

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 28**

**VALLEY HEALTH SYSTEMS, LLC d/b/a  
SPRING VALLEY HOSPITAL MEDICAL CENTER**

**Employer**

**and**

**Case 28-RC-260389**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
LOCAL LODGE SC711<sup>1</sup>**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

Valley Health Systems, LLC d/b/a Spring Valley Hospital Medical Center (the Employer) operates an acute care hospital located in Las Vegas, Nevada (the Employer's facility). International Association of Machinists and Aerospace Workers, Local Lodge SC711 (Petitioner) seeks to represent a unit of technical employees employed at the Employer's facility. Petitioner requests that the election be conducted by mail ballot in light of the extraordinary circumstances presented by the ongoing COVID-19 pandemic.

The Employer contends that the petitioned-for unit is inappropriate because it includes classifications of employees who are not technical employees (respiratory therapists I, II, and III, collectively called respiratory therapists, and the buyer/pharmacy), and it does not include some classifications of employees who are technical employees (tech-OB and tech-OB certified, collectively called OB technicians). Specifically, the Employer contends that respiratory therapists are professional employees, the buyer/pharmacy is a clerk, and OB technicians are technical employees.<sup>2</sup> The Employer further contends that the conduct of a mail ballot election

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<sup>1</sup> The names of both parties appear as amended at hearing.

<sup>2</sup> At hearing, the parties stipulated that any technical unit in which the Regional Director ordered an election should include employees employed in the tech-pharmacy and tech-pharmacy (non-cert) (collectively, pharmacy technicians), tech-OR/surgical (cert) (surgical technicians), imaging special procedures imaging technicians, cardiac catheterization lab imaging technicians, occupational therapy assistants, physical therapy assistants, and hyperbolic technician classifications, and I accept that stipulation based on the evidence in the record. The record additionally references an OB-LVN classification, a licensed vocational nurse employed in the Labor/Delivery department. The parties stipulated that, while that position existed at one time, currently, no employee is employed in that position, and there is no expectation that classification will be used in the future. Based on the record evidence, I accept this stipulation and have not referenced the OB/LVN classification in this decision.

is appropriate because a manual election can be conducted safely and because the Board prefers the conduct of manual elections.

A hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing in this matter on May 27, June 2, and June 3, 2020. As explained below, based on the record, the arguments of the parties, and relevant Board law, I find that the record establishes that respiratory therapists, the buyer/pharmacy, and OB technicians are technical employees and must be included in the Unit. There are approximately 110 employees in the unit found appropriate. I further find that the conduct of a mail ballot election is appropriate under the present circumstances.

## **I. APPROPRIATE BARGAINING UNIT**

### **A. Facts**

#### **1. Respiratory Therapists**

The Employer employs approximately 63 respiratory therapists in the respiratory therapy department. Three of these employees are currently employed in the respiratory therapist I position, 50 are employed in the respiratory therapist II position, and 10 are employed in the reparatory therapist III position, with each successive classification indicating an advancing level of skill and knowledge in cardiopulmonary care.

Respiratory therapists are employed throughout the hospital in many departments, working directly with patients. Three employees, in the supervisor of respiratory therapy classification, are the department's first line supervisors. These supervisors report to the department head, the manager of respiratory therapy, who currently holds that position on an interim basis.<sup>3</sup>

Physicians establish a plan of care for a patient, and respiratory therapists are responsible for implementing that plan in their area of specialty. Respiratory therapists assess patients' respiratory condition by metrics such as respiratory rates, lung function, and oxygen saturation, using visual examination and tools such as a stethoscope or pulse oximeter. More skilled respiratory therapists can also collect information using more complex techniques, such as obtaining an arterial blood gas sample. Respiratory therapists analyze the information provided by these samples, not the samples themselves. For example, when an arterial blood gas sample is collected, the sample is analyzed automatically by equipment and provides a result. If not done automatically, a sample is sent to a lab and the lab performs an analysis. The respiratory therapist will take the information provided and use it in implementing the plan of care.

