

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

<p>CR&R Incorporated</p> <p style="text-align:right">Employer,</p> <p style="text-align:center">and</p> <p>PACKAGE AND GENERAL UTILITY DRIVERS, TEAMSTERS LOCAL UNION NO. 396</p> <p style="text-align:right">Petitioner.</p>	<p>Case Nos. 21-RC-262469; 21-RC-262474</p>
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**CR&R INCORPORATED'S
REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Section 102.67(c) of the National Labor Relations Board's Rules and Regulations, CR&R Incorporated ("CR&R" or "Employer") requests review of the Decision and Direction of Election ("Decision") issued by the Regional Director for Region 21 on August 12, 2020 in the above-captioned matter.

The Regional's Director's conclusion that A Drivers share a community of interest with all Perris and Cherry Valley employees was erroneous for three primary reasons.

First, the Regional Director incorrectly held that "the factor that most strongly supports Petitioner is the evidence of contact and interchange between A and B drivers" and that such contact was "regular and uncomplicated." (D.D.E. at 8.)¹ However, the record simply does not support this finding because the record shows that to the extent any A Driver did non-Class A work at Perris and Cherry Valley it was very limited and sporadic. One union witness (an A Driver) testified that when an injury resulted in the Employer placing him on light duty, he was assigned to do paperwork and then was moved off-site to fill fuel tankers. He did not do any Class B driving. The other union witness (another A Driver) testified that he filled in for a residential route and drove a roll-off truck when his Class A truck was out of service. The record also shows that Perris and Cherry Valley employees never perform Class A work because it would be illegal for them to do so. Thus, interchange is limited, sporadic, and one-sided.

Second, the Regional Director gave no consideration to the parties' bargaining history. The Employer offered undisputed evidence that it has collective bargaining agreements with this Union

¹ References to the official transcript of the proceedings shall appear as (Tr. _); references to Board Exhibits shall appear as (Bd. Ex. _); references to Employer Exhibits shall appear as (Er. Ex. _); and references to the Regional Director's Decision shall appear as (D.D.E. _).

at four other locations with operations similar to those of Perris and Cherry Valley, yet none of those labor agreements cover any A Driver.

Third, the Regional Director incorrectly viewed Class A and Class B drivers as essentially being the same type of employee, stating they “share a common skill, operating a truck” and “have similar training in the broad sense that they both hold a commercial driver’s license.” (D.D.E. at 4.) If true, then any B Driver (who only needs to have two years of experience to work for the Employer) would be able to do the work of an A Driver (a position requiring five years of experience and a license that is more difficult to obtain than a Class B license). The difference in skills would be readily apparent to anyone that attempted to operate a tractor-trailer combination that weighs 35,000 pounds (a vehicle requiring a Class A license).

The Regional Director’s Decision to include A Drivers in the unit is contrary to Board law and based on factual conclusions that are not supported by record evidence. The only commonalities between A Drivers and the remaining Perris and Cherry Valley employees (e.g., shared parking lot, bathroom facilities, and breakrooms,² similar uniforms and benefits, etc.) do not show a community interest where, as here, numerous other factors heavily outweigh these minor commonalities, including lack of common supervision, sporadic and one-sided interchange, lack of integration, bargaining history, compensation and departmental organization. As such, the only appropriate unit in this case is one that does not include A Drivers.

With respect to the Regional Director’s decision to order a mail ballot, the Employer is mindful of the seriousness of COVID. However, the mere existence of the pandemic and his hypothetical assumptions that a manual election will result in an outbreak do not give Regional

² There was no evidence of joint use of the “shared” bathroom facilities and breakrooms as the witnesses testified that they take they rest breaks and meal periods while on the route. (D.D.E. at 4; Tr. 124, 135.) They are only on the premises to pick-up and return vehicles and paperwork.

Director's license to deny a manual ballot election in all cases. At some point, the Board must intervene by reinstating and reaffirming longstanding precedent that reflects a preference for manual elections, especially when an employer, like CR&R, demonstrates that employees in the petitioned-for unit continue to report to the facility on a daily basis, it will institute all reasonable safety protocols, including some that go beyond those set forth in General Counsel Memorandum 20-10, and the overall risk to employees is low.

Accordingly, the NLRB should grant review, vacate the Decision, order the Regional Director to exclude A Drivers from the petitioned-for unit, and order a manual election.

II. THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

On July 1, 2020, Package & General Utility Drivers, Teamsters Local Union No. 396 (the "Union") filed two separate Petitions with the National Labor Relations Board seeking to include and exclude the following from the petitioned-for unit:

Case No. 21-RC-262469:

Employees Included: All regular full-time and part-time Drivers, Sweepers, Helpers, Mechanics, Welders, Parts Clerks, Polisher Techs, Fuelers, Truck Washers, Bin Washers, Yard Persons, Operators, Traffic Controllers and MRF Employees employed by the Employer at its facility located at 1706 Goetz Road, Perris, CA 92570.

Employees Excluded: All other employees, all office employees, supervisors, salespersons, professional employees and guards, as excluded in the Act.

Case No. 21-RC-262474:

Employees Included: All regular full-time and part-time Drivers, Helpers, Mechanics, Welders, Parts Clerks, Fuelers, Truck Washers and Yard Persons employed by the Employer at its facility located at 40590 High Street, Cherry Valley, CA 92223.

Employees Excluded: All other employees, all office employees, supervisors, salespersons, professional employees and guards, as excluded in the Act.

(Bd. Ex. 1).

The Employer contends that the only appropriate unit “is a single bargaining unit consisting of employees at the Employer’s Perris and Cherry Valley facilities,” but without including 20 “A Drivers.”³ (D.D.E. at 1.) The Employer and the Union also requested and agreed to a manual ballot election. (D.D.E. at 11.)

Following two days of hearing on these issues, on August 12, 2020, the Regional Director concluded the following constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the National Labor Relations Act (“Act”):

Included: All full-time and regular part-time operations employees, maintenance employees and drivers including Driver A, Driver B, Driver B/RO, Driver B/C, Driver *CIC* [sic], Driver C, Driver-Lead, Driver C/ST, Driver B/S, Scout Driver, Driver Helper, Site Attendant, Equipment Operator, Night Equipment Operator, Plant Operator, I&E [sic] Technician, Preventive Maintenance Mechanic, Yard Person, AD Plant Lead Operator, Industrial Mechanic, Mechanic, Maintenance Mechanic, EMSW Lead, Operator Assistant, Engineered Municipal Solid Waste Maintenance, Welder, Container Repair, Night Yard Dumper, Yard Dumper, Bin Repair, Sweeper, Yard Attendant, Laborer, Yard Driver, Maintenance Helper, Parts Clerk, Truck Polisher, Tire Technician, Steam Cleaner, Class C/M Mechanic, Truck/Equipment Mechanic, Fueler, Lead Mechanic, Janitor/Laborer, Janitor, Tarper/Forklift, Laborer-Yard, Cart Bin Maintenance, Laborer/Forklift/Traffic Director employed by the Employer at its Perris facility currently located at 1706 Goetz Road, Perris, CA 92572 and its Cherry Valley facility currently located at 40590 High Street, Cherry Valley, CA 92223.

