

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**BUSCH AGRICULTURAL RESOURCES,¹
Employer**

and

Case 27-RC-263511

**TEAMSTERS, CHAUFFEURS,
WAREHOUSEMAN AND HELPERS LOCAL
UNION NO. 893 AFFILIATED WITH
THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
Petitioner**

DECISION AND DIRECTION OF ELECTION

On July 23, 2020,² Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 893 Affiliated with the International Brotherhood of Teamsters (Petitioner) filed the instant representation petition under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of employees employed by Busch Agricultural Resources (Employer) at its Idaho Falls, Idaho, and Osgood, Idaho facilities (Employer's facilities). There are approximately 79 employees in the petitioned-for unit.³

The parties stipulated, and I find, that the following is an appropriate unit⁴ for the purposes of collective bargaining:

¹ The parties stipulated, and I so find, that to the extent the formal documents do not correctly reflect the names of the parties, that they be corrected as reflected herein.

² All dates hereinafter are in 2020 unless indicated otherwise.

³ The Employer's Statement of Position includes the names of 76 employees in the petitioned-for unit of "Malt houses 1-4: Electrician, Instrumentation, Operators, Elevator Operators, Mechanics, Maintenance. Idaho Falls (Osgood) Elevator Operators & Operators. Seed plant Operators." The Employer also submitted a list of three lab analysts that were eventually included in the unit, therefore increasing the unit to approximately 79 employees.

⁴ The Employer contends that it presently has no part-time employees nor does it intend to have any in the foreseeable future. The Union does not dispute this fact, and therefore, despite the Employer's contentions in its post-hearing brief, the inclusion of part-time employees was not an issue that was litigated at the instant hearing. Inasmuch as the parties agree that there are no part-time employees and the matter was not litigated, I find it unnecessary to make a determination as to whether they would be included or excluded from the petitioned-for unit.

Included: All full-time elevator operators, malt operators, lead operators, plant foremen, electricians, general maintenance employees, lab analysts, research techs, and S and E operators I and II employed by the Employer at its facilities in Idaho Falls and Osgood, Idaho.

Excluded: All other employees; casual employees; coordinators, including elevator, malt house, electrical plant safety and BTS coordinators; office clerical employees, including office assistants, logistics specialists, and office clerks; planners, including technician planners; salaried employees; confidential employees; temporary employees; seasonal employees; professional employees; guards; managers; and supervisors, as defined by the Act.⁵

A videoconference hearing was held on August 13 before a hearing officer of the National Labor Relations Board (Board). The only matter at issue is whether the election should be conducted by a manual or mail ballot method. Petitioner maintains a mail ballot election is the appropriate choice under the circumstances, while the Employer argues that a manual election can be conducted safely at the Idaho Falls facility and is the correct choice.⁶ The Employer filed a post-hearing brief on these issues, while the Union waived its right to do so.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing, but the positions of the parties were solicited for consideration prior to the direction of an election. Having considered the entire record in this proceeding, relevant Board law, the arguments of the parties, and the Employer's post-hearing brief, I find the combination of the current pandemic and the circumstances surrounding the Employer's facilities creates an extraordinary circumstance making a mail ballot election appropriate in this case.

THE EMPLOYER'S OPERATION

The Employer is engaged in the procurement and production of raw agricultural products to be used in the brewing industry. The parties stipulated, and I so find, that the Idaho Falls and Osgood facilities are the only two facilities of the Employer involved herein. No details were adduced at the hearing regarding the configuration of either facility or exactly what kind of work was performed there and under what conditions. The Employer contends it employs about 70 employees in the unit sought at the main location and employs 7 unit employees at the Osgood location.⁷

⁵ The Employer tacitly requested in its post-hearing brief, and I so find, that the record be corrected to reflect BTS coordinators rather than ETS coordinators as they appear in the transcript. I further correct the term "seasonable" in the transcript to "seasonal."

