

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**Garland, Texas**

**ECOLAB PRODUCTION LLC**

**Employer**

**and**

**Case 16-RC-264667**

**RETAIL, WHOLESALE, AND DEPARTMENT  
STORE UNION<sup>1</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), a hearing was conducted before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether, in light of the continuing COVID-19 pandemic,<sup>2</sup> the Region should conduct an election for certain employees of the Employer, who are employed in Garland, Texas, by manual or mail ballot. The Employer argues it is possible to conduct a manual election safely. The Petitioner seeks a mail ballot election based on the circumstances of the ongoing COVID-19 pandemic.

The Employer provides water, hygiene, and infection prevention solutions and services. The Petitioner seeks to represent a wall-to-wall unit of approximately 32 employees at the Employer's facility in Garland, Texas. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):

**Included:** All full-time and regular part-time fork truck operators, logistics specialists, logistics leads, inventory control clerks, and dock coordinators employed by the Employer at its facility located at 1600 South Jupiter Road, Garland, Texas.

**Excluded:** All other employees, office clericals, guards, managers and supervisors as defined by the Act.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,<sup>3</sup> the parties were permitted to present their positions, as well as documentary

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<sup>1</sup> Parties' names appear as amended at the hearing.

<sup>2</sup> Throughout this decision, the terms "COVID-19," "Covid," and "coronavirus" are used interchangeably to describe the novel coronavirus.

<sup>3</sup> Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

evidence, and file post-hearing briefs regarding the mechanics of this election. I have carefully considered the record, including those positions and arguments. As explained below, I find that, in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, a prompt election by mail is appropriate.

## **I. THE POSITIONS OF THE PARTIES**

### **A. The Petitioner<sup>4</sup>**

The Petitioner maintains a mail ballot election is appropriate given the current state of the COVID-19 pandemic in Texas, particularly Dallas County and the City of Garland.

### **B. The Employer**

The Employer provides water, hygiene, and infection prevention solutions and services. At its facility in Garland, Texas, the workplace at issue in the instant petition, the Employer provides warehouse and shipping and receiving services for its supply chain operations.

The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains the risk can be mitigated, and it is capable of taking steps which would ensure a safe manual election. In this regard, the Employer notes it is considered an essential business that has remained fully operational throughout the COVID-19 pandemic.

The Employer proposes conducting a 2½-hour manual election, from 3:00 p.m. to 5:30 p.m., on September 23, 2020,<sup>5</sup> in its open-air warehouse and states that it would meet or exceed the procedures set forth in General Counsel Memorandum 20-10, Suggested Manual Election Protocols. Specifically, the Employer maintains:

- 1) the polling times and procedures for releasing voters would be sufficient to accommodate social distancing and cleaning requirements without endangering participants by unnecessarily elongating exposure among the Board agent and the observers;
- 2) each observer would have a separate table with plexiglass shields and a separate voter eligibility list;
- 3) the Board agent would have a separate table with a plexiglass shield;
- 4) there would be separate tables for the voting booth and ballot box;
- 5) all tables for each observer, Board agent, voting booth, and ballot box would be at least six feet apart;
- 6) only one voter at a time would approach the observer's table and election booth to ensure social distancing;

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<sup>4</sup> In assessing the Petitioner's position, I have not relied on its responsive statement of position, which was untimely filed and not properly served on the Employer. See generally, *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017).

<sup>5</sup> All dates are in 2020 unless otherwise noted.

- 7) after clearance by the observers, the Board agent would place an individual ballot on the table for the voter, and then step back to maintain social distance before the voter picks up the ballot;
- 8) the Employer would provide new CDC-conforming facemasks and gloves in the polling room for each voter, observer, and the Board agent;
- 9) the open warehouse area where polling will be conducted is a spacious area that would easily accommodate more than six-foot distancing,<sup>6</sup> which would be marked on the floor with tape, to ensure separation for voters, observers, and the Board agent;
- 10) the floor of the polling area would be marked to remind individuals and enforce social distancing;
- 11) the Employer would certify in writing, no earlier than 48 hours before the election, but no later than 24 hours before the election, that the polling area is consistently clean in conformance with established CDC Hygienic and Safety Standards;
- 12) the Employer would have ample cleaning and disinfecting supplies for the voters, including paper towels and bottles of disinfectant spray, such that the voting booth could be cleaned between each voter;
- 13) there would be a separate entrance and exit for voters with markings to depict safe, one-way traffic flow through the voting area;
- 14) the Employer would provide separate tables spaced at least six feet apart, so the Board agent, observers, and voting booth, and ballot box are all at least six feet apart;
- 15) there would be separate voter lists for each observer to check;
- 16) the Employer would provide a new disposable pencil without eraser for each voter to mark his or her ballot;
- 17) the Employer would provide glue sticks or tape to seal any challenged ballot envelopes;
- 18) the Employer would provide plexiglass barriers of sufficient size in the voting area for the voters, observers, and Board agent, to separate them from voters and each other, in addition to providing the CDC-conforming facemasks, hand sanitizer, gloves, and wipes for the observers and Board agent;
- 19) in accordance with CDC guidance, all voters, observers, party representatives, and other participants would wear CDC-conforming masks in all phases of the election, including the preelection conference, in the polling area, or while observing the ballot count. Signs would be posted in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives, and other participants of this requirement;
- 20) the Employer would utilize during the day of the voting, a negative air machine to provide additional ventilation in the polling area, and that machine would have a HEPA filter that will remove 0.3 microns or larger particles at a 99.97% rate.