Excluded: All other employees, office clerical employees, confidential employees, managerial employees, Operations Managers, Route Managers, Lab Supervisors, Maintenance Supervisors, Area Supervisors, Shop Managers, TMT and Shop Managers, Office Assistants, Administrative Assistants, Day Dispatchers, Operations Coordinators, Sustainability Coordinators,

³ The terms “A Driver” or “A Drivers” refer to drivers who are required to and do hold a Class A commercial driver’s license, and are assigned to work in CR&R’s Transportation Division that requires a Class A license. (Tr. 78.) There are a few Perris and Cherry Valley employees, which the parties stipulate are in the petitioned-for unit, who hold a Class A license, but who are not required to hold a Class A license. Further, they do not perform work requiring a Class A license and do not work in the Transportation Division. The terms “A Driver” or “A Drivers” do not apply to those undisputed employees.

Sales/Marketing Representatives, Material Buyers, Customer Service Representatives, Weighmaster/Scale Attendants, Scalehouse Operators, Traffic Directors, Sorters, employees primarily assigned to the Anza, Pinion Pines, and Idyllwild locations, professional employees, guards and supervisors as defined in the Act.

(D.D.E. at 12.)

In addition, the Regional Director ordered a mail ballot election. (D.D.E. at 11.)

III. THE BASIS ON WHICH REVIEW IS SOUGHT

The following compelling reasons require the Board to grant this Request for Review:

- The Decision to include A Drivers in the unit raises a substantial issue of law or policy because it departs from officially reported Board precedent.
- The Decision on substantial factual issues relating to the inclusion of A Drivers in the unit is clearly erroneous on the record and such error prejudicially affects the rights of the Employer, a party to the proceeding.
- The Decision to order a mail ballot election presents a substantial question of law or policy because it presents a departure from officially reported Board precedent. *See San Diego Gas & Electric*, 325 NLRB 1143 (1998).⁴
- A substantial question of law or policy is raised because of the absence of officially reported Board precedent to support the Regional Director's action that turns solely on the existence of COVID-19 in California generally and gives little weight to the Board's preference for manual elections and the specific safety conditions at the Perris and Cherry Valley locations or the implementation of safety measures to protect those involved in the election.

IV. STATEMENT OF FACTS RELATING TO UNIT DETERMINATION

A. About CR&R Incorporated.

CR&R Incorporated is a large, multi-facility, full-service waste and recycling collection company in Southern California, serving businesses throughout Orange, Los Angeles, San

⁴ On July 6, 2020, General Counsel Peter B. Robb issued GC Memorandum 20-10 containing suggested manual election protocols and reiterating that "the Board has ultimate authority to make decision on when, how and in what matter elections are conducted. . . ." *See* General Counsel Memorandum 20-10.

Bernardino, Imperial and Riverside counties.⁵ In Southern California, the Employer has the following locations:

- Anza (waste drop off facility);
- Beach House (an office);
- Cherry Valley (full-service waste collection site);
- Colton (full-service waste collection site, waste processing, and transfer station);
- CRT (a Stanton waste processing and transfer station);
- Idyllwild (waste drop off facility);
- Lakeview (composting site);
- Lampson (full-service waste collection site);
- Orangewood (truck and bin painting);
- Perris (full-service waste collection site, waste processing, transfer station, and anaerobic digester);
- Pinion (waste drop off facility);
- San Juan Capistrano (full-service waste collection site, waste processing, transfer station, and composting); and
- Santa Fe Springs (full-service waste collection site, waste processing, and transfer station).

(Tr. 42-46; Er. Ex. 9.)

The Employer has collective bargaining agreements with the Union at four different locations, none of which cover any A Drivers (even if they are based at these locations) (Tr. 112):

- The Colton Disposal agreement covers Class B Drivers (described more fully in the next section), helpers, yardpersons, bin repairpersons, mechanics, and truck

⁵ Haulaway Storage Containers is a subsidiary of the Employer (Tr. 215) and, thus, a separate corporation not at issue in these proceedings, except as noted below. The Regional Director wrote that “[t]he exact relationship between Haulaway and the Employer is not detailed in the record.” (D.D.E. at 3.) All witnesses who testified about this relationship made it clear that Haulaway is a separate and distinct business entity from CR&R. (Tr. 70, 76 (referring to Haulaway as CR&R’s “sister company”), 78 (stating that Haulaway is a “separate corporation”).)

maintenance employees. (Er. Ex. 11.) This location also has non-union employees. (Er. Ex. 10.)

- The Colton Transfer agreement covers operators, scale operators, and laborers. (Er. Ex. 12.) This location also has non-union employees. (Er. Ex. 10.)
- The Solag agreement covers Class B Drivers. (Er. Ex. 13.)
- The Stanton agreement covers Class B Drivers, helpers/swampers, bin repairpersons, mechanics and truck maintenance employees. (Er. Ex. 14.) This location also has non-union employees. (Er. Ex. 10.) The agreement does not cover any of the A Drivers based in Stanton.

B. Class A Versus Class B Drivers

CR&R employs numerous classifications of employees, but Class A and Class B Drivers are at the center of this dispute and, thus, require further discussion.

According to the federal Department of Transportation Federal Motor Carrier Safety Administration:⁶

- A Class A license is required for any *combination of vehicles* which has a gross combination weight rating or gross combination weight of 26,001 pounds or more, whichever is greater.
- A Class B license is required for any *single vehicle* which has a gross vehicle rating or gross vehicle weight of 26,001 pounds or more, whichever is greater.

Essentially, a Class A license is required when a driver attaches a trailer to his tractor, a far more difficult vehicle to operate than a single vehicle of the same weight. (Tr. 80-81; 95-96.)

It is easier to get a Class B license than it is to get a Class A license. An individual can obtain a Class B license simply by going to the Department of Motor Vehicles to take a written and driving test, and for the latter, the individual can get away with taking their road test by renting a Ryder moving truck. (Tr. 95-96.)

⁶ <https://www.fmcsa.dog.gov/registration/commercial-drivers-license/drivers>

On the other hand, getting a Class A license requires attendance at a school to learn to operate a Class A vehicle. (Tr. 95-96.) The individual can either pay for the training or sign up to work with a large long-haul transportation company for a period of two or three years in which they will pay for the schooling. (Tr. 95-96.) Once the individual receives this training, he or she must then have a tractor and a trailer for use with the road test, along with taking a written test at the Department of Motor Vehicles. (Tr. 95-96.)

Class A drivers can operate any vehicle that the Employer owns, including a front loader, an end loader and a roll off. The reverse is not true, however -- Class B Drivers are prohibited by law and company policy from operating any vehicle requiring a Class A license (e.g., a tractor and trailer combination). (Tr. 78, 93, 95-96.) Class B Drivers do no work for the Transportation Division. (Tr. 78, 93.) In fact, they cannot fill in for or do the work of a driver in the Transportation Division *unless* they (a) have a Class A commercial driver's license (and any necessary endorsements), (b) have at least five years of experience operating a vehicle that requires a Class A license, *and* (c) apply for and are accepted to work as an A Driver in the Transportation Division. (Tr. 95-96.)

