

**London's Farm Dairy, Inc. and Local 339, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 7-RC-21023**

June 20, 1997

**ORDER DENYING REVIEW**

**BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS**

The Employer's April 11, 1997 request for review of the Regional Director's Decision and Direction of Election utilizing mail ballots is denied. (Pertinent portions are attached as an appendix.)

We find that the Regional Director acted within his discretion in directing a mail ballot election in this case at all four of the Employer's locations. The unit consists of drivers working out of four locations throughout the State of Michigan. The Petitioner requested that the Regional Director conduct the election by mail ballots. The Employer requested that the election be conducted manually, but it offered an alternative position that the election be conducted manually at the Burton and Port Huron facilities and by mail at the Grayling and Coleman facilities.

The Regional Director decided to conduct the election entirely by mail ballot, citing the following reasons: "(1) the voting unit consists of over-the-road drivers working out of four locations that are great distances apart; (2) the employees are scheduled to report to their respective location every other day such that manual balloting at each location would require two days for the election; (3) starting or reporting times vary throughout the day and employees then depart for their routes, resulting in a need for polling hours to cover substantially all of both scheduled days; (4) the Grayling location with six employees is at a great distance from the Regional Office, there is no building at that location which could be used for balloting and voting would require at least two overnight stays by the Board agents; (5) the Coleman location out of which 10 employees work is also at a distance from the Regional Office and would also require polling hours for most of two days."

Contrary to our dissenting colleague, we find that the Regional Director's decision to conduct a mail ballot election at the four locations fell clearly within his discretion. The Grayling facility is 199 miles from the Regional Office and the Coleman facility is 130 miles from the Regional Office. Further, there are only a few employees at each facility,<sup>1</sup> there are extraordinary variations among the shifts and starting times of the drivers, and there is no building at the Grayling loca-

tion which could be used for balloting. Although the Employer contends that the election at these facilities could be conducted by the same Board agent on the same day, the Employer proposed that the Grayling election be conducted between 2 and 3 a.m. and the Coleman election be conducted between 5 and 6 a.m.

A manual election at Burton and Port Huron also posed numerous scheduling difficulties. Accommodating the employees' two alternate-day shifts of between 11 and 15 hours, starting times that vary as much as 10 hours, many of which are predawn, and their uncertain return times would require nearly all day voting sessions during each of 2 successive days at these locations. Further, in order to provide, as the Employer has suggested, for three voting sessions of between 2 and 4 hours each over 2 days at Port Huron and one 5-hour voting session at Burton, it appears that the Employer would have to significantly alter the work schedule of a substantial number of employees, which may well inconvenience a significant number of employees and might affect their views of the election process. In making this observation, we are not condemning the Employer's offer as improper. We are merely noting that mail ballots would avoid inconveniencing the need to impose work schedule changes on a significant number of employees, who may well have family responsibilities or other plans for what would normally be their off-work time and might resent the change as something effectively forced on them by those who initiated and supported the organizing campaign.

Contrary to our dissenting colleague, we view the manual provision he cites regarding the "best place to hold an election, from the standpoint of accessibility to voters" as irrelevant to the threshold issue of whether an election should be by manual vote or mail ballot. That provision speaks to the optimal location of the polling place when it is determined that the election is to be by manual ballot. It could not reasonably be argued that ballots received at their homes are "inaccessible" to voters. Further, while we agree with our dissenting colleague that the Agency has a proud long tradition of conducting elections by manual balloting and that most elections have been and are conducted manually, it has an equally long history of conducting elections by mail. From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, for example, *Lykes Bros. S.S. Co.*, 2 NLRB 102, 108, 111 (1936); *United Press Assns.*, 3 NLRB 344, 352 (1937); *Pacific Greyhound Lines*, 4 NLRB 520, 539 (1937); *Pacific Lumber Inspection Bureau*, 7 NLRB 529, 534 (1938); *Salt River Valley Water Users Assn.*, 32 NLRB 460, 472 (1941); *Continental Bus Systems*, 104 NLRB 599, 601 (1953); and *National Van Lines*, 120 NLRB 1343 (1958).

