

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

XPO LOGISTICS FREIGHT, INC.

Employer

and

Case 04-RD-270680

MIGUEL VALLE

Petitioner

and

**HIGHWAY TRUCK DRIVERS AND HELPERS
LOCAL 107, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Union Involved

DECISION AND DIRECTION OF ELECTION

The sole issue in this proceeding is whether this decertification election should be conducted manually or by mail ballot. The Union Involved, Teamsters Local 107, contends that the election should be conducted manually. The Employer, XPO Logistics Freight, and Petitioner, Miguel Valle, anticipate that a mail ballot will be ordered, but they would both agree to a manual election. If a manual election is conducted, the Employer and Petitioner would hold it at the Employer's facility, while the Union Involved would conduct it at its banquet hall. After considering the arguments of the parties, for the reasons discussed below, I find that a mail-ballot election is appropriate.

The Employer is a nationwide provider of transportation and logistical services with a facility in Cinnaminson, New Jersey (the Facility). Petitioner filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to decertify the existing unit of Driver Sales Representatives (DSRs), city employees, and linehaul employees at the Facility. There are about 22 employees in this unit. A hearing was held on January 19, 2021¹ by videoconference before a Hearing Officer of the National Labor Relations Board (the Board). At the hearing, the parties reached stipulations with respect to all litigable issues, including the composition of the voting unit. Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Regional Director, the parties were permitted to make oral arguments at the hearing and file post-hearing briefs. The Union Involved and Petitioner filed briefs.

I. Factual Overview

¹ All dates are in 2021 unless otherwise noted.

At the outset, I take administrative notice of the current public health crisis in the United States created by the Covid-19 pandemic. To date, there have been more than 25 million confirmed cases of Covid-19 in the United States and over 417,000 deaths. The nation has experienced a widely shifting transmission rate, including sharp upticks in confirmed cases after periods of lower transmission. For example, on December 30, 2020, the 7-day moving range of new confirmed cases was 181,279 a day, and on January 8, 2021, the range spiked to 248,706 per day. As of January 30, the 7-day moving range had decreased to 149,348 cases. While the number of confirmed positive cases per day is currently trending downwards, the United States has seen more than a million confirmed cases in the last seven days.

There have been approximately 692,543 Covid-19 cases reported in the State of New Jersey. The state mirrors the current downward daily case trend, but the 7-day moving positivity rate is at 9.7%, and the positivity rate during the previous month was at 9.73%. The Employer's facility is in Burlington County, New Jersey, which has seen a 1.29% decrease in the 7-day case average number. However, the positivity rate in the county is at 7.94% and has remained at about that percentage since November 2020.

On January 19, New Jersey Governor Phil Murphy signed Executive Order No. 215. The Order extended the Covid-19 Public Health Emergency that was declared on March 9, 2020 through Executive Order No. 103, which had been previously extended in 2020 by several other executive orders. Governor Murphy noted at the time of issuance of the order that "the COVID-19 pandemic is still in full swing." The Order referred to the fact that the State was "again experiencing significant upticks in the rate of reported new cases across all counties." In that regard, although by January 26, the number of cases reported had decreased to 4,117 from 6,115, on January 23 this number was far higher than in mid-to late-December, when those numbers were in the 2,000 to 3,000 range. The numbers have continued to fluctuate dramatically. On January 31, the State reported 3,823 cases, although just two days before, the number of confirmed cases was 5,023.²

II. Position of the Parties

The Union Involved contends that a manual election should be conducted at its banquet hall in Philadelphia, an approximately 15 to 20-minute drive from the Employer's facility. The Union Involved asserts that the election could be held safely there as the hall is large enough to allow for social distancing. The Union Involved is willing to provide hand cleaning stations and take all the precautions and requirements contained in General Counsel Memo 20-10 (discussed below) and notes that there have been no positive Covid-19 cases at its facility. The Union Involved states finally that although the positivity rate in Philadelphia County is 29.11%, a safe election could be held in a manner that avoids violations of state or local health orders related to maximum gathering size.

The Employer believes that the Board's standards point towards a mail ballot election in

² The statistics in this section are derived are from the websites of the United States Centers of Disease Control and Prevention (CDC), the New Jersey Department of Health, and the Johns Hopkins University of Medicine Coronavirus Resource Center.

this case, but contends that if a manual election is directed, it should be held at the Employer's facility, where the employees report to work. Petitioner similarly contends that if a manual election is conducted, it should be held at the Employer's premises.

