

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

San Antonio, Texas

LAZARUS ENERGY HOLDINGS, LLC

Employer

and

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION AFL-CIO¹**

Petitioner

Case 16-RC-266439

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act (Act), a hearing was conducted before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether, in light of the continuing COVID-19 pandemic,² the Region should conduct an election for certain employees of the Employer, who are employed in Bexar and Karnes Counties, Texas, by manual or mail ballot. The Employer argues it is possible to conduct a manual election safely. The Petitioner seeks a mail ballot election based on the circumstances of the ongoing COVID-19 pandemic.

The Employer produces and distributes petroleum products. The Petitioner seeks to represent a unit of approximately 57 operators and maintenance employees at the Employer's facilities in San Antonio, Elmendorf, and Falls City, Texas. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):

Included: All full-time and regular part-time operators and maintenance employees, including terminal operators, lab techs, instrument techs, and electricians employed by the Employer at its facilities located at 7811 South Presa Street, San Antonio, Texas; 1 BDA Crossing, San Antonio, Texas; 20830 Lamm Road, Elmendorf, Texas; and, 5999 County Road 211, Falls City, Texas.

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

¹ Parties' names appear as amended at the hearing.

² Throughout this decision, the terms "COVID-19," "Covid," and "coronavirus" are used interchangeably to describe the novel coronavirus, SARS-CoV-2.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,³ the parties were permitted to present their positions, as well as documentary evidence, and file post-hearing briefs regarding the mechanics of this election. I have carefully considered the record, including those positions and arguments. As explained below, I find that, in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, a prompt election by mail is appropriate.

I. THE POSITIONS OF THE PARTIES

A. The Employer

The Employer does not reject the contention that the present pandemic requires special considerations, but it maintains the risk can be mitigated, and that it is capable of taking steps that could ensure a safe manual election. In this regard, the Employer notes that the petitioned-for employees are considered “essential workers” and that it has remained operational throughout the COVID-19 pandemic. The Employer proposes a manual election over two consecutive days, consisting of a 4-hour session from 3:00 p.m. to 7:00 p.m. on Thursday, November 5, 2020,⁴ and a 2-hour session from 5:00 p.m. to 7:00 p.m. on Friday, November 6, to be held in the garage of its firehouse located next to its administration building.

1. The Employer’s Operation

The petitioned-for employees regularly work out of four separate facilities, including the administration building, a refinery, and two terminals. The refinery is approximately one mile east of the administration building while the Elmendorf and Falls City terminals are located approximately 10 miles and 40 miles southeast of the administration building, respectively. The administration building consists of an office area, a shop, and a warehouse, and regularly houses approximately 47 individuals,⁵ including 15 petitioned-for employees—10 maintenance employees and five laboratory employees. Of the 10 maintenance employees, five are in the Mechanical Group, four are in the Instrument and Electrical (I&E) Group, and one is in Utility but floats with the Mechanical Group.

Approximately 32 petitioned-for employees work in the refinery while the Elmendorf and Falls City terminals contain approximately six unit employees and four unit employees, respectively. The record does not disclose if, or how many, non-unit employees work at the refinery and terminals.

³ Sec. 102.66(g)(1) of the Board’s Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

⁴ All dates are in 2020 unless otherwise noted.

⁵ According to the Employer, there are approximately 32 people assigned to the administration building who are excluded from the Unit, including management, administration, and contractors; however, 13 individuals currently telework and two routinely work at the refinery. The remaining 17 in-office personnel work in enclosed offices or physically distanced cubicles.

Laboratory employees, refinery operators, and terminal employees work a “DuPont schedule,” rotating 12-hour shifts on a 4-week cycle, to provide 24/7 coverage.⁶ The record is silent on the schedules worked by maintenance employees; however, they all attend socially distanced startup meetings with their respective group supervisor at the beginning their shifts before being deployed to the shop or refinery. In the shop, employees perform project work on physically separated equipment. Operators have contact with maintenance and laboratory employees in the refinery, particularly when equipment is taken out of service. The record does not disclose the duration of the contact or how often it happens.

2. The Employer’s Current and Proposed COVID-19 Protocols

The Employer has implemented COVID-19 safety policies. Specifically, personal hygiene and safety protocols instruct employees as follows:

- Wash your hands as soon as you enter the workplace.
- Wash your hands after touching any high-touch surface with bare hands, such as door handles, security or payment keypads, or communal workstations. If possible, cover your hand with something when touching high-touch surfaces.
- Wear a face covering that covers your nose and mouth, at all times, unless you have received specific instruction otherwise.
- Stay at least 6 feet away from all other people, at all times. If a 6-foot distance cannot be maintained, a mask must be worn, even if you are otherwise exempted from that requirement.
- If you cough or sneeze while not wearing a face covering, do so into your elbow or a tissue. Immediately throw away the tissue (if used), promptly wash your hands, and put on a face covering to avoid further exposing those around you.
- Employees must clean their work area after each shift to help minimize the spread of COVID-19. Routine cleaning will help maintain a healthy environment and remove impurities, including germs from surfaces that are frequently touched.

