

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

THE ATLANTIC GROUP, INC.,

Employer,

and

NLRB Case No: 16-RC-256920

**INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS LOCAL
220,**

Petitioner,

**EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Arthur T. Carter
Texas Bar No. 00792936
Lisa M. Thomas
Texas Bar. No. 24113509
Littler Mendelson, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116,
Dallas, TX 75201-2931
(214) 880-8100 (Telephone)
(214) 880-0181 (Facsimile)
atcarter@littler.com
lmthomas@littler.com

and

Noah G. Lipschultz
Littler Mendelson, P.C.
1300 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 630-1000 (Telephone)
(612) 630-9626 (Facsimile)
nlipschultz@littler.com

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ATTORNEYS FOR THE ATLANTIC GROUP,
INC., AN INDIRECT SUBSIDIARY OF DAY
AND ZIMMERMANN

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Pursuant to section 102.67 of the National Labor Relations Board’s (“Board”) Rules and Regulations (“R&R”), the Employer The Atlantic Group, Inc.¹ (“Company”), seeks review of the Decision and Direction of Election (“DDE”) issued by the Regional Director of Region 16 on March 18, 2020, and requests that the Regional Director’s decision be reversed, that the International Brotherhood of Electrical Workers Local 220’s (“Union”) certification be set aside, and that either the petition be dismissed or a new election be ordered that includes outage employees, who will return to Comanche Peak Nuclear Power Plant in fall 2020. Alternatively, if the foregoing relief is not granted, the Company requests the Board order a new election to be conducted on-site, not through mail ballots.

¹ The original election petition named Day and Zimmerman [sic] as the Employer. The Employer corrected the record to indicate that Zimmermann has two “n”s and that the correct name for the Employer is The Atlantic Group, Inc. The NLRB’s docket for this matter reflects this change, and this Request for Review is submitted on behalf of The Atlantic Group, Inc. Please note, however, that the record also refers to Day and Zimmerman, D&Z, and DZ.

I.
PRELIMINARY STATEMENT

The Union filed its petition in this case on February 25, 2020, seeking to represent a unit consisting of certain employees at Comanche Peak Nuclear Power Plant in Somervell County, Texas (“Comanche Peak”).² The requested unit was defined as “[a]ll full time and regular part time employees employed by the employer at Comanche Peak in the following departments: Decon, Electrical, Insulator/Scaffold, Lake, Mechanic, Mechanical, Operations, Paint, Radiation Detection, Scaffold, Site Facilities, and Utility.” (Board Ex. 1.) The Company contended that the unit should include all of the employees at the facility who perform maintenance and modification (“M&M”) and radiation protection (“RP”) work—inclusive of employees who work during plant outages at Comanche Peak.

On March 18, 2020, the Regional Director approved the Union’s petitioned-for unit but excluded the outage employees. Despite their large numbers and ongoing relationship with and presence at the Company, the Regional Director treated these employees like temporary workers and not as part of an expanding unit or even as seasonal workers. In doing so, he disregarded the Company’s practice of reemploying workers during the regularly occurring and foreseeable plant outages at Comanche Peak and ignored Board precedent on expanding units and the facts surrounding the common terms and conditions of employment between the core and outage employees.

In addition, the election in this case was conducted through mail ballots, with 27 votes for the Union and 21 votes against—but there were 10 employees who did not vote.³ When the Region

² Comanche Peak Power Company LLC is owned and operated by Luminant Generation, a subsidiary of Vistra Energy (“Luminant”).

³ In addition, one ballot was deemed void because it was submitted without a signature, and three votes were challenged and not counted.

sought both parties' positions as to the propriety of an in-person versus a mail-ballot vote, both the Union and the Company argued that an in-person vote was preferable. The Company advised that an in-person vote could be conducted safely for all concerned, given the safety protocols in place at the Comanche Peak site.

Contrary to Board precedent favoring in-person elections, the Region nevertheless ordered a mail ballot. Mail ballots disenfranchise employees because turnout is much lower than in-person voting, as shown by the facts in this case. Although 62 employees purportedly were sent ballots, roughly 16% of employees in the approved unit did not vote, at a time when in-person voting was possible, preferable, and agreed to by the parties and even though the employees were working on-site at Comanche Peak. The consequence of the Region's disregard of Board precedent is that the interests of all employees, including a group of employees that was large enough to have changed the outcome of the election, has thereby been prejudiced.

II.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Procedural History.

In response to the Union's February 25 petition, the Company submitted a Statement of Position arguing that 1) the unit should consist of outage employees who were in the process of being hired, and 2) the eligibility period for voting should begin on April 26, 2020.⁴ (Board Ex. 3.) Region 16 held a Representation Hearing on March 5, 2020. At the hearing, the Union argued the outage workers were "temporary" workers and should be excluded from the unit. (Tr. 203-05.)

⁴ The Company also clarified the job descriptions that should appropriately make up the unit, as the Union described "departments" that did not align with the job descriptions or positions of the employees at Comanche Peak.

On March 18, the Regional Director issued his DDE directing an election in the Union’s petitioned-for unit, excluding the outage employees and allowing one classification of employees (“Lake”) to vote subject to challenge. (DDE at 10.)⁵ The Regional Director ordered an in-person election at Building 3G2 Classroom 7 at Comanche Peak, on a date to be determined. (DDE at 10.) He further stated that eligible voters were those “employed during the payroll period ending March 15, 2020.” (DDE at 10.) The Region later sought the parties’ positions as to whether the election should be in-person, per the Board’s normal procedures, or via mail ballot. The Company argued that the vote should be held in-person and could be done safely in accordance with social distancing and other safety precautions. The Union agreed that an in-person vote was preferable but placed a premium on whichever method would result in an election sooner. As noted above, the Board held an election by mail ballot. According to the Notice of Election issued April 10, 2020, the ballots were mailed on April 20; employees were to ensure their ballots were returned by close of business on May 18, and they were counted on May 29, 2020. The Union won the election by a tally of 27 to 21, with 10 employees not submitting ballots and 1 ballot void for lack of signature.