C. The Perris and Cherry Valley Facilities.

As noted above, the Union filed a petition seeking to represent employees at the Employer's Perris and Cherry Valley facilities.

Perris is a full-service waste collection site with its own profit and loss center. (Tr. 271, Er. Exs. 9-10.) It also processes waste and has a transfer station and an anaerobic digester. (*Id.*) A transfer station receives materials as an initial stop before it then is transported to a different location. (Tr. 44.) There are more than 200 employees in Perris, which includes maintenance, clericals, administration, and drivers. (Tr. 271-72.) In terms of drivers, none operate a vehicle requiring a Class A driver's license. (Tr. 271-72.) Instead, to the extent any Perris employee

operates a vehicle (other than the A Drivers working in the Transportation Division), it is in the context of operating a Class B vehicle, primarily roll off, front end loaders, and side loaders (among others). (Tr. 271-72.). None of the employees at Perris are eligible for a bonus. (Tr. 219.) All Perris employees also are paid on different pay scales. (Tr. 102.) As will be discussed below, all report to Ed Campos, the Regional Operations Manager.

Cherry Valley is a full-service waste collection site. (Tr. 42-46; ER. Ex. 9.) There are approximately a dozen employees at Cherry Valley, most of whom are B Drivers operating roll offs, side loaders or front loaders. (Tr. 271-72.) None of the Cherry Valley employees receive a bonus. (Tr. 103.) And, Cherry Valley employees are paid on their own pay scale. (Tr. 102.) They report to the same manager as the Perris employees -- Campos.

Campos is responsible for overall operations at both Perris and Cherry Valley. (Tr. 47, 271.) He reports directly to the President of CR&R. (Tr. 48.) Campos has full authority over all aspects of the operations at both Perris and Cherry Valley. (Tr. 271-72.) This includes hiring, discipline, firing, routes, setting wage scales, and other scheduling and operational matters. (Tr. 271-72.) The Union's testimony from Class B Drivers confirms that they take all of their direction from and receive instructions directly from Campos and his team. (Tr. 271-72.) Campos has no authority over any A Drivers. (Tr. 100-01, 110-11, 273, 278.) They admittedly are not entitled to any bonus.

D. The Transportation Division and A Drivers

As noted above, A Drivers are employees who are required to and do hold a Class A commercial driver's license, and are assigned to work in CR&R's Transportation Division, the only division at CR&R that has jobs requiring a Class A license. A Drivers are located at Lampson (10 drivers), Perris (20 drivers), San Juan Capistrano (four drivers), Santa Fe Springs (two drivers), and Stanton (47 drivers). (Tr. 103; Er. Ex. 10.) All of them work in non-union positions (even

though, as explained above, almost half of them work at Stanton which has a labor agreement that covers other employees including the Class B Drivers). (Tr. 112; Er. Ex. 10.)

In October 2018, the Employer concluded that the way it was using employees doing work that required a Class A license was inefficient. (Tr. 274-75.) Specifically, the business model at that time resulted in a Class A vehicle being utilized only part of the time because it would haul a load from city A to city B, only to return to city B or another city with an empty load. (Tr. 274-75.) To correct this inefficiency and maximize the use of their tractor-trailers as they travel from site to site, the Employer created the Transportation Division and transferred all operations pertaining to the operation and use of Class A vehicles (e.g., tractor-trailers) to a centralized division. (Tr. 274-75.) The job of the Transportation is, of course, transportation of materials from one site to another. This is different than the function of the Perris and Cherry Valley drivers, whose job it is to collect waste. The Transportation Division is totally autonomous from the other facilities of the Employer and even has its own profit and loss statement. (Tr. 80, 96.)

The Employer tasked Josh Woodward as the Transportation Operations Manager for this new Division. (Tr. 77.) All A Drivers, all vehicles requiring a Class A license, and all routes and work performed by those drivers and tractor-trailers were transferred to this Division as of October 2018. (Tr. 77, 274.)

All of the driving positions in the Transportation Division require a Class A commercial drivers' license, as described above. (Tr. 80-81.)

All of the A Drivers are hired, supervised, disciplined, and terminated by Woodward, not by managers assigned to the individual locations such as Perris and Cherry Valley. (Tr. 111, 217-18.) If an individual applies for a position in the Transportation Division as an A Driver, the applicant must have a Class A license and also must have at least five years of experience operating

a vehicle requiring a Class A license (compared to B Drivers that only need two years of experience). (Tr. 80-81, 96.) The applicant then proceeds to an interview with a recruiter, an interview with the hiring committee and then a separate interview and road test with Woodward. (Tr. 100-01.) Woodward makes the final decision, in partnership with the President of the Company, as to whether to hire an A Driver for the Transportation Division. (Tr. 100-01.)

If a current employee working outside of the Transportation Division wants to apply to a position with that Division, and assuming the driver has the requisite license and experience, Woodward still makes the ultimate decision whether to allow the driver to join the Division. (Tr. 100-01.) In fact, Woodward conducts a road test with a driver as part of this process. (Tr. 249-50.) While Campos, for example, might tell Woodward of any issues or concerns he has with the driver at issue, Campos cannot require the Transportation Division to grant the transfer request. (Tr. 100-01.)

A Drivers all report to, take direction from, and receive their routes and assignments from a Transportation Division Manager, most frequently, Woodward. (Tr. 111.) The Transportation Division Managers have no responsibility for or oversight of any Perris or Cherry Valley employee. (Tr. 79, 99-100.)

A Drivers are eligible for a bonus that is based in part on the overall performance of the entire group of A Drivers in the Transportation Division. (Tr. 103, 251.) The A Drivers are paid pursuant to a wage scale that applies only to them, and not to any other employees. (Tr. 102.)

Vacations of A Drivers are scheduled at a group-wide level within the Transportation Division (e.g., an A Driver in one city might be denied his choice of days off if an A Driver in another city with more seniority requests the same time off). (Tr. 110-11.) Campos and his

managers and office clericals have no input into scheduling in the Transportation Division. (Tr. 110-11.)

As explained above, A Drivers operate equipment that no other employee can operate and while doing so, perform completely separate functions than those performed by other drivers. The latter *collect* smaller amounts of materials using a roll off, a front end loader or a side end loader (among other types of equipment). Some of them drive flatbeds and others drive street sweepers. (Tr. 80.) A Drivers, on the other hand, *transport* much larger amounts (e.g., bulk) of materials and regularly and routinely visit other CR&R facilities to both pick up and deliver those bulk materials. (Tr. 80, 108.) As Woodward explained during the hearing:

Perris loads trash, recycle, EMSW, and green waste out of their facility and into their facility, actually, as well. San Juan Capistrano, we do bring horse bedding and things like that from one place to that transfer station, as well as that transfer station over to Perris. We transfer green waste from San Juan Capistrano's [MRF] over to the AD plant. I haul green waste from CRT's facility to Perris. I haul cardboard back from Perris to corporate. I haul recycle material from all of those locations into corporate or into Potential, depending upon what's going on. Bins, trucks, trash carts, all of that stuff moves in ... between and around all of our different facilities.

(Tr. 106-07.)

