UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

AMAZON.COM SERVICES, LLC

Employer,

Case 10-RC-269250

and

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION

Petitioner.

PETITIONER'S OPPOSITION TO THE EMPLOYER'S MOTION TO STAY THE ELECTION PENDING REVIEW

George N. Davies
Richard P. Rouco
QUINN, CONNOR, WEAVER,
DAVIES & ROUCO, LLP
2 – 20th Street North Suite 930
Birmingham, AL 35203
Tel. (205) 870-9989
gdavies@qcwdr.com
rrouco@qcwdr.com

I. INTRODUCTION & SUMMARY

The Petitioner Retail, Wholesale and Department Store Union respectfully requests that the Board deny the Employer's request for a stay to the election pending review. Such extraordinary relief is not appropriate in this case because the Employer's Request for Review does not raise any compelling and substantive arguments that the Board did not already consider when it issued the decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). The Employer's Motion for a Stay and corresponding Request for Review are long on speculation about what might go wrong with the conduct of a mail-ballot election and short on facts. The only fact that the Employer repeatedly mentions is that the petitioned-for unit is "unusually large" but there is no "large unit" exception under *Aspirus* or Board law for that matter. The Board has successfully conducted mail-ballot elections in substantially larger units and there is no indication that the Region lacks the resources and experience to competently and efficiently conduct a mail-ballot election in this case.[1]

1. The Employer's Motion for Stay is somewhat scatter-shot. The Motion recapitulates arguments raised in the Request for Review and makes unsupported claims about the potential consequences of allowing the mail-ballot election ordered in this case to proceed. For example, the Motion claims that "errors" identified in the D&DE stand to disenfranchise, based on recent statistics, between 1,100 and 1,700 potential voters. But nowhere in the Request for Review does the Employer claim that between 1,100 and 1,700 eligible voters will be disenfranchised. This claim in the Motion apparently stems from the argument in the Request for Review that mail-ballot elections on average have lower turnout. Voter turnout statistics, however,

[1] *Sutter West Bay Hospitals*, 357 NLRB 197 n. 6 (2011)(observing that the Board had recently conducted a mail-ballot election in a unit involving over 40,000 eligible employees)

are not the same as statistics regarding voter disenfranchisement. These are two separate statistics that the Employer's Motion regrettably conflates; nor is the comparison to public office elections correct. The Board has long recognized that the relevant question is whether an employee has been afforded an opportunity to vote and not whether they've actually exercised that option. *Jowa Security Services*, 269 NLRB 297, 298 (1984). The former implicates the issue of voter disenfranchisement while the latter concerns voter turnout. With respect to the comparison to public office elections, again the issue is expanding opportunities to vote in hopes that individuals will exercise the right to vote not forcing or coercing people into voting.

2. As to the alleged "errors" in the D&DE, the Employer's Request for Review identifies two issues with the Acting Regional Director's application of *Aspirus* that it claims need clarification, namely the meaning of the term "outbreak" as used in Situation 5 and the use of an employer's own testing data at a specific site as the "best available geographic statistical measure" under Situation 2. The remaining issues are not specific to this case but allege deficiencies with mail-ballot election in general; alleged deficiencies that the Board has largely rejected. As summarized below and argued in the Petitioner's Opposition to the Employer's Request for Review, the Employer's specific complaints about the application of *Aspirus* by the Acting Regional Director and its complaints in general about mail-balloting lack merit:

+ 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 % instead of 4.3 % and masked the prevalence of the virus in its facility. The Acting Regional Director did not abuse her discretion in finding the 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 electing in this case.

Thus, contrary to the Employer's contention, the five specific legal issues advanced in the Request for Review do not raise compelling reasons for the Board to reconsider *Aspirus* after only having issued the decision a little less than three months ago. But separate and apart from the question of whether the Employer's Request for Review satisfies Section 102.67(d) of the Board's Rules and Regulations, the Motion for Stay does not meet the standards governing such extraordinary relief.

ARGUMENT

A. Standard governing a request for a stay of an election.

3. Rule 102.67(j)(2) of the Board's Rules and Regulations which governs the request for a stay of a Regional Director's D&DE states the following:

(j) Requests for extraordinary relief. (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief: (i) Expedited consideration of the request; (ii) A stay of some or all of the proceedings, including the election; or (iii) Impoundment and/or segregation of some or all of the ballots. (2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion.

