

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

AMAZON.COM SERVICES INC.

**Case Nos. 29-CA-277198
29-CA-278982**

and

CONNOR VINCENT SPENCE

and

NATALIE MONARREZ

Case No. 29-CA-277598

and

DERRICK PALMER

Case No. 29-CA-278701

and

**Case Nos. 29-CA-285445
29-CA-286272**

AMAZON LABOR UNION

ORDER FOR HEARING BY VIDEOCONFERENCE

The Amended Consolidated Complaint in the above matter, issued on February 18, 2022, alleges that Amazon.com Services, Inc. (Amazon) discharged and otherwise retaliated against Dacquan Smith for his activities on behalf of Amazon Labor Union and his other protected concerted activities, in violation of Sections 8(a)(1) and (3) of the Act, and committed numerous violations of Section 8(a)(1), including interrogations, statements of futility, solicitation of grievances with promises to remedy, surveillance and creation of the impression of surveillance of Union activity, confiscation and unlawful restrictions on the distribution of Union literature, and unlawful disparagement of the Union.

The hearing in this matter was originally scheduled to begin on April 5, 2022, and was subsequently postponed by mutual agreement of the parties to June 6, 2022. In its Answer to the initial Consolidated Complaint issued on January 27, 2022, Amazon took the position that the hearing should be conducted in person, as opposed to by videoconference using the Zoom for government platform. During several conference calls, the parties and I engaged in substantial discussions regarding the feasibility and logistics of an in-person hearing. Subsequently during a conference call on May 17,

2022, I directed the parties to submit any additional written statements regarding whether to conduct the hearing in-person or by videoconference on or before May 23, 2022, in order to account for the most recent changes in the circumstances of the COVID-19 pandemic in the New York City area and the facilities available for conducting the hearing. In their statements submitted on May 23, 2022, Counsel for the General Counsel (General Counsel) takes the position that the hearing should be conducted by videoconference. Amazon contends that the hearing should be conducted in person.¹ While the Charging Party had previously expressed an opposition to holding an in-person hearing, they did not submit any written statement regarding the issue.

Based upon the circumstances of the pandemic in the New York City area at this time, and the subsequent implications for an in-person hearing pursuant to Safety Protocols promulgated by the agency to address the COVID-19 pandemic, I find that an in-person hearing in the instant case is not feasible on June 6, 2022, as scheduled. On May 17, 2022, the New York City Department of Health increased the COVID-19 Alert Level for New York City from Medium to High. The High Alert level indicates that there is currently “high community spread,” and “Substantial pressure on the health care system” in the New York City area based upon the number of new cases diagnosed, new hospital admissions with COVID-19, and hospital occupancy or percentage of inpatient beds occupied by COVID-19 patients.² See www1.nyc.gov/site/doh/covid/covid-19-alert-levels.page. The high community spread, increasing hospital admissions with COVID-19, and increasing inpatient beds occupied by COVID-19 patients all indicate that, as the NYC Department of Health states, “heightened precautions” are necessary to “help slow the spread of COVID-19.” The NYC Department of Health therefore recommends that given the High Alert level individuals “Do not go to crowded, indoor gatherings,” and “Limit any type of gathering to a small number of people.”³ Such recommendations militate against holding an in-person hearing on June 6, 2022.

In addition, General Counsel represents that the agency is not able to locate any available facility proximate to the offices of Region 29 which would accommodate social distancing protocols for all of the anticipated hearing participants. Based upon discussions with the parties during conference calls, the hearing in the instant case will involve at least six attorneys, three party representatives, the witness, a court reporter,

¹ On May 24, 2022, Amazon submitted a Reply to General Counsel’s statement, and on May 25, 2022, General Counsel submitted a Reply to Amazon’s submission. All parties are hereby directed to *not* submit reply papers of any kind unless reply materials are explicitly authorized by the NLRB Rules and Regulations and/or relevant caselaw, or they obtain my specific permission to do so.

² These factors are also used to determine COVID-19 Community Levels developed by the Centers for Disease Control and Prevention (CDC). See [cdc.gov/coronavirus/2019-ncov/science/community-levels.html](https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html).

