

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

JDRC MANAGED SERVICES, LLC

Employer,

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 881**

Case No. 25-RC-265109

Petitioner.

EMERGENCY MOTION TO STAY MAIL-BALLOT ELECTION

Pursuant to Section 102.67(j) of the National Labor Relation Board’s (NLRB or “Board”) Rules and Regulations, Employer, JDRC Managed Services, LLC (“JDRC”), respectfully requests the Board grant this Emergency Motion to Stay the Mail-Ballot Election ordered by the Regional Director, currently set to begin on October 13, 2020 at 11 a.m. ET pending the Board’s ruling on JDRC’s Request for Review and ultimate decision as to whether the Regional Director abused her discretion by ordering a mail-ballot election over the parties’ stipulation to an in-person election and despite the extensive COVID-19 protocols and PPE protections offered for this small bargaining unit.

Alternatively, JDRC requests the Board to impound the ballots pending the Board’s ruling on JDRC’s Request for Review and ultimate decision on the mail-ballot election determination.

I. INTRODUCTION

Despite the mutual agreement of the United Food and Commercial Workers International Union, Local 881 (the “Union”) and JDRC to hold an in-person manual election at Cresco Labs, LLC’s Lincoln, Illinois processing and cultivation facility (the “Lincoln Facility”), the Regional Director abused her discretion and ordered a mail ballot election.

In arriving at her decision, the Regional Director ignores the long-standing Board preference favoring manual elections and fails to engage in a well-reasoned analysis as to whether a mail-ballot election is appropriate *in this case* to meet the “extraordinary circumstances” necessary to depart from an in-person manual election. The Order focuses on national facts about COVID-19 and mail ballots rather than the facts of this case that makes it unlikely that any in-person balloting will occur so long as COVID-19 still exists anywhere in the United States. This standard ignores that “extraordinary circumstances” require case-specific facts, and effectively creates a presumption in favor of mail ballots. What few facts relate to the actual site of the election were mistakenly drawn from the wrong state, which is also plain error and an abuse of discretion.

The Regional Director’s abuse of discretion has resulted in the scheduling of a mail-ballot election less than two weeks after the Order. In light of the particular circumstances of this election, the Regional Director’s abuse of discretion calls for extraordinary relief in the form of a stay of the scheduled mail-ballot election pending the Board’s ruling on JDRC’s Request for Review and, if granted, the Board’s ultimate decision on the mail-ballot election determination.

II. FACTUAL BACKGROUND

Cresco is engaged in the production, processing and retail sale of cannabis products for medical use and recreational consumption. JDRC supplies employees to Cresco at its Lincoln, Illinois processing and cultivation facility (“Lincoln Facility”). On August 24, 2020, the Union filed a Notice of Petition for Election with the NLRB seeking an in-person election at the Lincoln Facility. JDRC requested an in-person manual election. *See* Exhibit B to JDRC’s Request for Review. Despite both parties agreeing to an in-person election, the Regional Director Patricia K. Nachand denied the Stipulated Election Agreement for a manual election. The parties agreed to a stipulated record in lieu of an in-person hearing. *See* Exhibit A to JDRC’s Request for Review.

On September 30, 2020, Regional Director Nachand issued a Decision and Direction of a Mail-Ballot Election (“Order” or “DD&E”) to begin on October 13, 2020 at 11 a.m. ET. *Id.* The Regional Director ordered a mail-ballot election despite the parties’ agreement to hold an in-person election at the Lincoln Facility. In arriving at her decision, The Regional Director ignores that this is a regulated facility with controlled access, extensive existing COVID-19 protocols and PPE requirements, that employees are already working in the Lincoln Facility, and that JDRC can and has stipulated that it will implement all the recommended measures in General Counsel GC Memo 20-10 for an in-person election.

In arriving at her decision, the Regional Director departs from the long-standing Board preference favoring manual elections and requiring “extraordinary circumstances” to effectively create a presumption in favor of mail ballots. Compounding that error, she fails to engage in an analysis as to whether a mail-ballot election is appropriate *in this case*. Instead, the Order relies upon generalized statements about COVID-19 in the abstract. What is more,

the Regional Director incorrectly cites to irrelevant COVID-19 data from another state to reach an erroneous conclusion regarding the risk of COVID-19 at the Lincoln Facility. The Regional Director fails to consider JDRC's proposed safety protocols that go beyond the General Counsel's proposed COVID-19 protocols to hold an in-person manual election.

The Order creates a standard wherein it is impossible to hold a manual in person-election while COVID-19 still exists anywhere in the United States. In other words, no matter whether the parties agreed to a manual election, and no matter what precautions the parties implemented, the Regional Director suggests that a mail-ballot election would always be incrementally more safe than an in-person manual election so long as COVID-19 exists. By ignoring local conditions about infection rates and the availability here of safety precautions, an outdoor tent, and PPE, the Regional Director has strained "the extraordinary circumstances" exception to an in-person election to the breaking point. The Regional Director's DD&E analysis shows an abuse of discretion.

The Regional Director's abuse of discretion has resulted in the scheduling of a mail-ballot election to begin only two weeks after the Order. In light of the clear evidence of abuse of discretion, the Regional Director's actions call for extraordinary relief in the form of a stay of the scheduled mail-ballot election pending the Board's ruling on JDRC's Request for Review and, if granted, the Board's ultimate decision on the mail-ballot election determination.

