

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

**CENTERPOINT ENERGY HOUSTON
ELECTRIC,**

CASE NO. 16-RC-229214

Employer,

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION 66,**

Petitioner.

THE EMPLOYER’S BRIEF ON REVIEW

Pursuant to section 102.67(h) of the National Labor Relations Board’s (“Board”) Rules and Regulations (“R&R”), the Employer, CenterPoint Energy Houston Electric, LLC, (“CEHE” or “Company”), files this Brief on Review of the Decision and Direction of Election (“DDE”) issued by the Region 16 Regional Director (“RD”) on November 1, 2018, requests that the RD’s decision be reversed and that International Brotherhood of Electrical Worker Local 66’s (“Union”) *Armour-Globe* election petition be dismissed.

I. PRELIMINARY STATEMENT AND GROUNDS FOR REVIEW

The Union filed an *Armour-Globe* petition (“Petition”) on October 15, 2018 seeking to include a group of approximately 37 clerical Service Area Assistants (“SAAs”) in a long-established bargaining unit of approximately 1,473 skilled construction, maintenance and operations employees. The RD ruled that: (1) the Union is not contractually barred from seeking to include the SAAs in the existing unit even though the SAAs are undisputedly clerical employees, and the parties’ collective bargaining agreement (“CBA”) expressly excludes “office and clerical” employees from the bargaining unit; and (2) the SAAs are plant clerical employees who share a

sufficient community of interest with the existing unit as to be included in that unit. On April 29, 2019, the Board granted review in part on the issue of whether the SAAs share a sufficient community of interests with the existing bargaining unit to warrant their inclusion in that unit.

The RD's community of interest conclusion disregards the vastly different terms and conditions of employment that the SAAs have from bargaining unit employees, and the Board's long-standing history of excluding clericals from a bargaining unit of highly skilled employees like the construction, maintenance and operations unit in this case. The RD's conclusions that the SAAs are plant clerical employees because their work is functionally integrated with the bargaining unit, and that the SAAs have a sufficient community of interests with the bargaining unit to be included are in error. Therefore, CEHE respectfully requests that the RD's decision be reversed and the Union's *Armour-Globe* petition be dismissed.¹

II. PROCEDURAL HISTORY

The Petition was filed on October 15, 2018. CEHE timely filed its Statement of Position on October 22, 2018, and an evidentiary hearing was held before the Region on October 23-24, 2018. On November 1, 2018, the RD issued the DDE in which he excluded seven Power Delivery Solutions SAAs from the petitioned-for unit and directed an election be held on November 8, 2018 for the remaining 30 SAAs (the "included SAAs") to determine whether they should be included in the existing unit. On November 8, 2018, the tally of ballots showed that there were 16 "yes" votes, 13 "no" votes, and 1 spoiled ballot. On November 16, 2018, the RD issued a Certification of Representative.

¹ For all the reasons asserted in its Request for Review, CEHE maintains that existing collective bargaining agreement expressly excludes SAAs and therefore the Petition should also be dismissed for that reason. In particular, the Board's holding in *UMass Memorial Medical Center*, 349 NLRB 369, 370 (2007), was wrongly decided because it allows exclusionary language in a collective bargaining agreement to be disregarded. CEHE does not waive this argument by filing this brief.

III. STATEMENT OF FACTS

A. CEHE Maintains the Wires, Poles and Electric Infrastructure Serving Over Two Million Customers in the Houston Area.

CEHE, which is headquartered in Houston, Texas, is a domestic energy delivery company. (DDE at 2). It installs, operates, and maintains the transmission towers, wires, poles and electric infrastructure serving over two million customers in a 5,000 square mile electric service territory in the greater Houston area. (DDE at 2). CEHE does not generate electricity, but it ensures the delivery of electricity from power plants to CEHE's substations, and then from those substations to its customers' homes and businesses. (*Id.*).

It also owns, operates and maintains the substations. Finally, it installs, operates and maintains the wires, poles and meters that deliver electricity from the substations to its customers. (Tr. 20-21; DDE at 2, n.5).

CEHE's business operations consist of four units: Distribution Operations, which is responsible for installing, operating and maintaining the lines, poles and meters from substations to customers; High Voltage Operations, which is responsible for installing, operating and maintaining the transmission lines and towers from power plants to substations; Power Delivery Solutions ("PDS"), which is responsible the customer-facing aspects of CEHE's business; and Asset Planning and Optimization. (DDE at 2; Tr. 22-23). Each unit is overseen by a vice president.²

² At the time of the hearing, Steve Greenley was the Vice President for Distribution Operations; Martin Narendorf was the Vice President for High Voltage Operations; Julienne Sugarek was the Vice President for Power Delivery Solutions and Dale Bowden is the Vice President for Asset Planning and Optimization. (DDE at 2, n.6).

At the time of the hearing, most of the included SAAs worked in the Distribution Operations unit.³ (Tr. 29; Co. Ex. 3). Distribution is divided into four regions: North (overseen by Regional Director Jake Bunch), Southeast (overseen by Regional Director Jeff Hulon), Central (overseen by Regional Director Paul Wilson) and Southwest (overseen by Regional Director Dominick Robinson). (DDE at 3). There are multiple service centers within each region. (*Id.*). Each service center is managed by an Operations Manager. (*Id.*). All covered SAAs work in one of CEHE's service centers. (DDE at 3). SAAs report to the Operations Managers.⁴ (DDE at 2; Tr. 29). In contrast, the construction, maintenance and operations bargaining unit employees report to Operations Supervisors. (DDE at 3).

B. CEHE's Construction, Maintenance and Operations Employees Have Been Covered by a Collective Bargaining Agreement Since at Least 1915 While SAAs Have Been Excluded as Office and Clerical Employees.

