

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

EWA WARRIOR SERVICES, LLC

Employer

and

Case 31-RC-261566

**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 EWA Warrior Services, LLC (Employer). The petitioned-for unit was clarified at the hearing to include all full-time and regular part-time Electronics Technicians Maintenance I, Electronics Technicians Maintenance II, and Engineering Technicians V employed by the Employer at its operations located at Fort Irwin, California. There are approximately 12 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). One issue was litigated at the hearing, namely whether the employees in the petitioned-for unit share a community of interest such that they are an appropriate unit within the meaning of the Act. The Employer argues the Engineering Technician V position should be excluded from the petitioned-for unit because it does not share a community of interest with the other petitioned-for employees, while the Petitioner maintains the petitioned-for unit is appropriate, as it shares an internal community of interest. The Petitioner also contends the exclusion of the Engineering Technician V would create a one-person residual unit, which the Board seeks to avoid, while the Employer asserts there are plans to expand the number of people in the classification.

In addition to the issue above, the other 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 would not delay resolution of the question concerning representation.

¹ All dates are in 2020 unless otherwise noted.

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

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 and relevant Board law, I find that the evidence establishes that the petitioned-for unit, including the Engineering Technician V, share a community of interest sufficient to establish that it is an appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Furthermore, based on the entire record, relevant Board law, and the extraordinary circumstances of a pandemic, I shall direct a mail-ballot election commencing on the earliest practicable date.

I. THE EMPLOYER'S OPERATION

The Employer is a defense contractor supporting the Threat Systems Management Office of the United States Army. At Fort Irwin, it operates under an unpopulated joint venture with Systems Application & Technologies, Inc. (SA-Tech), called Test & Evaluation Services and Technologies LLC (TEST),³ which provides test planning, execution and reporting, systems test integration, and engineering services under the Threat Systems Operations and Maintenance Integrated Support contract (TSOMIS).

The Employer's Vice President, Threat Systems, Jack Dills, is also the program manager for TEST and oversees operations at Fort Irwin. Isaac Mendez is employed by the Employer as the site lead for TEST and directly supervises the Employer's employees at Fort Irwin.

The Employer functions under two operational phases: one "during operations" being ran by the U.S. military and the other, known as "white weeks," consists of equipment maintenance. During operations, the Employer runs 24-hour cycles with employees working 12-hour shifts in the field operating and supporting primarily five types of equipment: Cicada, Wideband Configurable Controlled Jammer (WCCJ), Giraffe Agile Multiband (GAMB), Networked Electronic Support Threat Sensors (NESTS), and AAA2, which is part of an anti-aircraft training system. Employees are also assigned to the Division Tactical Operations Center (DTC), the command-and-control center that offers and receives feedback from the field. Each of the Employer's 12 Electronics Technicians Maintenance are assigned to one of the above for each field training operation.

During the maintenance phase, employees work four 10-hour shifts, Monday through Thursday, out of the Employer's facility at Fort Irwin, a fenced-in compound containing two trailers. The record does not indicate the total size of the trailers, but they contain several offices, a large conference room, a break room, a restroom, and workbenches. Smaller jobs are done at the workbenches while projects requiring more space are completed outdoors.

All employees of the Employer at Fort Irwin are subject to the same work rules and policies, including an employee handbook. They do not have uniforms but are required to follow

³ I take administrative notice of the record in Case 31-RC-261541, where the Petitioner seeks to represent certain employees of SA-Tech at Fort Irwin, to the extent that SA-Tech and the Employer jointly operate TEST and to extent that the record in that case provides additional details regarding the facility where the Employer's employees work.

the same dress code. The record does not reflect the wage rates for any of the Employer's employees.

