

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

**SYSTEMS APPLICATION &
TECHNOLOGIES, INC.**

Employer

and

Case 31-RC-261541

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 725**

Petitioner

DECISION AND DIRECTION OF ELECTION

On June 11, 2020,¹ International Association of Machinists and Aerospace Workers, District Lodge 725 (Petitioner or Union) filed a representation petition under Section 9(c) of the National Labor Relations Act (Act) seeking to represent certain employees of Systems Application & Technologies, Inc. (Employer). The petitioned-for unit was clarified at the hearing to include all full-time and regular part-time ground support equipment mechanics, electronics technician maintenance I and II, and engineering technicians III and IV employed by the Employer at its operation located at Fort Irwin, California. There are approximately 16 employees in the petitioned-for unit.

A videoconference hearing on the petition was held on July 2 before a Hearing Officer of the National Labor Relations Board (Board). No issues were litigated at the hearing. The sole matter to be decided in this case is whether, in light of the continuing COVID-19 pandemic,² the Region should conduct a manual or a mail-ballot election. The Employer argues that a manual election is appropriate and that it is possible to conduct a manual election safely. The Petitioner supports whatever method does not delay resolution of the question concerning representation.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail-ballot election commencing on the earliest practicable date.

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¹ All dates are in 2020 unless otherwise noted.

² Throughout this decision, the terms “COVID-19,” “coronavirus,” and “virus” are used interchangeably.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic in the United States

On March 13, President Donald J. Trump issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”³ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and Prevention (CDC),⁴ an agency of the United States government, has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”⁵ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. *How to Protect Yourself & Others*.⁶ The CDC has also issued publications regarding pre-symptomatic and asymptomatic transmission of COVID-19, including the *Emerging Infectious Disease Journal* (Online Report) for July, “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic.”⁷ The Online Report emphasizes, “transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” Despite these unprecedented efforts to limit transmission, as of July 21, over 3.8 million people in the United States have been infected with COVID-19 and over 140,630 people have died from it.⁸

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you

³ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed July 21, 2020).

⁴ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (last accessed July 21, 2020).

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed July 21, 2020); “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed July 21, 2020).

⁶ *Ibid.*

⁷ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed July 21, 2020). See also, “The implications of silent transmission for the control of COVID-19 outbreaks.” *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“even if all symptomatic cases are isolated, a vast outbreak may nonetheless unfold ... we found that the presymptomatic stage and asymptomatic infections account for 48% and 3.4% of transmission, respectively”) (last accessed July 21, 2020).

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

are in contact with others can help reduce the spread of COVID-19.”⁹ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes,” but “it is unlikely to be spread from domestic or international mail, products or packaging.” *Am I at risk for COVID-19 from mail, packages, or products?*¹⁰ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.” *Running Essential Errands.*¹¹

B. The COVID-19 Pandemic in California and San Bernardino County

Many state and municipal governments have issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 4, the Governor of the State of California (Governor) declared a “State of Emergency to Help State Prepare for Broader Spread of COVID-19.”¹² On March 19, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations for the Federal Critical Infrastructure Sectors.

On May 4, the Governor issued a press release¹³ announcing that based on California’s progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is “still dangerous and poses a significant public health risk.” The Governor further announced that while California would be moving from Stage 1 to Stage 2, its “counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020.” *Ibid.*

The California Department of Public Health (CDPH) monitors data related to COVID-19 for each of California’s 58 counties, including San Bernardino County where the Employer’s

⁹ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last accessed July 21, 2020). See also Governor of the State of California Executive Order N-64-20, <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”) (last accessed July 21, 2020).

¹⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed July 21, 2020).

¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last accessed July 21, 2020).

¹² See <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

¹³ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>.

facility is located. If a county does not remain below established thresholds for a seven-day average for positive cases per day, elevated disease transmission, increasing hospitalization, and limited hospital capacity, it is placed on the County Monitoring List, which is then used to reinstitute health measures such as closing business sectors and restricting gatherings and travel.

