

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

**AMAZON.COM SERVICES, LLC**

**Employer,**

**Case 10-RC-269250**

**and**

**RETAIL, WHOLESALE AND  
DEPARTMENT STORE UNION**

**Petitioner.**

**PETITIONER'S OPPOSITION TO EMPLOYER'S  
REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S  
DECISION AND DIRECTION OF ELECTION**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** ..... iv

**I. INTRODUCTION AND SUMMARY OF ARGUMENT** .....1

**II. STATEMENT OF THE CASE** .....6

**III. ARGUMENT**.....6

**A. The Employer’s Request for Review Should Be Denied Because It Fails to Satisfy Any of the Grounds for Granting Review.** .....6

**B. The Petition Does Not Present Compelling Reasons for “Clarifying” the Criteria for Directing Mail Ballot Election because the Acting Regional Director Applied the Correct Standard.**.....10

**1. The Employer’s Petition Presents No Critical Questions Left Unanswered in *Aspirus* that Dictate a Different Outcome than the Decision of the Acting Regional Director to Direct a Mail Ballot Election.** .....10

**2. *Aspirus*’s Condition 2 has not Swallowed the Board’s Presumption in Favor of Manual Elections. Indeed, the Employer’s Proposed Reading of Condition 2 Effectively Nullifies All the Conditions including Condition 2 Articulated in *Aspirus*.** .....12

**a. The Employer’s claim that *Aspirus* Provides Insufficient Guidance to Regional Directors on Determining the Appropriate Geographic Area and Timeframe Lacks Merit and Fails to Appreciate that Regional Directors Still Retain Discretion Under *Aspirus* and that Absent a Showing of a Prejudicial Abuse of Discretion, the Board’s Policy is Not to Disturb the DDE.**.....12

**b. The Employer is flat wrong that the Acting Regional Director Mistakenly Used Outdated County Level Data and Should have Relied on Amazon’s Self-Reported Positivity Rate.** .....12

**c. The Employer’s claim that the Acting Regional Director Used Outdated Information Regarding the 14-day Case Trend Is Not a Basis For Granting Review Because It is Undisputed Evidence that the 14-day Positivity Rate For Jefferson County Greatly Exceeded the Five Percent Threshold And That Cases In Jefferson County Still Remain At High Levels.** .....14

**3. The Board does not need to provide guidance on what constitutes an “outbreak” because this case does not turn on the finding that BHM1 experienced an outbreak, which in any event the evidence clearly indicates is happening. In the 14-day period preceding January 7, 2021, BHM1 recorded at a minimum a 4.3 percent positivity rate based on asymptomatic testing and a daily case rate of 183 per 100k which is a very high rate** .....17

**4. Condition 4 Correctly Recognizes that Employees Must Perceive the Board As Conducting the Election and Not the Employer. The Employer’s Proposed**

<b>Safety Protocols Would Clearly Leave the Impression that Amazon is Jointly Conducting the Election.....</b>	<b>20</b>
<b>5. The Employer Was Not Precluded From Introducing Relevant Evidence But In Fact Was Given a Week After the Pre-Election Hearing Had Closed to Submit Evidence In the Form Of An Offer Of Proof and then Given Another Two Weeks to Submit a Brief And Additional Evidence.....</b>	<b>22</b>
<b>C. The Board Should Not Reconsider the <i>Aspirus</i> Framework.....</b>	<b>23</b>
<b>2. The Acting Regional Director Did Not Abuse Her Discretion in This Case By Noting that Issues Related to Voter Participation Can be Handled Through Post-Election Procedures and the Board Should Reject Amazon’s Request that The Board Abandon <i>Aspirus</i> On the Grounds that Manual Elections Result In Higher Voter Participation..</b>	<b>26</b>
<b>3. The Employer’s “potpourri” of arguments about efficiency and delay are based on anecdotal evidence, speculation and false accusations of misconduct and do not present compelling reasons for reconsidering <i>Aspirus</i> and overriding the Acting Regional Director’s decision to direct a mail-ballot election. ....</b>	<b>28</b>
<b>4. Board law does not restrict Employer free speech during mail-ballot elections and there is no basis (let alone a compelling one) for reconsidering <i>Aspirus</i>. ....</b>	<b>31</b>
<b>D. The Request that the Board Adopt New Minimum Standards for Mail-Ballot Elections is Not a Basis for Reconsidering <i>Aspirus</i> Nor for Finding that the Acting Regional Director Abused Her Discretion For Following the Board’s Current Procedures. ....</b>	<b>34</b>
<b>IV. CONCLUSION.....</b>	<b>35</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>37</b>

**TABLE OF AUTHORITIES**

*Altec Industries*, 10-RD-25707 (Sept. 2, 2020) .....24

*Aspirus Keweenaw*, 370 NLRB No. 45.....*passim*

*Fessler & Bowman, Inc.*, 341 NLRB 932 (2004) .....35

*GPS Terminal Services, Inc.*, 326 NLRB 839 (1998)..... 11, 26

*Jowa Security Services*, 269 NLRB 297, 298 (1984) .....28

*Mission Industries*, 283 NLRB 1027 (1987) .....30

*NLRB v. Cedar Tree Press, Inc.* 169 F. 3d 794 (3d Cir. 1999) .....31

*Professional Transportation, Inc.*, 32-RC-259368 (December 2, 2020) .....35

*San Diego Gas & Electric*, 325 NLRB 1143 (1998) ..... 30, 33

*Sitka Sound Seafoods, Inc.* 325 NLRB 685, 686 (1998).....28

*Stiefel Construction Co.*, 65 NLRB 925 (1946) .....28

*Sutter West Bay Hospitals*, 357 NLRB 197, 198 (2011).....30

*Thompson Roofing*, 291 NLRB 743 n. 1 (1986).....30

*Wilson & Co. Inc.*, 37 NLRB 944 (1941).....31

The Petitioner Retail, Wholesale and Department Store Union (“RWDSU”) respectfully submit the following opposition to the Employer’s request for review of the Acting Regional Director’s January 15, 2021 Decision and Direction of Election.

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

The Employer’s petition for review should be denied in its entirety. The Board should not revisit and abandon the flexible framework articulated in *Aspirus Keweenaw* which strikes a balance between giving guidance and the exercise of discretion on a “nonlitigable” matter traditionally entrusted to Regional Directors. The Employer’s arguments for abandoning *Aspirus Keweenaw* are frequently raised and frequently rejected arguments with how Regional Directors have exercised their discretion in the midst of an unprecedented pandemic and not “compelling reasons for reconsideration” of a decision issued a little more than two months ago.

The Covid-19 pandemic has taken the lives of over 430,000 people and now is not the time to further constrain Regional Directors in their assessment of whether the virus presents a risk to employees and Board agents. As the Employer notes, the spread of the virus and its mutations in local communities can change monthly, weekly and even daily. And this local variability is precisely why the Board should reject the Employer’s invitation to micromanage Regional Directors faced with making a decision on how to conduct a representation election.

In this case, the Acting Regional Director in an extensive and well-reasoned decision applied the *Aspirus* framework to the facts she found, and, exercising the discretion both Board law and regulations vested in her, concluded that a mail-ballot election was appropriate. For example, the undisputed evidence is that at the time of the Decision and Direction of Election (DDE) issued, the 14-day county-level positivity rate was three (3) times greater than the five (5) percent threshold.

Likewise, the Employer's own data showed a severe outbreak at the facility during the 14-day period preceding January 7, 2015; an unremarkable fact given that the county where the facility is located was experiencing unprecedented spread of the virus. This outbreak strongly cautioned against holding a manual election at BHM1 which would involve thousands of employees and at least 10-15 Board agents (if not more) conducting an election over 4 to 5 days. It also demonstrated that the safety measures the Employer adopted at BHM1 may not stop the spread of the virus at the facility. Some may disagree with this assessment but it simply cannot be an abuse of discretion for a Regional Director to follow the guidance provided and exercise her discretion on a non-litigable matter.

