

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

In the Matter of:

IKEA DISTRIBUTION SERVICES, INC.

Employer,

and

UNITED MAINTENANCE TECHNICIANS
OF TEJON

Petitioner.

Case 31-RC-266527

**IKEA DISTRIBUTION SERVICES REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION
AND MOTION FOR STAY OF ELECTION**

November 12, 2020

M.J. Asensio
Jeremiah L. Hart
Baker & Hostetler LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215

Nancy Inesta
Baker & Hostetler LLP
11601 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90025-0509

*Attorneys for Employer
IKEA Distribution Services, Inc.*

Table of Contents

I. INTRODUCTION1

II. FACTUAL BACKGROUND.....3

 A. IKEA’s Operation3

 B. Working at the Lebec DC4

 C. The Operations Department.....5

 D. The Facilities Department.....7

 1. Maintenance Technicians.....8

 2. Power Equipment Technician12

 3. Cleaners.....12

 E. Procedural Background.....13

III. LEGAL ARGUMENT.....14

 A. The Regional Director’s Departure from Officially Reported Board Precedent
 Raises a Substantial Question of Law.....14

 1. *Macy’s West Stores, Inc.* Has No Precedential Value17

 2. *Macy’s West Stores, Inc.* Is Wholly Inapplicable18

 3. The Regional Director’s Reliance on *Macy’s West Stores, Inc.* Ignores
 the Board’s Statutory Obligations and Is Based on a Legal Fiction.....19

 4. The Regional Director’s Reliance on *Macy’s West Stores, Inc.*
 Destroys the Rights of Excluded Employees Where the Preclusion
 Rule Applies.....21

 B. The Regional Director Admits a Different Result if the Region Performed the
 Community of Interest Analysis22

 C. A Substantial Question Concerning the Legality of the Petitioned-For Unit is
 Raised By the Regional Director’s Departure from the Board’s Precedent
 Requiring the Petitioner to Establish that the Petitioned-For Unit is
 Appropriate for Bargaining.....23

 1. The Petitioner Did Not Prove the Petitioned-for Unit Has an Internal
 Community of Interest23

a.	IKEA’s Organizational Structure.....	25
b.	Job Functions and Work	27
c.	Contact Among Employees	28
d.	Terms and Conditions of Employment.....	29
2.	The Petitioner Did Not Prove the Petitioned-for Unit Is Sufficiently Distinct to Warrant an Independent Bargaining Unit	30
a.	Functional Integration.....	33
b.	Terms and Conditions of Employment.....	35
c.	Contact Among Employees	36
d.	Common Supervision.....	38
e.	Skills and Training.....	39
f.	Interchange.....	41
g.	Employer’s Organization	42
h.	Community of Interest Summary.....	42
D.	A Substantial Question Concerning the Legality of the Petitioned-For Unit is Raised by the Regional Director’s Departure from the Board’s Precedent Set Forth in Step Three of <i>The Boeing Co.</i>	43
1.	The Regional Director Failed to Consider IKEA’s Bargaining History as Required by the Third Step of The Boeing Co.	43
2.	The Regional Director’s Decision was Arbitrary and Lacked A Reasoned Explanation.....	45
E.	The Regional Director’s Ruling to Preclude IKEA from Participating in the Hearing Deprived IKEA of Due Process	46
F.	There Are Compelling Reasons for the Board to Reconsider the Application of the Preclusion Rule.....	48

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954).....	46
<i>Alcan Aluminum Corp.</i> , 178 NLRB 362 (1969)	34, 37
<i>Allen Health Care Services</i> , 332 NLRB 1308 (2000)	<i>passim</i>
<i>American Security Corp.</i> , 221 NLRB 1145 (1996)	30
<i>Associated Charter Bus Co.</i> , 261 NLRB 448 (1982)	17
<i>Atlanta Hilton & Towers</i> , 273 NLRB 87 (1984)	36
<i>AVI Foodsystems, Inc.</i> , 328 NLRB 426 (1999)	20
<i>Beecham Products</i> , 251 NLRB 731 (1980)	32, 37, 40, 41
<i>Boeing Co.</i> , 337 NLRB 152 (2001)	34
<i>Boston After Dark</i> , 210 NLRB 38 (1974)	28
<i>Brunswick Bowling Products, LLC</i> , 364 NLRB No. 96 (2016)	47
<i>Buckhorn Inc.</i> , 343 NLRB 201 (2004)	38
<i>Chromalloy Photographic</i> , 234 NLRB 1046 (1978)	34
<i>Columbia Broadcasting System, Inc. v. U.S.</i> , 316 U.S. 407 (1942).....	46

<i>Davidson Hotel Co.</i> , 13-RC-217485.....	47
<i>Davidson Hotel Co., LLC v. Nat'l Labor Relations Bd.</i> , No. 19-1235, 2020 WL 6220012 (D.C. Cir. Oct. 23, 2020).....	45, 46
<i>E. I. Du Pont & Co.</i> , 205 NLRB 552 (1971)	38
<i>Electro Metallurgical Co. (Ashtabula, Ohio)</i> , 101 NLRB 577 (1952)	44
<i>Electro Metallurgical Co. (Niagara Falls, N. Y.)</i> , 57 NLRB 518 (1944)	44
<i>Executive Resources Associates</i> , 301 NLRB 400 (1991)	41
<i>Fleming Foods, Inc.</i> , 313 NLRB 948 (1994)	32
<i>General Electric Co. (Schenectady, N.Y.)</i> , 89 NLRB 726 (1950)	44
<i>Greater Bakersfield Memorial Hospital</i> , 226 NLRB 971 (1976)	40, 41
<i>Harrah's Illinois Corp.</i> , 319 NLRB 749 (1995)	26
<i>Hilton Hotel Corp.</i> , 287 NLRB 359 (1987)	41
<i>International Bedding Co.</i> , 356 NLRB 1336 (2011)	38
<i>Interstate Warehousing of Ohio, LLC</i> , 333 NLRB 682 (2001)	32, 37, 40, 41
<i>Jewish Hosp. of Cincinnati</i> , 223 NLRB 614 (1976)	32
<i>K&N Eng'g, Inc.</i> , 365 NLRB No. 141 (2017)	34
<i>Kroger Co.</i> , 155 NLRB 546 (1965)	44

<i>In re Lodgian Inc.</i> , 332 NLRB 1246 (2000)	40
<i>Macy’s West Stores, Inc.</i> , 32-RC-246415.....	<i>passim</i>
<i>Metropolitan Hosp.</i> 223 NLRB 282 (1976)	38
<i>Monsanto Co.</i> , 183 NLRB 415 (1970)	37, 38
<i>Montilla v. I.N.S.</i> , 926 F.2d 162 (2d Cir. 1991).....	46
<i>Park Central Care and Rehabilitation Center</i> , 32-RC-266500.....	48
<i>PCC Structural</i> s, 365 NLRB No. 160 (2017)	<i>passim</i>
<i>Promoco Manuf. Co.</i> , 34-RC-2279, 2009 WL 3147895 (2009).....	29
<i>Publix Super Markets, Inc.</i> , 343 NLRB 1023 (2004)	<i>passim</i>
<i>Ramada Beverly Hills</i> , 278 NLRB 691 (1986)	33, 36
<i>Republic Steel Corp. (Warren, Ohio)</i> , 131 NLRB 864 (1961)	44
<i>Specialty Healthcare and Rehabilitation Center of Mobile</i> , 357 NLRB 934 (2011)	32
<i>TDK Ferrites Corp.</i> , 342 NLRB 1006 (2004)	33
<i>Texas Color Printers, Inc.</i> , 210 NLRB 30 (1974)	38
<i>The Boeing Co.</i> , 368 NLRB No. 67 (2019)	<i>passim</i>
<i>The F. & M. Schaefer Brewing Co.</i> , 198 NLRB 323 (1972)	<i>passim</i>

<i>The Neiman Marcus Group, Inc.</i> , 361 NLRB No. 11, slip op. 4 (2014).....	26, 42
<i>Training School at Vineland</i> , 332 NLRB 1412 (2000)	28
<i>Transerv Sys.</i> , 311 NLRB 766 (1993)	26
<i>Turner Industries Group, LLC</i> , 349 NLRB 428 (2007)	39, 41
<i>U.S. Postal Svc.</i> , 208 NLRB 948 (1974)	31
<i>U.S. v. Ginsburg</i> , 376 F.Supp. 714 (D.Conn. 1974).....	46
<i>United States Plywood-Champion Papers, Inc.</i> , 174 NLRB 292 (1969)	38
<i>Univ. of Chicago</i> , 13-RC-198365, 2017 WL 2402773 (2017).....	3
<i>Westin Hotel</i> , 277 NLRB 1506 (1986)	33, 37
<i>Williams Sonoma Direct, Inc.</i> , 365 NLRB No. 13 (2017)	31
Constitutions	
U.S. Const. amend. V. A.....	46
Statutes	
29 U.S.C. § 159(b)	15, 20
29 U.S.C. § 159(c)	22
Other Authorities	
29 CFR § 102.66(d)	<i>passim</i>
29 CFR § 102.67(d)	14, 15
79 FR 74308-01	49
79 FR 74309.....	49

79 FR 74425.....	22, 49
<i>Decision and Direction of Election, Davidson Hotel Co., 13-RC-217485.....</i>	<i>47</i>
<i>Order Directing Hearing in Macy’s West Stores, Case No. 32-RC-246415.....</i>	<i>18</i>

Pursuant to National Labor Relations Board (“NLRB” or “Board”) Rules and Regulations 102.67(c), (d) and (j), IKEA Distribution Services, Inc (“IKEA” or “Employer”), respectfully requests review of the Regional Director’s Decision and Direction of Election (“DDE”) issued in Case 31-RC-266527, and moves for a stay of all of the proceedings, including the election.¹ Compelling and necessary reasons exist for granting review and staying the election pending review.

I. INTRODUCTION

In this case, the Regional Director disregarded the Region’s statutory obligation to determine the appropriate bargaining unit in each case and failed to apply binding precedent by declining to analyze whether the petitioned-for employees’ interests were sufficiently distinct from the excluded employees. In doing so, the Regional Director denied excluded employees the protections of the National Labor Relations Act (the “NLRA” or the “Act”) and made the petitioned-for unit controlling. Specifically, the Regional Director applied only steps one and three of the community of interest analysis as clarified in *The Boeing Co.*, 368 NLRB No. 67 (2019) despite recognizing the Region’s obligations under the Act to determine the appropriateness of the bargaining unit and receiving evidence regarding the excluded employees. The Regional Director’s disregard for the Act and established Board precedent has not only prejudiced IKEA but denied those employees who were excluded from the petitioned-for unit their Section 7 rights as recognized by *PCC Structurals*, 365 NLRB No. 160 (2017). The Regional Director’s departure from the Board’s binding precedent in *Boeing* and *PCC Structurals* raises a substantial question of law and warrants review.

¹ The DDE is attached hereto as Exhibit 1. The record from the pre-election hearing in this matter is attached hereto as Exhibit 2. Citations to the record’s transcript and referred to throughout as “Tr. ___”. Citations to the Board’s and Petitioner’s exhibits from the pre-election hearing are referred to throughout as “Bd. Ex. ___” and “Pet. Ex.”, respectively.

The Regional Director also committed review-warranting error by departing from the Board's precedent in step one of *Boeing* by finding the petitioned-for unit appropriate when the record does not include sufficient evidence to establish that the petitioned-for employees share an internal community of interest. The United Maintenance Workers of Tejon (the "Union" or "Petitioner") petitioned for only two classifications in the Facilities Department of IKEA's Lebec, California Distribution Center (the "Distribution Center" or "DC"), the Maintenance Technicians and the Power Equipment Technicians. However, the record lacks sufficient evidence about the Power Equipment Technicians, and the limited record evidence cannot show an internal community of interest amongst the petitioned-for employees. The Regional Director simply did not have enough evidence about the Power Equipment Technicians to find an internal community of interest with the Maintenance Technicians and the petition should be dismissed. The Regional Director's failure to require the Petitioner to produce sufficient record evidence of an internal community of interest between the petitioned-for employees is a deviation from both *Boeing* and *Allen Health Care Services*, 332 NLRB 1308 (2000) which put the burden of establishing the appropriateness of a petitioned-for unit on the Petitioner. The Regional Director's Departure from these binding Board precedents raises a substantial question of law and warrants review.

