

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

**GOLDEN STATE FOODS
Employer**

and

Case 10-RC-267373

**BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS UNION
LOCAL 42¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On October 8, 2020,² Petitioner Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 42 filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act, seeking to represent certain employees of Golden State Foods at its plant in Opelika, Alabama. A hearing officer of the National Labor Relations Board conducted the hearing in this matter on October 30 via videoconference.

This sole issue in this case is whether, given the constraints of the COVID-19 pandemic, to conduct an election by manual balloting or mail balloting. On November 9, after the hearing had closed, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), which provided a standard for assessing the propriety of mail-ballot elections during the pandemic. On November 12, a Notice to Show Cause issued on whether to conduct a manual, mail-ballot, or mixed manual-mail ballot election in light of *Aspirus Keweenaw*. The Employer submitted a brief and response, but the Petitioner did not.

The Employer contends that a manual election is appropriate in this matter and that *Aspirus Keweenaw* does not dictate otherwise. At hearing, the Petitioner noted its willingness to participate in a manual election as long as the Employer would abide by the protocols of General Counsel Memorandum 20-10, *Suggested Manual Election Protocols* (July 6, 2020) (GC 20-10).

Having considered the entire record in this matter, I am directing a mail-ballot election. To give context for my discussion, I begin with facts related to the Employer's operations and the petition. I then review the Employer's proposal for a manual-ballot election. After that review, I discuss

¹ I have corrected the Petitioner's name to conform with the parties' stipulation in Board Exhibit 2.

² All dates are for the year 2020 unless otherwise noted.

the Board’s decision in *Aspirus Keweenaw*, the Employer’s brief in light of that case, and the case’s application to the present matter. Finally, I conclude with my findings.³

II. FACTS

The Employer is a Delaware corporation with a plant located in Opelika, Alabama. Opelika is located in Lee County. At its Opelika plant, the Employer manufactures hamburger patties and other ground-meat products for its clients.

The Employer’s Opelika plant has remained open since the beginning of the COVID-19 pandemic. At hearing, the Employer presented extensive testimony and evidence regarding the Employer’s early response to the pandemic and its current policies and procedures related to safe working conditions at the plant. The Employer has had several cases of COVID-19 at its plant, and, with the exception of two employees who lived together, all of the cases were individual and did not develop as clusters. At the time of the hearing, the Employer had learned of its most recent case of COVID-19 at the plant on October 26, which involved a front-office worker who is not a member of the petitioned-for unit. The most recent instance of COVID-19 involving an employee in the petitioned-for unit was from October 5.

The Petitioner seeks to represent a unit of all full-time and part-time hourly employees working in the Quality, Fresh, Frozen, Nestle, Maintenance, Shipping, and Receiving departments of the Employer’s Opelika plant. The parties have stipulated that the petitioned-for unit is appropriate for bargaining. There are approximately 199 employees in the petitioned-for unit.

III. THE EMPLOYER’S PROPOSED ELECTION ARRANGEMENTS

The Employer proposes a manual election over one day with two voting times: 7 to 9 a.m. and 2:30 to 4:30 p.m. The Employer proposes a release schedule that permits 10 to 15 voters to proceed to the voting area at a time. While maintaining proper distancing, the group of voters will wait in the employee break room—the Employer’s “staging area”—and approximately five voters will move from the staging area to the voting line outside the polling area. Employees will receive hand sanitizer before and after voting. The polling area will contain only four individuals while the polls are open: the two observers, the Board agent, and the voter. As a voter leaves the voting area and returns to the staging area, a voter from the voting line will enter the polling area, and another voter will move from the staging area to the voting line. Voters who have voted will return to work. The Employer will continue this process until all employees on a shift have had an opportunity to vote. Employees not scheduled for work on the day of the election will be permitted to enter the staging area after completing normal requirements for entering the Employer’s plant. The ballot count will then take place in the voting area. During the count, only five individuals will be present: the Board agent, two observers, and two party representatives.

The Employer has committed to the following:

³ As to preliminary matters, the parties stipulated that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Petitioner is a labor organization within the meaning Section 2(5) of the Act. The parties have also stipulated that there is no contract bar in existence that would preclude the processing of this petition.

