

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

Grand Prairie, Texas

AIRGAS USA, LLC¹

Employer

and

Case 16-RC-262896

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 745**

Petitioner

DECISION AND DIRECTION OF ELECTION

Three issues are presented in this case. The first is whether a single-facility unit sought by Petitioner is appropriate. Petitioner contends that a single-facility unit comprised of 25 drivers at the Employer's production/distribution facility located at 801 West Carrier Parkway, Grand Prairie, Texas (the Grand Prairie facility) is an appropriate unit for bargaining. The Employer contends that a multi-facility unit including two additional production/distribution facilities located at 319 NE 23rd Street, Fort Worth, Texas (the Fort Worth facility) and 3116 Quebec Street, Dallas, Texas (the Dallas facility) is the only appropriate unit. The second issue is whether the petitioned-for unit, which is limited to drivers, must include other job classifications. The Employer contends that the multi-facility unit must include its production employees classified as production operators, production leads, operations coordinators, and lab technicians.² The third issue is whether to conduct a manual or mail ballot election given the current constraints of the COVID-19 pandemic.

A hearing officer of the Board held a video hearing in this matter. As explained below, based on the record and relevant Board law, I find that the petitioned-for unit is an appropriate unit. I also find that in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, an election by mail is appropriate.

¹ The Employer's name appears as corrected by stipulation of the parties.

² I acknowledge that in the parties' stipulation, they agree that the petitioned-for unit of drivers employed at the Employer's Grand Prairie facility is an appropriate unit. In its brief, Petitioner argues that "the Employer, by stipulating to the fact that the petitioned-for unit is an appropriate unit, cannot now argue that the unit is inappropriate" and that the Employer should be "estopped from asserting the exact opposite of its agreement that the unit is, in fact, appropriate." However, I note that the stipulation also clearly sets forth the issues raised by the Employer regarding unit composition and scope which the parties agreed are to be resolved.

I. THE EMPLOYER'S OPERATIONS

In about 2016, the Employer merged operations with AirLiquide and commenced operating its Grand Prairie production/distribution facility. In about October 2019, the Employer purchased a retail location in Dallas called TechAir and commenced operations of its Dallas production/distribution facility. The Fort Worth production/distribution facility has been in existence for many years.

At the Grand Prairie, Fort Worth and Dallas facilities, the Employer is engaged in the processing, distribution and delivery of compressed liquid gases to medical, industrial, commercial and retail customers. The Grand Prairie facility, known as the “main hub” or “super plant,” is the largest of the three facilities – it distributes oxygen, nitrogen, carbon dioxide, argon, nitric oxide, helium as well as specialty gases of various grades and combinations. The Fort Worth facility, which is the second largest, distributes various grades of oxygen, nitrogen, carbon dioxide, and argon; it is also the only facility which maintains a segregated area for flammable gases such as propylene and acetylene.³ The Dallas facility, the smallest of the three, distributes industrial and medical-grade oxygen, nitrogen, and carbon dioxide.

The Grand Prairie facility is approximately 24 miles from the Fort Worth facility and 17 miles from the Dallas facility; the Fort Worth facility is approximately 33 miles from the Dallas facility.

The Grand Prairie, Fort Worth and Dallas production/distribution facilities are part of the Employer's North Texas area operations. The North Texas area is comprised of the Dallas, Fort Worth and Red River districts. The Grand Prairie and Dallas facilities are part of the Dallas district and the Fort Worth facility is part of the Fort Worth district – they are the only production/distribution facilities in the North Texas area. There are multiple other non-production/distribution facilities in the North Texas area. These “branch locations,” or stores, sell gases directly to customers. While the Employer also employs drivers and other employees at its stores, none of those store drivers or other store employees are in question in this proceeding.

Jason Merideth, Distribution Manager for the North Texas area (NT Distribution Manager), oversees distribution for all three facilities. His main office is located at the Grand Prairie facility, but he regularly visits the Fort Worth and Dallas facilities. Merideth reports to Bill Ziots, Vice President of Distribution, who reports to Chris Ryan, President of the Southwest Region.⁴ Stanley Redding, Operations Manager for the North Texas area (NT Operations Manager), oversees operations for all three facilities; like Merideth, his main office is located at the Grand Prairie

³ The record incorrectly references “amidylene” and “ametylene” as a flammable gas – the correct name appears to be acetylene.

⁴ The Southwest Region is comprised of the North Texas, East Texas, West Texas, and New Mexico/El Paso areas.

facility and he regularly visits the Fort Worth and Dallas facilities.⁵ Redding reports to Kevin Barnhart, Vice President of Operations, who reports to Ryan.

Reporting directly to Merideth are three Grand Prairie Distribution Managers (Tom Andris, Distribution Manager-AM; Justin Smith, Distribution Manager-PM; and Michael Michean, Distribution Manager-Microbulk); one Fort Worth Distribution Manager, Louis Cheng; and one Dallas Distribution Manager.⁶ The petitioned-for drivers report directly to the Grand Prairie Distribution Managers except for two inter-branch drivers who report to the Grand Prairie Plant Manager at the facility, as further described below. The drivers at the Fort Worth and Dallas facilities report directly to Fort Worth Distribution Manager Cheng and the Dallas Distribution Manager, respectively, except for one inter-branch driver at the Fort Worth facility who reports to the Fort Worth Plant Manager, as further described below.⁷

Reporting directly to Redding are Grand Prairie Plant Manager Jason Chop, Fort Worth Plant Manager Rosendo Espino, and Dallas Plant Manager Michael Coleman. Grand Prairie Production Managers Daniel Collis and Julio Yopez report to Chop; one production manager reports to Espino; and one production manager reports to Coleman.⁸ The production employees at issue, which the Employer seeks to include, report to a production manager at the facility at which they are employed. As further noted below, the record also references, without detail, shift supervisors in production operations.

The Employer's corporate headquarters for the Southwest Region, including human resources, called Empire Central, is located in Dallas.⁹ Human Resources Director Brenda Vance and Human Resources Manager Linda Brooks manage human resources for the entire Southwest Region; they work at Empire Central and regularly visit the three facilities in question. Vice President of Distribution Ziots and Vice President of Operations Barnhart also work at Empire Central as well as Scott Hartman, Director of Safety for the Southwest Region. Robert Squibb is the Safety and Compliance Specialist for the North Texas area including the three facilities in question; the record is unclear as to his work location.

As noted, there are approximately 25 drivers in the petitioned-for unit at the Grand Prairie facility. The Employer proposes to include 63 additional employees. These employees include 34 production employees at the Grand Prairie facility: nine production operator-1s/loaders/sorters (hereafter referred to as loaders), 15 production operator-2s/fillers (hereafter referred to as fillers), one production operator-3 (hereafter referred to as PO-3), two production leads, four lab technicians, and three operations coordinators (hereafter referred to as OCs); 20 employees at the Fort Worth facility: 11 drivers, 2 loaders; five sorters; one production lead, and one OC; and nine employees at the Dallas facility: six drivers, two sorters and one.

⁵ District Manager, Dennis O'Day, who oversees sales and retail stores and supervises six sales employees and Area Branch Operations Coordinator (ABOC), Anthony Smith, who monitors open orders for distribution, also work at the at the Grand Prairie facility and regularly visits the Fort Worth and Dallas facilities. The record is unclear as to their full reporting relationships.

⁶ The name of the Dallas Distribution Manager is not in the record.

⁷ The Employer's brief incorrectly notes that all drivers report to NT Distribution Manager Merideth.

⁸ The names of the Fort Worth and Dallas Production Managers are not in the record.

⁹ The Employer's U.S. corporate headquarters is in Radnor, Pennsylvania.

The Grand Prairie facility currently operates three shifts (day, afternoon, and night), Sunday through Friday. The record reflects that the Fort Worth and Dallas facilities operate one or two shifts. Each facility includes a common break room and rest rooms for all employees, production and distribution offices, production and warehouse areas, and a yard where the delivery trucks are kept. The Grand Prairie facility also has a call center on-site with six customer service representatives who answer customer calls, take phone orders, and follow up with customer issues. These customer service representatives report directly to Grand Prairie supervisor David Meyer. There are also customer service representatives assigned to cover the Fort Worth facility who are stationed at an off-site retail center. There are no customer service representatives for the Dallas facility.

II. THE PETITIONED-FOR DRIVERS AND PRODUCTION EMPLOYEES

All employees at each of the three facilities share the same parking lot, break rooms, and restrooms. Employees have direct access only to their assigned facility. Grand Prairie employees access their facility by employee identification badges, while Fort Worth employees access their facility by key. All employees work an average of 40 hours per week¹⁰ and use the Kronos time management system to record hours. There are Kronos kiosks and computers inside each facility for clocking in and out at the beginning and end of each day. All hourly employees and management personnel receive the same area-wide company benefits: health insurance, life insurance, disability insurance, five days sick leave, vacation time based on years of service, seven paid holidays, and two floating holidays. All hourly employees wear the same uniforms, consisting of gray pants and shirts. In addition, hourly employees must wear company-purchased protective steel-toed boots and may opt for a company-purchased winter coat and hat.

All hourly employees are subject to the same company-wide policies, procedures and work rules as set forth in the Employer's employee handbook. Discipline for all hourly employees goes through human resources. In this regard, the direct supervisor at the facility will contact human resources about a disciplinary matter and often provide a recommendation for discipline. Human resources determines the appropriate level of discipline by reviewing the employee's disciplinary history and, in some cases, conducting a disciplinary investigation. Although there is no formal discipline procedure, in general, human resources, in collaboration with the facility supervisor,¹¹ implements a progression of discipline depending on the severity of the offense which begins with an employee discussion (verbal warning) and progresses to a first written warning, second written warning, final written warning/suspension/performance improvement plan (PIP), and termination. Disciplinary incidents involving safety violations are reported by the employee's supervisor to Safety Specialist Squibb and his superiors. All employees are provided company email addresses and regularly use email in the course of their work duties.

