

UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLAS PACIFIC/GULFTECH,

Employer,

and

Case No. 27-RC-258742

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,

Petitioner.

ATLAS PACIFIC’S REQUEST FOR REVIEW

Atlas Pacific Engineering Company (“Atlas Pacific,” or the “Employer”), pursuant to Section 102.67 of the National Labor Relations Board’s (N.L.R.B.” or “Board”) Rules and Regulations, hereby requests review of the Regional Director’s Decision and Direction of Election (the “Decision”) in the above-referenced case, dated April 20, 2020.¹

Atlas Pacific seeks review of the Regional Director’s unsubstantiated finding that a mail ballot election is safer and appropriate in the instant circumstances. Contrary to the Regional Director’s finding, the Board maintains a well-established presumption in favor of conducting a manual election. Neither the Regional Director nor the Petitioner elicited any evidence, testimony, or facts sufficient to rebut the Board’s presumption to hold a manual election. The Decision is a clear departure from reported Board precedent and is based on clearly erroneous findings of substantial fact, speculation and conjecture which are prejudicial to Atlas Pacific and the voting employees. Moreover, the Regional Director’s refusal to permit the parties to elicit relevant

¹ The Regional Director’s Decision is attached to this Request for Review as Exhibit A.

evidence and facts during the pre-election hearing was prejudicial error and represents a compelling reason to reevaluate any Board policy that would prohibit an evidentiary presentation in these circumstances. The novel issues presented in this Request for Review have immediate and potential dire consequences effecting the employee franchise. Accordingly, the Board must grant the Request, stay the election, and provide its guidance.

INTRODUCTION

The NLRB has repeatedly held that a manual election is the most effective way to protect employees full and free right to vote in a representation election, particularly where, as here, all voting employees are present at a single site of employment. The Board has held that a mail ballot election may be held where holding a manual election would be too difficult, such as situations where employees are widely dispersed and do not report to a single location. No such circumstances are present here. Indeed, in consideration of the current public health crisis, Atlas-Pacific put forth a detailed plan to conduct a safe voting procedure in a controlled environment. Accordingly, a manual ballot election was appropriate and mandated in this case.

The Regional Director concluded – without the benefit of any evidentiary record – that “extraordinary circumstances” required a mail ballot election. This speculative conclusion was wrought out of whole cloth and was not based upon any evidentiary record. To compound this error, the Regional Director acknowledged that she did not “find that a manual election is impossible, or that mail ballot elections are the only appropriate option”, and recognized that she did not “find fault with the Employer’s carefully considered plan for how a manual election could be conducted.” Nevertheless, the Regional Director eschewed the presumption in favor of manual balloting and ordered a mail ballot election.

The Regional Director's Decision did not present evidence sufficient to rebut the presumption that a manual election is appropriate. Even if the Regional Director's claimed "evidence" would ordinarily be sufficient, her factual findings were made *sua sponte*, without any support in the record. While the Board grants the Regional Director discretion on election proceedings, it is an abuse of that discretion for the Regional Director to rely on her own individual factual determinations without granting the parties an opportunity to be heard. The result was a Decision issued without due process and contrary to reported Board precedent.

PROCEDURAL BACKGROUND

On April 3, 2020, the Petitioner filed the operative Petition. *See* Exhibit B (Petition).² The Petitioner requested an election via mail ballot. *Id.* Atlas-Pacific agreed that the unit composition was appropriate, but disagreed that a mail ballot election was appropriate in these circumstances. The Regional Director requested Atlas-Pacific to devise a plan to conduct a safe manual election in consideration of COVID-19. Atlas-Pacific put forth its election plan, as well as the reasoning for conducting a manual election in accordance with the Board's precedent, in its Statement of Position. *See* Exhibit C (Atlas-Pacific's Statement of Position). Included in the Statement of Position was the affidavit of Plant Manager Mark Means detailing the safety measures the Employer was observing and prepared to implement to ensure a safe election. *See* Ex. C at 7-9. The Parties participated in a telephonic pre-election hearing on April 13, 2020. *See* Exhibit D (Transcript and Record of April 13, 2020 pre-election hearing)³. The Regional Director refused to allow testimonial evidence at the pre-election hearing. *See* Exhibit E (April 9, 2020 E-Mail from

² The upper right-hand corner of the Petition erroneously states the petition was filed on March 3, 2020.

³ Citations to the hearing transcript will be referenced as (Tr. __:__), representing the page number and line number(s).

the Region to Counsel). During the hearing, the Petitioner offered no alternative plan to conduct a safe mail ballot election and specifically declined to refrain from conducting home visits during the mail ballot. (Tr. 10:18–23:9). On April 20, 2020, the Regional Director issued a Decision and Direction of Election setting a mail ballot election. *See* Ex. A.

ARGUMENT AND AUTHORITIES

Atlas Pacific requests review of the Decision pursuant to the Board’s Rule § 102.67 (c) (1), (2), (3) and (4).

A. The Regional Director’s Decision Departs From Reported Board Precedent.

The Regional Director failed to apply the Board’s presumption that manual ballot elections are preferred and inexplicably did not require the presentation of any evidence to rebut the presumption. *See generally* Ex. A. The Regional Director further considered “facts” not introduced in the hearing and without providing parties with an opportunity to respond to such “facts.” *Id.* In this regard, the Regional Director’s Decision denied Atlas Pacific due process and elevated concerns regarding the inconvenience of Agency staff over the Section 7 rights of employees.

The Board adheres to a presumption that in-person voting/manual ballots are preferable as they tend to effectuate employees Section 7 rights. *See Willamette Industries*, 322 NLRB 856 (1997); *see also San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998); *Reynolds Wheels International*, 323 NLRB 1062, 1063 (1997) (“[U]nder existing Board precedent and policy, the applicable presumption favors a manual election, not a mail ballot.”). While the decision to conduct an election by mail or manual ballot is within the discretion of the regional director (*see Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954) (place); *San Diego Gas & Electric*, 325 NLRB at 1144 (1998) (mail ballot)), elections are normally held on the employer’s premises in the absence of good cause to the contrary. The Board’s longstanding rule is that

elections should, as a general rule, be conducted manually, unless the regional director reasonably concludes that circumstances make voting in a manual election difficult. *San Diego Gas & Electric*, 325 NLRB at 1144; NLRB CASE HANDLING MANUAL, § 11301.2 (“The Board has ... recognized ... that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done”). The Board has articulated three situations that “normally suggest the propriety of using mail ballots”: (1) where eligible voters are “scattered” over a wide geographic area due to their job duties; (2) where they are “scattered” in that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress. NLRB CASE HANDLING MANUAL, § 11301.2; *San Diego Gas & Electric*, 325 NLRB at 1145; *see also London’s Farm Dairy, Inc.*, 323 NLRB 1057 (1997); *Reynolds Wheels International*, 323 NLRB at 1062-63.

Admittedly, no circumstances typically warranting consideration of a mail ballot election are present in this case. Ex. A at 6. The petitioned-for employees are coming to work at the Pueblo facility every day due to Atlas Pacific’s status as a critical business, and the Governor’s Stay at Home Order, in any event, will expire prior to the Employer’s proposed manual election date. (Tr. 27:14–28:6); *Colorado Public Health Order* 20-24. It is undisputed that the Board prefers in-person elections because it tends to maximize the employee franchise. If this election is allowed to proceed via mail-ballot election, the voting employees may be denied their statutory rights to participate in the election. *See, e.g., San Diego Gas and Electric*, 325 NLRB 1143, 1146 (1998) (“The Board’s experience with representation elections has shown that the voter participation rate is generally higher in elections conducted manually than in mail ballot elections.”) The purpose of

the Act is to assure each employee has the fullest freedom in exercising their guaranteed rights under the Act. Thus, there is a clear showing that extraordinary relief is required in this case.

B. The Regional Director Erroneously Denied the Parties the Right to Present Evidence on the Efficacy of a Manual Ballot Election.

The Regional Director's decision to order a mail ballot election in this case was premised entirely upon her unsubstantiated conclusions regarding the impact of the COVID-19 public health crisis on the voting process. While the COVID-19 pandemic may present unique circumstances, the Regional Director should not have denied the parties an opportunity to be heard on whether holding a manual ballot would be "difficult," rather than ordering a "no issue" hearing. *See* Ex. E. Because the Regional Director denied the parties the right to present evidence at the hearing, there is no evidence in the record sufficient to rebut the manual ballot presumption. Indeed, the facts and circumstances presented in this case do not even suggest that conducting a manual election at the Pueblo facility would be "difficult" or "impractical," as required in every Board decision that has upheld a mail ballot election. It is undisputed that the voting employees report to work every day, work regularly scheduled shifts, and can conveniently vote in person if a manual election is held at the plant. *See* (Tr. 27:14–28:6); Ex. C.

The Regional Director cannot simply rebut a presumption on her own based upon so-called "evidence" adduced outside the record in the case. In any case, the Regional Director's refusal to direct an on-site manual election with the Employer's safety measures actually creates a greater health and safety risk for employees. To state otherwise is at best speculative, but significantly avoids the right of Petitioner (and its avowed intention) to conduct home visits during mail balloting. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), *revd.* on other grounds, 133 NLRB 1092 (1961) (union home visits lawful during mail balloting).

The only undisputed facts in this matter support a manual election. As a “critical infrastructure” business, the Pueblo facility has continued to operate during the COVID-19 public health crisis pursuant to Federal, state and local orders. *See* (Tr. 27:14–28:6); Ex. C. Appropriate preventative measures have been implemented by the Atlas Pacific to mitigate the potential risk of COVID-19 infection. *Id.* Atlas Pacific continues to follow guidance provided by the Centers for Disease Control and Prevention with respect to preventing the spread of COVID-19 in its workplace. *Id.* Significantly, not a single case of COVID-19 illness has been reported at the Pueblo facility. *See* Ex. C.

C. The Regional Director Based Her Decision on Clearly Erroneous and Prejudicial “Factual” Findings.

Despite her direction of a “no issue” hearing, the Regional Director went outside the record of these proceedings to make purported factual findings regarding the relative safety of mail ballot elections. For instance, the Regional Director concluded that a manual ballot election would entail greater interaction of individuals, without even mentioning interpersonal interactions that occur during the NLRB’s mail ballot process. Ex. A at 4-5. She speculated about the attendees at the pre-election conference and the count. *Id.* She misstated the number of employees voting. *Id.* at 4. She speculated about employees absent due to illness (though there are no employees ill and absent from work) and she speculated about employees simply choosing to stay home. *Id.* at 4-5. The Regional Director made a host of unsubstantiated findings regarding about COVID-19 and incorrectly concluded that the Governor’s Stay at Home Order would extend beyond April 26. *Id.* at 4-6. Additionally, the Regional Director suggested that this Agency’s April 1st Order articulated a preference for mail balloting. *Id.* at 6.

Ostensibly, the Regional Director’s Decision ordered a mail ballot election by relying on “the number of employees involved, the location of the Employer’s facility likely necessitating

travel, and the circumstances in Pueblo County at this time.” Ex. at 5. However, the Regional Director’s conclusions were “supported” only by her *sua sponte* factual conclusions about the “circumstances”. For example, the Regional Director found that “it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among [employees].” Ex. A at 4. Atlas Pacific’s Statement of Position, however, establishes that the employees already work and abide by social distancing and Atlas-Pacific’s plan, which the Regional Director found no fault, specifically provides that employees will be released in groups of five. *See* Ex. C. The Regional Director cites no evidence or facts to establish that a manual election will create any unsafe interactions. *See generally* Ex. A. The legal standard at issue is whether the Regional Director’s findings were “clearly erroneous on the record.” 29 C.F.R. § 102.67(d)(2). Because the Regional Director allowed no record and went outside the record for her findings, they are, by definition, clearly erroneous.

The parties, but most importantly, the employees were prejudiced by the Regional Director’s finding. The Regional Director’s refusal to consider evidence and to draw her own conclusions regarding the relative safety of the procedures, is a fundamental denial of due process. Her incorrect conclusions about the mail balloting in this case (and failure to consider home visitation) arguably puts the petitioned-for employees at greater risk of infection. Indeed, the Regional Director explicitly disregarded all record evidence regarding the Petitioner conducting home visits and holding multiple in-person meeting in derogation of state orders and federal guidelines. Ex. at 3. This significant omission from the Regional Director’s analysis is critical because it undermines the very reasons she cites in support of her Decision. Indeed, the Petitioner’s right to conduct uncontrolled home visits during the mail ballot period risks the safety and well-being of the employees, union representatives, and the Pueblo community. By excluding evidence

that directly contradicts the Regional Director's finding that a mail ballot election is safer than a manual election the Regional Director's Decision is clearly erroneous and a denial of due process.

