

San Diego Gas and Electric and International Brotherhood of Electrical Workers, Local Union 465, AFL-CIO, Petitioner. Case 21-RC-19862

July 21, 1998

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX,
LIEBMAN, HURTGEN, AND BRAME

On December 3, 1997, the Acting Regional Director for Region 21 issued a Decision and Direction of Election, in which he directed that an election be conducted among the employees in the unit found appropriate.¹ No party filed a Request for Review from the Regional Director's Decision and Direction of Election. On December 9, 1997, the Region notified the parties that it was considering conducting the election by mail ballot, and invited the parties to submit position statements concerning the appropriateness of a mail ballot election. The Employer submitted a position statement opposing a mail ballot, requesting that the election be held at two of the Employer's sites, and offering to provide transportation as needed or requested. The Petitioner filed a position statement stating its preference for a mail ballot rather than a manual ballot. On December 18, 1997, the Acting Regional Director informed the parties that the election would be conducted by mail ballot, because the 20 unit employees work at 8 different locations spread across an area of over 80 miles.

On December 24, 1997, the Employer, pursuant to Section 102.67(c)(1) and (2) of the Board's Rules and Regulations, filed a Request for Review of Regional Director's Decision to Conduct Election by Mail Ballot. The ballots for the election were mailed on January 5, 1998, and the election has been conducted and the ballots have been impounded pending the Board's ruling on the Employer's request for review.

The Employer contends that the Acting Regional Director's decision to hold a mail ballot election is contrary to the Board's rules, citing to the NLRB Casehandling Manual (Part Two), Representation Procedures (Casehandling Manual), Section 11336, which states that "the use of mail balloting, at least in situa-

¹The unit found appropriate by the Regional Director is as follows:

All dispatchers, dispatch assistants, and district clerks employed by the Employer in its construction and operation districts, at the following facilities: Mountain Empire District, Pine Valley, California; Eastern District, El Cajon, California; Metro District, 701 33rd Street, San Diego, California; Beach Cities District, 4848 Santa Fe Street, San Diego, California; North Coast District, Carlsbad, California; Northeast District, Escondido, California; Orange County District, San Clemente, California; and the Ramona Satellite Office, Ramona, California; excluding all other employees, clerical employees, professional employees, guards, and supervisors as defined in the Act.

tions where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election." The Employer contends that infeasibility of a manual election has not been shown, based on factors set forth in Section 11336 of the Casehandling Manual, because the parties have stipulated that "the employees in question all 'work a set schedule' at essentially the same time each day."

Having duly considered the matter, the Board has decided to grant the Employer's request for review, and, on the merits, to affirm the Acting Regional Director's decision to hold the election in this case by mail ballot.

I. FACTUAL BACKGROUND

The Employer is a utility providing gas and electrical services in San Diego and Orange Counties, California. The unit which the Petitioner is seeking to represent consists of some 20 dispatchers who work at 8 locations in southwest California.²

On December 9, 1997, the Region notified the parties by letter that it was considering conducting the election by mail ballot. The letter solicited the views of the parties in this regard and also asked each party to propose "an appropriate logistical sequence (times and places)" to be followed if the election were to be conducted manually.

The Petitioner took the position that a mail ballot election was preferable because the unit employees were scattered over 8 locations 80 miles apart. In response to the Region's request for a manual election alternative, the Petitioner submitted two possible scenarios for a traveling election, under which a Board agent would drive sequentially to each of the eight locations, conducting manual balloting at each.

The Employer responded that a mail ballot was not appropriate and proposed instead that a manual election be held at two locations: its Northeast District office in Escondido and its Century Park facility in San Diego. In its letter to the Regional Director proposing the two-site election, the Employer stated that it would "provide transportation as needed or requested" but otherwise made no proposals as to how and at what times the balloting should be conducted. Neither did it comment on the Petitioner's suggestion that an eight-site traveling election would be the best alternative if a manual election was ordered.

Under the Employer's proposal, 11 employees would vote at the Century Park location: 3 from the

²The eight locations are the Metro District and the Beach Cities District, both located in San Diego; the Eastern District, in El Cajon; the Mountain Empire District, in Pine Valley; the Ramona Satellite Office, in Ramona; the Northeast District, in Escondido; the North Coast District, in Carlsbad; and the Orange County District, in San Clemente.

Beach Cities office (6 miles away), 4 from the Metro office (10 miles away), 3 from the Eastern office (14 miles away) and 1 from the Mountain Empire office (60 miles away). Of the other nine employees, who would vote at the Northeast District office in Escondido, three work at that location, three would come from the North Coast office (19 miles away), one would come from the Ramona office (20 miles away), and two would come from the Orange County office (49 miles away).

The Petitioner objected to the Employer's proposal, arguing that employees should not be required to travel such distances to vote. The Petitioner noted that there was no justification for requiring employees to vote at the Century Park facility—which it said is the headquarters of the Employer's Labor Relations and Human Resources departments—because none of the unit employees work at that location. The Petitioner also objected to the "perceived advantage" it claimed the Employer would gain by providing employees with transportation to the polling sites.

After hearing from both parties, the Acting Regional Director rejected the Employer's two-site manual election proposal as well as an eight-site traveling election, which no party preferred, and decided to conduct the election by mail ballot.³ Citing Section 11336 of the NLRB Casehandling Manual, which states that the use of mail ballots should be explored where long distances are involved or where eligible voters are scattered, the Acting Director noted that both of those factors are present in this case. A mail ballot election, he stated, could be accomplished with a minimal expenditure of Agency resources and no employee would be expected to travel away from his work station to a central polling site. In contrast, under the Employer's two-site manual election proposal, 17 of the 20 eligible employees would have to travel to vote in the election—one of them more than 120 miles round trip. The Acting Director also noted that none of the employees work at the Century Park location, where the Employer was proposing that 11 employees be required to vote, and that the Employer had not responded to the Region's request that it propose an appropriate logistical sequence for a manual election. He estimated that the other alternative—conducting polling at all eight locations where the employees work—would require 8 hours of a Board agent's time, including 4 hours to travel to each of the sites.

