

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

**PERDUE FOODS, LLC D/B/A
DRAPER VALLEY FARMS,**

Employer,

and

Case No. 19-RC-263822

**TEAMSTERS LOCAL UNION NO. 252,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Petitioner.

**PERDUE FOODS REQUEST FOR REVIEW OF
REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION AND
REQUEST FOR IMMEDIATE STAY OF MAIL BALLOT ELECTION**

Pursuant to Section 102.67 of the Board’s Rules and Regulations, Perdue Foods, LLC d/b/a Draper Valley Farms (“Employer” or “Company”) requests immediate review of the Decision and Direction of Election (“Decision” or “DD&E”) issued by the Regional Director on August 31, 2020 in the above-captioned matter. The Board should grant this Request for Review and *immediately stay the distribution of mail ballots scheduled for September 9, 2020, pursuant to the Decision.*

This case presents to the Board the question of whether a manual vote can EVER be conducted while there is ANY presence of the SARS-CoV-2 virus (i.e., the virus causing COVID-19) anywhere in a community. The petition seeks a small bargaining unit of four (4) drivers, and a manual election will likely require brief interaction with only five (5) or so people. The Employer has provided assurances of all appropriate safeguards as required by GC Memo. 20-10.¹ Further, the community in which the election would be conducted (Lewis County, Washington) has never

¹ On July 6, 2020, General Counsel Peter B. Robb issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that “the Board has ultimate authority to make decision on when, how and in what manner elections are conducted. . . .” *See* GC Memo. 20-10.

been hard hit by the pandemic, and current spread is well contained (i.e., one or two positive tests per day). Additionally, no employees at the Employer's worksite in Chehalis, Washington, have tested positive for the virus. In light of these facts, and the increasing understanding that the virus is rarely deadly to anyone without a serious pre-existing health condition, there is no legitimate reason not to conduct a manual ballot election (the Board's long preferred method of conducting votes in representation cases).

Here, the DD&E presents a substantial question of law or policy because it presents a departure from officially reported Board precedent without fact-based justification specific to the circumstances that are presented with this vote. *See S.D. Gas & Elec.*, 325 NLRB 1143 (1998). Likewise, a substantial question of law or policy is raised because of the absence of officially reported Board precedent to support the Regional Director's action that turns solely on the minimal existence of COVID-19 in Lewis County and gives little weight to the Board's preference for manual elections, the small size of the unit, the specific health and safety conditions at the Employer's facility, or the implementation of measures to protect those involved in the election.

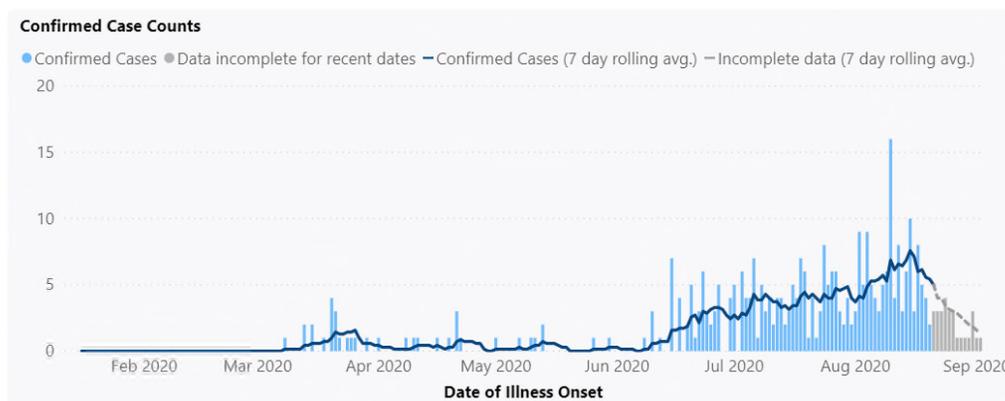
As established below, the Regional Director abused his discretion by ordering a mail ballot election despite the ability to conduct a more than reasonably safe manual election. The Regional Director's Decision represents an erroneous and unjustified departure from applicable NLRB law and policy and denies employees the right to participate in the NLRB's preferred election method that maximizes voter participation and free choice.

