

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

**2101 LLC D/B/A
INTERCONTINENTAL TRUCK BODY**

Employer

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS LODGE 88, AFL-CIO**

Petitioner

Case 19-RC-258144

**2101 LLC D/B/A INTERCONTINENTAL TRUCK BODY'S
EMERGENCY REQUEST FOR REVIEW OF THE REGIONAL
DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

2101 LLC d/b/a Intercontinental Truck Body (“ITB” or “Employer”), pursuant to Section 102.67 of the National Labor Relations Board’s (“NLRB” or “Board”) Rules and Regulations, hereby requests review of the Regional Director’s May 19, 2020 Decision and Direction of Election (“Decision”) in this matter. 29 C.F.R. § 102.67 (2020); Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020). ITB seeks review of the Regional Director’s erroneous findings that “extraordinary circumstances” exist in the instant circumstances. Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020). The Regional Director’s finding that “significant risk [to] all election participants” creates “extraordinary circumstances” precluding a manual ballot election constitutes a “decision on a substantial factual issue [that] is clearly erroneous on the record and such error prejudicially affects” the Employer. *Id.*; 29 C.F.R. § 102.67(d)(2). In the alternative, the Regional Director’s

direction of a mail ballot election raises “a substantial question of law [and] policy” meriting review based upon a “departure from, officially reported Board precedent” and an “absence of” reported Board precedent clarifying limits applicable to the “extraordinary circumstances” exception to the presumption in favor of manual ballot elections. 29 C.F.R. § 102.67(d) (1) (i-ii); *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998).

A. Procedural History

The Petitioner filed its RC Petition with NLRB Region 19 on March 17, 2020. EXHIBIT A, *RC Petition* (March 17, 2020). The Region initially set the pre-election hearing for April 9, 2020. Exhibit B, *Docket Letter* (March 18, 2020). On April 8, the Region reset the hearing to May 29, 2020 and again, on April 27, 2020, reset the hearing to May 14, 2020, with a Pre-Hearing Conference for May 12, 2020, both by telephone. Exhibit C, *Order Rescheduling Hearing* (April 8, 2020); Exhibit D, *Order Rescheduling Hearing* (April 27, 2020). The due date for the Employer’s Position Statement was set for May 8, 2020. Exhibit D, *Order Rescheduling Hearing* (April 27, 2020). The Employer timely filed its Position Statement. Exhibit E, *Employer’s Statement of Position* (May 8, 2020). Following the Pre-Hearing Conference, the parties stipulated to the unit composition, agreed to a stipulated hearing record, and agreed to submit their respective positions concerning the time, place, and manner of the election to the Region on May 15, 2020, rather than through a telephonic hearing. Exhibit F, *Stipulation of Record for Pre-Election Hearing* (May 13, 2020) On May 19, 2020, the Regional Director issued his Decision. Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020).

B. Relevant Precedent

Board precedent has long maintained a strong presumption in favor of manual ballot elections. *See e.g., San Diego Gas and Electric*, 325 NLRB 1143 (1998); *In re Halliburton*

Servs., 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

The Regional Director recognized in his Decision “that absent public health concerns, I would not order a mail ballot election in this case.” Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020). To overcome the presumption in favor of manual ballot elections in such circumstances, Board precedent requires “extraordinary circumstances.” *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Regional Director and the Petitioner have not identified anything that could reasonably be called “extraordinary circumstances” sufficient to rebut the Board’s presumption in favor of manual elections in this case, where no active COVID-19 cases exist to prevent a manual ballot. Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020); Exhibit J, *Machinists Position Statement re: Time, Place and Manner of Election NLRB Case No. 19-RC-258144* (May 15, 2020)

C. Analysis

The Regional Director abused his discretion in misapplying officially reported Board precedent, leading to the erroneous consideration of facts irrelevant to the proposed election site in Deer Lodge County, Montana. Board precedent makes clear that “extraordinary circumstances” must exist at “the election scene” in order to warrant foregoing the presumption in favor of manual ballot elections. *San Diego Gas and Electric*, 325 NLRB 1143 (1998); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954). The Board recently reaffirmed this focus on the “local area” in several unpublished Orders. *Johnson Controls, Inc.*, 16-RC-256972, fn.1 (Order Denying Request for Review, May 18, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867, fn.1 (Order Denying Request for Review, May 8, 2020); *Atlas Pacific Engineering Company*, 7-RC-258742, fn.1 (Order Denying Request for Review, May 18,

2020). The Regional Director improperly ignored the total lack of active COVID-19 cases at “the election scene” and relied instead upon generalized conditions throughout the country as a whole. Caroline Buckee, an epidemiologist at Harvard University has stated “[w]e have to be making decisions that are hyper local. This is not one big epidemic, it’s multiple, small epidemics.” Mackenzie Mays and Myah Ward, *Reopening tension pits state, local officials against each other in sign of what’s to come*, May 20, 2020, available at <https://www.politico.com/states/california/story/2020/05/20/reopening-tension-pits-state-local-officials-against-each-other-in-sign-of-whats-to-come-1284317>.

Here, the Regional Director determined that a manual election would pose “a significant risk for all election participants,” leading to a finding of extraordinary circumstances warranting a mail ballot election “despite the fact that Deer Lodge County has so far been fortunate to have only three confirmed cases of COVID-19 and zero deaths.” *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020). Those three cases were reported almost two full months ago. Exhibit I, *Employer’s Statement of Position Regarding Method of Election* (May 15, 2020).

a. Zero Active Cases in a County Does Not Constitute Extraordinary Circumstances Warranting a Mail Ballot.

The Regional Director does not specify exactly what he relies upon to find that risk rising to the level of an extraordinary circumstance, sufficient to forego a manual ballot in a county with zero active COVID-19 cases, but cited “current Federal and state public health guidance strongly recommends discouraging gatherings and minimizing non-essential business travel.” Exhibit K, *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (May 19, 2020). The Regional Director cited, in particular, Montana’s Phase 1 reopening guidelines, which, according to the Regional Director, recommended “minimizing non-essential business travel.” *Id.*

However, on May 19, 2020, Montana governor Steve Bullock announced that beginning June 1, 2020, Montana would enter Phase 2 of its reopening plan.¹ Governor’s Office, GOVERNOR BULLOCK ANNOUNCES MONTANA TO ENTER PHASE TWO OF REOPENING PLAN ON JUNE 1ST, May 19, 2020, *available at* <https://news.mt.gov/governor-bullock-announces-montana-to-enter-phase-two-of-reopening-plan-on-june-1st>. Phase 2 of Montana’s reopening will eliminate the quarantine requirement for out of state, non-business travelers into Montana and recommends avoiding gatherings of groups larger than 50 people (rather than 10), “unless physical distancing can be maintained.” *Id.* In addition, as of May 19, 2020, Spokane County, Washington, where the Region maintains a resident office, that conducted the conference and hearing in this case, can transition to Phase 2 of the Washington phased reopening plan, which permits some non-essential travel. Lauren Kirschman, *Coronavirus updates: Inslee issues guidance for real estate, fitness in Phase 2*, Tacoma News Tribune, May 20, 2020, *available at* <https://www.thenewstribune.com/news/coronavirus/article242864806.html>.

While, these phased reopening orders never presented a legal impediment to the essential governmental service of holding a manual election, a Resident Board Agent traveling alone from Spokane County, where some nonessential travel and public life is permissible, to Deer Lodge County, Montana, where “[c]oncert halls, bowling alleys, and other places of assembly may operate with reduced capacity,” hardly involves the level of risk to constitute “extraordinary circumstances.” Nor do the unsubstantiated concerns expressed by the Regional Director support the conclusion that holding a manual ballot would contravene the broader intention of any state or local order.

Representation elections are core to the NLRB’s mission. NLRB Office of Public Affairs,

¹ The Employer proposed June 5, 2020 as the election date.

NLRB Resumes Representation Elections, April 1, 2020, available at

<https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>. Holding a manual ballot election in a county with no active COVID-19 cases safely effectuates the goals of the National Labor Relations Act in the manner prescribed by the Board.

b. The Regional Director Improperly Considered Potential Travel Plans of Counsel for Both Parties.

The Regional Director's Decision argued against the propriety of a manual election based on several unsupported assumptions. One of these assumptions was that counsel for the Petitioner and counsel for the Employer would travel to the election site from Alameda County, California and Harris County, Texas respectively, and to support the potential risk of COVID-19 exposure in those two places. Neither counsel indicated they planned to attend a manual ballot election. Counsel for the Employer can state unequivocally that they do not plan to attend any election at the facility. Additionally, the Petitioner's local has representatives in Butte, Montana who have been involved in this matter since the filing of the Petition who would more likely serve as the Petitioner's representative. Basing the determination in part on the number of infected persons in the locales of the parties' attorneys is ludicrous, or at best totally improper. Moreover, the Board's decisions provide that the determination on whether to hold a mail or manual ballot depends on examining the circumstances prevailing in the local area, where the election is to be conducted. *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954); *Johnson Controls, Inc.*, 16-RC-256972, fn.1 (Order Denying Request for Review, May 18, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867, fn.1 (Order Denying Request for Review, May 8, 2020); *Atlas Pacific Engineering Company*, 7-RC-258742, fn.1 (Order Denying Request for Review, May 18, 2020). In this case, the local area has no active cases, which is glaringly

distinct from the circumstances that prevailed in every prior case where a mail ballot was directed.

c. The Regional Director Gave Improper Weight to Employees Fearing to Take Part in a Manual Ballot Election When a Mail Ballot Election Will Potentially Disenfranchise More Individuals.

The Director's Decision also proposed the unsupported potential scenario in which a manual election could disenfranchise voters who may be wary of participating in a manual election because they will need to interact with others. The employer in this case is an essential business. All employees work with all other employees during the same shift and have done so continuously throughout the now expired Montana stay-at-home order. The Director's potential scenario has no basis in fact. No employee has expressed concerns with participating in a manual election because they are wary of COVID-19. On the contrary, employees' attendance has been excellent throughout the stay-at-home orders. The Director also assumes, without support, that conducting a manual election "would only increase the possibility of greater interaction among the Employer's employees," but a secret ballot election by its nature is an event consisting of solitary actions taken by isolated individuals. The Employer has likewise proposed substantial safety measures such as thorough sanitation of the voting area, N-95 masks, gloves, hand washing, available hand sanitizer, separate tables and lists for observers and the Board Agent, plastic screens in front of tables, and a large space to accommodate social distancing.

Moreover, the Employer cited reports that some postal deliveries were taking more than one month for individuals to receive them. In the ordered mail election employees will only have 3 weeks to receive, complete, and return their ballots. It is possible that some voters will not even receive their ballots before the voting period ends. Finally, Congresspersons Maloney and Connolly issued a statement that the Postal Service could shutter as early as June unless

Congress provides relief. Congressperson Carolyn B. Maloney and Gerald E. Connolly, *Letter to Majority Leader Mitch McConnell*, March 24, 2020 available at

[https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-24.CBM%20GEC%20to%20McConnell-%20Senate%20re%20Postal%20Emergency.pdf)

[24.CBM%20GEC%20to%20McConnell-%20Senate%20re%20Postal%20Emergency.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-24.CBM%20GEC%20to%20McConnell-%20Senate%20re%20Postal%20Emergency.pdf). No such relief has been granted at this time. The delays in service that many people are experiencing could seriously worsen or service could stop altogether depending on the financial wellbeing of the Post Office and the health of its mail carriers.

d. The Regional Director Failed to Address USPS Service Issues that Could Disenfranchise Employees.

The Regional Director failed to adequately consider the problems with the mail ballot election. Mail service outages have been reported throughout the country. Jake Offenhartz, *Gothamist*, "The Mail Just Stopped": Coronavirus Staffing Shortages And Budget Gaps Push Postal Service To Brink Of Collapse, (April 2, 2020) <https://gothamist.com/news/mail-coronavirus-staffing-postal-service-covid-19>.

The Regional Director failed to address how delivery issues with the mail may result in disenfranchisement of the voters. Downtdetector, a monitoring service that reports on outages of various apps, internet providers, online services, and other providers shows service problems throughout the Seattle area where any mail would need to pass through to reach the NLRB office. Downtdetector, *USPS Outage Map*, (last accessed May 14, 2020) <https://downtdetector.com/status/usps/map/> Readers on that site have discussed delays of a month or more in various USPS deliveries. A statement issued by the National Association of Mail Carriers on April 17, 2020, found that 8,000 postal workers were quarantined at that time. Frederic Rolando, *Statement from President Frederic V. Rolando Re: COVID-19 Virus Crisis*, National Association of Letter Carriers, April 17, 2020, <https://www.nalc.org/news/nalc->

updates/body/4-17-20-statement.pdf. Moreover, there has even been concern from Congresspersons that mail service may need to be suspended in June. Congressperson Carolyn B. Maloney and Gerald E. Connolly, Letter to Majority Leader Mitch McConnell, March 24, 2020, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-24.CBM%20GEC%20to%20McConnell-%20Senate%20re%20Postal%20Emergency.pdf>. Delays in the ability of voters to receive the mail from the NLRB and delays in the mail being returned to the NLRB may result in insufficient voters participating in the election and employees being unable to return their ballots in time. The Regional Director only gave employees 3 weeks to receive and return their ballots at a time when some USPS deliveries are taking more than 1 month.

D. Conclusion

The Regional Director abused his discretion in finding that conducting a manual election at the Employer's facility in Anaconda, Montana poses a significant risk that rises to the level of an extraordinary circumstance under Board precedent. Generalized references and reliance upon the effects and prevalence of COVID-19 in other parts of the country to find a level of risk that triggers the extraordinary circumstances exception in *San Diego Gas* contravenes Board precedent. This case raises the substantial question of what limits, if any, confine Regional Directors' use of the extraordinary circumstances exception to overcome the Board's presumption in favor of manual elections, while COVID-19 is present in any degree, in any part of the country. A manual election is appropriate in an area where there are zero active COVID-19 cases, no reported community spread, and appropriate measures are taken during the election to ensure employee safety.

Date: May 22, 2020

Respectfully Submitted by:

ALANIZ LAW & ASSOCIATES, PLLC
Attorneys for Employer, 2101 LLC d/b/a
INTERCONTINENTAL TRUCK BODY

/s/ Richard D. Alaniz

Richard D. Alaniz, esq.

Tex. Bar No. 00968300

ralaniz@alaniz-law.com

Brett Holubeck, esq.

Tex. Bar No. 24090891

bholubeck@alaniz-law.com

Scott Stottlemyre, esq.

Tex. Bar No. 24098481

sstottlemyre@alaniz-law.com

20333 State Hwy. 249, Ste. 272

Houston, TX 77070

CERTIFICATE OF SERVICE

The undersigned, on behalf of Employer, 2101 LLC d/b/a Intercontinental Truck Body, LLC, sent a true and correct copy on May 22, 2020, via efile and email, of Intercontinental Truck Body's Emergency Request For Review Of The Regional Director's Decision And Direction Of Election this day to the NLRB Region 19 Director and to the parties at the addresses set forth below:

Office of the Executive Secretary
National Labor Relations Board
via efile

Ronald K. Hooks, NLRB Region 19 Director
via efile

Sara Dunn
via email: Sarah.Dunn@nlrb.gov

Adam D. Morrison
via email: Adam.Morrison@nlrb.gov

Jason Hardwick
via email: jhardwick@iamaw.org

Caren Sencer
via email: csencer@unioncounsel.net

/s/Richard D. Alaniz
Richard D. Alaniz

EXHIBIT A

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed

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
Intercontinental Truck Body

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
78 Gold Street Anaconda, MT 59711

3a. Employer Representative - Name and Title
Cory Riley, Operations Manager

3b. Address (If same as 2b - state same)
Same

3c. Tel. No.
406-797-7900

3d. Cell No.
406-581-5753

3e. Fax No.

3f. E-Mail Address
coryr@itbusa.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)
Manufacturing/Fabrication Facility

4b. Principal product or service
Manufacturing and Fabricating equipment for loading ramps and tow vehicles

5a. City and State where unit is located:
Anaconda, MT

5b. Description of Unit Involved

Included: All full time and regular part time production, fabrication, maintenance and facilities maintenance employees of the employer at the facility located at 78 Gold Street, Anaconda, MT 58711

Excluded: Temps, Managers, Supervisors, Clerical Workers, and all other employees including professional employees, managerial employees, guards, supervisors, and other employees as defined by the Act.

6a. No. of Employees in Unit:
18

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: 7a. Request for recognition as Bargaining Representative was made on (Date) 3/17/2020 and Employer declined recognition on or about _____ (Date) (If no reply received, so state). **No Reply**

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).
None

8b. Address

8c. Tel No.

8d Cell No.

8e. Fax No.

8f. E-Mail Address

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)
None

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: Manual Mail Mixed Manual/Mail

11b. Election Date(s):
APRIL 6, 2020

11c. Election Time(s):

11d. Election Location(s):
Lunch room, 78 Gold Street Anaconda, MT 59711

12a. Full Name of Petitioner (including local name and number)
International Association of Machinists and Aerospace Workers, Local Lodge 88

12b. Address (street and number, city, state, and ZIP code)
156 West Granite Street Butte, MT 59701

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Association of Machinists and Aerospace Workers, AFL-CIO

12d. Tel No.
406-723-8044

12e. Cell No.
406-565-0062

12f. Fax No.

12g. E-Mail Address
troy@iamw24.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title Jason Hardwick, Grand Lodge Representative

13b. Address (street and number, city, state, and ZIP code)
620 Coolidge Rd., Suite 130, Folsom, CA 95630

13c. Tel No.
916-985-8101

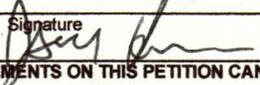
13d. Cell No.
916-936-6013

13e. Fax No.
916-985-8121

13f. E-Mail Address
jhardwick@iamaw.org

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) Jason Hardwick

Signature 

Title Grand Lodge Representative

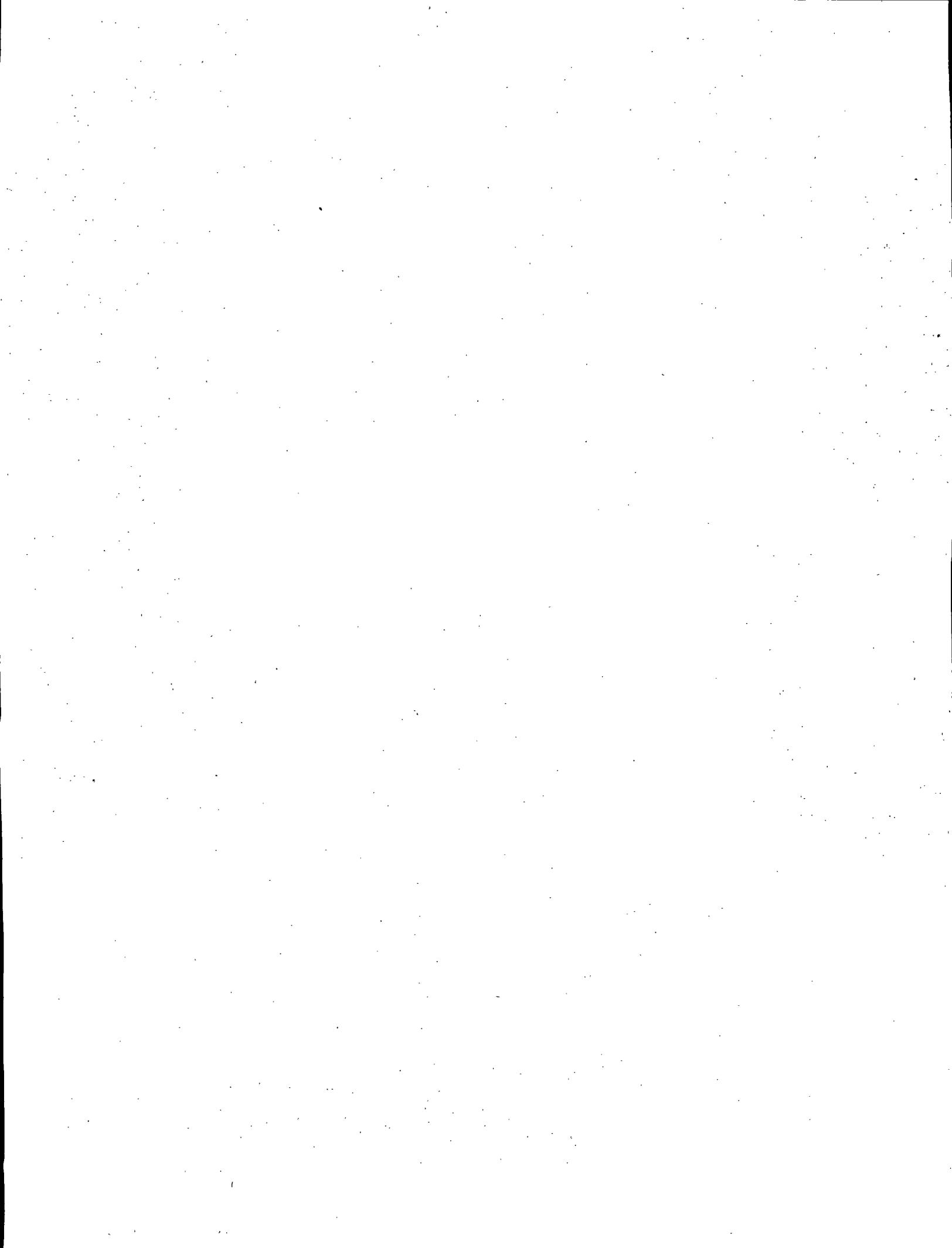
Date 3/17/2020

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.

EXHIBIT B





UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006

Agency Website: www.nlr.gov
Telephone: (206)220-6300
Fax: (206)220-6305



Download
NLRB
Mobile App

March 18, 2020

URGENT

coryr@itbusa.com

Cory Riley
Intercontinental Truck Body
78 Gold Street
Anaconda, MT 59711

Re: Intercontinental Truck Body
Case 19-RC-258144

Dear Mr. Riley:

Enclosed is a copy of a petition that International Association of Machinists and Aerospace Workers, Lodge 88 filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures.

Investigator: This petition will be investigated by Field Attorney SARAH K. BURKE whose telephone number is (206)220-6291. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Supervisory Field Examiner DIANNE TODD whose telephone number is (206)220-6319. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by March 20, 2020 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate with your employees electronically, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Pacific Time on April 08, 2020**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form may be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon April 08, 2020.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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.

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the

appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 AM on Thursday, April 9, 2020** at a **place to be determined in Butte, MT**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party, the regional director may postpone the hearing for up to 2 business days upon a showing of special circumstances and for more than 2 business days upon a showing of extraordinary circumstances. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);
- (b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized 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 cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. When feasible, the list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determination on the merits solely based on the evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

March 18, 2020

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



RONALD K. HOOKS
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)

lu

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 19-RC-258144	Date Filed 3-17-2020

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
Intercontinental Truck Body

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
78 Gold Street Anaconda, MT 59711

3a. Employer Representative - Name and Title
Cory Riley, Operations Manager

3b. Address (if same as 2b - state same)
Same

3c. Tel. No. 406-797-7900 **3d. Cell No.** 406-581-5753 **3e. Fax No.** **3f. E-Mail Address** coryr@itbusa.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.) Manufacturing/Fabrication Facility **4b. Principal product or service** Manufacturing and Fabricating equipment for loading ramps and tow vehicles **5a. City and State where unit is located:** Anaconda, MT

5b. Description of Unit Involved
Included: All full time and regular part time production, fabrication, maintenance and facilities maintenance employees of the employer at the facility located at 78 Gold Street, Anaconda, MT 58711
Excluded: Temps, Managers, Supervisors, Clerical Workers, and all other employees including professional employees, managerial employees, guards, supervisors, and other employees as defined by the Act.

6a. No. of Employees in Unit: 18
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: **7a. Request for recognition as Bargaining Representative was made on (Date) 3/17/2020 and Employer declined recognition on or about _____ (Date) (If no reply received, so state). No Reply**
 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). None **8b. Address**

8c. Tel No. **8d. Cell No.** **8e. Fax No.** **8f. E-Mail Address**

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)
None

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:** Manual Mail Mixed Manual/Mail

11b. Election Date(s): APRIL 6, 2020 **11c. Election Time(s):** **11d. Election Location(s):** Lunch room, 78 Gold Street Anaconda, MT 59711

12a. Full Name of Petitioner (including local name and number) International Association of Machinists and Aerospace Workers, Local Lodge 88 **12b. Address (street and number, city, state, and ZIP code)** 156 West Granite Street Butte, MT 59701

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state) International Association of Machinists and Aerospace Workers, AFL-CIO

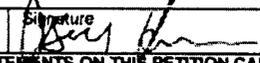
12d. Tel No. 406-723-8044 **12e. Cell No.** 406-565-0062 **12f. Fax No.** **12g. E-Mail Address** troy@iamw24.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title Jason Hardwick, Grand Lodge Representative **13b. Address (street and number, city, state, and ZIP code)** 620 Coolidge Rd., Suite 130, Folsom, CA 95630

13c. Tel No. 916-985-8101 **13d. Cell No.** 916-936-6013 **13e. Fax No.** 916-985-8121 **13f. E-Mail Address** jhardwick@iamaw.org

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) Jason Hardwick **Signature**  **Title** Grand Lodge Representative **Date** 3/17/2020

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.



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that International Association of Machinists and Aerospace Workers, Lodge 88 has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 19-RC-258144 seeking an election to become certified as the representative of the employees of Intercontinental Truck Body in the unit set forth below:

Included: All full time and regular part time production, fabrication, maintenance and facilities maintenance employees of the employer at the facility located at 78 Gold Street, Anaconda, MT 58711.

Excluded: Temps, Managers, Supervisors, Clerical Workers, and all other employees including professional employees, managerial employees, guards, supervisors, and other employees as defined by the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that **IF AN ELECTION IS HELD**, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (206)220-6300.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**



<p style="text-align: center;">INTERCONTINENTAL TRUCK BODY</p> <p style="text-align: center;">Employer</p> <p style="text-align: center;">and</p> <p style="text-align: center;">INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 88</p> <p style="text-align: center;">Petitioner</p>	<p style="text-align: center;">Case 19-RC-258144</p>
---	---

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at **9:00 AM on Thursday, April 9, 2020** and on consecutive days thereafter until concluded, at a **place to be determined in Butte, Montana,**¹ a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Intercontinental Truck Body must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Pacific time on April 08, 2020. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Pacific on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: March 18, 2020



RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

¹ The hearing may be rescheduled to a later date.

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

Intercontinental Truck Body Employer and International Association of Machinists and Aerospace Workers, Lodge 88 Petitioner	Case 19-RC-258144
--	--------------------------

AFFIDAVIT OF SERVICE OF: Petition dated March 17, 2020, Notice of Representation Hearing dated March 18, 2020, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 18, 2020, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Cory Riley
Intercontinental Truck Body
78 Gold Street
Anaconda, MT 59711
coryr@itbusa.com

Jason Hardwick, Grand Lodge Representative International Association of Machinists and Aerospace Workers, AFL-CIO 620 Coolidge Road Suite 130 Folsom, CA 95630-3182 jhardwick@iamaw.org Fax: (916)985-8121	International Association of Machinists and Aerospace Workers, Lodge 88 156 W Granite St Butte, MT 59701-9262
--	--

March 18, 2020
Date

Dennis Snook, Designated Agent of NLRB
Name

/s/ *Leila Nomoto*
Signature

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 8 days (excluding intervening federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position. Included with the Notice of Representation Hearing are a copy of the petition, this form, a Statement of Position form, a Notice of Petition for Election, and a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: The regional director may postpone the hearing for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request should be filed with the regional director. E-Filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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.

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon on the business day before the opening of the hearing. The regional director may postpone the due date for filing and serving the Statement of Position for up to 2 business days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. The Statement of Position form may be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 2 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically if the employer customarily communicates with its employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; and eligibility formulas. At the hearing, the Statement of Position will be received into evidence and, prior to the introduction of further evidence, all other parties will respond on the record to each issue raised in the Statement. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be filed only upon special permission of the regional director and within the

time and addressing the subjects permitted by the regional director. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. If allowed, briefs should be double-spaced on 8½ by 11 inch paper. Briefs must be filed in accordance with the provisions of Section 102.111(b) of the Board's Rules. E-Filing of briefs through the Board's website, www.nlr.gov, is encouraged, but not required. Facsimile transmission of briefs is NOT permitted.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 14 days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List - The employer must provide to the regional director and the parties named in the election agreement or direction of election 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 cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List - Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election - Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal - If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

**REVIEW THE FOLLOWING IMPORTANT INFORMATION
BEFORE FILLING OUT A STATEMENT OF POSITION FORM**

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

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

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

Consequences of Failure to Supply Information: 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. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 19-RC-258144	Date Filed March 17, 2020

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? Yes 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? Yes 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? Yes No If yes, state the basis for your position.

6. Describe all other issues you intend to raise at the pre-election hearing.

The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.
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)
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)

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: Manual Mail 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 STATEMENT OF POSITION 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. Reg. 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.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME Intercontinental Truck Body	CASE NUMBER 19-RC-258144
--	-----------------------------

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

CORPORATION LLC LLP PARTNERSHIP SOLE PROPRIETORSHIP OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES
--	--

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).

7. A. PRINCIPAL LOCATION: B. BRANCH LOCATIONS:

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. Total:	B. At the address involved in this matter:
-----------	--

9. DURING THE MOST RECENT (Check appropriate box): CALENDAR YR 12 MONTHS or FISCAL YR (FY dates)

	YES	NO
A. Did you provide services valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$		
B. If you answered no to 9A, did you provide services valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided. \$		
C. If you answered no to 9A and 9B, did you provide services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$		
D. Did you sell goods valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$		
E. If you answered no to 9D, did you sell goods valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$		
F. Did you purchase and receive goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$		
G. Did you purchase and receive goods valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$		

H. Gross Revenues from all sales or performance of services (Check the largest amount):
 \$100,000 \$250,000 \$500,000 \$1,000,000 or more If less than \$100,000, indicate amount.

I. Did you begin operations within the last 12 months? If yes, specify date: _____

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

YES NO (If yes, name and address of association or group).

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER
------	-------	----------------	-------------

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)	SIGNATURE	E-MAIL ADDRESS	DATE
--------------------------------	-----------	----------------	------

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/or unfair labor practice proceedings 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 may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

EXHIBIT C

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

INTERCONTINENTAL TRUCK BODY

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from April 9, 2020 to 9:00 AM on **Wednesday, May 27, 2020¹** at a place to be determined in Butte, MT. The hearing will continue on consecutive days until concluded.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on May 26, 2020. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 8, 2020

RONALD K. HOOKS

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

¹ Due to the evolving nature of the current COVID-19 situation the Regional Director may in his discretion reschedule the hearing date should the changing COVID-19 situation, in his view, significantly affect the Region's operational status, or, its ability to safely conduct hearings.

EXHIBIT D

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

INTERCONTINENTAL TRUCK BODY

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from May 27, 2020, at 9:00 AM, to **Thursday, May 14, 2020**, at 9:00 AM PDT. The telephonic hearing will continue on consecutive days thereafter until concluded. At the hearing, the parties will have the right to appear telephonically and provide witness testimony if needed. The hearing dial-in number and conference ID code will be provided to the parties by May 13.

YOU ARE FURTHER NOTIFIED that at 1:00 PM Pacific time on **Tuesday, May 12, 2020**, the hearing officer will hold a pre-hearing teleconference to discuss the possibility of the parties reaching a stipulated election agreement, technical difficulties by participants in hearing, such as internet accessibility, the advance submission of exhibits, the presentation of witnesses, rules of conduct for hearing attendees, and, if necessary, subpoenaed documents, petitions to revoke or other pre-hearing motions. This office will provide the parties with the pre-hearing teleconference dial-in number.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on **Thursday, May 7, 2020**. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 27, 2020

RONALD K. HOOKS

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

EXHIBIT E

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 19-RC-258144	Date Filed 05/07/2020

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 2101 LLC d/b/a Intercontinental Truck Body	1c. Business Phone: 406-797-7900	1e. Fax No.:
--	--	--------------

1b. Address (Street and number, city, state, and ZIP code) 234 Hilltop Lane, Conrad, MT 59425	1d. Cell No.:	1f. e-Mail Address coryr@itbusa.com
---	---------------	---

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? Yes 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? Yes 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.)
See attached

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 See attached	Excluded See attached
---	---------------------------------

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.
N/A

5. Is there a bar to conducting an election in this case? Yes No If yes, state the basis for your position.

6. Describe all other issues you intend to raise at the pre-election hearing.
See attached

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at <http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015>.
(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

State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: Manual Mail Mixed Manual/Mail

8b. Date(s) June 5, 2020	8c. Time(s) 1:30 - 2:30 PM	8d. Location(s) 78 Gold Street Anaconda, MT 59711
------------------------------------	--------------------------------------	---

8e. Eligibility Period (e.g. special eligibility formula) N/A	8f. Last Payroll Period Ending Date May 9, 2020	8g. Length of payroll period <input type="checkbox"/> Weekly <input checked="" type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)
---	---	--

9. Representative who will accept service of all papers for purposes of the representation proceeding **Alaniz Law & Associates PLLC**

9a. Full name and title of authorized representative Richard D. Alaniz, Corporate Attorney	9b. Signature of authorized representative /s/ Richard D. Alaniz	9c. Date 05/07/2020
--	--	-------------------------------

9d. Address (Street and number, city, state, and ZIP code) 20333 State Highway 249, Ste. 272, Houston, TX 77070	9e. e-Mail Address ralaniz@alaniz-law.com
---	---

9f. Business Phone No.: 281-833-2200	9g. Fax No. 281-833-2240	9h. Cell No.
--	------------------------------------	--------------

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION 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. Reg. 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.

#4

Michael Robins

6130 31st Ave NE, Marysville, WA 98271

Bert Robins

6130 31st Ave NE, Marysville, WA 98271

Ueland Family Limited Partnership

8 West Park Street, Butte, MT 59701¹

¹ This address has been amended to reflect the correct, business address for the Ueland Family Limited Partnership.

ITB EMPLOYEES	JOB TITLE	LOCATION	HOURS	NOTES
TIM ANDERSON	Painter	Flight Line Production	7:00 a.m.-3:30 p.m.	
TOBY BEAVIS	Welder I	Commercial Production	7:00 a.m.-3:30 p.m.	
MALVIN COPENHAVER	Welder II	Commercial Production	7:00 a.m.-3:30 p.m.	
GABRIEL DERIEUX	Blasting/Undercoating Tech	Flight Line Production	7:00 a.m.-3:30 p.m.	
TRACY FIORANI	Paint Prep Assistant	Flight Line Production	7:00 a.m.-3:30 p.m.	
TIMOTHY HANKINSON	Welder II	Commercial Production	7:00 a.m.-3:30 p.m.	
RAY JOHNSON	Wilson Ramp Technician	Wilson Ramp Production	7:00 a.m.-3:30 p.m.	
JIMMY KNAPP	Welder II	Commercial Production	7:00 a.m.-3:30 p.m.	
KELLY MERRICK	Welder I	Flight Line Production	7:00 a.m.-3:30 p.m.	
CALEB MERTZ	Welder I	Flight Line Production	7:00 a.m.-3:30 p.m.	
DANIEL NAVARRO	Assembly Technician	Flight Line Production	7:00 a.m.-3:30 p.m.	
CRYSTAL ROBB	Tear Down Assistant	Flight Line Production	7:00 a.m.-3:30 p.m.	
ROBERT ROUNS	Machinist	Wilson Ramp/Flight Line Production	7:00 a.m.-3:30 p.m.	
LENNY RUSTAD	Welder I	Commercial Production	7:00 a.m.-3:30 p.m.	
JERIN STAINER	Electrical Technician	Flight Line Production	7:00 a.m.-3:30 p.m.	
THOMAS VASKEY	Electrical Technician	Flight Line Production	7:00 a.m.-3:30 p.m.	
ZACHARY YOTHER	Assembly Technician	Flight Line Production	7:00 a.m.-3:30 p.m.	
VICTOR ZENAHLIK	Wilson Ramp Technician	Wilson Ramp Production	7:00 a.m.-3:30 p.m.	
SPHERION EMPLOYEES	JOB TITLE	LOCATION	HOURS	
DANIEL HILDE	Welder I	Commercial Production	7:00 a.m.-3:30 p.m.	
EXPRESS EMPLOYEES	JOB TITLE	LOCATION	HOURS	
MATTHEW WINCHELL	Janitorial	Shop Floor	7:00 a.m.-3:30 p.m.	

