PACKERS SANITATION SERVICES INC (PSSI)

Employer

and

UNITED FOOD & COMMERCIAL WORKERS
LOCAL 540

Petitioner

EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL
THE REGIONAL DIRECTOR'S ORDER CONVERTING THE ELECTION TO A MAIL
BALLOT ELECTION AND EMPLOYER'S SPECIAL APPEAL OF SUCH RULING

Packers Sanitation Services, Inc. (PSSI) (the “Employer), pursuant to Rule 102.26 of the Board’s Rules and Regulations, files this Request for Special Permission to Appeal the Regional Director’s Order on May 11, 2022, in which the Regional Director (“RD”) abused his discretion to cancel the in-person, manual election set for Friday, May, 13, 2022 and ordered a mail ballot election based only on his conclusion that the 14-day trend of new confirmed COVID-19 cases in Tarrant County, Texas, is increasing and that the 14-day “testing positivity rate” in Tarrant County, Texas, is higher than 5 percent. The Regional Director did not make any effort to evaluate the relevant circumstances and confirm whether for this particular unit and location a manual election was both the preferred and safe method for allowing employees to decide the issue of union representation. The late and sudden change in the election process has and will interfere with the rights of employees if the mail-ballot process is allowed to occur. In support of this Request and Special Appeal, the Employer states as follows:
1. Based on the facts of this case, the Regional Director’s Order issued on May 11, 2022, is an abuse of discretion. A mail ballot election will not only create a miscarriage of justice, but also have the effect of disenfranchising voters.

2. On April 13, 2022, the Union filed a petition for an election with the National Labor Relations Board (“NLRB” or the “Board”) in which the Union seeks to be certified as the bargaining representative of certain employees of the Employer at the Employer’s Forth Worth, Texas facility.

3. The applicable unit consist of approximately 33 eligible voters.

4. On May 3, 2022, the RD approved a Stipulated Election Agreement (the “Agreement”) between the Employer and the Union. (Exhibit A, Agreement.) The Agreement provided for a secret, manual-ballot election to take place on May 13, 2022, between 12:30 a.m. CST and 1:30 a.m. CST in the Executive Conference Room at the Employer’s facility located at 11301 Northpark Drive, Fort Worth, Texas. The agreement further outlined the safety protocols the Employer agreed to abide by during the election—which are the protocols required by GC Memo 20-10, *Suggested Manual Election Protocols*.

5. On May 11, 2022, at approximately 4:35 p.m. (CST), a day before the eligible voters would arrive to vote for the manual ballot election, the RD issued an Order cancelling the manual ballot election and converting the election to a mail ballot election. (Ex. B, Order.) The RD did so without a hearing and despite the Employer’s objection to the change.

6. However, a majority of the six “parameters” the Board outlined in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020) that should be considered before deciding whether to order a mail-ballot election favor an in-person election.
7. Currently, Region 16 is not under mandatory telework status as noted on the Board’s website. Therefore, the first factor does not weigh in favor of a mail ballot election.

8. The Board’s website further notes that the “COVID Community Level” in Fort Worth is “low.”

Similarly, Tarrant County’s website lists the “COVID Community Level” as “LOW.” Thus, although the RD’s Order notes that according to COVIDActNow.org and the NY Times’ website new confirmed cases in Tarrant County are increasing and the positivity rate is above 5%, the levels are still deemed “low” both by the Board and the Tarrant County government. Further, it is indisputable that daily COVID-19 testing performed in Texas has decreased to its lowest levels in years. While the COVID-19 positivity rate may have increased, it is evident that individuals are no longer testing themselves for Covid-19 in the same large numbers as occurred in October 2020 when the Board decided Aspirus Keweenaw and only those with symptoms are testing making it substantially more likely that a higher percentage will test positive in May 2022 than in October 2020 (e.g., in October 2020 the daily average of COVID-19 test in Texas surpassed 70,000 compared to less than 15,000 daily tests in May 2022). A threshold of 5%, therefore, is no longer reasonable and the Employer avers the county-, state-, and nation-wide positive case trend should not be examined in a vacuum and form the sole basis of a mail-ballot election. This is especially true here where the Employer continued to operate throughout the Pandemic, has had no major outbreaks of Covid-19 at its Fort Worth Facility, and has not had a single reported Covid-19 case in the last sixty (60) days at its Fort Worth facility. Finally, the most prevalent strain of Covid-19 currently present in the United States is substantially less severe than the most prevalent strain in October 2020—providing further support for not basing a mail-ballot election on this

