

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

Austin, Texas

Y STRATEGY LLC¹

Employer

and

Case 16-RC-264655

**LABORER'S INTERNATIONAL UNION OF
NORTH AMERICA LOCAL 1095**

Petitioner

and

**OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION (OPEIU), LOCAL 277**

Intervenor

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a wall-to-wall unit of all full-time and regular part-time employees employed by the Employer, but excluding all managers, confidential employees, temporary employees, supervisors and interns.² The unit sought by Petitioner consists of the classifications of operations employees, canvassers and callers. As of the time of the hearing, there were nine employees in these classifications: seven operations employees and two callers. The Employer agrees with the unit as proposed by Petitioner. The Intervenor contends that the appropriate unit should include only the operations employees and must exclude the callers and canvassers because they do not share a sufficient community of interest with the operations employees.³ The Intervenor also argues that the proposed unit must specifically exclude the Employer's two currently employed callers, Michael Kindred and Avonne Kindred, as irregular or seasonal part-time employees. Finally, the Intervenor argues that the proposed unit must exclude operations employee Alex Wright as a supervisor within the meaning of the Act based on his authority as Field Director to assign and responsibly direct employees, and effectively recommend the hiring of other employees.

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 wall-to-wall unit is an appropriate unit for the purposes of collective bargaining. Specifically, I find that Field Director Alex Wright is

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

² Petitioner's original petition sought to represent all non-management employees, but excluding all management employees. At the hearing, although Petitioner did not formally amend its petition, nor did the parties enter in a stipulation, the parties agreed to this unit description as proposed by the Intervenor.

³ In its brief, the Intervenor only addressed whether the callers should be excluded from the proposed unit based on a lack of sufficient community of interest with the operations employees – it did not address any community of interest factors with regard to the canvassers. Notwithstanding the absence of this issue from the Intervenor's brief, since the issue was presented at hearing and raised in both Petitioner's and the Employer's briefs, I will consider it herein.

not a supervisor within the meaning of the Act; the callers and canvassers do not have meaningfully distinct interests that outweigh their similarities with the operations employees; and that all of petitioned-for employees share a sufficient community of interest and constitute an appropriate voting group for an election. I also find sufficient evidence to conclude that Michael Kindred and Avonne Kindred meet the average-hours-worked formula set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). Accordingly, they are each eligible to vote. Any other part-time employees on the voter list whose regular part-time status is in question may vote subject to challenge. If their ballots are challenged and determinative of the outcome of the election, individual eligibility determinations will be made as needed, based on the appropriate standard.

I. THE EMPLOYER'S OPERATION

The Employer operates an office in Austin, Texas where it provides political campaign management and consulting services to candidates running for political office as well as organizations supporting various ballot initiatives in and around Travis County, Texas. These political consulting services include directing and coordinating field efforts and communications strategies for political campaigns. Field organizing efforts include directing and coordinating face-to-face contact with voters by canvassing door-to-door, and requesting that individuals support a particular candidate, ballot initiative, or cause. Voter outreach services are also provided by callers, also known as phone bankers, via the Employer's call center. Communications services include developing on-line as well as off-line campaign strategies and services such as website/digital design services; social media campaign development; and creating campaign logos, mailings, and literature to reach the public, supporters and the press.

Mykle Tomlinson, the owner and CEO of the Employer, oversees all operations. The petitioned-for employees, who comprise all of the Employer's employees, report to Tomlinson. The Austin office, located on Manor Road, is approximately 1,400 square feet and includes two large rooms, two small rooms with desks, and a break area with cubicles. Tomlinson generally occupies one of the small rooms as an office, sometimes sharing it with other operations employees. The other small room is occupied by Field Director Alex Wright and other operations employees. The record reflects that employees and desks are rearranged frequently among these rooms. One of the large rooms contains a large conference table and is used as a conference room for employees and clients and also contains a number of computer call stations. The other large room contains additional call stations as well as office equipment such as printers and paper cutters. There are a total of approximately nine call stations at the Austin office. The record reflects there is another small office area used as an employee break area which contains about five cubicles used by operations employees.

As noted, there are three classifications of employees in the petitioned-for unit (operations employees, callers and canvassers) and as of the time of the hearing, there were nine employees in the petitioned-for unit (seven operations employees and two callers). The number of employees and hours worked fluctuates greatly because the volume of campaign work and the required employee complement is dependent on the ebbs and flows of election cycles. When campaigns are getting underway and during the busy election cycle, employees are hired in large numbers in all classifications. Generally, there are more employees on the Employer's payroll and more hours worked in even-numbered election years in comparison to odd-numbered non-election years. At the end of a campaign and/or the election cycle, employees are routinely laid off. This results in a high turnover rate of the Employer's employees. When a new campaign commences and/or the election

cycle picks up, former employees are routinely recalled for employment and new employees are hired. The slowest time of the Employer's business is generally during January to late Summer of an odd-numbered year.

The Employer's operations changed dramatically in March 2020⁴ when it closed its office due to the COVID-19 pandemic. At that time, the Employer suspended all canvassing operations⁵ and remaining employees were directed to work remotely.

II. THE PETITIONED-FOR EMPLOYEES

As noted, all of the petitioned-for employees report directly to Tomlinson. Before March, all employees worked at and/or out of the Austin office. They shared the same offices, conference room, break room, and restrooms. All employees are eligible to receive "win bonuses" awarded by the candidate/campaign at the end of a successful campaign – these bonuses are awarded at the discretion of Tomlinson and range from approximately \$100 to \$250 per each employee that worked on the campaign. There is no evaluation process for any employees.