Everyone in the four facilities at issue are required to wear a face covering unless they are in separate physically distanced spaces (e.g., offices or cubicles). Employees and contractors at the administration building, refinery, and Elmendorf terminal undergo a temperature check and health screening administered by a nurse⁷ when they enter the building. Visitors to the administration building have their temperatures checked. The record does not disclose how often or how many people visit the administration building, the purpose of such visits, or with whom they may come into contact. Individuals at the Falls City terminal perform a self-screening. The record does not indicate whether the refinery or terminals receive visitors. Passing the temperature check and health screening are a condition of entering the building.

⁶ Excluding one laboratory employee, who works Monday through Friday, 7:00 a.m. to 4:00 p.m.

⁷ If the nurse is not available, the Employer has predesignated other individuals to conduct the temperature check and health screening.

In addition, the Employer requires employees who feel any sign of illness to stay home. Employees with someone in their household, or who have been within 6 feet of someone, who has been diagnosed or presumptively diagnosed with COVID-19 must contact the Employer for instructions on whether to quarantine. Similarly, employees must report all out-of-state travel to the Employer, which reports may lead to quarantine. The record does include any details on how many times the Employer has required employees to quarantine or for how long.

The administration building is cleaned daily after hours by a contract cleaner, including disinfecting high-touch areas such as doorknobs, timeclocks, and keyboards. The operations management also maintains a supply of disinfectants, sanitizer, masks, and tape for employees in his office, which he regularly cleans. In addition, the security officer cleans high-touch hours several times daily when performing rounds.

The refinery is cleaned daily by the same contract cleaner as the administration building and disinfected and decontaminated weekly by a different third-party cleaner. The Elmendorf and Falls City terminals have a full supply of cleaning and sanitizing products.

The firehouse, where the Employer proposes holding the election, is cleaned as needed. Although the record does not include the frequency or number of people accessing the firehouse, the Employer stated that the firehouse receives “minimal use” and that employee trainings previously held there have been discontinued. Further, the Employer offered to engage a third-party contractor to clean, disinfect, and decontaminate the firehouse in advance of a manual election. The proffered polling place is a firetruck garage bay with two bay doors, which would remain open during the election. The bay measures approximately 50 foot by 65 foot by 15-to-20 foot high.

In addition, the Employer would provide the certifications listed in General Counsel Memorandum 20-10, Suggested Manual Election Protocols (GC 20-10).

Since the beginning of the COVID-19 pandemic, throughout the four facilities, 10 of the Employers employees have had confirmed COVID-19 infections and one was presumed to have had COVID-19. The most recent confirmed case was reported on September 27; that employee was released back to work by a medical professional on October 9. In the 14 days prior to the preelection hearing, the Employer was unaware of any employee testing positive, being directed by a medical professional to proceed as if testing positive, awaiting test results, or exhibiting symptoms of COVID-19, or having been in direct contact with a person who tested positive, was directed by a medical professional to proceed as if testing positive, or is awaiting test results. The record does not disclose whether any contractors or visitors to the Employer’s facilities have tested positive for COVID-19, but the Employer asserts that there have been no work-related exposures to COVID-19.

The Employer argues that San Antonio and Karnes County both report they are low risk for exposure to COVID-19. The Employer highlights that Karnes County recently received an exemption to Texas’s facial covering requirement and further notes that the Occupational Safety

and Health Administration (OSHA) classifies the oil and gas industry in the lowest risk categories for exposure to COVID-19⁸.

The Employer also argues, without support, that mail ballot elections during the COVID-19 pandemic have resulted in lower voter participation than manual election prior to the pandemic and where, as here, employees are reporting to work, that voter participation would be maximized by a manual election. It raises concerns about the mail ballot procedure, including forwarded mail and ballot counts done by remote viewing.

The Employer also notes nothing in the Board's or General Counsel's announcements preclude ordering manual elections and argues that the circumstances present in the instant case, including relevant COVID-19 statistics, the proposed safety protocols and polling place, and OSHA's low-risk classification, support directing a manual election.

B. The Petitioner

The Petitioner maintains that a mail ballot election is appropriate given the current state of the COVID-19 pandemic in Texas and in particular Bexar County and Greater San Antonio. The Petitioner contends that participation rates in manual elections may be somewhat higher than mail elections but that the mail ballot provides an effective means of providing employees with an opportunity to vote with regard to their representation.

II. BOARD LAW AND ITS APPLICATION TO THE INSTANT CASE

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). "It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346).

The Board's longstanding policy is that elections should, as a general rule, be conducted manually; however, a Regional Director may reasonably conclude, based on circumstances tending

⁸ OSHA uses a 4-category scheme of Lower (caution), Medium, High, and Very High. "COVID-19 Control and Prevention, Oil and Gas Industry Workers and Employees." OSHA. <https://www.osha.gov/SLTC/covid-19/oil-gas.html> (accessed October 22, 2020).

to make voting in a manual election difficult, to conduct an election by mail ballot. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.⁹ This includes a few specific situations addressed by the Board, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other “extraordinary circumstances.” In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, above at 1145. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law vests Regional Directors with discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and provides that Regional Directors should tailor the method of conducting an election to “enhance the opportunities of all to vote.” *Ibid.*

Consistent with the recognition of the discretion afforded to Regional Directors, on April 17, the Board issued a “COVID-19 Operational Status Update,”¹⁰ 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.