B. Background.

The Company is an indirect subsidiary of The Day & Zimmermann Group, Inc., and it provides services and products as a contractor to nuclear and fossil fuel power plants throughout the United States. These services include the aforementioned M&M and RP services that the Company provides when plants are online or operational as well as when they have planned outages or shutdowns for construction and maintenance work. On August 9, 2018, the Company

⁵ The so-called Lake employees include four individuals who work at Squaw Creek Park, across from the power plant. The lake has boat ramps and is open to the public during certain days and hours, and these employees are tasked with overseeing the park. (Tr. 182.) All but one of the Lake employees has been laid off, although there is an expectation of recalling these employees in October.

entered into a contract to provide qualified RP personnel at the Comanche Peak Nuclear Power Plant. On January 30, 2020, it entered a separate five-year contract to provide M&M support services at Comanche Peak, including such services during scheduled or emergent outage periods.

C. Outages at Comanche Peak.

During outage work, various portions of the Comanche Peak site cease active operations while a number of necessary M&M projects ensue. For 2020 there will be two such scheduled outage periods. The first occurred from April 19, 2020 through May 14, 2020. The second is scheduled to begin on October 18, 2020 through November 11, 2020. Comanche Peak has two operating units, and they rotate outages so that maintenance can be performed on one unit while the other is still online. (Tr. 41-42.) These outages are part of the regularly planned operations of nuclear power plants, which must regularly be powered down in order to do necessary construction and maintenance work.

Preparation for the April to May outage period began in early 2020. As shown on Company Exhibit 5, for instance, a Staff Progress Tracking chart dated February 10 shows initial recruiting efforts for M&M workers beginning in late January. Company Exhibit 3 further indicates the Company was hiring M&M employees within 26 different “disciplines,” totaling 309 employees to be hired from February 10 to April 14. Company Exhibit 4 shows 95 additional hires in 9 position types, to be hired from March 30 through April 20. As noted in the Company’s Statement of Position, the Company was hiring employees in the following classifications, which collectively would make an appropriate bargaining unit:

SR Decon, SR HP, JR Decon, JR HP, Radiation Supervisor, Carpenter Helper, Carpenters, Heavy Equipment Operator, Electrical Helpers, Electrician (Journeyman), Equipment Operators, Foreman (Operator), Foreman (Paint), Foreman (Pipefitter), Heavy Equipment Mechanic, Insulator Helper, Insulators Journeyman, Laborers Utility, Laborers (Entry) Fire Watch, Laborers (Proficient) Foremen, Mechanic Journeyman, Millwright Helpers, Painter

Helper, Painters (Journeyman), Pipefitter (Journeyman), Pipefitter
Helper, Rigger, Safety Representatives, Welders (Journeyman)

(Board Ex. 3.) The record in this case refers to “core” and “outage” employees, wherein the core employees work year-round at Comanche Peak and the outage employees join them during the outage periods. As further discussed below, the job classifications and descriptions of both core and outage employees are the same; one cannot tell from someone’s job title or duties whether s/he is a core or outage employee, and the outage employees work in the petitioned-for departments under the same supervision as core employees. The Union did not specifically seek to exclude outage employees in its petition and, rather, focused on job titles or descriptions that are the same for both groups of employees, core and outage, tacitly admitting there is no meaningful difference in the day-to-day functions of these employees.

D. Expanding Unit.

Leading up to the spring 2020 outage, the Company hired an additional several hundred employees to work alongside the core employees, as shown in the hearing testimony of Ross McConnell, Senior Vice President of Nuclear Operations for the Company. When the Union filed its petition on February 25, 2020, asserting that there were 63 employees in the unit, the Company was already in the process of hiring outage employees; in fact, the Company began hiring outage employees on February 10. (Tr. 43.) By the time the Union submitted its petition and as McConnell testified, the Company could identify by name 86 employees who belonged in the petitioned-for group due to new outage hires who had already begun their work. (Board Ex. 3, Att. B; Tr. 63.) McConnell noted that this number included “personnel that were hired on January 30th, as well as additional . . . employees that were hired up until the Petition date of the 25th.” (Tr. 63.) In addition, McConnell testified that approximately 213 employees had accepted employment and were slated to start work after February 25 and before the outage, as listed by

name in the Company's Statement of Position. (Board Ex. 3, Att. C; Tr. 64.)⁶ Furthermore, by the time of the hearing, the Company had extended offers to 102 more outage employees and was waiting on acceptances (Tr. 73), which would result in the Company ultimately hiring 401 or 402 employees fitting the job descriptions of the petitioned-for unit. (Tr. 62; Co. Exs. 3 & 4.) In sum, as evidenced by Company Exhibits 3 through 6 and McConnell's testimony, positions were being filled for the outage, staggered start dates had been identified, and the names of employees who had either already started or were confirmed to start on specific dates prior to the outage had also been identified.⁷

For the fall 2020 outage, it is anticipated that the same number of employees will be needed and the same planning period will be used, as "it is foreseeable that [the fall outage process] will be very similar, if not the same" as the spring outage. (Tr. 108.) And as mentioned, the Company has a multi-year contract for Comanche Peak, so this consistent cycle and process is expected to continue. It is also anticipated that most of the employees who work the spring outage will also work the fall outage, as the company prefers to rehire outage employees due to their knowledge of the power plant, the work, and the personnel. (Tr. 32-33; 82-83; 108.) Given the large number of employees who were in the process of being hired, all employees who are on-site for outages should have been included in the unit, and the election should not have occurred until a representative complement of workers was present. This would have occurred by mid-April, given that the outage was starting on April 19, 2020.

⁶ See Co. Exs. 3 through 6 for data showing employees sought and hired for the outage. As seen in the exhibits and as testified to by McConnell, many employees began work before the outage started on April 19. (Co. Exs. 3, 4, 6; Tr. 54.)

⁷ See also Co. Ex. 7 for job descriptions listing the job titles and duties applying to both core and outage employees, without distinguishing between groups of employees. See also Co. Exs. 3 & 4 and McConnell's testimony (Tr. 69-70) regarding the number 402. The exhibits show the Company was looking to hire 404 employees (309 noted on Co. Ex. 3 and an additional 95 noted on Co. Ex. 4) and then subtracted 2 supervisors to determine 402 outage employees would fit the job descriptions of the proposed unit.

