

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

Austin, Texas

VICTORY WINE GROUP, LLC

Employer

and

Case 16-RC-257874

TEAMSTERS LOCAL NO. 997

Petitioner

DECISION AND DIRECTION OF ELECTION

On March 11, 2020, the Teamsters Local No. 997 (Petitioner) filed a representation petition under Section 9(c) of the Act seeking to represent certain employees of Victory Wine Group, LLC (Employer).

On March 19, 2020, before any election agreement was reached or hearing was held in this matter, because of safety concerns related to the COVID-19 pandemic in the United States, the Board ordered that all Board-conducted elections would be temporarily suspended. The Board lifted that suspension two weeks later, on April 1, 2020. In ending the suspension, the Board noted that appropriate measures for conducting elections in a safe and effective manner were available and noted that the determination as to such measures would be left to the Regional Directors.

Because mail ballots have the advantage of significantly reducing social interactions, after the Board lifted the suspension of Board elections, the Region solicited the parties' positions as to the appropriateness of a mail ballot election. Thereafter, the parties submitted their positions whereby the Employer opposes holding the election by mail, asserting that a manual election could be conducted safely at its facility, while the Petitioner also favors a manual election but does not object to an election by mail to prevent further delay.

On April 21, 2020, a hearing officer of the Board held a telephonic hearing in this matter in which the parties presented offers of proof on the appropriateness of a mail ballot election. Having reviewed the parties' positions, and having considered other factors, as addressed below, I have determined that because of the extraordinary circumstances presented by the ongoing pandemic, the National Labor Relations Board will conduct this election by mail ballot.

Although the type of election to be held is not a litigable issue at a hearing¹, I herein provide the basis for my decision to order a mail ballot election in this case.

¹ Cf. *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

National, state, county, and local authorities have all declared states of emergency or disaster, and public health officials recommend minimizing in-person contact. I am unconvinced by the Employer's position that measures could be undertaken which would allow for the safe and effective conducting of a manual ballot election at this time. The most responsible measure to ensure a safe election is to change the method to a mail ballot election, which will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to this virus. Additionally, given the current rapidity of changes to both recommended and mandatory virus-countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in an effective manner.

I. BACKGROUND AND POSITIONS OF THE PARTIES

The Employer is a Delaware limited liability corporation with a facility located in Austin, Texas. The Employer is engaged in the business of distributing fine wines and spirits. Petitioner seeks to represent a unit of Employer's warehouse workers and drivers at its facility located at 4009 Commercial Center Drive, Suite 600, Austin, Texas.

Petitioner asserts that a manual election is the most appropriate method of election, and citing the Board's press releases, notes that such an election can be held at the discretion of Regional Directors. However, Petitioner argues that if the Regional Director does not deem a manual election safe in this case, it should not cause further delay and that per the Board's Rules and Regulations, this case involves extraordinary circumstances warranting a mail-ballot election.

The Employer asserts that only a manual election would be appropriate. The Employer argues that under *San Diego Gas & Electric*, 325 NLRB 1143 (1998), as well as the NLRB Case Handling Manual, Part II § 11301.2, representation elections should be held manually, absent unusual circumstances making voting in a manual election difficult, or where a manual election is impractical or not easily conducted. The Employer argues there are no such circumstances here, and that conducting a manual election while observing social distancing and other safety protocols at the Employer's facility is manageable. The Employer argues that the rare exception to the manual election presumption has been where employees are widely scattered and cannot easily visit the workplace to vote, but that this is not the case here.

The Employer states, without authority, that mail ballot voting is inherently flawed and less reliable than manual voting. The Employer also notes that unforeseen delay has never been the basis for the Board ordering a mail ballot election. Finally, the Employer contends that a manual election could be safely conducted at its facility, even observing social distancing protocols.

