

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

**CEMEX CONSTRUCTION MATERIALS
FLORIDA, LLC**

Employer

and

Case 12-RC-270160

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION 173**

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

On December 14, 2020, International Brotherhood of Teamsters, Local Union 173 (the Petitioner) filed a representation petition in the above case with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a unit of full-time and regular part-time ready-mix drivers and operator loaders employed by Cemex Construction Materials Florida, LLC (the Employer)¹ at its facility located at 4415 15th Street East, Bradenton, Florida, excluding all clerical employees, dispatchers, guards, and supervisors as defined in the Act. Bradenton is located in Manatee County, Florida. There are approximately 18 ready-mix drivers and 1 operator loader in the petitioned-for unit.

In its Statement of Position, the Employer contends that the operator loader classification should be excluded from the unit based on “lack of community of interest and dual function.” In

¹ The correct legal names of the parties, as captioned above, appear in this Decision as stipulated at the hearing. The parties stipulated, and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The parties further stipulated, and I find, based on the following stipulated facts, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Employer, Cemex Construction Materials Florida, LLC, is a Delaware limited liability company with offices and places of business at various locations in the State of Florida, including an office and place of business located at 4415 15th Street East, Bradenton, Florida, the only location involved herein, and it is engaged in the business of providing cement, aggregate products, building materials and supplies to various customers. During the past 12 months, in conducting its business operations described above, the Employer purchased and received at its offices and places of business in the State of Florida goods valued in excess of \$50,000 directly from points located outside the State of Florida.

its Responsive Statement of Position the Petitioner contends that the operator loader shares a community of interest with the ready-mix drivers, is not a manager or supervisor, and should be included in the unit.

In its Statement of Position, the Employer also asserts that a manual election should be conducted. Specifically, the Employer contends that a safe manual election can be conducted notwithstanding the Covid-19 pandemic, because (1) it would adhere to the protocols for a safe manual election set forth in General Counsel Memorandum 20-10, *Suggested Manual Election Protocols* (July 6, 2020), (2) it has stringent coronavirus policies and procedures in effect, and (3) there have not been any confirmed positive cases of COVID-19 at its Bradenton facility since July 2020 and only two such cases since the pandemic began. The Employer further argues that none of what it refers to as the “proposed” standards set forth by the Board in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), support a mail ballot election. The Employer also asserts:

For example, whether Manatee County’s current 14-day lookback rate for positive tests exceed 5% of the total population, which it does not, is not the correct analysis to consider. More important is the actual experience of this operation since March 2020, when testing began. Over the past nine months, there have been two reported positive tests. Neither was traced to the operation. The last of these events was on [sic] July 2020. This Employer’s stringent COVID-19 protocols, implemented at all of the U.S. operations early in the Spring, have clearly aided in limiting contacts at work.

In its Responsive Statement of Position, the Petitioner contends that a mail ballot election should be conducted in view of health concerns that would be present in a manual election as a result of the Covid-19 pandemic. The Petitioner cited a December 26, 2020 article from the Bradenton Herald newspaper which states that the daily Covid-19 positivity rate for Manatee County was then 8.97 percent.

A hearing was held by videoconference technology on January 5, 2021. At the hearing the parties stipulated that the operator loader may vote in the election subject to challenge. In view of the parties' agreement that the operator loader may vote subject to challenge, the only issue to be decided is the method of conducting the election, i.e. by manual election or mail ballot election. The Employer filed a post-hearing brief, which I have carefully considered.

I. METHOD OF VOTING

A. Positions of the Parties

The Employer represents that it is an international company based in Mexico, with hundreds of locations in the United States including 111 locations in Florida, and over 9,000 employees in the United States, of whom approximately 2,500 work in Florida. The Employer asserts that safety is its top priority, that it developed and implemented stringent Covid-19 protocols to operate safely during the pandemic, and that it has seven safety managers in Florida, who implemented these protocols and provided employee education in these protocols at all locations, including the Bradenton ready-mix plant, in March and April 2020.² The Employer represents that its protocols are based on guidance from the Centers for Disease Control and Prevention, the World Health Organization, and other experts.