Notwithstanding the substantial prevalence of the virus in its own facility and evidence of significant community transmission, the Employer still urges the Board to ignore or minimize this evidence, trust that its proposed safety protocols will prevent transmission of the virus and substitute its judgment for that of the Acting Regional Director. The proposed safety protocols, however, provide no protection from the virus when individuals leave the facility. As an independent agency of the Federal Government, the Board's response to this pandemic must look beyond the narrow interest of a particular party and consider the public health concerns and interests of each local community where Board agents will travel to and conduct Board activities. Accordingly review should be denied for the following reasons:

In applying *Aspirus* Situation 2, the DDE relied on 14 day county-level positivity rate and doing so cannot be an abuse of discretion since *Aspirus* states a preference for county-level data. The Employer's argument that its facility's positivity rate was the "best available geographic statistical measure" is incorrect. Employer cites no authority for the proposition that from a public health perspective such a narrow and artificially drawn boundary is appropriate. The Employer

fails to explain why the Regional Director abused her discretion in accepting publicly vetted data from governmental and academic sources over the Employer's self-reported positivity rate; a rate which was incorrectly calculated as 2.88 % and masked the prevalence of the virus in its facility. The Acting Regional Director did not abuse her discretion in finding that the Employer's proposed "geographic measure" was unpersuasive because employees and visitors do not live at the Employer's facility, Board agents would be required to travel from out-of-state to the facility and the prevalence of asymptomatic transmission and the presence of COVID-19 both inside and outside the Employer's facility cannot be ignored given the crisis in Jefferson County.

The Board does not need to clarify what constitutes an "outbreak" under Situation 5 because in this case the undisputed evidence shows that during the 14-day period preceding the filing of its COVID-19 certification on December 28, 2020, the Employer reported 40 positive cases. The Employer did not indicate whether these were symptomatic or asymptomatic cases. The Petitioner's expert Dr. Judd noted that such a number in a 14 day period indicates that the Employer's BHM1 facility was experiencing COVID-19 case rates above what the Harvard Global Health Institute recommends for safely operating, which is 25 cases per 100,000. During 14 day period preceding Dec. 28, BHM1's case rate was 48 per 100,000. The Employer then reported in its brief that during the 14-day period preceding January 7, 2021 (8 days before the DDE issued), it recorded 194 positive COVID-19 cases. This is a dramatic increase in number of cases. The case rate jumped to 183 per 100,000 in approximately 10 days. Even in a facility with 7,575 employees and contractors, this is a major outbreak. Given these facts, the Employer cannot show that the Acting Regional Director abused her discretion in finding that Situation 5's outbreak scenario was present, regardless of how she defined the term "outbreak."

The Board does not need to clarify Situation 4 in the *Aspirus* decision because the Acting Regional Director did not abuse her discretion in finding that “utilization of the Employer’s extensive resources would tend to give the appearance to voters that the Region is accepting benefits from the Employer and is no longer a neutral party.” The Employer’s proposal to arrange for transportation, sanitized hotel rooms, safe food delivery, an RV on the premises for Board Agents use (all for the ostensible purpose of keeping Board agents safe) would tend to give the appearance of accepting benefits. Likewise, Acting Regional Director did not abuse her discretion in finding that the Employer’s proposal to use its digital “Distance Assistance” to police social distancing while employees stand in line to vote and to supply pass through boxes or vending machines could create the impression of surveillance and imply a problematic amount of Employer involvement in election proceeding. This finding is further supported by the Employer’s proposal to conduct temperature checks and use rapid COVID-19 testing immediately prior to voting. The Employer wrongly accuses the Acting Regional Director of a “Catch 22” approach. In *Aspirus*, the Board warns Regional Directors not to approve manual election arrangements where the Employer proposes safety protocols that create the impression that any party controls access to the Board’s election process. This is precisely the concern the Acting Regional Director articulated in response to the Employer’s safety protocols and thus cannot be an abuse of discretion.

The Board should not grant review just to explain to the Employer that under Board Regulations, the time, place and method of conducting an election are “nonlitigable.” The Employer can submit its “evidence” supporting its position on the appropriate time, place and manner for conducting an election directly to the Region. It is safe to say that the Employer in this case availed itself of this opportunity with its extensive submissions and briefing.



Finally, the Board should not grant review to “reassess” the *Aspirus* framework on account of alleged “most current scientific approaches” and/or to rehash arguments about alleged problems with mail-balloting that the Board already addressed or considered in *Aspirus*. Other than citing a post on the website of John Hopkins Coronavirus Resource Center about the limitations of positivity rate data (a post that was almost certainly available to the Board when it decided *Aspirus*), the Employer offers no other “current scientific approaches” that cast any doubt on the *Aspirus* framework. Positivity rate data is still used and tracked by public health professionals, including the John Hopkins Coronavirus Resource Center, in determining whether the virus is circulating in a community. A current opinion from one of the Employer’s experts Dr. Vin Gupta urges all 50 states to align on public policy/approaches and, among other things, “**avoid all travel**” because of the high number of deaths and the new COVID-19 variants already here and circulating in some communities. As to problems with mail-balloting, the Employer reiterates for example that mail-ballot elections on average have lower turnout rates and that the *Aspirus* framework does not properly balance the goals of increasing voter turnout with the Board’s responsibility to help stem a pandemic that has already taken more lives than all American lives lost during World War II. The Board in *Aspirus* however specifically addressed this issue of balancing the demands of public health policy with the goal of increasing voter turnout. It noted that “although the generally lower voter turnout in mail-ballot elections supports the Board’s historic preference for manual elections, it is not a relevant consideration in assessing whether a Regional Director has abused his or her discretion by directing a mail-ballot election in a specific case.” 370 NLRB No. 45, slip op. fn. 6. All the other concerns about delay and election integrity have likewise been considered. Ultimately, none of these concerns demonstrate that the Acting Regional Director abused her discretion in directing a mail-ballot election in this case.

## **II. STATEMENT OF THE CASE**

On November 20, 2020, the Union filed a RC petition with National Labor Relations Board, Region 10, seeking to represent certain employees employed by the Employer at its warehouse facility located in Bessemer, Alabama. When no stipulation could be reached, a representation case hearing was held in this matter on December 18, 21 and 22, 2020. By the last day of the hearing, the only issue remaining was whether the election should be conducted by mail or manual ballot. After hearing arguments from the parties, the Hearing Officer permitted the Employer to submit an Offer of Proof by December 28, 2020 regarding its position that a manual ballot should be conducted. (Tr.189) The Hearing Officer similarly allowed the Union to December 31, 2020 to file a response to the Employer's Offer of Proof. (Tr. 189). The Hearing Officer also permitted the parties to January 7, 2021 to file post-hearing briefs. (Tr. 189-190). The Employer filed its Offer of Proof on December 28, 2020 and the Union followed with its Response to the Employer's Offer of Proof on December 31, 2020. Both parties filed post-hearing briefs on January 7, 2021. On January 15, 2021, the Acting Regional Director issued her Decision and Direction of Election directing a mail ballot election.

## **III. ARGUMENT**

### **A. The Employer's Request for Review Should Be Denied Because It Fails to Satisfy Any of the Grounds for Granting Review.**

The Board should deny the Employer's request for review because there are no substantial questions of law or policy raised on account of any of the grounds identified in 29 C.F.R. § 102.67(d). The Employer does not identify an absence of or departure from officially reported Board precedent. In fact, the Employer acknowledges that the Board's recent *Aspirus* decision address the situations where a Regional Director can exercise their discretion to direct a mail-ballot

election; nor does the Employer argue that the Acting Regional Director in this case departed from the guidance provided under *Aspirus*.

The Employer's request fails to show that the Acting Regional Director's decision on a substantial factual issue is "clearly erroneous" and that such error prejudicially affected its rights. The closest the Employer comes to arguing for this ground is the claim that the Acting Regional Director erroneously relied on "outdated" 14-day county-level case trend data. As noted below, the case trend data was updated one day before the DDE issued and the DDE cites case trend data as it was reported four days prior to the issue date. Assuming this qualifies as an erroneous decision on a substantial factual issue, the Employer does not argue that its rights were prejudiced. Though the 14-day county-level case trend was declining from unprecedented highs, the daily cases were still substantially above prior peaks. But more importantly, the Acting Regional Director correctly found that the 14-day county-level positivity rate as of the date of the DDE exceeded the five (5) percent positivity rate by a factor of three. The Acting Director also correctly observed that there was a COVID-19 "outbreak" at the Employer's BHM1 facility. Given these findings are not clearly erroneous, the Employer could not establish that the alleged erroneous finding regarding the 14-day county-level case trend resulted in any prejudice.