Similarly, the Regional Director departed from binding Board precedent in *Boeing* and *Allen Health Care Services*, 332 NLRB 1308 (2000) by failing to require the Petitioner to carry his burden of submitting sufficient evidence showing the petitioned-for employees share interests distinct from excluded employees in the context of collective bargaining. The Regional Director's failure to do so raises a substantial question of law warranting review.

Review is also warranted because the Regional Director departed from the Board's binding precedent under step 3 of the *Boeing* analysis. Without citing a single precedent, let alone

distinguishing IKEA's case citations, the Regional Director rejected IKEA's history of collective bargaining solely on the basis that the Petitioner is not the same union found at the Employer's other facilities. This departure from precedent also raises a substantial question of law warranting review.

Finally, the Regional Director's decision not to permit IKEA to participate in the hearing under Section 102.66(d) of the Board's Rules and Regulations violated IKEA's due process rights under the Fifth Amendment of the Constitution of the United States as the Regions have inconsistently applied the preclusion rule. This ruling in conjunction with the hearing constituted prejudicial error to IKEA. Further, there are compelling reasons for reconsideration of the Board's preclusion rule in Section 102.66(d). For these reasons, too, review is warranted.

Given the Regional Director's errors and the importance of the issues implicated in this case, the Board should grant review of the DDE, and, on review, dismiss the petition. As all parties would benefit from the Board's resolution of the election-related issues in this case before voting takes place, a stay should be granted.² *Univ. of Chicago*, 13-RC-198365, 2017 WL 2402773 (2017).

II. FACTUAL BACKGROUND

A. IKEA's Operation

IKEA's Lebec, California Distribution Center consists of nine buildings.³ (Tr. 5). Buildings 1 through 6 are under a single roof and together account for 1.6 million square feet. (Tr. 31-32,

² Under Section 102.67(c), as this Request for Review was filed within 10 business days of the DDE and the validity of any ballots cast may be affected by the Board's ruling, IKEA requests that if a stay is not granted, the ballots cast during the course of the November 17, 2020 election be impounded and unopened pending the Board's decision on this Request for Review.

³ The Regional Director incorrectly determined that the DC was limited to the main facility, which is comprised of six contiguous buildings. (DDE at 4, fn. 9). The Hearing Officer failed to ascertain the complete layout of the facility at issue including which employees work in which buildings and how often. While Rigoberto Razo specifically indicated that there are more than six buildings that comprise the DC, the Hearing Officer failed to explore this testimony to accurately understand the scope of IKEA's Lebec operation. (Tr. 293).

138; Pet. Ex. 3). Buildings 7 and 8 are across the street from buildings 1-6 and building 9 is approximately two miles away from buildings 1-6. The DC runs 24 hours a day, 7 days a week. (Tr. 291).

The DC's purpose is to receive, store, and ship IKEA product. IKEA product arrives at the DC via trucks in shipping containers or trailers. (Tr. 138, 142). The product from those shipping containers or trailers is unloaded on the south side of the DC and placed into the DC's racking until it is needed to fulfill an order from one of IKEA's retail stores or an online customer. (Tr. 139-140). When the product is needed to fulfill an order, it is "picked" or removed from the racks, placed on an outbound truck on the north side of the DC, and shipped to its destination. (Id.).

B. Working at the Lebec DC

Employees work at the DC in various classifications, including: Warehouse Coworkers, Stock Controllers, Recovery Coworkers, Internal Haulers, Maintenance Technicians, a Power Equipment Technician, Cleaners, and an Auditor. (DDE p. 4, 10). All IKEA employees who work at the DC enter the facility for work through the main entrance on the north side of the main building (Tr. 189-190) and clock-in using the same time clocks. (Tr. 187). All employees who need to change clothing before or after their shift utilize the same locker rooms. (Tr. 133). All hourly employees also share the same break and café areas. (Tr. 190).

All hourly employees at the DC are subject to the same employment policies.⁴ (Tr. 227; Bd. Ex. 4). Similarly, all of IKEA's hourly employees at the DC are covered by the same benefit policies and their compensation is determined by the same pay scale. (Tr. 241, 269; Bd. Ex. 5). All the employees at the DC ultimately report to Jermaine Gordon, the Site Manager. (Pet. Ex. 2).

⁴ The common employment policies include policies covering attendance, behavior standards, code of conduct, employee purchases, safety, harassment and discrimination, incentive pay, privacy, information security, mobile devices, pay practices, problem resolution, and rest breaks and meals. (Tr. 227, Bd. Ex. 4).

As a 24/7 operation, the DC runs three shifts. (Tr. 291). Shift times vary depending on department. For example, first shift for all employees runs from 5:00a.m. to 1:30p.m. (*Id.*). The second shift for Maintenance Technicians runs from 1:00p.m. to 9:30p.m. and the third shift runs from 9:00p.m. to 5:30a.m. (Tr. 152). Second shift for employees other than Maintenance Technicians starts at either 2:00p.m. or 3:00p.m. and third shift runs from 8:30p.m. to 5:00a.m. (Tr. 30, 291, 319). All employees who work second or third shift receive a shift differential of \$0.50 or \$1.00 per hour (Tr. 231).

C. The Operations Department

IKEA's operations department ("Operations") has two sides: SD operations and CDC operations. (Tr. 78, 241; Pet. Ex. 2). The SD operation is located in buildings 1-5⁵ and provides product to IKEA's retail stores. (Tr. 241, 293). The CDC operation primarily function in building 6 and fulfills e-commerce orders placed on IKEA's website. (Tr. 114, 139).

IKEA product arrives at the DC via trucks on pallets in shipping containers or trailers. (Tr. 138, 142). The shipping containers or trailers are placed in a parking space outside the DC, but they are not immediately backed up to one of the DC's dock doors for unloading. (Tr. 139). That process is completed by IKEA's Internal Haulers⁶ who drive large trucks along the outside of the DC and position trailers full of product at the DC's south side dock doors for unloading. (Tr. 135, 139). Once a trailer or container full of product is placed at a dock door, the product is removed by a Warehouse Coworker driving a forklift or other kind powered equipment. (Tr. 139-140). There are various kinds of equipment used at the DC to move product including: Scissor Lifts, Clamp Trucks, Boom Lifts, Counterbalances, Reach Inc. Kooi Forks, Electronic Pallet Jacks,

⁵ Buildings 7-9 are also used for SD operations, but the Hearing Officer failed to elicit evidence on that point.

⁶ This position is also called "yard jockey" throughout the record. These employees are certified on various kinds of material handling equipment, wear uniforms, and use radios when working. (Tr. 135-36, 154-55, 178; Bd. Ex. 8).

Cranes, and Order Pickers (collectively “material handling equipment”). (Tr. 43; Bd. Ex. 8). As the Warehouse Coworker’s primary job is to move product throughout the DC using material handling equipment, they obtain certifications on the various pieces of material handling equipment. (Tr. 253; Bd. Ex. 8).

Using their material handling equipment, the Warehouse Coworker takes the product from shipping containers and places it on the racking that covers the majority of the DC’s floor space or places it on a conveyor system to be placed in the racking. (Tr. 140; Pet. Ex. 3). When the product on the racking is needed for shipment to a store or an e-commerce customer, it is removed from the racking or “picked.” (Tr. 141-42). Product to be provided to an IKEA retail store is picked by Warehouse Coworkers on the SD side of the operation. (Tr. 79; 139-140). The Warehouse Coworker places the picked product in a trailer on the north side of the DC for delivery. (Tr. 139, 141). When a trailer is ready for delivery, it is moved by an internal hauler from the dock door where it was loaded to another parking space to await pick-up for final delivery by a third party. (Tr. 135; 139). Product that is to be sent directly to an e-commerce customer is retrieved by an automated retrieval system (the “ASRS”) and shipped to the customer via FedEx. (Tr. 48, 362). Warehouse Coworkers in both the SD and CDC operations are supervised by Team Leads. (Tr. 290-92, 317-18).

As product moves through the DC, it is sometimes damaged. (Tr. 136). When product is damaged, Recovery Coworkers are responsible for assessing the extent of the damage, determining whether the product can be salvaged and placed back in the racks for distribution or whether it must be discarded. (Tr. 136; Bd. Ex. 3, Recovery Coworker Competence Profile). As product is constantly moving in and out of the DC, Stock Controllers are responsible for monitoring the DC’s inventory. (Bd. Ex. 3, Stock Controller Competence Profile). These employees track product from

the time it enters the DC until the time it is shipped. (Tr. 136-37; Bd. Ex. 3, Stock Controller Competence Profile).⁷ Like Warehouse Coworkers, both Recovery Coworkers and Stock Controllers are certified to and frequently operate material handling equipment in the performance of their duties. (Tr. 84, 85-86; Bd. Ex. 8). Operations employees regularly work in both the SD and CDC operations. (Tr. 145).

Additionally, the process of receiving, moving, storing, and shipping product sometimes presents safety issues. It is the reasonability of the Auditor to identify and address safety-related issues in the DC. (Tr. 448-49). For example, if a pallet of product is damaged and presents a safety issue, the Auditor is responsible for investigating that issue and working with Warehouse Coworkers, Stock Controllers, Recovery Coworkers, and others to ensure the issue is addressed and the product can handled safely. (Tr. 449-51).

D. The Facilities Department

The DC's Facilities Department exists: "To provide the highest level of customer service possible by eliminating unscheduled downtime, always interacting in a professional and courteous manner, and completing projects on budget and on time." (Bd. Ex. 13, Facilities Mission Statement). In short, the Facilities Department ensures that all the operations employees can perform their work. (Tr. 352; Bd. Ex. 13).

The Facilities Department includes hourly employees in three classifications: Maintenance Technicians, Power Equipment Technicians, and Cleaners. (DDE).⁸ Aaron Lucas is the Facilities

⁷ The Hearing Officer failed to obtain testimony about the Stock Controller's duties, supervision, or day-to-day interaction with other employees from any witness with personal knowledge. (Tr. 60, 123). IKEA offered to provide the supervisor responsible for the Stock Controllers and Recovery Coworkers, Brad Conradi, as a witness, but despite the lack of evidence in the record concerning either of these job classifications, the Hearing Officer declined to call the witness. (Tr. 432, 442-43).

⁸ The Sustainability Developer is not an hourly employee.

Manager. (Tr. 399; Pet. Ex. 2). Facilities Team Leads report to Lucas and directly supervise the Maintenance Technicians on each shift and the Cleaners. (Tr. 400; Pet. Ex. 2).

1. *Maintenance Technicians*

Maintenance Technicians are responsible for helping ensure that the DC and the equipment used therein are safe and operational. (Tr. 401; Bd. Ex. 13, Facilities Mission Statement). In order to achieve this result, Maintenance Technicians perform preventative maintenance tasks to prolong the working life of equipment or systems, such as oiling and cleaning. (Tr. 63-64). Preventative maintenance tasks are reoccurring and are distributed to Maintenance Technicians through a computer system called CAFM. (Tr. 68).

Maintenance Technicians also perform certain repair work. (Tr. 68). The repairs performed by Maintenance Technicians may be simple facilities upkeep, like fixing a clogged toilet or they may involve repairing the automation system in CDC. (Tr. 68, 352-53). Significant repairs, whether they are on material handling equipment or the facility itself, are performed by contractors. (Tr. 47, 80-81). Any DC employee who identifies an issue can submit a service order through CAFM seeking a repair. (Tr. 351, 359-60). The order is then converted to a work order and distributed to a Maintenance Technician. (Id.).

