

**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 REQUEST FOR REVIEW**

**I. INTRODUCTION**

Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board (the “Board”), Vistar Kentucky (“the Employer” or “the Company”), by and through its undersigned counsel, hereby submits this Request for Review of the Acting Regional Director’s May 29, 2020 Decision and Direction of Election (“Decision”) as compelling reasons exist for the Board’s intervention.

This case presents an issue that has not been addressed by the Board in its recent COVID-19 mail ballot decisions: Kentucky, the state where the election will take place, has reopened its economy and has eased or lifted many of its pandemic-related restrictions. Despite the novel circumstances at play, the Acting Regional Director cited recent Board law from jurisdictions with significantly different local circumstances and entirely inapplicable state directives. Thus, the

Acting Regional Director abused her discretion by concluding that a mail ballot election is necessary due to the COVID-19 pandemic. In reaching a decision to hold a mail ballot election, the Acting Regional Director ignored Kentucky's broad reopening program, the Board's precedent respecting the limited use and inherent unreliability of mail ballots, and the absence of extraordinary circumstances in Kentucky.

For the reasons set forth herein, as well as the Employer's Emergency Motion to Stay the Election, substantial questions of law and policy are raised because of the Acting Regional Director's fundamental disregard of the case-specific circumstances at play in Kentucky. Therefore, the election should be stayed pending conclusive Board guidance concerning how elections should be conducted during COVID-19 when the local jurisdiction at issue is more than a month into its phased reopening program.

## **II. STATEMENT OF THE CASE AND SUMMARY OF EVIDENCE**

### **A. Matters Prior To Pre-Election Hearing**

On May 8, 2020, General Drivers, Warehousemen and Helpers, Local Union No. 89 Affiliated with the International Brotherhood of Teamsters ("the Union") filed a petition with the National Labor Relations Board ("the Board") seeking to represent a unit comprised of the 17 drivers at Vistar's distribution center in Louisville, Kentucky. (Board Exhibit 1(a)). Vistar is an essential employer, and the petitioned for employees have worked continuously throughout the COVID-19 pandemic. (Employer Exhibit 1, pp. 1, 3)

Notably, both Vistar and the Union agreed in principle to the terms of a Stipulated Election Agreement that would have resulted in a manual ballot election on June 4, 2020. Moreover, the Field Attorney assigned to the petition also expressed his willingness to administer a manual ballot election in conjunction with the Parties' wishes. However, the Acting Regional Director rejected

the Parties' proposal for a Stipulated Election Agreement and refused to allow the Parties to proceed with a manual ballot election. On May 8, 2020, the Region issued a Notice of Representation Hearing, scheduled for May 18, 2020. (Board Exhibit 1(b)).

**B. The May 18, 2020 Pre-Election Hearing**

The Union and Employer appeared for a telephonic hearing on May 18, 2020. The focus of the hearing was determining the manner in which the election would be administered. Specifically, the Employer presented arguments in favor of a manual ballot election while the Union argued in favor of a mail ballot election.

**1. The Employer's position in favor of a manual ballot election.**

The Employer asserted that the election should be conducted via manual ballot. The Employer explained that manual ballot elections are the Board's preferred method for administering representation elections, and deviation from this method would be unwarranted in the present case. (Tr. 12). Specifically, the Employer argued that ordering a mail ballot would contravene the Board's precedent and guidelines. (Tr. 15). To support this position, the Employer drew attention to Board's seminal case for mail ballot elections, *San Diego Gas and Electric*, 325 NLRB 1143, which outlines the three scenarios in which mail ballot elections are appropriate. None of those three scenarios are applicable to the present case. (Tr. 13). The Employer also highlighted Part 2, 11301.2 of the NLRB's Case Handling Manual, which expressly states that the Region should consider the desires of all parties when determining what type of election is appropriate. (Tr. 14). Prior to the pre-election hearing, the Employer, the Union, and the Field Attorney for Region 9 had all expressed their willingness to proceed with a manual ballot election on June 4, 2020. (Tr. 14).

Additionally, the Employer explained that it has remained operational throughout the COVID-19 pandemic and has implemented numerous safety and sanitation protocols to maintain the safety of the workplace and the health of its employees. (Tr. 13). These protocols would help the Employer provide a viable, safe setting for the manual ballot election. To that point, the Employer explained the logistics for the election. The election would be held in the Employer's large conference room where appropriate social distancing protocols would be observed at all times. (Tr. 21). Moreover, the petitioned-for employees have staggered shifts that would prevent the employees from lining up or congregating outside the voting room. At most, there would only be four individuals in the polling room at any given time (one voting employee, the Board agent, and an observer from the Union and the Employer). (Tr. 22). Masks and gloves would also be provided to all individuals present. (Tr. 25).