<sup>1</sup>There are 6 employees at Grayling, and, according to the Regional Director, there are 10 employees in Coleman. The Employer contends that there are only five employees in Coleman. This discrepancy is immaterial to the Regional Director's or our reasoning.

Our dissenting colleague urges that mail ballot elections will lead to a lack of secrecy in that employees will vote under the "prying eyes" of others. We do not agree with that assessment. The instructions to employees which accompany the mail ballots specifically state that they are to be marked in secret. They emphasize that it is important to maintain that secrecy and direct the employee not to show the ballot to anyone after it is marked. The ballots are typically mailed to an employee's home address. In that setting, employees have ample opportunity to cast their ballots in accord with the instructions and in complete privacy. The dissent has presented nothing which indicates that employees in fact ignore the Board's instructions. Nor is there any evidence to support our dissenting colleague's abstract assertion that coercion will take place during a mail ballot election.

Indeed, in the 62-year history of the Act, there has been only one reported instance of such abuse, see *Human Development Assn.*, 314 NLRB 821 (1994), and there is a similar record in the 71-year history of the Railway Labor Act (RLA), under which the use of mail ballots in representation elections has been the rule and not the exception.<sup>2</sup> See *United Air Lines*, 22 NMB No. 82 (1995), for the rare instance of alleged "ballot collection" and consequent invasion of privacy in an RLA representation election. Indeed, only two other instances of such alleged improprieties have been reported in the 63-year period in which the National Mediation Board has been conducting elections under the RLA—and in no reported case has the NMB ever set aside an election on this basis.

Finally, the dissent states that there is a "stronger case for manual elections among our current work force" because "(w)e see an increasing number of immigrant workers at our polling places" and they will equate manual elections with "industrial democracy." Throughout the period that the Act has been in effect, the work force has included a substantial number of immigrant workers, who have participated in both manual and mail ballot elections conducted by this Agency. We do not agree with the dissent's assertion that immigrant workers would perceive a "serious commitment" to democracy only when manual elections are conducted, given the widespread use of mail ballots in the political process at all levels of American Government. For the same reason, we reject the dissent's suggestion that a mail ballot election has less "solemnity and integrity" than a manual ballot election.

<sup>2</sup> Indeed, no manual election has been conducted by the National Mediation Board (NMB) under the RLA since 1987. A review of published NMB decisions in the past 50 years indicates that only about 30 manual elections were conducted during that period of time.

Accordingly, we do not find the Regional Director's decision to conduct a mail ballot election to constitute an abuse of his discretion, and we deny the Employer's request for review.<sup>3</sup>

MEMBER HIGGINS, dissenting.

I believe that a complete mail ballot election here is a departure from the Agency's wise tradition of favoring manual balloting. That tradition is embodied in the NLRB Casehandling Manual (Part Two) Representation Proceedings, sections 11302.2 and 11336 (Manual). The former provision states:

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.

My colleagues say that this provision is relevant only to the issue of where to hold a manual balloting. That position ignores other parts of the Manual. More particularly, section 11336 of the Manual provides that mail balloting is to be limited "to those circumstances that clearly indicate the infeasibility of a manual election."<sup>1</sup>

There is no showing that a manual election is "infeasible" here, at least at the Burton and Port Huron locations. Indeed, my colleagues do not assert that such an election is "infeasible." Thus, the Regional Director should not have rejected the opportunity to conduct a manual election at the Burton and Port Huron locations. The Employer was willing to stipulate a mail ballot at Grayling and Coleman and a manual election at Burton and Port Huron. A mixed manual-mail election is expressly sanctioned by the Manual,

<sup>3</sup> Chairman Gould notes that this decision is consistent with the denial of a request for reconsideration and special request for review in *Weis Markets*, Case 4-RC-18987 (Feb. 25, 1997) (not reported in Board volumes). Additionally, consistent with his concurring opinion in *Willamette Industries*, 322 NLRB 856 (1997), Chairman Gould notes that providing employees at the Port Huron and Burton locations with an adequate opportunity to vote as they routinely arrive at or depart the Employer's trucking facilities would place an unduly burdensome strain on the resources of the Regional Office.