Respiratory therapists also chart the information they collect. When part of a plan of care requires a patient achieve a certain blood oxygen saturation level, or receive respiratory

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<sup>3</sup> The parties stipulated at hearing that respiratory therapist leads, a separate position from the supervisor of respiratory therapy, are not supervisors within the meaning of Section 2(11) of the Act. Based on the record evidence, I accept this stipulation.

treatment, a respiratory therapist will perform that function, providing oxygen therapy or delivering nebulizer treatments. When directed by a physician, respiratory therapist will place a patient on a ventilator, including intubating the patient.<sup>4</sup>

In performing their work, respiratory therapists may develop an opinion regarding modification of the plan of care, and they may take these concerns to the physician. Although the plan of care is directed by the physician, a respiratory therapist has discretion regarding how that plan of care is implemented. For example, a respiratory therapist may decide whether nasal cannula or an oxygen mask is the best method to deliver oxygen to a patient. When administering care, the respiratory therapist also makes decisions regarding factors such as flow rates.

Respiratory therapists also work with others in developing and implementing new patient care procedures in their area of specialty. The record describes how physicians, respiratory therapists, and nurses studied how “proning” – essentially rotating a patient from a face up to a face down position in a safe manner – could assist patients on ventilators. This same group then developed a strategy to implement the practice at the Employer’s facility.

Respiratory therapists are required to be a graduate of an American Medical Association approved Respiratory Technician/Therapist program, a two-year program. Approximately 10 of the 63 current respiratory therapists have a bachelor’s degree, but this is not required by the Employer for hire or advancement. The Employer requires respiratory therapists to hold a current State of Nevada Practitioner of Respiratory Care license and a State of Nevada Blood Gas Technologist, Blood Gas Assistant, or General Supervisor license. The licensing requirement in Nevada requires respiratory therapists to complete 22 hours of continuing education biannually.

Although not required at the time of hire in a respiratory therapist I position, in order to work in certain hospital departments or to advance to the respiratory therapist II and III classifications, respiratory therapists must obtain additional specializations. In order to work in the neonatal or critical care departments, a respiratory therapist must obtain an advanced critical life support, neonatal resuscitation provider, or pediatric life support certification. In order to become a respiratory therapist III, an employee must become either a registered respiratory therapist certified by the National Board of Respiratory Care (NBRC), neonatal pediatric specialist, or advanced critical care specialist certified by the NBRC, or have three years of experience in neonatal or adult critical care and the critical care certification described previously.<sup>5</sup>

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<sup>4</sup> Physicians also intubate patients; the record does not detail the full extent of when this is the responsibility of a physician and when it is the responsibility of a respiratory therapist. A physician makes the decision to intubate in either instance.

<sup>5</sup> At hearing, it was disputed whether the Employer would, going forward, require all new respiratory therapist hires to be registered by the NBRC, which requires passing a two-part examination consisting of a written exam and a clinical simulation. The requirement does not appear in the current position description for the respiratory therapist I or II position; it only appears in the position description for the respiratory therapist III position. While I do not find the record supports finding registration by the NBRC is a requirement for hire, I do note that 60 of the Employer’s 63 respiratory therapists are registered.

Respiratory therapists do not work outside the respiratory therapy department, but they may move outside their typical work location. For example, a respiratory therapist who works in neonatal intensive care may work in the emergency department in the event additional help is needed in the emergency department, but the respiratory therapist will always be performing the work of a respiratory therapist. This type of movement has limitations. For example, a respiratory therapist without neonatal pediatric specialist certification could not assist in the neonatal intensive care unit.

Respiratory therapists I earn \$24.00 to \$24.50 an hour, respiratory therapists II earn \$30.00 to \$45.00 an hour, and respiratory therapists III earn \$35.00 to \$47.00 an hour.

## **2. OB Technicians**

The Employer employs approximately 8 OB technicians in the Labor and Delivery department. The OB technicians report to the clinical supervisor for the department, a registered nurse, and the director of women's services, the overall department manager.

OB technicians assist with caesarean section and vaginal births, functioning as a surgical technician. When assisting in a C-section birth, an OB technician prepares the physician's table, including gathering the necessary instrument packs and preparing those tools in the manner preferred by the physician. The hospital keeps records of physician preferences, although an OB technician is likely to know the preferences of a physician with whom the technician works frequently.