II. CONDUCTING A MANUAL BALLOT ELECTION WOULD RISK INFECTING EMPLOYEES, THE BOARD AGENTS CONDUCTING THE ELECTION, AS WELL AS JEOPARDIZING THE HEALTH OF THE PUBLIC AT LARGE

At the time of this decision, despite unprecedented efforts to limit transmission, over 40,000 deaths from COVID-19 have been reported in the United States.² The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel and the general population of Central Texas are subject to the risks of COVID-19 transmission. This risk has been recognized by officials in several declarations, recommendations, and orders at the national, state, and local level. President Donald J. Trump, issued a "[Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease \(COVID-19\) Outbreak](#)," on March 13, 2020. That same day, Governor Greg Abbott, similarly issued "[a proclamation certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas](#)." On April 12, 2020, Governor Abbott issued a proclamation "[extending his disaster declaration for all Texas counties in response to COVID-19](#)." On March 9, 2020, in Travis County, Texas, where the Employer's facility is located, County Judge Sarah Eckhardt issued a "Declaration of Disaster Due to Public Health Emergency."³

Texas has been significantly affected by the novel coronavirus, with new confirmed cases and deaths every day. As of April 23, 2020, Texas has reported almost 22,000 cases of COVID-19, with 1,649 patients currently in the hospital because of the virus.⁴ At least 561 people have died because of COVID-19 statewide. In Travis County, where the Employer's facility is located, 1,256 cases have been confirmed, and 28 people have died from COVID-19. In Harris, Tarrant, Dallas, and Bexar counties, where Board Agents conducting the election would travel from, there are similar and higher rates of infection (Harris County, 5211; Dallas County, 2,683; Tarrant County, 1,430; Bexar County; 1,126).⁵

Government agencies and authorities, recognizing the danger of this pandemic, have taken appropriate measures to limit exposure. Travis County Judge Sarah Eckhardt has ordered all citizens to stay at home except for travel related to essential activities, and to observe social distancing and face covering requirements, and has prohibited all indoor and outdoor public or social gatherings of any number of people outside of a single household.⁶ The Order has been extended to at least May 8, 2020.⁷

² Johns Hopkins University & Medicine *Coronavirus Resource Center* <https://coronavirus.jhu.edu/map.html>, last accessed April 21, 2020.

³ Travis County, Texas, "Travis County Declaration of Disaster Due to Public Health Emergency", March 6, 2020, accessed at <https://www.traviscountytexas.gov/news/2020/1945-novel-coronavirus-covid-19-information>, last accessed April 23, 2020.

⁴ Texas Department of State Health Services, "[Texas Case Counts: COVID-19 Case Dashboard](#)," last accessed April 23, 2020.

⁵ *See id.*

⁶ The County Judge of Travis County, "[Stay Home – Work Safe](#)" March 13, 2020; extended April 13, 2020.

⁷ The County Judge of Travis County, "[Order No. 2020-7](#)" April 13, 2020.

Although Region 16 has available personnel who would appear to be infection free, the virus is believed to spread through presymptomatic and asymptomatic individuals. At some point in the future, testing may be more widespread. Currently, sending a Board agent to conduct the election would risk the exposure of everyone at the facility. Eligible voters along with other employees who may come into contact with these participants, Board agents, and party representatives, would risk being exposed to the virus and spreading it to 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.

The Board's manual election procedures require close proximity for the duration of the election between Board agents, election observers, and voters. Employees use the same pens or pencils while voting in an enclosed booth before placing their ballots in a sealed box; each of these ballots is individually handled by the Board agent conducting the election, and available for inspection by the party representatives. Before voting, voters are required to give their names to party observers, who then check the name off of the same voter list. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families, and the community.

III. THE ONLY ACCEPTABLE WAY TO MITIGATE THESE RISKS IS A MAIL BALLOT ELECTION

In its position statement, the Employer contends that 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 apart at any given time, and maintaining a sanitary and disinfected place for all on the premises. The Employer offered only vague solutions to concerns regarding the risk of infection, failing to offer in greater detail how it will ensure voters are not in close proximity, and what measures it will use to maintain a sanitary environment.

In addition to those identified by the Employer, I have considered the feasibility and efficacy of other measures not specifically raised by the parties. Regarding the election itself, I have considered using masks and gloves, frequently sanitizing election equipment, the use of plastic barriers, and the required testing of participants (regardless of symptoms). I have also considered whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site.