D. There Are Compelling Reasons For Reconsideration Of An Important Board Rule Or Policy.

The Regional Director imposed a restriction on the presentation of evidence at the pre-election hearing based solely on former General Counsel Griffin's Memorandum, which neither anticipated nor addressed the current circumstances. *See* Ex. E; GC 15-06. The resulting record was thus devoid of the information necessary for the Regional Director to make an informed decision as to whether the presumption for manual election had been rebutted.

Former General Counsel's Griffin's Memorandum was clearly aimed at expediting the election process under the Board's then newly implemented election procedures. *See generally* GC 15-06. However, it is unreasonable to suggest the Agency sought to eliminate the possibility that there would be unique circumstances warranting the development of a record. The Regional Director indicated that she had no alternative but to order a "no issue" hearing under the Memorandum. *See* Ex. E.

If true, adhering to such a policy would subjugate not only the employee franchise but employee safety to the Agency's more marginal interest in expediting elections. The Board's primary purpose is to ensure free and fair elections, which maximize every employee's opportunity to vote. Restricting the evidence in this case prevented proper consideration of the best possible election proceedings for *employees*. Accordingly, the Board should reconsider the purported rule relied on by the Regional Director in this case and permit the Regional Director to illicit all relevant evidence and facts.

CONCLUSION

For all of the reasons set forth above, Atlas pacific requests review of the Regional

Director's Decision.

Dated this 24th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2020, a true and correct copy of the foregoing **ATLAS PACIFIC'S REQUEST FOR REVIEW** was e-filed with the National Labor Relations Board and was served upon the following:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ATLAS PACIFIC ENGINEERING COMPANY,

Employer

and

Case 27-RC-258742

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO (Petitioner) on April 3, 2020, under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of employees employed by Atlas Pacific Engineering Company (Employer) at its Pueblo, Colorado facility (Employer's facility). There are approximately 90 employees in the unit sought.

The only matter at issue is whether the election should be conducted by manual or mail ballot method. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing, but the positions of the parties were solicited for consideration at an April 13, 2020, telephonic hearing before a hearing officer of the National Labor Relations Board (Board).

The question before me is how best to conduct this election given the reality of the COVID-19 pandemic. The impact of COVID-19 on daily life has been profound. Many of the measures recommended by the Federal and state governments to prevent the spread of the virus are well-known at this point: maintain a 6-foot distance between individuals, work or engage in schooling from home, avoid social gatherings, avoid discretionary travel, and practice good hygiene. *The President's Coronavirus Guidelines for America*; Centers for Disease Control and Prevention, *How to Protect Yourself and Others*.

In addition, many state and municipal governments have issued restrictions tailored to the situation in specific communities. On March 19, 2020, *Colorado Public Health Order 20-22* closed bars, restaurants, gyms and similar facilities until April 30, 2020, to prevent large groups from gathering. On April 9, 2020, *Colorado Public Health Order 20-24* directed all individuals to stay at home whenever possible, leaving only to perform necessary activities, such as caring for family members, obtaining necessary supplies, or working in a "critical business," until April 26, 2020.



Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19 the impact of the virus has continued in Colorado and throughout the United States. The Sheriff's Office of Pueblo County and the Pueblo Department of Public Health & Environment report that, as of April 19, 2020, 86 confirmed cases of COVID-19 exist in Pueblo County. Seven Pueblo County residents have died from COVID-19.

The Employer, which manufactures food processing machinery, is a critical business in the food supply chain. As a result, employees continue to report for work and perform their regular duties, albeit with at least some changes in regular operations to incorporate social distancing to the extent possible. The Employer's facility in Pueblo is located about 120 miles south of Denver, Colorado, where the Region 27 office is located.

POSITIONS OF THE PARTIES

Petitioner maintains that a mail ballot election is necessary because of the realities of the current COVID-19 pandemic and associated restrictions. First and foremost, a manual election requires at least some gathering of people, voters, Board agents, and observers. While measures can be taken to limit interaction and make these interactions as safe as possible, this is ultimately not an essential gathering because the mail ballot procedure exists.

Second, beyond the concerns associated with gathering, a manual election requires travel of individuals such as Board Agents and party representatives, in and out of Pueblo, an unnecessary risk to the communities involved. Third, Petitioner notes the Board's procedures for a manual election are well-established and involve steps that are problematic under the current circumstances, with numerous close contact activities such as voters using a ballot booth, observers jointly maintaining a voter list, and a challenged ballot procedure that involves an exchange of materials between the voter and a Board agent. To simply try to modify these procedures in the interest of safety during a manual election would create a "logistical nightmare," in the words of Petitioner.

The Employer's position is that voting should be conducted entirely by manual ballot, based on the Board's longstanding policy favoring manual balloting. The Employer does not reject the contention that the present pandemic requires special considerations. However, it maintains that the risk can be mitigated and that it will take steps necessary to have a safe manual election. These include but are not limited to: proposing a long voting period that will allow voters time for spacing and avoid congregating; conducting balloting in a large room that will allow room for social distancing; placing the tables used by the observers and Board agent, the voting booth used by the voters, and the ballot box 6-feet apart; providing hand sanitizer, gloves, and masks for all participants; requiring employees to wear masks and sanitize during the election; releasing employees to vote in small groups to prevent crowding; and deep cleaning the polling place prior to voting. At hearing the Employer introduced photographs showing the room in which it proposed holding the election, demonstrating how tables and the voting booth could be arranged in a manner to maintain social distancing; a hallway marked with 6-foot indicators demonstrating how voters could wait; and signs in the workplace reminding employees of the need for proper social distancing. The Employer additionally notes its employees have been working for several

weeks in the current environment and are well-versed in social distancing and other cautionary measures.

The Employer argues that, considering the above precautions, and because its employees continue to report to the Employer's facility daily, there is no basis to deviate from the Board's preference for manual elections. To bolster this point, the Employer argues that a mail ballot election essentially creates a one-sided restriction, as a union is free to conduct home visits, but an employer is not, as such visits are per se objectionable.¹ In essence, to order a mail ballot election in the instant case would place a restriction only on the Employer without a reasonable basis, as safety and public health concerns have been sufficiently addressed.

In making their positions known at hearing, both parties made representations regarding their own conduct, and the conduct of the other party, in complying with Federal and Colorado social distancing guidelines. I have not considered these assertions in making my decision. Outside of the Employer's demonstration of how it would prepare for a manual election, I do not find the proffered exhibits and representations relevant as the hearing conducted was held solely for the purpose of obtaining the parties' positions on the mechanics of the election.

THE BOARD'S STANDARD

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* The casehandling manual addresses the most common situation where a mail ballot is utilized: where employees are "scattered," working in different geographic areas, working in the same area but traveling on the road, working different shifts, or working combinations of full-time and part-time schedules. *Id.* This scattering of

¹ In support of its arguments the Employer cites to the Board's decision in *Grill Concepts*, an unpublished 2019 decision in case 31-RC-209589. Procedurally, I note this is an unpublished decision lacking precedential value. Substantively, that decision addresses whether a party allegedly offering to physically assist voters with mail ballots was objectionable conduct. That is not the procedural posture of this case or otherwise an issue.

employees was also the issue in *San Diego Gas & Elec.*, and in that case the Board identified a specific test for use under these circumstances.

On April 17, 2020, the Board issued an announcement, "COVID-19 Operational Status," which states, in part:

Representation Elections — Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

DETERMINATION

The instant case raises the issue of whether to direct a manual or mail ballot election based on public health concerns, and specifically whether the circumstances of the COVID-19 pandemic, in Pueblo at the time of my decision, make a mail ballot appropriate. Before turning to that question, I note there is no contention that the employees in question are scattered by location or schedule. Absent public health concerns this would almost certainly not be an election where a mail ballot would be considered.

However, for the reasons articulated earlier, this election will not be held under normal circumstances. Guidelines currently in place at the Federal level recommend avoiding unnecessary social contact and conducting business remotely when possible. Similarly, public health orders in place in Colorado make it clear that gathering is discouraged unless absolutely necessary. The essential nature of a business in the front range of Colorado has not shielded certain businesses from the spread of COVID-19 and its disruptions. Dozens of residents of Pueblo County are ill with COVID-19, and others have died. The Employer's employees are at the workplace because their work is critical to the food supply, and because of the nature of the work no option exists to perform their work remotely. While the mail ballot procedure may not be the Board's preferred procedure, it is one of the Board's procedures for conducting an election. Under the present circumstances I find it appropriate to order a mail ballot election.

The unit consists of approximately 90 employees. Any manual election will potentially result in 90 interactions between the voters, observers, and the Board Agent or Agents that can be avoided if a mail ballot is used. While each employee is already in contact with some other employees in the workplace, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among themselves. The selected employee observers and the assigned Board agent would certainly encounter all of the unit employees at a manual election who would choose to vote. This increased interaction may be minimal, an employee standing in a line that would

not normally be necessary, or may be major, such as an ill employee reporting to work. The Board's manual procedures do not contain an absentee ballot or remote option, so an employee must appear at the polls to vote. It is not inconceivable that an employee who is not working due to illness, considered not working due to mild illness, or has self-quarantined due to exposure to someone who is ill, might report to work to avoid disenfranchisement in a manual election.

It is reasonable to conclude that a manual election would result in travel of the Board agent or agents, if no other party. The Employer's facility is a significant driving distance from Denver and the nearest major airport, Denver International Airport. Under the Employer's proposed schedule, a pre-election conference would typically be scheduled no later than 5:30 a.m. on the day of the election and there would be a five-hour break between polling sessions, followed by a count until about 5:30 p.m. Non-essential travel is to be generally avoided at this time. Although there is no Federal rule or requirement that strictly prohibits holding a manual election, I find that holding a mail ballot election, and minimizing travel and the contact between individuals, is in the spirit of the current Federal recommendations.

In reaching this conclusion I do not find that a manual election is impossible, or that mail ballot elections are the only appropriate option. I only find that in the particular circumstances of this case, with the number of employees involved, the location of the Employer's facility likely necessitating travel, and the circumstances in Pueblo County at this time, it is the appropriate option.

I do not find fault with the Employer's carefully considered plan for how a manual election could be conducted. The details it has presented, including elements directed at hygiene and sanitation, social distancing, and spreading out the time between voters, will be necessary for any manual election after restrictions are relaxed. However, I do note that some of these precautions, by their very nature, introduce other problems. For example, a longer polling period lasting several hours with small groups released on a schedule may help avoid voters congregating in line while waiting to vote, but this protracted process significantly increases the time the observers and Board agent conducting the election spend in proximity to each other.² Ultimately, the Employer's employees are working at the Employer's facility because no alternative exists due to the nature of the work. Regarding a manual election, however, an alternative does exist.

The Employer also correctly notes that many aspects of the novel coronavirus that causes COVID-19 are unknown, and that risk cannot be completely eliminated by conducting a mail ballot election. While true, the current recommendations strongly recommend avoiding or limiting in-person contact between individuals, and as such a mail

² There are manual ballot procedures that also provide challenges to maintaining appropriate distancing. For example, a voter may spoil a ballot, which would require that the Board agent retrieve the ballot from the voter and provide a new ballot. The challenged ballot process requires the voter to place the challenged ballot in an envelope prepared by the Board agent and then seal and initial envelope before placing it in the ballot box. See Representation Casehandling Manual, Section 11338.3. Also, the Board agent must ensure that the observers are properly marking the voter list(s).

ballot election minimizes, even if it does not eliminate, risk.³ I also recognize that the current stay-at-home order issued by the Governor of Colorado may expire on April 26, 2020, or it may be extended in some fashion. The restrictions on Colorado's citizens is too uncertain at this time to presume it would be lifted in its entirety. Further, the Governor's order is just one factor I have taken into to consideration in directing a mail ballot.

Finally, I do not agree that the mail ballot election procedure is *only* intended to address scattered workforces. This is clearly the most common reason a mail ballot is used, and it is correct that in all the cases cited by the Employer this was the basis for directing a mail ballot. However, as stated earlier, absent the current extraordinary circumstances a mail ballot election would almost certainly not be under consideration in this case. The COVID-19 pandemic is an unprecedented situation, and I do not find that the absence of a history of applying mail ballot procedures in similar circumstances suggests a mail ballot is inappropriate during this stage of a pandemic. Ultimately, discretion allows for a response to developing or new circumstances, and the Board has stated Regional Directors retain *broad* discretion to order a mail ballot election where circumstances dictate. See *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) ("a Regional Director has broad discretion in determining the method by which an election is held.") Indeed, the Board in its April 17, 2020 announcement requires that I consider safety, staffing, and federal, state and local laws and guidance. I find the extraordinary circumstances are present here that require me to utilize that discretion and order a mail ballot election for the reasons stated above.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴

³ I note that this approach of balancing Section 7 rights with public health demands is consistent with the broader approach the Board has taken in response to the current pandemic. On March 19, due to the extraordinary circumstances related to the COVID-19, the Board suspended all elections, including mail ballot elections, until April 3, 2020. On April 1, 2020, after determining measures were in place at the Regional level to allow elections to resume in a safe and effective manner, the Board did not extend this suspension, but allowed elections to resume as determined by the Regional Directors.

