

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

CASE NO. 01-RC-263214

**IN THE MATTER OF
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 633**

AND

**COCA-COLA BEVERAGES NORTHEAST, INC.
(LONDONDERRY SALES SERVICE CENTER)**

**COCA-COLA BEVERAGES NORTHEAST, INC.'S
REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION**

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TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. SUMMARY OF EVIDENCE.....	2
III. ARGUMENT IN SUPPORT OF COKE NORTHEAST’S REQUEST FOR REVIEW	3
A. Standard of Review	3
B. The Acting Regional Director Abused His Discretion In Departing From Board Precedent Favoring In Person Elections	3
IV. CONCLUSION.....	9

I. INTRODUCTION

On July 20, 2020, the International Brotherhood of Teamsters Joint Council 10 on Behalf of Teamsters Local Union No. 633 of New Hampshire (“Local 633” or the “Union”) filed an RC Petition seeking certification as the collective bargaining representative for certain warehouse employees of the Londonderry, New Hampshire Sales Service Center (“LSSC”) of Coca-Cola Beverages Northeast, Inc. (“Coke Northeast” or “Employer”), a bottler and distributor of Coca-Cola and other non-alcoholic beverage products located approximately 45 minutes from the Region 1 Boston office.¹ As the result of a hearing on August 7 and a Decision and Direction of Election (“Decision”) issued on August 24, the composition of the voting unit is set. Coke Northeast files this Request for Review because the Acting Regional Director rejected its request for and jettisoned longstanding National Labor Relations Board (“NLRB” or “Board”) policy in favor of a manual election based on nothing more than ipse dixit and in such a manner that it plainly amounts to an abuse of his discretion.

Thus, pursuant to Section 102.67 of the Board’s Rules and Regulations, Coke Northeast requests review of the Acting Regional Director’s decision to hold the election by mail. The Acting Regional Director’s analysis was so meaningless that it would justify holding a mail election in every representation case regardless of Board policy and thus the analysis constitutes an abuse of discretion.

¹<https://mapquest.com/directions/from/us/ma/boston/02222/%5B10-10%5D-causeway-st-42.364909,-71.062421/to/us/nh/londonderry/03053-2131/7-symmes-dr-42.918950,-71.379019>.

II. SUMMARY OF EVIDENCE

Coke Northeast seeks a manual election because not only is a manual election the normal course of conduct for an election, but manual elections result in greater participation. (**Transcript “T” – 130**). Compounding the betterment of the election process produced by a manual election, the current publicized delays in the delivery of mail by the United States Postal Service provide another salient reason why a manual election should be held. This delay in delivery service raises the likelihood of delays in both eligible voters’ receipt of ballots and the return delivery of completed ballots to the NLRB Region 1 office in time to be counted. (**T-130**). The Union’s only objection to a manual election was a concern about possible delay as a result of Regional office staffing decisions. (**T-129**).

Coke Northeast represented at the hearing that all of the potential voters work on site and that it could provide an election environment in full compliance with the General Counsel’s Suggested Manual Election Protocols (**Memorandum GC 20-10**); (**T-20, 22, 130, 131**). The Union² agreed that Employer’s large second floor conference room is suitable for the election, and both Employer and the Union also agreed that a manual election could be conducted in this large conference room in compliance with the General Counsel’s recommendations. (**T-130,131**). The Hearing Officer and the parties reached agreement on the hours of the election, providing for four and a half hours for balloting spread out to permit employees working all shifts the opportunity to vote. (**T-133,134**). The potential voters number thirty eight, all of whom can move safely through a large conference room over the course of four and a half hours without violating any social distancing guidelines. (**Decision, pp. 3,4,8**). The Acting Regional Director rejected a manual

² The Union is somewhat familiar with the Employer’s facility in light of a manual vote less than three years ago, Case 01-RC-207847, and because the parties have a longstanding relationship in a separate bargaining unit at the Employer’s adjacent production facility that shares a common wall and door with the subject warehouse. (**T-19**); **Decision**, p. 2.

election solely based on remote and speculative possibilities, none of which are grounded in the record nor based on facts subject to the taking of judicial notice.