The Board has continued to affirm that the ongoing COVID-19 pandemic constitutes extraordinary circumstances as contemplated by *San Diego Gas*. See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying on “the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework” to deny review of Regional Director’s decision to order a mail ballot election).

In recent cases, the Board has noted that it will continue to consider whether manual elections should be directed “based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested

⁹ I note the provisions of the Casehandling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and it is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) (“the General Counsel’s nonbinding Casehandling Manual”); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, above at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

¹⁰ <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

protocols set forth in GC Memorandum 20-10.”¹¹ The instant case is analyzed using this framework.¹²

III. PREVAILING COVID-19 CIRCUMSTANCES

COVID-19 has created a public health crisis, which the country is still trying to get under control. The U.S. Centers for Disease Control and Prevention (CDC) continues to recognize: “We are still learning about how the virus spreads and the severity of illness it causes.”¹³ This can be seen in the CDC’s recognition earlier this month that COVID-19 spreads not just through respiratory droplets and “close contact” but also via smaller airborne “particles that can remain suspended in the air over long distances (usually greater than 6 feet) and time (typically hours).”¹⁴ Some studies place transmission distances over 25 feet.¹⁵ Around the same time, the CDC also expanded the underlying medical conditions that place people at a higher risk of severe illness from COVID-19 to include adults with obesity, or who are overweight, or who smoke or have a history of smoking.¹⁶ This week, on October 21, the CDC expanded its definition of “close contact” from being within 6 feet of an infected person for at least 15 minutes to being within 6 feet of an

¹¹ See *Jersey Shore University Medical Center*, 22-RC-263932 (unpublished October 1, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Savage Services Corp.*, 21-RD-264617 (unpublished October 1, 2020); *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (same); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (same).

¹² While the Board has stayed several directed mail ballot elections since late August, including two cases in this Region, stating the requests for review “raised substantial issues warranting review,” it has not specified the issues that caused it to grant review, delineated factors outside of *San Diego Gas* to be considered during the COVID-19 pandemic, established a different standard for determining the method of election, or issued any other ruling that impacts my conclusions and findings herein.

¹³ “How COVID-19 Spreads” (updated October 5, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (accessed October 22, 2020).

¹⁴ “Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission” (updated October 5, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (accessed October 22, 2020). See also “How COVID-19 Spreads,” above.

¹⁵ “What is the evidence to support the 2-metre social distancing rule to reduce COVID-19 transmission?” (June 22, 2020). Centre for Evidence-Based Medicine, University of Oxford. <https://www.cebm.net/covid-19/what-is-the-evidence-to-support-the-2-metre-social-distancing-rule-to-reduce-covid-19-transmission/> (“Smaller airborne droplets laden with SARS-CoV-2 may spread up to 8 metres concentrated in exhaled air from infected individuals Whilst there is limited direct evidence that live SARS-CoV-2 is significantly spread via this route, there is no direct evidence that it is *not* spread this way”) (emphasis in original) (accessed October 22, 2020).

¹⁶ “People with Certain Medical Conditions” (October 16, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (accessed October 22, 2020).

infected person for at least 15 minutes over a 24-hour period, clarifying that multiple separate encounters that total more than 15 minutes carries a higher risk of transmission.¹⁷

The total number of COVID-19 cases in the U.S. has surpassed 8.2 million and is currently surging in several areas of the country.¹⁸ It is responsible for over 230,000 deaths in this country; however, the CDC acknowledges “this might underestimate the total impact of the pandemic on mortality.”¹⁹

In assessing the local conditions, I must consider the state of the pandemic in Texas, particularly Bexar and Karnes Counties, where the petitioned-for employees are located and where a manual election would be held, along with Greater San Antonio, where two of Region 16’s Board agents are located and would be required to travel if they conduct the election. I also consider the state of the pandemic in the Dallas-Fort Worth metroplex, where other Region 16 Board agents are located and from where they would be traveling should the Region’s minimal staff in Greater San Antonio be unavailable or unable to conduct the election. Texas continues to be the nation’s second highest state for COVID-19 infections,²⁰ with over 838,000 cases as of October 21.²¹ On April 17, the date of the Board’s Operational Status Update, the number of new COVID-19 cases reported for the entire State of Texas on that single day was 916. While new COVID-19 cases in Texas remained steady from 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, and then spiked again to 17,820, on September 17.²² Although cases decreased over the next three weeks, the rolling 7-day average has been increasing since October 11. Still, the true number of cases in Texas is likely higher because many people have not been tested and, as the CDC maintains, “**It is important to realize that you can be infected and spread the virus but feel well and have no symptoms**” (emphasis in original).²³

¹⁷ “Appendices” (updated October 21, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/appendix.html> (accessed October 22, 2020).