The Employer requires all employees to undergo a multitude of training; some of this training is company-wide, while other training is classification or facility specific. Regarding company-wide training, drivers and production employees must complete new employee safety training online via the Employer's "Airgas University" intranet site. Throughout employment,

¹⁰ From about March 2020 to recently, employees at all three facilities were furloughed to 32 hours per week as a result of decreased business due to the COVID-19 pandemic.

¹¹ For drivers, NT Distribution Merideth is also involved in discipline as further explained below.

they are required to participate in periodic safety training regarding a multitude of company-wide safety policies and issues. While most of this training is conducted at the employees' respective facilities by Safety Specialist Squibb, sometimes a facility manager will train employees from other facilities. For example, Grand Prairie Production Manager Daniel Collis recently conducted medical gas training for all Dallas facility drivers and production employees. The record is unclear as to whether and when Collis conducted similar training at the Grand Prairie and Fort Worth facilities. All drivers and production employees as well as all plant management at the three facilities are trained and certified to operate forklifts.

Regarding facility-wide training, employees must also complete training regarding local facility safety policies and procedures; this type of training is usually conducted by a facility manager. For example, all drivers and production employees at the Grand Prairie facility have been trained regarding Grand Prairie's safety rule permitting only one forklift at a time to pass through the overhead doors. All drivers and production employees also receive training through the Employer's leadership observation program. This training includes random observation of an employee's work duties by a direct supervisor (supervisors perform about two employee observations per month). Finally, there is some record evidence that each Employer facility with more than ten employees is required to maintain a local safety committee comprised of hourly and management employees from all departments. Each safety committee is required to meet once each quarter at the facility. Safety Specialist Squibb appears to oversee safety committees at the Grand Prairie and Fort Worth facilities. The record is unclear as to whether a safety committee has yet been formed at the Dallas facility.

A. Drivers

Out of the 25 drivers in the petitioned-for unit at the Grand Prairie facility, approximately 21 are local drivers,¹² two are inter-branch drivers,¹³ and two are microbulk drivers. Out of the ten drivers at the Fort Worth facility, approximately nine are local drivers¹⁴ and one is an inter-branch driver. All six drivers at the Dallas facility are local drivers. Each facility maintains its own fleet of delivery trucks for its drivers. On occasion, the facilities share trucks.

As noted, all drivers report directly to a distribution manager at their assigned facility, except for the two Grand Prairie inter-branch drivers who report to the Grand Prairie plant manager as further described below. All drivers' wages range between \$20.00 and \$29.00 per hour¹⁵ and, as noted, they work an average of 40 hours per week. In addition to clocking in and out at the facility via the Kronos timekeeping system described above, the drivers also log onto an onboard computer in their truck via the Employer's PeopleNet computer system which tracks driver movement and hours throughout the day. All of the drivers work until their deliveries are complete; on average, they work eight hours per day. Per U.S. Department of Transportation

¹² Also known as city drivers.

¹³ Also known as shuttle drivers.

¹⁴ There is currently one vacant local driver position at the Fort Worth facility.

¹⁵ Newly hired drivers start at \$20.00 to \$22.00 per hour at the discretion of NT Distribution Merideth and human resources, with input from the distribution manager from which the new driver will be assigned.

(DOT) regulations, drivers are not allowed to work more than 12 hours per day or 60 hours per week.

All drivers are required to possess a commercial driver license (CDL) to operate large, heavy and hazardous material vehicles in commerce. There are three classes of CDLs that determine the type and size vehicle a driver is permitted to drive: Class A, Class B, and Class C. Depending on the truck driven and the materials delivered, drivers must also possess specialized CDL endorsements such as HAZMAT, air brakes, and tanker endorsements. Finally, all drivers must pass background checks and drug screens.

All drivers receive yearly performance appraisals from a distribution manager at their respective facility. The appraisals are approved by NT Distribution Manager Merideth and human resources. Drivers receive merit raises at these managers' discretion which range from 25 cents to \$1.25 per hour. In about July 2019, the Employer instituted a bonus program for drivers consisting of a \$1,000 per quarter performance-driven bonus. However, in March 2020, when the Employer's business slowed down due to the COVID-19 pandemic, it indefinitely suspended the bonus program at all three facilities. As noted, all driver disciplines are initiated by a distribution manager at the facility who is involved in the disciplinary process. Driver discipline must be approved by NT Distribution Manager Meredith as well as human resources.

Hiring at the three facilities is primarily the responsibility of NT Distribution Manager Merideth. The hiring process is generally initiated by human resources which posts driver job openings internally on AirNet, a company intranet site, as well as on Taleo.com, a talent management software program, and Indeed.com, a public internet search engine for job postings. Human resources screens all driver applications and sends viable candidates to Meredith for consideration. At Merideth's direction, human resources arranges prospective driver interviews which are conducted by Merideth and human resources along with the distribution manager from the facility at which the prospective driver will be assigned. Likewise, all drivers desiring to transfer to a different Employer facility must go through this application and interviewing process.¹⁶

In addition to company-wide and facility-wide training noted above, drivers must complete additional training pertaining to their driver classification. New hire drivers are required to complete 15 days of "onboarding training" consisting of a combination of online training in "New Hire Driver Qualification Program" through Airgas University and hands-on training with an experienced driver at the assigned facility. Drivers attend weekly safety meetings at their assigned facilities, which are conducted by the local facility distribution manager – on occasion, NT Distribution Manager Merideth, Distribution Vice President, Distribution Ziots, and/or Southwest

¹⁶ An exception to the normal hiring procedure occurred at a job fair held in about February 2020, where a number of high level and individual facility distribution and production managers participated in mass hiring interviews for both drivers and production employees at all three facilities. This appears to be a one-time occurrence – in this regard, the record evidence demonstrates that more prospective applicants expressed interest than expected by the Employer and further that the Employer, having completed a number of recent acquisitions, had more job openings than normal.

Region President Ryan attends these meetings. Safety Specialist Squibb also conducts other driver-only training and federally required compliance audits for drivers.

1. Local Drivers

The local drivers deliver gases directly to medical, industrial, commercial and retail customers and are part of the Employer's distribution operations. As noted, they report directly to a distribution manager at their assigned facility. The Grand Prairie local drivers have staggered start times of 5:30, 6:00, 6:30, and 7:00 a.m.; the Fort Worth local drivers have staggered work times of 6:00 and 6:45 a.m.; and the Dallas local drivers all start work about 6:00 a.m. Any overtime work for local drivers is authorized by a distribution manager at the facility and/or NT Distribution Manager Merideth.

The daily routine of the local drivers is similar among the three facilities. They clock in at a common area/break room¹⁷ at the facility and pick up their paperwork, which is prepared in advance by a distribution manager at the facility. At the Grand Prairie facility, driver paperwork is kept in a bin in the driver/break room. Driver paperwork consists primarily of a load sheet and a trip report.¹⁸ The load sheet lists an inventory of available gas cylinders in the facility and the amount and type of gas cylinders ordered by customers for that day. The trip report lists product orders and the driver's customers and delivery stops for the day. Additional driver paperwork includes a hazmat manifest listing hazardous materials on the driver's truck (required for DOT stops) and a customer list showing customer addresses and exact quantities contained in each delivery order. Occasionally, there is some cross-over of customers for deliveries among the drivers at the three facilities such that drivers from different facilities will deliver to the same customer. A list of driving routes is also provided to drivers by a distribution manager via a computer software program that generates a map of the most efficient routes.

Once they have their paperwork, drivers proceed to their assigned truck, log on to their onboard computer, and conduct a 15-minute pre-trip walk-around inspection to ensure the truck is in working order. Then, they check the load on their truck, which has been pre-loaded by the loaders, and reconcile the product that has been loaded to that listed on their load sheet.

About 60 percent of the time, there is an issue with the load – either something is on their truck that should not have been loaded, or, something is missing from the truck that should have been loaded. Sometimes the issue can be resolved quickly and independently by the driver, for example, by pulling a few cylinders off the truck and putting them back in the pool bin. Other times, the driver will need to request a loader to pull large cylinders¹⁹ off the truck with a dolly or a forklift. If no loader is available at this time, the driver may use the dolly or forklift to remove the cylinders, however, this does not happen often. If something is missing from the truck, the driver will typically request a loader to retrieve the missing product and wait for it to be loaded. The loader may advise the driver that the requested product is not available which results in the driver having to “cut” it from his load sheet.

¹⁷ At the Grand Prairie facility the break room is also called the drivers room.

¹⁸ Also known as a trip sheet.

¹⁹ Large gas cylinders are referenced in the record as vertical gas liquids (VGLs).

On occasion, a driver may change stops with another driver after the product has been loaded. In this situation, the drivers typically adjust and reload their trucks on their own. Whenever any adjustment is made to an original load, the driver must request revised paperwork from either a distribution manager or an OC.

Once the driver secures and verifies the load and receives final paperwork, the distribution manager or OC will electronically transmit a final trip report to the driver's handheld computer. The driver then completes a final verification of load typically requesting that a lead driver²⁰ or distribution manager check the load and sign the load sheet. There is some limited record evidence that a driver will request a loader to verify the load when a lead driver or distribution manager is not available. Once the load has been verified, the driver is ready to leave the yard.

Load sheets may contain orders for "certified" gases. As explained further below, a certified cylinder is one in which the gas has been tested, analyzed and certified for contents by a lab technician who attaches a "certification of analysis" to the cylinder. During the driver verification process explained above, drivers must also verify that all certified cylinders listed on the load sheet are on their truck with attached certificates of analysis. There is some record evidence that drivers request certifications directly from the lab technicians. However, the record demonstrates that in most cases certified cylinders are pre-loaded by loaders in the loading process and only on rare occasion will a driver request a certification of analysis from a production employee when one is missing.