In addition, the Employer would provide the certifications listed in General Counsel Memorandum 20-10, Suggested Manual Election Protocols (GC 20-10).

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<sup>6</sup> The Employer stated that the area is at least 50 feet by 50 feet. The record does not disclose the height.

The Employer asserts that only a manual election would be appropriate, arguing the Board's decision in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), and related authority, prohibit mail balloting unless a manual ballot is not feasible. The Employer contends there are no such circumstances here, including the specific exceptions listed in *San Diego Gas*, and that conducting a manual election while observing social distancing and other safety protocols at the Employer's facility, including those in GC 20-10, is manageable. It also argues a mail ballot election would not accurately reflect employee free and fair choice. In support of this argument, the Employer cites *Mission Industries*, 283 NLRB 1027 (1987) ("mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees' voting"); *Brink's Armored Car*, 278 NLRB 141 (1986) ("the danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations than in manual elections because of the absence of direct Board supervision over the employees' voting"); and *Thompson Roofing*, 291 NLRB 793 (1988) (mail ballot elections "are more vulnerable to the destruction of laboratory conditions" required for representation proceedings).

## II. BOARD LAW AND ITS APPLICATION TO THE INSTANT CASE

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure 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, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). "It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346).

The Board's longstanding policy is that elections should, as a general rule, be conducted manually; 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. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.<sup>7</sup> 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

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<sup>7</sup> I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and it is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) ("the General Counsel's nonbinding Casehandling Manual"); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, above at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

“extraordinary circumstances.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, above at 1145. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law vests Regional Directors with discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and provides that Regional Directors should tailor the method of conducting an election to “enhance the opportunities of all to vote.” *Ibid.*

Consistent with the recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a “COVID-19 Operational Status Update,”<sup>8</sup> which states 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.

The Board has continued to affirm that the ongoing COVID-19 pandemic constitutes extraordinary circumstances as contemplated by *San Diego Gas*. See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework” to deny review of Regional Director’s decision to order a mail ballot election).

In recent cases, the Board has noted that it 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.” See *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same). The instant case is analyzed using this framework.<sup>9</sup>

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<sup>8</sup> <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

<sup>9</sup> The Board has granted review and issued a stay of directed mail ballot elections in three cases: *Aspirus Keweenaw*, 370 NLRB No. 13 (August 25, 2020); *Draper Valley Farms*, 370 NLRB No. 20 (September 9, 2020); and *ClarkWestern Dietrich Building Systems, LLC*, 01-RC-264014 (unpublished September 16, 2020). However, the Board has not cited factors outside of *San Diego Gas*, established a different standard for analyzing petitions filed during the COVID-19 pandemic, or issued a ruling in those cases that impacts my conclusions and findings herein.

### III. PREVAILING COVID-19 CIRCUMSTANCES

COVID-19 has created a public health crisis, responsible for approximately 200,000 deaths in this country. The total number of cases in the U.S. has surpassed 6.7 million and is currently surging in several areas of the country.<sup>10</sup> In assessing the local conditions, I must consider the state of the pandemic in Texas and the Dallas-Fort Worth metroplex, where the Board agent conducting the election is located and would be required to travel, with particular attention to Dallas County, where the Employer is located. In the past two weeks, Texas surpassed Florida to become the nation's second highest state for COVID-19 infections, with 668,500 cases as of September 21.<sup>11</sup> On April 17, the date of the Board's Operational Status Update, the number of new COVID-19 cases reported in Texas on that single day was 916. While new COVID-19 cases in Texas remained steady from April to May, since June, the number of new confirmed cases climbed dramatically to a high of 10,791 new cases on a single day, July 15.<sup>12</sup> Although cases have been decreasing since then, two months later the number of new cases being reported was still more than five times the amount when the Board issued its Operational Status Update—4,816 new cases on September 15.<sup>13</sup> The true number of cases in Texas is likely higher because many people have not been tested and, as the U.S. Centers for Disease Control and Prevention (CDC) maintains, **"It is important to realize that you can be infected and spread the virus but feel well and have no symptoms"** (emphasis in original).<sup>14</sup>

