

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

COCA-COLA BEVERAGES NORTHEAST, INC.,

Employer

And

CASE NO.
01-RC-263214

**CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA LOCAL UNION
NO. 633 OF NEW HAMPSHIRE, A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Petitioner

**PETITIONER’S OPPOSITION TO COCA-COLA BEVERAGES NORTHEAST, INC.’S
REQUEST FOR REVIEW OF DECISION AND DIRECTION OF ELECTION**

INTRODUCTION.

By its Petition, Chauffeurs, Warehousemen and Helpers of America Local Union No. 633 of New Hampshire a/w Internal Brotherhood of Teamsters (“Local 633” or “Union”) seeks to represent a bargaining unit of certain employees of the Coca-Cola Beverages Northeast, Inc. (“Employer” or “Coca-Cola”) working at the Employer’s Londonderry, New Hampshire Sales Center (“Facility”). On August 24, 2020, the Acting Regional Director issued his *Decision and Direction of Election* expanding the bargaining unit requested by Local 633 to include Inventory Specialists and Leads and ruling that “the current pandemic does not present ordinary circumstances;” that “[a] mail-ballot election provides the certainty of process and procedure to conduct an election within a prompt period and in an effective manner;” and that “[a] mail-ballot election has no apparent drawbacks and allows for a degree of certainty that a manual election does not currently permit. Importantly, a mail-ballot election also has the potential to protect the

voters, the parties, the observers, and the Board agents from unnecessary exposure to COVID-19.” DDE at pp. 10-11.

Coca-Cola has filed a Request for Review claiming that “the Regional Director abused his discretion in directing a mail in ballot election rather than a manual election.” *Request for Review* at p. 9. Pursuant to Section 102.67(f) of the Board’s Rules and Regulations, Local 633 hereby opposes Coca-Cola’s Request for Review.

Argument.

At the conclusion of the RC hearing, the Employer was asked to “provide an explanation for the reason why the Employer is seeking an in-person election.” The Employer’s full explanation was as follows:

MR. BENNETT: Manual elections are a matter of due course in terms of processing of representation cases, unless there is a reason not to conduct a manual election. In terms of the issues with the pandemic, the requirements that have been set forth in the information that was provided to us, in terms of the room and the sanitation and the spacing and entry and exit and all else, we can fully comply with.

Our concerns in terms of proceeding with a mail ballot election are that anecdotally, participation is less fulsome than in a manual election. And there are risks in terms of the quality of service from the United States Post Office in terms of ballots being able to process through the mail in a timely way. Some of that’s driven by cutbacks at the Post Office that have slowed down the mail substantially.

We think that the best way to give the employees full and fair free choice is to have a manual that maximizes the opportunity for people to show up and vote. Tr. 130.¹

In order to facilitate timely elections (both RC and RD), Regional Directors, with Board support, have overwhelmingly ordered, over the objections of employers, that elections be conducted by mail ballot since the declaration of a National Emergency in March 2020.² At

¹ The Employer in its Post-Hearing Brief did not expand upon or add to this explanation.

² For example, every DDE issued in August 2020 has provided for a mail ballot election over the objection of the employer. See *Airgas USA, LLC*, 16-RC-262896 (August 27, 2020); *Westside Plumbing, LLC*, 28-RC-263057 (August 26, 2020); *200 State Street, LLC*, 04-RC-263237 (August 25, 2020); *American Paper Bag, LLC*, 04-RC-

their core, the Regional Directors' decisions have emanated from the Board's continued directive that the Covid-19 pandemic creates "extraordinary circumstances" under *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998) that permit the ordering of a mail ballot election. See, e.g., *Daylight Transport, LLC*, 31-RC-262633, *Order Denying Request for Review* (August 19, 2020) ("In finding that a mail-ballot election is warranted in this case, we rely on the extraordinary circumstances resulting from the Covid-19 pandemic.")

In the instant DDE, the Acting Regional Director, on the issue of whether a manual or a mail ballot election should be conducted, stated as follows:

The Board has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Electric*, 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.* at 1144-1145.

As the Employer states, the Board's longstanding policy is that elections should generally be conducted manually. NLRB 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.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

During the present COVID-19 pandemic, the Board has consistently taken the position that the pandemic constitutes extraordinary circumstances of the kind contemplated by *San Diego Gas*. For example, on August 19, 2020, in *Daylight Transport LLC*, 31-RC-

263126 (August 24, 2020); *The Seattle Times Co.*, 19-RC-261015 (August 20, 2020); *Paragon Systems, Inc.*, 21-RC-262650 (August 20, 2020); *Supervalu Wholesale Operations, Inc.*, 18 RC-263474 (August 20, 2020); *National Grid Energy Management, LLC*, 29-RD-261756 (August 20, 2020); *Eyemart Express, LLC*, 14-RC-263568 (August 19, 2020); *Santa Rosa Stainless Steel Fabricators*, 20-UD-264159 (August 18, 2020); *Ozark Automotive Distributors, Inc.*, 10-RC-263025 (August 18, 2020); *Aspirus Keweenaw*, 18-RC-263185 (August 17, 2020); *La Casa Norte*, 13-RC-262986 (August 14, 2020); *Cogent Waste Solutions, LLC*, 29-RC-256443, 256449 (August 14, 2020); *Daylight Transport, LLC*, 31-RC-262633 (August 12, 2020); *Antioch Tire, Inc.*, 13-RC-263043 (August 12, 2020); *CR&R Incorporated*, 21-RC-262469, 262474 (August 12, 2020); *The Wurlitzer Master Tenant, LLC*, 07-RC-261060 (August 11, 2020); *Gulf Coast Health & Rehabilitation, LLC*, 15-RC-262845 (August 10, 2020); *Morningstar Senior Management, LLC*, 27-RC-2622531 (August 6, 2020); *Laz Parking New York New Jersey, LLC*, 02-RC-262518 (August 4, 2020); *Mission Hospital*, 10-RC-257615 (August 4, 2020); *Clean Earth Environmental Solutions, Inc.*, 22-RC-262351 (August 3, 2020).