Maintenance Technicians also receive work from other employees when working “the floor.” (Tr. 299; 351-352). Maintenance Technicians working the floor move about the DC and are available for on-demand maintenance services. (Tr. 299). Calls for on-demand maintenance services can come from anywhere and happen multiple times each day. (Tr. 299-300, 321-23, 351-52). Team Leads from Operations have the authority to call Maintenance Technicians over the radio and direct them to perform repairs. (Tr. 296, 308-310, 327). Team Leaders from Operations can “give orders” to Maintenance Technicians when necessary to resolve a repair issue. (Tr. 308).

When Team Leaders from Operations call Maintenance Technicians for repair work, the Maintenance Technicians are expected to respond. (Tr. 310-11). Operations Team Leads are not required to obtain approval from Facilities Department supervision before directing Maintenance Technicians to perform repair work. (Tr. 311). In fact, it is “very rare” for an Operations Team Lead to have reason to contact the Maintenance Technicians’ Team Lead as the Operations Team Leads have authority to direct the work of Maintenance Technicians as needed. (Tr. 295-96). Hourly employees from Operations are also permitted to stop Maintenance Technicians and ask them to help with malfunctioning equipment or other needed repairs and do so often. (Tr. 299, 323). One Operations Team Lead described the relationship between Operations and the Maintenance Technicians as “a close-knit family.” (Tr. 323).

Maintenance Technicians work closely with other hourly employees, like Warehouse Coworkers, Stock Controllers, Recovery Coworkers, and Internal Haulers on a daily basis to identify necessary repairs. (Tr. 299-300, 321-23, 351-52). For example, when an Internal Hauler’s truck malfunctions or a door on a shipping container is unable to be opened, the Internal Hauler calls a Maintenance Technician and explains the issue he is experiencing and the Maintenance Technician will do his best to repair the issue. (Tr. 75-76, 192). If the Maintenance Technician is unable to perform the repair, he will tag the piece of equipment out for IKEA’s vendor to repair. (Id.). Similarly, when the material handling equipment operated by Warehouse Coworkers, Stock Controllers, and Recovery Coworkers malfunctions, they notify a Maintenance Technician who troubleshoots the piece of equipment and attempts to repair it. (Tr. 46-47, 83-83, 85-86). One of the first things the Maintenance Technician does when responding to a call concerning malfunctioning material handling equipment is ask the hourly employee to describe the problem they are experiencing to assist the Maintenance Technician in identifying the issue. (Tr. 325).

Maintenance Technicians also often ask an employee experiencing problems with their material handling equipment to demonstrate the problem they want repaired by operating the faulty equipment for the Maintenance Technician to observe. (Tr. 315).

Maintenance Technicians and other hourly employees perform work together when needed. (Tr. 312, 332-33). For example, when racking configurations are needed in the CDC operation, Warehouse Coworkers work together with Maintenance Technicians to move the racking in the area. (Tr. 332-33). When pallets tip on the DC's conveyor system, Warehouse Coworkers often work alongside the Maintenance Technician to eject the pallet from the conveyor.⁹ (Tr. 312, 314-15). Cleaners help Maintenance Technicians move heavy objects, deliver materials to Maintenance Technicians, and assist Maintenance Technicians with preventative maintenance. (Tr. 82-83).

Maintenance Technicians have much of the same training as other hourly employees at the DC. (Pet. Ex. 6). For example, there are at least 24 shared training modules completed by all hourly DC employees through IKEA's online learning platform, My Learning. (Tr. 256; Pet. Ex. 6; Bd. Exs. 8-9). In addition, Maintenance Technicians may receive training in 24 other areas depending on the employee.¹⁰ (Pet. Ex. 6). Of the additional 24 areas, 13 areas of training are not exclusive to Maintenance Technicians and are also provided to Warehouse Coworkers, Stock Controllers, Recover Coworkers, and Auditors as needed. (Pet. Ex. 6). The remaining 11 training items are

⁹ Team Lead Razo testified that Warehouse Coworkers assist Maintenance Technicians eject pallets from the conveyor system in approximately half of these instances he's observed. (Tr. 315-16).

¹⁰ The areas of training received by Maintenance Technicians are: Paper Void Machine, Table Saw SOP, Mitre Saw SOP, Corrugated Recycler, Compactor Operating, Vertical Baler, Horizontal Baler, ASRS Safety Training, Roof Access Safety Procedure, Frazier/Shafter Cross Beam Replacement SOP, SPCC Training, Hands on Fire Extinguisher Training, Corded & Cordless Hand Drill SOP, Portable Electric Pliers, MHE LOTO, EPA Training, Hazardous Material Handling/Communication, Fueling Procedure, IKEA Welding/Physical Hazards, Lathe & Turret Mill SOP, Hydraulic Lift SOP, Golf Cart Training, Generator Run Time, and Fire Watch Training. (Pet. Ex. 6).

exclusive to the Facilities Department.¹¹ However, not all Maintenance Technicians receive training in all 11 areas. (Pet. Ex. 6).

Similarly, Maintenance Technicians have the same material handling certifications as other hourly employees. (Bd. Ex. 8). All Maintenance Technicians are certified on at least one piece of material handling equipment and between the Maintenance Technicians as a group, they are certified on all the material handling equipment used in the DC. (Bd. Ex. 8).

IKEA values growth from within and employees from Operations frequently transfer into the Maintenance Technician position.¹² (Tr. 241-42; Bd. Exs. 6, 7). For example, five of the thirteen current Maintenance Technicians started out as Operations employees. (Bd. Ex. 6).¹³ The Maintenance Department not only accepts transfers from employees in Operations positions, it also cross-trains employees in Operations. (Tr. 369). For example, a Warehouse Coworker from the CDC side of Operations cross-trained as a Maintenance Technician. (Tr. 369).

Maintenance Technicians wear a uniform. (Tr. 169-170). It consists of a blue shirt and blue pants made of fire-retardant material. (Tr. 178, 370; Pet. Ex. 5). The blue shirt has yellow high-visibility stripes. (Tr. 176-77; Pet. Ex. 5). Maintenance Technicians carry radios as part of their uniforms. (Tr. 154-55).

¹¹ The areas of training exclusive to Maintenance Technicians are: Table Saw SOP, Mitre Saw SOP, ASRS Safety Training, Corded & Cordless Hand Drill SOP, Portable Electric Pliers, MHE LOTO, IKEA Welding/Physical Hazards, Lathe & Turret Mill SOP, Hydraulic Lift SOP, Generator Run Time, and Fire Watch Training.

¹² In fact, the first shift Team Lead, Mitchell Newman worked as a Warehouse Worker and in several other positions at the DC before transferring into the Maintenance Technician position and eventually becoming a supervisor. (Tr. 345-46).

¹³ Javier Virgen Avila started at the DC as a Warehouse Coworker in January 2017 and moved into the Maintenance Technician position in July 2020. (Tr. 243; Bd. Ex. 6). Melvin Mamauag was hired at the DC as a Warehouse Coworker in April 2010 and transferred into a Maintenance Technician position in May 2012. (Tr. 243; Bd. Ex. 6). Gabriel Atkinson was initially hired as a Warehouse Coworker in January 2016 and moved into the Maintenance Technician position in April 2020. (Tr. 249-251; Bd. Exs. 6, 7). Sloan Mayen was initially hired as a Warehouse Coworker in November 2014 and transferred into the Maintenance Technician position in June 2017. (Bd. Ex. 6). Likewise, Tyric Hayden was hired as a Warehouse Coworker in January 2016 and transferred into the Maintenance Mechanic position in March 2018. (Bd. Ex. 6).

Maintenance Technicians are based out of the maintenance shop, located between buildings one and four. (Pet. Ex. 3). The maintenance shop contains cabinets holding replacement parts and tools, three computers where the Maintenance Technicians can access CAFM, and a variety of tools. (Tr. 29, 133-34). The Team Leads for the Maintenance Technicians and the Cleaners have their offices in the maintenance shop. (Tr. 134-35). The maintenance shop is accessible by “[m]aintenance personnel, cleaners, anybody in facilities.” (*Id.*).

2. *Power Equipment Technician*

The Power Equipment Technician works in his own specified area of the maintenance shop where he has specialized equipment, including a lift. (Tr. 151, 391). He is a “mechanic” for the material handling equipment. (Tr. 151). He does “the most turning of a wrench on the power equipment.” (*Id.*). The Power Equipment Technician stays in his area in the maintenance shop “all shift.” (*Id.*). He does not perform preventative maintenance, facility repair work, or respond to calls for repairs on the DC floor. (*Id.*).

The Power Equipment Technician receives training in the 24 My Learning training modules completed by all DC employees. (Pet. Ex. 6). He also receives training in some, but not all, of the training modules exclusive to the Facilities Department. (Pet. Ex. 6). Like many other DC employees, the Power Equipment Technician is certified to operate various pieces of material handling equipment including Electronic Power Jacks, Counterbalances, Scissor Lifts, and Reach Inc. Kooi Forks. (Bd. Ex. 8).

3. *Cleaners*

Cleaners are also part of the Facilities Department. (Tr. 130). A Cleaner’s job is to move about the DC on material handling equipment and empty large bins of waste—mainly the plastic IKEA’s products are wrapped in when they arrive at the DC— from throughout the facility so the

waste can be recycled. (Tr. 130, 298). Cleaners operate material handling equipment “99 percent of the time.” (Tr. 131).

Like the Maintenance Technicians, the Cleaners are based out of the maintenance shop. (Tr. 132, 134, 356). The Team Lead who supervises the Cleaners has his office in the maintenance shop and the maintenance shop is the Cleaners’ “meeting place.” (Tr. 132, 135). Additionally, both Cleaners carry radios and wear uniforms (Tr. 132, 155). The Cleaner’s uniform looks like the Maintenance Technicians’ uniform, but is made of thinner material, and the Cleaners can wear shorts. (Tr. 74, 132).

Maintenance Technicians frequently interact with Cleaners. (Tr. 132). For example, Cleaners assist Maintenance Technicians in the performance of preventative maintenance tasks. (Tr. 82-83). They also move materials Maintenance Technicians need to perform repair duties. (Id.).

Like all other DC employees, Cleaners participate in the 24 shared My Learning training modules.¹⁴ (Pet. Ex. 6; Bd. Ex. 9). They also receive training in some, but not all, of the additional training modules exclusive to the Facilities Department. (Pet. Ex. 6). Employees in the Cleaner position maintain certifications for various material handling equipment including Counterbalances and Electronic Pallet Jacks. (Bd. Ex. 8).

E. Procedural Background

On September 23, 2020, the UMTT filed a petition seeking to represent the Maintenance Technicians, Power Equipment Technicians, and Preventative Maintenance Technicians at the DC.

¹⁴ Petitioner Exhibit 6 lists one Cleaner, Oscar Miranda, as a Preventative Maintenance Mechanic under the Facilities tab. (Pet. Ex. 6). The Preventative Maintenance Mechanic position no longer exists, and Miranda is currently in the Cleaner position. (Tr. 89-90; Bd. Ex. 9). Petitioner Exhibit 6 lists Cleaners Jose Vaca Mendoza and Jorge Salas as Warehouse Coworkers under the IKEA General Training Tab. (Pet. Ex. 6). Both Vaca Mendoza and Salas are currently in the Cleaner position. (Tr. 53; Bd. Ex. 9).

(Bd. Ex. 1(a)). IKEA filed its Statement of Position contesting the appropriateness of the petitioned-for unit on October 5, 2020 at 11:22a.m. (Bd. Ex. 1(e); Declaration of Jeremy Hart at ¶3, Ex. A, attached as Exhibit 3). IKEA inadvertently did not serve its Statement of Position on Michael Wedeking, representative of the UMTT, until 1:41p.m., one hour and forty-one minutes late. (Ex. 3, ¶4, Ex. B). Wedeking was working on October 5, 2020 until 1:33p.m. (Michael Wedeking Timecard for October 5, 2020, attached as Exhibit 4). Wedeking filed the UMTT's Responsive Statement of Position on October 7, 2020 though it was not due until October 8, 2020. (Bd. Exs. 1(c), 1(f)). At the pre-election hearing on October 14, the Regional Director, pursuant to 29 CFR § 102.66(d) ("the preclusion rule"), directed the Hearing Officer to preclude IKEA from litigating the issues raised in its Statement of Position because of its late service. (DDE p. 2). IKEA made a motion for reconsideration, which the Regional Director denied. (DDE p. 2).

