

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**Tate's Bake Shop, Inc.**

**Employer**

**and**

**Case 29-RC-271138**

**Amalgamated Local 298, Eastern States Joint Board,  
International Union of Allied, Novelty and  
Production Workers, AFL-CIO**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On January 7, 2021,<sup>1</sup> Amalgamated Local 298, Eastern States Joint Board, International Union of Allied, Novelty and Production Workers, AFL-CIO (the Petitioner), filed a representation petition, pursuant to Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees of Tate's Bake Shop, Inc. (the Employer), at its facilities located in East Moriches and West Hampton Beach, New York. A hearing officer of the National Labor Relations Board (the Board) conducted a hearing in this matter by videoconference on January 29, and the Employer timely submitted a post-hearing brief.

The sole issue in this matter is whether to conduct an election by manual or mail ballot. The Employer contends that a manual election is appropriate. The Petitioner also requests a manual election but is amenable to a mail-ballot election. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated to me the authority to decide this matter.

Having carefully considered the entire record, I am directing an election by mail ballot. To give context for my discussion of this matter, I begin with facts relating to the Employer's operations. I then review the Board's decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). After that review, I summarize the parties' positions. Following those summaries, I discuss my reasons for directing a mail-ballot election. I conclude with my findings.

**The Employer's Operations**

The Employer, a New York corporation, manufactures baked goods, including pies, cakes, and cookies. The Employer's principal office and primary manufacturing plant are located at 62 Pine Street in East Moriches, New York, and its warehouse is located at 220 Rogers Way, Suite A, in West Hampton Beach, New York.<sup>2</sup> Both of these locations are in Suffolk County of New

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<sup>1</sup> All dates are for the year 2021 unless otherwise noted.

<sup>2</sup> The Employer also operates a small retail bake shop in Southampton, New York. The record shows that no employees in the petitioned-for unit work at the bake shop.

York. The Petitioner seeks to represent approximately 432 employees working at these locations: 415 employees at the manufacturing plant in East Moriches and 17 employees at the warehouse in West Hampton Beach.

Since the United States federal government declared a national emergency in the face of the COVID-19 pandemic on March 13, 2020, the Employer has not closed its operations due to any infection or outbreak among its employees. As of the date of the hearing in this matter, 12 of the employees in the sought-after unit were going through a quarantine period due to positive COVID-19 tests. Based on the Employer's own tracing of the COVID-19 virus through its facility, the Employer has determined that those quarantining employees did not come into contact with the virus within the Employer's facilities.

### **The Board's Decision in *Aspirus Keweenaw***

In *Aspirus Keweenaw*, 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." *Id.*, slip op. at 4. 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 avoids 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.

## The Parties' Positions

### A. The Employer's Position

The Employer argues that a mail-ballot election is not appropriate because none of the situations detailed by the Board in *Aspirus Keweenaw* are present in this case.<sup>3</sup> I address each of these situations in the next section on the election method.

In addition to addressing the circumstances listed in *Aspirus Keweenaw*, the Employer further argues that mail balloting negatively impacts non-English speaking voters and results in lower overall voter turnout. Regarding non-English speakers, the Employer notes that the Petitioner's counsel stated her understanding at hearing that many of the employees are Spanish speaking and unable to read in their own language, which would result in employees' confusion in completing and returning their ballots. With respect to lower overall voter turnout, the Employer cites to the Board's general observations of voter turnout in *Aspirus Keweenaw*, in which the Board stated that participation was lower in mail-ballot elections than in manual elections by 30 percent prior to March 15, 2020, and lower by 20 percent between March and November 2020.

For election arrangements, the Employer proposes taking the following precautions in order to ensure a safe manual election:

1. The Employer will provide a spacious polling area, sufficient to accommodate social distancing of six feet, which will be marked on the floor with tape to ensure separation of observers, voters, and Board agents.
2. The Employer will have a separate entrance and a separate exit for voters, with markings to depict a safe flow of traffic through the polling area.
3. The Employer will separate tables six feet apart so the Board agents, observers, voting booth, and ballot box are at least six feet apart.
4. The Employer will provide plexiglass barriers of sufficient size to separate observers from Board agents, and to separate observers and Board agents from voters.
5. The Employer will provide masks, hand sanitizer, gloves, and wipes.
6. The Employer will allow inspection of the polling area to be conducted by video conference at least 24 hours prior to the election so that the Board agents and parties may inspect the polling area.

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<sup>3</sup> At the time of the hearing and the Employer's brief, the 14-day testing positivity rate in Suffolk County was higher than 5 percent. Citing to data from an individual at the University of Connecticut, the Employer argued that predicted positivity rates for COVID-19 would be below 5 percent by February 11 and would continue to fall. I do not pass on the appropriateness of such predictions because, as detailed later in this decision, the 14-day testing positivity rate is currently below 5 percent.

7. The Employer will, in accordance with CDC guidance, require that all voters, observers, party representatives, and other participants wear masks during all phases of the election.
8. The Employer will provide the Region with the required certifications regarding positive COVID-19 tests, if any, as detailed in GC Memo 20-10.