During the procedure, the OB technician is responsible for handing the physician the requested instruments and then collecting those instruments. An OB technician is expected to have familiarity with the C-section procedure and be able to anticipate what the physician is likely to need in order to facilitate an efficient and safe procedure. The OB technician keeps a count of all instruments, sutures, sponges, and any other items used during a procedure so that all materials are monitored and accounted for at the conclusion. The OB technician is also responsible for monitoring the room throughout the procedure to verify a sterile environment is maintained. If the OB technician observes a deviation or a risk to the sterile environment, they notify all present, and the procedure stops.

When a C-section is complete, the OB technician is responsible for assisting in cleaning the room, collecting any instruments, and disposing of them or returning them for cleaning as appropriate. The OB technician will also make sure that any specimen collected during a procedure is sent to the appropriate laboratory for analysis.

When assisting in a vaginal birth, the OB technician tracks the progress of a patient's labor and anticipates when delivery may occur. They then collect the materials needed for the physician that will be assisting in the birth. When the patient is ready for delivery, the OB technician and will assist with positioning the patient. The OB technician is also responsible for a quantitative blood loss calculation, determined by weighing the amount of fluid collected during the process. Because family may be present during this type of birth, the OB technician may also assist with communication with non-employees in the room.

The Employer requires OB technicians to have a high school diploma and to have completed a surgical technician program, a program typically lasting about one year. Surgical technicians can receive a certification from the National Board of Surgical Technology and Assisting following an examination. Recent changes in Nevada state law require that, in order to be employed in the “practice of surgical technology” by a health care institution, an individual must have completed an accredited a surgical technologist program and been certified, have completed the training program for surgical technologists in the armed forces, or have engaged in the practice of surgical technology in a health care facility before January 1 of 2018.” The record indicates that going forward the Employer will require OB technicians to be certified, consistent with the law, but that it has grandfathered its current non-certified employees, a practice similarly consistent with the law.

Upon starting at the hospital, OB technicians receive between 3 to 6 weeks of additional training from the Employer. OB technicians earn up to \$39.00 an hour.

### **3. Buyer/Pharmacy**

The Employer employs numerous pharmacy technicians in its pharmacy.<sup>6</sup> Pharmacy technicians package and distribute medications throughout the Employer’s facility. This can be done by delivering medication in bulk to dispensing machines located in departments, where the department staff will dispense and label the medications, or by individually packaging and labeling medication in the pharmacy for patient use. There is no evidence pharmacy technicians deliver medication directly to patients.

Pharmacy technicians also inject intravenous medications into IV bags for medication that is dispensed in this manner. Pharmacy technicians will also visit departments to retrieve items, such as a crash cart, that, once used, need to be restocked by the pharmacy. After the restocking process is done, the items are returned to their respective departments. Pharmacy technicians are required to be a high school graduate and hold a Nevada pharmacy technician license.<sup>7</sup>

The buyer/pharmacy classification is a specialized role for a pharmacy technician, currently one employee is employed in this position full-time and another pharmacy technician occasionally performs this role. The buyer/pharmacy classification reports directly to the director of pharmacy and works out of an office located near the pharmacy, next to the office of the director of pharmacy. The buyer/pharmacy is required to be a high school graduate, have a pharmacy technician license, and 5 years’ experience as a pharmacy technician.

The buyer/pharmacy is responsible for ordering medications, from wholesalers that have a contractual relationship with the Employer, to maintain stock within certain parameters. The contractual relationships are established by the Employer’s corporate office, and the number of

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<sup>6</sup> A retail pharmacy is located at the hospital but is separate from the internal pharmacy that provides medication to the various departments in the hospital. Only the Hospital’s internal pharmacy is involved in this case.

<sup>7</sup> The parties stipulate that the pharmacy technicians are properly included in the petitioned-for technical unit.

doses kept in the pharmacy, referred to as PAR level, is a range established by the Director of Pharmacy. The buyer/pharmacy will also work with suppliers to resolve supply issues.