³The Regional Director first advised the parties that he had decided to conduct the election by mail in a letter dated December 18, 1997. Thereafter, the Employer submitted a request for reconsideration of the decision, to which the Petitioner responded. The Regional Director then reaffirmed his decision in a letter dated December 24, 1997. The reasons for his decision, which we review here, are set forth in those letters.

II. DISCUSSION

"Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The Board in turn has delegated to the Regional Directors discretion in determining the arrangements for an election, including the location of the election and whether it should be conducted by manual balloting or mail ballot. *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958).⁴ As the Board stated in *National Van Lines*:

[C]ircumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions. Because of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections shall be conducted. Only where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him to conduct representative [sic] elections will the Board nullify an election and prescribe other election standards.

A Regional Director's discretion, however, is not unfettered and is to be exercised within certain guidelines. Because of the value of having a Board agent present at the election, the Board's long-standing policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location. The Board has also recognized, however, that there are instances where the Regional Director, because of circumstances that would tend to make it difficult for eligible employees to vote in a manual election, may reasonably conclude that conducting the election by mail ballot, or a combination of mail and manual ballots, would enhance the opportunities for all to vote.

Agency procedures for the conduct of representation elections, including guidelines for use by the Regional Director in determining when a mail ballot election is appropriate, are set forth generally in Part Two of the

⁴Contrary to the suggestion of our dissenting colleagues, the Board employs an abuse of discretion standard in determining whether to overturn the decision of a Regional Director as to whether an election should be conducted manually or by mail. E.g., *Shepard Convention Services*, 314 NLRB 689, 690 (1994), enf. denied on other grounds, 85 F.3d 671 (D.C. Cir. 1996); *London's Farm Dairy*, 323 NLRB No. 186 (June 20, 1997). Thus, whichever party challenges the Regional Director's decision on the manner of conducting the election must show that the Regional Director has abused his or her discretion. The abuse of discretion issue encompasses whether the Regional Director acted within the guidelines that we have outlined in directing a mail ballot election.

NLRB Casehandling Manual.⁵ This volume of the Manual has not, however, been revised since 1989, and therefore does not reflect decisions of the Board issued since that date. This has resulted in some confusion as to when it is appropriate to use mail ballots. We therefore take this occasion to set forth the following guidelines clarifying the circumstances under which it is within the Regional Director's discretion to direct the use of mail ballots.⁶

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;⁷ and (3) where there is a

⁵The Casehandling Manual is prepared by the General Counsel for the purpose of providing guidance to Agency employees involved in the handling of cases arising under the Act. As to matters on which the Board has issued rulings, the drafters of the Manual of course seek to accurately reflect Board law. However, the Manual "is not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law." Casehandling Manual, Part Two, Purpose of Manual. Moreover, the guidelines in the Manual "are not Board rulings or directives" and "are not intended to be and should not be viewed as binding procedural rules." *Id.*, quoted in *VIP Health Care Services v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996). See also, e.g., *Queen Kapiolani Hotel*, 316 NLRB 655 fn. 5 (1995); *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44 (2d Cir. 1994); *Modern Plastics Corp. v. McCulloch*, 400 F.2d 14 (6th Cir. 1968). Thus, while the Casehandling Manual can be regarded as generally reflecting Board policies, in the event of conflict it is the Board's decisional law, not the Manual, that is controlling.

⁶The Manual should be revised to reflect these guidelines, which reflect a more flexible standard than has sometimes been inferred from the sentence in Sec. 11336 of the current version stating that the use of mail ballots should be limited to circumstances that indicate the "infeasibility" of a manual election. The Board has never construed the "infeasibility" standard so narrowly as to mean that mail ballots may be used only if a manual election is incapable of being accomplished. Rather, as the Board's decisions in this area reflect, and as the Manual provision read as a whole indicates, the use of mail ballots has been considered appropriate in circumstances where a manual election might be possible, but would be impractical, or not easily done. Because, however, the use of the term has clearly contributed to confusion in this area, it should be deleted when the Manual is revised.

⁷Thus, employees may be deemed to be "scattered" where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. The "scattered" criteria are intended to apply in any situation where all employees cannot be present at the same place at the same time. See, e.g., *London's Farm Dairy, Inc.*, 323 NLRB No. 186 (June 20, 1997); and *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1997).

The mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election. However, as noted below, the Regional Director may appropriately take into account considerations of economy and effi-

cient use of agency resources where other factors are present that suggest the propriety of using mail ballots. Thus, for example, where the holding of a manual election at times and places convenient for eligible voters would require that voting sessions be conducted at multiple locations and/or over a period of several days, the Regional Director, in exercising his discretion as to whether to use mail ballots, may consider such factors as the burden imposed on Board resources where there is a substantial distance between the workplace and the Regional, Subregional, or Resident Office responsible for conducting the election.

strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, 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 finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern.⁸ 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.