Specific to the polling area, the Employer proposes holding the election in its 3,000 square-foot Cakes & Pies Building at its manufacturing facility in East Moriches.<sup>4</sup> Within the Cake & Pies Building, approximately 1,500 square feet may be dedicated to the voting area. The Employer will cease production and vacate the building for the duration of each voting session. The building has exhaust fans, which the Employer will continue to run for the election. The Employer will also clean the intake filters to ensure clean air quality. The Employer proposes use of a voting schedule with release times. All individuals entering the building will go through a screening process, which includes questions to assess potential exposure to COVID-19 and a temperature check. Individuals who pass the screening are provided a colored wristband, the color of which changes from day to day.

The Employer proposes having a manual election on a Thursday due to the largest number of employees being present at its plant to pick up their paychecks. The Employer suggests three time slots to accommodate the large number of voters and the COVID-19 safety protocols: 6 a.m. to 8 a.m., 12 noon to 4 p.m., and 10 p.m. to 12 midnight.

Alternatively, the Employer suggests a modified mail-ballot election in which mail ballots are sent to voters, and the voters return their ballots to a ballot box at the Employer's facility on a predetermined date. The ballot box and voting area would be set up by a Board agent in the presence of a representative from each party. After preparing the box and voting area, the Board agent would leave, and a second Board agent would monitor the voting area remotely. After the conclusion of the final voting session, a Board agent would collect the box from the Employer's facility. The Employer did not suggest a method for the ballot count under this proposed method.

## **B. The Petitioner's Position**

The Petitioner stated its preference for a manual election at hearing, noting that it is also willing to proceeding with a mail-ballot election. The Petitioner also objected to the Employer's modified mail-ballot election proposal as described above. The Petitioner did not file a post-hearing brief.

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<sup>4</sup> I note that the Employer has not proposed a second polling location for its warehouse in West Hampton Beach. Using the fastest route during usual traffic according to Google Maps (<https://www.google.com/maps>), the distance between the Employer's manufacturing plant and its warehouse is approximately 9.7 miles. *Bud Antle, Inc.*, 361 NLRB 873 (2014), incorporating by reference *Bud Antle, Inc.*, 359 NLRB 1257, 1257 fn. 3 (2013) (the Board may take administrative notice of approximate distances based on Google Maps).

### The Election Method

Having carefully considered the entire record in this matter, I am directing a mail-ballot election. As discussed below, I find that the appearance of COVID-19 variants in New York City and Suffolk County constitute a compelling consideration under the sixth situation detailed in *Aspirus Keweenaw* and warrants the use of mail ballots.

Before considering this case in light of *Aspirus Keweenaw*, I note that I am unpersuaded by the Employer's arguments concerning the literacy of its employees and the possibility of lower voter turnout in mail-ballot elections. First, the Board has previously denied review in a case where the employer raised a concern regarding the literacy of some of its employees. In that case, the Regional Director stated, "With regard to the issue raised by the Employer as to the literacy of some of its employees, the undersigned is of the view that the issue of an employee's literacy is the same whether the election is conducted manually or by mail." *North American Plastics Corp.*, 326 NLRB 835, 838 (1998). Furthermore, neither party presented any evidence with respect to employees' literacy. In the absence of any such evidence, I do not find this concern warrants a manual election.<sup>5</sup>

Second, concerning voter turnout in mail-ballot elections, the Board in *Aspirus Keweenaw* specifically spoke to this issue in establishing its guidelines for the use of mail ballots during the pandemic. The Board stated as follows:

To be clear, although the generally lower voter turnout in mail-ballot elections supports the Board's historic preference for manual elections, it is not a relevant consideration in assessing whether a Regional Director has abused his or her discretion by directing a mail-ballot election in a specific case. We also recognize that the very circumstances that ordinarily support conducting a mail-ballot election may affect voter participation.

*Aspirus Keweenaw*, above, slip op. at 2 fn. 6. Consequently, this argument is not persuasive.

Turning now to the matter of the COVID-19 pandemic's effect on this case, I take administrative notice of the current state of the pandemic. As of February 18, 2021, there have been over 27.8 million cases of COVID-19 in the United States and 491,411 deaths.<sup>6</sup> Of all the counties within the United States, Suffolk County has the 17th largest number of cases and the 18th largest number of deaths.<sup>7</sup>

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<sup>5</sup> Either party may present evidence of actual disenfranchisement of voters, if applicable, in post-election objections.

<sup>6</sup> See <https://coronavirus.jhu.edu/map.html>.

<sup>7</sup> See <https://coronavirus.jhu.edu/us-map>.

As noted above, the Board has laid out five specific situations in which Regional Directors should consider a mail-ballot election during the pandemic. The Board also included a sixth situation, “other similarly compelling considerations,” acknowledging that the five specified situations “are not exclusive or exhaustive,” and that the Board “will consider... whether [other] circumstances similarly warrant an exception to [the Board’s] preference for manual elections.” *Id.*, slip op. at 7-8.