A. Electronics Technicians Maintenance (ETMs)

The Electronics Technician Maintenance (ETM) position consists of three categories: I, II, and III. However, the Employer employs about 11 ETMs in only two categories: eight ETM Is and three ETM IIs. Each category refers to a combination of skill, experience, and qualifications required to hold each position and employees can progress through the categories by acquiring the necessary knowledges, skills, and abilities. According to the Employer,⁴ the ETMs are basic troubleshooters that perform basic maintenance functions.

During the white weeks, ETMs replace parts, repair, and refit the equipment. The site lead, who is a former ETM I, testified that during maintenance cycles he ensured systems had power and performed systems checks, giving the example of turning on a jammer and using an attenuator to make sure it is operating properly on all the different frequencies. He also stated ETMs visually inspect systems and the vehicles that house them, for example, checking fluid levels (e.g., oil, transmission, antifreeze). During operations, ETMs are in the field operating and maintaining the equipment, troubleshooting any malfunctioning pieces and ensuring all systems are operational.

If an ETM determines a task is beyond their abilities, they regularly contact the Engineering Technician V for assistance completing the job.

The record does not reflect what, if any, equipment the Employer provides to ETMs.

B. The Engineering Technician V (ET V)

The Employer employs one ET V at Fort Irwin,⁵ a position which it describes as a non-degreed engineer. According to the Employer's Program Manager, the ET V is the advanced troubleshooter, who not only can fix complex problems but understands why the problem occurred. Its Site Lead testified that the ET V can do everything an ETM can do, plus has knowledge of networking and radio frequencies. As such, the ET V regularly substitutes for ETMs if they are unavailable. Due to the ET V's advanced knowledge, the Employer uses him to mentor, teach, and train its ETMs. He also interacts with the Employer's lead engineer at another facility, White Sands Missile Range.

The ET V interacts with the Employer's customer, the U.S. Government, regarding complex testing and systems issues related to its equipment. The ET V also has access to a classified server room, which no other employee has. Both the Program Manager and the Site Lead testified that the ET V is an expert on the WCCJ, where he debugs and programs the

⁴ I note that neither party called an ETM, the ET V, or a test planner as witnesses. Only two witnesses were presented, the program manager and the site lead, both by the Employer.

⁵ ET V is the top category, and the record contains no details about positions ET II-IV.

system. To perform all these functions, the Employer provides the ET V with a laptop and, in the last year, began providing him with an office that he uses around 10 hours per white week. The ET V's office also contains an electronics locker that holds cables and other electronic parts and for which the ET V has a key.

During operations, the ET V is regularly called into the field to troubleshoot advanced issues, particularly with the WCCJ, alongside the ETMs.

C. Other Employees at the Employer's Facility

Test planners work with U.S. military personnel to design and implement the blueprint and strategy for each field operations test. They ensure the placement of systems to achieve the desired effect (e.g., jamming the signal for a particular unit). Test planners operate out of the Rear Tactical Operations Center (RTOC), which is a separate building from the DOTC where the ETMs and ETs work, sending directions to the ETMs and other employees in the field. The Employer employs two test planners at Fort Irwin.

The record contains little information regarding ground support equipment mechanics (GSEMs); however, it indicates GSEMs generally operate and maintain the vehicles that house the Employer's equipment and provide transportation to the ET V. The Employer does not employ any GSEMs at Fort Irwin; all current GSEMs at Fort Irwin work for SA-Tech.

D. The Employer's Response to COVID-19

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.

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 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 disclose if personal protective equipment (PPE) is provided by the Employer or the employees.

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, the

employee in the Engineering Technician V position at issue in this case was sick and had either taken a test or planned to be tested.⁶

II. COMMUNITY OF INTEREST

A. Board Law

In accordance with Section 9(b) of the Act, “[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]” 29 U.S.C. § 159 (b). When making a determination as to whether a petitioned-for unit is “appropriate” under Section 9(b) of the Act, “the Board’s discretion in this area is broad, reflecting Congress’ recognition ‘of the need for flexibility in shaping the [bargaining] unit to the particular case.’” *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985) (quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944)).