The CBA coverage of the construction, maintenance and operating employees dates back to approximately 1915. (DDE at 3; Tr. 166). During this long-standing bargaining relationship, the SAAs have never been included in this bargaining unit or covered by the CBA. (Tr. 166-168; Co. Ex. 8 at 2). And importantly, since 1952, the CBA's recognition clause has specifically excluded office and clerical employees, including SAAs (emphasis added):

All of the Company's construction, maintenance and operating employees who are working in classifications listed in ARTICLE 18 of this Agreement engaged in CenterPoint Energy, Houston Electric, LLC, but excluding plant protection employees, supervisors as defined in the Act, professional employees (including nurses), office and clerical employees, janitors and meter readers.

(DDE at 3; Co. Ex. 8 at 2) (emphasis added). It goes on to state:

³ The RD stated that Distribution Operations is the only business unit involved in this case. (DDE at 3). This is incorrect. Two included SAAs work in High Voltage Operations, and one works in Asset Planning and Optimization. (Tr. 31; 34; Co. Ex. 12). No party contested the inclusion of these three employees in the petitioned-for unit on the grounds that they work outside of Distribution Operations.

⁴ Two SAAs report to a supervisor in High Voltage Operations and one reports to a supervisor in Asset Planning and Optimization. These three SAAs do not report to Operations Supervisors.

The provisions of this Agreement shall be limited in their application to employees of Company in the bargaining unit described in Section 1. Wherever the words "employee" and "employees" are used in this Agreement, unless otherwise noted, they shall be construed to refer only to employees described in said Section 1 for whom the Union is the exclusive bargaining representative.

(Co. Ex. 8 at 2). Prior to the instant Petition, and through bargaining resulting in numerous iterations of the CBA, the Union has not sought to include SAAs or other “office and clerical employees” in this bargaining unit. (DDE at 4).

C. CEHE’s Construction, Maintenance and Operations Employees Have Specialized Training and Skills to Operate CEHE’s Electric Distribution System.

The bargaining unit employees are employed in several classifications, which, unlike the SAAs, involve job duties and specialized skills and training related to constructing, maintaining and operating its electric distribution system.⁵ Specifically:

- Distribution Linemen and Transmission Linemen (“Linemen”) comprise approximately two-thirds of the bargaining unit. (Tr. 69). Distribution Linemen work in the Distribution Operations business unit. (Tr. 38; Co. Exs. 4-6). Transmission Linemen work in the High Voltage Operations business unit. (Tr. 38; Co. Exs. 4-6) To be hired, linemen must have prior experience as journeymen linemen in the construction and maintenance of high voltage electrical systems and/or must complete a three year apprenticeship program. (Tr. 69). Linemen are required to have a commercial driver’s license (“CDL”), and must be able to interpret blueprints, work orders, manuals and other highly technical material related to their jobs. (Tr. 70). Their workday consists of the following (Tr. 39-40): Linemen report to their assigned service centers in the morning to pick up their trucks and equipment before they are dispatched to work on service orders in the field. Linemen return to the

⁵ The RD stated there are 43 different job classifications, apparently relying on Article 18 of the CBA. (DDE at 9; Co. Ex. 8 at 45-52). Article 18 sets forth wage rates for each level of various job classifications. The Petition identified the 13 skill areas set forth in Article 17, Section 2 as the relevant job classifications.

service centers in the afternoon at the end of their shifts. They spend the vast majority of their days in their trucks and working in the field. While in the field, linemen exercise significant discretion concerning the installation, operation, repair and maintenance of the electrical lines and other equipment associated with CEHE's electricity distribution system. For instance, linemen dispatched to a service call have discretion concerning the work that must be completed, whether additional work outside the original scope is needed, and how such work will be performed.

- Underground Network Tester and Cable Splicers work on various pieces of equipment within CEHE's electricity distribution system. These jobs require completion of a three-year apprentice program and have specialized electric skills. (Tr. 73-74).
- Substation Performance and Substation Projects Electricians repair and maintain CEHE's substations. They must have a college degree to be hired and complete a three-year apprentice program. (Tr. 78).
- Shop Services Electricians are skilled craftsman such as electricians, welders, and carpenters who physically work on CEHE's assets, which are then used in installing, operating, repairing and maintaining CEHE's distribution system. They are housed at the central fleet garage (aka "the shop"). (Tr. 78-79).
- Meter Technicians must complete a formal training program. Meter Installers and Meter Testers must complete a three-year apprentice program. (Tr. 82-83). They install, repair and maintain CEHE's metering equipment.
- Distribution Controllers must complete a three-year apprentice program. They operate the Automated Distribution Management System ("ADMS") computer system that ensures the integrity of CEHE's entire distribution and transmission infrastructure, including

coordinating the switching of CEHE's high voltage lines, and dispatch line crews to address faults they identify in the ADMS. (Tr. 83-85).

- Radio Communications Technicians must have an advanced degree to be hired and complete a three-year apprentice program. They work on the systems and equipment that allows the electric distribution system to communicate with the distribution control system, the trucks, and the diagnostic equipment. (Tr. 85).
- Radio Communication Installers must have an existing license and are hired as journeymen. Like the Radio Communications Technicians, they work on the systems and equipment that allows the power distribution system to communicate with distribution control, the trucks, and the diagnostic information. (Tr. 87).
- Automotive Vehicle Technicians ("AVTs") must complete a three-year apprenticeship or be licensed mechanics and complete an abbreviated apprentice program. Their job duties are to work on CEHE's fleet trucks and haulers. (Tr. 86-87).
- Automotive Maintenance Mechanics assist the apprentice AVTs by doing oil changes and fluid replacements on CEHE's fleet trucks. They are candidates for AVT jobs. (Tr. 88).
- Material Handlers must complete a three-year apprentice program and on the job training. Material handlers are skilled workers who must be able to discern the various types of equipment, material and part numbers at CEHE. They also pull the equipment from storage, load it on trucks and occasionally drive the trucks. (Tr. 88-89).
- Warehousemen assist material handlers. (Tr. 90-91). In addition to using computers to review work orders, they retrieve necessary equipment from the warehouse, load that equipment on dollies or pallet jacks and otherwise stage it for loading onto crew trucks.