On July 2, the Governor ordered 19 counties (Health Officer Orders), including San Bernardino County, that had been on the County Monitoring List for three consecutive days to “close all bars, pubs, brewpubs, and breweries, whether operating indoors or outdoors” and cease indoor services for restaurants, wineries and tasting rooms, family entertainment centers and movie theaters, zoos, museums, and cardrooms.¹⁴ The Health Officer Orders also noted, “[p]ublic health studies have shown that the risk of transmission is exacerbated in indoor spaces, particularly when lacking appropriate ventilation.”

On July 9, due to the surge in COVID-19 cases in California and the local area, the Brigadier General for Fort Irwin (General), where the Employer’s facility is located, reinstated certain restrictions, including no travel for nonessential services and activities, a curfew for the access control point,¹⁵ and banning visitors in quarters and private residences. Visitors without Department of Defense business must receive approval from the General or an O-6 Commander to access Fort Irwin.¹⁶

On July 13, after 29 counties, including San Bernardino County, had remained on the County Monitoring List for at least three consecutive days, the Governor expanded the restrictions from the previous Health Officer Orders to the rest of the state and reinstated additional closures for San Bernardino County and others on the County Monitoring List to include the indoor operations of gyms and fitness centers, places of worship, indoor protests, offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.¹⁷

As of July 16, San Bernardino County remained on the County Monitoring List, failing to meet the thresholds for elevated disease transmission and increasing hospitalization.¹⁸ According to CDPH, San Bernardino County is “experiencing elevated disease transmission and increasing

¹⁴ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Order%20Closing%20Indoor%20Services%20and%20Sectors-San%20Bernardino.pdf>

¹⁵ The access control point (ACP) is closed from 11:00 p.m. to 4:00 a.m. for anything other than mission essential functions and emergency medical care.

¹⁶ See https://home.army.mil/irwin/application/files/3315/9468/0027/Modified_GO_with_Local_Area_v2_10JUL2020_signed.pdf

¹⁷ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>

¹⁸ San Bernardino County also announced a testing supply shortage as recently as July 15, posting on Twitter: “Due to testing supply shortages we have only been able to open a limited amount of appointments for July 16 and 17 at this time.” <https://twitter.com/SBCountyPH/status/1283509920373981185> (last accessed July 21, 2020). See also “San Bernardino County canceled 11,000 COVID-19 tests this week due to supply shortage.” *Desert Sun*. <https://www.desertsun.com/story/news/health/2020/07/10/san-bernardino-county-canceled-11-000-covid-19-tests-week/5417872002/> (last accessed July 21, 2020).

hospitalizations,” which the CDPH attributes to “1) community transmission from gatherings, 2) *workplace transmission*, 3) transmissions at state prison, state hospital, county jails and academy, and skilled nursing facilities, 4) transfer of patients from Imperial County.”¹⁹ (emphasis added).

Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of July 21, according to data released by the San Bernardino County Department of Public Health, there were 25,067 confirmed cases of COVID-19 in San Bernardino County and 333 people have died from COVID-19.²⁰

C. The Employer’s Operation and COVID-19

The Employer is a defense contractor supporting the Threat Systems Management Office. At Fort Irwin, it operates under an unpopulated joint venture with EWA Warrior Services LLC (EWA), called Test & Evaluation Services and Technologies LLC (TEST),²¹ which provides test planning, execution and reporting, systems test integration, and engineering services at Fort Irwin. As an essential business, the Employer remains operational during the COVID-19 pandemic, and its employees continue to report to work at the Employer’s facility and perform their regular duties, 10 hours per day, Monday through Thursday. Employees work in two trailers, which are separated from the rest of Fort Irwin by a fence. The trailers contain offices, a restroom, a large conference room, and a break room. The record does not reflect the size of the areas in which the employees work.