III. LEGAL ARGUMENT

The Board grants requests for review "only where compelling reasons exist therefor." 29 CFR § 102.67(d). Grounds for review include: (1) the presence of a substantial question of law or policy that is raised based on the absence of or departure from officially reported Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and that effort prejudicially affects a party's rights; (3) a ruling made in connection with a proceeding resulted in prejudicial error; or (4) there are compelling reasons for reconsideration of an important Board rule or policy. *Id.* The Board's review of this decision is warranted.

A. The Regional Director's Departure from Officially Reported Board Precedent Raises a Substantial Question of Law

Section 9(b) of the Act, 29 U.S.C. § 159(b), requires the Board "in each case" to decide the appropriateness of the petitioned-for bargaining unit to "assure to employees the fullest freedom in exercising [protected] rights." *See also PCC Structuralists*, 365 NLRB No. 160 (2017); *Allen*

Health Care Services, 332 NLRB 1308, 1309 (2000) (“The Board has an affirmative statutory obligation to determine the appropriate bargaining unit in each case.”). In *PCC Structurals*, the Board explained that Section 9(b) requires an analysis of whether employees in the petitioned-for unit share a community of interest and whether that community of interest is “sufficiently distinct” from the interests of employees excluded from the unit sought. 365 NLRB No. 160 at *11, *13. In doing so, the Board must determine whether “*excluded* employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members.” *Id.* (emphasis added). This evaluation requires the Board to consider whether:

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

Id. This weighing of the excluded employee's interests assures “that extent of organizing will not be determinative, consistent with Section 9(c)(5); it ensures that bargaining units will not be arbitrary, irrational, or “fractured”—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping as a separate appropriate unit; and it ensures that the Section 7 rights of excluded employees who share a substantial (but less than “overwhelming”) community of interests with the sought-after group are taken into consideration.” *Id.* at *7.

In *The Boeing Co.*, 368 NLRB No. 67 (2019), the Board clarified that the *PCC Structurals* analytical framework requires analysis of the following three steps to determine whether a petitioned-for unit is appropriate: (1) whether the petitioned-for unit shares an internal community of interest; (2) whether the petitioned-for employees have meaningfully distinct interests that outweigh the similarities with excluded employees; and (3) whether the unit is appropriate when

considering industry and employer bargaining precedent. “Henceforth, the Board’s determination of unit appropriateness will consider the Section 7 rights of employees *excluded* from the proposed unit *and* those included in that unit” *PCC Structural*s, 365 NLRB No. 160 at *10 (emphasis in original). Regional Directors are therefore required to apply all three steps to determine whether the petitioned-for unit is appropriate. *See also id.* at *8 (“Section 9(b) demonstrates, inescapably, that Congress intended that the Board ‘in each case’ would carefully consider the interests of *all* employees”) (emphasis in original).

Here, the Regional Director did not apply *Boeing*’s three-step test. (DDE p. 3). Instead, the Regional Director relied on the unpublished decision in *Macy’s West Stores, Inc.*, 32-RC-246415, n.1 (unpublished May 27, 2020) and applied only steps one and two of the *Boeing* analysis. In *Macy’s West*, the Board stated in a footnote that:

[W]here no party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is unnecessary to apply the three-step analysis set forth in *The Boeing Company*, 368 NLRB No. 67 (2019), which applies “when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit.” *Id.* slip op. at 2. It is true that steps one and three of *Boeing*—the requirement that any appropriate unit have an internal community of interest, and that consideration must be given to the Board’s decisions on appropriate units in the particular industry involved—reference broad principles that are generally applicable to unit determinations. Step two, however—which considers “whether the petitioned-for employees share a community of interests sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit,” *ibid.* (internal quotations omitted)—only applies if a party contends that additional employees must be included in the unit to render it appropriate, a situation not present in this case.

Macy’s West Stores, Inc., 32-RC-246415, n.1. According to the Regional Director, just as no party in *Macy’s West* asserted the smallest appropriate unit must include employees excluded from the petitioned-for unit, so too no party in the present case made that assertion since she had ruled that IKEA was precluded from litigating the appropriateness of the unit under Section 102.66(d) of the Boards Rules and Regulations. (DDE p. 3). As a result, the Regional Director applied only steps

one and three of the *Boeing* test and found that the employees in the petitioned-for unit constituted an appropriate unit for bargaining. (DDE pp. 3-4).

The Regional Directors departure from the full three-step analysis required by *Boeing* for the truncated analysis of *Macy's West* was inappropriate and raises a substantial question of law warranting review. This is so for four reasons. First, *Macy's West* was an unpublished decision and thus had no binding precedential value. Second, the Regional Director's reliance on *Macy's West* was misplaced as that case is factually distinguishable. Third, the Regional Director's reliance on *Macy's West* is based on a legal fiction. Fourth, the Regional Director's reliance on *Macy's West* creates a standard in cases involving the application of the preclusion rule.

1. *Macy's West Stores, Inc. Has No Precedential Value*

Unpublished Board decisions have no binding precedential value. *See Associated Charter Bus Co.*, 261 NLRB 448, 450 n.7 (1982) ("Unpublished Board decisions affirming regional determinations have no binding precedential value."). This should be an unremarkable proposition since "[t]hey are not bound or distributed except to the immediate litigants." *Marriott Int'l, Inc.*, No. 20-CA-28111, 2001 WL 1589699, n. 22 (NLRB Div. of Judges March 20, 2001). In *Assoc. Builders and Contractors, Inc.*, the Board adopted the ALJ's decision which stated: "When the Board establishes controlling precedent on any matter relevant to unfair labor practice proceedings, it does so by rule of published decision." 331 NLRB 132, 140 n.17 (2000). The Board has never stated that this common-sense proposition does not apply with equal force to the Board's decisions in representation matters.

The Board's three-line decision in *Macy's West* denying the petitioner's request for review was unpublished. (DDE p. 3). As such, it has no precedential value and the Regional Director inappropriately relied on it to the exclusion of the full three-step test in *Boeing*. An unpublished

decision of the Board cannot supplant published Board precedent, but that is what the Regional Director's decision accomplished in this case. As such, the Regional Director's departure from *Boeing* in favor of the unpublished *Macy's West* decision raises a substantial question of law warranting review.

2. *Macy's West Stores, Inc. Is Wholly Inapplicable*

The Regional Director's reliance on *Macy's West* was defective not only because it is an unpublished decision, but also because *Macy's West* is wholly inapplicable to the present case. In *Macy's West*, the parties entered into a stipulated election agreement under which they agreed to vote two classifications subject to challenge. *See Order Directing Hearing in Macy's West Stores*, Case No. 32-RC-246415.¹⁵ Thus, except for the two challenged classifications, the employer specifically agreed that the voting unit was appropriate. *Id.* Following the election, a hearing was held to determine whether the employees in the challenged classifications would be included in the bargaining unit. *Id.* Thus, the *only* issue at the hearing was whether the two challenged classifications shared an internal community of interest with the other employees in the voting unit. *Macy's West Stores, Inc.*, No. 32-RC-246415, 2020 WL 2768915 at *1 fn. 1. In this limited context, the Board clarified that performing the second step analysis under *Boeing* was unnecessary as no party was claiming that the smallest appropriate unit included employees excluded from the petitioned-for unit. *Id.* Indeed, performing the *Boeing* step two analysis in *Macy's West* would have been futile because there were no excluded employees whose interests required consideration under *Boeing* step 2. *Id.*

But that is not the case here. In the present case the Petitioner has sought to represent a unit of 14 employees in a facility of over 400 hourly employees, and the 14 employees sought by the

¹⁵ A copy of this Order is attached hereto as Exhibit 5.

Union constitute only a fraction of a department. In this case employees have unquestionably been excluded from the petitioned-for unit. Additionally, unlike *Macy's West*, the present case does not involve a stipulated election agreement. *Macy's West* is simply inapplicable to the present case and the Regional Director's reliance on it to the exclusion of the full three-step *Boeing* analysis raises a substantial question of law warranting review.

3. *The Regional Director's Reliance on Macy's West Stores, Inc. Ignores the Board's Statutory Obligations and Is Based on a Legal Fiction*

The Regional Director determined that *Macy's West* applied, not the full three-step *Boeing* analysis, because IKEA "was precluded from asserting that additional employees must be included in the petitioned-for unit to render it appropriate" (DDE p. 3). Thus, in the Regional Director's estimation, the application of the preclusion rule found in Section 102.66(d) IKEA's negated IKEA's challenge to the appropriateness of the bargaining unit and only the application of *Boeing* steps one and three was required. *Id.* The Regional Director was wrong.

Board law is clear: "Absent a stipulation, [the Board] still must determine the appropriateness of the unit in every case." *Allen Health Care Services*, 332 NLRB at 1309.¹⁶ The Board must determine whether the petitioned-for unit is appropriate even if no party raises an issue concerning the unit's appropriateness. *Id.* Indeed, in *Allen Health Care Services*, the Board found that it was still required to analyze the appropriateness of the bargaining unit *even though the employer refused to take a position on the unit* because the unit was not presumptively appropriate.

The Board reasoned:

In contrast to *Bennett Industries*, and its progeny, no similar burden of proof exists in the instant case as there is no contention that the petitioned-for unit is

¹⁶ Under Section 9(b), petitioned-for units that are (1) a wall-to-wall unit; (2) a unit of professional or non-professional employees; (3) a guard unit; or (4) a single facility unit are presumptively appropriate and the burden rests on the opposing party to show that the unit is not appropriate. 29 U.S.C. § 159(b); *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999). However, where the petitioned-for unit is not one of the above-listed units, the unit is not presumptively appropriate, and the petitioner must carry the burden of presenting evidence establishing the appropriateness of the petitioned-for unit. *Allen Health Care Services*, 332 NLRB 1308 (2000).

presumptively appropriate. We find here that because there is no presumption, the appropriateness of the petitioned-for unit remains to be determined *notwithstanding that the Employer refused to take a position on the Issue*.

332 NLRB at 1309 (emphasis added). Thus, absent a stipulated agreement or a presumptively appropriate unit, the Board must determine in each case whether the unit is appropriate before directing an election. *Id.* As explained above, this determination is statutorily rooted and necessarily involves consideration of the interests of employees excluded from the petitioned-for unit. *See PCC Structurals*, 365 NLRB No. 160 at *8, *10. Thus, the application of the preclusion rule in any case does not—and cannot—release the Regional Director from the obligation to give proper consideration to the interests of employees excluded from the petitioned-for unit when determining the appropriateness of a petitioned-for unit. If that were the case, the Board’s procedural rules would take precedence over Section 9(b) of the Act and the interests and rights of employees could be ignored based on a legal fiction produced by a procedural technicality. That is not what the Act provides.

This not a case where, as in *Macy’s West*, application of *Boeing’s* second step would have been futile because there were no excluded employees to consider. This is a case where the second step of *Boeing* should have been applied and was not. Nor is this a case where no party contended that the smallest appropriate unit must include employees excluded from the petitioned-for unit. IKEA raised that issue in its Statement of Position. (Bd. Ex. 1(e)). Though the Regional Director precluded IKEA from litigating the issues raised in its Statement of Position, the *Regional Director* properly put the inclusion of the excluded employees at issue. (Tr. 10). At the outset of the pre-election hearing, the Hearing Officer expressly “note[d] for the record that it is Petitioner’s burden to . . . establish[] that the petitioned-for unit is a readily identifiable group that shares a community of interest that is sufficiently distinct from those employees that it seeks to exclude.” (*Id.*). The Region then spent three days seeking evidence relevant only to step 2 of the *Boeing* analysis. (*See*

generally, Ex. 2). Indeed, if performing step two of the *Boeing* analysis was unnecessary, so was the testimony of every witness who testified at the pre-election hearing as, as is demonstrated below, very little evidence relevant to the internal community of interest was taken at the hearing and the Region rejected IKEA's offer of proof relating to *Boeing* step three. The Regional Director's actions at the hearing in this matter clearly indicated that the interests of the DC employees excluded from the petitioned-for unit were at issue. Claiming they now are not presents a substantial question of law concerning the legality of the petitioned-for unit and warrants the Board's review.