They also operate forklifts and pallet jacks. They are candidates for material handler positions.

- Appliance Repairmen are the in-house facilities crew for CEHE's facilities. (Tr. 96-97). Currently, they work on HVAC systems at substations and other CEHE facilities. In particular, they are trained to install and repair chillers of up to five tons, and to handle the materials and equipment associated with these tasks.
- The Truck Driver must maintain a CDL. (Tr. 98). There is currently one truck driver who operates a hydraulic truck and trailer. He transports equipment used to install, operate, repair and maintain CEHE's distribution system.

Employees in the bargaining unit all wear uniforms, and many of them are required to wear specialized safety equipment, including fire-resistant clothing, hard hats, safety glasses, gloves and the like. (Tr. 101-102). Virtually all bargaining unit members spend their days working with tools, working with the various components that make up CEHE's electric distribution system and working with the equipment used to install, operate, repair and maintain it. Of course, bargaining unit employees' terms and conditions of employment are controlled by the CBA. (Co. Ex. 8). All bargaining unit members receive hourly wages, work hourly eight or ten-hour schedules, and have a bonus program that pays them between 1.5% and 3% of their wages based on attendance. (Tr. 102; 314-15; 347; Co. Ex. 8 at 81).

D. The SAAs Are Office and Clerical Employees Who Do Not Have the Requisite Training and Skills to Construct, Maintain or Operate CEHE's Electric Distribution System.

On the other hand, the petitioned-for SAAs are office and clerical employees expressly excluded from the bargaining unit. (Co. Ex. 8 at 2). Individuals with a high school diploma and basic computer skills are eligible to be hired with no prior experience or special training required.

The included SAAs work at desks inside 13 of CEHE's service centers.⁶ Their primary job duties consist of typing, printing, transmitting, and filing paperwork (both in paper and electronically), answering phones, ordering supplies, and responding to e-mail. (Tr. 59-60). SAAs have flexible 9/80 work schedules rather than fixed weekly schedules like bargaining unit employees have. (Tr. 103; 104; 105). The Company works with SAAs individually to set their work hours. (Tr. 179). They do not wear uniforms or specialized safety clothing or equipment. (Tr. 64; 71-74; 101-102; 213; 218). They do not have any specialized training or an apprenticeship program. (Tr. 68-69; 70; 72; 74-76; 78-99). Unlike bargaining unit employees, SAAs are salaried non-exempt employees and have different bonuses and health and welfare benefits than unit employees. (Tr. 102; 179-180; 181; 182; 213; 217- 218; 221-222). SAAs do not work in the field. (Tr. 59; 63-64; 219; 222-223). They do not operate or touch any equipment associated with transmitting electricity or associated with installing, maintaining, operating or repairing that equipment. (Tr. 70-71; 74; 76; 77; 79; 86; 95; 288-89;).

One task performed by Operations SAAs involves paperwork associated with time entries. (Tr. 59-60; 128-133). Specifically, linemen use mobile computers to enter information into CEHE's system regarding how much time they spend on a certain job while they are in the field. This information is then electronically transmitted to an email group that includes Operations SAAs and Operations Supervisors simultaneously for review. SAAs print out the time sheets and review them to flag any errors. If needed, they transmit the paper time sheets to linemen for review and correction before sending them to the Operations Supervisors. It is linemen's responsibility to enter their time and review it for accuracy. It is the Operations Supervisors' responsibility to

⁶ At the time of the hearing, the SAAs worked at the following service centers: Greenspoint, Humble, Cypress, Bellaire, Spring Branch, Katy, Galveston , Fort Bend, Baytown, H.O. Clarke, South Houston, Sugar Land, and Harrisburg. (Tr. 27; Co. Ex. 2).

approve the time. In any event, once the linemen submit the time from the field, it is in CEHE's system for the purposes of payment unless it is changed by a lineman or supervisor. The SAAs do not independently approve or change time entered by linemen in the system. They are simply an extra set of eyes in this process. (Tr. 132).

The included SAAs are required to complete a work order form if a line crew in the field has to make repairs beyond the original scope of a work order. (Tr. 134-136). In this case, the crew would call into the office, and provide the SAA or an Operations Supervisor with details about the additional work. If the lineman called an SAA, the SAA would type the information into a pre-set work order form for transmission to the appropriate personnel. The only time an SAA is allowed to complete a work order form is if the work is a simple "like for like" replacement where one piece of equipment is being swapped out for the exact same piece of equipment. (Tr. 116-118). Moreover, linemen are increasingly using CEHE's automated systems to create these sorts of work orders.⁷ (Tr. 121). Direct calls to SAAs to complete these types of work orders are fairly rare.

The majority of CEHE's work orders are not like for like work orders, but rather are work orders that are generated by PDS employees and then transmitted to Operations Supervisors for assignment to line crews. (Tr. 122-126; Co. Exs. 10, 11). SAAs do not become involved in these sorts of work until days or even weeks after the line crew has completed the work associated with them. At this point, the SAAs "back office" the work orders by electronically stamping them and filing them. (Tr. 113-114; 115; 201).

⁷ In addition, linemen can call distribution controllers to communicate a case of trouble situation. In these situations, the distribution controller creates a case of trouble report that allows the linemen to document the extra work at issue. (Tr. 83-84).

