

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

AMAZON.COM SERVICES LLC,)	
)	
Employer,)	
)	
and)	Case No. 10-RC-269250
)	
RETAIL, WHOLESALE AND)	
DEPARTMENT STORE UNION,)	
)	
Petitioner.)	
)	

EMPLOYER’S MOTION TO STAY THE ELECTION PENDING REVIEW

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This election case presents a perfect storm—multiple gaps in National Labor Relations Board (“NLRB” or “Board”) precedent, Acting Regional Director errors, and missed opportunities for mail-ballot improvements, all with the rights of *thousands* of employee-voters at stake. It cries out for a stay, so that the Board can set election matters back on course before ballots are mailed. Otherwise, this case threatens to tie up the Board (and a federal court) for years, instead of resulting in a clear and cogent resolution of the issues up front.

Thus, pursuant to Section 102.67(j)(1)(ii) of the Board’s Rules and Regulations, the Employer, Amazon.com Services LLC (“Amazon”), seeks the Board’s immediate intervention in and stay of a mail-ballot election currently scheduled to start on February 8, 2021. Amazon is concurrently filing a Request for Review of the Acting Regional Director’s January 15, 2021 Decision & Direction of Election (“D&DE”) ordering a mail-ballot election.¹

The bargaining unit here is unusually large and, by far, the largest since the COVID-19 pandemic began—approximately 5,800 employees. *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), provided guidance on holding elections during the pandemic, but it did not address many of the aspects critical to this case. It never defined or outlined key legal concepts—such as what is a COVID-19 “outbreak” and how a Regional Director is supposed to view intracounty COVID-19 data—both of which came back to haunt the process in this case. *Aspirus* was developed in the context of a much smaller proposed bargaining unit involving a potential indoor election at a hospital—not an outdoor election at a warehouse under the extensive protocols that Amazon proposed here. The *Aspirus* understanding of COVID-19

¹ 29 U.S.C. § 102.67(c); *see also* Memorandum GC 20-07, Guidance Memorandum on Representation Case Procedure Changes, at 9 (June 1, 2020) (“§102.67(c) provides for the automatic impoundment of all ballots if a request for review of a pre-election decision is filed within 10 days of the direction of election and remains unresolved when the election is conducted.”).

reflected assumptions developed comparatively earlier in the pandemic—before scientific understanding of the virus and possible precautions had developed to where it is today. Finally, *Aspirus* suggested no mail-ballot guidelines to alleviate the acknowledged mail-ballot voter turnout problems. The flawed D&DE here rests on the Acting Regional Director’s own indefensible answers to these open questions—such as concluding that an “outbreak” is “*any* presence” of COVID-19 at the facility, that significant data about COVID-19 rates within the fully operational facility give way to more generalized statistics, and that employer-provided safety measures show undue influence over the election. And, indeed, Regional Directors nationwide now ironically and incorrectly rely on *Aspirus* to deem almost all forms of in-person voting as unsafe.

Amazon’s Request for Review summarizes these gaps and errors in detail, and identifies **five specific legal issues** under the *Aspirus* framework and related errors in the D&DE that warrant the Board’s review. The Board should seize the opportunity to provide needed clarity and direction for Regional Directors and to correct the errors made by the Acting Regional Director here. Those errors stand to disenfranchise, based on recent statistics, between 1,100 and 1,700 potential voters, which is a result starkly at odds with Board precedent and policy. This result also stands in vivid contrast to the recent, successful efforts by many state governments to *expand the choices* for how and when individuals can vote in political elections, including through mail ballots. The Board, ironically, has been *limiting the right to vote* through its mail-ballot-only approach for almost every election held since March 2020.

This motion also meets the standard of Section 102.67(j)(2) because there is a “clear showing that it is necessary under the particular circumstances of the case” to stay the mail-ballot election. Based on the extraordinary size of the unit, it will take a significant amount of time and

resources to prepare and mail ballots for the election (likely hundreds of hours and multiple Board staff, who seemingly will have to perform all this work remotely, and perhaps alone, to avoid virus spread). Such substantial resources will be rendered completely worthless if the Board later grants Amazon’s Request for Review and orders any changes to the procedures dictated in the D&DE. Additionally, an alteration of voting procedures after ballots are mailed on February 8 could lead to substantial voter confusion—and even more disengagement and lower voter turnout than is ordinarily seen in mail-ballot elections.