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single factor. The presence of one or more of these six “situations” outlined in *Aspirus Keweenaw* does not require a mail-ballot election. *Aspirus Keweenaw*, 370 NLRB, slip op. at 8.

9. The proposed election location - the executive conference room - would not violate any state or local health orders governing maximum gathering size. In fact, there currently are no restrictions on the size of gatherings or physical distancing within Tarrant County. Even if there were, the Agreement notes that the executive conference room is large enough to easily accommodate a table and three chairs, with more than six feet of space between them, and separate doorways for entry and exit. The third factor, therefore, also weighs against direction of a mail ballot election.

10. Pursuant to the Agreement, the Employer is willing and able to fully comply with all manual election requirements set forth in GC Memo 20-10. This includes certifying that the polling area was sanitized in compliance with applicable CDC standards; certifying the number of individuals who test positive, are awaiting test results, or who are exhibiting symptoms or sustain exposure over the two weeks preceding the election; making the polling area available for video inspection at least 24 hours prior to the election; furnishing disposable pencils, glue sticks, and tape for purposes of sealing envelopes within the polling area; marking the floor of the polling area with tape to ensure sufficient separation at all times; providing plexiglass barriers to separate those seated at the table in the polling area from one another and from others in the polling area; and providing masks, hand sanitizer, gloves, and wipes. Accordingly, the fourth factor favors an in-person election.

11. There is no Covid-19 outbreak at the Employer’s Fort Worth Facility. In fact, the Employer has not had a single reported Covid-19 positive employee in the last sixty (60) days. Therefore, the fifth factor does not support a mail ballot election.
12. No other compelling considerations or circumstances support a mail ballot election in this case. Again, the Employer is more than capable of taking those proactive steps necessary to ensure the safety of all election participants and NLRB and third-party representatives. It should also be noted that the Employer’s workforce has been reporting to their workplace each and every day throughout the pandemic. The notion that they are fully capable of doing so in the course of performing their duties every day but not for purposes of casting their ballots over a single hour falls completely flat. Therefore, the last factor does not weigh in favor of a mail ballot election.

13. Additionally, since the RD issued the Order cancelling the in-person, manual election, the Employer has received voluntary reports that eligible employees have current circumstances in which they no longer have nor maintain an active mailing address. Therefore, these employees will be disenfranchised if an in-person, manual vote is not held. The RD’s May 11, 2022, Order guarantees that employees will be disenfranchised if the election is held by mail ballot. As it is longstanding Board policy to increase participation in elections as much as possible, the RD’s decision should be overturned. See San Diego Gas & Electric, 325 NLRB 1143, 1150 (stating employees’ Section 7 rights are “anchored in the opportunity to vote on a collective-bargaining representative” which “depends upon . . . maximum participation by the electorate”) (1998) (Members Hurtgen and Brame, dissenting); NLRB Case Handling Manual (Part Two) Section 11301.2 (stating a mail ballot election is only appropriate where “Regional Director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.”). Since a mail ballot election would definitively deprive several employees of the opportunity to vote, the Board should order a manual ballot election.
14. If the RD’s Order is not overturned, the Board should, at least, require a full and complete hearing to determine if, at this point in the declining COVID-19 pandemic, it is possible to have a safe, in-person, manual election for the unit and location in question.