As of September 16, Dallas County and its surrounding counties of Tarrant, Denton, Collin, Rockwall, Kaufman, and Ellis accounted for over 150,000 positive cases, nearly a quarter of all cases in Texas.<sup>15</sup> Like Texas overall, the most-up-to-date information for Dallas County (as of September 17), where a manual election would take place, shows an increase in the rolling 7-day average for new cases since late August.<sup>16</sup>

The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel, and the general population of North Texas are subject to the risks of COVID-19 transmission. Dallas County, where a manual election would take place, has not been spared from COVID-19, with 311 new cases being reported on September 16, and with a total of 76,149 confirmed cases and 985 residents who have died from COVID-19.<sup>17</sup> It is not possible for me to know if these numbers represent an increase in the number of infections, a

<sup>10</sup> CDC COVID Data Tracker. <https://www.cdc.gov/covid-data-tracker/#cases> (accessed September 21, 2020).

<sup>11</sup> CDC COVID Data Tracker. <https://www.cdc.gov/covid-data-tracker/#cases> (accessed September 21, 2020).

<sup>12</sup> Ibid.

<sup>13</sup> "COVID-19 in Texas (Dashboard)." Texas Department of State Health Services. <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9c9c8b83> (accessed September 21, 2020).

<sup>14</sup> "Overview of Testing for SARS-CoV-2 (COVID-19)" (updated August 24, 2020). CDC. <http://cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed September 21, 2020).

<sup>15</sup> Ibid. Dallas County (75,838 cases), Tarrant County (42,208 cases), Denton County (11,225 cases), Collin County (12,482), Rockwall (1,498 cases), Kaufman (2,981 cases), and Ellis (4,136 cases).

<sup>16</sup> Dallas County Press Release dated September 17, 2020. Dallas County Health and Human Services. [https://dallascounty.org/Assets/uploads/docs/covid-19/press-releases/september/9.17.2020-Press-Release-Dallas-County-Reports-Additional-Positive-2019-Novel-Coronavirus-\(COVID-19\)-Cases.pdf](https://dallascounty.org/Assets/uploads/docs/covid-19/press-releases/september/9.17.2020-Press-Release-Dallas-County-Reports-Additional-Positive-2019-Novel-Coronavirus-(COVID-19)-Cases.pdf)

<sup>17</sup> "Dallas County Coronavirus (COVID-19) Updates and Information." Dallas County Texas. <https://www.dallascounty.org/covid-19/> (accessed September 17, 2020).

reflection of more widespread testing or better reporting; however, it is sufficient to establish that there continues to be significant community spread of COVID-19.

### A. Current Federal, State, and Local Directives

The CDC explains that COVID-19 is primarily spread from person to person,<sup>18</sup> and highlights the “[b]est way to prevent illness is to avoid being exposed to this virus” (emphasis in original).<sup>19</sup> A person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes.”<sup>20</sup> Social distancing guidance from the CDC’s COVID-19 factsheet instructs people to “limit in-person contact as much as possible.”<sup>21</sup> “Moreover, its September 8 update for travelers continues to maintain: “Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**” (emphasis in original).<sup>22</sup>

The CDC’s recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. The CDC further states that 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; however, “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>23</sup> 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.”<sup>24</sup>

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. On June 25, Texas Governor Greg Abbott reinstated a ban on elective surgeries in four metropolitan counties (Bexar, Dallas, Harris and Travis), then expanded it five days later to

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<sup>18</sup> 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/> (accessed September 16, 2020).

<sup>19</sup> “How to Protect Yourself & Others” (updated September 11, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed September 16, 2020).

<sup>20</sup> “Frequently Asked Questions, Spread” (updated September 16, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed September 16, 2020).

<sup>21</sup> <https://www.cdc.gov/downloads/2019-ncov-factsheet.pdf> (accessed September 16, 2020).

<sup>22</sup> “Travel during the COVID-19 Pandemic” (updated September 8, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed September 16, 2020).

<sup>23</sup> “Coronavirus Disease 2019 (COVID-19), Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?” <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed September 16, 2020).