III. Board Law

The Board has held that the mechanics of an election, such as the date, time, and place, are left to the discretion of the Regional Director. *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1366 (1954). In addition, the Board has found that Regional Directors have the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998); NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2 (the determination over the method of election is not an issue subject to litigation).

The Board generally has a strong preference for conducting manual elections. NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2; *San Diego Gas & Electric*, 325 NLRB 1143 (1998). However, it also has a long history of conducting elections by mail when necessary. As the Board noted in *London's Farm Dairy, Inc.*, 323 NLRB 1057 (1997), "[f]rom the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." There are well-established procedures for conducting effective mail-ballot elections set forth in the Board's *Casehandling Manual (Part Two)*, *Representation Proceedings*, at Section 11336, et seq.

On July 6, 2020, the General Counsel for the Board issued GC 20-10 to provide guidance for conducting manual elections during this pandemic. The memorandum details numerous suggested manual election protocols to minimize the risk of Covid transmission. It also reaffirmed that Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted.

On November 9, 2020, the Board issued a decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), wherein it "set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of Covid-19." *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4. In that decision, the Board identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

1. The Agency office tasked with conducting the election is operating under 'mandatory telework' status.
2. Either the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size.
4. The employer fails or refuses to commit to abide by the GC Memo 20-10 protocol.

5. There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
6. Other similarly compelling considerations.

The Board did not give increased weight to any particular factor and specifically found that only one factor need be present in order to “normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4. The Board indicated that a Regional Director who exercises discretion to direct a mail-ballot election when one or more of these situations exists will not have abused his or her discretion. *Id.*, slip op. at 8.

IV. Application Of Board Law To The Facts

Due to the high testing positivity rates in Burlington County and the State of New Jersey, I find that a mail ballot election is warranted.

In *Aspirus Keweenaw, supra*, the Board listed the six parameters, cited above, that Regional Directors should evaluate in determining the appropriateness of directing a mail-ballot election during the pandemic. The Board went on to state that “[i]f one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 4.

One of the factors cited by the Board in *Aspirus Keweenaw, supra*, that suggests the propriety of holding elections by mail ballot during this pandemic is a 14-day testing positivity rate above 5 percent in the county where the manual election would be held. As noted above, the positivity rate in Burlington County has been significantly higher than 5 percent since about November, and the positivity rate in Philadelphia, where the Union Involved would hold the election, is almost six times the 5% rate. Although the other *Aspirus Keweenaw* factors may allow for a manual election, the spread of the virus, as indicated by the positivity rate, is so severe that a mail-ballot election is clearly the safer choice.

Accordingly, considering the above, and based on the most recent data demonstrating that the Covid-19 testing positivity rate has remained above 5% for an extended period in the relevant county and state, I find that a mail ballot election is warranted in this case.

CONCLUSION

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

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties,³ and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that the Union Involved is a labor organization within the meaning of Section 2(5) of the Act.
4. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein, and there is no contract bar or other bar to an election in this matter.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Driver Sales Representatives (DSRs), city employees, and linehaul employees employed by the Employer at its facility located at 1403 Industrial Highway, Cinnaminson, New Jersey.

Excluding: All other employees, dock employees, office clerical employees, maintenance employees, managerial employees, confidential employees, professional employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Highway Truck Drivers and Helpers Local 107, a/w International Brotherhood of Teamsters.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Thursday, February 18, 2021. Voters

³ The Employer is a Delaware corporation engaged in interstate freight transportation. It has an office and place of business at 1403 Industrial Highway, Cinnaminson, New Jersey, the only facility involved in this proceeding. During the past 12 months, the Employer purchased and received goods, products, and materials valued in excess of \$50,000 directly from points outside the State of New Jersey.

must return their mail ballots so that they will be received by close of business on Thursday, March 11, 2021. The mail ballots will be counted on Wednesday, March 17, 2021, at a time and location to be determined, either in person or otherwise, after consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 p.m. on February 24, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **January 30, 2021**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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

C. Voter List

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

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, February 4, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the

equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Signed this 2nd day of February 2021.



THOMAS A. GOONAN
Regional Director, Region Four
National Labor Relations Board