

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

US FOODS, INC.

Employer

and

Case 31-RC-264241

TEAMSTERS LOCAL 63

Petitioner

DECISION AND DIRECTION OF ELECTION

On August 6, 2020,¹ Teamsters Local 63 (Petitioner or Union) filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent certain employees of US Foods, Inc. (Employer). After the Region issued a Notice of Hearing, the parties waived their right to a hearing before a Hearing Officer and entered into a Stipulation of Record for Pre-Election Hearing (Stipulation) on August 25, 2020, which I approved the same day. The petitioned-for unit was clarified in the Stipulation to include all full-time and regular part-time forklift operators, pickers, leads, loaders, receivers, maintenance, and sanitation employees employed by the Employer at its Fontana, California facility, and excluding all other employees, professional employees, managerial employees, office clerical employees, guards, and supervisors as defined in the Act. There are approximately 69 employees in the petitioned-for unit.

The only issue left unresolved by the Stipulation is whether the election should be held manually at the Employer's facility or by mail ballot, considering the continuing COVID-19 pandemic.² The parties agreed in the Stipulation that they would each file their respective statements of position on this issue, and that a party proposing a manual election would, in addition to providing its argument on whether a manual election could be safely held, also provide a detailed description of the proposed election arrangements, including the location, size and layout of the room, ingress and egress, and ventilation. The manual election proponent would also explain how its arrangements would comply with the recommended protocols described in General Counsel Memorandum 20-10 (GC 20-10), and would provide statistics as to the number of its employees who have tested positive, exhibited symptoms, or been quarantined because of the current COVID-19 pandemic.

In this case, the Employer is requesting that a manual election be held at its Fontana, California facility and argues that it can be held safely utilizing the protocols it has proposed for the setup and conduct of the election in a trailer in a separate area. The Petitioner asserts that a

¹ All dates hereinafter are in 2020 unless otherwise noted.

² Throughout this decision, the terms "COVID-19," "coronavirus," and "virus" are used interchangeably.

mail ballot election is appropriate but also proposes the election be held outside in the event that a manual election is ordered.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail ballot election commencing on the earliest practicable date.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic in the United States

On March 13, President Donald J. Trump issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”³ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and Prevention (CDC),⁴ an agency of the United States government, has determined “[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 recommends that people avoid close contact with other individuals who do not live in the same household.⁵ According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.” *How It Spreads*.⁶ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: 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. *How to Protect Yourself & Others*.⁷

The CDC has also published reports regarding pre-symptomatic and asymptomatic transmission of COVID-19, including the *Emerging Infectious Disease Journal* (Online Report) for July, “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic.”⁸ The Online Report emphasizes,

³ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed September 9, 2020).

⁴ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (last accessed September 9, 2020).

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed September 9, 2020); “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed September 9, 2020).

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed September 9, 2020).

⁷ *Ibid.*

⁸ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed September 9, 2020). See also, “The implications of silent transmission for the control of COVID-19 outbreaks.” *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“even if all symptomatic cases are isolated, a vast outbreak may nonetheless unfold ... we found that the pre-symptomatic stage and asymptomatic infections account for 48% and 3.4% of transmission, respectively”). This

“transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” Despite these unprecedented efforts to limit transmission, as of September 9, over 6.2 million people in the United States have been infected with COVID-19 and 188,688 people have died.⁹

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.”¹⁰ The CDC further states 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 “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?*¹¹ 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 Errands.*¹²

B. The COVID-19 Pandemic in California and San Bernardino County

The Employer’s Fontana, California facility is located in San Bernardino County. Many state and municipal governments have issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 4, the Governor of the State of California (Governor) declared a “State of Emergency to Help State Prepare for Broader Spread of COVID-19.”¹³ On March 19, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations for the Federal Critical Infrastructure Sectors.

article was subsequently updated on July 28, 2020 to observe that, based on current data, that “silent transmission during pre-symptomatic and asymptomatic stages are responsible for more than 50%” of infections (last accessed September 9, 2020).