Finally, and perhaps most importantly, the Employer described the status of Kentucky's phased reopening plan. On the morning of the pre-election hearing, Kentucky had entered Phase II of its reopening plan. Under Phase II, Kentucky government agencies and offices were able to reopen and continue operations, and restaurants were able to resume dine-in services, subject to certain limitations. (Tr. 15). The Employer's position was, and continues to be, that if it is safe enough to open state agencies, state offices, and restaurants for dine-in services, manual elections do not pose an inherit danger warranting a mail ballot election. (Tr. 15-16).

In additional to its oral argument, the Employer introduced a position statement, which set forth in greater detail its position in favor of a manual ballot election. (Employer Exhibit 1).

## **2. The Union's Position in Favor of a Mail Ballot Election**

The Union asserted that a mail ballot election was more appropriate than a manual ballot election. That said, the Union also acknowledged that it had agreed to a manual ballot election during previous discussions related to a Stipulated Election Agreement. (Tr. 14, 17).

To support its argument for a mail ballot, the Union cited statistics regarding COVID-19 infections and deaths. (Tr. 17-18). Additionally, the Union was unmoved by the Employer's implementation of heightened safety and sanitation measures. It argued that safety guidelines notwithstanding, the risk associated with a manual ballot election was too great. (Tr. 20-21).

### **III. THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

On May 29, 2020, the Acting Regional Director issued her Decision, directing a mail ballot election to take place on June 15, 2020. Initially, the Acting Regional Director summarized many of the public health concerns associated with COVID-19. She also addressed Kentucky's response to the COVID-19 crisis by outlining the numerous directives issuing from Kentucky's Governor in March 2020, many of which are no longer in effect. (Decision, at 2-3). The Acting Regional Director also acknowledged that as of May 11, 2020, Kentucky has begun the reopening of its economy. (Decision, at 3). However, despite paying lip service to Kentucky's reopening plan, the Decision did not seriously analyze the impact of Kentucky's reopening on the propriety of a mail ballot election.

The Acting Regional Director reached her decision, in part, through reliance on inapplicable precedent. Specifically, she reasoned that the Board had already addressed the question of mail ballots in the context of the COVID-19 pandemic when it decided *Atlas Pacific Engineering Company*, 27-RC-258742 (Unpublished, May 8, 2020). (Decision, at 5). The Acting Regional Director highlighted the Board's rationale in favor of a mail ballot due to the

“extraordinary federal, state, and local government directives that . . . required the closure of nonessential businesses . . . .” *Atlas Pacific*, fn. 1. (Decision, at 6). However, this rationale is inapplicable to Kentucky, considering the state is several weeks into its reopening program and has removed many COVID-19-related restrictions. Indeed, *Atlas Pacific* did not involve an employer in a state that had permitted many businesses and industries, including government offices and agencies, to resume in-person operations. Thus, the reference to *Atlas Pacific* as a basis for the Decision in this case is misguided.

The Acting Regional Director also suggested that a manual ballot is inappropriate because it would require the gathering of more than 10 people. The Decision noted that, “While Kentucky has begun a phased reopening, gatherings of more than 10 people remain prohibited.” (Decision, at 6). This is a mistaken interpretation Kentucky’s reopening directive.<sup>1</sup> On May 11, 2020, Kentucky published Minimum Requirements for All Entities that either remained open during the pandemic or were reopening pursuant to the state’s reopening plan.<sup>2</sup> These requirements do not limit employee gatherings to 10 or fewer individuals. Furthermore, Kentucky also published Requirements specific to the Manufacturing and Distribution industry.<sup>3</sup> Again, these industry-specific requirements do not limit employee gatherings to 10 or fewer individuals. Thus, the reference to the 10-person limit in the Decision is clearly misguided.

Moreover, even if the Acting Regional Director was correct in her understanding that the Employer is subject to the 10-person limitation, the manual ballot election would take place

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<sup>1</sup> While it is true that gatherings of more than 10 people are generally prohibited, the restriction would not apply to the Employer.