As to concerns about delay, the D&DE calls for **almost two months** to lapse between when ballots are to be mailed (February 8) and counted (March 30). Given the time already built in for this election (which may be extended due to inevitable problems with a mail-ballot election of this size), a stay pending consideration of Amazon’s Request for Review would not add material delay to this representation matter to any party’s detriment.

In sum, to avoid voter confusion and the Region and Board wasting tremendous administrative resources on preparing and mailing more than 5,800 ballots, and to ensure that the Board can give due consideration to the numerous legal issues presented by Amazon’s Request for Review, the Board should grant this motion as soon as possible.

I. SUMMARY OF THE RELEVANT FACTS

As Amazon’s Request for Review explains in more detail, the Retail, Wholesale and Department Store Union (“Petitioner” or “Union”) filed a petition for election on November 20, 2020, seeking to represent a unit of hourly associates employed at Amazon’s BHM1 Fulfillment Center in Bessemer, Alabama (“Petition”). (B. Ex. 1(a)).² Over the next several weeks, Amazon

² References to the Hearing Transcript are in the form of “Tr. ___” and references to the Board Exhibits are in the form of “B. Ex. ___.”

asked Region 10 to check the Union’s showing of interest because the petitioned-for unit actually had approximately 6,000 employees—not the 1,500 that the Union claimed—indicating that the Union could not possibly have obtained authorization cards from 30% of the actual number of employees.

Without explanation, Region 10 rejected Amazon’s showing-of-interest challenge after two weeks. And on December 18, 2020, Region 10 Hearing Officer Kerstin Meyers opened the pre-election hearing. By the third and final day, December 22, the parties had formally stipulated to all but one of the contested issues: whether the election should occur by mail. Before the third hearing day opened on December 22, however, the Hearing Officer directed Amazon to make a written offer of proof and denied Amazon’s request to present witness testimony on the method of election issue. (Tr. 189). Amazon submitted its perfected offer of proof (“Offer of Proof”) on December 28, 2020, and the Union filed a response on December 31, 2020. On January 7, 2021, the parties submitted post-hearing briefs.

On January 15, 2021, Acting Regional Director Lisa Henderson issued her D&DE. She ordered a mail-ballot election ostensibly under *Aspirus* Conditions 2 and 5. The Acting Regional Director also rejected, without consideration, several mail-ballot voter and election protection proposals in Amazon’s post-hearing brief that would have promoted a faster election, increased voter participation, and reduced or eliminated potential fraud with what was then more than 6,000 mail ballots (slightly under 6,000 now). Accepting the Union’s Catch-22 argument, the Acting Regional Director held that Amazon’s comprehensive protocol to ensure a safe election threatened the election’s appearance of neutrality. She did not accept Amazon’s offer to consult with the Region (and the Union) to modify Amazon’s protocols to address any concerns, nor did she address Amazon’s suggestion that the Board provide ample signage, banner, etc. that

would cure any such concerns. The D&DE directed ballots to be mailed on February 8, 2021, but ballots are not required to be returned to Region 10’s office until almost two months later (on March 29, 2021) and are to be counted starting on March 30, 2021.

Amazon’s Request for Review, filed concurrently, identifies serious legal issues that warrant the Board’s review:

- The Board should provide guidance for determining the most “applicable” and “best available geographic statistical measure” for purposes of *Aspirus* Condition 2, which evaluates local COVID-19 statistics. The need for guidance is particularly striking in this case. The Acting Regional *rejected* the best available statistics on testing positivity rates—which showed case numbers and a test positivity rate of just 2.88% at the BHM1 facility itself (the size of three Alabama “cities”)—based on the premise that Board agents and employees would travel through other parts of the county, state, or region. Such a premise—**effectively overruling this part of *Aspirus***—eliminates the use of intracounty data in all cases, no matter how accurate, because opponents of manual elections can cherry-pick whatever statistics make a manual election look riskier, regardless of the availability of more precise data. The Acting Regional Director also applied an *outdated* 14-day trend showing a slight increase in infections, when if she had run the same calculation as of the decision date, as the Board directed, it would have shown a 14-day trend of *declining* infections.
- The Board should explain what constitutes an “outbreak at the facility” under *Aspirus* Condition 5. Here, the Acting Regional Director noted that *Aspirus* had failed to offer a definition of “outbreak” and reached the remarkable conclusion that *any* level of infection or potential infection among employees counts as an “outbreak.” For the Acting Regional Director, 40 infections in a facility of more than 6,000 employees over a period of 14 days before December 28, 2020 was enough to constitute an outbreak.³ If true, facilities will be in a constant state of “outbreak” unless and until the virus all but disappears, with no manual elections occurring until that unknown time.
- The Board should clarify employers’ ability to implement safety measures to facilitate a manual election above and beyond GC Memo 20-10, as *Aspirus* Condition 4 envisions, building on procedures that the General Counsel and Board already have found allow for a safe election. In this case, the Acting Regional Director rejected Amazon’s proposed protocols, finding that they