262633 (August 19, 2020) the Board, in denying the employer's request for review of a decision directing a mail-ballot election, advised:

The Board will continue considering whether manual elections should be directed based on the circumstances then prevailing in the Region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10...

Under ordinary circumstances, I would almost certainly order a manual election. However, as the Petitioner notes, the current pandemic does not present ordinary circumstances. Given the rapid fluctuations to both recommended and mandatory virus countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. For example, should the Board agent directed to conduct a manual election unexpectedly develop symptoms consistent with COVID-19 on the morning of the election, the election would be postponed at the last minute. If a group of the Employer's employees were exposed to COVID-19 several days before the election, they would be forced to forfeit their right to vote in order to quarantine themselves to protect their colleagues and neighbors. If the State of New Hampshire suffers a major increase in the COVID-19 infection rate and the local government is forced to limit the size of non-essential gatherings, a manual election might run contrary to state law and party representatives based in neighboring Massachusetts might be prevented from crossing state lines without undergoing a two-week quarantine. A mail-ballot election provides the certainty of process and procedure to conduct an election within a prompt period and in an effective manner.

While the Board has expressed a general preference for manual balloting, it has never hesitated to ballot by mail when the circumstances warrant it. Indeed, the Board's preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. For example, the majority opinion in *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) holds that balloting by mail is not in fact less effective and does not lend itself to subterfuge, coercion, invasion of privacy or other abuse. As the Board observed then, "Indeed, in the 62-year history of the Act, there has been only one reported instance of such abuse, *see Human Development Assn.*, 314 NLRB 821 (1994), and there is a similar record in the 71-year history of the Railway Labor Act (RLA), under which the use of mail ballots in representation elections has been the rule and not the exception." Also note that no manual election has been conducted by the National Mediation Board (NMB) under the RLA since 1987. Simply put, the Board has a long and proud tradition of conducting manual- and mail-ballot elections alike. It simply prefers manual elections when, unlike here, they are feasible, safe, and practical to conduct.

While the Employer has theorized that the United States Postal Service may not be able to deliver mail ballots in a timely manner, it has provided no evidence of actual mail delays in New Hampshire. The Region has consistently extended the time allowed for the return of mail ballots during the pandemic to alleviate such concerns and will do so here.

The Board noted in *Daylight Transport LLC* that while concerns about potential disenfranchisement of voters could be relevant to whether a mail-ballot election is appropriate, such concerns do not automatically require a manual election. Any party is, of course, free to present evidence of any actual disenfranchisement of voters in post-election objections.

I am, therefore, directing a mail-ballot election. A mail-ballot election has no apparent drawbacks and allows for a degree of certainty that a manual election does not currently permit. Importantly, a mail-ballot election also has the potential to protect the voters, the parties, the observers, and the Board agents from unnecessary exposure to COVID-19. DDE at 9-11.

There is no reasonable dispute that the Country, including New Hampshire, remain in the midst of the Covid-19 pandemic and, by all predictions, including those of the CDC, the pace of infections and deaths will increase from their summer levels in September. Thus, according to the CDC's August 27th Update: "This week CDC received forecasts of national COVID-19 deaths over the next 4 weeks from 37 modeling groups. Of the 37 groups, 34 provided forecasts for both new and total deaths and three provided forecasts for total deaths only. This week's national ensemble forecast predicts that 4,000 to 8,300 new COVID-19 deaths will be reported during the week ending September 19 and that 196,000 to 207,000 total COVID-19 deaths will be reported by that date."

In addition, while New Hampshire, state-wide, is fortunate to currently have a low infection rate, much of the state is rural. However, when the more urban areas of the state are viewed in isolation such as the City of Manchester and its Londonderry suburb, the infection rate is substantially less favorable. For example, Londonderry, where the Employer's facility is located, as of August 29, 2020, had 1-4 active cases and a total of 185.

At this point, the directive should be to minimize risk whenever and wherever possible. Currently, in Region 1 and no doubt in most other Regions, hearings, including RC hearings, are being conducted remotely; and, in fact, the instant RC hearing was conducted remotely. The use

of Zoom to conduct remote hearings is a new NLRB initiative put in place because of the pandemic to minimize risk. In contrast, the option of conducting mail ballot elections has been available since the NLRA was enacted. It is ironic indeed to argue, as the Employer does in its Request for Review, that the Acting Regional Director, after Region 1 conducted a remote RC hearing, abused his discretion in ordering a mail ballot election in the resulting DDE.

CONCLUSION.

Hopefully, in the not too distant future, children and young adults will be able to attend school exclusively in person, restaurants will be allowed to fully open, high school and college sports will be played and even played with fans in the stands and Region 1 will return to in person hearings. Until that time, employers, including Coca-Cola in the instant matter, should not be able to argue successfully that Regional Directors abuse their discretion when they minimize risks by ordering that mail ballot elections be conducted.

Wherefore, Local 633 respectfully requests that the Board deny Coca-Cola's Request for Review.

Respectfully submitted,

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HELPERS OF AMERICA LOCAL UNION
NO. 633 OF NEW HAMPSHIRE, A/W
INTERNATIONAL BROTHERHOOD OF
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