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last accessed September 9, 2020). See also Governor of the State of California Executive Order N-64-20. <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”) (last accessed September 9, 2020).

¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed September 9, 2020).

¹² See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (updated August 3, 2020; last accessed September 9, 2020).

¹³ See <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> (last accessed September 9, 2020).

On May 4, the Governor issued a press release¹⁴ announcing that based on California's progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is "still dangerous and poses a significant public health risk." The Governor further announced that while California would be moving from Stage 1 to Stage 2, its "counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020." Ibid. Despite these measures, however, reported cases of COVID-19 have continued to climb in California to its current level of 737,911 cases and 13,758 deaths as of September 9.¹⁵

The California Department of Public Health (CDPH) monitors data related to COVID-19 for each of California's 58 counties, including San Bernardino County where the Fontana facility is located. If a county did not remain below established thresholds for a seven-day average for positive cases per day, elevated disease transmission, increasing hospitalization, and limited hospital capacity, it was placed on the County Monitoring List, which was then used to reinstitute health measures such as closing business sectors and restricting gatherings and travel.

On July 2, the Governor ordered 19 counties (Health Officer Orders), including San Bernardino County, that had been on the County Monitoring List for three consecutive days to "close all bars, pubs, brewpubs, and breweries, whether operating indoors or outdoors" and cease indoor services for restaurants, wineries and tasting rooms, family entertainment centers and movie theaters, zoos, museums, and cardrooms.¹⁶ The Health Officer Orders also noted, "[p]ublic health studies have shown that the risk of transmission is exacerbated in indoor spaces, particularly when lacking appropriate ventilation."

On July 13, after 29 counties, including San Bernardino County, had remained on the County Monitoring List for at least three consecutive days, the Governor expanded the restrictions from the previous Health Officer Orders to the rest of the state and reinstated additional closures for San Bernardino County and others on the County Monitoring List to include the indoor operations of gyms and fitness centers, places of worship, indoor protests, offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.¹⁷ On August 28, California unveiled its Blueprint for a Safer Economy, a new framework replacing the County Monitoring List for reopening its economy in light of COVID-19. As of September 9, San Bernardino County remained in the top tier of counties most impacted by COVID-19, where the virus is "widespread" and "[m]any non-essential indoor business operations are closed."¹⁸

¹⁴ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/> (last accessed September 9, 2020).

¹⁵ <https://www.Covid19.CA.Gov>.

¹⁶ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Order%20Closing%20Indoor%20Services%20and%20Sectors-San%20Bernardino.pdf> (last accessed September 9, 2020).

¹⁷ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf> (last accessed September 9, 2020).

¹⁸ "Blueprint for a Safer Economy." <https://covid19.ca.gov/safer-economy/> (last accessed September 9, 2020).

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of September 9, according to data released by the San Bernardino County Department of Public Health, there have been 49,691 confirmed cases of COVID-19 in San Bernardino County and 765 people have died from COVID-19.¹⁹ In fact, as of September 9, San Bernardino County had the fourth highest total number of positive cases and deaths among the 58 counties in California.²⁰ In the City of Fontana, where the Employer's facility is located, the number of confirmed positive COVID-19 cases as of September 9 was 6,618, with 91 deaths.²¹

C. The Employer's Position on a Manual Election and Suggested Safety Protocols

The Employer is a food service distributor, and its Fontana, California facility has continued to operate during the pandemic as an essential element in the food supply chain. The approximately 69 employees in the petitioned-for unit primarily work in the warehouse at the Fontana facility. The Employer proposes that a manual election be conducted in an office trailer provided for the election and situated in a location away from the main facility and the other employees at the facility.