With respect to the conduct of the pre-election hearing or a ruling made in connection with this hearing, the Employer contends that the Acting Regional Director erred in not allowing the presentation of live testimony regarding the mail-ballot issue but instead required both parties to submit their evidence in the form of an offer of proof. There is no substantial issue of law or policy raised by this ruling because under 29 C.F.R. § 102.66(g)(1) the parties don't have a right to litigate the method of conducting an election, which in turn means there is no right to a hearing on the mail-ballot issue. *See, Aspirus Keweenaw*, 370 NLRB No. 45, slip op. fn. 3. The fact that the

Acting Regional Director allowed an offer of proof and the submission of written evidence along with briefs far exceeded the obligation to simply solicit the parties' position on the method of conducting the election after the "pre-election" hearing concluded.<sup>1</sup> Moreover, the Employer makes no effort to show how the lack of a hearing on a "nonlitigable" issue resulted in prejudice (i.e. what evidence was it precluded from offering that it did not already submit in writing).

Lastly, it is evident that the Employer's request focuses entirely on the final ground supporting review, namely, that there are compelling reasons for reconsideration of an important Board rule or policy. The Employer argues that the Board should revisit *Aspirus* given the alleged faulty application of the decision by the Acting Regional Director (which centers largely on her rejection of the Employer's facility as the appropriate geographic level for purposes of determining whether positive rates exceed 5 percent) and her interpretation of the term "outbreak" as used in Situation 5. Alternatively, the Employer urges the Board to effectively abandon the *Aspirus* framework because it's misaligned with the evolving nature of the pandemic and the alleged inability to balance numerous competing statutory objectives. This argument is based entirely on the alleged short-comings of mail-ballot elections.

First, as to the arguments that the Acting Regional Director incorrectly applied *Aspirus*'s Situations 2 and 5, these are not compelling reasons for granting review. The Employer's arguments don't overcome the strong policy of vesting Regional Directors with discretion to decide how best to conduct an election. The Acting Regional Director in this case decided that county-level data should be used to determine local COVID-19 conditions and not site specific data that was entirely provided by the Employer. *Aspirus* clearly entrusts this judgment to the

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<sup>1</sup> A pre-election hearing was held because the parties disagreed on the unit description. However, during the course of the hearing, a stipulation was reached on this issue and thus concluding the hearing.

discretion of the Regional Director. Likewise, the Acting Regional Director's interpretation of the term "outbreak" as used in *Aspirus's* Situation 5 does not present a compelling reason for intervening in this case. The Employer argues that the Acting Regional Director's interpretation is too stringent because one case in a 14-day period constitutes an "outbreak" under her interpretation but this does not show an "abuse of discretion." Disagreement with an interpretation is not a compelling reason for overriding the strong policy that vests Regional Director's with discretion, especially when the evidence (as discussed below) demonstrates a significant number of reported COVID-19 cases at the Employer's facility the week prior to the DDE issuing.

Second, the Employer's remaining arguments for reconsidering *Aspirus* are not case-specific but raise a myriad of concerns about mail-balloting that the Board in *Aspirus* considered and rejected. The Board has previously considered issues regarding voter turnout, delay and alleged election integrity concerns and found that these arguments are insufficient to compel Regional Directors to direct manual elections during a pandemic. The Board in *Aspirus* further rejected the argument that a Regional Director must direct a manual election if the Employer can establish that its proposed safety protocols will result in a *de minimis* risk of virus transmission during the balloting.

The Board issued *Aspirus* not to overturn longstanding policy granting Regional Directors discretion over how to conduct an election but simply to clarify that Regional Directors who decide to direct a mail-ballot elections because of COVID-19 should base such decisions on local data/conditions present at the time the decision is made and on not national trends. There is no reasonable basis for claiming that the DDE at issue in this case does not focus on local county-level COVID-19 conditions. As a result, the Board should reject the Employer's efforts to revise

*Aspirus* and impose further restrictions on a Regional Director’s discretion to direct a mail-ballot election. There are no overpowering reasons for doing so.

**B. The Petition Does Not Present Compelling Reasons for “Clarifying” the Criteria for Directing Mail Ballot Election because the Acting Regional Director Applied the Correct Standard.**

**1. The Employer’s Petition Presents No Critical Questions Left Unanswered in *Aspirus* that Dictate a Different Outcome than the Decision of the Acting Regional Director to Direct a Mail Ballot Election.**

Contrary to the Employer’s assertion, the evidence does not overwhelmingly show that a manual election can be safely conduct in Jefferson County, Alabama. The Acting Regional Director correctly applied the guidelines set forth in *Aspirus* when exercising her discretion and did not adopt “an expansive misinterpretation of *Aspirus*,” a claim based largely on the Employer’s proposition that its facility in Bessemer should be treated as the appropriate geographic unit for determining the prevalence of COVID-19 in a community. The Employer does not deny the fact that Jefferson County, AL (at the time the DDE issued) had a 14-day positivity rate of over 17 percent.<sup>2</sup> DDE p. 6. This undisputed fact alone supports the Acting Regional Director’s decision to direct a mail ballot election and undercuts the assertion that she abused her discretion. The other manufactured ambiguities regarding *Aspirus*’s guidelines are simply immaterial to this case and certainly don’t justify setting aside the DDE or remanding the case to the Region.

The Board in *Aspirus* was well aware that many employers have adopted the safety measures outlined in GC Memo 20-10 and proposed additional measures to limit workplace transmission of COVID-19 during an election. 370 NLRB No. 45, slip op. at 2. But the effectiveness of these measures at limiting transmission did not override the other “situations” that

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<sup>2</sup> According to Bamatracker.com (a site dedicated to tracking COVID-19 data in real time and which Dr. Judd testified is a well-respected site used by public health professionals and academics in Alabama) the 7 day positivity for Jefferson County on January 15, 2021 was 29.08 percent.

justify a Regional Director's decision to direct a mail-ballot election; the position that Amazon seemingly advances in its petition. (Employer's Request for Review, p. 13). Indeed, compliance with GC Memo 20-10 (which focuses on ensuring social distancing during the balloting process) is the minimum requirement and an employer's refusal to fully comply with GC Memo 20-10 is one of the situations justifying a mail-ballot election. In other words, agreeing to comply with GC Memo 20-10 does not entitle an employer to a manual election; if this were true, the Board would have said so.

Finally, the Employer claims that the DDE in this case illustrates that Regional Directors have misinterpreted *Aspirus* as a "blank check" to disregard the longstanding presumption favoring manual elections. Not only is this assertion about the DDE in this case patently false, its broadside against all Regional Directors demonstrates the Employer's disregard for the difficult decisions Regional Directors must make when balancing the safety of petitioned for unit employees and the Board's own staff against the Board's preference for manual elections.<sup>3</sup> Indeed, if the Employer's evidence indicates that these extensive safety protocols are needed to ensure a safe manual election, then the Acting Regional Director acted within her discretion to order a mail-ballot election. A manual election where extra-ordinary safety measures are needed is not the type of manual election the Board envisioned when it expressed a preference for manual elections over mail-ballot ones.

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<sup>3</sup> Though *Aspirus* clearly indicates that there's a presumption favoring manual elections, it overstates the force of this presumption. It is well settled that a decision on the method of election is left to the discretion of the Regional Director and once the election procedure has been set, the party seeking to alter that procedure has the burden of demonstrating that the Regional Director abused her discretion. *GPS Terminal Services*, 326 NLRB 839 (1998)(Chairman Gould's concurrence) Under Amazon's reading of the "presumption" favoring manual elections, Regional Directors are effectively stripped of discretion and the burden shifts to the Regional Directors to prove that a mail-ballot election is appropriate.

2. ***Aspirus's* Condition 2 has not Swallowed the Board's Presumption in Favor of Manual Elections. Indeed, the Employer's Proposed Reading of Condition 2 Effectively Nullifies All the Conditions including Condition 2 Articulated in *Aspirus*.**
  - a. **The Employer's claim that *Aspirus* Provides Insufficient Guidance to Regional Directors on Determining the Appropriate Geographic Area and Timeframe Lacks Merit and Fails to Appreciate that Regional Directors Still Retain Discretion Under *Aspirus* and that Absent a Showing of a Prejudicial Abuse of Discretion, the Board's Policy is Not to Disturb the DDE.**

The Employer argues that the Board should grant the request for review because this case shows that Condition 2 needs clarification on the issues of “geographic level and timeframe.” The Board in *Aspirus* identified five (5) situations that if “one or more are present . . . will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” 370 NLRB No. 45, slip. op. at 4. Situation or Condition 2 suggests that a mail ballot election is appropriate if “either the 14-day trend in the 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.” *Id.* at p. 5.