According to the Employer, its protocols include checking employees for high temperatures before they start work, a mandatory wearing of face masks and social distancing, regular cleaning of its facility and daily cleaning of its trucks, available hand sanitizer, and required posting of Covid-19 protocols. The Employer represents that each of its 18 ready-mix drivers has a regularly assigned truck and that the Employer has limited two-person driver

² Copies of the Employer's Covid-19 safety protocols were admitted in the record as part of the Employer's position that a manual election should be conducted.

training since March 2020, presumably in order reduce contact between employees. The Employer further asserts that the Bradenton plant received scores of 89 and 99 percent, respectively, when audits of its compliance with Covid-19 protocols were conducted in June and late November 2020, and corrections regarding implementation of the Employer's Covid-19 protocols were implemented within 48 hours of the June audit. The Employer further represents that a little over four percent of its 2,500 employees in Florida have tested positive for Covid-19, and asserts that this means the positivity rate among its employees is below five percent. The Employer represents that the second and most recent of the two positive Covid-19 cases at its Bradenton plant occurred over six months ago, in June or July 2020.³

The Employer proposes to conduct a manual election in a stand-alone 42 by 44 foot warehouse (approximately 1,848 square feet) at its Bradenton premises that has two entrances, with the warehouse garage door open,⁴ for 90 minutes to two hours, starting at 5:30 a.m. or 6:00 a.m., following all of the protocols in GC Memorandum 20-10. The Employer further proposes that the ballot box should be sealed after the election and the count of ballots conducted remotely by videoconference from the Regional office in Tampa on another day, shortly after the election. The Employer contends that because of the small size of the unit and the warehouse location, voters, observers, and the Board agent could safely maintain social distancing. The Employer further argues that a manual election is likely to result in a larger voter turnout than a mail ballot election.

³ The Employer made no representation about the extent to which its Florida employees were tested for Covid-19, so it is not possible to glean a meaningful positivity rate from the Employer's representation.

⁴ Photographs of the Employer's Bradenton premises and the warehouse were admitted in the record as part of the Employer's position that a manual election should be conducted.

The Petitioner seeks a mail ballot election because of surging Covid-19 outbreaks both locally and nationwide.

B. Covid-19 statistics for Manatee County

The Employer asserts in its brief that Covid-19 positive testing data reveals a 6 percent positivity rate for the period from December 19, 2020 through January 2, 2021, and that it determined that rate by eliminating test results for individuals who, according to the Employer, are unlikely to be in the workforce, including all tested persons 15 years old and younger, all tested persons 65 years old and older, and half of the tested persons between the ages of 14 through 25.⁵ The Employer asserts that conclusion is based on information from the Florida Department of Health, but cited no website or other authority, did not claim that the Florida Department of Health calculated the 6 percent figure, and did not “show the math” as to how it reached this result on its own. The Employer further asserted that there has been a large decrease in positive tests in Manatee County since January 1, 2021, which may show that the positivity rate for the “Manatee County workforce” is actually below 5 percent. The Employer cited no authority or specific information as to how it concluded that the positivity rate has declined since January 1.

The Florida Department of Health Covid-19 website shows that the 7-day Covid-19 positivity rate for Manatee County for the week starting on December 27, 2020 and ending on January 2, 2021 was 10.78 percent and the 7-day Covid-19 positivity rate for Manatee County for the week starting on January 3, 2021 and ending on January 9, 2021 was 10.74 percent. Accordingly, the Manatee County Covid-19 positivity rate for the 14-day period ending on

⁵ I note that the Employer’s age ranges of 15 and younger, and 14 through 25, overlap, and the Employer provided no explanation for this.

January 9, 2021 was 10.76 percent.⁶ In addition, according to the Florida Department of Health Covid-19 website there were 3,280 confirmed positive Covid-19 cases in Manatee County during the 14-day period starting on December 30, 2020 and ending on January 12, 2021, whereas there were 2,512 confirmed positive Covid-19 cases in Manatee County during the previous 14-day period from December 16 to December 29, 2020.⁷ This is the most recent information available regarding positivity rates and numbers of confirmed cases in Manatee County.

C. Region 12 elections among the Employer’s employees during the pandemic

I take administrative notice that since the outbreak of the Covid-19 pandemic in March 2020, Region 12 has conducted three representation elections involving ready-mix drivers employed by the Employer. These elections were conducted among employees of the Employer who work at Employer facilities in Port Charlotte, Fort Myers and Naples, Florida. These facilities are south of Bradenton, but also in southwest Florida.⁸ The elections in these three cases were conducted pursuant to petitions filed by International Brotherhood of Teamsters, Local 79. In each of these cases, mail ballot elections were conducted pursuant to Stipulated Election Agreements reached by the parties.