I. STATEMENT OF THE CASE

On July 29, 2020, Teamsters Local Union No. 252 ("Petitioner" or "Union") filed a representation petition seeking to represent four (4) drivers at the Company's Chehalis, Washington facility. The parties agreed to all terms for a stipulated election except the issue of manual vs. mail ballots. The parties were given the opportunity to file position statements

regarding the appropriate election method, which the Company did on August 21, 2020. The Regional Director would decide one issue: whether to conduct a manual or mail ballot election.

On August 31, 2020, the Regional Director issued the *Decision and Direction of Election* (see DD&E). In the Decision, while the Regional Director makes passing reference to the Board’s preference for manual ballots, he then orders mail ballots solely based on the pandemic’s past presence in Lewis County, rather than the specific, current circumstances in the County and at the Company’s facility where the employees work and would vote. Indeed, the Regional Director relies heavily on directives that the Lewis County Department of Health issued over a month ago (July 22 and August 3, during a mild resurgence in cases) prohibiting large scale gatherings at sporting events and in schools (DD&E, pp. 3-4). Mentioned, but ultimately disregarded by the Regional Director, is the fact that as of August 26, 2020, Lewis County moved to “Phase 3” of the state’s reopening plan which allow social gatherings of up to 10 people, and much larger gatherings for religious services, sporting and recreational activities, and restaurants (DD&E, p. 3). Ignored by the Regional Director altogether was the actual epidemiologic curve in Lewis County and that, in the last 7 days, there has been an average of only 1 case per day diagnosed in the county:



<https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>. Further, the pandemic has resulted in only four deaths in Lewis County – two in March, one in April, and one on August 2.

Id. Simply put, Lewis County has only modestly been touched by the pandemic, and there is no current significant spread.

More importantly, the Regional Director gave little weight to the fact that no employee at the Employer's facility has tested positive for COVID-19; it is a small voting group that will require no large gathering and not require extended time together; and the largest possible group to gather is well within the "Phase 3" limits for even social gatherings in Lewis County. Further, the Employer can and is committed to comply with the protocols of GC Memo. 20-10. To put it bluntly, if these circumstances do not permit a manual vote to be conducted, then there are no circumstances under which a manual vote would be deemed required in Region 19.

II. ISSUE

The principal issue in dispute is whether the Regional Director abused his discretion by ordering a mail ballot on the sole basis that COVID-19 still has a slight presence in Lewis County.

The Regional Director's conclusion that a mail ballot is necessary due to "extraordinary circumstances" is factually and legally erroneous and contrary to NLRB precedent and GC Memorandum 20-10. The current state of the pandemic in Lewis County, the small voting group, and the ability to conduct a manual vote while observing all health and safety protocols belies the conclusion that a health and safety risk overrides the importance of following the Board's preference for a manual ballot to ensure maximum participation and regularity in the vote.

Accordingly, the NLRB should grant review, vacate the Decision, stay the mail ballot election, and direct the Region to conduct a manual election.

III. BACKGROUND

The Company operates a feed mill in Chehalis, Washington, that produces poultry feed to support its poultry farming and food production operations in and about Washington State. The four (4) drivers in the putative bargaining unit support that operation by

distributing the feed to affiliated farm facilities. The feed mill operations have continued without interruption during the pandemic, and there have been no positive COVID-19 tests among any of the employees at the facility. All eligible voters report to work at the facility on a daily basis, Monday through Friday, at the beginning of the day and return multiple times during the course of the day. All are also currently scheduled to work on September 9, 2020, the day the Region has set to mail ballots.

IV. THE REGIONAL DIRECTOR'S FINDINGS

The DD&E ignores the clear experience of the Board that mail ballot elections depress employee participation and makes no mention of the overriding goal of the Act to promote and protect employee choice. Instead, the DD&E effectively finds that the presence of “any risk” of virus transmission and the fact that Lewis County has not “fully” returned to unrestricted activity presents “extraordinary circumstances” so as to justify not conducting a mail ballot. Thus:

- While acknowledging that “the number of COVID-19 cases in Lewis County is relatively low compared with other counties in the State of Washington,” he places weight on the fact that over a month ago “county health officials ... prohibited public sporting events and ... recommend[ed] that schools hold only virtual classes for the duration of the year.” (DD&E, p. 7)
- While acknowledging that “none of its dozen employees at this facility, including the 4 in the petitioned-for unit, have been diagnosed with COVID-19,” and that manual voting would “not require a mass gathering of the kind still limited by state and local authorities,” he places greater weight on his opinion that “the risk of infection to the Board agent or other parties during the pre-election conference, the election itself, and the subsequent ballot count remains unknown.” (DD&E, pp. 7-8)
- Ignoring guidance by the General Counsel for Regional Directors to conduct manual votes when possible with the proper protocols, the Regional Director finds that “even the safest manual election still involves significant physical interaction, congregating, and an inherent risk of exposure to and infection by the virus.” He then speculates regarding other possible risks that, of course, are not part of any record because no hearing was conducted. (DD&E, p. 8)

- The Regional Director concludes a mail ballot is “prudent” because, “*even though the Employer has committed to taking steps to mitigate the risk of transmission, these measures may only reduce the danger of transmission but cannot eliminate it.*” (DD&E, p. 8)(emphasis added)

In sum, the Regional Director finds that unless all risk can be “eliminated,” then it is better to conduct a mail ballot. Of course, every manual vote has always entailed some level of “risk” – driving to a facility, potential inclement weather, voters and other participants who may have a communicable disease but are taking no precautions, voting at inherently more dangerous facilities like refineries, chemical plants, munitions plants, etc. The threshold set by the Regional Director effectively would mean that no manual ballot can take place in Region 19 for the duration of any residual presence of the pandemic – and, indeed, sets a standard to suggest that mail ballots might be warranted in any situation where there is a hypothetical health or safety risk.

V. APPLICABLE LEGAL STANDARDS AND ANALYSIS

A. The Regional Director Erred in Ordering a Mail Ballot Election.

The Regional Director’s actions rewrite Board precedent by misapplying the holding of *San Diego Gas & Electric* and the NLRB’s *Casehandling Manual Part Two: Representation Proceedings* (“*Casehandling Manual*”), section 11301.2 (“Manual or Mail Ballot Election: Determination”). *San Diego Gas & Electric* establishes that Regional Directors should consider mail ballots in at least three situations: scattered voters, scattered schedules, and strike or lockout situations. The Board left open the possibility that other “extraordinary circumstances” may be relevant to election-type decisions. *S.D. Gas & Elec.*, 325 NLRB at 1145, n.6. Recently, Regional Directors have interpreted the “extraordinary” language to encompass the current COVID-19 pandemic. *See, e.g., Atlas Pacific; Victory Wine*. However, Regional Director decisions have frequently been devoid of any fact-specific analysis and, instead, reliant upon the fact that COVID-

19 exists generally, as well as assumptions that employers cannot implement sufficient safety measures to ensure a safe manual election.

The refusal of Regional Directors to analyze unique case-specific factors misapplies Board precedent. Regional Directors should always analyze all of the factors that the Board has previously determined inform their discretion: employee free choice of representative, maximum voter participation, supervision of selection of representative, and voter safety at a particular location subject to additional relevant facts. Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting exists only to address situations in which it necessary to “enhance the opportunity of all to vote.” *Casehandling Manual*, section 11301.2. *San Diego Gas & Electric* stands for the same: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie the exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

B. Mail Ballot Elections Result in Reduced Voter Turnout.

Recent data definitively and empirically demonstrate that mail ballot elections significantly **diminish** turnout. During the week of March 7 to 13, 2020, more than 93% of manual ballots had a participation rate above 80% — only two out of thirty elections (6.7% of manual elections) resulted in lower rates. *See Wainfleet Co.*, No. 03-RC-256434 (63% rate); *Growing Seeds at Crystal Springs*,

Inc., No. 19-RC-256529 (75% rate). However, from March 14 to June 9, Regional Directors exclusively ordered mail ballot elections and ***nearly 40% of elections had a participation rate of 80% or less.*** Indeed, COVID-19-related mail ballots have resulted in a very significant decrease in voter turnout compared to typical manual ballot elections. *See, e.g., Paragon Sys., Inc.*, No. 09-RC-259023 (55%); *River Mkt. Comm. Co-op* No. 18-RC-256986 (54%); *Univ. Protection Serv., LLC*, No. 10-RC-257846 (52%); *Triple Canopy, Inc.*, No. 27-RC-257463 (37%); *Am. Sec’y Programs, Inc.*, No. 05-RC-256696 (36%); *Children & Adult Disability Ed. Servs.*, No. 04-RC-256028 (40%).