III. ARGUMENT

Section 102.67(j)(1) allows a party requesting review to also move to stay the election and move to impound some or all of the ballots. To obtain extraordinary relief, the moving party must make "a clear showing that it is necessary under the particular circumstances of the case."

Id.

Here the undisputed record favors an in-person election consistent with Board preference. There are few COVID-19 cases in Logan County, even fewer in Lincoln, Illinois, and *no* known positive COVID-19 cases at the Lincoln Facility. The lack of outbreak at the Lincoln Facility is in no small part due to the extensive COVID-19 prevention and control protocols that have been in place since March 2020. These protocols implemented social distancing measures, require employees to wear protective equipment, promote employee hygiene and frequent cleaning and disinfection and require employees and visitors to engage in health screenings prior to entering the facility. JDRC requires individuals to preventatively quarantine if they feel ill or have potentially been exposed to COVID-19 in efforts to limit spread of COVID-19 in the workplace. An epidemiologist consults with JDRC on its COVID-19 protocols. To safely conduct the election, JDRC has demonstrated its willingness to go beyond the requirements in GC Memo 20-10 to ensure a safe election. *See* Exhibits B, D and F to JDRC's Request for Review.

Furthermore, the Lincoln Facility is a small facility that cannot be accessed by the public. The bargaining unit petitioned for is ultimately only 51 employees, who will be voting over two divided shifts and a 90-minute polling time. It is a secured, state-regulated facility. *See* Exhibits B, C, D and E to JDRC's Request for Review. This means that access is controlled, that there will never be crowds in the voting room as the Regional Director suggested, and that members of the public will not be entering the facility during the election decreasing the risk that safety protocols are not followed. In addition to the COVID-19 protocols, the Lincoln Facility is a facility that produces edible and consumable products and is subject to the already stringent existing safety and sanitation practices, including infection control, PPE, daily wellness checks before entry and cleanliness procedures. *See* Exhibits B

and D to JDRC's Request for Review.

The Regional Director failed to appropriately consider any of these facts and abused her discretion in order a mail-ballot election, focusing largely on national statistics and ignoring local conditions and available precautions, such as use of an outside tent.

The Board has long held that in-person manual elections are the preferred election method. And the Board and the General Counsel have clearly contemplated that safe in-person elections are possible during COVID-19. *See* General Counsel Memo 20-10. As JDRC's Request for Review demonstrates in detail, the Regional Director's decision ordering a mail-ballot election is a clear abuse of discretion given her departure from Board precedent. The Order reflects an unreasoned departure from the Board's strong preference for in-person manual elections over mail-ballot elections. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998). The Order neglects to determine whether the "extraordinary circumstances" present *in this case* warrant a mail-ballot election and instead relies primarily upon generalized conclusions.

Second, the DD&E is an abuse of discretion because of the erroneous facts upon which it mistakenly relies and the undisputed facts it ignores, depriving the decision of substantial evidence. The DD&E incorrectly primarily relies on the overall spread of cases in the United States rather than focusing on this community and this facility where **no** employees have contracted COVID-19. And in the rare instance the Regional Director cites specifics, these the specifics are simply erroneous, including citing data for *Logan County, Colorado*, not Illinois. *See* Request for Review p. 13-16.

In this regard, the Regional Director also suggests that the election would violate state Executive Orders against gatherings over 50 and suggests that the commute to the election for the agent would be long and dangerous. Neither is true. The entire bargaining unit petitioned

for had 49 employees and there were 51 on the *Excelsior* list. But the election is to be held over a 90-minute period covering employees working on two separate shifts, which avoids large groups in the voting area over one time. As to commuting, the agent running the election out of the Sub-Region 33 office is only 47 minutes away, a standard commuting time for many. *See id.*

Third, the Order results in prejudicial error to the Union and JDRC by ignoring the parties' mutual intent to follow safety protocols to conduct an in-person manual election. *See Request for Review*, p. 16. In this regard, the Regional Director, worries without any factual basis in the record that the parties will violate the agreed safety protocols. Again, there is no basis for that conclusion in the record and relying on that suggestion in the face of the parties' joint stipulation is plain error. *See id.*

Fourth, given that the pandemic's ongoing nature, the Board must consider what circumstances are appropriate for deviating from Board preference for in-person elections during the COVID-19 pandemic on a case-by-case election. Under the case law, there is no basis for the one-size-fits-all solution the Region relies on to order a mail ballot. *See Request for Review*, p. 17-18.

At bottom, this is a small election at a facility with no COVID-19 cases, existing PPE and safety protocols, and two parties who stipulated to a short, outdoor, in-person election. There is no basis in the record that demonstrate the extraordinary circumstances necessary to order a mail ballot, and the order is an abuse of discretion. The Regional Director ignored these undisputed facts in reaching her decision. The election should be stayed, and an in-person election ordered as the parties agreed.

IV. CONCLUSION

For the foregoing reasons, extraordinary relief is required. The Board should grant JDRC's Emergency Motion to Stay the presently scheduled mail-ballot election pending the Board's decision on JDRC's Request for Review.

In the alternative, the Board should impound the ballots until the Board has considered JDRC's Request for Review and reached an ultimate judgment on the mail-ballot election determination.

Dated this 6th day of October 2020.

Respectfully submitted,

JDRC Managed Services, LLC

/s/ Kenneth F. Sparks

One of Its Attorneys

Kenneth F. Sparks
Eugene A. Boyle
Vedder Price P.C.
222 N. LaSalle Street
Suite 2600
Chicago, IL 60601
312-609-7877

Attorneys for JDRC Managed Services, LLC