- b. **The Employer is flat wrong that the Acting Regional Director Mistakenly Used Outdated County Level Data and Should have Relied on Amazon's Self-Reported Positivity Rate.**

The Employer argues that the appropriate geographic area for determining positivity rates is the BHM1 facility itself, which it erroneously claims calculated as a 2.88 percent positivity rate during the 14 day period preceding January 7, 2021 when the positivity rate was 4.3 percent for asymptomatic testing.<sup>4</sup> The Employer cites no authority for the proposition that a site specific

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<sup>4</sup> Amazon relies on the supplemental certification of Mike Stone submitted as Exhibit 1 to the January 7, 2021 brief filed with the Region for the claim that the positivity rate during the preceding 14-day period was 2.88 percent. However, the positivity rate of the 556 test Amazon actually performed during this 14-day period, the rate is 4.3 percent (24 positives/divided by 556 tests). *See*, Supplemental Certification of Mike Stone, ¶ 3.



positivity rate provides the “best available geographic statistical measure” for determining whether there is significant COVID-19 transmission in the locality where the facility is located. Indeed, its experts do not advance this claim, as it is epidemiologically unsound.<sup>5</sup> A facility specific measure is unsound because the Employer’s employees and their families do not live at the BHM1 facility and spend most their time away from the facility living and interacting with others in Jefferson County. Moreover, the many Board agents who would conduct this election would not spend all their time at BHM1 but rather would need to stay in local hotels and would have to meet among themselves during the election. The Acting Regional Director gave these reasons for rejecting the Employer’s proposed facility specific positivity rate and such conclusion cannot reasonably be characterized as an abuse of discretion. DDE at p. 8. Other than stating the safety protocols it proposes will reduce the risk of transmission, Amazon provides no reason why it’s an abuse of discretion for the Acting Regional Director to rely on county level data, especially given the fact that employees live in the county and not the facility.

The Employer’s argument that its BHM1 facility should be treated as a “city” and therefore the facility is the appropriate “intracounty” geographic unit fails for the very same reasons. It should go without saying that the Employer’s BHM1 facility is not a city. The facility does not perform any governmental functions and employees and their families are not residents of BHM1. Though corporate towns were once a sad legacy of Alabama, they no longer exist and the Employer’s view of itself as a “city” betrays an attitude that special rules apply to large employers.

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<sup>5</sup> Amazon offers no explanation for why a site specific positivity rate is the same as a positivity rate used by county public health officials to determine community transmission in a county. A county wide positivity rate covers all residents of the county that anyone visiting the county may encounter. Moreover, the county rate reported by public health departments reflects a symptomatic testing rate (i.e. people showing symptoms who then seek out testing). Amazon’s testing involves asymptomatic testing. As discussed below, a 4.3 percent positivity rate for asymptomatic testing is a very high rate for a single employer.

Indeed, why shouldn't an employer with 25 employees and a facility positivity rate below 5 percent receive the same treatment Amazon insists it is entitled to in this case? Of course, adopting this interpretation of "geographical level" would effectively eliminate Situation/Condition 2 and in turn needlessly expose employees and Board agents to a risk of contracting COVID-19 because it ignores whether the virus is spreading in the locality where the facility is located.

Finally, the Board in *Aspirus* noted that the data on positivity rates should be obtained from "official state or local government sources." 370 NLRB No. 45, fn. 25. The Employer provides no argument as to why the Acting Regional Director abused her discretion when she relied on positivity rates reported by the Alabama Department of Public Health. Indeed, it is not an abuse of discretion for the Acting Regional Director to trust official government sources over a private entity's self-reported numbers.

**c. The Employer's claim that the Acting Regional Director Used Outdated Information Regarding the 14-day Case Trend Is Not a Basis For Granting Review Because It is Undisputed Evidence that the 14-day Positivity Rate For Jefferson County Greatly Exceeded the Five Percent Threshold And That Cases In Jefferson County Still Remain At High Levels.**

The Employer claims that the Acting Regional Director used outdated 14-day case trend data and that the 14-day case trend data from the Alabama Department of Public Health showed a declining number of cases as of January 14, 2021, the day before the DDE issued. The Employer acknowledges that the Acting Regional Director relied on publicly available data as of January 11, 2021 but argues that because she didn't use the January 14, 2021 data, she committed an error.

First, the Employer's arguments regarding the 14-day case trend are not a basis for granting the request for review because it is undisputed that the county level positivity rate as of January 15, 2021 was well above 10 percent (i.e. more than twice the 5 percent level). The fact that cases were declining from an alarming peak in late December and early January is not a basis for finding

that the Acting Regional Director abused her discretion when she relied on the case trend data available as of January 11, 2021 because she still correctly applied Situation 2 by relying on the county level positivity rate.

Second, a 14-day county level declining case trend does not mean that the virus is not spreading in Jefferson County, which is ultimately the question that *Aspirus* indicates a Regional Director should consider when deciding whether to direct a mail ballot election. 370 NLRB No. 45, slip. op. at 6 (noting the “if either of these measures is met (i.e. 14-day increasing case trend or 14-day county level positivity rate greater than 5 percent) this suggest that the virus is spreading in that locality and the interest in public safety will ordinarily indicate the propriety of a mail ballot election). The graph Amazon includes in its brief at page 20 shows that as of January 15, 2021, Jefferson County was averaging 590 daily cases. This was a decrease from a peak average high of 680 daily cases recorded on January 15. To put this number in perspective, during the summer peak that occurred in mid-July 2020, the highest average daily case rate for Jefferson County was 338.<sup>6</sup>

Additionally, the average daily case rate per 100,000 for Jefferson County is 55.7/100,000 as of January 16, 2021.<sup>7</sup> This number is greater than the national average of 50.1 per 100,000.<sup>8</sup> The point is that COVID-19 transmission remains a serious and substantial risk in Jefferson

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<sup>6</sup> See, Alabama’s COVID-19 Data and Surveillance Dashboard, <https://alpublichealth.maps.arcgis.com> (lasted visited on January 26, 2021). The data for July 2020 can be found for Jefferson County by clicking the “Data and Surveillance” menu, selecting Jefferson County, and then selecting tab 8.

<sup>7</sup> Alabama’s COVID-19 Risk Indicator Dashboard, Alabama Dept. of Public Health, [arcg.is/0brSGj](http://arcg.is/0brSGj) (last visited on January 26, 2021)

<sup>8</sup> Center for Disease Control, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days) (last visited on January 26, 2021)

County, AL.<sup>9</sup> Based on the current state of COVID-19 cases in Jefferson County and the likelihood of another surge as the more infectious strain gains a foothold, the Acting Regional Director did not abuse her discretion in directing a mail ballot election even with a 14-day declining case trend.

Third, the ADPH's color code risk indicator is not a good measure of the risk of contracting COVID-19. Though the indicator currently classifies Jefferson County as "low risk" the fact remains that the positivity rate exceeds 10 percent (currently at 13.7 percent for the preceding 14-day period) and that the cases per 100,000 exceed the national average.<sup>10</sup> Indeed, the ADPH warns against placing too much reliance on its risk categories. *See* Alabama's COVID-19 Risk Indicator Dashboard <https://alpublichealth.maps.arcgis.com/apps/opsdashboard/index.html> (last visited on January 26, 2021) ("Data are lagged to allow for completeness in reporting. These data can change as new information about cases is gathered or updated, which means the risk categories could change from red to green and back to red.") Moreover, according to the Harvard Global Health Institute (HGHI), the COVID-19 rates in Jefferson County place the county in the highest risk category under its risk evaluation system.<sup>11</sup>

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<sup>9</sup> The Harvard Global Health Institute classifies a positive case rate greater than 25 per 100,000 as posing a serious risk of infection and recommends that jurisdictions with a rate in excess of 25 per 100,000 should adopt mandatory stay at home order. *See*, <https://globalepidemics.org/wp-content/uploads/2020/06/key-metrics-and-indicators-v4.pdf>. Gov. Ivey has extended Alabama's "Safer At Home" order through March 5, 2021.

<sup>10</sup> According to website bamatracker.com, the current 7 day daily average positivity rate for Jefferson County is 25.06 percent and the 14-day average daily positivity rate as of January 15 was 18.18 percent. *See*, <https://bamatracker.com/county/Jefferson> (last visited on January 26, 2021). As Dr. Judd explained in her declaration, bamatracker.com is used by public health officials and academics in the State of Alabama because it provides a more update analysis of COVID conditions.