Under the first five situations of *Aspirus Keweenaw*, consideration of a mail-ballot election is not warranted. First, the Region 29 Office is not on a mandatory telework status.<sup>8</sup> Second, neither the 14-day trend in new confirmed cases of COVID-19 nor the 14-day testing positivity rate in Suffolk County are trending sufficiently upward.<sup>9</sup> Third, the record does not reflect whether the Employer meets the mandatory New York State guidelines for manufacturers to operate at no more than 50 percent occupancy, nor does the record reflect whether the Employer meets the state’s exception to this mandatory guideline in order to safely conduct its core operations.<sup>10</sup> Fourth, the

<sup>8</sup> See <https://www.nlr.gov/field-office-status>.

<sup>9</sup> As of February 21, the 14-day testing positivity rate in Suffolk county is 4.8 percent. See <https://forward.ny.gov/percentage-positive-results-county-dashboard>. The table below contains the number of new cases per day in Suffolk County reported at <https://bao.arcgis.com/covid-19/jhu/county/36103.html> as of February 23. I have calculated the change in new cases from the previous day and the overall average change in new cases over the 14-day period.

Date	Number of New Cases	Change in New Cases from Previous Day	Average Daily Change in New Cases, Previous 14 Days
February 22	563	-129	-23.85
February 21	513	64	
February 20	602	1	
February 19	714	-246	
February 18	461	47	
February 17	590	-86	
February 16	526	-18	
February 15	525	289	
February 14	771	-173	
February 13	724	16	
February 12	810	-158	
February 11	828	-246	
February 10	539	329	
February 9	712		

<sup>10</sup> See <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ManufacturingShortGuidelines.pdf>. The document states, “These guidelines apply to all manufacturing businesses in regions of New York that have been permitted to reopen, as well as to manufacturing businesses statewide

Employer's proposed safety protocols for a manual election comply with the requirements of GC Memo 20-10. Fifth, while the record shows that some employees were quarantining at the time of the hearing, there is no other evidence of an outbreak at the Employer's facilities.

Despite the above, I am concerned by the appearance of COVID-19 virus variants in New York City and in Suffolk County. On February 15, New York Governor Andrew Cuomo announced that a patient in a New York City hospital tested positive for the South African variant of the COVID-19 virus.<sup>11</sup> Governor Cuomo remarked that there is concern regarding the lethality of the South African variant and how it may relate to ongoing vaccination efforts for COVID-19. The Center for Disease Control and Prevention (CDC) notes that there is “[c]urrently no evidence to suggest that [the South African] variant has any impact on disease severity.”<sup>12</sup> Additionally, Governor Cuomo announced on January 20 that two cases of the U.K. variant of the COVID-19 virus were identified in Suffolk County.<sup>13</sup> The CDC notes that the U.K. variant “is associated with increased transmissibility (i.e., more efficient and rapid transmission),” and scientists from the U.K. have reported that the variant “may be associated with an increased risk of death compared with other variants.”<sup>14</sup> Because these variants are now present in the New York metropolitan area, including Suffolk County, and because some reports raise a concern as to the increased chance of transmission or lethality with these variants, I find these circumstances constitute a compelling consideration under the sixth factor of *Aspirus Keweenaw* that warrants an exception to the Board's preference for manual elections. Accordingly, I am directing a mail-ballot election in this matter.

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that were previously permitted to operate as essential.” The record reflects that the Employer was deemed one such essential business.

<sup>11</sup> See <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-21>.

<sup>12</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html>.

<sup>13</sup> See <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-15>.

<sup>14</sup> See link at fn. 10 above.

## CONCLUSIONS AND FINDINGS

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:

**Included:** All full-time and regular part-time Packers, Depositors, Runners, Mixers, Bakers, Team Leads, Sanitation employees, Warehouse employees, Maintenance employees, and Band Oven Operators employed by the Employer at its facilities located at 62 Pine Street, East Moriches, New York, and at 220 Rogers Way, Suite A, West Hampton Beach, New York,

**Excluded:** All office clerical employees, confidential employees, other employees, and supervisors as defined by the Act.

## 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 Amalgamated Local 298, Eastern States Joint Board, International Union of Allied, Novelty and Production Workers, AFL-CIO. Both the ballots and notices will be in English and Spanish.

### A. Election Details

I have determined that a mail ballot election will be held. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the National Labor Relations Board, Region 29, on **March 26, 2021**. 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 mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by close of business on **April 21, 2021**.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact **Shao Chen** via telephone at **(718) 765-6186** or via e-mail at **shao.chen@nlrb.gov** by no later than 5:00 p.m. on **April 6, 2021** in order to arrange for another mail ballot kit to be sent to that employee.

### **B. Voting Eligibility**

Eligible to vote in the election are those employees in the unit who were employed during the payroll period ending immediately before **February 21, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in any 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 which commenced less than 12 months before the date of the first election, 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; (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 **February 26, 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.**

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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlrb.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.nlrb.gov](http://www.nlrb.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.

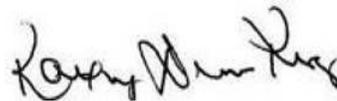
### **RIGHT TO REQUEST REVIEW**

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](http://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: February 24, 2021



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