

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5**

MOUNTAIRE FARMS INC.

Employer

and

Case 05-RD-256888

OSCAR CRUZ SOSA

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS  
UNION LOCAL 27 A/W UNITED FOOD AND  
COMMERCIAL WORKERS INTERNATIONAL  
UNION, AFL-CIO

Union

**ORDER AND SUPPLEMENTAL DIRECTION OF ELECTION**

Oscar Cruz Sosa (the Petitioner) filed the petition herein with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (Act), seeking to decertify United Food and Commercial Workers Union, Local 27 a/w United Food and Commercial Workers International Union, AFL-CIO (Union) as the exclusive collective-bargaining representative of roughly 800 employees employed by Mountaire Farms, Inc. (the Employer), a poultry processing plant in Selbyville, Delaware. A hearing was held on March 10, 2020, on the issue of whether the petition was barred by the in-force collective-bargaining agreement (CBA). The Petitioner and Employer argued that the union-security clause in the CBA is unlawful, thus removing the contract as a bar to an election. The Union countered that the union-security clause was lawful, preserving the CBA's ability to bar the petition.

On March 19, 2020,<sup>1</sup> because of safety concerns related to the ongoing COVID-19 pandemic, the Board ordered that all Board-conducted elections be temporarily suspended. On March 23, Delaware Governor John Carney declared a state of emergency for the State of Delaware due to the pandemic. The Governor then issued a stay-at-home order effective March 24, and on March 29, instituted a mandatory 14-day quarantine for all travelers arriving in Delaware from out of state. The Employer's Selbyville facility, however, continued to operate at full capacity under President Donald Trump's Executive Order classifying meat and poultry processing plants as essential infrastructure that must remain open during the pandemic.<sup>2</sup>

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<sup>1</sup> All dates refer to 2020 unless otherwise noted.

<sup>2</sup> Exec. Order No. 13917, 85 Fed. Reg. 26313 (May 1, 2020).

On April 1, the Board lifted its suspension on Board-conducted elections, noting that appropriate measures for conducting elections in a safe and effective manner were available and that the determination as to such measures would be left to the Regional Directors.

On April 8, I issued a Decision and Direction of Election (DDE) in this case, finding that the CBA's union-security clause could not serve as a bar to the processing of the petition. On April 10, I issued the Notice of Election scheduling, a manual election to take place on June 17, from 5:00 a.m. to 10:00 a.m. and 2:00 p.m. to 7:00 p.m. in the Employer's training room at its Selbyville facility.

On April 22, the Union filed a Request for Review with the Board challenging my findings and conclusions in the DDE. That Request for Review remains pending before the Board.

On May 24, the Union filed with me a Motion for a Mail Ballot Election. The Petitioner and the Employer filed their Oppositions to the Union's Motion on May 28. Upon review of the parties' filings and the current and changed circumstances of the COVID-19 pandemic, I issued an Order to Show Cause why the election should not be conducted by mail ballot. The parties filed their responses on June 5.

Having reviewed the parties' responses, and having considered other factors as addressed below, I have determined that because of the extraordinary circumstances presented by the ongoing pandemic, this election will be conducted by mail.

## **I. POSITIONS OF THE PARTIES**

The Employer and Petitioner assert that only a manual election is appropriate.<sup>3</sup> The Employer proposes significant precautionary measures for the manual election to mitigate the risk of transmission of COVID-19 among the employees, observers, and Board agents. The Employer suggests conducting the election in a 40-by-40-foot tent placed outside, in the facility's parking lot, instead of the training room the parties stipulated to at the hearing, because the risk of transmission is mitigated when outdoors. The Employer argues that this tent would allow for ample spacing between Board agents, observers, and voters, and the entrance and exit would be customized to ensure safety protocols by all parties. The Employer also proposes the use of plastic barriers to protect Board agents as they pass ballots to voters; one-way movement in and out of the voting tent; and individually packaged meals, water, and personal protective equipment (PPE) (including face masks, face shields, gloves, and hand sanitizer) for Board agents and election observers. Bargaining-unit employees would be directed to wear their Employer-provided PPE while voting. The Employer would also provide separate pencils for each voter, hand sanitizer stations, additional plastic barriers where appropriate, and visual signage regarding social distancing.

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<sup>3</sup> The Petitioner adopted the Employer's Response to the Order to Show Cause. For brevity, I will simply label these the Employer's arguments.

The Employer also cited to Governor Carney's modification to several state-wide restrictions effective as of June 1, including lifting the 14-day quarantine for out-of-state travelers and permitting outdoor gatherings of up to 250 people.

The Employer asserts that a mail-ballot election presents unique challenges with its workforce: employees move frequently without providing a chance of address; they have a low literacy rate; many do not speak English as their native language; and many are first-generation immigrants who are suspicious of government mail and lack faith in the postal system.

On the other hand, the Union asserts that there is no safe way to conduct a manual election because COVID-19 is still present in the workplace and the community. Because the safety of all involved parties cannot be guaranteed during a manual election, the Union urges me to order a mail-ballot election instead.