⁶ The Employer appears to suggest in its post-hearing brief that inasmuch as the Petitioner initially requested a manual election in its petition, that it is not permitted to change its position and request a mail-ballot election. Given the changing landscape of the COVID-19 pandemic as discussed in further detail below, I reject this argument in favor of the Petitioner's current request for a mail-ballot election and the amendment of its position is permitted.

⁷ A Google search shows that the Osgood facility is about a 12 to 15minute drive from the Employer's main facility.

THE CURRENT IMPACT OF THE CORONA VIRUS PANDEMIC

At this point in the pandemic, while many aspects of COVID-19 still remain not fully understood, the critical public health interventions for reducing the spread of the virus are well-established. The Centers for Disease Control and Prevention (CDC) emphasizes that “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.” *How to Protect Yourself & Others*.⁸

As a practical matter this has resulted in many Federal, state, and local government guidelines focusing on the same set of practices to avoid respiratory person-to-person transmission: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. The CDC has also highlighted the risk posed by pre-symptomatic and asymptomatic transmission, stating “transmission in the absence of symptoms reinforce the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*.⁹ Despite efforts to limit transmission, over 6 million people in the United States have been infected with COVID-19 and over 185,000 people have died.¹⁰

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”¹¹ The CDC acknowledges the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes, but adds due to the nature of the virus “it is unlikely to be spread from domestic or international mail, products or packaging.” *Am I at risk for COVID-19 from mail, packages, or products?*¹² To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.” *Running Essential Errands*.¹³

The Governor of the State of Idaho (the Governor), where the Employer’s facilities are located, issued an *Order to Self-Isolate* through its Department of Health and Welfare on March 25 ordering all individuals living in the State to self-isolate at their place of residence except to

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

⁹ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article

¹⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>

¹² See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

¹³ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>

engage in essential activities and work for essential business and government services. The Order further directed all business to cease nonessential operations at physical locations and prohibited all non-essential gatherings of any number of individuals and non-essential travel. This Order was effective until April 30.¹⁴

On August 6, the Governor updated his previously announced *Idaho Rebounds* program with *Guidelines for Opening Up Idaho* (Guidelines) which contained a number of criteria to be met in order to advance through various stages of reopening.¹⁵ These Guidelines provide criteria for employers to meet at all stages of reopening that include six-foot physical distancing; sanitation and personal hygiene for employees and patrons; frequent disinfection and regular cleaning of the business; PPE; limiting close interactions with patrons; and developing strategies to address infected employees, including requiring them to stay at home as well as those directly exposed to them and closing the workplace until the location can be properly disinfected. The Governor's Guidelines called for 4 states of reopening, with the fourth and final stage estimated to begin between June 13 and July 10 if all criteria for the previous stages had been met. At the final stage, movie theatres, bars, nightclubs, and large venues would be able to operate with appropriate physical distancing protocols. All criteria in the Governor's Guidelines would be reviewed every two weeks to determine the feasibility of advancing to the next stage. Most of the State of Idaho, including Bonneville County where the Employer's facilities are located, is at Stage 4 of the reopening.

Currently, the State of Idaho has reported 32,664 confirmed or probable cases of COVID-19 and 327 resulting deaths as of September 3.¹⁶ Idaho does not have a state-wide response plan, however, and responses are handled on a local or regional level by district.¹⁷ Currently, Idaho has an infection rate of 1,862 per 100,000 people.¹⁸

Eastern Idaho Public Health Department (EIPH) which covers Bonneville County where the Employer's facilities are located, has issued a Regional Response Plan that defines various risk levels to be applied at a municipal, city, county, or regional level.¹⁹ The Regional Response Plan described several risk levels determined by the number of cases per 10,000 population: since Bonneville County was the largest county in the eastern region, it required the highest number of cases to move from one level – Minimal, Moderate, High, or Critical – to another. A range of Mitigation Strategies for each risk level were recommended with, for example, a Moderate Risk Level suggesting face coverings while in public; restrictions on events and social gatherings; telework where possible and feasible with business operations; and minimization of non-essential travel to a Critical Risk level calling for a Stay-at-Home Order.²⁰

¹⁴ See https://www.idahofallsidaho.gov/DocumentCenter/View/10721/Governor-Littles-Amended-Self-Isolation-Order_April-15-2020

¹⁵ See www.Rebound.Idaho.gov.