E. Mail Ballot Election Is Held Over the Company’s Objection.

As described above, on March 18, 2020, the Regional Director ordered an election that excluded the outage workers, although the parties contemplated an in-person election at Comanche Peak. But on April 6, 2020, the Region requested the parties’ position on whether a mail ballot election was appropriate. Citing strong Board precedent, the Company in its Statement of Position objected to a mail ballot election and argued the election should take place on-site immediately before or immediately after the outage, when the core employees would have time to vote. The Union agreed that “a manual election is appropriate at the site,” noting in this regard that employees continued to work at the site every day, notwithstanding various shelter-in-place orders that had been issued. Yet the Region ordered a mail ballot election begin on April 20. The Union won the election by a tally of 27 to 21, with 10 employees not submitting ballots and 1 ballot void for lack of signature.

**III.
GROUND FOR REVIEW**

Under R&R section 102.67(d), the Board grants a request for review of a regional director’s decision “where compelling reasons exist therefor.” 29 C.F.R. § 102.67(d). The Company respectfully requests that the Board grant review, reverse the Regional Director’s decision, set aside the Union’s certification, and either dismiss the petition or order a new election that includes outage employees who will return in fall 2020. Alternatively, the Company requests the Board order a new election to be conducted on-site, not through mail ballots. The Company requests this relief for the following reasons:

- a. The Regional Director’s finding that community-of-interest analysis is not applicable to this case was factually and legally erroneous.
- b. The Regional Director’s analysis of the influx of outage employees was both factually erroneous and legally flawed under Board precedent, as he failed to acknowledge that the unit was expanding.

- c. The Union’s petitioned-for unit is not conducive to effective collective bargaining and will undermine rather than promote industrial stability.
- d. The Regional Director’s allowance of mail ballots over the objection of the Company departed from Board precedent, resulting in prejudicial error affecting the rights of the Company and its employees.

IV.
ARGUMENT

A. Because the Outage Employees Are Not Temporary Workers, Community-of-Interest Analysis Is Appropriate and Shows a Strong Community of Interest Between Core and Outage Employees.

As an initial matter, it is vital to recognize the strong community of interest between the core and outage employees. The Regional Director erred when he stated, “As I find outage employees to be temporary employees, community of interest is not applicable.” (DDE at 2 n.3.) Because the outage employees are not temporary workers but were part of the expanding unit—as further discussed below—it is proper to consider their shared interests with the core employees because it further exemplifies why they should all be included in the bargaining unit. The evidence clearly establishes that the petitioned-for core employees share a strong community of interest with the outage employees, above and beyond what the Board requires since overruling the heightened standard set forth in *Specialty Healthcare & Rehab. Ctr. of Mobile*, 357 NLRB No. 83, slip op. (2011). See *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 5 (2017) (overruling *Specialty Healthcare* and noting the “assessment of whether the sought-after employees’ interests are sufficiently distinct from those of employees excluded from the petitioned-for group . . . ensures that the Section 7 rights of excluded employees who share a substantial (but less than ‘overwhelming’) community of interests with the sought-after group are taken into consideration”).

When conducting a community-of-interest analysis, the Board has always relied heavily on the integration of operations and the degree of contact and interaction between employees in determining which unit is appropriate. *See, e.g., The Trustees of Columbia Univ. in the City of New York*, 364 NLRB No. 90, slip op. at 19 (2016) (finding a sufficient community of interest by emphasizing “substantial similarities among the types of work” of employees, “that they work in similar settings,” and that they “serve similar functions with respect to” the employer’s mission despite having “differences in the difficulty and independence of work assignments, as well as in pay and benefits”); *Buckhorn, Inc.*, 343 NLRB 201, 203-04 (2004) (focusing on the “highly integrated” operations and “significant degree of contact and interaction” among employees in two purportedly separate groups of maintenance and production employees to find they should constitute one unit, despite discrepancies in their skill levels and wage rates); *TDK Ferrites*, 342 NLRB 1006, 1008 (2004) (emphasizing the “highly integrated” workforce, “significant degree of interaction among” employees in purportedly separate groups, the fact that there was generally “no distinction between, or separation of, work areas occupied by” the purportedly separate groups, and the “substantial degree of overlap of functions among” the employees). In this case, the overlapping job descriptions, duties, supervision, location of work, and pay rate create an inherent overlapping community of interest between the core and outage employees.

No one disputes that the core and outage employees share the same job classifications and perform the same work, side by side. The outage employees are not “strangers” to Comanche Peak, as the Union would have the Board believe. (Tr. 204.) Indeed, as the Regional Director expressly noted, the outage and core employees are both connected to Comanche Peak:

- “The Employer uses the same job classifications across core and outage crew employees.” (DDE at 3.)
- “[I]t appears RP outage employees perform the same work as RP core employees.” (DDE at 6.)

- “McConnell testified that the Employer has a preference for hiring site returnees,” and approximately half of the 92 RP outage employees were “site returnees,” meaning they had worked at Comanche Peak previously. (DDE at 6.)
- “M&M outage work is similar to on-line [non-outage] work.” (DDE at 6.)
- “During an outage, core employees and outage employees may work alongside each other and on the same tasks.” (DDE at 6.)
- “[D]uring an outage [the core employees] are paid the same rate as the outage workers.” (DDE at 4.)⁸

In addition, the Union’s own witness, Brett Walden, admitted recognizing by name several of the outage employees that the Company proposed for inclusion in the unit because they have worked at Comanche Peak in the past. (Tr. 176-178, 180-82.)

