

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

HOOD RIVER DISTILLERS, INC.

Employer

and

Case 19-RD-271944

DAVID COONTZ, an Individual

Petitioner

and

TEAMSTERS LOCAL UNION NO. 670¹

Union

DECISION AND DIRECTION OF ELECTION

On January 28, 2021,² David Coontz (Petitioner) filed a representation petition (the Petition) under § 9(c) of the National Labor Relations Act (the Act) seeking to decertify Teamsters Local Union No. 670 (Union) as the exclusive collective bargaining representative of a bargaining unit of employees (Unit) employed by Hood River Distillers, Inc. (Employer) at its facility located in Hood River, Oregon.

Neither the scope nor the composition of the bargaining unit is in dispute. Further, the parties agree a mail-ballot election is appropriate under the circumstances of this case. However, due to an ongoing labor dispute, the parties disagree regarding the voting eligibility of various individuals. Additionally, having requested that the Petition be blocked by pending unfair labor practice charges, the Union makes several arguments why an election should not take place.

A hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing on February 23. The hearing officer did not allow the parties to present evidence regarding voting eligibility but did allow the parties to state their respective positions on the record. The parties were also allowed to submit briefs addressing their positions, and the Employer and the Union both filed briefs with me after the conclusion of the hearing.

As explained below, based on the arguments of the parties and relevant Board law, I find conducting the petitioned-for election is consistent with the Rules and Regulations of the National Labor Relations Board (Rules and Regulations). I further find the issues raised regarding voting eligibility are not appropriate for resolution at the pre-hearing stage. Instead, as explained fully below, the Board has directed that these issues are appropriately resolved by way of post-election proceedings. Accordingly, I have directed the petitioned-for mail ballot election, permitting all

¹ The names of the parties appear as amended at hearing.

² All dates 2021 unless otherwise indicated.

employees whose eligibility is in dispute to vote, and the parties are free to challenge the eligibility of voters consistent with their positions to preserve the issues of employee eligibility.

RECORD EVIDENCE AND POSITIONS OF THE PARTIES

The Employer is engaged in the business of producing and distributing distilled spirits from its Hood River facility, and the Union has represented the employees in the Unit for approximately 50 years. The most recent collective bargaining agreement covering the Unit had effective dates of March 1, 2015, through February 28, 2019.

At hearing, the hearing officer took administrative notice of the pleadings in the ongoing unfair labor practice cases involving the Union and Employer. Although separate from this case, those pleadings contain allegations that provide an outline of the labor dispute that forms the basis for the parties' arguments regarding voting eligibility. In short, on or about May 6, 2020, certain employees in the Unit engaged in a strike. The Employer hired replacement workers, but on or about August 27, 2020, the striking employees made an unconditional offer to return to work. The Employer placed the strikers on a "rehire list," and to date some have returned to work, but replacement workers also continue to work at the facility.

The Union filed several unfair labor practice charges, subsequently consolidated on December 1, 2020, in an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. This was followed by an Order Further Consolidating Cases, Second Consolidated Complaint, and Notice of Hearing dated February 4, and was then amended on February 24. A hearing before an Administrative Law Judge of the Board is scheduled to begin on May 25. Based on the Union's charges, the Board also authorized filing for injunctive relief under §10(j) of the Act and, on February 19, I did so in the United States District Court, District of Oregon, *Hooks v. Hood River Distillers, Inc.*, Case No. 3:21-cv-00268. A hearing in that matter is set for April 2.

As noted above, on January 28, Petitioner filed the Petition seeking to decertify the Union. Consistent with §102.63(b) of the Rules and Regulations, the Employer submitted a Statement of Position with the Region regarding the Petition. This document contains a list of all employees in the Unit as of the payroll period preceding the filing of the petition who remained employed at the time of filing. This list identified 49 employees, 30 identified as currently employed at the Employer's facility, 12 identified as on a "rehire list," 4 identified as "quit/declined offer of rehire," and 3 identified as "ineligible for rehire (terminated and/or position eliminated)." At hearing the Employer added another name to the list of employees currently employed at the Employer's facility, bringing the total to 50 identified employees.

The Employer and Petitioner maintain that the 31 current employees are eligible to vote in the election. Additionally, the Employer and Petitioner do not dispute the eligibility of the 12 employees identified on the "rehire list." The Employer maintains that the remaining 7 individuals, employees who are alleged to have quit, declined an offer of rehire, retired, been terminated, or had their position eliminated, are not eligible to vote. Petitioner agrees, apart from the employee in the position the Employer maintains was eliminated, as Petitioner has no knowledge of that situation.