Depending on load issues, drivers generally leave to go on the road as early as 6:30 and as late as 8:00 a.m. While drivers are assigned to routine routes, their stops vary day to day. Although their trip report and route map provide a suggested order of stops, they have discretion to vary stops as needed. Each driver is afforded a 30-minute lunch break while on the road. At each stop, the driver parks and secures the truck, unloads the product, and provides a receipt to the customer printed from the driver's handheld computer. The driver then picks up and loads empty cylinders, if any, to return to the facility. At each stop throughout the day, the driver completes the trip report, reconciling all deliveries by noting arrival and departure time at each stop, contents of delivery, and number of empty cylinders picked up. Local drivers average about 16 stops per day.

At the end of the deliveries, the driver returns to the facility and segregates empty cylinders from full cylinders on separate pallets inside the truck. The loader counts the remaining product and reconciles it with the driver's trip report and then unloads the truck. The unloading process takes about 15 minutes. The driver then moves the truck to the staging area for next day loading, completes a ten-minute post-trip inspection of the truck (checking the condition of the tires and for any leaks), and logs off of the onboard computer.²¹ The driver then turns in paperwork and the handheld computer to the distribution office. It is not uncommon for the driver to check paperwork

²⁰ There is one leader driver at each of the Grand Prairie and Fort Worth facilities. Their job description notes that the lead driver position is non-supervisory and neither party claims they are supervisors. The scant record evidence about them does not note any significant difference between their duties versus the other drivers except that a lead driver is more experienced with greater seniority and provides hands-on training to new drivers.

²¹ The Employer has a contract with Premier Fleet Services for all truck preventative maintenance and another contract with Schneider Fleet services for all truck repair work.

for next day deliveries before leaving the facility. Generally, drivers clock out of the facility around 4:00 to 6:00 p.m.

2. The Inter-Branch Drivers

As noted, two inter-branch drivers work at the Grand Prairie facility and one works at the Fort Worth facility. Prior to 2020, the Grand Prairie inter-branch drivers, like the local drivers, reported directly to a distribution manager in distribution operations. In about February 2020, the inter-branch drivers at the Grand Prairie facility were moved to production operations and now report directly to Grand Prairie Plant Manager Chop. The Fort Worth inter-branch driver currently continues to report to Fort Worth Distribution Manager Cheng.

Instead of making deliveries to Employer customers, like the local drivers, the inter-branch drivers deliver gases primarily to Employer stores located in the North Texas area.²² They are routinely assigned to the same store delivery locations daily and weekly. They also shuttle gases and other products as needed among the three production/distribution facilities. Inter-branch drivers also cover routes for local drivers (and vice versa) at their assigned facilities as needed – such assignments are coordinated between a distribution manager and an OC.

The inter-branch drivers work the same hours and possess the same qualifications as the local drivers. For the most part, they follow the same routine daily procedures as the local drivers with some variation. They complete the same pre-trip and post-trip inspections. The record is unclear whether and to what extent they and/or loaders load and unload their trucks at the facility. Their final verification process is completed with store personnel at the delivery sites rather than at the facility. Like the local drivers who unload their product at customer sites, the inter-branch drivers unload their product when delivering to stores. However, when delivering to a production/distribution facility, the inter-branch driver is sometimes assisted by a loader. The Grand Prairie inter-branch driver paperwork is processed by an OC in the production office rather than the distribution office.

3. The Microbulk Drivers

As noted, two microbulk drivers work at the Grand Prairie facility. Like the local drivers, the microbulk drivers are part of the Employer's distribution operations and report directly to a distribution manager at their assigned facility. They drive tractor-trailer-tanker trucks to transport gases in bulk form to Employer customers. They possess the same qualifications as the other drivers and are required to have a Class A CDL with HAZMAT tanker and airbrakes endorsements to drive this size truck. Bulk drivers who work out of the Employer's merchant gas division located in Cleburne, Texas,²³ fill the bulk tanks at the Grand Prairie facility and the Grand Prairie production operators pump gas for microbulk deliveries from the bulk tanks.²⁴ For the most part, the microbulk drivers follow the same routine, daily procedures as the local drivers with some

²² There are approximately nine stores located in the North Texas area: Garland, McKinney, Gainesville, Denton, Sherman, Terrell, Tyler, Paris, and Sulphur Springs.

²³ Petitioner has not petitioned to represent the bulk drivers and there is no claim by the Employer that they should be included in any unit found to be appropriate.

²⁴ Gases for local and inter-branch deliveries are pumped from non-bulk tanks at the facility.

variation. Because their stops are more spread out, microbulk drivers have an earlier start time, around 4:00 a.m.

B. Production Employees

Each plant manager is responsible for the hiring of all production employees (loaders, fillers, production leads, OCs, and lab technicians) at their respective facility. The hiring process for production employees is similar to the above-described hiring process for the drivers. In this regard, human resources posts production jobs internally on AirNet, and externally on Taleo.com and Indeed.com. Human resources screens production applicants and sends candidates to the plant manager for consideration. At the plant manager's direction, human resources arranges prospective production interviews which are conducted by the plant manager and human resources. Sometimes the production manager also participates in prospective production employee interviews.

In addition to company-wide and facility-wide training noted above, production employees complete some additional training pertaining to their production classification. New hire production employees complete new employee training consisting of a combination of online training via the Employer's Airgas University intranet site and hands-on training with an experienced employee in the same production position at the facility. Production employees attend pre-shift daily "tailgate" production meetings conducted by a production lead. Safety Specialist Squibb also conducts other production-only on-site training. As noted, the production employees wear the same uniforms as the drivers.

The record is silent regarding performance appraisals for production employees as well as whether they receive merit raises. There is no bonus program for production employees. Discipline for production employees is initiated by the production manager or plant manager at the facility. Disciplinary write-ups for all production employees are signed by a production manager or plant manager and human resources.

1. Production Operators and Production Leads

There are approximately nine loaders (production operator-1s), 15 fillers (production operator-2s), one production operator-3 and two production leads employed at the Grand Prairie facility; two loaders, five fillers, and one production lead employed at the Fort Worth facility; and two fillers²⁵ employed at the Dallas facility.

All production operators and leads report directly to a production manager at their assigned facility. When a production manager is not present, they report to the plant manager. The record also references the presence of shift supervisors in production. However, it is unclear at which they work, how many there, and what their job duties and responsibilities are. All of the production operators and production leads work fixed eight to ten-hour schedules. The Grand Prairie facility operates three shifts (6:00 a.m. to 4:00 p.m.; 11:00 a.m. to 7:00 p.m.; and 9:00 p.m. to 5:00 a.m.) and production employees are assigned by Plant Manager Chop. Limited record evidence

²⁵ These fillers are absent from the Employer's employee lists attached to its Statement of Position as Attachment C.

demonstrates that the Fort Worth and Dallas facilities each operate one main production shift from about 4:00 a.m. to 1:00 p.m. and that Fort Worth facility staffs a shift of primarily loaders from 9:00 a.m. to 6:00 p.m. for the unloading of trucks at the end of driver shifts. Overtime work for production operators and production leads is authorized by a production manager or plant manager at the facility, or by NT Operations Manager Redding.

At the Grand Prairie and Fort Worth facilities, loaders work primarily in the production areas of the plant including the filling, sorting, flammable gas, and cylinder storage/warehouse areas. They sort gas cylinders and move them from the production areas to the staging area of the yard where they load the cylinders onto the trucks. They receive work orders from the production manager at the facility. They start loading cylinders about 3:00 a.m. so that most of the drivers' orders are loaded by the time the drivers arrive to work. When the drivers arrive at their trucks, the loaders are available to answer questions concerning verification of loads. Like the drivers, their paperwork is processed by an OC. Loaders earn approximately \$16.00 per hour.

The fillers at all three facilities are primarily responsible for filling customer orders by pumping cylinders with gases. They receive work orders from the production manager at the facility. The cylinders are stored in the warehouse area of each plant. Based on the work order, the filler determines the number of cylinders needed, and the type and quantities of gas to pump. They perform pre-fill inspections to test for purity prior to fulfilling an entire order. For orders requiring certified gases, the filler is responsible for getting a certification of analysis from a lab technician. The record is unclear as to whether the cylinders requiring certifications are brought to the lab. When their orders are filled, the fillers print out a package control record (PCR) which is verified for proper fill levels by another filler or an OC. The fillers then place the filled cylinders in a separate area for the loaders to pick up. The fillers complete their paperwork by signing off on work orders and returning paperwork to the production office for processing by an OC. Fillers earn approximately \$17.00 per hour.

Fillers rarely assist in loading except at the Dallas facility which is small and does not have loaders. At the Dallas facility, the two fillers perform both loading and filling work as described above. Loaders do not perform filling work.

There is one production operator-3 employed at the Grand Prairie facility who earns approximately \$18.00 per hour. The production operator-3 job description states that the individual "...performs various duties in the plant including monitoring equipment to fill industrial gas mixes and medical gas products as well as performing Level 1 and 2 duties. ..." There is some limited record testimony that describes the production operator-3 as a "specialized filler" who works closely with the lab technicians in fulfilling orders for specialized blended gases.

There is scant record evidence regarding the production leads. Approximately one production lead is assigned to each shift at the Grand Prairie facility and one production lead assigned to the main production shift at the Fort Worth facility. There are no production leads assigned to the Dallas facility. There is no record evidence of a production lead job description or wage rate. Some record evidence reflects that production leads conduct the above-described pre-shift production "tailgate" meetings.