There is no temporary interchange between SAAs and members of the bargaining unit. (Tr. 101; 194). This is so because virtually all members of the bargaining unit have specialized skills that require an apprenticeship program or extensive on-the-job training. Similarly, there is virtually no movement of SAAs into permanent bargaining unit positions.⁸

IV. ARGUMENT

A. **The SAAs Do Not Share a Sufficient Community of Interests with Bargaining Unit Employees to be Included in the Same Unit.**

The Board should reverse the RD's unit determination and dismiss the Petition because the petitioned-for SAAs do not share a sufficient community of interests with bargaining unit employees to be included in that unit. An *Armour-Globe* election allows "employees sharing a community of interest with an already represented unit of employees to vote whether to join that unit." *Unisys Corp.*, 354 NLRB at 829. The key inquiry is whether the SAAs share a community of interest with unit employees and constitute an identifiable, distinct segment so as to compromise an appropriate voting group.⁹ *Id.*; *cf. NLRB v. Magna Corp.*, 734 F.3d 1057, 1060-61 (5th Cir. 1984) (denying enforcement to NLRB order because it failed to apply community of interest test in analyzing unit clarification issue and including employee in unit as a plant clerical).

The traditional community of interest test is applicable to this question. *See, e.g., John Scripps Newspaper Corp.*, 329 NLRB 854, 857 (1999) (citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962) and *Great A & P Tea Co.*, 140 NLRB 1011 (1963)) ("The Board looks to various factors in determining whether a new group of employees should be added to an existing

⁸ To the company's knowledge, only one SAA has permanently transferred into a bargaining unit position, and that occurred in approximately 2005. She was only allowed to do so after she passed the requisite hiring exam. She was treated just like any other applicant off the street would have been treated for this position. (Tr. 144; 193-194).

⁹ Two recent Regional Director decisions hold that the Union has the burden of proving that the SAAs are properly included in the construction, maintenance, and operations bargaining unit. *See Sims Group USA Corp.*, 20-RC-216696 (April 6, 2018) (citing *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990)); *Alliance One Tobacco USA*, 11-UC-93 (July 11, 2018).

bargaining unit through unit clarification or other representation proceedings” . . . including “compensation, work hours, supervision, qualifications, skills, training, job functions, location, work contact, integration, interchange, and bargaining history”). The Board considers whether the employees sought have distinct skills and training, have distinct job functions and perform distinct work, including the amount of overlap between the bargaining unit classifications and the employees to be added to the unit; whether the petitioned-for employees are functionally integrated with bargaining unit employees; have frequent contact with bargaining unit employees; interchange with bargaining unit employees; have distinct terms and conditions of employment and are separately supervised. *See, e.g., International Bedding Co.*, 356 NLRB 1336, 1337 (2011); *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024-1027 (2004); *United Operations, Inc.*, 338 NLRB 123, 124-125 (2002).

1. There is No Bargaining History Including the SAAs in the Bargaining Unit.

Since its inception in 1915, SAAs and other clerical employees have never been included in the existing bargaining unit, and the Union has never previously attempted to include them. (DDE at 3; Tr. 63; 166; 192-196; Co. Ex. 8). In fact, for the last 65 years, they have been expressly excluded from the unit. (DDE at 4). Here, the RD simply failed to give weight to this bargaining history contrary to Board precedent. In making unit determinations, the Board affords “significant weight” to prior bargaining history such as this establishing that a group of employees have historically been excluded from an existing unit. *See Michigan Bell Telephone*, 192 NLRB 1212, 1213 (1971) (no history of bargaining for commercial department employees relevant factor in appropriate unit determination). *See also ADT Security Services, Inc.*, 355 NLRB 1388 (2010) (prior bargaining history given significant weight in appropriate unit determinations); *CHS, Inc.*, 355 NLRB 914, 916 (2010) (historical exclusion from existing unit relevant factor in UC petitions); *Teamsters United Parcel Service National Negotiating Committee*, 346 NLRB 484, 485

(2006) (previously unrepresented employees may not be accreted into existing unit where the group sought has been in existence and historically excluded from the unit).¹⁰

2. Bargaining Unit Employees and the SAAs Have Vastly Different Terms and Conditions of Employment.

Further, the record evidence demonstrates that SAAs have very different terms and conditions of employment from employees included in the construction, maintenance and operations bargaining unit. This should be no surprise because the SAAs do not construct, maintain or operate CEHE's electrical distribution system. It is therefore improper to include them in the bargaining unit. For instance:

- **Different Training and Skills:** The RD properly concluded that the SAAs “are not required to have any formal education” and that the “existing bargaining unit employees possess skills and qualifications . . . that are necessarily different than the (DO) SAA employees.” (DDE at 9-10). SAAs perform their job duties with only basic computer skills and a high school diploma and do not require any special training, skills or certifications to perform their jobs. (DDE at 5; Tr. 64; 69; 76; 77; 219). The RD also properly concluded that the opposite is true of bargaining unit employees. They have highly specialized skills, training and apprenticeship programs and are required to safely work on CEHE's electric distribution system and the equipment used to install, operate, repair and maintain it. And their jobs require that they exercise discretion and independent judgment. (DDE at 5; Tr. 68-69; 70; 72; 74-76; 78-99). The Board has a long history of excluding non-professional employees, such as SAAs, from units of highly skilled employees such as those in the existing unit. *See, e.g., Avco Lycoming Division*, 173 NLRB 1199 (1968) (technical employees use independent judgment and

¹⁰ While these decisions involve accretion issues, the functional result is the same as an *Armour-Globe* election – i.e., including unrepresented employees in a group of employees in an existing bargaining unit.

specialized skills and training to accomplish highly technical work); *Nevada-California Electric Corp.*, 20 NLRB 79 (1940) (excluding clericals from unit of linemen and electricians because interests are different and no evidence union ever bargained for both groups); cf. *Mercy Catholic Medical Center*, 365 NLRB No. 165, slip op. at 1, n. 2 (Dec. 16, 2017) (denying request for review and excluding OR Technicians as technical employees from a non-professional bargaining unit).