The Employer has implemented a number of safety protocols and social distancing practices in line with state and local health orders as it has continued to operate during the COVID-19 pandemic, including: (a) mandatory face coverings or masks for all employees and visitors when within 6 feet from another individual; (b) employees’ hands must be washed before and after every shift, break, smoke break, restroom visit, or in the event an employee is visibly soiled with an unknown substance; (c) all work areas are to be sanitized before the end of every shift (to include tools used by employees throughout their shifts); (d) employees are required to monitor hygiene and health at all times; (e) thermometers are on hand and used every day to monitor employee temperatures at the beginning of every shift; and (f) health status forms have been completed by all employees and must be immediately updated when an employee’s health status changes. The record does not reflect whether personal protective equipment (PPE) is provided by the Employer or the employees.

¹⁹ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed July 21, 2020).

²⁰ See <https://sbccovid19.com/> (last accessed July 21, 2020).

²¹ I take administrative notice of the record in Case 31-RC-261566, where the Petitioner seeks to represent certain employees of EWA at Fort Irwin, to the extent that EWA oversees the facility where the Employer’s employees work – as the program manager overseeing TEST is employed by EWA – and given the Employer’s proposal to adopt the manual election protocols suggested by EWA.

As of the date of the hearing, the Employer reported that, to its knowledge, none of its employees employed at the Employer's facility had tested positive for COVID-19; however, one employee was sick and had either taken a test or planned to be tested.

D. The Employer's Proposed Safety Precautions for a Manual Election

The Employer outlined the measures it would take to try to ensure that any manual election in this matter could be conducted safely despite the COVID-19 pandemic. The Employer proposed erecting plexiglass barriers to separate the Board agents, election observers, and employees voting in the election; having the Board agents and election observers utilize disposable pens and pencils throughout the election process; marking off spaces at 10-foot intervals to safely separate employees waiting to vote in the election; providing personal protective equipment, such as masks and gloves, to Board agents, election observers, and employees voting in the election who may need them; and separating the entrance and exit to the polling station to ensure that voters will not pass by one another at an unsafe distance. The Employer did not specify the type of masks it would provide. The Employer further proposed the election take place in the large conference room (33½ feet by 26½ feet) at the Employer's facility. As noted above, the Employer has offered to mark off the conference room at 10-foot intervals and have employees use one door to enter and a different door to exit to maintain social distancing.

E. The Parties' Positions Concerning Election Details

With respect to the proposed date for the election, the Employer proposed to conduct the manual election as early as practicable that the Region thinks would work to conduct a manual election, and it proposed Wednesday, July 15 or any day August 3 through 6. With respect to proposed polling times, the Employer has proposed a single 30-minute session from 10:00 a.m. to 10:30 a.m.

As indicated above, the Union simply seeks to have the election as soon as practicable and does not have a preference for the manner in which the election is conducted.

Finally, all parties agreed that: the Employer's employees are paid biweekly, with the last pay period before the hearing ending on June 19; there are no eligibility formulas applicable to this election; and it is appropriate for the Board to provide its Notices of Election and ballots in English.

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. NLRB Casehandling Manual (Part Two) Representation Procedures Sec.

11301.2 (Casehandling Manual).²² In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the Board set forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are “scattered,” either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, the Casehandling Manual and the Board’s decision in *San Diego Gas* recognize there may be “extraordinary circumstances” under which other relevant factors should be considered by a Regional Director.

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Casehandling Manual indicates a Regional Director may exercise discretion to order a mail-ballot election where conducting an election manually is not feasible and that, under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. *Ibid.*

On April 17, the Board issued an announcement regarding the COVID-19 pandemic titled, “COVID-19 Operational Status,”²³ which states in pertinent part:

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

On July 6, following the pre-election hearing in these cases, General Counsel Peter Robb issued a memorandum on Suggested Manual Election Protocols (GC 20-10). As the General Counsel noted, GC 20-10 is not binding on Regional Directors because the Board – not the General Counsel – has authority over matters of representation. He further noted that Regional Directors “have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.” Among other suggestions in GC 20-10, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party

²² I note the provisions of the Manual are not binding procedural rules; the Manual is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Aaron Medical Transportation, Inc.*, 2013 WL 6673598 (2013) (unpublished) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007)); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

²³ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

representatives, have not tested positive for COVID-19, come into contact with someone who tested positive within the preceding 14 days, are not awaiting test results, and are not exhibiting COVID-19 symptoms. GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation.