Additionally, as discussed, I have considered using a mail ballot election and measures associated with a mail ballot election. I have considered requiring Region 16 personnel to sanitize outgoing mail, limiting the number of people who may participate in the count; and requiring social distancing for count attendees.

Regarding the Employer's proposed social distancing in the voting area, I agree that social distancing could reduce the risk of spread, however, I note that 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.”⁸ Some scientists disagree that 6 feet is enough.⁹ Given the uncertainty of determining an “appropriate” distance, we cannot be sure that current guidelines sufficiently mitigate risk. Additionally, it is possible that guidelines could change between the time of an election order and the date of the election.

Regarding the use of masks and gloves, the Regional Office currently has none available. These supplies are most needed by healthcare institutions at this time. I also note that 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.

Based on the foregoing, I conclude that use of mail ballot election would provide the framework for more certain election procedures.

IV. DISCUSSION

While the Employer is considered an essential business during this time, the health of its employees and their families must be protected. Given the conditions in Texas at this time, and the available risk mitigation measures, I conclude that conducting an election placing employees in close proximity to Board agents and party observers, who may be traveling from regions with higher rates of infection than Travis County—and who may be carrying the virus—is not acceptable.

Given my conclusion about the current safety and effectiveness of a manual election, the Employer alternatively would request the Union withdraw its petition and refile at a later time. Notwithstanding that this request appears to go directly to the Union, I herein provide my reasoning as to why Petitioner should not be required to do so. The Employer contends that delay has never been a reason cited by the Board for ordering a mail ballot election. Even granting this contention, the Board has ordered mail ballot elections because of circumstances that would temporarily prevent or delay a manual election for an indefinite time. *San Diego Gas & Electric* mentions such a condition—a strike—as one in which a mail ballot election would be appropriate. Presumably, a manual election could be held at some unknown time after the strike ended.

⁸ See the CDC’s website entry [Coronavirus Disease 2019 \(COVID-19\), Prevent Getting Sick, How COVID-19 Spreads](#).

⁹ See, e.g., Lydia Bourouiba, “[Turbulent Gas Clouds and Respiratory Pathogen Emissions Potential Implications for Reducing Transmission of COVID-19](#)”, *Journal of American Medicine*, March 26, 2020 (“Given the turbulent puff cloud dynamic model, recommendations for separations of 3 to 6 feet (1-2 m) may underestimate the distance, timescale, and persistence over which the cloud and its pathogenic payload travel, thus generating an underappreciated potential exposure range for a health care worker.”)

However, the Board recognized that this was at least one situation that would delay an election and would be grounds for conducting a mail ballot election, rather than a manual one.

The Board has also upheld the use of mail ballot elections during the off-season for seasonal employees.¹⁰ Even though it would have been possible to delay an election and hold it manually later in the year, when seasonal employees were present at work, the Board found a mail ballot election proper in these circumstances.

Here, a manual election cannot be held without endangering the health and safety of employees, party observers, Board agents, and the broader community. Since the Board has allowed mail ballot elections to take place in situations where a manual election would be delayed because of strikes or the absence of seasonal workers, and the current pandemic presents extraordinary circumstances preventing a manual election under the facts presented in this case, a mail ballot election is appropriate.

A Regional Director has broad authority over conducting representation elections.¹¹ However, the Board has provided guidelines for reasonably exercising this discretion when ordering a mail ballot election. The Board's policy for when a Regional Director should order a mail ballot election was described in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998):

When deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are "scattered" because of their job duties over a wide geographic area; (2) where eligible voters are "scattered" in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, a lockout or picketing in progress.

We also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above.¹²

¹⁰ E.g., *Sitka Sound Seafoods*, 325 NLRB 685 (1998); *Pennsylvania Interscholastic Athletic Association*, 365 NLRB No. 107 (2017).

