michigan/2020/07/14/michigan-coronavirus-cases-top-70000/5436822002/> ("The seven-day average of new coronavirus cases in Michigan is up to 495 daily from 394 daily for the previous seven-day period, according to state data").

¹⁷ "Gov. Gretchen Whitmer closes Michigan indoor bar service, except for Up North." *Detroit Free Press*. <https://www.freep.com/story/news/local/michigan/detroit/2020/07/01/gov-whitmer-closes-michigan-indoor-bar-service-except-up-north/5354417002/> (last accessed July 13, 2020).

¹⁸ "Risk level for COVID-19 spread increases in 4 Michigan regions." *Fox 2 Detroit*. <https://www.fox2detroit.com/news/risk-level-for-covid-19-spread-increases-in-4-michigan-regions> (last accessed July 13, 2020).

¹⁹ See Joel Achenbach. "Coronavirus hot spots erupt across the country; experts warn of second wave in South," *The Washington Post*, May 20, 2020, https://www.washingtonpost.com/health/coronavirus-hot-spots-erupt-across-the-country-experts-warn-of-possible-outbreaks-in-south/2020/05/20/49bc6d10-9ab4-11ea-a282-386f56d579e6_story.html.

²⁰ Executive Order 2020-151 went into effect July 14. https://content.govdelivery.com/attachments/MIEOG/2020/07/14/file_attachments/1495465/EO%202020-151%20Emerg%20declaration.pdf.

²¹ "Where We Stand with COVID-19." <https://www.michigan.gov/coronavirus> (last accessed July 16, 2020).

confirmed deaths (3,143).²² Wayne County has reported 1,372 confirmed cases per 100,000 people, Oakland County has reported 1,108, and Macomb County has reported 896,²³ all of which are higher than the Michigan average of 773 per 100,000 people while Wayne and Oakland Counties are higher than the national average of 1,023.7 cases per 100,000 people.²⁴

Although Michigan has decreased its rate of new cases substantially from its peak, other states, such as Arizona, Florida, and Texas are emerging as the country's latest epicenters after reporting recent record numbers of new infections. Confirmed coronavirus cases in the United States surpassed 2.5 million on June 28 and 3 million less than two weeks later. In Michigan, Wayne, Oakland, and Macomb Counties have seen an increase in COVID-19 cases over the last 14 days.²⁵

D. The Employer's Operations

The Employer is a comprehensive health plan and healthcare provider for seniors operating out of five facilities located in Wayne, Oakland, and Macomb Counties. It services over 1,200 participants, who receive outpatient care at one of the Employer's facilities or in their own residences, with the goal of keeping them living independently as long as possible. The Employer provides primary and specialty care, along with social services, emergency services, and hospice care.²⁶ The Employer's drivers transport participants to and from its facilities and to and from outside appointments.

E. COVID-19 at the Employer

The Employer's participants are elderly and at the highest risk of severe illness and death from COVID-19, according to the CDC.²⁷

At the beginning of the pandemic, the Employer closed its facilities to participants and began providing care exclusively in participants' homes via in-person visits, telephone, and videoconferencing. The Employer's Chief Medical Officer, CEO, and Human Resource Director conducted educational sessions for employees in each of the facilities regarding the novel

²² "Public Use Datasets 7/12/2020." Michigan Data.

https://www.michigan.gov/documents/coronavirus/Cases_and_Deaths_by_County_2020-07-14_696370_7.xlsx (last accessed (July 15, 2020)).

²³ "United States COVID-19 Cases and Deaths by County." CDC COVID Data Tracker. <https://www.cdc.gov/covid-data-tracker/#county-map> (last accessed July 13, 2020).

²⁴ "United States COVID-19 Cases and Deaths by State." CDC COVID Data Tracker. <http://cdc.gov/covid-data-tracker/#cases> (last accessed July 13, 2020).

