

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 06**

COCA-COLA CONSOLIDATED, INC.¹

Employer

and

Case 06-RC-275902

**CHAUFFEURS, TEAMSTERS & HELPERS
LOCAL UNION NO. 175**

Petitioner

DECISION AND DIRECTION OF ELECTION

Chauffeurs, Teamsters & Helpers Local Union No. 175 (the “Petitioner”) filed the petition in this matter under Section 9(c) of the National Labor Relations Act, as amended (the “Act”), seeking to represent all full-time and regular part-time delivery/merchandisers, account developers, warehouse, BAMS, full service and equipment services employees employed by Coca-Cola Consolidated, Inc. (the “Employer”) at its Beckley, West Virginia facility. The parties stipulated, and I find, the petitioned-for unit to be appropriate for purposes of collective bargaining.

The sole issue presented in this proceeding relates to the mechanics of the election. A hearing officer of the National Labor Relations Board (the “Board”) held a videoconference hearing in this matter on May 11, 2021.² While the mechanics of an election is not a litigable issue, the parties were permitted to state their respective positions regarding this sole issue on the record, and were afforded the opportunity to file post-hearing briefs.³ Only the Employer submitted a post-hearing brief for my consideration.

The Employer argues that notwithstanding the ongoing Covid-19 pandemic, a manual election in this case is appropriate and can be conducted safely. Petitioner seeks a mixed manual and mail election whereby any voter who cannot vote manually due to Covid-19-related issues is able to vote by mail. Petitioner stated on the record, however, that it would ultimately agree to a mail ballot election. As explained below, due to the continued pandemic and the current local Covid-19-related data, along with the applicable Board law, I find that a mail ballot election is necessary. Accordingly, I will direct a mail ballot election in this case, the details of which are described at the end of this Decision.

¹ The Employer’s name appears here as amended by the parties.

² Hereinafter all dates occurred in 2021, unless otherwise noted.

³ At the hearing, the Hearing Officer rejected the Employer’s statement of position (“SOP”), pursuant to my direction, because the Employer failed to timely file and serve the SOP with the Board and Petitioner, respectively. Section 102.66(d) of the Board’s Rules and Regulations required the Employer to timely file and serve the SOP on the Petitioner, and because it failed to do so, the SOP was placed in the rejected exhibits file. I hereby affirm the Hearing Officer’s ruling made on the record.

I. STATEMENT OF FACTS

The Employer is engaged in the manufacturing and distribution of soft drink products. As part of its operations, the Employer maintains a facility in Beckley, West Virginia, the only facility involved herein. The Employer’s facility—where the Employer and Petitioner have proposed to conduct the manual election—is located in Raleigh County, West Virginia. As of May 19, according to the West Virginia Department of Health & Human Resources, Raleigh County has experienced the following number of daily cases within the previous 14 days:

14-day Raleigh County Confirmed Cases⁴													
-14	-13	-12	-11	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1
9	6	17	6	4	12	7	12	12	12	4	10	4	14

Additionally, the West Virginia Department of Health & Human Resources reports the following daily positivity rates for Raleigh County within the previous 14 days:

14-day Raleigh County Daily Positivity Rates (numbers below are in percentages)⁵													
-14	-13	-12	-11	-10	-9	-8	-7	-6	-5	-4	-3	-2	-1
3.57	6.45	5.9	3.58	7.69	12.59	7.76	4.73	9.9	4.67	4.08	11.61	10.67	8.23

The West Virginia Department of Health & Human Resources does not report a rolling 14-day positivity rate. However, an average of the above positivity rate data shows that Raleigh County has experienced an average positivity rate of 7.25 percent within the previous 14 days. The Centers for Disease Control and Prevention (CDC), an agency of the federal government, reports that the current 7-day rolling positivity rate in Raleigh County, as of May 15, is 8.06 percent.⁶

II. POSITIONS OF THE PARTIES

The Employer argues that a manual election can be conducted safely at its facility. The Employer proposes the use of its boardroom inside its facility, or a 1,200 square foot outdoor tent, to hold the instant election. In either circumstance, the Employer commits to following the Board’s suggested manual election protocols announced in General Counsel Memorandum 20-10. In that regard, the Employer agrees to place markings on the ground as a means of enforcing proper social distancing, and will provide disposable pencils, glue sticks or tape to seal challenge ballot envelopes, and plexiglass barriers. According to the Employer, there have been no positive Covid-19 cases among its employees since February 26. Since March 10, there have been no employees who have exhibited symptoms of Covid-19. And within the last 14 days, there have been no employees who have had contact with anyone who has tested positive for Covid-19, or who is awaiting test results for Covid-19.

⁴ <https://dhhr.wv.gov/COVID-19/Pages/default.aspx> (“Case and Lab Trends” tab, “County Filter”) (last visited May 19).

⁵ <https://dhhr.wv.gov/COVID-19/Pages/default.aspx> (“Other Trends” tab, “County Filter”) (last visited May 19).

⁶ <https://covid.cdc.gov/covid-data-tracker/#county-view> (last visited May 19).

Lastly, the Employer relies on recent changes to Covid-19 precautions in arguing for a manual election. The Employer notes that West Virginia schools returned to in-person learning for the Spring semester, and the Governor increased the capacity limit for restaurants and bars to 100 percent on March 5, increased the social gathering limit to 100, and allowed all youth travel sports to take place except for those counties designated as “Red” in the state county alert system map. Additionally, the Employer cites to the CDC’s recent guidance that people who are fully vaccinated against Covid-19 no longer need to wear masks or physically distance, with certain exceptions. The following day, West Virginia’s Governor updated the State’s restrictions to comport with the change in CDC guidance.