³ As Amazon reported in its post-hearing brief, out of the 7,575 individuals (including Amazon employees and third parties) in the BHM1 facility during the 14-day period ending on January 7, 2021, 218 (2.88%) fell into the category of “individuals present in the facility within the preceding 14 days [who] have tested positive for [COVID]-19,” self-reported confirmed positives, and presumptive positive numbers. *See* E. Brief at 30.

suggested too much influence by Amazon over the election. Since *Aspirus* endorses and indeed requires employer commitments to making the election site safe, the Board should forcefully repudiate the Acting Regional Director’s Catch-22 approach. At a minimum, the Board should direct Regional Directors that they must engage with the parties to assess and adjust proposed protocols before rejecting them out of hand based on the potential impression to voters.

- The Board should explain how Regional Directors are supposed to assess the *Aspirus* conditions if parties are precluded from introducing relevant evidence because they cannot “litigate” the issue.
- Finally, the Board should reassess aspects of the *Aspirus* framework in light of the most current scientific approaches that most governmental agencies are using to balance safety and other aims. As applied in practice, *Aspirus* gives insufficient weight to fundamental Board goals, such as increasing voter participation, processing election petitions speedily and efficiently, and ensuring that employees make a free and informed choice in elections.

II. ARGUMENT

Section 102.67(j)(1) allows a party requesting review to also move to stay the election and move to impound some or all of the ballots. 29 C.F.R. § 102.67(j)(1). To obtain extraordinary relief, the moving party must make “a clear showing that it is necessary under the particular circumstances of the case.” *Id.*

While Amazon’s Request for Review explains in detail how the D&DE demonstrates serious and systemic flaws in the Board’s *Aspirus* decision, a temporary stay is warranted in this case for at least three separate reasons *regardless* of how the Board ultimately rules on the Request for Review.

First, given the extraordinary size of the unit (more than 5,800 potential voters), moving forward with a mail-ballot election would require a tremendous expenditure of the Region’s time and resources between now and February 8, 2021. Amazon estimates that hundreds of hours of Board agent time will be required to prepare and distribute more than 5,800 mail ballots—and with Board agents working remotely and presumably isolated from each other (Amazon assumes that the Acting Regional Director, having declined to conduct an in-person election, would not

then have Board agents prepare and distribute mail ballots through in-person activity). These agency resources would be for naught if the Board grants the Request for Review and either orders a manual election or sends the matter back to the Regional Director for a supplemental decision or altered voting procedures. By staying the election pending review, the Board would avoid wasted administrative and financial resources.

Second, if the Board alters the voting method or procedures after the Region has already mailed out ballots and voting instructions by February 8, 2021, it would likely cause substantial voter confusion, and even disengagement. Many voters may assume that any subsequent ballots or instructions are duplicative and disregard the later-received materials. Others might become frustrated by having to choose between two sets of instructions that both appear official. And some voters may even question the legitimacy of the election materials if they receive a subsequent set that appears to reverse course. The Board can avoid such confusion and disengagement if it stays the election process until after it reaches a final determination on the Request for Review.

Third, a temporary stay pending consideration of the Request for Review would not result in undue delay given the size and scope of this case. The D&DE already dictates a nearly two-month gap between when ballots are to be mailed and returned to the Region, and it will take a significant amount of time to conduct a virtual count of thousands of ballots—well into April 2021, and possibly longer if the ballot count triggers disputes over ballot validity. Particularly given the procedural posture, granting Amazon’s motion would not result in unwarranted delay, even if the Board were to later deny the Request for Review after careful consideration. It would simply allow the Board to take the time necessary to resolve the Request for Review on critical issues affecting this and other representation matters before the Board.

III. CONCLUSION

For these reasons, Amazon respectfully requests that the Board grant its Motion to Stay the Election Pending Review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Employer's Motion to Stay the Election Pending Review was filed today, January 21, 2021, using the NLRB's E-Filing system and was served by email upon the following:

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