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time, it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc.*, 256 NLRB 1069 (1981).

The Act does not require a petitioner to seek representation of employees in the most appropriate unit, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996) (emphasis added). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988). In order to find that a petitioned-for unit is appropriate, the employees in the unit must share a community of interest. When deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; (4) are functionally integrated with the employer’s other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *PCC Structural, Inc.*, 365 NLRB No. 160, slip op. at 6 (2017) (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). With regard to organization of the plant, the Board has made clear that it will not approve of fractured units – that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). All relevant factors must be weighed in determining community of interest, including the Board’s established guidelines for appropriate unit configurations in specific industries. *PCC Structural*, 365 NLRB No. 160, slip op. at 11.

⁶ The record is not clear whether this is the same person, working at the Employer’s facility, who was sick and getting tested in Case 31-RC-261541.

B. Application of Board Law to the Instant Case

Based on the record evidence, I find that the evidence establishes that the employees in the petitioned-for unit, including the ET V, share a sufficient community of interest to make the unit an appropriate within the meaning of the Act. As discussed below in more detail, in reaching this conclusion, I rely on evidence of a common administrative grouping, functional integration, contact between ETMs and the ET V, overlap of certain job functions, common supervision, and common terms and conditions of employment. Therefore, I shall direct an election in a unit including the ET V.

1. Employer's Organization

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. Thus, for example, generally the Board will not approve a unit consisting of some, but not all, of an employer's production and maintenance employees. See, *Check Printers, Inc.* 205 NLRB 33 (1973). However, in certain circumstances, the Board will approve a unit despite the fact other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1289, 1291 (2000).

In this case, it is undisputed that all the petitioned-for employees, including the ETMs and the ET V, consist of all the Employer's employees listed under "Operations & Maintenance" in the TEST organizational chart.⁷ Thus, this factor weighs in favor of finding that the ET V shares a community of interest with the rest of the petitioned-for unit, i.e. the ETMs.

2. Skills and Training

This factor examines whether disputed employees can be distinguished from one another based on qualifications, skills, or training. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in the petitioned-for unit. Evidence that disputed employees must meet similar requirements to obtain employment, that they have similar job descriptions or licensure requirements, that they participate in the same Employer training programs, or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *The Phoenician*, 308 NLRB 826 (1992).

Here, the record does not reveal precisely what training or certifications, if any, ETMs possess as compared to the ET V, nor is there evidence conclusively showing what education level or requirements an individual must have to work in any position at the Employer. The record shows ETMs and the ET V perform some similar functions in that they both operate and maintain the same equipment. However, the evidence indicates ETMs apply basic technical

⁷ While the chart does not list ET V, the Employer explained this was an oversight and the ET V should be listed under Operations & Maintenance. The chart also lists Maintenance SME, ETM III, and ET II-IV under Operations & Maintenance; however, these positions are employed by SA-Tech and not the Employer.

knowledge to simple or routine tasks, while the ET V works on non-routine and complex assignments and possesses a higher degree of skill, both mentoring and training ETMs. In fact, ETMs regularly seek out the ET V when they are unable to complete an assignment due to insufficient knowledge, skill, or ability. Similarly, the ET V programs and debugs the WCCJ, a skill and function not possessed by anyone else at the Employer. While ETMs are not allowed to contact lead engineers at the Employer's other facility, the ET V interacts with the Employer's lead engineer at White Sands Missile Range.

Because there is evidence the ET V possesses skills distinct from the ETMs, this factor arguably supports excluding the ET V from the unit.

3. Job Functions and Work

This factor examines whether disputed employees can be distinguished from one another on the basis of job duties or functions or the work they perform. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in the unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions. *Casino Aztar*, above; *J.C. Penny*, above; *Brand Precision*, above. Where there is also evidence of similar terms and conditions of employment and some functional integration, evidence of similar skills and functions can lead to a conclusion that disputed employees must be in the same unit, despite lack of common supervision or evidence of interchange. *Phoenician*, above.