- The Employer will provide spacious polling area, sufficient to accommodate six-foot distancing, which will be marked on the floor with tape to ensure separation for observers, the Board Agent, and voters.
- The Employer will have a separate entrance and exit for voters, with markings to depict safe traffic flow through the polling area.
- The Employer will have separate tables spaced six feet apart so the Board Agent, observers, ballot booth, and ballot box are at least six feet apart from one another.
- There will be sufficient disposable pencils without erasers for each voter to mark their ballot.
- The Employer will provide glue sticks or tape to seal challenge-ballot envelopes.
- There will be plexiglass barriers of sufficient size to separate observers and the Board Agent from voters and each other during the voting and to separate all individuals during the pre-election conference and ballot count.
- The Employer will provide masks, hand sanitizer, gloves, and wipes for observers.
- The Employer will allow an inspection of the polling area to be conducted by video conference at least 24 hours prior to the election so that the Board Agent and parties can view the polling area.
- In accordance with guidance from the Center for Disease Control and Prevention (the CDC), all voters, observers, party representatives, and other participants will wear CDC-conforming masks during all phases of the election, including the pre-election conference, in the polling area, and while observing the count. The Employer will post signs in or immediately adjacent to the Notice of Election to notify voters, observers, party representatives and other participants of this requirement.
- The Employer will provide the Region with required certifications regarding COVID-19.

More generally, the Employer has also confirmed its willingness to comply with the election protocols of GC 20-10.

The Employer has presented outdoor and indoor options for voting. To hold the election outdoors, the Employer will set up a tent in its parking lot, which is adjacent to the plant. To hold the election indoors, the Employer proposes use of its front office conference room. The Employer will place two air purifiers in the conference room.

IV. DISCUSSION

Having carefully considered the entire record and in light of the ongoing COVID-19 pandemic in Lee County, where the Employer's plant is located, I am directing a mail-ballot election in this

matter. Below, I briefly summarize the Board’s decision in *Aspirus Keweenaw*, review the Employer’s argument for a manual election in light of *Aspirus Keweenaw*, and discuss my rationale for directing a mail-ballot election.

A. *Aspirus Keweenaw*

The Board issued its decision in *Aspirus Keweenaw* to provide “specific and defined parameters ... in determining election type against the backdrop of COVID-19.” 370 NLRB No. 45, slip op. at 4. In providing those parameters, the Board outlined six situations “that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by [the COVID-19] pandemic.” *Ibid.* The six situations are as follows:

- (1) The NLRB office tasked with conducting the election is operating under “mandatory telework” status.
- (2) Either the 14-day trend in the 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 avoid violating mandatory state or local health orders relating to maximum gathering size.
- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- (5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- (6) Other similarly compelling considerations.

The Board found that in the presence of any of the above situations, Regional Directors must consider directing a mail-ballot election. However, the presence of any of these situations does not require a mail-ballot election. Furthermore, the Board stated that Regional Directors who direct mail-ballot elections in any of the above situations will not be found to have abused their discretion. *Id.* slip op. at 8.

B. The Employer’s Position

The Employer argues that none of the six factors under *Aspirus Keweenaw* apply in the present case:

- (1) None of the Region 10 offices are currently operating under “mandatory telework” status.

- (2) Citing to the Alabama Department of Public Health COVID-19 Risk Indicator Dashboard,⁴ Lee County’s testing positivity rate as of November 17 was below 5 percent. The Employer did not provide any data on 14-day trend in the number of new confirmed cases in Lee County.
- (3) Alabama’s most recent state order on gathering sizes issued on November 8 and is in effect until December 11. The order contains no limits on gathering sizes that are applicable to essential operations such as the Employer’s Opelika plant.
- (4) The Employer has confirmed that it would follow the protocols of GC 20-10.
- (5) As of the Employer’s brief on November 17, there were no outbreaks of COVID-19 at the Employer’s plant, and there had been no reported positive tests for COVID-19 other than those described above.
- (6) There are no compelling considerations for conducting a mail-ballot election. The Employer argues that other compelling considerations weigh in favor of a manual election, which include the fact that it has not ceased operations during the pandemic, United States Department of Agriculture agents are present at the plant every day to ensure a safe working environment, and the Employer has many policies and procedures in place to prevent the spread of COVID-19.