¹¹ The Board has long held that a Regional Director has broad discretion to decide issues of election conduct, so long as this discretion is not abused or exercised arbitrarily, capriciously, or unreasonably. This includes determining whether to conduct an election by mail, even if the Direction of Election did not provide for mail balloting. See, e.g., *Fedders Manufacturing Company*, 7 NLRB 817, 822 (1938); *Postex Cotton Mills, Inc.*, 73 NLRB 673, 677 (1947); *E.I. Dupont du Nemours*, 79 NLRB 345, 346 (1948); *North American Plastics Corp.*, 326 NLRB 198 (1998); *California Pacific Medical Center*, 357 NLRB 197, 198 (2011).

¹² See also *Casehandling Manual Part Two: Representation Proceedings* 11301.2, "Manual or Mail Ballot Election: Determination;" *Outline of Law and Procedure in Representation Cases* 22-110, "Mail Ballots." As noted in *San Diego Gas & Electric*, 325 NLRB at 1143, 1145 fn 6, a past version of the Casehandling Manual directed mail ballots to be used only in cases where, if a party objected to mail ballots, a manual election was clearly infeasible. The Board, noting that this language did not reflect Board law and had resulted in confusion in using mail ballots, directed the

While there is a preference for conducting manual elections in ordinary circumstances, *San Diego Gas* allows a Regional Director to exercise discretion and order a mail ballot election in extraordinary circumstances. *San Diego Gas* did not claim to provide an exhaustive list of circumstances where mail ballot elections would be allowed, but rather *at least* three cases where mail ballot elections should normally be used.

The Board rejected limitations implied by outdated language in the Casehandling Manual that suggested mail ballot elections were proper only if manual elections were “infeasible,” as well as suggestions that a mail ballot election should never be held where it would be possible to conduct an election manually. *Id.* at 1145, fn 6, 10.

The Board, in *San Diego Gas*, clarified that the use of mail ballot elections is not limited to three enumerated circumstances, but that “other relevant factors,” especially in “extraordinary circumstances” may be considered by a Regional Director. The present circumstances, a worldwide pandemic in which more than 185,000 deaths have occurred, are extraordinary, and present many relevant factors suggesting that a mail ballot election would be appropriate.

V. CONCLUSION

This election must be held “on the earliest date practicable consistent with the Board’s rules.”¹³ A manual election cannot be held safely at this time. There is no indication when a manual election could be safely held. Waiting until it would be safe to conduct a manual election would further delay this already-delayed election. However, a mail ballot election would allow this election to be held safely and without further delay.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find 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.¹⁴
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.

Casehandling Manual to be revised “to reflect a more flexible standard than has sometimes been inferred” from the “infeasibility” standard. *Id.* at 1145, fn 6. The current Casehandling Manual reflects the language of *San Diego Gas* almost verbatim.

¹³ *Casehandling Manual Part Two: Representation Proceedings*, 11302.1.

¹⁴ The Employer, Victory Wine Group, LLC, a Delaware limited liability corporation with a facility located at 4009 Commercial Center Drive, Suite 600, Austin, Texas, the only facility involved in this matter, is engaged in the business of distributing fine wines and spirits. During the past 12 months, a representative period, the Employer, in conducting its business operations, purchased and received at its Austin, Texas facility goods valued in excess of \$50,000 directly from points located outside of the State of Texas.

4. 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 warehouse workers and drivers employed by the Employer at its facility currently located at 4009 Commercial Center Drive, Suite 600, Austin, Texas.

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

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 Teamsters Local No. 997.

1. 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 May 4, 2020. Voters must return their mail ballots so that they will be received by close of business on May 25, 2020. The mail ballots will be counted on June 3, 2020 at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date.

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 May 15, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **April 17, 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.

3. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **April 27, 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.

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. 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.

4. 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.

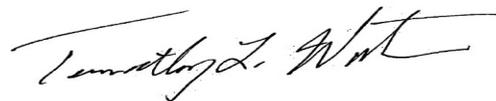
RIGHT TO REQUEST REVIEW

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 14 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, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

DATED at Fort Worth, Texas, this 23rd day of April 2020.



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