This characterization of the outage workers as familiar to Comanche Peak was consistent with the testimony of the Company’s witness, McConnell. His undisputed testimony was that, when hiring employees for each outage at a nuclear plant, they “tie [their searches] to site experience. We look for people, as the case is here, . . . who have worked at Comanche Peak before, and we tie those people in.” (Tr. 32-33.) He also confirmed that the core and outage employees’ job classifications are “pretty much the same across the board” and that they perform the same jobs and must have the same skills. (Tr. 35-36.) The workers also “come in and go in the same shops, have the same supervisors,” and work in the same areas of the facility. (Tr. 38.) An outage employee can fill in for a core employee if the core employee gets sick. (Tr. 142-43.) They complete the same application materials and go through the same hiring process. (Tr. 96, 98.) And neither the employment agreements of the core workers nor the outage workers have an end date. (Co. Exs. 9, 11, & 12.) As McConnell explained, the termination of any employee’s work “could be tomorrow, it could be after the outage, it could be a year from now. You don’t

⁸ See also Co. Ex. 8 on the pay rates of workers. When an outage begins, core employees’ wages are increased, and they match the wages of outage employees. (Tr. 136-37.)

know. That is why we don't know how long somebody will be there.” (Tr. 95.)⁹ Although all employees, including outage employees, know how long an outage will last, “[s]ome of those [outage employees] stay and do . . . additional work” because there is no precise end date of their employment. (Tr. 121.) The number of employees who remain after the outage “depends on what work will be scheduled and what work needs to be done after the outage.” (Tr. 130). Furthermore, core workers do not necessarily have more job security than outage employees because “everybody is evaluated,” and the Company will “keep the most-qualified person.” (Tr. 107.) McConnell testified that, in the Company’s experience, a core crew member might be laid off and an outage employee retained, based on qualifications. (Tr. 107.) In sum the Company not only seeks to rehire outage employees for subsequent outages, but those outage employees do not necessarily have less job security than core employees; the performance of all employees is evaluated, and the best employees will have continual work at Comanche Peak. This further exemplifies how these employees are viewed and treated as a group with a strong community of interest.

Rather than address and weigh this evidence, the Regional Director instead focused on minor differences between core and outage employees that do not speak to their joint interests. For instance, he noted, “Core employees receive at least two identification badges,” with one providing “access to the protected areas” and the other “allow[ing] entry into outlying plant buildings, offices, and the training center.” (DDE at 4.) This was based on testimony by Catherine Kelly, Senior Radiation Protection Technician working for Luminant at Comanche Peak. Kelly used the badges as an example of how core employees are treated differently from outage

⁹ The Union further tried to make the core employees seem like strangers by noting some of them receive a per diem for living more than 50 miles from the plant, suggesting this means they are not part of the community surrounding Comanche Peak. Yet McConnell indicated core employees may be eligible for the per diem rate as well. (Tr. 101-02). He further indicated approximately 50% of outage employees received per diem payments, which means approximately half of outage employees have a residence within 50 miles of Comanche Peak. (Tr. 138.)

employees (whom she said generally possess only one badge), but she could not confirm that outage employees are never given two badges. (Tr. 169.) Furthermore, Kelly indicated employees who have double badges let outage employees “in these buildings to train,” using their badges to provide access. (Tr. 169.) The significance of the badges was overstated at the hearing because outage employees can in fact access areas they need to access for their work—just like the core employees they work alongside.¹⁰ Hearing Officer Gray herself noted, “[Kelly] doesn’t know the specific guidelines and procedures. She said it could include an outage employee if they need to get into an area. She is unaware of—she can’t tell you the specific provision that prevents an outage employee from having a double badge.” (Tr. 170-71.)¹¹

When considered holistically, the core and outage employees clearly share a community of interests. Focusing on minor differences such as badges and parking passes ignores the most important facets of their working relationship—the facets that the Board time and again emphasizes. These include several key facts: that these workers share the same job titles and descriptions, perform the same work, are paid the same rates, and work alongside one another at Comanche Peak.

¹⁰ In fact, the Regional Director did not determine whether the Lake Employees should be included in the unit, and according to the Petitioner’s witness, Brett Walden, they do not have any badges and work across the lake from the power plant, on Squaw Creek Park. (Tr. 182-83.) If they may still be considered part of the unit, then surely the outage workers should be part of the unit, given that they have at least one badge and perform the same work that core employees do on the grounds of the plant.

¹¹ The Regional Director also noted, “Core employees receive parking stickers for the long-term employees [sic] parking lot.” (DDE at 4.) This came from Kelly’s testimony as well. (Tr. 158.) Kelly merely said that core employees “get a parking sticker for [their] car so [they] can park a lot closer,” suggesting that outage employees park farther from the building. (Tr. 158.) The fact that year-round employees have a parking preference should surprise no one, and it should have no weight when considering the community of interest in the day-to-day jobs performed by core and outage employees.

B. The Regional Director Erred Because He Disregarded Evidence of the Expanding Unit at Comanche Peak.

In light of the strong community of interest between core and outage employees, the Regional Director erred in ignoring how the expanding-unit principles justified barring the election as premature.

1. As a Factual Matter, the Proposed Unit at Comanche Peak Was Significantly Expanding Within a Short and Certain Time Frame.

The Regional Director erred when he found the outage employees “are temporary employees” and that, as a result, the Company’s “plans to hire outage employees do not constitute an expanding unit.” (DDE at 2.) In his analysis, the Regional Director stated, “[T]he Board has long held where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries.” (DDE at 7 (citations omitted).) The Board frequently cites *Pen Mar Packaging Corporation*, 261 NLRB 874 (1982), for the standard regarding temporary employees. These decisions note that temporary workers have a relatively “finite” termination date and no “reasonable contemplation of continued employment beyond the term for which the employee was hired.” *Boston Med. Ctr. Corp.*, 330 NLRB 152, 166 (1999) (quoting *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992)). The Board has further stated, “The critical inquiry . . . is whether the ‘temporary’ employee’s tenure of employment remains uncertain” as of the eligibility payroll date set by the Board. *Id.* See also DDE at 7 (“The test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. . . . If the tenure of the disputed individuals is indefinite or uncertain and they are otherwise eligible, they are permitted to vote.”) (citations omitted).

The plans here are not inchoate but definite and certain. Many of the same outage employees are likely to return to Comanche Peak for the fall outage, and outage employees in

general will be rehired to hold these same positions on a recurring basis. The Company has a five-year contract with Comanche Peak to conduct M&M and RP outage work on both of the facility's units, so it is certain to continue this cycle. In fact, while many of the same outage employees can be expected to return in the fall, not every current core employee will necessarily be present in the fall, as each employee is evaluated to ensure the most qualified people are retained. (Tr. 107.) Importantly, although the Company has no history with Comanche Peak as to M&M outage employees, McConnell testified that, based on his experience "across the nation and our current customers, . . . it runs 85 percent returnees, on an average." (Tr. 83.) With respect to RP employees, the Company has a strong preference for rehiring them as returnees. As McConnell further testified, "[j]ust a few" of the RP returnees had previously worked at Comanche Peak for an employer other than the Company; "most of them" had in fact worked for the Company. (Tr. 85.)

