Starbucks Corporation (“Employer”) operates a retail coffeehouse located at 3904 Commercial Street SE, Salem, Oregon (the “Store”). On May 26, 2022, Workers United (“Petitioner”) filed a representation petition seeking to represent approximately 27 employees employed at the Employer’s Store.

On June 15, the Employer and Petitioner entered into a stipulated record in lieu of a hearing on this matter. The appropriateness of the petitioned-for bargaining unit is not in dispute; the parties have agreed to a single-store unit comprised of all full-time and regular part-time baristas and shift supervisors employed at the Store. The only issue in this case is the method of election. Pursuant to the stipulation, the Employer and Petitioner agreed to submit written statements regarding their positions on the method of election by no later than June 23. Both parties submitted post-hearing briefs, with Petitioner seeking a mail-ballot election given the extraordinary circumstances posed by the ongoing COVID-19 pandemic, while the Employer maintains a manual election is mandated by Board precedent and the current realities of the COVID-19 pandemic.

The Board has delegated its authority in this proceeding to me under § 3(b) of the Act. Applying the Board's decision in Aspirus Keweenaw, 370 NLRB No. 45 (2020), to the circumstances in the instant case, I am directing a mail-ballot election for the reasons addressed below.

1 All dates 2022 unless otherwise indicated.
2 The Employer was granted an Extension of Time to June 27, 2022 to file its post-hearing brief.
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 year. Despite unprecedented efforts to limit transmission, to date over 80 million people in the United States have been infected with COVID-19 and over 1 million people have died.3

The Centers for Disease Control and Prevention (CDC), has determined “[l]imiting close face-to-face contact with others is the best way to reduce the spread of coronavirus disease 2019 (COVID-19).”4 According to the CDC, “[a]ttending events and gatherings increases your risk of getting and spreading COVID-19;”5 Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid crowds, practice good hygiene, maintain at least a 6-foot distance between individuals, and use masks when around other people.6

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. The Board has traditionally 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 the 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 and Elec., 325 NLRB 1143, 1144 (1998); citing Halliburton Services, 265 NLRB 1154 (1982); National 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 & Elec., 325 NLRB at 1144-45.

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5 Id.
6 Ibid.
The Board’s longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board 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*, supra 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,” *Memorandum GC 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.

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*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 and not the Board and is intended to provide guidance to regional personnel in the handling of representation cases. See Patient Care, 360 NLRB 637, 638 (2014), citing Solvent Services, 313 NLRB 645, 646 (1994).*
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 National Van Lines, 120 NLRB at 1346). The Regional Director’s determination to conduct an election manually or by mail is subject to an abuse of discretion standard. Aspirus, 370 NLRB No. 45, slip op. at 3 (citing San Diego Gas & Electric, 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 or his discretion. Aspirus, 370 NLRB No. 45, slip op. at 8.

C. Position of the Parties

The Employer contends there are no circumstances guided by Aspirus Keweenaw present in this case justifying the direction of a mail ballot election given the current state of the pandemic. The Employer argues that current vaccination rates, and the availability of vaccines generally, make the directives of Aspirus Keweenaw outdated. Specific to this case, the Employer argues that the case count in Marion County, Oregon (where the election would be held) is 232 cases per 100,000 residents per day as of June 24. The Employer maintains that the data trends indicate that if the Region orders a manual election in July, the COVID-19 case count will continue to be within acceptable limits. Moreover, the Employer states that should the Region require it, the Employer will comply with the suggested manual election protocols in the General Counsel’s Memorandum GC 20-10 to the extent they differ from and/or exceed the Employer’s current safety protocols.

The Employer further argues that the 14-day test positivity rate is now an unreliable and skewed statistic, hence the Aspirus Keweenaw standard is now outdated and its factors are largely irrelevant. However, the Employer acknowledges that the CDC now assesses the community risk of COVID-19, or its variants, based on the preceding 7-day period and classifies the community risk factors within a risk rubric identified as low, medium or high. The risk in Marion County, as asserted by the Employer, is currently assessed at “medium.” In addition, in asserting that vaccines are widely available and most of the adult population has been vaccinated and insulated from the most serious health outcomes from COVID-19, the Employer notes that in Marion County, Oregon, over 81.6% of individuals aged eighteen and older have received at least one dose of the vaccine and over 74.4% of individuals aged eighteen and older are fully vaccinated. In sum, the Employer maintains that Aspirus Keweenaw is outdated as any reasonable measure of determining the method of election.

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8 According to the CDC, Covid Data Tracker (updated July 1, 2022) Marion County COVID-19 Community Level is medium (2nd highest level) [https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Oregon&data-type=CommunityLevels&list_select_county=41047](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Oregon&data-type=CommunityLevels&list_select_county=41047) (last viewed July 5, 2022.)

9 Id.

10 Id.

11 The CDC, Covid Data Tracker, Vaccinations in Marion County, Oregon (updated July 1, 2022) [https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Oregon&data-type=CommunityLevels&list_select_county=41047](https://covid.cdc.gov/covid-data-tracker/#county-view?list_select_state=Oregon&data-type=CommunityLevels&list_select_county=41047) (last viewed July 5, 2022)
Consistent with its arguments above and noting the layout of the Starbucks store at issue and the requirements of General Counsel Memorandum GC 20-10, the Employer proposes two possible polling locations for holding a manual election: a conference room in a nearby hotel or a parking lot near the Store under a tent. The Employer further proposes that the manual election occur over two days in July across all three work shifts with polling periods from 8:00 a.m. to 10:00 a.m. and 2:00 p.m. to 4:00 p.m. on each day. Although the Employer argues that the precautions articulated in Memorandum GC 20-10 are outdated, it does agree to comply with the requirements detailed in that memorandum.