⁴ During the hearing the parties stipulated to the following commerce facts:

The Employer, Atlas Pacific Engineering Company, is a limited liability company with facilities and places of business throughout the United States, including places of business in the State of Colorado, where it is engaged in the manufacture of food processing machinery. During the past 12 months, a representative time period, the Employer purchased and received at its Colorado locations goods, materials, and supplies valued in excess of \$50,000 directly from entities located outside the State of Colorado.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time fabrication, machine shop, assembly, inspector, maintenance, shipping, stores, and tool room employees employed by the Employer at its Pueblo, Colorado facility; excluding all managers, office clerical employees, professional employees, and supervisors as defined by the National Labor Relations Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AFL-CIO**.

A. Election Details

I have determined that a mail ballot election will be held. As of the hearing date, Petitioner has waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **3:00 p.m., Monday, May 4, 2020**, ballots will be mailed to voters from the National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, May 11, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 27 Office at **(303) 844-3551** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

Ballots are due in the Denver Regional Office by 5:00 p.m. on Friday, May 22, 2020. All ballots will be commingled and counted at the Regional Office at 9:00 a.m. on Tuesday, May 26, 2020.⁵ In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

⁵ If, on the date of the count, the Regional Office is not available to the parties for the count, the count will be done remotely by a live video conference. If the Regional Director determines this is likely, the parties will be provided information on how to participate in the count by video conference.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately prior to the date of this Decision, **April 17, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States 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.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Wednesday, April 22, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Atlas Pacific Engineering
Company
Case 27-RC-258742

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated at Denver, Colorado on the 20th day of April, 2020.

/s/ Paula Sawyer

PAULA SAWYER
REGIONAL DIRECTOR,
NATIONAL LABOR RELATIONS BOARD
REGION 27
BYRON ROGERS FEDERAL OFFICE
BUILDING
1961 STOUT STREET, SUITE 13-103
DENVER, CO 80294

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 27-RC-258742	Date Filed 3/3/2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer Atlas Pacific /Gulftech	2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 1 Atlas Avenue CO Pueblo 81001-
--	--

3a. Employer Representative – Name and Title Mark Means	3b. Address (If same as 2b – state same) 1 Atlas Avenue CO Pueblo 81001-
---	---

3c. Tel. No. (719) 948-3040	3d. Cell No.	3e. Fax No. (719) 948-3058	3f. E-Mail Address mark.means@atlaspacific.com
---------------------------------------	---------------------	--------------------------------------	--

4a. Type of Establishment (Factory, mine, wholesaler, etc.) Misc. Fabricated Products	4b. Principal product or service Manufacturing Machinery	5a. City and State where unit is located: Pueblo, CO
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5b. Description of Unit Involved Included: See Attached Page 2 for additional details Excluded: See Attached Page 2 for additional details	6a. No. of Employees in Unit: 90	6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
---	--	---

Check One: **7a.** Request for recognition as Bargaining Representative was made on (Date) 04/03/2020 and Employer declined recognition on or about _____ (Date) (If no reply received, so state). No reply received
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (if none, so state).	8b. Address
--	--------------------

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address
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8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)
--------------------------------	---	--

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____
(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.	11a. Election Type: <input type="checkbox"/> Manual <input checked="" type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail
--	--

11b. Election Date(s): April 21, 2020	11c. Election Time(s): 6:00 a.m. to 8:00 and 2:00p.m. to 4:00 P.M	11d. Election Location(s): Mail in Ballots due to the situation with COVID-19 we must keep everyone
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12a. Full Name of Petitioner (including local name and number) Douglas Paul Fennell United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union	12b. Address (street and number, city, state, and ZIP code) 695 Jerry Street Suite 208 CO Castle Rock 80104-
---	---

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

12d. Tel No. (720) 307-4096	12e. Cell No. (303) 775-0597	12f. Fax No. (720) 538-0941	12g. E-Mail Address dfennell@usw.org
---------------------------------------	--	---------------------------------------	--

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.			
13a. Name and Title		13b. Address (street and number, city, state, and ZIP code)	

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
---------------------	----------------------	---------------------	----------------------------

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) Douglas Paul Fennell	Signature Douglas Paul Fennell	Title International Staff Representative	Date 04/2/2020 18:20:13
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
27-RC-258742	3/3/2020

Employees Included

All Fabrication, Machine shop, Assembly, Inspectors, Maintenance, Shipping, Stores, and Toolroom employees as covered under the act.

Employees Excluded

All Office Personal, Management and Supervisors as defined under the act.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No.

Date Filed

INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position:		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code):		1d. Cell No.:	1f. e-Mail Address:
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b.)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. Added: _____ Excluded: _____			
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at (a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) (b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D).			
8a. State your position with respect to the details of any election that may be conducted in this matter. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s):	8c. Time(s):	8d. Location(s):	
8e. Eligibility Period (e.g. special eligibility formula):	8f. Last Payroll Period Ending Date:	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length) _____	
9. Representative who will accept service of all papers for purposes of the representation proceeding			
9a. Full name and title of authorized representative		9b. Signature of authorized representative	
		9c. Date	
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.:	9h. Cell No.:	

**WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.



UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

ATLAS PACIFIC/GULFTECH,

Employer,

and

Case No. 27-RC-258742

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,

Petitioner.

ATTACHMENT TO STATEMENT OF POSITION

Atlas Pacific Engineering Company (“Atlas Pacific”) contends that a mail ballot election is not warranted under the current circumstances. Atlas Pacific has been designated as an essential business by Colorado and the Federal Government. The employees subject to this Petition have continued to operate safely by following social distancing requirements and other precautions. Although COVID-19 has had a substantial impact on Atlas Pacific and its workforce, as it has across essentially every business in the United States, an election among eligible employees may be conducted safely at Atlas Pacific’s facility during their working time with appropriate social distancing and other safety measures.

The Board adheres to a presumption that in-person voting/manual ballots are preferable as they effectuate employees Section 7 rights. *See Willamette Industries*, 322 NLRB 856 (1997); *see also San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998); *Reynolds Wheels International*, 323 NLRB 1062, 1063 (1997) (“[U]nder existing Board precedent and policy, the applicable

presumption favors a manual election, not a mail ballot.”). While the decision to conduct an election by mail or manual ballot is within the discretion of the regional director (*see Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954) (place); *San Diego Gas & Electric*, 325 NLRB at 1144 (1998) (mail ballot)), elections are normally held on the employer’s premises in the absence of good cause to the contrary. The Board’s longstanding rule is that elections should, as a general rule, be conducted manually, unless the regional director reasonably concludes that circumstances make voting in a manual election difficult. *San Diego Gas & Electric*, 325 NLRB at 1144; NLRB CASE HANDLING MANUAL, § 11301.2 (“The Board has ... recognized ... that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done”). In its caselaw, the Board has articulated three situations that “normally suggest the propriety of using mail ballots”: (1) where eligible voters are “scattered” over a wide geographic area due to their job duties; (2) where they are “scattered” in that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress. NLRB CASE HANDLING MANUAL, § 11301.2; *San Diego Gas & Electric*, 325 NLRB at 1145; *see also London’s Farm Dairy, Inc.*, 323 NLRB 1057 (1997); *Reynolds Wheels International*, 323 NLRB at 1062-63. None of these circumstances is present in this case.

There is no arguable basis to deviate from the Board’s longstanding policy favoring manual ballot elections. Nothing about the facts and circumstances presented in this case even remotely suggests that conducting a manual election at the Pueblo facility would be “difficult” or “impractical.” Employees at the Pueblo facility report to work at a single location every day, work regularly scheduled shifts and can conveniently vote in person if a manual election is held at the

plant. Moreover, conducting an on-site manual election would not overly burden the resources of the agency. A manual election could be completed in a single day by a single Board agent.

Any argument that conducting an on-site manual election would create a health and safety risk for employees or others participating in the election process is purely speculative. As a “critical infrastructure” business, the Pueblo facility has continued to operate during the COVID-19 public health crisis pursuant to Federal, state and local orders. Appropriate preventative measures have been implemented by the Atlas Pacific to mitigate the potential risk of COVID-19 infection. Atlas Pacific continues to follow guidance provided by the Centers for Disease Control and Prevention with respect to preventing the spread of COVID-19 in its workplace. Significantly, not a single case of COVID-19 illness has been reported at the Pueblo facility.

Given its existing infection control measures, the Employer can safely accommodate an in-person vote with social distancing and in accordance with suggested guidelines. *See* Statement of Mark Means (attached hereto). At the request of the Region, the Employer presented a plan to conduct a safe in-person vote in this matter as follows:

- Three-hour voting time frames to both maximize the opportunity for employees to vote and provide ample “spacing” of voter participation to ensure proper social distancing.
- In person balloting will occur in the training room. The training room has ample square footage (~780 sq. ft.) to provide marked (with floor tape) spacing of employees in the queue to vote.
- Tables will be positioned to provide 6 feet of space between the Board Agent and each observer.
- Observers and the Board Agent will be provided hand sanitizer, gloves, and masks.
- Employees will likewise be provided hand sanitizer at the entrance to the polling place, gloves and masks. Employees will be required to wear masks and sanitize.

- Employees will be released by work center in groups of 5 to maximize spacing and minimize voter flow and crowding of employees in the queue. Release would be accomplished by an agreed-to message over the PA system.
- Voters will enter the polling place through the South double glass doors and exit via the West door back through the Fabrication department.
- The voting queue would be formed at least 15 feet back from the hallway where people would exit after voting. The employer would social distance in the hallway at 6 feet using floor striping.
- The Employer will deep clean the polling place prior to voting and provide materials for the Board Agent to sanitize materials during the polling periods.
- The Employer is an essential business and has had social distancing measures in place since the imposition of the Stay at Home Order. Employees are already accustomed to these measures.

The Petitioner has provided no evidence or argument that a mail ballot election will be a safer process than a manual ballot election with proper precautions. Further, both prior to and after the filing of the Petition in this case, Petitioner has continued to engage in in-person organizing activities and campaign activities with Atlas Pacific employees without regard for any safety precautions designed to mitigate the risk of COVID-19 infection. Indeed, Petitioner has convened meetings in its hall, personally distributed materials, and engaged in employee home visits with no safeguards against the spread of COVID-19. Without evidence to the contrary, Atlas Pacific expects the Petitioner to continue these activities if the Region permits a mail ballot election, unencumbered by the recommended safeguards. In comparison, Atlas Pacific's plan to conduct a safe manual election protects every eligible voter, while also adhering the Board's preferred election method. Accordingly, the Region should conduct an in-person/manual election in this case.

Dated this 9th day of April, 2020.

Respectfully submitted,

SHERMAN & HOWARD L.L.C.



Patrick R. Scully
633 Seventeenth Street, Suite 3000
Denver, CO 80202
Telephone: (303) 299-8218
Facsimile: (303) 298-0940
pscully@shermanhoward.com

ATTORNEY FOR EMPLOYER

**UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ATLAS PACIFIC/GULFTEC,

Employer,

and

Case No. 27-RC-258742

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,

Petitioner.

AFFIDAVIT OF MARK MEANS

I, Mark Means, being first duly sworn upon oath, state as follows:

1. My name is Mark Means. I am of sound mind, over the age of twenty-one and the information contained herein is based on my personal knowledge.
2. I have been employed by Atlas Pacific Engineering Company, since 2018. My current position is Director of Operations.
3. In my role as Director of Operations, I am responsible for, among other things, implementing and enforcing Atlas Pacific's safety policies and procedures, including ensuring the safety of all employees during the current COVID-19 pandemic.
4. Atlas Pacific was deemed an essential business by the State and Federal governments and has remained operational.

5. In accordance with the Federal and State requirements, as well as the CDC's recommendations, Atlas Pacific has implemented appropriate social distancing requirements and other measures to ensure the safety of the employees during the COVID-19 pandemic.

6. There have been no confirmed cases of COVID-19 in the Pueblo, Colorado facility.

7. I was involved with putting together the plan to safely conduct a manual election in Atlas Pacific's Pueblo, Colorado facility.

8. In putting together Atlas Pacific's plan, I concluded that we have the capability and the resources to safely conduct a manual election in its Pueblo, Colorado

9. The size of the training room, where voting will occur, is 28 ft. by 28 ft., totaling 784 sq. ft.

10. The large training room will be deep cleaned prior to voting and provides more than ample space to position tables 6 feet apart for Board Agent and each observer.

11. Atlas Pacific will provide proper Personal Protective Equipment ("PPE"), including gloves and masks, hand sanitizer, and cleaning supplies to the observers and the Board Agent. Each employee will also be provided PPE and hand sanitizer prior to entering the polling room.

12. Atlas Pacific employees will be released in groups of 5 to maximize spacing and minimize voter flow and crowding of employees in the queue. The release of employees will be accomplished by an agreed-to message over the PA system.