2. *Operations Coordinators*

There are approximately four OCs employed at the Grand Prairie facility; one OC employed at the Fort Worth facility; and one OC employed at the Dallas facility. They primarily perform clerical and administrative tasks at each facility related to processing paperwork related to customer orders and deliveries including entering orders, posting tickets, and closing shipments. According to the OC job description, OCs enter tickets, production data, cylinder movements, and raw receipts on the Employer's electronic operating system for production called SAP;²⁶ order and maintain supplies; process special handling in billing matters; prepare shipping documents for outbound freight; and count and verify incoming and outbound loads for accuracy. At the Grand Prairie facility, two OCs also referenced as distribution coordinators, work in the distribution office handling driver paperwork²⁷ and two OCs, also referenced as production coordinators, work in the production office handling production and inter-branch driver paperwork. There does not appear to be any such separate distinction at the Fort Worth and Dallas facilities. There is some record evidence that OCs from different facilities have weekly phone calls with each other regarding plant material and supply levels and shuttling of supplies among the facilities; hot-shot orders; and common issues with customer orders.

The record is not entirely clear as to whom the OCs report. Overall, they appear to report directly to the plant manager and/or a production manager. However, the record also reflects that at the Grand Prairie facility, the two OC/distribution coordinators also report to Grand Prairie distribution manager. Some limited record evidence reflects that ABOC Smith reviews the work of OCs, especially at the Grand Prairie facility.

3. *Lab Technicians*

Four lab technicians are employed exclusively at the Grand Prairie facility. They report to Lab Manager Stephen Reagan who reports to Plant Manager Chop. They work in a lab located by the production office. One lab technician is assigned to each shift.²⁸ Their primary duties are to test and analyze gases and create certifications of analysis as requested by customers. At the beginning of their shift, they participate in the pre-shift tailgate meeting with the other production employees. Then, they review work orders and make rounds at the plant to get readings on gas tanks and cylinders. Although the record is not entirely clear, it appears that cylinders are brought to them in the lab by fillers. They perform testing and analysis of gases in the lab and print out certificates of analysis and attach them in a plastic sleeve to the gas cylinders. On occasion, when a driver discovers a certificate of analysis is missing from his/her load, the lab technician will prepare a certificate requested directly by the driver. Managers are also authorized to print certificates of analysis and do so on occasion. It is unclear whether loaders or fillers pick up the cylinders from the lab for loading onto the trucks. The third shift lab technician who is present at the Grand Prairie facility when the trucks are being loaded is qualified to move trucks to the

²⁶ The record does not define a full name for the acronym SAP.

²⁷ This driver worker includes paperwork related to "hot shot" drivers who are contracted by the Employer and perform urgent deliveries for all three facilities.

²⁸ The record is unclear as to which shift the fourth lab technician works.

loading area if necessary. At the end of their shift, the lab technicians clean the lab area and prepare it for the next shift. The lab technicians wear the same vendor-provided uniforms as the other production employees.

4. *Other Hourly Employees*

The record mentions other hourly employees at the Grand Prairie facility who are employed as welding technicians and a maintenance technician. These employees may also work in production operations. The record does not indicate the job duties of the welding technicians, whether any are employed at the Fort Worth or Dallas facilities, or to whom they report. The maintenance technician works day shift hours and reports to Grand Prairie Plant Manager Chop. He is responsible for maintaining and repairing plant equipment, such as pumps, compressors, vacuums, vaporizers and tanks, at all three plants. He does not perform any truck repairs.

Petitioner has not petitioned to represent any of these other employees and there is no claim by the Employer that they should be included in any unit found to be appropriate.

III. UNIT SCOPE

Petitioner contends that drivers at the Employer's Grand Prairie facility constitute an appropriate single-facility unit, while the Employer asserts that the only appropriate unit is a multi-facility unit including the Fort Worth and Dallas facilities. For the reasons set forth below, I find that the single-unit facility sought by Petitioner is appropriate.

A. Board Law Regarding Single Facility Units

The Board has long held that a petitioned-for single-facility unit is presumptively appropriate unless it has been so effectively merged or is so functionally integrated that it has lost its separate identity. *D&L Transportation, Inc.*, 324 NLRB 160, 160 (1997). The party opposing the single-facility unit bears the heavy burden of rebutting its presumptive appropriateness. *J&L Plate, Inc.*, 310 NLRB 429, 429 (1993); *Renzetti's Market, Inc.*, 238 NLRB 174, 175 (1978). In order to rebut the presumption, the party challenging the presumption must be able to show that the day-to-day interests of the employees at the single location have merged with those of the employees at the other locations. *Id.* at 175. To determine whether the single-facility presumption has been rebutted, the Board examines several factors including: (1) central control over daily operations and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange; (4) the distance between locations; and (5) bargaining history, if any exists. See, e.g., *Trane*, 339 NLRB 866, 867 (2003); *D&L Transportation*, 324 NLRB at 160; *J &L Plate, Inc.*, 310 NLRB at 429.

B. Application of Board Law Regarding Single Facility Units

In reaching the conclusion that a single-facility unit is appropriate, I rely on the following analysis and record evidence.

1. Central Control over Daily Operations and Labor Relations

The Board has made clear that “the existence of even substantial centralized control over some labor relations policies and procedures is not inconsistent with a conclusion that sufficient local autonomy exists to support a single local presumption.” *California Pacific Medical Center*, 357 NLRB 197, 198 (2011) (citations omitted). Thus, “centralization, by itself, is not sufficient to rebut the single-facility presumption where there is significant local autonomy over labor relations. Instead, the Board puts emphasis on whether the employees perform their day-to-day work under the supervision of one who is involved in rating their performance and in affecting their job status and who is personally involved with the daily matters which make up their grievances and routine problems.” *Hilander Foods*, 348 NLRB 1200, 1203 (2006). Therefore, the primary focus of this factor is the control that facility-level management exerts over employees’ day-to-day working lives.

I acknowledge that the Employer maintains centralized control over some personnel matters and labor relations functions for all three facilities. In this regard, NT Distribution Manager Merideth oversees distribution operations for all three facilities and NT Operations Manager Redding oversees operations for all three facilities. Both managers maintain primary offices at the Grand Prairie facility and regularly communicate with distribution managers, production managers, and plant managers at all three facilities. Human resources conducts all hourly employee disciplinary investigations. NT Distribution Manager Merideth is in charge of hiring drivers for all three facilities and pay rates for newly hired drivers are set at the discretion of Merideth and human resources. Payroll is processed for employees at all three facilities, as well as at least all employees employed in the Southwest Region, by Asset Manager Donna Barnhart in Tulsa, Oklahoma. Employees at all three facilities receive the same benefits and some of the same training, and are covered by the same company-wide policies and procedures. Employee uniforms for each facility are identical.

However, the record also demonstrates significant local supervision and autonomy over labor relations matters. Neither NT Distribution Manager Merideth or NT Operations Manager Redding regularly interact directly with drivers or production employees at any facility. Rather, each facility’s distribution/delivery operations is overseen by a distribution manager who independently assigns work to drivers, and each facility’s production operations are overseen by a production manager who independently assigns work to production employees. Distribution managers prepare driver paperwork and routinely assist drivers with load verifications. Production managers are in charge of production planning at their respective facilities, including monitoring inventory and open orders. With the OCs, production managers prepare and process work orders and paperwork for production operators. In the production manager’s absence, the plant manager at the facility assigns work to production employees. Employees direct their questions and issues to these direct supervisors. With specific regard to the Grand Prairie inter-branch drivers, their work is assigned by Grand Prairie Plant Manager Chop.

Each Plant Manager is responsible for the hiring of all production employees (loaders, fillers, production leads, OCs, and lab technicians) at their respective facility. Although NT Distribution Manager Merideth, along with human resources, is in charge of hiring drivers for all

three facilities, the individual facility distribution managers involved in prospective driver interviews for their facility and provide recommendations for hiring to Merideth and human resources. While I recognize that at a job fair recently held in about February 2020, a number of high level and individual facility distribution and production managers participated in mass hiring interviews for both drivers and production employees at all three facilities, this appears to be a one-time occurrence – in this regard, the record evidence demonstrates that more prospective applicants expressed interest than expected by the Employer and further that the Employer, having completed a number of recent acquisitions, had more job openings than normal. Overall, the record demonstrates that the distribution managers, production managers and plant managers working at the facility who maintain control over employees' day-to-day working conditions at their respective facility.

Although human resources conducts employee disciplinary investigations, it is the distribution managers, production managers and plant managers at the facilities who initiate disciplinary investigations and actions for issuance of written warnings, PIPs, suspensions and terminations of drivers and production employees. The issuance of discipline is a collaborative effort coordinated by human resources involving these facility managers and higher-level management. Although pay rates for newly hired drivers are set at the discretion of NT Distribution Merideth and human resources, the facility distribution managers provide input. In this regard, tenured drivers receive yearly performance appraisals from distribution manager(s) at their respective facility, which are approved by NT Distribution Manager Merideth and human resources. All of these managers are involved in determining merit raises for drivers. It is unclear who decides pay rates for production employees.

Although drivers and production employees at all three facilities receive some of the same training, they also receive training which is facility-wide as well as training at the facility which is classification-specific. Each facility may implement its own local safety policies and procedures and train its employees thereon. For example, hourly employees at the Grand Prairie facility have been trained regarding Grand Prairie's safety rule permitting only one forklift at a time to pass through the overhead doors.

Even though the Employer's higher-ranking management officials retain final authority over certain matters as noted above, there is significant local autonomy at the three facilities over labor relations procedures and policies and the distribution managers, production managers and plant managers at each facility are involved in key decisions, such as work assignments, hiring, firing, and discipline for production employees and drivers at their respective facility. These managers are likewise involved in appraising and increasing the wages of drivers at their facility. This exercise of considerable control over employees' day-to-day working supports the presumption of a single-facility unit. See, *Rental Uniform Service*, 330 NLRB 334, 335-336 (1999); *Executive Resources Associates*, 301 NLRB 400, 402 (1991); *Renzetti's Market*, 238 NLRB at 175-176.

