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# Union Elections Hang in the Balance as NLRB Ponders Vote by Mail

By Robert Lafolla

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- Board has halted five mail-ballot union elections
  - Delays generally hurt unions, help employers
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The National Labor Relations Board has halted more mail-in union elections than it's allowed in recent months despite the coronavirus pandemic, issuing last-minute orders that indefinitely delayed votes already scheduled.

While the board had been broadly supportive of mail-ballot elections, it has stopped five elections since late August while allowing just four to proceed, one of which was a vote to eject an existing union, according to a Bloomberg Law analysis. The NLRB has yet to rule on how those suspended elections will proceed, although it sent one case back to a regional director. The ballots in three of the contests would have been counted by Oct 7.

The board's willingness to reconsider whether the virus is a valid reason for voting by mail has caused the types of delays that generally hurt unions and help employers, according to labor law professors with NLRB experience. Delayed votes can disrupt union momentum, blunting enthusiasm and giving employers more opportunities to persuade employees to vote no, the academics said.

In all five orders suspending mail-ballot elections, the board's majority provided no details about its decision except to say that the employer's request that it do so "raises substantial issues warranting review."

NLRB spokesman Edwin Egee declined to comment on those decisions or the criteria behind them.

Some union officials worry about the delays.

"It's an opportunity for the employer, aided by the NLRB, to snuff out organizing," said Rob DeRosa, a business representative for an International Brotherhood of Teamsters local trying to organize a small group of drivers at a Perdue Foods chicken processing plant in Washington state.

The ballots would have been mailed out to the drivers Sept. 9 and counted by agency officials Oct. 2. But the Republican-controlled NLRB—over the objection of the board's sole Democratic member—suspended the election on Sept. 9.

The agency hasn't given the Teamsters affiliate any guidance on when the board might decide whether to permit the mail-ballot election or order an in-person vote, DeRosa said. The union is trying to maintain the drivers' interest and support in the face of a delay that makes it look bad, while Perdue uses the extra time to campaign against the union, he said.

Perdue's attorney in the case, Anthony Byergo of Ogletree Deakins, declined to comment because the case is still pending. In a brief filed with the NLRB, the company argued the regional director abused his discretion by imposing a standard that effectively eliminates in-person elections until the pandemic is over.

### **Evolving Views as Pandemic Continues**

From early May to late August, the board rejected at least 15 company requests to reconsider regional directors' orders for mail-in voting because of the pandemic. The NLRB halted a mail-ballot decertification election during that time too, but it was due to a regional director's procedural error which she fixed in a subsequent decision ordering a mail-in vote.

In those cases, the board had cited pandemic lock-down conditions— government orders limiting travel and closing nonessential businesses, and NLRB staff who'd conduct elections being on mandatory telework—to justify rejecting employer objections.

The NLRB's reasoning appeared to shift after General Counsel Peter Robb issued a July 6 memo to regional offices detailing protocols for safe manual elections. In the immediate aftermath of that memo, the board more generally cited the "extraordinary circumstances resulting from the Covid-19 pandemic" when it rejected employer objections to mail-ballot elections.

It changed course on mail-in votes in its Aug. 25 decision halting ballots that were to be sent to nurses at Aspirus Keweenaw Hospital in Michigan. The ballots to join the Michigan Nurses Union would have been counted three weeks ago.

"The vast majority of RNs at Aspirus Keweenaw Hospital have publicly stated they wanted to form a union," said Melissa Boals, a member of the union's board of directors. "It seems to me the D.C. NLRB, by indefinitely delaying this election, is on the side of Aspirus executives."

Aspirus' attorney, Scott Beightol of Michael Best & Friedrich, didn't respond to requests for comment. The hospital told the NLRB in a brief that it has enhanced virus control protocols and is located in an area that's considered to be low risk for transmitting Covid-19.

### **Regional Decisions, Oversight from D.C.**

Regional directors who have ordered mail-ballot elections considered a number of factors, including the local status of the pandemic, and the safety of the workers and agency staffers who would participate in manual elections, according to Robb's memo.

"This is almost an incredible area for the board to tread on regional directors, given how fact-sensitive and local the decisions are," said Michael Duff, a University of Wyoming law professor and former NLRB staffer. "It has the feel of Mount Olympus issuing decrees to local offices that are dealing with changing conditions on the ground."

The NLRB's insistence that workers must cast votes in person outside of extraordinary circumstances contrasts with the National Mediation Board, which conducted mail-ballot elections in the railway and airline industries for most of its history and now handles most votes either by phone or online, Duff said.

The labor board's 1998 decision in *San Diego Gas & Electric* set forth guidelines for regional directors to decide whether to order mail-ballot elections. Opponents of mail voting had raised the specter of fraud, but the board was only able to find one example in the mediation board's history of mail-in elections, said William Gould, a Stanford University law professor who led the NLRB at the time.

The NLRB's newfound doubts about mail ballots mirror the political debate over voting at the national level, with President Donald Trump making baseless claims that voting by mail would be beset by fraud, Gould said. "What else can explain Washington officials with no first-hand knowledge of local conditions potentially reversing regional directors' orders for mail-ballot elections?"

Employers generally prefer manual elections because of the NLRB's measures to ensure secrecy, avoid electioneering around the voting area, and prevent voter fraud or coercion, said Amy Gaylord, an attorney with management-side firm Akerman. Gaylord isn't involved in mail-ballot elections that the NLRB has suspended.

The National Labor Relations Board Union, which represents agency personnel who administer elections, strongly favors universal mail-ballot elections during the pandemic, union official Mike Bilik said in a statement.

### **'Stuck in Limbo'**

Unions and employers are forced to wait once the NLRB suspends a mail-ballot election.

The board is currently reviewing a regional director's order to mail out ballots so that workers at ClarkWestern Dietrich Building Systems' steel frame plant in Connecticut could decide whether they want to join the United Steelworkers. The board halted the election on Sept. 16, when the ballots were supposed to be mailed.

The Steelworkers asked the regional director to withdraw his order directing a mail-ballot election in an attempt to hold the vote as soon as possible, union spokeswoman Jess Kamm Broomell said, but the union is “stuck in limbo” as it waits to hear from the NLRB, creating a stressful situation for the workers.

“Delays provide time for companies to apply pressure, and without a clear timeline, it’s hard for” the workers, Broomell said. “By and large, workers are frustrated and just want to vote.”

The board lifted the stay and sent the case back to the regional director Oct. 6, signaling that the union may get permission to proceed with the in-person election it once sought to avoid.

One of ClarkWestern’s attorneys in the case, John Lovett of Frost Brown Todd, declined to comment because the case is pending.

To be sure, unions haven’t been universally harmed by the suspended elections.

An Oct. 1 NLRB order stopped ballots from being sent that day to workers at an Ecolab Production facility in Texas. That could actually aid the Retail, Wholesale, and Department Store Union, which has had only limited contact with workers due to the pandemic, said Tim Ferguson, the union business agent overseeing the Ecolabs campaign.

But, “if the delay goes on any longer than a couple of weeks, it may have a negative impact,” Ferguson said.

Ecolab’s lawyer, Cameron Pierce of Littler Mendelson, declined to comment.

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