13. Voting employee will enter the training room through the South double glass doors and exit via the West door back through the Fabrication department.

14. The voting queue will be formed at least 15 feet back from the hallway where people would exit after voting. The employer will also use floor striping to separate voting queue positions 6 feet apart to ensure proper social distancing.

Further Affiant Sayeth naught.



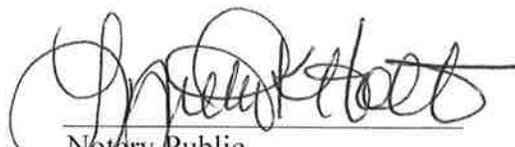
Mark Means

ss.)
)
) STATE OF COLORADO
) Pueblo COUNTY
)

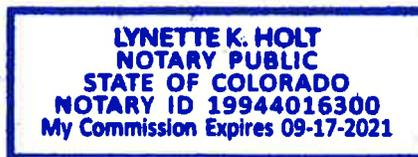
Subscribed and sworn before me this 9 day of April, 2020.

Seal

My commission expires 9/17/2021.



Notary Public



OFFICIAL REPORT OF PROCEEDINGS
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 27

In the Matter of:

Atlas Pacific/Gulftech, Case No. 27-RC-258742

Employer,

and

United Steel, Paper and
Forestry, Rubber,
Manufacturing, Energy, Allied
Industrial and Service Workers
International Union,

Petitioner.

Place: Denver, Colorado (Telephonic)

Dates: April 13, 2020

Pages: 1 through 54

Volume: 1

OFFICIAL REPORTERS
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Phoenix, AZ 85020
(602) 263-0885



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 27

In the Matter of:

ATLAS PACIFIC/GULFTECH,

Employer,

and

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION,

Petitioner.

Case No. 27-RC-258742

The above-entitled matter came on for hearing, pursuant to notice, before **ISABEL SAVELAND**, Hearing Officer, at the National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, Colorado 80294, on **Monday, April 13, 2020, 10:17 a.m.**



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APPEARANCES

On behalf of the Employer:

PATRICK R. SCULLY, ESQ.
SHERMAN & HOWARD, LLC
633 17th Street, Suite 3000
Denver, CO 80202-3622
Tel. (303)299-8218
Fax. (303)298-0940

On behalf of the Petitioner:

BRAD MANZOLILLO, ESQ.
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EXHIBITS

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EXHIBIT**IDENTIFIED****IN EVIDENCE**

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Board:

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B-1 (a) through B-1 (f)

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B-2

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B-3

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Union:

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U-1

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U-2

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U-3

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Employer:

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PROCEEDINGS

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2 HEARING OFFICER SAVELAND: Okay. So let's go on the
3 record. The hearing will be in order. This is a formal
4 hearing in the matter of Atlas Pacific Engineering Company,
5 case number 27-RC-258742 before the National Labor Relations
6 Board. The Hearing Officer appearing for the National Labor
7 Relations Board is Isabel Saveland.

8 All parties have been informed of the procedures at formal
9 hearings before the Board by service of a description of
10 procedures in certification and decertification cases with a
11 notice of hearing. I have additional copies of this document
12 for distribution if any party wants more.

13 Will counsel please state their appearances for the
14 record? For the Petitioner.

15 MR. MANZOLILLO: Brad Manzolillo, M-A-N-Z-O-L-I-L-L-O.
16 Counsel for the United Steelworkers, Petitioning Union. 60
17 Boulevard --

18 HEARING OFFICER SAVELAND: For the --

19 MR. MANZOLILLO: 60 Boulevard of the Allies, 5 Gateway
20 Center, Room 913, Pittsburgh, PA, 15222.

21 HEARING OFFICER SAVELAND: And for the Employer.

22 MR. SCULLY: Thank you, Madam Hearing Officer. Patrick
23 Scully, of the law firm of Sherman & Howard, for the Employer.
24 Address is 633 17th Street, Suite 3000, Denver, Colorado,
25 80202.



1 HEARING OFFICER SAVELAND: Are there any other
2 appearances? Let the record show no response.

3 Are there any person -- any other persons, parties or
4 labor organizations in the hearing room or on this call who
5 claim an interest in this proceeding? Let the record show no
6 response. I now propose to receive the formal papers. They've
7 been marked for identification as Board's Exhibit 1(a) through
8 1(f), inclusive. Exhibit 1(f) being an index and description
9 of the entire exhibit.

10 The exhibit has already been shown to all parties. Are
11 there any objections to the receipt of these exhibits into the
12 record? Hearing --

13 MR. MANZOLILLO: This is Mr. Manzolillo -- Mr. Manzolillo,
14 and no objection from the Union.

15 HEARING OFFICER SAVELAND: For the Employer?

16 MR. SCULLY: No objection, Madam Hearing Officer.

17 HEARING OFFICER SAVELAND: Okay. It is received -- the
18 formal papers are received into evidence.

19 **(Board Exhibit Number 1(a) through 1(f) Received into Evidence)**

20 HEARING OFFICER SAVELAND: Are there any motions to
21 intervene in these proceedings to be submitted to the Hearing
22 Officer for ruling by the Regional Director at this time? Let
23 the record reflect there is no answer.

24 The -- are the parties aware of any other employers or
25 labor organizations that have an interest in this proceeding?

1 The Hearing Officer hears no response.

2 In discussions off the record, the parties discussed that
3 there's a pending -- there are two pending motions to revoke
4 two subpoenas. By discussion, the parties have decided -- or I
5 have decided as the Hearing Officer, that I am going to defer
6 making any ruling on that motion -- on those motions at this
7 time and we will see, if at the end of hearing, I need to make
8 a ruling.

9 The parties to this proceeding have executed a document
10 which is marked as Board Exhibit 2.

11 **(Board Exhibit Number 2 Marked for Identification)**

12 HEARING OFFICER SAVELAND: That Exhibit contains a series
13 of stipulations, including among other items, that the
14 Petitioner is a labor organization within the meaning of the
15 Act. There is no contract bar, and the Employer meets the
16 jurisdictional standards of the Board. Are there any
17 objections to the receipt of Board Exhibit 2? For the
18 Petitioner?

19 MR. MANZOLILLO: No objection.

20 HEARING OFFICER SAVELAND: For the Employer?

21 MR. SCULLY: Patrick Scully for the Employer, no
22 objection.

23 HEARING OFFICER SAVELAND: Okay. So the two -- I'm sorry,
24 Board Exhibit 2 is received in evidence.

25 **(Board Exhibit Number 2 Received into Evidence)**



1 HEARING OFFICER SAVELAND: Do the parties stipulate that
2 there is no collective bargaining history between the parties
3 in this petitioned-for unit? Employer?

4 MR. SCULLY: Patrick Scully for the Employer. We so
5 stipulate.

6 HEARING OFFICER SAVELAND: Union -- the Petitioner?

7 MR. MANZOLILLO: Brad Manzolillo for the Petitioner. We
8 also stipulate.

9 HEARING OFFICER SAVELAND: Okay. Are there any petitions
10 pending in other regional offices involving other facilities of
11 the Employer?

12 MR. SCULLY: Patrick Scully for the Employer. No, Madam
13 Hearing Officer.

14 MR. MANZOLILLO: Brad Manzolillo for the Petitioner. Not
15 to my knowledge, no.

16 HEARING OFFICER SAVELAND: Okay. So because we have a new
17 issue here and there are no litigable issues here in the
18 hearing, I'm going to be reading this portion of the Hearing
19 Officer's script regarding the end of the hearing, but really,
20 it's going to be the hearing.

21 The parties are reminded that prior to the close of the
22 hearing, the Hearing Officer will solicit the parties'
23 positions on the types, dates, times, and locations of the
24 election and the eligibility period, including most recent
25 payroll ending date and any applicable eligibility formulas,

1 but will not permit litigation of those issues. The Hearing
2 Officer will also inquire as to the need of foreign language
3 ballots and notices of election. Please have the relevant
4 information with respect to these issues available at that
5 time.

6 The parties have been advised that the hearing will
7 continue from day to day as necessary until completed unless
8 the Regional Director concludes that extraordinary
9 circumstances warrant otherwise.

10 The parties are also advised that upon request, they shall
11 be entitled to a reasonable period at the close of hearing for
12 oral arguments. Post-hearing briefs shall be filed only upon
13 special permission of the Regional Director. In addition, a
14 party may offer into evidence a brief memo of points and
15 authorities, case citations, or other legal arguments during
16 the course of the hearing and before the hearing closes.

17 The Employer has completed, and I have marked for
18 identification as Board Exhibit 3, a statement of position in
19 this matter.

20 **(Board Exhibit Number 3 Marked for Identification)**

21 HEARING OFFICER SAVELAND: Are there any objections to
22 the receipt of this exhibit into the record? From the
23 Petitioner?

24 MR. MANZOLILLO: No, Your Honor. This is Mr. Manzolillo.

25 HEARING OFFICER SAVELAND: Okay.



1 MR. SCULLY: No objection.

2 HEARING OFFICER SAVELAND: Okay. Hearing no objection,
3 Board Exhibit 3 is received.

4 **(Board Exhibit Number 3 Received into Evidence)**

5 HEARING OFFICER SAVELAND: Give me a moment while I send
6 this to the court reporter.

7 All right. The parties have agreed that there are no
8 questions concerning representation to be litigated at this
9 hearing. The parties agree that the sole issue presented in
10 this matter are the details of the election -- manner and
11 details of election in this matter.

12 Okay. So first, we will start with -- actually, can we go
13 off the record for a moment?

14 MR. MANZOLILLO: Yes, Your Honor. We're fine.

15 HEARING OFFICER SAVELAND: Per the court reporter?

16 THE COURT REPORTER: We're off the record.

17 (Off the record at 10:25 a.m.)

18 THE COURT REPORTER: We are back on the record.

19 HEARING OFFICER SAVELAND: Okay. This is the Hearing
20 Officer again. So now, we're going to explore election details
21 for when the election is directed. Does any party whose
22 entitled to receive the voter list wish to waive the 10-day or
23 any portion of the 10-day requirement? Petitioner?

24 MR. MANZOLILLO: At this time, I would not specifically,
25 but if logistics works out to allow that in the middle of our



1 situation, we might.

2 HEARING OFFICER SAVELAND: Okay. So at this time, you are
3 not waiving any of your 10 days?

4 MR. MANZOLILLO: No.

5 HEARING OFFICER SAVELAND: Okay. Generally, the
6 presumption is for a manual election. I'll have the Petitioner
7 go first.

8 So Mr. Manzolillo, what is the Petitioner's position
9 concerning dates, times, and locations of elections and the
10 eligibility period including the most recent payroll ending
11 date, any applicable eligibility formulas proposed by the
12 parties?

13 MR. MANZOLILLO: Your Honor, if I can, I'm going to read
14 an opening statement about what we've proposed mail ballots
15 election and the reason why we are seeking a mail ballot
16 election.

17 HEARING OFFICER SAVELAND: Okay. Go ahead.

18 MR. MAZOLILLO: Okay. The Union continues to request a
19 mail ballot election for the election in case number
20 27-RC-258742, Atlas Pacific Engineering Corporation. Despite
21 the Employer's claims otherwise, a mail ballot of election is
22 the safest and surest way in this case to ensure a fair
23 election where employees are not denied their right to vote.
24 The overriding objection in considering a mail ballot election
25 procedure is expanded and is franchised so that those employees

1 who are limited with no opportunity to cast a ballot in a
2 manual election, will be able to vote in a mail ballot
3 election.

4 The Board has delegated to the Regional Director's
5 discretion in determining whether an election should be
6 conduction by a manual ballot or mail ballot. The National Van
7 Lines, 120 NLRB 1343 (1958), where an employer challenged the
8 Regional Director's direction of a mail ballot election. The
9 Board stated circumstances surrounding working conditions of
10 various industries requiring adaptation of established election
11 standards to those peculiar conditions.

12 Because of these circumstances, the Board has invested
13 Regional Directors with broad discretion in determining the
14 method by which the election shall be conducted. Only where it
15 is affirmatively shown that the Regional Director is poorly
16 used the discretion afforded him to conduct representative
17 elections while the Board nullify the elections and describe
18 what the elections stand; supra 1346.

19 Despite this broad discretion, the Board has found that a
20 Regional Director abused their discretion, and failed to direct
21 a mail ballot election when circumstances have called for it.
22 In Shepard Convention Services, 314 NRLB 689 (1994), the Board
23 found the Regional Director abuses their discretion by
24 directing a manual election in circumstances where it will not
25 afford full enfranchisement to employees in the appropriate

1 unit. This is a clear case where the Regional Director should
2 direct a mail ballot election for several reasons.

3 First, and most importantly, we are in the midst of a
4 public health crisis of a level not seen in this country in 100
5 years. Centers for Disease Control have advised that for
6 public safety, including the safety of employees and their
7 families, the businesses that remain open should -- and I'm
8 quoting directly from the CDC website, "actively encourage sick
9 employees to stay at home."