In sum, the Transportation Division and its A Drivers act and are treated as a completely separate company with a separate profit and loss center, separate city and client contracts, centralized management, separate experience, specialized hiring and license requirements, specialized equipment, separate billing practices, and a completely different scope of work. They operate independent and apart from Perris and Cherry Valley and could function as its own corporate entity if needed.

V. APPLICABLE LEGAL STANDARDS AND ANALYSIS

A. The Regional Director Erred in Including A Drivers in the Petitioned-for Unit

1. Appropriate Standard.

Section 9(b) of the National Labor Relations Act (“NLRA” or “Act”) mandates that the Board must determine what constitutes an appropriate unit “in each case.” 29 U.S.C. § 159(b). The Act also mandates that in determining whether a unit is appropriate, the extent to which the employees have organized shall not be controlling. *See* 29 U.S.C. § 159. Although nothing in the Act requires the unit for bargaining to be the only appropriate unit or the most appropriate unit, the Act requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *See Overnite Transp. Co.*, 322 NLRB 723, 726 (1996); *Brand Precision Serv.*, 313 NLRB 657, 658 (1994); *Phoenix Resort Corp.*, 308 NLRB 826, 828 (1992). In making these determinations and deciding representation cases, the Board has been clear that the legislative history of the Act “demonstrates that Congress intended that the Board’s review of unit appropriateness would not be perfunctory.” *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017).

Further, and particularly relevant in this case, a proposed bargaining unit is *inappropriate* if it is based on an arbitrary, heterogeneous, or artificial grouping of employees. *See Moore Business Forms, Inc.*, 204 NLRB 552, 553 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343, 1345-46 (1951). In addition, the Board has “always assumed it obvious that the manner in which a particular employer has organized its operations and utilizes the skills of the labor force has a direct bearing on the community of interest among the various groups of employees... and is, thus, an important consideration in any unit determinations.” *International Paper Co.*, 96 NLRB 295, 298 n.7 (1951).

To determine whether employees share a sufficient community of interest to constitute an appropriate unit, the Board considers several factors, such as:

Whether the employees are organized in separate departments; have distinct skills and training; have distinct job functions and perform distinct work; including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*PCC Structural*s, slip op. at 13 (internal citation omitted). The Board also considers the extent of the parties' bargaining history. *The Boeing Co.*, 368 NLRB No. 67 (Sept. 9, 2019).

2. **A Drivers Do Not Share a Community of Interest With Other Perris and Cherry Valley Employees**

The record evidence shows that the Regional Director should have excluded Perris A Drivers from the petitioned-for unit because they do not share a community of interest with other Perris and Cherry Valley employees.

Before considering the factors, however, it is important to highlight that the Employer transitioned all aspects of the A Drivers' employment, including their supervision, expenses associated with them or their vehicles, and revenues generated from their work, to the Transportation Division in October 2018. (Tr. 274-75.) Doing so allowed the Employer to make better use of A Drivers and their trailers by eliminating a business model that resulted in a trailer transporting a loaded trailer from point A to point B, but then having an empty trailer from point B to the next point.⁷ (Tr. 274-75.) It is against this backdrop that the analysis must be considered.

⁷ The Union's efforts at proving community of interest consisted of offering evidence that, if true, likely took place before that transition occurred and its witnesses offered no proof that any of their self-serving evidence is an accurate depiction of the true state of the Employer's business as of and since October 2018.

a. The Regional Director correctly concluded that department organization favors the Employer

As noted above, the Board has “always assumed it obvious that the manner in which a particular employer has organized its operations and utilizes the skills of the labor force has a direct bearing on the community of interest among the various groups of employees... and is, thus, an important consideration in any unit determinations.” *International Paper Co.*, 96 NLRB at 298 n.7.

To reiterate, and as explained above, in October 2018, and in an effort to become more efficient, the Employer transitioned all A Drivers from the management, supervision, oversight, and expense and profit/loss considerations from Perris to the Transportation Division. (Tr. 274-75.) If the Region includes A Drivers in the petitioned-for unit and if the Union is selected as the bargaining representative at Perris and Cherry Valley, the Region will upset this model as any collective bargaining agreement applicable to a small group of A Drivers will impact non-represented A Drivers at the five other locations where A Drivers report (Lampson, Perris, San Juan Capistrano, Santa Fe Springs, and Stanton) and the Transportation Division as a whole. This also would cause operational harm given the interchange of all A Drivers in the Transportation Division on both a daily and a long-term basis, as discussed more fully below (e.g., vacation scheduling, route planning, bonus calculations, etc.).

In sum, the Regional Director correctly gave due consideration to the model and structure the Employer has chosen for its business. *See United Operations, Inc.*, 338 NLRB 123, 124-25 (2002) (finding no community of interest where, among other things, the employer organized the employees “into a separate department and treat[ed] them accordingly).

b. The Regional Director correctly concluded that supervision favors the Employer

The Regional Director agreed that A Drivers and the remaining Perris and Cherry Valley employees do not share common supervision. *See Bradley Steel, Inc.*, 342 NLRB 215, 216 (2004) (finding no community of interest where, among other things, the employees at issue were “separately supervised”); *United Operations*, 338 NLRB at 124-25 (no community of interest where, among other things, the employees had separate immediate supervision).

To ensure the Board has as clear picture of the Employer’s overall operations and its arguments in this Request for Review, it is worth repeating that *all* A Drivers report and answer to a single manager: Woodward. Woodward and his two direct reports, make all decisions that impact the A Drivers and their daily routines and lives at CR&R. Specifically:

- Woodward interviews and hires all A Drivers. (Tr. 100.) Again, the Union offered no evidence to the contrary.
- Woodward decides all discipline and termination matters in partnership with one of CR&R’s owners. (Tr. 111.) The Union did not offer any testimony or evidence to suggest that anyone at Perris ever disciplined or terminated an A Driver. According to Campos, neither he nor any manager or supervisor at Perris or Cherry Valley have any ability to discipline or terminate an A Driver. (Tr. 273, 278.) The record does not even reflect any suggestion that Perris or Cherry Valley managers have input in such decisions.
- Woodward schedules and assigns routes for A Drivers. (Tr. 85-86.) The Union’s evidence is not to the contrary. Campos testified without contradiction that neither he nor his direct reports have anything to do with A Drivers’ routes or scheduling. (Tr. 273, 278.)
- Woodward is solely responsible for providing A Drivers with their uniforms. (Tr. 253.) And, A Drivers’ benefits, compensation and uniforms are charged to the Transportation Division, not Perris or Cherry Valley. (Tr. 80, 82, 96.)
- Woodward approves all vacation and time-off for A Drivers. (Tr. 110-11.) The Union suggested that a Perris clerical handing a blank vacation and time-off form to an A Driver somehow shows they have a community of interest with other

Perris employees.⁸ Not so. There is no evidence the office clerical or any manager or supervisor at Perris ever approved or even wrote anything on those requests. All the record shows, as confirmed by Campos, is that while the clerical might hand an A Driver *a blank form* at the A Driver's request, those forms are then provided to Woodward for his consideration and approval - Perris has nothing to do with scheduling or approving vacation beyond simply providing a blank form to an employee. (Tr. 110-11.) In fact, the Transportation Division maintains its own vacation scheduling calendar. (Tr. 110-11.)