<sup>24</sup> “Running Essential Errands” (updated September 11, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed September 16, 2020).

four South Texas counties to preserve hospital capacity.<sup>25</sup> On June 26, he ordered bars to close and capped restaurant capacity at 50%, down from 75%.<sup>26</sup> On July 2, Governor Abbott issued executive order GA-29 requiring Texans in most counties to wear masks in public.<sup>27</sup> The Governor also issued a proclamation giving mayors and county judges the ability to impose restrictions on some outdoor gatherings of over 10 people, and making it mandatory that, with certain exceptions, people cannot be in groups larger than ten and must maintain six feet of social distancing from others.<sup>28</sup> Recently, on August 8, Governor Abbott extended the statewide disaster declaration he first issued in March declaring that COVID-19 continues to pose an “imminent threat of disaster for all counties in Texas.”<sup>29</sup> Governor Abbott said in a statement: “Renewing this Disaster Declaration will provide communities with the resources they need to respond to COVID-19, ... I urge Texans to remain vigilant in our fight against this virus. Everyone must do their part to slow the spread of COVID-19 by wearing a mask, practicing social distancing, and washing your hands frequently and thoroughly.”<sup>30</sup> On September 17, Governor Abbott implemented a new metric for expanding occupancy limits focused on high hospitalizations.<sup>31</sup> Under the new metric, trauma service area (TSA) E, which contains Dallas County and its surrounding counties, may increase occupancy levels to 75% for restaurants, retail stores, office buildings, manufacturing facilities, gyms, exercise facilities and classes, museums, and libraries and resume elective surgeries starting September 21, as long as the number of COVID-19 hospitalized patients remains under 15% of the total number of hospitalized patients for seven consecutive days.<sup>32</sup>

Dallas County provides nonbinding health guidance to the public, where it has four color-coded levels of risk: Red (Stay Home Stay Safe), Orange (Extreme Caution), Yellow (Proceed Carefully), and Green (New Normal Until Vaccine). On September 3, Dallas County moved the risk level from Stay Home Stay Safe to Extreme Caution. However, on September 15, Dallas County reported:

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<sup>25</sup> “Gov. Greg Abbott bans elective surgeries in four South Texas counties to preserve hospital capacity” (June 30, 2020). *The Texas Tribune*. <https://www.texastribune.org/2020/06/30/texas-coronavirus-elective-surgeries-cameron-hidalgo-nueces-webb/> (accessed September 16, 2020)

<sup>26</sup> Ibid.

<sup>27</sup> “Governor Abbott Establishes Statewide Face Covering Requirement, Issues Proclamation To Limit Gatherings” (July 2, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings> (accessed September 16, 2020).

<sup>28</sup> Ibid.

<sup>29</sup> “Governor Greg Abbott Renews COVID-19 Disaster Declaration” (August 8, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-greg-abbott-renews-covid-19-disaster-declaration-3> (accessed September 16, 2020).

<sup>30</sup> “Governor Abbott Extends State Disaster Declaration For COVID-19” (August 8, 2020). Office of the Texas Governor. <http://gov.texas.gov/news/post/governor-abbott-extends-state-disaster-declaration-for-covid-19> (accessed September 16, 2020).

<sup>31</sup> “Governor Abbott Expands Capacity For Certain Services In Texas, Announces Guidance For Nursing Home, Long-Term Care Visitations” (September 17, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-expands-capacity-for-certain-services-in-texas-announces-guidance-for-nursing-home-long-term-care-visitations> (accessed September 17, 2020).

<sup>32</sup> “Executive Orders GA-30 and GA-31.” Texas Department of State Health Services. <https://www.dshs.texas.gov/ga3031/> (accessed September 17, 2020).

The provisional 7-day average daily new confirmed and probable cases (by date of test collection) for CDC week 36 was 270, slightly decreased from the previous CDC week 35's daily average of 303. The percentage of respiratory specimens testing positive for SARS-CoV-2 remains high with 10.8% of symptomatic patients presenting to area hospitals testing positive in week 36.

This positivity rate is above the 10% rate Governor Abbott previously used to reinstate restrictions related to COVID-19,<sup>33</sup> and the rolling 7-day average is well-above the average at the time the Board issued its Operational Status Update on April 17, which was around 120 cases.<sup>34</sup>

## **B. Election Guidance**

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “[c]onsider voting alternatives available in your jurisdiction that minimize contact. Voting 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” (emphasis in original).<sup>35</sup> In line with the CDC's principles, Governor Abbott suspended sections of the Texas Election Code to delay elections scheduled for May 2, and then extended early voting for elections on November 3 by six days and allowed in-person return of mail ballots throughout early voting, a practice normally limited to election day.<sup>36</sup>

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual election protocols. While specifically noting that it is not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, it provides, in relevant part:

They [Regional Directors] have made, and will continue to 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

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<sup>33</sup> “Governor Abbott Takes Executive Action To Contain Spread Of COVID-19” (June 26, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-takes-executive-action-to-contain-spread-of-covid-19> (accessed September 16, 2020).

<sup>34</sup> Figure 1 of “2019 Novel Coronavirus (COVID-19) Summary” (updated September 11, 2020), above.

<sup>35</sup> “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed September 16, 2020).