I note that the Board has denied review of Regional Directors' decisions to conduct mail-ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, Case 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves).²⁴ Recently, on July 14, the Board, in an Order denying a request for review in *Brink's Global Services USA, Inc.*, Case 29-RC-260969, addressed a mail-ballot determination in the context of the COVID-19 pandemic and with consideration of GC 20-10. In footnote 2 to that Order, the Board found the COVID-19 pandemic to be "extraordinary circumstances" as contemplated by *San Diego Gas*. With respect to GC 20-10, the Board did not formally adopt its guidance, noting only the following: "The Board will continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10."²⁵

III. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail-ballot election is appropriate requires considering in each case both the public health concerns presented by the COVID-19 pandemic and the Board's stated preference for manual elections. I recognize that the Board has traditionally preferred manual elections and I do not discount concerns about potential problems associated with mail-ballot elections. However, I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety concerns in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

I acknowledge that absent the public health concerns arising from the pandemic, I would order a manual election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. I recognize a degree of reopening has begun, in the United States generally and in California specifically. I also recognize that in San Bernardino County, not only does COVID-19 remain present in the local community, but an ongoing surge in confirmed cases presents a significant health risk. As noted above, current Federal, State, and

²⁴ The Regional Director's Decision and Direction of Election, dated May 7, 2020, and the Board's May 18, 2020 Order are available on the Board's public website at <https://www.nlr.gov/case/16-RC-256972>.

²⁵ The Order is available on the Board's public website at <https://www.nlr.gov/case/29-RC-260969>.

San Bernardino County public health guidance, along with the General's orders for Fort Irwin, strongly recommend discouraging gatherings to reduce the risk of exposure to and spread of COVID-19, and a mail-ballot election minimizes such risk.

I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail-ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees' union representation preferences in light of the current COVID-19 situation in San Bernardino County. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. The Employer's employees remain working at the Employer's facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

I appreciate the Employer's willingness to make certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 at the locality where the election would take place and the substantial inevitable interaction and potential exposure associated with a manual election, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. Voters, observers, and party representatives would all need to appear at the Employer's facility to participate in the election. I recognize that, as noted in GC 20-10, the pre-election conference could take place by video. Although the Employer proposed limiting the voting period to 30 minutes, I do not believe that would be an adequate amount of time to conduct a manual election and abide by the safety protocols of social distancing and limiting the number of voters in the room at one time. A one-hour voting period would be more realistic. The Board agent and observers would need to share the employee conference room, which is a confined area, for the duration of the manual election, as well as the count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must then provide a ballot to each voter, which per GC 20-10, could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. At the end of the election, the Board agent must count the ballots cast by all voters, the count typically being held in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend in the confined area of the conference room beyond simply the voting period window.

In these circumstances, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. Although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the

polling area. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line that would not normally be necessary if the employee were performing work duties, or may be major, such as an employee infected with COVID-19 unknowingly reporting to work to vote in the election. Although the Employer's policy is to send home any employees who display symptoms of COVID-19, any election participant could be a pre-symptomatic or asymptomatic carrier of the virus. The CDC's "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic²⁶ and would neither be identified nor have sought testing. Furthermore, setting aside the observers and Board agent who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a forthcoming study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.²⁷ Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling room and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. This is especially concerning because a confined, indoor location – such as the proposed polling place – is essentially the ideal place for the COVID-19 virus to survive in the air.²⁸

Additionally, conducting manual elections under the current circumstances could disenfranchise voters. If any employee displays symptoms during the 14 days before the election, the General's and Employer's protective measure of denying access to employees coming from off base and visitors with COVID-19 symptoms could result in employees being unable to participate in a manual election, and the Board's manual election procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. Similarly, any voter who had within the previous 14 days merely been in direct contact with somebody with COVID-19 (or with somebody who is awaiting test results for COVID-19 or who has been directed by a medical professional to proceed as if they have tested positive for

²⁶ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed July 21, 2020). See also "Temporal dynamics in viral shedding and transmissibility of COVID-19" (April 15, 2020). *Nature*. <https://www.nature.com/articles/s41591-020-0869-5> ("We estimated that 44% ... of secondary cases were infected during the index cases' presymptomatic stage ...") (last accessed July 21, 2020).