Chairman Gould also notes that the manual does not constitute "a form of authority binding . . . on the Board." See National Labor Relations Board Casehandling Manual, Purpose of Manual. See also *Shepard Convention Services*, 314 NLRB 689 (1994), enf. denied 85 F.3d 671 (D.C. Cir. 1996). Moreover, in his view, while the Employer's offer to change the employees' work schedules is not improper, the message sent to employees would be that their ability to vote would be predicated on a different work schedule over which they would have no control. Chairman Gould's view is that employee free choice is not best realized under such circumstances.

<sup>1</sup> One of my colleagues correctly observes that the Manual is not binding on the Board. However, as the D.C. Circuit Court has reminded us, the Manual "reflect[s] the Board's policies." The court, relying on the Manual, reversed the Board's direction of a mail ballot election. *Shepard Convention Services v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996).

section 11336.1 and would put a Board agent on the scene at the two locations which have the greatest number of voters and are quite near to the Regional Office.

My colleagues assert that a manual election at Burton and Port Huron would pose "scheduling difficulties." I see no need to get into an extended debate concerning the degree of difficulty of holding a manual election at these locations. The significant point is that "difficulty" is not the touchstone. As noted above, the Manual calls for a mail ballot only when circumstances "clearly indicate the *infeasibility* of a manual election" (emphasis added). Because there is not even a suggestion here that a manual election at these locations is infeasible, manual balloting should be held.

But, even if "difficulties" were the touchstone, the Employer has offered to revise work schedules to accommodate a manual election. My colleagues do not suggest that it would be improper for the Employer to change work schedules in order to accommodate a traditional manual election. Indeed, any such suggestion should be rejected. There is no evidence that the change is aimed at facilitating the voting of only those thought to be against the Union. Rather, the change was aimed at facilitating a manual ballot. Thus, the message to employees is that the Employer has taken an action to facilitate the voting process by making it easier for employees to vote. Where, as here, the Employer is willing to make a change in order to allow Board procedures to operate in the optimal way, we should not reject the overture or condemn it. Rather, we should accept it as an accommodation to Board processes, just as we routinely accept an employer's offer to hold an election on its premises.

My colleagues say that the Employer's changes "may well inconvenience a significant number of employees," that such employees "may well have family responsibilities or other plans," and that these employees "might resent" the change. The language chosen by my colleagues is instructive. The "mays" and "mights" reflect the fact that there is no evidence to support the speculation. I would not rely on speculation as a basis for refusing to hold the traditional manual ballot.

My colleagues have cited several cases, including early ones, in which mail balloting was conducted. These cases are not inconsistent with my position. I have long recognized that mail ballots are appropriate in limited circumstances. Consistent with this, there have been cases (including early ones) in which mail balloting was conducted. But, the significant point is that manual balloting is preferred, and mail balloting is to be used only when manual balloting is infeasible.

It is argued that mail balloting is less expensive than manual balloting. In response, I recognize that it is important for agency officials to seek to conserve re-

sources. That laudable goal should not, however, undermine the critical importance of Board agent presence at an election. That presence assures the secrecy, integrity, and solemnity of a process that has been uniformly praised since 1935.

With particular respect to secrecy, 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. Even if the employer and union have no coercive presence at that place, there is still a need for secrecy. Elections are often highly charged events, and an employee should be free to vote in the privacy of the booth, away from the prying eyes of any person.

Because of the "infeasibility" standard, the great majority of NLRB elections have been conducted manually. The result has been an enormous success, with very few instances of invasion of secrecy or of coercion in the election process. My colleagues predict that this same fine record will continue, even if more elections are conducted by mail. In this regard, they point to ballot instructions, and to the paucity of reported cases of abuse under the National Labor Relations Act (NLRA) and the Railway Labor Act (RLA). However, the presence of an instruction printed on a form is not a guarantee that the instruction will be followed. And, the paucity of cases is simply reflective of the fact that, until now, mail balloting is used only infrequently by our Regional Directors who have been applying the "infeasibility" standard with wisdom and discretion. More importantly, even if my colleagues have a basis for predicting that an increase in mail balloting will not mar our fine record, the issue is whether we should run this risk. Phrased differently, the question is whether we should tamper with success. I would not fix something that is not broken.