²⁵ "Michigan Coronavirus Map and Case Count." New York Times. <https://www.nytimes.com/interactive/2020/us/michigan-coronavirus-cases.html> (last accessed July 13, 2020).

²⁶ Employer Exhibit 2 lists the Employer's services.

²⁷ "Older Adults" (updated June 25, 2020). Coronavirus Disease 2019 (COVID-19). <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last accessed July 13, 2020) ("8 out of 10 COVID-19-related deaths reported in the United States have been among adults aged 65 years and older").

coronavirus—its transmission, incubation period, signs and symptoms, and how to protect against contracting it. A coronavirus-specific in-service was held, where the Employer trained employees on personal protective equipment (PPE) and how to educate participants about the disease and PPE.

In June, the Employer reopened its facilities to participants with restrictions based on CDC guidance for COVID-19. All facilities currently operate under a no-visitor policy. The Employer also implemented mandatory no-contact temperature checks²⁸ and face coverings (masks) for anyone entering its facilities, which the Employer provides as needed. If an employee's temperature is greater than 100°F, the employee is sent home; however, the record shows one employee was sent home with a temperature of less than 100°F, although it does not indicate if the employee exhibited other potential COVID-19 symptoms.

Other PPE (e.g., gloves) is available inside the facility for use by employees and participants. Participants and employees are not required to be tested for COVID-19, and the Employer does not track employees who have tested positive.

According to the Employer, 8% of its participants (around 100 people) have tested positive for COVID-19, and 3% (around 36 people) have died from COVID-19 related complications.

While the record does not reveal exactly how many employees have tested positive for COVID-19, the last employee to test positive was in mid-April. When an employee tests positive for COVID-19, he or she is not allowed in the Employer's facilities for at least 14 days. There are currently two employees who have not returned to work due to unspecified reasons related to COVID-19.

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

Section 11301.2 of the NLRB Casehandling Manual (Part Two) Representation Proceedings provides, in part:

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual sets forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are "scattered," either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section

²⁸ There is no evidence staff or participants have their temperatures taken at any other time.

states that “[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director,” citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that a regional director may use discretion to order a mail-ballot election where conducting an election manually is not feasible and that, under extraordinary circumstances, the regional director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. *Ibid.*

On April 17, the Board issued an announcement regarding the COVID-19 pandemic titled, “COVID-19 Operational Status,” which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. 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. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, 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 *San Diego Gas* contemplated “extraordinary circumstances” beyond the considerations described in the Manual and 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. *Ibid.* The Board has continued to recognize the ongoing COVID-19 pandemic as “extraordinary circumstances” under *San Diego Gas*. See, for example, *Roseland Community Hospital*, 13-RC-259788 (June 25, 2020) (denying review of Regional Director’s decision to hold mail-ballot election due to COVID-19).

On July 6, following the pre-election hearing in these cases, General Counsel Peter Robb issued a memorandum on Suggested Manual Election Protocols (GC 20-10).²⁹ As Robb noted, GC 20-10 is not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation. Among other things, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms. However, the CDC’s

²⁹ On July 7, the Employer sent a copy of GC 20-10 to the undersigned and the Petitioner as well as correspondence reiterating its belief, based on the record and the protocols in GC 20-10, that it could safely conduct a manual election.

“current best estimate” is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³⁰ and would neither be identified nor have sought testing. Moreover, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation. A mail-ballot election avoids these concerns.

III. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail-ballot election is appropriate in each of these cases requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. Manual elections are the preference of the Board, and I recognize the “potential problems” associated with mail-ballot elections are some of the reasons the Board has traditionally preferred manual elections. I do not discount those concerns.

Absent the present pandemic, manual elections would almost certainly be held in these cases. However, my decision in these cases is ultimately based on the “extraordinary circumstances” presented by this public health emergency. I recognize a degree of reopening has begun, in the United States generally and in Southeast Michigan specifically. At the same time, it is undisputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is no easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains.

