

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BAKER COMMODITIES, INC.

Employer

and

Case 28-RC-259125

**GENERAL TEAMSTERS (EXCLUDING
MAILERS), STATE OF ARIZONA, LOCAL 104**

Petitioner

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under §9(c) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of §3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.

I. SUMMARY

The petition in this matter was filed by the General Teamsters (Excluding Mailers), State of Arizona, Local 104 (Petitioner) on April 13, 2020, under Section 9(c) of the Act, seeking to represent a unit of employees employed by Baker Commodities, Inc. (Employer) at its Phoenix, Arizona facility. There are approximately 18 employees in the petitioned-for unit.

The issues raised in this matter are: whether the election in this matter should be delayed until a manual election can safely be held in light of the COVID-19 Pandemic; whether conducting a manual or mail ballot election is appropriate; and whether the election in this matter should be delayed because the Employer was not immediately provided with a Spanish-language notice of petition for election upon request.

The Employer contends that the election should be delayed until a manual election can safely be held in light of the COVID-19 Pandemic; that conducting a mail ballot election is not necessary or appropriate in the present circumstances; and that the election should be delayed because the Employer was not immediately provided with a Spanish-language notice of petition for election upon request. Although the Union initially petitioned for a mail ballot election, it stated at the hearing that it would not object to conducting a manual election.

For the reasons set forth below, I have determined that I must proceed with conducting an election without delay and also in the most responsible and appropriate manner under the circumstances. I am, therefore, directing a mail ballot election commencing on the earliest practicable date.

II. RECORD EVIDENCE

A. The COVID-19 Pandemic

Before the filing of the instant petition, on March 9, 2020, Director of the Arizona Department of Health Services Dr. Cara Christ publicly confirmed that community spread of COVID-19 was occurring in the State of Arizona.

On March 30, 2020, after continued community spread, Arizona Governor Doug Ducey issued State of Arizona Executive Order 2020-18, “Stay Home, Stay Healthy, Stay Connected, Physical Distancing to Mitigate COVID-19 Transmission,” requiring that people limit their time away from their place of residence or property except to conduct or participate in certain essential activities or functions or to use services or products provided by essential business services, with certain limited exceptions. The Order is set to expire on April 30, 2020, but may be extended.

On April 16, 2020, following the issuance of Shelter in Place or Stay at Home orders in most states, the White House released a phased reopening plan advising states to begin the first phase of reopening only once certain gating criteria are met, including a downward trajectory of COVID-19 cases for a 14-day period.

As of the date of this decision, according to data released by the Arizona Department of Health Services, the State of Arizona has 7,202 confirmed cases of COVID-19, with 304 known deaths associated with the virus. The majority of those 7,202 cases are in Maricopa County, where the Employer’s facility is located. Nearly half of Arizona’s COVID-19 deaths occurred in Maricopa County. Arizona had its greatest number of confirmed cases of COVID-19 thus far on April 20, 2020, and its next greatest number of confirmed cases of COVID-19 thus far on April 24, 2020, based on data reported by the Arizona Department of Health Services, with the caveat that illnesses reported in the last 4 to 7 days may not be reported yet.

B. The Employer’s Ongoing Operations

The Employer operates a rendering facility in Phoenix, Arizona. The Employer contracts with local restaurants and grocery stores and retrieves food waste to be converted into biodiesel fuel, fertilizer, and animal feed. At the Employer’s facility, grease from restaurants is converted into biodiesel fuel, while food scraps from grocery stores are turned into fertilizer and/or animal feed.

The Employer’s business has been designated as essential under the Governor of Arizona’s Shelter in Place order, and the Employer has implemented a number of safety protocols and social distancing practices at its Phoenix, Arizona facility as it has continued to operate during the COVID-19 Pandemic.

The proposed bargaining unit includes all full-time and part-time plant processing employees located at the Employer’s facility. Plant processing employees have been designated as essential workers and are regularly reporting to work during the COVID-19 Pandemic despite

the Governor of Arizona's Shelter in Place order. These employees are working at the same facility and are subject to the social distancing practices imposed by the Employer.

During the pandemic, the Employer has conducted monthly meetings for the entire facility as well as individual department meetings to notify employees of the newest safety procedures which are being implemented in the Employer's facility. The Employer has instructed its drivers to maintain distance from others while at restaurants and grocery stores and has eliminated the requirement that drivers obtain signatures when retrieving food waste. The Employer has limited access to its facility to employees and individuals who have appointments at the facility. Everyone entering the building must be cleared by a security guard, who inspects all individuals entering and exiting the facility. This inspection is intended to identify each individual as either employee or visitor and confirm that no one is entering the facility without an appointment. The inspection does not include temperature checks or other medical screenings.