- **Different Work Locations and Job Duties:** SAAs perform different job functions and do not work outside of their offices. (DDE at 10). In contrast, the majority of bargaining unit employees work in the field, and all of them install, repair, operate, maintain or otherwise touch electric distribution equipment or the rolling stock and equipment associated with these duties. No bargaining unit employees spend the majority of their days working at desks in service centers doing clerical tasks.¹¹ Linemen, who constitute most of the bargaining unit, spend no more than an hour and a half a day that the service centers where SAAs work – *i.e.*, just long enough to pickup/drop off their equipment and get their work assignments from Operations Supervisors. (Tr. 59; 156). SAAs, on the other hand, spend their entire days working at desks inside service centers doing clerical tasks like typing, printing, filing, and answering phones and e-mail. (DDE, p. 5; Tr. 59; 63-64; 219; 222-223). SAAs do not use any of the specialized equipment that employees in the bargaining unit use. (Tr. 179 192; 213). *Montgomery Ward & Co.*, 230 NLRB 366, 367 (1977) (in holding that petitioned-for employees have a sufficiently distinct community of interest to warrant their representation in a separate unit, Board relied

¹¹ As discussed *infra* at 17-18, although distribution controllers do work at desks, unlike the petitioned-for SAAs, they actually operate CEHE's electric distribution system after undergoing a three-year apprenticeship.

on the lack of interchange between the employees, different work locations, and different work skills among other factors).

- **Different Supervision:** Linemen report to Operations Supervisors; SAAs do not. (DDE at 5). Rather, most of the included SAAs report to Operations Managers. *Constellation Power Source Generation, Inc.*, 05-RC-14906, et al., 2000 NLRB LEXIS 942 at *263 (Shuster, 2000) (having “separate immediate supervision from production and maintenance employees” a factor in decision to exclude customer service investigator from unit); *see also Judge & Dolph, Ltd.*, 33-CA-11482, 1997 NLRB LEXIS 352 at *71 (Pannier, III, 1997) (unlawful accretion based in part upon the separate immediate supervision between employee groups).
- **Different Uniforms and Safety Equipment:** Bargaining unit employees wear uniforms and safety equipment; SAAs do not. (DDE, p. 5; Tr. 64; 71; 72-73; 74; 101-102; 213; 218). *The Mirage Casino Hotel*, 338 NLRB 529, 531 (2002) (different uniforms a factor in decision to exclude craft employees from a unit of engineers).
- **Little or No Interchange:** There is no temporary interchange between SAAs and bargaining unit members. (Tr. 101; 194). In fact, the record shows there is only one instance of an SAA named Lana Bigford moving into a bargaining unit position. But she was not allowed to do so until after she passed the requisite examination and was required to complete a three-year apprenticeship, just like any other applicant off the street would be required to do. (Tr. 144; 193-194; 220). This happened approximately 13 years ago and has not happened again.
- **Other Terms and Conditions of Employment:** Bargaining unit employees work fixed schedules for hourly pay; SAAs work flexible 9/80 schedules and are salaried non-exempt employees. (DDE, p. 5; Tr. 102; 179-180; 181; 182; 213; 217; 218; 221-222; Co. Ex. 12). Bargaining unit employees also have different benefits, different bonus structures and different

attendance policy requirements than do the SAAs. (DDE at 3; Tr. 102-105). *See also, e.g., C & L Systems Corp.*, 299 NLRB 366, 386 (1990) (excluding clerk who maintained different working hours than production unit, wore office clothes, spent the majority of day doing paperwork unrelated to production work, and utilized skills different from production unit).

In sum, the substantial weight of evidence shows that SAAs do not share bargaining history with bargaining unit employees, have markedly different skills and training requirements than bargaining unit employees, have different work locations and job duties than bargaining unit employees, have different supervision than bargaining unit employees, have different uniforms and safety equipment than bargaining unit employees, have limited or no temporary or permanent interchange with bargaining unit employees, and have different wages, schedules, bonus structures, and attendance requirements than bargaining unit employees. For all the foregoing reasons, it cannot reasonably be said that SAAs and bargaining unit employees have a community of interests sufficient to be included in the same unit; rather, they are very distinct groups of employees. The RD's findings to the contrary are erroneous for the reasons discussed below.

3. The RD's Conclusion That SAAs are Plant Clericals is Erroneous as a Matter of Law and Fact.

Despite the foregoing differences, the RD nonetheless held the SAAs were properly included in the construction, maintenance and operations bargaining unit because they are "plant clericals" rather than "office clericals." (DDE at 9-10). The Board's long standing practice of excluding office clericals from units of production workers "is rooted in community-of-interest concepts, . . . albeit it is occasionally difficult to discern." *Caesar's Tahoe*, 337 NLRB 1096, 1098 (2002); *see Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1041 (9th Cir. 1978)(reversing the Board, excluding 22 office clericals from a unit of production employees, and stating "the line

between plant and office clerical is faint; sometimes it disappears”).¹² “Normally, plant clericals spend most of their working time in the plant production area. The test generally is whether the employees’ principal functions and duties relate to the production process, as distinguished from general office operations.” *Caesar’s Tahoe*, 337 NLRB at 1098. Here, there is no dispute that SAAs perform clerical duties. (DDE at 5, 9). The RD erred in determining they are plant clericals, however, because they do not work in a plant production area, their work is not sufficiently integrated with the bargaining unit’s work, and they do not otherwise share a sufficient community of interests to be included in the construction, maintenance and operations bargaining unit.

a. SAAs Do Not Spend Their Working Time in the Production Area.