³ Amazon argues that “public health conditions” involving the COVID-19 pandemic have improved significantly since the initial Complaint issued on January 27, 2022. While an overall analysis of the course of the pandemic and its impact on public health is beyond my expertise, it is obvious that the circumstances of the pandemic fluctuate both temporally and geographically. I thus rely here upon the judgment of the NYC Department of Health with respect to the factors underlying its Alert Level designations and the consequent safety measures advisable at the current time.

and myself at any particular time. Because of the high profile of the instant case, it is also reasonable to expect that members of the public and media will attend to observe. Based upon my many years of personal experience, I concur in General Counsel's assessment that the hearing rooms at Region 29's offices are not adequate to accommodate recommended social distancing protocols with the number of participants and attendees the hearing in this case will likely involve.⁴ In addition, I have no reason to doubt General Counsel's representations that a search for adequate facilities in the area has been unavailing, in that the agency's Facilities Management Branch has reported that there is no available space at United States District and Bankruptcy Courts in Brooklyn, and the closest Federal Mediation and Conciliation Service office is located thirty miles from Region 29's offices. I also do not find it appropriate to order that the hearing take place at the offices of Respondent's attorneys absent the consent of all parties.⁵ Thus, it appears that there are no facilities available which will accommodate recommended social distancing protocols given the number of participants and potential observers involved in the instant proceeding.

Furthermore, in order to determine how the instant hearing can be conducted safely for all participants and observers, I find it important to consider other factors unique to the New York City area. Most importantly, in the New York City area, the vast majority of individuals participating in or observing the hearing must travel on public transportation in order to attend. This necessarily entails travel in subway trains and buses, and on commuter railroads, in close proximity to hundreds of other people, significantly affecting the potential risk of exposure to COVID-19. Thus, given the extent of community spread and pressure on the health care system that characterizes the High Alert level, the risk of contracting COVID-19, of poor outcomes, and of undermining public health in general is intensified in a manner which renders an in-person hearing inadvisable.

It is also important to note that, based upon the High Alert level currently in effect, the New York City Health Commissioner "advises all New Yorkers to wear a mask in any public indoor setting," and advises that individuals older than 65 "or otherwise at a high risk of severe illness from COVID-19 should also wear a mask in crowded outdoor settings and avoid gatherings when possible." See www1.nyc.gov/site/doh/covid/covid-19-alert-levels.page. Pursuant to agency Field Office Safety Protocols promulgated on April 5, 2022, New York City's High Alert status requires that both agency employees and visitors wear a mask inside agency offices in the New York City area.⁶ The protective masks recommended by both the CDC and the NYC Department of Health cover the entire lower area of the face, in order to cover both

⁴ The larger hearing room on the second floor of 26 Federal Plaza, which could potentially allow for compliance with recommended social distancing protocols, is currently unavailable, as it is being used by Region 2 while that Region's offices are closed as a result of an issue involving asbestos.

⁵ General Counsel opposes conducting the hearing at the offices of Respondent's counsel, contending that requiring employee witnesses to testify in such a setting could have an intimidating and coercive effect, and that the Region would not be able to ensure that agency COVID protocols are enforced in a private facility.

⁶ General Counsel confirms in her written submission that the Region's mask mandate "applies to staff and all visitors, including witnesses."

the nose and mouth completely. See www1.nyc.gov/site/doh/covid/covid-19-prevention-and-care.page#face; www1.nyc.gov/assets/doh/downloads/pdf/covid/basics-about-face-coverings.pdf

One of the primary functions of the Administrative Law Judge is to evaluate witness credibility and consequently resolve disputed issues of fact involving conflicting testimony. See, e.g., *M.P.C. Plating, Inc.*, 301 NLRB 785, 788, fn. 13 (1991), enf. denied in part on other grounds, 912 F.2d 883 (6th Cir. 1990) (“assessment of witness credibility” a “function of the administrative law judge”); *Romo Paper Products*, 208 NLRB 644, 645 (1974) (ALJ “abdicated his responsibility to determine credibility” by failing to “resolve credibility dispute”). Credibility resolutions are particularly critical in cases such as this one, where evidence regarding the Complaint’s allegations that Amazon violated Sections 8(a)(1) and (3) of the Act will likely entail factual determinations premised upon an analysis of conflicting witness testimony, as opposed to documentary evidence of uncontested probative value.

