

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

**Newburg Egg Corp.,**

**Employer,**

**– and –**

**United Food and Commercial Workers Local 342,**

**Petitioner.**

**Case 03-RC-267766**

**Request for Review and  
Motion to Stay Election**

1. Newburg Egg Corp., the Employer in this matter (“Employer”), by and through its attorneys, Zabell & Collotta, P.C., hereby requests a review of the Decision and Direction of Election issued by Paul J. Murphy, Regional Director, National Labor Relations Board, Region 3, dated November 19, 2020.

2. This request for review is made pursuant to Section 102.67 of the National Labor Relations Board’s (the “Board”) Rules and Regulations and includes a motion to stay the election made pursuant to subsection (j)(1)(ii) of that same section.

3. By way of background, a 9(c) Petition was filed on October 19, 2020, wherein the United Food and Commercial Workers Local 342 sought representation of all full and regular part time production, cooking, shipping, receiving, cleaning, sanitation, quality control and maintenance employees, and excluding all other employees, including but not limited to drivers, supervisors, managers, owners, security guards and clerical/office employees. A representation hearing took place on November 6, 2020 and the singular issue discussed at the hearing was whether the election was to be held by manual or mail ballot. The employer filed a post-hearing brief on November 13, 2020.

4. The Regional Director issued a Decision and Direction of Election on November 19, 2020. The Regional Director's decision was limited to the issue of whether to conduct a manual or mail ballot election. Ultimately, the decision directed a mail ballot election citing to the Board's recent decision in *Aspirus Keweenaw*. The Regional Director's decision sets forth in relevant part:

The only matter in contention is whether to conduct a manual or mail ballot election. The Employer and the Petitioner have both stated a preference for a manual election. However, I have directed a mail ballot election because this is the safest and most appropriate method of conducting a prompt election in view of the extraordinary circumstances presented by the pandemic.

The Employer has proposed that a manual election be held in a presently unused 1100-square foot room on the second floor of a standalone building located across the street from the Employer's plant. The room is sufficiently large to allow for social distancing and has a separate entrance and exit. The employees have been provided with personal protective equipment, including facial coverings. The Employer has provided the Region with an affidavit stating that there has been no outbreak of Covid-19 at its facility and that no individuals present in the facility within the past fourteen days have tested positive for Covid-19.

While the Employer's precautions are laudable, I am directing a mail ballot election in accordance with the Board's recent decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020). *Aspirus Keweenaw* holds, in part, that a mail ballot election should be directed where the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing.

The Employer's facility is located in Woodridge, New York, which is in Sullivan County. The Employer argues in its brief that the 14-day trend in the number of new confirmed cases for Sullivan County is decreasing; specifically, the Employer points to fourteen new cases documented on October 30 as opposed to eight new cases documented on November 12. However, viewing the same data in the same way six days

later would suggest the opposite conclusion: there were fifteen new cases documented on November 18 as opposed to ten new cases on November 4.<sup>1</sup>

That being the case, I will take a more expansive view of overall trends in Sullivan County. Sullivan County's Covid-19 dashboard<sup>2</sup> shows a steady and irrefutable rise in confirmed cases from a low point in August to the present day: (graph in original omitted). On August 18, there were only two active cases in the county; on September 18, twenty-five cases; on October 19, thirty cases, and on November 18, 118 cases.

Pursuant to *Aspirus Keweenaw*, such a trend warrants a mail ballot election rather than a manual election.

### **Employer's Request for Review should be Granted**

5. The Regional Director's decision represents a departure from officially reported Board precedent and review should therefore be granted under section 102.67(d)(1)(ii) of the Board's Rules and Regulations.

6. Specifically, on November 9, 2020, the Board published its decision in *Aspirus Keweenaw*, providing guidance for Regional Directors regarding considerations to be made in determining whether an election should be conducted by mail-ballot, as opposed to manual ballot, because of COVID-19 related conditions. Case 18-RC-263185, 370 NLRB No. 45, 4-5 (2020).

7. The Board provided the following situations that would make the direction of a mail-ballot election appropriate: (1) The Agency 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

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<sup>1</sup> Footnote in original decision: "See <https://bao.arcgis.com/covid-19/jhu/county/36105.html> (last visited on November 19, 2020)".

<sup>2</sup> Footnote in original decision: "See <https://sullivanny.us/departments/publichealth/coronavirus> (last visited on November 19, 2020)".

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; and (6) Other similarly compelling circumstances. *Id.*

8. As set forth above, the Regional Director's decision to direct a mail ballot election is based entirely on factor number (2): the 14-day trend in the number of new confirmed cases in the county where the election is to be held.

9. In its post-hearing brief, the Employer argued that trends in Sullivan County regarding new infections and the infection rate remain fairly steady and are overall decreasing. Specifically, the Employer articulated that "while the 14-day trend in the number of new confirmed cases for Sullivan County is sporadic, with some associated peaks and valleys, overall it is decreasing, with fourteen (14) cases October 30, 2020 and down to eight (8) as of November 12, 2020."<sup>3</sup>

10. A general understanding of the data presented for consideration is important since the Regional Director characterizes the Employer's argument in a specific way so as to present "analogous" data that supports a mail ballot election. However, if truly analogous data were examined; i.e. the 14-day trend of new

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<sup>3</sup> Footnote in original: "Johns Hopkins University, COVID-19 Status Report for Sullivan, New York, last accessed on November 13, 2020, available at <https://bao.arcgis.com/covid-19/jhu/county/36105.html>"

confirmed cases in the county where the election is to take place, the result would be the same as presented by the Employer: trends in Sullivan County regarding new infections remain fairly steady.