In *Broyhill & Associates, Inc.*, 298 NLRB 707, 712 (1990), the ALJ held with Board approval that, “if there is an office, separated from the production area and in which there are clericals working, those are invariably office clericals.” As a threshold matter, the fact that SAAs spend all their working time in offices while the vast majority of bargaining unit employees, namely the linemen, spend most of their working time in the field where there are no SAAs working cuts against the RD’s conclusion that SAAs are plant clericals. *Gordonsville Industries*, 252 NLRB 563, 591 (1980) (“Normally, plant clericals spend all or most of their working time in the plant production area”).

In support of his determination, the RD stated that “the existing unit . . . includes distribution controllers who, similar to the (DO) SAAs employees, perform their work in an office

¹² For at least the last 39 years, the Board and courts have recognized that the line between office clericals and plant clericals “is faint . . . sometimes it disappears.” See, e.g., *Gordonsville Industries*, 252 NLRB 563, 590 (1980), aff’d, 673 F.2d 550 (D.C. Cir. 1982), cert. denied, 457 U.S. 1117 (1982) (citing *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1041 (9th Cir. 1978)); see also *Caesar’s Tahoe*, 337 NLRB at 1098 (distinction between office clerical and plant clerical is “difficult to discern”). This is an opportunity for the current Board to clarify the standard so that this important issue, which frequently determines the outcomes of union elections and impacts other important community of interest issues, is no longer “difficult” to apply.

at their desks in support of other bargaining unit employees, such as linemen.” (DDE at 9). The fact that both distribution controllers and SAAs work at desks is the limit of their commonality, however. Distribution controllers work in a different building, the Electronic Control Dispatching Center than the included SAAs. (DDE at 10; Tr. 140). Also unlike SAAs (but like other bargaining unit employees), distribution controllers undergo a three-year apprentice program to learn how to do their jobs. They undergo this program because, unlike SAAs (but like other bargaining unit employees), they actually operate CEHE’s electric distribution system. (Tr. 83-84).

Rather than with distribution controllers, the more appropriate comparison is between the included SAAs and the excluded PDS SAAs, who the RD found do not have a sufficient community of interests to be included.¹³ (DDE at 1, n.3). The RD so held despite the fact that the excluded PDS SAAs and the included SAAs work in the same buildings; have the same 9/80 work schedules, pay structures, bonuses, and benefits; and in fact perform each other’s job duties. (DDE at 5; Tr. 397; 411). Especially given the strong similarities between the included SAAs and the excluded PDS SAAs, comparing distribution controllers to included SAAs just because both groups work in an office is far too general to support the RD’s plant clerical analysis.

b. That SAAs and Bargaining Unit Employees Share CEHE’s Business Goal of Providing Safe and Reliable Power to Customers Does Not Overcome the Limited Involvement SAAs Have with the Actual Performance of Unit Work.

The RD provided two reasons for holding that SAAs are functionally integrated with bargaining unit employees, both of which are faulty. First, the RD held that SAAs and bargaining unit employees are functionally integrated, at least in part, because they share “a common goal of maintaining the wires, poles, and electric infrastructure to ensure the reliable delivery of power...”

¹³ The Union sought to exclude the PDS SAAs at the beginning of the hearing and CEHE did not contend that they should be included in the unit. (DDE at 1, n.3).

(DDE at 10). But the fact of the matter is that all 7,000 CEHE employees, including the excluded PDS SAAs, share this goal. Thus, this factor is simply too generalized to be meaningful in this case where the defining characteristic of the bargaining unit is that it includes employees who are trained to and actually touch the equipment used to accomplish this goal. The SAAs and other excluded employees are not so trained and therefore do not need that equipment.

Second, the RD found that the included SAAs spend 90 percent of their time on “timecard collection/completion, review and closing of work orders, maintenance of inventories, ordering supplies, etc.” (DDE at 9). He thus held “that bargaining unit employees, e.g. linemen, rely on the (DO) SAAs employees to perform their work such that their work could not be completed/finalized without the (DO) SAA employees’ support,” and concluded that the SAAs’ work was so integrated with the bargaining unit’s work that they should be included in the unit. (DDE at 10). A careful examination of the record, however, reveals that the RD’s conclusion that there was a “high degree of functional integration” is not supported by the record. Instead, the record demonstrates that 90 percent of SAAs’ time is spent on back office clerical tasks, different than the task performed by bargaining unit employees.

Timecards. With respect to timecards, the evidence shows that SAAs print and review linemen’s timecards for errors after the linemen have completed their job duties of constructing, maintaining and operating CEHE’s electric distribution system. (Tr. 128-129; 132; 132-133; 313-314). They perform this work in their offices using computers and printers. SAAs are not generally responsible for entering or approving linemen’s time.¹⁴ Rather, the linemen and their

¹⁴ The SAAs contend that they do enter linemen’s time, but the record establishes that SAAs only enter time when a lineman is on vacation or away from work. (Tr. 373). Entering a set number of hours for vacation is very different than determining how many hours a lineman spent on a particular job, which is something only a lineman or his supervisor would know.

supervisors enter and approve time. (Tr. 130-131; 132).¹⁵ Reviewing timecards is a back office task performed after the fact that does not help linemen accomplish their daily work tasks. *See Weldun International, Inc.*, 321 NLRB 733, 735 (1996) (affirming that verifying hours on an employee's time sheet in order to make necessary correction is "minimal contact" with production unit and "does not directly involve production work"); *Container Research Corp.*, 188 NLRB 586, 587 (1991) (work with time cards not sufficient to require inclusion in bargaining unit).