¹⁶ See www.coronavirus.idaho.gov.

¹⁷ See www.coronavirus.idaho.gov *Welcome to Novel Coronavirus (COVID-19)*.

¹⁸ See <https://covid.cdc.gov/covid-data-tracker>. Comparatively, Colorado's infection rate per 100,000 is 1,019.

¹⁹ See <https://eiph.idaho.gov>

²⁰ *Id.*

On August 6, the EIPH issued an Amended Order of Restriction for Bonneville County which noted that the rate of COVID-19 infections reported by Bonneville County had exceeded the established threshold of 10/10,000 for three consecutive days in accordance with the EIPH's Regional Response Plan as described above and was now at a Moderate Risk Level. Consequently, the EIPH ordered further specific restrictions for social gatherings and events, both public and private, restricting "to a maximum occupancy in the venue that provides for approximately 25 square feet per person (area of three feet radius) based on the area patrons and staff, participants, and/or performers for the event." The Amended Order further provided for facial coverings to be worn and physical distancing of at least 6-feet to be maintained between non-household members at gatherings, including entrances, exits, restrooms, or any other locations within the venue. As of September 1, Bonneville County had 1852 cases, 208 of which were currently active, and 12 deaths, and the infection rate has now increased to 17.5/10,000.²¹

Also of note is the fact that since August 6 when the Amended Order issued for Bonneville County, 2 additional counties within the scope of the EIPH have been reclassified as moderate risk, causing further Orders of Restriction to be issued.²²

There do not appear to be any published statistics regarding COVID-19 cases specifically for Idaho Falls.²³

THE PARTIES' POSITIONS ON THE METHOD TO CONDUCT THE ELECTION

The Employer has requested that a manual election be held over two days to accommodate the various shifts of the employees – some 12 and some 8 hours long– and the four crews that rotate on and off duty. The Employer further requests two polling sessions each day: the first from 9:00 a.m. to 11:00 a.m. and the second from 7:00 p.m. to 9:00 p.m. to largely coincide with the employees' break times so that their work areas would not be abandoned while they were voting.

The Employer confirmed at the hearing that it had carefully reviewed General Counsel Memorandum 20-10 issued July 6, 2020 and that it could meet or exceed the safeguards recommended therein (GC 20-10).²⁴ Specifically, the Employer asserted that it could establish greater social distancing and provide greater sanitary protocols and procedures than those recommended by GC 20-10. Furthermore, the Employer asserted that it could release employees

²¹ *Id.*

²² They are Jefferson County and Teton County. The overall trend shows that community spread of COVID-19 is increasing in Eastern Idaho.

²³ The Employer asserts that it regularly checks in with the Eastern Idaho Regional Medical Center located in Idaho Falls and was recently advised that there were currently 25 confirmed COVID-19 cases in the city (out of a population of approximately 80,000). I note that the website for the Eastern Idaho Regional Medical Center www.eirmc.com/covid-19 does not show any local statistics regarding Covid-19 so this figure cannot be independently confirmed.

²⁴ <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>

in an orderly fashion to prevent issues raised in GC 20-10.²⁵ The Employer concedes that the 7 employees at the Osgood facility would have to drive to the main facility in Idaho Falls in order to vote. It is not clear whether, when, or how these employees would be released from work to travel between facilities, but the Employer suggests that they would be allowed to vote on working time during any of the sessions. The Employer asserts that employees from the Osgood facility do come to the main location for “communication” meetings, but the record does not indicate how often such meetings occur or whether employees have travelled from Osgood to Idaho Falls for such meetings during the pandemic.

