WEYERHAEUSER NR COMPANY

Employer

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE W24

Petitioner

DECISION AND DIRECTION OF ELECTION

Weyerhaeuser NR Company ("Employer") is engaged in the distribution of building materials. On June 9, 2022, International Association of Machinists and Aerospace Workers, District Lodge W24 ("Petitioner") filed a representation petition seeking to represent approximately 21 employees employed by the Employer at its facility located at 2812 Old Salem Rd. NE ("Facility") in Albany, Oregon, which is located in Linn County.

The appropriateness of the petitioned-for bargaining unit is not in dispute; the only issue in this case is the method of election. On June 23, 2022, the Employer and Petitioner entered into a stipulated record in lieu of a hearing on this matter. Pursuant to the stipulation, the Employer and Petitioner were able to submit written statements regarding their position on the method, date, time, and place of the election ordered. The Employer did so, maintaining that a manual election held at the Facility is appropriate despite the high COVID-19 test positivity rate because the Board’s current standard is a poor measure for identifying COVID risk. Petitioner, in the stipulated record, notes that it seeks a mail ballot election, but did not submit a written statement.

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 due to the high COVID-19 test positivity rate in Linn County.

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 almost 88 million
people in the United States have been infected with COVID-19 and over 1 million people have died.\(^1\)

According to the Centers for Disease Control and Prevention (CDC), “[a]ttending a large gathering or event increases your chance of being in close contact with people outside your household and being exposed to COVID-19.”\(^2\) 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: get vaccinated, stay 6 feet away from others, avoid poorly ventilated spaces and crowds, practice good hygiene, and use masks when around other people.

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 election in limited circumstances. In 2020, in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), 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 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*, 325 NLRB at 1144-45.

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.\(^3\) 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


\(^3\) 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 representations cases. *See Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).
“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,” 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.

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 that a manual election is appropriate. Specifically, the Employer acknowledges that the test positivity rate in Linn County is greater than the 5 percent positivity rate identified by the Board in Aspirus, but argues that the test positivity rate is a poor measure for identifying COVID-19 risk and that it must be viewed in the context of other factors and present conditions. As an example of this, the Employer notes that GC Memo 20-10 was issued on July 6, 2020, predating the availability of any COVID-19 vaccination, and now over 70 percent of the Oregon population is fully vaccinated.

Petitioner took the position that a mail ballot is appropriate but did not file a brief in support of its position.

D. Determination

I conclude that a mail-ballot election is appropriate based on the COVID-19 test positivity rate in Linn County, the county where the Facility is located.

Several of the Aspirus 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 Memorandum GC 20-10, and there is no evidence of a current outbreak at the Facility. The only factor I find requires a detailed analysis is the remaining factor: whether the 14-day trend in number of new confirmed cases in the county where the Facility is located is increasing, or the 14-day testing positivity rate 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 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 Facility is located is increasing. The Oregon Health Authority publishes daily case rates for Linn County as well as charts that reflect 7-day averages. According to the Oregon Health Authority, as of July 5, Linn County had a 7-day average of 34.4 cases, and as of June 28, the prior 7-day period, Linn County had a 7-day average of 46.4 cases; this reflects a decrease. Similarly, as of July 7, 2022, the Johns Hopkins University & Medicine Coronavirus Resource Center reports a -14 day case count in Linn County of 58 cases and a -1 day case count of 29 cases, a decrease. The data from the intervening dates reflects an average of about 67 cases per day, when excluding non-reporting days, such as holidays and weekends, reflecting a “0” as a

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null value, not an indication of zero cases. Taken together, I find this data reflects a decreasing trend in Linn County.

Regarding the second contingency, whether the 14-day testing positivity rate in Linn County is 5 percent or higher, I find conflicting data from the State of Oregon, but all of the available data points are higher than the Board’s 5 percent threshold. According to one table published by the Oregon Health Authority, as of July 5, 2022, the most recent reporting date, Linn County has a 15.2 percent test positivity rate, although the timeframe covered by this percentage is unclear. According to another table published by the Oregon Health Authority, as of July 6, 2022, Linn County has a 10 percent test positivity rate, though again there is no indication as to the timeframe this covers. A third graph published by the Oregon Health Authority reveals that for the week from July 3 to July 9, 2022, 17.1 percent of tests were positive, and for the week from June 26 to July 2, 2022, 9.8 percent of tests were positive, which averages to a 13.5 percent positivity rate over the past 14 days.

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 test positivity rate in Linn 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. To the extent the Employer argues that the Board should abandon its test from Aspirus, these are arguments best directed to the Board. I am obligated to apply the Board’s decisions, and I have done so here in directing a mail-ballot election.

II. 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.

2. The labor organization involved claims to represent certain employees of the Employer.

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9 The parties stipulated to the following commerce facts:
The Employer, Weyerhaeuser NR Company, a Washington corporation with an office and place of business located in Albany, Oregon, is engaged in the distribution of building materials. Within the last calendar year, a representative period, the Employer in the conduct of its operations derived gross revenues in excess of $500,000 and purchased and received at its Albany, Oregon, facility goods valued in excess of $50,000 directly from points located outside the State of Oregon.
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 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 forklift operators and lead forklift operators employed by the Employer at its Albany Distribution Center located in Albany, Oregon.

EXCLUDED: All other employees, office clerical employees, confidential employees, managers, and guards and supervisors as defined in the Act.

There are approximately 21 employees in the unit.

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 International Association of Machinists and Aerospace Workers, District Lodge W24.

A. Election Details

The election will be conducted by mail.

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 26, 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, August 4, 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 1-866-762-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 3:00 p.m. on Tuesday, August 16, 2022. The mail ballots will be comingled and counted by an agent of Subregion 36 of the National Labor Relations Board on Tuesday, August 16, 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 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.

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 Tuesday, July 12, 2022. The list must be accompanied by a certificate of service showing service on all parties.10 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.

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10 Petitioner did not waive its 10 days with the voter eligibility list as part of the stipulated record.
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.

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 at Seattle, Washington on the 8th day of July, 2022.

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Suite 4948
Seattle, WA 98174