In the strike, lockout, or picketing situation, for example, the Regional Director may, in his or her discretion, order either a mail ballot or a mixed manual-mail ballot election in order to insure that eligible voters are not required to cross a picket line in order to vote,⁹ or because striking and locked-out workers have left the area or taken other temporary employment that makes it difficult for them to get to the election site to cast a manual ballot. Similarly, where a significant number of eligible voters are not scheduled to be at the election site at the times proposed for manual balloting—for such reasons as that they work part-time or on an on-call basis, or have duties that keep them in the field for substantial periods of time—the Regional Director might reasonably conclude that their opportunity to participate in the election would be maximized by utilizing mail or mixed manual-mail ballots.¹⁰

⁸This factor is only to be considered if one or more of the other factors we have outlined above are present. Accordingly, Regional Directors should not order mail ballot elections based solely on budgetary concerns. See *Willamette Industries*, 322 NLRB 856 (1997).

⁹In such a situation, as long as striking employees have not left the area or taken other employment that would interfere with their ability to participate in a manual election, we agree with our dissenting colleagues that holding the election at a neutral site would also be appropriate.

¹⁰Our dissenting colleagues suggest that it would be possible to hold manual elections in some situations where employees work multiple shifts, as well as in some strike or lockout situations. We do not disagree. However, we reject our dissenting colleagues' apparent premise that a mail ballot election should not be held where it would be possible to conduct the election manually. A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both

Continued

Contrary to our dissenting colleagues, we do not agree that the holding of mail ballot elections in circumstances that fall within these guidelines will inevitably result in more instances of voter coercion, because a Board agent is not present while the vote is being cast. In fact, mail ballots have been utilized by the Board since the NLRA was enacted—and in recent years in about 2 percent of all elections—and abuses have rarely occurred. Indeed, as the Board has previously noted, there has been only one reported case involving such an abuse in the history of the Act, and in elections conducted under the Railway Labor Act, which are routinely conducted by mail ballot, there have been only three reported cases involving improprieties. See *London's Farm Dairy*, supra, slip op. at 2, and cases cited therein.

Neither do we agree that the statistics regarding turnout at Board-conducted elections cited by the dissent demonstrate that using mail ballots rather than manual ballots reduces voter participation in elections. The Board's experience with representation elections has shown that the voter participation rate is generally higher in elections conducted manually than in mail ballot elections. However, because 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. See *VIP Health Care Services v. NLRB*, supra at 1126 (expressing doubt whether qualified voters who did not exert the minimal effort required to fill in and return a mail ballot would have been more likely to vote in a manual election where to do so would have required them to make a special trip to the election site during off duty hours).

Finally, we reject the dissent's contention that because, under the rule in *Peerless Plywood Co.*, 107 NLRB 427 (1953), employers are prohibited from giving mass "captive audience" speeches to employees during the period beginning 24 hours before the actual balloting period begins, the use of mail ballots "significantly silences" the employer. We note that during the *Peerless Plywood* period, the employer and its agents remain free to continue to campaign against the union not only through mailings to employees at their homes, but also in the workplace, where they can distribute and post literature, communicate with employees one-on-one, and even continue to conduct mass meetings, as long as the meetings are on the employees' own time and attendance is not mandatory. *Livingston Shirt Corp.*, 106 NLRB 400, 408 (1953).

more efficient and likely to enhance the opportunities for the maximum number of employees to vote.

Like our concurring colleague, we know of no reason to believe that employees are less likely to cast fully reasoned votes in mail ballot elections than in manual elections, or that employees will be insufficiently aware of the importance of the choice they are making absent what the dissenters describe as "the symbolism and the drama which accompanies a manual ballot." Consequently, if pursuant to the guidelines described above, a Regional Director concludes that it is appropriate to conduct all or part of the election by mail, we believe that the Board should defer to that decision.

In directing a mail ballot election in this case, the Acting Regional Director relied on the fact that the unit employees are scattered over a large geographic area, and that adopting the Employer's proposal would have required employees to travel long distances from their work stations in order to vote. We therefore find that he acted within the scope of his discretion, whether under the Casehandling Manual provisions as they are presently worded or under the guidelines we have set forth above. Section 11336 of the Manual explicitly states that "[p]articularly . . . where eligible voters are scattered because of their duties, the possibility [of mail balloting] should be explored." Thus, as the Court of Appeals for the District of Columbia Circuit has noted, the Manual specifically instructs Regional Directors in cases such as this to explore the possibility of mail balloting and to exercise their discretion in determining whether such an election is appropriate. *VIP Health Care Services v. NLRB*, supra at 1126, 1127. On these facts the case also falls within the first of the three circumstances we describe above as ordinarily suggesting the propriety of using mail ballots. We therefore conclude that the Acting Regional Director has acted within the discretion which he has been afforded to determine the method of conducting the election, and thus we affirm his decision to hold the election by mail ballot.

ORDER

IT IS ORDERED that the case is remanded to the Acting Regional Director for Region 21, with directions to open and count the ballots in the mail ballot election, and to take further appropriate action.

CHAIRMAN GOULD, concurring.

I agree with my colleagues' decision to affirm the Acting Regional Director's decision to hold the election in this case by mail ballot. I join in their decision to abandon the "infeasibility" standard set forth in the Casehandling Manual, and provide guidelines in keeping with the Board's decisions in this area. Thus, I agree that a mail ballot is appropriate in those circumstances cited by my colleagues, namely, where eligible voters are scattered because of their job duties

over a wide geographic area; where eligible voters' work schedules vary such that they are not present at a common location at common times; and where there is a strike, a lockout, or picketing in progress.