<sup>36</sup> “Governor Abbott Issues Proclamation Extending Early Voting Period For November 3rd Election” (July 27, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-extending-early-voting-period-for-november-3rd-election> (accessed September 16, 2020).

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 locally.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board agents and observers; the employer's certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel's suggestions also include the Employer's self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state "symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath." However, the CDC's "Symptoms of Coronavirus" and Texas's "Symptoms of COVID-19" include additional symptoms:<sup>37</sup>

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC also notes: "This list does not include all possible symptoms."<sup>38</sup> The Employer follows the Texas Department of State Health's "Checklist for all Employers and Event Organizers," which requires the Employer to send home any employee with the above symptoms, including "[f]eeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit"

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<sup>37</sup> "Dallas County Coronavirus (COVID-19) Updates and Information" simply links to "CDC Symptoms of Coronavirus." See <https://www.dallascounty.org/covid-19/> (accessed September 16, 2020).

<sup>38</sup> "Symptoms of Coronavirus." CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed September 16, 2020); "Symptoms of COVID-19." Texas Department of State Health Services. <https://dshs.texas.gov/coronavirus/#symptoms> (accessed September 16, 2020).

or who has had “[k]nown close contact with a person who is lab confirmed to have COVID-19.”<sup>39</sup>

#### IV. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Manual elections are the preference of the Board.<sup>40</sup> Absent the present pandemic, a manual election would almost certainly be held in this case. I recognize that a degree of reopening has begun, in the United States generally, and in Texas and Dallas County specifically. At the same time, it is undisputed that COVID-19 remains present in the community and presents a well-established and significant health risk. There is no easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains. Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections.

##### A. The Employer’s Legal Arguments

At hearing and in its brief, the Employer argued the Board applies an “infeasibility” standard to the method of election, that is, mail ballot elections are limited to extraordinary circumstances when manual elections are infeasible. However, the Board abandoned the “infeasibility” standard over 20 years ago and established its current guidelines based on Board decisions. *San Diego Gas*, above at 1146; see also *ibid.* (Gould, concurring) (“I join in [the majority’s] decision to abandon the ‘infeasibility’ standard ... and provide guidelines in keeping with the Board’s decisions in this area”).<sup>41</sup>

The Employer further argues that none of the extraordinary factors listed in *San Diego Gas*, or its progeny, are present in the instant case, contending the Employer is fully operational with petitioned-for employees regularly reporting to its facility. The Employer overlooks about one dozen recent Board orders denying review of mail ballot elections ordered due to the extraordinary circumstances of the COVID-19 pandemic, where the petitioned-for employees were reporting to work<sup>42</sup> including a case similar to this one from this Region. In *Johnson Controls*, 16-RC-256972,

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<sup>39</sup> Employer Exhibit 6.

<sup>40</sup> The Board’s general preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees’ representational desires. See, for example, *London’s Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (showing the Board has conducted mail ballot elections since its earliest days).

<sup>41</sup> The infeasibility language cited by the Employer comes the dissenting opinion, but it does not explicitly argue the current standard should be overturned.

<sup>42</sup> *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020); *Roseland Community Hospital*, 13-RC-259788 (unpublished June 25, 2020); *TDS Metrocom, LLC*, 18-RC-260318 (unpublished June 23, 2020); *Vistar Transportation, LLC*, 09-RC-260125 (unpublished June 12, 2020); *Twinbrook Health & Rehabilitation Center*, 06-RC-257382 (unpublished June 5, 2020); *Seminole Electric Cooperative, Inc.*, 12-

the Employer had zero confirmed COVID-19 cases and adhered to many of the GC 20-10 protocols (e.g., 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). On May 6, around the time of my decision and direction of mail ballot election in that case, Texas had reported just over 34,000 positive cases and 948 fatalities, with 1,812 people hospitalized. As noted above, as of September 21, Texas has over 686,000 positive cases. It now has approximately 14,500 deaths<sup>43</sup> and over 3,000 people are hospitalized due to COVID-19.<sup>44</sup>

The Employer also contends mail balloting results in voter disenfranchisement and “significantly lower” voter participation; however, its only evidence comes from more than 20 years ago, specifically the dissenting opinion in *San Diego Gas* and a 1994 General Counsel Memorandum. Importantly, the Employer’s argument ignores the Board majority in *San Diego Gas*, which explained:

[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. Moreover, the Employer’s selective quotes from Board decisions belie their true meaning. The full sentence for the Employer’s quoted text in *Mission Industries*, 283 NLRB 1027 (1987), is as follows:

As noted in *Brink’s Armored Car*, 278 NLRB 141 (1986), mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over employees’ voting.