The Regional Director relied on three facts to support his conclusion that these employees are temporary and not part of an expanding unit, namely: that employees are hired for a particular outage (DDE at 7), that not all of the RP returnees had previously worked for the Company (DDE at 7-8), and that there was no history of rehiring M&M employees at Comanche Peak (DDE at 7). These facts are inconsequential and ignore McConnell's testimony and the reasonable inferences therefrom. The Company, after all, has just started its five-year contract at Comanche Peak (DDE at 7), and the evidence of the Company's plans is undisputed. These facts do not negate that, as McConnell testified and as evinced with the RP and M&M employees, the Company has a strong preference for hiring returnees. (Tr. 32-33; 82-83; 108.) The Regional Director therefore failed to consider McConnell's testimony and infer that, if the Company rehires employees on a recurring

basis for outages at Comanche Peak, then the outage employees should be considered part of an expanding unit and not temporary employees.

Ultimately, contrary to the Regional Director’s finding, several of the outage employees have returned and/or will return for future outages, so they are not “employed for one job only.” They do have a “substantial expectancy of continued employment.” As the testimony of McConnell indicates, the Company has a strong preference for rehiring outage employees because they understand Comanche Peak and the work. (Tr. 32-33; 82-83; 108.) By emphasizing the fact that outage employees are not immediately offered a position during the next outage, the Regional Director erroneously stated the employees have a “tenure [that] is both certain and definite.” (DDE at 7.) On the contrary, this cyclical work is consistent with how seasonal employees are often treated—not immediately offered a job for the next cycle but having a “substantial expectancy of continued employment” because they understand the job and the employer. Furthermore, outage employees are informed about the next outage, and the Company “ask[s] for their interest” in returning; the Company only cannot commit to rehiring every outage employee because there is the possibility that work needs will fluctuate prior to the next outage. (Tr. 140-41.)

McConnell further testified that the work is seasonal, with outages occurring “basically fall and spring of every year, within those windows,” in order to avoid outages during the peak power seasons of winter and summer. (Tr. 31.)¹² Because of the cyclical nature of the work, plant owners “are pretty accurate within a week or two of when the outage is going to be.” (Tr. 112.) In early 2020, this allowed the Company to know for a certainty that the proposed unit was expanding;

¹² The Regional Director noted that Comanche Peak is switching from outages every 18 months to every 24 months, stating “the next planned outages will not happen until 2022.” (DDE at 6.) This is factually incorrect. First, the next planned outage is occurring this fall 2020, as the Regional Director otherwise noted in his decision. Second, it is unclear whether the Regional Director accurately interpreted how the outages occur, as Comanche Peak has two units, and they do not experience an outage at the same time. In other words, outage employees will be rehired for each unit’s outage, staggered in fall and spring on a 24-month cycle per unit. (Tr. 112.)

they were already hiring employees when the election petition was filed, and they knew how many employees they would be hiring (hundreds, in fact) and when they would be starting work. The petition was therefore premature and should have been dismissed or held in abeyance.

The Board's expanding unit principles seek to ensure that it does not "impose a bargaining representative on a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals." *Toto Indus. (Atlanta), Inc.*, 323 NLRB 645, 645 (1997). Using a case-by-case analysis to assess whether a unit is expanding, the Board considers factors including the size of the complement at the time of the hearing, the size of the expected complement, the rate of expansion, the nature of the industry, and the number of job classifications expected to change. *Id.* A key factor is whether the projected expansion is speculative or reasonably foreseeable in the near future. In those cases, the Board will dismiss a petition as prematurely filed in order to avoid disenfranchising a large contingent of the expected workforce. For instance, in *World Southern Corporation*, 215 NLRB 287, 287 (1974), the Board found that a Regional Director improperly ordered an election where the workforce was comprised of 297 employees at the time of the hearing but was expected to increase to 550 within 8 months. *See also J.R. Simplot*, 130 NLRB 272, 274-75 (1961) (election deferred where there were 52 employees at the time of petition, and that number was expected to expand to 175); *SCI Ill. Servs., Inc.*, 13-RC-21255 (Nov. 3, 2004) (petition dismissed as premature due to expected expansion from 8 employees to 150 in a 10-month period); *Altec Indus.*, 11-RC-6479 (May 9, 2002) (petition dismissed as premature where 21 employees were employed at time of hearing, with 150 anticipated to be hired within 2 years).

In analogous circumstances, the Board has recognized that it is unlawful to begin a bargaining relationship when recognition is premised on a showing of interest associated with a

workforce that has not yet reached representative complement status. In *O-J Transport Co.*, 333 NLRB 1381 (2001), the Board found an employer violated Section 8(a)(2) of the Act when it recognized and bargained with a union in a situation where it was expected to increase its workforce ten-fold within a matter of months. Similarly, in *Hilton Inn Albany*, 270 NLRB No. 207 (1984), the Board found an employer's recognition to be premature where, as here, a substantial number of the employees in the proposed unit had not yet performed any work for the employer. This was true even though such employees constituted over 30% of the expected anticipated unit complement and over 50% of the classifications at issue. *Id.*

In this case, the Regional Director failed to analyze these factors by relying on minor factors (such as one or two badges and parking spots) and by focusing on the literal start and end dates of the outage in order to find outage workers are temporary employees. This was so even though the expansion for the outage was going from 63 proposed unit employees to over 400 who fit the proposed descriptions, all within less than 2 months of the petition. (Co. Exs. 3 & 4.) The Regional Director even noted that "the M&M Manpower Request Form for the Spring 2020 Outage shows 17 separate hire dates starting on February 10, 2020, and ending on April 14. . . . For the Spring 2020 Outage, 259 of the projected 309 M&M outage employees are scheduled to be hired after March 29. Similarly, all 92 RP outage employees are scheduled to be hired between March 30 and April 20." (DDE at 5.) This was clearly a unit of workers with the same jobs that was ramping up and expanding in large, certain numbers over a short period of time. The Regional Director erred by focusing on the dates of the outage rather than the reality of the ramp-up and the working relationship between the core and outage employees.

