

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

**VISTAR KENTUCKY**

**Employer,**

**and**

**GENERAL DRIVERS,  
WAREHOUSEMEN AND HELPERS  
LOCAL UNION NO. 89, AFFILIATED  
WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**Petitioner.**

**Case No. 09-RC-260125**

**EMPLOYER’S EMERGENCY MOTION TO STAY THE ELECTION**

Pursuant to Sections 102.67(j) of the Rules and Regulations of the National Labor Relations Board (the “Board”), Vistar Kentucky (“the Employer”), by and through its undersigned counsel, hereby submits this Emergency Motion to Stay The Election as directed by the Acting Regional Director’s May 29, 2020 Decision and Direction of Election (“Decision”). A mail ballot election in this case is scheduled to commence on June 15, 2020.

Section 102.67(j) allows parties to seek a stay of proceedings, including representation elections. The Rules note that “[r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case.” This extraordinary relief is warranted in the instant case given the impact the COVID-19 pandemic has had on the Board’s representation processes. Also, given that the election is scheduled to begin in less than two weeks, a stay is appropriate until the Board issues clear guidance concerning how elections should be conducted in a state

which has lifted many of the COVID-19-related restrictions and whose economy has begun reopening (the Employer submits the election should be conducted by manual ballot).

In fact, as described below and in the Employer's accompanying Request for Review, the instant case is remarkably similar to *Atlas Pacific/Gulftech*, No. 27-RC-258742, in which the Board recently granted the Employer's Emergency Motion to Stay the Election pending the Board's assessment of the Regional Director's Decision to direct a mail ballot election over the employer's objection.

Moreover, this case presents an issue that has not been addressed by the Board's recent COVID-19 mail ballot decisions: Kentucky, the state where the election will take place, has reopened its economy and eased or lifted many of its pandemic-related restrictions. For example, state government offices in Kentucky are physically open for business and conducting in-person operations. Despite the novel circumstances at play, the Acting Regional Director ignored Kentucky's broad reopening program and cited recent Board law from jurisdictions with significantly different local circumstances and entirely inapplicable state directives. The Acting Regional Director's Decision was grounded in inapposite precedent, rejecting a case specific analysis in favor of one-size-fits-all approach. The Decision assumes that every employer in the country is incapable of conducting a safe manual ballot election, regardless of their state's reopening progress and the current status of the pandemic in their location. This cannot be the case.

The Acting Regional Director also disregarded the Board's precedent respecting the limited use and inherent unreliability of mail ballots. The Board has long favored manual ballot elections, subject only to limited, narrow exceptions that do not apply here. *See San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998). Moreover, utilizing mail ballots during a worldwide pandemic considerably increases the likelihood of disenfranchising voters and stifling voter participation.

The Board has recognized that even in *normal* times, the U.S. mail can be unreliable and can result in the disenfranchisement of mail ballot voters. *See Int'l Total Svcs.*, 272 NLRB 201 (1984). The inherent unreliability of mail balloting is compounded by the present logistical challenges caused by the pandemic and the unavailability of procedural safeguards. If the U.S. mail is an unreliable means of facilitating representation elections in normal times, it is fanciful to think it could be faithfully relied upon during a pandemic. The Acting Regional Director's order for a mail ballot election violates the fundamental Board policy of affording employees the broadest possible participation in Board elections. *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981). Thus, the Employer is strongly opposed to abandoning the manual ballot in favor of a largely unregulated mail ballot process that is devoid of meaningful measures to maximize voter participation and reliability.

Given its classification as a life-sustaining business, Vistar never closed its operations in response to the pandemic. Instead, the Company took prompt action to implement a plethora of measures designed to maintain the health and safety of its workforce as it continued to operate. These same measures can be relied upon to safely conduct a manual ballot election. Moreover, the eligible voters are essential employees that have continued to work throughout the pandemic, thus a manual ballot election presents no greater risk of exposure to COVID-19 than reporting to work on any other day.

For the reasons illustrated herein as well as the Employer's Request for Review, the election in this case should be stayed pending the outcome of conclusive Board guidance concerning the appropriateness of a mail ballot election when a state has reopened its economy and lifted many COVID-19-related restrictions.

**CONCLUSION**

For the foregoing reasons, the Board should grant the Employer's Request for Review and summarily stay the election.

Respectfully submitted,

JACKSON LEWIS P.C.  
Ross M. Gardner  
Nicholas B. McGrath

*/s/ Ross M. Gardner*

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Ross M. Gardner

ATTORNEYS FOR VISTAR KENTUCKY  
Dated: June 3, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that, on June 3, 2020, I caused a true and correct copy of the foregoing Request for Review to be served upon Petitioner GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS through its representative, Bryan Trafford, via e-mail, at the following address of record: [btrafford@teamsters89.com](mailto:btrafford@teamsters89.com). I also certify that I filed this document with the Executive Secretary through the Board's E-Filing system.

*/s/ Ross M. Gardner* \_\_\_\_\_

Ross M. Gardner