## II. THE BOARD'S STANDARD

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees[]", and "[t]he Board in turn has delegated to the Regional Directors discretion in determining the arrangements for an election...." *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* 325 NLRB at 1144-1145. A Regional Director's decision should only be overturned where a clear abuse of discretion is shown. *National Van Lines*, 120 NLRB at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* The Casehandling Manual addresses the most common situations where a mail ballot is utilized: where employees are "scattered," working in different geographic areas, working in the same area but traveling on the road, working different shifts, or working combinations of full-time and part-time schedules. *Id.*

In a recent announcement, the Board emphasized Regional Directors' discretion in scheduling elections in light of the "extraordinary circumstances of the current pandemic." Its April 17 announcement, "COVID-19 Operational Status," states, in part:

**Representation Elections** — 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.

**III. CONDUCTING A MAIL-BALLOT ELECTION MINIMIZES THE RISK OF EXPOSING EMPLOYEES, BOARD AGENTS, EMPLOYER AND UNION REPRESENTATIVES, THEIR FAMILIES, AND THE PUBLIC TO COVID-19.**

Under the present circumstances, I find it appropriate to direct a mail-ballot election.

As an initial matter, I note that there is no contention that the employees in question are scattered by location or schedule. Absent public health concerns related to the spread of COVID-19, this would almost certainly not be an election where a mail-ballot election would be considered.

At the time of this Order, the United States has reached a grim milestone of over 110,000 COVID-19-related deaths.<sup>4</sup> Of Delaware's approximately 10,000 confirmed coronavirus cases, almost half are in Sussex County, where the Employer's facility is located.<sup>5</sup> While Governor Carney has loosened some COVID-19-related restrictions, on June 6, he renewed the State of Emergency declaration and noted that "COVID-19 is still active" and urged residents to "remain vigilant and follow public health guidelines."<sup>6</sup> As recently as June 8, the Delaware Division of Public Health announced 30 new cases of coronavirus among state residents.<sup>7</sup> Public health experts continue to advise individuals to avoid unnecessary social contact, and to conduct business remotely when possible in order to avoid possible spikes in cases in the coming weeks.<sup>8</sup> The Employer's employees are at the workplace because their work is considered critical to the food supply, and there is no option for them to work remotely.<sup>9</sup>

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<sup>4</sup> Johns Hopkins University, Center for Systems Science and Engineering, *COVID-19 Dashboard*, <https://systems.jhu.edu/research/public-health/ncov/> (last visited June 9, 2020)

<sup>5</sup> *Delaware Coronavirus Map and Case Count*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/interactive/2020/us/delaware-coronavirus-cases.html>.

<sup>6</sup> Delaware News, Office of the Governor, *Governor Carney Formally Extends State of Emergency* (June 6, 2020), <https://news.delaware.gov/2020/06/06/governor-carney-formally-extends-state-of-emergency/>

<sup>7</sup> Delaware News, Division of Public Health, *Public Health Announces 30 More Positive Cases of COVID-19 in Delaware, No New Deaths* (June 8, 2020), <https://news.delaware.gov/2020/06/08/public-health-announces-30-more-positive-cases-of-covid-19-in-delaware-no-new-deaths/>

<sup>8</sup> Joel Achenbach, *Coronavirus hot spots erupt across the country; experts warn of second wave in South*, 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](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).

<sup>9</sup> I also note that on March 24, Governor Carney's Sixth Modification of the Declaration of a State of Emergency provided, inter alia, that an otherwise duly registered voter can qualify for an

In response to the Order to Show Cause, the Employer provided me with information regarding COVID-19 testing at the facility, as well as figures on the number of employees who have quarantined and the Employer's comparative absenteeism rates. On May 27, the Employer conducted its first plant-wide testing for COVID-19. Of the 1,419 employees tested, 34 tested positive. All employees that tested positive were asymptomatic. Those employees were sent home and directed to return to work on June 8. Additionally, since the beginning of April, the Employer directed an additional 46 employees to self-quarantine due to their reported exposure to the coronavirus, whether at work or elsewhere. The most recent group of employees self-quarantined from May 7 to 16, and returned to work on May 17. The Employer also reported that absenteeism at the Employer's facility was 10 percent higher – and in one week close to 15 percent higher – in the last three weeks of May when compared to a similar time period in 2019.

The Employer has suggested what I believe is a thoughtful and carefully-considered plan for minimizing the risk of exposure during a manual election. However, even with the measures it proposes, a manual election will potentially result in 800 interactions between the voters, observers, and Board agents – all interactions that can be avoided with a mail-ballot election. In addition to the large size of the bargaining unit, the ten-hour voting period means that Board agents and observers will have significant, prolonged exposure to each other in addition to hundreds of voters.