A. Operations employees

As noted, as of the time of the hearing, the Employer employed seven operations employees who report directly to Tomlinson. Three of these operations employees are also referenced by designated titles: Alex Wright is the Field Director; Rio Sauer is the Art Director;⁶ and Gabe Kokoszka is the Digital Associate. The other four operations employees are Sabrina Virani, Ben Speigner, Alex Evans, and Shaun Chestnut.

The operations employees work collaboratively during campaigns performing similar as well as some different tasks. They all perform tasks during the campaigns such as data entry, sending mass campaign text messages to voters via a texting app, responding to any follow-up contact by voters, attending face-to-face campaign events, coordinating volunteer recruitment events, and recruiting volunteer canvassers. Operations employees communicate with each other and Tomlinson about campaign issues and strategies via a chat room computer app called Slack. Each campaign has a designated Slack channel and all operations employees have access to all channels. All operations employees attend a "Wise Guys Team" meeting conducted by Tomlinson each Monday at 11:00 a.m. during which Tomlinson goes through bullet points of ongoing campaigns and addresses client needs and tasks that need to be completed.

During the height of a campaign, there is always an onslaught of outreach to voters including mass mailing, calling, and yard sign deliveries. Regarding mailings, these are described in the record as "all-hands-on-deck" events - employees in all classifications address and stamp postcards and envelopes, and stuff envelopes. Operations employees perform the same calling tasks performed by the callers on an as-needed basis during campaigns. In this regard, each campaign budget includes a fixed number of guaranteed calls and if the callers are not meeting a campaign's call quota, the operations employees will step in to make calls. In addition, Operations employees make fund-raising

⁴ All dates hereafter are in 2020 unless otherwise stated.

⁵ The record is silent as to the number of canvassers employed, if any, prior to the March 2020 office closure.

⁶ Also known as Creative Director.

phone calls to voters and potential campaign donors. Operations employees as well as canvassers also deliver signs to voters.

All operations employees are paid by salary on a bi-monthly basis – they do not record their time worked. Wright, Sauer, Kokoszka and Virani are full-time employees and eligible to receive healthcare benefits. Speigner, Evans and Chestnut are part-time employees and not eligible for any benefits. The record notes the specific bi-monthly salaries of part-time operations employees Speigner and Evans as approximately \$1,070. All operations employees generally start work around 9:00 a.m. to 10:00 a.m. and full-time operations employees work to about 5:00 p.m. to 6:00 p.m. except as specifically noted below. No degree or special qualifications are required for operations employees, although some possess prior experience related to their designated title or duties as described below. All operations employees have company email accounts. Following the March office closure, operations employees were provided the opportunity to bring home their desktop computers – some have opted to do so, and some have opted to use their own personal computers to perform remote work. Also, since the office closure, the Employer has provided a \$20 per pay period stipend toward cell phone and internet service to all operations employees engaged in remote work. All operations employees recently attended a Netroots Nation virtual training conference.

1. Field Director Alex Wright

Wright was hired as an operations employee/Field Director in 2017. He possessed some prior experience in IT and running database programs. As a Field Director, Wright’s primary duty includes “cutting turf” for the canvassers. “Cutting turf” begins when Tomlinson, sometimes along with Wright, looks at voter data to determine a targeted voter precinct and decides how many canvassers will be needed for a shift. Tomlinson provides Wright with a number of canvassers and Wright uses a computer algorithm program to map out walking routes for the canvassers. Wright then uploads turf lists, or routes, to the canvassers’ tablets. Many of the canvassers are college students without vehicles. They often know each other as Tomlinson frequently encourages canvassers to solicit their friends and roommates as canvassers, especially during busy election times when many are needed. Canvasser shifts are from 4:00 p.m. to 9:00 p.m. When canvassers arrive to work, they pick up their tablets and packets (map, campaign literature, clip board) from Wright in the front office. Wright assigns routes to canvassers based on the number of canvassers available for each shift, who shows up for canvassing work,⁷ the group of canvassers carpooling together to the drop-off site, and the number of knocks targeted for the shift. The canvassers are divided into carpool groups and travel together to the drop-off site to start their individual routes. As the canvassers walk door-to-door they follow a uniform script which has been written by Wright. Following each visit, they upload contact information into their tablet, including whether anyone answered the door and any conversation that took place. Wright is available via text message to answer logistical questions or questions about a campaign while the canvassers are on their routes. Wright also monitors weather and will text canvassers when threatening weather is forecasted. Wright monitors canvasser “contact rates” via a computer app while they are on their routes. A contact rate is the percentage per shift of a canvasser’s knocks that result in actually speaking with an individual about the campaign. The Employer targets a 30 percent contact rate per canvasser and Wright will text canvassers as needed advising to either slow down and spend more time at each knock to increase their contact rate, or to slow down their

⁷ Given the nature of the work and their student status, it is not uncommon for canvassers to report for work on one day but then not show up on another day.

pace and spend more time speaking with voters to decrease the contact rate. Wright can also monitor the canvassers via a GPS app that tracks where the canvassers have walked to make sure they are actually walking their routes. However, Wright has no authority to discipline canvassers if a certain contact rate is not met or if a route has not been completed. Wright is not held accountable in any way regarding the canvassers' contact rate or performance. Based on his coordination duties with regard to the canvassers, Wright generally starts work later than the other operations employees and works until the end of the canvassers' shift at 9:00 p.m.

