

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

Houston, Texas

PHILLIPS 66 (Sweeny Refinery)

Employer

and

Case No. 16-RC-087513

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
UNION NO. 564**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. The Petition and Issue Presented

On August 17, 2012, the Petitioner filed a petition, seeking to represent all operators and terminal operators employed by the Employer at its Sweeny Refinery in Old Ocean, Texas. The petition excluded all other employees, including office clericals, maintenance employees, instrumentation technicians, laboratory technicians, chemical technicians, guards and supervisors as defined by the Act. At the time of the filing of the petition, the Employer employed about 339 employees in the petitioned-for unit.

A hearing in this case was held before a hearing officer on August 27, 2012. The hearing presented one issue - the appropriateness of the above-described bargaining unit. The Petitioner seeks to represent the above-described operators at the Sweeny Refinery. The Employer, on the other hand, maintains the smallest appropriate unit should include not only the operators, but also 32 laboratory and chemical technicians. The Employer also asserts that the Board's public utility

presumption should be applied in this case. The record does not reflect any collective bargaining history exists among these particular employee classifications.¹

II. The Regional Director's Findings

I have considered the evidence adduced during the hearing and the arguments advanced by both parties in their post-hearing briefs. For the reasons set forth below, I find that the petitioned-for unit consisting of all operators and terminal operators employed by the Employer at its Sweeny Refinery in Old Ocean, Texas, excluding the laboratory and chemical technicians, is an appropriate unit. Accordingly, I am directing an election in a unit consisting of approximately 339 employees.

To lend a context to my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will discuss the facts, including operators, laboratory employees, their interrelation, and the reasoning that supports my findings.

III. Overview of Employer's Operations

The Employer is a Delaware energy corporation with a place of business in Old Ocean, Texas, where it operates a petrochemical refinery. This case concerns the Employer's operations at its petrochemical refinery in Old Ocean, Texas (herein referred to as Sweeny Refinery).

The Sweeny Refinery is a large campus consisting of a main office building, maintenance building, laboratory building, approximately six production units and three terminals. The terminals are located outside a fence that surrounds the other buildings. The three terminals are named San Bernard, Jones Creek and Freeport. Pipelines connecting the terminals transport crude oil to the refinery.

¹ Five separate bargaining units already exist at the Sweeny facility for the following groups: pipefitters, machinists, crane operators, boilermakers, and welders.

The Sweeny Refinery is managed by General Manager Gary Freiburger, who oversees approximately six departments, including the operations department; maintenance department; technical department; health, safety and environmental oversight department (HSE); human resources department; and finance department. The managers of the human resources department and the health, safety and environmental oversight department have job responsibilities that apply to all the employees at the Sweeny Refinery. For example, the manager of HSE handles the new employee safety training for the entire refinery, and the human resource manager oversees recruitment, staffing, labor relations, training, medical services, payroll, and public relations for the entire refinery.

The operations department is managed by Darin Fields. The team leads in the operations department report to Fields. Next in the hierarchy of management within the operations department are the specialists. The specialists manage the operators. The operators work in the various production units, while the terminal operators work in the terminals.

The technical department is led by manager Tim Sherbon. Team leader Ruben Gonzalez reports to Sherbon and oversees the fraction (or gas chromatography) laboratory, control laboratory, and analytical laboratory. The laboratories are housed in a separate building with its own parking lot. Laboratory and chemical technicians, as well as chemists and engineers work in the laboratories.

There was limited testimony about the maintenance department and finance department. The welders, boilermakers, crane operators, machinists, and pipefitters work in the maintenance department.

IV. Operators and Terminal Operators

Operators are subject to operating policies unique to their classification. Operators also complete specialized training unique to the operator position.

On each 12-hour shift within a production unit of the operations department, there is a lead operator (also called a stillman), an inside operator and an outside operator. The lead operator coordinates between the inside and outside operators by radio throughout the shift. The outside operator is responsible for going around the unit and making sure the equipment is operating properly. If the outside operator detects any equipment that is not functioning properly, he informs the inside operator. Meanwhile, the inside operator works in the central control room and responds to the needs of the production unit – for example, speeding up or slowing down the pump, or confirming that samples have been taken.