10 "Employees who have -- this includes employees who
11 have symptoms, fever, cough, shortness of breath
12 should notify their supervisor and stay home. Sick
13 employees should follow CDC recommended steps.
14 Employees should not return to work until the
15 criteria to discontinue home isolation are met in
16 consultation with health care providers and state and
17 local health departments. Employees who are well,
18 but who do have a sick family member home with
19 COVID-19, should notify their supervisor and follow
20 CDC recommended precautions including remaining in
21 quarantine.

22 "Businesses are also directed to identify where and
23 how workers might be exposed to COVID-19 at work.
24 This includes being aware that some employees may be
25 at higher risk for serious illness, such as older

1 adults and those with chronic medical conditions.
2 Consider minimizing face-to-face contact between
3 these employees or assign work tasks that allow them
4 to maintain a distance of six feet from other
5 workers, customers and visitors, or to telework if
6 possible.

7 "The employers are further directed to separate sick
8 employees. The employees who appear to have
9 symptoms, fever, cough, or shortness of breath upon
10 arrival or who become during the day should
11 immediately be separated from other employees,
12 customers and visitors, and sent home.

13 "If an employee is confirmed to have a COVID-19
14 infection, an employer should inform fellow employees
15 of a possible exposure to COVID-19 in the workplace,
16 but maintain confidentiality as required by the HHS.
17 In short, if any employee shows any sign of
18 respiratory illness, the employer should strongly
19 encourage, if not require, them to stay home until
20 they are well clear of their illness. Particular
21 attention is to be paid to older employees and
22 employees with underlying health conditions."

23 On March 26th, the government of Colorado similarly issued
24 at stay-at-home order for all individuals except for the
25 performance of essential tasks or the performance of essential

1 work. This order is very likely to be extended because the
2 proposed election date that Colorado is -- because the expected
3 peak in Colorado is expected to be in May.

4 As the virus surges throughout the country, there is no
5 way to anticipate who might show such signs or have members of
6 their household show such signs, and if the CDC guidelines are
7 being followed, not be allowed on their work site. There is no
8 way to anticipate how many employees at a particular work site
9 may show symptoms or when they may show them. The only way to
10 ensure employees will an opportunity to vote is for a mail
11 ballot election to occur.

12 And similarly, what happens if an older employee -- if
13 somebody shows illness at the work site, what happens to older
14 employees or those with underlying conditions? Secondly, in
15 this environment, it is simply irresponsible to conduct a
16 manual election at this time.

17 A manual election not only requires that employees leave
18 their work areas and gather in or near the polling place, but
19 there must also be agents from all parties to ensure fairness
20 of the election process. There must also be agents from all
21 parties present for the pre-election conference, the closing
22 and opening of each poll session, and the vote count. This
23 means that the Union, and the Board officials, and any outside
24 Employer representative, maybe travel to another community to
25 the polling site they're expected, and from the opening and

1 closing of polls, and the count, and then to travel back to
2 their community.

3 The Board must have adequate personnel to set up the
4 election, conduct the conferences, the count, and of course, to
5 run the election itself. The Union has the right to have
6 representatives of its choosing, including attorneys, present
7 despite the fact that there may be travel restrictions.

8 For example, I live in PA, and if I were assigned to be
9 one of the representatives for the election, I would have to
10 travel cross-country. This would normally not be a big issue
11 for me, but under these circumstances, such travel and
12 cross-mingling of widespread communities should be limited to
13 only absolutely necessary situations.

14 Would representatives and Board agents have their
15 temperatures checked before being allowed in the polling area?
16 What if someone had a temperature when they arrived or at some
17 point during the day when they were supposed to be at the
18 polling area, such as for the count?

19 During a manual election, in addition to the voters, there
20 need to be observers for both parties and Board agents to
21 conduct the elections. Under normal circumstances, the
22 observers are located right near the Board agent that handles
23 the voter list to assure they are talking about checking off
24 the correct person.

25 It is unclear how this could safely be achieved in these

1 conditions. We are told by employees at the training room in
2 the fabrication building where we understand that Employer
3 proposed the election be held is not that large. Based on the
4 employee list we received, we might be the dealing with some
5 challenged ballots. Granted, probably a limited number, but
6 nonetheless some challenged ballots.

7 How would any challenged ballots be handled? Who would
8 put the ballots in an envelope and sign them? How would the
9 ballots be exchanged and filled out? Would pens need to be
10 exchanged? Would ballots be handled -- handed to employees?

11 Would the Board agent change gloves after every voter,
12 sanitize their hands after ever vote? How about the voting
13 booth and ballot box, would parties be allowed to inspect them?
14 Would they be sanitized after every person voted? Where would
15 everything be located? How would a count occur while keeping
16 social distance and meeting other CDC guidelines? This would
17 be a logistical nightmare.

18 Finally, while the Employer claims that it would take
19 substantial measure to ensure social distance and other CDC
20 recommended measures during a manual election, we've received
21 reports from multiple employees who've expressed concerns about
22 this. We have been informed by multiple employees that they
23 have not been provided face masks at work up to date. They can
24 only get nitrile gloves if they go to a specific manager's
25 office for them. And they have not received adequate, if any,

1 hand or other sanitizer. At least, this is what we've be
2 reported to date.

3 We have also been informed that several employees have
4 gone to management and complained that one of their coworkers
5 has been showing active signs of respiratory illness for more
6 than a week in the machine shop with the largest -- where a
7 large number of employees work. The sick employee has
8 reportedly been coughing and wheezing. Employees have asked
9 management if their sick coworker could be separated or
10 preferably, be sent home until they are better. We are told
11 management's response is they could not be sent home because of
12 lack of PTO.

13 We have also been told by employees, by multiple
14 employees, that the Employer has hired an outside labor
15 consultant from California who has travelled to the work site
16 and has held meetings in the same training room or one very
17 near where the election would be conducted. We have been
18 informed that despite the CDC guidelines on the gatherings of
19 10 or fewer people, the Employer has been holding two captive
20 audience meetings each day of the week, and at least up until
21 the last couple days there have been as many as 12 or 13
22 employees in attendance, in addition to the labor consultant
23 and any management personnel. If these reports are correct, or
24 even some of them are correct, how are we to trust that the
25 Employer can incur safe conditions for a manual election?

1 Beyond these issues, the Employer's primary, supervisory,
2 and managerial offices are located right across from the
3 corner of the fabrication building where the entrance to the
4 training room is. And the vast majority of the employees
5 would have to leave their work area and walk right by those
6 offices to get to the voting area. Whether that be through a
7 hallway where the offices are actually, physically located, or
8 just outside of them -- the long windows outside of those
9 offices.

10 The Employer's plan does not account for weather
11 conditions when employees walk outside or if they need to be
12 outside the building in the voting area, since they would need
13 to be so spread out. Again, I have not had an opportunity to
14 inspect this site, so I can't, you know, speak specifically to
15 any limitations that might be there.

16 So in contrast to all of this, a mail ballot could be
17 prepared by one or two Board agents following the CDC
18 guidelines, and then sent out in the mail, returned, and the
19 parties could be connected via video for the -- you know, a
20 video call or anything of that nature for a count. There would
21 be no cumbersome challenge ballot process. The challenge
22 ballots would simply be returned and kept separate until they
23 are resolved.

24 As described below, the Union has not engaged in home
25 visits with any of the employees since mid March --



1 MR. SCULLY: That's not true.

2 MR. MANZOLILLO: -- and --

3 MR. SCULLY: That just is simply not true. That's not
4 true.

5 MR. MANZOLILLO: You'll have your opportunity to -- you'll
6 have your opportunity to rebut my statement --

7 HEARING OFFICER SAVELAND: Just a minute, just a minute.

8 MR. MANZOLILLO: -- and I'll afford you the same --

9 HEARING OFFICER SAVELAND: Please, everybody, stop
10 talking. Okay?

11 For the Employer, just go ahead, if you don't mind, and
12 just keep notes about the things that you're going to
13 specifically rebut that he said during his -- during his
14 argument. That way we can -- we can keep the voices separate.
15 So just -- you'll get your chance, Mr. Scully, to fully
16 respond to anything that you want to say you believe is untrue.
17 Okay?

18 So for the Petitioner, proceed.

19 MR. MANZOLILLO: Okay. As described below, the Union has
20 not engaged in home visits of any of the employees since mid
21 March or about a week before the home visit -- the governor's
22 stay-at-home order went out. So there would be no in-person
23 contact at employees' homes while the ballots were out during a
24 mail ballot election.

25 This process is so much simpler and safer for everyone



1 involved. It is difficult to see why the Employer is also not
2 supporting it.

3 While not -- while we don't feel relevant -- directly
4 relevant to the question of whether a mail ballot election
5 should be directed, the Union also wishes to respond to
6 misinformation purported by the Employer in its position
7 statement.

8 While it's true the Union did engage in a limited number
9 of house calls in earlier March, once it became clear in-person
10 contact should be limited due to the virus, the union
11 organizers discontinued this practice on or around March 19th.
12 Since then, the Union has communicated via phone with
13 employees.

14 The Union has conducted a couple of small meetings with
15 employees at its hall since then, but they have been limited to
16 fewer than ten individuals and chairs have been spaced eight
17 feet apart while sanitizer and gloves have been made readily
18 available.

19 I'm going to now send out the Union's exhibits. I
20 attached all three because they're related to the union hall.

21 Hold on one second.

22 So I have three exhibits that have just been sent out.
23 Union Exhibit 1 is a -- shows a picture of the union hall room
24 where these couple of meetings have been held. As you can see,
25 the -- if you look at Union Exhibit 1, the chairs are spread

1 apart eight feet in any direction.

2 MR. SCULLY: Pardon me. I haven't received the --

3 HEARING OFFICER SAVELAND: Yeah. Mr. --

4 MR. SCULLY: I do not have copy of the --

5 HEARING OFFICER SAVELAND: Yeah. Mr. --

6 MR. SCULLY: Pardon me. I --

7 MR. MANZOLILLO: Did it not go through? Did it not go
8 through?

9 MR. SCULLY: It hasn't come through.

10 HEARING OFFICER SAVELAND: I haven't received them either.

11 MR. SCULLY: Just one second here. Yeah.

12 HEARING OFFICER SAVELAND: Let's pause until all the
13 parties have received the exhibits.

14 I just received one.

15 MR. SCULLY: Okay. I have them now.

16 MR. MANZOLILLO: Okay. You have them now. Okay.

17 If you guys want to look and open them, I'm speaking to
18 Union Exhibit 1 right now. And that's the picture of the room.
19 As you can see, the chairs have been put eight feet apart in
20 any direction. And you can see sanitizer available.

21 Picture 2 is just the notice -- or Exhibit 2, Union
22 Exhibit 2 is just a notice of ten or fewer people being allowed
23 in the union hall. And the Union has not been open for any
24 other meetings since the governor's order other than these
25 couple of meetings. I think there's been two since they've had

1 the -- since the governor's order went out.

2 Despite -- and then you can see that -- in Union
3 Exhibit 3, the notice of the union hall being closed for
4 business.

5 Despite the Employer's claims, the Union has made every
6 effort to abide by CDC guidelines. Supportive employees have
7 communicated and shared information with other employees, and
8 therefore the union organizers have not had to engage in
9 face-to-face communication and solicitation since the
10 governor's guidelines went out -- or order went out. The union
11 organizers and staff have had no in-person communication other
12 than the small meetings conducted under the CDC guidelines at
13 the hall.

14 The Union was in a difficult position in this case. The
15 employees had contacted us and expressed an interest in being
16 represented well before there was any clear virus -- you know,
17 clear -- how serious this virus situation was. And then in the
18 late stages of the campaign, when the Employer was aware of the
19 campaign, the level of the pandemic became clear even in
20 Colorado. The Union was left with a choice of putting a
21 campaign on hold despite extensive employee support or to file
22 for potentially an unsafe manual election.

23 Instead, the Union chose to file for a mail ballot
24 election, which in this case, in this environment, is the only
25 way to allow employees to exercise their rights in a



1 representation election in a timely and safe manner. The
2 Union, therefore, reiterates its request that the Regional
3 Director issue a direction for a mail ballot election.

4 We would propose dates either beginning on April 26
5 through -- for a two-week period or from May 3rd -- May 4th for
6 a two-week period. I'm sorry. So April 27th through May 11th
7 or -- if I have my dates correct -- on a Monday through -- for
8 two weeks through the following Monday, or on May 4th through
9 May 18th.

10 HEARING OFFICER SAVELAND: Okay.

11 MR. MANZOLILLO: We don't think any -- I mean, obviously
12 if there's any issue about the on-call or part-time employees,
13 you know, we're fine with the Davison-Paxon formula. But we
14 don't anticipate any issues like that.