¹⁸ CDC COVID Data Tracker. <https://www.cdc.gov/covid-data-tracker/#cases> (accessed October 22, 2020).

¹⁹ “Morbidity and Mortality Weekly Report” (October 20, 2020). CDC. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6942e2.htm> (finding nearly 300,000 excess deaths in 2020 compared to late January through October 3, 2019) (accessed October 22, 2020).

²⁰ Ibid. (Cases and Deaths by State).

²¹ COVID-19 in Texas (Dashboard).” Texas Department of State Health Services. <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (accessed October 22, 2020).

²² Ibid. (US and State Trends sorted for Texas).

²³ “Overview of Testing for SARS-CoV-2 (COVID-19)” (updated October 21, 2020). CDC. <http://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html> (accessed October 22, 2020).

As of October 21, Bexar County had the fourth highest number of COVID-19 cases in Texas with 63,807²⁴ while Karnes County reported a total of 524.²⁵ Dallas County and Tarrant County were ranked second and third, respectively, with 91,313 cases²⁶ and 60,795 cases.²⁷

The voting group of employees, other personnel at the Employer's facility, National Labor Relations Board Region 16 personnel, and the general population are subject to the risks of COVID-19 transmission. Bexar County, where a manual election would take place, has not been spared from COVID-19, with 213 new cases being reported on October 21 alone, and a total of 1,232 residents who have died from COVID-19, with an additional 151 deaths under investigation.²⁸ The numbers are similar for Dallas County and Tarrant County, where the Board agent conducting the election may be traveling. On October 21, Dallas County reported 589 new cases, and a total of 1,091 deaths²⁹ while Tarrant County had 633 new cases and a total of 710 deaths.³⁰ 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 community spread of COVID-19.

A. Current Federal, State, and Local Directives

The CDC explains that "COVID-19 is thought to spread mainly through close contact from person to person, including between people who are physically near each other (within about 6 feet). People who are infected but do not show symptoms can also spread the virus to others."³¹ It highlights that the "[b]est way to prevent illness is to avoid being exposed to this virus" (emphasis in original).³² "It spreads through respiratory droplets or small particles, such as those in aerosols, produced when an infected person coughs, sneezes, sings, talks, or breathes" (emphasis in original).³³ Moreover, its October 6 update for travelers continues to maintain:

²⁴ "Dashboards & Data, COVID-19 Summary: San Antonio/Bexar County." City of San Antonio. <https://covid19.sanantonio.gov/About-COVID-19/Dashboards-Data> (accessed October 22, 2020).

²⁵ "COVID-19 UPDATES & INFORMATION." Karnes County Texas. <http://www.co.karnes.tx.us/page/karnes.Home%20-%20Copy> (accessed October 22, 2020).

²⁶ "Dallas County Coronavirus (COVID-19) Updates and Information." Dallas County Texas. <https://www.dallascounty.org/covid-19/> (accessed October 22, 2020).

²⁷ "COVID-19 (A CORONAVIRUS)." Tarrant County, Texas. <https://www.tarrantcounty.com/en/public-health/disease-control---prevention/coronaviruas.html> (accessed October 22, 2020).

²⁸ "Dashboards & Data, COVID-19 Summary: San Antonio/Bexar County," above (accessed October 22, 2020).

²⁹ "Dallas County Coronavirus (COVID-19) Updates and Information," above (accessed October 22, 2020).

³⁰ "COVID-19 (A CORONAVIRUS)," above (accessed October 22, 2020).

³¹ "How COVID-19 Spreads," above (accessed October 2020).

³² "How to Protect Yourself & Others" (updated September 11, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed October 22, 2020).

³³ "Frequently Asked Questions, Spread" (updated October 21, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread> (accessed October 22, 2020).

“Travel increases your chance of getting and spreading COVID-19. **Staying home is the best way to protect yourself and others from COVID-19**” (emphasis in original).³⁴

The CDC’s recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of facial coverings, good personal hygiene, and social distancing of at least six feet. The CDC further states that the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one’s mouth, nose, or eyes; however, “it is unlikely to be spread from domestic or international mail, products or packaging.”³⁵ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”³⁶

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Responding to a surge of cases in June, Texas Governor Greg Abbott reinstated bans on elective surgeries in several metropolitan counties, including Bexar and Dallas, and ordered bars to close and capped restaurant capacity at 50%, down from 75%.³⁷ On July 2, Governor Abbott issued executive order GA-29 requiring Texans in most counties to wear facial coverings in public and 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.³⁸ While some of these restrictions have been partially or fully rescinded, Texas remains the state with the second highest number of confirmed COVID-19 cases.

On October 7, Governor Abbott extended the statewide disaster declaration he first issued in March declaring that COVID-19 continues to pose an “imminent threat of disaster for all counties in Texas.”³⁹ On October 15, Bexar County Judge Nelson Wolff continued the local

³⁴ “Travel during the COVID-19 Pandemic” (updated October 6, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed October 22, 2020).