<sup>2</sup> The Employer requests the Board take Administrative notice of the Minimum Requirements for All Entities that were published with Kentucky’s May 11, 2020 Healthy at Work Order. [https://govsite-assets.s3.amazonaws.com/34CVrepQ8KClctVAQEDH\\_5-11-2020%20CHFS%20Order%20Minimum%20Requirements%20for%20All%20Entities.pdf](https://govsite-assets.s3.amazonaws.com/34CVrepQ8KClctVAQEDH_5-11-2020%20CHFS%20Order%20Minimum%20Requirements%20for%20All%20Entities.pdf)

<sup>3</sup> [https://govsite-assets.s3.amazonaws.com/NPorVe1VTFGX8CTr3801\\_Healthy%20at%20Work%20Reqs%20-%20%20Manufacturing%20Distribution%20Supply%20Chain%20-%20Final%20Version%201.2.pdf](https://govsite-assets.s3.amazonaws.com/NPorVe1VTFGX8CTr3801_Healthy%20at%20Work%20Reqs%20-%20%20Manufacturing%20Distribution%20Supply%20Chain%20-%20Final%20Version%201.2.pdf)

without violating said limitation. As explained in greater detail below, no more than four individuals would be present in the polling location at any given time during the election, and measures could easily be taken to limit the limit the number of people present for the pre-election conference and the post-election vote count.

Finally, the Acting Regional Director was unpersuaded by the Employer's health and safety measures. She dismissed the Employer's comprehensive protocols as being insufficient to "*guarantee* the safety of all those involved in a manual election." (Decision, at 6) (emphasis added). In so doing, the Acting Regional Director creates an impossibly high standard that flips the Board's presumption in favor of manual ballots on its head.

#### **IV. ARGUMENT**

As discussed herein, the Acting Regional Director erred by directing a mail ballot election when a manual ballot election can be accomplished safely and in compliance with state and local government directives.

##### **A. Kentucky's Reopening Directives Distinguish this Case from Other Board Decisions Regarding Mail Ballots During COVID-19.**

Kentucky's business reopening directives render a mail ballot election unnecessary and inappropriate. On May 11, 2020, Kentucky began the process of reopening its economy by entering Phase I of its Healthy at Work program ("the Program"). Under Phase I of the Program, businesses in certain industries, including those in the distribution and supply-chain sector, were permitted to reopen subject to industry-specific regulations and the state's minimum requirements for all entities. On May 18, 2020, the same day as the pre-election hearing, Kentucky expanded its reopening process and allowed state government offices and agencies to reopen for in-person services. As of May 22, 2020, Kentucky restaurants were permitted to resume dine-in services, subject to capacity limitations and other health and safety protocols. By June 15, 2020, the date

upon which the manual ballot would have taken place,<sup>4</sup> several additional businesses are permitted to reopen, including: barbershops and hair salons; nail salons; tanning salons; massage therapy businesses; tattoo parlors; aquatic centers; bowling alleys; fitness centers; and movie theaters.<sup>5</sup>

The status of Kentucky's reopening process presents a circumstance that has not been addressed by the Board's recent mail ballot decisions. Specifically, the representation election would take place in a jurisdiction that has reopened its economy and lifted or relaxed many of its COVID-19-related restrictions. This fact distinguishes the present case from the Board's recent decisions in *Atlas Pacific Engineering Co.*, 27-RC-258742 (Unpublished, May 8, 2020) and *Touchpoint Support Services, LLC*, 07-RC-258867 (Unpublished, May 18, 2020). In those cases, the Board ordered a mail ballot election after citing:

The extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of non-essential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework.

*See Atlas Pacific* at n.1; *Touchpoint* at n. 1. The reasoning in *Atlas Pacific* and *Touchpoint* is inapplicable here. First, the Employer in the present case was never subject to Kentucky's closure directives and continued to operate throughout the pandemic as a life-sustaining business. Second, Kentucky's reopening program and the rollback of its business closure directives represents circumstances that were not present in *Atlas Pacific* or *Touchpoint*. These distinguishing characteristics necessitate a different outcome in this case.

Kentucky's Governor, in conjunction with the state's public health officials, established a timeline for reopening the state's economy. By June 15, 2020, the date of the election in this case,

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<sup>4</sup> The Acting Regional Director ordered the mail ballot election to begin on June 15, 2020. Presumably, a manual ballot election would have been held on the same day.

