

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

MAPLEBEAR INC. d/b/a INSTACART

Employer

and

Case 13-RC-259423

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing on this petition was conducted before a hearing officer of the National Labor Relations Board (Board) to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.¹

Maplebear Inc. doing business as Instacart (“Employer”) operates a technology company that provides a platform through which customers can purchase groceries and consumer packaged goods from retail partners and arrange for those goods to be delivered on an expedited basis. United Food and Commercial Workers International Union (“Petitioner”) seeks to represent a unit of all In-Store Shoppers employed by the Employer working inside the Jewel-Osco store currently located at 3400 North Western Avenue, Chicago, Illinois, excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act.²

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer’s rulings made at the hearing are free from prejudicial error and are affirmed.
- b. 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.
- c. The Petitioner is a labor organization within the meaning of the Act.
- d. The Petitioner seeks to represent certain employees of the Employer in the unit described in the petition it filed herein, but the Employer declines to recognize the Petitioner as the collective-bargaining representative of those employees.
- e. There is no collective-bargaining agreement covering any of the employees in the voting group sought in this petition and the parties do not contend that there is any contract bar to this proceeding.
- f. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

² As stipulated at hearing.

I. ISSUES AND PARTIES' POSITIONS

The Employer argues the petition should be held in abeyance until response measures associated with the ongoing COVID-19 pandemic are no longer in effect³ while the Petitioner argues against a delay in processing the petition.

II. DECISION

As explained below, based on the record and relevant Board law, I find the Employer failed to establish an indefinite delay in processing the instant petition is warranted. Accordingly, I direct an election in the following appropriate unit:

Included: All In-Store Shoppers employed by the Employer working at the Jewel-Osco store currently located at 3400 North Western Avenue, Chicago, Illinois.

Excluded: Site Managers, Shift Leads, office clerical employees and guards, professional employees and supervisors as defined in the Act.

III. LEGAL ANALYSIS

On March 19, 2020, the Board temporarily suspended representation elections through April 3, 2020.⁴ On April 1, 2020, the Board ordered the resumption of representation elections starting April 6, 2020.⁵ The instant petition was filed on April 22, 2020.

³ In its statement of position, the Employer argued that if I did not hold the petition in abeyance the present circumstances did not warrant a mail-ballot election and a safe manual ballot election was feasible. The manner of election is an administrative matter and not a litigable issue. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

The Employer also challenged the validity and implementation of the Board's 2014 Election Rule. See 79 Fed.Reg. 74308 (2014). I declined to permit litigation of this issue at the hearing because I do not have rulemaking authority and the Board and courts have already considered and rejected such arguments. See, for example, *University of Southern California*, 365 NLRB No. 11, slip op. at 1 fn. 1 (2016) (citing *Pulau Corp.*, 363 NLRB No. 8 (2015); *Associated Builders & Contractors of Texas v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce v. NLRB*, 118 F.Supp.3d 171 (D.D.C. 2015)).

On December 18, 2019, the Board published a "new" final rule modifying the Agency's Representation Case Procedures to take effect April 16, 2020; however, on March 30, 2020, the Board postponed the effective date of this final rule from April 16, 2020 to May 31, 2020. Thus, it does not apply in this case. See also, *Western Wall Systems, LLC*, 2020 WL 1931401 fn. 1 (2020) (applying 2014 Election Rule and noting amendments are not in effect until May 31, 2020).

⁴ "National Labor Relations Board Suspends Representation Elections Through April 3, 2020" (Mar. 19, 2020). <https://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through> (last accessed May 5, 2020).

⁵ "NLRB Resumes Representation Elections." (Apr. 1, 2020). <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections> (last accessed May 5, 2020).

The Act safeguards the right of employees to self-organization and to select representatives of their own choosing for collective bargaining, or other mutual protection, without restraint or coercion by their employer. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Since its earliest days, the Board has held employee rights are not diminished during times of emergency, ordering dozens of elections during World War II for workers performing essential functions. See, for example, *Detroit Gasket & Mfg. Co.*, 55 NLRB 718, 720 (1944) (finding “no merit in the Company’s objection to organizational efforts of employees and to the holding of elections under the Act during the war”).

Here, the Employer has not suggested its essential employees are unable to vote, incapable of voting, or otherwise prevented from casting a ballot. Its only contentions are employees may become distracted from performing their “essential” jobs by having the choice for union representation, and the ongoing COVID-19 pandemic somehow prevents employees from receiving information from the Employer. However, at the hearing, the Employer provided no evidence it could not communicate with its employees and cited no cases where the Board has delayed conducting an election, let alone processing a representation petition, due to the potential for employee distraction.

IV. CONCLUSION

As the Employer has failed to establish eligible voters are unable to safely cast ballots at the current time, I direct an election in the unit set forth above.

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 United Food and Commercial Workers International Union.

1. Election Details

I direct that the election be conducted by mail ballot. Since pursuant to the Board’s Rules and Regulations, Section 102.66(g)(1), the type of election is not a litigable issue, my rationale for directing a mail ballot election is set forth in a separate letter.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 5:00 p.m. on Wednesday, May 20, 2020, from the National Labor Relations Board, Region 13, 219 S. Dearborn Street, Suite 808, Chicago, IL 60604. 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 by mail and do not receive a ballot in the mail by May 26, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 13 Office at (312) 353-7570 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Ballots will be due on Thursday, June 11, 2020. All ballots will be commingled and counted on Thursday, June 18, 2020 at 10:00 a.m. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **May 3, 2020**, 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

3. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 11, 2020**. 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.

4. 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 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.

V. 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 14 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 may be E-Filed through the Agency's website but 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. A party filing a request for review must serve a

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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.

Dated on this 7th day of May 2020

/s/Peter Sung Ohr

Peter Sung Ohr, Regional Director
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