ALANIZ LAW & ASSOCIATES LLP

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

20333 STATE HWY 249 ♦ SUITE 272 ♦ HOUSTON, TEXAS ♦ 77070

T: (281)833-2200

F: (281)833-2240

TO: Ms. Sara Dunn
National Labor Relations Board
Region 19
915 2nd Avenue
Seattle, WA 98174

FROM: Alaniz Law & Associates
Representative for 2101 LLC d/b/a Intercontinental Truck Body

DATE: May 7, 2020

RE: Case No: 19-RC-258144
Petitioner: International Association of Machinists and Aerospace Workers, AFL-CIO

STATEMENT OF POSITION

I. Background

Intercontinental Truck Body (“ITB” or “Employer”) is a manufacturing facility that produces Wilson Ramps, Commercial Truck Modifications to the body, and Air Force Tugs (tow trucks). The facility receives raw materials such as aluminum, Ford F350 trucks, or customer supplied commercial vehicles and pre-cut steel plates to convert vehicles.

There are three general categories of products made at the facility. Wilson ramps are formed, drilled, riveted, painted, and shipped based on the required specifications. To create an Air Force tug (tow truck), Ford F350 Trucks are shortened in length; new steel bodies are formed, welded, painted, and installed; and new lighting, wiring, and hitches are installed. Commercial trucks are modified by assembling aluminum beds, making boxes for the truck bed, and converting the bed by adding lights and wiring and performing other modifications.

II. The Petitioner’s Bargaining Unit Description

The International Association of Machinists and Aerospace Workers, Lodge 88 (“Petitioner”) seeks to represent a bargaining unit it describes as “[a]ll full time and regular part time production, fabrication, maintenance and facilities maintenance employees of the employer at the facility located at 78 Gold Street, Anaconda, MT 58711.” The Board Agent’s initial communication on this case excluded “Temps, Managers, Supervisors, Clerical Workers, and all other employees including professional employees, managerial employees, guards, supervisors, and other employees as defined by the Act.” On May 4, 2020, the Petitioner informed the Employer and the Board Agent that it is only seeking to represent “permanent employees.” This unit description raises several questions: First, it raises material questions as to the definitions “regular” part time employees and part time employees of any other ilk, and what, if any, meaningful distinction(s) exists between the two classifications. Second, it raises the question of how to properly classify temporary employees. Third, it potentially raises the question whether a full-time employee, who is also a temp, should be included in the bargaining unit. More fundamentally, the question is raised as to what extent, if at all, “temps” can be excluded from a bargaining unit under Board precedent, solely based on temporary status.

A. Standard for Determining an Appropriate Bargaining Unit

To determine whether the Petitioner seeks an appropriate bargaining unit, the Board must first determine whether the putative unit members share a community of interest. *PCC Structural, Inc.*, 365 NLRB 160, 1337. “Although more than one appropriate unit might exist, the statutory language plainly requires that the Board ‘in each case’ consider multiple potential configurations.” *PCC Structural, Inc.*, 365 NLRB No. 160, 1331 (2017). “[T]he Board’s responsibility [is] to assure to employees in each case their fullest freedom in the exercise of Section 7 rights, as stated in Section 9(b) of the Act,” and to achieve this, the Board must second,

examine the “interests that excluded employees have in common with those in the petitioned-for unit.” *PCC Structural, Inc.*, 365 NLRB 160, 1333 (internal quotations omitted) (2017). To determine whether a unit has a shared community of interest the NLRB examines the organization of departments, skills and training of employees, job functions, functional integration, contact, interchange, terms and conditions of employment and prior bargaining history. *PCC Structural, Inc.*, 365 NLRB No. 160 (2017).

Further, a unit combining employees jointly employed by a “supplier” employer and a “user” employer with employees solely employed by the user employer “logically falls within the ambit of a 9(b) employer unit.” *Miller & Anderson, Inc.*, 364 NLRB 39, 1892 (2016). Those employees “working side by side, are part of a common enterprise” and thus, generally members of the same bargaining unit, regardless of the fact that some employees are solely employed by the user employer and some are jointly employed by the user employer along with the supplier employer. *Miller & Anderson, Inc.*, 364 NLRB 39, 1892 (2016). Ultimately, excluded employees must ““have meaningfully distinct interests in the context of collective bargaining that outweigh similarities”” to justify their exclusion. *The Boeing Company*, 368 NLRB 67, 5 (2019) (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)).

The Board must also examine whether there are any special considerations for the facility, industry, or employer. *The Boeing Company*, 368 NLRB 67 (2019). The standard is outlined in *In re North American Rockwell Corp.*, 193 NLRB 983 (1971). In *Rockwell* the Board found that the appropriate unit encompassed five different divisions throughout the Los Angeles area rather than a subset of employees at one division within the area.

A determination is necessary that the two employees supplied by two different staffing companies – one as a welder and the other as the facilities maintenance employee – are joint

employees of ITB and the respective staffing companies, who should be included within the bargaining unit. Additionally, it is necessary to determine whether part-time, temporary employees provided through the Department of Labor's Job Corp program should be properly included within the bargaining unit.

B. Staffing Company Welder and Facilities Maintenance and Non-Staffing Employees

The Employer employs one welder, Daniel Hilde, and one facilities maintenance employee, Matthew Winchell, who are each, also employed by discrete staffing agencies. Both of these employees work full time at ITB. Both employees were hired for indefinite durations, perform the same work alongside other bargaining unit employees, work in the same facility on the same schedule, utilize the same skills and training, and share the same supervision. However, these jointly employed employees are paid by the staffing agencies and not on ITB's payroll. ITB's Employee Handbook defines full-time employees as those "who work[] 30 or more hours per week on a regular basis," and part-time employees as those "who work[] an average of less than 30 hours per week." ITB Employee Handbook p. 3. Full time employees are eligible for all company benefits, while part time employees "may not be eligible for all company benefits." *Id.* Only full-time employees are eligible for health, dental, and vision insurance through ITB, eligible for six paid holidays, and eligible for paid time off. *Id.* at 5,6,8.

The Petitioner seeks to represent a unit that includes "fabrication" employees, which squarely includes welding. The Employer employs five Welder I's and three Welder II's. Two Welder I's and all three Welder II's work in Commercial Production. Two Welder I's work in Flight Line Production. The staffing agency welder is a Welder I, who works in the Commercial Production portion of the facility. Thus, he performs the same or similar job functions interchangeably with

seven other employees, utilizing the same skills, at the same location, working the same full-time schedule, under the same supervision.

The unit description provided by the Petitioner also includes “maintenance and facilities maintenance employees.” The only employee holding the facilities maintenance title, as included in Petitioner’s unit description, is jointly employed by the Employer and a staffing company. He performs cleaning and maintenance duties on the shop floor, aiding the work of employees, utilizing the same skills, at the same location, working the same full time schedule, under the same supervision, and under the same terms and conditions.

Thus, a strong community of interest exists between both jointly employed employees and the employees solely employed by ITB. Neither jointly employed employee possesses materially distinct interests from employees solely employed by ITB. In addition, Mr. Winchell is expected to become solely employed by ITB in the near future. His job duties, supervision, and material terms and conditions of employment will remain unchanged following his conversion to sole employment.

C. Job Corp Participants

In addition to employees solely employed by ITB and the jointly employed employees discussed above, members of the Department of Labor’s (“DOL”) Job Corp program – generally about seven or eight at any given time – also work in the Employer’s facility. The Job Corps program “is the largest nationwide residential career training program in the country.” *What is Job Corp?*, https://www.doleta.gov/job_corps/, last accessed May 5, 2020. “The program helps eligible young people ages 16 through 24 complete their high school education, trains them for meaningful careers, and assists them with obtaining employment.” *Id.* These Job Corp participants have not worked on ITB’s facility since March 13, 2020, when the DOL announced

temporary suspension of the program. *U.S. DEPARTMENT OF LABOR ANNOUNCES TEMPORARY PAUSE IN JOB CORPS CENTER OPERATIONS*,

<https://www.dol.gov/newsroom/releases/eta/eta20200317>, last accessed May 5, 2020. The

Employer's Employee Handbook defines temporary employees as those "employed full-time or part-time for a specific job assignment or limited duration." ITB Employee Handbook p. 8.

Temporary employees are not eligible for company provided benefits. *Id.*

The Job Corp participants work in ITB's facility for a set period of approximately three months. The period time Job Corp participants work in the facility is set by the Job Corps program's administrators. During this DOL-set period of work, Job Corps participants have a shorter workday and work a one-week-on-one-week-off schedule. The Job Corps participants are paid a set wage and are ineligible for compensation increases, unlike ITB employees, and are likewise not entitled to the same benefits, as health insurance, paid holidays, and workers' compensation insurance for these individuals is provided through the Job Corps program. Thus, Job Corps participants are temporary employees who share a limited community of interest with bargaining unit employees and have "have meaningfully distinct interests in the context of collective bargaining that outweigh similarities" to justify their exclusion. *The Boeing Company*, 368 NLRB 67, 5 (2019) (quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). While participation in an on the job training and educational program akin to Job Corps is not determinative of the participants' exclusion from the bargaining unit, the numerous differences in the working terms and conditions undercut any community of interest. *In re Catholic Cmty. Servs.*, 254 NLRB 763, 765.¹ Additionally, the Job

¹ *In re Catholic Cmty. Servs.* dealt with employees under the Comprehensive Employment and Training Act (CETA), which was the precursor to the Job Training Partnership Act of 1982, which the DOL's Job Corps Program is administered under.

Corps participants have not worked in the Employer's facility for two months and have no set return date. If and when Job Corps participants return to the Employer's workplace, they will in all likelihood be new individuals, but ITB has no control over this.

III. Conclusion on Bargaining Unit Composition

Based on the above, and given the Board's confused and in-flux precedent and regulations regarding the inclusion or exclusion of jointly employed and temporary workers, we defer to the decision of the Regional Director and the Board to determine whether the bargaining unit should properly include the jointly employed, staffing agency employees and/or the Job Corps participants should be included within the bargaining unit. *See Hy Brand Industrial Contractors, Ltd.*, 366 NLRB 20 (2018) and *Board Delays Effective Date of Election Protection Final Rule*, Office of Public Affairs, April 8, 2020.

IV. Board Precedent Weighs in Favor of a Manual Ballot Election Over a Mail Ballot Election.

As previously communicated to the Region, the Employer believes that a manual ballot election in the single, Anaconda, Montana facility of the Employer is appropriate in this case for a variety of reasons. The National Labor Relations Board ("NLRB" or "Board") has long held that the National Labor Relations Act ("NLRA" or "Act") grants the Board the power to "designate the site of an election." *In re Halliburton Servs.*, 265 NLRB 1154 (1982). The Board has also, in its discretion, primarily left the determination of the time and place of elections to the discretion of the Regional Director, based on the Director's "close view of the election scene, including the many imponderables which are seldom reflected in a record, [which] is essential to a fair determination of this issue." *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954). The Board has made clear that the Regional Director's discretion "is not unfettered and is to be exercised within certain guidelines," and that "that representation elections should as a general

rule be conducted manually, either at the workplace or at some other appropriate location.” *San Diego Gas*, 325 NLRB 1143, 1144 (1998). Board precedent favors manual elections in the unit’s workplace because this facilitates unit members’ opportunity to vote. *In re Halliburton Servs.*, 265 NLRB 1154 (1982); *Groceryworks.com Operating Company LLC*, 19-RC-254203 (Jan. 24, 2020). Further, mail ballot elections are “more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over the employees’ voting,” and “inspire lower participation than on-site elections.” *Thompson Roofing, Inc.*, 291 NLRB 743, fn. 1 (1988); *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

The Board’s *San Diego Gas* decisions sets out guidelines clarifying the circumstances under which the Regional Director has the discretion to direct the use of mail ballots. The Board cites three specific situations that “normally suggest the propriety of using mail ballots.” *San Diego Gas*, 325 NLRB 1143, 1145 (1998). They are: 1) where eligible voters are “scattered” because of their job duties over a wide geographic area; 2) where eligible voters are “scattered” in the sense 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, a lockout or picketing in progress. None of these circumstances are present in this case. In addition, there are no other factors present that would likely inhibit voter participation, which is the Board’s primary consideration in selecting between a mail or manual ballot election. *San Diego Gas*, 325 NLRB 1143, 1146 (1998).

The Board’s position is further laid out in the NLRB Case Handling Manual (Part Two), Representation Procedure (“Case Handling Manual” or “Manual”) Section 11336, which states that “the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a

manual election.” Here there is no infeasibility related to the potential eligible voters. The employees all work at the Employer’s single facility in Anaconda, Montana. All potential unit employees work on a single daytime shift with the same daily work schedule.

In this case, the only basis for considering foregoing a manual ballot election in favor of a mail ballot election is the potential difficulties posed by the Coronavirus pandemic. However, for the reasons stated below, the circumstances in this case are not so extraordinary as to warrant deviation from the Board’s longstanding preference for manual ballot elections.

A. ITB Employees Are Currently Working Onsite

First, the Employer fabricates and modifies metal parts that are critical to the transportation sector and parts used in military applications. The parts produced fall into three, general product lines: Wilson ramps, commercial trucks, and air force tugs. Wilson ramps are used to load motor vehicles onto trucks, trains, or airplanes for transport, commercial trucks are outfitted with aluminum boxes to haul grain, among other things, and Air Force tugs are used to tow Air Force jets. As such, the Employer is an “essential business” under state and federal guidelines. *See Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions ¶ 8 and CISA ADVISORY MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE.* Due to its role as an essential business in the state and nation’s essential infrastructure and the nature of the work performed, the Employer has remained in operation, with employees working on site, for the entirety of Montana’s Stay-at-Home Order, with excellent attendance throughout the period. This means that the Employer and unit members are knowledgeable and experienced in social distancing and hygiene best practices, and further, that holding a manual ballot election would not expose employees to further contact beyond the brief

presence of a Board Agent and the Petitioner's observer, to conduct the election. Centers for Disease Control and Prevention, *How to Protect Yourself and Others*.

B. There Are Zero Active Cases in the County Where ITB is Located and Montana's Stay-At-Home Order Has Expired.

Second, to the extent that the Stay-At-Home Order may have been relevant, it essentially expired on April 26, 2020 and businesses have been progressively resuming operation since that date. Places of worship opened with reduced capacity and strict social distancing protocols on April 26, restaurants and bars opened May 4, subject to certain social distancing guidelines, public schools began opening May 7, and the state continued to advise avoiding gatherings of more than 10 people in situations where appropriate social distancing could not take place.

Anaconda, Deer Lodge County, Montana, where the Employer's facility is located, has fortunately experienced a total of only three COVID-19 cases and even more fortunately, no deaths, as of May 7, 2020. *MONTANA RESPONSE: COVID-19 - Coronavirus - Global, National, and State Information Resources*,

<https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>, Montana State Library, (last accessed May 7, 2020). All three cases in Deer Lodge

County were reported in March. Tom Kuglin, *Montana adds 14 cases of COVID-19 by Sunday night, for a total of 161*, Helena Ind. Rec., Mar. 29, 2020, available at

[https://helenair.com/news/state-and-regional/montana-adds-14-cases-of-covid-19-by-sunday-night-for-a-total-of 161/article_9466a3f3-72c1-5d38-9a8b-b79fba8ab392.html](https://helenair.com/news/state-and-regional/montana-adds-14-cases-of-covid-19-by-sunday-night-for-a-total-of-161/article_9466a3f3-72c1-5d38-9a8b-b79fba8ab392.html); Kristine DeLeon,

Anaconda's AWARE Inc. confirms two coronavirus cases among its staff, MT Standard, Mar. 31, 2020, available at [https://mtstandard.com/news/local/anacondas-aware-inc-confirms-two-](https://mtstandard.com/news/local/anacondas-aware-inc-confirms-two-coronavirus-cases-among-its-staff/article_328cae88-27b2-59c8-ab02-5595a0472a3d.html)

[coronavirus-cases-among-its-staff/article_328cae88-27b2-59c8-ab02-5595a0472a3d.html](https://mtstandard.com/news/local/anacondas-aware-inc-confirms-two-coronavirus-cases-among-its-staff/article_328cae88-27b2-59c8-ab02-5595a0472a3d.html). All three people who suffered from COVID-19 in Deer Lodge County have now recovered leaving

no active cases remaining in the county. *MONTANA RESPONSE: COVID-19 - Coronavirus - Global, National, and State Information Resources*,

<https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>, Montana State Library, (last accessed May 7, 2020). Further, the number of new cases in Montana has steadily declined since the end of March, only 23 active cases remain in the state of more than one million people, and zero new cases have been reported in Montana since May 3, 2020. *Id.* Holding a manual ballot election in a county with zero active cases is in stark contrast to the circumstances present in recent decisions and directions of elections from the Regional Directors in Regions 27 and 16 respectively. There the Regional Directors cited concerns over potential exposure due to the large and growing numbers of COVID-19 cases in those areas. The Region 16 Director cited the 1,256 confirmed COVID-19 cases and 28 deaths in Travis County, Texas and the 499 confirmed COVID-19 cases and 40 deaths in Lubbock County, Texas.² *Durham School Services*, 16-RC-259069 (April 27, 2020); *VICTORY WINE GROUP, LLC*, 16-RC-257874 (April 23, 2020). The Region 27 Director cited 86 confirmed cases and seven deaths in Pueblo County, Colorado. *Atlas Pacific Engineering Company*, 27-RC-258742 (April 22, 2020). These decisions also predate the hearing in this matter by three weeks, during which time, the “curve has flattened” to a substantial degree in many places around the country, including Montana.³ The most recent Decision and Direction of Election directing a mail ballot election was issued on May 5, 2020 involving an employer located in

² The number of reported cases in Travis County, Texas grew from 1,256 on April 23, 2020 to 1,876 on May 7, 2020, 499 on April 27, 2020 to 567 on May 7, 2020 in Lubbock County, Texas, 86 on April 20, 2020 to 161 on May 7, 2020 in Pueblo County Colorado. Texas Case Counts COVID-19, Tex. Health and Human Services (last accessed May 7, 2020)

<https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>; *COVID-19 Colorado Case Summary*, Colo. Dept. of Health & Environment (last accessed May 7, 2020)
<https://covid19.colorado.gov/data/case-data>.

³ The number of new cases reported in Montana peaked on March 26, 2020 when 35 new cases were reported.

Cook County, Illinois, which has seen 19,249 confirmed cases and 892 deaths. *Fontanini Foods, LLC*, 13-RC-257636 (May 5, 2020); *Illinois County Map of COVID-19 Positive Cases*, State of Ill. Coronavirus (COVID-19) Response (last accessed May 7, 2020) <https://coronavirus.illinois.gov/s/county-map>. These examples are a far cry from Deer Lodge County, Montana. Simply stated, a manual ballot election can be safely conducted in a county with no active cases.

C. Washington’s Stay-At-Home Order Has Begun to Expire But Never Posed an Obstacle to Holding This Election in Montana.

Third, the Washington stay-at-home order affecting the Seattle-headquartered NLRB Region 19 began to expire on May 4, 2020. The Governor signed an Order on the fourth implementing a phased reopening, beginning to lift restrictions on public life and allowing non-essential businesses to begin reopening. *Safe Start Washington*, Office of the Governor. Many construction projects began to resume even earlier on April 24, pursuant to Governor Inslee’s plan. *Id.* Under the Governor’s plan, smaller, less affected Washington counties will be able to apply for waivers to open businesses and public life more rapidly than the state generally. *Id.*

Irrespective of the Orders, governmental functions such as the NLRB continued, with most employees teleworking throughout March, April, and May. *NLRB Announces Agency-wide Telework Until April 1*, NLRB Office of Public Affairs (March 16, 2020). At the Board’s direction, union elections have been proceeding since April 6, which “is core to the NLRB’s mission.” *NLRB Resumes Representation Elections*, NLRB Office of Public Affairs (April 1, 2020). Further, a manual election in this case involves only one Board Agent, who has presumably been teleworking since the Board announced Agency-wide telework on March 16, 2020. *NLRB Announces Agency-wide Telework Until April 1*, NLRB Office of Public Affairs (March 16, 2020); Hassan A. Kanu, *Labor Board Extends Teleworking Indefinitely Due to*

Pandemic, Bloomberg Law Mar. 27, 2020, available at <https://news.bloomberglaw.com/daily-labor-report/labor-board-extends-teleworking-indefinitely-due-to-pandemic>. Thus, the Board Agent will have been self-isolated far beyond the CDC recommendation for people who experienced symptoms. Centers for Disease Control and Prevention, *What to Do If You Are Sick*. Moreover, driving from Seattle to Anaconda does not expose the Board Agent to any contact or pose a material risk to either the Board Agent, the Employer, or the potential voters. The Board Agent can further take the CDC recommended precautions such as monitoring his or her temperature for fever, practice thorough hand washing, and wear appropriate PPE.

D. Precautions Can Mitigate the Minimal Risks of Holding a Manual Ballot Election in a County With Zero Active COVID-19 Cases.

Fourth, the unit consists of only approximately 20 members, meaning the election could be conducted in less than an hour, while utilizing strict social distancing and hygiene protocols. To observe social distancing and hygiene guidelines advised by the CDC, the voting room could be thoroughly deep cleaned and disinfected immediately prior to the commencement of voting. Unit members could remain at their workstations while waiting to vote or wait in a line, standing more than six feet from one another, as indicated by markings on the floor, and check their temperature prior to casting their ballot. The balloting could be conducted in a room large enough to allow for the observer for both sides, the board agent, and the voting unit member to remain more than six feet apart. Each observer could have his or her own table and copy of the Eligibility List as a slight modification to the Case Handling Manual to allow for necessary social distancing. *See* National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11322.1. Each observer could still check off voters as appropriate on different sides of the voters' names using different colored pens or pencils. *See Id.* The Board Agent could also have a separate table. The voting booth could be at least six feet

away from each table. “Affirmative steps ... taken to avoid confusion” could include a taped off path and signage indicating the route that unit members should walk to arrive at the voting booth to indicate how voters should proceed into the room to the checking table and then the voting booth and out of the room, while remaining six feet away from the observers and Board Agent. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11322. Clear plastic screens could be used as an additional safety measure. Unit members would enter the voting room one at a time, in accord with the standard protocol for most small unit manual ballot election. The employee could then stand at a point marked with tape on the floor, state her or his name, the observers could check that voter off the list, the Board Agent could place a ballot on the table for the voter to retrieve after the Board Agent has backed away from table at least six feet, and the voter could retrieve the ballot off of the table and proceed to the ballot box. Spoiled ballots could be handled in this same manner, by the voter placing the spoiled ballot on the table, the Board Agent retrieving the ballot, inspecting it, placing a clean ballot on the table, and the voter retrieving the clean ballot and proceeding again to the voting booth. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11322.3. The closing of the poll and all signing and certifying of documents could be completed, while following social distancing protocols. *See* National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Secs. 11318.4 & 11324.

Hand sanitizer would be available for the observers and Board Agent at their respective tables. Unit members would sanitize their hands immediately prior to casting their ballot and each would use his or her own pencil or pen to fill out the ballot or any commonly used pen or pencil could be sanitized after each use. Each voter could wipe down the voting booth surfaces with a disinfectant wipe prior to departing. All participants would wear gloves and properly

fitted N-95 masks throughout the process, provided by the Employer. Mask and gloves would be made available to the Board Agent. Due to the small size of the unit and the personal familiarity between unit members, lowering of masks for identification purposes would be unnecessary.

Similar to the spoiled ballot procedure outlined above, the Board Agent could fill out the appropriate information on the challenged ballot envelope stub at the Agent's table. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11338.3. While the voter remains in the voting booth, the Board Agent could place the challenge envelope on the voting table for the voter to retrieve. *Id.* Once the Board Agent returns to his or her table, the voter could exit the voting booth, display his or her folded ballot, place the ballot in the challenged ballot envelope, seal the envelope, and place the envelope in the box. *Id.* Additionally, the small size of the unit and the lack of dispute over the unit composition mean the likelihood of a challenged ballot in the first place is slim.

E. A Mail Ballot Election Will Not Expedite the Return of Election Results and Thus Will Not Fulfill the Ends of the National Labor Relations Act Faster Than A Manual Ballot Election.

Mail ballot procedures generally cause a month to six weeklong delay between the election date – when ballots are mailed – and the date ballots are counted, and the election results can be determined. *See e.g., Durham School Services*, 16-RC-259069 (April 27, 2020); *Atlas Pacific Engineering Company*, 27-RC-258742 (April 22, 2020); *VICTORY WINE GROUP, LLC*, 16-RC-257874 (April 23, 2020); *Groceryworks.com Operating Company LLC*, 19-RC-254203 (Jan. 24, 2020). Voters casting their ballots is not an end unto itself, but rather, a means of determining whether union representation in collective bargaining is preferred by a majority of the eligible bargaining unit voters. 29 U.S.C. §151. Given the rural locale of the unit members combined with the severe consequences of COVID-19 on the United States Postal Service and the elevated

potential for delays in mail delivery this creates, what is typically a month or six-week delay could be required to extend even longer. Thus, a manual ballot election delayed by three or four weeks to allow even further mitigation of COVID-19 in Montana, would result in a much quicker return of election results than a mail ballot. In this case, Montana has relaxed its social distancing guidelines as a result of a sustained decline in COVID-19 cases since early April, rendering a late May manual ballot election, conducted under strict social distancing guidelines appropriate. A further, three or even four-week delay prior to a manual ballot, as an additional layer of caution, would allow for an early June manual ballot election and still provide election results earlier than a mail ballot. Short staffing at the Regional Office additionally could depress voter turnout because ballots returned in unsigned envelopes might not be processed as expeditiously as they would when a full office staff is present. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11336.4(b). Combined with the rural area the unit members live in and the potential mail delays this entails, unsigned envelopes from attempted voters face steep obstacles to being counted.

Further, a mail ballot election would present the same issues as a manual ballot election for the Board Agent and observers counting ballots. Section 11336.5(b) of the Case Handling Manual states in part: “At the time scheduled for the count, the returned envelopes are treated as “voters” approaching the checking table. The observers at the table make their marks alongside the respective names on the list.” National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11336.5(b). With the mail ballots presumably sent to the Region 19 office in Seattle, following this procedure would require the Board Agent to travel in person to the Region’s office and the Employer’s and presumably the Petitioner’s representative

to travel from Montana to Seattle to observe the count, where the COVID-19 pandemic remains substantially more prevalent.

V. The Circumstances in Deer Lodge County, Montana Are Not So Extraordinary to Warrant the Regional Director to Direct an Essential Employer to Conduct a Mail Ballot Election Under Board Precedent.

The Board's longstanding election rules favoring manual ballot elections are in place to ensure, to the extent possible, full participation by all eligible voters who wish to vote. An election in the employees' own workplace would assure that a full opportunity to vote is provided. We believe that a manual ballot election is far preferable to mail ballots sent to employees living in a rural area without any major metropolitan population center. If the Regional Director determines that ballots cannot be cast in person in Anaconda, Montana due to extraordinary circumstances foisted on the parties by the COVID-19 pandemic, it stands to reason that these same extraordinary circumstances would also preclude a count of mail ballots at the Region 19 office in downtown Seattle. Thus, a mail ballot election could not return election results any faster than a manual ballot election. In light of this, the Board's long held presumption in favor of manual ballot elections dictates a manual ballot election at the Employer's workplace should be directed by the Regional Director.

Date: May 7, 2020

Respectfully Submitted by:

ALANIZ LAW & ASSOCIATES, PLLC
Attorneys for Employer, 2101 LLC d/b/a
INTERCONTINENTAL TRUCK BODY

/s/ Richard D. Alaniz

Richard D. Alaniz, esq.

Tex. Bar No. 00968300

ralaniz@alaniz-law.com

Brett Holubeck, esq.

Tex. Bar No. 24090891

bholubeck@alaniz-law.com
Scott Stottlemyre, esq.
Tex. Bar No. 24098481
sstottlemyre@alaniz-law.com
20333 State Hwy. 249, Ste. 272
Houston, TX 77070

CERTIFICATE OF SERVICE

The undersigned, on behalf of Employer, 2101 LLC d/b/a Intercontinental Truck Body, LLC, sent a true and correct copy, via efile and email, of Intercontinental Truck Body's Statement of Position this day to the NLRB Region 19 Director and to the parties at the addresses set forth below:

Ronald K. Hooks, NLRB Region 19 Director
via efile

Sara Dunn
via email: Sarah.Dunn@nlrb.gov

Jason Hardwick
via email: jhardwick@iamaw.org

/s/Richard D. Alaniz

Richard D. Alaniz

EXHIBIT F

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**2101 LLC d/b/a
INTERCONTINENTAL TRUCK BODY ¹
Employer**

Case 19-RC-258144

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88, AFL-CIO
Petitioner**

STIPULATION OF RECORD FOR PRE-ELECTION HEARING

The undersigned stipulate and agree to the following:

1. On March 17, 2020, International Association of Machinists and Aerospace Workers, Lodge 88, AFL-CIO (herein referred to as "the Petitioner") filed a petition seeking to represent certain employees of 2101 LLC d/b/a Intercontinental Truck Body (herein referred to as "the Employer"). This petition is attached as Exhibit 1. On March 18, 2020, the Region served the petition on the parties and issued a Notice of Hearing in this matter. A copy of the March 18, 2020 Notice of Hearing and the Affidavit of Service are attached as Exhibit 2. On April 8, 2020, the Region issued an Order Rescheduling the Hearing to May 27, 2020. A copy of the April 8, 2020 Order Rescheduling Hearing and the Affidavit of Service are attached as Exhibit 3. On April 27, 2020, the Region issued an Order further Rescheduling the Hearing from May 27, 2020 to May 14, 2020. A copy of the April 27, 2020 Order Rescheduling Hearing and the Affidavit of Service are attached as Exhibit 4.
2. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.
3. The Employer, a State of Montana limited liability company, with a place of business in Anaconda, Montana, is engaged in the business of manufacturing various commercial and military transportation

¹ The parties stipulate and agree that the petition in this matter should be amended to reflect the legal name of the Employer as set forth in paragraph 1 of this document. In addition, to the extent the formal documents in this proceeding do not correctly reflect the name of either party as designated in paragraph 1, the formal documents are hereby amended to do so.

opt 5/13

equipment. In the past twelve months, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 directly from points outside the State of Montana and received gross revenues in excess of \$500,000. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

4. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time production, fabrication, maintenance, and facilities maintenance employees employed directly by the Employer at its Anaconda, MT facility.

Excluded: All other employees, employees supplied by temporary staffing agencies, employees supplied through the Job Corp Program, professional employees, clerical employees, managers, and guards and supervisors as defined by the Act.

6. There is no history of collective bargaining between these parties in the proposed bargaining unit identified above and there is no contract or other bar in existence to an election in this case.

7. The Employer's payroll period is for a period of two weeks. The most recent payroll eligibility ending date at the time of the signing of this stipulation was May 9, 2020.

8. The sole issue that precludes reaching a stipulated election agreement in this case is whether the election should be conducted in-person or by mail ballot, including the date(s) of the election. The parties are not in dispute about any other issues related to this election.

9. The Employer and Petitioner will each e-file on the NLRB's website their position in writing (herein "**written statement**") on the method-of-election issue by the close of business (4:45 p.m. PT) on Friday, May 15, 2020; the written statement should also be served on the other party by the same deadline. In addition to outlining the party's position on the appropriateness of a manual or mail ballot election, if a party is a proponent of a manual election, the written statement must also describe: 1) if and when a manual election could be safely held; and 2) a proposal for how a manual election could be conducted to ensure the safety and health of all participating, including among other things: whether there would be masks, gloves, and hand sanitizer available for all participants.

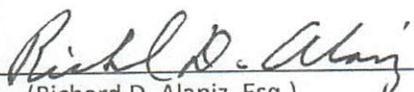
10. The parties have been informed of the procedures at formal hearing before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. By entering into this stipulation, the parties waive their right to a pre-election hearing before a Hearing Officer in this matter.

11. This stipulation, its exhibits, and each party's written statement will constitute the entire record for this matter. The Regional Director will make a determination solely on the basis of the stipulated record, its exhibits, and the parties' written statements.

14. The parties retain the right to file, limited to the method, date, time, and place of election ordered, a request for review of the Regional Director's decision with the Board.

15. In the event that the Regional Director orders a mail ballot election, and in the event he sets a due date for returning ballots different than the date of the ballot count, the parties understand that no ballot will be counted that the Region receives after the due date established by the Regional Director and the parties waive their right to file objections based upon any untimely received ballots.

2101 LLC d/b/a Intercontinental Truck Body



(Richard D. Alaniz, Esq.)

May 13, 2020
(Date)

International Association of Machinists and Aerospace Workers, Local Lodge 88, AFL-CIO



(Karen Sencer, Esq.)
C

5/13/2020
(Date)

EXHIBIT G

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 19-RC-258144	Date Filed 3-17-2020

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
Intercontinental Truck Body

2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
78 Gold Street Anaconda, MT 59711

3a. Employer Representative - Name and Title
Cory Riley, Operations Manager

3b. Address (If same as 2b - state same)
Same

3c. Tel. No. 406-797-7900 **3d. Cell No.** 406-581-5753 **3e. Fax No.** **3f. E-Mail Address** coryr@itbusa.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.) Manufacturing/Fabrication Facility **4b. Principal product or service** Manufacturing and Fabricating equipment for loading ramps and tow vehicles **5a. City and State where unit is located:** Anaconda, MT

5b. Description of Unit Involved
Included: All full time and regular part time production, fabrication, maintenance and facilities maintenance employees of the employer at the facility located at 78 Gold Street, Anaconda, MT 58711
Excluded: Temps, Managers, Supervisors, Clerical Workers, and all other employees including professional employees, managerial employees, guards, supervisors, and other employees as defined by the Act.

6a. No. of Employees in Unit: 18
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes **No**

Check One: **7a. Request for recognition as Bargaining Representative was made on (Date) 3/17/2020 and Employer declined recognition on or about** _____ (Date) (If no reply received, so state). **No Reply**
 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). None **8b. Address**

8c. Tel No. **8d Cell No.** **8e. Fax No.** **8f. E-Mail Address**

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)
None

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:** Manual Mail Mixed Manual/Mail

11b. Election Date(s): APRIL 6, 2020 **11c. Election Time(s):** **11d. Election Location(s):** Lunch room, 78 Gold Street Anaconda, MT 59711

12a. Full Name of Petitioner (including local name and number)
International Association of Machinists and Aerospace Workers, Local Lodge 88 **12b. Address (street and number, city, state, and ZIP code)**
156 West Granite Street Butte, MT 59701

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state)
International Association of Machinists and Aerospace Workers, AFL-CIO

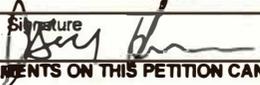
12d. Tel No. 406-723-8044 **12e. Cell No.** 406-565-0062 **12f. Fax No.** **12g. E-Mail Address** troy@iamw24.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title Jason Hardwick, Grand Lodge Representative **13b. Address (street and number, city, state, and ZIP code)**
620 Coolidge Rd., Suite 130, Folsom, CA 95630

13c. Tel No. 916-985-8101 **13d. Cell No.** 916-936-6013 **13e. Fax No.** 916-985-8121 **13f. E-Mail Address** jhardwick@iamaw.org

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) Jason Hardwick **Signature**  **Title** Grand Lodge Representative **Date** 3/17/2020

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.