As noted above, Petitioner seeks a mixed manual and mail election, whereby most voters will vote in person, and any employee suffering from Covid-19 issues can be issued a mail ballot if they are unable to vote in person. However, Petitioner did state that it has no objection to a mail ballot election.

III. BOARD LAW

The Board’s longstanding policy is that elections should, as a rule, be conducted manually. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2; *San Diego Gas and Electric*, 325 NLRB 1143, 1145 (1998). However, the Board has stated that a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.*

Indeed, Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Electric*, supra; *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Electric*, 325 NLRB at 1144-1145. The Regional Director’s decision should not be overturned unless a clear abuse of discretion is shown. *National Van Lines*, 120 NLRB at 1346.

On November 9, the Board issued its Decision on Review 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. Moving forward, the Board has identified the following six situations which suggest the propriety of using mail ballots to conduct elections:

- (1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...
- (2) [e]ither 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) [t]he

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) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

Aspirus Keweenaw, 370 NLRB No. 45 slip op. at 4-8. “County-level positivity rate data should be obtained from official state or local government sources.” Id. at 6, fn. 25.

IV. APPLICATION OF BOARD LAW TO THE FACTS

After careful examination of the record, the parties’ positions, and the current state of the coronavirus in Raleigh County where the Employer’s facility is located, I have determined that a mail-ballot election is the safest and most appropriate method for conducting this election.

One factor of the Board’s *Aspirus* test that suggests the propriety of using mail ballots to conduct an election during this pandemic is an increasing 14-day trend in the number of new confirmed cases or a 14-day testing positivity rate above 5 percent in the county where the manual election would be held. Both circumstances are present in this case. The number of confirmed new cases in Raleigh County has increased from 9 to 14, with a high of 17 cases during the previous 14-day period. Additionally, the average positivity rate within the previous 14 days is approximately 7.25 percent, with a positivity rate higher than 5 percent in 9 of the last 14 days. Moreover, the daily positivity rate has increased from 3.57 to 8.23 percent during that same period. Accordingly, based on the local Covid-19 data, I find that factor two of the Board’s *Aspirus* test is met here.

The Employer briefly raised a concern in its post-hearing brief that a mail ballot election may produce a lower voter turnout than a manual election. While the Employer’s concern has validity, the Board, in issuing its decision in *Aspirus*, considered and addressed long-standing concerns related to voter turnout in mail ballot elections. See *Aspirus Keweenaw*, 370 NLRB No. 45 slip op. at 2, fn. 6. Notwithstanding those concerns, the Board set forth the six enumerated conditions where a mail ballot election would be appropriate during this pandemic, one of which has been met in this case. Accordingly, I find that the elevated positivity rate, coupled with the increase in confirmed cases in Raleigh County, outweigh any concerns related to voter turnout in a mail-ballot election.

Lastly, I find that a mixed manual-mail election, as proposed by the Petitioner, is inappropriate in this case. The Board does not provide absentee ballots. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Sec. 11302.4; *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794 (3d Cir. 1999); *KRCA-TV*, 271 NLRB 1288 (1984); *Wilson & Co.*, 37 NLRB 944 (1941). Specifically, the Board has concluded that, when conducting a manual election, ballots for voting by mail should not be provided to those ill at home or in the hospital. Moreover, a mixed manual-mail election should be arranged only where a manual election is otherwise appropriate and:

- (a) appropriate circumstances are present involving “scattered” or geographically distant employees;
- (b) employees are involved in a strike, lockout or picketing;
- (c) all parties agree that employees on layoff status should be sent mail ballots; or
- (d) a significant number of employees cannot vote in person because of an assignment that makes it impossible or impractical for them to be present at the pools.

National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Sec. 11335.1. First, I have found, as discussed in detail above, that a manual election is not appropriate in this case due to the ongoing pandemic. Second, none of the four circumstances outlined above that must be present in order for a mixed manual-mail election to be appropriate are present in this case. Accordingly, I find that a mixed manual-mail election is inappropriate here.

V. FINDINGS AND CONCLUSIONS

Having carefully considered the record evidence and applying the applicable Board law to these circumstances, I find that a mail-ballot election is the safest and most appropriate method for conducting this election. I therefore direct a mail-ballot election in this case.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows.

1. The hearing officer’s 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, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁷
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. There is no contractual bar, or any other bar, to conducting an election in this matter.

⁷ The parties stipulated that the Employer is a Delaware corporation and is engaged in the manufacturing and distribution of soft drink products from its Beckley, West Virginia facility, the only facility involved herein. The parties further stipulated that the Employer, during the past 12-months, a representative period, in conducting its business operations, purchased and received goods and materials valued in excess of \$50,000 directly from locations outside the State of West Virginia.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Delivery/Merchandisers, Account Developers, Warehouse, BAMS, Full service and Equipment Services employees employed by the Employer at its Beckley, West Virginia, facility.

Excluded: All Office Clericals, Clerks/Checkers, Guards, managers, and professional employees 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 Chauffeurs, Teamsters & Helpers Local Union No. 175.

A. Election Details

I have determined that a mail ballot election will be held in light of the extraordinary circumstances presented by the ongoing pandemic and the high positivity rate and increasing number of confirmed Covid-19 cases in Raleigh County, West Virginia. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 5:00 p.m. on June 7, 2021, by the National Labor Relations Board, Region 06 from its office at 1000 Liberty Ave. Room 904 Pittsburgh, PA 15222-4111. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 14, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 06 Office at (412) 395-4400 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Region 06 Office on June 28, 2021 at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Pittsburgh Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of Covid-19 and the directions of state or local authorities including but not limited to Stay at Home orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending May 19, 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 **May 24, 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 that will issue and that accompany 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.

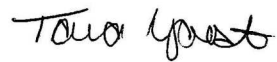
RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

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

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

Dated: May 20, 2021



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