With regard to the proposed setup for a manual election at the Idaho Fall facility, the Employer presented a floor plan of its employee communications room showing that it measures approximately 35 by 43 feet. According to this floor plan, approximately 13 employees would line up on floor markings located 6-feet apart inside the room, with additional employees similarly spaced outside if needed, and then would individually approach a table where the observers would be seated about 8 feet apart. The voting booth would appear to be located some unspecified distance opposite the observers, but the location of the ballot box is not indicated. Although ingress is indicated, there is no indication of egress from the room. The photographs of the room provided by the Employer appear to show a typical open meeting room but do not show how it would look when laid out for an election. The Employer further asserts that it can meet and exceed the recommended protocols in GC 20-10, including the certifications of wellness, disposable pencils, glue sticks, or tape to seal ballots, barriers to protect and separate participants, and masks, sanitizers, gloves, and wipes for the observers. An inspection of the polling area by video conference at least 24-hours prior to the election would also be provided by the Employer.

The Employer also stated that it regularly maintains signs at its facilities to remind employees to wear CDC-compliant masks, and marks the floors with tape and logos to remind employees about social distancing. The Employer does not describe any extant protocol for monitoring compliance regarding the above, or for taking employees’ temperatures before they report for their shift.

The Petitioner, in support of its position that a mail-ballot election should be held, asserts that Bonneville County where the Employer’s facilities are located is currently in a “Red Zone” for the State of Idaho with the highest current cases in the state according to a map released by the CDC. However, no supporting documentation was presented to support this contention and it could not be independently verified. The Employer confirmed that Bonneville County is in Stage 4 of reopening as described above but does not mention the additional restrictions imposed by the EIPH on August 6 due to the recent uptick in cases.

²⁵ No evidence presented as to whether employees in Idaho Falls, where the vast majority of the employees in the petitioned-for unit are located and where a manual election might be held, all work in the building where the voting would take place or whether they are in several buildings or areas and how exactly they would be released to vote and by whom.

In response to an exhibit presented by the Union naming eight employees whom it asserted were under quarantine due to COVID-19, the Employer acknowledged that one employee was asked some time ago to self-quarantine after a trip to Honduras but has been back at work for some months; four others were potentially exposed and self-quarantined but returned to work after testing negative; and one experienced COVID-19-like symptoms and was asked to self-quarantine out of an excess of caution until he was eventually diagnosed with something else and returned to work. Only one employee on that list, according to the Employer, has actually tested positive for COVID-19 and eventually returned to work. With regard to the remaining two employees whom the Union identified as being quarantined due to COVID-19, one never worked for the Employer²⁶ and the other was never quarantined.²⁷

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, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998).²⁸ This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually.²⁹ 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.

On May 8, the Board, in an Order denying a request for review in *Atlas Pacific Engineering Company*, Case 27-RC-258742, addressed a mail ballot determination in the context of the COVID-19 pandemic. In its footnote to that Order, the Board noted that *San Diego Gas* contemplated "extraordinary circumstances" beyond the considerations

²⁶ That employee's name does not appear on the voter list submitted with the Employer's Statement of Position.

²⁷ The Employer initially asserted that only one employee has tested positive for COVID-19 and had returned to work after the requisite CDC quarantine period, and that another three employees were under quarantine at the request of the Employer even though they have not tested positive for the virus.

²⁸ 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).

²⁹ See *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel and not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. See *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)).

described above, and that circumstances in place at the time – federal, state, and local government directives limiting nonessential travel, requiring the closure of nonessential businesses, and the Regional office conducting the election on mandatory telework – constituted a valid basis for directing a mail ballot election in that case after considering the conditions surrounding a manual election.

On July 6, the General Counsel issued the previously referenced memorandum titled “Suggested Manual Election Protocols.” Memorandum GC 20-10 (GC 20-10). In that memo, the General Counsel reiterated that Regional Directors have the authority, delegated by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted.” The General Counsel further noted Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

The memorandum then addressed suggested election mechanics, certifications and notifications required to verify a safe election can occur, and the need to include election arrangements in an election agreement.