In addressing its reasons for a manual election, the Employer argues that the Board favors manual elections and typically conducts an election on an employer's premises. While the Employer acknowledges it is within a Regional Director's discretion to order a mail ballot election, the Employer also maintains that here none of the circumstances that typically warrant consideration of a mail ballot election, described in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), are present, namely where employees are "scattered" over a wide geographic area, "scattered" over time because of widely variable schedules, or where a strike, lockout, or picketing is in progress. The Employer argues the COVID-19 pandemic in and of itself does not justify deviating from the Board's long-standing practice of holding manual elections, since precautions such as those described in GC 20-10 can be taken to ensure a safe and fair election.

In support of its position, the Employer maintains a mail ballot election likely provides greater risk of exposure to COVID-19 than a manual election, as there would be no safety requirements regarding the handling of the mailed ballots. The Employer additionally argues a mail ballot election is more likely to disenfranchise voters, as manual elections typically result in a higher voter turnout and therefore produce a determinative tally that truly reflects the determination of a majority of the employees.

In regard to the mechanics of a manual election, the Employer commits to complying with the protocols identified in GC 20-10, and more specifically proposes the following:

- The election would take place on September 25, 2020, with polling sessions from 9:00 a.m. to 11:00 a.m. and from 1:00 p.m. to 5:00 p.m.

¹⁹ See <https://sbcovid19.com/>.

²⁰ See https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no.

²¹ See <https://www.fontana.org/3272/Coronavirus-COVID-19>.

- The polling place would be in an office trailer provided for the election and situated in a location away from the main facility and the other employees at the facility.
- The voting area would be 22 feet by 12 feet and have three separate tables with plexiglass screens and set up six feet apart to accommodate the Board agent, Employer observer, and Union observer with a fourth table set off in the corner for a voting booth area. The space would be large enough that the observers can be six feet apart from each other, the Board agent, and the voter.
- There would be a separate entrance and exit point from the voting area so that voters would not need to pass one another after voting.
- The voting area would be sanitized immediately prior to the arrival of the Board agent and the opening of the polling area and again prior to the opening of the proposed second voting session.
- Sanitizer, masks, wipes, and gloves would be available in the voting area.
- There would be appropriate distance markers leading to the office trailer and to the voting area.
- The Employer would set up a “wellness station” outside the voting area solely for the employees voting to ensure that no one has exhibited any symptoms prior to entering the voting area. The wellness checks would be performed by someone who has no authority over the petitioned-for employees.

In addition to these specific measures taken on the day of the election, the Employer notes that many of the practices it currently has in place are relevant to the safety of the election. These include:

- Employees and visitors arriving at the facility have their temperature taken and respond to a series of health questions regarding possible virus symptoms. If an employee or visitor has a fever above 100.4 or responds to one of the health questions that suggests possible virus infection, the person is required to leave the facility. Further, social distance protocols are required during this initial health screening. As a result, on the day of the election, all voters would undergo two wellness checks: one when they arrive at work per standard procedure and another before entering the polling area.
- The Employer has an established practice at the facility of bleaching and sanitizing all surfaces and equipment every hour and maintains ample supplies of hand sanitizer for employees and visitors.
- The petitioned-for employees do not arrive at the facility at the same time and, therefore, there would not be a group of warehouse employees in the voting area at any one time over the total of six (6) hours that the Employer proposes as voting periods.

Although the Employer committed to doing so in the stipulated record, it did not provide statistics as to the number of its employees who have tested positive, exhibited symptoms, or been quarantined because of the current COVID-19 pandemic in its written statement.

D. The Petitioner’s Position

The Petitioner argues that given the current COVID-19 numbers in California and particularly in San Bernardino County, where the Employer’s facility is located and where the

outbreak of the virus has been widespread and severe, it presents “extraordinary circumstances” that make a mail ballot election necessary. The Petitioner argues that a mail ballot election ensures the safety of participants, is the method of election most in compliance with local stay-at-home orders, and because it allows all eligible voters to exercise their right to vote. For these reasons the Petitioner requests that a mail ballot election be ordered and commence on September 18, 2020. The Petition also submits that should a manual election be ordered, it should be held outdoors, but it does not provide any specific details for an outdoor polling place.