As noted above and discussed below, the ET V is capable of completing complicated assignments. However, the record does not disclose how often the ET V performs non-routine or complex work rather than basic or simple tasks. The Site Lead testified that when ETMs run into difficulty, the ET V assists them and walks them through how to properly resolve the issue so that if it ever happens again the ETMs are able to fix it themselves. However, the ET V is the only person to program the WCCJ, accesses a classified server room, and interacts with the Employer's customer. Based on the foregoing, I find that although there are similarities in job duties and functions of the ETMs and the ET V, there are also differences in the work they perform given the expanded role of the ET V. Thus, this factor is neutral.

4. Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. Thus, for example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Another example of functional integration is when the Employer's workflow involves all employees in a unit sought by a union. Evidence that employees work together on the same matters and perform similar functions is relevant when examining whether functional integration exists. *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024-1025 (2004); *Transerv Systems, Inc.*, 311 NLRB 766 (1993). On the other hand, if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.

The Employer argues that there is no functional integration here. However, based on the facts described above, the evidence supports finding the ET V is functionally integrated with the ETMs. The ET V and the ETMs provide the same service, operating and maintaining the same equipment, with the ET V addressing advanced issues and the ETMs solving simpler problems. Not only does the ET V complete complex tasks building on the more basic work of the ETMs, but he plays a large role in mentoring the ETMs and increasing their skills. The functional integration is further evidenced by the ET V's development of training plans and standard operating procedures (SOPs) for ETMs.

Accordingly, this factor weighs in favor of finding that the ET V shares a community of interest with the ETMs.

5. Contact Among Employees

Also relevant is the amount of work-related contact among employees, including whether they work beside one another. Thus, it is important to compare the amount of contact employees in the unit sought by a union have with one another. See, e.g., *Casino Aztar*, 349 NLRB at 605-606; *Associated Milk Producers, Inc.*, 251 NLRB 1407, 1408 (1970).

Here, the record provides ample evidence of a high degree of contact between the ET V and ETMs. Given their functional integration, the Employer's Site Lead described contact between the ET V and ETMs as "pretty frequent," stating they interacted with each other "quite often" and "all the time." Thus, this factor also weighs in favor of finding that the ET V shares a community of interest with the ETMs.

6. Interchange

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange "may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resources Associates*, 301 NLRB 400, 401 (1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)).

In this case, there is no evidence of transfers between ETMs and the ET V position. However, although ETMs cannot interchange with the ET V due to their lower skill level, the ET V substitutes for ETMs when they are absent or unavailable. In this regard, the Employer's Site Lead testified that this happens "plenty of times." Given that the evidence of interchangeability is limited to the ET V substituting for ETMs, but not vice versa, I find that this factor is neutral.

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7. Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion (e.g., hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. However, the fact employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate area. *Bradley Steel, Inc.*, 342 NLRB 215 (2004); *Overnite Transportation Co.*, 322 NLRB 347 (1996). Similarly, sharing a common personnel system for hiring, background checks and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corp.*, 221 NLRB 1145 (1996).

In the instant case, ETMs share common terms and conditions of employment with the ET V. These include being paid in a similar fashion (as both classifications are paid hourly),⁸ the same benefits options, the same applicable policies and procedures which are contained in an employee handbook, the same work location, and the same hours.⁹ The record contains no evidence of the Employer's disciplinary or appraisal procedures or practices.

Accordingly, this factor also weighs in favor of finding that the ET V shares a community of interest with the ETMs.