Even before GC 20-10 issued, the Board had denied review of Region Directors’ decisions to conduct mail-ballot elections due to COVID-19 circumstances even though employers offered to follow the same or similar protocols as those set forth in GC 20-10.³⁰

Similarly, in an earlier Order denying a Request for Review which involved a mail-ballot election determination based on COVID-19 considerations, and which issued after GC 20-10 issued, the Board found the pandemic to be an extraordinary circumstance as contemplated by *San Diego Gas & Electric, supra*. The Board did not formally adopt the guidance of GC 20-10, and noted only that: “The Board will continue to consider whether manual elections should be directly based on the circumstances then prevailing in the region charged with conducting that election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”³¹

More recently, the Board denied an employer’s Request for Review of a Regional Director’s order of a mail ballot election in *Daylight Transport LLC* 31-RC-262633 (Aug. 19, 2020), citing *San Diego Gas & Electric, supra*, for the proposition that extraordinary circumstances could permit a Regional Director to exercise her discretion outside of the guidelines set forth in that decision. Specifically, the Board relied upon the extraordinary circumstances resulting from the COVID-19 pandemic in finding that a mail-ballot election was

³⁰ See, for example, *Johnson Controls, Inc.*, Case 16-RC-256972 (May 18, 2020).

³¹ *Brink’s Global Services USA, Inc.*, Case 29-RC-260969 (July 14, 2020).

warranted, despite the employer's assurances that it would comply with CDC and GC 20-10's foregoing guidelines and even hold the entire election outdoors.

DETERMINATION

The instant case raises the issue of whether to direct a mail ballot election based on public health concerns, and specifically whether the circumstances of the COVID-19 pandemic in Idaho and Bonneville County make a mail ballot appropriate. Before turning to the specifics of this case, I note that I am only considering a mail ballot election in this matter because of the extraordinary circumstances presented by the COVID-19 pandemic. Under normal circumstances, a Board agent would fly from Denver International Airport to conduct the election, rent a car, stay at a hotel, and would likely travel between the locations to conduct the polling rather than require employees to drive to vote.

The parties do not disagree on most of the circumstances surrounding this election as it relates to COVID-19, including the current rates of infection in the State and County where the Employer's facilities are located. Thus, the only issue is whether those circumstances warrant departing from the Board's usual practice of conducting a manual election on-site and ordering a mail-ballot election.

Based on current Board rulings, it seems at this particular time that the COVID-19 pandemic constitutes the kind of extraordinary circumstance contemplated in *San Diego Gas & Electric, supra* to justify departure from the Board's normal practice of conducting manual elections.³² The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. Thus, after careful consideration of the record and the arguments of the parties, including the brief filed by the Employer, I find that a mail-ballot election is preferable to a manual election for the following reasons.

First, it is well documented that the best way to prevent illness is to avoid being exposed to the virus by person-to-person contact. Any manual election requires a certain amount of substantial interaction between individuals, including the parties' representatives, observers, and Board agent at the pre-election conference; the Board Agent, observers, and voters in the polling place during the election; and employees waiting in line to vote. This interaction creates inherent risk and exposure to and infection by the virus. Steps can be taken to mitigate the risk posed by this gathering, such as the use of face coverings and marking six-foot distances on the floor, but these measures merely reduce the danger of transmission, they do not eliminate it.

³² The Employer in its post-hearing brief argues the only exception to a manual election recognized in *San Diego Gas & Electric, supra*, is the existence of a "scattered" unit, either by geographic dispersion or work schedules. As discussed in great detail above, however, this is not the only "extraordinary circumstance" recognized by *San Diego Gas & Electric* and its progeny.