In sum, the Regional Director correctly found that supervision weighs in the Employer's favor.

c. The Regional Director failed to consider bargaining history

The Regional Director was required to, but did not, consider the parties' bargaining history. *See The Boeing Co.*, 368 NLRB No. 67, slip op. at 2. As explained above, the Union has collective bargaining agreements with CR&R at four sites similar to Perris, yet none of those agreements cover any A Drivers. (Tr. 112; Er. Exs. 11-14.) Some of those labor agreements cover B Drivers and maintenance employees, but do not cover A Drivers. (Er. Exs. 11 (Colton Disposal agreement) and 14 (Stanton agreement).). One of those agreements cover operators, but not the B Drivers based there (Er. Ex. 12 (Colton Transfer). Another covers only B Drivers, but does not include A Drivers. (Er. Ex. 13 (Solag.).)

In sum, the Union has never represented any A Driver at any other CR&R location, even those with operations similar to Perris and which employ B Drivers. This only bolsters the Employer's contention here that it is inappropriate to include A Drivers in the unit. The Regional Director's failure to address this factor was error.

⁸ Notably, the record is silent on when this allegedly occurred and, thus, it is entirely possible the Union's evidence pre-dates the transition of A Drivers to the Transportation Division in October 2018.

d. A Drivers have higher compensation and different wage scales than B Drivers

The Regional Director should have weighed this factor in the Employer's favor. While it might be true that the wages rates between A and B Drivers are similar in a limited number of respects, which the Employer disputes, the Regional Director was required to consider that both groups of employees are covered by different wage scales and progressions *and* that A Drivers are entitled to a monthly bonus that is not available to any other Perris or Cherry Valley employees. *See Terex*, 360 NLRB 1252 (2014) (finding no community of interest where, among other things, the employees were subject to separate wage progressions); *Dinah's Hotel & Apartments*, 295 NLRB 1100, 1101 (1989) (finding no community of interest where, among other things, the employees did not have the same compensation). This extra payment made to A Drivers on a monthly basis shows that A Drivers make more money than Perris and Cherry Valley employees and, thus, when combined with the other factors described elsewhere in this Request for Review, proves the absence of a community of interest.

e. The Regional Director inappropriately dismissed critical differences in duties, experience requirements, and licensing requirements between A and B Drivers.

If A and B Drivers perform the same type of work, operate the same type of equipment, and simply need a "commercial driver's license" to perform their jobs, as the Regional Director concluded, why is it that B Drivers do not perform the work of an A Driver -- ever? And, why is it that the Employer requires an A Driver to have five years of Class A Driving experience to perform work in the Transportation Division? The answer is simple: they perform completely different jobs, have completely different experience requirements, and possess different licenses. *See Bradley Steel*, 342 NLRB at 216 (finding no community of interest where, among other things, the employees at issue spent the majority of their time performing "specialized functions" that

were different from those performed by other employees); *United Operations*, 338 NLRB at 124-25 (finding no community of interest where, among other things, the technicians had skills unique to their job and no department employees could do the work of the disputed employees).

A Drivers are required to have a Class A commercial driver's license and five years of provable experience driving a Class A vehicle if they want to even be considered for a position with the Transportation Division. (Tr. 95-96.) There is no evidence in the record, and the Union did not attempt to claim, that any Perris or Cherry Valley employee has the skills, experience, and training necessary to work or fill in for an A Driver. Nor could it.

Instead, the Union was left with highlighting that Class A and Class B Drivers are subject to the same medical and drug testing requirements in Department of Transportation. Yet, this downplays the significance of having a Class A license. In reality, to suggest that A Drivers and other Perris and Cherry Valley employees do comparable work is to ignore the vast differences between the types of vehicles for which a certain license is required. Specifically, according to the federal Department of Transportation Federal Motor Carrier Safety Administration:⁹

- A Class A license is required for any ***combination of vehicles*** which has a gross combination weight rating or gross combination weight of 26,001 pounds or more, whichever is greater.
- A Class B license is required for any ***single vehicle*** which has a gross vehicle rating or gross vehicle weight of 26,001 pounds or more, whichever is greater.

Essentially, a Class A license is required when a driver attaches a trailer to his tractor, a far more difficult vehicle to operate than a single vehicle of the same weight. Hence the need for a special license that is more difficult to obtain and, for A Drivers working in the Transportation Division, the need for at least five years of experience operating a Class A vehicle.

⁹ <https://www.fmcsa.dog.gov/registration/commercial-drivers-license/drivers>

The Regional Director refused to give weight to the Employer's argument that it is more difficult to obtain a Class A license than B. Although stating that this argument would have reflected "a significant difference in training and in requirements for" the Class A license compared to the Class B, the Regional Director wrote that the Employer failed to offer evidence supporting the argument. (D.D.E. at 4.) Yet, with respect to Class A licenses, the Transportation Division Manager testified:

... [I]n order to get your license, you can do it a couple of different ways. You can either pay for it. That's what I did. Or you can find somewhere where you can generally go to work for them. They'll train you. You have to usually sign a contract with them and give a couple years of your life and operate -- operate for them.

(Tr. 95.)¹⁰

The Regional Director's finding that A and B Drivers are essentially the same in terms of experience and job duties is illogical and renders meaningless the United States Department of Transportation's different licensing standards implemented to ensure proper controls of interstate commerce, including the safety of people on the roads. An analogy is instructive. Specifically, dentists and registered dental assistants practicing in the state of California must have a license from the Dental Board of California,¹¹ but it does not follow that their holding of a license makes them the same in terms of skills and duties, especially given the different educational and training requirements. While a dentist certainly can do the work of a dental assistant, the reverse is not true. If the federal Department of Transportation deems it critical to the regulation of interstate

¹⁰ The Regional Director incorrectly asserts that the Employer claimed that obtaining a Class A "requires completion of a training program from a trucking school, or two- or three-years' experience working for a trucking company." (D.D.E. at 4.) In truth, what the Employer wrote in its brief is the following: "The individual can either pay for the training or sign up to work with a large long-haul transportation company for a period of two or three years in which they will pay for the schooling. (Tr. 95-96.)" This is consistent with the Transportation Division Manager's testimony, copied verbatim above.

¹¹ <https://www.dbc.ca.gov/licensees/index.shtml>

commerce to create and mandate different types of licenses depending on the type of equipment being operated, then the Regional Director should defer to that agency's expertise and recognize the many differences between A and B Drivers, as described herein.

In sum, A Drivers have a more marketable, specialized license that allows them to operate any vehicle the Employer owns, and they are required to have more experience than B Drivers. Perris and Cherry Valley employees simply cannot perform this work without the requisite license, experience, and training -- A Drivers are the only employees who can operate any vehicle or perform any work for the Transportation Division. For this reason, the Regional Director erred in failing to weigh this factor in the Employer's favor.

f. The Regional Director erred in finding that A Drivers and B Drivers perform the same duties and, thus, are functionally integrated.