³⁵ “Frequently Asked Questions, Prevention, Am I at risk for COVID-19 from mail, packages, or products?” (updated October 21, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Prevention> (accessed October 22, 2020).

³⁶ “Running Essential Errands” (updated September 11, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 22, 2020).

³⁷ “Gov. Greg Abbott bans elective surgeries in four South Texas counties to preserve hospital capacity” (June 30, 2020). *The Texas Tribune*. <https://www.texastribune.org/2020/06/30/texas-coronavirus-elective-surgeries-cameron-hidalgo-nueces-webb/> (accessed October 22, 2020)

³⁸ “Governor Abbott Establishes Statewide Face Covering Requirement, Issues Proclamation To Limit Gatherings” (July 2, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-establishes-statewide-face-covering-requirement-issues-proclamation-to-limit-gatherings> (accessed October 22, 2020).

³⁹ “Governor Greg Abbott Renews COVID-19 Disaster Declaration” (October 7, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-renews-state-disaster-declaration-for-covid-19> (accessed October 22, 2020).

disaster declaration and public health emergency due to COVID-19 by issuing Executive Order NW-16. The order recognizes “the transmission of COVID-19 has not dissipated but remains a significant threat to the health and safety of the Bexar County Community.”⁴⁰ It requires facial coverings in most commercial entities and when not able to socially distance in public, enforceable by a fine. It also prohibits household and outdoor gatherings in excess of 10 people, with limited exceptions,⁴¹ and postpones elective surgeries that would adversely affect hospital capacity.

Tarrant County Judge B. Glen Whitley issued an executive order on August 25, effective until November 30, continuing the local disaster due to the public health emergency of COVID-19 that recognizes “the transmission of COVID-19 has not significantly dissipated and remains a serious threat to the health and safety of the Tarrant County Community and additional action is necessary to decrease rates of infection and the number of people admitted to hospitals, ICU, or on ventilators,” implements a ban on outdoor gatherings in excess of 10 people, and requires facial coverings in most commercial enterprises and in public when unable to socially distance.⁴² Additionally, San Antonio provides a weekly assessment of its COVID-19 risk level in seven categories using a 5-step system (Low, Moderate, Steady, Severe, Critical). As of October 19, the system reported the following risk levels in each category: 2 week decline in cases (Moderate), testing capacity (Low), contact tracing (Low), hospital trends (Steady), doubling rate (Low), positivity rate (Moderate), hospital stress (Moderate). This gave San Antonio an overall risk of Low.⁴³

Dallas County Judge Clay Jenkins issued supplemental orders on August 4, with no expiration, “necessary to protect the lives, health, welfare, and safety of the County’s residents from the devastating impacts of this pandemic,”⁴⁴ and recognizing “the transmission of COVID-19 has not dissipated but remains a significant threat to the health and safety of the Dallas County Community and rates of infection are increasing at an alarming exponential rate and the number of people ending up in the hospital, ICU, or on ventilators is also dramatically rising despite efforts by local authorities to control the spread.”⁴⁵ The supplemental orders, in part, requires face coverings in most commercial enterprises and when unable to socially distance in public, and mandates entire households isolate at home if one member tests positive. Additionally, Dallas County provides nonbinding health guidance to the public, where it has four color-coded levels of COVID-19 risk: Red (Stay Home Stay Safe), Orange (Extreme Caution), Yellow (Proceed

⁴⁰ “Bexar County Executive Order NW-16” (October 15, 2020). <https://www.bexar.org/DocumentCenter/View/28350/Bexar-County-Executive-Order-NW-16> (accessed October 22, 2020).

⁴¹ Although the Employer’s services are exempted, there is no indication that Board elections would be.

⁴² https://www.tarrantcounty.com/content/dam/main/covid-cares/TarrantCountyExecutiveOrder_8-25-20.pdf (accessed October 22, 2020).

⁴³ “Dashboards & Data,” above (accessed October 22, 2020).

⁴⁴ <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/august/080420-Amended-SupplementalOrderonContinuingRequirements.pdf> (accessed October 22, 2020).

⁴⁵ <https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/august/080420-Amended-SupplementalOrderonFaceMasking.pdf> (accessed October 22, 2020).

Carefully), and Green (New Normal Until Vaccine). As of October 21, Dallas County was at Red (Stay Home Stay Safe), the highest level of risk.⁴⁶

B. Election Guidance

While the CDC has not specifically addressed Board elections; it has issued recommendations based on the following guiding principles:

The more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times.

Specifically, the CDC instructs officials to “[c]onsider offering alternatives to in-person voting if allowed” and recommends voters “[c]onsider voting alternatives available in your jurisdiction that minimize contact. Voting 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” (emphasis in original).⁴⁷ In line with the CDC’s principles, Governor Abbott suspended sections of the Texas Election Code to delay elections scheduled for May 2, and then extended early voting for elections on November 3 by six days and allowed in-person return of mail ballots throughout early voting, a practice normally limited to election day.⁴⁸

On July 6, General Counsel Peter Robb issued GC 20-10, a memorandum setting forth suggested manual 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, it provides, in relevant part:

They [Regional Directors] have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

In other words, GC 20-10 offers advice on how to conduct a manual election when and if a Regional Director determines a manual election is appropriate. It is not a checklist whereby a manual election is mandated if the protocols are met.

