

## Mail Ballots Share Card Checks' Lack of Safeguards

*Available Now in Rare Circumstances, NLRB Avoids Mail Balloting Due to Lack of Confidentiality Protections, Low Employee Participation Rates*

As proponents of the Employee Free Choice Act continue to consider variations aimed at securing the necessary votes to pass legislation assisting union organizing, one alternative to card checks being considered is mail ballots. Mail balloting is a rarely used procedure currently available to the National Labor Relations Board (NLRB) in situations where traditional voting at the workplace is impractical. It is used sparingly by the Board because, as in the case of card checks, employees do not necessarily indicate their preference in private and, in filling out and mailing their ballots, may be subject to undue influence or even coercion by the union, the employer or a co-worker. Moreover, employee participation in mail balloting tends to be lower than normal. Indeed, it is not clear how mail ballots would improve the election process which, in 2008, resulted in union election victories in two out of every three elections.

### Mail Ballots Are Rarely Used by the NLRB

In a normal election, employees manually cast their ballots in the privacy of an election booth, policed by an NLRB agent to ensure that the balloting is confidential and free of any coercion. Representatives of both the employer and the union are present but may not engage in any campaigning and the location itself must be free of any campaign materials or activity. Typically, the election booth is located at the workplace, which is normally the most accessible location to all employees and facilitates their ability to participate without disrupting their normal workday schedules. Indeed, as one NLRB member declared, "the process of holding manual elections is the crown jewel of the Board's accomplishments."<sup>1</sup> According to the Board's *Casehandling Manual*, "representation elections should, as a general rule, be conducted manually" and mail ballots are only to take place in instances where long distances are involved or employees are scattered because of their duties.<sup>2</sup> Thus, mail ballots are only used in unusual circumstances.

### Mail Ballots Lack the Procedural Protections

The reason the Board has generally avoided using mail balloting is because it lacks the protections and the procedural orderliness of a regular election. In a mail ballot election, the Board mails, to each eligible voter, a "voter kit" which includes instruction on how to vote by mail, the contact information of a designated NLRB employee, a ballot, and a postage-paid return envelope.<sup>3</sup> Employees usually have two weeks to return the mail-ballot.<sup>4</sup> The Board provides 24 hours notice to the union and employer before the time and date on which the mail ballots are sent to eligible voters and the notice also states the time and date by which the ballots must be returned to NLRB.<sup>5</sup> Finally, notices are posted in the workplace informing eligible employees about the election.<sup>6</sup> Past proposals to increase the use of mail ballots have met resistance not only within the management community but by career NLRB employees as well. In 1994, when then-Chairman William Gould proposed that the NLRB expand the situations in which mail ballots were

to be used, many of the strongest comments in opposition were filed by NLRB regional office officials who noted, among other things:

- The presence of a Board agent at an election gives employees a greater sense of security that their rights are being preserved;<sup>7</sup>
- The potential for interference by either party increases the likelihood of a second election having to be conducted because of misconduct;<sup>8</sup>
- By including ballots with other “junk mail” that employees typically receive, it “dilutes the seriousness of the process;”<sup>9</sup>
- If the voter is confused or uncertain about the process, there is no official agent available to answer their questions, increasing the likelihood that he or she will procrastinate and “find it easier to not vote;”<sup>10</sup>

### Mail Ballots Have a Lower Participation Rate

In an NLRB-conducted election, the result is determined by a majority of those voting, as opposed to the total unit. Thus, in any NLRB election, the outcome may be determined by a minority of the workforce involved, as long as they represent a majority of those voting. In the case of mail balloting, where participation rates tend to be low, this is of particular concern. While the Board does not keep annual statistics on mail-in election participation rates, in the most recent data available, the NLRB General Counsel reported that, for FY 1993, manual elections had an 87.9 percent participation rate, compared to 72 percent for mail ballot elections. The 1994 case of *Shepard Convention Services*<sup>11</sup> illustrates the problem. The Board granted a union’s request. Overturning a regional director’s decision, the Board ordered that a mail ballot be conducted at the request of the union for non-regular “on call” employees who installed, maintained and dismantled trade show and convention displays. Out of 438 eligible votes, only 77 cast ballots—40 for the union, 23 for an alternative union and five for no union. Even though only 9 percent of the total unit had voted for the union—with only 17.5 percent voting—the Board sought to certify the union but was ultimately overturned by the D.C. Circuit Court which admonished the Board for not following the Regional Directors decision, which would have resulted in a higher turnout—“it could hardly have been lower.”<sup>12</sup>

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<sup>1</sup> *London’s Farm Dairy, Inc.*, 323 NLRB 1057 (1997) (Member Higgins dissenting).

<sup>2</sup> National Labor Relations Board Casehandling Manual §11301.2.

<sup>3</sup> *Id.* at §11336.2(c).

<sup>4</sup> *Id.* at §11336.2(d).

<sup>5</sup> *Id.* at §11336.2(b).

<sup>6</sup> *Id.* at §11336.3.

<sup>7</sup> Daniel V. Yager, *NLRB Agency in Crisis*, 46 (1996) (quoting Richard J. Roth, Assistant Director of Brooklyn NLRB Regional Office).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (quoting Nina Rzymiski, NLRB Region 6, Election Specialist).

<sup>10</sup> *Id.*

<sup>11</sup> 314 NLRB No. 115 (1994)

<sup>12</sup> *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996)