A Drivers haul and transport much larger quantities of waste and recyclables than other drivers. (Tr. 80.) They also haul and transport trailers, four-yard bins, trucks, and other items that B Drivers do not handle because, as described above, the evidence shows they (a) do not have the appropriate equipment, (b) do not have the appropriate license, (c) do not have the requisite experience, and/or (d) do not work in the Transportation Division.

Moreover, A Drivers travel to and from other CR&R facilities and corporations whereas B Drivers typically service residential accounts closer to their assigned location. (Tr. 80-81.) A Drivers also make long-haul trips to other cities and states, which require them to spend the night in those jurisdictions -- B Drivers do not. (Tr. 172, 174.)

In spite of this evidence, the Regional Director somehow concluded that "the duties of the A and B drivers ... are not so different as to support the Employer's contention that the unit sought is inappropriate," and that "functional integration also supports the Petitioner's argument." (D.D.E. at 7.)

The Regional Director's conclusion is incorrect for several reasons:

- He ignored evidence that A Drivers, due to the nature of their vehicles (a tractor-trailer combination) haul different and much larger materials or items to different types of customers, including trailers, containers, and trucks. (Tr. 80-81.) A Drivers haul containers and trailers to commercial customers -- B Drivers do not. (*Id.*) A Drivers haul trucks for repair to other facilities -- B Drivers do not. (*Id.*) B Drivers, on the other hand, use completely different types of equipment requiring a lesser class of license to collect smaller amounts of trash and recyclables, usually from residential customers, and then dump the materials at the Perris or Cherry Valley transfer stations. (*Id.*)
- The Regional Director concluded that A Drivers do not “perform any over-the-road trucking.” (D.D.E. at 7.) However, an A Driver (presented by the Union) testified that on at least two occasions, he hauled to and stayed overnight for several nights in both Blythe, California and Colorado. (Tr. 172 and 174.) There is no evidence that B Drivers have ever done the same.
- He assumes that Perris is the “central point” for the receipt of all materials (D.D.E. at 7), when in fact, A Drivers haul materials all over Southern California, as they must since they transport more than just trash and recyclables. (Tr. 108.) It is factually incorrect to suggest that A Drivers who report to Perris spend all of their time hauling or transporting materials to or from Perris. A Drivers regularly transport waste and other materials to and from all of the facilities that CR&R operates. (Tr. 108.)

The Regional Director did not even consider the scenarios the Employer described in its Post-Hearing Brief to demonstrate the extent to which any evidence of integration shows that it is between Perris A Drivers and the A Drivers at other locations (and undercuts any claim of integration between Perris A Drivers and other Perris and Cherry Valley employees):

- ***Vacation scheduling.*** A Drivers at all locations submit their vacation requests to Woodward. (Tr. 110-11.). In deciding when an A Driver can take his vacation, Woodward considers the seniority of all A Drivers in the Transportation Division. (Tr. 110-11.) An A Driver at Perris requesting time off in October might be denied that request if another A Driver at Stanton, for example, submits a request for the same week, but has more seniority than the Perris A Driver. If the Employer and the Union end up with a Perris and Cherry Valley labor agreement that also covers A Drivers, the impact of any vacation provisions in that labor agreement will necessarily spill over to vacation considerations for other A Drivers at non-represented locations.
- ***A Driver Transfers.*** The transfer of A Drivers from one location to another to do Class A work provides a second example. Woodward testified to numerous instances of this occurring:

So Julian Sandoval is now in Perris. He was in corporate before. Eraclio Navarro was in Stanton, he moved to Perris; and then he moved back to Stanton for a few days, didn't like it, then moved back to Perris again. Rigo and Rogelio Montoya both started in our Garden Grove facility. Then they moved over to our Stanton facility, then they moved to the Perris facility. Let's see. Myself, I -- I started in Perris, moved to Stanton, back to Perris. Now I'm back in Stanton again. I have, let's see, Santa Fe Springs, Cesar (phonetic) and Efram and Jose Chacon, Martin Gonzales; they all started in Stanton, and then moved to Santa Fe Springs, and now they're back to Stanton again. Actually, they moved from Santa Fe Springs to Los Angeles, Clark's, then back to Santa Fe Springs, then back to Stanton. Mike Watson moved from Stanton to San Juan Capistrano, same with Chuck Wiest.

(Tr. 109.) If Perris A Drivers are included in a labor agreement that does not include all A Drivers, the Employer's ability to continue to make these types of transfers would be severely limited if it wanted to either transfer A Drivers into or out of the Perris bargaining unit.

- ***Route scheduling and out-of-town assignments.*** A collective bargaining agreement that restricts the Employer in its ability to assign work or requires the Employer to consider seniority above any other considerations would render the current system inoperative. These considerations demonstrate that A Drivers have a community of interest with other A Drivers -- not the remaining employees at Perris and Cherry Valley.

The employees at issue in this case are not functionally integrated and the Regional Director erred in concluding otherwise. A and B Drivers perform different functions and use different equipment to perform those functions. B Drivers ***collect*** waste, recyclables and materials with roll offs, front loaders, and side loaders whereas A Drivers use tractors and trailers to ***transport*** much larger amounts of those same materials ***in addition to other types of materials and equipment*** that the B Drivers cannot transport given their lack of experience, the requisite license, and the requisite equipment. (Tr. 78, 80-81.) As such, the Regional Director should have weighed this factor in the Employer's favor. *See United Operations*, 338 NLRB at 124 (no functional integration where one group of employees answered general service maintenance calls whereas the other group of employees answered more specific calls requiring special skills).

g. The Regional Director’s finding of employee interchange is based on sporadic and one-sided instances.

The undisputed record evidence is that employee interchange is the exception rather than the rule and it is completely one-sided--an A Driver can drive a B truck, but a B Driver cannot legally drive an A truck. Yet, the Regional Director somehow concluded that “the factor that most strongly supports Petitioner is the evidence of contact and interchange between the A and B Drivers.” (D.D.E. at 8.) Specifically, he “[found] it significant that A drivers *regularly* function as B drivers, covering shifts and performing work when a tractor trailer is unavailable.” (Id. (emphasis added).) He went further: “The *regular* and uncomplicated way A drivers fill in and perform the work of B drivers is a telling example of how the Employer’s operations actually operate.” (Id. (emphasis added).)

His conclusions are based on incorrect factual determinations and giving too much to this factor when the Board has held that “sporadic” and “one-sided” interchange must be given little, if any, weight. *See Macy’s, Inc.*, 361 NLRB No. 4, slip op. at 10 (2014) (temporary interchange and one-way interchange are accorded little weight in community of interest analyses), *enfd.* 824 F.3d 557 (5th Cir. 2016).

The evidence is clear:

- Only *one* A Driver (a Union witness) testified that he filled in for a residential route at Perris because his truck was down and drove a Class B vehicle at Cherry Valley. (Tr. 241-42.) He does not suggest that this was a “regular” occurrence. (Id.) Nor did the Union in its counsel’s closing argument.
- The other A Driver who testified about doing “other” work at Perris had been injured and, thus, was placed on light duty. (Tr. 154-56.). Initially, the Employer had assigned him to help with paperwork and more recently, had been assigned to fill fuel tanks at a facility away from Perris or Cherry Valley. (Id.) ***This driver has never done Class B work.*** (Tr. 159, 177.)
- The only other evidence about employee interchange came from the Transportation Division Manager, and all of his testimony discussed all of his A Drivers filling in at the numerous other locations in Southern California when an unexpected and infrequent

issue arose such as a Class A truck breaking down or unexpected workload issues. (Tr. 104-05.) He was very clear in his testimony that his discussions about A Drivers temporarily filling in for others was not limited to the A Drivers in Perris. (*Id.*) Thus, the Regional Director could not infer from the Manager’s broad testimony that A Drivers “regularly” fill in for Perris employees.