**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**



<p>INTERCONTINENTAL TRUCK BODY</p> <p align="center">Employer</p> <p align="center">and</p> <p>INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 88</p> <p align="center">Petitioner</p>	<p align="center">Case 19-RC-258144</p>
---	--

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at **9:00 AM on Thursday, April 9, 2020** and on consecutive days thereafter until concluded, at a **place to be determined in Butte, Montana,**¹ a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Intercontinental Truck Body must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Pacific time on April 08, 2020. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Pacific on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: March 18, 2020



RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

¹ The hearing may be rescheduled to a later date.

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

Intercontinental Truck Body Employer and International Association of Machinists and Aerospace Workers, Lodge 88 Petitioner	Case 19-RC-258144
--	--------------------------

AFFIDAVIT OF SERVICE OF: Petition dated March 17, 2020, Notice of Representation Hearing dated March 18, 2020, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on March 18, 2020, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Cory Riley
Intercontinental Truck Body
78 Gold Street
Anaconda, MT 59711
coryr@itbusa.com

Jason Hardwick, Grand Lodge Representative International Association of Machinists and Aerospace Workers, AFL-CIO 620 Coolidge Road Suite 130 Folsom, CA 95630-3182 jhardwick@iamaw.org Fax: (916)985-8121	International Association of Machinists and Aerospace Workers, Lodge 88 156 W Granite St Butte, MT 59701-9262
--	--

March 18, 2020
Date

Dennis Snook, Designated Agent of NLRB
Name

/s/ Leila Nomoto

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

INTERCONTINENTAL TRUCK BODY

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from April 9, 2020 to 9:00 AM on **Wednesday, May 27, 2020¹** at a place to be determined in Butte, MT. The hearing will continue on consecutive days until concluded.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on May 26, 2020. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 8, 2020

RONALD K. HOOKS

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

¹ Due to the evolving nature of the current COVID-19 situation the Regional Director may in his discretion reschedule the hearing date should the changing COVID-19 situation, in his view, significantly affect the Region's operational status, or, its ability to safely conduct hearings.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

INTERCONTINENTAL TRUCK BODY

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

AFFIDAVIT OF SERVICE OF: Order Rescheduling Hearing, dated April 8, 2020.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 8, 2020**, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

Cory Riley
Intercontinental Truck Body
78 Gold Street
Anaconda, MT 59711

Spherion
1015 S. Montana St.
Butte, MT 59701

Richard D. Alaniz , Attorney
Alaniz Law & Associates
20333 State Hwy., 249, Ste. 272
Houston, TX 77070

Express Professionals Employment
700 E. Front St.
Butte, MT 59701

Scott Stottlemire , Attorney
Alaniz Law & Associates
20333 State Hwy. 249, Ste. 272
Houston, TX 77070

Jason Hardwick , Grand Lodge
Representative
International Association of Machinists and
Aerospace Workers, AFL-CIO
620 Coolidge Road Suite 130
Folsom, CA 95630-3182

Brett Holubeck , Attorney
Alaniz Law & Associates
20333 State Hwy., 249, Ste. 272
Houston, TX 77070

International Association of Machinists and
Aerospace Workers, Lodge 88
156 W Granite St
Butte, MT 59701-9262

April 8, 2020

Date

Dennis Snook, Designated Agent of NLRB

Name

Leila Uomoto

Signature

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

INTERCONTINENTAL TRUCK BODY

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from May 27, 2020, at 9:00 AM, to **Thursday, May 14, 2020**, at 9:00 AM PDT. The telephonic hearing will continue on consecutive days thereafter until concluded. At the hearing, the parties will have the right to appear telephonically and provide witness testimony if needed. The hearing dial-in number and conference ID code will be provided to the parties by May 13.

YOU ARE FURTHER NOTIFIED that at 1:00 PM Pacific time on **Tuesday, May 12, 2020**, the hearing officer will hold a pre-hearing teleconference to discuss the possibility of the parties reaching a stipulated election agreement, technical difficulties by participants in hearing, such as internet accessibility, the advance submission of exhibits, the presentation of witnesses, rules of conduct for hearing attendees, and, if necessary, subpoenaed documents, petitions to revoke or other pre-hearing motions. This office will provide the parties with the pre-hearing teleconference dial-in number.

The Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on **Thursday, May 7, 2020**. The Statement of Position may be e-Filed but, unlike other e-Filed documents, must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 27, 2020

RONALD K. HOOKS

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**2101 LLC d/b/a INTERCONTINENTAL TRUCK
BODY**

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88**

Petitioner

AFFIDAVIT OF SERVICE OF Order Rescheduling Hearing dated April 27, 2020

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **April 27, 2020**, I served the above-entitled document(s) by **regular mail and email** upon the following persons, addressed to them at the following addresses:

Cory Riley
Intercontinental Truck Body
78 Gold St
Anaconda, MT 59711-9017

Brett Holubeck , Attorney
Alaniz Law & Associates
20333 State Highway 294 Ste 272
Houston, TX 77070-2617

Richard D. Alaniz , Attorney
Alaniz Law & Associates
20333 State Highway 294 Ste 272
Houston, TX 77070-2617

Spherion
1015 S Montana St
Butte, MT 59701-2807

Scott Stottlemire , Attorney
Alaniz Law & Associates
20333 State Highway 249 Ste 272
Houston, TX 77070-2617

Express Professionals Employment
700 E Front St
Butte, MT 59701-2988

Jason Hardwick , Grand Lodge
Representative
International Association of Machinists and
Aerospace Workers, AFL-CIO
620 Coolidge Rd Ste 130
Folsom, CA 95630-3182

International Association of Machinists and
Aerospace Workers, Lodge 88
156 W Granite St
Butte, MT 59701-9262

Ron Morgan
Job Corps
525 S Griffin Street - RM 317
Dallas, TX 75202

April 27, 2020

Date

Dennis Snook, Designated Agent of NLRB

Name

Leila Nomoto

Signature

EXHIBIT H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

2101 LLC D/B/A INTERCONTINENTAL TRUCK
BODY

Employer

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88

Case 19-RC-258144

Petitioner

ORDER CANCELLING HEARING

IT IS HEREBY ORDERED that the telephonic hearing in the above matter set for
Thursday, May 14, 2020 is hereby cancelled.

Dated: May 13, 2020

RONALD K. HOOKS

RONALD K. HOOKS, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 19
915 2ND AVE STE 2948
SEATTLE, WA 98174-1006

EXHIBIT I

TO: Ronald K. Hooks, Regional Director
Region 19
National Labor Relations Board
915 2nd Avenue
Room 2948
Seattle, WA 98174-1078

FROM: Alaniz Law & Associates
Representative for 2101 LLC d/b/a Intercontinental Truck Body

DATE: May 15, 2020

RE: Case No: 19-RC-258144
Petitioner: International Association of Machinists and Aerospace Workers, AFL-CIO

STATEMENT OF POSITION REGARDING METHOD OF ELECTION

I. Board Precedent Favors Manual Ballot Election Because Manual Ballots Best Ensure Employee Enfranchisement

As previously communicated to the Region, the Employer believes that a manual ballot election in the single, Anaconda, Montana facility of the Employer is safe and appropriate in this case for a variety of reasons. The National Labor Relations Board (“NLRB” or “Board”) has long held that the National Labor Relations Act (“NLRA” or “Act”) grants the Board the power to “designate the site of an election.” *In re Halliburton Servs.*, 265 NLRB 1154 (1982). The Board has also, in its discretion, primarily left the determination of the time and place of elections to the discretion of the Regional Director, based on the Director’s “close view of the election scene, including the many imponderables which are seldom reflected in a record, [which] is essential to a fair determination of this issue.” *Manchester Knitted Fashions, Inc.*, 108

NLRB 1366 (1954). The Board has made clear that the Regional Director’s discretion “is not unfettered and is to be exercised within certain guidelines,” and “that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location.” *San Diego Gas*, 325 NLRB 1143, 1144 (1998). Board precedent favors manual elections in the unit’s workplace because this facilitates unit members’ opportunity to vote. *In re Halliburton Servs.*, 265 NLRB 1154 (1982); *Groceryworks.com Operating Company LLC*, 19-RC-254203 (Jan. 24, 2020). Further, mail ballot elections are “more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over the employees’ voting,” and “inspire lower participation than on-site elections.” *Thompson Roofing, Inc.*, 291 NLRB 743, fn. 1 (1988); *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996).

The Board’s *San Diego Gas* decision sets out guidelines clarifying the circumstances under which the Regional Director has the discretion to direct the use of mail ballots. The Board cites three specific situations that “normally suggest the propriety of using mail ballots.” *San Diego Gas*, 325 NLRB 1143, 1145 (1998). They are: 1) where eligible voters are “scattered” because of their job duties over a wide geographic area; 2) where eligible voters are “scattered” in the sense 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, a lockout, or picketing in progress. None of these circumstances are present in this case. In addition, there are no other factors present that would likely inhibit voter participation, which is the Board’s primary consideration in selecting between a mail or manual ballot election. *San Diego Gas*, 325 NLRB 1143, 1146 (1998).

The Board’s position is further laid out in the NLRB Casehandling Manual (Part Two), Representation Procedure (“Casehandling Manual” or “Manual”) Section 11336, which states

that “the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election.” Here there is no infeasibility related to the potential eligible voters. The employees all work at the Employer’s single facility in Anaconda, Montana. All potential unit employees work on a single daytime shift with the same daily work schedule. The Employer is deemed “essential” and all employees have been reporting for work as scheduled throughout the emergency.

In this case, the only basis for considering foregoing a manual ballot election in favor of a mail ballot election is the potential difficulties posed by the Coronavirus pandemic. The Board has recently acknowledged in an unpublished decision that a Regional Director’s Decision and Direction of a mail ballot, relying on “the extraordinary federal, state, and local government directives” limiting non-essential activity, was not an abuse of discretion. *Atlas Pacific Engineering Company*, 27-RC-258742, fn.1 (May 8, 2020). The Board further stated that Regional Directors’ “assessment of current Covid-19 pandemic conditions in the local area” and how these conditions potentially affect Board personnel safety is a proper basis for considering the merits of a mail ballot. *Id.* For the reasons stated in detail below, the circumstances in the local area – Anaconda, Montana – are far from extraordinary. Montana’s Stay-At-Home order has expired, any de minimis risk to Board personnel can be mitigated through common sense precautions, and no present circumstance warrants deviation from the Board’s longstanding preference for manual ballot elections.

a. Mail Delivery Disruptions May Disenfranchise Voters

Numerous, recent news reports throughout the country highlight the problems with mail delivery during the COVID-19 pandemic. Such delivery issues are more rampant at the United

States Postal Service (“USPS” or “Postal Service”) due to the number of postal workers in the country that have been affected by COVID-19. A statement issued by the National Association of Mail Carriers on April 17, 2020, found that 8,000 postal workers were quarantined at that time. Frederic Rolando, *Statement from President Frederic V. Rolando Re: COVID-19 Virus Crisis*, National Association of Letter Carriers (May 14, 2020), <https://www.nalc.org/news/nalc-updates/body/4-17-20-statement.pdf>.

Problems with delivery of the mail could cause employees to lose their voice in the election. The post office Mail delivery problems have been reported in Detroit, Colorado, New Orleans, New York, and several other locations. Anne Runkle, Oakland County residents report delays in mail delivery, *The Oakland Press*, (April 22, 2020)

https://www.theoaklandpress.com/news/coronavirus/oakland-county-residents-report-delays-in-mail-delivery/article_be936296-840d-11ea-bf7a-731dcf043be3.html; Evan Kruegel, Coloradans report mail delays; COVID-19 causing delivery issues nationwide, FOX31 Denver KDVR-TV, (April 16, 2020) <https://kdvr.com/news/coronavirus/coloradans-report-mail-delays-covid-19-causing-delivery-issues-nationwide/>; Thomas Perumean, Problems with Postal Service another fallout due to COVID-19, WWL 870 FM 105.3, (April 9, 2020),

<https://wwl.radio.com/articles/problems-with-postal-service-another-fallout-due-to-covid-19>; Jake Offenhartz, Gothamist, "The Mail Just Stopped": Coronavirus Staffing Shortages And Budget Gaps Push Postal Service To Brink Of Collapse, (April 2, 2020) <https://gothamist.com/news/mail-coronavirus-staffing-postal-service-covid-19>.

Even where delivery in an area is not affected, individuals may lose delivery of mail. In one case, a woman that tested positive for COVID-19 was reportedly refused service for mail. Arezow Doost, Post-it note left for woman diagnosed with COVID-19 reads no more mail

delivery, (May 11, 2020), <https://www.kxan.com/investigations/post-it-note-left-for-woman-diagnosed-with-covid-19-reads-no-more-mail-delivery/>.

Moreover, there is a possibility that mail delivery could completely stop.

Congresspersons Maloney and Connolly issued a statement that the Postal Service could shutter as early as June unless Congress provides relief. Congressperson Carolyn B. Maloney and Gerald E. Connolly, Letter to Majority Leader Mitch McConnell, March 24, 2020, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-24.CBM%20GEC%20to%20McConnell-%20Senate%20re%20Postal%20Emergency.pdf>.

Obviously, the end of the Postal Service or any of the significant reported disruptions would require the parties to consider other methods for employees to return their ballots or result in ballots not being counted. A delay in delivery of mail would cause ITB employees to lose the ability have their voices heard in this election. A manual election would avoid all of these potential issues that could further delay the process.

b. Past Comments and Concerns from the NLRB Itself Demonstrate that a Mail Ballot Election May Limit Employees' Ability to Participate in the Election

Problems with mail ballots have been noted by prior NLRB regional offices. These were outlined when Chairman William Gould proposed expanding the use of mail ballots in 1994.

Comments included that:

- A Board agent's presence provides employees an increased sense of security and assurance that their rights are preserved. Daniel V. Yager, *NLRB Agency in Crisis*, 46 (1996) (*quoting* Richard J. Roth, Assistant Director of Brooklyn NLRB Regional Office).
- There is increased potential for interference by either party, which increases the odds that an additional election will have to be conducted because of misconduct. *Id.*

- Ballots are included with other junk mail that reduces the seriousness of the process. *Id.* (quoting Nina Rzymiski, NLRB Region 6, Election Specialist).
- A voter that is confused or uncertain about the process lacks the ability to speak with an official agent to answer questions, which increases the likelihood that they will procrastinate and “find it easier to not vote.” *Id.*

The problems of a mail ballot election are demonstrated in *Western Wall Systems, LLC*, 28-RC-247464 (Apr. 16, 2020). *Western Wall* was a mixed manual ballot election where seven votes were to be counted by mail. *Id.* There were numerous problems with these mail ballots. *Id.* There were statements that most, if not all of the ballots may not have been received by the designated date; a voter contacted the NLRB, but the NLRB stated that they did not know anything about the ballots; five of the voters received duplicate ballots and these were not counted because they were not properly completed or arrived late at the NLRB. *Id.* Moreover, the envelopes that needed to be signed only had instructions in English and the unit was primarily composed of people that were only literate in Spanish. *Id.* Finally, many of the employees in this election received the ballot on the same day that would have been required to return it. *Western Wall Systems, LLC*, 28-RC-247464 (Apr. 16, 2020). All of these issues disenfranchised members of the potential bargaining unit even though the results in the election were not affected. *Id.*

The NLRB has itself decided to no longer issue decisions by mail but is instead using eservice as many of its members are teleworking. (see exhibit _____ email discussing service of NLRB decisions). The NLRB’s decision shows the increased problems that may be present for the NLRB in conducting a mail ballot election.¹

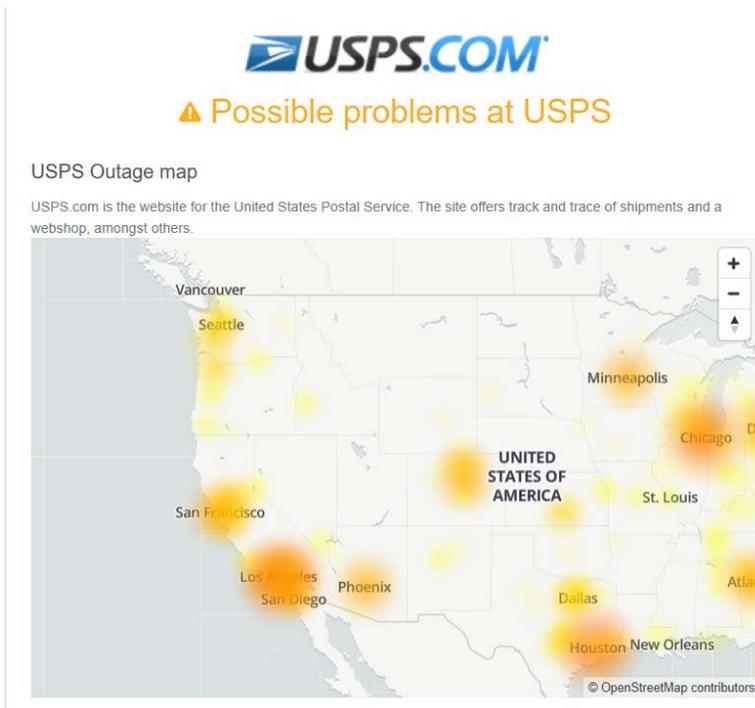
¹ The NLRB seems to be acknowledging that service by mail may be delayed or otherwise difficult or compromised.

All of these facts demonstrate the difficulty of conducting a mail ballot election in this election when mail service delays have been noted throughout the country.

c. Mail Balloting May Result in too Few Participants for the Unit to be Certified

Mail balloting may result in an election where a miniscule number of employees participate, and an additional election must be held. In *Shepard Convention Services*, a mail ballot election, a mere 77 ballots, 19 percent of the total number of eligible votes, were cast in a 438-person unit. *Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, (D.C. Cir. 1996) (86, including 9 void ballots, of 438 eligible voted in mail election, or 19.6%). The D.C. Circuit admonished the NLRB in that case and overturned their attempt to certify the union, due to disenfranchisement of the majority of eligible voters. *Id.*

Downdetector, a monitoring service that reports on outages of various apps, internet providers, online services, and other providers shows service problems throughout the Seattle area where any mail would need to pass through to reach the NLRB office.



A review of complaints on the site reveals numerous individuals that describe issues with USPS tracking being out of date or incorrect, deliveries taking more than a month in some areas, and substantial delays in post office services. A mail ballot election may cause severe disenfranchisement issues for individuals as the mail will have to be re-routed several times for it to make it from the office in Seattle to Anaconda, Montana and back to the NLRB offices. Delays of a month that some individuals are complaining about for various types of shipments would likely result in a complete disenfranchisement of many members of the unit or shrink the number of returned ballots to the point where a unit certification might be subject to challenge. A manual election avoids this problem.

II. There Are Zero Active Cases in the County Where The Employer is Located and Montana's Stay-At-Home Order Has Expired.

To the extent that Montana's Stay-At-Home Order may have been relevant, it essentially expired on April 26, 2020 and businesses have progressively resumed operation since. Montana, Reopening the Big Sky, Phased Approach, *available at* <https://drive.google.com/file/d/1ndkepiFNDJZC6y2jXBQEGswv7EMdmphy/view> (last accessed May 14, 2020). Places of worship opened with reduced capacity and strict social distancing protocols on April 26, restaurants and bars opened May 4, subject to certain social distancing guidelines, public schools began opening May 7, and the state continued to advise avoiding gatherings of more than 10 people in situations where appropriate social distancing could not take place. *Id.*

Anaconda, Deer Lodge County, Montana, where the Employer's facility is located, has fortunately experienced a total of only three COVID-19 cases and even more fortunately, no deaths, as of May 15, 2020. *MONTANA RESPONSE: COVID-19 - Coronavirus - Global, National, and State Information Resources,*

<https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>, Montana State Library, (last accessed May 15, 2020). All three cases in Deer Lodge County were reported almost two months ago in March. Tom Kuglin, *Montana adds 14 cases of COVID-19 by Sunday night, for a total of 161*, Helena Ind. Rec., Mar. 29, 2020, available at https://helenair.com/news/state-and-regional/montana-adds-14-cases-of-covid-19-by-sunday-night-for-a-total-of-161/article_9466a3f3-72c1-5d38-9a8b-b79fba8ab392.html; Kristine DeLeon, Anaconda's AWARE Inc. confirms two coronavirus cases among its staff, MT Standard, Mar. 31, 2020, available at https://mtstandard.com/news/local/anacondas-aware-inc-confirms-two-coronavirus-cases-among-its-staff/article_328cae88-27b2-59c8-ab02-5595a0472a3d.html. All three people who suffered from COVID-19 in Deer Lodge County have now recovered, leaving zero active cases remaining in the county. *MONTANA RESPONSE: COVID-19 - Coronavirus - Global, National, and State Information Resources*, <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>, Montana State Library, (last accessed May 15, 2020). Further, the number of new cases in Montana has steadily declined since the end of March. *Id.* Only 19 cases remain active in the state of more than a million people, and on average, during May, only one new case per day has been reported throughout the state. *Id.* Montana has experienced the fewest COVID-19 cases per capita of any state and the “curve has flattened” almost entirely in the state.² *Id.*; N.Y. Times, *Coronavirus in the U.S.: Latest Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed May 15, 2020).

² The number of new cases reported in Montana peaked on March 26, 2020 with 35 new cases reported.

Deer Lodge County, with zero active COVID-19 cases, presents a stark contrast to the circumstances numerous Regional Directors examined in recent weeks when issuing Decisions and Directions of Elections requiring mail ballots. *See e.g., Roseland Community Hospital*, 13-RC-256995 (May 12, 2020); *MyCity Transportation LLC*, 12-RC-258326 (May 8, 2020). In these decisions and the decisions cited in the chart below, Regional Directors have pointed to the risks created by the large and growing number of COVID-19 cases as the basis for directing mail ballots, rather than the preferred manual ballot elections.

CASE	D & D of E DATE	EMPLOYER LOCATION	CASES – DATE OF DECISION	CURRENT CASES³
<i>Citizen 360 Condominium</i> , 02-RC-257691	April 17, 2020	New York County (Manhattan), NY	“one of the nation’s epicenters”	24,525 and 3,007 deaths
<i>Flynn Architectural Finishes, Inc.</i> , 05-RC-258064	April 22, 2020	Montgomery County, Maryland	Cited national and state numbers.	7,759 cases and 411 deaths
<i>Atlas Pacific Engineering Company</i> , 27-RC-258742	April 20, 2020	Pueblo County, CO	86 Cases, 7 Deaths	186 cases and 13 deaths
<i>VICTORY WINE GROUP, LLC</i> , 16-RC-257874	April 23, 2020	Travis County, TX	1,256 Cases, 28 Deaths	2,288 cases and 72 deaths
<i>JDRC Managed Services, LLC</i> , 13-RC-258758	April 24, 2020	Cook County, IL	Not Cited	58,457 cases and 2,675 deaths
<i>Durham School Services</i> , 16-RC-259069	April 27, 2020	Lubbock County, TX	499 Cases, 40 Deaths	607 cases and 50 deaths

³ Case numbers and deaths were pulled from *The Covid Tracking Project*, The Atlantic, <https://covidtracking.com/data> (last accessed May 15, 2020) and *Tracking the novel coronavirus in the U.S.*, Reuters, <https://graphics.reuters.com/HEALTH-CORONAVIRUS-USA/0100B5K8423/index.html> (last visited May 15, 2020).

<i>Ryder Truck Rental, Inc.</i> , 32-RC-258444	April 28, 2020	San Joaquin County, CA	528 Cases, 25 Deaths	644 cases and 31 deaths
<i>Millennium Tower Residences</i> , 02-RC-258153	April 29, 2020	New York County (Manhattan), NY	“New York City is one of the epicenters of the nation’s current COVID-19 outbreak.”	24,525 and 3,007 deaths
<i>Baker Commodities, Inc.</i> , 28-RC-259125	April 29, 2020	Maricopa County, AZ	7,202 Cases, 304 Deaths in AZ, with the “majority” in Maricopa County	6,821 cases and 302 deaths
<i>Omni Glass & Paint, LLC</i> , 18-RC-259116	April 30, 2020	Winnebago County, WI	Not Cited	108 Cases and 1 Death
<i>California Foresic Medical Group, Inc. (Wellpath)</i> , 32-RC-258519	May 1, 2020	Stanislaus County, CA	Not Cited	537 Cases and 23 Deaths
<i>Touchpoint Support Services, LLC</i> , 07-RC-258867	May 4, 2020	Oakland County, MI	“Detroit and its surrounding metropolitan areas in Southeast Michigan have been strongly affected by the virus with multiple confirmed cases and deaths.”	7,952 cases and 888 deaths
<i>North American Industrial Services, Inc.</i> , 22-RC-258810	May 5, 2020	Union County, NJ	“New Jersey is one of the epicenters of the nation’s current COVID-19 outbreak”	14,385 cases and 930 deaths
<i>Fontanini Foods, LLC</i> , 13-RC-257636	May 5, 2020	Cook County, IL	Not Cited	58,457 cases 2,675 deaths
<i>Curaleaf Massachusetts, Inc.</i> , 01-RC-259277	May 7, 2020	Plymouth County, MA	Not Cited	6,774 cases and 435 deaths
<i>Maplebear Inc. d/b/a Instacart</i> , 13-RC-259423	May 7, 2020	Cook County, IL	Not Cited	58,457 cases 2,675 deaths
<i>Johnson Controls, Inc.</i> , 16-RC-256972	May 7, 2020	Bexar County, TX	1,677 Cases, 52 Deaths	1,976 cases and 58 deaths

<i>Twinbrook Health & Rehabilitation Center, 06-RC-257392</i>	May 8, 2020	Erie County, PA	Not Cited	129 cases and 3 deaths
<i>MyCity Transportation LLC, 12-RC-258326</i>	May 8, 2020	Broward County, FL	“significant prevalence of COVID-19 in Broward County”	6,057 cases and 267 deaths
<i>Roseland Community Hospital, 13-RC-256995</i>	May 12, 2020	Cook County, IL	Not Cited	58,457 cases 2,675 deaths
<i>Ca Florida Holdings, LLC D/B/A The Palm Beach Post And Palm Beach Daily News, 12-RC-256556</i>	May 13, 2020	Palm Beach County, FL	“one of the highest among all counties statewide”	4,278 cases and 263 deaths
<i>Gannett MHC Media, Inc., a wholly owned subsidiary of Gannett Media Corp. d/b/a Fort-Myers News-Pres, 12-RC-256899</i>	May 13, 2020	Collier County, FL, Lee County, FL	Not Cited	Collier County: 882 cases and 35 deaths Lee County: 1,350 cases and 73 deaths

Every case noted on this chart involves cases involve a prevalence of COVID-19 that is a far cry from that present in Deer Lodge County, Montana. Simply stated, a county with zero active cases in a state with a total of 19 active cases does not present extraordinary circumstances. A manual ballot election can be safely conducted.

III. Washington’s Stay-At-Home Order Will Have Expired But Never Posed an Obstacle to Holding This Election in Montana.

The Washington Stay-At-Home order affecting the Seattle-headquartered NLRB Region 19 began to expire on May 4, 2020. The Governor began a phased reopening, beginning to lift restrictions on public life and allowing non-essential businesses to begin reopening. *Safe Start Washington*, Office of the Governor, <https://coronavirus.wa.gov/what-you-need-know/safe-start> (Last accessed May 14, 2020). Many construction projects began to resume even earlier on April 24, pursuant to Governor Inslee's plan. *Id.* Under the Governor's plan, less populous, less affected Washington counties, ten in total, are permitted to apply for variances to open businesses and public life more rapidly than the state generally. *Id.*; Spaced out: State issues Phase 2 guidelines for opening retail stores, <https://komonews.com/news/coronavirus/spaced-out-state-issues-phase-2-guidelines-for-opening-retail-stores> (last accessed May 14, 2020). Thus far eight counties have applied and been approved to move into Phase 2 of the Governor's plan ahead of the rest of the state allowing for in-store retail shopping, in-restaurant dining, and limited non-essential travel. Lauren Kirschman, *Coronavirus updates: 3 counties approved for next phase of reopening; Washington DFI investigating scams*, *The News Tribune*, May 11, 2020, available at <https://www.thenewstribune.com/news/coronavirus/article242585471.html>. The remainder of the state is scheduled to enter Phase 2 on June 1. *Inslee issues guidance for limited in-store retail, manufacturing in phase 2*, *The News Tribune*, May 11, 2020, available at <https://www.thenewstribune.com/news/coronavirus/article242699201.html>.

Irrespective of the Orders, governmental functions such as the NLRB continued, with most employees teleworking throughout March, April, and May. *NLRB Announces Agency-wide Telework Until April 1*, NLRB Office of Public Affairs (March 16, 2020). At the Board's direction, union elections have been proceeding since April 6, which "is core to the NLRB's mission." *NLRB Resumes Representation Elections*, NLRB Office of Public Affairs (April 1,

2020). Further, a manual election in this case involves only one Board Agent, who has presumably been teleworking since the Board announced Agency-wide telework on March 16, 2020. *NLRB Announces Agency-wide Telework Until April 1*, NLRB Office of Public Affairs (March 16, 2020); Hassan A. Kanu, *Labor Board Extends Teleworking Indefinitely Due to Pandemic*, Bloomberg Law, Mar. 27, 2020, available at <https://news.bloomberglaw.com/daily-labor-report/labor-board-extends-teleworking-indefinitely-due-to-pandemic>. Thus, the Board Agent will have self-isolated far beyond the CDC recommendation for people who experience symptoms. Centers for Disease Control and Prevention, *What to Do If You Are Sick*, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html> (Last accessed May 15, 2020). Driving from Seattle to Anaconda would not violate Washington’s Stay-At-Home Order, expose the Board Agent to any potential contact with the virus, or pose a material risk to either the Board Agent, the Employer, or the potential voters.⁴ Moreover, the Board’s Resident Agent in Spokane has largely handled the pre-election processing of this matter. A Resident Agent driving from Spokane to Anaconda would similarly not violate Washington’s Stay-At-Home Order, expose the Board Agent to any potential contact with the virus, or pose a material risk to either the Board Agent, the Employer, or the potential voters. Additionally, a Resident Agent traveling from Spokane to Anaconda would provide the added benefit of reducing travel time and costs by approximately half when compared to the Regional headquarters in Seattle, which fulfills one of the Board’s administrative purposes of the Resident Office. Finally, Spokane County has experienced approximately ten times fewer COVID-19 cases per capita than Kings County. The Board Agent, wherever she or he travels from, can

⁴ Per Board directive, “skeleton staff” of Board personnel have continued to travel into the regional office “as needed to handle the mail,” among other duties, which presents greater risk of COVID-19 exposure than travel to Anaconda, MT.

further take the CDC recommended precautions such as monitoring his or her temperature for fever, practice thorough hand washing, and wear appropriate PPE.

IV. Precautions Can Mitigate the Minimal Risks of Holding a Manual Ballot Election in a County With Zero Active COVID-19 Cases.

The unit consists of only 18 members. Voting could be completed in less than an hour, while utilizing strict social distancing and hygiene protocols. To observe social distancing and hygiene guidelines advised by the CDC, the voting room could be thoroughly deep cleaned and disinfected immediately prior to the commencement of voting using a 60% or greater alcohol solution. Unit members could remain at their workstations while waiting to vote until the prior voter exits the voting area, or wait in a line, standing more than six feet from one another, as indicated by markings on the floor. Unit members could check their temperature prior to casting their ballot. The balloting could be conducted in a space on the shop floor, cordoned off for privacy by welding curtains, which would be large enough (approximately 40 feet by 40 feet) to allow for the observer for each side, the board agent, and the voting unit member to remain more than six feet apart for the entirety of the process.

The necessary election equipment (voting booth, ballot box, ballots, etc.) could be packaged in plastic bags and isolated from contact with Board personnel for several days or a week prior to the Board Agent conducting the election transporting the materials to Anaconda. *See* National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11304. Necessary distribution of election equipment materials, such as instructions or badges, could be done through the Board Agent placing the materials on the observers' tables while the observers are not present. Each observer could have his or her own table and copy of the Eligibility List as a slight modification to the Case Handling Manual to allow for necessary social distancing. *See* National Labor Relations Board Casehandling Manual Part Two Representation Proceedings,

Sec. 11322.1. Each observer could still check off voters as appropriate on different sides of the voters' names using different colored pens or pencils. *See Id.* The Board Agent could also have a separate table. The voting booth could be at least six feet away from each table. "Affirmative steps ... taken to avoid confusion" could include a taped off path and signage indicating the route to indicate how voters should proceed into the room to the checking table, then to the voting booth, and then out of the voting room, all while remaining six feet away from the observers and Board Agent. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11322. Clear plastic screens placed in front of each table could be used as an additional safety measure.

Unit members would enter the voting room one at a time, in accord with the standard protocol for most small unit manual ballot elections. The employee could then stand at a point marked with tape on the floor, state her or his name, the observers could check that voter off the list, the Board Agent could place a ballot on the table for the voter to retrieve after the Board Agent has backed away from his or her table, at least six feet, the voter could retrieve the ballot off of the table, and proceed to the ballot box. Spoiled ballots could be handled in this same manner, by the voter placing the spoiled ballot on the Board Agent's table, the Board Agent retrieving the ballot, inspecting it, placing a clean ballot on the table, the voter retrieving the clean ballot, after the Board Agent has backed at least six feet away from the table, and the voter could then proceed again to the voting booth. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11322.3. The closing of the polls and all signing and certifying of documents could additionally be completed, while following social distancing protocols by reviewing and signing consecutively, rather than concurrently. *See*

National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Secs. 11318.4 & 11324.

Similar to the spoiled ballot procedure outlined above, the Board Agent could fill out the appropriate information on the challenged ballot envelope stub at the Agent's table. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11338.3. While the voter remains in the voting booth, the Board Agent could place the challenge envelope on the voting table for the voter to retrieve. *Id.* Once the Board Agent returns to his or her table, the voter could exit the voting booth, display his or her folded ballot, place the ballot in the challenged ballot envelope, seal the envelope, and place the envelope in the box. *Id.* Additionally, the small size of the unit and the parties' stipulation to the unit composition mean the likelihood of a challenged ballot in the first place is slim.

Hand sanitizer would be available for the observers and Board Agent at their respective tables. Unit members would sanitize their hands immediately before and after casting his or her ballot and each would use his or her own pencil or pen to fill out the ballot or any commonly used pen or pencil could be sanitized after each use. Each voter could wipe down the voting booth surfaces with a disinfectant wipe prior to departing. All participants would wear gloves⁵ and properly fitted N-95 masks throughout the process, provided by the Employer. Mask and gloves would be made available to the Board Agent. Due to the small size of the unit and the personal familiarity between unit members, lowering of masks for identification purposes would be unnecessary.

⁵ The CDC only recommends wearing gloves while cleaning or when caring for a sick person. Outside of these two contexts, wearing gloves "will not necessarily protect you from getting COVID-19 and may still lead to the spread of germs. The best way to protect yourself from germs when running errands and after going out is to regularly wash your hands with soap and water for 20 seconds or use hand sanitizer with at least 60% alcohol." When to Wear Gloves, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/gloves.html> (last accessed May 14, 2020).

V. A Mail Ballot Election Will Not Expedite the Return of Election Results and Thus Will Not Fulfill the Ends of the National Labor Relations Act Faster Than A Manual Ballot Election.

Mail ballot procedures generally cause a month to six weeklong delay between the “election date” – when ballots are mailed – and the date ballots are counted, the point at which the election result can be determined. *See e.g., Gannett MHC Media, Inc., a wholly owned subsidiary of Gannett Media Corp. d/b/a Fort-Myers News-Pres*, 12-RC-256899 (May 13, 2020); *Ca Florida Holdings, LLC D/B/A The Palm Beach Post And Palm Beach Daily News*, 12-RC-256556 (May 13, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867 (May 4, 2020); *VICTORY WINE GROUP, LLC*, 16-RC-257874 (April 23, 2020); *Groceryworks.com Operating Company LLC*, 19-RC-254203 (Jan. 24, 2020). Voters casting their ballots is not an end unto itself, but rather, a means of determining whether union representation in collective bargaining is preferred by a majority of the eligible voters. 29 U.S.C. § 151. Given the rural locale of the unit members combined with the severe consequences of COVID-19 on the United States Postal Service and the elevated potential for delays in mail delivery this creates, what is typically a month or six-week delay could be required to extend even longer. Thus, a manual ballot election delayed by three or four weeks to allow even further mitigation of COVID-19 in Montana, would result in a much quicker return of election results than a mail ballot. In this case, Montana has relaxed its social distancing guidelines as a result of a sustained decline in COVID-19 cases since early April, rendering an early June manual ballot election appropriate. A mail ballot would necessarily entail at least a further, four to six-week delay before ballots could be counted and the results returned. This means the June 5 manual ballot election proposed by the Employer will provide election results about one month earlier than a mail ballot, fulfilling the Petitioner’s desire for an expeditious election, as well as effectuating the goals of the Act. 29 U.S.C. § 151.

