

Directors will determine mail-ballot elections will be necessary both during the COVID-19 pandemic and beyond; and the Board's increased tolerance for "modern" but flawed voting methods that threaten fraud, privacy violations, and decreased voter participation.

CDW urges the Board to review the case and provide clarity to the employer and employee communities on the use of mail-ballot elections in union representation elections.

Respectfully submitted,

/s/ Kristen Swearingen

Kristen Swearingen

Chair

Coalition for a Democratic Workplace

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Coalition for a Democratic Workplace’s brief in support of the employer’s Request for Review of the Acting Regional Director’s Decision and Direction of Election and Motion to Stay Election Pending Review was filed today, February 3, 2021, using the NLRB’s E-Filing system, and was served by email upon the following:

George N. Davies
Richard P. Rouco
Attorneys for Petitioner
gdavies@qcwdr.com
rrouco@qcwdr.com

Harry Johnson
Nicole Buffalano
David Broderdorf
Geoffrey Rosenthal
Attorneys for Employer
harry.johnson@morganlewis.com
nicole.buffalano@morganlewis.com
david.broderdorf@morganlewis.com
geoffrey.rosenthal@morganlewis.com

Lisa Henderson
Acting Regional Director, Region 10
lisa.henderson@nlrb.gov

Kerstin Meyers
Field Attorney, Region 10
kerstin.meyers@nlrb.gov

Lanita Cravey
Field Examiner, Region 10
lanita.cravey@nlrb.gov

/s/ Kristen Swearingen _____
Kristen Swearingen

ARGUMENT

CDW urges the Board to grant the employer's Request for Review of the Acting Regional Director's Decision and Direction of Election and Motion to Stay the Election Pending Review in this case in order to build on its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), ("*Aspirus*") and provide greater clarity on proper use of mail-ballot elections during the COVID-19 pandemic as the circumstances around the pandemic and its possible end continue to evolve.

NLRB precedent strongly favors manual elections for the reasons set forth in *Aspirus*; "Manual elections permit in-person supervision of the election, promote employee participation, and serve as a tangible expression of the statutory right of employees to select representatives of their own choosing for the purpose of collective bargaining, or to refrain from doing so." *Id.* at 1. Unfortunately, the Regional Director's Decision and Direction of Election in *Amazon.com Services* does not give proper weight to the importance of these factors, particularly the need to promote employee participation in such a large election.

Statistics routinely show that participation rates in mail-ballot elections are consistently lower than those seen in manual voting. As was explained in the Board's *Aspirus* decision, statistics "reflect that the mail-ballot participation rate continues to lag significantly behind the manual election participation rate," despite modest increases seen during the COVID-19 pandemic. *Id.* at 2. The Board concludes, "manual elections tend to promote greater participation in the election process." *Id.* at 2. Using this reasoning the employer contends in its Request for Review that the decision to move forward with a mail-ballot election "stand[s] to disenfranchise... between 1,100 and 1,700 potential voters, which is a result starkly at odds with Board precedent and policy." If the goal of the Board is to advance employees' right to organize or refrain from doing so under Section 7 of the Act, then the Board should make every effort to

implement manual elections whenever possible unless and until mail-ballot participation rates match those of in-person elections.

The employer community is also concerned with the lack of clarity over when the Board and Regional Directors will determine mail-ballot elections are required; the Board has acknowledged that “the guidance available to Regional Directors as to whether to direct a mail-ballot election has, to date, been limited and relatively general.” *Id.* at 4. Unfortunately, the Board did not define critical legal concepts in *Aspirus*, including what is considered a COVID-19 “outbreak.” This ambiguity allowed the Regional Director in *Amazon.com Services* to conclude that an outbreak is “any presence of COVID-19 in an employer’s facility” within the fourteen days prior to the Regional Director’s determination. This standard is extremely misguided in its breadth; if adopted, we could potentially see the Board regularly ordering mail-ballot elections for years to come.

Furthermore, while not raised in the Request for Review, CDW is extremely concerned with the Board’s increased tolerance for voting methods that tend to reduce election participation by eligible voters and may increase the vulnerability of the entire process to fraud. In her dissent in *Aspirus*, Chair McFerran stated, “The Board should consider expanding and normalizing other ways to conduct representation elections on a permanent basis, including mail, telephone, and electronic voting,” and she expressed interest in bringing Board elections “into the modern age.” *Id.* at 9. Her statements downplay the significance of the decreased participation among employees between mail-ballot versus manual elections and ignore the potential drawbacks of electronic voting, such as lack of security and means of voter authentication. CDW is particularly concerned with any increased reliance on these remote methods of voting when the Board still has not examined the impact of Memorandum GC 15-08 (Oct. 26, 2015) on electronic signatures for a showing of interest, possibly related fraud and security issues, and whether the methods set

forth in the memo advance or hinder employees in pursuit of their rights under the Act. Should the NLRB decide to expand upon the use of mail-ballot elections due to COVID-19 or any other reason despite the negative consequences described above, we strongly urge the Board to consider adoption of a minimum turnout threshold to ensure strong participation among employees. Through such a policy, the Board can ensure that a true majority of eligible employees want and choose union representation.

CDW urges the Board to grant Amazon.com Service LLC's Request for Review and Motion to Stay the Election Pending Review. Through review of the case, the Board would have an opportunity to fully weigh the arguments on these important issues and provide clear, sound judgement for relevant stakeholders.

Respectfully submitted,

/s/ Kristen Swearingen

Kristen Swearingen

Chair

Coalition for a Democratic Workplace

February 3, 2021