The buyer/pharmacy has some discretion regarding the number of doses kept in stock. Within the PAR range, the buyer/pharmacy can adjust the amount ordered to match anticipated need, for example ordering additional flu vaccine prior to flu season. The record indicates this type of anticipatory ordering may occasionally exceed the PAR level and may occur as frequently as several times a week when the hospital is experiencing high volumes. The buyer/pharmacy will frequently consult with director of pharmacy before exceeding PAR levels, or report after the fact, but is not required to in every instance.

The buyer/pharmacy does not take part in rounding, the regularly scheduled deliveries to nursing units to restock medication, or other pharmacy technician duties. The pharmacy technicians and the buyer/pharmacy are in regular contact, and both the pharmacy technicians and the buyer/pharmacy collect medication deliveries and bring them to the pharmacy.

Pharmacy technicians earn between \$20.52 and \$30.45 an hour. The buyer/pharmacy earns \$30.78 an hour.

## **B. Analysis**

The Board's Health Care Rule, at Section 103.30 of the Rules and Regulations of the Board, provides that, absent circumstances that do not apply here, the following eight units are the only appropriate units in an acute care hospital: (1) all registered nurses, (2) all physicians, (3) all professionals except for registered nurses and physicians, (4) all technical employees, (5) all skilled maintenance employees, (6) all business office clerical employees, (7) all guards, and (8) all other nonprofessional employees.

Technical employees, one of the eight units identified in the Health Care Rule, have traditionally been defined by the Board as those who "do not meet the strict requirements of the term 'professional employees' as defined in the Act, but whose work is of a technical nature, involving the use of independent judgment and requiring the exercise of specialized training usually acquired in colleges or technical schools, or through special courses." *Rhode Island Hospital*, 313 NLRB 343, 353 (1993); quoting *Litton Industries of Maryland*, 125 NLRB 722, 724-725 (1959).

The Board has additionally noted, in the Health Care rule and subsequent cases, that most hospital technical employees are either certified following an examination, licensed, or required to register with an appropriate state authority. *Rhode Island Hospital*, 313 NLRB at 353, citing *Barnert Memorial Hospital*, 217 NLRB 775, 776 (1975). Technical employees play a support role and work in patient care, are typically paid more than nonprofessional employees, and have little interchange with other nonprofessionals. *Id.*; *Meriter Hospital, Inc.*, 306 NLRB 598, 599 (1992).

Respiratory therapists and respiratory technicians have been found to be technical employees by the Board in several cases. See *Trinity Memorial Hospital of Cudahy*, 219 NLRB 215, 216 (1975), *St. Elizabeth's Hospital of Boston*, 220 NLRB 325, 327 (1975); *William W.*

*Bockus Hospital*, 220 NLRB 414, 417 (1975); *Children's Hospital of Pittsburgh*, 222 NLRB 588, 593 (1976); *Alexian Brothers Hospital*, 219 NLRB 1122, n. 5 (1975). Surgical technicians have similarly been found to be technical employees, as have pharmacy technicians. *Trinity Memorial Hospital of Cudahy*, supra at 217; *Meriter Hospital, Inc.*, supra at 601.

Professional employees are defined in Section 2(12) of the Act, which states, in summary, that a professional employee is one engaged in work that is predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment in its performance, and that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. Consistent with this criteria, in the acute care hospital context, the Board has found classifications such as chemists, pharmacists, and social workers to constitute professional employees. *Barnert Memorial Hospital Center*, 217 NLRB at 783, *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981).

### **1. Respiratory Therapists**

I find the evidence establishes respiratory therapists are properly categorized as technical employees. Their duties, implementing the cardiopulmonary portions of a plan of care determined by a physician, are technical in nature. The record establishes the regular use of independent judgment in determining how to best accomplish the goals established by this plan of care, or in the methods used. Further, respiratory therapists clearly possess specialized training, and that specialized training is acquired in a specialized respiratory therapy program. Finally, almost all the Employer's respiratory therapists have been certified following an examination, even if this aspect of their employment may not be required immediately upon hire. All respiratory therapists are required to maintain a license with the State of Nevada.