- Importantly ***B Drivers do not do Class A work*** -- at all. In fact, without an A license they would be prohibited from doing so.

It is a stretch to interpret testimony from one A Driver about two isolated incidents of performing the Class B work as proof that A Drivers “regularly” perform the work of B Drivers. As the Board in *United Operations* explained, “[t]hat some HVAC techs may occasionally perform BSE duties not strictly within their job description or that BSEs may perform some minor HVAC tasks does not render the unit inappropriate where, as here, the HVAC techs spend a substantial majority of their time performing distinctive duties.”¹² 338 NLRB at 124-25. The Board further added that “sporadic instances of employees’ assisting with another department’s tasks reflect ‘a spirit of cooperation or civility’ rather than overlap of job functions.” *Id.* (citing *Ore-Ida Foods*, 313 NLRB 1016 (1994); *Maxim’s De Paris Suite Hotel*, 285 NLRB 377, 378 (1987); *Omni International Hotel*, 283 NLRB 475 (1987)).

In *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1415 (1978), the Board held that operators and laborers did not have a community of interest where, among other things, operators performing the work of a laborer was a “secondary” assignment that was “made basically to give them something to do when there are not operator tasks for them to perform.” *See also Cristal USA, Inc.*, 08-RC-184947 (May 18, 2017) (denying employer’s request for review where interchange was sporadic and not reciprocated); *Ore-Ida Foods*, 313 NLRB at 1020 (interchange too sporadic to support a community of interest where it was during a shutdown period and would

¹² The Regional Director rejected the Employer’s reliance on *United Operations* stating that the decision “specifically noted that no temporary interchange was present.” (D.D.E. at 8.) Yet, the facts and legal reasoning in *United Operations* support the Employer’s position that the interchange factor weighs in its favor.

prevent layoffs). According to the Board: “Indeed although they perform some laborers’ functions during cold weather, the primary function of operators at all times remains the operating of heavy construction equipment and they require special training and skills in order to do that work.” *Dick Kelchner Excavating*, 236 NLRB at 1415.

Moreover, to determine whether there is employee interchange, the term necessarily envisions that there should be some evidence that B Drivers fill in for A Drivers. However, as discussed throughout this Request for Review, B Drivers *cannot* fill in for A Drivers because they are not qualified or do not have a Class A license or have not transferred into a Class A position in the Transportation Division. Interchange cannot exist unless it goes both ways. *See Macy's, Inc.*, 361 NLRB No. 4, slip op. at 10. Here, the sporadic and limited instances of interchange are completely one-sided.

There also is no record evidence of any interchange of equipment. A Drivers never use the Perris or Cherry Valley equipment to perform work for the Transportation Division, and Perris and Cherry Valley employees are not even qualified or legally allowed to use A Drivers’ equipment. *See Bradley Steel*, 342 NLRB at 216 (no community of interest where, among other things, the employees used different tools). This further undercuts the assertion that this factors weighs against the Employer.

Further, while the Regional Director believed there to be “no record of A drivers based at Perris having any contact with other A drivers ... based at Colton, San Juan Capistrano, or Stanton,” he could only reach this conclusion by ignoring testimony on this point. Specifically, the evidence shows that Perris A Drivers have significant interchange with other A Drivers based at other locations given that their route assignments, which depend heavily on customer needs and

the Employer's overall operations, require the A Drivers to travel to and from the Employer's and client's facilities, sometimes at long distances. (Tr. 108.) Specifically, regarding A Drivers:

... I have some drivers that are just moving out of a facility, and I have other drivers that, on a daily basis, move between facilities. So it just depends on the need of -- of the company and that facility itself. ... [M]aybe one day they have a lot of cardboard; the next day, they don't. That case, we're going to haul more in between Perris and corporate or San Juan and corporate than we will from, you know, say, Monday, for instance, right? We've already cleaned out everything from Friday and Saturday. So Monday, we might not have as much. But Tuesday through Friday we will.

(Tr. 108.) It is incorrect to suggest based on this testimony that A Drivers based at Perris or other CR&R facilities have no contact with each other.

There is no evidence to show regular interchange between A Drivers and other Perris and Cherry Valley employees. Sporadic and one-way instances of A Drivers performing Class B work are insufficient as a matter of Board law to hold otherwise. The Regional Director's finding to the contrary was error.

h. The remaining commonalities do not outweigh the above factors, all of which favor the Employer

Having addressed the Regional Director's incorrect factual conclusions and misapplication of Board law, what remains is evidence that employees (1) have access to the same Perris bathrooms and breakrooms (although drivers make little or no use of them as they are primarily driving and take their meals and rest breaks while on the road); (2) have a few hourly wage rates that are roughly the same as those of A Drivers (but this is coincidental because they are on different scales); (3) are required to take drug tests and possess a medical card (requirements imposed on all drivers by the federal government and not the Employer); and (4) leave paperwork in baskets located in the same room (but ignores that the paperwork left by the A Drivers goes to the Transportation Division) (Tr. 133), and the paperwork left by the B Drivers goes elsewhere).

These facts, however, are insufficient as a matter of longstanding Board law to find the employee groups share a community of interest. *See also Essex Wire Corp.*, 130 NLRB 450, 453 (1961) (the Board found that just because employees may physically be around each other does not mean that they frequently interact with each other).

In sum, the Regional Director erred in including A Drivers in the unit. A Drivers do not share a community of interest with Perris and Cherry Valley employees because they: (a) are part of a *separate division* that effectively acts as its own company; (b) *report to* a different manager who supervises them and makes all decisions relating to hiring, discipline, terminations, scheduling, vacation approval, and routes; (c) drive equipment that requires a *specialized* Class A license; (d) perform *separate* duties and functions; (e) must have a *set level of experience* required to work as an A Driver; (f) *earn more money* because they are entitled to a bonus; (g) have *separate* vacation scheduling requirements, with time-off approved only by the Transportation Division and requiring consideration of A Drivers at the Employer's other locations (but not considering of the vacation schedules for other Perris and Cherry Valley employees); and (h) *have never been included in any of the labor agreements* between the Employer and the Union at other CR&R locations. The Board should set aside the Decision.

B. The Regional Director Erred in Ordering a Mail Ballot Election

1. Appropriate Standard

The Board adheres to a presumption that in-person voting/manual ballots are preferable as they tend to effectuate employees' Section 7 rights. *See Willamette Industries*, 322 NLRB 856 (1997); *see also San Diego Gas & Electric*, 325 NLRB at 1144; *Reynolds Wheels International*, 323 NLRB 1062, 1063 (1997) (“[U]nder existing Board precedent and policy, the applicable presumption favors a manual election, not a mail ballot.”). While the decision to conduct an election by mail or manual ballot may be within the discretion of the regional director (*see*

Manchester Knitted Fashions, Inc., 108 NLRB 1366, 1367 (1954) (place); *San Diego Gas & Electric*, 325 NLRB at 1144 (mail ballot)), elections are normally held on the employer's premises in the absence of good cause to the contrary.