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees’ union representation preference and to certify the results of such elections. The Board’s obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. Regional Directors have an obligation to appropriately exercise their discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has acknowledged that circumstances may necessitate adaptations on the Board’s part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Assn. of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*; see also *NLRB Casehandling Manual (Part Two) Representation Procedures Sec. 11301.2* (Casehandling Manual).²² Thus, “[o]nly where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him [or her] to conduct representative elections will the Board nullify an election and prescribe other election standards.” *National Van Lines*, 120 NLRB at 1346.

The Board has determined that there are some instances in which a mail ballot election is appropriate because “of circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that

²² I note the provisions of the *Casehandling Manual* are not binding procedural rules; the *Casehandling Manual* is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Aaron Medical Transportation, Inc.*, 2013 WL 6673598 (2013) (unpublished) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007)); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

“extraordinary circumstances” may warrant a departure from the specific guidelines articulated in that case. *Id.*

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, a Regional Director may exercise discretion to order a mail ballot election where conducting an election manually is not feasible and, under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. In addressing the COVID-19 pandemic, the Board has recognized the discretion afforded to Regional Directors in election matters. In this regard, when the Board issued an announcement titled “COVID-19 Operational Status”²³ on April 17 regarding the COVID-19 pandemic, it stated in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On July 6, General Counsel Peter Robb issued a memorandum titled “Suggested Manual Election Protocols.” (GC 20-10). In that memorandum, the General Counsel acknowledges that the protocols suggested therein are not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, and he reiterates 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 notes 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.

Among other suggestions in GC 20-10, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, come into contact with someone who tested positive within the preceding 14 days, are not awaiting test results, and are not exhibiting COVID-19 symptoms.²⁴ GC 20-10 does not provide an enforcement mechanism for any of its suggestions

²³ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

²⁴ I note the self-certifications in GC 20-10 and the Employer’s health questionnaire specify only three symptoms of COVID-19: a fever, cough, or shortness of breath. However, the CDC and State of California all list 11 symptoms: fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss

other than canceling an election, which would delay resolution of the question concerning representation.

In several recent Orders, the Board has continued to find the ongoing COVID-19 pandemic to be “extraordinary circumstances” as contemplated by *San Diego Gas*.²⁵ With respect to GC 20-10, the Board did not formally adopt its guidance, noting only the following: “The Board will continue to consider 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.” *Brink’s Global Services USA, Inc.*, 29-RC-260969, fn. 2 (unpublished July 14, 2020).²⁶

I note that the Board has denied review of Regional Directors’ decisions to conduct mail ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves).²⁷ Similarly, in *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020), the Board denied the employer’s request for review and upheld my decision to order a mail ballot election involving a similar number of employees as the petitioned-for unit here, at a facility also located in Fontana, and even though the Employer proposed many of the same safety protocols and went even further by proposing an outdoor polling place.²⁸

III. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail ballot election is appropriate requires considering in each case both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. I recognize that the Board has traditionally preferred manual elections. However, I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety concerns in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea. The CDC also explains that the list is not all inclusive. See CDC’s “Symptoms of Coronavirus,” <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>; and California’s “Symptoms and risks,” <https://covid19.ca.gov/symptoms-and-risks/> (last accessed September 9, 2020).

²⁵ See, e.g., *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same); *Tredroc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same).

²⁶ The Order is available on the Board’s public website at <https://www.nlr.gov/case/29-RC-260969>.

²⁷ The Regional Director’s Decision and Direction of Election, dated May 7, 2020, and the Board’s May 18, 2020 Order are available on the Board’s public website at <https://www.nlr.gov/case/16-RC-256972>.

²⁸ My Decision and Direction of Election and the Board’s Order are available on the Board’s public website at <https://www.nlr.gov/case/31-RC-262633>.