The Employer contends that the specialized knowledge and skills of the respiratory therapists are so advanced to have transcended the technical skills and become professional. I disagree. My determination is not based on the statutory language regarding professional work being predominantly intellectual, varied, and involving the regular exercise of discretion and judgment. As noted above, these elements do exist to a degree in this position. However, I do not find that the two-year degree required of respiratory therapists is knowledge "of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital." This two-year degree, even if the additional 3-month course of study for registration with the NBRC, is dissimilar to the education requirements for classifications traditionally found professional by the Board, such as chemists, pharmacists, and social workers.

The education requirements typical of respiratory therapists or respiratory technicians are part of the reason the Board has traditionally placed this classification in technical units. Additionally, respiratory therapists work in patient care, in patient care departments, under the direction of physicians. Although the record evidence paints a detailed picture of what work respiratory therapists perform, and how they accomplish those duties, I do not find the Employer has identified significant differences between the respiratory therapists at issue in this case and

those employees in the cases cited above where the Board found respiratory technicians properly included in a technical unit.<sup>8</sup>

For the reasons stated, I find that the approximately 63 respiratory therapists must be included in the unit.

## 2. OB Technicians

As an initial matter, I note that, although their title differs slightly, the OB technicians at issue here are surgical technicians employed in the Labor and Delivery department. Because of their role in assisting with vaginal births, their range of duties and skills may be wider than some surgical technicians, but their function is nearly identical to that traditionally associated with the surgical technician classification. Indeed, they are educated in surgical technician programs and licensed accordingly.<sup>9</sup>

The Board addressed the question of surgical technicians in detail in *Rhode Island Hospital*, 313 NLRB at 353. In that case, surgical technicians prepared the equipment, instruments and tables necessary for the surgeon prior to a procedure. During the procedure, they passed instruments and sutures to the surgeon and were responsible for keeping the entire operating area sterile. During surgery, they were responsible for handling any tissue removed by the physician for testing purposes, including by ensuring that the tissue was properly labeled and preserved. After a procedure, it was the surgical technicians' responsibility to clean the tables and instruments and assist in cleaning the area. In order to perform these functions, the surgical technicians in received special training, ranging from 3-months to a year, but the employer only required a high school diploma. *Id.* There was no requirement that the surgical technicians be licensed or certified. *Id.* at 353-354. In finding the surgical technicians to be technical employees, the Board noted that, although some of their duties were routine, others, such as anticipating the needs of the doctors performing surgery, were clearly skilled, and, further, the Employer allowed discretion, such as the order and arrangement of the instrument tray. *Id.*

Here, the duties of the OB technicians are nearly identical to those of surgical technicians in *Rhode Island Hospital*. The OB technicians use their discretion during procedures, they anticipate the needs of the doctors performing surgery, and the Employer allows discretion in areas such as the order and arrangement of the instrument tray and determining when to stop a procedure because sterile conditions have been compromised. Petitioner argues stopping a procedure if the glove of a surgeon rips, one example used in the record, does not require independent judgement. However, this is the exception that proves the rule. If this were the only instance where sterile conditions were compromised, the Employer could simply have a policy that a procedure stops when this occurs, but this is not the only instance that can compromise the sterile environment. Because the sterile conditions can be compromised in myriad ways, an OB

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<sup>8</sup> I note that in certain cases cited by the Employer, such as *Lakeside Community Hospital, Inc.*, 307 NLRB No. 189 (1992), the Board merely left a professional unit containing respiratory therapists undisturbed; it did not analyze their inclusion.

<sup>9</sup> As noted previously, the parties have stipulated to the inclusion of surgical technicians in the petitioned-for bargaining unit, and I have accepted that stipulation.

technician is trained in what is and is not sterile, and they then apply that knowledge to what they observe.

Petitioner appears to argue that the OB technicians here are not technical employees, and are instead more aligned with nonprofessional employees, because some OB technicians are not certified. While it is true that the Employer employs some OB technicians who are not certified as surgical technicians, they are grandfathered consistent with Nevada law. I do not find this factor alone outweighs the other factors suggesting OB technicians are technical employees. As noted above, the OB technicians in *Rhode Island Hospital* also lacked certification.