One important component of any credibility assessment is the demeanor of the particular witness whose testimony is being presented. See, e.g., *Casino Pauma*, 362 NLRB 421, 423, fn. 4 (2015); *Standard Dry Wall Products, Inc.*, 91 NLRB, 544, 545 (1950), enf’d. 188 F.2d 362 (3rd Cir. 1951) (demeanor a “factor of consequence” in credibility resolutions). Thus, the Board stated in *Standard Dry Wall Products, Inc.* that “as the [Administrative Law Judge], but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a[n ALJ’s] credibility findings insofar as they are based on demeanor.”⁷ 91 NLRB at 545. Based upon over eleven years of experience as an Administrative Law Judge with the agency, it is my conclusion that the ability to assess the credibility of the witnesses appearing before me will be detrimentally affected if those witnesses testify while wearing masks covering the nose and mouth, as the currently applicable agency Safety Protocols require. Thus, in my estimation, hearing testimony from witnesses by videoconference who are able to testify without wearing masks is preferable to hearing in-person testimony from witnesses who must wear masks while testifying.

The Board has repeatedly ruled over the past two years that videoconference hearings constitute a viable alternative to in-person hearings where necessary in order to conduct a hearing safely and effectively, and to ensure that the Act is enforced in an efficient and meaningful manner in the context of the COVID-19 pandemic. See, e.g., *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 2-CA-142626, unpub. Board order issued May 14, 2021 (2021 WL 1966555); *William Beaumont Hospital*, 370 NLRB No. 9 (2020); *XPO Cartage, Inc.*, 370 NLRB No. 10 (2020). I do not concur in Amazon’s contention

⁷ It is well-settled that the “established policy” of the Board “is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.” *United States Postal Service*, 365 NLRB No. 51 at p. 1, fn. 1 (2017), citing *Standard Dry Wall Products, Inc.*, supra; see also *E.S. Sutton Realty Co.*, 336 NLRB 405, fn. 2 (2001) (noting that “the Board should reverse a judge’s credibility resolutions only in rare cases”); *Adams and Associates, Inc.*, 871 F.3d 358, 371 (5th Cir. 2017) (ALJ’s credibility resolutions “are binding unless unreasonable, contradictory to other findings, or unjustified,” and generally “require deference except in unusual circumstances”).

that the Board's recent decision in *Pizza Piazza, Inc.*, unpub. Board order issued March 14, 2022 (2022 WL 789275), prohibits an ALJ from ordering a fully remote hearing after the agency as a whole resumes in-person operations. At the time the Board issued its unpublished order in *Pizza Piazza, Inc.*, the agency's health and safety protocols, including its requirements regarding the wearing of masks inside agency facilities discussed above, had not yet been issued.⁸ Therefore, the Board was not confronted with a situation involving the application and impact of the agency protocols vis-a-vis COVID alert levels, as is the case here.

As a result, for all of the reasons discussed above regarding the circumstances engendered by the current status of the COVID-19 pandemic in the New York City area, the trial in this case will be conducted by videoconference using the Zoom for Government platform.⁹ The remainder of this order will address the manner in which trial participants and non-participant observers may access the unfair labor practice trial on Zoom, and provide instructions for how the trial will proceed, as described below.

Trial Dates

The trial will begin on June 6, 2022 at 9:30 a.m., and will continue on consecutive days that week, and on consecutive days the week of June 13, 2022. In general, please bring any additional scheduling issues which arise to my attention as soon as possible.

On the first day of the hearing, we will begin by addressing procedural and preliminary matters, including opening the trial record, introducing the formal papers, resolving any outstanding disputes regarding subpoenas and the production of documents, addressing any other pending motions, and opening statements. Counsel for the General Counsel (General Counsel) should then be prepared to begin presenting their first witness.