Wright is involved in the hiring process. He posts job openings at the direction of Tomlinson – Tomlinson determines whether job postings are necessary and affordable by reviewing candidate and campaign budgets. Jobs are posted on internet sites such as Indeed.com, LinkedIn and Craigslist, as well as job boards on nearby college campuses such as the University of Texas at Austin. Wright has interviewed prospective employees for canvasser and caller positions. As noted, most canvasser applicants are college students who have been referred by existing employees. The same is true for callers, many of whom are also college students or retired/semi-retired adults. Employment is tied to the campaign cycle. Consequently, there is a high turnover rate for callers and canvassers.

The qualifications for both positions are minimal. Canvassers are merely required to be able to walk a distance, talk to voters about the campaign from a prepared script, and offer a yard sign. Callers are simply required to be able to wear a computer headset and talk to voters from a prepared script. Tomlinson tracks data to determine the number of canvassers and callers needed as an election season is underway and as new campaigns arise and provides this information to Wright. Tomlinson keeps a list of previous canvassers and lets Wright know who should or should not be interviewed from the list. Job interviews conducted by Wright for these positions are for the most part brief and informal. They are limited to a review of the applicant's competence to perform the aforementioned uncomplicated and menial tasks. To a large extent, because job qualifications are minimal and interviews are not complex, canvasser applicants interviewed by Wright are automatically recommended to Tomlinson for hire without any in-depth discussion or independent review by Tomlinson. There is no evidence that Wright has interviewed a candidate whom he did not recommend for hire; nor is there any evidence that Tomlinson has rejected the candidates Wright recommended. Tomlinson's intervention in the hiring process appears limited to flagging candidates who proved unreliable as workers in the past.

As noted, the Employer suspended all canvassing operations in March. As a result, Wright has been working on random projects, performing general operations duties as described above including data entry, delivering yard signs, voter calling, and campaign mailings. During this time, Wright, along with Tomlinson, has also overseen callers as described below.

2. Art Director Rio Sauer

Sauer was hired as an operations employee/Art Director in about 2016. She possessed some prior experience in graphic design. As Art Director, Sauer's primary duties include graphic design for candidate and campaign websites, logos, direct mail items, and social media posts. With a focus on design, she works closely with Digital Associate Gabe Kokoszka whose focus is on content. Sauer is the only operations employee who performs freelance jobs on the side. There is some limited record evidence-lacking in detail-that Sauer interviewed and recommended the hiring of operations employees including current employees Kokoszka, Virani and Speigner, as well as two former

operations employees and two operations/communication applicants. As noted with regard to Speigner, when Sauer interviewed him, he was already working for the Employer as a student intern having been previously hired as a canvasser. With regard to the two operations/communications prospective employee interviews, Sauer conducted the initial interviews followed by separate interviews and independent review by Tomlinson. Although there was some record evidence indicating that Sauer signed and issued job offer letters to some of these individuals, no such letters were offered into the record and, moreover, the record demonstrates they were drafted at the direction and approval of Tomlinson. In all of these interview examples, Tomlinson approved all hiring. There is no claim that Sauer is a statutory supervisor.

3. Digital Associate Gabe Kokoszka

Kokoszka was hired as an operations employee/Digital Associate. As a Digital Associate, Kokoszka handles digital communications for candidates and campaigns. This includes writing emails and email blasts to voters, drafting letters and some press releases⁸ on behalf of candidates and campaigns, and editing candidate/campaign websites. Assisted by operations employee Evans, as well as Sauer and Tomlinson, Kokoszka handles all social media posts on behalf of candidates and campaigns on social media sites such as Facebook, Twitter, and Instagram.

4. The Other Operations Employees

Operations employee Speigner was hired by the Employer as a canvasser in about August 2018. About six months later, he became an intern and in about May 2019 he became an operations employee. Speigner works part-time, 20 hours per week. His primary duties include directing and coordinating the student interns as well as common operations duties such as data entry for campaign fund raising activities; campaign mailings; delivering yard signs; sending mass text messages to voters and responding to follow-up contact; and recruiting volunteers. Before March, there were about five interns working at a time for the Employer. The interns assist Speigner in the campaigns he is working on with operations duties including data entry and staffing campaign events. The interns must also perform one mandatory canvassing shift per week.⁹ Speigner has interviewed prospective interns and made internship recommendations to Tomlinson. In some of these cases, Speigner recommended the intern applicant for a canvasser job in lieu of an internship. The record demonstrates that in all cases, Speigner's recommendations of applicants have been subject to Tomlinson's independent review. As with Sauer, although there was some record evidence indicating that Speigner signed and sent job offer letters to some of these individuals, no such letters were offered into the record and, moreover, the record demonstrates they were drafted at the direction and approval of Tomlinson. There is no claim that Speigner is a statutory supervisor. Finally, Speigner has filled in for Wright on a number of occasions when he is absent and has covered Wright's described duties regarding monitoring the canvassers and callers. Since March, Speigner has been working on random projects performing operations duties such as date entry, delivering yard signs, voter calling, and campaign mailings.

Operations employee Alex Evans was a student intern from about September 2019 until the office shut down due to the COVID-19 pandemic in March. Following the shutdown, Evans left

⁸ Tomlinson writes most of the press releases.