<sup>11</sup> In the HGHI's risk classification system, red is the highest risk level. All but two counties in Alabama are currently coded as red. *See*, <https://globalepidemics.org/key-metrics-for-covid-suppression/>. (last visited January 26, 2021) To reach the county map of Alabama, select counties under the "US Geo-Level" menu and then select "Alabama" under the search option.

Finally, other than arguing that the Acting Regional Director used “outdated” data for the 14-day county level case trend, the Employer offers no compelling reason for why the Board should grant the requested review.<sup>12</sup> As noted above, it is undisputed that the 14-day county level positivity rate exceeds ten (10) percent. In effect, the Employer is asking the Board to clarify an issue that is not outcome determinative. Under *Aspirus* it is not an abuse of discretion for a Regional Director to direct a mail ballot election with the 14-day county level positivity rate exceeds ten (10) percent even if the 14-day county level case trend is declining.

- 3. The Board does not need to provide guidance on what constitutes an “outbreak” because this case does not turn on the finding that BHM1 experienced an outbreak, which in any event the evidence clearly indicates is happening. In the 14-day period preceding January 7, 2021, BHM1 recorded at a minimum a 4.3 percent positivity rate based on asymptomatic testing and a daily case rate of 183 per 100k which is a very high rate**

The Employer urges the Board to clarify Situation 5 which allows Regional Directors to exercise their discretion and direct a mail ballot election if there is an “outbreak” at the Employer’s facility. However, this case is not the proper vehicle for such review because as noted above it is undisputed that the 14-day county level positivity rate well exceeds ten (10) percent, let alone the five (5) percent threshold outlined in *Aspirus*’s Situation 2. Situation 5 simply recognizes that there may be instances where the 14-day county level measures identified in Situation 2 are not present but that a specific facility has experienced a COVID-19 outbreak. Under such circumstances, a Regional Director does not abuse his or her discretion by directing a mail ballot election.

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<sup>12</sup> When arguing about the 14-day county level case trend, Amazon accepts the county as the appropriate geographical level. It’s unclear how you square this position with the position that the BHM1 facility is the appropriate geographic level for purposes of assessing whether the 14-day positivity rate exceeds 5 percent.

In this case, the Acting Regional Director concluded that based on Amazon’s certification (as required under GC Memo 20-10 and *Aspirus*) that during the 14-day period preceding certification forty (40) employees tested positive, an “outbreak” was present under Situation 5 and thus providing an **additional** factor favoring a mail ballot election. DDE at p. 5. The Employer notes that its brief updated the percentage of “affected individuals” as 2.88 percent of the total number of employees at BHM1 (a percentage that was erroneously calculated because it used the wrong denominator of all employees and contractors at BHM1 and not just those employees the Employer tested for COVID-19) and submits that this percentage is not an outbreak. The Employer further argues that “any presence of COVID-19” cannot be an “outbreak” under Situation 5 and that the Board should clarify what an outbreak means because otherwise Regional Directors will have free rein to order mail-ballot elections until COVID-19 is completely eliminated from the United States.

Allowing a Regional Director the discretion to order a mail-ballot election if within the preceding 14-day period any employees at the Employer’s facility have tested positive recognizes the unique dangers and challenges SARS-COV-2 present. It is well settled now that individuals with COVID-19 may show little or no symptoms and that asymptomatic individuals can transmit the virus to others. Moreover, someone with the virus may not show symptoms for up to 14 days and thus should quarantine for this period if in close contact with someone known to be positive.<sup>13</sup> Because the virus can easily spread, asymptomatic transmission presents a unique problem. One asymptomatic COVID-19 case means that this person more likely than not unknowingly

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<sup>13</sup> See, Center for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics> (last visited on January 26, 2021). The information about asymptomatic transmission and need to quarantine for 14 days can be found on the Frequently Asked Questions page under the Contract Tracing Tab.

transmitted the virus to others. Thus, a single asymptomatic positive case may be indicative of a much wider presence of COVID-19 in a workplace. The fact that 4.3 percent of the employees tested by Amazon during the 14-day period preceding January 7 were positive clearly supports the Acting Regional Director's finding that there was an "outbreak" at BHM1.

The Employer's alleged 2.88 percent positivity rate is also inaccurate. It is a mix of self-reported cases where the Employer did not test the employee and the positives resulting from Amazon's testing program divided by the total number of employees (7575). This is not an acceptable positivity calculation. The Employer has not tested all 7,575 employees at BHM1. The denominator in a positivity calculation is the number of people tested and not all persons working at BHM1. According to the Employer, during the 14-day preceding January 7, 2021, 556 employees were tested under its testing program the covers asymptomatic employees and 24 tested positive. This results in a positivity rate of 4.3 percent (i.e.  $24/556$ ), a percentage that indicates an outbreak at the facility.

Perhaps most concerning is that a 4.3 percent positivity rate where the Employer is testing asymptomatic employees clearly indicates a severe problem. The University of Alabama system has been conducting similar asymptomatic testing since the fall of 2020 and normal rates are 0.7% (<https://uasystem.edu/covid-19/dashboard>). 4.3% is alarmingly high and clearly indicates an outbreak at the facility. If the 556 people tested are representative of the full 7,575 employees then there are approximately 301 employees who were COVID positive and infectious but still working because they have not been tested. The 301 figure is calculated by multiplying 7,575 by 4.3 percent ( $=325.72$ ) and subtracting the 24 individuals who tested positive. People without symptoms are less likely to be vigilant in disease control measures because they believe themselves to be "not sick with COVID".

Finally, Dr. Judd noted that the cases per 100,000 experienced at Amazon when it was believed to have only 40 positive cases far exceeded the 25 daily cases per 100,000 recommended by the Harvard Global Health Institute for safe operation of a business. She calculated the rate to be 48 daily cases per 100,000 using just 40 positive cases during the preceding 14-day period. The most recent representation from the Employer that it recorded 194 positive COVID-19 cases during the 14-day period preceding January 7, 2021 only worsens the “per 100,000” case rate. Based on the data contained in its January 7, 2021 filing, 194 positive cases over 14 days represents a rate of 183 cases per 100K ( $194/14$  gives rate of 13.6 cases per day divided by 7575 and multiplied by 100K). This rate far exceeds what public health professionals recommend to operate safely (i.e. 25 per 100K). *See*, <https://globalepidemics.org/key-metrics-for-covid-suppression>. Indeed, if Amazon’s BHM1 were a city, HGHI would recommend that it immediately implement a mandatory stay-at-home order.

Because the evidence supports the presence of an “outbreak” under Situation 5, the Acting Regional Director did not abuse her discretion in concluding that this factor favored conducting a mail-ballot election. Accordingly, the Board should deny the Employer’s request to clarify the meaning of the term “outbreak” as it relates to this case.

**4. Condition 4 Correctly Recognizes that Employees Must Perceive the Board As Conducting the Election and Not the Employer. The Employer’s Proposed Safety Protocols Would Clearly Leave the Impression that Amazon is Jointly Conducting the Election.**

The Employer argues that the Acting Regional Director wrongly used its proposed safety protocols as a basis for favoring a mail-ballot election over a manual one. Again, because undisputed evidence established that Situation 2 (i.e. a 14-day county level positivity rate in excess of 5 percent) and Situation 5 were present, the Board should not grant the request for review in



order to clarify Situation 4. The presence of Situation 2 alone is sufficient to find that the Acting Regional Director acted within her discretion in directing a mail-ballot election.

The Acting Regional Director did not abuse her discretion when she viewed the Employer's proposed safety protocols as cause for concern. For example, recognizing that several Board agents would need to stay in Jefferson County for several days to conduct this election, the Employer proposed arranging for transportation to and from Jefferson County, arranging for sanitation of the hotel rooms (and at one point proposed arranging for the rental of entire floor at a local hotel), arranging for travel to and from the local hotel, providing RVs on the premises of BHM1 for Board agents to use and arranging for food delivery to Board agents. DDE at p. 3. The Employer has also proposed erecting several large tents for purposes of balloting outdoors, equipping the tents with ventilation systems, conducting temperature checks of all employees and Board agents on election days, providing all the safety equipment to conduct the election (pass through boxes and vending machines), providing disposable masks and hand sanitation and using a "Digital Assistant" to monitor social distancing. DDE at p. 3.

The Employer's proposed safety protocols far exceed the measures outlined in GC Memo 20-10. The Acting Regional Director correctly observed that the benefits listed above would tend to give the appearance to voters that the Region is accepting benefits from the Employer and is no longer a neutral party. Moreover, the extensive use of the Employer's resources needed to conduct a manual election in a manner that the Employer's experts deem safe does not avoid "the impression that a party, rather than the Board, has control over the election process." 370 NLRB No. 45, slip op. at 7.

