Starbucks Corporation ("Employer") operates retail coffeehouses. On May 31, 2022, Workers United a/w SEIU ("Petitioner") filed a representation petition seeking to represent approximately forty-two (42) employees employed by the Employer at its store located at 7707 McKnight Road, Pittsburgh, PA 15237 (Store 19816 referred to as the "McKnight Road Southbound Store"), in Allegheny County.

The appropriateness of the petitioned-for bargaining unit is not in dispute, the only issue in this case is the method of election. A hearing was held before a Hearing Officer of the National Labor Relations Board (the Board) via videoconference on June 21 at which time the parties were afforded the opportunity to present evidence and to state their respective positions on the record. The parties submitted post-hearing briefs, and I have carefully considered them. The Employer maintains that a manual election held at the McKnight Road Southbound Store is mandated by Board precedent and the current realities of the COVID-19 pandemic, and the Petitioner contends that a mail-ballot election is appropriate.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the National Labor Relations Act (the Act). Having considered the parties’ positions, evidence, and the entire record, and for the reasons described below, I find that applying the Board's decision in Aspirus Keweenaw, 370 NLRB No. 45 (2020), to the circumstances in the instant case, a mail-ballot election is warranted due to the high COVID-19 test positivity rate in Allegheny County.

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1 To the extent the formal documents did not correctly reflect the parties’ names, the parties stipulated to amend the formal documents to accurately reflect the names as identified herein.

2 All dates are 2022 unless otherwise noted.
I. METHOD OF ELECTION

A. The COVID-19 Pandemic

The COVID-19 pandemic has had a profound impact on daily life in the United States in the last two years. Despite unprecedented efforts to limit transmission, to date over 87 million people in the United States have been infected with COVID-19 and over 1 million people have died.\(^3\)

To prevent the spread of the virus, the Centers for Disease Control and Prevention (CDC) recommends getting COVID-19 vaccines, wearing a mask, staying 6 feet away from others, testing, frequent and proper hand washing, covering the mouth and nose when sneezing or coughing, and cleaning and disinfecting. Importantly, it also recommends avoiding poorly ventilated spaces and crowds.\(^4\)

Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted the way the Board conducts its elections. Traditionally, the Board has conducted in-person, manual elections and used mail-ballot elections in limited circumstances. In 2020, in Aspirus Keweenaw, the Board addressed the circumstances where the pandemic may dictate appropriate use of mail-ballot elections. As the pandemic has ebbed and flowed over the years since Aspirus the result has been an increase in the use of the mail-ballot procedures. KMS Commercial Painting, LLC, 371 NLRB No. 69, slip op. at 1 (2022) (304 mail ballot elections taking place in fiscal year 2022). Mail-ballot procedures have allowed the Board to continue conducting elections even in the face of high COVID-19 transmission rates. As the Board stated in KMS, “during the pandemic, the Board's mail ballot procedures have served the Board's mission of ensuring free and fair elections, while also ensuring the health and safety of employees, parties, and Board personnel throughout the election process.” \(^{Id}\)

B. Board Standard

Congress has entrusted the Board with a wide degree of discretion in establishing the procedures and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. San Diego Gas & Elec., 325 NLRB 1143, 1144 (1998), citing Halliburton Serv., 265 NLRB 1154 (1982); Nat’l Van Lines, 120 NLRB 1343, 1346 (1958); NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. San Diego Gas, 325 NLRB at 1144-45. A Regional Director’s broad discretion in determining the method by which an election is held should not be overturned unless a clear abuse of discretion is shown. Nouveau Elevator Indus., Inc., 326 NLRB 470, 471 (1998), citing San Diego Gas, 325 NLRB at 1144 n.4 and Nat’l Van Lines, 120 NLRB at 1346.


The Board’s longstanding policy is that elections should, as a rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. Id. This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. San Diego Gas, 325 NLRB at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors, including this Region’s, directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6, 2020, the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” GC Memorandum 20-10, setting forth detailed suggested manual election protocols.