Petitioner opposes the Employer’s arguments. Petitioner contends that here, consistent with General Counsel Memorandum GC 20-10, and pursuant to Aspirus Keweenaw, supra, a mail ballot election is appropriate in light of the current COVID-19 test positivity rate in Oregon, and specifically in Marion County. Petitioner’s June 23 brief provides the 7-day COVID-19 positive test rate for Marion County ending June 11. The COVID-19 test positivity rate for Marion County at the time Petitioner’s brief was filed was 12.3%. This rate is far above the five percent threshold established by the Board in Aspirus Keweenaw.

II. DETERMINATION

Several of the Aspirus factors are not relevant to my determination in this case. 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 Memorandum GC 20-10, and there is no evidence of a current outbreak at the Employer’s facility. Ultimately, I have determined that a mail ballot election is appropriate in this case due to the remaining factor: the COVID-19 test positivity rate in Marion County, the county where the Store is located. Specifically, I have determined that the 14-day trend in the number of new confirmed cases 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. The Board in Aspirus 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 first contingency at issue here is whether the 14-day trend in number of new confirmed cases in the county where the facility is located is increasing. The Oregon Health Authority tracks and publishes COVID-19 tracking data and related metrics daily, and such tracking data and metrics are reported in a biweekly report published by the Oregon Health Authority. The COVID-19 Community Level and associated metrics for Marion County are also tracked and updated daily. As of July 5, the Oregon Health Authority reported for Marion County a 14-day case count of 104 cases and a 1-day case count of 109 cases, a modest increase, with significant

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12 Petitioner’s Post-Hearing Brief on Method of Election, June 23, 2022, Exhibit A.
fluctuations in daily case counts. As of June 28, Marion County reported 1,946 new cases of COVID-19 during the 14-day period from June 16 to June 30.

    Regarding the second contingency, whether the 14-day testing positivity rate in Marion County is 5 percent or higher, Marion County reports a 7-day testing positivity rate. As of July 5, Marion County reported a 7-day testing positivity rate of 15.9 percent for the week beginning June 26. For the previous 7-day period, the week beginning June 19, the testing positivity rate in Marion County was 14.7%. This data demonstrates that the testing positivity rate has been above 5 percent in Marion County during the most recent 14-day period.

Aspirus directs that a mail ballot election may be appropriate where either one of the two contingencies described above are met. As I find the 14-day testing positivity rate in Marion County is above the Board’s 5 percent threshold, I conclude that this is a sufficient basis to order a mail ballot election consistent with Aspirus. Under these circumstances, I do not find it necessary to discard the framework utilized in Aspirus or rely on the alternative statistics proffered by the Employer. To the extent the Employer’s argues it is time to leave Aspirus behind, these are arguments best directed to the Board as I am obligated to apply its decisions, and I have done so here in directing a mail ballot election.

III. CONCLUSION

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

    1. 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.

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16 Id.

17 Oregon Health Authority County COVID-19 Community Transmission Weekly Monitoring Periods (last viewed July 5, 2022), https://public.tableau.com/app/profile/oregon.health.authority.covid.19/viz/OregonCOVID-19PublicHealthIndicators-SummaryTable/DiseaseSpread-SummaryTable

18 I note that the agreed upon stipulation does not include a time period for the computation of the commerce facts. The time period for computation is generally a preceding yearly period proximate to the filing of the petition. This appears to be an inadvertent omission. The parties stipulated to the following commerce facts:

The Employer, a Washington corporation with an office and place of business located in Salem, Oregon, is engaged in the business of operating a retail coffeehouse. The Employer derived gross revenues in excess of $500,000 and purchased and received at its facility within the State of Oregon goods valued in excess of $50,000 directly from suppliers outside the State of Oregon. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
2. The parties stipulated, and I find that Petitioner is a labor organization within the meaning of § 2(5) of the Act and claims to represent certain employees of the Employer.

3. 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.

4. The parties stipulated, and I find that 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 baristas and shift supervisors employed by the Employer at its store located at 3904 Commercial Street SE, Salem, Oregon.

**EXCLUDED:** All store managers, assistant store managers, office clerical employees, confidential employees, managerial employees, professional employees, and guards and supervisors as defined in the Act.

There are approximately 27 employees in the unit.

**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 Workers United.

**A. Election Details**

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by a designated official of the National Labor Relations Board, Subregion 36, 1220 SW 3rd Avenue, Suite 605, Portland, OR 97204 on **Tuesday, July 19, 2022 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 Thursday, July 28, 2022, 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 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 36 office by 3:00 p.m. on Tuesday, August 9, 2022. The mail ballots will be comingled and counted by an agent of Subregion 36 of the National Labor Relations Board on **Tuesday, August 9, 2022 at 3:00 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 **July 3, 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.

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 **Thursday, July 7, 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

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19 Petitioner did not waive any of the 10 days that it is entitled to the voter list.
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 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.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 at Seattle, Washington on the 5th day of July, 2022.

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Suite 2948
Seattle, WA 98174