I acknowledge that absent the public health concerns arising from the pandemic, I would order a manual election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. I recognize a limited degree of reopening has begun, in the United States generally and in California specifically. I also recognize that in San Bernardino County, not only does COVID-19 remain present in the local community, but it continues to be classified as “widespread.” As noted above, current Federal, State, and San Bernardino County public health guidance continues to strongly recommend discouraging gatherings to reduce the risk of exposure to and spread of COVID-19, and a mail ballot election minimizes such risk.

Thus, based on the facts outlined above and for the reasons detailed below, I find that it is appropriate to direct a mail ballot election in this case because: the current pandemic conditions constitute extraordinary circumstances that merit deviation from a manual election; a mail ballot election is the safest method of conducting an election under the circumstances; and, in comparison to a manual election, a mail ballot election avoids disenfranchising voters due to the pandemic.

A. The Risks Associated With the COVID-19 Pandemic Constitute Extraordinary Circumstances

Although questions regarding the transmission of SARS-CoV-2 and the nature of COVID-19 abound, the basics of the pandemic from a public health perspective are at this point quite familiar: it is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees’ union representation preferences in light of the current COVID-19 situation in San Bernardino County. 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. The Employer’s employees remain working at the Employer’s facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

Manual election procedures inherently require substantial interaction, and that interaction generates risk. I appreciate the Employer’s efforts to mitigate this risk by making certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 in San Bernardino County and Fontana, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. I am disappointed that although it committed to providing statistics as to the number of its employees who have tested positive, exhibited symptoms, or been quarantined because of the current COVID-19 pandemic, the Employer did not do so. This prevents me from assessing in greater detail the risk associated with holding a manual election at the Employer’s facility. I do not find

it appropriate to assume, in the absence of evidence, that the Employer's facility is untouched by COVID-19 and that no employees in the petitioned-for unit or the Employer's facility as a whole have been infected or have had to quarantine because of the virus, particularly in a county where COVID-19 transmission is widespread. Rather, to the contrary, the opposite is more likely.²⁹

With respect to the inevitable interactions and risk of exposure necessitated by a manual election, voters, observers, and party representatives, as well as the Board agent, would all need to travel to and appear at the Fontana facility to participate in the election. Party representatives, the observers, and the Board agent usually would gather for approximately 15 to 30 minutes for the pre-election conference, including inspection of the voting area, though I recognize that GC 20-10 suggests that this may could take place by video. More significantly, even though the Employer has proposed utilizing a trailer separate from the facility, this is still an indoor area, and the Board agent and observers would need to share the same enclosed area for a period of at least six hours during the polling periods, plus the vote count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must provide a ballot to each voter, which per GC 20-10 could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election, the Board agent and observers might need to use a restroom at the Fontana facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, which is typically done in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend together beyond simply the voting period windows. In addition to the Board agent and observers being exposed to each other for an extended period of time, they also would be exposed, albeit briefly, to many people during the course of conducting the election. Furthermore, the Employer's proposed two separate voting periods, the first starting at 9:00 a.m. and the last ending at 5:00 p.m., raise additional concerns because such an election likely would require the Board agent coming from the Regional Office in West Los Angeles to spend the entire day in a public place in San Bernardino County, further increasing the Board agent's potential exposure to COVID-19.³⁰

As noted above, the Employer has incorporated many of the accommodations used to combat the spread of COVID-19 in its plan for a manual election, such as social distancing, the use of plexiglass shields, and face coverings. However, in my view, in light of the current

²⁹ That said, I am not relying on an adverse inference from the Employer's failure to provide the information it agreed to provide about its workforce being infected with COVID or having to quarantine.

³⁰ I also note that the Mayor of the City of Los Angeles issued a new order on August 7, 2020 requiring residents of the City of Los Angeles to remain at home, with some exceptions (August 7, 2020 Order); see "[Public Order Under City of Los Angeles Emergency Authority](#)" (last accessed September 9, 2020). Although a Board agent traveling from the City of Los Angeles to Fontana to conduct the election would not necessarily violate the August 7, 2020 Order, I do note that a Board agent traveling from Los Angeles for the election (including – as noted above – having to spend a large part of the day in some public place in San Bernardino County) would be counter to the August 7, 2020 Order's directive that "Angelenos must minimize contact with others as much as possible," insofar as it is possible here to eliminate such contact by conducting a mail ballot election.

circumstances in San Bernardino County, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. For example, although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus.