The Employer has also provided both surgical masks and N-95 masks to employees since the beginning of the COVID-19 Pandemic. Employees are required to wear either the surgical mask or the N-95 mask any time when they are engaged in a face to face interaction with another person while on duty. When at their desks or otherwise not interacting with other people, employees are permitted to remove their masks. Employees have always been required to wear gloves for the performance of certain parts of their job duties and continue to have access to gloves during the COVID-19 Pandemic. The record evidence does not reflect whether the provided N-95 masks are fitted, how often employees are provided with replacement masks, or what training employees are given on the use of the masks.

The Employer has also made changes to the layout and cleaning schedule at its Phoenix facility to reduce the risk of exposure to COVID-19 should an infected individual enter the facility. Tables that previously seated four individuals now seat one individual, and all tables are now subject to frequent cleanings. Doors are disinfected three times each day, at 8:00 a.m., 11:00 a.m., and 2:00 p.m. Conference tables are disinfected after each use, and the Employer's conference room is kept locked at all times when the room is not in use.

In addition to providing employees with personal protective equipment and making adjustments to the layout of its facilities and to its cleaning schedules, the Employer is also monitoring all employees and other individuals entering its facility for symptoms associated with COVID-19 and has instructed employees exhibiting symptoms to return home and remain there until they can seek medical treatment. The Employer has had to send at least one employee home during this time, and, when that employee was not able to obtain a test for COVID-19, the Employer instructed the employee to remain at home for ten days. That employee has since returned to work and does not presently exhibit any symptoms of COVID-19.

C. The Employer's Proposed Safety Precautions

The Employer introduced evidence about what measures it would take to ensure that any manual election in this matter could be conducted safely despite the COVID-19 Pandemic.

The Employer has proposed that the election take place in a conference room with dimensions of approximately 30 feet by 30 feet, which has accommodated meetings of approximately 35 people at a time. The conference room has windows, which the Employer can open during the election. The conference room is isolated, with only two entrance/exit points, and has a door that exits onto a sidewalk which wraps around the outside of the Employer's facility. The sidewalk is approximately 115 feet long. The Employer has offered to mark off the sidewalk at six-foot intervals to allow for social distancing by employees waiting to vote in a manual election. There are exterior windows, but no interior facing windows in this conference room, so no one inside the facility would be able to see into the conference room while the election was underway. The record does not reflect whether or not the sidewalk is visible from anywhere inside the Employer's facility, security guard house, or parking lot.

The Employer has also offered to provide personal protective equipment for any person attending the election, including the Board agent assigned to conduct any manual election. The Employer already provides surgical masks, N-95 masks, and gloves to all of its employees and has made hand sanitizer available throughout its facility, and it is prepared to provide the same equipment and materials to anyone present at the Employer's facility for a manual election.

The Employer has also agreed to provide enough pencils for all voters to mark their ballots with separate pencils, eliminating the need for people to touch the same pencil and for the Board agent to distribute and collect pencils that may have been touched by every voter in the unit.

Finally, the Employer has proposed extending the time of the election, despite the small size of the petitioned-for unit in this case. The Employer has proposed two voting sessions, one from 11:00 a.m. to 1:00 p.m. and one from 7:30 p.m. to 9:00 p.m. and has agreed to allow employees to vote at any time during those periods.

D. The Spanish Language Notice of Petition for Election

The Employer's Counsel requested a Spanish-language notice of petition for election on April 14, 2020, the day the petition was filed. The Employer was provided with a Spanish-language notice of petition for election on April 21, 2020.

III. ANALYSIS

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform that function must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. Therefore, I have decided to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has made it clear that mail ballot elections need not be reserved only for the

most extraordinary circumstances, reasoning that “neither our precedent nor common sense supports such a stringent approach to the use of mail ballots.” *Sutter Bay West Hospitals*, 357 NLRB 197, 198 (2011). Indeed, the Board has always acknowledged that circumstance may necessitate adaptations on the Board’s part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

The Board has determined that there are some instances in which a mail ballot election is appropriate because “of circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that extraordinary circumstances may warrant a departure from the specific guidelines articulated in that case. *Id.*

I find that the COVID-19 Pandemic presents an extraordinary circumstance that make conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the unit employees’ union representation preferences at this time. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election, all participants’ family members, and the public must be considered in determining the appropriate method for conducting the election.