⁹ The parties stipulated that interns should not be included in any unit found to be appropriate.

college and attempted to continue working remotely as an intern from her home. However, due to deficient wi-fi signal issues she was not able to work remotely. In about July, Tomlinson offered her an operations job and on about August 10, Evans returned to Austin and began working remotely as an operations employee. Evans works part-time, 20 hours per week. Like Speigner and Wright, her primary operations duties while working remotely have included data entry, delivering yard signs, voter calling, and campaign mailings.

Operations employee Sabrina Virani was hired in about October 2019. She works full-time. Her primary duties include checking candidate and campaign emails; coordinating and calendaring campaign events; completing questionnaires and endorsement forms on behalf of political candidates; campaign mailings; and assisting in fund raising calls by political candidates.

Operations employees Shaun Chestnut was hired in about January. Chestnut works full-time. His primary duties include coordinating yard sign deliveries and delivering yard signs. Like the other operations employees, he also performs data entry, delivering yard signs, voter calling, and campaign mailings.

B. Callers

As noted, all callers report directly to Tomlinson. They are scheduled during the hours of 4:00 p.m. to 9:00 p.m., Monday through Friday; 10:00 a.m. to 3:00 p.m. on Saturday; and 12:00 p.m. to 5:00 p.m. on Sunday. The number of callers and hours worked are dependent on the election cycle and amount of campaign work. The record reflects that during the height of a campaign season, there can be up to about nine callers working up to 30 hours per week, and during election downtimes, as few as two callers working about 10 hours per week. The starting pay rate for callers is \$10 per hour. They all work part-time and are not eligible for benefits. They do not have company email accounts.

Before the office shutdown in March, the callers worked exclusively at nine call stations in the Austin office, making phone calls to voters from a prepared script written by Tomlinson. The callers clocked in and out from an iPad mounted to the wall at the office via an app called Homebase. Calls are automatically routed to callers via an app to their computer. The caller wears a headset and follow a prepared call script on their computer screen in speaking with voters about a campaign. Call scripts are written by Tomlinson. Per the script, the caller identifies him/herself, provides general information about the candidate/campaign and asks the recipient for support. If the recipient asks for more detailed information about the candidate, the caller will provide any additional information from campaign literature provided by Tomlinson or refer the recipient to the candidate/campaign website. At the end of each call, the caller completes a short internal survey, or checklist, marking the recipient as “yes,” “no,” or “undecided,” and answering a few short pre-determined questions. “Yes” recipients are offered yard signs by the caller which are delivered by operations employees or canvassers. Once the checklist is completed, the caller presses a “next” button in the computer app and another call is automatically queued to the caller. Since the app generates all calls for the callers, there is no interaction among the callers about who will take which calls. Callers are assigned one 15-minute break every two hours. To achieve optimal use of the computer call system, all callers on duty are assigned the same break time. New callers are trained by Tomlinson in logging onto and using the computer calling app. Until the March office shutdown, lead caller Jack Chicanchan oversaw calling operations by monitoring call statuses and reminding the callers to take their assigned breaks.

At the height of a campaign season, calling and mailing are at peak levels. During these times, the callers spend a significant amount of time supporting the operations team in performing mailing activities such as hand-addressing, labeling and stamping postcards and envelopes, and stuffing envelopes. These mailing activities are performed by all petitioned-for employees in a collaborative fashion at the conference room table. Operations employees' shifts commonly overlap with the callers reporting to work early (before 4:00 p.m.) and the operations employees staying later (after 5:00 p.m.) to do mailing. As a result of the office shutdown and remote work conditions since March, currently there is less interaction among the callers and the operations employees and canvassers. The callers do not perform other operations work besides mailing and they do not use Slack in their job duties.¹⁰

At the end of a campaign season, callers are typically laid off by the Employer and advised they will be recalled when additional campaign work becomes available. Tomlinson keeps track of callers by a computer list which he uses for recall purposes when additional calling work becomes available. Callers can refuse work without any repercussion – Tomlinson stops calling individuals who repeatedly refuse work.

Following the March office shutdown, the Employer provided computers to callers to work remotely. While working remotely, callers record their time on their computers via the Homebase app. Since the shutdown and lead caller Chicanchan's departure, call operations have been monitored by Tomlinson and Wright. Either one will upload call lists to the computer app. Tomlinson and Wright are able to monitor call activity statuses via the computer as "active," "inactive," or "ready" and they will text or call a caller if they see the caller is scheduled to work and is in "inactive" status, or if the caller is working and is in "ready" status for a prolonged period. They also monitor callers regarding set break times. This monitoring does not result in any disciplinary action to callers, rather, it is solely to remind and support the callers in their duties while they are working remotely.

For a short time in July, the Employer employed approximately 14 callers for a special runoff campaign. Some of the callers hired by the Employer were former canvassers. The record is unclear as to the number of callers hired at this time or the circumstances of their hiring. It is also unclear whether the 14 callers includes some of the current operations employees. The record also references that as of the time of the hearing, the Employer was considering recalling approximately four previous callers. Otherwise, the Employer has regularly employed callers Michael Kindred and Avonne Kindred since about 2018 to present, sometimes working few and sometimes working many hours per week. Each earn approximately \$13 per hour. In the month of July, Avonne Kindred worked 58 hours and Michael Kindred worked 56 hours and from August 16 to 31, they each worked 15.5 hours of work. Their recent remote work duties have included calling as well as supporting the operations team in performing mailing for a "Vote By Mail" campaign.¹¹

¹⁰ There is limited record evidence that about two years ago, callers performed some one-time-only data entry work for a massive Austin FC (Football Club) campaign.