Further, short staffing at the Regional Office could additionally depress voter turnout because ballots returned in unsigned envelopes might not be processed as expeditiously as they would when a full office staff is present. National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11336.4(b). Combined with the rural area the unit members live in and the potential mail delays this entails, unsigned envelopes from attempted voters face steep obstacles to being counted. A mail ballot election would additionally present the same issues as a manual ballot election for the Board Agent and observers counting ballots. Section 11336.5(b) of the Case Handling Manual states in part: “At the time scheduled for the count, the returned envelopes are treated as “voters” approaching the checking table. The observers at the table make their marks alongside the respective names on the list.” National Labor Relations Board Casehandling Manual Part Two Representation Proceedings, Sec. 11336.5(b). With the mail ballots presumably sent to the Region 19 office in Seattle, following this procedure would require the Board Agent to travel in person to the Region’s office and the Employer’s and presumably the Petitioner’s representative to travel from Montana to Seattle to observe the count, where the COVID-19 pandemic remains substantially more prevalent.

V. The Circumstances in Deer Lodge County, Montana Are Not So Extraordinary to Warrant the Regional Director Directing an Essential Employer to Conduct a Mail Ballot Election Under Board Precedent.

The Board’s longstanding election rules favoring manual ballot elections are in place to ensure, to the extent possible, full participation by all eligible voters who wish to vote. An election in the employees’ own workplace would assure that the Board provides a full opportunity to vote to eligible voters. A manual ballot election is far preferable to mail ballots sent by a Postal Service beleaguered by COVID-19 to employees living in a rural area relatively unscathed by COVID-19. The delays inherent to a mail ballot election could not return election

results any faster than a manual ballot election and these delays could be exacerbated by the difficulties faced by the Postal Service. If the Regional Director determines that ballots cannot be cast in person in Anaconda, Montana due to extraordinary circumstances, it stands to reason that these same extraordinary circumstances would also preclude a count of mail ballots at the Region 19 office in downtown Seattle.

In light of this, the Board's long held presumption in favor of manual ballot elections dictates a manual ballot election at the Employer's workplace located at 78 Gold, Anaconda, Montana 59711 should be directed by the Regional Director. Therefore, the Employer proposes holding a manual ballot election from 1:30 PM to 2:30 PM on Friday, June 5 at the Employer's facility. This date also avoids having an election during the week of the Memorial Day holiday, May 25th, a period when some employees may have planned to be away.

Date: May 15, 2020

Respectfully Submitted by:

ALANIZ LAW & ASSOCIATES, PLLC
Attorneys for Employer, 2101 LLC d/b/a
INTERCONTINENTAL TRUCK BODY

/s/ Richard D. Alaniz

Richard D. Alaniz, esq.

Tex. Bar No. 00968300

ralaniz@alaniz-law.com

Brett Holubeck, esq.

Tex. Bar No. 24090891

bholubeck@alaniz-law.com

Scott Stottlemyre, esq.

Tex. Bar No. 24098481

sstottlemyre@alaniz-law.com

20333 State Hwy. 249, Ste. 272

Houston, TX 77070

CERTIFICATE OF SERVICE

The undersigned, on behalf of Employer, 2101 LLC d/b/a Intercontinental Truck Body, LLC, sent a true and correct copy on May 15, 2020, via efile and email, of Intercontinental Truck Body's Statement of Position Regarding Method of Election this day to the NLRB Region 19 Director and to the parties at the addresses set forth below:

Ronald K. Hooks, NLRB Region 19 Director
via efile

Sara Dunn
via email: Sarah.Dunn@nlrb.gov

Adam D. Morrison
via email: Adam.Morrison@nlrb.gov

Jason Hardwick
via email: jhardwick@iamaw.org

Caren Sencer
via email: csencer@unioncounsel.net

/s/Richard D. Alaniz

Richard D. Alaniz

EXHIBIT J

STEWART WEINBERG
DAVID A. ROSENFELD
WILLIAM A. SOKOL
ANTONIO RUIZ
MATTHEW J. GAUGER
ASHLEY K. IKEDA
LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
KRISTINA L. HILLMAN
BRUCE A. HARLAND
CONCEPCION E. LOZANO-BATISTA
CAREN P. SENCER
ANNE I. YEN
KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOIGUES
KERIANNE R. STEELE
GARY P. PROVENCHER
EZEKIEL D. GARDNER
LISL R. SOTO
JOLENE KRAMER
ALEJANDRO DELGADO

May 15, 2020

VIA E-FILING

Mr. Ronald K. Hooks
National Labor Relations Board, Region 19
Regional Director
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174-1078

CAROLINE N. COHEN
XOCHITL A. LOPEZ
CAITLIN E. GRAY
TIFFANY CRAIN ALTAMIRANO
DAVID W.M. FUJIMOTO
ALEXANDER S. NAZAROV
THOMAS GOTTHEIL (1986-2019)
JERRY P.S. CHANG
ANDREA C. MATSUOKA
KATHARINE R. McDONAGH
BENJAMIN J. FUCHS
CHRISTINA L. ADAMS
WILLIAM T. HANLEY
ABEL RODRIGUEZ
ANDREW D. WEAVER

**Re: Machinists Position re: Time, Place and Manner of Election
NLRB Case No. 19-RC-258144**

Dear Mr. Hooks:

Petitioner filed its petition in mid-March with the goal of allowing employees to exercise their right to vote as quickly as possible. Due to processing delays mainly stemming from the Covid-19 pandemic, these employees have already been denied their right for far too long.

OF COUNSEL

ROBERTA D. PERKINS
NINA FENDEL
TRACY L. MAINGUY*
ROBERT E. SZYKOWNY
ANDREA K. DON
LORI K. AQUINO
SHARON A. SEIDENSTEN

• Admitted in Hawaii
◆ Also admitted in Nevada
▼ Also admitted in Illinois
▶ Also admitted in New York and Alaska
* Also admitted in Florida
◆ Also admitted in Minnesota

The Rules and Regulations regarding R case proceedings require the Regional Director to order an election for the soonest practicable date. The Regional Director has wide discretion in determining the place, time, and manner of election. The NLRB has already approved, by refusing to take review, of a Regional Director exercising this discretion in ordering a mail ballot to protect voters, party representatives, and board agents in *Atlas Pacific Engineering Company*, 7-RC-258742 (Order Denying Request for Review, May 8, 2020).

In this case, such discretion should be exercised to direct a mail ballot election at the earliest practicable date – 10 days after the issuance of the Decision and Direction of Election.¹ Although the employer has taken the position that a manual ballot can be safely executed based on the situation in the geographic location of the employer's facility and the extra precautions, the analysis does not take into account a number of important factors.

Montana Shelter in Place Order

Montana began a phased re-opening in the end of April. Under that plan, still currently in effect, employers are required to maintain social distancing, engage in symptom screening, and close any common gathering locations. Further, non-essential travel is to

¹ The Union hereby waives a portion of the 10 days it is entitled to have the voter eligibility list prior to the election. The Union agrees to have the list for 7 days, waiving 3.

be limited and gatherings of over 10 people are to be avoided. Montana is currently in phase 1 of its staged reopening. <https://covid19.mt.gov/> provides the state-wide directives. According to census data, Montana has a population of roughly 1,068,778 as of July 2019.

www.census.gov/quickfacts/MT. Only 24,549 people in the state have been tested.

<https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>. Less than 2.5% of the population has been tested. So while it may be true there are no new reported cases in Deer Lodge County, the vast under-testing leaves open significant questions regarding asymptomatic individuals who may be carrying the virus throughout the county.

Montana's phased re-opening requires significant precautions still be taken and pays particular attention to those traveling to Montana from out of state, as a board agent would need to do.

Logistics of an Election Require Close Contact

While the employer provides a list of precautions that could be taken to reduce risk during an election, such steps are insufficient and would, by the employer's own admission, required a modification to the Case Handling Manual (see Statement of Position, p. 13). A manual election would require at least 20 interactions between votes, observers, and the Board Agent. This is avoided by a mail election. A list is shared between the observers and the Board Agent. Even if checking off opposite side of the list, observers are less than a foot apart.

The employer recommends voters queuing up to vote and have their temperature checked before voting. Unless that is then used to disenfranchise voters who do have a higher than normal temperature (by preventing them from entering the voting area), this serves no purpose. It would also either add an additional person at all times to the voting area (both increasing risk and disturbing the laboratory conditions of the election) or would require one of the observers or the board agent, all of whom are presumably untrained as medical professionals, to assess whether the voter was well enough to vote. Clearly, an employer representative could not undertake this task without interfering with the election.

Each of the employer's suggestions on how to minimize the risk of spread of infection adds an additional obstacle to an employee voting. Bring your own pen, wipe down the voting booth, don a pair of gloves. And inevitably a voter will fail to have their mask (or other protective equipment) on and either be denied the opportunity to vote or increase risk to others in the voting area.

Board Agent Health and Safety is the Responsibility of the Regional Director

Board agents of Region 19 are assigned through either Portland or Seattle. Either way, an agent will need to travel to Montana, either by car or plane, to facilitate a manual ballot election. The concerns with air travel, relying on re-circulated air, are well known and will not be repeated. Different concerns, including clean restrooms and facilities along the way are raised by car travel. Either way, there would be a required hotel stay which is in conflict with the telework directive of the Agency. A decision as to whether a mail ballot or manual ballot affects not only the eligible voters but also the board agent assigned to carry out the task.

In conclusion, although all parties would generally advocate for a manual ballot under normal circumstances, the uncertainties in the factors above make a mail ballot the only means by which the

Regional Director can ensure the employees have the ability to exercise their rights under the Act in a timely and safe manner. This analysis has been undertaken by most Regions in the last few weeks. Attached for review are the Decision and Direction of Election in a number of those cases. *Curaleaf Massachusetts, Inc.*, 01-RC-259277 (5/7/2020); *Twinbrook Health & Rehabilitation Center*, 06-RC-257382 (5/8/2020); *Quickway Transportation, Inc.*, 09-RC-257491 (5/15/2020); *MyCity Transportation LLC*, 12-RC-258326 (5/8/2020); *Johnson Controls, Inc.*, 16-RC-256972 (5/7/2020); *Omni Glass & Paint, LLC*, 18-RC-259116 (4/30/2020); *North American Industrial Services, Inc.*, 22-RC-258810 (5/5/2020); *Arakelian Enterprises, Inc.*, 31-RD-223318 (5/8/2020); *Ryder Truck Rental, Inc.*, 32-RC-258444 (4/28/2020).

Regardless of the manner of balloting, the election in this case should be held promptly. The Union requests the election be set for 10 days after the Decision and Direction of Election issues.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Caren P. Sencer', with a long horizontal flourish extending to the right.

Caren P. Sencer

CPS:sma
opeiu 29 afl-cio(1)

Enclosures

cc: International Association of Machinists & Aerospace Workers, District Lodge W24

149445\1083602

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ATLAS PACIFIC ENGINEERING COMPANY
Employer

and

27-RC-258742

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

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.¹

¹ The Board's May 1, 2019 stay is lifted as of today's order. The Regional Director shall, as needed, issue a new Notice of Election providing an updated mail-balloting schedule.

In denying review, we note that the Board's decision in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), recognizes that Board elections should, as a general rule, be conducted manually and specifies well-settled guidelines for determining whether a mail-ballot election would normally be appropriate. We agree with the Regional Director that, under normal circumstances, this would almost certainly not be an election where a mail ballot would be considered. But in *San Diego Gas & Electric*, the Board also recognized that "there may be other relevant factors that the Regional Director may consider in making this decision" and that "extraordinary circumstances" could permit a Regional Director to exercise his or her discretion outside of the guidelines set forth in that decision. *Id.*

In determining whether, on these facts, the Covid-19 pandemic constitutes an extraordinary circumstance, the Regional Director properly considered the detailed plan for conducting a manual election in a safe manner proposed by the Employer. Unit employees continue to report for work because the Employer's facility has been designated an essential business as part of the food supply chain. Ultimately, the Regional Director's principle concern over a manual ballot appears to be the safety of NLRB personnel.

While we certainly share this concern and it certainly is the Agency's responsibility to ensure the safety of NLRB personnel, the Board has not previously found, under *San Diego Gas & Electric*, that internal Agency considerations constitute extraordinary circumstances that would warrant conducting a mail-ballot election outside of the guidelines specified therein. In finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework. Mandatory telework in the regional office is based on the Agency's assessment of current Covid-19 pandemic conditions in the local area. Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

Dated, Washington, D.C., May 8, 2020.

Pursuant to Sec. 102.66(g)(1) of the Board’s Rules and Regulations, a hearing officer is required to solicit the parties’ positions regarding the type of election “but shall not permit litigation of those issues.” This provision is consistent with longstanding Board precedent holding that election details — including the type of election to be held — are nonlitigable matters left to the discretion of the Regional Director. See *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). As such, there is no merit to the Employer’s contention that the Regional Director improperly denied the parties the opportunity to present evidence on the propriety of a manual election, nor is there any merit to the assertion that the Regional Director inappropriately considered government orders and resources that are not contained in the record.

The Board is open to addressing the normal criteria for mail balloting in a future appropriate proceeding.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

CURALEAF MASSACHUSETTS, INC.

Employer

And

Case 01-RC-259277

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 328**

Petitioner

DECISION AND DIRECTION OF ELECTION¹

Curaleaf Massachusetts, Inc. (the Employer) is engaged in the business of operating a cannabis dispensary. United Food and Commercial Workers Union, Local 328 (the Petitioner) seeks to represent a bargaining unit of all full time and regular part time marketing coordinators, lead dispensary associates, dispensary associates including those performing admissions duties, compliance leads, lead packaging associates, and packaging associates employed at the Employer's Hanover, Massachusetts location but excluding dispensary managers, assistant dispensary managers, confidential employees, managers, guards, and supervisors as defined in the Act.

The Employer takes the position that the sole marketing coordinator does not share a community of interest with the other petitioned-for employees. I have deferred litigation of this matter and determined that the marketing coordinator shall vote subject to challenge. Otherwise, the parties stipulate, and I find, that the following bargaining unit is appropriate under the Act:

All full time and regular part time lead dispensary associates, dispensary associates, including those performing admissions duties, compliance leads, lead packaging associates, and packing associates employed at the Employer's Hanover, Massachusetts location.

¹ The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before a Hearing Officer of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

Excluding all dispensary managers, assistant dispensary managers, confidential employees, managers, guards and supervisors, as defined by the Act.

The only remaining matter in contention is whether to conduct a manual or mail ballot election.

The Petitioner argues that a mail ballot election is not only safer than a manual election but the only legal method by which an election can be held while the Commonwealth of Massachusetts is under a stay-at-home advisory due to the COVID-19 pandemic.

The Employer argues that a mail ballot election is inappropriate and prefers that the Region postpone any election until after Massachusetts resumes normal operations. If an election is to be held immediately, the Employer proposes that a manual election should be held in a vacant office space some three miles from the employees' work location so as to minimize the exposure of its customers and all parties to COVID-19.

Facts

During the pandemic, the Commonwealth of Massachusetts has issued a stay-at-home advisory, as has the Centers for Disease Control. All but essential businesses have been required to cease operations. Except with regard to "delivery of COVID-19 Essential Services," gatherings of more than 10 people are prohibited.

Thus, any "gatherings" of each parties' observers, the Board agent and representatives of the parties for the pre-election preparation and conference; the observers, Board agent and voters waiting in line to vote during the course of the election; and the observers, Board agent and parties' representatives assembled for the vote tally, would arguably be contrary to state law.

As the Employer operates a medical marijuana dispensary, it is classified as a health care provider and remains open, like other pharmacies, to provide critical medication to patients. The bargaining unit at issue is therefore comprised of "essential workers" who continue to commute to and from their usual workplace and perform their usual job duties during the pandemic. Although the employees' schedules have remained essentially unchanged, some employees have required leave due to pandemic-related caregiving obligations. Additionally, the members of the bargaining unit, like all essential workers, are at a high risk of becoming infected with COVID-19 themselves and several have become ill. Many of the customers who visit the dispensary each day are particularly vulnerable to fatal complications from COVID-19 due to underlying medical conditions including cancer, HIV, AIDS, hepatitis C, ALS, Crohn's disease and Parkinson's disease.

The Employer proposes that the Region conduct a manual election in a vacant, large office space on the second floor of a corporate office building located 3.2 miles from the dispensary at which bargaining unit employees work. The Employer's own corporate office is in this building. The proposed space measures 1307 square feet, allowing for social distancing, and the Employer has offered to prepare 35 separate Ziploc bags containing one facemask, one pair

of gloves, and one pencil for each eligible voter, thereby mitigating the risk that voters might pass COVID-19 to one another by sharing election materials. The Employer states that because eligible voters use vehicles to get to the dispensary, they would have “no issue” driving to an off-site polling location.

The Employer objects to a mail ballot election on the ground that employees may not receive their ballots due to changes in living arrangements or mail collection during the pandemic. Next, the Employer asserts that mail ballot elections are inherently unreliable. Finally, the Employer expresses a concern that employees will be unable make an informed decision about whether they wish to be represented by the Petitioner while the ability to communicate face-to-face is limited. Thus, the Employer prefers that the election be postponed until Massachusetts has resumed normal operations.

Analysis

A manual election held at the Employer’s premises could potentially endanger the most vulnerable members of the public, and indeed neither party has proposed that a manual election ought to be held at the Employer’s premises. Instead, while the Union prefers a mail ballot, the Employer prefers that a manual election be held several miles from the bargaining unit employees’ usual work location.

The NLRB Case Handling Manual makes it plain that in the absence of good cause to the contrary, the election should be held on the Employer’s premises. Circumstances indicating the possibility of an offsite election at a neutral location include the involvement of striking employees and pervasive employer unfair labor practices. The regional director must evaluate any alternative site proposed by other parties to the election, as well as other readily available sites. In evaluating these sites, the regional director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site. See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1819–1823 (2011); *Austal, USA, LLC*, 357 NLRB 329 (2011).

Furthermore, the Case Handling Manual instructs that any election held away from the employer’s premises should be held in a public building, social hall, hotel, motel, school, church, or garage; a place normally used as a municipal voting place is particularly desirable. Final arrangements must be made by the Board agent and permission to use such property must be in writing. Rental expense, if any, should be borne by the Agency. An offer of the parties to assume the expense should be rejected since the Agency cannot accept funds from private parties, as this would be a prohibited augmentation of its appropriations, *North American Plastics Corp.*, 326 NLRB 835 fn. 3 (1998).

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board reviewed the circumstances under which it may be appropriate to direct a mail ballot election. The Board’s longstanding policy has been that, as a general rule, representation elections should be conducted manually. Recognizing, however, that there are some extraordinary circumstances that would

make it difficult for eligible employees to vote in a manual election, the Board has vested Regional Directors with broad discretion to determine the method by which elections shall be conducted. Under the guidelines set forth in *San Diego Gas*, a mail ballot election may be appropriate where eligible voters are “scattered” because of their job duties in terms of geography and/or varied work schedules, so that all employees cannot be present at a common location at common times to vote manually. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

The employees at issue here are not “scattered” in the traditional sense. They are, however, “scattered” by COVID-19, which has rendered an immediate manual election, like so many other previously-ordinary gatherings, unsafe. The global pandemic which has thus far claimed over four thousand lives in Massachusetts alone and resulted in a complete reorganization of society presents the most extraordinary of circumstances.

Although many employees continue to work their usual schedules, other employees may be unable to travel to a polling location due to their responsibilities as caregivers or their own illness. Still more employees may be reluctant to travel from their workplace to an entirely separate location to vote while stay-at-home advisories urge them not to travel except where absolutely necessary in their capacity as essential workers. Indeed, a manual election may run contrary to the Orders of Governor Baker regardless of the location at which it is held.

Most importantly, the safety of all involved cannot be guaranteed during a manual election. Many of those infected with COVID-19 are not symptomatic and unknowingly pass their infection to those with whom they interact. There can be no assurance that the space proposed by the Employer will have been cleaned appropriately or that those who did the cleaning were not themselves infected.² Likewise, there can be no assurance that the individual who prepares the bags of protective equipment proposed by the Employer will be free from infection. In any event, the Agency cannot accept election materials from private parties and the use of Board resources required to run an off-premises manual election during a pandemic is not warranted here.

The Employer proposes that indefinite postponement of the election is preferable to a mail ballot election. I disagree. The Board has long taken the position that questions concerning representation must be resolved as quickly as possible. The current rule governing representation cases, which became effective in 2015, makes note of the importance of a swift resolution:

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel and

² The space proposed by the Employer also requires employees to leave their normal place of work to travel to corporate headquarters, perhaps creating an inherently coercive polling location.

the agency's regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency... The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

The Employer argues that the instant case should not be processed in accordance with the so-called "2014 New Rules" rules because the rules shortened the time between the filing of a petition and an election in a manner contrary to Congressional intent. However, I do not have the authority to ignore the rules presently in effect. The Employer prefers new rule expected to take effect later this year, but that rule also emphasizes the holding in *A.J. Tower* that employees' votes ought to be recorded speedily:

Within this general framework, "the Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *A.J. Tower Co.*, 329 U.S. at 331...

As noted above, the Supreme Court has identified speed in recording employees' votes as one interest the Board's representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board's and Congress's emphasis on the need for expedition in representation cases.

Contrary to the Employer's protestations, a mail ballot election has no apparent significant drawbacks. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. The Employer's suggestion that employees will not be able to discuss the prospect of unionization during the pandemic seems highly unlikely; even under normal circumstances, employees communicate by telephone, email, text message, social media, and other electronic means. Such modes of communication with the unit employees are equally available to the Employer and the Petitioner. As for the inherent unreliability of mail ballot elections, the Board has held mail ballot elections for many decades and the vast majority of these elections—like the vast majority of manual elections—have concluded without incident.

Given the extant conditions, the Region's use of mail balloting has a strong comparative advantage in avoiding negative effects on employees' ability to fairly and fully express their desires on the question of representation.

I conclude that, under these circumstances, a mail ballot election is appropriate because it will protect the health and safety of voters, Agency personnel, the parties' representatives, and the public during the current health crisis. Failure to order a mail ballot election undermines the Board's duty to tally employees' votes as swiftly as possible.

Conclusion

The National Labor Relations Board will conduct a secret mail 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 Food and Commercial Workers Union, Local 328.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On Tuesday, May 26, ballots will be mailed to voters by National Labor Relations Board, Region 3, Buffalo, NY. 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.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 3 office in Buffalo, NY, by close of business on June 22, 2020.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 2, 2020 should communicate immediately with the National Labor Relations Board by either calling the Region 1 Office at (617) 565-6700 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director, at 10:00 am on Friday, June 26, 2020. Each party will be allowed to have one observer attend the virtual ballot count.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

B. Voting Eligibility

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

Employees engaged in 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.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

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(1) 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 **Monday, May 11, 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 prior to 12:01 a.m. on **Wednesday, May 20, 2020** and copies must remain posted until the end of the election.

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

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.

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: May 7, 2020

A handwritten signature in cursive script, appearing to read "Paul J. Murphy". The signature is written in dark ink on a light background.

Paul J. Murphy
Acting Regional Director



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 5:00p.m. on Tuesday, May 26, 2020, ballots will be mailed to voters from Region 03 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. **Any ballot received in an envelope that is not signed will be automatically void.**

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, June 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 01 Office at (617)565-6700 or our national toll-free line at 1-844- 762-NLRB (1-844- 762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 03 Office by close of business on June 22, 2020.

All the ballots will be commingled and counted virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director, at 10:00 am on Friday, June 26, 2020.



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full time and regular part time lead dispensary associates, dispensary associates, including those performing admissions duties, compliance leads, lead packaging associates, and packing associates employed at the Employer's Hanover, Massachusetts location who were employed by the Employer during the payroll period ending April 25, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All dispensary managers, assistant dispensary managers, confidential employees, managers, guards and supervisors, as defined by the Act.

Others permitted to vote: At this time, no decision has been made regarding whether the marketing coordinators are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

 <p>UNITED STATES OF AMERICA National Labor Relations Board 01-RC-259277</p> 	
<p>OFFICIAL SECRET BALLOT For certain employees of CURALEAF MASSACHUSETTS, INC</p>	
<p>Do you wish to be represented for purposes of collective bargaining by UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 328?</p>	
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>	
<p>YES</p> <input data-bbox="440 1602 573 1698" type="checkbox"/>	<p>NO</p> <input data-bbox="1079 1602 1213 1698" type="checkbox"/>
<p>DO NOT SIGN THIS BALLOT. See enclosed instructions.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>	



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (617)565-6700 or visit the NLRB website www.nlr.gov for assistance.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

**TWINBROOK HEALTH & REHABILITATION
CENTER¹**

Employer

and

Case 06-RC-257382

S.E.I.U. HEALTHCARE PENNSYLVANIA²

Petitioner

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by S.E.I.U. Healthcare Pennsylvania (Petitioner) on March 3, 2020³, under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of licensed practical nurses (LPN's) employed by Twinbrook Health & Rehabilitation Center (Employer)⁴ at its Erie, Pennsylvania facility (Employer's facility). There are approximately 18 employees in the unit sought.

On March 11, 2020, I approved a Stipulated Election Agreement in the instant case, in which the parties agreed that a Board-conducted manual election be held at the Employer's facility on March 30⁵. Thereafter, on March 17, the Region postponed the scheduled election due to the safety concerns related to the COVID-19 pandemic in the United States. On April 7, the Petitioner filed a motion requesting that the election be conducted by mail ballot. On April 10, the Employer filed a motion opposing a mail ballot election. Following unsuccessful efforts to secure the agreement of the parties to conduct the election by mail ballot, on April 15, the Petitioner filed a motion withdrawing its request for a mail ballot election and requesting that I revoke my approval of the Stipulated Election Agreement and conduct a hearing. On April 16, the Employer filed a response to the Petitioner's motion and argued that further processing of the petition should be stayed in view of the impact of the COVID-19 pandemic on its business operations. On April 16, I issued an Order Revoking Approval of Stipulated Election Agreements and Second Notice of Representation Hearing in order to fully address the issues raised by the parties. A telephonic

¹ The Employer's name appears here as amended at the hearing.

² The Petitioner's name appears here as amended at the hearing.

³ All dates herein are in 2020, unless specified otherwise.

⁴ The parties stipulated that the Employer is a Pennsylvania corporation engaged in the operation of a post-hospital skilled nursing care facility in the Commonwealth of Pennsylvania. During the past twelve-month period, the Employer derived gross revenues in excess of \$250,000 from the operation of its business and purchased and received goods and materials valued in excess of \$5,000 directly from points located outside of the Commonwealth of Pennsylvania.

⁵ A separate petition was filed by the Petitioner in Case 06-RC-257392 for a unit of service and maintenance employees and the parties entered into a Stipulated Election Agreement which provided for the same voting arrangements as this case. Thus, the elections would be conducted simultaneously and accommodating two voting units totaling about 80 employees.

hearing was held on April 27, before a hearing officer of the National Labor Relations Board (the Board).

I. ISSUES AND POSITIONS OF THE PARTIES

The only matter in contention is whether to conduct a manual or mail ballot election. The determination of the method of the election is within the sole discretion of the Regional Director, and generally it is not an issue subject to litigation. See NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11228 and Section 11301.2. However, I am mindful that my decision regarding the election arrangements is subject to review by the Board. For that reason, the parties' positions concerning the election arrangements were solicited during the hearing.

The parties are not in agreement concerning the type of election that is appropriate in the instant situation. The Petitioner's position is that, because of the COVID-19 pandemic, currently it is not safe to conduct in-person manual elections. Additionally, it avers that current restrictions on visitors at nursing facilities precludes holding a manual election at the Employer's facility and there is no reliable information at this time to establish with certainty when those restrictions will be lifted. The Employer, on the other hand, argues that a mail ballot election is not appropriate because (1) mail ballots are particularly vulnerable to certain problems and issues, (2) there is a potential of transmission of COVID-19 through the handling of mail ballots, (3) the Employer has not enjoyed a sufficient opportunity to effectively communicate with employees about the election, and (4) beginning an election at this time will disrupt employees from their work responsibilities. In this regard, the Employer proposes to hold a manual election on June 5, 2020 during three different polling periods covering the early morning, mid-to- late afternoon and early evening hours. It proposes that the polling be held in the first-floor lobby of the Employer's facility inside the front door of its facility. In the event that an election cannot be held at the Employer's facility, the Employer proposes to secure a neutral location to hold the election.

II. FACTS

At the outset, I take administrative notice of the pandemic health situation that currently exists in the United States, and that continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. The virus that causes COVID-19 is infecting people and spreading easily from person-to-person. On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. On March 13, President Donald Trump proclaimed that the COVID-19 outbreak in the United States constituted a national emergency. This situation poses a serious public health risk.

The Employer is a post-hospital skilled nursing facility. As recognized by the Center for Disease Control (CDC), nursing home populations, given their congregate nature and resident population served, are at higher risk of being infected by COVID-19. If infected, residents at these facilities are at increased risk of serious illness.⁶ Furthermore, caregiving staff at these facilities,

⁶ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#people-in-nursing-homes-or-LTC-facilities>

are at elevated risk from COVID-19. According to the CDC, many cases of COVID-19 in the U.S. have occurred among older adults living in nursing homes or long-term care facilities. Therefore, it has established recommendations that are specific for nursing homes, including skilled nursing facilities.⁷ The guidance focuses on several priorities, one of which is keeping unrecognized COVID-19 from entering these facilities. In this regard, the CDC cautions that visitors and healthcare personnel continue to be potential sources of introduction of COVID-19 into nursing homes. Thus, to protect the vulnerable nursing home populations, aggressive efforts toward visitor restrictions are recommended.

The Centers for Medicare and Medicaid Services (CMS) is a federal agency within the United States Department of Health and Human Services (HHS) responsible, among other things, for establishing the quality standards in long-term care facilities, more commonly referred to as nursing homes. In response to the COVID-19 pandemic, the CMS issued guidance, last revised on March 13, for limiting the transmission of COVID-19 for nursing homes. The guidance provides that all facilities nationwide “should restrict access of all visitors and non-essential health care personnel, except for certain compassionate care situations, such as an end-of-life situation. In those cases, visitors will be limited to a specific room only. Facilities are expected to notify potential visitors to defer visitation until further notice (through signage, calls, letters, etc.).”⁸

In the Commonwealth of Pennsylvania, on March 6, Governor Tom Wolf issued a Proclamation of Disaster Emergency due to the emergence of COVID-19 in the United States and the Commonwealth of Pennsylvania. On March 18, the Pennsylvania Department of Health (PA DOH) also issued guidance for nursing facilities on COVID-19 mitigation, requiring the restriction of all visitors, with exceptions of compassionate care. On March 19, the Governor and Secretary of Health issued Orders directing the closure of non-life sustaining businesses because these present the opportunity for unnecessary gatherings, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19. On March 23, Governor Wolf announced a statewide Stay-at-Home order to protect Pennsylvanians and mitigate the spread of COVID-19 by decreasing the opportunities for the transmission of the virus and decrease the risk of community spread. The order was extended several times and currently most Pennsylvania counties are under the Stay-at-Home order. On April 20, Governor Wolf announced a target date of May 8 for the beginning of phased reopening and easing of restrictions. Effective 12:01 a.m. May 8, 2020, the county of Erie will be in the yellow phase in which some restrictions on work and social interaction will ease. As previously mentioned, the Employer’s facility is in Erie. Notwithstanding the easing of restrictions for some counties, restrictions on nursing and healthcare facilities remain unchanged.

There is still a lot that is unknown about COVID-19 and how it spreads, but the CDC has expressed that coronaviruses are thought to be spread most often by respiratory droplets and although the virus can survive for a short period on some surfaces, it is unlikely to be spread from domestic or international mail products or packaging.⁹ Finally, as states, including the

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#people-in-nursing-homes-or-LTC-facilities>

⁸ QSO-20-14-NH.

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>

Commonwealth of Pennsylvania, begin to loosen restrictions and businesses begin to open, the CDC guidelines for social distancing, wearing of facial masks and frequent handwashing remain in place.

III. ANALYSIS

The Board has held that the mechanics of an election, such as date, time, and place are left to the discretion of the Regional Director. See *Ceva Logistics U.S., Inc.*, 357 NLRB 628 (2011). The Board has specifically found that the Regional Director has the discretion to determine whether an election will be conducted manually or by mail ballot. See *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998) (stressing that the Regional Director has broad discretion in determining the method by which an election is conducted and that such a decision should not be overturned unless clear abuse of discretion can be demonstrated).

In *San Diego Gas & Electric*, the Board noted that it had invested its Regional Directors with broad discretion to determine the method by which elections are conducted. *San Diego Gas & Electric*, 325 NLRB at 1144. The Board has, however, recognized that such discretion was not unfettered, and it set forth certain guidelines over that discretion. *Id.* In doing so, the Board stated that its policy was that elections should, generally, be conducted manually, but that there were some instances in which a mail ballot would be appropriate because “of circumstances that would tend to make it difficult for eligible employees to vote in a manual election.” *Id.* In clarifying the guidelines for a Regional Director’s discretion to order a mail ballot election, the Board directed that a Regional Director should consider “at least” where employees are geographically or temporally scattered, or where there is a strike, lockout, or picketing in progress. *Id.* at 1145. In *San Diego Gas & Electric*, the Board also recognized that there may be other relevant factors to consider, and that extraordinary circumstances may warrant a departure from the stated guidelines in the exercise of discretion. *Id.* at 1145. see also NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2. Extraordinary circumstances are those unusual and unforeseen deviations from the range of circumstances already considered. A pandemic of a respiratory disease spreading from person to person caused by a novel coronavirus (COVID-19) that poses a serious public health risk could not have been anticipated by the Board at the time it issued its decision in *San Diego Gas & Electric*. This is exactly the type of extraordinary circumstances in which a Regional Director may exercise his or her discretion to take into consideration other factors.

Here, a manual election cannot be safely held at the lobby area in the Employer’s facility as proposed by the Employer. Under the current pandemic, in deciding the method of election I need to consider factors such as safety, federal, state and local laws and guidance. In this regard, there are restrictions in place by the CMS and PA DOH, in addition to recommendations by the CDC, that call for the restriction of all visitors and non-essential healthcare personnel, except for certain compassionate care situations, in skilled nursing facilities. Board agents and union officials are covered by these restrictions. Additionally, holding an election at the Employer’s facility at this time would unnecessarily put at risk the health and safety of voters, Agency personnel, the parties’ representatives, and, particularly, patients and residents at the facility.

The Employer also suggested holding the election at a neutral site. Holding the election at a location other than the Employer's facility seems impracticable. At first instance, it will call for employees to make a trip to a site other than their workplace during non-work hours. This would undoubtedly pose an inconvenience to voters and may disenfranchise some voters from participating in the election if they are unavailable during non-work hours. Furthermore, holding the election at a different site does not remove the elevated risk of contracting the virus which is inherent in the person-to-person contact that will be necessary between voters, Agency personnel, and the parties' representatives. As previously mentioned, healthcare personnel continue to be the source of introduction of COVID-19 into nursing homes and holding a manual election at a different site with the participation of party representatives and Board agents puts these employees unnecessarily at risk of potential further exposure to COVID-19, which would undoubtedly have a detrimental impact on the vulnerable nursing home population. Additionally, it is unknown whether under the current circumstances an appropriate location can be secured to hold a manual election in the foreseeable future.