⁴⁶ “Dallas County Coronavirus (COVID-19) Updates and Information,” above (accessed October 22, 2020).

⁴⁷ “Considerations for Election Polling Locations and Voters.” U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (accessed October 22, 2020).

⁴⁸ “Governor Abbott Issues Proclamation Extending Early Voting Period For November 3rd Election” (July 27, 2020). Office of the Texas Governor. <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-extending-early-voting-period-for-november-3rd-election> (accessed October 22, 2020).

The suggested protocols include: polling times sufficient to accommodate social distancing without unnecessarily elongating exposure among Board agents and observers; the employer's certification in writing that the polling area is consistently cleaned in conformity with CDC standards; a spacious polling area, sufficient to accommodate six-foot distancing; separate entrances and exits for voters; separate tables spaced six feet apart; sufficient disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; plexiglass barriers of sufficient size to protect the observers and Board agents; and provision of masks, hand sanitizers, gloves, and disinfecting wipes.

The General Counsel's suggestions also include the Employer's self-certification 24 to 48 hours before a manual election for how many individuals have been present in the facility within the preceding 14 days who have tested positive for COVID-19; who have been directed by a medical professional to proceed as if they have tested positive for COVID-19; who are awaiting results of a COVID-19 test; who are exhibiting symptoms of COVID-19; or who have had direct contact with anyone in the previous 14 days who has tested positive for COVID-19. The certifications in GC 20-10 state "symptoms of COVID-19, including a fever of 100.4°F or higher, cough, or shortness of breath." However, the CDC's "Symptoms of Coronavirus," Texas's "Symptoms of COVID-19," and the Employer's "COVID-19 Workplace Safety Policies" include additional symptoms:⁴⁹

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

The CDC also notes that the list does not include all possible symptoms while the Employer's policies recognize these are the "common symptoms"

IV. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Manual elections are the preference of the Board.⁵⁰ Absent the present pandemic, a manual election would almost certainly be held in this case. I recognize that a degree of reopening has begun, in the United States generally, and in Texas and Bexar, Dallas, and Tarrant Counties specifically. At the same time, it is undisputed that COVID-19 remains present in the community and presents a well-established

⁴⁹ "Symptoms of Coronavirus." CDC. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed October 22, 2020); "Symptoms of COVID-19." Texas Department of State Health Services. <https://dshs.texas.gov/coronavirus/#symptoms> (accessed October 22, 2020); Board Exhibit. 4.

⁵⁰ The Board's general preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. See, for example, *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997) (showing the Board has conducted mail ballot elections since its earliest days).

and significant health risk. There is no easily identifiable bright line that can designate when “extraordinary circumstances” have passed while the increased risk of transmission in group activities remains. Whether a mail ballot election is appropriate in this case requires considering both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections.

A. The Employer’s Procedural Arguments

The Employer also contends mail balloting results in voter disenfranchisement and lower voter participation; however, the Employer’s argument ignores the Board’s decision in *San Diego Gas*, above, which explained:

[B]ecause mail ballot elections have, by design, largely been limited to situations where factors were present which were likely to inhibit voter participation if the election were conducted manually, there is no reason to believe that participation in those particular elections would necessarily have been higher had they been manual elections.

Id. at 1146. Although I do not discount the concern regarding potential voter participation issues and acknowledge the potential risks of mail delivery procedures on the outcome of a mail ballot election, there is no indication that the United States Postal Service in Greater San Antonio is unable to deliver mail, that the petitioned-for employees would be unable to understand the mail balloting procedure, that the addresses of the eligible employees are not known or up to date, or that there are any impediments to voter participation. Any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate, and the return date for mail ballots can be extended to accommodate voters who may not be regularly residing at their residence or may be quarantining their mail.⁵¹ While concerns about potential disenfranchisement of voters could be relevant to whether a mail ballot election is appropriate, such concerns do not automatically require a manual election.⁵² In fact, there appears to be significant risk of voter disenfranchisement in a manual election for any voter who is (1) diagnosed with COVID-19 immediately preceding the election, (2) self-quarantining based on contact tracing, potential exposure, or symptoms of COVID-19, or (3) or has a temperature or other symptoms on the day of election even if they are not due to COVID-19. This chance increases when using all 11 symptoms from the CDC, Texas, and the

⁵¹ The Employer speculates “some employees may not open or accept mail due to fear of potential virus exposure.” The Employer presents no evidence that employees have expressed such concerns and, as studies have shown COVID-19 remains active on paper for only one day, mail balloting allows ample time for employees to quarantine their mail. “New coronavirus stable for hours on surfaces” (March 17, 2020). National Institutes of Health. <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (“scientists found that severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) was detectable ... up to 24 hours on cardboard) (accessed September 16, 2020). Also, as noted above, the CDC advises people can avoid the “unlikely” transmission of the virus via mail by simply washing or sanitizing their hands for 20 seconds or quarantining letters to reduce any risk.