4. *The Regional Director's Reliance on Macy's West Stores, Inc. Destroys the Rights of Excluded Employees Where the Preclusion Rule Applies*

The Regional Director's reliance on *Macy's West* has created a new standard for determining the appropriateness of bargaining units when the preclusion rule applies. Apart from the obvious reality that it is the function of the Board, not the Region, to interpret the Act and to establish, when necessary, new standards, the standard created and applied by the Regional Director here is destructive of the rights and interests of employees excluded from petitioned-for units where preclusion applies.

Section 9(c) of the Act provides that: "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling." 29 U.S.C. § 159(c). Section 9(c) protects the interests of employees excluded from the petitioned-for unit. *PCC Structurals*, 365 NLRB No. 160 at *7. Thus, "Congress intended that the Board 'in each case' would carefully consider the interests of *all* employees." *PCC Structurals*, 365 NLRB No. 160 at *8. Where the interests of employees excluded from the petitioned-for unit are not considered, contrary to the intent expressed in Section 9(c), the petitioned-for unit becomes controlling. *Id.* at *7. That is the effect of applying *Macy's West* in cases where the preclusion rule operates to

prevent a party from raising or litigating the inclusion of excluded employees in a petitioned-for unit. In such a case, it is not simply the precluded party that suffers, but the statutory rights of the excluded employees. This result runs contrary not only to Section 9(c) of the Act, but also to the preclusion rule itself. Section 102.66(d) was designed prevent time-wasting gamesmanship in pre-election litigation, not to destroy the Section 7 rights of employees excluded from petitioned-for bargaining units. 79 FR 74425. Consequently, the Regional Director's application of *Macy's West* in cases, like this one, where the absence of a challenge to the appropriateness of the petitioned-for unit is solely due to the operation of the preclusion rule raises as substantial question of law and warrants Board review.

B. The Regional Director Admits a Different Result if the Region Performed the Community of Interest Analysis

The Regional Director's failure to apply the community of interest analysis is especially egregious considering the admission that a "different conclusion may have been reached" if the Region had conducted the step two analysis involving the interests of the excluded employees. (DDE at 18). Essentially, the Regional Director acknowledges that had the Region done the proper analysis and afforded excluded employees their Section 7 rights, the result might be different (i.e. the excluded employees share a community of interest with the petitioned-for employee). Instead the Regional Director denied these employees their rights under the Act and sanctioned a bargaining unit that disregards the protected rights of all excluded employees. These actions are contrary to the Act and established Board law and must be reversed.

C. A Substantial Question Concerning the Legality of the Petitioned-For Unit is Raised By the Regional Director’s Departure from the Board’s Precedent Requiring the Petitioner to Establish that the Petitioned-For Unit is Appropriate for Bargaining

1. *The Petitioner Did Not Prove the Petitioned-for Unit Has an Internal Community of Interest*

Where a petitioned-for unit is not presumptively appropriate, the petitioner must carry the burden of presenting evidence establishing the appropriateness of the petitioned-for unit. *Allen Health Care Services*, 332 NLRB 1308 (2000); *see also* NLRB Hearing Officer’s Guide, pg. 72. Here, the petitioner sought a unit of Maintenance Technicians, Power Equipment Technicians, and Preventative Maintenance Technicians. (Tr. 19; Bd. Ex. 1(a)). At the hearing, and upon confirmation that the Preventative Maintenance Technician position had been discontinued at the DC, the petitioner agreed to move forward with a unit of all Maintenance Technicians and Power Equipment Technicians. (Tr. 20). Consequently, under *Boeing* step one, petitioner was required to present sufficient evidence that employees in the petitioned-for unit share an internal community of interest using the traditional community of interest factors. *Boeing*, 368 NLRB No. 67. That is, the “interests shared by the petitioned-for employees [cannot be] too disparate to form a community of interest within the petitioned-for unit.” *Id.* *See also Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004) (“In reaching the conclusion that the Regional Director’s unit determinations are not appropriate, we rely on the fact that the differences *among* the fluid processing unit employees and *among* the distribution unit employees are nearly as great as the differences *between* the unit.”) (emphasis in original).

Though the Regional Director found that the Maintenance Technicians and Power Equipment Technicians share an internal community of interest under step one of *Boeing*, she did so without the necessary evidentiary support. (DDE p. 18). Throughout the Decision and Direction

of Election the Regional Director emphasized that lack of evidence in the record concerning the Power Equipment Technicians. The Regional Director specifically highlighted that:

- “The record is not clear as to whether the power equipment technician is at the top of this [pay] structure with the maintenance technicians.” (DDE p. 6);
- “The record is not clear as to whether the power equipment technician uses the lockers in the maintenance shop or stores any Employer-issued tools there.” (DDE p. 9);
- “There is no evidence regarding whether the power equipment technician has Employer-issued keys.” (DDE p. 9);
- “[T]here is minimal testimonial evidence about the specific job duties of the power equipment technician, but the record reveals that the power equipment technician turns wrenches on the power equipment and works on forklifts, reaches, and the general power equipment.” (DDE p. 9);
- “The record is unclear as to what precisely “turning a wrench” means.” (DDE p. 9, n. 28);
- “The record is not clear as to how the power equipment technician receives work orders.” (DDE p. 10);
- “The record does not reveal whether the power equipment technician carries a radio or walks through the buildings at all.” (DDE p. 10);
- “The record also does not reveal whether the power equipment technician is required to wear the same uniform as the maintenance technicians and/or whether the uniform is laundered by the uniform company.” (DDE p. 10);
- “It is unclear whether the power equipment technician qualifies for an alternate work schedule.” (DDE p. 10);
- “There is no evidence about whether the power equipment technician physically performs any work outside the maintenance shop.” (DDE p. 14);
- “The record does not reveal precisely whether the maintenance technician and power equipment technician use similar equipment.” (DDE p. 15);
- “Nor does [the record] reveal how the power equipment technician receives work orders.” (DDE p. 15);
- “[I]t is not clear how much work-related contact there is between [maintenance technicians and power equipment technicians]. For example, we do not know how often they may work beside each other, whether they ever work on the same piece of equipment, whether the power equipment technician will go out on the floor with the maintenance technician, or whether the power equipment technician also access the areas restricted by Employer-issued keys.” (DDE p. 16);
- “[T]here is no evidence of temporary work assignments between maintenance technicians and the power equipment technician.” (DDE p. 16);
- “[T]he record evidence is not clear as to whether [maintenance technicians and power equipment technicians] receive similar wage rates or are within the same wage ranges” (DDE p. 17);
- “The record is not clear as to whether the power equipment technician wears the same fire-retardant long sleeve shirt and pants as the maintenance technician.” (DDE p. 17);

- “[I]t is not clear whether [the requirement of high visibility on the floor] includes the power equipment technician, nor is it clear whether the power equipment technician ever works on the floor such that he would need a uniform to be highly visible.” (DDE p. 17);
- “[T]here is no evidence regarding Newman’s [the direct supervisor of first shift maintenance technicians and the power equipment technician] authority to hire, fire, or to discipline his direct reports (or to effectively recommend those actions)” (DDE p. 17);

There simply is no evidence about what the Power Equipment Technician actually does, how much he is paid, how he gets his work, what he wears to work, whether he works throughout the facility, how often he interacts with the Maintenance Technicians, what equipment the Power Equipment Technician uses to perform his duties, what equipment IKEA has issued to the Power Equipment Technician, the schedule worked by the Power Equipment Technician, or whether there is any temporary interchange between Maintenance Technicians and Power Equipment Technicians. (DDE pp. 6, 9, 10, 14, 15, 16, 17). Given the Regional Director’s admissions, *very little* is actually known about the Power Equipment Technician.

Despite admitting that the record concerning the Power Equipment Technician is inadequate, the Regional Director forged ahead and found an internal community of interest between the Maintenance Technicians and the Power Equipment Technician based on assumptions and inconsequential similarities. The Regional Director’s conclusions on many of the community of interest factors were clearly erroneous and create a substantial question concerning the legality of the petitioned-for unit.

a. IKEA’s Organizational Structure

When assessing whether the structure of IKEA’s organization supported an internal community of interest, the Regional Director found that “it is undisputed that the maintenance technicians and the power equipment technician are grouped within Facilities” and “[o]ther classifications are included within Facilities, including the cleaners and the sustainability developer, but they are not considered part of maintenance.” (DDE p. 13). The Regional Director

supports this conclusion by stating that cleaners “sometimes” go into the maintenance shop, but they are not based out of the maintenance shop. (DDE p. 13 n. 32).

Initially, issue is not whether Maintenance Technicians and the Power Equipment Technician use the maintenance shop to the exclusion of other employees in the Facilities Department, but whether these classifications constitute a separate administrative grouping. *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11, slip op. 4 (2014). In *Harrah's Illinois Corp.*, 319 NLRB 749 (1995), the Board found that the petitioned-for maintenance unit was inappropriate because it did not constitute its own administrative grouping but rather shared a department with the employer’s cleaners. In *Transerv Sys.*, 311 NLRB 766 (1993), the Board found a unit of bicycle messengers inappropriate, in part, because the bicycle messengers worked in a single department with drivers under the same departmental manager, even though both groups had separate immediate supervision. That is exactly the case here. Maintenance Technicians, Power Equipment Technicians, and Cleaners, though they may have different Team Leads are in one department—the Facilities Department—and are commonly managed by Aaron Lucas. There is no separate administrative grouping for Maintenance Technicians and Power Equipment Technicians and the Regional Director’s conclusion to the contrary is wrong.

Additionally, the Regional Director’s factual finding is incorrect. There is simply no testimony in the record indicating that Maintenance Technicians and Power Equipment Technicians constitute a separate administrative grouping within Facilities. At best, the evidence shows that *first shift* Maintenance Technicians and the Power Equipment Technician are directly supervised by Mitchell Newman. (Tr. 350). The record, however, contains no evidence regarding how second and third shift Maintenance Technicians and Cleaners are supervised. That is because the Hearing Officer failed to elicit this important information. If he would have sought this

information, he would have discovered that second and third shift Maintenance Technicians and Cleaners report to the same Team Lead as there is only one Waste Sorting (Cleaner) Team Lead. (Tr. 400-01; Pet. Ex. 2). What is more, the Facilities Manager, Aaron Lucas characterized the Team Leads not as maintenance team leads, but as *facilities team leads*. (Tr. 400). Though the Hearing Officer had the opportunity to ask the Facilities Manager, Aaron Lucas, about the administrative groupings, if any, within the Facilities Department, he failed to do so. Furthermore, the Regional Director's effort to substantiate the Region's finding of a separate administrative grouping of Maintenance Technicians and Power Equipment Technicians by appealing to the use of the maintenance shop is simply wrong. Contrary to the Regional Director's conclusion, the Cleaners *are* based out of the maintenance shop. The record demonstrates that the Cleaners' Team Lead's office is in the maintenance shop, the Cleaners hold their meetings in the maintenance shop, and the maintenance shop is always accessible to "anybody in facilities." (Tr. 132, 134-35, 356). The mere fact that the Cleaners do not utilize the maintenance shop in the same way the Maintenance Technicians do does not mean that they are not "based" out of the maintenance shop or that they constitute a separate administrative grouping. The Regional Director's conclusion to the contrary is clearly erroneous and has resulted in prejudicial error to IKEA.