*Mission Industries* at 1027. The Board immediately followed this by noting that it had developed procedures to combat that vulnerability:

Accordingly, the Board has adopted mail ballot election procedures, including the use of an identification stub, designed to preserve the integrity of the election process and to ensure that no reasonable doubt is raised about the fairness or validity of that process.

Ibid. Read in context, the Board effectively stated that its procedures for mail ballot elections combat any vulnerabilities posed by the absence of Board supervision at the time employees cast

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RC-256815 (unpublished May 28, 2020); *Intercontinental Truck Body*, 19-RC-258144 (unpublished May 28, 2020); *Roseland Community Hospital*, 13-RC-256995 (unpublished May 26, 2020); *Johnson Controls*, 16-RC-256972 (unpublished May 18, 2020); *Touchpoint Support Services*, 07-RC-258867 (unpublished May 18, 2020); and *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020).

<sup>43</sup> “COVID-19 in Texas (Dashboard),” above (accessed September 21, 2020).

<sup>44</sup> “Texas COVID-19 Data, COVID-19 by TSA [Trauma Service Area]” (updated September 16, 2020). Texas Department of State Health Services. <https://dshs.texas.gov/coronavirus/TexasCOVID-19HospitalizationsOverTimebyTSA.xlsx> (accessed September 21, 2020).

their votes. Similarly, in *Thompson Roofing, Inc.*, 291 NLRB 793 (1988), the Board’s reference that mail ballot elections are more vulnerable to the destruction of laboratory conditions actually championed the specific mail ballot election procedures instituted by the Board “to preserve the integrity of the election process.” *Id.* at 793, fn. 1. The Board, in *Thompson Roofing*, did not cite to the mail ballot vulnerabilities in order to diminish the effectiveness of mail voting methods, but instead took the opportunity to defend mail ballot elections and the procedures put in place to ensure the integrity of such elections. Consequently, I find the Employer’s reliance on *Mission Industries* and *Thompson Roofing* to be misplaced and meritless. Likewise, the Employer’s citation to *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122 (D.C. Cir. 1996) as support for its claim that mail ballot elections inspire lower participation is also unpersuasive. Although the Court opined that mail ballot elections inspire lower participation, it upheld the mail ballot election in that case, finding that mail ballot elections are useful in certain situations, and are left to the discretion of Regional Directors. *Id.* at 1126.

Although I do not discount the concern regarding potential voter participation issues and acknowledge the potential risks of mail delivery procedures on the outcome of a mail ballot election, there is no indication that the United States Postal Service in the Dallas-Fort Worth metroplex is unable to deliver mail, that the petitioned-for employees would be unable to understand the mail balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any impediments to voter participation. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate, and the return date for mail ballots can be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.<sup>45</sup> While concerns about potential disenfranchisement of voters could be relevant to whether a mail ballot election is appropriate, such concerns do not automatically require a manual election.<sup>46</sup> Any party is, of course, free to present evidence of any actual disenfranchisement of voters in postelection objections. See, for example, *Daylight Transport*, 31-RC-262633 (unpublished August 19, 2020).

## **B. The Employer’s COVID-19 Protocols**

The Employer contends the following measures can ensure a safe and effective manual election: using social distancing measures by making sure voters are not less than six feet (and up

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<sup>45</sup> The Employer speculates “some employees may not open or accept mail due to fear of potential virus exposure.” The Employer presents no evidence that employees have expressed such concerns and, as studies have shown COVID-19 remains active on paper for only one day, mail balloting allows ample time for employees to quarantine their mail. “New coronavirus stable for hours on surfaces” (March 17, 2020). National Institutes of Health. <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (“scientists found that severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) was detectable ... up to 24 hours on cardboard) (accessed September 16, 2020). Also, as noted above, the CDC advises people can avoid the “unlikely” transmission of the virus via mail by simply washing or sanitizing their hands for 20 seconds or quarantining letters to reduce any risk.

<sup>46</sup> I note there appears to be significant risk of voter disenfranchisement in a manual election for any voter who is (1) diagnosed with COVID-19 immediately preceding the election, (2) self-quarantining based on contact tracing, potential exposure, or symptoms of COVID-19. This chance increases when all 11 symptoms from the Employer’s checklist (as opposed to the three symptoms in the GC 20-10 certifications) require self-isolation or quarantining.

to 15 feet) apart at any given time and maintaining a sanitary and disinfected place for all on the premises. See Sec. I.B., above. While the Employer has offered to provide floor markings at more than the suggested distance, there are no means for enforcing social distancing. I have also considered the feasibility and efficacy of its other proffered measures. Regarding the election itself, I have considered the use of plexiglass barriers. I have also considered the required self-quarantining and self-isolation of symptomatic or contact traced employees, use of PPE, and whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site. I have considered limiting the number of people who may participate in the preelection conference and the ballot count and requiring social distancing for all participants.