The wisdom of holding manual elections continues to this day. Indeed, there is an even stronger case for manual elections among our current work force. We see an increasing number of immigrant workers at our polling places. For many of these workers, the Board election may be their first and perhaps their only experience with a secret ballot election. Bringing the ballot box to their workplace emphasizes for them, as it has for millions of workers since 1935, that the U.S. Government has a serious commitment to industrial democracy. Workers should know that the Board is not just a postage stamp away; rather, it is present, ready, willing, and able to provide them with the opportunity to vote secretly about choosing to engage in, or refrain from, collective bargaining.<sup>2</sup>

<sup>2</sup>I do not doubt that mail balloting also shows a governmental commitment to industrial democracy. My point is that the govern-

*Continued*

In sum, the process of holding manual elections is the crown jewel of the Board's accomplishments. Manual elections are what we do at the Board; we should do it here; and, absent a clear showing of "infeasibility," we should willingly utilize our resources to do it in every case.

mental action of bringing the election to the workplace emphasizes that commitment in a particularly meaningful way.

#### APPENDIX

##### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act) a hearing was held on London's Farm Dairy,<sup>1</sup> Case 7-RC-21023, before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding,<sup>2</sup> I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.<sup>3</sup>

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.<sup>4</sup>

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time truck drivers employed by the Employer, working in and out of its locations at 2136 Pine Grove Avenue, Port Huron, Michigan; 11987 West Pere Marquette, Coleman, Michigan; 3300 East Bristol Road, Burton, Michigan; 113 Fig Street, Grayling, Michigan; but excluding all office clerical employees, managerial employees, professional employees, technical employees, confidential employees, production and maintenance employees, dock em-

ployees, janitorial employees, guards and supervisors as defined in the Act.

##### DIRECTION OF ELECTION<sup>5</sup>

An election by secret ballot shall be conducted under the direction and supervision of me among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, 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 employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local 339, International Brotherhood of Teamsters, AFL-CIO.

##### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is directed that within 7 days of the date of this decision two copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the DETROIT REGIONAL OFFICE on or before APRIL 8, 1997. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

<sup>5</sup>The only issue presented for hearing by the Employer and Petitioner was the scheduling of the election date and times, and whether a mail ballot election should be ordered. Unless, unlike here, the timing of the election is related to the peculiar characteristics of an employment complement, such as whether or not an employee group is representative, or whether there is seasonal employment or other similar issues, the mechanics of an election, including the use of mail ballots, are administrative matters to be decided, after issuance of the decision and direction of election, by the regional director. See *Oneida County Community Action Agency*, 317 NLRB 852 (1995); *North American Soccer League*, 236 NLRB 1317, 1322 fn. 15 (1978). Consequently, I decline to rule in the instant Decision and Direction of Election on these matters.

<sup>1</sup>The name of the Employer appears as amended at the hearing.

<sup>2</sup>The parties filed briefs, which have been carefully considered.

<sup>3</sup>In view of my findings below regarding the Direction of Election, the hearing officer appropriately denied the Employer's request that a representative of the Regional Office made available to testify as to the Board's processes, procedures, and costs in conducting a mail ballot election. Furthermore, I reaffirm my denial during the course of the hearing of the Employer's request for review of the hearing officer's ruling. Consequently, the Employer's request in its brief that "all materials relating to its hearing requests for access to evidence about Board costs associated with conducting a mail ballot election, including subpoena requests for Board agent testimony and documents in the possession of the Region, and written requests for consent of the Regional Director for such testimony and documents, be preserved and included in the record for any subsequent transfer to the Board" is denied.

<sup>4</sup>The Employer is a Delaware corporation engaged in the business of processing and distribution of milk and related products.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision

may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570. This request must be received by the Board in Washington by APRIL 15, 1997.