Once during every 12-hour shift, the outside operator collects samples of the chemicals being produced in the production unit and places the samples in a box located in front of the control room. Later in the day, the operators check their computers to find out the results of the laboratory testing of these chemicals.

The terminal operators work in the San Bernard, Jones Creek and Freeport terminals to transport crude oil to various production units at the refinery. The distance from the terminals to the refinery varies between 15 to 30 miles. The samples of material collected from the terminals are picked up by security guards who serve as couriers to transport the samples to the laboratories for testing.

V. Laboratory and Chemical Technicians

Laboratory and chemical technicians must undergo training specific to laboratory employees. All the laboratory employees work in a separate building apart from the production

units. The only laboratory employees who leave the laboratory during their 12-hour shift are fractional laboratory technician I's and control laboratory utility testers. The fractional laboratory technician I's and the control laboratory utility testers retrieve samples from the tank farm area. There is no evidence that they have any substantial interaction with operators when they retrieve samples from the tank farm area. In fact, the only evidence of interaction with the tank farm operators is a brief phone call from the technician or utility tester to inform the unit that he/she is coming to retrieve samples.

The utility testers also pick up samples from the sample boxes outside the production units. There are three utility testers who work in the control laboratory, but only one utility tester works on a shift. Because the sample boxes are located outside the production units, the utility testers do not have occasion to enter the production units and interact with operators. In total, fractional laboratory technician I's and the control laboratory utility testers spend about two and one-half hours of their 12-hour shifts picking up samples outside the laboratory. The remainder of their shift is spent at the laboratory.

The remaining laboratory and chemical technicians conduct tests on the collected samples and post the test results on the computer system. On average, about 900 samples are tested each day by the laboratories, and 99.9 percent of the test results are communicated by posting on the computer system. The technicians are only responsible for conducting the tests, not for working with the operators to correct products whose samples do not meet specifications.

The laboratories do not test samples exclusively for the production units. In fact, the laboratory also conducts tests for outside terminals other than San Bernard, Jones Creek and Freeport. The record is silent as to whether these terminals belong to another refinery. Outside

laboratories, like SGS and Inspectra, conduct some of the testing of samples collected from the terminals.

VI. Interrelation Between Operators and Technicians

Other than General Manager Freiburger, who oversees the entire refinery, the operators and technicians do not have any supervision in common. The operations manager Darin Fields manages the operators, and the technical manager Tim Sherbon manages the technicians. Fields and Sherbon report directly to the general manager. Fields and Sherbon are not accountable to each other. The operators are located in the production units and terminals, while the technicians all work in the laboratory building.

All employees at the Sweeny Refinery, including the operators and technicians, share a common human resource manager and HSE manager. Both operators and technicians attend new employee orientation, which lasts about 4 to 8 hours, and new employee safety training and are subject to the same rules of conduct and regulations in the Employer's safety handbook. After the new employee orientation and new employee safety training, the operators and technicians have separate training programs specific to their respective working fields.

Operators and technicians receive the same benefits. Except for the lead lab technician, they have the same wage scale. The operations and technical department employees are scheduled on four 12-hour shifts. Operators and technicians do not take lunches or breaks together as their break areas are in their separate buildings.

Operators and technicians are not cross-trained, so they are not qualified to complete the other's job duties. There is no temporary transfer of employees among these two departments. The only two examples of permanent transfers from the operations department to the technical

department occurred over 20 years ago. These permanent transfers had to complete laboratory-specific training when they moved from operations to the technical department.

The amount of interaction between the operators and technicians is controverted. Normally, operators do not interact with technicians during the process of retrieving or testing samples. As stated earlier, 99.9% of test results are reported by the technical department by simply posting the results on the computer system. The operators obtain the results by logging on to their computers. Occasionally, laboratory technicians may contact the operators by phone to inform them a sample did not meet a specification. Testimony regarding the frequency of these calls varied between approximately two to three times per year to three to five times per 12-hour shift. It is undisputed these phone calls were brief and only lasted a matter of seconds. Lead technician Arnold Ybarra testified that if the operations department is running smoothly, the technical department does not interact much with the operators; however, if the operations department is having issues with its samples, then he could be interacting with the operators as much as 50% of his 12-hour day.