An obvious point that seems to have escaped Amazon is that if all its proposed safety measures are required to safely conduct a manual election then this strongly indicates that the

prevalence of COVID-19 in Jefferson County and the facility pose a substantial risk to employees and visitors. Though these measures reduce the risk of COVID-19 transmission (just like mask wearing, hand sanitation and social distancing do), they do not eliminate such risk.<sup>14</sup> The Acting Regional Director's decision to error on the side of caution by directing a mail-ballot election cannot be fairly characterized as an abuse of discretion given the extraordinary lengths that the Employer's experts say are needed to conduct a safe manual election under the current conditions.

**5. The Employer Was Not Precluded From Introducing Relevant Evidence But In Fact Was Given a Week After the Pre-Election Hearing Had Closed to Submit Evidence In the Form Of An Offer Of Proof and then Given Another Two Weeks to Submit a Brief And Additional Evidence.**

The Employer complains that it did not have an opportunity to present evidence at a hearing pertaining to the conditions outlined in *Aspirus*. It contends that the longstanding regulation found at 29 C.F.R. § 102.66(g), which precludes litigation on questions related to the method of conducting an election, conflicts with the *Aspirus* framework and that Regional Directors should not have the power to bar a party from presenting evidence at a hearing, especially as it relates to Situation or Condition 2. The Employer's real complaint is that the Acting Regional Director did not adopt its position that the BHM1 facility is appropriate geographic level and not the county for purposes of determining whether the positivity rate exceeds 5 percent. As noted above, the Acting Regional Director considered the Employer's evidence and argument regarding Condition 2 and found the argument unpersuasive because "neither employees nor party representatives nor Board

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<sup>14</sup> Amazon makes several references to Dr. Judd's statement that the measures it proposes would likely reduce the risk of transmission. Dr. Judd is only stating what every public health official has been advising: mask wearing, social distancing, hand sanitation, cleaning surfaces and monitoring symptoms reduce the risk of COVID-19 transmission. What Amazon omits is that Dr. Judd recommends the use of other options than congregating together to conduct an election under the current COVID-19 conditions in Jefferson County. Given that she is the only expert actively working in Jefferson County and advising county and state public health officials her recommendation should carry extra weight.

agents exist entirely within the Employer’s facility.” DDE at p. 8. As noted in *Aspirus*, it may be appropriate to consider COVID-19 data from the areas where employees reside. 370 NLRB No. 45, slip op. at p. 6. So even if the Employer’s facility-specific level is the appropriate level (which clearly it is not), the Acting Regional Director did not abuse her discretion by considering county level data and basing her decision on the positivity rates reported for Jefferson County in the 14-day period preceding the DDE. Such decision is squarely within her discretion under *Aspirus*.

It is unclear why the Employer thinks that presenting the evidence it submitted in its offer of proof with respect to Situation 2 at a hearing would be more persuasive. Nor has the Employer identified any evidence it would have presented at a hearing that it did not submit directly to the Region in written form.

**C. The Board Should Not Reconsider the *Aspirus* Framework.**

The Employer’s argument that the Board should abandon the *Aspirus* framework is based on a skepticism of the metrics and data public health experts and government officials rely on to navigate a highly contagious and deadly disease. In its stead, the Employer proposes that the Board should adopt a test focused solely on whether the employer’s proposed safety protocols will prevent a “material increase in virus spread” regardless of whether 14-day county-level positivity rates exceed five (5) percent or the 14-day county level case trend is increasing. (Employer’s Request For Review, p. 28). The Employer asserts that the Board should revisit *Aspirus* a little more than two months after it was decided in order to “keep up with changing circumstances.” *Id.*

The Employer, however, has not identified a circumstance or argument that was not already considered when the Board decided *Aspirus*. Indeed, prior to *Aspirus*, employers urged the Board to direct manual elections because proposed safety protocols reduced the risk of transmission during the balloting to virtually zero; the precise argument the Employer advances in

this case. *See, Altec Industries*, 10-RD-25707 (Sept. 2, 2020)(directing mail-ballot electing in Jefferson County AL notwithstanding employers extensive proposal on safety protocols and expert witness testimony supporting the protocols as reducing the risk of transmission).<sup>15</sup> Accordingly, the Board should deny the request for review because there is no need to revisit what the Board in *Aspirus* clearly considered.

The Employer’s discontent with the Acting Regional Director’s decision finds its fullest expression in the argument that the Board should distrust publicly reported 14-day positivity rates and 14-day case trend data. Though these metrics have limitations, every public health official relies on this data to make decisions regarding measures needed to stem the spread of the virus. The Employer offers no compelling reason for the Board to remove these metrics as the basis for a Regional Director’s decision to direct a mail-ballot election, even if they are imperfect measures.

But more importantly, the Employer has not demonstrated that the Jefferson County 14-day positivity rate as reported by the Alabama Department of Public Health is so unreliable that the Acting Regional Director abused her discretion when she relied on this data. In fact, the high positivity rates recorded for Jefferson County in late December and early January, 2021 coincided with a hospitalization crisis and one which the county is still experiencing.<sup>16</sup> Thus, it is simply incorrect to assert that a county level positivity rate in excess of 18 percent (which was the rate at

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<sup>15</sup> One of the rationales the Board gave for issuing the guidance found in *Aspirus* was that its “experience in this area now encompasses over two dozen cases in which parties have sought review of mail-ballot determinations based on a wide range of potentially relevant considerations.” 370 NLRB No. 45, slip op. at 4.

<sup>16</sup> The crisis will only get worse as the rise in cases from the Christmas and New Year’s holidays start to impact the County’s hospitals. *See*, <https://wbhm.org/feature/2021/overwhelmed-with-covid-patients-alabama-hospitals-near-crisis-level/> January 6, 2021. The problem is not simply that a person traveling to Jefferson County might contract COVID-19 and possibly need medical care but that hospitals and their providers may not be able to care for someone needing emergency care unrelated to COVID-19. *Id.*

the time of the DDE) does not indicate that the virus is spreading in Jefferson County, the locality where BHM1 is situated. The Employer's own experience with COVID-19 cases proves not only the existence of an outbreak at the facility but that the virus was spreading in the county and continues to spread.

The Employer's reliance on the John Hopkins Coronavirus Resource Center is misleading. The Resource Center simply notes that testing protocols and the amount of tests administered may impact the usefulness of the positivity metric. But the concern is that positivity measures when based on incomplete data and inadequate testing may under-represent the extent of the virus's prevalence in a community and miss emerging threats. Despite limitations, the Resource Center believes it is important to still calculate and track each state's test positivity using a people centric approach. <https://coronavirus.jhu.edu/testing/differences-in-positivity-rates>. As noted above, the Employer presented no evidence that Jefferson County's testing protocols or the number of daily tests administered rendered the county-level positivity rate useless.

More importantly, the quote from the Resource Center site does not support the conclusion that a county-level positivity measure should not be used to determine whether a mail-ballot as opposed to a manual election should be conducted. The question of whether a Regional Director abuses his or her discretion when directing a mail-ballot instead of manual election is far different question than whether to close schools or businesses based solely on a 14-day county-level positivity rate. In the latter case, governmental officials must decide whether to prohibit normal daily activities. In the former, a Regional Director is simply asked to choose between two Board sanctioned methods of conducting an election and not whether an election should be conducted at all.

Contrary to the Employer's suggestion, this not the time to set new standards, abandon the public health metrics outlined in Situation 2 and adopt a test narrowly focused on an employer's facility. Jefferson County (like many other counties) was at the time of the DDE and still is struggling to contain the spread of COVID-19 and, as long as a locality is faced with a substantial spread of the virus as indicated by a positivity rate measure or the number of daily cases, the Board should hold its current course of allowing Regional Directors to make the decision on how to conduct an election based on such data.<sup>17</sup> The sole focus should not be on whether an employer's proposed safety protocols will limit the spread of the virus during the balloting phase of an election because activity needed to conduct the election will necessarily occur off-site and not during balloting (i.e. travel to the facility, overnight stays etc.).<sup>18</sup> As the Board in *Aspirus* seemingly recognized, the current broader community based approach is the appropriate standard during a pandemic.