Unlike my colleagues, however, I would not limit the use of a mail ballot to only these circumstances. I would find the use of mail ballots appropriate in all situations where the prevailing conditions are such that they are necessary to conserve Agency resources and/or enfranchise employees. My colleagues in the majority state that Regional Directors should not direct mail ballot elections based solely on budgetary concerns. For the reasons set forth below, I hold a different view. As discussed below, I also reject the dissent's contentions that an increased use of mail ballots will diminish the integrity of Board elections, decrease employee participation or effectively silence the employer's voice in the election campaign.

In its recent decisions, the Board has encouraged greater use of postal ballots with the overriding objective of expanding franchise so that employees who ordinarily have limited or no opportunity to cast a ballot in a manual election will be able to participate in the election process. Beginning with *Lone Star Northwest, Inc.*, 36-RD-1434 (unpublished), the Board has directed mail ballot elections in situations that did not justify a mail ballot election under the language of the current representation case manual. See also *London's Farm Dairy*, 323 NLRB No. 186 (June 20, 1997), and *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1997). In *Lone Star*, the Board granted the union's request for review of a Regional Director's decision not to order a mail or mixed manual-mail ballot for economic strikers and striker replacements. Even though the Board's Casehandling Manual did not provide for a mail ballot under these circumstances, the Board concluded only a mail ballot would enfranchise the voters who were on strike.

As I have previously observed, the provisions of the Board's Casehandling Manual do not constitute "a form of authority binding . . . on the Board." See National Labor Relations Board Casehandling Manual, Purpose of Manual; *London's Farm Dairy*, 323 NLRB No. 186, slip op. at fn. 3. See also *Shepard Convention Services*, 314 NLRB 689 (1994), enf. denied 85 F.3d 671 (D.C. Cir. 1996). Further, as noted by the majority, although the Manual states that "the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots should be limited to those circumstances that clearly indicate the infeasibility of a manual election," the Board has never held or construed the Casehandling Manual so narrowly as to require mail ballots only in situations where it would be impossible to conduct a manual ballot election. Since the provisions of the Casehandling Manual cannot supercede or substitute for the provisions of the

Act, for formal decisional precedent, or for the Board's Rules and Regulations, I agree with my colleagues that the "infeasibility" standard relied on by the dissent should be abandoned.

The use of mail ballots in appropriate circumstances will not only expand employee franchise beyond what would be provided in a manual election in the same circumstances,¹ but it will conserve Agency resources in the new period of austerity which we confront. In *London's Farm Dairy*, 323 NLRB No. 186, slip op. at 2, fn.3 (June 20, 1997), and in my concurring opinion in *Williamette Industries*, 322 NLRB 856 (1997), I emphasized the importance of "an unduly burdensome strain" on Agency resources as a factor to be taken into account by a Regional Director in ordering a mail ballot election. Although my colleagues in the majority concede that a Regional Director should consider "what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern," they also find that it cannot be the sole factor in the decision. I do not understand what so differentiates budgetary concerns from other factors that it leads my colleagues to conclude that budgetary concerns standing alone cannot in any circumstance justify the direction of a mail ballot election. Indeed, in this time of austerity and scarce Agency resources, it is imperative, as the General Counsel stated in his directive, that Regional Directors conserve budget resources wherever and whenever possible in the exercise of their discretion to establish the mechanics of the election process. See Office of the General Counsel Field Memorandum OM 98-7, issued January 30, 1998.

The dissent suggests that voter turnout is always lower in mail ballot elections. However, mail ballots are generally ordered where it is difficult to obtain voter participation with a mail or manual ballot, thus rendering meaningless a direct or raw comparison between voter participation under mail and manual ballots.² I find similarly unpersuasive my dissenting colleagues' contention that coercion is inevitable in the mail balloting procedure. As the Board noted in *London's Farm Dairy*, in the appropriate circumstances, eligible voters have been permitted to cast their ballots by mail since the earliest days of the Act and, in that time, there has been only one reported instance of

¹As the Board pointed out in *London's Farm Dairy*, 323 NLRB No. 186, slip op. at 2, fn. 2 (June 20, 1997), mail ballots are the rule and not the exception under the Railway Labor Act. Indeed, the National Mediation Board (NMB) has conducted all ballots by mail for more than a decade! The instances of illegal behavior are rare, as is true under our Act.

²The participation data for mail ballots cited by the dissent reflects those cases where the employees are difficult to reach. The bulk of the postal ballot cases will continue to fall in this category, notwithstanding the fact that some of them will turn exclusively or primarily on budgetary considerations.

abuse. 323 NLRB No. 186, slip op. at 1–2 (citing *Human Development Assn.*, 314 NLRB 821 (1994)).

The dissent also seems to suggest that unless employees cast their ballots under the supervision of a Board agent, the integrity of the election process will be lost. Again I disagree. The Board rejected a similar assertion in *London's Farm Dairy*, noting that the instructions that accompany the ballot specifically instructs the employee to mark the ballots in secret and directs the employee not to show the ballot to anyone after it is marked. 323 NLRB No. 186, slip op. at 2. Further, as the Board's own experience in conducting manual elections clearly demonstrates, the presence of a Board agent does not guarantee "laboratory conditions." See e.g., *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970) (election set aside where a single vote was determinative of the election and the conversations of the petitioner's observer, already criticized by the Board agent, "culminated in his gratuitous offer of a loan to a prospective voter."); *International Stamping Co.*, 97 NLRB 921 (1951) (election set aside where during the election, the employer's observer went through the plant with an eligibility list calling out the names of prospective voters and checking off each voter's name as he left to vote); and *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968) (election set aside where ballot box left unattended when an altercation developed outside the polling place during the voting period and drew the officials away).