In the mail ballot election conducted among a unit of ready mix drivers, operator loaders, and general drivers employed at three Naples, Florida facilities of the Employer in Case 12-RC-257813, from May 18 to June 12, 2020, 31 employees cast valid ballots out of a unit of approximately 32 eligible voters, and a 32nd ballot envelope that was void was received. Thus,

⁶ See <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429>, select Manatee County, click on the Florida Testing tab, and see the graph at the bottom of the page.

⁷ See <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429>, select Manatee County, click on the Cases by County tab, and add the number of cases during each 14-day period.

⁸ According to Google Maps directions, <https://www.google.com/maps/dir///@21.0387217,105.7817828,19z> the Bradenton facility (4415 15th Street E) is approximately 52 miles north of the Port Charlotte facility (19300 Peachland Blvd., Port Charlotte), 103 miles north of the Fort Myers facility (15201 Alico Road, Fort Myers), and 113 miles north of the Wiggins Pass Road, Naples facility (1425 Wiggins Pass Road, Naples).

there was approximately 97 percent participation, not counting the void ballot. In the mail ballot election in Case 12-RC-261559, held from July 22 to August 12, 2020, in a unit of ready mix drivers and operator loaders at a Fort Myers, Florida facility of the Employer, 19 of the approximately 20 eligible voters, or 95 percent, cast valid mail ballots. In the mail ballot election in Case 12-RC-268057, held from December 3 to December 30, 2020, among a unit of ready-mix drivers and operator loaders, and 2 block drivers who were permitted to vote subject to challenge, at a facility of the Employer in Port Charlotte, Florida, 12 of the total of approximately 14 eligible voters, or approximately 86 percent, cast valid ballots.

II. ANALYSIS

Preliminarily, with respect to the Employer's argument that it was improperly denied the right to call witnesses regarding the method of voting, Section 102.66(g) of the Board's Rules and Regulations permits parties to state their positions as to the "type, date(s), time(s), and location of the election," but does not permit them to present witness testimony or otherwise litigate those matters. See also, *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 6, fn.27 (2020). At the hearing and in its brief the Employer argues that it was improperly denied the right to call witnesses to testify in support of its position that a manual election should be conducted, and that it should have received notice to that effect before the hearing. However, in view of Section 102.66(g) of the Board's Rules and Regulations the Employer was not denied due process because it had no right to call witnesses regarding the method of voting. This is also clear from the guidelines in the NLRB Casehandling Manual (Part Two), Representation Proceedings, Sections 11228 and 11301.4; see also, *Halliburton Services*, 265 NLRB 1154, 1154 (1982); *Manchester Knitted Fashions*, 108 NLRB 1366, 1367 (1954). I further note that the Employer had ample opportunity to set forth its position regarding the method of voting,

including in its Statement of Position, its representations made and exhibits presented at the hearing, and in its brief. The Employer's position has been fully considered herein.

I have determined that a mail ballot election will be held because of the extraordinary pandemic circumstances currently existing in Manatee County, Florida, where the Employer's facility is located. On November 9, 2020, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), in which, after affirming the Board's longstanding policy favoring manual elections, it provided guidance regarding five specific situations that normally suggest that a mail ballot election is appropriate because of the extraordinary circumstances presented by the COVID-19 pandemic, or "other similarly compelling circumstances." *Id.*, slip op. at 4-7. A Regional Director who exercises his or her discretion to direct a mail ballot election when one or more of these situations exists will not have abused his or her discretion. *Id.*, slip op. at 8.

The second specific situation identified in *Aspirus Keweenaw* includes two separate factors, either of which normally warrants a mail ballot election. This situation occurs when "[e]ither 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." *Id.*, slip op. at 5-6. Both of these factors suggest that a mail ballot election is appropriate in this case. The positivity rate is determined by comparing the number of positive Covid-19 tests with the total number of Covid-19 tests administered in the county during the 14-day period in question. *Id.*, slip op. at 5.⁹

In Manatee County, Florida, where the Employer's facility is located, the Covid-19 testing positivity rate, based on the number of positive and total tests in the county during each of

⁹ Contrary to the assertion in the Employer's Statement of Position, Covid-19 positivity rates are not based on a comparison between the number of positive tests and the number of persons in the population as a whole.