Work Orders. The record reveals that the vast majority of work orders are generated by the PDS employees, not by SAAs.¹⁶ (Tr. 110-111; 114; 286-87; 414; Co. Ex. 9). The SAAs' role with respect to such work orders arises after they have been assigned to and completed by a line crew and reviewed by an Operations Supervisor. SAAs do not write the substantive installation and equipment information in such orders and do not assign such orders to bargaining unit employees. And once they receive a work order, the SAA's role is to electronically stamp the work order as "back office received," verify that the necessary information is present in the work order, and then to file the work order. (Tr. 113-114; 115; 201). Again, all of this is "back office" work that occurs up to 30 days after the bargaining unit employees' work has been completed. (Tr. 293).

The SAAs testified that they have substantive involvement in "like for like" work orders, which a line crew uses to replace a piece of equipment with the exact same piece of equipment

¹⁵ Therefore, RD's factual finding that "(DO) SAA employees are responsible for the accuracy of time keeping records of the bargaining unit" is not supported by the record evidence. (DDE at 6).

¹⁶ Specifically, most of CEHE's work orders are generated by PDS Consultants who receive installation or upgrade requests directly from the customer. The consultant delivers the work order to the Operations Manager, who assigns it to an Operations Supervisor, who in turn, requests the necessary materials from the warehouse and assigns the work order to a line crew to be completed. The line crew completes the work order and turns it back in to the Operations Supervisor who verifies the work is completed a few days later. It is only after all of this takes place that the work order makes its way to an SAA. (Tr. 116). In fact, the included SAAs are not trained or authorized to operate the computer software used to generate and process work orders. (Tr. 117).

while in the field. The evidence demonstrates that sometimes, when line crews arrive on a job, they discover that additional work is needed to replace a piece of equipment, which is why they carry extra pieces of equipment on their trucks. (Tr. 116-117). When this occurs, line crews sometimes contact SAAs to create “like for like” work orders to document the swapping of the equipment. (Tr. 119-120). The record also demonstrates, however, that SAAs are told exactly what to put in these work orders. (Tr.118-120; 147). In fact, SAAs’ involvement with like for like work order happens only occasionally, takes fifteen minutes or less, and is getting rarer as this process is increasingly automated. (Tr. 120; 121; 127; Co. Ex. 10). *See Constellation Power Source Generation*, 05-RC-14906, et al., 2000 NLRB LEXIS 942, 38 (Shuster, 2000) (“mere handling of production related material does not transform an office clerical into a plant clerical”).¹⁷ Critically, the Union’s own linemen witnesses testified on cross-examination that they would complete their work tasks regardless of what SAAs do with like for like work orders. (Tr. 312-313; 341).

Maintenance of Inventories and Ordering Supplies. Finally, with respect to the maintenance of inventories and ordering supplies, the record demonstrates that SAAs order office supplies like forms and other paperwork. (Tr. 253; 254; 280; 369). They also order tags that the linemen use in the course of their jobs. (Tr. 255; 388). But given the SAAs’ testimony as to how much time they spend on timecards and work orders, these tasks cannot be a significant part of their job duties, and certainly they do not do these things daily. (Tr. 285-286; Un. Ex. 1).

¹⁷ *See also, e.g., Continuous Curve Contact Lenses*, 236 NLRB 1330, 1332 n. 6 (1978) (“The fact that EDP employees ‘send’ a daily inventory of lenses to production planning and ‘receive’ lot cards from lot card control employees is not on this record sufficient to establish such community of interest”); *Cincinnati Bronze, Inc.*, 286 NLRB 39, 44 (1987) (excluded office clerk spent all day writing up orders for purchases and expediting flow of materials during the production process); *Avecor, Inc.*, 309 NLRB 73, 75 (1992) (excluded office clerical brought production paperwork to plant and had contact with production workers four to five times a day).

There is no dispute that SAAs spend a substantial amount of their time reviewing timecards and “back officing” work orders. But these tasks are not similar to the job duties of typical plant clerical employees who work in production areas and are directly involved in the production process. *See, e.g., Hamilton Halter Co.*, 270 NLRB 331, 331-32 (1984) (plant clericals initiated the production process through receiving and processing of customer orders and also performed work in the production area similar to bargaining unit employees). Rather, the majority of SAAs’ duties occur after bargaining unit employees have completed their work, and even bargaining unit employees themselves testified that they could complete their work without the SAAs involvement in work orders. As a result, the RD erred in finding that the SAAs are plant clerical employees because they have a “high degree of functional integration” with the bargaining unit employees. Instead, the SAAs perform most of their tasks well after bargaining unit employees complete theirs.

4. The Other Community of Interest Factors Relied on By the RD Are Insufficient to Establish a Community of Interests Between the SAAs and the Bargaining Unit.

The RD also found that SAAs shared a sufficient community of interests with bargaining unit employees to be included in the construction, maintenance and operations bargaining unit because they share some of the same facilities and undergo some of the same generalized training as bargaining unit employees. But these factors are minor bordering on irrelevant when the totality of the circumstances in this case is considered.

Breakrooms, Restrooms and Parking Lots. For example, the RD relied on the fact that SAAs “share the same break room, restroom, and parking lot as bargaining unit employees.” (DDE at 10). This factor is a minor one at best, however, given that linemen spend virtually their entire work day away from the service centers and thus do not use the service centers’ breakrooms and restrooms for most of their shifts. (Tr. 59; 156). Further, the record establishes that no other

bargaining unit employees work in the same areas as the SAAs, and thus this factor is largely irrelevant to them as well. (Tr. 59; 63-64; 219; 222-223; 314).

Harassment and Ethics Training. Similarly, although the RD noted that bargaining unit employees and the included SAAs undergo some of the same training, it should be no surprise in today's world that CEHE expects all of its employees to undergo training regarding its sexual harassment and ethics policies. Such training is minor in comparison to the very significant, years-long skills training that bargaining unit employees undergo but the included SAAs do not. Likewise, even though bargaining unit employees and the included SAAs undergo safe-driver training, such common training is insufficient to overcome the fact that bargaining unit employees undergo much more significant training to obtain CDL licenses, fork lift certifications and the like. (Tr. 70; 88-89; 90; 91; 98).