The Board's purpose in regulating the conduct of elections is to insure that employees cast an uncoerced and well-considered vote. Yet, there is nothing to suggest that employees do not cast a fully reasoned vote in a mail ballot election. My dissenting colleagues invoke the "symbolism and drama which accompanies a manual ballot." In my view, symbolism is present in the mail ballot election by virtue of the language of the ballot and the instructions sent by the Regional Office. Further, the symbolism of a manual election does not enjoy any particular advantage over that in a mail ballot election. Indeed, it has one disadvantage in that it permits employers to attempt to manipulate the symbolism and drama of an in-plant election in order to gain advantage in the election. Thus, based on my experience as a practitioner and an academic in the field of labor law since 1961, and on my many conversations with management attorneys, I note that some employers attempt to direct the Board agent and the procedures surrounding the election in a way that creates the appearance in the eyes of the employees that their employer controls not only their salary and benefits but also the Board's procedures.³

³The fact that employers resort to this strategy suggests both that it is effective and that it is not always redressed by the objection procedure.

Noting a limitation on the use of the "captive audience speech" technique during a mail ballot election, the dissent states that "a mail ballot significantly silences one of the campaign voices [i.e., the employer] during an essential part of the campaign." This assertion is completely without basis inasmuch as it assumes that the employer's only method of communication is or should be the captive audience. As the majority notes, an employer is free to conduct "captive audience" speeches throughout the campaign period until the *Peerless Plywood*⁴ rule takes effect 24 hours

The dissent contends that I am relying on nonrecord "facts." Congress, however, has entrusted the Board with the "special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). And it is precisely because the Board, as Justice Frankfurter aptly stated, is "equipped with its specialized knowledge and cumulative experience" that the Board's determinations are accorded deference by the Courts. *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 242 (1959). In the instant case, all I have done is to apply my cumulative experience in the field of labor-management relations.

The attempt by employers to present a particular image of Board procedures to employees, which is designed to influence their voting behavior, is well demonstrated by the following commentary:

The NLRB had designated twenty-six polling places throughout the Ohio Appalachians and Kentucky, and some of the nine board agents were afraid to drive their government cars along the winding, icy roads of those isolated mountain territories. Their concerns left us an entree to make a name in the NLRB. We told the agents that we would gladly drive them to the polling sites—many of which were out at the pits—in company four-wheel-drive wagons. When the union activists heard about our plan, they were outraged and demanded that a union election observer be allowed to ride alongside the polling agent. We, of course, refused, threatened to take back our offer if union people were ordered along. The NLRB denied the union demand. So on election morning, several polling agents boarded Cravat [the employer] trucks and headed for the polling sites in the company of a Cravat driver. That was one more victory for us: in a union-busting campaign, the relentless accumulation of small victories leads to the final big win. By the time the balloting was underway, I had no doubt that the election was ours.

M.J. Levitt, *Confessions of a Union Buster*, at 31 (New York: Crown Publishers, Inc., 1993).

In citing this commentary, I do not suggest in any way that my dissenting colleagues are motivated by a desire to engage in or assist "union busting." The book, however, highlights techniques by which the Board's manual ballot procedures have been manipulated by sophisticated employers and labor consultants in ways that mail ballots cannot be manipulated. The dissent's reliance upon the employer's communication avenues in connection with manual and mail ballots makes the *Union Buster* commentary relevant. In any event, as I have stated, my primary reliance is upon my own expertise buttressed by numerous conversations with labor lawyers representing management.

⁴107 NLRB 427 (1953). Member Brame questions the validity of the *Peerless* rule. See the dissent at slip op. 11, fn. 11. I agree with Board precedent that the *Peerless* rule is properly applied to employers, but I disagree with its application to unions. In my view the interference with a free election condemned in *Peerless* results from the combined effect of the last minute character of the speech and the employer's economic power over its employees and exclusive control of the workplace. I would not apply the *Peerless* rule to a union's last minute campaign speech since the union neither wields

before the ballots are mailed⁵ and, during the actual balloting period, the employer is free to lawfully campaign in the workplace. By decrying the unavailability of the “captive audience” speech, my dissenting colleagues appear to both exalt this right of communication at the time most propitious to the employer over all avenues of communication protected by the Act, and also suggest that unions have the advantage over employers in communicating with employees concerning their views of representation.⁶ Neither view is soundly conceived in terms of the reality of the workplace and the principles of the Act. Through its exclusive control of company time and property,⁷ an employer enjoys virtually complete access to the minds of its employees during working hours. As the Court made clear in *Lechmere v. NLRB*,⁸ employers are not required to permit nonemployee union organizers to enter their property to communicate with employees. The employer also wields considerable economic power over its employees who depend completely on their jobs as their means of livelihood and economic existence. As a result of this economic power, an employer’s statement is imbued with a “force independent of persuasion.”⁹ The union, on the other hand, can only attempt to convince employees that, if selected as their collective-bargaining representative, it will obtain an agreement from the employer that improves wages, benefits, and working conditions.

The dissent also notes that, during the critical period prior to an election, the Board permits unions but not

the employer’s economic power nor possesses the employer’s access to employees.

⁵The concerns expressed by the dissent as they relate to communication opportunities appear to find their basis in this fundamental difference between mail and manual ballots. In a manual ballot election, employers can hold captive audience speeches at a time more proximate to the actual casting of the ballot by the voter. Cf. *Confessions of a Union Buster*, supra at 108:

In an NLRB election, we might have felt somewhat secure. Our plan would have been to keep the warmth and love in focus until the last ballot was counted, then collect our check and walk away. But a Railway Labor Act election is done differently, and it wasn’t going to be easy. Under the railway act, a union election is conducted by mail. Voters have two weeks to mark their ballots and return them to the National Mediation Board.