¹¹ The Kindreds have come into the office to pick up mailing supplies from Tomlinson and Chestnut.

C. Canvassers

As noted, all canvassers report directly to Tomlinson. They are scheduled throughout the week during the hours of 4:00 p.m. to 9:00 p.m. The number of canvassers and hours worked are dependent on the election cycle and amount of campaign work. There are an average of seven to eight canvasser routes in any given day with one canvasser assigned to each route. The Employer hires up to 25 canvassers per campaign. The starting pay rate for canvassers is \$15 per hour. They all work part-time and are not eligible for benefits. They do not have company email accounts. There is limited record evidence regarding a separate written bonus system for canvassers based on days worked and yard signs placed.

Since the March office shutdown, the Employer has suspended all canvassing operations. Before that time, canvassers were assigned routes generally in one voting precinct. They would report to work at 4:00 p.m. to pick up their tablets and packets (map, campaign literature, clip board) from Wright in the front office. Canvassers are divided into carpool groups and travel together to the canvassing drop-off point then walk their individual routes. As noted, they follow a script written by Wright as they go door-to-door. Following each visit, they upload contact information into their tablet, including whether anyone answered the door, conversation that took place, identity of the individual the canvasser spoke to, and interest receiving a yard sign. Canvassers take yard signs with them on their route or they request yard signs following a visit from Wright or another operations employee which are thereafter delivered either by an operations employee or the canvasser. While canvassers are not required to check in with anyone while on their routes, they may direct any questions they have to Wright via text message. This might include logistical questions related to the route, requesting additional information about the candidate/campaign or a yard sign, or advising of a needed break. Canvassers are also advised by Wright regarding their contact rate as described above. New canvassers receive training packets from Tomlinson or Wright with a list of “dos and don’ts.” As noted, during the height of a campaign season, employees in all classifications, including canvassers, support the operations team in performing mailing activities.

Like the callers, at the end of a campaign season, canvassers are typically laid off by the Employer and advised they will be recalled when additional campaign work becomes available. Tomlinson keeps track of canvassers on a computer list which is used to recall them when additional calling work becomes available. Canvassers can refuse work without repercussion – Tomlinson stops calling individuals who repeatedly refuse work. As noted, for a short time in July, the Employer hired an unknown number of former canvassers to perform calling duties for a special runoff campaign.

III. BOARD LAW

A. Supervisory Status

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such

authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Accordingly, under Section 2(11), individuals are deemed to be supervisors if they have authority to engage in any one of the above Section 2(11) indicia; their exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment; and their authority is held in the interest of the employer. See, *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Section 2(11)'s definition is read in the disjunctive, and thus, the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. See, *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Since supervisors are excluded from the Act's protection, the Board has been careful to avoid construing the statutory language too broadly. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686). The Board requires supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Id.* at 1048.

To meet this standard, the party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of such power are insufficient. See, *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. See, *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Indicia other than those enumerated in Section 2(11) of the Act are secondary indicia. Although secondary indicia may be considered in determining supervisory issues, they are not dispositive. In the absence of one of the enumerated primary indicia, secondary indicia, standing alone, are insufficient to establish supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

B. Community of Interest

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)). Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the unit sought by the petitioner. The Board next 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 Structural*s, 365 NLRB No. 160, slip op. at 12 (2017) (emphasis in original). See also, *The Boeing Company*, 368 NLRB No. 67 (September 9, 2019) in which the Board clarified *PCC Structural*s to, among other things, emphasize that the community-of-interest inquiry must include examining whether employees excluded from the unit “have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members.” *Id.*, citing *PCC Structural*s, 365 NLRB at 11 (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016)). If those distinct interests do not outweigh the similarities, the unit is inappropriate and “the appropriate-unit analysis is at an end.” *PCC Structural*s, *Inc.*, 365 NLRB at 13. In making these determinations, the Board considers whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *Id.*; (citing *United Operations*, 338 NLRB 123 (2002)). The Board considers all of the factors together, as no single factor is controlling. However, 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. Finally, the *Boeing* Board clarified that the community-of-interest standard includes, where applicable, “consideration of guidelines that the Board has established for specific industries with regard to appropriate unit configurations.” *Id.*

While the Board has held that not every apparently appropriate unit will suffice when a party contends a petitioned-for unit is too small, Congress expressly contemplated the plantwide unit in Section 9(b), and the Board has long found “[a] plant-wide unit is presumptively appropriate under the Act, and a community of interest inherently exists among such employees.” *Airco, Inc.*, 273 NLRB 348, 349 (1984), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 136 (1962). As the *Airco* Board explained, the community-of-interest standard is the same but the burden shifts to the employer to prove that “the interests of a given classification are so disparate from those of other employees that they cannot be represented in the same unit.” *Id.*, citing *E. H. Koester Bakery*, 136 NLRB 1006, 1011 (1962).