For the reasons stated, I find that the approximately 8 OB technicians employed in the Labor and Delivery department must be included in the unit.

### **3. Buyer/Pharmacy**

The record evidence demonstrates that, while a separate classification with a separate title, the buyer/pharmacy classification is a pharmacy technician with a specialized set of duties.<sup>10</sup> It is not disputed that the regular pharmacy technicians do not perform the medication ordering function of the buyer/pharmacy, and that the buyer/pharmacy does not perform the medication delivery and stocking function of the pharmacy technicians. However, the two classifications work in the same department and have the same education requirements and the same license. Further, the requirement that the buyer/pharmacy have five years' experience as a pharmacy technician, and that the wage rate is within cents of the top of the pharmacy technician wage scale, is strong evidence that the buyer/pharmacy is a position for an experienced pharmacy technician with a certain skill set. As such, I find the Board's determinations placing pharmacy technicians in technical units, cited previously, are strong evidence the buyer/pharmacy is a technical employee.

The Board's standard for technical employees is met when the buyer/pharmacy position is considered. The work is of a technical nature: it is not the ordering and data entry of a clerk but ordering that requires judgment regarding volume based on knowledge gained regarding the ebb and flow of medication use as a pharmacy technician. The specialized training obtained in a pharmacy technician program is the basis for this knowledge, as with many employees in technical classifications. It is true that the buyer/pharmacy does not work directly in patient care, but in this regard the work of the buyer/pharmacy is the same as pharmacy technicians, and that has not prevented the Board from traditionally finding pharmacy technicians to be technical employee.

The Employer argues the buyer/pharmacy is equivalent to a purchaser, excluded from a technical unit in cases such as *Rhode Island Hospital*, supra, because they were not involved in patient care. I do not find the buyer/pharmacy is equivalent to a clerk ordering general supplies according to set parameters. The buyer/pharmacy is a licensed pharmacy technician in the pharmacy department applying pharmacy knowledge to make decisions regarding ordering. I do not find the buyer or purchaser cases cited by the Employer as applicable. Further, to the extent

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<sup>10</sup> As previously noted, the parties stipulated to the inclusion of the pharmacy technicians in the petitioned-for technical unit, and I have accepted that stipulation.

the buyer/pharmacy is defined as a clerical position, I would find the proper parallel to be that of a plant clerical, an analogy that would still place the buyer/pharmacy in the technical unit with the pharmacy technicians.

For the reasons stated, I find that the buyer/pharmacy must be included in the unit.

## II. APPROPRIATE ELECTION METHOD

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 Electric*, 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 & Electric* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.*

Like much of the United States, Nevada responded to the initial COVID-19 outbreak by instituting an emergency order to restrict social gathering and movement in March of 2020. In response to an improved public health situation in early May 2020, a phased reopening began. On May 28, 2020, Nevada entered the second phase of this plan, which allows public and private gatherings of 50 or fewer people.<sup>11</sup>

Here, Petitioner contends that a mail ballot election is appropriate due to the extraordinary circumstances presented by the ongoing COVID-19 pandemic.

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<sup>11</sup> As requested by the Employer, I take notice of Governor Sisolak's Declaration of Emergency Directive 018 and Declaration of Emergency Directive 021 ("Directive 21"), [http://gov.nv.gov/News/Emergency\\_Orders/2020/2020-05-28 - COVID-19 Declaration of Emergency Directive 021 - Phase Two Reopening Plan \(Attachments\)](http://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28 - COVID-19 Declaration of Emergency Directive 021 - Phase Two Reopening Plan (Attachments)). I also note that, following the hearing, the Employer submitted a position statement citing: a press release issued by Governor Sisolak on June 4, 2020, noting a downward trajectory in the positive test rate for COVID-19 in Nevada at that time and stating that hospitals were appropriately stocked (<https://nvhealthresponse.nv.gov/wp-content/uploads/2020/06/06.03-NV-COVID-UPDATE.pdf>); the fact that casinos in Las Vegas were permitted to reopen June 5, 2020; and facts regarding the election in Case 28-CA-254977 in which only one ballot was counted for a unit of four employees the return of an unsigned ballot with no means of identifying the voter and the return of a ballot sent to an incomplete address. Although the introduction of additional evidence following the close of a hearing requires a motion to reopen, and the submission of a post-hearing brief would require permission of the Regional Director, I have taken administrative notice of the facts stated by the Employer and have considered them in making this decision, given that they consist of information contained in a state governor's press release, the widely known fact of casinos reopening, and facts concerning the conduct of a Board election by this Region.