²⁷ "Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions." *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020 (Early Release). https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed July 21, 2020). See also, "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed July 21, 2020).

²⁸ "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> ("The results demonstrate that stability of the virus is dependent on environmental conditions. The greatest stability was observed under cool, dry, and dark conditions, similar to those found indoors.") (last accessed July 21, 2020).

COVID-19, despite not being tested) would likely be expected to quarantine and be unable to vote.

The Employer opined that mail balloting “is inherently more susceptible to fraud and less reliable than manual in-person balloting.” However, it provided no evidence in support of this conclusory statement, and I note the Employer may file post-election objections if it has specific evidence of such fraud or unreliability in this case.

While I do not find a manual election to be impossible, I have determined that, under the current circumstances in San Bernardino County, which – as noted above – is “experiencing elevated disease transmission and increasing hospitalizations,”²⁹ conducting a mail-ballot election is the most responsible and appropriate method of holding an election without undue delay. Admittedly, the suggested manual election protocols outlined in GC 20-10, along with the Employer’s proposed procedures for a manual election, would reduce the risk of contracting COVID-19 if exposed to it during the election. However, there is no enforcement mechanics to ensure that all of these protocols/procedures are followed by all election participants at all times – at least none that do not involve disenfranchising voters or postponing or canceling the election on the day of the election. Moreover, even assuming these protocols could be enforced, there is no evidence in the record or publicly available, and backed by scientific studies, to establish that following these protocols would reduce the risk to an acceptable level under current circumstances. To the extent that the protocols would reduce the risk, I find that the remaining risk of exposure to and of contracting COVID-19 given the current conditions in the State of California and in San Bernardino County specifically still establishes the kind of “extraordinary circumstances” that make directing a mail ballot election appropriate. Moreover, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages alternative methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board’s duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees’ union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency’s obligations and responsibilities, I am directing a mail-ballot election. A mail-ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

²⁹ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed July 21, 2020). See also, “Coronavirus now spreading faster in suburbs like Orange County than in L.A. County.” (July 17, 2020) *Los Angeles Times* (“The community spread has brought other grim consequences ... in San Bernardino County, the number [of its hospitalized patients with confirmed coronavirus infection] has more than quadrupled ...,” and noting that San Bernardino County’s number of new COVID-19 cases over the preceding 14 days per 100,000 residents increased from 222 on July 1 to 408 on July 15). <https://www.latimes.com/california/story/2020-07-17/coronavirus-is-now-spreading-faster-in-the-suburbs-than-in-la-county> (last accessed July 21, 2020).

IV. CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³⁰
3. The parties stipulated and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Ground Support Equipment Mechanics, Electronics Technicians Maintenance I, Electronics Technicians Maintenance II, Engineering Technicians III, and Engineering Technicians IV employed by the Employer at its operations located at Fort Irwin, California.

Excluded: All other employees, Engineering Technicians V, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 16 employees.

³⁰ The Employer, Systems Application and Technologies, Inc., a Delaware corporation with operations located at Fort Irwin, California, the only operations involved in this matter, provides operations and maintenance services. During the past calendar year ending December 31, 2019, a representative period, the Employer derived gross revenues in excess of \$1,000,000 and performed services valued in excess of \$50,000 in States other than the State of California.

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, DISTRICT LODGE 725**.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. On **Friday, August 7, 2020**, ballots will be mailed to voters by an agent of Region 31 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Monday, August 17, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 31 office by close of business (5:00 p.m.) on **Friday, August 28, 2020**. All ballots will be commingled and counted by an agent of Region 31 of the National Labor Relations Board on **Monday, August 31, 2020 at 2:00 p.m.** via a videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Friday, July 17, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

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

To be timely filed and served, the list must be received by the Regional Director and the parties by **Friday, July 24, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be

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

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Los Angeles, California this 22nd day of July 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
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Los Angeles, CA 90064-1753