Casual Fridays. Again elevating minor similarities over major differences, the RD noted that some bargaining unit employees get to wear casual clothes on Fridays. This ignores the record evidence that SAAs, unlike bargaining unit employees, wear casual clothes all the time, do not wear uniforms, and do not have to wear the same safety equipment as bargaining unit employees. (Tr. 64; 71; 72-73; 74; 101-102; 213; 218).

Schedule and Holidays. Finally, the RD also ignored record evidence in asserting that some bargaining unit employees work a 9/80 schedule similar to SAAs and observe the same paid holidays. Contrary to this assertion, the record shows that only SAAs and supervisors work 9/80 schedules, and bargaining unit employees work holidays while SAAs do not. (DDE at 6, 10; Tr. 103; 104-105).

B. The RD's Community of Interest Analysis Missed the Forest for the Trees.

In sum, the RD's conclusion that the SAAs share a sufficient community of interests with bargaining unit employees to be included in the same unit missed the forest for the trees. There is

no dispute that SAAs have different job duties, different skills and abilities, different training, different work locations, different schedules, different supervisors, different pay and bonus structures, and different benefits from the bargaining unit. Moreover, there is no temporary interchange between the SAAs and the bargaining unit, and there is only one instance of an SAA moving into a bargaining unit position which occurred over 13 years ago and was subject to the same requirements and apprentice program as any applicant off the street. The Board has regularly concluded that two groups of employees do not share a sufficient community of interests to be included in the same unit when they have different skills, training, duties, pay, supervisors, schedules, benefits, and lack temporary or permanent interchange. *See PCC Structural, Inc.*, 365 NLRB No. 160, n. 44 (Dec. 15, 2017) (discussion of Board’s community of interest factors, in particular that having distinct terms and conditions of employment such as skills, training, wages, hours, training, supervision, equipment, and infrequent interchange does not support inclusion in an existing unit).

The factors relied on by the RD, namely describing the SAAs as “plant clericals” and relying on comparatively minor similarities between the SAAs and bargaining unit employees are insufficient to outweigh all the factors demonstrating a lack of a community of interests between the two groups. Indeed, as explained above, the most significant of the RD’s conclusions in this regard—functional integration—is not supported by the record.

This case is a good example of why the Board has a long history of excluding clerical employees like the SAAs from units of skilled and/or production and maintenance employees. Clerical employees and skilled employees simply do not share a community of interests. In fact, it was on this basis that the Board in *BF Goodrich Rubber Co.*, 55 NLRB 338 (1944), held that unskilled tool clerks should be excluded from a machinists voting group. In particular, the Board

noted that, “they are unskilled employees performing essentially clerical duties.” *Id.* at 345; *see also, Mitchellace, Inc.*, 314 NLRB 536 (1994); *Swift & Co.*, 166 NLRB 589, 590 (1967); *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957) (citing cases and stating that the Board customarily excludes office clericals from a unit of production and maintenance workers); *California Cornice Steel & Supply Corp.*, 104 NLRB 787, 789 (1953) (office clericals customarily excluded from residual unit of production and maintenance employees); *Brown Instruments Division*, 115 NLRB 344, 348 (1956) (office clericals customarily excluded when a union seeks to add them to an existing production/maintenance unit); *Power Inc.*, 40 F.3d at 420-21 (“Exclusion of office clericals from production units is consistent with long standing NLRB policy, and has repeatedly been upheld”).¹⁸ The same applies with equal force here because SAAs are not functionally integrated with the bargaining unit and do not share a sufficient community of interest with it.

Courts and prior Board decisions have long recognized that in exercising its discretion to determine a unit appropriate for the purposes of collective bargaining, the Board must assure that the approved unit creates a situation where stable and efficient bargaining relationships can occur. *See Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362 (1949) (“To achieve stability of labor relations was the primary objective of Congress in enacting the [NLRA]”); *NLRB v. Catherine McAuley Health Center*, 885 F.2d 341, 344 (6th Cir. 1989) (“In addition to explicit statutory limitations, a bargaining unit determination by the Board must effectuate the Act’s policy of

¹⁸ Interestingly, meter readers are also expressly excluded from the bargaining unit. The Board has routinely held that meter readers do not share a sufficient community of interests with employees like those in the bargaining unit because they perform the clerical task of reading meters and, like the SAAs, they do not perform physical labor. *See Portland General Electric Company*, 258 NLRB 788 (1984); *Battle Creek Gas Co.*, 132 NLRB 1528, 1530 n.2 (1961); *The Houston Corporation*, 124 NLRB 810, 812 (1959).

efficient collective bargaining.”). Including the 30 SAAs in a 100-year-old, 1,437 member bargaining unit dominated by employees with vastly different terms and conditions of employment will not satisfy this goal.

V. CONCLUSION

The only issue presented by the Petition is whether the SAAs should be included in the existing construction, maintenance and operations bargaining unit. They should not be so included because they do not share a sufficient community of interests with the existing bargaining unit employees. The RD erred when he reached the opposite conclusion.

For all of the foregoing reasons, the Employer requests that its Request for Review be granted, the Regional Director’s Decision and Direction of Election be reversed and the Petition be dismissed.

Date: May 13, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of May, 2019, she caused a true and correct copy of CenterPoint Energy Houston Electric, LLC's Request for Review of Regional Director's Decision and Direction of Election, in the above-captioned matter, to be filed with the Board electronically using the NLRB's electronic filing system and also to be served simultaneously upon the following individuals addressed as follows:

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