The Employer provides three reasons for granting its Motion to Stay the election. The offered reasons do not make a clear showing that a stay is necessary under the particular circumstances of this case.[2]

[2] In *University of Chicago*, Yale University, 365 NLRB No. 40 (2016), and other cases, former Board Member Miscimarra argued for a stay under circumstances where he believed that the Board was improperly ordering an election in a unit of employees where, in his view, the NLRB lacked jurisdiction. If the jurisdictional question would be resolved in favor of Member Miscimarra's view, the entire election would be illegitimate, and a unit of non-employees would have improperly voted in a Board election. Similarly, in *Yale University*, Member Miscimarra's dissenting view that "substantial questions are presented regarding whether the nine separate bargaining units" in which the Region had ordered elections were appropriate, as compared to other single-unit examples. *Yale Univ.*, 365 NLRB No. 40 (Feb. 22, 2017). It is because of the "complexity of these questions" that affect the legitimacy of whole units that Member Miscimarra believed a stay would avoid the problem of the substantial delay to be incurred in post-election proceedings. And, these cases raised, in Member Miscimarra's view, numerous serious questions of voter eligibility. For example, in the *University of Chicago* case, along with the question of whether unit members were employees at all, the employer had presented the issues that some unit members were temporary, and that some could fall under a representation petition filed by a different union. Such issues would re-surface as challenges, leading to extensive post-election litigation. Therefore, Member Miscimarra argued for a stay on the basis that resolving these questions prior to an election actually hastened and shortened the overall election and certification process. *Yale Univ.*, 365 NLRB No. 40 (Feb. 22, 2017) (Member Miscimarra, dissenting) ("moving forward with the elections here disregards the fundamental fact that important election-related questions will likely require many months and possibly years to resolve"). Here, the mail vs. manual election balloting issue does not raise the potential for extensive post-election litigation if the stay is not granted. The single issue

4. The Employer has failed to establish that such extraordinary relief is "necessary." Nor has it established that the granting of a stay of this election would benefit the parties, prevent delay, or further employee free choice in any way. Prior to its *Aspirus* ruling, the Board regularly denied motions to stay an election where a party simply argued that a Region's ordering of a mail ballot election in reliance on the "extraordinary circumstances" of the COVID-19 pandemic was an abuse of discretion. *See, e.g.*, *Rising Ground*, 2020 WL 5411512, at *1 (DCNET Sept. 8, 2020) (finding that a mail ballot was warranted and that the Regional Director's reliance on the "extraordinary circumstances resulting from the Covid-19 pandemic" was not an abuse of discretion and was appropriate under *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998)); *Twinbrook Health & Rehab. Ctr*, No. 06-RC-257382, 2020 WL 3047991, at *1 (DCNET June 5, 2020).

5. Now, the Employer attempts this same failed tactic but this time there are clear guidelines as outlined in *Aspirus* that the Acting Regional Director acknowledged and applied, thus making it more unlikely the Board will find an alleged abuse of discretion. Though the Employer's Request for Review contains numerous arguments, they all amount to a disagreement with how the Acting Regional Director applied the *Aspirus* guidance or an attack on the use of mail-ballots in general which for the most part the Board had rejected in prior cases, including *Aspirus*. What the Employer's Motion to Stay cannot overcome is the simple fact that the *Aspirus*

---

raised by Amazon here does not present an overarching question of unit appropriateness. Whether the employees in this election vote by mail or in person, Amazon admits that they are employees, that they are an appropriate unit, and that, subject to any remaining challenges not signaled here, they are eligible to vote. Nor is there any prejudice to Amazon or to the employees' whose free choice is at stake. Amazon merely contends that its method is preferable and that its protocols are sufficiently safe.

decision did not overrule *San Diego Gas*, did not contravene the Board's earlier pandemic-related decisions, and, most importantly, did not abolish the discretion granted to Regional Directors in deciding election-related matters. Thus, contrary to the Employer's contention, the alleged ambiguities in the *Aspirus* framework do not support a stay given that such relief was routinely denied when there was no framework at all.[3]

B. Employer's Three Reasons for Issuance of Stay Do Not Make a Clear Showing that Such Relief is Appropriate

6. Again emphasizing the size of the petitioned-for unit, the Employer first argues that a mail-ballot election would require the Region to expend considerable resources and that should the Board grant the Request for Review and either order a manual election or send the matter back to the Regional Director these agency efforts would be for naught. The Employer does not cite a single case supporting this argument. Moreover, this argument is not specific to this case. Indeed, if the Board accepted the "conservation of agency resources" as a valid basis for staying an action pending action on a request for review, then stays would be norm and not the exception. The fact that the Acting Regional Director decided to commit resources to conduct a mail-ballot election because of the COVID-19 conditions existing in Jefferson County at the time of her decision is not grounds for staying such action even if the Board decides to clarify some aspect of *Aspirus*.