The Employer proposes a two-day election, with two 2-hour polling periods each day in order to accommodate the employees' various shifts and crews, for a total of 8-hours of polling. This would require that the observers be exposed to a Board agent and each other for more than four hours each day, including the pre-election conference on the first day and the ballot count on the second day. No clear plan has been presented as to how the employees will be released except to state that the polling times are designed to coincide with their break periods to serve the work needs of the Employer. Although not specifically stated, this would suggest that a relatively large number of employees could show up at once and may need to line up for some time in order to cast their ballots. In fact, the diagram provided by the Employer suggests that up to 15 employees spaced 6-feet apart may be in the room at once, with overflow lining up outside if needed. This figure exceeds the size of a mass gathering recommended by the CDC and local officials. Further, it is unknown when the additional seven voters from the Osgood facility might arrive to vote. The record does not disclose how or whether they would be released to vote or if they would travel on their own time to the Idaho Falls location. In that regard, given the circumstances in Bonneville county, it is not prudent to bring employees from separate facilities to have contact with each other for an election when it is not necessary to do so.

This is a problem that cannot be adequately resolved in a manual election; a shorter polling period (or periods) limits the amount of time the Board agent and observers congregate in a confined indoor space, but it increases the likelihood of voters gathering while waiting to vote. Shorter polling periods also increase the likelihood that unscheduled employees, particularly those from the Osgood facility, may not have a sufficient opportunity to vote. As noted, a longer polling period simply reverses the situation. In the end, regardless of the various safety protocols assured by the Employer, I find the Employer's proposed polling period will keep the observers confined to a relatively small room with a Board agent and a progression of voters for numerous hours over two days.

Second, the fact that a large percentage of virus transmission is through pre-symptomatic or asymptomatic carriers exacerbated the risk for all parties. According to the CDC, the "current best estimate" is that up to 50% of COVID-19 transmission occurs while people are pre-symptomatic and that 40% of people with COVID-19 are asymptomatic.³³ Setting aside the observers and the Board agent who must remain in the polling area at all times during the voting period, the potential exposure to the virus from a pre-symptomatic or asymptomatic carrier would not be limited to only the few minutes that voters would be in the polling area, as a forthcoming study by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.³⁴ Thus, if a pre-symptomatic or asymptomatic voter were

³³ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed August 9, 2020). See also "Temporal dynamics in viral shedding and transmissibility of COVID-19" (April 15, 2020). *Nature*. <https://www.nature.com/articles/s41591-020-0869-5> ("We estimated that 44% ... of secondary cases were infected during the index cases' presymptomatic stage ...")

³⁴ "Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions." *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020 (Early Release). https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed August 9, 2020). See also, "Predicting the Decay of SARS-CoV-2 in Airborne Particles."

to enter a polling area and sneeze or cough, the well-documented “droplets” containing the virus would remain in the air and the observers and the Board Agent – as well as any subsequent voters – could potentially be exposed to the virus for the remainder of the election and vote count.

The Employer does not dispute that at least five known employees may have been exposed to COVID-19, most of them through family members, and one of whom tested positive for the virus. Even though most of them tested negative, they may still be asymptomatic carriers who have the potential to infect others. Also, it appears that the Employer relies upon self-reporting by the employees, since there is no evidence that any screening is conducted at the worksite. Since these employees are deemed essential workers and do not have the option to work from home, it is conceivable that some may report to work even though they have symptoms or do not feel well. Although employees at the facility are instructed to wear face coverings and observe social distancing, there is no evidence presented that compliance is regularly monitored by the Employer.

Finally, based upon the number of employees at the Employer’s facilities that have already quarantined for contracting or possibly being exposed to Covid-19, it is reasonable to assume that others may also be quarantined going forward, given the rates of infection in Bonneville County. Any quarantined employees – whether they actually have the virus or not – who are quarantined around the time of a manual election would be unable to vote and would therefore be completely disenfranchised, since there is no provision in a manual election for absentee voting. A mail-ballot election would address this potential issue and would allow all who wish to vote to have the opportunity to do so.³⁵

I find these factors, including the current status of the COVID-19 pandemic in Bonneville County, Idaho, the time that observers would have to spend inside this facility together with a Board agent in an enclosed space, the number of voters who would have to pass through an enclosed area, the uncertainty as to the numbers of employees arriving at any given time, a requirement that employees from a separate facility must travel to the main facility in order to vote during the pandemic, and the likelihood that additional employees would be quarantined during the election, create an extraordinary circumstance. For these reasons, I am directing a mail ballot election in this matter.³⁶

<https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed August 9, 2020).