Most recently, in another case in Region 19, this pattern of low voter participation continued. In *SunSteel, LLC*, No. 19-RC-261739, the same Regional Director ordered a mail ballot over the Employer’s objection in a unit of 134 employees. Only 104 ballots were returned (5 of which were challenged, so only 99 votes counted on August 31, 2020). Again ... a participation rate under 80%.

Further, mail ballots produce far more irregularities and problems that bring into question the integrity of the voting process. Thus, in *Fontanini Foods, LLC*, the Regional Director **twice** extended the mail ballot period at his own direction because of low turnout. *Id.*, No. 13-RC-257636 (Reg’l Dir. June 29, 2020). In that case, the Region commingled ballots and counted on June 17, 2020 – then extended the initial mail ballot period until July 1, 2020. On July 1, the Regional Director then extended the period for a second time, until July 8, 2020, because only 227 of 401 (56.6%) mailed ballots had been returned as of June 29. Other issues also arose in that case, including: some employees had to pay to receive the NLRB package, there were missing and duplicate ballots, and a few employees attempted to contact the NLRB but never heard back about ballot issues. Ultimately, the Region only tallied 216 ballots (despite claiming to have had 227 as of June 29). All of these circumstances raise significant concerns as to the regularity and integrity of the election process – one of the hallmarks of the manual ballot process and its simple, transparent procedures.

If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Board should overturn the instant Decision. The circumstances in Lewis County suggest a very low risk of exposure generally. More importantly, the eligible voters report to work at the Employer's facility every day and this is a small voting group requiring no mass gathering – indeed, it would not violate the threshold for even social gatherings in Lewis County and will require no extended interaction. Finally, the Employer can and has committed to comply with all necessary health and safety protocols for a manual election. Under these circumstances, the employees should receive one the major quintessential protections of the National Labor Relations Act: a manual, secret ballot election.

C. The Regional Director Failed to Assess the Current Status of the Pandemic in Lewis County or Health and Safety Factors Specific to Company's Facility.

In making his assessment of the circumstances of the pandemic in Lewis County, the Regional Director appears to have relied inaptly on dated information not truly applicable to the ability to conduct safely an election in a small voting group today. Specifically, the Regional Director placed weight on directives from the Lewis County Department of Health issued in late July and early August prohibiting sporting events (i.e., a form of mass gathering) and recommending against opening schools (i.e., another form of mass gathering). He gave little weight to the fact that Lewis County moved to Phase 3 reopening on August 26 that permits social gatherings of up to 10, and much larger gatherings for religious services, sporting and recreational activities, and restaurants. Nor did he mention that local schools have reopened some in person schooling for smaller groups of students with special needs requiring in-person instruction. <https://chehalisschools.org/blog/2020/09/03/superintendent-reopening-message/> (Aug. 21, 2020, message of Chehalis Schools Superintendent). This more recent information directly applicable to the safety of small group activities is clearly more applicable to the vote in issue here.

Further, the Regional Director gave almost no weight to the circumstances at the facility – that is, that there have been no positive tests, that it is a small voting group, and that the Company is able and committed to ensure compliance with all safety protocols outlined GC Memo. 20-10. Indeed, the voting circumstances in this case stand in sharp contrast with those presented in *SunSteel, Inc.*, No. 19-RC-261739 (Reg. Dir., July 21, 2020), where the same Regional Director ordered a mail ballot over the Employer’s objection in a unit of 134 employees. In the DD&E in that case, emphasis was placed on the fact that Yakima County (where that employer’s facility is located) was the “most severely impacted” of Washington’s counties and was one of only a few counties that was not yet out of Phase 1 in the state’s reopening plan. *Id.* at 2, 5. The Regional Director’s rationale in that case turned specifically on the “severity of the outbreak in Yakima County generally” and his assessment that a manual vote would “require a gathering of a relatively large group of employees in a community with widespread COVID-19 transmission.” *Id.* at 5. Yet now the Regional Director is ordering a manual ballot in almost precisely the opposite situation – a limited local outbreak, no significant current transmission, current substantial reopening of activities, and a very small voting group. Simply put, the DD&E here lacks consistency with prior decisions and fails to have support in the record or the publicly available official reports as to the status of the pandemic in Lewis County or the risks of manual voting for this specific voting unit.