15. To the extent there is a mail-ballot election in this matter, the Employer request that all ballots be impounded and not counted until the significant and novel issues in this matter have been fully and thoroughly reviewed, briefed, and properly decided.

WHEREFORE, the Employer respectfully requests special permission to appeal the Regional Director’s Order cancelling the manual ballot election and converting the election to a mail ballot election and submits that such ruling should be reversed.

Respectfully submitted, this 13th day of May 2022.

/s/ Michael D. Carrouth
Michael D. Carrouth
COUNSEL FOR PACKERS SANITATION SERVICES, INC., LTD. (PSSI)
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Packers Sanitation Services, Inc., Ltd. Case 16-RC-294032

The parties AGREE AS FOLLOWS:

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Employer, Packers Sanitation Services, Inc., Ltd., a Ohio corporation, with a place of business located at 1301 Northpark Drive, Fort Worth, Texas 76102, the only facility herein involved, is engaged in the business of providing food safety solutions. During the last twelve months, a representative period, the Employer, in conducting its business and operations, derived gross revenues in excess of $500,000, and purchased and received at its Fort Worth facility goods and materials valued in excess of $50,000 directly from points located outside the State of Texas.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

   DATE: May 13, 2022  HOURS: 12:30 a.m. CST to 1:30 a.m. CST
   PLACE: The Executive Conference Room at the Employer’s facility located at 1301 Northpark Drive, Fort Worth, Texas.

If the election is postponed or canceled, the Regional Director, in his discretion, may reschedule the date, time, and place of the election.

The Regional Director has and retains the full and complete discretion to determine whether it is unsafe, for any reason, to conduct a manual election on the stipulated date. Further, if the Regional Director determines a manual election is unsafe, or if the election is postponed or cancelled for any other reason, the Regional Director has and retains sole and complete discretion to reschedule the date, time, location, and/or manner of the election, including converting the election to a mail ballot election, as he deems appropriate.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   INITIALS: MDC
INCLUDED: All regular full-time and part-time food safety sanitation employees, including Employee Retention Program Trainers (ERP Trainers), Food Safety Sanitors, and Leads working at the Cargill Meat Solutions facility located at 1301 Northpark Dr., Fort Worth, Texas.

EXCLUDED: All other employees, office clericals, confidential employees, managers, guards, and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the payroll period ending May 1, 2022, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the above unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, and, in a mail ballot election, before they mail in their ballots to the Board’s designated office, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, 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. 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. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated. The question on the ballot will be “Do you wish to be represented for purposes of collective bargaining by UNITED FOOD & COMMERCIAL WORKERS INTERANTIONAL UNION LOCAL 540 AFL-CIO, CLC?” The choices on the ballot will be “Yes” or “No”.

Initials: MDC
8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day the ballots are mailed to employees. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

9. NOTICE OF ELECTION ONSITE REPRESENTATIVE. The following individual will serve as the Employer’s designated Notice of Election onsite representative:

Larry Mata; Manager; 1301 Northpark Drive, Fort Worth; Texas 76102; contact@pssi.com; telephone: (888) 871-6335; cellphone: (608) 568-3429

10. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

11. OBSERVERS. Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally. Each party may designate an observer or observers to participate in the count, including challenging the eligibility of voters.

12. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

13. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board’s Rules and Regulations.

14. SAFETY PROTOCOLS. If these protocols cannot be followed (or attested to as required by Memorandum GC 20-10), the Regional Director reserves the right to cancel or reschedule the manual election, or convert the election to a mail-ballot election with ballots being mailed out on or as soon as practicable after the scheduled manual election date. Given the COVID-19 pandemic, in order to protect the voters, observers, Board agent(s), and others during the election and ballot count:

a. The Employer will provide four separate tables with three chairs that will be placed at least 6 feet apart in the voting area: there will be one table for the Employer’s Election Observers, one for the Union’s Election Observer(s), one for the Board Agent(s), and one for the ballots/ballot box/writing utensils. In the event the space of the voting area will not allow for four separate tables; the Employer will set the voting area up to ensure that 6 feet of space between the voters, the Board Agent, and the Election Observers can be maintained at all times.

b. Employer will place markings throughout the voting area, and in the immediate vicinity outside of that area, to ensure proper social distancing for voters and to ensure that the voting line does not exceed 4 voters at a time.