2. Similarity of Skills, Functions, and Working Conditions

The similarities or dissimilarities of work, qualifications, working conditions, wages and benefits between employees has some bearing on determining the appropriateness of the single-facility unit. However, this factor is less important than whether individual facility management

has autonomy and whether there is substantial interchange. See, *Dattco, Inc.*, 338 NLRB 49, 51 (2002) (“This level of interdependence and interchange is significant and, with the centralization of operations and uniformity of skills, functions and working conditions is sufficient to rebut the presumptive appropriateness of the single-facility unit.”).

Generally speaking, the drivers among the three facilities are engaged in similar driving work and the production employees are engaged in similar production work. However, while the three facilities run similar operations, there are some notable differences. The largest of the three facilities, the Grand Prairie facility, produces and delivers the largest volume of product – it runs three continuous shifts, Sunday to Friday, while the other facilities operate only one or two shifts. The Grand Prairie facility employs approximately 25 drivers and 34 production employees, far more than the Fort Worth and Dallas facilities combined. As a result of its larger number of drivers and production employees in comparison to the other facilities, the Grand Prairie facility has designated distribution coordinators who handle driver paperwork and production coordinators who handle production employees’ work orders as well as the inter-branch drivers’ paperwork. The Grand Prairie facility also operates a lab with lab technicians who test, analyze and certify gases, and an on-site call center with customer service representatives who respond to customer issues. Importantly, the Grand Prairie facility uses automated state-of-the-art pumps and equipment for its production and distribution operations, while the other facilities use manual equipment. The Fort Worth facility is specialized to the extent that it operates a segregated area for flammable gases such as propylene and acetylene which are not produced at the Grand Prairie and Dallas plants. The Fort Worth facility also operates an off-site call center. The smallest of the three facilities, the Dallas facility, does not use loaders in its production operations. Rather, two fillers complete all production duties. Importantly, as noted, the drivers and production employees from each facility are separately supervised. They receive their work assignments from managers at their respective facilities and they report for work and clock in at their respective facilities.

In sum, although the drivers and production employees perform the same general work among the three facilities, the petitioned-for drivers at the Grand Prairie facility remain easily identifiable as a separate contingent of employees. Based upon the foregoing, the record evidence does not support a conclusion that employees at the three facilities in dispute share identical skills, functions or working conditions.

3. *Functional Integration of Operations*

Evidence of functional integration is relevant to the issue of whether a single-facility unit is appropriate. Functional integration refers to when employees at two or more facilities are closely integrated with one another functionally notwithstanding their physical separation. *Budget Rent A Car Systems*, 337 NLRB 884 (2002). This functional integration involves employees at the various facilities participating equally and fully at various stages in the employer’s operation, such that the employees constitute integral and indispensable parts of a single work process. *Id.* However, an important element of functional integration is that the employees from the various facilities have frequent contact with one another. *Id.* at 885.

In this matter, the record reveals that drivers and production employees are functionally related in that they all perform work in the Employer’s combined production and distribution

operations resulting in the delivery of gas cylinders to customers. More specifically, the fillers fill the cylinders which are loaded by the loaders and ultimately delivered by the drivers. OCs handle and process production orders and distribution/delivery paperwork from the filling and loading production processes through the distribution/delivery process. The lab technicians test, analyze and certify specialized gases filled and loaded by production operators and delivered by drivers. Thus, to some degree, the drivers are dependent on the work of the production employees the Employer seeks to include and there is some contact between the two groups of employees. However, the record does not identify *regular and frequent* work-related interchange among the employees. As noted above, each facility produces and distributes different types of gases, uses different tools, implement their own policies and procedures, and conducts its own training. Drivers do not regularly transfer or switch between the facilities and each facility operates independently with separated and non-integrated local management. While there is also some sharing of equipment among the facilities, this is limited to an occasional lending of truck or pump and a single master pressure and vacuum gauge used among the facilities for an annual calibration. Although much of the work performed by production employees is essential to the delivery function generally, the production employees have much, if not more, contact among themselves in work activities supportive of the Employer's production services than with the drivers. Thus, I conclude that the degree of integration shown on this record does not warrant rejection of the separately identifiable and distinct unit sought herein.

4. *The Degree of Employee Interchange*

Interchange occurs where a portion of the work force of one facility is involved in the work of the other facility through temporary transfer or assignment of work. However, a significant portion of the work force must be involved and the work force must be actually supervised by the second location to meet the burden of proof of the party opposing the single-facility unit. *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999). For example, the Board has found established and significant employee interchange where during a one-year period, there were approximately 400 temporary employee interchanges among three terminals in a workforce of 87, where the temporary employees were directly supervised by the terminal manager where the work was being performed. *Dayton Transport Corp.*, 270 NLRB 1114, 1115 (1984). On the other hand, where the amount of interchange is unclear both as to scope and frequency because it is not clear how the total amount of interchange compares to the total amount of work performed, the burden of proof is not met, including where a party fails to support a claim of interchange with either documentation or specific testimony providing context. *Cargill, Inc.*, 336 NLRB 1114, 1114 (2001); *Courier Dispatch Group*, 311 NLRB 728, 728, 731 (1993). Also important in considering interchange is whether the temporary employee transfers are voluntary or required, the number of permanent employee transfers, and whether the permanent employee transfers are voluntary. *New Britain Transportation Co.*, 330 NLRB at 398.

Notably, there is rare employee interchange among the drivers between the facilities. Drivers are permanently assigned to one facility and their routes begin and end at their assigned facility. While on occasion, drivers from the Grand Prairie facility, the largest facility with the most drivers, have covered short-staffed routes at the Fort Worth facility, this has not happened since about Summer 2019 when an unknown number of Grand Prairie drivers covered Fort Worth routes for about two months. I also note that recently, since about April 2020, a driver from the Dallas facility has covered the route of a driver from the Grand Prairie facility and a driver from

the Grand Prairie facility has covered the route of a driver from the Fort Worth facility due to manpower issues related to the COVID-19 pandemic.

There is greater, albeit still minimal, evidence of interchange among the production employees between the facilities. Like the drivers, production employees are permanently assigned to one facility and their work begins and ends at their assigned facility. There is some vague record evidence that in the beginning of 2019, three production operators from the Fort Worth facility were sent to the Grand Prairie facility to assist in its then seven-day production. In about August 2019, a production manager from the Grand Prairie facility sent three loaders to the Fort Worth facility for one day at the Fort Worth plant manager's request. In about December 2018, when a pump crashed at the Grand Prairie facility, about five fillers and an acting supervisor from the Grand Prairie facility were emergently sent to the Fort Worth facility to fill medical oxygen cylinders for the Grand Prairie facility; while at the Fort Worth facility on an emergency basis, these fillers did not interact with any Fort Worth employees and not perform any Fort Worth-related work. Importantly, in all of these temporary transfers involving production employees, the record evidence demonstrates that the visiting employees continued to take direction from management at their assigned facility.

There is some record evidence of cross-over in training between the facilities. In this regard, when the Dallas facility and its drivers were acquired in about October 2019 from TechAir, training for these drivers was conducted by lead drivers at the Grand Prairie facility followed by hands-on training at the Dallas facility. Since the Dallas facility does not have a lead driver, any new-hire Dallas drivers would presumably be trained by a lead driver from the Grand Prairie or Fort Worth facility. However, the Employer has not hired any new drivers at the Dallas facility to date. There is another example in the record of production employees at the Grand Prairie facility training three Dallas production operators and a Production Manager at the Grand Prairie facility on a piece of equipment that the Dallas facility was acquiring from the Grand Prairie facility. This training lasted about one hour. After this equipment was in place at the Dallas facility, a Grand Prairie production employee was sent to Dallas for one day to observe its operation by Dallas employees. Despite this evidence of cross-over training relied on by the Employer, overall, I find such training is offset by the many separate trainings held for employees at their assigned facility.

Finally, with regard to permanent transfers of drivers to other facilities, there is one example in the record of a driver from the Grand Prairie facility permanently transferring to a driver position at the Fort Worth facility about three years ago. With regard to permanent transfers of production employees to other facilities, there is brief conclusionary record testimony referencing permanent transfers of production operators at the rate of two to three per year between the Grand Prairie and Fort Worth facilities. While the Employer referenced four examples of production operators transferring permanently from the Fort Worth facility to the Grand Prairie facility, it provided detail in only one of these examples, which involved a production operator/filler who voluntarily resigned at the end of 2019 from the Grand Prairie facility and was rehired at the Fort Worth facility three months later. No documentary or testimonial evidence was presented as to the timing or details of the other three permanent transfers to the Grand Prairie facility referenced by the Employer. The Employer also presented one example of a production operator transferring from the Grand Prairie facility to the Fort Worth facility in about April 2020. The record is void of evidence that any of these permanent transfers of employees were required.

Rather, in all of these examples, the transferring employee was required to go through the Employer's formal application and interview process. See *Red Lobster*, 300 NLRB 908, 911 (1990) (finding that the significance of employee interchange in the context of a potential multi-facility unit is diminished where it occurs as a matter of employee convenience, i.e., is voluntary).

In its brief, the Employer relies on *Dayton Transport Corporation*, supra, to support its argument that a multi-facility unit constitutes the only appropriate unit. In finding the employer's operations to be integrated and administratively centralized, the Board therein specifically noted that all of the trucks were regularly interchangeable and switched among its three terminals; drivers were frequently temporarily assigned to other facilities than their assigned facility; and, importantly, drivers who temporarily transferred to another terminal came under the supervision of that terminal, not their assigned terminal. Id. at 1114-1115. These factors of interchangeability are not present here. Similarly, in *Purolator Courier Corp.*, 265 NLRB 659 (1982), another case cited by the Employer, the Board found the employees in question were "constantly moving from terminal to terminal" with "significant overlapping supervision." Id. at 662. Finally, in *Eastman Interiors, Inc.*, 273 NLRB 610 (1984), cited by the Employer, while the Board found that the presumption favoring a single-facility unit was rebutted by the pervasive centralized control of all labor relations and personnel matters and high degree of functional integration, it also noted the frequent temporary and permanent transfers of sales employees among all nine facilities as a basis for its finding. Id. at 613-614.