Zoom Invitations

Before the trial, I will send the parties a PDF Zoom invitation by e-mail on Microsoft Outlook. The parties may share the PDF copy of the Zoom invitation with other participants and observers. However, please **do not forward the e-mail attaching the PDF Zoom invitation, which will contain my email address.**

⁸ Thus, the Board refers to the agency health and safety protocols as "forthcoming."

⁹ In its Reply, Amazon requests that any remote hearing be delayed until the Board can rule on a Request for Special Permission to Appeal a determination that the hearing will take place by videoconference. This request is denied. The two-week period of hearing dates in June 2022 has been set for some time, and arranging hearing dates in this case requires coordinating the schedules of at least six different attorneys and myself. Furthermore, once the hearing opens the parties can address procedural matters and issues involved in the production of documents and electronically stored information pursuant to Subpoenas *Duces Tecum*, and any required rulings can be made on the record, prior to the inception of their case presentations.

If you are unable to join the meeting either online or by phone, please contact one of the other participants in the trial or call our Courtroom Deputy, whose name and telephone number will be provided after an assignment is made, for assistance. If you cannot reach the assigned Courtroom Deputy, please call Ms. Dana Brown at the Division of Judges, New York Branch Office at (212)944-2943 for assistance.

Courtroom Deputy

As I have discussed with the parties, I have requested that a Courtroom Deputy be assigned to participate in the trial in this case. The Courtroom Deputy will be available during the trial to assist with managing the trial, handling exhibits, and addressing technical issues with Zoom, should any arise. The Courtroom Deputy will be an attorney from the “Board-side” of the National Labor Relations Board (i.e., the staff of a Board Member, the Office of the Executive Secretary, or the Solicitor’s Office), and will be screened from working on this case if it comes before the Board.

Identification of Participants

To facilitate managing the trial and access thereto, **by Noon (Eastern time) on the business day before the first hearing date**, each party must email the Judge and Courtroom Deputy a list of all trial participants to which counsel has sent information about accessing the trial on Zoom. This list is for procedural use only and will not become part of the record. The list must include each participant’s name, email address, telephone number and role in the proceeding. This list is necessary for the Judge to allow the appropriate access to the proceedings and to correctly assign individuals to breakout rooms (when needed) or the waiting room.

As the trial proceeds, each party must supplement its list as needed to identify any new trial participants. The parties shall provide any supplemental participant names **by Noon (Eastern time) on the business day before the participant will be joining the trial**. Notwithstanding these instructions, a party will not be precluded from calling a witness who is not on the party’s participant list if the witness is necessary for presenting the party’s case.

To limit the number of video images on the Zoom video display during trial, the following participants generally should be the only participants with their outgoing video turned on: the Judge; one attorney per party (typically the attorney presenting argument or handling the witness);¹⁰ and the witness. All other trial participants may observe the trial proceedings but generally should have their outgoing video off and their audio on mute (unless directed otherwise by the Judge or Courtroom Deputy). This will enable all participants to select “Hide Nonvideo Participants” in Zoom settings and focus their attention on the video images of participants who are actively involved in the trial.

¹⁰ This guideline does not preclude another attorney from turning their video and/or audio on if the need arises to speak briefly during the trial.

Identification of Non-Participant Observers (Public Access)

The Regional Office (Region 29) will have the responsibility of advising any members of the public (non-participant observers) about how they may access the trial. Parties may also share copies of the PDF Zoom invitation with any known non-participant observers, but also must provide the Region, **by Noon (Eastern time) on the business day before the next trial date**, the names and email addresses of any such known non-participant observers. The Region must then provide a list of all non-participant observers to the Judge and Courtroom Deputy **by 5:00 pm (Eastern time) on the business day before the next trial date**. The Judge and Courtroom Deputy will use the list to manage access to the trial.