The Regional Director further overemphasized the fact that some of the returning RP outage employees did not work for the Company when they were previously at Comanche Peak.

(DDE at 7-8.) The Regional Director acknowledged that the Company has not had these particular contracts at Comanche Peak for long (DDE at 3), and that does not diminish the fact that employees return to this site and that the Company has a practice of seeking to rehire outage employees. By emphasizing that there is “only a single season’s employment with regard to” the M&M employees and by arguing that this is unlike seasonal work because Luminant selects the seasons for outages, (DDE at 8 n. 12), the Regional Director has missed the forest for the trees. The point is that Comanche Peak has recurring and predictable outages, when it requires a significant increase of RP and M&M employees to work alongside its core RP and M&M employees; those outages will keep recurring, the Company will keep preferring to rehire employees from outage to outage, and the job descriptions and work will remain the same from outage to outage. As McConnell testified, “it is foreseeable that [the fall outage] will be very similar, if not the same.” (Tr. 108.) *Cf. Millbrook, Inc.*, 204 NLRB 1148, 1148-49 (1973) (ordering an election include “seasonal employees [who] work alongside and under the same supervision as year-round employees augmenting the year-round complement on the processing lines”). Based on the facts presented to and ignored by the Regional Director, Comanche Peak had an expanding unit of RP and M&M workers, all of whom should have been allowed to vote.

2. The Regional Director Relied on Inapposite Case Law and Drew Inferences from Such Authority That Are Not Applicable Here, Therefore Erring as a Matter of Law.

The Regional Director presented a handful of Board decisions in his analysis to suggest that the particular issues in this case have been decided by prior authority. For instance, he cited *Cajun Co, Inc.*, 349 NLRB 1031, 1034-35 (2007), which is distinguishable because the primary question for the Board was whether the workers were engaged in intermittent construction work or maintenance work, i.e., whether the *Daniel/Steiny* eligibility formula should be used; the Board found the work was primarily intermittent construction, both due to the tasks performed and the

fact that, during non-outage times, “the Employer has laid off its entire work force at a single plant and no work of any kind has been performed, causing the work during the non-outage period to be intermittent.” *Id.* at 1033. It is also unclear in that case whether the outages occurred with the kind of consistency we have in this case, as the employer in *Cajun Co.* had “multiple outages during the January-May period” but rehired few of the same employees for more than one outage in that period (20-25% of 18 outage employees were rehired). *Id.* at 1034, 1032. The Regional Director in *Cajun Co.* further noted, “Outage employees are not afforded any special preference for rehire.” *Id.* at 1036. This is unlike our case, wherein roughly half of RP employees were rehires who were present at Comanche Peak during the previous outage.¹³ Furthermore, whereas the Board in *Cajun Co.* emphasized the intermittent nature of the construction work, resulting in sporadic employment of both core and outage employees, the work in this case is not characterized by such unpredictable ebbs and flows.

The Regional Director cited another inapposite case, stating, “The Board’s decision in *E. F. Drew & Co.*, 133 NLRB 155, 156-7 (1961) is particularly on point” because it excluded temporary employees from the proposed unit. (DDE at 8.) Yet in that case, “[t]he record show[ed] that the Employer hired 26 employees during the month of April 1961,” and there is no mention of any repeat or cyclical work in the future. *E. F. Drew & Co.*, 133 NLRB at 156. When the Board found “it appears that these employees were hired for one job only,” those employees clearly had “no substantial expectancy of continued employment”—as the decision mentions no prospect

¹³ The Board did not comment on the outage employees’ expectation of future employment, focusing on the intermittent nature of the construction work overall and the *Daniel/Steiny* question. Yet the Regional Director noted “that ‘outage employees’ do have an expectation of future employment,” given that 20-25% of them “return[ed] for subsequent employment.” *Id.* at 1039. The Regional Director further noted those employees “possess[ed] a substantial interest in the Employer’s terms and conditions of employment,” which “warrant[ed] being eligible to vote and be included in the unit.” *Id.* Although the Board did not ultimately comment on this finding, it is noteworthy that, in the present case, roughly half of the RP employees were rehired from Comanche Peak’s prior outage and that the Company does have a preference for rehiring employees. (Tr. 32-33; 82-83; 108.)

of any other possible work in the future. *Id.* at 157. That is not the case here, where the Company has not only rehired outage workers but knows that future outages will occur and when they will occur.

Finally, the Regional Director cited *Sealite, Inc.*, another case where a group of workers was found to be temporary. 125 NLRB 619 (1959). (DDE at 8-9.) Yet in the single paragraph in which the Board evaluated these workers, it noted,

Part of the Employer's business consists of repairing leaks in sewer pipes. These jobs may occur either in California or in neighboring States, and frequently necessitate the hiring of truckdrivers and laborers on the site to help with the particular project. Such employees vary in number from 1 to 10 or 12 at any one time, and their employment may last from several days to several months. . . . As it appears that the aforementioned construction-site employees are hired for one job only, and have no substantial expectancy of continued employment, we find they are temporary employees and exclude them from the unit.

Id. at 619-20. It is unclear whether these temporary workers have much, if any, interaction with the permanent employees, and the temporary workers themselves appear to be scattered geographically and working on any particular day or handful of days at any point during the year. This is entirely different from the present case, where outage workers are routinely hired as a group to work alongside core employees at Comanche Peak.

Ultimately, the Regional Director erroneously stated the Company “briefly increases its workforce using an ‘outage crew.’” (DDE at 3.) This suggests the outage workers are a separate group that comes and goes quickly, divorced from the core group. In actuality, the outage employees consistently join the ranks of the core employees, ramping up for an outage and sometimes working at Comanche Peak even after an outage officially ends. As McConnell noted, “[A]ll the positions exist whether or not the requirements of the outage [mean] that you would need to fill all the positions. But all the positions exist.” (Tr. 143.) Even the Regional Director

noted that “[t]he Employer uses the same job classifications across core and outage crew employees” and that “outage employees perform the same work as RP core employees.” (DDE at 3, 6.) It therefore stands to reason that this was an expanding unit wherein the outage employees were excluded from voting even though they were immediately beginning work at Comanche Peak—performing the same tasks as core employees at the same location—and even though their job positions will continue to exist at Comanche Peak in the future.