Overall, the record does not establish that any significant portion of the work force regularly or frequently works between the facilities which the Employer contends must be in the unit. There is rare employee interchange among the drivers between the facilities and the examples presented by the Employer of interchange among the production employees demonstrated management at their assigned facility and were not supported by documentation or specific testimony. While I acknowledge the Employer's evidence represented with regard to cross-training of employees among the facilities, I do not find it persuasive to conclude that the Employer has met its burden with respect to this factor.

5. *Distance between Locations*

The Board does not place great emphasis on geography, particularly where there is separate local supervision and in an absence of interchange. For instance, in *Avi Foodsystems, Inc.*, 328 NLRB 426 (1999), the Board found a single-facility unit of cafeteria workers appropriate, excluding employees who worked at a cafeteria about a mile away on the same campus, because of the substantial local autonomy exhibited by cafeteria managers and the lack of employee interchange. In *Gordon Mills, Inc.*, 145 NLRB 771 (1963), the Board approved an independent unit of employees at the employer's 'Forest' plant, which was only 500 feet from its 'Velvetone' plant, despite the fact that the employer in that case maintained a centralized general and personnel office and there was common oversight by a plant manager and assistant plant manager. The Board reasoned that the plants had separate lower level supervision, without significant employee interchange, and that the common use of services or facilities was not enough to destroy the separate identities of the plants. Here, there is significantly more distance between the facilities than in these cases. Whatever geographic proximity of the facilities argued by the Employer exists is outweighed by the employees' lack of regular interchange or interaction with one another, separate supervision, different skills and training, and separated work facilities.

6. *Bargaining History*

There is no history of collective bargaining at any of the facilities. Each plant has its own safety committee, but there is no suggestion that petitioned-for employees represent other employees in their roles on safety committees. Normally, the absence of bargaining history is a neutral factor in the analysis of whether a single unit facility is appropriate and it does not support nor does it negate the appropriateness of the unit sought by Petitioner. *Trane*, 339 NLRB at 868 fn. 4. However, Board cases establish that the absence of bargaining history weighs in favor of the single-facility presumption where, as here, no union seeks to represent employees on a broader basis. See *New Britain Transportation Co.*, 330 NLRB at 398.

7. *Conclusion Regarding Unit Scope and Single-Unit Facility*

I have carefully considered the record evidence and weighed the various factors described above, and I find the single-facility presumption has not been rebutted. In doing so I reject the Employer's assertion that its operations are so effectively merged into one comprehensive unit, or so functionally integrated, that the production/distribution facilities have no separate identity. In particular, I rely on a nearly complete lack of employee interchange and contact and the degree of local autonomy as demonstrated by the existence of separate supervisory management for each location to consider that the Employer has not overcome the single-facility presumption.

I will now consider whether the drivers at the Grand Prairie facility share a community of interest sufficiently distinct from the interests of the production employees the Employer seeks to include.

IV. UNIT COMPOSITION

Petitioner seeks only to represent drivers. The Employer contends that the unit should also include production employees (production operators, loaders, fillers and production operator-3s, production leads, OCs and lab technicians) as they share a community of interest with drivers. For the reasons set forth below, I find that drivers at the Grand Prairie facility share a community of interest sufficiently distinct from the interests of the employees the Employer seeks to include and I conclude that these classifications are appropriately excluded from the single-facility unit.

A. Board Law

When examining the appropriateness of a unit, the Board must determine not whether the unit sought is the only appropriate unit or the most appropriate unit, but rather whether it is “*an* appropriate unit.” *Wheeling Island Gaming*, 355 NLRB 637, 637 fn. 1 (2010) (emphasis in original) (citing *Overnite Transportation Company*, 322 NLRB 723 (1996)). In determining whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See *Wheeling Island Gaming*, 355 NLRB at 637. Additionally, the Board analyzes “whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from that unit to warrant a separate bargaining unit.” *PCC*

Structurals, 365 NLRB No. 160, slip op. at 12 (2017) (emphasis in original). See also *Wheeling Island Gaming*, 355 NLRB at 637 fn. 1 (the Board’s inquiry “necessarily proceeds to a further determination of whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant establishment of a separate unit”). In weighing the “shared and distinct interests of petitioned-for and excluded employees [...] the Board must determine whether ‘excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.’” *PCC Structurals, Inc.*, 365 NLRB at 13 (emphasis in original) (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). Once this determination is made, “the appropriate-unit analysis is at an end.” *PCC Structurals, Inc.*, 365 NLRB at 13.

In making these determinations, the Board relies on its community of interest standard, which examines:

whether the employees are organized into a separate department; 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 Structurals, Id.* at 13 (citing *United Operations*, 338 NLRB 123 (2002)).

Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). 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, 556 (1999). However, *all* relevant factors must be weighed in determining community of interest.

B. Application of Board Law

In reaching the conclusion that the petitioned-for unit of drivers at the Grand Prairie facility is appropriate, I rely on the following analysis and record evidence.

1. Organization of the Plant

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 would 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 even though other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1289-1291 (2000).

Here, the Employer has clear and distinct administrative groupings distinguishing drivers from production employees. With the exception of one inter-branch driver at the Grand Prairie facility, drivers are part of distribution operations. All drivers are required to possess a CDL. On the other hand, production employees are part of production operations – they do not drive trucks and they do not leave

the facility to perform work. Although the two OCs working as distribution coordinators at the Grand Prairie facility appear to be a part of distribution operations, unlike the other OCs at all three facilities, they also do not perform driver work and do not leave the facilities to perform work. Additionally, although drivers and production employees share some common training related to gases and plant safety, each group receives specialized training related to driving and production duties, respectively. This factor weighs in favor of a unit of drivers excluding the production employees sought to be included by the Employer.

2. *Common Supervision*

Another community-of-interest factor the Board considers when evaluating the appropriateness of a petitioned-for unit is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of employees' supervisors who have the authority to hire, fire or discipline employees (or effectively recommend those actions) or 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 Resource Associates*, 301 NLRB at 402. Common supervision weighs in favor of placing the employees in dispute in one unit but does not mandate separate units. *Casino Aztar*, 349 NLRB 603, 607, fn. 11 (2007). However, the fact that two groups are commonly supervised does not mandate that 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.

Although NT Distribution Merideth is in charge of distribution for all three facilities, drivers are separately supervised by facility distribution managers. Likewise, although NT Operations Manager Redding is in charge of production for all three facilities, production employees are separately supervised by facility production managers and plant managers. The limited record evidence that at the smaller facilities of Fort Worth and Dallas, the plant manager or production manager is in charge of all hourly employees (including the drivers) when there is no distribution manager present is not persuasive where there is one main shift operated at each facility which includes a designated distribution manager. That a single inter-branch driver at the Grand Prairie facility recently commenced reporting to Grand Prairie Plant Manager Chop and that two Grand Prairie OCs were recently designated as production coordinators is also not persuasive where this constitutes a negligible fraction of common supervision. Thus, the evidence demonstrating that petitioned-for drivers are separately supervised and do not share common supervision with the production employees weighs in favor of a separate unit of drivers at the Grand Prairie facility as petitioned by Petitioner.

3. *The Nature of Employee Skills and Functions*

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one 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, supports a finding of similarity of functions. Evidence that disputed employees have similar requirements to obtain employment; that they have similar job descriptions or licensure requirements; that they participate in the same Employer training programs; and/or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB at 603 (petitioned-for beverage employees have no separate community of

interest from restaurant and catering with regard to job function, duties, or skills); *J.C. Penney Company, Inc.*, 328 NLRB 766, 766-767 (1999) (petitioned-for employees in catalog fulfillment department and telemarketing employees “have similar skills and perform similar functions”); *Brand Precision Services*, 313 NLRB 657, 657-658 (1994) (a unit of operators, apart from other production employees, is not appropriate where “the operators' training, skills, and functions are not distinct from those of the laborers or leadmen”); *Phoenician*, 308 NLRB 826, 827-828 (1992) (petitioned-for unit of golf course maintenance employees is too limited in scope and must include the landscape employees where “high degree of overlap in job functions” exists).

Here, the petitioned-for drivers are part of the Employer’s distribution operations and the production employees sought to be included by the Employer are part of production operations. They do not perform the same basic functions and they do not have the same job duties. Drivers were hired to be delivery drivers, they have separate job description, they are required possess CDLs and enhanced endorsements to drive large trucks, and they participate in specialized training. Production employees do not possess any special license and they do not perform any driving duties. Although the Employer asserts that drivers spend a significant portion of their time performing loading work, it is only on rare occasion that drivers perform loading work on facility premises. Although there is record evidence that there are no loaders employed at the Dallas facility such that the drivers might perform some loading work there, the record is speculative in this regard and is lacking in detail. Moreover, as acknowledged by the Employer, because drivers’ hours are federally regulated and their driving time is considered to be at a premium, the drivers spend as little time as possible performing non-driving work duties. In this regard, it is more likely for a plant manager than a driver to perform any production duties. Finally, I note that while the record reveals that business slowed in all facilities at the beginning stage of the COVID pandemic and the Employer permitted drivers to perform some production work in order to work an eight-hour day, this was an unprecedented situation. As business activities picked up again, drivers resumed their normal driving activities.

In sum, despite some minor distinctions, drivers perform driving work with specialized licenses, possess different skills, and spend most of their working time away from the facility. These factors weigh in favor of finding that the petitioned-for unit of drivers at the Grand Prairie facility is appropriate.