⁵² I note there appears to be significant risk of voter disenfranchisement in a manual election for any voter who is (1) diagnosed with COVID-19 immediately preceding the election, (2) self-quarantining based on contact tracing, potential exposure, or symptoms of COVID-19. This chance increases when all 11 symptoms from the Employer’s checklist (as opposed to the three symptoms in the GC 20-10 certifications) require self-isolation or quarantining.

Employer’s policies (as opposed to the three symptoms in the GC 20-10 certifications). Any party is, of course, free to present evidence of any actual disenfranchisement of voters in postelection objections. See, for example, *Daylight Transport*, 31-RC-262633 (unpublished August 19, 2020).

B. The Employer’s COVID-19 Protocols

The Employer contends 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 (and up to 10 feet) apart at any given time and maintaining a sanitary and disinfected place for all on the premises. See Sec. I.A.2, above. While the Employer has offered to provide floor markings at more than the suggested 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 plexiglass barriers. I have also considered the required self-quarantining and self-isolation of symptomatic or contact traced employees, use of personal protective equipment (PPE), such as facemasks and sanitizer, and whether a Board agent conducting the election could observe appropriate restrictions while traveling to the election site. I have considered limiting the number of people who may participate in the preelection conference and the ballot count and requiring social distancing for all participants.

Regarding the Employer’s proposed social distancing in the voting area, I agree social distancing could reduce the risk of spread; however, as noted above, the appropriate distance may be much farther than 6 feet while the CDC continues to advise people that “[s]taying home is the best way to protect yourself and others from COVID-19.”⁵³ This guidance is echoed by Texas’s and Bexar County’s continued executive orders and proclamations regarding mandatory mask wearing and limiting large gatherings at this time.⁵⁴ The CDC acknowledges that “[t]here is much more to learn about the transmissibility, severity, and other features associated with COVID-19 and investigations are ongoing,”⁵⁵ and its recent revelations on airborne transmission and increased risk of severe illness for common medical conditions, along with still unknown but potentially devastating long-term effects.⁵⁶ Given the uncertainty of determining an “appropriate” distance

⁵³ “Travel during the COVID-19 Pandemic,” above (accessed October 22, 2020).

⁵⁴ “Governor Abbott Establishes Statewide Face Covering Requirement, Issues Proclamation To Limit Gatherings,” above (accessed October 22, 2020); “Bexar County Executive Order NW-16,” above (accessed October 22, 2020).

⁵⁵ “Frequently Asked Questions, Spread,” above (accessed October 22, 2020).

⁵⁶ “Long-Term Effects of COVID-19” (updated September 16, 2020). CDC. <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html> (accessed October 22, 2020); “The lasting misery of coronavirus long-haulers” (September 14, 2020). *Nature*. <https://www.nature.com/articles/d41586-020-02598-6> (“Months after infection with SARS-CoV-2, some people are still battling crushing fatigue, lung damage and other symptoms of ‘long COVID’.”) (accessed October 22, 2020); “The hidden long-term cognitive effects of COVID-19” (October 8, 2020). Harvard Health Publishing. <https://www.health.harvard.edu/blog/the-hidden-long-term-cognitive-effects-of-covid-2020100821133> (accessed October 22, 2020); “Long-term Health Consequences of COVID-19” (October 5, 2020). *Journal of the American Medical Association*. <https://jamanetwork.com/journals/jama/fullarticle/2771581> (accessed October 22, 2020); “COVID-19 (coronavirus): Long-term effects.” Mayo Clinic. <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351> (“COVID-19 symptoms can

and the general unknowns of the virus itself, I cannot be sure current guidelines sufficiently mitigate risk.

Manual election procedures inherently require substantial interaction among voters, observers, party representatives, and Board agent, all of whom must be present at the Employer's facility. The Board agent, observers, and party representatives participate in a preelection 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 polling 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.

Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange, and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the culmination of the election, the ballot count will proceed in the same area with multiple people, which will unnecessarily cause a significant risk of exposure for all involved. It is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line who might not normally in the course of his work interact with others, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election and potentially unwittingly expose others to the virus. The fact that two of the Employer's employees have tested positive within the last two months, highlights the fact the risk of exposure to somebody at the Employer's facility with COVID-19 is not just theoretical. The proposed polling periods would have two observers and a Board agent in the same area for over six hours, interacting with approximately 57 eligible voters.

This election would also involve travel to the facility by a Board agent and party representatives. Even if everyone who would participate in a manual election might appear to be infection free, the virus is believed to spread through pre-symptomatic and asymptomatic individuals.⁵⁷ Eligible voters, along with other employees who may come into contact with the

sometimes persist for months. The virus can damage the lungs, heart and brain, which increases the risk of long-term health problems.”) (accessed October 22, 2020).

⁵⁷ “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic” (July 2020). *Emerging Infectious Diseases Journal*. https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (accessed October 22, 2020); “The implications of silent transmission for the control of COVID-19 outbreaks” (July 28, 2020). *Proceedings of the National Academy of Sciences of the United States of*

participants, the Board agent, and party representatives, could risk exposure to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. 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 in Texas and Bexar, Dallas, and Tarrant Counties.