In Aspirus Keweenaw, 370 NLRB No. 45 (2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in 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 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; or
6. Other similarly compelling circumstances.

Id. slip op. at 4-7. The existence of one or more of these situations will normally suggest that a mail ballot is appropriate under the “extraordinary circumstances presented by this pandemic.” Id. slip op. at 4. The Regional Director has discretion to conduct an election by mail ballot “under the peculiar conditions of each case.” Id. slip op. at 3, citing Nat’l Van Lines, 120 NLRB at 1346. The Regional Director’s determination to conduct an election manually or by mail

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5 I note that the provisions of the Casehandling Manual are not binding procedural rules; it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See Patient Care, 360 NLRB 637, 638 (2014), citing Solvent Services, 313 NLRB 645, 646 (1994).
is subject to an abuse of discretion standard. Aspirus, 370 NLRB No. 45, slip op. at 3, citing San Diego Gas, 325 NLRB at 1144 n. 4. Finally, in Aspirus, the Board noted that a Regional Director who directs a mail-ballot election under one or more of the foregoing six situations will not have abused her discretion. Aspirus, 370 NLRB No. 45, slip op. at 8.

C. The Parties’ Positions

The Employer contends that a manual election held at the McKnight Road Southbound Store is appropriate. Specifically, the Employer argues that the Board should abandon its standard under Aspirus Keweenaw, 370 NLRB No. 45 (2020), because the pandemic circumstances have changed and evolved and Aspirus Keweenaw was decided before the availability of multiple COVID-19 vaccines and at-home COVID-19 testing. The Employer asserts that the Board should instead return to the San Diego Gas & Elec., 325 NLRB 1143 (1998), standard in which case a manual election would be appropriate. The Employer also highlights that manual elections are more accurate and fair, as demonstrated by alleged issues with recent mail-ballot elections involving employees of the Employer, including some elections conducted by this Region. Citing Nouveau Elevator Indus., Inc., 326 NLRB 470 (1998), the Employer also argues that the party seeking a departure from manual ballots bears the burden of showing that mail ballots are appropriate.

Further, the Employer maintains that even assuming the Aspirus Keweenaw test applies, a manual election is still appropriate as the Region is not subject to a mandatory telework order, there are no government orders restricting gathering, the Employer agrees to abide by the necessary Board protocols—including those set forth in GC Memorandum 20-10, and there is no current outbreak at the McKnight Road Southbound Store. In its brief, the Employer further argues that although Allegheny County’s COVID-19 positivity is currently above 5% due to a recent spike, the CDC lists the County as a “Low” risk and the positivity trend shows a steady decline since February, leading to a reasonable conclusion that the positivity rate will be below 5% on the date the Region’s Decision and Direction of Election is issued.

The Employer proposes that an in-person election be held July 12 with the polling occurring at two separate time periods from 10:00 a.m. to 12:00 p.m. and 2:00 p.m. to 4:00 p.m., in order to provide a voting opportunity to employees working all shifts, namely the opening shift, mid-day shift, and closing shift. The Employer proposes to close the McKnight Road Southbound Store to the public during all voting times, and it has also expressed a willingness to have multiple voting periods over the course of two days.

Petitioner contends that a mail ballot is appropriate because test positivity rate in Allegheny County is far above the 5% threshold set by the Board in Aspirus Keweenaw. The Petitioner further argues that, independent from Aspirus Keweenaw, a mail-ballot election would also be warranted.

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6 Including low voter turnout.

7 The Employer is incorrect on this point. As set out above, the case law makes clear that the standard is an abuse of discretion standard and therefore, whichever party challenges the Regional Director’s decision bears the burden of showing that the Regional Director abused her discretion. San Diego Gas, n.4 at 1144.
under *San Diego Gas* because a number of employees at the McKnight Road Southbound Store work part-time and they are “scattered” in time due to their variable work schedules.