C. Casual or Part-time Status

In making a determination concerning an individual's status as a casual or a regular part-time employee, the Board considers not only the length, but also the regularity of employment. *New York Display & Die Cutting Corp.*, 341 NLRB 930, 930 (2004), citing *Pat's Blue Ribbons And Trophies*, 286 NLRB 918, 919 fn. 6 (1987). Regularity does not necessarily mean a fixed schedule; rather this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that such work has been only on a sporadic basis. *Id.* The Board applies formulas to determine whether irregular employees have a sufficient community of interest with regular employees warranting their inclusion in a voting unit. In devising eligibility formulas to fit the unique conditions of any particular industry, the Board seeks "to permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer." *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992), *enfd.* 2 F.3d 35 (3d Cir. 1993). The Board's longstanding and most widely used formula for voting eligibility for part-time employees is the *Davison-Paxon* formula, under which an employee is deemed to have "a sufficient regularity of employment to demonstrate a community of interest with unit employees if the employee regularly averages 4 or more hours of work per week for the last quarter prior to the eligibility date." *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). The Board has explicitly defined the "last quarter prior to the eligibility date" as the 13-week period immediately preceding the eligibility date. *Woodward Detroit CVS, LLC*, 355 NLRB 1115 (2010), citing *Hardy Herpolsheimer's*, 227 NLRB 652 (1976). Where special circumstances exist, the Board applies alternative formulas to optimize enfranchisement.

IV. APPLICATION OF BOARD LAW

A. The Supervisory Status of Field Director Alex Wright

The Intervenor asserts that Field Director Wright is a statutory supervisor based solely on his authority to assign work to and responsibly direct other employees, and effectively recommend the hire of other employees. In reaching the conclusion that Wright is not a supervisor within the meaning of the Act, I rely on the following analysis and evidence.

1. Assignment of Work

The Board in *Oakwood* defined assigning work as "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood*, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." *Id.* at 692. The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Id.* The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." *Id.* at 693. The Board found that the

relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Id.* at 693. (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.* at 693.

With regard to the element of designating an employee to a place, there is no record evidence that Wright designates callers to a place. Regarding canvassers, the record evidence establishes that Wright uses a computer algorithm program to map out walking routes for the canvassers and assigns each canvasser a specific route when they report to work at 4:00 p.m. Such route assignments are based on the number of canvassers available for each shift, who shows up for canvassing work, the group of canvassers carpooling together to the drop-off site, and the number of knocks targeted for the shift. Notably, there are minimal qualifications to work as a canvasser and the record does not demonstrate any differences in the skills among the canvassers. Thus, such assignment by Wright with respect to placing employees does not require him to use judgment which involves a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood, Id.* at 693.

With regard to the element of appointing an employee to a time, there is no record evidence that Wright is involved in or has any authority regarding the scheduling of any employees. As noted, callers and canvassers have set work hours. There is no record evidence of any employees requesting schedule changes; callers and canvassers can refuse work without any repercussion. The Intervenor has not established any exercise of supervisory authority regarding the scheduling of other employees and the record does not support that Wright appoints any employees to a time as contemplated by *Oakwood*. See, *Golden Crest*, 348 NLRB at 728-730 (2006).

With regard to the element of giving significant overall duties, as noted, there are minimal qualifications to work as a caller or canvasser. The record does not demonstrate any differences in the skills or duties among the callers or among the canvassers. All callers are capable of making any campaign call and all canvassers are capable of handling any canvassing route. There is no record evidence that any of these employees possess specific training or skills to perform their jobs, or that Wright performs any detailed analysis of their abilities in relation to production needs and goals. Additionally, there is no evidence that Wright makes any isolated reassignments concerning the employees. The record overall demonstrates that the callers’ and canvassers’ assignments are routine in nature and based on their position, rather than any particular expertise, and the evidence is insufficient that the direction provided to them by Wright requires the use of independent judgment or involves a “degree of discretion that rises above routine or clerical.” *Oakwood*, 348 NLRB at 693.

2. *Responsible Direction*

For direction to be responsible, the person directing must have oversight of another’s work and be accountable for the other’s performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, *and* that there is a “prospect of adverse consequences” for others’ deficiencies. *Community Education Centers, Inc.* 360 NLRB 85-86 (2014); *Oakwood*, 348 NLRB at 691-692, 695.

The Intervenor has not established that Wright is *accountable* for their actions in directing callers or canvassers. Although the record evidence establishes that Wright is largely in charge of day-to-day direction while the canvassers are on their routes, there is no evidence he has suffered any

adverse consequences or received any discipline concerning the deficient performance of the canvassers. To the contrary, the record demonstrates that Wright provides direction merely in the way of advice to canvassers, especially new canvassers, when they are on their routes. Likewise with regard to the callers, while there is some record evidence that Wright has been overseeing call operations since the March shutdown, there is no evidence he has suffered any adverse consequences or received any discipline concerning the deficient performance of the callers. The overall record does not demonstrate that the Employer imparted clear and formal notice to Wright that he will be held accountable for the job performance of any employees. See, *Golden Crest*, supra at 731. Thus, I find that the Intervenor has not met its burden to establish that Wright responsibly directed employees as contemplated by *Oakwood*.

3. *Hiring*

The Intervenor does not claim that Wright possesses supervisory authority to independently hire other employees. Rather, the Intervenor asserts that that he is involved in the hiring procedure and possesses authority and uses independent judgment to effectively recommend the hire of canvassers. In *J.C. Penney Corp.*, 347 NLRB 127, 129 (2006), the Board explained that:

[T]he power to effectively recommend a hire. . . contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. See, *Bowne of Houston*, 280 NLRB 1222, 1225 (1986) (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire); *The Door*, 297 NLRB 601, 601–02 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating in applicant interviews).