There are times when the operations department needs testing done quickly, and an operator takes a sample directly to the laboratory building. The testimony varied as to whether the operator stayed at the laboratory and waited for the results. A witness who had worked in the operations department for more than 32 years testified he had only taken samples to the laboratory building twice in his career, and he did not stay to await the results.

The technical operators from the Jones Creek terminal also send samples to the laboratories. However, these samples are delivered to the laboratories by security guards acting as couriers, instead of utility testers. The fractional laboratory technician I's and control laboratory utility testers who pick up samples for about two-and-a-half hours of their 12-hour

shift do not interact with operators during the retrieval process. In fact, most of the samples retrieved from the production units are contained in boxes located outside the production units. The boxes are near the road, so the utility testers can stay on the road while traveling through the refinery picking up samples. A lead technician who testified did not even know what kind of personal protective equipment the operators wear because the technicians do not go inside the unit. Tech I's never leave the laboratories.

Occasionally, the operations department will send special requests to the technical department for specific testing it would like performed. While the frequency of these special requests was estimated by one witness to be about three times during a 12-hour shift, this same witness admitted that a dispatcher in the main office building calls in special requests. Thus, it was unclear how many of these special requests were made directly by the operators.

There was brief testimony that a chemical technician in the analysis laboratory telephones an operator each morning to inform him whether the waste water meets specifications. There is no evidence that this once-daily communication is extensive.

The operations department employees perform certain tests, such as pH, conductivity and alkalinity. These tests take a small amount of time. For example, testing for pH takes about a minute and only occurs once during each 12-hour shift.

VII. Analysis

In determining the petitioned-for unit is an appropriate unit, I examine here the current standard for assessing the scope of the unit, the facts involved applied to that standard. In addition, I discuss the Employer's contention that the public utility presumption should apply to this unit.

In evaluating the appropriateness of the petitioned-for unit, traditional community of interest factors apply. In *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. (2011), the Board reexamined the standard for finding a unit appropriate where a labor organization petitions for an election in a unit of employees who are readily identifiable as a group, and where that group shares a community of interest under the traditional criteria. In those cases, the Board will find the petitioned-for unit to be appropriate despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit. *Id.*, slip op. at 12.

The Board in *Specialty Healthcare* reiterated that employees “may seek to organize ‘a unit’ that is ‘appropriate,’ not necessarily *the* single most appropriate unit.” *Id.*, slip op. at 9 (quoting *American Hospital Assn.*, 499 U.S. 606, 610 (1991)); *Overnite Transportation Co.*, 322 NLRB 723, 723 (1996) (“It is well-settled then that there is more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining.”); *J.C. Penney Co.*, 196 NLRB 708, 709 (1972) (recognizing that though a larger unit could be *an* appropriate unit, that did not render the petitioned-for unit inappropriate).

In determining whether a petitioned-for unit is an appropriate unit, the Board in *Specialty Healthcare* reverted to the traditional community of interest test. The traditional community of interest test examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with

other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, slip op. at 9, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

The Petitioner contends that a unit consisting of operators and terminal operators at the Sweeny Refinery is an appropriate unit. The Employer asserts that a unit consisting of the operators must also include the laboratory and chemical technicians at the Sweeny Refinery. The scope of the unit sought by the petitioner is relevant but cannot be determinative of the unit. *Metropolitan Life Insurance Co.*, 156 NLRB 1408, 1418 (1966); *Airco, Inc.*, 273 NLRB 348 (1984).

Here, the operators and terminal operators are a readily identifiable group of employees within the same department with common supervision. In determining whether this proposed unit is an appropriate unit, the next question is whether the employees share a community of interest. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998).

The operators and terminal operators clearly share a community of interest. They all share the same job classification, shifts, wage scale, and training. Because they all work within the operations department, their immediate and intermediate supervision is separate and distinct from the other employees in the plant, including the technicians. Their primary duty, unlike the technicians, is the production of materials at the refinery. The operators must comply with certain operating policies unique to their department. Operators are normally the only employees working within the production units and terminals. In contrast, in accomplishing their job duties, technicians do not need to enter the production units and terminals. There is no evidence of transfers into the operations department from other job classifications, and there were only two examples from at least 20 years ago of permanent transfers out of the operator position. The

interaction between operators and technicians is limited and infrequent. The record does not reflect any interaction between operators and other employees from other departments at the refinery. Applying traditional community of interest factors to these facts, I find the petitioned-for unit is an appropriate unit.