<sup>5</sup> The Acting Regional Director cited Kentucky's Healthy at Work Program and the corresponding business opening timeline provided at the following link: [https://governor.ky.gov/attachments/20200319\\_Order\\_Mass-Gatherings.pdf](https://governor.ky.gov/attachments/20200319_Order_Mass-Gatherings.pdf)

state government employees will have returned to their offices, restaurants will have their doors open to the public, gyms and fitness centers will have resumed operations, and various personal service providers will have resumed work.<sup>6</sup> The state leaders that established this timeline have a particular appreciation for and expertise in assessing the risks associated with the pandemic in their state. Yet, the Acting Regional Director supplanted their judgment for her own. The Acting Regional Director concluded it is too dangerous to administer a manual ballot election five weeks into Kentucky's phased reopening plan. This conclusion is illogical. While Kentucky's leaders are permitting citizens to eat in public restaurants and government employees to interact with citizens at their state offices, the Acting Regional Director deems it too great a risk to allow essential employees, working continuously throughout the pandemic, to cast a vote at their employer's facility. The judgment of Kentucky's Governor and the state's public health officials should have been given deference.

By relying on *Atlas Pacific*, the Acting Regional Director grounded her decision in inapposite precedent. The employer in that case was subject to different and much more stringent state and local orders than those at play here; thus, the rationale driving the outcome in that decision does not apply. The Acting Regional Director's strict reliance on *Atlas Pacific* represents an endorsement of a one-size-fits-all approach, under which the circumstances of a particular state or region are of no relevance to the analysis. The Acting Regional Director's Decision mandating a mail ballot, devoid of case-specific context, assumes that every employer in the country is incapable of conducting a safe manual ballot election, regardless their state's reopening status. This cannot be the case. The rigidity of this approach is untenable, and the representation election in this case should proceed via manual ballot.

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<sup>6</sup> Some of these business sectors have already resumed operations, and all of them will have resumed operations by June 15th.

**B. The Acting Regional Director Disregarded the Board’s Guidelines Respecting the Limited Use and the Inherent Unreliability of Mail Ballots.**

The Board has long favored manual ballot elections, subject only to limited, narrow exceptions that do not apply here. The Acting Regional Director’s decision ordering a mail ballot election contravened the Board’s well-established precedent and guidelines respecting the limited use of mail ballot elections. Moreover, the Board’s longstanding concerns of diminished voter participation and inherent unreliability associated with mail ballot elections are only exacerbated by the COVID-19 pandemic. Thus, the Acting Regional Director abused her discretion by taking the unwarranted step of requiring a mail ballot in this case.

**1. The criteria for a mail ballot election set forth in *San Diego Gas & Electric* are not implicated by the Union’s petition.**

As a matter of Board law, the Acting Regional Director abused her discretion by requiring mail ballots in this case. The Board’s long-standing policy has favored manual elections over mail ballot elections. *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998); *see also Atlas Pacific Engineering Co.*, 27-RC-258742 (Unpublished, May 8, 2020) (reaffirming that Board elections should, as a general rule, be conducted manually); *Touchpoint Support Services, LLC*, 07-RC-258867 (Unpublished, May 18, 2020) (noting Board elections should generally be administered manually). Regional Directors exercise discretion to determine the arrangement for an election, including whether it should be conducted by manual ballot or mail ballot. *See Halliburton Services*, 265 NLRB 1154 (1982). However, that discretion is not boundless; it is to be exercised within the confines of well-established Board guidelines.

In *San Diego Gas*, the Board articulated guidelines for limited, specific circumstance under which a Regional Director may deviate from the presumption of a manual ballot election. 325

NLRB at 1145. Specifically, the Board identified three scenarios where mail ballots may be appropriate, including: (1) when eligible voters are ‘scattered’ over a wide geographic area; (2) when eligible voters’ work schedules vary significantly; and (3) in the event of a strike, lockout, or picketing. *Id.*

None of these three scenarios are present in the instant case. Indeed, all 17 employees in the proposed unit physically report to work at the Company’s Louisville, Kentucky facility, so they are not ‘scattered’ over a wide geographic area. In addition, the employees’ work schedules do not vary significantly, as they all work the same general schedule (Monday – Friday), dispatching in the early morning hours and returning to the facility at the conclusion of their delivery route in the mid-afternoon. Lastly, there clearly is not a strike, lockout, or picketing occurring at the Company’s facility. Thus, it cannot be disputed – none of the scenarios where mail ballot elections are appropriate are present in this case.

Board guidance further interprets *San Diego Gas & Electric* as instructing Regions to “consider the desires of all the parties.” Casehandling Manual, Part Two, “Representation Proceedings” at 11301.2. Here, Vistar strongly prefers to hold a manual ballot election, and the Union agreed in principle to a Stipulated Election Agreement that would have resulted in a manual ballot election. Moreover, the Field Attorney from Region 9 assigned to this petition readily volunteered to administer a manual ballot election on the June 4th date agreed to by the Parties.