C. The Union’s Petitioned-For Unit Is Not Conducive to Effective Collective Bargaining and Will Undermine Rather Than Promote Industrial Stability.

The Board has long held that part of its mission is to create efficient and stable collective bargaining relationships. *See Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962). This is why section 9(b) of the Act requires the Board to approve appropriate bargaining units “in each case” to ensure employees the “fullest freedom in exercising the rights guaranteed by” the Act. 29 U.S.C. § 159(b). The Board recognized this necessary balance in *Kalamazoo Paper Box Corporation*:

Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination . . . must have a direct relevancy to the circumstances within which the collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.

136 NLRB at 137 (internal citation omitted).

As experienced negotiators know, bargaining for only a part of an integrated workforce has the potential to undermine rather than foster industrial stability and also to create workplace friction between the represented and unrepresented groups. This case clearly illustrates the point. The core and outage employees all perform the same work side by side, at the same facility. The workers here all make the same wages, and those wages actually increase during an outage. (Tr.

136-37.) This “step-up” of wages applies to outage employees as well as core employees, and it shows a strong commonality of interest for purposes of collective bargaining and contract administration. Given their common job titles and duties, these employees all have an interest in determining how they are represented. The Regional Director’s decision ignores the commonalities among these workers and wrongly excludes the outage employees from having a seat at the table.

D. The Regional Director’s Allowance of Mail Ballots Over the Objection of the Company Departed from Board Precedent, Resulting in Prejudicial Error Affecting the Rights of the Company and Its Employees.

As the Company noted in its Statement of Position on the use of mail ballots (and the Union likewise conceded in its own statement), the Board has long held that representation elections should be held manually. *See, e.g., San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998) (“[T]he Board’s long-standing policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location.”). The Board recognizes “the value of having a Board agent present at the election” and has limited the use of mail ballots to those “extraordinary circumstances” that “make it difficult for eligible employees to vote in a manual election” or where a manual election “would be impractical, or not easily done.” *San Diego Gas & Elec.*, 325 NLRB at 1145, 1145 n.6. *See also Willamette Indus., Inc.*, 322 NLRB 856, 856 (1997) (finding Regional Director erred in ordering mail ballot election considering employees worked at a single site of employment, even if it was 80 miles from the Board’s office); CHM, Part II, Section 11301.2, 11302.2 (2017) (“The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually”; “[t]he best place to hold an election, from the standpoint of accessibility of voters, is somewhere on the employer’s premises. In the absence of good cause to the contrary, the election should be held there.”); N.L.R.B., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, 22-110, 22-105 (2017) (“The Board’s longstanding rule is that elections should, as a

general rule, be conducted manually”; “[e]lections are generally held on the employer’s premises in the absence of good cause to the contrary.”). The extraordinary circumstances that may justify use of mail ballots 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 they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress.

San Diego Gas & Elec., 325 NLRB at 1145. The Board has noted, “[I]n the absence of extraordinary circumstances, we will normally expect the Regional Director to exercise his or her discretion within the[se] guidelines.” *Id.* Ultimately, “[t]he purpose of such narrow criteria is to ensure that mail balloting is employed in a limited number of cases each year.” *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 797 (3d Cir. 1999).

None of these extraordinary circumstances existed in this case. All voters in the approved unit worked at a single site, Comanche Peak, despite the pandemic. The Union highlighted this fact in its Statement of Position on a mail ballot election (“Union SOP”):

- “The employees here are all on the job, and thankfully they are, otherwise we would all be self-quarantining in the dark.” (Union SOP at 1.)
- “[U]nit employees are working on the jobsite everyday [sic]. The worksite is a nuclear power plant, clearly an essential business.” (Union SOP at 2.)
- “There would be nothing inherently more dangerous about voting than there is in employees’ normal work activity at the plant.” (Union SOP at 2.)
- “Though there is an ongoing pandemic that has shut down many workplaces around the country, [Comanche Peak], where the parties here had previously agreed that an election should be held, is not one of those places.” (Union SOP at 3.)
- “Employees in the petitioned-for unit here have been reporting to work every day, just as they have been since the petition in this case was filed.” (Union SOP at 3.)

In addition to these facts, the Union noted, “The only apparent obstacle to a manual election [was] the Region’s concern for its own employees.” (Union SOP at 1.) The convenience of the unit

employees, and their access to voting, should have been the primary concern and should have mandated a manual election.

Further, the Company was advised that Luminant would permit an election to occur on-site, including access by Union representatives, Company representatives, and Region representatives, provided that they all observed safety policies and procedures related to the COVID-19 pandemic. This included answering a questionnaire regarding whether they were displaying any COVID-19 symptoms or had traveled outside the state of Texas within the past 30 days, as well as having a temperature screening on-site before entering the area with the proposed voting location. The proposed voting room (which the Union proposed and to which the Company agreed) was large enough to accommodate appropriate social distancing protocol both for the in-room participants and those waiting in line to vote. The Company was also amenable to a release schedule or expanded voting times to lessen any voting lines. All of these measures would have been consistent with what essential businesses have been doing across the country for months during this pandemic. In fact, the employees at Comanche Peak were already subject to daily temperature checks, had masks, and practiced social distancing. The traditional safety measures that already exist at heavily regulated nuclear facilities were heightened during the pandemic, making in-person voting perfectly feasible and safe.

The Company proposed holding the election on-site either before or after the outage, given the constraints on the employees, who work 12-hour shifts in protected areas that would be difficult to exit and reenter in order to vote. In its April 6, 2020, Statement of Position, the Company proposed that—if the Board would not delay a vote until after the outage—an in-person election should be held on April 16, 2020, or April 23, 2020. The proposed voting time windows were 5:00 a.m. to 8:00 a.m. and 4:30 p.m. to 7:00 p.m. to accommodate everyone's schedule and their

need to socially distance. Even in cases where employees are more scattered and work varied schedules, the Board has upheld the decision to hold a manual election, in part because “the applicable presumption favors a manual, not a mail-ballot election.” *Nouveau Elevator Indus.*, 326 NLRB 470, 471 (1998). *See also id.* at 470 (finding no abuse of discretion in ordering a manual election where over 1,600 employees of different employers were located throughout New York City and New Jersey, working a “myriad of schedules, including being on-call 24 hours a day”).