4. *Interchange and Contact Among Employees*

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 Resource Associates*, 301 NLRB at 401 (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1081)). Lack of significant employee interchange between groups of employees is a “strong indicator” that employees enjoy a separate community of interest. *Id.* at 401.

As discussed above, there is little interchange of drivers and production employees between the facilities. Likewise, there is minimal work-related contact between employees within individual facilities. They cross paths at work on a very limited basis – drivers spend a majority of each work day on the road while production employees spend their entire work day at their

assigned facility. Although they clock in and out at the same place and use the same restrooms and break areas, drivers' work time at the facility is limited to the distribution office and yard, while production employees' work areas cover the entire span of the facility. Specifically, there is some contact between the drivers and the OCs regarding the handling and processing of driver paperwork. Notably, for the most part, the loaders start loading cylinders about 3:00 a.m. so that most of the drivers' orders are loaded by the time they arrive to work. The greatest extent of contact between drivers and loaders occurs during the daily "handoffs" when the loaders turn over outgoing loads to the drivers in the morning and receive incoming loads at the end of the day. During these times, drivers and loaders might briefly discuss issues related to verification of loads – drivers might request a loader to verify the load but only when a lead driver or distribution manager is not available. Drivers, on occasion, use the forklift or dollies to adjust their loads. This is the extent of contact and interaction among the drivers and the loaders. The record also demonstrates that only on rare occasion will a driver request a certification of analysis from a lab technician. The record is absent of any evidence regarding regular contact and interaction between drivers and fillers with the exception of the two fillers at the Dallas facility who appear to perform some loading work.

Overall, the record does not establish frequent interchange among drivers and production employees at the individual facilities.

5. *Degree of Functional Integration*

As noted, functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. 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. Evidence that employees work together on the same matters, *have frequent contact with one another, and perform similar functions* is relevant when examining whether functional integration exists for community of interest purposes. *Transerv Systems*, 311 NLRB 766, 766 (1993) (emphasis added). 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.

As noted above, the record demonstrates functional integration to the extent that the drivers and production employees perform work in the Employer's combined production and distribution operations resulting in the delivery of gases to customers. In its brief, the Employer cites *Atchison Lumber and Logging Co.*, 215 NLRB 572 (1974), in which the Board found that an appropriate unit must include production and maintenance employees where the petitioned-for unit included only drivers. The Employer argues that, like in *Atchison*, the instant case demonstrates "similar integrated dependence" at the Employer's facilities. However, the *Atchison* Board importantly noted that "[i]n appropriate cases, the Board has found that truckdrivers may constitute separate units where the drivers are a functionally distinct and homogeneous group whose duties and interests are different from other employees." *Id.* at 572.²⁹ Here, as discussed, the record does not

²⁹ Moreover, while the Employer lists multiple other Board cases in its brief referencing them as "historical precedent" supporting the inclusion of drivers and production employees in a single unit, I note that "there is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act only requires that the unit be 'appropriate.'" *Overnite*

identify *regular and frequent* work-related interchange among the drivers and production employees or performance of similar skills and duties. Based upon the foregoing, I have concluded that the Employer has not met its burden of showing that the operations and the work performed by the drivers and production employees are so functionally integrated as to rebut the presumption of a single-facility unit.

6. *Terms and Conditions of Employment*

Terms and conditions of employment include whether employees receive similar wages and are paid in a similar fashion (for example 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 facts that 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 have sufficient interchange and/or work in a physically separate area. *Bradley Steel, Inc.*, 342 NLRB 215, 215-216 (2004); *Overnite Transportation Company*, 322 NLRB at 350. 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 Corporation*, 321 NLRB 1145, 1146 (1996).

Here, drivers share some common terms and conditions of employment with production employees whom the Employer seeks to include in the unit. These include a hourly wage rate; the same area-wide company benefits; the same company-wide policies, procedures and work rules as set forth in the Employer's employee handbook; and the same uniforms, restrooms, and parking lots. On the other hand, there are some significant differences between the terms and conditions of employment between the drivers and production employees, particularly with regard to wage ranges and policies and procedures. In this regard, drivers earn higher wages than production employees; the lowest driver hourly wage rate is \$20.00 and the highest is \$29.00, while the lowest production employee hourly wage rate is \$16.00 and the highest is \$18.00. Although the employees are all subject to company-wide policies, procedures and work rules, the individual facilities implement specialized training related to driving and production duties. These factors weigh in favor of finding that the petitioned-for unit of drivers at the Grand Prairie facility alone is appropriate.

7. *Conclusion Regarding Unit Composition and Community of Interest*

In determining that the unit sought by Petitioner is appropriate, I have carefully weighed the community-of-interest factors cited in *United Operations*, supra. I conclude that the unit sought by Petitioner is appropriate because the record reveals that the petitioned-for drivers are a sufficiently distinct, recognizable group; their distinct interests outweigh their shared interests the employees the Employer seeks to include.³⁰ More specifically, the overall separate organizational

Transportation Company, 322 NLRB at 723 (other citations omitted) (petitioned-for unit of drivers and dock workers, excluding mechanics, is an appropriate unit).

³⁰ In its brief, the Employer relies on *The Boeing Co.*, 368 NLRB No. 67, slip op. (2019) in support of its argument that the petitioned-for unit is fractured. In *Boeing*, the Board considered whether a petitioned-for unit limited to two classifications within the employer's production line was an appropriate unit under a

structure of the Employer's distribution/delivery and production operations, separate supervision, lack of contact between the employees and difference in skills and functions strongly weigh in favor of finding that the production employees at the Grand Prairie facility do not share a community of interest with the drivers sufficient to mandate their inclusion in the same unit

V. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. The Parties' Positions

The parties both contend that despite the ongoing COVID-19³¹ pandemic, a manual election in this case can be conducted safely. In this regard, the Employer would implement, and its employees at the Grand Prairie facility would be required to follow, these precautions, as set forth in the parties' stipulation, in preparation for a manual election:

- provision of a spacious well-ventilated polling area at the Grand Prairie facility capable of providing social distancing and separate entrance and exit ways;
- floor markings for social distancing;
- separate shielded tables for Board agent, observers, voting booth and ballot box;
- single-use disposable writing instruments and glue sticks for voting procedures;
- hand sanitizer and wipes provided throughout election area;
- mandatory mask-wearing with masks and gloves available on-site;
- limitation on number of election observers.
- certification by the Employer 24 to 48 hours preceding election certifying that polling area is clean and the COVID status of individuals at the facility, including those who are COVID-positive or have had contact with a COVID-positive individual; awaiting COVID results; or exhibiting COVID symptoms;
- certification of COVID status at time of election by all party representatives, observers, and anyone seeking to participate in any election proceedings;
- 14-day post-election notification by parties of COVID status of any election participants.

The parties also propose various additional safety measures which could be implemented for manual elections to reduce the risk of COVID-19, including those suggestions included in General Counsel Memorandum 20-10 (July 6, 2020³²) entitled "Suggested Manual Election Protocols" (GC 20-10). The parties argue that if all of these precautions are implemented, the election can be conducted safely and will provide voters the best opportunity to exercise their right to vote.

PCC Structurals analysis. The Board found that the two classifications in the petitioned-for unit did not share a community of interest with each other and even if they did, they did not share a community of interest sufficiently distinct from the interest of the employer's other production and maintenance employees excluded from the unit. Importantly, the Board noted "what is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit." The Board's decision in *Boeing* does not compel a different finding herein.

³¹ Throughout this decision, the terms "COVID-19," "COVID," and "coronavirus" are used interchangeably.

³² All dates hereafter are in 2020 unless otherwise noted.

B. Agency Directives and Legal Authority

Section 11301.2 of the NLRB Casehandling Manual (Part Two) Representation Proceedings provides, in part:

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. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual sets 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, this Section states that "[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director," citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that a regional director may use 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," 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, General Counsel Peter Robb issued GC 20-10, which set forth suggested election protocols while specifically noting that it is not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation. Among other things, 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, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms.

C. Conducting a Manual Ballot Election Would Risk Infecting Employees, the Board Agents Conducting the Election, as well as Jeopardize the Health of the Public at Large

COVID-19 has created a public health crisis, responsible for upwards of 175,000 deaths in this country.³³ The total number of COVID-19 cases in the U.S. has surpassed 5 million and is currently surging in several areas of the country.³⁴ Unfortunately, Texas is no exception. On April 17, the date of the Board's Operational Status Update, the number of new COVID cases reported in Texas on that single day was 916. On August 25, 2020, the number of new case being reported on this day alone was 6,091.³⁵ The true number of cases in Texas is likely higher because many people have not been tested, and studies suggest people can be infected and not feel sick. While COVID cases in Texas remained steady in April to May, since June, the number of new confirmed cases climbed dramatically to a high of 10,791 new cases on a single day, July 15.³⁶ Although cases have been decreasing since then, Texas currently ranks as the third highest state in the nation in COVID cases.³⁷ The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel, and the general population of North Texas are subject to the risks of COVID-19 transmission. This risk has been recognized by officials in several declarations, recommendations, and orders at the national, state, and local level. President Donald J. Trump, issued a "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," on March 13.³⁸ That same day, Governor Greg Abbott, similarly issued a proclamation certifying that COVID-19 poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas.³⁹ On June 25, Governor Abbott reinstated a ban on elective surgeries in four metropolitan counties (Bexar, Dallas, Harris and Travis), then expanded it five days later to four South Texas counties to preserve hospital capacity.⁴⁰ On June 26, he ordered bars to close and capped restaurant capacity at 50%, down from 75%.⁴¹ On July 2, Governor Abbott issued executive order GA-29 requiring Texans in most counties to wear masks in public.⁴² The Governor also issued a proclamation giving mayors and county judges the ability to impose restrictions on some outdoor gatherings of over 10 people, and making it mandatory that, with certain exceptions, people cannot be in groups larger than ten and must maintain six feet of social distancing from others.⁴³ Recently, on August 8, Governor Abbott extended the statewide

³³ <https://www.cdc.gov/covid-data-tracker/#cases> (accessed August 24, 2020).