III. ARGUMENT IN SUPPORT OF COKE NORTHEAST'S REQUEST FOR REVIEW

A. Standard of Review

Pursuant to the regulations promulgated by the Board, the Board will grant a request for review upon any of the following four grounds:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in conjunction with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 CFR Part 102.67(c). Compelling reasons exist for the Board to grant this Request for Review of the Regional Director's decision.

B. The Acting Regional Director Abused His Discretion In Departing From Board Precedent Favoring In Person Elections

The Acting Regional Director correctly recognized in his Decision that Board precedent and policy favor manual elections. **Decision**, p. 9, *citing NLRB Casehandling Manual Part Two Representation Proceedings, Sec. 11301.2*. He even posited that “[u]nder ordinary circumstances, I would almost certainly order a manual election.” But instead of recognizing that circumstances more ordinary than in most regions, he erected a straw man to justify voting by mail. Since a mail ballot election may be appropriate in the face of circumstances that make in person voting more difficult, *Nouveau Elevator Industries*, 326 N.L.R.B. 470, 471 (1998), *see also, San Diego Gas*,

325 N.L.R.B. 1144, 1145 (1998), the Board has identified situations in which mail in voting may be appropriate as follows:

- 1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (3) where there is a strike, a lockout or picketing in progress.

San Diego Gas, supra.

Recent Board decisions have confirmed that the ongoing COVID-19 pandemic creates “extraordinary circumstances” that require the Board, taking in to account the application of the protocols set forth in GC 20-10, to consider the appropriateness of manual elections in light of the circumstances of COVID-19 in the region where the election would be held. *See, Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020). Although the Acting Regional Director recognized his obligation to consider the circumstances prevailing in Region 1, he abandoned this obligation instead of doing so. **Decision** at p. 10, *quoting Daylight Transport LLC*, 31-RC-262633 (August 19, 2020).

The discretion delegated by the Board to its Regional Directors is not unbounded. *Nouveau Elevator Industries*, 326 N.L.R.B. 470, 471 (1998), *citing, San Diego Gas & Electric*, 325 N.L.R.B. 1143, 1144 fn. 4 (1998); *National Van Lines*, 120 N.L.R.B. 1343, 1346 (1958). While the Board should expect its Regional Directors to exercise discretion when applying the above guidelines to determine the appropriateness of a manual election, the Board must protect an objecting party when that discretion has been abused as clearly as it has in this case.

The Acting Regional Director’s analysis can be found within a paragraph at the top of page 10 of the Decision and more specifically within a single sentence. The Acting Regional Director,

without identifying a factual basis, concluded that a mail in election in the town of Londonderry, New Hampshire because “a manual ballot election would be fraught with uncertainty and subject to unpredictable changes” in light of “the rapid fluctuations to both recommended and mandatory virus countermeasures.” *Id.*

Absent from that conclusion is any supporting factual analysis likely because the current COVID-19 conditions in Region 1 (and in particular New Hampshire and Boston/Hartford)³ have been and remain completely at odds with the Acting Regional Director’s conclusion. After hitting a peak in early May, infection rates in New Hampshire have been trending downward throughout the Summer. At 1.0%, New Hampshire currently enjoys the 5th lowest COVID-19 positivity rate in the country.⁴ Both Connecticut and Massachusetts have also shown downward trends in positivity. Connecticut comes in 4th, just ahead of New Hampshire with a current positivity rate of 0.93%, while Massachusetts is rated 9th with a positivity rate of 1.7 %.⁵ All three states, and all of Region 1, have been and remain well below the CDC recommended positivity rate of 5%, and even further below the national average of 6.92%.⁶

Instead of considering these facts, which are subject to judicial notice, the Acting Regional Director described three patently hypothetical examples that he felt justified exercising his discretion to abandon Board policy. First, the Acting Regional Director hypothesizes that the Board agent assigned to oversee the election could wake up with symptoms of COVID-19 **exactly** on the morning of the election, forcing a last minute postponement. While this chain of events and its exact timing theoretically could happen, the risk of it happening is not much different than the

³ Region 1 offices are located in Boston, MA and Hartford, CT.