Yet the Regional Director ordered a mail ballot election in this case regardless, going against established precedent in a way that is not justified by the existence of COVID-19. First, the core employees in the unit were essential workers who were present at the site and able to vote either before or after the outage, as proposed. All appropriate protocols for mitigating COVID-19 risk were in place; contrary to the Regional Director’s statements in his Order and Supplemental Direction of Election (“Order”), there was no greater risk of exposure to the virus through a manual election versus a mail ballot election, given the ability to sterilize the voting location at Comanche Peak and ensure everyone used personal protective equipment (“PPE”). Further, it is not the case that, “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.” (Order at 1-2.) There is no evidence of uncertainty around the ability of Comanche Peak, an essential business that was not closing, to organize an election for roughly 62 employees. The Regional Director also claimed “sending a Board agent to conduct the election would risk the exposure of everyone at the facility.” (Order at 3.) The Regional Director cited the potential for the virus to spread on shared pens, pencils, and ballots (Order at 4), yet authorities

including the CDC indicate the virus does not travel primarily on surfaces.¹⁴ The Regional Director even groundlessly claimed a manual election could jeopardize the nation’s energy supply because of the consequences of an outbreak at Comanche Peak (Order at 2, 4)—notwithstanding the fact that all employees were already working at Comanche Peak and were highly unlikely to contract the virus from Board and Union representatives who would have been present at the election, all wearing PPE, social-distancing, and observing sanitization measures.

Second, the Board issued a statement on April 1 indicating that, despite suspending elections temporarily due to COVID-19, it would “not extend its temporary suspension of Board-conducted elections past April 3, 2020 and will instead resume conducting elections beginning Monday, April 6, 2020.”¹⁵ The Regional Director even noted that the Board had lifted its suspension on elections on April 1 and further acknowledged that even the Union favored a manual election. (Order at 1.) If a manual election were allowed to happen anywhere, a heavily regulated essential business like Comanche Peak would be the place to hold one, yet the Regional Director simply dismissed each proposed mitigation measure as inadequate. In sum, there was no need to break with the Board’s long-standing principles on voting procedure, notwithstanding the Regional Director’s views.

Ultimately, the Union won the election by a 27 to 21 vote margin, with 10 employees not voting—meaning roughly 16% of the 62 eligible voters did not return their mail ballots. Because in-person voting yields higher turnout than mail ballots, these 10 individuals were more likely to

¹⁴ The CDC has consistently stated the virus does not primarily spread through surfaces or objects versus through close human contact wherein droplets are spread through sneezing, coughing, or talking at close range. *See, e.g.,* Jacey Fortin, *Surfaces Are “Not the Main Way” Coronavirus Spreads, C.D.C. Says*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/2020/05/22/health/cdc-coronavirus-touching-surfaces.html> (last visited June 17, 2020). With PPE, sanitization measures, and social-distancing, it would be highly unlikely for the virus to spread on pens, pencils, or ballots.

¹⁵ See Office of Public Affairs, *NLRB Resumes Representation Elections*, NLRB (Apr. 1, 2020), <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections> (last visited June 14, 2020).

have voted if the election were conducted on-site. This is particularly true during the pandemic when the U.S. Postal Service has reported delays and other delivery issues due to COVID-19.¹⁶ Furthermore, the Board has noted that “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.” *Thompson Roofing, Inc.*, 291 NLRB 743, 743 n.1 (1988). *See also Brink’s Armored Car*, 278 NLRB 141, 141 (1986) (“The danger that the laboratory conditions surrounding an election may be destroyed are greater in mail balloting situations than in manual elections because of the absence of direct Board supervision over the employees’ voting.”). The lack of supervision may have contributed to the fact that 1 ballot was void for lack of signature, as employees did not have Board representatives present during voting to answer questions. Mail ballots also “generally inspire lower participation than on-site elections.” *Kwik Care v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996). The unjustified decision to use mail ballots in this case effectively disenfranchised roughly 16% of eligible employees, whose votes would have been adequate to change the result of the election.

V. **CONCLUSION**

For all of the foregoing reasons, the Company asks that its Request for Review be granted and the Regional Director’s Decision and Direction of Election be reversed, that certification be set aside, and that either the petition be dismissed or a new election be ordered that includes outage employees, who will return to Comanche Peak in fall 2020. In the alternative, the Company requests the Board order a new election that is conducted on-site, not through mail ballots.

¹⁶ *See, e.g., USPS Coronavirus Updates: Expected Delivery Changes*, USPS (Apr. 17, 2020), <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes> (last visited June 14, 2020); Jake Offenhartz, “*The Mail Just Stopped*”: *Coronavirus Staffing Shortages and Budget Gaps Push Postal Service to Brink of Collapse*, GOTHAMIST (Apr. 2, 2020), <https://gothamist.com/news/mail-coronavirus-staffing-postal-service-covid-19> (last visited June 14, 2020).

June 19, 2020

Respectfully submitted,

/s/ Arthur T. Carter

Arthur T. Carter

Texas Bar No. 00792936

Lisa M. Thomas

Texas Bar. No. 24113509

Littler Mendelson, P.C.

2001 Ross Avenue,

Suite 1500, Lock Box 116,

Dallas, TX 75201-2931

(214) 880-8100 (Telephone)

(214) 880-0181 (Facsimile)

atcarter@littler.com

lmthomas@littler.com

and

Noah G. Lipschultz

Littler Mendelson, P.C.

1300 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

(612) 630-1000 (Telephone)

(612) 630-9626 (Facsimile)

nlipschultz@littler.com

ATTORNEYS FOR
THE ATLANTIC GROUP, INC.,
AN INDIRECT SUBSIDIARY OF
DAY AND ZIMMERMANN

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020, a copy of the Employer's Request for Review of Regional Director's Decision and Direction of Election was served on the following persons:

Timothy L. Watson
Regional Director
National Labor Relations Board, Region 16
Fritz G. Lanham Federal Building
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6107
Served by e-filing at nlrb.gov

Michael A. Murphy
Counsel for Petitioner
Served by email at Michael.Murphy@IBEW.org

/s/ Arthur T. Carter
Arthur T. Carter

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