Initials: MDC
c. Employer will ensure that the voting area has sufficient room for voters to maintain 6 feet of space between one another when entering and exiting the voting area (the Board Agent will direct the flow of traffic to allow only one voter in the area at a time).

d. Employer will ensure the voting area has a separate entrance and exit for voters, with markings to depict safe traffic flow throughout the polling area.

e. Employer will provide hand sanitizers and an abundant number of sanitizing wipes for the voting area.

f. Employer will provide masks for all voters.

g. Employer will provide masks and gloves for all party representatives and observers.

h. The Board Agent, voters, and Election Observers shall wear masks in the voting area during the entirety of the election process. In accordance with the “Voting Place Notice”, Form NLRB-5017, the Board Agent has the discretion to advise a voter who is not properly masked to leave the voting area and return when properly masked.

i. Employer will provide a sufficient number of disposable pencils without erasers for each voter to mark their ballot.

j. Employer will provide glue sticks or tape to seal challenged ballot envelopes.

k. Employer will provide plexiglass barriers of sufficient size to protect the observers and Board agent to separate observers and the Board agent from voters and each other, pre-election conference and ballot count attendees.

l. The Board Agent has the discretion to limit attendance at the counting of the ballots to the number of people who can maintain 6 feet of space between one another.

m. All individuals attending the pre-election conference and ballot count shall wear masks. The Board Agents have the discretion to advise a conference or count attendee who is not properly masked to leave the conference/count and return when properly masked.

n. An inspection of the polling area will occur by Zoom videoconference with all parties at **10:00 a.m. on May 12, 2022** so that the Board Agents and parties can view the polling area.

o. Employer will post signs immediately adjacent to the Notice of Election to notify voters, observers, party representatives, and other participants of the mask requirement.

Initials: MDC
p. Employer will sanitize the polling area the day of the election, prior to the start of the pre-election conference.

q. Parties will immediately notify the Regional Director in writing if any participant in the election, including all representatives, observers, and eligible voters, test positive for COVID-19 or if they have been directly exposed to individuals who have tested positive for COVID-19 during the 14 days immediately preceding the election date.

r. The Employer will complete and submit GC 20-10 COVID-19 Certification Forms A and B to the Region within the time frame set forth on the forms. The Forms will be considered by the Regional Director in determining whether conducting the election manually will jeopardize public health. Failure to provide accurate or timely forms may result in the election being cancelled, rescheduled, or converted to a mail ballot election.

s. The Petitioner and the Union will complete and submit GC 20-10 COVID-19 Certification Form B to the Board Agent conducting the election within the time frame set forth on the form.

t. Individuals for which Form B was not submitted will not be permitted to be physically present at the pre-election conference, to serve as an observer during the election or at the ballot count.

u. All parties agree to immediately notify the Regional Director, if, within 14 days after the day of the election, any individuals who were present in the facility on the day of the election:

- have tested positive for COVID-19 (or has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) within the prior 14 days;
- are awaiting results of a COVID-19 test;
- are exhibiting symptoms of COVID-19, including a fever of 100.4 or higher, cough, shortness of breath;
- have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19 (or who are awaiting test results for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested).
Packers Sanitation Services, Inc., Ltd.  
(employer)

By: ____________________________
   (Signature)  5/3/22
   (Date)

Print Name: Michael D. Carrouth

UNITED FOOD & COMMERCIAL WORKERS  
INTERANTIONAL UNION LOCAL 540 AFL-CIO, CLC  
(Petitioner)