⁶The dissent argues that this “mail ballot case” is not the appropriate forum for discussing the issue of the relative ability of the parties to communicate with voters. However, it is my dissenting colleagues who rely on what they perceive as an infringement of the employer’s ability to communicate with employees as a basis to object to the increased use of mail ballot elections.

⁷Although *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), allows workplace solicitation by employees, the non-employee union organizer is for the most part forced to campaign outside company property.

⁸502 U.S. 527 (1992)

⁹*NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). See also *NLRB v. Falk Corp.*, 102 F.2d 383, 389 (7th Cir. 1939) (“The position of the employer . . . carries such weight and influence that his words may be coercive when they should not be so if the relation of master and servant did not exist.”).

employers to visit individual employees at their homes to present views on unionization.¹⁰ The Board, however, applies this rule in both manual and mail ballot elections based on the recognition that

there is a substantial difference between the employment of the technique of individual interviews by employers on the one hand and by unions on the other. Unlike employers, unions often do not have the opportunity to address employees in assembled or informal groups, and never have the position of control over tenure of employment and working conditions which imparts the coercive effect to systematic individual interviews conducted by employers. Thus, not only do unions have more need to seek out individual employees to present their views, but, more important, lack the relationship with the employees to interfere with their choice of representatives thereby. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133–134 (1957), rev’d on other grounds, 133 NLRB 1092 (1961).

In my view, for the reasons set forth above, a properly conducted mail ballot election is in many if not all instances the equal of a manual ballot for achieving the Board’s statutory goal of ensuring employees the opportunity to cast their ballots for or against representation under circumstances free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice.¹¹ Accordingly, I affirm the Regional Director’s decision to direct a mail ballot election in the instant case.

MEMBERS HURTGEN AND BRAME, dissenting.

1. Introduction

The Board today continues on a path toward greater utilization of mail balloting. This process began in *Shepard Convention Services*, 314 NLRB 688 (1994). Although the Board’s direction of a mail ballot election in that case was reversed by the D.C. Circuit,¹ the Board, undaunted, continued on that path in *London’s Farm Dairy*, 323 NLRB No. 186 (June 20, 1997), and *Reynolds Wheels*, 323 NLRB No. 187 (June 20, 1997). The misdirection continues today.

We believe that this direction is contrary to the finest traditions of the Board, and is fraught with peril. We therefore dissent.

The Board’s policy is set forth in the National Labor Relations Board’s Casehandling Manual:

¹⁰See *Peoria Plastic Co.*, 117 NLRB 545, 547–548 (1957), and *Orleans Mfg. Co.*, 120 NLRB 630 (1958).

¹¹*Excelsior Underwear Inc.*, 156 NLRB 1236, 1240 (1966).

¹*Shepard Convention Services v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996).

The best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer's premises. In the absence of good cause to the contrary, the election should be held there.

In addition, Section 11336 provides in relevant part:

[T]he use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election.

2. Policy considerations

Although the Manual provisions do not have the binding force of law, they nonetheless reflect the Board's historical wisdom of favoring manual elections.² That wisdom has its roots in the fundamental purpose of the Act—to provide for workplace democracy in which employees can select or reject a union as bargaining representative. At bottom, our difference with our colleagues is that we believe that manual elections, as compared to mail ballot elections, are far more likely to achieve that goal. We would therefore generally restrict mail ballot elections to those limited situations mentioned in the Manual.

In view of our difference with our colleagues we believe that it is important that we emphasize the essential role that Manual elections play in the realization of employees' Section 7 rights. These rights are anchored in the opportunity to vote on a collective-bargaining representative, which, in turn, depends upon the following factors: (1) Communicating to the voters the importance of the choice they are about to make; (2) secrecy of the ballot; (3) integrity of the voting process; (4) an absence of coercion on the voter; (5) maximum participation by the electorate; and (6) full opportunity for the voter to hear all points of view. In our view, manual balloting, as compared to mail balloting, is far more likely to achieve these essential elements of elections.

Nothing emphasizes the importance of the voter's choice more than the symbolism and the drama which accompanies a manual ballot. Employees are first alerted to their forthcoming choice when presented with authorization cards. The drama begins with the preelection hearing and formal announcement by conspicuously posted election notices. Electioneering intensifies until the day before the election. The next day the Board agent appears, surveys the facility, marks off the no-campaign areas, and instructs the observers. Usually with great solemnity and visibility, the agent seals the ballot box, opens the polls and superintends the campaign free area. Everything points to the so-

lemnity and importance of the employee's choice, and more than any words, this process says to the employee, "This is important—so important that the United States Government has sent its agent to protect your right to vote in a free and unfettered election."

As to secrecy of the ballot, the voter in a manual election stands in the privacy of the voting booth. No one can see how he or she votes. In a mail ballot, the marking of the ballot can occur at any place, public or private, and it can occur in the presence of another person or indeed scores of other persons.

With respect to the integrity of the ballot, the Board agent, in a manual election, monitors closely the entire balloting procedure. The agent is on site to guard against improprieties and to observe and report any that occur. With a mail ballot, there is no such guardian. As the Board has said: "Mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over employees' voting." *Thompson Roofing, Inc.*, 291 NLRB 743 at fn. 1 (1988).

Historically, the Board and its agents have fulfilled this role in an exemplary fashion. The manual election is the one area where all sides (management, unions and employees) traditionally set aside their differences and uniformly praise the manner in which Board agents perform their responsibilities. Conversely, if the election is conducted outside the presence of a Board agent, the solemnity of the process is lost as ballots are intermixed with junk mail, and the diffusion of balloting over time at multiple locations jeopardizes the integrity of the election process. In short, the manual election is the Board's "crown jewel," and we would not abandon it unless there is a showing that such an election is infeasible.