⁴ As of August 26, 2020, New Hampshire had the 4th lowest 7-day positivity rate in the country at 1.0%. <https://coronavirus.jhu.edu/region/us/new-hampshire>; <https://coronavirus.jhu.edu/testing/testing-positivity>

⁵ <https://coronavirus.jhu.edu/testing/testing-positivity>.

⁶ <https://coronavirus.jhu.edu/testing/testing-positivity>; <https://coronavirus.jhu.edu/testing/international-comparison>

risk of a Board agent waking up too sick to conduct an election in a non-pandemic environment. If the simple possibility that a Board agent could wake up with symptoms or be ill the morning of an election was sufficient to ignore Board policy and require a mail in election, then there would be no discretion involved - all elections would be by mail and Board policy would simply be ignored. And as noted above, Region 1's experience is among the very best in the entire country so this alleged risk is marginal at best.⁷ In addition, the Acting Regional Director's example ignores two easy and simple solutions that would ensure the adherence to Board policy.⁸ First, the Acting Regional Director could assign two Board agents to conduct the vote, a pre-pandemic practice in some cases in Region 1. Second, he could assign a back-up Board agent which is what the Acting Regional Director would do if the assigned Board agent were to become sick or have symptoms at any time **prior** to the day of the vote.⁹ Simply put, in light of the Region's COVID-19 experience, the risk that a Board agent might wake up with symptoms the day of the manual election, while extraordinary, is simply not the type of "extraordinary circumstance" envisioned by the Board in *San Diego Gas*.

The Acting Regional Director's second example is that mail in ballots protect against the possibility that an employee, or group of employees, tests positive and is subject to quarantine at the time of the election. In other words, he is concerned about disenfranchisement of voters due to the pandemic in a state that enjoys a 1% positivity rate. Again, this hypothetical lacks any record support or any accompanying analysis. Had the Acting Regional Director inquired then he would have learned how relatively safe New Hampshire is and he should already be familiar with the conditions surrounding the Region's two offices having participated in managing them over

⁷ Moreover, the analysis fails to consider the practices being followed by the staff of Region 1 to remain healthy.

⁸ Unless of course the concern is that every Region 1 Board agent manages to display symptoms or be ill that commence exactly on the morning of the vote.

⁹ The location of the facility is such that not even a hotel stay would be required to staff this manual vote.

the past six months. In discharging his duty to adhere to Board policy and had the raising of this excuse been a real concern, the Acting Regional Director should have instructed the Hearing Officer Krantz not only to inquire about the Employer's ability to conduct a safe manual election but to inquire about the risks that an employee or a group of employees in the voting unit would be in quarantine at the time of the election. Had the Acting Regional Director's concerns been approached more seriously, then he could have directed the Hearing Officer to inquire about the facility's status as an "essential employer", about the warehouse group's virus rate to date (which happens to be zero) and about the protective practices that have been in place throughout the pandemic.¹⁰ In addition, to reach his conclusion, the Acting Regional Director should have assessed regional virus rates, which, as set forth above, are extraordinarily quite low. Finally, as with the Board agent hypothetical, employee illness/quarantine on the date of the election is always a possibility, pandemic or otherwise, and the mere possibility thereof is insufficient to jettison Board policy in favor of a mail election. The Acting Regional Director's second hypothetical is not an "extraordinary circumstance" rather it is an extraordinary possibility.

The Acting Regional Director's third example of the risk associated with a manual election is his speculation that in the next few weeks New Hampshire, the fifth pandemically safest state in the country, could suddenly experience a spike in its infection rate so significant that its Governor would impose restrictions on gathering size (to fewer than four) and mandatory quarantines for people crossing state lines. Since the Employer is an essential business and since this vote would likely survive any hypothetically likely gubernatorial limit on gathering size, the Acting Regional Director's true concern is for the Board agent who might¹¹ be prevented from crossing the New

¹⁰ <https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/files/inline-documents/guidance-universal.pdf>.