The Union has requested that the previously filed unfair labor practices block processing of the Petition. However, if the Petition does result in an election, the Union argues that the 31 employees currently employed at the facility consist of replacement workers and recalled strikers. The Union asserts the approximately 7 recalled strikers are eligible to vote, but that the other 24 employees are replacements not eligible to vote under the Board's traditional approach. The Union also makes an alternative argument of ineligibility based on the ongoing litigation, as it contends all strikers are unfair labor practice strikers. Regarding the 4 individuals identified as "quit/declined offer of rehire" the Union does not dispute they are ineligible. The Union does maintain that the remaining 3 employees are eligible.

In sum, of the 50 employees identified on the Employer's list, as amended at hearing, the parties do not dispute the voting eligibility of 23. These include 7 current employees and 12 employees on the rehire list, who are eligible to vote, and 4 employees identified as "quit/declined offer of rehire," who are ineligible. The eligibility of the remaining 27 employees on the list, the 24 replacement workers and the 3 employees identified as "ineligible for rehire (terminated and/or position eliminated)," are in dispute.

ANALYSIS

The Act gives the Board responsibility for processing both representation and unfair labor practice cases. While frequently separate, the filing of a petition during the pendency of an unfair labor practice charge, or vice versa, brings the two together and creates questions regarding the manner in which the petition is processed. Because the party filing the unfair labor practice charge will often request the charge block the processing of the petition, this decision is referred to as a determination on "blocking charges."

1. Election Procedures

The Board's rule addressing blocking charges was recently revised. Section 103.20 of the Rules and Regulations identifies two types of blocking charges, neither of which delay the conduct of the election, but which, under certain circumstances, may delay the vote count and/or a certification. Charges referred to as "paragraph (c)" charges, identified in § 103.20(c), are those that challenge the circumstances surrounding the petition or the showing of interest, or that allege an employer has dominated a union and seeks to disestablish a bargaining relationship. *NLRB Casehandling Manual (Part Two) Representation Proceedings*, § 11730.2. In these circumstances, a regional director is compelled to impound the ballots at the conclusion of the election and, if complaint issues, then the ballots shall continue to be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition.

"Paragraph (b)" charges are all other blocking charges, and under § 102.30(b), in these cases an election is held and at the conclusion of the election the ballots are promptly opened and counted. *NLRB Casehandling Manual (Part Two) Representation Proceedings*, § 11730.3.

Having reviewed the Union's charges I find they do not contain allegations that challenge the circumstances surrounding the petition or the showing of interest, or that allege an employer has dominated a union and seeks to disestablish a bargaining relationship, allegations that would implicate impounding the ballots under § 102.30(c). Accordingly, I have ordered the petitioned-for election, and at the conclusion of the election the ballots will be opened and counted, and a

tally of ballots will issue. The question of certification to be resolved after a final determination regarding the charges and the effect, if any, the charges have on the election petition.³

2. Voting Eligibility

Determining whether a striking employee is eligible to vote in a representation proceeding first presents the question of whether the employee is an unfair labor practice or an economic striker. An unfair labor practice striker is eligible to vote, but an employee is not considered an unfair labor practice striker until the Board affirmatively makes this determination. *Bright Foods, Inc.*, 126 NLRB 553, 554 (1960); see also *Times Square Stores Corp.*, 79 NLRB 361, 364 (1948). Where the Board has not made such a determination, a striker is presumed to be an economic striker; still eligible to vote under § 9(c)(3) of the Act, but subject to a party rebutting the presumption of continued employment. See *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962).

The evidence that establishes an employee is not an economic striker, but instead has abandoned their employment, is determined on a case-by-case basis, but mere acceptance of other employment alone is not sufficient. *Pacific Tile & Porcelain Co.* at 1359–1360; see also *National Gypsum Co.*, 133 NLRB 1492, 1493 (1961); *Akron Engraving Co.*, 170 NLRB 232, 233–234 (1968). An economic striker may also be ineligible to vote if a party demonstrates their job has been eliminated for valid, substantial, non-strike-related economic reasons. *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989); see also *St. Joe Minerals Corp.*, 295 NLRB 517 (1989), but see *Globe Molded Plastics Co.*, 200 NLRB 377 (1972); *Omahaline Hydraulics Co.*, 340 NLRB 916 (2003). Finally, economic strikers may also lose their eligibility if they are discharged, or the employer refuses to reinstate them, for misconduct rendering them unsuitable for reemployment. *Lamb-Grays Harbor Co.* at 357.