Instead, the Board analyzes supervisory status by determining whether an individual’s hiring recommendations are in fact *effective*. Accordingly, the Board examines the amount of weight the employer affords the recommendation. See, *USF Reddaway, Inc.*, 349 NLRB 329, 340 (2007). The Board has found that “compatibility recommendations” are insufficient to support a finding of effective hiring recommendations under Section 2(11). *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999). Finally, an individual does not “effectively recommend hiring” unless there was “delegated authority to participate in the hiring process” and not merely an employer’s respect for an individual’s opinion on an applicant. See, *Plumbers Local 195*, 237 NLRB 1099, 1102 (1978).

The Board has also found that administering tests to applicants with preestablished standards designed to determine their technical competence and reporting on those results does not constitute an independent or effective recommendation to hire. *Hogan Manufacturing, Inc.*, 305 NLRB 806, 806 (1991). The *Hogan* Board noted:

“it is the test result, as indicated in the report, and not an independent recommendation from [the purported supervisor/interviewer] that [management] uses in deciding to hire ... and [the interviewer’s] exercise of judgment is limited wholly to conducting and grading the test and not recommending hire ... In these circumstances, [management’s] acceptance of [the interviewer’s] reports and reliance on them without retesting the [applicants] does not bestow on [the interviewer] the authority to hire effectively recommend such action.” At most such

acceptance and reliance show [management's] confidence in the interviewer's testing procedures and abilities and thus represent a deference to his expertise rather than a delegation of supervisory authority. *Id.*

Here, Wright's interviewing activities of prospective canvassers are akin to the interviews addressed by the Board in *Hogan*. In this regard, Wright conducts brief¹² and informal interviews with minimally skilled applicants to determine their competence to perform the job – canvasser applicants are asked whether they are able to walk a distance, talk to voters about the campaign from a prepared script, and offer a yard sign and caller applicants are asked if they are able to talk to voters from a prepared script. Hiring decisions are primarily based on the number of employees needed and applicant availability – according to Wright's testimony, Tomlinson advises him "ok we need more people, go ahead and bring them in." Following each interview, Wright advises Tomlinson that he interviewed someone and reports to Tomlinson on the competence of the applicant to perform the job. To a large extent, because job qualifications are minimal and interviews are not complex, applicants interviewed by Wright are automatically recommended for hire without any in-depth discussion or independent review by Tomlinson – according to Tomlinson's testimony, Tomlinson routinely responds "okay, when can they start." If a worker were converted to supervisor merely by recommending someone he knows to be skilled, even if the employer did no independent review, then any experienced rank and file worker would be converted to a statutory supervisor. Such is not the law because the worker is not exercising authority, in the interest of the employer (part of the worker's job function), plus independent judgment as contemplated by the Act. *Adco Electric Incorporated*, 307 NLRB 1113, 1124 (1992). Tomlinson approves all hiring and Wright is not permitted to extend a job offer to any prospective employee without Tomlinson's approval.

Based on the above, I find that the record does not support a conclusion that Field Director Wright possesses the authority to effectively recommend hiring using independent judgment.

B. Community of Interest Factors

The Intervenor asserts that the proposed unit must exclude all canvassers and callers because they do not share a sufficient community of interest with the remaining operations employees. In reaching the conclusion that the canvassers and callers do not have meaningfully distinct interests that outweigh their similarities with the remaining operations employees and that the petitioned-for wall-to-wall unit of employees is appropriate, I rely on the following analysis and record evidence.

1. Organization and Supervision

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). Another community-of-interest factor the Board considers when evaluating the appropriateness of a petitioned-for unit is whether the employees in dispute

¹² While there is record evidence that interviews last anywhere from 15 to 45 minutes and the Intervenor raises in its brief that a 45-minute interview is not brief, there is no record evidence that the varying length of interviews is based on any complexities associated with the job or qualifications required of the applicants.

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. Here, the Employer's operations are succinct and include all of petitioned-for employees. Tomlinson is the head of all campaign operations which includes the operations employees, calling and canvassing. The record clearly shows that all of the petitioned-for employees share common supervision.

2. *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. *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"). Here, the operations employees are not largely distinguishable from the callers and canvassers based on any unique function or special qualifications or skill requirements. There appears to be no significant variance in the skill level required to perform any of the jobs with the exception of Art Director Sauer who has graphic design experience, Digital Associate Kokoszka who has digital website design experience and Field Director Wright who has IT and computer programming experience. Although the operations employees largely perform broader campaign functions than the callers and canvassers, i.e., a multitude of campaign services as opposed only making calls and door-to-door visits, they all share some functions too with respect to campaign mailing activities, calling and yard sign deliveries. Moreover, the services the operations employees provide are inseparable from the callers and canvassers upon whom they depend to accomplish campaign tasks in each overall campaign. In sum, despite some differences in skills and functions, the above factors weigh in favor of finding that the petitioned-for wall to wall unit of employees is appropriate.

3. *Interchange and Contact*

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 are significant examples in the record of interchange and overlap in employees' duties with regard to campaign mailing activities, calling and yard sign deliveries. Although lacking in quantitative evidence, the overall record demonstrates that employees in the disputed classifications perform each other's job functions, which tends to show an indivisible unit rather than a separate identifiable unit. See, *Levitz Furniture Company of Santa Clara, Inc.*, 192 NLRB 61, 63 (1971). Additionally, there is collaboration work-related contact among the employees in the office when performing mailing activities. There is also work-related contact between the callers and canvassers and the operations employees when the callers and canvassers let operations employees know when a campaign script does not appear effective with voters and propose changes based conversations with voters. Further, employee Speigner was hired as a canvasser and later became an operations employee. Overall, the record establishes interchange and contact among the operations employees and callers and canvassers.