8. Supervision

In examining whether the employees in dispute are commonly supervised, most important is the identity of employees' supervisors who have the authority to hire, to fire or to discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resources Associates*, 301 NLRB at 402; *NCR Corp.*, 236 NLRB 215 (1978). Common supervision weighs in favor of placing the employees in dispute in one unit. However, the fact that two groups are commonly supervised does not mandate they be included in the same unit, particularly where there is no evidence of interchange, contact, or functional integration. *United Operations*, 338 NLRB at 125. Similarly, the fact that two groups of employees are separately supervised weighs in favor of finding against their inclusion in the same unit. However, separate supervision does not mandate separate units. *Casino Aztar*, 349 NLRB at 607, fn. 11. Rather, more important is the degree of interchange, contact, and functional integration. *Id.* at 607.

⁸ The record does not indicate the wage rate of either the ET V or ETMs.

⁹ Four 10-hour shifts, Monday through Thursday, on white weeks, and 12-hour shifts each day during operations.

In this case, the parties do not dispute that all the Employer's employees at Fort Irwin are ultimately supervised by Site Lead Isaac Mendez. Thus, this factor also weighs in favor of finding that the ET V shares a community of interest with the ETMs.

9. Summary of Community of Interest Factors Analysis

Based on the foregoing, considering all the community of interest factors,¹⁰ the evidence supports finding that the ET V shares a community of interest with the ETMs. In reaching this conclusion, I rely upon the ET V and ETMs comprising all the Employer's employees in the Operations & Maintenance administrative grouping, the frequent contact between the ETMs and the ET V, the common terms and conditions of employment, and the common supervision; notably, the Employer essentially concedes in its post-hearing brief that these factors support finding that the employees in the petitioned-for unit share a community of interest. Furthermore, contrary to the Employer's argument, the significant amount of functional integration between the ET V and the ETMs further supports finding that they share a community of interest. In addition, to the extent that there is some overlap of certain job functions, this too supports finding a community of interest. I acknowledge, though, that there are differences in skills and training as well as in a number of job functions that do not support finding a community of interest between the ET V and the ETMs. However, contrary to the Employer's argument, these differences and the limited interchangeability between the ET V and the ETMs do not support finding a lack of community of interest. In this regard, the Employer essentially argues in its post-hearing brief that "a weighted assessment of the distinct interests in order to determine whether the petitioned-for unit is appropriate," is necessary, citing *PCC Structural*s, supra, as well as the Board's reaffirmance in *The Boeing Co.*, 368 NLRB No. 67, slip op at. 3 (2019), that "the community-of-interest analysis must consider whether excluded employees 'have meaningfully distinct interests in the context of collective bargaining that outweigh similarities' with the included employees." However, the Employer's reliance on this weighted assessment of "meaningfully distinct interests" is misplaced because, as the quote above specifically recognizes, that evaluation applies when comparing employees in a petitioned-for unit and "excluded employees." That is not the case here. In the instant matter, both the ET V and ETM classifications are included in the petitioned-for unit. Thus, this weighted assessment does not apply. Even if it did, though, the differences in skills, training, and in job functions, as well as the limited interchangeability, would not be enough to outweigh all the other factors detailed above that support finding a community of interest. Application of *PCC Structural*s would lead me to conclude that the ET V does not have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with the ETM classifications and, therefore, the ET V should be included in the bargaining unit.

Thus, considering all of the factors as whole, I find that the evidence establishes that the petitioned-for unit, including the ET V, share a community of interest sufficient to establish that it is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

¹⁰ No industry-specific guidelines are applicable to this case.

III. METHOD OF ELECTION CONSIDERING THE COVID-19 PANDEMIC

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.”¹¹ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and Prevention (CDC),¹² 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.”¹³ According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.” *How COVID-19 Spreads*.¹⁴ 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*.¹⁵ 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.”¹⁶ 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

¹¹ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed July 21, 2020).

¹² 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).

¹³ 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).

¹⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed July 21, 2020).

¹⁵ *Ibid.*

¹⁶ 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).