15 HEARING OFFICER SAVELAND: Okay. So are you offering
16 those exhibits as --

17 MR. MANZOLILLO: Yes. So we move for their admission. We
18 move for the admission. So --

19 HEARING OFFICER SAVELAND: Okay. And then, Employer,
20 what's your position on the -- on Union Exhibits 1, 2, and 3?

21 MR. SCULLY: The Employer has no objection.

22 HEARING OFFICER SAVELAND: Okay. So then I will allow
23 them into the record. Let me forward this to the court
24 reporter.

25 **(Union Exhibits Number 1 through 3 Received into Evidence)**

1 HEARING OFFICER SAVELAND: Okay. And then for purposes of
2 this hearing, the Director just wanted me to let you know that
3 we are -- well, you know, if there's no objection, we will
4 admit these exhibits into the record. But they're in for a
5 limited purpose in documentary support for your positions on
6 the conduct of the election. So they're not -- it's not quite
7 the same as is -- as it is that you get in a normal litigable
8 issue hearing. But she will consider them and give them the
9 weight that is appropriate in her decision.

10 Okay. So did -- Mr. Manzolillo, did you have any
11 additional statement that you wanted to make, or shall we move
12 on to the Employer?

13 MR. MANZOLILLO: No, I understood on the exhibits. And
14 nothing further from the Union at this time.

15 HEARING OFFICER SAVELAND: Okay. And now for the
16 Employer?

17 MR. SCULLY: Thank you, Madam Hearing Officer. Patrick
18 Scully for the Employer, Atlas Pacific.

19 I'd like to begin by addressing some of the statements
20 that counsel for the Petitioner made on the record. And first
21 and foremost, what we understand this hearing to be is that it
22 is a no issue hearing. This premise that counsel would make
23 reference to statements of reports are -- we just think that
24 they should be given no consideration whatsoever in the course
25 of the Regional Director's decision, nor should the reader of

1 the record make any note of them.

2 When the Regional Director decided to have a no-issue
3 hearing, that eliminated the possibility for testimonial
4 evidence. Obviously neither counsel can circumvent that by
5 making reference to reports. And I think that that's a good
6 jumping off point for the argument in this case because, in
7 truth, Petitioner argues primarily that a mail ballot is
8 inherently safer. Petitioner makes this argument having no
9 degree in epidemiology, not being a doctor, having no expert
10 opinion on the matter.

11 And a mail ballot election in the NLRB world is something
12 quite unique. A mail ballot election involves the handling of
13 ballots, it involves the count, it involves the ability for the
14 parties to be at the count in a mail ballot election. It also
15 involves a one-sided restriction. The one-sided restriction
16 is, is that it's per se objectionable conduct under
17 General Shoe for an employer to do home visits.

18 Where as recently as last year, in 2019, the Board in
19 Grill Concepts -- which is a case reported. It's case number
20 31-RC-209589, an unpublished Board decision, June 28, 2019. In
21 that decision, the Board talked about the fact that during a
22 mail ballot election a union is free to conduct home visits,
23 which this Union has already admitted to doing in the past.
24 And notwithstanding counsel's representation to the contrary,
25 we believe those are ongoing.

1 And to take issue with one of the things counsel said in
2 his statement, I've demonstrated in the statement -- the sworn
3 statement, that is, of the plant manager, Mr. Means, some of
4 the individuals who are on the phone for Petitioner were
5 present at the job site after the issuance of the governor's
6 order, put their hands inside the cab of trucks and cars to
7 hand-deliver handouts to employees. Moreover, the Union
8 meeting admittedly violates -- violated the governor's
9 stay-at-home order. So we're dealing with a situation where
10 people can make reports one way or the other.

11 But the job of the Regional Director is to determine the
12 type of election that will effectuate the franchise. And if
13 the consideration is safety, the controlled environment of an
14 in-person manual ballot, as presented by Atlas Pacific, is the
15 only option for a safely conducted election, because in the
16 mail ballot world at the NLRB, there are no rules and no
17 restrictions on the conduct of the Petitioner during the course
18 of a mail ballot.

19 And to the extent that anyone doubts that or thinks that
20 that's an opinion of an employer counsel, all you need to do is
21 to read the Grill Concepts decision, and there's a thorough
22 discussion of the fact that unions routinely visit voters
23 during the mail ballot period and have contact with them.

24 Not to mention the mail ballots themselves; we don't for
25 sure how this particular virus is transmitted, we don't know

1 how long it lives on surfaces, we don't know any of those
2 facts. What we do know -- and we appreciate the fact that
3 counsel for the Petitioner said this -- is that the CDC has
4 issued particular guidelines. And those particular guidelines
5 speak to social distancing, they speak to sanitizing, they
6 speak to taking precautions in the workplace. All of the
7 things that are laid out in our proffer to the Region as to a
8 safe in-person mail ballot election.

9 And the presumption is in-person voting effectuates the
10 franchise. There is no evidence in the record and there is no
11 report of any sick employees on the voter list. There's no one
12 who is going to disenfranchised by an April 29th in-person
13 election.

14 As the Board explained, obviously in San Diego Gas &
15 Electric, that presumption is because people come to work --
16 and this business, Madam Hearing Officer, as obviously
17 demonstrated by Employer Exhibit 1, is an essential critical
18 business that is required to keep operating during this time
19 frame. And has specific permission to do so. And as such,
20 the Employer is taking precautions to permit the social
21 distancing and promote the social distancing of employees by
22 separating shifts, by keeping social distance in the workplace,
23 and by making that part of how they conduct business, because
24 this business must remain in business as part of a food
25 supply.

1 So Employer Exhibit 1 again is the designation of Atlas
2 Pacific as a critical business. Obviously pursuant to that
3 order, the Employer has continued to operate and to have all
4 employees in the petitioned for unit present at the workplace,
5 which is the number one reason why an in-person manual ballot
6 at the workplace most effectuates the franchise.

7 And I'd move for admission of Employer Exhibit 1.

8 MR. MANZOLILLO: And Employer Exhibit 1, is that
9 Mr. Means' affidavit?

10 HEARING OFFICER SAVELAND: Mr. Manzolillo, do you have an
11 objection to Exhibit 1?

12 MR. MANZOLILLO: No. Other than the -- go ahead.

13 MR. SCULLY: Mr. Manzolillo, just -- I've sent it to you.
14 I want to make sure you're looking at the same thing. It's
15 marked Employer Exhibit 1, and it's the designation of critical
16 business.

17 MR. MANZOLILLO: Okay. Hold on. Let me open that. I
18 haven't seen it.

19 MR. SCULLY: Right. I'm sorry.

20 MR. MANZOLILLO: No objection.

21 MR. SCULLY: Thank you so much, Petitioner.

22 HEARING OFFICER SAVELAND: Okay. If there is no
23 objection, Exhibit -- Employer's Exhibit 1 will be admitted
24 into the record.

25 **(Employer Exhibit Number 1 Received into Evidence)**



1 MR. SCULLY: Thank you, Madam Hearing Officer.

2 To continue -- and just for your reference, we're going to
3 be looking at Employer Exhibits 2 and 3.

4 In addition to the statements that have been set forth in
5 the position statement, the Employer specifically has taken,
6 again, the social distancing measures by restricting visitors,
7 requiring visitors to both adhere to the social distancing as
8 recommended by the CDC, and also make a declaration regarding
9 their health. That same -- those same requirements in
10 Employer's Exhibits 2 and 3 would apply in the event at the
11 election on April 29th.

12 So to the extent that Mr. Manzolillo in his opening
13 statement or closing statement, as he were, references
14 concerns about the attendants at the count on site or for the
15 pre-election conferences, those matters would be subject to
16 the social distancing memo and as well as the visitor
17 declaration.

18 And with that, we ask for admission of Employer's 2 and 3.

19 HEARING OFFICER SAVELAND: Okay. Has the Petitioner
20 reviewed those?

21 MR. MANZOLILLO: Yes. I mean, in the same light that the
22 Employer did not object to our photos, we might have some
23 questions about the relevance or how they would apply in the
24 situation -- in an actual situation where we were there with
25 people being denied, being held -- you know, representatives

1 being denied -- being allowed on the site, what would happen in
2 that case, as I raised in my statement. I don't -- I'm not
3 going to object for them being let in for whatever weight
4 they're --

5 HEARING OFFICER SAVELAND: Okay. Yeah. And just to be
6 clear, we'll admit Employer's Exhibits 2 and 3. And just the
7 same caveat that I gave before; all exhibits that are being
8 admitted into the record will be given the appropriate weight
9 by the Director when she makes her decision.

10 And so they're admitted into the record.

11 **(Employer Exhibit Number 2 and 3 Received into Evidence)**

12 HEARING OFFICER SAVELAND: Proceed, Employer.

13 MR. SCULLY: Thank you, Madam Hearing Officer.

14 So as indicated earlier, and as I've emphasized thus far,
15 there is no evidence nor has there been any evidence offered in
16 the exhibits presented by Petitioner that a mail ballot, and by
17 that I mean an NLRB conducted mail ballot election, in view of
18 the Grill Concepts rule and the one-sided rule of permitting a
19 union side visits, as well as the possible transmission of the
20 virus on materials as well as the personal contact during the
21 count, there is no evidence that it is a safer process.

22 And we do not contend that it would be safe to conduct a
23 normal manual ballot election. That is not our contention in
24 this case. What we are contending and what we are presenting
25 for the Regional Director's consideration is a strictly

1 controlled election. First and foremost, as we indicated in
2 our position statement, we are -- and we are flexible on this,
3 Madam Hearing Officer -- we are offering two three-hour blocks
4 to permit ample time for spacing in the course of in-person
5 voting. We are, again, flexible on that time frame, and we are
6 willing to expand it in accordance with any input from the
7 Petitioner.

8 But the point of that is to make social distancing part of
9 the election process in an in-person ballot, and have it be a
10 matter of agreement between the parties, much like you might
11 have an agreement with respect to special accommodations being
12 required for voting.

13 So to be clear, we are proposing a controlled in-person
14 ballot, not a free-for-all, not a typical in-person ballot, and
15 certainly not just a mail ballot; just let it happen. We're
16 saying let's control the process, let's make it safe as parties
17 who are sophisticated enough to do so.

18 So with that in mind, what we attempted to do in the
19 presentation of our exhibits further was to demonstrate how we
20 would control this by agreement with the Region and the
21 Petitioner. Of course, because we recognize that the
22 Petitioner wants everyone to have an opportunity to vote just
23 as the Employer does. And we think you can do this safely
24 applying social distancing.

25 What we said clearly in the statement that was provided,

1 the position statement, we will be providing masks, gloves,
2 and hand sanitizer to all participants, including the Board
3 agent, in this process. And with respect to the voting room
4 itself, which is the training room, as we indicate in our
5 position statement, it is almost 800 square feet, which is a
6 large meeting room. And as the Union indicated in its
7 exhibits, they certainly believe that social distancing in a
8 room is a safe way to proceed. We tend to agree with that.

9 So we'd like the parties to take a look at Employer
10 Exhibit 4, which is how we would propose that the parties agree
11 to control the voting room and stage the Board agent and the
12 two observers; providing six feet of space with markings on the
13 floor to indicate a proper social distance, a table on which to
14 place documents, and obviously the -- we would recommend
15 certainly that all parties have their -- there are marking
16 devices to the extent that anything needs to be marked. So we
17 think with the proper application of this social distancing a
18 voter could come in, present his or her identification, pick
19 up a ballot from that table, and then proceed to the ballot
20 area.

21 If you look at Employer Exhibit 5, we have a roughed-out
22 proposed location for that balloting area, which would be
23 obviously quite a ways away. There's also markings on the
24 floor on Employer Exhibit 5 to socially distance any humans
25 that happen to be in that area.



1 So as you can see, if we are dealing with one voter at a
2 time, if we, pursuant to our position statement, call only five
3 voters at a time over the PA, and by that meaning that they're
4 able to vote -- they don't have to vote obviously -- but no
5 more than five, and we can one by one the voters with ample
6 time and have proper social distancing as well as the PPE in
7 place in order for the election to occur, assuming it would
8 occur on April 29th as opposed to being postponed until some
9 later date.

10 So with that --

11 HEARING OFFICER SAVELAND: Let me --

12 MR. SCULLY: -- I would --

13 HEARING OFFICER SAVELAND: Can I --

14 MR. SCULLY: Yes.

15 HEARING OFFICER SAVELAND: Can I ask you a question --

16 MR. SCULLY: Of course.

17 HEARING OFFICER SAVELAND: -- Mr. Scully? I missed what
18 you said as far as the ballots. Did you say they'd be placed
19 down on a table or what -- I didn't quite hear that.

20 MR. SCULLY: So I think that the table that extends on
21 Employer Exhibit 4 from the middle location would be a place
22 where a -- the Board agent could set out a ballot, you know, a
23 safe distance from the Board agent -- obviously, the Board
24 agent would be, you know, wearing gloves and a mask -- and that
25 the employee could approach on the X, take the ballot, and then

1 proceed to the balloting area.