b. Job Functions and Work

Though the Regional Director acknowledges that the record does not indicate *what* the Power Equipment Technician does, how the Power Equipment Technician receives his work, or what tools he uses to perform his work, the Regional Director nevertheless finds that this employee shares common job functions and work with the Maintenance Technicians. (DDE pp. 9, 10, 14, 15). The Regional Director reaches this conclusion relying exclusively on the job descriptions for Maintenance Technicians and Power Equipment Technicians to find that they perform the same

basic function of repairing and maintaining equipment. (DDE pp. 14-15). But the Board has long recognized that job descriptions are not controlling in representational matters. *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (job descriptions are not controlling when assessing an employee's day-to-day duties). What is important is the day-to-day job duties of the employees at issue. *Id.* Here, it is clear—and it is recognized by the Regional Director—that the day-to-day job duties of the Maintenance Technicians and the Power Equipment Technicians are significantly different. (DDE pp. For example, the Maintenance Technicians work all over the DC performing preventative maintenance, work order repairs, or responding to on-demand calls. (Tr. 68, 156 ,352-53, 299). The Power Equipment Technician, however, works in his designated area of the maintenance shop “all shift.” (Tr. 151). That distinction, alone, demonstrates there is little, if any, overlap in job duties. Given that job descriptions are not controlling, any conclusion to the contrary is based on mere speculation. Speculation does not create a community of interest. *Boston After Dark*, 210 NLRB 38, 40 (1974) (refusing the find community of interest based on speculation); *Promoco Manuf. Co.*, 34-RC-2279, 2009 WL 3147895 (2009) (same). The Regional Director simply cannot find that Maintenance Technicians and Power Equipment Technicians perform the same, similar, or overlapping job functions without knowing what one of the classifications does.

c. Contact Among Employees

The Regional Director found that the amount of contact between the Maintenance Technicians and the Power Equipment Technicians does not weigh in favor of finding an internal community of interest, but it does not “cut against it.” (DDE 16). The Regional Director's conclusion, however, is once again based on speculation due to an insufficient record concerning the Power Equipment Technician. The Regional Director reasons that this factor does not cut against finding an internal community of interest because the Power Equipment Technician works

in the maintenance shop and the record is not clear how much time the Maintenance Technicians spend in the maintenance shop when they are not performing preventative maintenance, working the floor, performing repairs, or covering the ASRS. (DDE 16). The Regional Director's analysis ignores that the record shows that the Power Equipment Technician has "his own shop" with separate equipment within the maintenance shop and that "he just pretty much will stay there all shift." (Tr. 151, 391). Given this testimony, there is no evidence whatsoever that the Maintenance Technicians, who perform the vast majority outside of the maintenance shop, ever interact with the Power Equipment Technician. This factor is not simply neutral, but cuts against finding a community of interest between the Maintenance Technicians and the Power Equipment Technician.

d. Terms and Conditions of Employment

The Regional Director concluded that there were "more similarities in terms and conditions than differences" and so this factor indicated an internal community of interest between the Maintenance Technicians and the Power Equipment Technicians. (DDE p. 17). The Regional Director's "similarities" were limited, however, to the fact that both Maintenance Technicians and Power Equipment Technicians are hourly employees, they are subject to common benefits and work policies, and that they both wear the same badges and steel-toed boots. (DDE p. 17). At the same time, the Regional Director admits that the record is not clear whether about: 1) how the wages of the Maintenance Technicians compare to those of the Power Equipment Technician; 2) whether the Power Equipment Technician wears the same uniform as Maintenance Technicians; or 3) whether the Power Equipment Technician ever works on the floor with the Maintenance Technicians. (DDE p. 17). The Regional Director also admits that sharing common work policies and benefits does not warrant a community of interest finding when the employees share little else

in common. *American Security Corp.*, 221 NLRB 1145 (1996). Here, without common work policies and benefits, the Regional Director is left with two hourly classifications that have common identification badges and wear steel-toed boots. That is simply not enough to establish a community of interest.¹⁷ The record on this factor is simply too deficient to find an internal community of interest, and the Regional Director's tortured attempt to find otherwise is erroneous.

Though the Regional Director acknowledges the glaring lack of evidence about basic facts concerning the Power Equipment Technician, the Region nevertheless found an internal community of interest between the Maintenance Technicians and the Power Equipment Technician. The analysis is incomplete at best and simply wrong at worst given the deficient record upon which it is based. The Regional Director's reliance upon an insufficient record concerning the Power Equipment Technicians to find an internal community of interest creates a substantial question concerning the legality of the petitioned-for unit. As it is the petitioner's burden to present evidence that establishes an internal community of interest, where there is insufficient record evidence to do so, the correct approach is to dismiss the petition. *See U.S. Postal Svc.*, 208 NLRB 948, 955 (1974) (dismissing petition because "[p]etitioner has adduced insufficient evidence to warrant our finding this unit to be a separate appropriate unit."); *Williams Sonoma Direct, Inc.*, 365 NLRB No. 13 (2017) (regional director dismissed petition due to lack of record evidence needed to analyze community of interest). Thus, the Board should grant review and dismiss the petition.

2. *The Petitioner Did Not Prove the Petitioned-for Unit Is Sufficiently Distinct to Warrant an Independent Bargaining Unit*

For the reasons explained above, the Regional Director erred by abandoning the full three-step *Boeing* analysis for the truncated analysis under *Macy's West*. The Regional Director had an

¹⁷ This is especially the case where all employees in the DC have the same identification badges. (Tr. 170).

obligation to examine whether the employees in the petitioned-for unit share an external community of interest with excluded employees, and the Petitioner had the burden to present evidence that the petitioned-for unit is sufficiently distinct from excluded employees to be its own bargaining unit. If the Regional Director would have performed the *Boeing* step two analysis, she would have found that the petitioned-for employees are not sufficiently distinct from other employees to warrant their own bargaining unit. *Allen Health Care Services*, 332 NLRB 1308 (2000). Thus, the Regional Director's failure to find that Petitioner failed to carry his burden of proving the distinctness of the petitioned-for unit given the record evidence requires dismissal of the petition.

The Board has applied its traditional community of interest standard in cases where, as here, the petitioned-for unit included only maintenance employees. Under the Board's traditional community of interest standard, maintenance-only units are not appropriate where an employer operates a "highly integrated ... production process and the absence of any significant difference in terms and conditions of employment indicates that production and maintenance employees share a broad community of interest which outweighs any nominal community of interest which may be enjoyed by maintenance employees." *The F. & M. Schaefer Brewing Co.*, 198 NLRB 323, 325 (1972); *see also Beecham Products*, 251 NLRB 731 (1980) (maintenance only unit inappropriate where they spent their time on the floor in contact with production employees and were highly integrated); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682 (2001) (maintenance employees shared community of interest with other employees due to common terms and conditions of employment, regular contact, and permanent interchange); *see also Fleming Foods, Inc.*, 313 NLRB 948 (1994) (maintenance only unit inappropriate where maintenance employees had no

special licenses and did routine maintenance work while contractors performed skilled maintenance work).¹⁸

Importantly, just because a petitioned-for unit possesses some unique distinguishing characteristics does not make it a unit appropriate for collective bargaining. The Board discarded that line of thinking in its rejection of *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011). As such, simply performing maintenance functions is not enough to warrant a separate bargaining unit. This is especially true where maintenance employees are functionally integrated into the employer's operation and have frequent and repeated contact with other employees throughout the facility. See *Jewish Hosp. of Cincinnati*, 223 NLRB 614, 617 (1976) (maintenance-only unit inappropriate where the only distinction between maintenance employees and the excluded employees was the different job duties and skills associated with being a maintenance employee). While no one factor is determinative, the Board finds that a highly integrated facility (as present here) with frequent contact between maintenance and other employees overshadows any distinctions in skills or functions performed by the maintenance employees. *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004); see also *Westin Hotel*, 277 NLRB 1506 (1986) (extensive contact, integration of duties, and similar terms and conditions of employment among all hotel operating personnel outweighed lack of interchange).

Here, the traditional community of interest factors indicate that the petitioned-for employees share a community of interest with excluded employees. As a result, the petitioned-for

¹⁸ Though readily available, the Hearing Officer failed to obtain evidence for the record concerning the degree of skill required of and exercised by the maintenance employees in the petitioned-for unit. While testimony was given concerning the type of work performed, insufficient, if any, testimony was obtained concerning whether the petitioned-for maintenance employees exercise journeyman-level skills or general handyman skills. This distinction is an important factor in the Board's analysis of maintenance only cases and the record here is inadequate in this regard.

employees do not share interests sufficiently distinct to warrant a separate bargaining unit, and the petitioned-for unit is inappropriate.

a. Functional Integration

In the Board's traditional community of interest standard, functional integration exists where employees, though working in their own distinct functions, work together toward a common goal.¹⁹ See *Publix Super Markets, Inc.*, 343 NLRB 1023, 1024-1025 (2004); see also *Ramada Beverly Hills*, 278 NLRB 691 (1986) (functional integration exists based on employees' common objective even though employees perform a variety of different duties). As the Board recently explained in *The Boeing Co.*, the petitioned-for employees' functional integration is "*particularly compelling*" where the petitioned-for and excluded employees work towards the same goals. 368 NLRB No. 67 (2019) (emphasis added). Functional integration is such an important factor in the Board's traditional community of interest analysis that where petitioned-for and excluded employees' "work is highly integrated," distinctions between those employees "are offset by the highly integrated work force." *Boeing Co.*, 337 NLRB 152, 153 (2001) (finding a unit of all production and maintenance employees appropriate because "work is highly integrated" and distinctions between employees "are offset by the highly integrated work force.").

For example, in *Chromalloy Photographic*, 234 NLRB 1046 (1978), the Board relied on the maintenance employees' integral role in maintaining and repairing equipment so that production employees could perform their work and the employer could operate:

¹⁹ While the record contains some evidence that the petitioned-for maintenance employees are highly integrated in the operation of the Employer's warehouse, the record remains incomplete and insufficient on this point that the Board has identified as capable of offsetting other community of interest factors. Indeed, the Employer presented offers of proof that current Site Manager Jermaine Gordon and former Site Manager Jim Cavezza were available and would testify as to the extensive integration of the petitioned-for maintenance employees in the Employer's overall warehouse operation in every single step of the operation—from the time products arrive at the warehouse until the time they are shipped out—but the Hearing Officer decided he did not want that testimony and refused to permit either Mr. Gordon or Mr. Cavezza to testify on the issue of integration.

The Employer is engaged in a single highly integrated process. In order to achieve the purposes of the facility, a variety of tasks must be performed. These tasks include the repair and maintenance of cameras and related equipment. They also include making necessary modifications to such equipment to eliminate problems encountered in processing film. **Without these repairs and modifications, the Employer's business would cease to operate smoothly. Thus, camera repair and maintenance employees perform work which is closely related to the production of the Employer's final product.**

Id. at 1047 (emphasis added); *see also K&N Eng'g, Inc.*, 365 NLRB No. 141 (2017) (work of maintenance technicians functionally integrated with the work of the production employees because the maintenance techs provided repair and maintenance for the machines used by production employees); *Alcan Aluminum Corp.*, 178 NLRB 362 (1969) (maintenance employees working on equipment that is essential to the operation supports the existence of functional integration between maintenance and other employees and negates a finding that a maintenance-only unit is appropriate).

Here, there is no question that DC is highly integrated. The purpose of the DC is to receive, store, and ship IKEA's product. From start to finish, hourly employees at the DC work together toward this single goal. Internal Haulers position trailers of product for unloading. (Tr. 135, 139). If the Internal Hauler's truck malfunctions or a door on a shipping container full of product cannot be opened, a Maintenance Technician responds to perform a repair. (Tr. 75-76, 192). The Warehouse Coworkers unload product from the shipping containers and places it in the DC's racking. (Tr. 140; Pet. Ex. 3). Stock Controllers constantly monitor the inventory of product in the DC's racking. (Tr. 136-37; Bd. Ex. 3, Stock Controller Competence Profile). Recovery Coworkers assess any product damaged during in the warehousing process. (Tr. 136; Bd. Ex. 3, Recovery Coworker Competence Profile). Warehouse Coworkers then pick the product out of the racking for shipment. (Tr. 141-42). Warehouse Coworkers, Stock Controllers, and Recovery Coworkers perform their duties using material handling equipment. (Tr. 84, 85-86, 139-140; Bd. Ex. 8). When

this material handling equipment malfunctions, a Maintenance Technician is called to troubleshoot the equipment. (Tr. 46-47, 83-83, 85-86). Similarly, when the conveyor systems or ASRS—both of which move product through the DC—malfunction, a Maintenance Technician is relied upon to repair the breakdown. (Tr. 39, 153, 159-60). Throughout this process, Cleaners ensure that the DC is free of packing waste and that the waste is appropriately handled. (Tr. 130, 298). From the time product arrives on the DC property until the time it is shipped out to its destination, all the hourly employees work together to ensure it moves efficiently and safely. (Tr. 401). There is no question that the DC is a highly integrated operation.

b. Terms and Conditions of Employment

Under the traditional community of interest standard, the existence of common terms and conditions of employment across all employees indicates a separate bargaining unit is not appropriate. *The F. & M. Schaefer Brewing Co.*, 198 NLRB 323, 325 (1972) (separate maintenance unit not appropriate where maintenance employees and excluded employees shared common terms and conditions of employment). The Board expressly rejected the notion that differences in wage rates or uniform requirements detracted from a finding that maintenance employees had common terms and conditions with the excluded employees. *Id.* at 324-325. Additionally, the existence of centralized policies further supports that petitioned-for employees share a community of interest with excluded employees. *Atlanta Hilton & Towers*, 273 NLRB 87, 91 (1984); *Ramada Beverly Hills*, 278 NLRB 691 (1986).