**D. Determination**

I conclude that a mail-ballot election is appropriate based on the 14-day trend in the number of new confirmed cases of COVID-19 and the COVID-19 test positivity rate in Allegheny County, the county where the McKnight Road Southbound Store is located.

Several of the *Aspirus Keweenaw* factors are not relevant to my determination in this case. As the Employer contends, the Region tasked with conducting the election is not operating under mandatory telework status, mandatory state or local health orders relating to maximum gathering size are not at issue, the Employer has committed to abide by GC Memorandum 20-10, and there is no evidence of a current outbreak at the Store. The only factor I find that requires a detailed analysis is the remaining factor: whether the 14-day trend in number of new confirmed cases in the county where the McKnight Road Southbound Store is located is increasing, or the 14-day testing positivity rate is 5 percent or higher.

The Board in *Aspirus Keweenaw* directed Regional Directors to, in considering these statistical factors, utilize the data published by Johns Hopkins University, or from official state or local government sources. The Board further stated where county level data is not available, Regional Directors should look to state level data.

The first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the county where the McKnight Road Southbound Store is located is increasing. Allegheny County reports COVID-19 data on a weekly basis. This reporting frequency is reflected in the data published by John Hopkins University, with non-reporting days reflecting a “0” as a null value, not an indication of zero cases. As of July 1, 2022 the Johns Hopkins University & Medicine Coronavirus Resource Center reports a -14-day case count (the data point matching the 14-day time range prescribed by the Board) in Allegheny County of 3,367 cases. Specifically, from day -14 to -7 there were 1,314 cases and from day -7 to the present there were 2,053 cases, an increase of 739 cases. I find this data reflects a generally increasing trend in Allegheny County.

The second contingency at issue here is whether the 14-day testing positivity rate in Allegheny County is 5 percent or higher as of July 1, 2022. Allegheny County reports a 7-day average of 16.2% for the 7-day period ending on June 24, 2022, the most recent reporting date. Seven days prior, on June 17, 2022, the 7-day average was 14.7%. Taken together, this data

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8 See https://www.alleghenycounty.us/Health-Department/Resources/COVID-19/COVID-19-Dashboards.aspx (last viewed June 30, 2022), noting that while other data dashboards are updated daily, the relevant COVID-19 Summary dashboard is updated weekly.


demonstrates the testing positivity rate has been well-above 5% in Allegheny County with a slight increase of 1.4% during the most recent 7-day period for which data is available.

Aspirus Keweenaw directs that a mail ballot election may be appropriate where either one of the two contingencies described above are present. As I find the test positivity rate in Allegheny County is above the Board’s 5% threshold and is trending upward, I conclude that this is a sufficient basis to order a mail ballot election consistent with Aspirus Keweenaw. To the extent the Employer argues that the Board should abandon its test from Aspirus Keweenaw, and that manual elections are more accurate and fair, these are strictly policy arguments best directed to the Board. I am obligated to apply the Board’s decisions in exercising my discretion, and I have done so here in directing a mail ballot election.

Apart from the appropriateness of a mail-ballot election under the currently controlling Aspirus Keweenaw test, with regard to the appropriateness of a mail ballot election under San Diego Gas & Elec. where employees are scattered in terms of their work schedules, the Board has found mail ballot elections appropriate. M & N Mail Serv., Inc., 326 NLRB 451 (1998) (mail ballot election appropriate where drivers have a staggered work schedule and may not be scheduled to work or available to participate in an election). Here, the Employer’s Attachment B to its initial position statement, filed on June 10, 2022 advised that the employees at the McKnight Road Southbound Store worked “variable” schedules and in its position statement that its proposed polling times allows for the overlap of the morning, afternoon, and evening shifts. In its brief, the Employer asserted schedules for the store are generally morning shift (4:30 a.m.-11:30 a.m.); mid-day shift (9:30 a.m.- 4:30 p.m.); and (3) closing shift (4:30 p.m.-9:30 p.m.) and these shift hours remain constant; nonetheless, employees work different and varying shifts each week. Neither party has provided any information regarding employee schedules more specific than this. Therefore, and also considering that a number of employees at the McKnight Road Southbound Store work part-time, I further conclude that the McKnight Road Southbound Store bargaining unit employees’ schedules are scattered in scheduling time as described in San Diego Gas, and a mail-ballot election is also warranted under such criteria.

