

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

Austin, Texas

VIA 313 PIZZA RESTAURANT II, LLC

Employer

and

Case 16-RC-300851

RESTAURANT WORKERS UNITED

Petitioner

DECISION AND DIRECTION OF ELECTION

Via 313 Pizza Restaurant II, LLC (Employer) operates a pizza restaurant located at 3016 Guadalupe Street, Suite 100, Austin, Texas 78705 (North Campus facility). On August 5, 2022, Restaurant Workers United (Petitioner) filed a petition seeking to represent approximately 42 employees employed by the Employer at its North Campus facility, located in Travis County, Texas.

The appropriateness of the petitioned-for bargaining unit is not in dispute, the only issue in this case is the method of election.¹ On September 9, 2022, a videoconference hearing was held in this matter before a hearing officer of the National Labor Relations Board (Board). The parties stated their respective positions and filed post-hearing briefs addressing the method of election. The Employer contends a manual election is necessary and appropriate, the Petitioner contends the same regarding a mail-ballot election.

The Board has delegated its authority in this proceeding to me under §3(b) of the Act. Applying the Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), to the circumstances in the instant case, I am directing a mail-ballot election due to the high COVID-19 test positivity rate in Travis County.

¹ The Regional Director has decided to defer the issue of the supervisory status of the FOH Shift Managers and the BOH Shift Managers to the post-election procedure and have the BOH and FOH Shift Managers vote subject to challenge during the election.

A. METHOD OF ELECTION

1. *The COVID-19 Pandemic*

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last two years. Despite unprecedented efforts to limit transmission, to date approximately 95 million people in the United States have been infected with COVID-19 and over 1 million people have died.²

According to the Centers for Disease Control and Prevention (CDC) the risk of transmission from an infected person increases with several factors, such as the length of exposure, the quality of ventilation, and the proximity to an infected person.³ Many of the measures recommended by the federal, state, and local governments to prevent the spread of the virus are well-known at this point: vaccination, improved ventilation of indoor spaces, avoiding contact with people who have suspected or confirmed COVID-19, and wearing masks and increasing space and distance between individuals under certain circumstances.⁴

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. The Board has traditionally conducted in-person, manual elections and used mail-ballot elections in limited circumstances. In 2020, in *Aspirus Keweenaw*, the Board addressed the circumstances where the pandemic may dictate appropriate use of mail-ballot elections. As the pandemic has ebbed and flowed over the years since *Aspirus* the result has been an increase in the use of the mail-ballot procedures. *KMS Commercial Painting, LLC*, 371 NLRB No. 69, slip op. at 1 (2022) (304 mail ballot elections taking place in fiscal year 2022). Mail-ballot procedures have allowed the Board to continue conducting elections even in the face of high COVID-19 transmission rates. As the Board stated in *KMS*, “during the pandemic, the Board’s mail ballot procedures have served the Board’s mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process.” *Id.*

2. *Board Standard*

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346

² CDC, *Covid Data Tracker* (updated September 16, 2022) <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last viewed September 19, 2022).

³ CDC, *Understanding Exposure Risks*, (updated August 11, 2022) <https://www.cdc.gov/coronavirus/2019-ncov/your-health/risks-exposure.html> (last viewed September 19, 2022).

⁴ CDC, *How to Protect Yourself & Others*, (updated August 11, 2022) <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last viewed September 19, 2022).

(1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.*, 325 NLRB at 1144-45.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.⁵ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas*, supra at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region's, directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6, 2020, the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by *GC Memo 20-10*, "Suggested Manual Election Protocols;"
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

⁵ I note that the provisions of the Casehandling Manual are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

Id. slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” *Id.* slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” *Id.* slip op. at 3 (citing *National Van Lines*, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. *Aspirus*, 370 NLRB No. 45, slip op. at 3 (citing *San Diego Gas & Electric*, 325 NLRB at 1144 n. 4). Finally, in *Aspirus*, the Board noted that a Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her or his discretion. *Aspirus*, 370 NLRB No. 45, slip op. at 8.

3. Determination

In presenting their opposing views on the method of election, the Petitioner makes several arguments, and the Employer expresses its general opposition to a mail-ballot election. I address the parties’ contentions first, then consider the *Aspirus* factors that form the basis for my decision.

Petitioner contends that the employees should be considered “scattered” consistent with *San Diego Gas* and argues that a mail-ballot election will allow the most employees to participate without causing disruption to the restaurant’s operations. Petitioner also contends that it will be impossible to hold a manual election in this case under the *Aspirus* principles, given the COVID-19 positivity rate in Travis County, which was 16.6% at the time of hearing. Additionally, Petitioner notes that there have been recent COVID-19 outbreaks at the Employer’s location. Finally, Petitioner argues that a mail-ballot election will address the Employer’s concerns that the Employer is particularly busy during the months of September and October due to various events occurring in Austin, Texas.

The Employer argues that the election should be held manually because voter turnout is historically better in manual elections, and because voter error is higher in mail-in elections. The Employer argues that the pandemic is in a different phase than when *Aspirus* was first decided, when there was no vaccine, little testing, and no mitigating measures in place. With regard to the Employer’s arguments, I am bound by Board precedent and will abide by *Aspirus Keweenaw*.