The Employer maintains that a sufficiently safe manual election can be held at the hospital if proper safeguards are followed. To this end, the Employer entered in the record the steps it has already taken to prevent the spread of COVID-19 infection in its facility, including:

- (1) upon entry to the hospital, all employees, patients, and permitted visitors have their temperature screened, and, if a patient registers a high temperature, they are categorized as a “patient under investigation” and immediately placed in an isolation room;
- (2) all staff caring for patients under investigation wear appropriate PPE;
- (3) upon entry to the hospital, all employees, patients and permitted visitors are asked verbal screening questions released by the CDC regarding their potential symptoms or exposure to COVID-19;
- (4) employees are required to follow appropriate social distancing measures in common areas like the cafeteria;
- (5) any employee exhibiting symptoms of COVID-19 is not to report to work;
- (6) the facility is cleaned frequently, and the maintenance staff conducts a deep clean on common areas frequently and thoroughly cleans patient rooms after every discharge;
- (7) a no visitor policy was implemented in March 2020, but, since May 28, 2020, non-COVID patients have been allowed to have one inpatient visitation;
- (8) patient to patient interaction is limited by eliminating group and social activities and providing each patient with a private room, when possible; and
- (9) employees are provided appropriate PPE and hand sanitizer to maintain a sanitary environment; masks are distributed on a daily basis to all staff with replacements available if necessary; and employees replace gloves and gowns after each patient visit.

In regard to a manual election specifically, the Employer proposes to hold the election in a conference room in a lightly traversed area of the facility. The Employer notes the voting unit consists entirely of trained health professionals who are extremely experienced at using PPE and removing gloves in a sanitary fashion. Additionally, the Employer maintains that it can supply disposable gloves sufficient for use in the polling area to minimize any concern about transmission via items touched by more than one person, such as the voter lists, the ballots, and writing utensils.

Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. I agree with the Employer that a manual election is the Board’s preferred

method of conducting elections and that, absent the present pandemic, a manual election would almost certainly be held in this case. I also acknowledge that the reopening measures that have begun in Nevada, including Directive 21.

However, my decision in this case is ultimately based on my agreement with Petitioner regarding the “extraordinary circumstances” presented by this public health emergency. It is not disputed that COVID-19 remains present in the community and presents a well-established and significant health risk. Indeed, Directive 21 states this explicitly, as Section 8 states, in part:

All Nevadans are strongly encouraged to stay in their residences to the greatest extent possible. Recognizing that COVID-19 is still present in Nevada and highly contagious, Nevadans are advised that they are safer at home and should avoid interpersonal contact with persons not residing in their households to the extent practicable.

Directive 21 contains 40 additional sections, most of which provide detailed rules regarding limiting gatherings and social distancing. Taken as a whole, it is readily apparent that Directive 21 is an attempt to resume some level of economic activity in the service sector while still maintaining necessary public health measures. It is also readily apparent that the second phase of Nevada’s phased reopening is in no way a return to pre-pandemic normalcy.

Ultimately, as the Board has made clear, whether to conduct a manual or mail ballot election is a question of discretion. While the Employer has detailed the extensive steps it has taken to control the spread of COVID-19 in its facility, I find the circumstances of this case make it appropriate to hold a mail ballot election. I specifically find that the extraordinary circumstances presented by the COVID-19 pandemic remain present here for several reasons.