4. *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. Here the record reflects a high degree of integration between the petitioned-for employees' functions. See, *The Boeing Company*, 337 NLRB 152, 153 (2001) (High degree of functional integration outweighed the lack of interchange and common supervision among employees in three separate departments.) It is apparent from the record that the Employer's primary objective, running a campaign and garnering support for the candidate or cause, can only be accomplished through the coordinated efforts of the employees. *Id.* Each classification is dependent on and synced with the other to accomplish its respective task in this process. Any loss of one of these elements in the election cycle would effectively weaken the Employer's operations and services provided to clients. Based upon the foregoing, I have concluded that the Intervenor has not met its burden of showing that the operations and the work performed by the petitioned-for employees are not functionally integrated such that the petitioned-for wall-to-wall unit of employees is not appropriate.

5. *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 fact 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). There are some significant differences between the terms and conditions of employment between the operations employees and callers and canvassers, particularly with regard to wages. The callers and canvassers work part-time hours, are paid hourly and are not eligible for benefits while most of the operations employees work full-time, are paid salary, and are eligible for health care benefits. However, there is no record evidence that any of the operations employees receive any benefits besides health care such as additional insurances, 401(k) benefits, paid holidays or other leave. Additionally, the record demonstrates that employees do not separately record their time when performing each other's typical work (i.e., callers or canvassers performing mailing activities are paid their usual wages and would not clock in differently, and operations employees performing calling or canvassing duties are paid their usual salary wages). Although the record is limited regarding commonality of other terms and conditions of employment, it does not demonstrate that the callers and canvassers are subject to different rules, guidelines, and other terms and conditions of employment. Despite this lack of commonality in wages, I have concluded that the Intervenor has not met its burden of showing that the terms and conditions of employment among petitioned-for employees are so disparate such that the petitioned-for wall-to-wall unit of employees is not appropriate.

6. *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 et al.*, supra. I conclude that the callers and canvassers sought by the Intervenor to be excluded from the unit, do not possess meaningfully distinct interests that outweigh their similarities with the operations employees. Under these circumstances, a unit limited to the operations employees would constitute an arbitrary grouping that is inappropriate for collective bargaining. Given the degree of common supervision, structure of the Employer's operations, functional integration, and interchange, the appropriate unit must include all classifications. Accordingly, I find that the unit sought by the Petitioner is appropriate.

C. Part-time Status of Michael Kindred and Avonne Kindred

The Intervenor urges that in addition to lacking a sufficient community of interest with the operations employees, current callers Michael Kindred and Avonne Kindred are not eligible to vote as irregular or seasonal part-time employees. I find that any employees characterized as part-time or seasonal should be eligible to vote subject to the average-hours-worked formula set forth in the *Davison-Paxon* formula.¹³ Thus, to be eligible for inclusion in the bargaining unit and to vote, part-time callers Michael Kindred and Avonne Kindred, as well as other part-time employees on the voter list, must perform work similar to regular employees in the unit and must work an average of at least four hours per week in the 13 weeks preceding the election eligibility date.

The calendar quarter used as the measure in *Davison-Paxon* would end in this case with the payroll period immediately preceding the date of this decision. The Employer furnished some payroll records showing hours for Michael Kindred and Avonne Kindred for the relevant calendar quarter under *Davison-Paxon* (Employer Exhibit 9 showing that during the month of July, Michael Kindred worked 56 hours and Avonne Kindred worked 58 hours, and Employer Exhibit 2 showing from August 16 to

¹³ The parties did not take a position regarding an eligibility formula for employees.

31, they each worked 15.5 hours). These records are sufficient to find that Michael Kindred and Avonne Kindred meet the average-hours-worked formula set forth in *Davison-Paxon*. Accordingly, they are each eligible to vote. Any other part-time employees on the voter list whose regular part-time status is in question may vote subject to challenge. If their ballots are challenged and determinative of the outcome of the election, individual eligibility determinations will be made as needed, based on the appropriate standard.

V. CONCLUSION

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.¹⁴
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.
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 employees employed by the Employer at its Austin, Texas facility.

Excluded: All managers, confidential employees, temporary employees, interns, guards and supervisors as defined by the Act.

VI. 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 either **Laborers' International Union of North America Local 1095**, or **Office and Professional Employees International Union (OPEIU), Local 277**, or neither.

¹⁴ 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 Austin, Texas place of business, goods valued in excess of \$50,000 directly from points outside the state of Texas.

A. Election Details

The election will be conducted by mail.¹⁵ The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Tuesday, October 13, 2020. Voters must return their mail ballots so that they will be received by close of business on Tuesday, November 3, 2020. The mail ballots will be counted on Tuesday, November 10, 2020 at 2:00 p.m. at a location to be determined, either in person or 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 Friday, October 23, 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 **September 15, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

There may be a question as to whether certain part-time employees in the bargaining unit are eligible to vote based on the number of hours worked. For part-time employees who work on a regular basis, the Board utilizes the eligibility formula set forth in *Davison-Paxon Company, 185 NLRB 21(1970)*. As I may be unable to determine the eligibility of certain unnamed individual part-time employees based on the present record, they shall be permitted to vote under challenge if they are otherwise eligible.

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

¹⁵ The parties agreed on the record to a mail ballots election.

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 **September 30, 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.¹⁶ 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 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 28th day of September 2020.



Timothy L. Watson, Regional Director
National Labor Relations Board, Region 16
Fritz G. Lanham Federal Building
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6107

¹⁶ 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.