3.8 million people in the United States have been infected with COVID-19 and over 140,630 people have died from it.¹⁷

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 are in contact with others can help reduce the spread of COVID-19.”¹⁸ 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?*¹⁹ 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.*²⁰

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.”²¹ 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 release²² announcing that based on California’s progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of

¹⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹⁸ <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).

¹⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed July 21, 2020).

²⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last accessed July 21, 2020).

²¹ 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/>.

²² See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>.

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 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.²³ 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,²⁴ 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.²⁵

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,

²³ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Order%20Closing%20Indoor%20Services%20and%20Sectors-San%20Bernardino.pdf>.

²⁴ 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.

²⁵ See https://home.army.mil/irwin/application/files/3315/9468/0027/Modified_GO_with_Local_Area_v2_10JUL2020_signed.pdf.

offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.²⁶

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.²⁷ According to CDPH, San Bernardino County is “experiencing elevated disease transmission and increasing 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.”²⁸ (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-19.²⁹

C. 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 6-foot or greater 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 place 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 6-foot or greater intervals and have employees use one door to enter and a different door to exit to maintain social distancing.

²⁶ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>.

²⁷ 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).

²⁸ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed July 21, 2020).

²⁹ See <https://sbccovid19.com> (last accessed July 21, 2020).

In its post-hearing brief, the Employer offered to follow all of the measures set forth in the General Counsel's Suggested Manual Election Protocols memorandum (GC 20-10), along with thoroughly cleaning the polling place prior to the election, providing disinfectant for the ballot box and polling place, and separate voter lists for each observer.

D. 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, and it proposed Wednesday, July 15 or any day between about August 3 through 6. With respect to proposed polling times, in its post-hearing brief, the Employer has proposed one or two 45-minute voting periods, depending on whether the manual election is conducted during a white week/period (one session starting at 9:00 a.m.) or during field exercises (two sessions, one starting at 5:30 a.m. and one at 5:30 p.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 semi-monthly, with pay periods ending on the 15th day of the month and the last day of the month; 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 in English.

E. 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).³⁰ 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.

³⁰ I note the provisions of the Casehandling Manual are not binding procedural rules; the Casehandling 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).

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,”³¹ 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 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,

³¹ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

masks, and gloves).³² 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.”³³

F. 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 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

³² 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>.

³³ The Order is available on the Board’s public website at <https://www.nlr.gov/case/29-RC-260969>.

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 one or two 45-minute sessions, depending on when a manual election was conducted, I do not believe that one 45-minute session 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. Likewise, two 45-minute sessions, with one early in the day and the other late in the day, are problematic because it would potentially require the Board agent to spend the entire day either at Fort Irwin or in a public place in San Bernardino County, further increasing the Board agent's potential exposure to COVID-19. Moreover, 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 the Employer – consistent with 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 asymptomatic³⁴ 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.³⁵ 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.³⁶

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 COVID-19, despite not being tested) would likely be expected to quarantine and be unable to vote. Given the current conditions in San Bernardino County, the potential for voter disenfranchisement is real. In fact, based on the record, it is possible that at least one employee in the petitioned-for unit could be disenfranchised if a manual election were conducted as early as

³⁴ “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).

³⁵ “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).

³⁶ “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).

practicable given that, at the time of the hearing, the Engineering Technician V was sick and had either taken a test or planned to be tested.

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,”³⁷ 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.

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:

³⁷ 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).

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.³⁸
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 Electronics Technicians Maintenance I, Electronics Technicians Maintenance II, and Engineering Technicians V employed by the Employer at its operations located at Fort Irwin, California.

Excluded: All other employees, 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 12 employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to

³⁸ The Employer, EWA Warrior Services, LLC, a Delaware corporation with operations located at Fort Irwin, California, the only operations involved in this matter, specializes in developing, operating, maintaining, and sustaining complex instrumentation and threat simulation technologies for the Test & Evaluation (T&E) community on multiple ranges for the U.S. Department of Defense. 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.

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.** likely via a videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count. 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 **Wednesday, July 15, 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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