7. The Employer's second reason is that if the Board adopts one of its proposals and thus alters the voting method or procedures after the Region has sent out ballots that such action would likely cause substantial voter confusion or even disengagement. Not only does this voter confusion argument lack a factual basis and amounts to mere speculation, the Employer fails to

[3] If the Employer is correct that there are ambiguities in the *Aspirus* framework, then it difficult to see how it can establish an abuse of discretion because such alleged ambiguities required interpretation by Acting Regional Director.

explain how its proposals if adopted after ballots are mailed would create voter confusion. The Employer's proposals (which the Acting Regional Director correctly rejected in favor of the Board's standard and established procedures) would not require the Region to resend ballots. For example, if the Board decides that the Region should use Amazon's electronic communication platform to send an official NLRB notice, there is no reason this cannot be done after the ballots have been mailed without causing confusion or disengagement. Likewise, placing a mail drop box at BHM1, requesting updated addresses and scheduling automatic extension of due dates based on the percentage of votes received will not require the Region to resend mail ballots to all eligible voters. Accordingly, it is not clearly evident that adoption of the Employer's proposals after ballots are mailed would create voter confusion or disengagement such that a stay is justified.

8. The third and final reason the Employer argues warrants a stay pending consideration of the Request for Review is perhaps the weakest of the three reasons. The Acting Regional Director set a ballot return date approximately six (6) weeks from the mailing of ballots. This schedule was likely an accommodation of the Employer's concerns about the number of eligible employees involved in this election and the need to ensure that they are all given an adequate opportunity to vote. The Employer now seeks to use this accommodation as a reason for staying the election, arguing that granting such relief would not result in unwarranted delay when the Board denies its Request for Review. But this is contrary to everything the Employer has maintained about the "complexity" of conducting a mail ballot election given the number of eligible voters. If the number of eligible voters increases the number of issues that might arise during the balloting (i.e. not receiving or misplacing ballots etc.), then the Acting Regional Director likely set a schedule to accommodate these issues based on the Region's experience and to address the Employer's concerns. So the Employer's argument that a stay would not cause any

delay if the Request for Review is denied is baseless and does not constitute a clear showing that a stay is necessary in this case. Indeed, the argument is that a stay would not cause further delay if the Request for Review is denied, not that it is necessary in the circumstances of this case. If anything, the time built in to the schedule to handle potential problems favors denying the stay because if the Board decides to intervene in this case (which it should not), it can issue further guidance without the Region having to modify the current schedule.

III. CONCLUSION.

For the above stated reasons, the Petitioner respectfully requests that the Board deny the Employer's Motion to Stay.

Date: February 1, 2021

Respectfully submitted,

/s/George N. Davies
George N. Davies
/s/Richard P. Rouco
Richard P. Rouco

Quinn, Connor, Weaver,
Davies & Rouco, LLP
2 – 20th Street North
Suite 930
Birmingham, AL 35203
Phone: 205-870-9989
Fax: 205-803-4143
Email: gdavies@qcwdr.com
rrouco@qcwdr.com

Counsel for Petitioner
Retail, Wholesale and Department Store Union

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petitioner's Opposition to Employer's Motion to Stay Election was filed today, February 1, 2021, using the NLRB's e-filing system and was served by email upon the following:

Harry I. Johnson, III, Esq.
MORGAN, LEWIS & BOCKIUS LLP
2049 Century Park East
Suite 700
Los Angeles, CA 90067
harry.johnson@morganlewis.com

Nicole A. Buffalano, Esq.
MORGAN, LEWIS & BOCKIUS LLP
300 South Grand Ave., 22nd Floor
Los Angeles, CA 90071
nicole.buffalano@morganlewis.com

David R. Broderdorf, Esq.
Geoffrey J. Rosenthal, Esq.
MORGAN LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
david.broderdorf@morganlewis.com
geoffrey.rosenthal@morganlewis.com

Lisa Henderson, Acting Regional Director
Kerstin Meyers, Field Attorney
Region 10, National Labor Relations Board
233 Peachtree Street
1000 Harris Tower
Atlanta, GA 30303
lisa.henderson@nlrb.gov
Kerstin.meyers@nlrb.gov

/s/*George N. Davies*
George N. Davies