Although the Employer has offered certain accommodations in an effort to allow for some degree of social distancing and protection during the election, manual election procedures inherently require substantial interaction. Voters, observers, party representatives will all need to appear at the Employer’s facility to participate in the election. Party representatives, the observers, and the Board agent will have to gather for the pre-election conference, including the check of the voter list. The Board agent and observers will need to share a conference room, albeit a large one, for the duration of the election. The observers will need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent. The Board agent must hand a ballot to each voter, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Board agents must also count the ballots cast by all voters at the end of the election.

Although the Employer argues that a mail ballot election presents greater risks due to the need to touch the mail, the United States Centers for Disease Control and Prevention has advised that, although the COVID-19 virus can survive for a short period on some surfaces, it is unlikely

to be spread from mail. In these circumstances, the substantial interaction inherent in conducting a manual election presents the greater risk for all involved.

This degree of interaction required to conduct a manual ballot election creates risk for all election participants despite the social distancing and protective measures proposed by the Employer. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Although the Employer sends home employees who display symptoms of COVID-19, any election participant could be an asymptomatic carrier of the virus.

Further, conducting manual elections under the current circumstances could disenfranchise voters. If any employee displays symptoms during the 14 days before the election, the Employer's protective measure of sending home employees with COVID-19 symptoms for a 14-day period could result in employees being unable to participate in a manual election. In addition, during the current public health crisis, employees may be wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation.

Moreover, the Employer's offer of equipment, including N-95 masks, gloves, and writing instruments, to the Board for conducting the manual election itself presents another problem separate and apart from the health and safety and disenfranchisement issues I have discussed. The Anti-Deficiency Act expressly prohibits officers and employees of the United States Government from accepting voluntary services or contributions exceeding expenditures already authorized by law, except in emergencies involving the safety of human life or the protection of property. 31 U.S.C.A. § 1342. The acceptance of equipment from the Employer for conducting the election would amount to an augmentation of the Board's budget in violation of the Anti-Deficiency Act. Moreover, the CDC has urged that certain protective equipment, such as surgical masks or N-95 masks be reserved for use by healthcare workers and other medical first responders in responding to the current public health crises.

The Employer may prefer a manual election. The Union, in turn, initially requested a mail ballot election, but then later stated it would not object to a manual election. However, I have determined that, under the current circumstances, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay.

Although a Spanish-language notice of petition of election was provided to the Employer one week after its Counsel requested one, the Employer was provided with a notice on April 21, 2020, and that notice will soon be replaced with English and Spanish language notices of election following issuance of this decision, with such notice being posted through the conclusion of the election. Therefore, I find that the Employer not immediately receiving a Spanish-language notice of petition for election does not warrant delay for conducting the election.

In sum, in accordance with the Board's duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees' union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, their families, and the public, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency's obligations and responsibilities with respect to the acceptance and procurement of equipment, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

IV. 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 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.
3. 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. 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.
5. 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 Plant Processing employees employed by the Employer at its Phoenix, Arizona facility.

Excluded: All other employees, office clerical, guards and supervisors as defined in the Act.

There are approximately 18 employees in the unit found appropriate.

V. 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 General Teamsters (Excluding Mailers), State of Arizona, Local 104.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. At 2:00 p.m. on Tuesday, May 5, 2020, ballots will be mailed to voters by an agent of Region 28 of the National Labor Relations Board. 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 Tuesday, May 12, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 28 Office at (602) 640-2160 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 28 office by close of business (4:45 p.m.) on Tuesday, May 19, 2020. All ballots will be commingled and counted by an agent of Region 28 of the National Labor Relations Board on the earliest practicable date after the return date for mail ballots. In order to be valid and counted, the returned ballots must be received at the Regional Office, prior to the counting of the ballots. The parties will be permitted to participate by video conference. A meeting invitation for the video conference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending Sunday, April 26, 2020, 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 who are present in the United States may vote.

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(l) 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 Friday, May 1, 2020. 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.

VI. 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 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.

Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations, and must be accompanied by a certificate of service.

Filing a request for review electronically may be accomplished 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. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Phoenix, Arizona this 29th day of April 2020.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director