Under the extant conditions presented in this case, I find that a mail ballot election better ensures the safety of all participants. While the Employer avers in general terms that mail ballots are particularly vulnerable to problems and issues, and the Board has a long tradition and a strong general preference of conducting manual elections, it also has a long history of conducting elections by mail. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." See *London Farm Dairy*, 323 NLRB 1057 (1997) and cases cited therein. In this instance, a mail ballot election is the preferable method in order to avoid all risks of exposure and transmission present in group gatherings. Whereas the Employer suggests that there is potential of transmission of COVID-19 by mail, that potential is negligible compared to the potential of spread from group gatherings and close contact between election participants as a manual ballot election would require. Mail ballots may not eliminate all risks, but certainly minimizes the risks involved with the spread of COVID-19.

Additionally, considering that there is an ongoing uncertainty as to when this health crisis will ease, a manual ballot election cannot be directed at a date certain without the potential of additional significant delay. The first wave of this virus has not been completely ameliorated, and many medical experts and government officials have forecasted the realistic potential of a, possibly more severe, second wave, especially as restrictions begin to ease. In that there is not yet an approved medical treatment for the virus or a vaccine it is not possible at this time to accurately predict when it will be possible to safely conduct a manual election at this facility.

The Employer further contends that it has not enjoyed an appropriate opportunity to effectively communicate with employees about the election, and therefore, proposes that the election be held on June 5, or any day thereafter. The current rules governing representation cases recognize the employees' rights to have their votes in a Board-conducted election on questions concerning representation, "recorded accurately, efficiently and speedily." NLRB Final Rule, Representation Case Procedures, 79 FR 74307 (December 15, 2014); NLRB Final Rule, Representation Case Procedures, 85 FR 18366 (April 1, 2020); See also *NLRB v. A.J. Tower Co.* 329 U.S. 324, 331 (1946). Thus, conducting Board elections "on the earliest date practicable" is of crucial importance in any representation case.

I cannot accept the Employer's premise that the circumstances of this case warrant prioritizing the Employer's right to campaign at the expense of employee free choice. While both rights find its basis in the Act itself, I am required to balance the Employer's rights against the statutory responsibility to give effect to employees' wishes concerning representation. The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-620 (1969), established the standards for "balancing" an employer's Section 8(c) right, to express "any views, argument, or opinion" in communicating his views to his employees, with the employees' right to self-organization, holding (emphasis added, footnotes omitted):

[A]n employer's rights cannot outweigh the equal rights of the employee to associate freely, as those rights are embodied in §7 and protected by § 8(a)(1) and the proviso to § 8(c).

The Petition in this case was filed on March 3, thus, the Employer has enjoyed ample time to communicate with its employees about its opinion on unionization. Postponing the election an additional month in order to afford the Employer additional time to campaign, conflicts with one of the fundamental purposes of the Act: the protection and promotion of employee freedom of choice.

Finally, the Employer argues that holding an election will disrupt employees from their work responsibilities. At the outset, I must point out that even when Board elections are held under normal circumstances, employees are still required to attend to their work responsibilities. The fact that the Employer and its employees currently have increased work responsibilities as a result of the pandemic must be balanced against the fact that nine weeks have already elapsed since the filing of the petition. Moreover, the Employer's argument concerning increased job responsibilities actually supports the direction of a mail ballot election, which will further avoid the distraction of employees from their duties at the facility by allowing them to cast their ballots while off duty.

IV. DETERMINATION:

I conclude that, under the circumstances, a mail ballot election is appropriate, as it will better protect the health and safety of all parties involved during the current health crisis and it will enfranchise employees on the earliest date practicable.

V. CONCLUSIONS AND FINDINGS

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the 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 hereby affirmed.

2. Based on the facts set forth in footnote 4 of this Decision, the Employer is engaged in commerce within the meaning of Sections 2(6) and (7) and a health care institution within the meaning of Section 2(14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. There is no contractual bar, or any other bar, to conducting an election in this matter.
5. The Petitioner claims to represent certain employees of the Employer.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Licensed Practical Nurses (LPN's) employed by the Employer at its facility located at 3805 Field Street, Erie, PA .

Excluded: All Registered Nurses, Service and Maintenance, Office Clerical employees, Managerial employees, confidential employees, and guards, and professional employees and Supervisors as defined in the Act.

7. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the 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 S.E.I.U. Healthcare Pennsylvania.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit at 5:00 p.m. on Friday, May 15 2020, ballots will be mailed to voters by National Labor Relations Board, Region 06, from its office at 1000 Liberty Ave. Room 904 Pittsburgh, PA 15222-4111.¹⁰ Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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 Friday, May 22, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 06 Office at (412) 395-4400 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

¹⁰ At the hearing, the Petitioner waived its 10-day entitlement to the voter list.

All ballots will be comingled and counted at the Pittsburgh Regional Office on Monday, June 8, 2020, at 1:00 p.m. In order to be valid and counted, the returned ballots must be received in the Pittsburgh Regional Office prior to the counting of the ballots. Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities included but not limited to Stay at Home orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a videoconference platform (such as WebEx, Skype, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending April 25, 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(1) 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 May 12, 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.

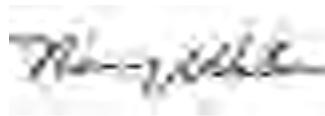
Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

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.

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: May 8, 2020

Nancy Wilson
Regional Director
National Labor Relations Board
Region 06
1000 Liberty Ave Rm 904
Pittsburgh, PA 15222-4111

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

QUICKWAY TRANSPORTATION, INC.

Employer

and

Case 09-RC-257491

**GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89 AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

General Drivers, Warehousemen and Helpers, Local Union No. 89 Affiliated with the International Brotherhood of Teamsters (Petitioner) seeks to represent a unit of all full-time and regular part-time drivers employed by Quickway Transportation, Inc. (Employer) at the Employer's 2827 S. English Station Road, Louisville, Kentucky facility and its sub-terminals located in Versailles and Franklin, Kentucky, excluding all office clerical employees, temporary employees, professional employees, guards and supervisors, as defined by the National Labor Relations Act (Act). There are approximately 73 employees in the petitioned-for unit. The parties have stipulated, and I find, that the agreed upon unit set forth above is appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act. ^{1/}

A hearing was held telephonically on May 1, 2020 ^{2/} before a hearing officer of the National Labor Relations Board (Board). The only issue presented in this matter, as discussed in more detail below, is whether the election should be held manually-in person-or by way of mail ballot. Election voting method is not a litigable issue at a pre-election hearing, but the parties were permitted to orally argue their positions as it relates to the mechanics of this election. I have carefully considered the positions and arguments presented by the parties on this single issue. For the reasons discussed below, I find that a prompt mail ballot election is appropriate given the extraordinary circumstances presented by the COVID-19 pandemic.

^{1/} The parties' stipulated unit description as described above does not specifically exclude the Employer's dispatchers that work at the referenced Employer locations. However, record evidence is clear, and I find, that the parties have agreed to exclude dispatchers from the petitioned-for unit.

^{2/} Hereinafter, all dates occurred in 2020 unless otherwise noted.

II. FACTS

To begin with, I take administrative notice of the pandemic health situation that exists in the United States, and continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. The Centers for Disease Control and Prevention (CDC), an agency of the United States Government, has issued guidance and recommendations as it pertains to the ongoing COVID-19 pandemic, and I take administrative notice of the same. According to the CDC:

[t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet). ^{3/}

Importantly, “[m]ore recently the virus has also been detected in asymptomatic persons.” *Id.*

To combat the spread of the virus, the CDC has issued recommendations including avoidance of gatherings of more than ten people, the use of face coverings and social distancing, among other recommendations. The CDC further states:

[a]lthough the virus can survive for a short period on some surfaces, it is unlikely to be spread from domestic or international mail, products or packaging. However, it may be possible that people can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads. ^{4/}

In order to avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises the public to “wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60 percent alcohol” after collecting mail from a post office or home mailbox. ^{5/}

Kentucky Governor Andy Beshear has issued a number of directives applicable to businesses and residents of the Commonwealth of Kentucky and those that might consider traveling throughout the Commonwealth. On March 6, Governor Beshear issued a State of Emergency (Executive Order 2020-215) in response to the developing COVID-19 crisis in the United States and the Commonwealth. Thereafter, on March 17, Governor Beshear ordered the closing of all public-facing businesses that encourage public congregation or could not comply with CDC guidelines concerning social distancing. Further restricting the movement of

^{3/} <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>

^{4/} <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>

^{5/} <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>

individuals within the Commonwealth of Kentucky, Governor Beshear issued Executive Order 2020-257 where: (1) all non-life-sustaining business were ordered to close by March 26 at 8:00 p.m.; and (2) all Commonwealth residents were encouraged to remain at home. On March 30, Governor Beshear issued Executive Order 2020-258 directing residents of the Commonwealth of Kentucky to refrain from traveling to other states, with limited exceptions. That order was expanded on April 2 to include certain restrictions of out-of-state movement into the Commonwealth of Kentucky.

Governor Beshear has also adopted certain CDC recommendations for combating the spread of the virus. On April 4, he adopted the CDC recommendations that people wear cloth face masks while continuing to engage in social distancing when outside of the home and in situations where social distancing is difficult to maintain. Governor Beshear continues to adopt the CDC's guidance on cloth face coverings and avoiding large gatherings.

On May 11, the Commonwealth of Kentucky will begin reopening sectors of the economy that were closed due to the COVID-19 pandemic.^{6/} In order for businesses to reopen and comply with Governor Beshear's Healthy at Work order, those businesses must meet certain Minimum Requirements in addition to sector specific guidance, including enforcing social distancing, limiting face-to-face interaction, encouraging the use of PPE, restricting common areas, and conducting daily temperature/health checks, among other requirements. The Minimum Requirements also apply to businesses who have remained open as essential operations.

The Employer in this case is engaged in the interstate transportation of goods and material. Its drivers are directly involved in the transportation of goods across state lines. As a transporter of goods and material, the Employer has remained open throughout the emerging crisis as a critical and essential business, and its drivers have continued to report to the Employer's facilities notwithstanding the Commonwealth of Kentucky's shelter-in-place orders. The Employer's main facility is located in Jefferson County, Kentucky, which has reported over 25 percent of all confirmed cases of COVID-19 in the Commonwealth.^{7/}

III. POSITION OF THE PARTIES

Petitioner argues that a mail ballot election should be directed. Due to orders and recommendations of the Federal Government and the Commonwealth, including those cited above, Petitioner contends that a mail ballot election is the safest and only appropriate method for conducting an election during this pandemic. Petitioner requests a voting period that does not last longer than 21-days, with ballots to be counted immediately after the voting period has ended.

The Employer asserts that a manual election should be directed. According to the Employer, the proposed manual election location-the Employer's trailer shop-has two large bays

^{6/} <https://govstatus.egov.com/ky-healthy-at-work>

^{7/} See: <https://kygeonet.maps.arcgis.com/apps/opsdashboard/index.html#/543ac64bc40445918cf8bc34dc40e334>.

with two large overhead doors and a standard entrance with ingress and egress. Because the Employer has been operating throughout the Commonwealth's stay-at-home order, the Employer argues that it has learned how to create a safe environment for its employees, which can be utilized to run a safe manual election at its facilities. The Employer further asserts that the trailer shop can be deep cleaned before an election, is well-ventilated, allows for physical distancing, and the Employer would make sure there is access to proper personal protective equipment like masks, hand sanitizer, gloves, etc. The Employer asserts that there are safety hazards inherent to the mail ballot process. Those voting will be required to handle mail that not only has been touched by other individuals, but may also have been orally sealed, thus transferring saliva to the envelope and potentially creating a safety risk for all those who come into contact with the envelope. Finally, in support of its position on this issue, the Employer cites the Board's policy favoring manual elections, argues that there is a potential for abuses without Board agent oversight of the election process, and further questions the reliability of the United States mail service at this time.

If a mail ballot election is directed, the Employer argues for a 21-day period between the issuance of this Decision and Direction of Election and when the ballots are mailed, a 21-day voting period and, thereafter, an additional seven-day grace period before the ballots are counted to ensure that all ballots mailed prior to the end of the voting period have sufficient time to reach the Regional office. ^{8/}

IV. ANALYSIS

It is longstanding Board practice that Regional Directors are afforded discretion in determining the method of balloting for representation elections. See, *Halliburton Services*, 265 NLRB 1154 (1982); see also, *Manchester Knitted Fashions*, 108 NLRB 1366 (1954) (stating that the Regional Director has the discretion to determine the time and place for an election). Specific to instances where mail or mixed manual-mail ballot elections are being contemplated, the Board has stated:

[w]hen deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are 'scattered' because of their job duties over a wide geographic area; (2) where eligible voters are 'scattered' in the sense 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, a lockout or picketing in progress.

San Diego Gas & Electric, 325 NLRB 1143, 1145 (1998). A Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election will

^{8/} The Employer also noted on the record that if a manual election is directed for a date other than its proposed June 16 and June 17 election, a mixed manual-mail ballot election may be appropriate because several of the employees within the petitioned-for unit report to the Employer's sub-terminals in Versailles and Franklin, Kentucky.

not be overturned “unless a clear abuse of discretion is shown.” *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, 325 NLRB at 1144, fn. 4. Although the Board expects Regional Directors to exercise their discretion within the bounds outlined above, it recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, 325 NLRB at 1145; see also NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2.

The Board has already had occasion to apply those guidelines that were outlined in *San Diego Gas & Electric* to the current pandemic, specifically as it pertains to the “extraordinary circumstances” language of that decision. In *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020), the Regional Director for Region 27 directed a mail ballot election notwithstanding the Employer’s argument that a manual election could be safely conducted at its facility. The Employer requested review of the Regional Director’s Decision and Direction of Election, and sought an emergency stay of the directed election. On May 1, the Board granted the emergency stay and stayed the election in order to give the Board time to consider the issues presented by the Regional Director’s Decision.

Thereafter on May 8, the Board denied the Employer’s request for review and lifted the stay of the election. According to the Board:

[i]n finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework. Mandatory telework in the regional office is based on the Agency’s assessment of current COVID-19 pandemic conditions in the local area. Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.

Atlas Pacific Engineering Company, 27-RC-258742, fn.1 (May 8, 2020). Accordingly, due to the current environment caused by the pandemic, the Board found that the Regional Director for Region 27 did not abuse her discretion in relying on the “extraordinary circumstances” language of the Board’s decision in *San Diego Gas & Electric* to order a mail ballot.

Given the extraordinary circumstances caused by the spread of COVID-19 that still face the Commonwealth of Kentucky and the entirety of the United States, I find it appropriate to exercise my discretion to direct a mail ballot, the details of which are provided below. Not only do I derive such discretion from extant case law, the Board has specifically emphasized Regional Director’s discretion in directing elections during these unprecedented times. On April 1, the Board, through the Office of Public Affairs, issued a press release indicating that beginning April 6, Board-conducted elections would resume after a two-week suspension. NLRB Resumes Representation Elections (2020), <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>, (last visited May 6, 2020). “The General Counsel now has advised that appropriate measures are available to permit elections to resume in a safe and effective manner,

which will be determined by the Regional Directors.” *Id.* Accordingly, in weighing the propriety of resuming elections—a “core” function “to the NLRB’s mission”—during these extraordinary and unpredictable times, the Board concluded, with input from the Board’s General Counsel, that elections should resume, subject to individual Regional Director’s discretion. *Id.* As such, the Board, with the General Counsel’s input, has afforded to Regional Directors the discretion, specific to the COVID-19 pandemic, to resume elections in a safe and effective manner, and I choose to appropriately exercise that discretion in this instance.

I have considered the Employer’s proffered plan to safely run a manual election at its facility, and while I acknowledge the careful consideration paid to this issue by the Employer, it simply cannot guarantee the safety of all those involved in a manual election. A manual election necessarily involves the face-to-face interaction of numerous people. At the pre-election conference, the Board Agent must meet with Employer and Petitioner representatives, attorneys who may be present, and election observers. During the election, the Board Agent and observers must check-in nearly 75 potential voters using the same voting list and sharing the same space. The voters must stand in line in order to obtain a ballot to vote, which will be distributed by the Board Agent, and will be required to use the same ballot booth as every other voter. Voters will ultimately place their ballots in the same ballot box. That ballot box will need to be opened, shown for inspection to all observers at the vote count to ensure no votes were left in the box, and the Board Agent will need to read each vote and tally the ballots with assistance from the observers.

While the above offers a simplified explanation of the processes involved in conducting a manual election, it is offered to show the volume of unavoidable face-to-face interactions made during the course of a manual election, especially in an election such as this that will likely involve nearly 80 individuals, possibly more. Given the current information from the CDC that asymptomatic individuals can be a source of transmission of the virus, just one failure to maintain proper social distancing or the use of appropriate personal protective equipment could jeopardize the safety of many individuals, through no fault of their own. Adding to the number of potential person-to-person contacts involved in this case—of which the CDC and the Commonwealth of Kentucky still recommends limiting as much as possible—thus increasing the risk of COVID-19 spread, is the fact that the petitioned-for unit involves interstate drivers who necessarily travel throughout the Commonwealth of Kentucky and across state lines, interacting daily with other individuals and businesses. The countless safety hazards involved with conducting a manual election are simply not present with an election conducted by mail, thus making it the safer method of voting at this time. ^{9/}

A mail ballot election is also well-suited during these difficult times to further effectuating the core purposes and policies of the Act. Processing representation petitions and timely conducting elections is central to the Board’s mission. The Employer’s arguments against the efficacy of mail ballot elections are unavailing. “From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail.” See,

^{9/} Like the Region 27 office, the Region 9 office charged with conducting the election in this matter remains on mandatory telework due to spread of COVID-19 within its jurisdiction. See, the Board’s rationale cited in *Atlas Pacific Engineering*, *supra*.

London Farm Dairy, 323 NLRB 1057 (1997) (internal citations omitted). Indeed, the Board has previously rejected arguments that mail ballot elections are inherently less secure, and that they would likely result in voter coercion or reduced voter participation. See, *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, 323 NLRB at 1058. While long-standing Board policy favors manual elections, mail ballot elections continue to be an often utilized voting method and continue to have their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

Finally, I find unavailing the Employer's argument that a mail ballot election will pose safety hazards to those involved in the process. There is no evidence that mail ballot elections will endanger public health or that people have been infected with the novel coronavirus by the handling of mail. To the contrary, as noted above, the CDC's guidance states that the novel coronavirus "is unlikely to be spread from domestic or international mail, products or packaging." Furthermore, the necessary precautions to avoid potentially being infected by the virus through the mail-hand-washing for 20 seconds or the use of hand sanitizer-are much more manageable than the litany of precautions that would need to be taken to ensure the safety of all participants in a manual election.

For the foregoing reasons, I direct a mail ballot election to be conducted in accordance with the election details discussed below.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction in this case.^{10/}
3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. No collective-bargaining agreement covers the employees in the petitioned-for unit, and no other bar exists to conducting an election.

^{10/} The parties stipulated in Board Exhibit 2, and I find, that the Employer is a Kentucky corporation that is engaged in the interstate transportation of goods and material. During the most recent 12-month period, the Employer derived gross revenues in excess of \$50,000 from the transportation of goods and materials directly to points outside the Commonwealth of Kentucky.

5. 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.

6. The following employees of the Employer, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers employed by the Employer at its facility located at 2827 S. English Station Road, Louisville, Kentucky 40299 and its Versailles, Kentucky and Franklin, Kentucky sub-terminals; but excluding all office clerical employees, temporary employees, professional employees, guards and supervisors, as defined in the 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 GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At 4:30 p.m. on May 22, 2020, ballots will be mailed to voters by the National Labor Relations Board, Region 9.^{11/} 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 do not receive a ballot in the mail by June 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 9 Office at (513) 684-3686 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

The ballots should be returned to the Regional Office by Friday, June 19, 2020. All ballots will be comingled and counted at the Region 9 office, John Weld Peck Federal Building,

^{11/} I deny the Employer's request to wait 21 days from the issuance of this Decision and Direction of Election before mailing the ballots and opening the voting window. I find that doing so would be an unjustifiable and unnecessary delay, especially in light of Petitioner's partial waiver of its right to have the voting list for 10 days before the voting period starts. Petitioner waived 8 days. Section 102.67(b) of the Board's Rules and Regulations that govern this case states, in relevant part, "[t]he Regional Director shall schedule the election for the earliest date practicable consistent with these Rules." I do not find that the Employer has proffered a sufficient reason to deviate from the Board's mandate.

National Labor Relations Board, 550 Main Street, Room 3-111, Cincinnati, Ohio on Monday, June 22, 2020, at 1:00p.m. ^{12/} In order to be valid and counted, the returned ballots must be received in the Region 9 office prior to the counting of the ballots. Due to the above-described extraordinary circumstances of the COVID-19 pandemic, I further direct that the ballot count will take place remotely through a video platform, such as iPhone, FaceTime or Skype, to be determined by the Acting Regional Director. Additionally, given our future uncertainty caused by the COVID-19 pandemic, and the often in-flux federal, state, and local government regulation of businesses, offices, and the movement of people, I further direct that the aforementioned ballot count date may be postponed should it become necessary to do so.

The parties have agreed, and I conclude, it is appropriate that the Notice of Election and ballots will be in English.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending May 9, 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 Acting 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.

^{12/} I am directing a 28-day voting period which essentially accommodates the Employer's request for a 21-day voting period and an additional 7-day grace period between the end of the voting period and the ballot count. I am not persuaded that a 7-day period is needed between the end of the voting period and the ballot count, and will not direct the same.

To be timely filed and served, the list must be *received* by the Acting Regional Director and the parties by **June 15, 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.

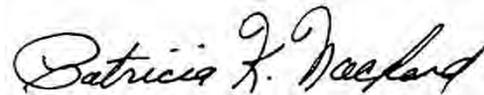
RIGHT TO REQUEST REVIEW

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 Acting 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 Acting Regional Director. A certificate of service must be filed with the Board together with the request for review.

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: May 15, 2020



Patricia K. Nachand, Acting Regional Director
National Labor Relations Board, Region 09
550 Main Street, Room 3-111
Cincinnati, OH 45202-3271

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

**MYCITY TRANSPORTATION LLC¹
Employer**

and

Case 12-RC-258326

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION NO. 769
Petitioner**

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

International Brotherhood of Teamsters, Local Union No. 769 (the Petitioner) seeks to represent a unit of all full-time and regular part-time Customer Service Representatives employed by MyCity Transportation LLC (the Employer) at the Fort Lauderdale-Hollywood International Airport, excluding all other employees, office clericals, managers, professional employees, guards and supervisors as defined by the National Labor Relations Act (the Act).² There are 22 employees in the unit sought by Petitioner. The parties have stipulated, and I find, that the agreed upon unit set forth above is appropriate for the purposes of collective-bargaining.

A hearing was held telephonically on April 29, 2020,³ before a hearing officer of the National Labor Relations Board (the Board). The only issue presented in this matter, as

¹ I approve the parties' joint stipulation, as noted in Board Exhibit 2, to amend the petition and other formal documents to correctly reflect the names of the parties as set forth above.

² The parties stipulated, and I find, that at all material times the Employer has been an Ohio limited liability company engaged in the business of providing transportation services at various locations throughout the United States, including at the Fort Lauderdale-Hollywood International Airport. The parties further stipulated, and I find, that the Employer has a principal place of business located at 17421 South Miles Road, Cleveland, Ohio, and conducts its Fort Lauderdale, Florida operations out of its place of business located at 4101 Ravenswood Road, Fort Lauderdale, Florida. During the past 12 months, in the course and conduct of its business, the Employer purchased and received at its Florida location, goods valued in excess of \$50,000 from firms which purchased those goods directly from points located outside the State of Florida; thus the Employer is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act and is subject to the jurisdiction of the Board. Finally, the parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

³ Hereinafter all dates occurred in 2020, unless otherwise noted.

discussed in more detail below, is how and when the election should be conducted. I have carefully considered the positions and arguments presented by the parties on this single issue. For the reasons discussed below, I find that a prompt mail ballot election is appropriate given the extraordinary circumstances presented by the COVID-19 pandemic.

I. FACTS

At the outset, I take administrative notice of the pandemic health situation that exists in the United States, and continues to affect the way that individuals, businesses, organizations, and governments conduct their daily operations. On March 11, the COVID-19 outbreak was characterized as a pandemic by the World Health Organization. I also take administrative notice of the information, guidance and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States government.⁴ The CDC states:

[t]he virus that causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Spread is more likely when people are in close contact with one another (within about 6 feet).

.... the virus has also been detected in asymptomatic persons.⁵

The CDC recommendations for dealing with this public health threat include the avoidance of gatherings of more than ten people, the use of cloth face coverings and social distancing, among other recommendations. The CDC further states:

Although the virus can survive for a short period on some surfaces, it is unlikely to be spread from domestic or international mail, products or packaging. However, it may be possible that people can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.⁶

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics>.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>

To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises:

After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.⁷

The advice to avoid becoming infected by the novel coronavirus by frequently washing hands with soap and water or using hand sanitizer has been widely and repeatedly publicized in the media and by health organizations, including in South Florida, throughout the past several months.⁸

On March 1, Florida State Surgeon General Scott Rivkees declared a public health emergency for the State of Florida related to the spread of COVID-19. Thereafter on March 9, Florida Governor Ron DeSantis issued Executive Order Number 20-52 declaring a state of emergency for the State of Florida to control and prevent the spread of COVID-19 within the state. Additionally, on March 30, Governor DeSantis issued Executive Order Number 20-89 restricting public access to non-essential businesses and facilities in Miami-Dade County, Broward County, Palm Beach County, and Monroe County, all in South Florida, due to the overwhelming spread of COVID-19 in those counties. Subsequently, Executive Order Number 20-91, issued on April 1, restricted Florida residents' movement outside of the home to those necessary to obtain or provide essential services or conduct essential activities.

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

⁸ See e.g. <https://www.sun-sentinel.com/news/sound-off-south-florida/fl-ne-sosf-hand-washing-songs-20200306-4k5kipxm5vd6jgb3xrytyr3ivm-story.html>; <https://www.miamiherald.com/news/state/florida/article240882406.html>; <https://www.sun-sentinel.com/coronavirus/fl-ne-hyde-virus-column-20200313-bfguvwu7cbdx7odtd5h2adqysu-story.html>; <https://southfloridareporter.com/how-to-properly-wash-your-hands-video/>; <https://miami.cbslocal.com/2020/02/27/washing-your-hands-is-best-defense-against-coronavirus-not-a-facemask/>; <https://www.usatoday.com/story/news/health/2020/03/16/coronavirus-tips-slow-covid-19-spread-wash-hands-stay-home/5058412002/>; <https://www.nbcnews.com/better/lifestyle/how-wash-your-hands-properly-according-doctors-ncna1102746>; <https://www.abcactionnews.com/news/national/are-you-washing-your-hands-properly-this-is-how-the-cdc-says-it-should-be-done>; <https://www.facebook.com/FLDepartmentofHealth/posts/wash-your-hands-often-and-thoroughly-with-soap-and-water-for-at-least-20-seconds/2783777031706463/>

On April 29, Governor DeSantis issued Executive Order Number 20-112, which implemented the State of Florida's Phase 1 plan for re-opening its economy. It became effective on May 4. However, Governor DeSantis specifically excluded Broward County, among two others, from Executive Order Number 20-112, and has required Broward County to continue to follow stricter protocols in coordination with the County's Mayor. Thus, movement in Broward County is still controlled by the Governor's safer-at-home restrictions.

As noted above, the Employer's operation involved herein is located in Fort Lauderdale, which is in Broward County, Florida, and thus falls within the Governor's safer-at-home restrictions, and, due to the significant prevalence of COVID-19 in Broward County, is not included in Executive Order Number 20-112—the Governor's order implementing an initial phased re-opening of the state's economy. Currently, all employees in the petitioned-for-unit are temporarily laid off due to the COVID-19 pandemic.

II. POSITION OF THE PARTIES

The Petitioner argues that a mail ballot election is appropriate in these circumstances, and that the mail ballot should begin on May 20, within three weeks after the date of the hearing. Additionally, Petitioner maintains that the counting of ballots should be accomplished through video meeting technology so that the parties and any other individuals who wish to observe the count are able to do so remotely. The Petitioner hypothesized that if it could be sure that the Employer would reopen its business and a safe manual election could be directed by June 11, it would agree to a manual election, but that it cannot be predicted when that will occur, so the Petitioner's position is that a mail ballot election should be conducted.

The Employer asserts that a mail ballot election is not presently appropriate due to the circumstances of the COVID-19 pandemic. According to the Employer, a mail ballot election

has the potential to cause infection hazards to employees that have to handle mail, both from touching the surface of the envelopes, as well as the seal which may have been orally licked, thus potentially transferring the virus.

Additionally, the Employer argues against the appropriateness of a mail ballot election due to employees being in layoff status. The Employer notes that because employees are away from the Employer's physical location, the Board's Notice of Election will either need to be mailed or emailed to bargaining unit employees, which will require that employees again have to handle potentially infected mail, and creating the possibility that they may not receive the electronically transmitted Notice of Election if the Employer does not have the most up-to-date email addresses. Finally, the Employer contends that conducting a mail ballot election while employees are away from the Employer's premises places the Employer at a disadvantage due to its inability to meet and speak with employees about the election and answer any questions they may have. Should a mail ballot election be directed, the Employer asserts that the election should not commence before late June.

III. ANALYSIS

It is longstanding Board practice that Regional Directors are afforded discretion in determining the method of balloting for representation elections. See *Halliburton Services*, 265 NLRB 1154 (1982); see also *Manchester Knitted Fashions*, 108 NLRB 1366 (1954) (stating that the Regional Director has the discretion to determine the time and place for an election).

Specific to instances where mail or mixed manual-mail ballot elections are being contemplated, the Board has stated:

[w]hen deciding whether to conduct a mail ballot election or a mixed manual-mail ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are 'scattered' because of their job duties over a wide

geographic area; (2) where eligible voters are 'scattered' in the sense 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, a lockout or picketing in progress.

San Diego Gas & Electric, 325 NLRB 1143, 1145 (1998). The Board further defined scattered "to apply in any situation where all employees cannot be present at the same place at the same time." *San Diego Gas & Electric*, 325 NLRB at 1145, fn. 7. A Regional Director's exercise of the broad discretion afforded by the Board in selecting the appropriate mechanics for an election will not be overturned "unless a clear abuse of discretion is shown." *Nouveau Elevator Industries*, 326 NLRB 470, 471 (1998), citing *San Diego Gas & Electric*, 325 NLRB at 1144, fn. 4. Although the Board expects Regional Directors to exercise their discretion within the guidelines outlined above, it recognizes that deviation from those guidelines may occur in extraordinary circumstances. *San Diego Gas & Electric*, 325 NLRB at 1145; see also NLRB Casehandling Manual (Part Two), Representation Proceedings, Section 11301.2. As the Board clearly stated in *San Diego Gas & Electric* that the term "scattered" should include all situations where employees cannot be present at the same place at the same time, which is precisely the case here. The temporarily laid off employees in the petitioned-for-unit cannot be expected to assemble at a specific place and time due to the COVID-19 pandemic and the safer-at-home guidelines currently in effect. Exercising my discretion to direct a mail ballot here falls squarely within the Board's directives in *San Diego Gas & Electric*, supra.

The Board has already had occasion to apply the guidelines that were outlined in *San Diego Gas & Electric* to the current pandemic. The Board's Order in *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020), involved the direction of a mail ballot election by the Regional Director for Region 27, notwithstanding the employer's argument that a manual election could be safely accomplished at its facility. The employer requested review of the

Regional Director's Decision and Direction of Election, and sought an emergency stay of the directed election. On May 1, the Board granted the emergency stay in order to give it time to consider the matter. Earlier today, May 8, the Board denied the employer's request for review and lifted the stay of the election. According to the Board:

[i]n finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework. Mandatory telework in the regional office is based on the Agency's assessment of current COVID-19 pandemic conditions in the local area. Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.

Atlas Pacific Engineering Company, 27-RC-258742, fn.1 (May 8, 2020). Due to the current environment caused by the pandemic, the Board found that the Regional Director for Region 27 did not abuse her discretion in relying on the "extraordinary circumstances" language of the Board's decision in *San Diego Gas & Electric* to order a mail ballot.

Given the extraordinary circumstances caused by the spread of COVID-19 that still face the State of Florida, and particularly the area of South Florida that includes Broward County, I find it appropriate to exercise my discretion to direct a mail ballot election, the details of which are provided below. Like the employees of the Region 27 office in Denver, Colorado, the employees of the Region 12 offices in Tampa and Miami, Florida who are charged with conducting the election in this case, remain on mandatory telework.

Additionally, and specific to the processing of representation petitions during this pandemic, on April 1, the Board, through the Office of Public Affairs, issued a press release indicating that beginning April 6, Board-conducted elections would resume after a two-week suspension. NLRB Resumes Representation Elections (2020), <https://www.nlr.gov/news->

[outreach/news-story/nlrb-resumes-representation-elections](#), (last visited May 6, 2020). “The General Counsel now has advised that appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors.” *Id.* Accordingly, in weighing the propriety of resuming elections—a “core” function “to the NLRB’s mission”—during these extraordinary and unpredictable times, the Board concluded, with input from the Board’s General Counsel, that elections should resume, subject to individual Regional Director’s discretion. *Id.* As such, the Board, with the General Counsel’s input, has afforded to Regional Directors the discretion, specific to the COVID-19 pandemic, to resume elections in a safe and effective manner, and I choose to appropriately exercise that discretion in this instance.

The Employer’s arguments against holding a mail ballot election are unavailing. There is no evidence that mail ballot elections endanger public health or that people have been infected with the novel coronavirus by the handling of mail. To the contrary, as noted above, the CDC’s guidance states that the novel coronavirus “is unlikely to be spread from domestic or international mail, products or packaging.” In the circumstances of the COVID-19 pandemic generally, and particularly in Fort Lauderdale, the main city in Broward County, where a safer at home order remains in place, I find that a mail ballot is a much safer method of voting than a manual election.

A manual election would involve a pre-election in-person meeting between the Board agent, one observer from each party (if the parties chose to designate observers, which is usually the case), and possibly with the parties’ counsels or other representatives, for the purpose of the Board agent and parties examining the polling area, the Board agent setting up the voting booth, posting “Voting Place” signs, distributing badges, providing written and verbal instructions to

the observers, answering any questions from the observers, confirming arrangements for voter release, discussing any last-minute changes to the voter list, and preparing and sealing the ballot box in the presence of the parties.⁹ In addition, throughout the polling period, the Board agent and observers would be present, in fairly close proximity, in order to check the voter list as employees periodically arrive to vote,¹⁰ and multiple voters would have to enter the same voting booth, likely touching the same surfaces within a short period of time. After a manual election the parties and Board agent typically meet to attempt to resolve any challenged ballots and so the Board agent may count the ballots in the presence of the parties.

These circumstances could present difficulties in preventing the spread of the coronavirus if any of those involved are infected and, as noted, persons may be infected without knowing it because they are asymptomatic and/or have not been tested for the virus. Manual polling may also raise difficult questions about the use of face masks and/or other personal protective equipment, including whether voters or others can be required to use such equipment. Whether or not such equipment is used, for the reasons noted above, it is apparent that a mail ballot election is the safer method of voting and is well suited to effectuating the purposes and policies of the Act during the COVID-19 pandemic, which does not appear to be abating to the extent necessary to hold a safe manual election in the near future. Steps could be taken to modify the usual procedures for a manual election to an extent to make it somewhat safer, but even with such precautions, a manual election appears to present a substantially greater risk of spreading the coronavirus than a mail ballot election.

⁹ See Section 11318 through 11318.4 of the Board's Casehandling Manual Part Two, Representation Proceedings.

¹⁰ See Section 11322.1 of the Board's Casehandling Manual Part Two, Representation Proceedings.