C. Discussion

The Board has delegated its discretion in determining such election arrangements to Regional Directors. *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that Unit employees will have the opportunity to vote even if an employee is in quarantine status.

I find that five of the six factors under *Aspirus Keweenaw* do not apply to the present case. However, as to the second factor, which involves the 14-day testing positivity rate for COVID-19, the most recent data shows that the rate is above 5 percent.

According to the same Alabama Risk Indicator Dashboard cited by the Employer, the number of tests and the testing positivity rate for the most recently updated information for Lee County is as follows:

- For the week of November 1 through November 7, there were 2,950 reported tests for COVID-19. Of those tests, 4.92 percent were positive.
- For the week of November 8 through November 14, there were 3,270 reported tests for COVID-19. Of those tests, 6.53 percent were positive.

⁴ See

<https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html#/b585b67ef4074bb2b4443975bf14f77d>.

The Alabama Department of Public Health COVID-19 Risk Indicator Dashboard places Lee County in the High Risk category. Based on above data, the 14-day test positivity rate is approximately 5.75 percent.⁵

Because this testing positivity rate is above 5 percent, I must consider the appropriateness of a mail-ballot election. Speaking to the 14-day trend in the number of new cases of COVID-19 and the 14-day testing positivity rate for COVID-19, the Board in *Aspirus Keweenaw* stated that “[i]f either of these measures is met, this suggests the virus is spreading in that locality, and the interest in public safety will ordinarily indicate the propriety of a mail-ballot election.” 370 NLRB No. 45, slip op. at 6. Based on this rationale, I find that a mail-ballot election is the appropriate method for this case.

V. CONCLUSION

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

1. The rulings 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.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and 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 unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and part-time hourly employees in Quality, Fresh, Frozen, Nestle, Maintenance, Shipping, and Receiving departments employed by the Employer at its Opelika, Alabama facility; but excluding all other employees, temporary employees, office clerical employees, professional employees, managers, guards and supervisors as defined in the Act.

⁵ To calculate the 14-day test positivity rate, I first calculated the number of positive tests for each week by multiplying the percent positive by the total number of tests for that week. After calculating the number of positive tests for each week, I added the number of positive tests together for the two weeks. Then, I divided the number of total positive tests by the total number of tests for the two weeks. I calculated this conservatively by rounding all decimals down to the nearest whole number. The calculated 14-day test positivity rate is rounded to the nearest hundredth of a percent.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Bakery, Confectionery, Tobacco Workers and Grain Millers Union Local 42.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. The National Labor Relations Board, Region 10, will mail ballots to voters at 2:00 p.m. on **Monday, December 14, 2020**. After receiving their ballots, voters who wish to vote must appropriately mark their ballots and return them in the provided return envelopes. Voters must sign the outside of the envelope in which they return their ballots. Any ballot received in an unsigned envelope will automatically be void.

Voters must return their mail ballots so that they will be received by the National Labor Relations Board, Birmingham Resident Office by close of business on **Monday, January 11, 2021**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Wednesday, December 23, 2020, should communicate immediately with the National Labor Relations Board by either calling the Birmingham Resident Office at (205) 933-3018 and asking to speak with Board Agent Lanita Cravey or the Information Officer, or calling our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities, including but not limited to safer-at-home orders, travel restrictions, social distancing, and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually beginning at 2:00 p.m. on **Tuesday, January 12, 2021**. The count will take place virtually on a platform (such as Skype, Zoom, or WebEx) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **November 14, 2020**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

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, employees engaged in an economic strike that commenced less than 12 months before the election date, 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 service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period for eligibility; (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(l) 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 **Monday November 30, 2020**. The list must be accompanied by a certificate of service showing service on all parties. 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 these 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.

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

D. Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on December 9, 2020**. If the Employer does not receive copies of the notice by November 9, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on non-posting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. If special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

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 14 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 may be E-Filed through the Agency’s website but 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. 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 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: November 25, 2020



LISA Y. HENDERSON
ACTING REGIONAL DIRECTOR
Region 10
National Labor Relations Board
Harris Tower Suite 1000
223 Peachtree Street N.E.
Atlanta, GA 30303-1531