All of the hourly employees at the DC are subject to the same employment policies, including policies covering attendance, behavior standards, code of conduct, employee purchases, safety, harassment and discrimination, incentive pay, privacy, information security, mobile devices, pay practices, problem resolution, and rest breaks and meals. (Tr. 227; Bd. Ex. 4).

Similarly, all of IKEA's hourly employees at the DC are covered by the same benefit policies and their compensation is determined by the same pay scale. (Tr. 241; Bd. Ex. 5). All employees who work second or third shift receive a shift differential of \$0.50 or \$1.00 per hour (Tr. 231). All DC employees enter the facility for work through the main entrance on the north side of the main building (Tr. 189-190) and clock-in using the same time clocks. (Tr. 187). All employees who need to change clothing before or after their shift utilize the same locker rooms. (Tr. 133). All hourly employees also share the same break and café areas. (Tr. 190). All DC employees ultimately report to Jermaine Gordon, the Site Manager. (Pet. Ex. 2).

The Maintenance Technicians, Cleaners, and Internal Haulers wear IKEA-provided uniforms and have radios, while the other hourly employees wear street clothing with steel-toed boots and an orange high-visibility vest. (Tr. 132, 135-36, 154-55, 169-170; Pet. Ex. 5). The uniform worn by Maintenance Technicians is fire retardant and must consist of long-sleeves and pants, this minor distinction does not overcome the significant similarities in terms and conditions of employment shared between Maintenance Technicians and other hourly employees. *The F. & M. Schaefer Brewing Co.*, 198 NLRB at 324-25.

c. Contact Among Employees

Under the traditional community of interest standard, frequent and regular contact among petitioned-for and excluded employees exists where the employer operates a functionally integrated facility. *Public Super Markets, Inc.*, 343 NLRB 1023, 1025 (2004); *Alcan Aluminum Corp.*, 178 NLRB 362 (1969) (frequent contact where maintenance employees work on production floor fixing equipment as part of a functionally integrated facility). Daily interaction, whether face-to-face or otherwise, between petitioned-for and excluded employees demonstrates frequent and regular contact for purposes of the Board's traditional community of interest standard and militates

against a finding that the petitioned-for employees are sufficiently distinct from excluded employees to constitute a separate group for purposes of collective bargaining. *Beecham Products*, 251 NLRB 731 (1980) (frequent contact existed where maintenance employees spent half of their time on the production floor); *Monsanto Co.*, 183 NLRB 415 (1970); *Westin Hotel*, 277 NLRB 1506 (1986). In a warehouse context, “work-related contact with the warehouse employees when they discuss the repair of forklift equipment” demonstrates frequent and regular contact between maintenance employees and excluded employees for purposes of applying the traditional community of interest standard. *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682 (2001).

Here, Maintenance Technicians in the petitioned-for unit have daily work-related contact with employees in other classifications. Maintenance Technicians work closely with Warehouse Coworkers, Stock Controllers, Recovery Workers, and Internal Haulers daily to troubleshoot equipment malfunctions and identify necessary repairs. (Tr. 46-47, 83-83, 85-86, 299-300, 321-23, 351-52). Every day on every shift there is a Maintenance Technician assigned to work “the floor” whose job is to move about the DC responding to on-demand calls for repairs and interact with other employees in need of maintenance support. (Tr. 153-54, 156, 191, 299-300, 321-23, 351-52). Indeed, Operations employees and Maintenance Technicians are such “a close-knit family” that Warehouse Coworkers and others simply flag a Maintenance Technician down when their material handling equipment is non-operational. (Tr. 299, 322). The frequency of work-related interaction between Maintenance Technicians and other hourly employees at the DC demonstrates that the employees in the petitioned-for unit are not sufficiently distinct to constitute a separate group for purposes of collective bargaining.

d. Common Supervision

Common supervision exists under the Board's traditional community of interest standard even where employees in the petitioned-for unit and excluded employees are subject to different first-level supervision. Specifically, common supervision exists when supervisors responsible for overseeing employees excluded from the petitioned-for unit direct the work of employees in the petitioned-for unit. *E. I. Du Pont & Co.*, 205 NLRB 552 (1971) (common supervision where maintenance employees receives direction from production supervisor); *Metropolitan Hosp.* 223 NLRB 282 (1976) (common supervision where maintenance employees receive direction resulting from work coordination while working throughout the facility); *United States Plywood-Champion Papers, Inc.*, 174 NLRB 292 (1969) (shared supervision with the production supervisor weighs against the appropriateness of a separate maintenance unit); *Buckhorn Inc.*, 343 NLRB 201 (2004); *Monsanto Co.*, 183 NLRB 415 (1970); *Texas Color Printers, Inc.*, 210 NLRB 30 (1974) (overlapping supervision supports a single unit); *International Bedding Co.*, 356 NLRB 1336 (2011).

Here, it is undisputed that supervisors from Operations direct the work of Maintenance Mechanics. Team Leads from Operations have the authority to call Maintenance Technicians over the radio and direct them to perform repairs. (Tr. 296, 308-310, 327). When Team Leaders from Operations call Maintenance Technicians for repair work, the Maintenance Technicians are expected to respond. (Tr. 310-11). Team Leaders from Operations are not required to obtain approval from Facilities Department supervision before directing Maintenance Technicians to perform repair work and it is "very rare" for an Operations Team Lead to have reason to contact the Maintenance Technicians' Team Lead as the Operations Team Leads have authority to direct the work of Maintenance Technicians as needed. (Tr. 295-96, 311). The record is clear that the

Operations Team Leads direct the work of the Maintenance Technicians multiple times each day. (Tr. 299-300, 321-23, 351-52). This shared direction of the Maintenance Technicians' work indicates that employees in the petitioned-for unit are insufficiently distinct to be a separate group for purposes of collective bargaining.

e. Skills and Training

Where petitioned-for employees and excluded employees are subject to substantial amounts of common training, additional job-specific training received by employees in various classifications does not indicate sufficient distinctiveness for purposes of collective bargaining under the Board's traditional community of interest standard. *Turner Industries Group, LLC*, 349 NLRB 428, 430, 432 (2007) ; *Publix Super Markets*, 343 NLRB at 1026 (where petitioned-for and excluded employees shared common training, "additional rules concerning food safety" for the petitioned-for unit did negate overall similarity of working conditions).

Possession of mechanical or electrical skills, especially when the work is routine in nature, does not indicate sufficient distinctness for a separate bargaining unit.²⁰ *The F. & M. Schaefer Brewing Co.*, 198 NLRB 323, 324 (1972); *see also In re Lodgian Inc.*, 332 NLRB 1246 (2000). Distinct skill sets and separate training requirements are further discounted when employees in the petitioned-for unit transfer into the position from other positions. *See Beecham Products*, 251 NLRB 731 (1980) (25% of maintenance employees progressed from the production floor militated against maintenance employees having distinct skills); *Greater Bakersfield Memorial Hospital*, 226 NLRB 971, 973 (1976) (the fact that 40% of the unit sought had transferred into maintenance jobs militated against a finding that employees had distinct skills); *Interstate Warehousing of Ohio*,

²⁰ Though there was testimony concerning the presence of an on-site contractor who repairs much of the material handling equipment at the facility, the Hearing Officer failed to question Facilities Manager Aaron Lucas concerning the extent of contracting of skilled maintenance work resulting in an incomplete and insufficient record on this issue.

LLC, 333 NLRB 682 (2001) (the transfer of warehouse employees to maintenance and the performance of unskilled maintenance show that maintenance employees do not have a separate community of interest).

The record is clear that employees in the petitioned-for unit have substantially the same training as other hourly employees in the DC. There are 24 shared training modules completed by all hourly DC employees through IKEA's online learning platform. (Tr. 256; Pet. Ex. 6; Bd. Exs. 8-9). While Maintenance Technicians receive training in 24 other areas, only 11 of them are exclusive to Maintenance Technicians, and not all Maintenance Technicians receive training in each of these 11 areas. (Pet. Ex. 6). The other 13 topics of training are provided as needed to Maintenance Technicians, Warehouse Coworkers, Stock Controllers, Recovery Coworkers, and Auditors. (Pet. Ex. 6). Similarly, employees in the petitioned-for unit have the same material handling equipment certifications as the DC's other hourly employees. (Bd. Ex. 8). Any minor differences in job-specific training received by employees in the petitioned-for unit does not make them sufficiently distinct for separate bargaining. *Turner Industries Group, LLC*, 349 NLRB at 430, 432; *Publix Super Markets*, 343 NLRB at 1026. This is further illustrated by the fact that nearly 36% of the petitioned-for employees transferred into their current classification from a Warehouse Coworker position. (Tr. 241-43, 249-51; Bd. Exs. 6, 7). The fluid movement of employees from the Warehouse Coworker position into the Maintenance Technician position demonstrates that the skills and training of employees in the petitioned-for unit are not sufficiently distinguishing to warrant separate bargaining. *Beecham Products*, 251 NLRB 731 (1980); *Greater Bakersfield Memorial Hospital*, 226 NLRB at 973; *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682 (2001).

f. Interchange

Interchange between petitioned-for employees and excluded employees indicates “blurred departmental lines” and a “fluid work force with roughly comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). Interchange is a critical factor in determining whether employees who work in different groups share a community of interest. *Executive Resources Associates*, 301 NLRB 400, 401 (1991).