Furthermore, the fact that a large percentage of virus transmission is through pre-symptomatic or asymptomatic carriers exacerbates the risk for all election participants. According to the CDC, the "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic³¹ and would neither be identified nor have sought testing. Setting aside the observers and Board agent, who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.³² Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling area and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. Here, while voters may proceed in and out of the office trailer in an orderly manner, it is still an enclosed space, and the number of people to whom the observers and the Board agent will be exposed to over an extended period of time still presents significant risk. This is especially concerning because a confined, indoor location – such as the proposed polling place – is essentially the ideal place for the COVID-19 virus to survive in the air.³³ Further, a manual election would require a Board agent to travel approximately 60 miles at a time when travel is discouraged.

³¹ "Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed September 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 ...")

³² "Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions." *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020. https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed September 9, 2020). See also, "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed September 9, 2020).

³³ "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> ("The results demonstrate that stability of the virus is dependent on environmental conditions. The greatest stability was observed under cool, dry, and dark conditions, similar to those found indoors.") (last accessed September 9, 2020).

Again, absent the information that the Employer failed to provide regarding the extent of COVID-19 transmission among the Employer's workforce, I am unable to make an informed assessment of the risks involved at the Employer's facility in particular. Simply stated, I have no way of knowing what specific circumstances a manual election would be conducted under at the Employer's facility and how much the inherent risk in conducting a manual election during the current pandemic has been exacerbated by the Employer's employees already having been exposed to or infected with the COVID-19 virus.

After considering all the current circumstances described above, I find holding a manual election at the Fontana facility would entail significant risk to all involved. Accordingly, I find this risk constitutes extraordinary circumstances that make a mail ballot election appropriate.

B. A Mail Ballot Election is the Safer Alternative

The Employer argues that a mail ballot election presents greater risks due to the need to touch the mail. I do not agree. As cited previously, CDC guidance states that the virus is unlikely to be spread from products or packaging that are delivered by mail. Further, the CDC's guidance on mitigating this risk, that an individual wash their hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol after collecting mail, is far easier to implement than the risk mitigation involved with the Employer's manual election proposal. Thus, I find that a mail ballot election is the safest method of conducting an election under the circumstances.

C. Disenfranchisement is a Greater Risk in a Manual Election

I acknowledge the Employer's concerns about a lower participation rate in mail ballot elections, and I agree with the Employer that absent the current pandemic, I likely would order a manual election in this case. However, I find the concerns regarding the potential for lower participation in this election speculative, and those concerns do not invalidate the extraordinary circumstances that is the basis for my decision. As the Board recognized in *San Diego Gas*:

[B]ecause mail ballot elections have, by design, largely been limited to situations where factors were present which were likely to inhibit voter participation if the election were conducted manually, there is no reason to believe that participation in those particular elections would necessarily have been higher had they been manual elections.

Id. at 1146. Although the Employer asserts that “[a]n analysis of the published tallies of mail ballot election[s] that have been conducted since the Agency has resumed conducting elections ... shows that the return rate of ballots on average to be less than 50% ...,” the Employer's point and its general assertion of “apparent postal issues with mail ballot elections” are not based on information or data specific to the area where this election will be conducted or by the Region conducting the election. With respect to the Employer assertion that “in a recent Region 31 election, *Apio Inc.* 31-RC-262264, apparently far less than 50% of the ballots were returned,” the Employer's assertion is wrong, as a much high percentage of ballots were returned. Furthermore, the timeframe of the mail ballot election I am ordering will provide plenty of time for mail to be

delivered, even if slightly delayed, and in my view any potential delay in the mail does not justify the risk of catching a potentially deadly virus posed by a manual election.