When a party contends that a petitioned-for unit containing employees readily identifiable as a group who share a community of interest is nevertheless inappropriate because it does not contain additional employees, the burden is on the party so contending to show that the excluded employees share an overwhelming community of interest with the included employees. *Specialty Healthcare*, supra, slip op. at 11 citing *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 421 (D.C. Cir. 2008). The Employer has failed to meet its burden here of demonstrating that the laboratory and chemical technicians share an overwhelming community of interest with the operators.

With regard to separate departments, the technicians are in the technical department, while the operators are in the operations department. Operators work in the production units and terminals, whereas the technicians (with the exception of fractional laboratory technician I's and control laboratory utility testers, who spend only two-and-half hours of their 12-hour shifts retrieving samples outside the production units) work in the self-contained laboratory building.

Operators possess different job skills and receive different training than technicians. The new employee orientation and safety training that operators and technicians are required to take is brief. Once they are assigned to their respective departments, operators and technicians have training programs specific to their departments.

Operators and technicians have distinct job functions. Terminal operators ensure crude oil is transported by pipeline to various production units in the refinery, where operators refine

the oil to manufacture various products. Technicians, meanwhile, are responsible for testing samples from the terminals and production samples and posting the results on the computer systems. Occasionally, technicians will contact the operations department to inform them a sample does not meet specifications. There was testimony that operators perform small tests, such as pH, conductivity and alkalinity tests on boilers. However, the record is clear that these tests only take about a minute each shift and are different from the testing of the samples that technicians perform. The type of work performed by operators and technicians does not overlap.

With respect to functional integration, the record shows the technicians' role in the operators' overall production process is limited. The technicians test samples of material collected from production units and post the results on the computer system. With regard to 99.9% of the test results, the technicians simply post the results without further involvement in the production process. Occasionally, the technical department will contact the operations department to alert them about a sample that has not met specifications. However, beyond a brief phone call communicating this result, the technical department does not interact further with the operations department to address the substandard sample. Additionally, the record reflects the technical department tests samples for other unspecified terminals outside the operations department. The technicians, thus, have responsibilities that are not focused on operators at this refinery. Therefore, there is insufficient evidence to demonstrate that the jobs of the operators and technicians are so functionally integrated as to compel the technicians' inclusion in a unit with the operators.

The frequency of contact between operators and technicians is low. With the vast majority of test results, technicians post test results on the computer system without contacting the operations department. When the technical department does call operations to inform them

of a substandard sample, the call is brief and lasts only seconds. Testimony regarding the frequency of these calls varied between two to three times per year to about three to five times per shift. The operations department sometimes calls in special requests for testing, and operators occasionally take samples directly to the laboratory building. However, the record reflects both of these events are infrequent and do not entail substantial interaction between operators and technicians.

There is no interchange between the operators and technicians, as operators are not trained to complete the job functions of technicians, and vice versa. There have only been two permanent transfers from the operations department to the technical department, and they both occurred over 20 years ago. Moreover, these transfers had to complete laboratory-specific training before they became technicians.

Regarding terms and conditions of employment, the wage scale, benefits, uniforms, and hours of operators and technicians are substantially the same. However, the similarity of these terms and conditions is insufficient to overcome the other community of interest factors. In contrast to the craft employees at issue in *Turner Industries Group, LLC*, 349 NLRB 428 (2007), cited by Employer, the operators and technicians here do not perform similar tasks, work in the same department, have regular interchange, have frequent contact, work in the same areas, nor are they functionally integrated. *Turner Industries* is distinguishable because in addition to having similar wages and benefits, the insulators and painters at issue there performed similar tasks and worked in the same department. Also, the insulators in *Turner Industries* had frequent contact and interchange and were functionally integrated with Alliance Contract Services (ACS) employees. Similarly, the electricians therein were found to have frequent contact and interchange with the ACS employees, in addition to having similar wages and benefits.

Therefore, the community of interest finding was not based on similar terms and conditions alone.

