

## **Problems with the resumption of NLRB elections as of 4-17-20 and possible solutions**

Because this is an evolving situation, this is both a tentative list of problems and a preliminary set of suggested solutions. We will be revising the memo with the help of general counsels, LCC members and organizing directors as further information is received.

On April 1, 2020, the NLRB announced that it would resume conducting elections beginning April 6, 2020. The Announcement recognizes that “conducting representation elections is core to the NLRB’s mission” and states that “appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Director.”

Since the announcement, the following problems have arisen in the regions or are expected to arise.

**Problem 1:** cases where there was stip that could not be followed because of suspension of elections or because the stip was for a manual election that is no longer possible.

This problem obviously exists in a limited pool of cases.

RDs’ approach varies partly because language of stips varies in these cases concerning authority of RD if election is not held on agreed date. For example, the Regional Director in Region 5 ordered a mail ballot election based on a stip providing for a manual election based on language reading, “If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, place, and manner of the election.” *See* Letter to the parties, *Signature Theatre, Inc.* Case 05-RC-257366 (April 15, 2020) (attached).

Employers argue RDs have no authority to revoke stip. Employers cite *T&L Leasing*, 318 NLRB 324 (1995). *See* Request for Review, *Northside Home & Hospice*, 13-RC-257168 (AFSCME Council 31) (April 15, 2020) (attached) (seeking review of RD’s April 13 order revoking stipulation and setting case for hearing when stipulation provided, “[i]f the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.”)

Recommended solutions:

Union should formally withdraw from stip. “Additionally, parties may withdraw from approved agreements, but only on an affirmative showing of unusual circumstances, or on agreement of all parties. *Sunnyvale Medical Clinic*, 241 NLRB 1156 (1979).” *T&L*, 318 NLRB at 325.

Union should also move RD to revoke approval of the stip on grounds of impossibility. “We believe that the date of an election and the type of election (manual or mail) are both very important elements of the election process. It is not unusual for parties to negotiate long and hard for their respective positions on these issues. Where, as here, they have reached agreement on these issues, that agreement cannot be cast aside, absent unusual circumstances which make the agreement impossible to perform. In the instant case, there is no showing of such impossibility.

That is, there is no showing that the location possibilities for a manual election had been exhausted. Further, even if there were a showing of impossibility, the appropriate procedure would be for the Regional Director to notify the parties of his intention to revoke the Stipulation because of that impossibility.” *T&L*, 318 NLRB at 326 (footnote omitted). “Obviously, however, where material agreed-upon terms are impossible to perform, regional directors may set aside the stipulation. Absent a new stipulation, they must proceed to a hearing.” *Id.* n. 12.

Unions can ask the RD to alter the date of the election or manner of election set forth in the stip, *depending on its language*. See *Signature Theater* (cited above) and *OT Training Solutions*, 18-RC-25776 (April 14, 2020) (District Lodge 77, IAM) (RD issued notice to show cause why she should not proceed under stipulation to order mail ballot election in unit subject to state-wide stay-at-home order when stipulation could not be followed both because of suspension of elections and because it specified manual election). The RD concluded, “I have reviewed the circumstances of this matter and I have concluded that the only feasible means for a timely, safe, and effective election is by mail.” *Id.* at 1-2. But note that this risks drawing an objection that might lead to the results being overturned if the stip language is not favorable. That is what happened in *T&L*.

**Problem 2:** RD not proceeding with pre-election hearing via telephone or video conference without all parties’ consent.

Recommended solution: RD should proceed with remote hearing, preferably via video conference, within the timelines established by the election rules to the extent possible.

The Act provides only that upon the filing of a petition

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Under the present circumstances, a hearing conducted using video or audio conference technology is certainly “an appropriate hearing.”

Under the regulations, Section 102.66 (a) provides, “Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine. . . .” Read in context, the term “appear at any hearing in person” means a party can appear without representation. It does not mean a party has a right to appear at a face-to-face hearing. The Board should construe the term to be satisfied by permitting parties to appear via video or audio conference when the hearing is being held exclusively by that means.

Section 102.64 provides that hearings “shall be open to the public unless otherwise ordered by the hearing officer.” If there is limited capacity on video and audio conferences, the hearing

officer should limit direct access to the hearings but only to the extent necessary and all records from the hearings will be accessible unless specifically subject to a protective order.

Videoconferencing for pre- and post-election hearings is not novel. The General Counsel has recognized that Regional Directors have had the authority to order video testimony in representation cases where appropriate, even over objections by parties, since at least the institution of the pilot video testimony program for representation cases in 2008. *See* OM 08-20. That authorization has continued, and been expanded to ULP hearings. *See* OM 11-42. OM 08-20 provided practical guidance for conducting video testimony. The Board and General Counsel should immediately adapt the practical guidance in OM 08-20 to the current situation, taking into account technological advancements and experience since issuance of OM 08-20, and issue a new memorandum to Regional offices to implement a temporary video conferencing program for all representation case hearings.

**Problem 3:** RD not ordering mail ballot election without all parties' consent

Solution: RD should order mail ballot election in all cases under the present circumstances absent unusual circumstances. *See Atlantic Group*, 16-RC-256920 (April 10, 2020) (IBEW Local 220) (attached) (after directing manual election in 70-person unit at functioning nuclear power plant at date to be determined, RD requested parties' positions on converting to mail ballot and directed mail ballot election over employer's objection). The RD reasoned:

The Board's manual election procedures require close proximity for the duration of the election between Board agents, election observers, and voters. Employees use the same pens or pencils while voting in an enclosed booth before placing their ballots in a sealed box; each of these ballots is individually handled by the Board agent conducting the election, and available for inspection by the party representatives. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families, and the community.

*Id.* at 4.

The RD further reasoned:

The Board, in *San Diego Gas*, clarified that the use of mail ballot elections is not limited to three enumerated circumstances, but that "other relevant factors," especially in "extraordinary circumstances" may be considered by a Regional Director. The present circumstances, a worldwide pandemic in which more than one-hundred deaths have occurred, are extraordinary, and present many relevant factors suggesting that a mail ballot election would be appropriate.

*Id.* at 8.

The RD concluded:

This election must be held “on the earliest date practicable consistent with the Board’s rules.” A manual election cannot be held safely at this time. There is no indication when a manual election could be safely held. Waiting until it would be safe to conduct a manual election would further delay this already-delayed election. However, a mail ballot election would allow this election to be held safely and without further delay.

*Id.* (footnote omitted).

**Problem 4:** Headquarters failing to provide the support and coordination necessary for Regions to conduct mail ballot elections in a reasonable timeframe.

Solution: Headquarters, or Regions that are not operating in areas subject to shelter/safer in place orders or that are not experiencing a high volume of petitions, should print and mail ballots and the ballots should also be returned to an office that is operating or has capacity.

**Problem 5:** RD not proceeding with post-election hearing via telephone or video conference without all parties’ consent. No identified cases at this time.

Solution: RD should proceed with remote hearing, preferably via video conference, for reasons explained in number 2 above.