In determining whether a mail or manual election is appropriate I have applied the Board’s decision in *Aspirus*. Several of the *Aspirus* factors are not relevant to my determination in this case. The Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by *Memorandum GC 20-10*, and there is no evidence of a current outbreak at the Employer’s facility. The only factor I find requires a detailed analysis is the remaining factor: whether the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing, or the 14-day testing positivity rate is 5 percent or higher.

The Board in *Aspirus* directed Regional Directors to, in considering these statistical factors, utilize the data published by Johns Hopkins University, or from official state or local government sources. The Board further stated where county level data is not available, Regional Directors should look to state level data.

The first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing. The restaurant at issue here is located in Travis County, Texas.

As of September 19, 2022, the Johns Hopkins University & Medicine Coronavirus Resource Center reports a -12 day case count of 757 cases and a 3-day case count of 208 cases, a decrease.⁶ In the interim the number of cases has fluctuated significantly, ranging as high as 757 cases at 12-day case count and as low as 154 cases at 6-day case count.⁷ In light of the significant fluctuations over the last 14 days, I find a clear trend is not discernable in this case and I have not utilized trend data in making my decision.

Regarding the second contingency, whether the 14-day testing positivity rate in Travis County is 5 percent or higher, the CDC reports a testing positivity rate for Travis County of 17.1 percent for the most recent week available (7-day period ending September 13, 2022).⁸ It does not appear that at any point within the preceding month the positivity rate fell below 15 percent. This is reinforced by the data available at the state level, as the Johns Hopkins University & Medicine Coronavirus Resource Center reports a 14.38 percent 14-day testing positivity level as of September 14, 2022.⁹ This data demonstrates the testing positivity rate has been well above 5 percent in Travis County during the most recent 14-day period for which data is available.

I find this is a sufficient basis to order a mail ballot election consistent with *Aspirus* and have done so below.

B. CONCLUSION

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁰

⁶ <https://bao.arcgis.com/covid-19/jhu/county/48453.html> (last viewed September 19, 2022).

⁷ Several days report a value of "0," but these almost certainly represent days when data was not reported, not a case count of 0 cases.

⁸ https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Texas&data-type=CommunityLevels&list_select_county=48453 (last viewed September 19, 2022).

⁹ <https://coronavirus.jhu.edu/testing/testing-positivity> (last viewed September 19, 2022).

¹⁰ The parties stipulated to the following commerce facts:

The Employer, Via 313 Pizza Restaurant II, LLC, a Texas limited liability company with a place of business located at 3016 Guadalupe, Suite 100, Austin, Texas 78705 (North Campus facility), is a restaurant that specializes in pizza. During the last twelve months, a representative period, the Employer derived gross revenues in excess of \$500,000. In conducting its operations during the same period of time, the Employer

3. The labor organization involved claims 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 voting group appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All full-time and regular part-time Cashiers, Hosts, Hostesses, Servers, Server Assistants, Bartenders, Cooks, Doughs, and Dishwashers.

EXCLUDED: All General Managers, Assistant General Managers, Assistant Managers, Kitchen Managers, MIT Managers in Training, Training Managers, BOH Trainees, FOH Trainees, BOH Trainers, FOH Trainers, Corporate Trainers, Guards, and Supervisors as defined by the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether employees classified as BOH Shift Managers and FOH Shift Managers are included in, or excluded from, the bargaining unit. Individuals in this classification may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election. ¹¹

purchased and received at its North Campus facility goods valued in excess of \$5,000 from directly outside the State of Texas. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

¹¹ The Petitioner seeks to also represent the BOH Shift Managers and FOH Shift Managers. The Employer contends BOH Shift Managers and FOH Shift Managers should be excluded from the unit because they are supervisors as defined by Section 2(11) of the Act. As of August 30, 2022, there were five (5) BOH Shift Managers and five (5) FOH Shift Managers employed by the Employer at this facility in issue. The Regional Director has decided to defer the issue of the supervisory status of the FOH Shift Managers and the BOH Shift Managers to the post-election procedure and have the BOH and FOH Shift Managers vote subject to challenge during the election.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Restaurant Workers United**.

A. Election Details

The election will be conducted by mail. On **Thursday, September 29, 2022, at 4:45 p.m. (CST)**, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 16. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

The ballots will be translated into English and Spanish.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Wednesday, October 12, 2022**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either calling the Region 16 Office at **817-978-2921** or our national toll-free line at **1-844-762-NLRB (1-844-762-6572)**.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 16 office by **4:45 p.m. (CST) on Thursday, October 20, 2022**. All ballots will be commingled and counted by an agent of Region 16 of the National Labor Relations Board on **Thursday, October 27, 2022, at 1:00 p.m. (CST)** with participants being present by videoconference, provided the count can be safely conducted on that date and at the Regional Director's discretion. No party may make a video or audio recording or save any image of the ballot count.

In order to be valid and counted, the returned ballots must be in an envelope signed by the voter and must be received in the Region 16 Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **September 6, 2022**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well

as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Wednesday, September 21, 2022**. The list must be accompanied by a certificate of service showing service on all parties.¹² **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

¹² Petitioner waived 7 days with the voter eligibility list.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in English and Spanish that will issue separately, in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under

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review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

DATED in Fort Worth, Texas on this 19th day of September 2022.



Timothy L. Watson
Regional Director
National Labor Relations Board
Region 16
Fritz G. Lanham Federal Building
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6107