The administrative structure of the Sweeny Refinery further demonstrates the lack of common supervision between the operators and technicians. The operations department is managed by Darin Fields and a series of intermediate supervisors, including team leaders and specialists. Fields is not accountable to any other manager at the refinery besides the general manager. Likewise, the technical manager, Tim Sherbon, oversees a team leader and three group leaders within the technical department. He is not accountable for any work performed within the operations department. While the operators and technicians share the same human resource manager and HSE manager, these two managers are not focused on only these two job classifications. Instead, the human resource manager and HSE manager have job responsibilities that apply to all the employees at the Sweeny Refinery, including the maintenance and finance departments.

The Employer also relies upon *Kalamazoo Paper Box*, 136 NLRB 134 (1962). *Kalamazoo Paper* is distinguishable from the facts at issue in this case. In *Kalamazoo Paper*, the petitioner was seeking to sever a unit of truckdrivers from the existing production and maintenance unit already represented by the intervenor. The Board found that the truckdrivers shared a sufficient community of interest with the production and shipping employees that a severance would be unwarranted. The employer's entire operation was under the direct supervision of the vice president in charge of production. Under his general supervision, the shipping department was led by a shipping clerk. The truckdrivers, thus, had common supervision with the other production and shipping employees. However, the community of interest finding was not based on common supervision alone. Rather, the Board found regular

and frequent interchange between the truck drivers and production and shipping employees. Additionally, the Board noted the truckdrivers performed exactly the same functions as other production and shipping employees. Conversely, there is no interchange between operators and technicians here, and their job functions do not overlap.

Therefore, the separate departments, distinct skills and training, distinct job functions, lack of functional integration, limited and rare interaction, lack of temporary and permanent interchange,² and separate supervision between the operators and technicians lead me to conclude that the laboratory and chemical technicians do not share an overwhelming community of interest with the operators warranting inclusion in the petitioned-for unit.

VIII. The Public Utility Presumption Does Not Apply

The Employer contends the smallest appropriate unit should include the laboratory and chemical technicians because the public utility presumption applies and therefore only a systemwide unit is appropriate. The Board has applied the public utility presumption to traditional public utilities, such as electricity, natural gas, telephone, and cable television services, where the employers provide an essential service directly to the public and are the only providers of that service. *Alyeska Pipeline Service Co.*, 348 NLRB 808, 808 (2006).

When the public utility presumption is applied, the Board will conclude that a systemwide unit is an appropriate unit. In *Alyeska Pipeline*, the Board applied the public utility presumption to a crude oil pipeline, even though the crude oil pipeline was not a public utility per se. The Board determined the public utility presumption should nevertheless apply because of the evidence demonstrating the public's reliance on the employer's services and the absence of available substitutes. *Id.* at 810.

² The Employer's brief does not address how the lack of interchange impacts this community of interest analysis.

A public utility presumption is a rebuttable presumption and “does not foreclose the possibility of finding a smaller unit to be appropriate.” *Id.* at 809. Here, a balancing test is applied: “the public interest in uninterrupted utility service that only a single entity can provide” versus employees’ rights as defined by Section 7 of the Act. *Id.* (emphasis added).

This three-part test to determine whether a smaller unit is possible analyzes: 1) whether the employees in the petitioned-for unit share a substantial community of interest; 2) the boundaries of the petitioned-for unit conform to a well-defined administrative segment and could be established without undue disturbance to the company’s ability to perform its necessary functions; and 3) there is no opposing bargaining history on a broader basis. *Id.* at 810.

In applying the public utility presumption in *Alyeska*, the Board cited several unique facts regarding the employer therein. The employer serviced the Trans-Alaska Pipeline, which was the only pipeline carrying crude oil over 800 miles. The petitioned-for unit was a marine terminal that was functionally integrated with the pipeline operations. The pipeline was the only way for any crude to reach three refineries, which would cause a shutdown for up to two weeks if the flow was halted. *Id.* at 808. The evidence there also reflected that the pipeline supplied 98 percent of the crude oil produced in Alaska and some of the local utilities relied entirely upon oil supplied from the pipeline. *Id.* at 809. Unlike the lower 48 states, where crude oil could be transported by barge, tanker truck and/or railroad tanker, crude oil in Alaska could only be transported by pipeline because of the ice, large areas of isolated, undeveloped terrain, and lack of rail service north of Fairbanks, Alaska. Thus, there was no feasible alternative method of transporting the oil. *Id.* at 810.