**2. The Acting Regional Director Did Not Abuse Her Discretion in This Case By Noting that Issues Related to Voter Participation Can be Handled Through Post-Election Procedures and the Board Should Reject Amazon's Request that The Board Abandon *Aspirus* On the Grounds that Manual Elections Result In Higher Voter Participation.**

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<sup>17</sup> The irony of Amazon's wholesale assault on *Aspirus* is that even if there had been no pandemic at all, ordering a mail-ballot election in this case would not be an abuse of discretion. The very size of Amazon's workforce at BHM1 will require multiple days of balloting and at least ten Board agents (if not more) to conduct the election. Moreover, the Employer submitted a document attached to its Statement of Position which showed that employee schedules are scattered so that employees are rarely all present during the same day. *See, GPS Terminal Services, Inc.*, 326 NLRB 839 (1998)(noting that a mail-ballot election was appropriate where employees work varied schedules so that all employee cannot be present at a common place and at a common time.) Given the enormous commitment of Board resources need to conduct a manual election, an order directing a mail ballot election to conserve resources would be appropriate. *Id.*

<sup>18</sup> Amazon's claim that it strictly adheres to safety protocols during normal operations demonstrates that all the precautions taken cannot stop an outbreak at the facility. There is no assurance that none of the 194 individuals who tested positive during a recent 14-day period did not contract the disease at work.

The Employer next argues that the current application of *Aspirus* severely undermines that Act's goal of maximizing voter participation in an election because the decision authorizes Regional Directors to direct mail-ballot elections during a pandemic. The Employer asserts that because the Acting Regional Director failed to balance the statutory objectives of ensuring maximum employee participation against the goal of permitting employees to be represented as quickly as possible, "it is likely that between 1,100 and 1,700 more employees will not cast votes or do so incorrectly as compared to the number in a manual election."

The Employer does not explain how it arrived at this prediction that 1,100, to 1,700 employees will choose not to cast a ballot. There are at least three reasons, however, why the Board should reject this argument. First, the Employer's voter turnout argument is not new, was considered by the Board in *Aspirus* and, consequently, doesn't satisfy the "compelling reasons" standard for reconsidering a decision issued a little more than two months ago.<sup>19</sup> Second, the voter turnout argument is based on a prediction of future behavior and it's for this reason, among others, that the Board deems "voter turnout" arguments an irrelevant "consideration in assessing whether a Regional Director has abused his or her discretion in a specific case." Third and most importantly, the Board has long adhered to the rule that ". . . where adequate opportunity to participate in the balloting is provided all those eligible to vote, the decision of the majority actually voting is binding on all. *See, Sitka Sound Seafoods, Inc.* 325 NLRB 685, 686 (1998)(rejecting objections to outcome of a mail-ballot election based on voter turnout and citing *S.W. Evans & Son*, 75 NLRB

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<sup>19</sup> The Employer's emphasis that this election involves many more employees than the average election is simply irrelevant. Indeed, the Board has conducted mail ballot elections in much larger units than the petitioned for unit in this case. *See, Sutter West Bay Hospitals*, 357 NLRB 197, n. 6 (2011)(noting that the Board conducted a mail-ballot electing in a unit involving over 40,000 eligible employees)

811, 813 (1948)) for proposition that it is the opportunity to vote and not whether an employee exercised the opportunity that is the relevant concern).

In *Jowa Security Services*, 269 NLRB 297, 298 (1984) the Board observed that “[w]hether employees fail to vote because of hospitalization, vacation, apathy, or any other normal conditions of life, we see no useful purpose in speculating as to the state of mind of employees who do not vote. In the absence of evidence that any employee eligible to vote was denied that right to cast a ballot, the reasons for an employee’s failure to vote are irrelevant.” (citing, *Stiefel Construction Co.*, 65 NLRB 925 (1946)). Because the controlling issue is whether employees were given an opportunity to vote, the Acting Regional Director did not abuse her discretion in deferring any concerns related to potential voter disenfranchisement to post-election proceedings.

The Employer has not provided a “compelling reason” why estimates regarding average turn-out rates should require the Acting Regional Director to direct a manual election in this case. Though increasing voter turnout is certainly an important consideration, it does not and should not override public health policy concerns, especially when it is unknown whether the voter turnout in the mail-ballot election directed in this case will significantly fall below the expected turnout in a manual election.

- 3. The Employer’s “potpourri” of arguments about efficiency and delay are based on anecdotal evidence, speculation and false accusations of misconduct and do not present compelling reasons for reconsidering *Aspirus* and overriding the Acting Regional Director’s decision to direct a mail-ballot election.**

The Employer argues that the Board should reconsider *Aspirus* because the standard it articulates has and will continue to lead to “unnecessarily long election cases.” The Employer’s parade of horrors, however, are not unique to the *Aspirus* standard but an attack against use of mail-ballots in general. The Employer effectively asks the Board to abandon the long-standing



use of mail-ballots in Board conducted elections. The Employer’s list of complaints about mail-balling provide no compelling reasons for reconsidering the policy of allowing Regional Directors the discretion to direct a mail-ballot election and eliminating the use of mail-ballots as a method of conducting elections.

The Employer’s assertion that “mail ballot elections almost always take longer” is based on anecdotal evidence found in a Washington Post article about union organizing during the pandemic and not the Board’s actual statistics. In 2020, NLRB representation elections had a median of 31 days from petition date to election date.<sup>20</sup> Though this was increase over 2019’s median of 24 days from petition date to election date, it is still below the 2013 median of 40 days from petition date to election date and the 2014 median of approximately 38 days. *Id.* n. 20. So even in a year where mail ballots were used more frequently than manual elections, the median number of days from petition to election is within range experienced over the prior 7 years. One would not expect this result if the Employer’s argument had merit.

The Employer cites no evidence that mail-ballot elections, by design, increase the potential for post-election disputes. The citations reference the unremarkable fact that certainty and finality of an election outcome must wait until the conclusion of post-election litigation. This is true of any election and not specific to elections conducted through the use of mail-ballots. Moreover, a feared “potential” for an increase in post-election disputes does not provide a “compelling reason” to reconsider *Aspirus* and effectively do away with the use of mail ballots.

The Employer’s argument that mail-ballot elections increase the risk of delay due to “elevated and prolong opportunities for coercion and other interference” likewise lacks any basis

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<sup>20</sup> See, *Ian Kullgren, Union Elections Took Longer in 2020, but Virus Not Only Factor, Daily Labor Report, (January 4, 2021).*

in fact. The Board has on several occasions “considered and rejected the contention that mail ballot elections will inevitably result in more instances of voter coercion.” *Sutter West Bay Hospitals*, 357 NLRB 197, 198 (2011)(citing *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Nor do the NLRB cases the Employer cites concerning the alleged “vulnerability” to destruction of laboratory conditions actually support the attack on the integrity of a mail ballot election. For example, in *Thompson Roofing*, 291 NLRB 743 n. 1 (1986) and *Mission Industries*, 283 NLRB 1027 (1987), the Board did not mention the potential mail ballot vulnerabilities in order to diminish the effectiveness of mail voting methods. Instead, in both cases it took the opportunity to explain and defend mail ballot elections and the procedures put in place to ensure the integrity of such elections.<sup>21</sup>

As to the Employer’s suggestion that “coercion or interference” is uniquely problematic at BHM1, it offers nothing more than the size of the petitioned-for unit and its fact-free assertion that the Union’s ability to make a showing of interest must be cause for “serious concern.” This latter accusation is no different than the baseless claim that if someone were to lose an election, it had to be stolen due to massive fraud.

The Employer’s argument that mail ballots are frequently lost or delayed again lacks evidentiary support. The Employer’s request does not point to evidence that the Postal Service in Birmingham AL will be unable to deliver ballots in a timely and accurate manner. Nor does the

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<sup>21</sup> In *Wilson & Co. Inc.*, 37 NLRB 944 (1941), a decision rendered prior to adoption of measures to ensure the integrity of mail-ballot elections, the issue was whether soldiers on active duty should be sent a mail ballot. Though in a prior case had authorized sending them a mail-ballot, the Board concluded that the problems experienced with doing so cautioned against including active duty military personnel. In *NLRB v. Cedar Tree Press, Inc.* 169 F. 3d 794 (3d Cir. 1999) the question was whether an eligible voter who would be away on election day was entitled to vote absentee in a manual election. The Court decision does not question the integrity or usefulness of mail-ballot elections but simply held that it was unreasonable for the Board to have rule that individuals are not entitled to vote absentee in a manual election.