the two most recent 7-day periods for which the Florida Department of Health provides the county positivity rate, exceeds 10 percent, and thus is more than double the 5 percent rate at which the Board finds a mail ballot election appropriate. The standard set forth by the Board in *Aspirus Keweenaw* does not attempt to discount positive tests attributable to persons who are not in the workforce, as the Employer claims to have done. The obvious reason for this is that people in the workforce may be infected with Covid-19 by people in the community who are not in the workforce. The Employer does not contend that its employees work in a “bubble.” Rather, its ready-mix drivers are obviously required to leave the Bradenton plant daily to make deliveries, and they also spend time off duty, living in their communities. Thus, they may be exposed to Covid-19 through community spread. For these reasons, the standard regarding the positivity rate set by the Board appropriately includes all persons tested in a given county. Moreover, the Employer concedes that the Manatee County positivity rate it deems relevant is above the 5 percent level pursuant to which the Board held that a Regional Director is authorized to direct a mail ballot election. *Id.*, slip op. at 5-6.

In addition, the 14-day trend in the number of new confirmed cases of Covid-19 in Manatee County has increased by 768 cases, approximately 30.6 percent, to 3,280 cases during the most recent 14-day period ending on January 12, 2021, from 2,512 cases during the previous 14-day period ending on December 29, 2020. Thus, the Employer’s claim that there has been a significant decrease in positive Covid-19 cases in Manatee County since January 1, 2021, is contradicted by the statistics of the Florida Department of Health.

In summary, both factors of the second situation described in *Aspirus Keweenaw* suggest that a mail ballot election is appropriate in this case, and in these circumstances, the Board has found that the Regional Director has the discretion to direct a mail ballot election.

Notwithstanding the Employer's plan to conduct a safe manual election, I find that for the health and safety of all involved, a mail ballot election should be directed because of the extraordinary circumstances of the Covid-19 pandemic in Manatee County at this time.

In making this decision, I do not rely on the extent of voter turnout in the three previous elections conducted by Region 12 among the Employer's employees during the pandemic. However, the Region's mail ballot experience in representation cases to which the Employer has been a party during the pandemic, all of which involved employees in the same job classifications as are involved herein, at facilities in the same general area of Florida as the Bradenton facility, shows that in aggregate, 62 of approximately 66 eligible voters (not counting the 32nd employee in Case 12-RC-257813 who apparently attempted to vote but cast a void ballot), or approximately 94 percent, voted. This very high level of voter turnout suggests that there is no need for concern that a mail ballot election will result in lower turnout than would be obtained in a manual election.

III. CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are 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 in this case.
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 concerning 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. As stipulated by the parties, no collective-bargaining agreement covers the employees in the petitioned-for unit, and no other bar exists to conducting an election.

6. I find that 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 regular part-time ready-mix drivers employed by Cemex Construction Materials Florida, LLC (the Employer) at its facility located at 4415 15th Street East, Bradenton, Florida; excluding all clerical employees, dispatchers, guards, and supervisors as defined in the Act.

Others permitted to vote: At this time, no decision has been made regarding whether the operator loader classification is included in, or excluded from, the bargaining unit, and individuals in this classification may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election by mail 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 International Brotherhood of Teamsters, Local Union 173.

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 and to the operator loader who is permitted to vote subject to challenge. At **9:30 a.m. on January 26, 2021**, ballots will be mailed to voters by the National Labor Relations Board, Region 12, from its office at **201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602-5824**. 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.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **February 3, 2021**, should communicate immediately with the National Labor

Relations Board by either calling the Region 12 Office at **(202) 615-2279** or **(813) 228-2661** or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the **Region 12 office, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida** on **February 23, 2021**, at **10:00 a.m.** In order to be valid and counted, the returned ballots must be received in the **Region 12 office in Tampa** prior to the counting of the ballots. Due to the above-described extraordinary circumstances of the Covid-19 pandemic, I further direct that the ballot count will take place remotely by videoconference on an electronic video platform such as Zoom for Government.

The Notices of Election and ballots will be printed in English and Spanish.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending January 9, 2021, including employees who did not work during that period because they were ill, on vacation, or 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, 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.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the operator loader classification whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (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. The Employer must also include in a separate section of that list the same information for those individuals who, according to this direction of election, will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **January 15, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.** The Petitioner waived five of the ten days allotted to review the voter list prior to the date of the election.¹⁰

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

¹⁰ Although the Employer stated on the record, perhaps as a joke, that it did not waive any time for the Petitioner to review the voter list, the Employer's position on this question is not relevant.

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.

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 accompanying this Decision 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 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: January 13, 2021.



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