With respect to the timing of the election, Section 102.67(b) of the Board's Rules and Regulations that govern this case states in relevant part, "The Regional Director shall schedule the election for the earliest date practicable consistent with these Rules." Processing representation petitions and timely conducting elections is central to the Board's mission, and conducting a mail ballot election is the clearly safer alternative to a manual election at this time. It is unknown how long it will be before a safe manual election can be conducted. It may not be possible to conduct a safe manual election even after the Employer's business reopens and the temporarily laid off employees have returned to their usual workplace at some unknown future time. Thus, directing a mail ballot election is the only way to safely accomplish the objective of allowing employees to exercise their statutory right to choose whether or not to be represented for the purpose of collective bargaining at the earliest date practicable.

Lastly, the Employer is not unfairly disadvantaged by a mail ballot election. Although the Employer is unable to hold captive audience meetings at its premises before it reopens, it appears that the Employer is able to communicate directly with the petitioned-for unit of employees by other means, such as telephone, video communications via telephone, email, and mail, regarding its position and opinions related to election, unions, and the Petitioner. Moreover, the Employer can use these other means to reach out to employees to find out if they have questions about these matters, and to provide answers.

For the foregoing reasons, I direct a mail ballot election to be conducted in accordance with the election details discussed below:

IV. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction therein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. No collective-bargaining agreement covers the employees in the petitioned-for-unit, and no other bar exists to conducting an election.

5. 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.

6. The following employees of the Employer, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Customer Service Representatives employed by the Employer at the Fort Lauderdale-Hollywood International Airport; excluding all other employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the National Labor Relations Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local Union No. 769.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At **9:30 a.m. on May 26, 2020**, ballots will be mailed to voters by the National Labor Relations Board, Region 12, from its office at **201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602-5824**. Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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 **June 3, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at **(786) 812-7993** or **(813) 228-2661** or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be comingled and counted at the **Region 12 office, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida** on **June 17, 2020**, at **10:00 a.m.** In order to be valid and counted, the returned ballots must be received in the **Region 12 office** prior to the counting of the ballots. Due to the above-described extraordinary circumstances of the COVID-19 pandemic, I further direct that the ballot count will take place remotely through a video platform, such as iPhone FaceTime or Skype, to be determined by the undersigned Regional Director.

The parties have agreed, and I conclude, it is appropriate that the Notice of Election and ballots will be in English.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending on April 24, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.¹¹

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,

¹¹ Both parties assert that the payroll period ending date used for voter eligibility purposes should be the payroll period ending closest to the date the petition was filed. The payroll period ending date to be used in directing an election is the latest completed payroll period preceding the date of issuance of the Notice of Election. No evidence or argument was offered to deviate from the Board's usual practice. Accordingly, the payroll period ending date used for voter eligibility will be the payroll period ending date preceding the date of issuance of the Notice of Election.

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 **May 12, 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 Election¹²

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

¹² Because the employees in the petitioned-for unit were temporarily laid off at the time of the hearing, in addition to the notice posting requirements for the Employer set forth herein, the Region 12 office will mail a copy of the Notice of Election to each employee at his or her address provided by the Employer on the voter list. Those Notices will be mailed by Region 12 by no later than May 15, 2020.

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.

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: May 8, 2020.



David Cohen, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

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

San Antonio, Texas

JOHNSON CONTROLS, INC.

Employer

and

Case 16-RC-256972

**SMART – SOUTHWEST GULF COAST
REGIONAL COUNCIL**

Petitioner

DECISION AND DIRECTION OF ELECTION

On February 26, 2020,¹ SMART – Southwest Gulf Coast Regional Council (“Petitioner”) filed a representation petition under Section 9(c) of the Act seeking to represent certain employees of Johnson Controls, Inc. (“Employer”).

On March 4, I approved a stipulated election agreement for a manual election to take place on March 26, however, on March 17, I issued an Order Postponing Election because of safety concerns related to the COVID-19 pandemic in the United States. Two days later, on March 19, the National Labor Relations Board (“Board”) ordered all Board-conducted elections temporarily suspended. The Board lifted its suspension and resumed conducting elections on April 6. In ending the suspension, the Board noted appropriate measures for conducting elections in a safe and effective manner were available and the determination as to such measures would be left to the Regional Directors.

Because mail ballots have the advantage of significantly reducing social interactions, after the Board lifted the suspension of Board elections, the Region solicited the parties’ positions as to the appropriateness of a mail-ballot election. Thereafter, the parties submitted their positions. The Employer opposed holding the election by mail, asserting a manual election could be conducted safely at its facility, while the Petitioner advocated for a mail-ballot election.

On April 23, after considering the parties’ positions, I revoked the stipulated election agreement and scheduled a hearing for the parties to present evidence and witnesses regarding the appropriate unit and their positions on the method of election. The next day, April 24, the Employer and Petitioner filed a joint motion to proceed with a manual election, proposing an agreed-to date, time, and place for the election, which I denied.

¹ All dates are in 2020 unless otherwise noted.

On May 4, a hearing officer of the Board held a telephonic hearing in this matter.² The parties stipulated to an appropriate bargaining unit³ and presented offers of proof on the method of election.

I. DECISION

Based on the parties' stipulations at hearing, having reviewed the parties' positions, and having considered other factors, as addressed below, I have determined that because of the extraordinary circumstances presented by the ongoing pandemic, the Board will conduct this election by mail-ballot.

Although the type of election to be held is not a litigable issue at a hearing,⁴ I herein provide the basis for my decision to order a mail-ballot election in this case.

National, state, county, and local authorities have all declared states of emergency or disaster, and public health officials recommend minimizing in-person contact. I am unconvinced by the Employer's position that measures could be undertaken which would allow for the safe and effective conducting of a manual ballot election at this time. The most responsible measure to ensure a safe election is to change the method to a mail-ballot election, which will minimize the risk of exposing employees, Board agents, Employer and Union representatives, their families, and the public to this virus and, thereby, maximize participation. Additionally, given the current rapidity of changes to both recommended and mandatory virus countermeasures, a manual ballot election would be fraught with uncertainty and subject to unpredictable changes. A mail-ballot election provides the certainty of process and procedure to conduct an election within a reasonably prompt period and in an effective manner.

² The Employer argued it was not appropriate to proceed with the hearing because it had submitted a Request for Review with the Board on the preceding business day, however, requests for review do not operate to stay a hearing unless specifically ordered by the Board, which did not happen in this case. See Section 102.67(c) of the Board's Rules and Regulations.

³ There are approximately 149 employees in the stipulated unit, however, the parties could not agree on the inclusion or exclusion of hourly plant clericals employees (including quality control, engineering, maintenance, production, and warehouse). According to the record, there are about 7 plant clericals. Because the Employer raises eligibility issues affecting at most approximately 5 percent of the unit, I conclude the Employer's contentions do not significantly change the size or character of the unit and thus are not relevant to a question concerning representation. Consequently, the parties were not permitted to present evidence at the hearing, as I concluded that it was unnecessary to resolve the eligibility issues before the election is conducted. Consistent with Section 102.64 of the Board's Rules and Regulations, I direct that the individuals in those classifications may vote in the election and that their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

⁴ See, for example, *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

II. BACKGROUND AND POSITIONS OF THE PARTIES

The Employer is a Wisconsin corporation engaged in diverse industrial and technological endeavors. At its facility in San Antonio, Texas, the workplace at issue in the instant petition, the Employer designs and produces heating, ventilation and air conditioning (HVAC) systems, industrial refrigeration, building management systems, fire and security systems, and mechanical equipment for commercial and residential buildings.

Although the Petitioner initially advocated for a mail-ballot election, it subsequently asserted a manual election is the most appropriate method of election and, citing the Board's press releases, notes that such an election can be held at the discretion of Regional Directors. However, Petitioner argues that if the Regional Director does not deem a manual election safe in this case, it should not cause further delay and, per the Board's Rules and Regulations, this case involves extraordinary circumstances warranting a mail-ballot election.

The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains that the risk can be mitigated, and that it is capable of taking steps which would ensure a safe manual election. In this regard, the Employer indicates it is able to provide a well-ventilated area, including an outdoor opening, that will allow room for social distancing; a plexiglass partition between the voters, the election observers, and the Board agents conducting the election; ample disposable pens or pencils for single-use voting; masks for the election observers, Union representatives, and Board agents; and gloves for the election observers and Board agents. The Employer stresses that there have been no confirmed, reported, or even suspected cases of COVID-19 at its San Antonio facility.

The Employer asserts only a manual election would be appropriate, arguing the Board's decision in *San Diego Gas & Electric*, 325 NLRB 1143 (1998) provides that representation elections should be held manually, and that mail balloting is only permissible where it enhances the opportunity for all to vote. The Employer contends there are no such circumstances here and that conducting a manual election while observing social distancing and other safety protocols at the Employer's facility is manageable. Further, it argues that under *San Diego Gas*, the rare exception to the manual election presumption has been where employees are widely scattered and cannot easily visit the workplace to vote, which is not the case here.

III. CONDUCTING A MANUAL BALLOT ELECTION WOULD RISK INFECTING EMPLOYEES, THE BOARD AGENTS CONDUCTING THE ELECTION, AS WELL AS JEOPARDIZING THE HEALTH OF THE PUBLIC AT LARGE

At the time of this decision, despite unprecedented efforts to limit transmission, over 72,000 deaths from COVID-19 have been reported in the United States, with over 1.2 million confirmed cases.⁵ The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel, and the general population of south-central

⁵ Johns Hopkins University & Medicine *Coronavirus Resource Center* <https://coronavirus.jhu.edu/map.html>, (last accessed May 6, 2020).

Texas are subject to the risks of COVID-19 transmission. This risk has been recognized by officials in several declarations, recommendations, and orders at the national, state, and local level. President Donald J. Trump, issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,” on March 13.⁶ That same day, Governor Greg Abbott, similarly issued a proclamation certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas.⁷ On April 12 Governor Abbott issued Executive Order 18 extending his disaster declaration for all Texas counties in response to COVID-19.⁸

Texas has been significantly affected by the novel coronavirus, with new confirmed cases and deaths every day. On April 23, Texas had reported almost 22,000 cases of COVID-19, with 1,649 patients in the hospital because of the virus. By May 6, less than two weeks later, reported cases have increased more than 50% to over 34,000; there are now 1,812 patients in hospitals because of the virus; and statewide fatalities have increased from 561 to 948 people.⁹ In Bexar County, where the Employer’s facility is located, 1,677 cases have been confirmed and 52 people have died from COVID-19.¹⁰

Government agencies and authorities, recognizing the danger of this pandemic, have taken appropriate measures to limit exposure. Bexar County Judge Nelson Wolff has ordered all citizens to stay at home except for travel related to essential activities, and to observe social distancing and face covering requirements, and has prohibited all indoor and outdoor public or social gatherings of any number of people outside of a single household (unless specifically exempted by the order) until May 19.¹¹ On April 29, City of San Antonio Mayor Ron Nirenberg indefinitely extended his declaration of a local state of disaster and health emergency.¹² Federal courts in the Western District of Texas have postponed all trials scheduled through May 31.¹³

Although Region 16 has available personnel who would appear to be infection free, the virus is believed to spread through presymptomatic and asymptomatic individuals. At some point in the future, testing may be more widespread. Currently, sending a Board agent to conduct the election would risk the exposure of everyone at the facility. Eligible voters along with other employees who may come into contact with these participants, Board agents, and party representatives, would risk being exposed to the virus and spreading it to the community and their

⁶ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed May 5, 2020).

⁷ “Governor Abbott Declares State of Disaster In Texas Due To COVID-19,” <https://tdem.texas.gov/covid-19/#1584552291367-2b8805f2-7b68> (last accessed May 5, 2020). As of April 29, 2020, Governor Abbott has issued 20 executive orders related to COVID-19.

⁸ “Governor Abbott Extends Disaster Declaration For COVID-19,” <https://gov.texas.gov/news/post/governor-abbott-extends-disaster-declaration-for-covid-19> (last accessed May 5, 2020).

⁹ Texas Department of State Health Services, “[Texas Case Counts: COVID-19 Case Dashboard](#),” (last accessed May 6, 2020).

¹⁰ Ibid.

¹¹ <https://www.bexar.org/DocumentCenter/View/26838> (last accessed May 5, 2020).

¹² Mayor’s Emergency Declaration No. 6. <https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Public%20Info/4.29%20Mayor's%20Emergency%20Declaration%20No.%206.pdf?ver=2020-04-29-173056-153> (last accessed May 5, 2020).

¹³ See <https://www.txwd.uscourts.gov/coronavirus-covid-19-guidance/>.

families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote.

The Board's manual election procedures require close proximity for the duration of the election between Board agents, election observers, and voters. Even if single-use disposable pens or pencils are used, Board agents hand fresh ballots to eligible voters and voting takes place in an enclosed booth before the marked ballot is placed in a sealed box; each ballot is individually handled by the Board agent conducting the election and available for inspection by the party representatives. Before voting, voters are required to give their names to party observers, who then check the name off the same voter list. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families, and the community.

IV. THE ONLY ACCEPTABLE WAY TO MITIGATE THESE RISKS IS A MAIL-BALLOT ELECTION

In its position statement, the Employer contends the following measures can ensure a safe and effective manual election: using social distancing measures by making sure voters are not less than six feet apart at any given time and maintaining a sanitary and disinfected place for all on the premises. While the Employer offered to provide floor markings at more than the appropriate distance, there are no means for enforcing social distancing. I have also considered the feasibility and efficacy of its other proffered measures. Regarding the election itself, I have considered using masks and gloves, frequently sanitizing election equipment, and the use of plastic barriers. I have also considered the required testing of participants (regardless of symptoms) and whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site.

Additionally, as discussed, I have considered using a mail-ballot election and measures associated with a mail-ballot election. I have considered requiring Region 16 personnel to sanitize outgoing mail, limiting the number of people who may participate in the count; and requiring social distancing for count attendees.

Regarding the Employer's proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread; however, I note the experts disagree about the distance required for safety and that guidelines are subject to change. Current Center for Disease Control guidance defines "good social distance" as "about 6 feet."¹⁴ Some scientists disagree that 6 feet is enough.¹⁵ Given the uncertainty of determining an "appropriate" distance, we cannot be sure current guidelines sufficiently mitigate risk. Additionally, it is possible guidelines could change between the time of an election order and the date of the election.

¹⁴ See the Center for Disease Control website entry: Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, How COVID-19 Spreads. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed May 5, 2020).

¹⁵ See, for example, Lydia Bourouiba, "[Turbulent Gas Clouds and Respiratory Pathogen Emissions Potential Implications for Reducing Transmission of COVID-19](#)," *Journal of American Medicine*, March 26, 2020 ("Given the turbulent puff cloud dynamic model, recommendations for separations of 3 to 6 feet (1-2 m) may underestimate the distance, timescale, and persistence over which the cloud and its pathogenic payload travel, thus generating an underappreciated potential exposure range for a health care worker").

Regarding the use of masks and gloves, the Regional Office currently has none available. These supplies are most needed by healthcare institutions at this time. Although the Employer has offered to make such personal protective equipment available, the safest method would involve Board agents bringing their own equipment. I also note the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity. Removal of the masks by the voter during voting would result in potential cross-contamination, thereby rendering the process even more risky.

Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread, given the number of individuals coming in and out of the voting area, the need for the passing of papers and proximity of individuals for the purpose of providing ballots and checking off names.

Based on the foregoing, I conclude the use of a mail-ballot election would provide the framework for more certain election procedures.

V. DISCUSSION

Although the Employer is considered an essential business during this time, the health of its employees and their families must be protected. The Employer highlights that no confirmed, reported, or suspected cases of COVID-19 have occurred at the facility, however, even as new outbreaks occur around the state,¹⁶ testing in Texas has lagged significantly behind the rest of the nation.¹⁷ In Bexar County, fewer than 20,000 people out of more than 2 million have been tested.¹⁸ Given that many—if not the majority—of people infected with (and capable of spreading) the novel coronavirus display no symptoms,¹⁹ this low rate of testing and likely greater than reported rate of infection²⁰ is particularly worrisome. Moreover, given the necessary attendance of offsite participants such as Board agents and parties' representative at a manual election, not to mention offsite contacts by employees with unknown parties in the days and hours preceding the election, a manual election has a high potential for contributing to the spread of infection. Given the conditions in Texas at this time, and the available risk mitigation measures, I conclude that conducting an election placing employees in close proximity to Board agents and party observers, who may be traveling from areas with higher rates of infection than Bexar County—and who may unknowingly be carrying the virus—is not acceptable.

¹⁶ Christopher Collins and Sophie Novack, "[COVID-19 Cases Now Tied to Meat Plants in Rural Texas Counties Wracked with Coronavirus](#)," *Tex. Observer*, April 22, 2020.

¹⁷ Asher Price, "[As Abbott looks to reopen Texas, coronavirus testing lags most other states](#)," *Statesman*, April 20, 2020

¹⁸ City of San Antonio Metropolitan Health District, [Novel Coronavirus \(COVID-19\) Public Info](#), accessed April 27, 2020 (19,245 tests administered in Bexar County to date).

¹⁹ Monica Gandhi, Deborah S. Yokoe, and Diane V. Havlir, "[Editorial: Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19](#)," *New Eng. J. Med.*, April 24, 2020 ("Asymptomatic transmission of SARS-CoV-2 is the Achilles' heel of Covid-19 pandemic control through the public health strategies we have currently deployed.")

²⁰ Kathleen M. Jagodnik et al., "[Correcting under-reported COVID-19 case numbers: estimating the true scale of the pandemic](#)," MedRxiv preprint, posted April 5, 2020 ("This study suggests that the current reporting of COVID-19 cases significantly underestimates the true scale of the pandemic. The lack of testing complicates the estimation of the true CFR and causes significant misinformation.")

The Employer contends that delay has never been a reason cited by the Board for ordering a mail-ballot election and argues the Board has delayed manual elections rather than use mail balloting. However, the Employer points to scant authority to support this contention.

In its Response to Order to Show Cause, the Employer primarily cites to *A&B HVAC Services, Inc.*, JD(NY)-44-13 (2013) (2013 WL 5305832), and *Kanuai Coconut Beach Resort*, 317 NLRB 996 (1995) both of which are inapposite. Neither of these cases supports the Employer's contention, "previous circumstances akin to the current environment did not result in an 'entitlement' to a mail ballot but, rather, a necessary delay to proceed with the Board's preferred manual ballot format."

In *A&B HVAC* an administrative law judge issued a decision regarding whether certain unfair labor practice allegations had been committed, and if so, whether they affected the election results in an election that had already taken place. In a passing footnote, the administrative law judge noted the election, "was originally scheduled for November 1, but had been postponed due to the effects of Hurricane Sandy," until November 15, 2012. This cited case has no bearing on the case at hand. To begin with, an administrative law judge's decision is not binding precedent unless the Board has adopted it over a party's exception.²¹ Even assuming that the Board had adopted the decision and its passing footnote, it still would have no bearing on this case as the footnote was merely providing factual background. While the footnote is not useful as a point of law, neither is it even useful as an historical anecdote. Importantly, there is no evidence that, in light of the "Superstorm," a mail-ballot election was an available, possible alternative. Given the devastation wrought by the superstorm, employees might have been scattered and residing in temporary or new houses, and regular Postal Service may have been interrupted. If anything, *A&B HVAC* stands for the proposition that on the eve of a massive hurricane, a Board office closed, canceled an election, and then rescheduled it for a new date two weeks later. That proposition does nothing to bolster Employer's contentions.

The other case the Employer relies on, *Kanuai Coconut*, 317 NLRB 996 (1995), is even less relevant. There were no election scheduling issues in that case. Rather, the only the issue present in that matter was whether the Employer's scheduling of a pay increase affected the election.

Although neither of the cases cited by the Employer address "circumstances akin to the current environment," there is Board precedent for using mail ballots in times of emergency to expedite resolving questions concerning representation. During World War II, the Board changed its default method of election for employees at sea from manual elections on docked ships to mail balloting at sea. It did so "in the interest of expediency." *Isbrandsten Steamship Co., Inc.*, 51 NLRB 883, 885 (1944). See also, *Ore Steamship Corp.*, 59 NLRB 1216, 1218 (1944) (specifically

²¹ See, e.g., *Colorado Symphony Assoc.*, 366 NLRB No. 122, slip op. at 1 fn. 3 (2018) and Sec. 13–200 of the NLRB's Bench Book ("In reviewing prior decisions to determine whether any of the ALJ's findings or analyses have precedential value, it is important to check... 1) which party or parties filed exceptions to the ALJ's decision (this is usually stated in the first paragraph of the Board's decision); 2) whether no exceptions were filed to any of the judge's findings or analyses (this is usually stated in a footnote in the Board's decision); 3) whether the Board did not pass on any of the judge's findings or analyses for some reason (this is also usually stated in a footnote); and 4) whether the Board affirmed any of the findings on different grounds than the ALJ.")

authorizing regional director discretion to use mail balloting for employees at sea). More recently, the Board has ordered mail-ballot elections because of circumstances that would temporarily prevent or delay a manual election for an indefinite time. *San Diego Gas* mentions such a condition—a strike—as one in which a mail-ballot election would be appropriate. Presumably, a manual election could have been held at some unknown time after the strike ended, however, the Board recognized this was at least one situation where an election delay would be grounds for mail balloting, rather than a manual election.

The Board has also upheld the use of mail-ballot elections during the off-season for seasonal employees.²² Even though it would have been possible to delay an election and hold it manually later in the year, when seasonal employees were present at work, the Board found a mail-ballot election proper in these circumstances.

Here, a manual election cannot be held without endangering the health and safety of employees, party observers, Board agents, and the broader community. Since the Board has allowed mail-ballot elections to take place in situations where a manual election would be delayed because of strikes or the absence of seasonal workers, and the current pandemic presents extraordinary circumstances preventing a manual election under the facts presented in this case, a mail-ballot election is appropriate.

A Regional Director has broad authority over conducting representation elections;²³ however, the Board has provided guidelines for reasonably exercising this discretion when ordering a mail-ballot election. The Board’s policy for when a Regional Director should order a mail-ballot election was described in *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998):²⁴

When deciding whether to conduct a mail-ballot election or a mixed manual-mail-ballot election, the Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) where eligible voters are “scattered” in the sense 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, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources,

²² See, for example, *Pennsylvania Interscholastic Athletic Assn.*, 365 NLRB No. 107 (2017); *Sitka Sound Seafoods*, 325 NLRB 685 (1998).

²³ The Board has long held that a Regional Director has broad discretion to decide issues of election conduct, so long as this discretion is not abused or exercised arbitrarily, capriciously, or unreasonably. This includes determining whether to conduct an election by mail, even if the Direction of Election did not provide for mail balloting. See, for example, *California Pacific Medical Center*, 357 NLRB 197, 198 (2011); *North American Plastics Corp.*, 326 NLRB 198 (1998); *E.I. Dupont du Nemours*, 79 NLRB 345, 346 (1948); *Postex Cotton Mills, Inc.*, 73 NLRB 673, 677 (1947); *Fedders Mfg. Co.*, 7 NLRB 817, 822 (1938).

²⁴ See also NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11301.2 (Jan. 2017); Outline of Law & Procedure in Representation Cases Sec. 22-110.

because efficient and economic use of Board agents is reasonably a concern. We also recognize that there may be other relevant factors that the Regional Director may consider in making this decision, but we emphasize that, in the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the guidelines set forth above.

Although there is a preference for conducting manual elections in ordinary circumstances, *San Diego Gas* allows a Regional Director to exercise discretion and order a mail-ballot election in extraordinary circumstances.²⁵ *San Diego Gas* did not claim to provide an exhaustive list of circumstances where mail-ballot elections would be allowed, but rather *at least* three cases where mail-ballot elections should normally be used.

The Board rejected limitations implied by outdated language in the Casehandling Manual suggesting mail-ballot elections were proper only if manual elections were “infeasible,” as well as suggestions that a mail-ballot election should never be held where it would be possible to conduct an election manually. *Id.* at 1145, fn 6, 10.

The Board, in *San Diego Gas*, clarified the use of mail-ballot elections is not limited to three enumerated circumstances, but that “other relevant factors,” especially in “extraordinary circumstances” may be considered by a Regional Director. The present circumstances, a worldwide pandemic in which more than 185,000 deaths have occurred, are extraordinary, and present many relevant factors suggesting that a mail-ballot election would be appropriate.

VI. CONCLUSION

This election must be held “on the earliest date practicable consistent with the Board’s rules.”²⁶ A manual election cannot be held safely at this time. There is no indication when a manual election could be safely held. Waiting until it would be safe to conduct a manual election would further delay this already-delayed election. However, a mail-ballot election would allow this election to be held safely and without further delay.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²⁷

²⁵ In their joint motion to proceed with manual election, the parties state their desire is “central” to the election method issue; however, *San Diego Gas* clearly makes it one of several considerations. Importantly, the Board recognized a Regional Director may use other unspecified factors when extraordinary circumstances are present.

²⁶ NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11302.1.

²⁷ The Employer, Johnson Controls, Inc., a Wisconsin corporation with a facility located at 5692 FM 1346, San Antonio, Texas, the only facility involved in this matter, is engaged in the business of manufacturing HVAC chillers.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. 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 hourly, direct & indirect, production, manufacturing, and maintenance employees (including leadmen, test stand, shipping, warehouse, painters, forklift operators, assemblers, welders, electricians, machinists, quality inspectors, insulators, tubefitters, and shipping clerks) employed by the Employer at its facility currently located at 5692 FM 1346, San Antonio, Texas.

EXCLUDED: All other employees, office clericals, temporary agency employees, guards, and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether plant clerical employees are included in, or excluded from, the bargaining unit, and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by SMART – Southwest Gulf Coast Regional Council.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on May 18. Voters must return their mail ballots so that they will be received by close of business on June 8. The mail ballots will be counted on June 16 at 2:00 p.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 16 office by no later than 4:45 p.m. on May 26, in order to arrange for another mail ballot kit to be sent to that employee.

During the past 12 months, a representative period, the Employer, in conducting its business operations, purchased and received at its San Antonio, Texas facility goods valued in excess of \$50,000 directly from points located outside of the State of Texas.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **April 25**, 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. The Employer must also include, in a separate section of that list, the same information for those individuals who will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by **May 11**. 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, included in this Decision and Direction of Election, 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.

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.

JOHNSON CONTROLS, INC.
Case 16-RC-256972

DATED at Fort Worth, Texas, this 7th day of May 2020.



Timothy L. Watson, Regional Director
National Labor Relations Board, Region 16
Fritz G. Lanham Federal Building
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6107

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18 - SUBREGION 30**

OMNI GLASS & PAINT, LLC

Employer

and

**PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL #7, AFL-CIO**

Petitioner

Case 18-RC-259116

DECISION AND DIRECTION OF ELECTION

This case is before me pursuant to a stipulated record entered between the parties on April 22, 2020.¹ The parties waived their right to a pre-election hearing and stipulated that the sole issue is whether the election should be conducted in person or by mail ballot, which is a non-litigable matter.² The Board has delegated its discretion in determining such arrangements to Regional Directors. *San Diego Electric*, 325 NLRB 1143, 1144 (1998). Petitioner argues for an election by mail ballot and the Employer argues for a manual election. In carefully considering the arguments made by the parties on this issue, I find that a mail ballot election is appropriate under the extraordinary circumstances presented by the COVID-19 pandemic.

CONCLUSIONS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.³
2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

¹ All dates are in 2020, unless otherwise noted.

² See Representation Proceedings Casehandling Manual, Section 11301.4 (“In the event a hearing is held during the course of processing the petition, the Hearing Officer will explore the parties’ positions regarding election arrangements, but parties shall not be permitted to litigate this issue,” citing *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954)).

³ The Employer is engaged in the business of providing commercial painting and glass services out of its Oshkosh, Wisconsin facility. In the last twelve (12) months, the Employer purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Wisconsin.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.
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:

All full time and regular part-time glazing fabricators, including saw operators, glass fabricators, and panel fabricators, employed by the Employer at the Employer's glazing fabrication facility in Oshkosh, Wisconsin; excluding all other employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Painters and Allied Trades District Council #7, AFL-CIO. For the reasons described below, I have determined that a mail ballot election will be conducted in this matter.

1. Employer Operations

The Employer maintains a shop in Oshkosh, Wisconsin, which employs ten employees in the proposed bargaining unit who fabricate glass panels at the Employer's facility.

2. Positions of the Parties

Petitioner requests a mail ballot election in this matter based on the extraordinary circumstances presented by the COVID-19 pandemic. In support of its position, it notes that Wisconsin is currently under a "Safer at Home" Order which limits in-person contact and travel to certain essential activities. It argues that the Board could not guarantee the safety of Board personnel, party representatives, employees or the public if a manual election were held and that a mail ballot election is the safest option. It further asserts that it would be more expeditious to order a mail ballot election now, rather than running the risk of having to reschedule a manual election because of the evolving nature and uncertainty about COVID-19 at this time.

The Employer argues for a manual election. It asserts that none of the traditional factors favoring a mail ballot as identified in *San Diego Electric*, 325 NLRB 1143 (1998), are present in this matter and that manual elections are favored by the Board. It argues

that the Employer and those involved with conducting an election would not be subject to the “Safer at Home” Order, as its designation as an essential operation would extend to the Board conducting a manual election at its facility. It argues that the presence of non-employee outside parties (such as the Board Agent) “does not increase the risk at all” and that the confirmed number of COVID-19 cases in Winnebago County, where the Employer is located, is very small in comparison to those in New York, Wuhan or Milan. It suggests that the pandemic has now peaked, reducing the risk to those involved with the manual election and proposes various safety measures that could be taken at the manual election. It also argues that a mail ballot election presents its own safety and logistical uncertainties.

3. COVID-19 is an extraordinary circumstance, requiring special consideration.

I have carefully considered both parties’ positions in this matter and I agree that this unit would be appropriate for a manual election in normal circumstances. Unfortunately, we are not under normal circumstances and there is much unpredictability regarding the current COVID-19 situation, including safety measures, whether it has peaked, how long it will last, and when we may return to normal circumstances. COVID-19 is an “extraordinary circumstance” which compels me to consider factors outside the traditional framework when deciding the form an election should take. In *San Diego Gas and Electric*, above, the Board set forth guidelines that should generally be used in determining whether to conduct an election by mail, including the extent of employee dispersion, whether it be geographically or by work schedule, and the presence of striking or locked out employees. However, the Board recognized that it would not expect Regional Directors to consider these factors in “extraordinary circumstances.”

Clearly, the COVID-19 pandemic is an extraordinary circumstance. I need not detail the rising number of confirmed cases (which remain on the rise in Wisconsin), the tens of thousands of deaths and the many uncertainties surrounding this pandemic. The Board has already indicated it considers COVID-19 an “extraordinary circumstance.” In each of its three news releases concerning the impact of COVID-19 upon representation elections, the current Board used the *San Diego Board’s* exact wording-- “extraordinary circumstances”-- to describe the COVID-19 pandemic.⁴ In its latest news release on April 17, the Board stated:

⁴ National Labor Relations Board, News Releases, *National Labor Relations Board Suspends Representation Elections Through April 3, 2020* (March 19, 2020) (available at: <https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-suspends-representation-elections-through>): “Due to the *extraordinary circumstances* related to the COVID-19 pandemic, the National Labor Relations Board today approved the suspension of all representation elections, including mail ballot elections, for the next two weeks effective immediately, through and including April 3, 2020.” (emphasis

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.

Each of the considerations identified by the Board, including existing Board precedent as applied to the matter now before me, favor the use of mail ballots.

4. A mail ballot election is necessary to ensure the safety of the Board Agent, party representatives, voters and the public.

A mail ballot election is the safer option for voters, parties, the Board Agent, and the public. A manual election requires the physical presence of a Board Agent, voters, observers for each party and party representatives. Manual election procedures require personal interaction. Observers share the same list in marking off voters, voters share the same voting booth and deposit ballots in the same cardboard box. The Board Agent hands ballots to each voter and at the conclusion of voting, the Board Agent conducts the count in the presence of others which requires the agent to handle each of the paper ballots previously handled by the voters.

Directing a manual election in this matter would run in direct contradiction to guidance issued by the U.S. Center for Disease Control and Prevention (CDC), which recommends “limit[ing] in-person contact as much as possible.”⁵ The CDC explains that COVID-19 is primarily spread from person to person and that a person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface

added); National Labor Relations Board, News Releases, *NLRB Resumes Representation Elections* (April 1, 2020) (available at: <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>): “On March 19, 2020, because of the *extraordinary circumstances* related to the COVID-19 pandemic, the NLRB had ordered the temporary suspension of all Board-conducted elections through April 3, 2020.” (emphasis added); National Labor Relations Board, News Releases, *COVID-19 Operational Status Update* (April 17, 2020) (available at: <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>): “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.” (emphasis added).

⁵ U.S. Center for Disease Control and Prevention, COVID-19 Guidance Documents, Coronavirus disease 2019 (COVID-19) Factsheet – CDC, *What you should know about COVID-19 to protect yourself and others* (available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>)

or object that has the virus on it, and then by touching your mouth, nose or eyes.” Similar guidance has been put forth by Winnebago County, where this election would take place.⁶ Given this guidance, holding a manual election under the circumstances presented here would needlessly increase the likelihood of spreading COVID-19.

I do not share the Employer’s optimism and certainty as to the safety of conducting a manual election at this time. The Employer cites to no guidance which suggests that limiting in-person contact is no longer recommended or needed to combat the spread of COVID-19. One need not look further than the headlines to see that workplaces are a major source of transmission in the state at the moment.⁷ Indeed, by proposing a variety of safety measures, the Employer must acknowledge there are inherent risks in personal contact during this pandemic. While I have carefully considered each of the safety precautions suggested by the Employer, the safest course at this time is to follow accepted guidance to limit in-person contact, especially in light of the many uncertainties related to transmission of the virus and efficacy of such safety measures.⁸

In contrast, mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact. Contrary to the Employer’s contention, Regional personnel are already handling mail sent to the Subregional office from the general public using appropriate safety precautions and thus there is little additional risk to conducting a mail ballot election. Even in the midst of this pandemic, the Region has already successfully conducted mail

⁶ Winnebago County Health Department, *COVID-19 (Coronavirus)*, <https://www.co.winnebago.wi.us/health/divisions-program-areas/communicable-disease/covid-19-coronavirus> (accessed April 30, 2020) (“Staying home, social distancing and hand washing are crucial to slowing the spread. The entire community is urged to support these efforts. Slowing spread of COVID-19 is necessary to keep from overwhelming our health care system and protecting those most at risk of serious illness.”)

⁷ Perez, Maria, *COVID-19 crisis intensifies at Wisconsin food plants: 1 dead, 100 more test positive*, Milwaukee Journal Sentinel (April 28, 2020).

⁸ See, e.g., Lu J., Gu J., Li K., Xu C., Su W., Lai Z., et al. *COVID-19 outbreak associated with air conditioning in restaurant, Guangzhou, China, 2020*. Emerg. Infect. Dis. 2020 Jul [accessed April 30, 2020] (available at: <https://doi.org/10.3201/eid2607.200764>) (COVID-19 suspected to have spread by presymptomatic individual in restaurant to patrons sitting at other tables through droplet transmission by air-conditioned ventilation); Reuters Fact Check, *Partly false claim: Wear a face mask; COVID-19 risk reduced by up to 98.5%*, Reuters (April 23, 2020) (“The U.S. Centers for Disease control and Prevention (CDC) told Reuters via email that wearing masks is recommended as a way of strengthening social distancing, but they do not have data to measure how this affects the risk of transmission. ‘Currently we are not finding any data that can quantify risk reduction from the use of masks,’ a CDC spokesperson told Reuters.”).

ballot elections. Although an in-person count may be infeasible for the indefinite future, arrangements can be made for a virtual remote count that provide all the safeguards of a traditional count.