2 HEARING OFFICER SAVELAND: Okay.

3 MR. SCULLY: Which is what we would propose.

4 And again, what we're saying is that we're not inflexible
5 on matters to the extent that Mr. Manzolillo or the Union in
6 general thinks that the distance should be different or a
7 particular way. You know, we want a safe election, we want
8 people to vote in person, and we think the way to do it is to
9 control it.

10 HEARING OFFICER SAVELAND: Right.

11 MR. SCULLY: The way to do is not to simply just say, oh,
12 okay, let them have a mail ballot, and then everyone -- all
13 bets are off, anyone can do whatever they want.

14 HEARING OFFICER SAVELAND: Right. So -- no. I'm just
15 talking logistics here.

16 And so the ballot would be out of my, or whoever runs the
17 election, out of the Board agent's hand. But you're saying it
18 would be okay because there would be observers there to observe
19 that nobody else took the ballot?

20 MR. SCULLY: Right. That --

21 HEARING OFFICER SAVELAND: Okay.

22 MR. SCULLY: -- she would place the ballots out on the
23 table with a gloved hand, essentially --

24 HEARING OFFICER SAVELAND: Okay.

25 MR. SCULLY: -- that the voter would come and get it with

1 also a gloved hand, and would mark it, return, and put it in
2 the ballot box.

3 HEARING OFFICER SAVELAND: Okay. And one other question
4 about the location. So you have this training room that we
5 have pictures of. In terms of the location of the room in
6 reference to any, you know, managerial offices or supervisory
7 offices, can you kind of tell me how that -- how they are in
8 relation to each other?

9 MR. SCULLY: It's not proximate to any managerial offices
10 or any --

11 HEARING OFFICER SAVELAND: Okay.

12 MR. SCULLY: -- supervisory offices. And obviously we
13 would observe -- frankly, the managerial office is in an
14 entirely different building.

15 HEARING OFFICER SAVELAND: Okay.

16 MR. SCULLY: But we would observe certainly any and all
17 precautions to close off any offices or -- you know, much in
18 the same way in a typical election, the Board agent -- if the
19 Board agent had any concerns about laboratory conditions, we
20 would -- but as far as its proximity, there are no supervisory
21 offices in the immediate proximity of this training room.

22 HEARING OFFICER SAVELAND: Okay. You know, that's what I'm
23 kind of getting at, is that since we're doing this not the day
24 of -- you know, I've been in situations where we, you know,
25 have to change --

1 MR. SCULLY: Yes.

2 HEARING OFFICER SAVELAND: -- the location.

3 MR. SCULLY: I understand.

4 HEARING OFFICER SAVELAND: So I just wanted to make sure
5 that the location that we're discussing is, you know,
6 appropriately -- you know, because this wouldn't be a situation
7 where we could at the last minute change rooms.

8 MR. SCULLY: Understood. Understood.

9 HEARING OFFICER SAVELAND: So that's why I was asking.
10 But those are my two questions at the moment. So go
11 ahead. You can keep going.

12 MR. SCULLY: Thank you.

13 So moving along to sort of as the counterpart to the
14 Employer -- to the Petitioner's exhibit of the union hall, we
15 have Employer Exhibit 6, which is an example of the floor
16 marked for social distance meeting, which is observed in
17 meetings that are currently held in this training room. As the
18 Employer deems necessary to have meetings, this is how that
19 room is staged, showing, you know, obviously the size of the
20 room but also how that social distancing is observed.

21 I want to move on. I don't want to ruin everyone's day
22 and keep them all day here. But let's look at Employer's
23 Exhibit 7. This is the hallway that approaches that training
24 room. And the Xs are the marks that we would ask that voters
25 adhere to, to remain socially distant as the voting proceeds.

1 Obviously, much in the way the super markets are currently
2 doing it. Hopefully, we'll do it better than the super
3 markets, frankly. But you know, again, a controlled
4 environment. And this is the hallway that proceeds to the
5 training room, Employer's Exhibit 7.

6 Employer Exhibit 8 is the door of the training room which,
7 as you can see, has the notice about the social distancing that
8 is required of maintaining the six-foot distance between the
9 employees. And in this case, obviously the voters.

10 If we look together at Employer Exhibit 9, it depicts the
11 exit from the room, which again there's space between the exit
12 pathway and the socially distance queue for voting. So we
13 would -- you know, we would have to agree that that's an
14 appropriate distancing as well ahead of time. And that again
15 is our design to address these things ahead of time.

16 With respect to those exhibits being the -- of the room,
17 the entrance and the exit, that is how we would propose to
18 stage and control the environment in a manual ballot.

19 And with that, we would ask for admission of Employer's
20 Exhibits 4, 5, 6, 7, 8, and 9.

21 HEARING OFFICER SAVELAND: Petitioner, any objection to
22 the pictures?

23 MR. MANZOLILLO: With the same limitations that I made
24 earlier, no, no objection.

25 HEARING OFFICER SAVELAND: Okay. Let me -- give me a

1 moment so I can send those to --

2 I'm just going to -- I'll follow up with emailing these in
3 just a minute. But you can keep going.

4 And they're admitted into the record since there's no
5 objection.

6 **(Employer Exhibits Number 4 through 9 Received into Evidence)**

7 MR. SCULLY: Thank you, Madam Hearing Officer.

8 We did want to take a few minutes to address some of the
9 representations made by counsel with respect to the Union's
10 efforts.

11 And again, what we think is relevant to this case is the
12 fact that a mail ballot election is not one in which the Board
13 seems to control the activities of the Petitioner, nor does the
14 mail ballot eliminate the physical presence during the count.
15 What the mail ballot does is, it's designed under the case law
16 and in view of the presumption -- and I would point with cases
17 like National Van Lines cited by the Petitioner, they are
18 talking about scattered workforces or workforces that are not
19 present. This is a workforce that is present in the workplace.
20 It is a workforce that report to the same location every day to
21 work. Those other cases concern scattered workforces, which is
22 very hard to argue that the -- that a mail ballot isn't
23 appropriate in those circumstances.

24 This case presents the novel -- and I don't mean to be
25 facetious but, you know -- the novel situation of the



1 Corona Virus, and the fact that nobody on this call and nobody
2 who is going to read this record and say for sure exactly how
3 it is transmitted, how long it lasts on paper, how often a
4 union agent may visit a house to give instructions on a mail
5 ballot, which the Board has permitted union agents to do, none
6 of those things and how it could be contracted will be
7 controlled. The only way to control it is to have an agreement
8 with regard to in-person balloting and applying social
9 distancing.

10 And if you look at what the Union has put out into the
11 world with respect to its activities as opposed to the
12 unsubstantiated reports, Employer Exhibit 10 is a union meeting
13 notice for the meeting referenced by counsel for Petitioner.
14 It is a meeting admittedly after Governor Polis' stay-at-home
15 order. It is in violation of that order.

16 It says nothing about social distancing. It gives no
17 advisory in direct contrast to the visitor advisors' advisement
18 that is given to every visitor who comes to Atlas Pacific. It
19 is the declaration that's given to every visitor. None of
20 those things are with this meeting notice. And obviously, as
21 Petitioner said, the meeting was conducted in direct violation
22 of the governor's order.

23 Further, if we look at Employer Exhibit 11, we have a
24 correspondence from the Union to the plant manager that talks
25 about the fact that, "Steelworkers engaged in a representation

1 campaign at your Pueblo facility." Right? It announces the
2 internal organizing committee. But it also says it protects
3 the rights of employees to solicit cards, handing out
4 information. Handing out information. Okay? No mention --
5 you know, no mention of any social distancing.

6 And in fact, in direct contrast to the representations of
7 counsel. And outside the Employer's facility after the
8 governor's order there still were steelworker representatives
9 handing flyers.

10 You know, again, in an uncontrolled environment, without
11 the agreement that social distancing should apply, that is the
12 behavior that happens. That is the risk of exposure. When it
13 is controlled, there's less risk. And that is what we're
14 trying to do by presenting our plan for an election.

15 With that, we would move for admission of Employer's
16 Exhibits 10 and 11.

17 HEARING OFFICER SAVELAND: Petitioner, do you have any
18 objections to these?

19 MR. MANZOLILLO: Certainly not with regard to Exhibit 11,
20 since that came from me. I'm certainly not going to deny it.

21 HEARING OFFICER SAVELAND: Okay.

22 MR. MANZOLILLO: With the -- Union Exhibit 10 -- I mean,
23 Employer's Exhibit 10, the only thing I would -- I may question
24 the relevance concerning we have put on the record that we held
25 two meetings after the governor's order went out. So you know,

1 I mean, I don't see the relevance.

2 And again, in the same effort the Employer gave to, you
3 know, allow exhibits in, for whatever weight they are to be
4 given, we're not going to object.

5 HEARING OFFICER SAVELAND: Okay. So then we will admit
6 them into the record.

7 **(Employer Exhibit Number 10 and 11 Received into Evidence)**

8 MR. SCULLY: Thank you.

9 And so with respect to Employer Exhibit 12, it is the
10 affidavit of Mark Means, the sworn affidavit of the plant
11 manager, regarding the election proposal for a safe, socially
12 distanced election in compliance with CDC guidelines to the
13 fullest extent possible.

14 Again, Mr. Means has gone on the record and given a sworn
15 statement under oath, submitted under penalty of perjury
16 obviously. And it's been previously admitted as Board
17 Exhibit 3. But the reason we submit it now separately is for
18 it to be viewed in the context of these other exhibits where we
19 lay out our plan for a socially distancing election.

20 So I would -- without adding any detail to that, I would
21 ask for admission of Employer Exhibit 12.

22 HEARING OFFICER SAVELAND: Petitioner?

23 MR. MANZOLILLO: Well, the Petitioner would simply note
24 that it has no ability to cross-exam or question Mr. Means
25 about this statement. So in our view, it should hold no more

1 weight than the statement made by Employer counsel in their
2 position statements. But again, we're not going to object
3 beyond that --

4 HEARING OFFICER SAVELAND: Okay. Yeah. I think, you
5 know, the -- like I said, these are all exhibits to your --
6 to -- it's documentary evidence to support your positions, and
7 they'll be given the weight that they deserve, based on how
8 they were presented and all those issues that you just
9 discussed.

10 So we will admit Number 12, I think that is, into
11 evidence.

12 **(Employer Exhibit Number 12 Received into Evidence)**

13 MR. SCULLY: Yes, Madam Hearing Officer. Thank you.

14 So just to sum up, the purpose of these exhibits and the
15 purpose of this statement is again to demonstrate the efforts
16 that the Employer is willing to go. And in fact, indicates
17 that we're willing to go further with respect to providing a
18 safe in-person manual election. And we think that that is the
19 only environment that can be controlled in this particular set
20 of circumstances.

21 And in fact, we don't know so much about COVID-19 and how
22 it's transmitted, and we don't know so much about how it gets
23 transmitted through contact and through packages and other
24 ways.

25 And what we're left with, Madam Hearing Officer, is the



1 law. And the law the Board gives us on the subject of ballot
2 is that there is a presumption that in-person voting is
3 appropriate, and that it is required of any party asking for a
4 mail ballot, whether it be a Petitioner or an employer, to
5 rebut that presumption.

6 And the circumstances where in the case handling manual,
7 in San Diego Gas & Electric and London's Farm Dairy, which is
8 323 NLRB 1057, in Reynolds Wheels, 323 NLRB 1062, in all of
9 those cases the Board has looked at whether the employees were
10 scattered. Because what the Board is focused on is
11 effectuating the franchise.

12 All the employees are present at Atlas Pacific Engineering
13 Company. They come to work. We have designed floating windows
14 so that they can actually attend the vote, if that is their
15 desire. And they're clearly not scattered.

16 What we're left with, in terms of the presumption being
17 rebutted, is speculation on the part of the Petitioner.
18 Speculation about the transmission, speculation about, we don't
19 do home visits. I mean, I stop to wonder, would in fact, any
20 sort of home visit in the course of a mail ballot be a basis to
21 overturn the election? I doubt that Petitioner would stipulate
22 to that. But that's a reasonable question, when you think
23 about the fact that a mail ballot is an uncontrolled
24 environment.

25 In our proposed manual ballot, as it may be flawed, it may

1 need improvement and it may need input from Petitioner, it is
2 certainly an attempt to control the spread of this virus, to
3 provide a safe environment, but most importantly, and most
4 important to the NLRB's mission, effectuate the franchise of
5 every single employee in the petitioned for unit. And that is
6 our job. That is our job as advocates and that is the Board's
7 job.

8 So with that in mind, we would propose that an election be
9 conducted on April 29th in the following time frames: 6 a.m.
10 to 9 a.m., and 2 p.m. to 5 p.m. in the training room that is
11 depicted in the photographs. The last payroll closing period
12 prior to the petition is March 27th. And we hope that in lieu
13 of April 29, what the Regional Director will determine is that
14 a manual ballot must be held.