Identified non-participant observers may observe the Zoom trial by video and/or audio but must have their outgoing audio on mute and their outgoing video turned off throughout the trial (unless directed otherwise by the Judge or Courtroom Deputy). Non-participant observers may not disrupt the trial in any way and may be subject to removal and other sanctions if they disrupt the trial or violate the Judge's instructions.

Prohibition of Videotaping or Recording the Trial

The official court reporter is the only individual permitted to record the trial. Accordingly, **do not video record, audio record, broadcast, televise, stream, screenshot, photograph, or otherwise copy the trial**. Violation of this rule may result in removal and other sanctions.

Exhibits

To facilitate the trial, it is requested that all parties email their potential exhibits to the Judge, the Courtroom Deputy, the court reporter, all other counsel, and the parties' own witnesses before the witness testifies. Jencks materials are not covered by this request, as those materials need not be provided until requested for cross examination.

As an alternative to email, the parties may request that the agency create secure NLRB SharePoint webpages for this case. Exhibits can be uploaded to Sharepoint, where they can be viewed by those with authorized access (such as an individual party, which may then provide access, as needed, to the Judge, Courtroom Deputy, court reporter, and/or other parties). Sharepoint may be required if a party intends to introduce an audio or video exhibit, or a large exhibit that cannot be transmitted by email. The agency requires at least three business days advance notice to set up a Sharepoint webpage.

All exhibits should, where possible, be pre-marked, paginated, and converted into one bookmarked PDF file per party. Please redact all personally identifiable information (PII, such as social security numbers, dates of birth, etc.) from your exhibits, and have an unredacted copy available for review if necessary.

Jencks Statements

Jencks statements, such as affidavits given to the General Counsel, will be provided (by email or another method) to opposing counsel upon request for cross examination. After cross-examination, opposing counsel **MUST** delete all Jencks statements from their computer and represent to the court and the General Counsel that it has done so.

Additional Appropriate Safeguards

Informed, but not controlled, by Section 102.35(c) of the NLRB Rules and Regulations, I will implement various appropriate safeguards to ensure that I and the parties have the ability to assess each witness' credibility and that the parties have a meaningful opportunity to examine and cross examine each witness. See *William Beaumont Hospital*, 370 NLRB No. 9 (2020) (noting that Section 102.35(c) addresses the videoconference testimony of a single witness during an in-person hearing, but is not controlling with respect to a hearing conducted entirely by videoconference). Appropriate safeguards will generally include, but are not limited to:¹¹

1. Before taking testimony, ensuring that I, all trial participants and the hearing reporter are able to hear the testimony and observe the witness, and ensuring that the witness is able to hear all other trial participants;
2. Permitting voir dire of any witness regarding their location, equipment, and surroundings, and, upon request, having the witness adjust their camera view to show whether any other individuals are present in the room where the witness is located;
3. Generally requiring the parties to provide copies of any exhibits to me, the witness, and all counsel of record before starting their examination (i.e., before starting direct, cross, or redirect);¹² and
4. Having video technology assistance available to assist with technical difficulties that may arise during the hearing (e.g., assistance from the Courtroom Deputy or agency information technology staff).

¹¹ Board Rule 102.35(c)(2) lists, as one safeguard, providing the opportunity of party representatives to be present at the remote location where the witness will be located when testifying. I will not be employing that safeguard because it is inconsistent with the physical distancing safety procedures that we all must follow due to the ongoing Coronavirus (Covid-19) pandemic.

¹² This requirement will not preclude counsel from sharing, at a later point, additional exhibits that counsel may need to use to address issues in the witness' testimony, or certain exhibits that counsel may wish to hold in reserve as part of their litigation strategy.

Ultimately, I will determine in my discretion whether it is feasible and appropriate to proceed with each witness' testimony by videoconference.¹³

Dated: May 25, 2022
New York, New York



Lauren Esposito
Administrative Law Judge

¹³ If I determine that it is not feasible to receive a witness' testimony by videoconference at a particular time, the remedies may include rescheduling the witness for a later trial date and/or having the relevant party take additional steps to ensure that the witness can access and participate in the Zoom hearing.