Although Region 7 has available personnel who would appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic individuals.³¹ At this time, sending Board agents to conduct the elections would risk the exposure of everyone at the facilities. Eligible voters, along with other employees who may come into contact with the Employer’s participants, Board agents, and party representatives, would risk being exposed to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

Ultimately, as the Board has made clear, this is a question of discretion. While the Employer has presented a comprehensive plan for conducting manual elections, including many of the protocols outlined in GC 20-10, I find the circumstances of these cases make it appropriate to hold mail-ballot elections. I find that the extraordinary circumstances presented by the

³⁰ “COVID-19 Pandemic Planning Scenarios” (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed July 13, 2020).

³¹ Ibid.; “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic” (May 4, 2020). *Emerging Infectious Diseases Journal* (Online Report). Centers for Disease Control and Prevention. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed July 13, 2020).

COVID-19 pandemic remain present here for several reasons. First, my decision is based on the undisputed continued presence of the virus in the Detroit Region/Southeast Michigan area, the growing number of COVID-19 cases in Wayne, Oakland, and Macomb Counties, and the severity of the COVID-19 risk. In relying on these considerations, I am mindful of the Employer's position that it has operated without an employee testing positive for COVID-19 since mid-April. However, I note what appears to be a recent increase in cases in Wayne, Oakland, and Macomb Counties. It is not possible for me to know if this represents an increasing number of infections, a reflection of more widespread testing, better reporting, or simply a momentary spike in cases. However, it does raise the possibility that, if I order manual elections, I will be directing voters and others to congregate under circumstances more dire than those faced today. Mail-ballot elections avoid this risk.

Second, my decision is also based on the Employer's role as a healthcare provider. While COVID-19 is present in all aspects of the community, the virus is most severe in older adults, which are the Employer's participants. The Employer is no doubt aware of this, as demonstrated by its ongoing restriction on regular visitation to its facilities and PPE requirements. I recognize the Employer has attempted to mitigate the risk to voters and its participants by proposing to conduct the elections in a large room with markings for social distancing, installing plexiglass dividers, and providing PPE and hand sanitizer. However, in any manual election voters will still physically come together in a single location, even if dispersed over time and socially distanced. This represents an increased risk to all those participating. Mail-ballot elections avoid this risk. Even a manual election following the Employer's comprehensive plan to address these risks still involves physical interactions, congregating, and, in my view, increased risk of infection.

Here, the Board's mail-ballot procedure is an established procedure that avoids these risks. Although the mail-ballot procedure may not be the Board's preferred procedure, it is one of the ways in which the Board conducts an election when circumstances dictate. Under the circumstances presented,^{32,33} I find it prudent to order a mail-ballot election in each case involved herein.

³² The Board has upheld regional directors' decisions to direct mail-ballot elections due to the current COVID-19 pandemic for employees of other healthcare employers. See, for example, *Roseland Community Hospital*, 13-RC-256995 (May 26, 2020); *Twinbrook Health & Rehabilitation Center*, 06-RC-257382 (June 5, 2020); *Roseland Community Hospital*, 13-RC-259788 (June 25, 2020).

³³ The Board has denied review of regional directors' decisions to conduct mail-ballot elections in circumstances where the employers offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, 16-RC-256972 (May 18, 2020) (denying review where employer had zero COVID-19 cases and offered outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves) and *Brink's Global Services USA, Inc.*, 29-RC-260969 (July 14, 2020).

IV. CONCLUSIONS

Based upon the entire record in this matter and for the reasons set forth above, I direct in each case involved herein a mail-ballot election to be conducted in accordance with the election details discussed below and I conclude and find as follows:

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

2. The Employer is engaged in commerce³⁴ within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

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.³⁵

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) of the Act.