First, my decision is based on the number of COVID-19 cases in Las Vegas. The Employer cites to figures showing a downward trend, and these are referenced in Directive 21. However, at a June 15, 2020, press conference Governor Sisolak announced Nevada was not ready to proceed to the third phase of reopening, and the following day Nevada officials reported an increase in positive COVID-19 cases in the Las Vegas area. It is not possible for me to determine whether cases in the Las Vegas area are on an upward or downward trend, whether the worst of the pandemic has passed Las Vegas, or whether that is still to come. However, these fluctuations do raise the possibility that, if I order a manual election, I will be directing voters and others to congregate under circumstances more dire than those faced today. A mail ballot election avoids this risk.

Second, my decision is also based on the Employer’s role as a health care provider. While COVID-19 is present in all aspects of the community, health care institutions, and other institutions where living spaces are in close proximity, present a special risk. The Employer is no doubt aware of this, as demonstrated by the special measures in place and its ongoing restriction on regular visitation to its facility. I recognize the Employer has taken significant steps to mitigate the possible spread of COVID-19 in its facility, but I find this highlights the risks to voters and patients more than it suggests no risk is present. In any manual election, voters will still physically come together in a single location, even if dispersed over time and socially

distanced. This represents an increased risk of some degree to all those participating. A mail ballot election avoids this risk.

I find the safest manual election still involves physical interactions, congregating, and as such increased risk. Much of Directive 21, and phased reopening plans in general, attempt to find the safest way for in-person, service-based industries, unable to operate during a general shutdown, to return to business in some capacity. Here, the Board has an established procedure that avoids the risk of in-person contact, its mail ballot procedure. While the mail ballot procedure may not be the Board's preferred procedure, it is one of the ways in which the Board conducts an election when circumstances dictate. Under the present circumstances, I find it prudent to order a mail ballot election.

### **III. CONCLUSION**

Based on the record, the arguments of the parties, and relevant Board law, I find that the record establishes the employees employed in the respiratory therapist, OB technician, and buyer/pharmacy classifications are all properly considered technical employees, and that, to be an appropriate unit at an acute care hospital, a technical unit must include these employees. I have directed an election accordingly below.

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.<sup>12</sup>
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 purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>12</sup> During the hearing, the parties stipulated to the following commerce facts:

The Employer, Valley Health System, LLC d/b/a Spring Valley Hospital Medical Center, a Delaware Limited Liability Company with an office and place of business in Las Vegas, Nevada, has been engaged in the operation of a hospital that provides acute care and other related medical services. In conducting its operations described above, during the 12-month period ending May 14, 2020, the Employer derived gross revenues in excess of \$250,000, and during that same period of time, purchased and received at its facility in Las Vegas, Nevada, goods valued in excess of \$50,000 directly from points outside the State of Nevada.

Included: All full-time and regular part-time respiratory therapist I, respiratory therapist II, respiratory therapist III, respiratory therapist leads, tech-pharmacy, buyer/pharmacy, tech-OR/surgical, tech-OB, imaging special procedures imaging technician, cardiac catheterization lab imaging technician, occupational therapy assistant, physical therapy assistant and tech-hyperbolic classifications employed at the facility located in Las Vegas, Nevada; excluding all managers, branch managers, regional managers, cooperate managers, all other professional employees, guards and supervisors as defined by the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the unit described above, which includes approximately 110 employees.

#### **IV. 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 ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE SC711**.

##### **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. At 2:00 p.m. on Wednesday, July 1, 2020, ballots will be mailed to voters by an agent of Region 28 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 Wednesday, July 8, 2020, should communicate immediately with the National Labor Relations Board by either calling the National Labor Relations Board, Region 28, Las Vegas Resident Office at (702) 388-6416 or the Board's 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 28, Las Vegas Resident Office by close of business (4:45 p.m.) on Wednesday, July 15, 2020.

All ballots will be commingled and counted at a location to be determined by the Regional Director at **10:00 a.m. on Wednesday, July 22, 2020.**<sup>13</sup> The parties will be permitted to participate in the ballot count, which may be held by videoconference. 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 **June 20, 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 **June 26, 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

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<sup>13</sup> If, on the date of the count, the Region 28 office is closed, or the staff of the Region 28 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.

NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://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](http://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.

#### **V. 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](http://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 Phoenix, Arizona on the 24<sup>th</sup> of June 2020.

*/s/ Cornele A. Overstreet*

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Cornele A. Overstreet, Regional Director