D. The Decision Violates Current Board Election Jurisprudence, Is Inapposite to NLRB General Counsel’s Memorandum 20-10, and Effectively Finds That No Manual Election Can Be Held While Any Vestige of the Pandemic Exists.

The Board reactivated election proceedings in an April 17, 2020, announcement entitled “COVID-19 Operational Status,” stating, “[c]onsistent with their traditional authority, Regional Directors have discretion as to when, where and if an election can be conducted, in accordance with NLRB precedent.” At least four elections were held in-person following the lifting of the election moratorium with no report of any problems with any such election. For example, in Byhalia,

Mississippi, Hearthside Food Solutions LLC workers successfully voted in person without issue. *Hearthside Food Solutions LLC*, Case No. 15-RC-258901 (June 3, 2020). There, the parties agreed to implement several safety measures, including erecting plexiglass barriers to separate workers, Board employees, and election observers; using disposable pens and pencils; marking off spaces at 10-foot intervals; providing masks and gloves; and separating the entrance and exit so workers would not pass each other.

With the experience of these elections, and the benefit of a variety of health information regarding the pandemic, on July 6, 2020, the Board’s General Counsel, Peter Robb, issued GC Memorandum 20-10 on “Suggested Manual Election Protocols.” (See GC Mem. 2010). GC 20-10 outlines numerous election protocols to ensure a safe election. ***The Company in this case has committed to comply with all the procedures listed, and there is no suggestion that it is unable to do so. Further, the Company will work with both the Region and the Petitioner regarding any additional concerns.***

In light of these facts, the Regional Director’s DD&E fails to follow precedent or the guidance of GC Memo. 20-10. Moreover, the rationale of the DD&E effectively finds that no manual vote can occur in Region 19 until which time the pandemic completely disappears. Indeed, the Regional Director finds that, unless the risk of transmission can be “eliminated,” then no manual vote should occur. This threshold criterion (essentially one of, “absolutely no risk to anyone”), of course, is inconsistent with Board law, the guidance of the General Counsel, and simply empirically impossible to reach. There is always “risk” of harm in day to day activity – risk of accidents, risk of transmission of another disease, etc. But there is no showing on the facts and circumstances of this case that there is a significant incremental risk of harm to anyone – indeed, with the extra health and safety precautions in place that reduce the transmission of any

virus (not just SARS-CoV-2) and reduced traffic on the roads, there well could be less risk of harm to a Board Agent in conducting this manual vote than in a typical pre-pandemic manual vote.²

E. The Board Should Issue An Immediate Stay of Mail Ballot Distribution.

The Decision indicates that the Region will distribute mail ballots on September 9, 2020. In order to prevent potential voter confusion and irreparable injury to the election process, the Board should grant review and issue an immediate stay of mail ballots in this case.

VI. CONCLUSION

The DD&E fails to follow established Board precedent, national labor policy, and recent General Counsel guidance. Though Regional Directors have some discretion when determining the manner of elections, mere reference to hypothetical risks does not justify choosing an election method that depresses voter turnout and impairs employee free choice. Any decision to use a mail ballot must assess the facts and concerns specific to the election at-hand – which was not done here. For all such reasons, the Company respectfully requests that the Board grant review, vacate the instant Decision, stay the mail ballot election, and order a manual ballot election.

Respectfully submitted:

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² It is also worth noting that recent statistics published by the CDC show that the health risks presented by COVID-19 skew overwhelmingly toward those with pre-existing serious health conditions. Indeed, 94% of all fatalities from COVID-19 in the United States have had co-morbidity factors such as diabetes, respiratory illnesses, heart disease, and cancer. Certainly, a Board Agent can be assigned to conduct the election who does not suffer from such a serious health condition. The Company is unaware of any driver with such a condition.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 4th day of September, 2020, the above and foregoing document was served filed via the NLRB's electronic filing portal and served by electronic mail to the following:

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