I have carefully considered the Employer's protocols and proffers, including the suggestions in GC 20-10. Subsequent to the issuance of GC 20-10, the CDC updated its COVID-19 pandemic planning scenarios and clarified the definition for the percent of transmission occurring prior to symptom onset (pre-symptomatic transmission) on September 10. 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 asymptomatic⁵⁸ and would neither be identified nor have sought testing, limiting the usefulness of any certifications. Similarly, the CDC's October 6 update for "Travel during the COVID-19 Pandemic" continues to warn: "You may feel well and not have any symptoms, but you can still spread COVID-19 to others."⁵⁹ While the suggested protocols for manual elections in GC 20-10 appear to adopt many of the CDC's in-person election recommendations for when other alternatives are not available, the Board has an acknowledged and accepted mail ballot procedure. Importantly, neither GC 20-10 nor the CDC's election guidelines have been updated to address the airborne transmission of COVID-19. Additionally, GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling the manual election, which would delay resolution of the question concerning representation. A mail ballot election avoids these concerns.

Ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, judges' orders in Bexar, Dallas, and Tarrant Counties recently reiterated "the transmission of COVID-19 has not significantly dissipated and remains a serious threat to the health and safety" of their respective communities. While cases may have currently plateaued in Bexar, Dallas, and Tarrant Counties, they remain significantly higher than in March, April, May, or June. Dallas County, where the Board agent conducting the election may be traveling, currently lists itself in the highest risk category for COVID-19 while Bexar County, where the election would take place, assesses itself as low risk. However, Dallas County and Bexar County use different measurements and neither the federal government nor Texas has established metrics for identifying a hotspot or surge or determining the risk of community spread. As I have

America (PNAS). <https://www.pnas.org/content/early/2020/07/02/2008373117> ("silent disease transmission during the presymptomatic and asymptomatic stages are responsible for more than 50% of the overall attack rate in COVID-19 outbreaks") (accessed October 22, 2020).

⁵⁸ "COVID-19 Pandemic Planning Scenarios" (updated September 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (estimating the infectiousness of asymptomatic individuals compared to infectious individuals at 75%) (accessed October 22, 2020).

⁵⁹ "Travel during the COVID-19 Pandemic" (updated October 6, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html> (accessed October 22, 2020).

already described, we have not reached a safe enough juncture from the peak of the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit person-to-person contact and travel within the state.

A mail ballot election also meets the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. As noted above, neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure, and there is no contention that the addresses of the eligible employees are not known or up to date, nor is there evidence that mail service in Texas or the Dallas-Fort Worth metroplex, where the mail ballots will be sent and received, has been disrupted. The Board's mail ballot procedures include means by which an employee who has not received a ballot in a timely manner may receive a duplicate. Mail balloting provides no additional risk to Board agents, parties, voters, or the public and is consistent with current guidance of limiting person-to-person contact and travel. Despite the Employer's claims, the Region has already successfully conducted a number of mail ballot elections and virtual remote ballot counts with arrangements for providing all the safeguards of a traditional count, when an in-person count was infeasible.

I have determined the record evidence, including the current prevailing circumstances of the COVID-19 pandemic in the region, supports finding a mail ballot election appropriate. The most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within Texas and hold a mail ballot election in this case.

This election must be held "on the earliest date practicable consistent with the Board's rules."⁶⁰ 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.

V. CONCLUSIONS AND FINDINGS

I 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.⁶¹

⁶⁰ Sec. 102.67(b) of the Board's Rules and Regulations.

⁶¹ As stipulated by the parties: The Employer, Lazarus Energy Holdings, LLC, a Delaware Limited Liability Company, maintains an office and place of business located in San Antonio, Texas, and is engaged in the production and distribution of petroleum products. During the past twelve months, a representative period, the Employer, in the

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:

Included: All full-time and regular part-time operators and maintenance employees, including terminal operators, lab techs, instrument techs and electricians employed by the Employer at its facilities located at 7811 South Presa Street, San Antonio, Texas; 1 BDA Crossing, San Antonio, Texas; 20830 Lamm Road, Elmendorf, Texas; and, 5999 County Road 211, Falls City, Texas.

Excluded: All other employees, office clerical employees, professional employees, confidential employees, managerial employees, guards and supervisors as defined in 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 the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO.

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 at 4:45 p.m. on Tuesday, November 3, 2020. Voters must return their mail ballots so that they will be received by 4:45 p.m. on Tuesday, November 24, 2020. The mail ballots will be counted on Tuesday, December 1, 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. In order to be valid and counted, the returned ballots must be signed by the voter and must be received in the Region 16 office prior to the counting of the ballots.

course and conduct of its business operations, sold and shipped goods valued in excess of \$50,000 directly to points located outside the State of Texas. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

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 Tuesday, November 10, 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 **October 11, 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(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. 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 **October 27, 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.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. 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 23rd day of October 2020.



Timothy L. Watson, Regional Director
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