5. A manual election would contravene the “Safer at Home” Order

Wisconsin is subject to a “Safer at Home” order for all Wisconsin residents, which was extended through May 26, 2020. That order requires Wisconsin residents to stay at home unless performing certain essential activities. It also provides that all non-essential travel within Wisconsin is prohibited. To run a manual election would require the Board Agent and party representatives to leave their homes and travel to Oshkosh, Wisconsin and have personal interaction with parties, voters and observers. I cannot deem a manual election in these circumstances to be “essential,” when a mail ballot election is both feasible and safe.⁹

6. Ordering a mail ballot election under these circumstances is supported by existing Board precedent.

My determination that a mail ballot election is appropriate given the circumstances is consistent with Board precedent. In *National Van Lines*, 120 NLRB 1343 (1956), the Board noted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

Consistent with Board precedent, I must exercise my discretion with the understanding that unit employees are currently working in the midst of the COVID-19 pandemic and that COVID-19 is spread by in-person contact. Given that “peculiar condition,” in exercising this discretion, I must protect the health and safety of all involved and the integrity of the election process. As such, I find that a manual election in this matter is not appropriate at this time due to safety concerns and local government directives related to the COVID-19 pandemic. Further, there is no known time in which such safety concerns and/or government directives will end. As a result, a mail ballot election will allow for holding of the election “at the earliest date practicable” consistent with the Board’s Rules and Regulations Section 102.67(b).

As discussed above, I have concluded that a mail ballot election can be held successfully without any additional safety risks to participants. Furthermore, I find that a

⁹ Even if the “Safer at Home” Order would not prohibit the holding of a manual election at the Employer, the Order is, at the very least, guidance issued by the State of Wisconsin, which the Board indicated I am to consider.

mail ballot election would meet the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees. I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known and up to date. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Wisconsin, the state in which the mail ballots will be sent and received, has been disrupted. Additionally, I note the mail ballot procedure would allow each eligible employee equal opportunity to vote even if they are quarantined due to exposure to COVID-19. For these reasons, a mail ballot election strikes the balance of ensuring a fair and free choice in the election process and the safety of all participants by avoiding their exposure to the risks inherent in a manual election in the midst of this pandemic.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Subregion 30, on May 11, 2020, at 4:30 p.m. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Subregion 30 office by close of business at 4:30 p.m. on May 27, 2020. The mail ballots will be counted at the Subregion 30 office located at 310 W. Wisconsin Avenue, Suite 450W, at 3:30 p.m. on June 3, 2020.

To help avoid the untimely return of a ballot, any person who has not received a ballot by May 18, 2020, or otherwise requires a duplicate mail ballot kit, should contact the Subregion 30 office in order to arrange for another mail ballot kit to be sent to that employee.

To ensure the safety of the Board Agent and the public, the count shall be conducted virtually. Additional instructions will follow.

VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the payroll period ending April 19, 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.

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 cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **May 4, 2020**.¹⁰ 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.

¹⁰ Petitioner waived the full ten-day period in order to proceed with an election on May 11, 2020.

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

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.

Omni Glass & Paint, LLC
Case 18-RC-259116

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 April 30, 2020

/s/ Jennifer A. Hadsall

JENNIFER A. HADSALL
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401-2657

Attachments

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**NORTH AMERICAN INDUSTRIAL
SERVICES, INC.**

Employer

and

Case 22-RC-258810

**INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 825**

Petitioner

DECISION AND DIRECTION OF ELECTION

North American Industrial Services, Inc. (the Employer) is engaged in the business of providing environmental cleanup. International Union of Operating Engineers, Local 825 (the Petitioner) seeks to represent a bargaining unit comprised of:

All full time and regular part-time operators, technicians, foremen, safety coordinators, and scheduler/planners employed by the Employer at Phillips 66 Refinery located at 1400 Park Avenue, Linden, New Jersey, but excluding all managerial employees, guards, and supervisors as defined in the Act, and all other employees.

The parties stipulate, and I find, that this bargaining unit is appropriate.

The only matter in contention is whether to conduct a manual or mail ballot election.¹

Although the Petitioner initially proposed a manual election, and indeed generally prefers manual elections, it has since determined that the election should be conducted via mail ballot because it is the safest and most expeditious manner in which to proceed during a global pandemic.

¹ The petition in this case was filed under Section 9(c) of the Act. The parties were provided opportunity to present evidence on the issues raised by the petition at a hearing held before Hearing Officer Henry Powell of the National Labor Relations Board (the Board). I have the authority to hear and decide this matter on behalf of the Board under Section 3(b) of the Act. I find that the hearing officer's rulings are free from prejudicial error and are affirmed; that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; that the Petitioner is a labor organization within the meaning of the Act; and that a question affecting commerce exists concerning the representation of certain employees of the Employer. Parties were given the opportunity to file post-hearing briefs, and both parties did so.

The Employer argues that a mail ballot election is inappropriate because mail ballot elections are inherently problematic; because mail service is presently impaired, thereby rendering a mail ballot election particularly unreliable; and because any election held under current circumstances will leave employees unable to determine whether they would prefer to be represented by the Petitioner.

The parties agree that a safe, fair manual election is not a possibility at the present time due to the COVID-19 pandemic and extant stay-at-home orders associated therewith. The Employer argues that the election should, therefore, be delayed indefinitely, while the Petitioner urges that an immediate mail ballot election be directed.

Facts

New Jersey is one of the epicenters of the nation's current COVID-19 outbreak and the State has officially declared and continued a public health emergency. Because public health is imperiled by the person-to-person spread of COVID-19, the State of New Jersey has implemented aggressive social distancing measures; and directed New Jersey residents to stay at home unless absolutely necessary. The State has also placed restrictions on which businesses may remain open and which employees may commute to their usual workplace. The petitioned-for unit employees have been designated as essential workers necessary to help maintain the national petroleum supply; therefore, they continue to perform their usual job duties at the Employer's facility.

It is worth noting that the Employer's facility is mere miles from New York City, the unquestioned epicenter of the COVID-19 outbreak in the United States. It is undisputed that a manual election at the present moment would not protect the health of voters, observers, Board agents, party representatives, or the general public. During a manual election the observers share the same voter list to check off the names of arriving voters; all voters use the same cardboard voting booth and share the same pencil to mark their ballots before depositing their ballots in the same cardboard ballot box; the Board agent must handle all the paper ballots during the count that takes place immediately after the close of the polling; and the Board agent and all parties' representatives must sign the same Tally of Ballots. The record also contains a learned treatise of the stability of SARS-CoV-2 on various surfaces published by the New England Journal of Medicine. The study concluded that the virus may remain viable on cardboard for 24 hours. The potential for infection through contacts required by a manual election is significant.

Governor Murphy has indicated that New Jersey might "reopen" in late May 2020. There has been no definitive date set, and the Governor has already been forced to extend multiple Executive Orders restricting movement within the State. Additionally, the possibility that any manual election scheduled after the expiration of current New Jersey Executive Orders would need to be rescheduled to comply with future Executive Orders introduces uncertainty and potential delay to the process.

The Employer provided anecdotal evidence to suggest that the delivery of mail in the area surrounding its premises has been impacted by the pandemic. Specifically, the closure of the post

office in Haledon, New Jersey, approximately 37 miles north of Linden, left three New Jersey towns without mail for at least two days in April 2020.

Analysis

In *San Diego Gas and Electric*, 325 NLRB 1143 (1998), the Board set out the circumstances under which it may be appropriate to direct a mail ballot election. Recognizing that there are some circumstances that would make it difficult for eligible employees to vote in a manual election, the Board has vested Regional Directors with broad discretion to determine the method by which elections shall be conducted. Under the guidelines set forth in *San Diego Gas*, a mail ballot election may be appropriate where eligible voters are “scattered” because of their job duties in terms of geography and/or varied work schedules, so that all employees cannot be present at a common location at common times to vote manually. When these situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of the parties and the efficient use of Board resources.

The employees at issue here are not “scattered” in the traditional sense. They are, however, “scattered” by COVID-19, which has rendered an immediate manual election, like so many other previously ordinary gatherings, unsafe and contrary to the spirit and letter of State measures designed to mitigate the impact of the pandemic. Crucially, unprecedented societal conditions have scattered employees in a new way. Employees may not wish to enter a voting area—however carefully prepared it may be—if they perceive it as a needless risk of COVID-19 infection. The health of the observers, party representatives, and Board agents is also a concern. Given the extant conditions, the Region’s use of mail balloting has a strong comparative advantage in avoiding negative effects on employees’ ability to fairly and fully express their desires on the question of representation.

The Employer argues that it would be an abuse of my discretion to order a mail ballot election in these extraordinary circumstances. I disagree. The Employer notes that I must take into account the desires of the parties. One party, the Petitioner, desires a mail ballot election because a mail ballot election offers a swift, safe alternative to a manual election. I must also take into account the efficient use of Board resources. A mail ballot election is currently the only way in which I can safely utilize the Board’s resources at all.

The Employer has proposed that a manual election should take place at an unspecified future time when it is demonstrably safe to do so. The Employer further objects to the use of mail ballots in general, pointing to the Board’s notation in *Western Wall Systems, LLC*, 28-RC-274464 (unpublished April 16, 2020) that it is “open to addressing the criteria for mail balloting in a future appropriate proceeding.” As the Board has not yet addressed those criteria, I must make my decision according to current law. Indeed, the Board has not signaled that it would hold that a mail ballot election can never be appropriate; it has only signaled that it would reevaluate the circumstances under which mail ballot elections may be appropriate. Furthermore, *Western Wall Systems* involved not a mail ballot election but a mixed manual-mail election. A mixed manual-mail election presents a unique set of complications which do not apply here.

The Employer also cites *Thompson Roofing, Inc.*, 291 NLRB 743 (1988), which holds that “mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual ballots because of the absence of direct Board supervision over the employees’ voting.” It is regrettably true that laboratory conditions are occasionally destroyed during mail ballot elections. Laboratory conditions are also occasionally destroyed during manual elections, resulting in objections and rerun elections. However, permitting employees to vote is at the heart of the Act’s mission, and ceasing all elections because a small minority of elections require rerunning would render the Act irrelevant.

Next, the Employer expresses a concern that employees will refuse to vote in a mail ballot election out of concern that the mail will be infected with COVID-19. The Employer presents no evidence that employees have expressed such concerns, and indeed the scholarly article in the record posits that COVID-19 remains on paper for only one day, thus allowing employees abundant time to return their ballots even if they prefer to “quarantine” their mail for several days. The Employer also expresses a concern that the United States Postal Service will be unable to deliver mail ballots to employees. However, a shutdown of one post office in a densely populated area (where there are many post offices in close proximity) generally does not result in a long-term disruption of mail service, and indeed it did not in the one example cited by the Employer. There is no indication that the Postal Service is presently unable to deliver mail. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a replacement ballot.

Finally, the Employer expresses a concern that unit employees will be unable to properly evaluate their desire to be represented by the Union while face-to-face communication is restricted. This seems highly unlikely, as employees are able to communicate by telephone, text message, social media, and other electronic means rather than in person at the workplace.

The Board has long taken the position that questions concerning representation must be resolved as quickly as possible. The current rule governing representation cases, which became effective in 2015, makes note of the importance of a swift resolution:

Underlying these basic provisions is the essential principle that representation cases should be resolved quickly and fairly. “[T]he Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331. Within the framework of the current rules—as discussed at length in the NPRM—the Board, the General Counsel and the agency’s regional directors have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. In part, the final rule codifies best practices developed over the years. This ensures greater uniformity and transparency... The long-standing instruction from the Casehandling Manual that the regional director will set the election for the earliest date practicable is codified. The statute was designed by Congress to encourage expeditious elections, and the rules require the regional director to schedule the election in a manner consistent with the statute.

The Board has long taken the position that it can best prevent economic instability by settling questions concerning representation as quickly as possible. Both the current rule governing representation cases, which became effective in 2015, and the new rule, soon to take effect, explicitly point to the Supreme Court's holding in *National Labor Relations Board v. A. J. Tower Co.*, 329 U.S. 324 (1946). *A.J. Tower* holds that

Within this general framework, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A.J. Tower Co.*, 329 U.S. at 331...

As noted above, the Supreme Court has identified speed in recording employees’ votes as one interest the Board’s representation procedures are bound to serve. This interest in speed or promptness has long been reflected by both the Board’s and Congress’s emphasis on the need for expedition in representation cases.

During the current pandemic, the need to act swiftly to prevent further disruption to the economy is all the more evident. Recent news reports suggest that the public health crisis is increasingly leading to labor unrest as essential workers grow ever more concerned about their safety at their places of work. Conducting Board elections “on the earliest date practicable” is crucial to maintaining industrial stability and reinforcing the foundation necessary for the economy’s swift recovery from the blow dealt it by COVID-19.

Although Governor Murphy has expressed hope that it will be safe and legal to resume normal activities in New Jersey in late May, there is no guarantee that this will be the case. The unit employees deserve an opportunity to fairly and fully express their desires on the question of representation as soon as possible. A mail ballot will allow them to do so. A manual election to be scheduled at an indeterminate time in the future will not. I take Official Notice that the conditions change and the Gov. Murphy has continued to adjust his position, and on May 4, 2020, he extended the closure of all public schools to June 30, 2020, clearly recognizing that the State is not ready to reopen.

A mail ballot election is the surest way to record employees’ votes efficiently and speedily. Undoubtedly, a mail ballot election will better protect the health and safety of voters, Agency personnel, the parties’ representatives, and the public during the current health crisis. Failure to order a mail ballot election undermines the Board’s duty to safeguard commerce and the United States economy by swiftly tallying employees’ votes. Therefore, I conclude that, under the circumstances, a mail ballot election is appropriate.

Conclusion

The National Labor Relations Board will conduct a secret mail 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 International Union of Operating Engineers, Local 825.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **May 22, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. 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.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by close of business on **June 12, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 2, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7065, or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state and local authorities including but not limited to Shelter in Place orders, travel restrictions, social distancing and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually, on a platform (such as Skype, WebEx, etc.) to be determined by the Regional Director on a date during the period from **June 26 to July 2, 2020**. Each party will be allowed to have one observer attend the virtual ballot count.

B. Voting Eligibility

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

Employees engaged in 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 service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

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(1) 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 **MAY 7, 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

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed

no later than 12:01 a.m. on May 19, 2020. If the Employer does not receive copies of the notice by May 15, 2020, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on nonposting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English, please notify the Board agent immediately if that is necessary for this election. Also, if special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board agent as soon as possible.

Please be advised that in a mail ballot election, the election begins when the mail ballots are deposited by the Region in the mail.

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.

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: May 5, 2020



DAVID E. LEACH III
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 22
20 WASHINGTON PL
FL 5
NEWARK, NJ 07102-3127

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

**ARAKELIAN ENTERPRISES, INC. D/B/A
ATHENS SERVICES**

Employer

and

Case 31-RD-223318

JOHN LOPEZ

Petitioner

and

**PACKAGE AND GENERAL UTILITY DRIVERS,
LOCAL 396, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Union

DECISION AND DIRECTION OF ELECTION

The petition in this matter was filed by John Lopez (Petitioner) on July 6, 2018, under Section 9(c) of the National Labor Relations Act (the Act), seeking to decertify the Package and General Utility Drivers, Local 396, International Brotherhood of Teamsters (Union) as the exclusive collective-bargaining representative of a unit of employees employed by Arakelian Enterprises, Inc. d/b/a Athens Services (Employer) at its Torrance, California facility (Employer's facility) located in Los Angeles County. There are approximately 116 employees in the petitioned-for unit.

Following the filing of the petition, Region 31 of the National Labor Relations Board (the Board) informed the parties on about July 16, 2018 that the petition would be blocked and placed in abeyance consistent with the Board's blocking policy while Region 31 investigated related unfair labor practice violations alleged in Cases 31-CA-223801, *et al.* Consistent with the Board's blocking policy, Region 31 kept the petition in abeyance while Cases 31-CA-223801, *et al.*, remained open pending investigation and subsequent litigation. Following the issuance of a Decision and recommended Order by the Honorable Jeffrey D. Wedekind on December 30, 2019 in Cases 31-CA-223801, *et al.*, Region 31 resumed processing of the petition. On February 27, 2020, I approved a Stipulated Election Agreement (Agreement) in which the parties agreed that a Board-conducted manual election be held in this case on March 19, 2020 at the Employer's facility. On March 16, 2020, due to the extraordinary circumstances related to the COVID-19 pandemic, I issued an Order Postponing Election, which postponed the election indefinitely. On March 19, 2020, due to the COVID-19 pandemic, 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. On April 17, 2020, the Board issued a press release indicating that its representation petitions and elections are being processed and conducted by its regional offices. The Board further provided that consistent with their traditional authority, its Regional Directors have discretion as to when, where, and if an election can be conducted in accordance with existing Board precedent. In doing so, the Board stated that its Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. Thus, on April 23, 2020, in light of the changed and extraordinary circumstances arising from the COVID-19 pandemic, I issued an Order Revoking Approval of Stipulated Election Agreement and Rescheduling Hearing (April 23, 2020 Order).

A telephonic hearing on the petition was held on May 1, 2020 before a Hearing Officer.¹ No issues were litigated at the hearing. The only matter addressed at the hearing was whether to direct a manual or mail ballot election given the current extraordinary circumstances arising from the COVID-19 pandemic. In addition, before and at the hearing, the Employer objected to the hearing being conducted by telephone and to my decision not to permit the parties to present witnesses. At the hearing, the Employer and the Union also objected that the Hearing Officer did not provide a presentation regarding the mechanics of how a potential mail ballot election and mail ballot count would be conducted, particularly a mail ballot count conducted by videoconference, before they were requested to provide their positions on the record regarding the dates and method of such a mail ballot election.

As to the sole matter addressed at the hearing, the Employer and the Petitioner object to a mail ballot election. The Employer objects to a mail ballot election, contending that a manual election can be safely conducted with the precautions/procedures outlined by the Employer. In addition, the Employer contends that the Board has not adequately described the procedures it would use for a mail ballot election and mail ballot count and does not have appropriate safeguards in place to ensure the safety and proper chain of custody of the mail ballots. The Petitioner did not further specify the reasons why he objects to a mail ballot election. The Union does not oppose a mail ballot election but prefers that a manual election occur at the earliest practicable date that a manual election can be conducted safely.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. For the reasons set forth in my April 23, 2020 Order and further set forth below, I affirm my decision to order that a pre-election hearing be held telephonically, without any witnesses, to elicit all parties' positions on the record regarding the type of election to be directed. Furthermore, based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail ballot election commencing on the earliest practicable date.

//

//

¹ The hearing in this matter was consolidated and held concurrently with the hearing in Case 31-RD-223335 with the understanding that a separate decision would issue in each case.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on daily life has been profound. As of May 7, 2020,² over 1,219,066 people in the United States have been infected with COVID-19 and over 73,297 people have died from it³. The Centers for Disease Control and Prevention (CDC) has determined that the best way to prevent the illness is to avoid being exposed to the virus.⁴ 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*,⁵ CDC, *How to Protect Yourself and Others*.⁶

Additionally, although not directly addressing NLRB elections, I note that the CDC has specifically issued guidance on elections, *Recommendations for Election Polling Locations*⁷ (CDC Election Guidance), stating that officials should encourage mail-in voting. This CDC guidance provides as follows:

Actions for elections officials in advance of election day

Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

- Encourage mail-in methods of voting if allowed in the jurisdiction.

The CDC has also issued publications regarding presymptomatic transmission of COVID-19, including a Morbidity and Mortality Weekly Report Early Release posted online on April 1, *Presymptomatic Transmission of SARS-CoV-2 — Singapore, January 23–March 16, 2020*⁸ (CDC Weekly Report). The CDC Weekly Report emphasizes, “The potential for presymptomatic transmission underscores the importance of social distancing, including the avoidance of congregate settings, to reduce COVID-19 spread.”

Many state and municipal governments have also issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 19, the Governor of the State of California (Governor) issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations of the Federal Critical Infrastructure Sectors.

² All dates hereafter are in 2020 unless otherwise indicated.

³ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁵ See <https://www.whitehouse.gov/briefings-statements/coronavirus-guidelines-america/>.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

⁸ See https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e1.htm?s_cid=mm6914e1_w.

On May 4, the Governor issued a press release⁹ announcing that based on California's progress in meeting metrics tied to indicators, California can begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the virus is "still dangerous and poses a significant public health risk." The Governor further announced that while California will be moving from Stage 1 to Stage 2, its "counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020." *Id.*

At the local level, on April 10, the Los Angeles County Department of Public Health (County Department of Public Health) updated its "Safer at Home" Health Officer Order (County Order), which remains in effect until May 15. The County Order has social (physical) distancing requirements for individuals and businesses. The County Order is aligned with Executive Order N-33-20, which requires Californians to stay at home unless performing essential activities. On May 6, the County Department of Public Health issued a Roadmap to Recovery, indicating that Los Angeles County will begin to ease restrictions on non-essential businesses beginning May 8 but only with respect to a very limited type of non-essential businesses and only for curbside pick-up and with adherence to distancing and infection control protocols.¹⁰ In issuing the Roadmap to Recovery, Los Angeles County has noted, "The coronavirus is still deadly and capable of quickly taking many lives. As L.A. County moves into its first stage of recovery, all residents, business owners and employees must continue to observe and practice all COVID-19 physical distancing requirements."¹¹

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of May 7, according to data released by the Los Angeles County Department of Public Health website, there were 29,427 confirmed cases of COVID-19 in Los Angeles County and 1,418 Los Angeles County residents have died from COVID-19.

B. The Employer's Ongoing Operations

The Employer, which is engaged in the business of providing waste sanitation services in Los Angeles County, is included within the essential services to remain operational during the COVID-19 pandemic. As a result, the Employer's employees continue to report to work at the Employer's facility and perform their regular duties, to ensure that the public has continued waste sanitation services. The Employer has implemented a number of safety protocols and social distancing practices applicable to all employees at the Employer's facility as it has continued to operate during the COVID-19 pandemic. As of the date of the hearing, the

⁹ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>.

¹⁰ See <http://www.publichealth.lacounty.gov/media/Coronavirus/docs/HOO/RoadmapToRecovery.pdf>. See also https://covid19.lacounty.gov/recovery/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

¹¹ See https://covid19.lacounty.gov/recovery/?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

Employer reported that, to its knowledge, none of its employees employed at the Employer's facility had tested positive for COVID-19.

During the COVID-19 pandemic, the Employer has provided its employees several CDC publications, including, but not limited to: *Social Distancing – COVID-19*, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19*, *Cleaning and Disinfecting Your Facility*, and *Symptoms of Coronavirus Disease 2019*. The Employer also issued an Occupational Safety SAFE Brief to its employees around February 27, to educate its employees about COVID-19.

The Employer represents that it is following CDC guidelines for all of its employees reporting to work at its facilities during the COVID-19 pandemic, including providing its employees personal protective equipment (PPE) – including 3M brand N-95 face masks (N-95 masks), hand gloves, disinfectant sprays and wipes, and hand sanitizer gels – to ensure its employees and their equipment stay sanitary. The record does not reflect whether the provided N-95 masks are fitted or what training employees are given on the use of the N-95 masks. The Employer's employees employed at the facility are also required to wear additional PPE unrelated to COVID-19, including work boots, reflective vests or jackets, and gloves.

The Employer has also staggered its start times to encourage its employees to social distance from each other at the start of their shifts. To further its employees' social distancing at the Employer's facility, the Employer has placed yellow and black floor markings six feet apart for its employees to use to make sure that they stay six feet from each other.

In addition to providing employees with PPE and making adjustments to the layout of its facilities to maintain social distancing, the Employer is also monitoring all employees and other individuals entering its facility for symptoms associated with COVID-19 and has instructed that if employees exhibit any symptoms they should return home and remain there until they can seek medical treatment. The Employer has implemented a check-in system at the start of each employee's shift in which each employee obtains new PPE as needed, including N-95 masks, hand gloves, disinfectant sprays and wipes, and hand sanitizer gels. During this check-in, the Employer also conducts a verbal health check of each employee, including asking each employee questions to determine possible exposure to COVID-19, such as, in the last 14 days: have you had a fever; do you have a fever; do you have a cough; have you had difficulty breathing; have you had any contact with any person who has been diagnosed or tested for COVID-19 and/or has experienced these type of symptoms. During the check-in, the Employer also performs a temperature check of each employee to ensure the employee does not have an elevated temperature. The Employer represented at the hearing that it had not had an increase in sick calls since the COVID-19 pandemic and that, to its knowledge, there were no known or suspected cases of COVID-19 among any of its employees.

With respect to keeping the Employer's equipment sanitary, the Employer's drivers and mechanics are expected to wipe down all touched surfaces in the exterior and interior of the Employer's equipment upon exit and entry to ensure that the equipment is sanitized. Further, when the Employer's drivers go out on their routes, each driver performs a Department of Transportation (DOT) pre-trip inspection and remains in the vehicle while collecting waste and recycling, without interacting with the public outside of the vehicle. Drivers typically obtain fuel

for the Employer's vehicles at the Employer's facility or at other Employer facilities near their routes. Drivers dispose of their waste and recycling at a materials recycling or transfer station, remaining in their vehicles while offloading the material. After drivers empty the loads on their vehicles, they return to the Employer's facility, complete their DOT post-trip inspection of the vehicle, and go home.

The Employer's mechanics repair the Employer's vehicles at the Employer's facility and are directed by the Employer to follow CDC guidelines on social distancing, frequent hand washing, and wearing the Employer-issued PPE, including N-95 masks, at all times at the Employer's facility.

Of the approximately 116 employees in the petitioned-for unit, a majority of these employees spend almost all of their workday outside of the Employer's facility performing work on their routes.

C. The Employer's Proposed Safety Precautions for a Manual Election

The Employer presented a detailed and helpful description of the measures it would take to try to ensure that any manual election in this matter could be conducted safely despite the COVID-19 pandemic. The Employer stated that to the extent that any party or the Board suggests additional safeguards that the Employer could do to make the election even safer or to make participants more comfortable, the Employer is willing to consider those suggestions.

The Employer proposed that the number of participants at the pre-election conference be limited so there is not a gathering of individuals present in one location for the typically 15 to 30-minute period needed for such a pre-election conference. The Employer stated that it would be willing to consider holding the pre-election conference in a different area if the parties preferred it, such as next to a garage door that could be opened, outside, or even by teleconference, if necessary. The Employer also proposed that each party have one observer (totaling three observers) and one Board agent present during the election to limit the number of individuals present in the voting room.

The Employer further proposed that the election take place in a drivers' training room at the Employer's facility with dimensions of approximately 15 feet by 25 feet. The drivers' training room is adjacent to the drivers' lounge room, which is not currently in use due to the COVID-19 pandemic. The drivers' training room is not adjacent to any supervisory or management offices. The Employer has offered to mark off the drivers' training room and the flooring along the route drivers would use to enter the drivers' training room at six-foot intervals to allow for social distancing by employees waiting to vote in a manual election. The record is not clear whether there are any exterior windows, but the windows in the drivers' training room have blinds that would be closed during the election so no one inside the Employer's facility would be able to see into the drivers' training room while the election was underway.

The Employer has also offered to provide the same PPE it provides and requires for its employees for any person attending the election, including the Board agent assigned to conduct

any manual election.¹² Such Employer-provided PPE includes N-95 masks, gloves, hand sanitizer, sanitation wipes, and disinfectant spray that the Employer already makes available to all of its employees throughout the Employer's facility, and the Employer is prepared to provide the same PPE to anyone present at the Employer's facility for a manual election.

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

D. The Parties' Positions Concerning Election Details

With respect to the proposed date for the election, the Employer has proposed to conduct the manual election as early as practicable, on Thursday, May 21; Thursday, May 28; or the earliest Thursday that the Region thinks would work to conduct a manual election. With respect to proposed polling times, the Employer has proposed extending the second polling session of the election to ensure sufficient time to maintain social distancing. The Employer has proposed two voting sessions, one from 5:00 a.m. to 7:00 a.m. and one from 3:00 p.m. to 6:00 p.m.

As indicated above, while the Union does not oppose a mail ballot election, the Union prefers that a manual election be conducted and agrees with all of the Employer's proposals for a manual election set forth above. The Petitioner opposes a mail ballot election and also agrees with all of the Employer's proposals for a manual election set forth above.

Finally, all parties agreed that: the Employer's employees are paid weekly, with the pay period ending on Sunday; there are no eligibility formulas applicable to this election; and it is appropriate for the Board to provide its Notices of Election and ballots in Spanish and in English.

II. ANALYSIS

A. The Pre-Election Hearing

With respect to the Employer's objection to my ordering that the pre-election hearing be conducted telephonically without any witness testimony, in the Employer's Statement of Position, it contends:

[T]he Hearing Officer must allow the parties to make a full and complete record of their positions on the election location at the Hearing, including the appropriate examination of witnesses and introduction of evidence. The Region Director has a duty "to adduce and weigh *evidence* relevant to these factors in determining where to conduct the ... election." See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1820 (2011)(emphasis added); Casehandling Manual, Sec. 11301.4 ("In the

¹² It is unclear whether the Region would be able to accept the PPE provided by the Employer. See, for example, the concern raised by the Regional Director of Region 28 in the Decision and Direction of Election in *Baker Commodities, Inc.*, Case 28-RC-259125, issued on April 29, 2020, that acceptance of such PPE might violate the Anti-Deficiency Act.

event a hearing is held during the course of processing the petitions, the Hearing Officer will explore the parties' positions regarding election arrangements, but parties shall not be permitted to litigate the issue." To effectively discharge this duty, the Regional Director must, as in any investigation, solicit and duly consider the parties' positions, sworn witness testimony, and exhibits that bear on the propriety of the election location.

Contrary to the Employer's assertion, the *2 Sisters Food Group, Inc. (2 Sisters)* Board decision does not support its argument that there must be a full hearing with testimony. *Id.* To the contrary, in that case, the Board specifically states when discussing factors to consider in deciding on remand whether to conduct the election at the Employer's facility that "[o]n remand, the Regional Director shall afford the Respondent an opportunity to address (*but not litigate*) this issue." (emphasis added). *Id.* Further, in *2 Sisters*, the Board notes the Regional Director's discretion in setting the location of an election based on "the many imponderables which are seldom reflected in a record." *Id.* at 1819. The Board's reference to such "imponderables which are seldom reflected in a record" clearly does not indicate that the Regional Director's decision must be based on witness testimony at a pre-election hearing. Additionally, I note that this Board decision specifically recognizes the Regional Director's discretion to order mail ballot elections in appropriate circumstances. *Id.* at fn. 13. Thus, nothing in *2 Sisters* requires a Regional Director to permit witness testimony on the issue of whether to conduct a manual or mail ballot election.

The same is true based on the Board's rules and case-handling guidance. For example, the Board's rules note that the pre-election hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination whether a question of representation exists. See Board's Rules and Regulations Sec. 102.64(a). A pre-election hearing is investigatory, not adversarial. See Board Casehandling Manual Part Two, Representation Proceedings, Sec. 11181 (Casehandling Manual). Further, the type of election to be conducted, the sole matter addressed at the hearing here, is not a litigable issue. See the Board's Rules and Regulations, Sec. 102.66(g)(1). Thus, nothing in the Board's Rules and Regulations or in the Casehandling Manual require witness testimony when deciding whether to conduct a manual or mail ballot election.

As to the Employer's objection that the hearing was conducted telephonically, Section 9(c) of the Act does not require a full in-person or video evidentiary hearing in every case. Rather, it requires "an appropriate hearing." Based on the foregoing and in light of the extraordinary circumstances arising from the COVID-19 pandemic in Los Angeles County at the time I issued my April 23, 2020 Order and when the pre-election hearing was conducted on May 1, and out of concern for the safety of all parties and Board personnel, I determined that "an appropriate hearing" in this proceeding would be a pre-election hearing conducted telephonically, particularly given that there were no litigable issues and that no witness testimony was going to be adduced. I note that during the telephonic hearing, the Court Reporter briefly dropped from the call twice. However, this did not cause any party to lose or otherwise be unable to present any evidence or arguments they so desired. Accordingly, for the reasons noted

in my April 23, 2020 Order and for the reasons detailed above, I affirm my decision to hold the hearing telephonically and without witnesses.

As to the Employer's and the Union's objection that the Hearing Officer should have provided the parties a presentation regarding the mechanics of a mail ballot election and a mail ballot count, particularly a mail ballot count conducted by videoconference, there is no basis for this objection. First, I note that at the hearing, each party was given the opportunity on the record to provide its "position on the date and method of the count." No party chose to give its position on the record as requested regarding the dates of any mail ballot election or the method of any mail ballot count. Instead, each party simply objected to the Board conducting a mail ballot election in this proceeding. The Employer objected repeatedly during the hearing to conducting any mail ballot count by videoconference but did not further elaborate its position regarding the method of any mail ballot count beyond its opposition set forth in its Statement of Position. With respect to the dates of any mail ballot election, at the hearing, the Employer provided, "Never." The Union and the Petitioner took no position at the hearing regarding the dates for any mail ballot election. Second, as acknowledged by the Employer in its Statement of Position, "In the event a hearing is held during the course of processing the petition, the Hearing Officer will explore the parties' positions regarding election arrangements, but parties shall not be permitted to litigate this issue." Casehandling Manual, Sec. 11301.4. Cf. *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954). This is precisely what occurred in the instant hearing – all parties were given the opportunity to present their positions regarding the election arrangements, including the dates of any mail ballot election and method of any mail ballot count. Finally, nothing in the Act, the Board's Rules and Regulations, or the Casehandling Manual requires a demonstration during a pre-election hearing of the steps and manner in which a mail ballot election will be conducted, including the count, before the parties are asked to state their positions on the details of a mail ballot election. To the extent that a party finds an aspect of the mail ballot election process was objectionable, its due process rights are protected and can be exercised by filing timely objections after the election.

B. The Election

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.¹³ Thus, it is my obligation to

¹³ In its April 17, 2020 press release, the Board stated that Regional Directors have discretion with respect to when, where and if an election can be conducted in accordance with existing Board precedent and the Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has made it clear that mail ballot elections need not be reserved only for the most extraordinary circumstances, reasoning that “neither our precedent nor common sense supports such a stringent approach to the use of mail ballots.” *Sutter Bay West Hospitals*, 357 NLRB 197, 198 (2011). Indeed, the Board has always acknowledged that circumstance may necessitate adaptations on the Board’s part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that “circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions.” 120 NLRB at 1346, citing *Shipowners’ Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, “[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted.” *Id.*

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

I acknowledge that absent public health concerns, I would not order a mail ballot election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. As noted above, current Federal, State, and Los Angeles County public health guidance strongly recommends discouraging gatherings, and a mail ballot election minimizes such risk. As of May 7, approximately 29,427 residents of Los Angeles County have confirmed cases of COVID-19 and 1,418 Los Angeles County residents have died from COVID-19. The Employer’s employees remain working at the Employer’s facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an alternative to conducting a manual election.

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

Although the Employer has offered certain accommodations in an effort to allow for some degree of social distancing and protection during the election, manual election procedures inherently require substantial interaction. Voters, observers, and party representatives would all

need to appear at the Employer's facility to participate in the election. Party representatives, the observers, and the Board agent would have to gather for approximately 15 to 30 minutes for the pre-election conference, including the check of the voter list and the parties' inspection of the voting area. The Board agent and observers would need to share the drivers' training room, an approximate 375-square-foot space, for the duration of the proposed manual election spanning five hours. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent. The Board agent must provide a ballot to each voter, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election lasting over five hours, the Board agent and observers might need to use a restroom at the Employer's facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, typically held in the same voting area, with the observers, party representatives, and other employees who wish to attend.

In these circumstances, the substantial interaction inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Although the Employer's policy is to send home any employees who display symptoms of COVID-19, any election participant could be an asymptomatic carrier of the virus.

Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary if the employee were performing work duties, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election. The Board's manual election procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote.

Additionally, conducting manual elections under the current circumstances could disenfranchise voters. If any employee displays symptoms during the 14 days before the election, the Employer's protective measure of sending home employees with COVID-19 symptoms could result in employees being unable to participate in a manual election. Moreover, guidance from the County Department of Public Health goes even further than the Employer's measures and, thus, increases the possibility of voter disenfranchisement; this is so because the County Department of Public Health guidance dictates a 14-day self-quarantine not just for symptomatic individuals but for anyone who has been in close contact with someone who has or is suspected to have COVID-19.¹⁴ Similarly, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving

¹⁴ See <http://publichealth.lacounty.gov/acd/ncorona2019/covidquarantine/>.

the degree of interaction required to conduct a manual election and may therefore refrain from participation.