The Board's longstanding rule is that elections generally should be conducted manually, unless the regional director reasonably concludes that circumstances make voting in a manual election difficult. *San Diego Gas & Electric*, 325 NLRB at 1144; NLRB Casehandling Manual, § 11301.2 ("The Board has ... recognized ... 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"). The Board has articulated three situations that "normally suggest the propriety of using mail ballots": (1) where eligible voters are "scattered" over a wide geographic area due to their job duties; (2) where they are "scattered" in that their work schedules vary significantly, so that they are not present at a common location at common times; and (3) where there is a strike, lockout or picketing in progress. NLRB Casehandling Manual, § 11301.2; *San Diego Gas & Electric*, 325 NLRB at 1145; see also *London's Farm Dairy, Inc.*, 323 NLRB 1057 (1997); *Reynolds Wheels International*, 323 NLRB at 1062-63.

None of these situations is present here. Here, the employees who are voting are "essential employees" in a pandemic "critical business." As such, they come to the facilities to work five days a week, every week. And, every single day, the employees work in an Employer-provided atmosphere that provides the high degree of safety required by the Centers for Disease Control and all other applicable health and safety agencies.

Board precedent in representation cases rests upon the critical threshold consideration of which method of election best advances employee choice (voter turnout, ease of participation, etc.). Mail or mixed ballot voting only exists when necessary to "enhance the opportunity of all to

vote.” NLRB Casehandling Manual § 11301.2. *San Diego Gas & Electric* stands for the same: “[e]xtraordinary circumstances” mandating a mail ballot election may occur when the Regional Director “might reasonably conclude that [voters’] opportunity to participate in the election would be maximized by utilizing mail or mixed ballot election methods.” *Id.* at 1145. Specifically, a Regional Director must tie his or her exercise of discretion, even in cases of extraordinary circumstances, to the Board’s proper role in ensuring employee participation and free choice. *Id.* at 1145 n.10 (“A Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.”).

2. **The Regional Director Abused His Discretion in Ordering a Mail Ballot Election**

What is absent from the Regional Director’s Decision is any sort of fact-specific analysis as to whether employees’ opportunity to participate in the election “would be maximized by utilizing mail ... ballot election methods.” Given the preference for manual elections, the Regional Director was *required* to analyze each and every factor the Board has previously held is relevant to the determination, including employee free choice, maximum voter participation, supervision of selection of representative, and voter safety at the location at issue.

Employee free choice and *maximum voter participation* are greater with a manual election. In this regard, when employees vote in a manual election, they get a ballot, check a “yes” or “no” box, and insert the ballot in the box. With a mail ballot, the voter must assume the United States Postal Service will actually deliver a ballot to him or her, open the ballot, check a “yes” or “no” box, and follow what some might view as several complicated steps to ensure their ballot (a) reaches the Region and (b) is counted (e.g., placing the ballot in the appropriate envelope, then placing that envelope in another envelope (each ballot is a different color), then “signing” the

outside of that envelope, and then (once again) hoping the United States Postal Service delivers the envelope to the Region in time for the ballot count). It is hard to imagine how anyone can credibly suggest that a mail ballot election is the better option to ensure employee free choice and maximum voter participation.

Beyond that, and as explained in the Employer's Post-Hearing Brief, voter turnout in Southern California mail ballot elections, including those in Region 21, leaves much to be desired.

Specifically:

- 34% return in *JetStream Ground Services, Inc.*, Case No. 31-RC-261494 (Aug. 10, 2020).
- 37% return in *Case Ambulance Service, Inc., d/b/a Falck USA, Inc.*, Case No. 21-RC-258117 (June 29, 2020).
- 36% return in *Alatus Aerosystems*, Case No. 21-RC-260848 (June 29, 2020).

Moreover, since July 13, 2020, the United States Postal Service admittedly has implemented measures that will slow the delivery of mail. And, since the Employer submitted its Post-Hearing Brief, the United States Postal Service has removed all sorting machines from post offices, which is sure to have an impact on any mail ballot election. The Regional Director mailed the ballots on August 21, 2020 and requires they be returned on or before close of business on September 3, 2020, in order to be counted in the ballot count on September 4, 2020.¹³ Nothing about the current situation and now the fiasco with the postal service will result in employee choice and maximum voter participation.

¹³ While the Decision states that ballots must be returned before 10:00 a.m. on Friday, September 4, 2020 (Decision at 13), there is no guarantee the postal service will delivery Friday's mail to the Region before 10:00 a.m. and, thus, in reality, ballots received on that day might not be counted.

Supervision of selection of representative can only occur with a manual election given the presence of a Board Agent and observers to make sure there are no improprieties. There is no supervision whatsoever with a mail ballot election.

Finally, the Regional Director did not adequately consider *voter safety*. The Regional Director recognized that (1) the Employer and the Union agreed to a manual election and (2) the Employer had presented sufficient evidence to show that it could take all measures outlined in the G.C. Memorandum, in addition to other measures not outlined in the Memorandum (e.g., providing face shields for all eligible voters, the Board Agent, and any other person involved in the election). (See Employer's Post-Hearing Brief at 26-29; Tr. 12-37; Er. Exs. 1 - 8.) Indeed, a manual election would follow the same safety protocols already in place at the facility, and the existence of a manual election would not increase potential transmission rates because employees already interact with each other in the same way they would during a manual election.

In reality, while the Regional Director correctly accepted that the Employer can fulfill all of the safety protocols set out in the GC Memorandum, and will implement additional measures to ensure voter and Board Agent safety, he ultimately placed a hypothetical safety risk (i.e., the assumption that voters will become infected no matter what the Employer does) above protecting employee free choice.

If voter turnout is of the utmost importance in representation cases, and the Board generally favors manual elections over mail ballot elections, the Board should overturn the Regional Director's Decision. Again, here, eligible voters come to work every day. These voters do not work from home. The state does not keep them at home on lockdown. Election or no election, they will interact just as much and in just the same fashion.

VI. CONCLUSION

Based on the foregoing facts, arguments and authorities, CR&R Incorporated hereby requests that the Board grant the foregoing Request for Review.

Respectfully submitted this 25th day of August, 2020.

CR&R INCORPORATED

By:



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

CR&R Incorporated <p style="text-align:center">Employer,</p> <p style="text-align:center">and</p> PACKAGE AND GENERAL UTILITY DRIVERS, TEAMSTERS LOCAL UNION NO. 396 <p style="text-align:center">Petitioner.</p>	Case Nos. 21-RC-262469; 21-RC-262474
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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2020, I served a copy of the foregoing **EMPLOYER’S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION** upon representative(s) for the Package & General Utility Drivers, Teamsters Local Union No. 396, by sending a true and correct copy of the same via email and first class United States mail, with adequate postage prepaid, addressed as follows:

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