I also note that conducting manual elections under the current circumstances poses a risk of disenfranchising voters. The Board's manual election procedures do not contain an absentee or remote voting option; if a manual election is ordered, an employee must appear in person at the polls to vote. Obviously, any employee currently infected or infected between now and the date of a manual election and who remained infected on the date of the election would be unable to vote. Moreover, any voter exposed to the virus or awaiting test results and subject to the recommended 14-day quarantine period would likewise be unable to vote in the election. In light of the current conditions in San Bernardino County, the potential for voter disenfranchisement is real. Furthermore, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation. Finally, the Employer's regular practice of taking employees' temperatures daily and administering a health questionnaire may raise the possibility of voters being turned away on the day of the election. I am not critical of the practice, and indeed it seems to be a conscientious effort to help identify those who could spread the virus, but it does pose concerns regarding access to the polls.³⁴ A mail ballot election would avoid the potential disenfranchisement of employees who are unable to vote because they contracted COVID-19, recently were exposed to it, or simply had a fever on the day of the election.

D. A Mail Ballot Election is Appropriate Under the Current Extraordinary Circumstances

While I do not find a manual election to be impossible, I have determined that, under the current circumstances in San Bernardino County, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. Admittedly, the suggested manual election protocols outlined in GC 20-10, along with the Employer's proposed procedures for a manual election, would reduce the risk of contracting COVID-19 if exposed to it during the election. However, even assuming these protocols could adequately be enforced without disenfranchising voters or postponing or canceling the election, there is no evidence in the record or publicly available, and backed by scientific studies, to establish that following these protocols would reduce the risk to an acceptable level under current circumstances at the location where the election would take place. To the extent that the protocols would reduce the risk, I find that the remaining risk of exposure to and of contracting COVID-19 given the current conditions in the State of California and in San Bernardino County specifically still establishes the kind of "extraordinary circumstances" that make directing a mail ballot election appropriate. Moreover, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages alternative methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board's duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees' union representation preference, I am directing

³⁴ On the other hand, employees may discount potential symptoms in responding to the questionnaire in order to exercise their right to vote thereby heightening the risk of exposure for everyone.

an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency's obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³⁵
2. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
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 parties stipulated and I find that the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time forklift operators, pickers, leads, loaders, receivers, maintenance, and sanitation employees employed by the Employer at its Fontana, California facility.

Excluded: All other employees, professional employees, managerial employees, office clerical employees, guards, and supervisors as defined in the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 69 employees.

³⁵ The Employer, a Delaware corporation with an office and place of business located in Fontana, California, is engaged in the non-retail sale of distribution of food and supply items to restaurants and institutions. During the last twelve months, a representative period of time, the Employer had gross revenues in excess of \$500,000, and purchased and received goods at its Fontana, California facility valued in excess of \$50,000, directly from suppliers located outside the State of California.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret 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 LOCAL 63**.

A. Election Details

For the reasons I have explained above, the election will be conducted by mail.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on Friday, September 18, 2020**. Ballots will be mailed to voters by the National Labor Relations Board, Region 31. 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 **Friday, September 25, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at (844) 762-NLRB ((844) 762-6572).

The returned ballots must be received by the Region 31 office by **5:00 p.m. on Friday, October 9, 2020**. All ballots will be commingled and counted by the Region 31 office at **2:00 p.m. on Wednesday, October 14, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 31 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, 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 **Saturday, September 5, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote by mail as described above.

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 **Monday, September 14, 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.** The Petitioner has waived its right to possess the voter list for 10 days prior to the date of the election and waives its right to file objections over this issue.

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-case-rules-effective-april-14-2015.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must 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. English and Spanish-language versions of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 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 requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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. 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 why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. 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 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 Los Angeles, California this 10th day of September 2020.

Mori Rubin

Mori Rubin, Regional Director
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