5. The following employees of the Employer constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Case 07-RC-257046: All full-time and regular part-time Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan; 250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all drivers, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

Case 07-RC-257047: All full-time and regular part-time drivers employed by the Employer at its facilities located at 24463 West Ten Mile Road, Southfield, Michigan; 250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn Michigan; and 35501 Mound Road, Sterling Heights, Michigan; but excluding all Certified Nurse Assistants (CNAs), Participant Care Associates (PCAs), and dietary employees, office clerical employees, managers, and guards and supervisors as defined in the Act, and all other employees.

³⁴ The parties stipulated to the following commerce facts: The Employer, PACE Southeast Michigan, a non-profit Michigan corporation with offices and places of business located at 24463 West Ten Mile Road, Southfield, Michigan; 250 McDougall Avenue, Detroit, Michigan; 17401 East Ten Mile Road, Eastpointe, Michigan; 15401 North Commerce Drive, Dearborn, Michigan; and 35501 Mound Road, Sterling Heights, Michigan, the only facilities involved herein, is engaged in the operation of skilled nursing facilities. During the calendar year ending December 31, 2019, the Employer derived gross revenues in excess of \$100,000 and purchased and received at each of its facilities listed above goods valued in excess of \$5,000 directly from points outside the State of Michigan.

³⁵ The parties stipulated at the hearing that Petitioner is a labor organization within the meaning of the Act.

V. ORDER SEVERING CASES

An Order Revoking Stipulated Election Agreements, Consolidating Cases and Rescheduling Representation Hearing having issued on June 25, and the undersigned having fully considered the matter,

IT IS HEREBY ORDERED that PACE Southeast Michigan, Case 07-RC-257046 be, and it hereby is, severed from Case 07-RC-257047.

VI. DIRECTION OF ELECTION – CASE 07-RC-257046

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 **LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

1. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 7. At 2:00 p.m. (EST) on July 29, 2020, ballots will be mailed to voters from the National Labor Relations Board, Region 7 Grand Rapids Resident Office. 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.

Those employees who believe they are eligible to vote and did not receive a ballot in the mail by August 10, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 7 Office at (313) 226-3200 or our national toll-free line at 1-844-762-6572 (NLRB).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 7 Grand Rapids Resident Office, by close of business, 4:45 p.m. (EST), on August 21, 2020. The mail ballots will be commingled and counted at 12:30 p.m. on August 28, 2020. The method for the count will require virtual participation and will be determined by the Regional Director prior to the count.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **July 10, 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.

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.

3. 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 **Tuesday, July 21, 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 lists 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.

The list must 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. The list must also be served electronically on the other parties named in this decision.

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.

4. 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 elections and copies must remain posted until the end of the elections. 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.

VII. DIRECTION OF ELECTION – CASE 07-RC-257047

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 **LOCAL 337, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

1. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 7. At 2:00 p.m. (EST) on July 29, 2020, ballots will be mailed to voters from the National Labor Relations Board, Region 7 Grand Rapids Resident Office. 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.

Those employees who believe they are eligible to vote and did not receive a ballot in the mail by August 10, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 7 Office at (313) 226-3200 or our national toll-free line at 1-844-762-6572 (NLRB).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 7 Grand Rapids Resident Office, by close of business, 4:45 p.m. (EST), on August 21, 2020. The mail ballots will be commingled and counted at 2:30 p.m. on August 28, 2020. The method for the count will require virtual participation and will be determined by the Regional Director prior to the count.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **July 10, 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.

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.

3. Voter List

As required by Section 102.67(1) 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 **Tuesday, July 21, 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 lists 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.

The list must 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. The list must also be served electronically on the other parties named in this decision.

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.

4. 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 elections and copies must remain posted until the end of the elections. 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.

VIII. 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 elections on the grounds that it did not file a request for review of this Decision prior to the elections. 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, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.³⁶ A party filing a request for

³⁶ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.

PACE Southeast Michigan
Cases 07-RC-257046 & 07-RC-257047

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 elections in this matter unless specifically ordered by the Board.

Dated: July 17, 2020



Terry Morgan, Regional Director
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