³⁵ The Employer in its post-hearing brief suggests that inasmuch as all of its employees who were previously quarantined for having contracted or been exposed to COVID-19 have already returned to work and will be able to vote that this is no longer an issue. This disregards the very real possibility, particularly given the number of cases in Bonneville County per capita, that employees may continue to be infected and exposed up until and through the time of a manual election. The very fact that it cannot be predicted whether this will happen and to how many employees further militates in favor of a mail-ballot election to avoid any possibility of disenfranchisement.

³⁶ The Employer in its post-hearing brief argues that a manual election would increase voter participation and obviate any potential concerns about voter coercion implicated by mail-in ballots. This argument was tacitly rejected by the Board in *Daylight Transport, LLC*, Case 31-RC-262633 fn. 2, where, in denying the employer’s request for review of the Regional Director’s decision to order a mail-ballot election, it noted that concerns of

CONCLUSIONS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I so find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³⁷
3. The parties stipulated, and I so find, that the labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time elevator operators, malt operators, lead operators, plant foremen, electricians, general maintenance employees, lab analysts, research techs, and S and E operators I and II employed by the Employer at its facilities in Idaho Falls and Osgood, Idaho.

Excluded: All other employees; casual employees; coordinators, including elevator, malt house, electrical plant safety and BTS coordinators; office clerical employees, including office assistants, logistics specialists, and office clerks; planners, including technician planners; salaried employees; confidential employees; temporary employees; seasonal employees; professional employees; guards; managers; and supervisors, as defined by the Act.

potential disenfranchisement of voters might be relevant, they failed to establish that, under the totality of the circumstances, that the Regional Director had abused her discretion. The Board further noted that any party was free to present evidence of any actual disenfranchisement of voters, if applicable, in future post-election proceedings.

³⁷ The parties stipulated, and I find, that the Employer is a Delaware corporation with several offices and places of business in the United States, including offices and places of business in Idaho Falls and Osgood, Idaho (the only facilities involved herein), engaged in the procurement and production of raw agricultural products to be used in the brewing industry. Annually, in conducting its operations described above, the Employer had sold and shipped from its Idaho Falls and Osgood, Idaho, facilities goods valued in excess of \$50,000 directly to points outside the State of Idaho.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret mail-ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 893 Affiliated with the International Brotherhood of Teamsters.

A. Election Details

I have determined that a mail ballot election will be held.

The ballots will be mailed to employees employed in the appropriate collective bargaining unit. At **3 p.m. on Monday, September 21, 2020**, ballots will be mailed by an agent of Region 27 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, September 28, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at (303) 844-3551 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 27 office **by 3:00 p.m. on Wednesday, October 21, 2020**. All ballots will be commingled and counted by an agent of Region 27 of the National Labor Relations Board on **Wednesday, October 21, 2020**, at **3:00 p.m.** by videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. A meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, 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.

C. 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.

To be timely filed and served, the list must be received by the regional director and the parties by **Tuesday, September 8, 2020**. The list must be accompanied by a certificate of service showing service on all parties. The region will no longer serve the voter list. Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-caseruleseffective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. 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 in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The English Notices of Election will be sent by the Region separately. The Notices must be posted so all pages of the Notices 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 Notices of Election electronically to those employees. The Employer must post copies of the Notices 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 the Decision until 10 business 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 requirement of Section 102.67 of the Board's Rules and Regulations. A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number and follow the detailed instructions.³⁸ 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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore

³⁸ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. 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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden.

the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Denver, Colorado on the 3rd day of September 2020.

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR,
NATIONAL LABOR RELATIONS
BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE
BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294