Based upon the facts alone, *Alyeska* is differentiated. Although the Employer contends that it supplies public utilities and fuels public buses, it is not the only supplier. *See Verizon*

Wireless, 341 NLRB 483, 484 (2004) (employer was not a historic monopoly and other service providers were readily available). *Also see Dean Transp., Inc. v. NLRB*, 551 F.3d 1055 (D.C. Cir. 2009). The Employer does not demonstrate that fuel from another gasoline company is not an option in Texas, much less other areas of the country. Nor does the Employer here identify or quantify the volume of crude oil refined at this facility compared to nationwide production or compared to the other organized facilities mentioned in the record.³ The Employer failed to present documentation and specific testimony demonstrating the Employer's products are the sole source of supply to public utilities or that the Employer is the direct vendor of these products to the public. Also notable is that the employees in *Alyeska* serviced the pipeline; here, the employees are refining crude oil and not servicing a singular pipeline.

As previously noted, the operators and the technicians do not share a substantial community of interest. Secondly, the prior analysis demonstrates that the operators are a well-defined administrative segment and may operate without undue disturbance because the employer may continue to transport oil through the pipelines to the refinery and manufacture the various products in the production units while still allowing the operators to be organized in a bargaining unit. Lastly, the bargaining history at this facility demonstrates that the maintenance employees already have separate representation. If the Employer insisted upon a true "systemwide" unit, it would have additionally requested the maintenance employees, as well as health, safety and environment department employees. Moreover, fragmentation of the Employer's operations at the Sweeny Refinery is already present with the five separate bargaining units that exist in the maintenance department. The existence of these five bargaining

³ The Employer does not demonstrate that it performs "vital service," such as a natural gas pipeline or supplier. Compare *Alyeska*, *supra* at 808, and cases cited therein.

units is evidence that collective bargaining is feasible along these well-defined administrative departments and does not cause undue disturbance to the Employer's operations.

Alyeska is distinguishable from the instant case. The Employer has failed to present evidence demonstrating the public's reliance on the Employer's products originating from the Sweeny Refinery and has failed to show that there are no available substitutes for these products. I, therefore, find the public utility presumption should not apply to these facts.

Based upon the prior analysis, I find that the petitioned-for unit is appropriate and accordingly will direct an election in that unit.

IX. Conclusions and Findings

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 affirmed.
2. The parties stipulate, and I find, that the Employer is a Delaware corporation with a place of business located in Old Ocean, Texas, engaged in the operation of a petrochemical refinery. Over the course of the last twelve months, which is representative of its operations, the Employer purchased and received at its Old Ocean, Texas facility goods valued in excess of \$50,000 directly from points outside the State of Texas.
3. The parties stipulate, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All operators and terminal operators employed by the Employer at its Sweeny Refinery in Old Ocean, Texas.

EXCLUDED: All other employees, including office clericals, maintenance employees, instrumentation technicians, laboratory technicians, chemical technicians, guards and supervisors as defined by the Act.⁴

X. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the International Union of Operating Engineers, Local Union No. 564.

The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any 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 which 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

⁴ The parties stipulated that the group leader in the technical department and the production specialist in the operations department possess and exercise one or more of the following authorities within the meaning of Section 2(11) of the Act and as such, should be excluded from any appropriate bargaining unit: authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them or to adjust their grievances or effectively to recommend such action, utilizing independent judgment in exercising such authority.

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.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before September 13, 2012. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list.

Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,⁵ by mail, or by facsimile transmission at 817-978-2928. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

XI. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by September 20, 2012. The request may be filed

⁵ To file the eligibility list electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu, and follow the detailed instructions.

electronically through E-Gov on the Agency's website, www.nlr.gov,⁶ but may not be filed by facsimile.

DATED at Fort Worth, Texas this 6th day of September, 2012.

/s/ Timothy L. Watson
Timothy L. Watson
Acting Regional Director
National Labor Relations Board
Region 16
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819 Taylor Street
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⁶ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.