The Employer has implemented a 100-percent temperature screening at its facility, and while I agree that this screening might decrease the likelihood of the spread of the coronavirus, current medical guidance warns that the possibility of pre-symptomatic and asymptomatic transmission of the virus presents serious challenges to stopping its spread. The fact that all 34 employees that tested positive for COVID-19 on May 27 were asymptomatic compounds this concern.<sup>10</sup> I simply cannot ignore the possibility that, at a manual election, asymptomatic COVID-19 carriers might come into contact with employees and Board personnel, and risk transmission to those individuals, despite precautionary measures. When a viable, and unquestionably safer, alternative exists in a mail ballot, I choose that alternative. I find that the most responsible measure to ensure a safe election is to change the method of balloting to a mail-ballot election, which will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to the coronavirus.

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absentee ballot for the State's 2020 presidential primary and other upcoming state and local elections. Specifically, the Governor ordered that the qualification of "sick or physically disabled" shall apply to and include "any such voter who is asymptomatic of COVID-19 infection and otherwise abiding by CDC and DPH guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19..." See, Section A. Elections, paragraph 5. <https://governor.delaware.gov/health-soe/sixth-state-of-emergency/> (last visited June 9, 2020).

<sup>10</sup> Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited June 9, 2020) ("Some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms.").

I also view the conduct of this election by mail ballot as having an additional benefit of eliminating the uncertainty that a manual election could be further cancelled or delayed. As the Employer's recent testing figures suggests to me, individuals could be present at the Employer's facility, be asymptomatic, and pose a risk of transmission. Individuals could be awaiting test results, exhibiting symptoms (or not), or have had contact with another individual who had tested positive or was awaiting results. These factors could trigger another cancellation and delay of this election. The mail ballot, however, eliminates this uncertainty and possibility of additional delay in employees being able to exercise their choice in this election, and allows them to do so in a manner that is the safest for all individuals involved.

#### **IV. THE CHALLENGES OF A MAIL BALLOT ELECTION CITED BY THE EMPLOYER CAN BE ADEQUATELY ADDRESSED BY BOARD PROCEDURES.**

The Employer cites "unique challenges for its workforce" that complicate a mail-ballot election. The Employer notes that many employees do not speak English as their native language. Based on the parties' representations, the Notice of Election and the ballots will continue to be printed in English, Spanish, and Haitian Creole to address these language concerns, as they were when I first directed a manual election.

The Employer also claims that employees move frequently without providing a change of address, the workforce has a low literacy rate, and many employees are first-generation immigrants who are suspicious of government mail and lack faith in the postal system. I find that all of these concerns can be amply addressed by the Employer, the Union, and the Petitioner, who all have the opportunity to explain the mail-ballot process to employees, encourage employees to notify the parties and the Regional office of any change in their mailing addresses, and work to alleviate any mistrust or suspicion employees may have about the election process. The posting of the Notice of Election, which includes a sample ballot, also serves the purpose of informing employees about the mechanics of the election. While the Board's Casehandling Manual suggests that the deadline for return of ballots should usually be two weeks, I find that three weeks is more appropriate here, and provides the parties with additional time to address these concerns. See NLRB Casehandling Manual Part Two Representation Proceedings, Sec. 11336.2(d).

#### **V. CONCLUSION**

The Board has stated that Regional Directors retain broad discretion to direct a mail-ballot election where circumstances dictate. *See Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) ("a Regional Director has broad discretion in determining the method by which an election is held.") The Board requires that I consider safety, staffing, and federal, state and local laws and guidance in scheduling elections. *See NLRB COVID-19 Operational Status Announcement* (April 17, 2020). I find that a manual election cannot be safely held at this time. Or, at the very least, a manual election unnecessarily exposes voters, parties, Board personnel, their families, and the public to the life-threatening dangers posed by COVID-19, and these dangers can be avoided by conducting this election by mail, and without compromising employee free choice. Because there is no indication when a manual election could be safely held, waiting to schedule a manual election would further delay this already-delayed election.

Accordingly, I find that the extraordinary circumstances present here require me to exercise that broad discretion afforded by the Board, and direct a mail-ballot election.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the election in this case be conducted by mail ballot.

### **SUPPLEMENTAL DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate in the Decision and Direction of Election issued in this matter on April 8, 2020. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers Union, Local 27 a/w United Food and Commercial Workers International Union, AFL-CIO.

#### **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 on Tuesday June 23, 2020.

Voters must return their mail ballots so that they will be received by 3:00 p.m. on Tuesday July 14, 2020.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 5 office by no later than 4:45 p.m. on Tuesday June 30, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director, at 3:00 p.m. on Wednesday, July 15, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

#### **2. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **April 4, 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.

The Employer **has timely filed and served**, the voter list pursuant to the Decision and Direction of Election issued on April 8, 2020.

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, which will issue shortly after this Order and Supplemental Direction of Election, 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 election and copies must remain posted until the end of the election. 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.

### **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 election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

June 10, 2020

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for 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 election in this matter unless specifically ordered by the Board.

Issued at Baltimore, Maryland, this 10<sup>th</sup> day of June 2020.

(SEAL)

/s/ *Sean R. Marshall*

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