Thus, the Acting Regional Director’s decision mandating a mail ballot election in this case was not only is inconsistent with *San Diego Gas*, but it also directly contravened the will of the Parties.

**2. Use of mail ballots during COVID-19 is likely to have an adverse impact on voter participation and the reliability of election results.**

It is well settled that manual elections afford employees the best opportunity to participate in representation elections. This concept was specifically identified by NLRB General Counsel Fred Feinstein who noted in a June 2, 1994 Memorandum to NLRB Chairman William B. Gould IV, that a study showed 87.9% of eligible voters participated in manual elections compared to 68.14% who participated in mail ballot elections. *See San Diego Gas & Electric*, 325 NLRB at 1151, n.4; *see also Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998) (“[i]t is well known that voter turnout is considerably higher in manual as opposed to mail ballot elections, and maximizing voter turnout is a legitimate objective in all elections.”). Empirical data, Board precedent, and Board policy all support and demonstrate that manual ballot elections afford employees the greatest opportunity to express whether they wish to be represented by a union.

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) (Board invalidated results of mail ballot election when it found that mail-delivery procedures affected the outcome). It is beyond question that “mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual ballots because of the absence of direct Board supervision over the employees’ voting.” *Thompson Roofing, Inc.*, 291 NLRB 743, n. 1 (1988). 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 inability to rely on the postal service to deliver and return mail ballots is not the only factor that may stymie voter participation. There have been multiple cases of postal service workers testing positive for COVID-19 in Kentucky, including Louisville,<sup>7</sup> and studies indicate the virus can survive on surfaces like cardboard or paper for 24 hours or longer. The outbreak of COVID-19 in the U.S. postal service is leading many to quarantine their mail by leaving it in their mailboxes or outside their residence unattended for several days. Voters taking additional precautions with their mail may experience delays in receiving their mail ballot, or mailing their ballot, which could result in their vote not being counted.

To the Company's knowledge, the Board has done little by way of implementing procedures to ensure the integrity, reliability, and safety of mail ballot elections. The Board has not set forth measures for producing and distributing ballots in the current pandemic situation. Further, upon information and belief, different Regions are conducting mail ballot elections by methods that would unquestionably result in a destruction of laboratory conditions, such as having NLRB staff print out ballots and mail them from their homes. Finally, and perhaps most importantly, the Region has not announced procedures for ensuring that Board personnel preparing, dispatching, or otherwise handling mail ballot kits have been screened for COVID-19 (e.g. via daily temperature checks) or otherwise have been cleared of the virus to avoid heightened contamination risk.

The strong likelihood of misdirected and unreceived mail makes clear that holding a mail ballot election would violate the fundamental Board policy of affording employees the broadest possible participation in Board elections. *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981). It is

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<sup>7</sup> <https://www.courier-journal.com/story/news/2020/03/24/coronavirus-kentucky-louisville-post-office-workers-feel-unsafe/2906335001/>

irresponsible to abandon the manual ballot in favor of a largely unregulated mail ballot process that is devoid of meaningful measures to maximize voter participation, reliability, and safety.

**C. The Instant Case Does Not Present Extraordinary Circumstances Warranting a Mail Ballot Election.**

In *San Diego Gas & Electric*, the Board acknowledged that Regional Directors have more latitude to mandate mail ballots when faced with “extraordinary circumstances.” 325 NLRB at 1145 (1998). COVID-19 undoubtedly presents unique and unprecedented challenges for employers and employees throughout the country. The circumstances caused by the pandemic are fluid, with state and local authorities releasing industry-specific regulations and guidance on a daily basis. The circumstances in state A may be significantly different than state B, just as the challenges in industry A may be significantly different than those in industry B. Consequently, a blanket determination that COVID-19 constitutes extraordinary circumstances is inappropriate and, as explained in sub-section A above, such a one-sized-fits-all approach is untenable and short sighted. Extraordinary circumstances simply are not present in this case.