By: ____________________________
   (Signature)  (Date)

Print Name: ____________________________

(union)

By: ____________________________
   (Signature)  (Date)

Print Name: ____________________________

Recommended: TAYLOR V. WHETSEL, Field
Examiner  (Date)

Date approved: ____________________________

Regional Director, Region 16
National Labor Relations Board

MDC

Initials: MDC
EXHIBIT B
Based on a petition filed on April 13, 2022 and pursuant to a Stipulated Election Agreement (Agreement) approved on May 3, 2022, a manual election was scheduled to be conducted on May 13, 2022, to determine whether certain employees of Packers Sanitation Services, Inc., Ltd. (the Employer) wish to be represented for purposes of collective bargaining by United & Food Commercial Workers International Union Local 540, AFL-CIO, CLC (Petitioner). The appropriate collective bargaining unit consists of:

INCLUDED: All regular full-time and part-time food safety sanitation employees, including Employee Retention Program Trainers (ERP Trainers), Food Safety Sanitors, and Leads working at the Cargill Meat Solutions facility located at 1301 Northpark Dr., Fort Worth, Texas.

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

The parties agreed, pursuant to paragraph 14 of the Agreement, that the Regional Director retains the right to cancel or reschedule the manual election or convert the manual election to a mail-ballot election given the changing nature of the COVID-19 pandemic.

Since the approval of the Agreement, changes and trend developments in the COVID-19 pandemic in Tarrant County, Texas, have resulted in the factors for safely holding a manual election as set forth by the Board in Aspirus Keweenaw, 370 NLRB No. 45 (2020) and as discussed in General Counsel Memorandum GC 21-01 no longer being met. Specifically, the 14-day trend
of new confirmed cases of COVID-19 in Tarrant County, Texas is increasing and the 14-day testing positivity rate in Tarrant County, Texas is higher than 5 percent.¹

As such, it is HEREBY ORDERED that the manual election schedule for May 13, 2022, is cancelled and CONVERTED to a mail-ballot election as set forth below:

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 16, on Wednesday, May 25, 2022, at 4:45 p.m. (CST). Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 16 office by Wednesday, June 15, 2022, by close of business at 4:45 p.m. (CST). The mail ballots will be counted by a designated Board Agent of the National Labor Relations Board on Friday, June 17, 2022, at 2:00 p.m. (CST), by videoconference, provided the count can be safety conducted on that date and at the Regional Director’s discretion.

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 void. In order to be valid and counted, the returned ballots must be received by the Region 16 Office prior to counting the ballots.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Region 16 office by no later than 4:45 p.m. (CST) on Wednesday, June 1, 2022, in order to arrange for another mail ballot kit to be sent to that employee.

A revised Notice of Election will issue reflecting these details. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day the ballots are mailed to employees. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

Inasmuch as the May 13, 2022, election is cancelled, the Employer should post this Order next to all Notices of Election that were previously posted.

¹ Information regarding COVID-19 activity is taken from COVIDActNow.org and from The New York Times website Coronavirus in the U.S.: Latest Map and Case Count.
DATED in Fort Worth, Texas on this 11th day of May 2022.

Timothy L. Watson  
Regional Director  
National Labor Relations Board  
Region 16  
Fritz G. Lanham Federal Building  
819 Taylor Street, Room 8A24  
Fort Worth, TX 76102-6178
PACKERS SANITATION SERVICES, INC.

Case No. 16-RC-294032

CERTIFICATE OF SERVICE

It is hereby certified that Packers Sanitation Service, Inc.’s Employer’s Request for Special Permission to Appeal the Regional Director’s Order Converting the Election to a Mail Ballot Election and Employer’s Special Appeal of Such Ruling, in the above-captioned case has been served on Petitioner by electronic mail to:

David Watsky, Esquire
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Organizing Director
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gonzalo@ufcw540.org

May 13, 2022

s/Michael D. Carrouth
Michael D. Carrouth