II. CONCLUSION

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

11 This includes the Employer’s argument of low voter turnout in recent mail-ballot elections.

12 To the extent the Employer asserts that Regions have directed manual elections in other single-store elections in some of its other stores around the United States, I note that the facts in those cases are distinguishable from the instant case. In the Regional Director’s Decision and Direction of Election in Case 12-CA-291975, issued April 13, 2022, it was noted—at page 4—that “[n]either party contends that the Covid-19 levels are a reason to hold a mail ballot election” and accordingly the Regional Director analyzed the facts of that case solely under San Diego Gas. Similarly, in Case 06-RC-295875, the Petition in that case—filed May 16, 2022—indicates that the Petitioner in that case was seeking a manual election. Here, in contrast, the Petitioner is seeking a mail-ballot election specifically because of the effects of the COVID-19 pandemic.
1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and is subject to the jurisdiction of the Board, and it will effectuate the purposes of the Act to assert jurisdiction herein.\(^\text{13}\)

3. The parties stipulated, and I find that Petitioner is a labor organization within the meaning of Section 2(5) of Act. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

4. The parties stipulated, and I find that there is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein, and there is no contract bar to this proceeding or other bar in existence that would preclude the processing of the petition.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

6. 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\(^\text{14}\):

   \textbf{INCLUDED:} All full-time and regular part-time Baristas and Shift Supervisors employed at the Employer’s facility located at 7707 McKnight Road, Pittsburgh, PA 15237 (Store 19816 referred to as the “McKnight Rd Southbound”).

   \textbf{EXCLUDED:} All Store Managers, office clerical employees, and guards, and professional employees and supervisors as defined by the Act, and all other employees.

\textbf{III. 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 \textbf{Workers United a/w SEIU}.

\(^\text{13}\) The parties stipulated to the following commerce facts:

The Employer, Starbucks Corporation, a Washington corporation with headquarters located in Seattle, Washington, and facilities located throughout the United States, including a facility located at 7707 McKnight Road, Pittsburgh, Pennsylvania, is engaged in the retail operation of restaurants. During the past twelve months, a representative period of time, the Employer derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

\(^\text{14}\) The parties stipulated that the Assistant Store Manager will vote subject to challenge as there was not an agreement as to whether this classification should be included or excluded from the bargaining unit.
A. Election Details

The election will be conducted by mail. On July 11, 2022, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 6. 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 July 18, 2022, should communicate immediately with the National Labor Relations Board by either calling the Region 6 Office at 412-395-4400 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 6 office prior to the count on August 3, 2022. All ballots will be commingled and counted by an agent of Region 6 of the National Labor Relations Board on August 3, 2022, at 11:00 a.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 Regional 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 June 26, 2022, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election. The parties stipulated to use of this formula, as set forth in Davison-Paxon Co., 185 NLRB 21, 23-24 (1970), to determine voter eligibility.

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. Unit employees in the military services of the United States may vote by mail as directed above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board’s designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.
C. Voter List

As required by Section 102.67(l) of the Board’s Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the regional director and the parties by Wednesday, July 6, 2022. 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.

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. 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 which will issue subsequent to this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The

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15 The Petitioner has agreed to waive the entire 10-day period it is permitted to receive the voting list prior to the opening of the polling period.
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.

IV. 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.nlrb.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: July 1, 2022

/s/ Nancy Wilson

NANCY WILSON
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