With respect to coercion, the Board agent will not permit any such coercion to occur during the balloting process. By contrast, such coercion can easily occur in a mail ballot situation. An employer or union agent can stand over the employee and even inspect his ballot to make sure that the vote is "right." An "election party" where mail ballots actually are marked can be held in which there is peer pressure to vote the "right" way. Votes can be bought, with money or promises, and the purchaser can make sure that he or she gets what was paid for. These are just a few examples of potential abuse.³ Even in situations where there is no employer or union misconduct, an election can be so highly charged that an employee should be free to vote his or her preference in a booth, free from the

²The court's reversal of the Board in *Shepard* was based upon the Board's departure from the Manual.

³It is no answer to say there have been few occurrences of these abuses. There have been few instances precisely because, until recently, there have been few instances of mail balloting.

oversight and pressures that can exist even in an employee's home.

With respect to maximum participation, the figures speak for themselves. A recent study showed that 87.9 percent of eligible employees participated in manual elections, and 68.14 percent participated in mail ballot elections, a difference of almost 20 percent.⁴

With respect to the factor of full opportunity to hear all points of view, we note that, under *Peerless Plywood*, 107 NLRB 427 (1953), the employer is essentially barred from having group meetings with employees during the 24-hour period before the balloting. While this rule may make good sense prior to a manual election, the application of that rule to a mail ballot election makes no sense. The mail ballot election occurs over a period of several weeks, and thus the *Peerless Plywood* rule applies to the entire period beginning 24 hours before the ballots are mailed by the Regional Director and ending with the return of the ballots.⁵ Thus, a mail ballot significantly silences one of the campaign voices during an essential part of the campaign.⁶ That approach is inconsistent with the goal of a truly informed electorate.

3. The instant case

In the instant case, a manual election is not infeasible. For example, a Board agent from the San Diego office could travel to all eight sites and back to San Diego. According to the Acting Regional Director, even after adding time for voting, the entire task (traveling and election) would take about 8 hours. Clearly, this is not an "infeasible situation." A Board agent, in a single day, can accomplish the entire task.

The Acting Regional Director concluded that a mail ballot was warranted on the basis that the employees were "scattered because of their duties," citing a portion of the Manual, Section 11336. We disagree. Unlike employees whose work causes them to roam over large distances (e.g., truckdrivers), the employees here work at fixed sites. The case is not different from any case involving a multi-site unit. In any event, the sites are not separated by large geographical distances; the sites are only 80 miles apart. Further, even if the employees are "scattered," within the meaning of the Manual provision, that same provision goes on to state that, in such circumstances, "the possibility [of a mail ballot] should be explored." And, most significantly, the Manual thereafter explicitly provides that a mail ballot should be conducted only if all parties consent,

⁴Memorandum from NLRB General Counsel Fred Feinstein to NLRB Chairman William B. Gould IV, dated June 2, 1994.

In *Shepard*, the participation rate was a mere 18 percent, with the result that a union was elected with less than 10 percent of those eligible to vote.

⁵*Oregon Washington Telephone Co.*, 123 NLRB 339 (1959).

⁶Moreover, a union can visit employees at home; the employer cannot do so.

unless a manual ballot would be infeasible. As shown above, that is not the case here.

4. Response to majority

In support of their view, our colleagues rely on *Halliburton Services*, 265 NLRB 1154 (1982), and *National Van Lines*, 120 NLRB 1343 (1958). The cases are inapposite. In *Halliburton*, the issue was the time and place of a manual election. In *National Van Lines*, the issue was whether the particular mail ballot procedures devised by the Regional Director were appropriate. By contrast, the issue in the instant case is manual balloting as opposed to mail balloting. That matter is subject to Board policy and practice, as articulated in the Manual.

Our colleagues point to three situations that, in their view, "normally suggest the propriety of using mail ballots." We will address those situations below. However, before doing so, we believe that, irrespective of the criteria used, the burden of proof is on the party who seeks to depart from the norm, i.e., from the preferred route of a manual election.

Our colleagues say that the Regional Director has discretion, and that the burden of proof is on the appealing party to show an abuse of discretion. We disagree. Concededly, the Regional Director has some discretion in deciding whether to hold a mail ballot election. However, as our colleagues recognize, that discretion "is to be exercised within certain guidelines." In sum, if the Regional Director is acting within those guidelines, he has discretion to order a mail or manual ballot, and the appealing party must show an abuse of discretion. But, as to the issue of *whether* the Regional Director has acted within the guidelines, we believe that the burden of proof is on the party who wishes to depart from the norm of a manual ballot.

With respect to the first "situation," we would agree that a mail ballot is generally appropriate where eligible voters are "scattered," (i.e., are at many locations) over a wide geographic area because of their job duties.

The second "situation" deals with employees who are "scattered in the sense that their work schedules vary significantly." As to these employees, our colleagues say that their mail-ballot criteria would apply "in any situation where all employees cannot be present at the same place at the same time." We disagree. Thus, for example, a Board agent can conduct the election in two phases corresponding to two shifts. And, this would be true, even if the shifts extend to a second day. Further, even if the election site is geographically removed from the Regional Office, a Board agent can make one trip, and can attend to other Board business during election "down" times. Similarly, where employees report to a central facility and then

go on the road, the election can be held at the times when they report to the central facility.⁷

As to the third “situation” we do not agree that a mail ballot is necessitated by a strike, lockout, or picketing. For example, where the strikers all live in the same small community, they can reasonably come to a neutral polling place.⁸

We recognize that it may be cheaper to hold a mail ballot, as opposed to a manual one, in some of the situations described above. However, for the reasons discussed in this opinion, we think that the extra expenditure, if any, is money that is well spent for the attainment of our statutory goal, viz., insuring the integrity of a free and secret ballot election with maximum participation.