¹¹ It is entirely realistic that Region 1 has Board agents who reside in New Hampshire as it is a common practice for tax reasons for Massachusetts employees to reside in southern New Hampshire.

Hampshire state line to conduct the election. However, he conducted no analysis of the actual situation and the risk of a viral spread of this proportion relying instead on an unsupportable hypothetical.¹² Doing so would have required at least a recognition that earlier this year New Hampshire applied a staged re-opening plan based on virus rate metrics, and transitioned from a Safe at Home plan to a Safer at Home plan, slowly and incrementally re-opening since June, under strict CDC compliant state guidelines. As a result of this plan, and its associated health protocols, virus rates trended down all summer, the state continues to have a very low infection rate and the risk of a cataclysmic reversal appears to be as extraordinary as the risks he posited in his first two examples.

Finally, the Decision fails to even mention, let alone challenge Employer's willingness to comply with **all** of the requirements set forth in GC 20-10. **(T-129, 130, 131)**. Pursuant to New Hampshire's Universal Guidelines, many of the precautions recommended in GC 20-10 are already mandated, including but not limited to enhanced cleaning and disinfection programs for the facility, use of facial coverings, access to handwashing and hand sanitizer, and evaluation of the ventilation system to assure adequacy.¹³ Moreover, a manual election in this instance would only require 38 people, already present at the facility, to move through a large conference room over the course of four and a half hours.

The Regional Director's decision reflects an abuse of his discretion that falls woefully short of the required analysis necessary to reach a thoughtful and considered decision regarding whether extraordinary circumstances exist that would make in person voting too difficult for this election. An assessment of the facts, rather than unsupported hypotheticals, reveals that while the pandemic

¹² Despite the Regional Director's concern, there is no quarantine requirement for visitors to New Hampshire from other New England states <https://www.covidguidance.nh.gov/out-state-visitors>.

¹³ <https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/files/inline-documents/guidance-universal.pdf>.

has not gone away, it is well managed in the region and does not amount to the “extraordinary circumstances” sufficient to jettison long standing Board policy and preference for in person voting.

IV. CONCLUSION

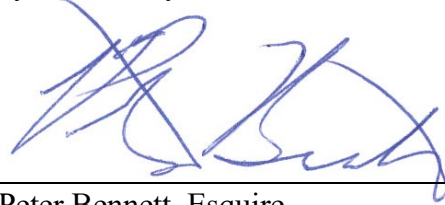
For all the foregoing reasons, the Employer Coke Northeast, respectfully requests that this Request for Review be granted and further find that the Regional Director abused his discretion in directing a mail in ballot election rather than a manual election. If NLRB policy is to favor a manual election, then the facts surrounding COVID-19 positivity rates in New Hampshire and Region 1 do not amount to circumstances extraordinary enough to override policy especially when coupled with the Employer’s expressed willingness to comply with GC 20-10.

Dated: Portland, Maine
August 28, 2020

Respectfully submitted,

COCA-COLA BEVERAGES
NORTHEAST, INC.,

by its attorneys,



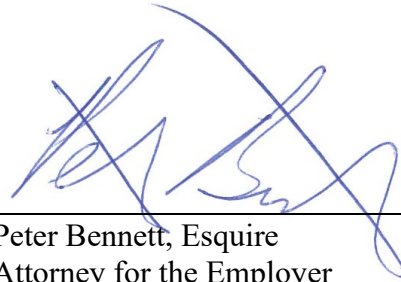
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CERTIFICATE OF SERVICE

I, Peter Bennett, Esquire, hereby certify, that on August 28, 2020, I served the within Request for Review upon counsel for the Union, Gabriel Dumont, Esquire, by emailing and mailing copies thereof to the following:

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