Regarding the Employer's proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread;<sup>47</sup> however, the CDC continues to advise people to "limit in-person contact as much as possible"<sup>48</sup> and that "[s]taying home is the best way to protect yourself and others from COVID-19."<sup>49</sup> This guidance is echoed by Texas's recent executive order as well as proclamations regarding mandatory mask wearing and recommendation to limit large gatherings at this time.<sup>50</sup> The CDC acknowledges that "[t]here is much more to learn about the transmissibility, severity, and other features associated with COVID-19 and investigations are ongoing" and "[w]hile more is learned every day, there is still a lot that is unknown about COVID-19 and the virus that causes it."<sup>51</sup> Given the uncertainty of determining an "appropriate" distance and the general unknowns of the virus itself, I cannot be sure current guidelines sufficiently mitigate risk.

Regarding the Employer's proposed filtration of the voting area, I agree that a spacious well-ventilated area may reduce the risk of transmission and I commend the Employer's offer of a portable HEPA filter. However, medical experts have not found proof that HEPA filters reduce the chances of spreading the virus, particularly without a negative pressure room preceded by positive pressure anteroom and proper filter placement, which is currently undefined,<sup>52</sup> and the CDC does not recommend their use in open areas to reduce the risk of transmission.

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<sup>47</sup> I note the experts disagree about the distance required for safety and that guidelines are subject to change. Current CDC guidance defines "good social distance" as "about 6 feet." Notably, some scientists disagree that 6 feet is enough. "Mounting evidence suggests coronavirus is airborne — but health advice has not caught up" (July 8, 2020). *Nature*. <https://www.nature.com/articles/d41586-020-02058-1> (accessed September 16, 2020); "What is the evidence to support the 2-metre social distancing rule to reduce COVID-19 transmission?" Centre for Evidence-Based Medicine, University of Oxford. <https://www.cebm.net/covid-19/what-is-the-evidence-to-support-the-2-metre-social-distancing-rule-to-reduce-covid-19-transmission/> ("Smaller airborne droplets laden with SARS-CoV-2 may spread up to 8 metres concentrated in exhaled air from infected individuals .... Whilst there is limited direct evidence that live SARS-CoV-2 is significantly spread via this route, there is no direct evidence that it is *not* spread this way") (emphasis in original) (accessed September 16, 2020).

<sup>48</sup> <https://www.cdc.gov/downloads/2019-ncov-factsheet.pdf> (accessed September 16, 2020).

<sup>49</sup> "Travel during the COVID-19 Pandemic" (updated September 8, 2020), above (accessed September 16, 2020).

<sup>50</sup> "Governor Abbott Establishes Statewide Face Covering Requirement, Issues Proclamation To Limit Gatherings" (July 2, 2020), above (accessed September 16, 2020).

<sup>51</sup> "Frequently Asked Questions, Spread" (updated September 16, 2020), above (accessed September 16, 2020).

<sup>52</sup> See, for example, "Performance analysis of portable HEPA filters and temporary plastic anterooms on the spread of surrogate coronavirus" (August 13, 2020). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7424318/> (accessed

Manual election procedures inherently require substantial interaction among voters, observers, party representatives, and Board agent, all of whom must be present at the Employer's facility. The Board agent, observers, and party representatives participate in a preelection conference in which they must inspect the voting area and check the voter list. The Board agent and observers must be present in the same space for the duration of the polling period. I also note the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity. Removal of the masks by the voter during voting would result in potential cross-contamination, thereby rendering the process even more risky. Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread, given the number of individuals coming in and out of the voting area, the need for the passing of papers and proximity of individuals for the purpose of providing ballots and checking off names.

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange, and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the culmination of the election, the ballot count will proceed in the same area with multiple people, which will unnecessarily cause a significant risk of exposure for all involved. This election would also involve travel to the facility by a Board agent and party representatives. Even if everyone who would participate in a manual election might appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic individuals.<sup>53</sup> Eligible voters, along with other employees who may come into contact with the participants, the Board agent, and party representatives, could risk exposure to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state, and local guidance, all of which advise avoiding in-person contact, which a manual election necessitates. This guidance is even more critical now given the continued high level of community spread of COVID-19 in Texas and Dallas County.

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September 16, 2020); Id., "Use of HEPA filters to reduce the risk of nosocomial spread of SARS-CoV-2 via operating theatre ventilation systems" (July 23, 2020). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7377688/> (accessed September 16, 2020).