Kentucky’s state directives do not justify a mail ballot election. On the contrary, Kentucky’s reopening plan supports the propriety of administering the election via manual ballot, and the Company’s distribution center presents a viable, safe environment to hold the election. 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 measures include:

- Health screenings / temperature checks before Associates or visitors enter the facility;
- Limiting visitor access to the facility;
- Limiting in-person meetings and following social distancing protocols;

- Sanitizing the entire facility, including work surfaces, door handles, break rooms, common areas, and restrooms with hospital-grade sanitation products daily;
- Sanitizing trucks and trailers daily;
- Hand sanitizing stations at main entrances, conference rooms, break rooms, the driver lounge, the warehouse receiving and shipping desk, and the driver check-in area;
- Requiring masks to be worn in all common areas;
- Providing PPE to Associates and visitors, including face masks, gloves, hand sanitizer, and goggles for drivers;
- Safety training regarding social distancing, personal hygiene, PPE, and sanitation;
- Posting health and safety signage in common areas.
- Sending home any Associate that exhibits symptoms of COVID-19;

(Employer's Exhibit 1, pg. 4)

The foregoing measures have enabled employees to continue working during the pandemic, and these same measures can be relied upon to safely conduct a manual ballot election.

Considering the petitioned for employees have been working throughout the pandemic, a manual ballot election presents no greater risk of exposure to COVID-19 than reporting to work on any other day. In addition, maintaining appropriate social distancing during the election will not be an issue. Indeed, the small number of eligible voting employees (17), coupled with the large conference room in which the election will be held, will allow everyone involved to maintain six feet of separation. Moreover, all 17 employees in the proposed unit are delivery drivers who complete their routes at varying times throughout the afternoon. Thus, unlike a shift operation in which employees may congregate at the polling location during a break time or before/after their shift, the employees in this case would individually trickle into the polling room after completing

their delivery route. The unique structure of the Company's operation in which each employee completes their shift at a different time will all but ensure that no more than four people will be present in the polling location at one time.<sup>8</sup>

The Acting Regional Director's concern with the number of people present in the polling room for the pre-election conference and the post-election vote count are similarly misplaced. As set forth above, the proposed polling location is a large conference room that would allow individuals to maintain appropriate physical distancing. Additionally, everyone who visits the facility, including visitors, is required to complete a health and temperature screening, and is provided with gloves and a mask. Thus, the Company's enhanced safety protocols would provide ample protection for anyone who participates in the election day activities.

Moreover, it would not be difficult to modify the manner in which the pre-election conference and post-election vote count are conducted to minimize physical interaction. For example, the Acting Regional Director could mandate that each party be limited to one representative for the pre and post-election proceedings. Under that scenario, there would never be more than five people present in the polling location.<sup>9</sup> Yet another option would be to conduct the pre-election conference virtually with only the employee observers present in the polling location and the party representatives participating via video conference. At the conclusion of the election, the Board Agent could seal the ballot box and the tally of ballots could be conducted via video-conference at the Region 9 offices the following day (just like the Acting Regional Director has ordered the tally of ballots to be conducted for the mail ballot election).

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<sup>8</sup> For example, an observer for the Company, an observer for the Union, the NLRB representative, and one voter would likely be the maximum number of individuals inside the voting room during polling hours.

<sup>9</sup> Company representative, Union representative, Board Agent, Company observer, Union observer.

Ultimately, the Acting Regional Director was unpersuaded by the Employer’s health and safety protocols. “I have considered the Employer’s proffered plans to safely run a manual election at its facility, but even those measures cannot guarantee the safety of all those involved in a manual election.” (Decision, at 6) (emphasis added). Apparently, the Acting Regional Director will not permit a manual ballot unless an employer can guarantee that the virus will not be contracted by any individual involved in the election. This impossibly high standard would render manual ballots unavailable for the foreseeable future, if not forever. Indeed, even after a vaccine is developed and widely distributed, an employer could not “guarantee” that the virus would not be contracted during an election, just as an employer cannot guarantee that an employee will not contract the flu at work.

At its core, the Acting Regional Director’s mail ballot order is a speculative and misguided effort to reduce the risk of exposure to COVID-19 at the expense of reliability, preservation of laboratory conditions, and overall workplace democracy. This type of ad hoc reordering of priorities is inconsistent with Board precedent, contrary to the Agency’s mission, and antithetical to the salutary purposes of the National Labor Relations Act. In light of Kentucky’s broad reopening order, Vistar’s implementation of robust health and safety protocols and, thus, the availability of a safe environment to administer the manual ballot, COVID-19 does not present “extraordinary circumstances” justifying a mail ballot election.

### **CONCLUSION**

The manual ballot election is one of the hallmark features of workplace democracy in the United States. It should not simply be brushed aside without due consideration. Accordingly, for the reasons set forth herein, the Board should summarily stay the election, grant the Employer’s Request for Review, and reverse the Decision of the Acting Regional Director.

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