Employer show that recent use of mail-ballot elections has resulted in inordinately prolonged election processes because of mail delivery problems. Moreover, the Board in *Aspirus* considered the mail delivery service argument and did not disallow the use of mail ballots during the pandemic on the basis of such concerns. *See*, 370 NLRB No. 45, slip op. at n. 12. The Employer simply has not presented a compelling reasons for reconsidering *Aspirus* based on fear that there will be a failure in the delivery of mail ballots to eligible voters.

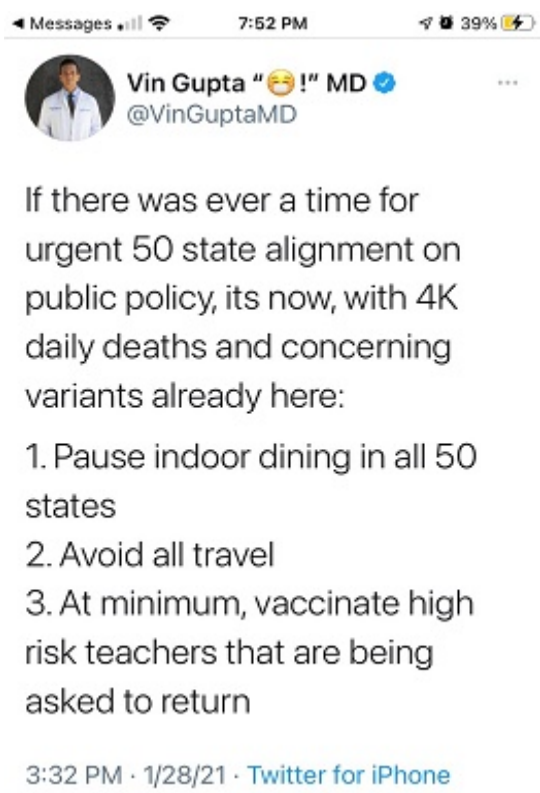
Finally, the Employer's argument that mail-ballot elections impose additional procedural instructions than manual elections is not a reason for finding that the Acting Regional Director abused her discretion when she directed a mail-ballot election. The Washington Post article cited in support of these alleged problems with mail-balloting simply does not address the issue of complexity in mail-balloting or incomplete or incorrect ballot or voting information. The anecdote by a union organizer about employees moving during the pandemic and the fear that they would return two ballots instead of one "never came to pass, Chavka said." *See*, Eli Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Meetings*, Washington Post (Sept. 11, 2020) Like the fear related in this article, the fears the Employer raises in its request for review are simply that, speculative worries about what could go wrong and not substantial evidence that mail-balloting has led to voting problems on a sufficiently large scale.

**4. Board law does not restrict Employer free speech during mail-ballot elections and there is no basis (let alone a compelling one) for reconsidering *Aspirus*.**

The Employer argues that *Aspirus* requires reconsideration because by making mail ballots the norm, the Board has exacerbated purported restrictions on employers' free speech rights and ability to communicate with their employees during the lengthy mail-ballot periods. The Employer

is complaining that during the mail-balloting period which lasts several weeks, it will not be allowed to hold captive audience meetings with its employees.<sup>22</sup>

First, the Employer continues to ignore that Jefferson County AL, like the rest of the country is still in midst of a COVID-19 pandemic. *Aspirus* recognizes the fact that during a pandemic, Regional Directors do not abuse their discretion to direct mail-ballots if local conditions show the presence of one or more specific situations. One of the Employer's experts recently urged all 50 states to adopt policies that avoid all travel because of SARS-COV-2 variants that are currently circulating in some communities:



Though Dr. Gupta offered the opinion that the safety protocols the Employer proposed will very likely prevent the transmission of SARS-COV-2 during the manual election process (an

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<sup>22</sup> Of course, though the mail-balloting period is longer than the amount of time taken to conduct a manual election, the additional time helps the Employer communicate its message.

opinion which the recent outbreak at BHM1 challenges), he recognizes that public officials should adopt measures to prevent the spread of new variants. A mail-ballot election is a safer alternative to a manual election and it involves no traveling. The Board should not backpedal on the guidance it gave in *Aspirus* on how Regional Directors should assess the threat to public health that COVID-19 presents; notwithstanding, the Employer's complaint that mail-ballot elections (just like mask wearing) restrains its free speech rights.

In any event, the Employer's free speech argument is not a compelling reason for reconsidering *Aspirus*. In *San Diego Gas & Electric*, 325 NLRB 1143, 1146 (1998) the Board rejected this argument because "during the *Peerless Plywood* period, the employer and its agents remain free to continue to campaign against the union not only through mailings to employees at their homes, but also in the workplace where they can distribute and post literature, communicate with employees one-on-one and even continue to conduct mass meetings, as long as the meetings are on employee's own time and attendance is not mandatory."

In this case, the Employer has already started its captive audience meetings with employees. During these meetings that involve approximately 300 employees at a time, the Employer is communicating its message that it opposes unions and that employees should vote to remain non-union. This is also communicated clearly to the employees present because employees who ask questions during the presentations have been photographed and removed from the meetings. The fact that these mass in-person meetings can no longer be mandatory during the *Peerless Plywood* period does not mean that the Employer will lack the ability to communicate (as it has done via text messages and other social media) with employees.

**D. The Request that the Board Adopt New Minimum Standards for Mail-Ballot Elections is Not a Basis for Reconsidering *Aspirus* Nor for Finding that the Acting Regional Director Abused Her Discretion For Following the Board's Current Procedures.**

The Employer suggests, without any evidence, that there was alleged fraud in the Union's collection and submission of the authorization cards to support its showing of interest. (Employer RFR, p. 40). Based on this fact-free assertion, the Employer argues that the Acting Regional Director "erred" by not accepting its additional "proposed safeguards to protect voters, reduce disputes, and increase voter turnout". (Employer RFR, p. 40). To be sure, there is no evidence of fraud in this case regarding the Union's showing of interest and such a claim is frivolous on its face. Thus, what the Employer really complains about here is that the Acting Regional Director declined to order, based on allegations of nonexistent "fraud" what the Employer contends is necessary to conduct a mail ballot election in this case. There is no evidence of fraud in this case and the attempt by the Employer to fashion any out of whole cloth to argue that the Acting Regional Director abused her discretion by not agreeing to its mail ballot "proposed safeguards" is without merit.

The Employer's reliance on *Professional Transportation, Inc.*, 32-RC-259368 (December 2, 2020) does not support its contention that the Acting Regional Director abused her discretion here. In that case, the overruled employer filed objections over alleged ballot solicitation conduct by the Union. After its objections were overruled and a certification of representative was issued, the employer requested review, among other complaints, on the issue of whether solicitation of mail ballots by telephone alone was objectionable conduct, noting that the Board had split on the issue in its decision in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004). The Board granted the employer's request for review "with respect to the Board's policy regarding mail-ballot solicitation as addressed in *Fessler & Bowman*". The Employer in this instance does not identify any Board

policy or precedent that the Acting Regional Director ignored or requires the Board to reconsider, when she declined to impose the Employer's wish list for conducting a mail ballot. If conduct occurs during the course of the election that the Employer believes objectionable, it will have the opportunity to file those objections, like the employer in *Professional Transportation*, pursuant to the Board's Rule and Regulations. Declining, however, to order Amazon's wish list does not amount to an abuse of discretion by the Acting Regional Director or require Board review especially where there is no evidence of fraud or misconduct.

The Employer similarly overreaches when it contends that the Acting Regional "must respond to the greater potential for administrative inefficiencies and potential party fraud and coercion that is characteristic of mail-ballot elections under current Board procedures." (Employer RFR, p. 41). First, there is no evidence of fraud in this case and nothing to support the Employer's claim that additional measures must be imposed to prevent "potential party fraud and coercion". Second, while the Board has opined that the danger of laboratory conditions being destroyed in an election are greater in a mail ballot election, such statements are generally made in defense of the procedures the Board has adopted to ensure the integrity of the election and this often quoted language does not support the claim that fraud and coercion "are characteristic of mail-ballot elections". Certainly, it does not warrant that the Board to grant review and rewrite current Board procedures for conducting a mail ballot election over nonexistent claims of fraud and coercion.

#### **IV. CONCLUSION.**

For the reasons stated above, the Petitioner respectfully requests that the Board deny the Employer's request for review.

Date: February 1, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Petitioner's Opposition to the Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election filed today, February 1, 2021, using the NLRB's e-filing system and was served by email upon the following:

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