<sup>53</sup> "Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic" (July 2020). *Emerging Infectious Diseases Journal*. [https://wwwnc.cdc.gov/eid/article/26/7/20-1595\\_article](https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article) (accessed September 16, 2020); "The implications of silent transmission for the control of COVID-19 outbreaks" (updated July 28, 2020). *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> ("silent disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate in COVID-19 outbreaks") (accessed September 16, 2020). See also, "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (accessed September 16, 2020). See also, "COVID-19 Pandemic Planning Scenarios," above (accessed September 16, 2020).

I have carefully considered the Employer's protocols and proffers, including the suggestions in GC 20-10. Subsequent to the issuance of GC 20-10, the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission) on September 10. The CDC's "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic<sup>54</sup> and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC's September 8 update for "Travel during the COVID-19 Pandemic" continues to warn: "You may feel well and not have any symptoms, but you can still spread COVID-19 to others."<sup>55</sup> While the suggested protocols for manual elections in GC 20-10 appear to adopt many of the CDC's in-person election recommendations for when other alternatives are not available, the Board has an acknowledged and accepted mail ballot procedure. Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns. Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, despite the current decline in the Dallas-Fort Worth metroplex, as I have already described, we have not reached a safe enough juncture from the peak of the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within the state.

A mail ballot election also meets the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. As noted above, neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure, and there is no contention that the addresses of the eligible employees are not known or up to date, nor is there evidence that mail service in Texas or the Dallas-Fort Worth metroplex, where the mail ballots will be sent and received, has been disrupted. The Board's mail ballot procedures include means by which an employee who has not received a ballot in a timely manner may receive a duplicate. Mail balloting provides no additional risk to Board agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Despite the Employer's claims, the Region has already successfully conducted a number of mail ballot elections and virtual remote ballot counts with arrangements for providing all the safeguards of a traditional count, when an in-person count was infeasible.

I have already determined the record evidence supports finding a mail ballot election appropriate. Combined with current prevailing circumstances of the COVID-19 pandemic in the region, the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within Texas and hold a mail ballot election in this case.

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<sup>54</sup> "COVID-19 Pandemic Planning Scenarios" (updated September 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed September 16, 2020).

<sup>55</sup> "Travel during the COVID-19 Pandemic" (updated September 8, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed September 16, 2020).

This election must be held “on the earliest date practicable consistent with the Board’s rules.”<sup>56</sup> Based on the foregoing, I conclude the use of a mail ballot election would provide the framework for more certain election procedures and is the appropriate and most responsible measure to ensure a safe election.

## V. CONCLUSIONS AND FINDINGS

I conclude that under the extraordinary circumstances described above, the election will be held by mail ballot.

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. 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.<sup>57</sup>

3. 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.

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 and regular part-time fork truck operators, logistics specialists, logistics leads, inventory control clerks, and dock coordinators employed by the Employer at its facility located at 1600 South Jupiter Road, Garland, Texas.

**Excluded:** All other employees, office clericals, guards, managers and supervisors as defined by the Act.

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<sup>56</sup> Sec. 102.67(b) of the Board’s Rules and Regulations.

<sup>57</sup> As stipulated by the parties: The Employer, Ecolab Production LLC, a State of Delaware corporation, is engaged in the business of providing warehousing, shipping, and receiving services for the Employer’s supply chain at its Garland, Texas, facility, the only facility involved herein. Within the last 12 months, a representative period, the Employer has purchased and received at its Garland, Texas, facility goods valued in excess of \$50,000 directly from points located outside the State of Texas.

## **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Retail, Wholesale, and Department Store Union

### **C. Election Details**

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on October 1, 2020. Voters must return their mail ballots so that they will be received by close of business on October 22, 2020. The mail ballots will be counted on October 29, 2020, at 2:00 p.m. at a location to be determined, either in person or videoconference, after consultation with the parties, provided the count can be safely conducted on that date and at the Regional Director's discretion.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 16 office by no later than 4:45 p.m. on October 9, 2020, in order to arrange for another mail ballot kit to be sent to that employee.

### **D. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending **September 12, 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 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.

### **E. Voter List**

As required by Section 102.67(1) 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. The Employer must also include, in a separate section of that list, the same information for those individuals who will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **September 23, 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-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-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](http://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.

#### **F. 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, included in this Decision and Direction of Election, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. 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.

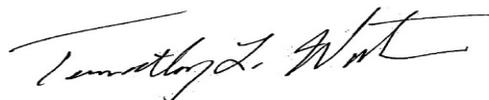
### **RIGHT TO REQUEST REVIEW**

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.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.<sup>58</sup> 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.

Although 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, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. 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 Fort Worth, Texas, this 21<sup>st</sup> day of September 2020.



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Timothy L. Watson, Regional Director  
National Labor Relations Board, Region 16  
Fritz G. Lanham Federal Building  
819 Taylor Street, Room 8A24  
Fort Worth, Texas 76102-6107

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<sup>58</sup> 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. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.