³⁴ *Ibid.*

³⁵ <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last accessed August 25, 2020).

³⁶ *Ibid.*

³⁷ <https://www.cdc.gov/covid-data-tracker/#cases> (accessed August 24, 2020).

³⁸ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (accessed August 24, 2020).

³⁹ "Governor Abbott Declares State of Disaster In Texas Due To COVID-19," <https://tdem.texas.gov/covid-19/#1584552291367-2b8805f2-7b68> (accessed August 24, 2020).

⁴⁰ <https://www.texastribune.org/2020/06/30/texas-coronavirus-elective-surgeries-cameron-hidalgo-nueces-webb/>

⁴¹ *Id.*

⁴² <https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings> (accessed August 24, 2020).

⁴³ <https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings> (accessed August 24, 2020).

disaster declaration he first issued in March declaring that COVID-19 continues to pose an “imminent threat of disaster for all counties in Texas.”⁴⁴ Governor Abbott said in a statement: “[r]enewing this Disaster Declaration will provide communities with the resources they need to respond to COVID-19,...I urge Texans to remain vigilant in our fight against this virus. Everyone must do their part to slow the spread of COVID-19 by wearing a mask, practicing social distancing, and washing your hands frequently and thoroughly.”⁴⁵ Dallas County, where a manual election would take place, has not been spared from COVID-19, with 578 new cases being reported on August 26, and with a total of 69,881 confirmed cases and 890 residents who have died from COVID-19.⁴⁶ It is not possible for me to know if these numbers represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there continues to be significant spread of COVID, which leads me to conclude there is too much risk to holding a manual election at this time or in the near future.

A mail ballot election avoids the uncertainties created by COVID-19. Although Region 16 has available personnel who would appear to be infection free, the virus is believed to spread through presymptomatic and asymptomatic individuals. Although testing has become more widespread, it has not reached a point where sending a Board agent to conduct the election would be risk-free from the exposure of everyone at the facility. It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board agent, who, along with the observers, will be in the voting area for a long and sustained period of time. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. A mail ballot election eliminates this risk. Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board’s manual election rules. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election “at the earliest date practicable” consistent with the Board’s Rules and Regulations Section 102.67(b).

The Board’s manual election procedures require close proximity for the duration of the election between Board agents, election observers, and voters. Even if single-use disposable pens or pencils are used, Board agents hand fresh ballots to eligible voters and voting takes place in an enclosed booth before the marked ballot is placed in a sealed box; each ballot is individually handled by the Board agent conducting the election and available for inspection by the party representatives. Before voting, voters are required to give their names to party observers, who then check the name off the same voter list. These procedures carry the risk of exposure for employees at the facility, party representatives, Board personnel, their families,

⁴⁴https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proclamation_IMAG_E_08-08-2020.pdf.

⁴⁵<https://gov.texas.gov/news/post/governor-abbott-extends-state-disaster-declaration-for-covid-19>.

⁴⁶<https://www.dallascounty.org/covid-19/> (accessed August 26, 2020).

and the community.

For the above reasons, I find that a mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

D. The Only Acceptable Way to Mitigate These Risks is a Mail Ballot Election

The parties contend that the following measures can ensure a safe and effective manual election: using social distancing measures by making sure voters are not less than six feet apart at any given time and maintaining a sanitary and disinfected place for all on the premises. While the Employer has offered to provide floor markings at more than the appropriate distance, there are no means for enforcing social distancing. I have also considered the feasibility and efficacy of its other proffered measures. Regarding the election itself, I have considered the use of plastic barriers. I have also considered the required testing of participants (regardless of symptoms) and whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site. Additionally, as discussed, I have considered using a mail ballot election and measures associated with a mail ballot election. I have considered limiting the number of people who may participate in the count; and requiring social distancing for count attendees.

Regarding the Employer's proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread; however, I note the experts disagree about the distance required for safety and that guidelines are subject to change. Current Center for Disease Control guidance defines "good social distance" as "about 6 feet."⁴⁷ The CDC further explains that COVID-19 is primarily spread from person to person and that a person may become infected when an "infected person coughs, sneezes or talks" or by "touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes."⁴⁸ Guidance issued by the CDC recommends "limit[ing] in-person contact as much as possible." This guidance is echoed by the state's recent executive order as well as proclamations regarding mandatory mask wearing and recommendation to limit large gatherings at this time.⁴⁹ Notably, some scientists disagree that 6 feet is enough.⁵⁰ Given the uncertainty of determining an "appropriate" distance, we cannot be sure current guidelines sufficiently mitigate risk. To avoid

⁴⁷ See the Center for Disease Control website entry: Coronavirus Disease 2019 (COVID-19), Prevent Getting Sick, How COVID-19 Spreads. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed August 24).

⁴⁸ U.S. Center for Disease Control and Prevention, COVID-19 Guidance Documents, Coronavirus disease 2019 (COVID-19) Factsheet – CDC, *What you should know about COVID-19 to protect yourself and others* (available at: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>) (accessed August 24).

⁴⁹ <https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings> (accessed August 24).

⁵⁰ See, for example, <https://www.cbsnews.com/news/coronavirus-spreads-farther-six-feet-indoor-spaces-poor-ventilation/> (August 12, 2020) ("infectious virus can spread through the air — up to 16 feet away from an infected patient — through tiny droplets called aerosols ... [the virus is] present in very small droplets, tiny ones that we call aerosols that can travel much farther through the air and remain in the air for minutes to hours at a time.").

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.”⁵¹ 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 that officials should consider alternative voting methods where permitted, 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....”⁵²

Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. The Board agent, observers and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. The Board agent and observers must be present in the same space for the duration of the election period. I also note the role of the observer would be made more difficult if voters were wearing masks covering their faces and obscuring their identity. Removal of the masks by the voter during voting would result in potential cross-contamination, thereby rendering the process even more risky. Regarding sanitation and disinfecting of the voting place, these measures would do little to substantially reduce the potential for spread, given the number of individuals coming in and out of the voting area, the need for the passing of papers and proximity of individuals for the purpose of providing ballots and checking off names. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state and local guidance, all of which advise avoiding in-person contact, which a manual election necessitates. This guidance is even more critical now given the continued high level of community spread of COVID-19 statewide.

I have carefully considered the Employer’s suggestions and the suggestions in GC 20-10. Although the General Counsel proposes self-certification for individuals in proximity to the polling place as well as identification of individuals exhibiting COVID-19 symptoms, I note that 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 asymptomatic⁵³ and would neither be identified nor have sought testing. Moreover, 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. A mail ballot election avoids these concerns. Ultimately, as GC Memo 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within the state.

A mail ballot election would also meet the procedure and safeguards necessary to ensure

⁵¹ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed August 24).

⁵² See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed August 24).

⁵³ “COVID-19 Pandemic Planning Scenarios” (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (accessed August 24).

the fair and free choice of bargaining representatives by employees. I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure. There is no contention that the addresses of the eligible employees are not known or up to date. Any mail ballot election, held at any time under any circumstances, includes and ensures procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Texas, the state in which the mail ballots will be sent and received, has been disrupted. Mail balloting provides no additional risk to Board agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

This election must be held “on the earliest date practicable consistent with the Board’s rules.”⁵⁴ Based on the foregoing, I conclude the use of a mail ballot election would provide the framework for more certain election procedures and is the appropriate and most responsible measure to ensure a safe election.

VI. CONCLUSION

For the reasons stated above, I have concluded that the single-facility unit of drivers sought by Petitioner is appropriate. I further conclude that under the extraordinary circumstances described above, the election will be held by mail ballot.

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

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁵⁵
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

⁵⁴ Board’s Rules and Regulations § 102.67(b)

⁵⁵ The parties stipulated that during the past 12 months, a representative period, the Employer, in the course and conduct of its business operations, purchased and received, at its Grand Prairie, Texas facility, goods valued in excess of \$50,000 directly from points located outside of the state of Texas.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act (the Unit):

Included: All full-time and regular part-time drivers employed by the Employer at the Employer's Grand Prairie, Texas facility.

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

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Teamsters, Local 745.

A. Election Details

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Friday, September 25, 2020. Voters must return their mail ballots so that they will be received by 4:45 p.m. on Friday, October 23, 2020. The mail ballots will be counted on Wednesday, October 28, 2020, at 2:00 p.m. at a location to be determined, either in person or by videoconference, after consultation with the parties, provided the count can be safely conducted on that date and at the Regional Director's discretion.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 16 office by no later than 4:45 p.m. on Monday, October 5, 2020, in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **August 23, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

Ineligible to vote are 1) employees who have quit or been discharged for cause since the designated payroll period; 2) striking employees who have been discharged for cause since

the strike began and who have not been rehired or reinstated before the election date; and 3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals who will be permitted to vote subject to challenge.

To be timely filed and served, the list must be *received* by the regional director and the parties by August 31, 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, included in this Decision and Direction of Election, 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.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.⁵⁶ 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.

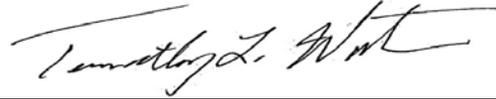
Although neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on

⁵⁶ On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. Parties who do not have necessary access to the Agency's E-Filing system may provide a statement explaining the circumstances, or why requiring them to E-File would impose an undue burden.

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the request and therefore the issue under review remains unresolved. 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 Fort Worth, Texas, this 27th day of August 2020.



Timothy L. Watson, Regional Director
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