The Employer argues that a mail ballot election presents greater risks due to the need to touch the mail. However, with respect to the safety of mail, CDC guidance states that “[a]lthough the virus can survive for a short period on some surfaces, it is unlikely to be spread from products or packaging that are shipped over a period of days or weeks at regular temperatures.” See *What Mail and Parcel Delivery Drivers Need to Know about COVID-19*.¹⁵ Additional CDC guidance, *Running Essential Errands*,¹⁶ recommends, “[a]fter collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.” The Employer also argues that the Board is unable to specify the exact chain of custody of the mail ballot from the time that it is mailed by the Board until the time it is counted at the ballot count by the Board agent. However, as in all mail ballot elections, the Region intends to take all necessary precautions to maintain an appropriate and secure chain of custody for the ballots.

Since all parties - the Employer, the Union, and the Petitioner - prefer a manual election, I do not take my determination to conduct a mail ballot election lightly. I do not find that a manual election is impossible, or that a mail ballot election is the only appropriate option. However, I have determined that, under the current circumstances, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. In fact, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages mail-in methods of voting if allowed during this extraordinary COVID-19 pandemic.

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

III. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/mail-parcel-drivers.html>.

¹⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁷
3. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or any other bar, to this proceeding.
5. 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.
6. The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time employees working at the Employer's facility at 1301 W. 228th Street, Torrance, CA 90501 in the following classifications: Driver (Class A/B), Utility Driver (Class A/B), Rear Driver, Front Driver, Roll Off Driver, Recycle Driver, Sweep/Barrell Driver (Class A/B), Bin Driver (Class A/B), Pull Out Driver, Utility Driver (Class C), Porter, Helper/Swamper, Truck Mechanic I, Truck Mechanic II, Truck Mechanic III, Truck Welder, Parts Clerk, Tire Repair, Lube Service, Truck Washer/Shop Utility, Bin Welder, Bin Painter, and Bin Washer.

Excluded: All other current classifications and employees, including but not limited to Dispatchers, Leads, Foremen, Sales employees, as well as all professional employees, business office clerical employees, technical employees, other nonprofessional employees, guards, managers and supervisors within the meaning of the National Labor Relations Act.

¹⁷ The Employer, Arakelian Enterprises, Inc. d/b/a Athens Services, a California Corporation with a place of business in Torrance, California, is engaged in the business of providing waste sanitation services. Within the past 12 months, a representative period, the Employer's gross revenues exceeded \$500,000 and during this same period, the Employer purchased and received goods, supplies and materials valued in excess of \$5,000 directly from enterprises located outside the State of California.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 116 employees.

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 **PACKAGE AND GENERAL UTILITY DRIVERS, LOCAL 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

A. Election Details

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

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. On **Tuesday, May 26, 2020**, ballots will be mailed to voters by an agent of Region 31 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, June 5, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 31 office by close of business (5:00 p.m.) on **Tuesday, June 16, 2020**. All ballots will be commingled and counted by an agent of Region 31 of the National Labor Relations Board on **Friday, June 19, 2020 at 2:00 p.m.** likely via a videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Sunday, May 3, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

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

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Tuesday, May 12, 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.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A 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.

Arakelian Enterprises, Inc. d/b/a
Athens Services
Case 31-RD-223318

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 Los Angeles, California this 8th day of May 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1753

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

RYDER TRUCK RENTAL, INC.

Employer

and

Case 32-RC-258444

**MACHINISTS AND MECHANICS LODGE NO.
2182, DISTRICT LODGE 190, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The petition in this matter was filed by Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO (Petitioner) on March 26, 2020, under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking to represent a unit of employees employed by Ryder Truck Rental, Inc. (Employer) at its Stockton, California facility (Employer's facility). There are approximately 33 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 prior to the direction of an election, at an April 22, 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. As of this writing, there have been over a million recorded cases of COVID-19 and over 56,329 deaths in the United States. 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, the Governor of the State of California issued Executive Order N-33-20 ordering all individuals living in the State of California to stay home until further notice. On March 22, 2020, an Order of the State Public Health Officer issued identifying Essential Critical Infrastructure Workers within the State of California. On April 14, 2020, an Order of the San Joaquin County Public Health Officer and Director of Emergency

Services of the County of San Joaquin (San Joaquin County Order) issued, requiring all individuals living within San Joaquin County to stay home or within their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible. This April 14, 2020 San Joaquin County Order was amended on April 24, 2020, but has very little application to the instant proceeding, as it clarified the social distancing protocols restrictions for Faith-based gatherings, implemented mandatory protocols to allow golf courses to resume limited operations, and provided clarification on Essential Businesses involving real estate and landscaping services. The order continues in place until it is rescinded in writing. On April 27, 2020, the counties of Alameda, Contra Costa, Marin, San Francisco, and Santa Clara, as well as the City of Berkeley, have extended their Shelter in Place orders through the end of May.

Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19 the impact of the virus has continued, in California and throughout the United States. The San Joaquin County Public Health Services reports that, as of April 27, 2020, 528 confirmed cases of COVID-19 exist in San Joaquin County. As of that date, 25 San Joaquin County residents have died from COVID-19.

The Employer, which is engaged in the truck rental business, is included within the Transportation Systems Sector that has been deemed one of the Critical Infrastructure Sectors to remain operational during the COVID-19 pandemic. As a result, the majority of employees continue to report for work and perform their regular duties, albeit with at least some changes in regular operations to incorporate social distancing and sanitizing to the extent possible at the Employer's facility. The record reflects that the Employer's business has been slower than usual due to the COVID-19 pandemic, causing the layoff of approximately five of its employees as of the April 22, 2020 hearing.

II. POSITIONS OF THE PARTIES

Petitioner emphasizes that its petition was filed on March 26, 2020, and it wants an election to commence at the earliest practicable date, preferably within three days from the issuance of my decision. Petitioner maintains that a mail ballot election is preferred because of the realities of the current COVID-19 pandemic and its associated restrictions. First and foremost, a manual election requires at least some gathering of people, including voters, Board agents, observers and any party representatives and others that elect to attend the pre-election conference and ballot count. While measures can be taken to limit interaction and make these interactions as safe as possible, a manual vote is ultimately not an essential gathering because the Board's mail ballot procedure exists as an alternative to in-person voting.

Second, beyond the concerns associated with such gatherings, a manual election requires travel of individuals such as Board Agents and party representatives, in and out of Stockton, California, causing an unnecessary risk to the participants and 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.

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 for manual voting. However, the Employer maintains that the risk can be mitigated and that it will take steps necessary to have a safe manual election. These mitigation steps include, but are not limited to: proposing a two hour voting period that will allow voters time for spacing and avoid congregating; conducting in-person voting in an approximate 20,000 square foot empty building or in an outside tailgate-type tent that will allow room and floor markers to maintain social distancing; placing the table used by the observers and Board agent, the voting booth used by the voters, and the ballot box at least 6-feet apart; utilizing a plexiglass screen between the Board agent and the observers; providing hand sanitizer, gloves, clothing coverings, and masks for all participants; providing floor markings and utilizing multiple voting booths to ensure proper social distancing within the voting area and at the voting line; and providing disposable pens or pencils in the voting booth for each voter's one-time use. The Employer additionally notes that the majority of its employees have been working for several weeks at the Employer's facility and are well-versed in social distancing, disinfecting, and other cautionary measures.

In sum, the Employer argues that, considering the above safety precautions, and because the majority of 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. The Employer is not aware of any cases of COVID-19 in the workforce. The Employer concedes, however, that none of the 37 people who work at the Stockton, California facility have been tested for COVID-19, have their temperatures scanned before entering the facility, or are required to wear face-masks at the facility, although about half wear face-masks on a voluntary basis.

III. BOARD'S ELECTION STANDARDS

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 (casehandling manual). 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 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.

IV. REGIONAL DIRECTOR DECISION FOR THIS ELECTION

The instant case raises the issue of whether to direct a mail ballot election based on public health concerns, and specifically whether the circumstances of the COVID-19 pandemic, in Stockton, California 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 or are participating in any strike, lockout, or picketing. Absent public health concerns this would not likely 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 the State of California and in San Joaquin County make it clear that gathering is discouraged unless absolutely necessary. Hundreds of residents of San Joaquin County have confirmed COVID-19 cases, and approximately 25 have died. The majority of the Employer's employees are currently working at the Employer's facility because their work is critical to the Transportation System Sector, and because of the nature of the work, no option exists to perform their work remotely. Further, I note that approximately five of the Employer's employees are laid off and thus are not currently working at the Employer's facility. 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.

Manual election proceedings inherently require substantial interaction. The unit consists of approximately 33 employees. Any manual election will potentially result in at least 33 interactions between the voters, observers, and the Board Agent or Agents that can be avoided if a mail ballot is used. While the majority of the employees are already in contact with one another at the Employer's facility, at least five of the employees have been laid off and are not currently reporting to the Employer's facility. It is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary, or may be major, such as an ill employee reporting to work to vote in the election. The Board's manual procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. It is not unreasonable to conclude 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, may report to work at the Employer's facility to avoid disenfranchisement in a manual election.

It is also reasonable to conclude that a manual election would result in travel, at a minimum by the Board agent or agents, as well as by the parties and their representatives. 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 within the spirit of the current Federal public health guidance.

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 San Joaquin County at this time, it is the appropriate option.

I do not find fault with the Employer's carefully considered and comprehensive plan for how a manual election could be conducted at the Employer's facility. The details it has presented, including elements directed at hygiene and sanitation, social distancing, and spreading out time between voters, would be necessary for any manual election. The Employer's experience with running a critical business in the COVID-19 environment also likely makes it well suited to apply these precautions. However, I do note that some of these precautions, by their very nature, introduce other problems. For example, a longer polling period lasting two hours for approximately 33 employees may help limit voters congregating in line while waiting to vote, but this increased polling time significantly increases the time the observers and Board agent conducting the election spend in close proximity to each other. Ultimately, the majority of the Employer's employees are working at the Employer's facility because no alternative exists due to the nature of their work. However, the Board does have an alternative to conducting a manual election. Additionally, current public health guidance strongly recommends avoiding or limiting in-person contact between individuals, and therefore a mail ballot election minimizes such risk.¹

Finally, I do not agree with the Employer's argument, citing *San Diego Gas & Elec.*, that the mail ballot election procedure is *only* intended to address scattered workforces and employees engaged in strikes, lockouts, and picketing not applicable to the instant proceeding. 325 NLRB at 1144-45. I acknowledge that these are the most common reasons that a mail ballot procedure is used, and it is correct that in *San Diego Gas & Elec.*, these reasons were referenced as "situations that normally suggest the propriety of using mail ballots." *Id.* at 1145. 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

¹ 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, 2020, 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.

On April 17, 2020, the Board issued a press release indicating that its representation petitions and elections are being processed and conducted by its regional offices. The Board further provided that consistent with their traditional authority, its Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing Board precedent. In doing so, the Board stated that its Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

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. 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.”) I find 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.²
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:

All full-time and regular part-time service technicians and fuelers employed by the Employer at its facility located at 3633 Duck Creek Drive, Stockton, CA; excluding all other employees, parts service persons, customer service coordinators, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by MACHINISTS AND MECHANICS

² During the hearing, the parties stipulated to the following commerce facts:

The Employer, Ryder Truck Rental, Inc., a Florida corporation, with an office and facility located in Stockton, California, is engaged in the truck rental business. During the past twelve months, the Employer has directly purchased and received products, valued more than \$50,000, from suppliers located outside the State of California.

LODGE NO. 2182, DISTRICT LODGE 190, INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 32, on May 4, 2020. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 32 office by close of business on May 25, 2020. In order to be valid and counted, the returned ballots must be received at the Region 32 office prior to the counting of the ballots.

All ballots will be commingled and counted at a location to be determined by the Regional Director at 10:00 a.m. on May 29, 2020.³ The parties will have the opportunity to participate remotely, if necessary, including using Facetime, to observe the count. No party is permitted to record the ballot count.

Any person who has not received a ballot by May 11, 2020, should immediately contact the Region 32 office at (510) 637-3300, or contact Board Agent Nicholas Tsiliacos at (510) 671-3046 to request a ballot.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **April 22, 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.

³ If, on the date of the count, the Region 32 office is closed, or the staff of the Region 32 office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period of time before the count, the parties will be provided information on how to participate in the count by videoconference.

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 **Thursday, April 30, 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.

The list must be filed electronically with the Region and served electronically on the other parties named in this decision. The list must 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.

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 Oakland, California this 28th day of April 2020.



Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

EXHIBIT K

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**2101 LLC D/B/A INTERCONTINENTAL TRUCK
BODY**

Employer

and

Case 19-RC-258144

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
LODGE 88, AFL-CIO**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. SUMMARY

The petition in this matter was filed by International Association of Machinists and Aerospace Workers, Lodge 88, AFL-CIO (Petitioner) on March 17, 2020,¹ under Section 9(c) of the National Labor Relations Act, as amended (Act), seeking an election to represent a unit of production and maintenance employees employed by 2101 LLC d/b/a Intercontinental Truck Body (the Employer) at its manufacturing facility located in Anaconda, Montana (Employer's facility). There are approximately 18 employees in the unit sought.

On March 18, Region 19 (the Region or Region 19) of the National Labor Relations Board (the Board) served the petition on the parties and issued a Notice of Hearing in this matter. On April 8, the Region issued an Order Rescheduling the Hearing to May 27. On April 27, the Region issued an Order further Rescheduling the Hearing from May 27 to May 14.

On May 13, both parties executed a Stipulation of Record for Pre-Election Hearing (Stipulation), agreeing that they are not in dispute about any other issues and that the sole issue precluding them from reaching a stipulated election agreement in this case is the manner of election, specifically, whether the election should be conducted by manual election or by mail ballot election, and the date(s) of the election. The parties also agreed that their Stipulation, its exhibits, and each party's position statements regarding the manner of the election due on May 15 constitutes the entire record for this matter (stipulated record) and that I will make a determination solely on the basis of the parties' stipulated record. Further, the parties agreed in their Stipulation that they retain the right to file, **limited to the method, date, time, and place of election ordered**, a request for review of my decision with the Board. (emphasis in original) Additionally, the parties agreed in their Stipulation that if I order a mail ballot election, and if I set a due date for returning ballots different than the date of the ballot count, the parties understand that no ballot will be counted that Region 19 receives after the due date I established.

¹ All dates hereafter are in 2020 unless otherwise indicated.

The parties further waived their right to file objections based upon any untimely received ballots.

Based on the parties' Stipulation and the stipulated record, the only issue I must determine is the manner of the election, whether to conduct a manual election or a mail ballot election given the reality of the COVID-19 pandemic.

II. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on daily life has been profound. As of May 18, 1,480,349 people in the United States have been infected with COVID-19 and 89,407 people have died from it.² The Centers for Disease Control and Prevention (CDC) has determined that the best way to prevent the illness is to avoid being exposed to the virus. *How to Protect Yourself and Others*.³ Many of the measures recommended by CDC 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. *Id.*

The CDC and the Occupational Safety and Health Administration have also recently issued specific interim guidance for the manufacturing industry, *Manufacturing Workers and Employers* (Interim Guidance).⁴ This Interim Guidance states that the virus is thought to spread mainly from person to person:

- Between people who are in close contact with one another (within about 6 feet, which is about two meters); and
- Through respiratory droplets produced when an infected person coughs, sneezes, or talks.

According to the Interim Guidance, recent studies indicate that people who are not showing symptoms can spread the virus, and it may also be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes. The Interim Guidance notes that this is not thought to be the main way the virus spreads, but acknowledges that we are still learning more about this virus.

With respect to the exposure to COVID-19 among manufacturing workers specifically, the Interim Guidance underscores that the manufacturing work environment—production or assembly lines and other areas in busy plants where workers have close contact with coworkers and supervisors—may contribute substantially to workers' potential exposures. The Interim Guidance notes distinctive factors affecting manufacturing workers' risk for exposure to COVID-19 including:

² See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

³ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html>.

- **Distance between workers** – Manufacturing workers often work close to one another on production or assembly lines. Workers may also be near one another at other times, such as when clocking in or out, during breaks, or in locker/changing rooms.
- **Duration of contact** – Manufacturing workers often have prolonged closeness to coworkers (e.g., for 8–12 hours per shift). Continued contact with potentially infectious individuals increases the risk of COVID-19 transmission.
- **Type of contact** – Manufacturing workers may be exposed to the infectious virus through respiratory droplets in the air—for example, when workers in a plant who have the virus cough or sneeze. It is also possible that exposure could occur from contact with contaminated surfaces or objects, such as tools, workstations, or break room tables. Shared spaces such as break rooms, locker rooms, and entrances/exits to the facility may contribute to their risk.

The Interim Guidance suggests certain administrative controls employers should implement to promote social distancing, including the following: limiting facility access only to essential workers; if meetings must be held, such as at shift changes, breaking them into smaller groups instead of holding a larger meeting, and eliminating non-essential meetings; employees maintaining at least 6 feet of distance from others at all times, including on breaks; and providing visual cues (e.g., floor markings, signs) as a reminder to workers to maintain social distancing. Other Interim Guidance recommendations to limit exposure and transmission of COVID-19 include: cohorting (grouping together) employees to reduce the spread of COVID-19 in the workplace by minimizing the number of different individuals who come into close contact with each other, potentially reducing the number of workers outside of the cohort exposure to the virus; and educating employees to avoid touching their faces, including their eyes, noses, and mouths, particularly until after they have thoroughly washed their hands upon completing work and/or removing personal protective equipment (PPE).

Further, although not directly addressing Board elections, I note that the CDC has specifically issued guidance on elections, *Recommendations for Election Polling Locations*⁵ (CDC Election Guidance), stating that officials should encourage mail-in voting. This CDC guidance provides as follows:

Actions for elections officials in advance of election day

Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.

- Encourage mail-in methods of voting if allowed in the jurisdiction.

In addition, many state and local governments have issued restrictions tailored to the situation in specific communities. On April 22, Montana Governor Steve Bullock (Governor)

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

issued a Directive providing guidance for the phased reopening of Montana (Directive).⁶ This Directive extends the March 30 mandatory quarantine for non-business travelers from out of state through the end of the emergency, requiring non-business travelers to quarantine for 14 days or for the duration of their visit – whichever is shorter. However, out-of-state travel to Montana for work-related reasons is exempt from this mandatory quarantine.

The Directive establishes three phases, explaining that the duration of each phase will be regularly evaluated in close consultation with public health and emergency management professionals. Factors considered in moving from one phase to the next include the ability for public health professionals to monitor new cases adequately and conduct contact tracing. Hospitals must maintain the ability to treat all patients safely, both COVID-19 patients and those with other health conditions. Montana must maintain its ability to screen and test all people with COVID-19 symptoms and maintain sufficient levels of PPE. The Directive emphasizes that negative indicators in these areas may result in the need to re-implement certain restrictions or take other protective measures.

There are certain requirements for employers that apply to all three phases, including developing and implement appropriate policies, in accordance with Federal, state, and local regulations and guidance, and informed by industry best practices, regarding: social distancing and PPE; temperature checks and/or symptom screening; testing, isolating, and contact tracing, in collaboration with public health authorities; sanitation; using and disinfecting common and high-traffic areas; monitoring the workforce for indicative symptoms and not allowing people with symptoms of COVID-19 to work; and collaborating with public health officials when implementing policies and procedures for workforce contact tracing following an employee's COVID-19 positive test result.

During Phase One, which is currently in effect, individuals should avoid gathering in groups of more than 10 people in circumstances that do not readily allow for appropriate physical distancing. Phase One guidance for employers includes: allowing employees to telework, and if telework is not feasible, accommodating alternative work schedules such as shift work and staggered scheduling in order to adhere to social distancing guidelines; closing common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols; and minimizing non-essential business travel.

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in Montana and throughout the United States. As of May 18, the Montana State Library (Library) reports that in Montana, there have been 470 confirmed cases of COVID-19, 20 active cases of COVID-19, and 16 deaths from COVID-19.⁷ At the local level, the Employer's facility is in Anaconda, Montana, located in Deer Lodge County. According to the Library, as of May 18, there were 3 confirmed cases of COVID-19 in Deer Lodge County. *Id.* The Library does not contain any data indicating whether

⁶ See <https://covid19.mt.gov/>.

⁷ See <https://montana.maps.arcgis.com/apps/MapSeries/index.html?appid=7c34f3412536439491adcc2103421d4b>.

any Deer Lodge County residents have died from COVID-19, but according to local news reports, there have been no COVID-19 deaths in Deer Lodge County.⁸

B. The Employer's Ongoing Operations

The Employer has continued operating its manufacturing facility, providing essential military and commercial transportation equipment, including aluminum grain hauling equipment, platforms, shelters, C-130 aircraft loading ramps (ramps), and steel flight line tow vehicles (tow trucks). The Employer's facility receives raw materials such as aluminum, Ford F350 trucks, or customer supplied commercial vehicles and pre-cut steel plates to convert vehicles. According to the Employer, its ramps are formed, drilled, riveted, painted, and shipped based on the required specifications. To create military tow trucks, Ford F350 Trucks are shortened in length; new steel bodies are formed, welded, painted, and installed; and new lighting, wiring, and hitches are installed. Further, the Employer modifies commercial trucks by assembling aluminum beds, making boxes for the truck bed, and converting the bed by adding lights and wiring and performing other modifications. According to the Employer, since it has remained operational for the duration of the COVID-19 pandemic, with its employees working at the Employer's facility, maintaining excellent attendance, the Employer and its employees are knowledgeable and experienced in COVID-19 social distancing and hygiene best practices.

III. POSITION OF THE PARTIES

A. Petitioner's Position – Mail Ballot Election is Necessary due to COVID-19

Petitioner maintains that a mail ballot election is necessary because of the extraordinary circumstances of the current COVID-19 pandemic and its associated restrictions. The Petitioner notes that Regional Directors have wide discretion in determining the place, time, and manner of election, and the Board has already denied a request for review of a Regional Director exercising her discretion to order a mail ballot to protect voters, party representatives, and Board agents.⁹ Petitioner highlights that Montana's phased re-opening requires that significant precautions still be taken and pays particular attention to those traveling to Montana from out of state, including a Board agent who would either be traveling from Seattle or Spokane in Washington State or from Portland, Oregon. With respect to such out-of-state travel to Montana, I note that Petitioner's counsel's office is located in Alameda, California, and the Employer's counsel's office is located in Houston, Texas.

Petitioner requests that I exercise my discretion to direct a mail ballot election at the earliest practicable date – 10 days after the issuance of this decision. To accommodate this request to have the election as early as possible, Petitioner agreed to waive three days of the 10 days it is entitled to have the voter list prior to the election, agreeing to have the list for a total of seven days.

⁸ See, e.g. <https://www.kpax.com/news/coronavirus/no-new-covid-19-cases-reported-in-montana-sunday-may-17>.

⁹ See *Atlas Pacific Engineering Company*, 7-RC-258742 (Order Denying Request for Review, May 8, 2020).

With respect to the risks associated with holding a manual election during the COVID-19 pandemic, Petitioner notes that a manual election would require at least 18 interactions between voters, two observers, and the Board agent. Further, a voter list is shared between the two observers and the Board agent, with observers less than a foot apart when they check off voters. According to Petitioner, the Employer's suggested precautions to reduce such risks during a manual election are insufficient and add additional obstacles to its employees voting in the election. In conclusion, although all parties would generally advocate for a manual election under normal circumstances, the Petitioner notes that the uncertainties present make a mail ballot election the only means by which I can ensure that the Employer's employees have the ability to exercise their rights under the Act in a timely and safe manner.

B. Employer's Position – Manual Election at the Employer's Facility

The Employer argues that the election should be conducted entirely by a manual election, based on the Board's longstanding policy favoring manual elections. According to the Employer, a manual election can be safely conducted at the Employer's facility and would result in a much quicker ballot count than a mail ballot election. The Employer proposes holding a manual election at the Employer's facility from 1:30 p.m. to 2:30 p.m. on Friday, June 5.

According to the Employer, since there are only approximately 18 employees in the petitioned-for unit, voting could be completed in less than an hour, utilizing strict social distancing and hygiene protocols. To observe social distancing and hygiene guidelines advised by the CDC, the voting room could be thoroughly deep cleaned and disinfected immediately prior to the commencement of voting using a 60% or greater alcohol solution. Eligible voters could remain at their workstations while waiting to vote until the prior voter exits the voting area, or alternatively, wait in a line, standing more than six feet from one another, indicated by floor markings. Eligible voters could check their temperature prior to casting their ballot. I note that the Employer's proposal does not specify how such temperature checks would take place, including ensuring that the thermometer is sanitized between each use and that the temperature reading is accurate. The Employer proposes a voting area at its facility, in an unidentified area on its shop floor of an approximate 40 feet by 40 feet size, cordoned off for privacy by welding curtains, which would purportedly be large enough to allow for the two observers, the Board agent, and the voter present to remain more than six feet apart for the entire voting period.

The Employer further proposes that the equipment necessary to run Board manual elections such as a voting booth, a ballot box, a voter list, and ballots, could be packaged in plastic bags and isolated from contact with Board personnel for several days or a week prior to the Board agent conducting the election transporting the materials to the Employer's facility. According to the Employer, the necessary distribution of election equipment materials, such as election instructions for observers and badges for observers, could be done through the Board agent placing such materials on each observer's separate table while the observers are not present.

Further, the Employer suggests that each observer could have his or her own voter list to allow for necessary social distancing, and each observer could check off voters on different sides

of the voters' names using different colored pens or pencils. The Employer proposes that the Board agent have a separate table, and the voting booth could be at least six feet away from the Board agent's table and both observers' tables. The Employer further indicates that a taped off path and signage could indicate the route to indicate how voters should proceed into the voting area to the observer checking tables, then to the voting booth, and then out of the voting area, all while remaining six feet away from the observers and Board agent. Additionally, the Employer offers to place clear plastic screens in front of both observers' tables and the Board agent's table as an extra safety measure.

The Employer proposes that each voter would enter the voting area one at a time. The voter could then stand at a designated floor marking, state his or her name, the observers could check that voter off the list, the Board agent could place a ballot on the table for the voter to retrieve after the Board agent has backed away from his or her table at a distance of at least six feet, the voter could retrieve the ballot off of the table, proceed to the voting booth, and place the ballot in the ballot box. Spoiled ballots could be handled in this same manner, by the voter placing the spoiled ballot on the Board agent's table, the Board agent retrieving the ballot, inspecting it, placing a clean ballot on the table, the voter retrieving the clean ballot, after the Board agent has backed at least six feet away from the table, and the voter could then proceed again to the voting booth and then the ballot box. The closing of the polls and all signing and certifying of documents by the Board agent and the parties could be completed consecutively, rather than concurrently, while following social distancing protocols.

As for the challenged ballot procedure, the Employer proposes that the Board agent fill out the appropriate information on the challenged ballot envelope at the Board agent's table. While the voter remains in the voting booth, the Board agent could place the challenge envelope on the voting table for the voter to retrieve. Once the Board agent returns to his or her table, the voter could exit the voting booth, display his or her folded ballot, place the ballot in the challenged ballot envelope, seal the envelope, and place the envelope in the ballot box. According to the Employer, the small size of the petitioned-for unit and the parties' Stipulation to the unit composition mean the likelihood of any challenged ballots is slim.

Finally, the Employer proposes that it would provide hand sanitizer for the observers and Board agent at their respective tables. The Employer would also provide all participants, including the Board agent, both observers, and all voters, gloves and N95 masks to wear throughout the manual election. Voters would sanitize their hands immediately before and after casting their ballots. Each voter would use his or her own pencil or pen to fill out the ballot or, alternatively, any commonly used pen or pencil could be sanitized after each use. Each voter could wipe down the voting booth surfaces with a disinfectant wipe prior to departing. Due to the small size of the petitioned-for unit and the familiarity between eligible voters, any lowering of masks for identification purposes would be unnecessary.

With respect to a mail ballot election, the Employer argues that a mail ballot election could disenfranchise voters and result in low voter participation due to the unreliability of the mail, mail service delays, and delays associated with the Regional office's receipt of mail ballots since all Board staff are currently teleworking. The Employer also notes that the Employer's

facility, located in Deer County, Montana, a county with zero active COVID-19 cases, in a state with a total of 20 active COVID-19 cases, does not present extraordinary circumstances warranting a mail ballot election.

IV. ANALYSIS

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.¹⁰ Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.¹¹

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has made it clear that mail ballot elections need not be reserved only for the most extraordinary circumstances, reasoning that "neither our precedent nor common sense supports such a stringent approach to the use of mail ballots." *Sutter Bay West Hospitals*, 357 NLRB 197, 198 (2011). Indeed, the Board has always acknowledged that circumstance may necessitate adaptations on the Board's part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that "circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions." 120 NLRB at 1346, citing *Shipowners' Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, "[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted." *Id.*

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

¹⁰ In its April 17th press release, the Board stated that Regional Directors have discretion with respect to when, where and if an election can be conducted in accordance with existing Board precedent and the Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

¹¹ See *Atlas Pacific Engineering Company*, 7-RC-258742 (Order Denying Request for Review, May 8, 2020).

I acknowledge that absent public health concerns, I would not order a mail ballot election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. As noted above, current Federal and state public health guidance strongly recommends discouraging gatherings and minimizing non-essential business travel, and a mail ballot election minimizes such risk. As noted above, despite the fact that Deer Lodge County has so far been fortunate to have only three confirmed cases of COVID-19 and zero deaths from COVID-19, a manual election at the Employer's facility in Anaconda, Montana, at a minimum, would require a Board agent to travel from Spokane¹² or Seattle¹³ in Washington State, or from Portland, Oregon,¹⁴ and could also involve the travel of Petitioner's counsel from Alameda, California¹⁵ and the Employer's counsel from Houston, Texas,¹⁶ where, in all of these areas, the COVID-19 statistics are far more grim than in Montana. The Employer's employees remain working at the Employer's facility because they provide essential services to their military and commercial customers, and because of the nature of their manufacturing and fabrication work, no alternative exists to perform their work remotely. However, the Board does have an alternative to conducting a manual election.

I find that the COVID-19 pandemic presents an extraordinary circumstance that makes conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the unit employees' union representation preferences at this time. The safety of the voters, the observers, the out-of-state party representatives, and the out-of-state Board agent conducting the election must be considered in determining the appropriate method for conducting the election.

Although the Employer has offered certain accommodations in an effort to allow for some degree of social distancing and protection during the election, manual election procedures inherently require substantial interaction. Voters, observers, and party representatives would all need to appear at the Employer's facility to participate in the election. Party representatives, the observers, and the Board agent would have to gather for approximately 15 to 30 minutes for the pre-election conference, including the check of the voter list and the parties' inspection of the voting area. The Board agent and observers would need to share a voting area indoors, of approximately 40 feet by 40 feet, enclosed merely by welding curtains, for the duration of the proposed manual election spanning an hour. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent. The Board agent must provide a ballot to each voter, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. The Board agent and observers might need to use a restroom at the Employer's facility, perhaps before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, typically held in the

¹² See <https://srhd.org/covid19cases>.

¹³ See <https://www.doh.wa.gov/emergencies/coronavirus>.

¹⁴ See <https://govstatus.egov.com/OR-OHA-COVID-19>.

¹⁵ See <https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9>.

¹⁶ See <https://harriscounty.maps.arcgis.com/apps/opsdashboard/index.html#/c0de71f8ea484b85bb5efcb7c07c6914>.

same voting area, with the observers, party representatives, and other employees who wish to attend.

In these circumstances, the substantial interaction inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the voting area. Despite the Employer's apparent precautions to minimize the transmission and spread of COVID-19 at the Employer's facility, any election participant could be an asymptomatic carrier of the virus.

Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary if the employee were performing work duties, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election. The Board's manual election procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. Additionally, conducting manual elections under the current circumstances could disenfranchise voters, as employees may be wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation.

Since the Employer prefers a manual election, I do not take my determination to conduct a mail ballot election lightly. I do not find that a manual election is impossible, or that a mail ballot election is the only appropriate option. However, I have determined that, under the current circumstances, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. In fact, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages mail-in methods of voting if allowed during this extraordinary COVID-19 pandemic.

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

V. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The parties stipulated and I find that the Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹⁷
2. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. The parties stipulated and I find that there is no history of collective bargaining between these parties in the proposed bargaining unit identified above and there is no contract or other bar in existence to an election in this case.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.
5. The parties stipulated and I find the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time production, fabrication, maintenance, and facilities maintenance employees employed directly by the Employer at its Anaconda, Montana facility.

Excluded: All other employees, employees supplied by temporary staffing agencies, employees supplied through the Job Corp Program, professional employees, clerical employees, managers, and guards and supervisors as defined by the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 18 employees.

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

¹⁷ The Employer, a State of Montana limited liability company, with a place of business in Anaconda, Montana, is engaged in the business of manufacturing various commercial and military transportation equipment. In the past twelve months, a representative period, the Employer has purchased and received goods valued in excess of \$50,000 directly from points outside the State of Montana and received gross revenues in excess of \$500,000. Accordingly, the Employer is engaged in commerce within the meaning of the Act and is subject to the jurisdiction of the Board.

be represented for purposes of collective bargaining by **INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 88, AFL-CIO.**

A. Election Details

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

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. On **Friday, May 29, 2020**, ballots will be mailed to voters by an agent of Region 19 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Friday, June 5, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at (206) 220-6300 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 19 office by **12:00 p.m. (noon) PST on Friday, June 19, 2020**. All ballots will be commingled and counted by an agent of Region 19 of the National Labor Relations Board on **Wednesday, June 24, at 1:00 p.m.**, likely via a videoconference to be arranged by Region 19. In order to be valid and counted, the returned ballots must be received at the Region 19 Office by **12:00 p.m. (noon) PST Friday June 19, 2020**. Per the parties' stipulation, no ballots will be counted that are received after the due date. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Saturday, May 9, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

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

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, May 21, 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.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A 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.

2101 LLC d/b/a Intercontinental Truck
Body
Case 19-RC-258144

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 Seattle, Washington this 19th day of May 2020.

RONALD K. HOOKS

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave Ste 2948
Seattle, WA 98174-1006

EXHIBIT L



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

19-RC-258144

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 4:45 PM PST on Friday, May 29, 2020, ballots will be mailed to voters from the National Labor Relations Board, Region 19 or Subregion 36. 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 Friday, June 5, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at (206)220-6300 or our national toll-free line at 1-844- 762-NLRB (1-844- 762-6572).

All ballots will be commingled and counted by a designated Board Agent of the National Labor Relations Board at 1:00 PM PST on Wednesday, June 24, 2020. In order to be valid and counted, the returned ballots must be received in the Region 19 Office, 2948 Jackson Federal Building, 915 2nd Ave, Seattle, WA 98174-1009 by 12:00 PM PST on Friday, June 19, 2020.



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

Those eligible to vote are: All full-time and regular part-time production, fabrication, maintenance, and facilities maintenance employees employed directly by the Employer at its Anaconda, Montana facility who were employed during the payroll period ending May 9, 2020.

EMPLOYEES NOT ELIGIBLE TO VOTE:

Those not eligible to vote are: All other employees, employees supplied by temporary staffing agencies, employees supplied through the Job Corp Program, professional employees, clerical employees, managers, and guards and supervisors as defined by the Act.

	<p>UNITED STATES OF AMERICA National Labor Relations Board 19-RC-258144</p> <p>OFFICIAL SECRET BALLOT</p> <p>For certain employees of 2101 LLC d/b/a INTERCONTINENTAL TRUCK BODY</p>	
<p>Do you wish to be represented for purposes of collective bargaining by INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE 88, AFL-CIO?</p>		
<p>MARK AN "X" IN THE SQUARE OF YOUR CHOICE</p>		
<p>YES</p> <input type="checkbox"/>	<p>SAMPLE</p>	<p>NO</p> <input type="checkbox"/>
<p>DO NOT SIGN THIS BALLOT. See enclosed instructions.</p> <p>The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.</p>		



United States of America
National Labor Relations Board



NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time where attendance is mandatory, within the 24-hour period before the mail ballots are dispatched**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (206)220-6300 or visit the NLRB website www.nlr.gov for assistance.