11. Indeed, the Regional Director, citing only to the number of cases fourteen days prior to the decision (10), and one day prior (15), states that “viewing the same data in the same way ... would suggest” an overall increase. However, he does not refer to the number of new confirmed cases on any interceding days and significantly, does not conclude based on this 14-day trend that the purported increase warrants a mail ballot election.

12. Instead, the Regional Director departs from the guidance provided in *Aspirus Keweenaw*, and relies on an alternative analysis to determine that a mail ballot is warranted. Namely, the Regional Director relies on “a more expansive view of overall trends in Sullivan County”, which “shows [an] irrefutable rise in confirmed cases from a low point in August to the present day.”

13. This analysis is incongruous with the Board’s decision in *Aspirus Keweenaw* which states a mail ballot election may be warranted based upon 14-day trends of new confirmed cases, not based upon a three-month trend of overall confirmed cases. The Regional Director’s decision amounts to an abuse of discretion.

14. Reviewing the number of overall confirmed cases during an ongoing global pandemic will always yield an increase in confirmed cases. This remains true even where the 14-day trend is decreasing because with each new case, the number of overall cases increases.

15. Significantly, in his decision the Regional Director does not articulate the basis for departing from the established Board precedent and analyzing different data than that required by *Aspirus Keweenaw*. 370 NLRB No. 45, at 6.

16. An up-to-date review of the 14-day trend in new confirmed cases of Covid-19 in Sullivan County shows that the numbers still remain steady: oscillating from 8 – 25 new cases per day.<sup>4</sup> This was true when the Employer filed its post-hearing brief on November 13, 2020, and based upon the limited data contained in the decision and direction of election, was also true when the Regional Director issued his decision on November 19, 2020. Overall, this confirms that over three different 14-day snapshots, since October 30, 2020, new confirmed cases of Covid-19 in Sullivan County are not trending upwards, but rather remaining constant. This fact further supports a review of the Regional Director’s decision directing a mail ballot election.

17. Lastly, the Regional Director’s decision departed further from established Board precedent in that it did not consider the desires of the parties. The Board has held that even when a mail-ballot is appropriate, the “Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources.” *See Aspirus Keweenaw*, 370 NLRB No. 45, at p. 3; *citing San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998).

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<sup>4</sup> Johns Hopkins University, COVID-19 Status Report for Sullivan, New York shows the number of new confirmed cases from November 18, 2020 through December 2, 2020 in chronological order as follows: 15, 23, 13, 21, 13, 15, 15, 15, 14, 19, 10, 25, 11, 8, last accessed on December 2, 2020, available at <https://bao.arcgis.com/covid-19/jhu/county/36105.html>.

18. In the instant matter, both the Employer and the Union prefer a manual election. Although the ballots will be provided in both English and Spanish, the parties have genuine concerns regarding employee ability to read and understand the mail ballot. Likewise, both the Employer and the Union have expressed concerns regarding the employees being confused with the mail in process. This concern is coupled with the general concern regarding employee addresses. For many employees, they receive mail at a post office box address and/or the employee resides in a multi-person dwelling, decreasing the likelihood of mail arriving in a timely manner.

19. These factors all weigh in favor of a manual election and were argued before the Regional Director. However, while he acknowledges that the Employer and the Union have a stated preference for a manual election, these factors were not analyzed or considered in directing a mail ballot election.

20. The Regional Director's reliance upon Covid-19 data representing a three-month trend of overall confirmed cases, and ignoring all other relevant factors is a significant departure from officially reported Board precedent and amounts to an abuse of discretion. Accordingly, the Employer's request for review should be granted.

**Employer's Motion to Stay the Election Should be Granted**

21. The Employer's motion to stay the election pending the Board's decision on the Request for Review and any subsequently granted review should be granted.

22. Currently, pursuant to the Election Arrangements sent by the Regional Director on November 19, 2020, the Mail Ballots must be sent to voters on December 8, 2020 at 3:30 p.m.

23. A stay is warranted because even if the ballots are sent, returned and impounded, if the Employer's request for review is granted, the mail ballot process has the potential to negatively impact a subsequent manual election, if ultimately directed.

24. This potential negative impact is made more likely by the above-referenced concerns regarding employee ability to read and understand the mail ballot. Surely, receiving and returning the mail ballot, or alternatively, receiving the mail ballot and being told to disregard same would further confuse employees and has the potential to compromise the integrity of a manual election.

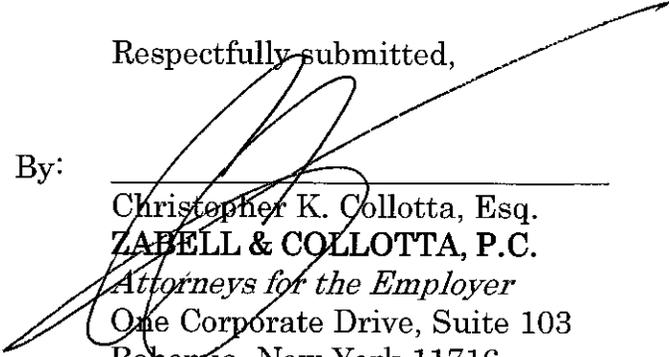
25. Therefore, there is a clear showing of necessity under the particular circumstances of this case that the Employer's motion to stay the election pending the Board's decision on the Request for Review and any subsequently granted review should be granted.

26. The Regional Director's reliance upon Covid-19 data representing a three-month trend of overall confirmed cases, while choosing to ignore all other relevant factors represents a significant departure from officially reported Board precedent and amounts to an abuse of discretion. Furthermore, a stay of the election is necessary in order to preserve the integrity of the election results.

27. Accordingly, the Employer's request for review and motion to stay the election should be granted in their entirety.

Dated: Bohemia, New York  
December 3, 2020

Respectfully submitted,

By: 

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