Replacement workers, hired to replace economic strikers, present a parallel question of eligibility. The Board presumes that replacements hired for strikers are temporary employees, but an employer may overcome this presumption by showing a mutual understanding between itself and the replacement that they are permanent. *O. E. Butterfield, Inc.*, 319 NLRB 1004 (1995). Temporary replacements are not eligible to vote. *Harter Equipment*, 293 NLRB 647 (1989). Permanent replacements are eligible to vote where a strike is called after the eligibility date and they are employed on the date of the election. *Macy's Missouri-Kansas Division*, 173 NLRB 1500, 1501 (1969).

Eligibility questions regarding strikers and replacements, like those discussed above, are normally deferred until after the election for disposition by way of challenges. *Bright Foods, Inc.*, *supra* at 553; *Pipe Machinery Co.*, 76 NLRB 247 (1948).

Both parties have taken positions regarding the eligibility of certain employees to vote in the election. However, as noted above, these voting eligibility questions are properly deferred to post-election proceedings. Accordingly, I affirm the hearing officer's decision to preclude the parties from presenting evidence regarding eligibility at the hearing. I will direct the petitioned-for

³ To the extent the Union argues I dismiss the Petition consistent with the reasoning applied in the Regional Director's Supplemental Decision and Order of November 9, 2020, in Case 07-RD-264330, *Rieth-Riley Construction Co.*, I note the Board granted the employer and petitioner's requests for review in that case on February 8, 2021, as they raised substantial issues warranting review, "especially with respect to whether the Regional Director's decision to dismiss the petitions is consistent with Section 103.20 of the Board's Rules and Regulations."

election, and the parties are free to challenge the eligibility of voters consistent with their positions. Assuming the challenges are determinative, the issues will be resolved at a post-election proceeding.

Conducting a ballot count and issuing a tally of ballots allows both the final determination on any blocking charges *and* any voting eligibility issue to be addressed, if necessary, by an Administrative Law Judge.⁴ I do not find that any party is prejudiced by a tally of ballots issued as this has no impact on the Unit absent certification, and a certification would only occur after the blocking charge issue is resolved.

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 made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵
3. The Union is a labor organization within the meaning of § 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 § 9(c)(1) and §§ 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 § 9(b) of the Act:

Included: All full-time and regular part-time employees.

Excluded: Employees hired for no more than thirty (30) calendar days, office and clerical employees, and guards 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 **Teamsters Local Union No. 670**.

⁴ By consolidating any post-election issues with the litigation of the unfair labor practice charges, the Administrative Law Judge can additionally determine whether a causal relationship exists between any unlawful conduct found and employee disaffection, consistent with *St. Gobain Abrasives*, 342 NLRB 434 (2004).

⁵ During the hearing the parties stipulated to the following commerce facts:

The Employer, Hood River Distillers, Inc., an Oregon company with an office and place of business in Hood River, Oregon, is engaged in the business of producing and distributing distilled spirits. During the previous twelve months, a representative period, the Employer had gross revenues in excess of \$500,000, and purchased and received goods valued in excess of \$50,000 directly from points outside the State of Oregon.

A. Election Details

The election will be conducted by mail. The ballots will be mailed to voters by a designated official of the National Labor Relations Board, Subregion 36, 1220 SW 3rd Avenue, Suite 605, Portland, OR 97204 on **Tuesday, March 23, 2021 at 4:30 p.m.** 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 Tuesday, April 6, 2021, should communicate immediately with the National Labor Relations Board by either calling the Subregion 36 office at 503-326-3085 or our national toll-free line at 1-866-762-NLRB (1-866-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 36 office by **4:30 p.m. on Tuesday, April 20, 2021.** All ballots will be commingled and counted by an agent of Subregion 36 of the National Labor Relations Board on **Wednesday, April 21, 2021, at 2:00 p.m.** with participants being present via electronic means. No party may make a video or audio recording or save any image of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Subregion 36 office, the Region will inform the parties with sufficient notice so that they may attend.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **immediately prior to the issuance of this Decision**, 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.

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 § 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 **Tuesday, March 9, 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.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 § 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 non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution.

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 §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 § 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 at Seattle, Washington on the 5th day of March, 2021.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
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