We acknowledge that we must be prudent in the expenditure of scarce public resources. At bottom, the issue is one of establishing priorities among competing demands on the funds available to the Agency. In our view, the obligation to insure integrity in the conduct of elections is perhaps the most important obligation of the Board. The Board has achieved an excellent record in this regard. This is due, in no small part, to the integrity that is ensured by the presence of a Board agent at a manual election. We think that it would be “penny-wise and pound-foolish” to risk this enviable record in an effort to achieve some savings.⁹

Finally, our colleagues’ application of their criteria to the instant case causes us concern about the criteria themselves. Our colleagues say that the employees here are “scattered over a large geographic area, that employees would have to travel long distances in order to vote, and that a manual election would require a substantial expenditure of Agency resources.” None of this is true. As noted above, a single Board agent can travel from the Board office in San Diego to all eight election sites. The entire endeavor would involve 8 hours. In sum, the unit employees will not have to travel at all; the election will come to them. And the cost of one Board agent for one day is money well spent to insure industrial democracy.

5. Response to concurring opinion

Chairman Gould’s concurrence argues that the Casehandling Manual has been superceded by *Shepard*

⁷ Concededly, if the employees are always on the road, or report at widely varying times, a mail ballot may be necessary.

⁸ If a significant number of strikers have left the geographic area, a mail ballot may be necessary. Similarly, if a significant number of strikers have interim jobs which preclude their coming to a manual election, a mail ballot may be necessary for them.

⁹ Of course, there may be instances where the costs are so prohibitive, or the drain on staff-power so substantial, that a mail ballot election is the only practical alternative. In this footnote, and in the prior two footnotes, we recognize that mail ballots are sometimes appropriate, even where a manual ballot is theoretically possible. Thus, the majority has mischaracterized our position.

and subsequent Board decisions. However, as noted above, the Board’s decision in *Shepard* was reversed by the circuit court because it departed from the Manual. The Chairman’s subsequent opinions then rely on the overturned Board decision in *Shepard*. In these circumstances, we would not rely on *Shepard* and the subsequent cases to say that the Manual has been superceded. More accurately, it has been ignored.

The concurring opinion suggests that “some employers” seek to direct the Board agent at a manual election, so as to make it appear that the employer controls the Board’s election procedures. Assuming *arguendo* that some employers may seek to do this to achieve a tactical advantage through the Board’s procedures, we have confidence in the ability of the Board agents to control the situation. Further, to the extent that the employers succeed in this stratagem, the objection procedure is always available to redress the situation.¹⁰ Thus, significantly, in manual ballot elections the presence of a Board agent and the parties’ observers acts as a deterrent to objectionable conduct and, to the extent that objectionable conduct may occur in the polling and adjacent areas, evidence of such conduct is readily available through the observers. In contrast, in a mail ballot election, coercion of employees, particularly if it is successful, is far less likely to become known to the parties and obtaining evidence in support of objectionable conduct is far more difficult.

The concurring opinion further says that we “suggest that unions have the advantage over employers in communicating with employees concerning their views of representation.” The concurrence then goes on to contend that this is not so. We do not consider this “mail ballot” case to be the appropriate forum in which to debate which party, if any, has a communication advantage. Our sole point is that a mail ballot does not simply change the method of voting; rather, by extending the *Peerless Plywood* period, a mail ballot imposes a significant limitation on one party’s acknowledgeably effective means of communicating with the employees.¹¹

¹⁰ In his concurring opinion, Chairman Gould says that this strategy is effective and is not always redressed by the objection procedure. These “facts,” in turn, are based on the Chairman’s “many conversations with management attorneys.” We would not rely on these nonrecord conversations, and thus we cannot find, on this record, the fact that he has found. Nor would we rely on the anecdotal hearsay “evidence” recited in a book called *Confessions of a Union Buster*. In our view, major changes in Board policy (e.g. altering the historic role of manual ballots) should not be based on such a slender reed. In addition, as the Chairman concedes, our position in favor of mail balloting is not based on favoring one side or the other. We simply wish to assure that Board elections are conducted in such a way as to best protect the Section 7 right to vote freely.

¹¹ Member Brame believes that, given the continued erosion of the once even-handed *Peerless Plywood* rule, the time has come to reexamine *Peerless’* premises in light of current empirical data and to

Finally, the concurrence notes our data (supra) which show that employee participation rates are higher in manual elections than in mail ballot elections. The concurrence contends that the data can be disregarded because mail ballots are used in circumstances where it is inherently difficult to obtain voter participation. He apparently believes that, absent a mail ballot in these cases, the participation rate would have been even lower. However, he cites no data for his thesis. In addition, under his view, a mail ballot can be held solely for budgetary reasons, i.e., when there is no problem of voter participation. We

reassess its restrictions on employer free speech in light of First Amendment jurisprudence.

would not sacrifice employee participation for the sole purpose of saving money.

6. Conclusion

The manual election lies at the heart of our system of workplace democracy. It is the cornerstone of this Agency's contribution to the successful workings of that democracy. Because of this, the Agency's historic practice has been to hold manual elections, except in rare circumstances where such elections are not feasible. Those circumstances were not present in *Shepard*, and they are not present here. Therefore, in deference to our values and our traditions, we would hold a manual election here.