15 But if the governor's order is extended, or if the
16 Regional Director has concern, that it be held at a later date
17 than April 29th. Not that we throw this situation into the
18 completely uncontrolled circumstances of a mail ballot, which
19 we think is, in fact, a riskier proposition.

20 And with that, we'll close. And we thank you for your
21 attention.

22 HEARING OFFICER SAVELAND: Okay.

23 So Petitioner, do you have any sort of short rebuttal, or
24 are you satisfied?

25 MR. MANZOLILLO: Well, if I could just -- for the most



1 part, I'm just going to be satisfied with our statement and let
2 it stand, but I'll take one minute just to make a couple of
3 brief rebuttal points.

4 First of all, to the extent the Employer focuses on the
5 inability of its supervisors to go out and make house calls
6 during a mail ballot election, and regardless of the Union's,
7 you know, statement that it will not make mail ballots under
8 governor's -- not make house visits under the governor's
9 order -- with mail ballot -- the fact is the Employer isn't
10 being disenfranchised in any way. They'll continue to be able
11 to have small group or the one-and-one meetings even if they
12 can't have large captive meetings of materials (phonetic)
13 during the extent of the mail ballots. So they're not being
14 prevented from speaking to employees every day during the mail
15 ballot period.

16 Secondly, the cases cited by the Employer, the Union
17 doesn't deny that that's the case law. The fact is, those do
18 not consider pandemic conditions like we're in right now. This
19 is an unprecedented public health situation in the country.
20 And that is why that that case law -- because it hasn't had the
21 deal with that -- the last one we had was 1918 to 1920, before
22 the NLRB even existed. They haven't -- their case law hasn't
23 had an opportunity to consider those conditions. And so,
24 again, we say these are unique circumstances that those cases
25 couldn't have contemplated.

1 I would also say that the -- I made my point about
2 Mr. Means already. I think that what we know about the
3 voting -- well, I had mentioned supervisory locale in my
4 statement. What I understand is that there is sort of,
5 L-shaped buildings close together, and the corner where this
6 room is, that building is directly across from the corner of
7 the building where the supervisory offices are.

8 So while they're not immediately proximate, in terms of
9 being in the room right next door, they are -- they do have
10 window-shot directly to who would be going in and out of this
11 building or in line for voting. So that is our level of
12 concern.

13 Now, if there's a way that -- you know, to work around
14 that, you know, then the Employer should go the steps. You
15 know, they can make the case if there is. That is the issue we
16 raise.

17 As noted, if it turns out there is an issue the day of the
18 election and we're able to observe this, there's no ability to
19 make alternative arrangements. Similarly, if Union
20 representatives or Board representatives, for whatever reason,
21 unknowingly or until they arrive or even during the day show --
22 you know, aren't able to meet the CDC guidelines or the
23 Employer's attempt to sort of have people sign documents
24 that -- you know, testifying to that or agreeing to that, then
25 what happens? Then the Board agents can't conduct the

1 election, the Union's not allowed to be present and see the
2 conditions or see the vote count. And vote counts can be done
3 via, you know, Skype or something along those lines in the
4 Board office.

5 And I think the last point -- I've lost my train of
6 thought here for a moment -- oh, yeah, is we don't -- the
7 Employer claims that there's no disenfranchisement, this is --
8 there will be no people missing votes; that's the problem with
9 this pandemic. And it's right, it is speculation, but we
10 can't -- this is unchartered ground. We don't know. People
11 have to be separated if they show any symptoms. Or they should
12 be anyhow. And there's no way to know what those conditions
13 will be when the voting time would take place.

14 So I think I would end my rebuttal with that point, that
15 there's just no way to know what the conditions would be at the
16 time of the vote, who might be -- who might have to be
17 quarantined because themselves or a family member or somebody
18 in their household that they've been exposed to showed any kind
19 of symptoms.

20 HEARING OFFICER SAVELAND: Okay. Employer, did you want
21 to rebut his rebut?

22 MR. SCULLY: Yeah. Just briefly.

23 And with all respect to Mr. Manzolillo, I think he's just
24 mistaken about this statement about a window. There aren't any
25 windows. And we can -- you know, we can demonstrate that.

1 There's no supervisory office that would permit the
2 observation of voters coming in. So I think that that's just
3 a mistake.

4 And I think that, you know, again with respect to the
5 control, it's something, you know, that you can handle in an
6 in-person manual ballot election that accommodates these
7 concerns. And what we don't know about transmission is a lot.
8 And we still don't know those things. And so we're speculating
9 about transmission and how that might play out in a mail
10 ballot. But again, I didn't hear any offer of a stipulation
11 with respect to objectionable conduct.

12 And I think that ultimately we know -- and frankly, I
13 would say that we wouldn't waive our right to be present at a
14 count in any event. So there's obviously a visual inspection
15 that has to occur in a count sometimes, and we wouldn't want to
16 waive that.

17 But I think that we've certainly made our position clear,
18 and we appreciate the time that you've spent listening to it.
19 And we will await the Regional Director's decision.

20 HEARING OFFICER SAVELAND: Okay. Can we go off the record
21 very quickly?

22 MR. MANZOLILLO: Sure.

23 HEARING OFFICER SAVELAND: Court reporter?

24 THE COURT REPORTER: We're off the record.

25 HEARING OFFICER SAVELAND: Hello?



1 THE COURT REPORTER: We're off the record.

2 HEARING OFFICER SAVELAND: Okay. Thank you.

3 (Off the record at 11:30 a.m.)

4 THE COURT REPORTER: We are back on the record.

5 HEARING OFFICER SAVELAND: Okay. Thank you.

6 During an off-the-record discussion, the Employer stated
7 that they wished to file a post-hearing brief. The Petitioner
8 waived the right to file a post-petition (sic) brief. The
9 Regional Director has concluded that briefs may not be filed in
10 this particular hearing.

11 In terms of -- with reference to the subpoena issue, it's
12 my understanding that at this time the Union has decided to
13 withdraw the subpoena that it had issued in this matter.

14 Is that correct, Petitioner?

15 MR. MANZOLILLO: That is correct.

16 HEARING OFFICER SAVELAND: Okay. So therefore, I don't
17 need to make any sort of ruling on the Employer's petition to
18 revoke. Let's see.

19 And then, finally, when -- I wanted the -- to give
20 Petitioner a final chance to state his position regarding the
21 voter list and any waiver.

22 MR. MANZOLILLO: Yes. The Union would consider, you know,
23 depending on the timing of the Regional Director's order and
24 the proposed dates, would consider waiving a limited number of
25 days, say, of the three days of the time it would have with the

1 eligible voter list.

2 HEARING OFFICER SAVELAND: Okay. And then, Madam Court
3 Reporter, do you have an estimate about -- of how many pages
4 this transcript is going to be?

5 THE COURT REPORTER: I would say between 40 and 50 pages.

6 HEARING OFFICER SAVELAND: Okay. And have you received
7 all the exhibits that I've forwarded to you via email this
8 morning?

9 THE COURT REPORTER: I have not checked, but --

10 HEARING OFFICER SAVELAND: There should be 12. Okay.

11 THE COURT REPORTER: I have not checked, but --

12 HEARING OFFICER SAVELAND: If there's any issue with that,
13 please let me know --

14 THE COURT REPORTER: Will do.

15 HEARING OFFICER SAVELAND: -- later.

16 THE COURT REPORTER: Will do.

17 HEARING OFFICER SAVELAND: Okay. All right.

18 MR. SCULLY: And I'm sorry, Madam Hearing Officer.

19 HEARING OFFICER SAVELAND: Sure.

20 MR. SCULLY: Can the court reporter forward the ordering
21 information to the parties?

22 HEARING OFFICER SAVELAND: Can you do that, Ms. Court
23 Reporter?

24 THE COURT REPORTER: Yes, I can.

25 HEARING OFFICER SAVELAND: Great.

1 MR. SCULLY: Thank you.

2 HEARING OFFICER SAVELAND: Let me read this final portion.

3 The Regional Director will issue a decision in this matter
4 as soon as practical, and will immediately transmit the
5 document to the parties and their designated representatives by
6 email, facsimile, or by overnight mail if either an email
7 address nor facsimile number is provided.

8 If an election -- or when an election is directed, the
9 Employer must provide the voter list. To be timely filed and
10 served, the voter list must be received by the Regional
11 Director and the parties named in the direction within two
12 business days after the issuance of the direction unless a
13 longer period, based on extraordinarily circumstances, is
14 specified in the decision and direction of election.

15 A certificate of service on all parties must be filed with
16 the Regional Director when the voter list is filed. The Region
17 will no longer serve the voter list.

18 The Employer must submit the voter list in an electronic
19 format approved by the General Counsel unless the Employer
20 certifies that it does not have the capacity to produce the
21 list in the required format. The list must be filed in common,
22 everyday electronic file formats that can be searched.
23 Accordingly, unless otherwise agreed to by the parties, the
24 list must be provided in a table in a Microsoft Word file or a
25 file that is compatible with Microsoft Word.

1 The first column of the list must begin with each
2 employee's last name, and the list must be alphabetized overall
3 or by department by last name. Because the list will be used
4 during the election, the font size of the list must be
5 equivalent of Times New Roman 10 or larger. That font does not
6 need to be used, but the font must be that size or larger. A
7 sample optional form for the list is provided on the NLRB
8 website at www.nlr.gov.

9 The Employer stated -- I'm sorry. Excuse me. Hold on one
10 minute. Okay.

11 The Board stated that it is presumptively appropriate for
12 the Employer to produce multiple versions of the list where the
13 data required is kept in separate databases or files so long as
14 all of the lists link the information to the same employees
15 using the same names in the same order, and are provided within
16 the allotted time. If the Employer provides multiple lists,
17 the list used at the election will be the list containing the
18 employees' names and addresses.

19 The list must include full names, work location, shifts,
20 job classifications, and contact information, including home
21 addresses, available personal email addresses, and available
22 home and personal cellular telephone numbers of all eligible
23 voters.

24 The Employer must also include in a separate section of
25 that list the same information for those individuals the

1 parties have agreed will be permitted to vote subject to
2 challenge, or those individuals who, according to the decision
3 and direction of election, will be permitted to vote subject to
4 challenge.

5 I think that is everything we need to cover. I did want
6 to ask the court reporter, is there anything that you can see
7 right now that there's any sort of issue with telling who said
8 what?

9 THE COURT REPORTER: No. Everything was pretty clear.
10 Thank you.

11 HEARING OFFICER SAVELAND: Okay. So unless the parties
12 have anything -- if there's nothing further, the hearing will
13 be closed.

14 Hearing no response, the hearing is now closed.

15 **(Whereupon, the hearing in the above-entitled matter was closed**
16 **at 11:46 a.m.)**

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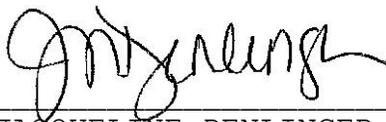
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CERTIFICATION

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This is to certify that the attached proceedings before the National Labor Relations Board (NLRB), Region 27, Case Number 27-RC-258742, Atlas Pacific/Gulftech, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, at the National Labor Relations Board, Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, Colorado 80294, on Monday, April 13, 2020, 10:17 a.m., was held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.



JACQUELINE DENLINGER

Official Reporter



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Fw: Atlas Hearing

Scully, Patrick R.

Fri 4/24/2020 10:45 AM

To: Scully, Patrick R. <PSCULLY@shermanhoward.com>;

📎 2 attachments (8 MB)

GC 15-06.pdf; Board Ex. #2.docx;

Patrick R. Scully
Sherman & Howard LLC
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303.299.8218

From: Saveland, Isabel <Isabel.Saveland@nlrb.gov>
Sent: Thursday, April 9, 2020 12:33 PM
To: Scully, Patrick R.; dfennell@usw.org
Subject: Atlas Hearing

Dear Parties,

I want to clarify a few things for hearing on Monday. As of now, it seems the parties agree to the unit description. I've attached Board Exhibit #2 which has the description in there so you can let me know of any problems. Of course, the Employer has until noon tomorrow to decide whether there is a unit issue that will be litigated at hearing.

If it ends up that the only issue going to hearing is the manner and details of an election, the Region will not be taking testimonial evidence. Rather the parties will set forth their positions regarding both methods of election. Of course you may consult with anyone about these details and give reasons for your positions; we will just not be taking testimonial evidence on this issue. Please see pages 23-24 in GC 15-06.

With respect to any exhibits, it will be helpful to have them labeled and emailed to all parties. I will be forwarding any accepted/rejected exhibits to the court reporter once they have been admitted/rejected so that the record is complete. At the outset of hearing we all need to identify ourselves each time we speak so the record is clear. The reporter will let us know when we can stop if/when the reporter can distinguish who is talking.

Thank you,