As explained above, 36% of the employees in the petitioned-for unit transferred into the position from a Warehouse Coworker position. (Tr. 241-43, 249-51; Bd. Exs. 6, 7). More importantly, however, the record reveals that Maintenance Technicians and Warehouse Coworkers work together on certain maintenance-related tasks. For example, Warehouse Coworkers and Maintenance Technicians worked together to re-configure the racking in the CDC operation. (Tr. 332-33). Similarly, when pallets tip on the DC’s conveyor system, Warehouse Coworkers work alongside Maintenance Technicians to eject the pallet. (Tr. 312, 314-15). This interchange of duties happens up to 50% of the time a pallet is stuck on a conveyor. (Tr. 314-15). Cleaners help Maintenance Technicians move heavy objects, deliver materials for Maintenance Technicians to use, and assist Maintenance Technicians in the performance of preventative maintenance tasks. (Tr. 82-83). Further, the Facilities Department engages in cross-training of Operations employees in maintenance. (Tr. 369). The permanent transfer of employees from Operations into the Maintenance Technician position, the temporary interchange between Maintenance Technicians and Warehouse Coworkers, and the cross-training of Warehouse Coworkers demonstrates that the petitioned-for employees are not sufficiently distinct to warrant their own bargaining unit.

g. Employer's Organization

Under the Board's traditional community of interest standard, a petitioned-for unit that includes only a portion of an administrative group weighs against the appropriateness of a petitioned-for unit. The community of interest test focuses on the employer's chosen structure of its workplace. *The Neiman Marcus Group, Inc.*, 361 NLRB No. 11, slip op. 4 (2014). The Board has "always assumed it obvious that the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has direct bearing on the community of interest among various groups of employees in the plant and thus an important consideration in any unit determination." *Id.* The highly integrated nature of the DC demonstrates that while separate departments may exist within the facility, they are so integrated as to make a single wall-to-wall unit consistent with the DC's organizational structure and the realities of the workplace. This is especially true since the petitioned-for unit is a fraction of the Facilities Department and, as explained in detail above, does not constitute its own administrative grouping. Consequently, the consistency of a wall-to-wall unit including Maintenance Technicians, Power Equipment Technicians, Warehouse Coworkers, Stock Controllers, Recovery Coworkers, Internal Haulers, and Auditors with the organizational structure of the DC highlights the appropriateness of such a unit and why the fractional petitioned-for unit must be rejected.

h. Community of Interest Summary

The Board's traditional community of interest factors demonstrate that the Maintenance Technicians share a community of interest with the other hourly employees in the DC. The DC is a highly integrated operation with all hourly employees working together toward the goal of moving product through the facility to its destination. Employees in the petitioned-for unit share nearly all terms and conditions of employment with excluded hourly employees, they have work-

related contact with excluded employees on a daily basis, their work is directed by supervisors of excluded employees on a daily basis, they have no distinct training or skills that warrant separate bargaining, and there is significant permanent interchange between excluded and petitioned-for employees and some temporary interchange. Including all the hourly employees in a single unit is also consistent with the highly integrated structure of IKEA's operation. Consequently, the Regional Director's departure from the three-step *Boeing* test and resulting failure to analyze whether petitioned-for employees share an external community of interest with excluded employees raises a substantial question concerning the legality of the petitioned-for unit and warrants the Board's review. On review, the Board should dismiss the petition as the petitioner has failed to carry his burden of proving that the petitioned-for unit is sufficiently distinct for purposes of bargaining.

D. A Substantial Question Concerning the Legality of the Petitioned-For Unit is Raised by the Regional Director's Departure from the Board's Precedent Set Forth in Step Three of *The Boeing Co.*

1. *The Regional Director Failed to Consider IKEA's Bargaining History as Required by the Third Step of The Boeing Co.*

As the Board made clear in *The Boeing Co.*, 368 NLRB No. 67 (2019), a third step exists in the community of interest analysis: the evaluation of facility, industry, or *employer* precedent. In evaluating the bargaining history, the Board affords significant weight to the bargaining units at the employer's other facilities. As the Board explained in *Electro Metallurgical Co. (Niagara Falls, N. Y.)*, 57 NLRB 518 (1944), where "there is no history of collective bargaining, the *form which collective bargaining has taken in other plants of an employer* is regarded by the Board as a *significant factor* in determining the appropriate unit."²¹ (emphasis added); *see also Electro*

²¹ Relevant to this assessment is the form of bargaining taking place at all the employer's facilities; not any petitioned-for unit or units that are part of a stipulated election agreement.

Metallurgical Co. (Ashtabula, Ohio), 101 NLRB 577 (1952) (finding that a facility-wide unit was the appropriate unit based on collective bargaining history at other facilities); *Republic Steel Corp. (Warren, Ohio)*, 131 NLRB 864 (1961) (weighing the pattern of separate bargaining for clerical employees of the employer); *General Electric Co. (Schenectady, N.Y.)*, 89 NLRB 726 (1950); *Cf Kroger Co.*, 155 NLRB 546 (1965) (where the Board found that the separate identity of a maintenance department was “further established by the separate history of bargaining for maintenance employees at certain of the Employer's other plants”).

The Regional Director’s failure to consider the established form of collective bargaining undertaken at IKEA’s other facilities further supports granting review. IKEA submitted an offer proof regarding the unit compositions at all its unionized facilities. ((DDE at 19 fn. 33; Tr. 427-428; 437-438). Not only did the Hearing Officer reject to hear the evidence (Tr. 428), the Regional Director rejected the relevance of the other facilities because the IAM, and not the Petitioner, represents the employees at the other facilities. (DDE at 18-19). Initially, the Regional Director’s reliance that other facilities are not relevant because the petitioner is not the IAM is undermined by the fact that both the IAM and Teamsters represent plantwide units of IKEA’s employees at other facilities. (Tr. 433-39). Moreover, consideration of the union’s identity is not supported by Board law. Tellingly, the Regional Director does not cite a single case in support of the Region’s position, nor is there any attempt to distinguish IKEA’s cited precedent. Instead, established precedent looks at the *form* of collective bargaining at the employer’s other facilities, not *who* the union represents at the other facilities. The offer of proof establishes, consistent with Board precedent, that at all five unionized facilities, IKEA conducts bargaining on a plantwide basis.²²

²² The Regional Director’s failure to accept this offer of proof and receive evidence on this issue violates Section 102.66(c) as well as the Region’s statutory obligations to determine the appropriateness of the petitioned-for unit.

The Regional Director's departure from the Board's precedent under step three of *Boeing* creates as substantial question concerning the legality of the petitioned-for unit warranting review.

2. *The Regional Director's Decision was Arbitrary and Lacked A Reasoned Explanation*

The Regional Director's decision not to mention or distinguish the cases cited by IKEA in support of its the *Boeing* step three standard is arbitrary and constitutes a failure to engage in reasoned decision-making.²³ "The Board must explain its reasoning when certifying bargaining units." *Davidson Hotel Co., LLC v. Nat'l Labor Relations Bd.*, No. 19-1235, 2020 WL 6220012, at *2 (D.C. Cir. Oct. 23, 2020). "A decision of the Board that departs from established precedent without a reasoned explanation is arbitrary." *Id.* Thus, where the Board fails to "cite – let alone distinguish – a single contrary precedent ... this failure is fatal" to its decision to certify the bargaining unit. *Id.* at *3.

Here, IKEA cited numerous cases explaining the *Boeing* step three standard. The Regional Director simply rejected IKEA's citations without distinguishing or even mentioning the controlling precedent. Rather, the Regional Director simply dismissed IKEA's authorities because the Union at issue is different from the unions at IKEA's other facilities. But the Regional Director never supported the Region's position with precedent or distinguished IKEA's cited precedent. The Regional Director's failure to provide and explanation or to engage in reasoned decision-making further indicates the existence of a substantial question concerning the legality of the petitioned-for unit and the propriety of IKEA's request for review.

²³ While IKEA was not permitted to submit a full post-hearing brief, the Regional Director permitted IKEA to brief the standard that should be applied. (DDE p. 3 n.6).

E. The Regional Director’s Ruling to Preclude IKEA from Participating in the Hearing Deprived IKEA of Due Process

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides that no person shall “be deprived of life, liberty, or property, without due process of law” U.S. Const. amend. V. A federal agency’s inconsistent application of its duly promulgated regulations violates the Fifth Amendment’s Due Process Clause. *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407, 422 (1942) (agency regulations on which individuals are entitled to rely bind agency); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (vacating deportation order of Board of Immigration Appeals because the procedure leading to deportation did not conform to the relevant regulations); *Montilla v. I.N.S.*, 926 F.2d 162, 164 (2d Cir. 1991) (“The notion of fair play animating [the Fifth Amendment] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule maker may then with impunity ignore or disregard as it sees fit.”); *U.S. v. Ginsburg*, 376 F.Supp. 714, 717-18 (D.Conn. 1974) (“The Court agrees that the Due Process Clause proscribes inconsistent and unequal treatment generated by a governmental agency’s violation of its own regulations.”).

The NLRB’s regulations provide, in relevant part an employer named in an RC petition “shall” file a Statement of Position with the Regional Director and serve a copy of that Statement of Position on the other parties named in the petition. 29 CFR 102.63(b)(1). Section 102.66(d) of the Board’s regulations provides that a party who does not comply with the Statement of Position requirement “shall be precluded” from raising any issue or litigating any issue that the party failed to raise in its Statement of Position. 29 CFR 102.66(d).

The NLRB’s Regional Offices have inconsistently applied the preclusion rule set forth in 29 CFR 102.66(d) thus depriving participants in representation hearings of due process. In the instant case, IKEA timely filed its Statement of Position, but served it on the Union one hour and

forty-one minutes late. As a result, the Regional Director precluded IKEA from participating in the hearing. (DDE p. 2). However, IKEA is aware of other instances in which an employer named in an election petition failed to timely serve its Statement of Position and *was not* precluded from raising issues and litigating them at the pre-election hearing. Most notably, *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016), the Board affirmed the Regional Director's decision to allow the non-petitioning party to present evidence despite failing to timely file its statement of position. In *Davidson Hotel Co.*, 13-RC-217485, for example, the employer timely filed its Statement of Position, but served it two hours and twenty-nine minutes late. Despite the union's Motion to Preclude the Taking of Evidence, the Region permitted the employer to fully participate in the hearing, including the ability to raise issues, present evidence, and cross-examine the union's witnesses. *See Decision and Direction of Election, Davidson Hotel Co.*, 13-RC-217485. Indeed, the Regional Director did not raise the preclusion issue in the DDE. Similarly, in *Aakash, Inc., a/b/a Park Central Care and Rehabilitation Center*, 32-RC-266500, the employer did not file a statement of position at all, yet the Region permitted it to fully participate in the pre-election hearing. IKEA is confident these are not the only instances of the Regions' inconsistent application of 102.66(d) and has filed a FOIA request to discover additional inconsistencies in the Regions. (Ex. 3, ¶7, Ex. C).

Regardless of whether additional inconsistencies exist, the simple fact that inconsistent application of 102.66(d)'s preclusion rule exists demonstrates that IKEA's due process rights have been violated. If the Regions have permitted other employers to fully participate in pre-election hearings despite more egregious service delays and even outright failure to serve a statement of position, IKEA should have been similarly permitted to participate in the pre-hearing election in

the instant case. As a result, the Regional Director's application of 102.66(d)'s preclusion rule in this case deprived IKEA of due process of law.

While the Regions' inconsistency violated IKEA's rights in the instant case, this issues' reach is not limited to this case. Every employer that has been precluded from fully participating in a pre-election hearing by operation of the preclusion rule has suffered a deprivation of due process at the hands of the Regions as a result of their failure to follow the Board's regulations. If the Board is going to issue rules, the Regions must follow them. When the Regions fail to follow the rules, it is not without consequence. At a minimum, this case should be remanded to the Region with instructions to hold the hearing for a second time permitting IKEA to fully participate.

F. There Are Compelling Reasons for the Board to Reconsider the Application of the Preclusion Rule

The preclusion rule found in 102.66(d) first came into the Board's regulations in 2014 in conjunction with the new requirement that an employer named in RC petitions file a statement of position setting forth its position with respect to the petitioned-for unit. 79 FR 74308-01 (December 15, 2014). Employers were previously required to take positions on the petitioned-for unit orally at the hearing, but the practice was not uniform and some hearing officers did not require parties to state their positions or permitted parties to change positions as the hearing unfolded. 79 FR 74309. These practices impeded efficient litigation. *Id.* According to the Board, Section 102.66(d)'s preclusion rule was intended to prevent the such gamesmanship. The Board explained:

Preclusion regarding the statement of position is justified by the rulemaking record and the Board's experience demonstrating that non-petitioning parties sometimes do not share the information solicited by the statement of position form prior to the hearing, or they take shifting positions on the issues at the hearing. Such conduct impedes efforts to reach election agreements or hold orderly hearings.

79 FR 74425.

Here, the Region applied Section 102.66(d)'s preclusion rule to prevent IKEA from raising the appropriateness of the petitioned-for unit despite the reality that IKEA's late service of its statement of position on the Petitioner was nothing more than inadvertent oversight. Ex. 3, ¶5. IKEA was not engaged in the kind of pre-hearing gamesmanship the preclusion rule was designed to address. (Id.). Indeed, as soon as IKEA realized its error, it served its Statement of Position on the Petitioner. (Id.). IKEA's service was one hour and forty-one minutes late. Ex. 3, ¶4, Ex. B. Petitioner received IKEA's Statement of Position more than eight full days prior to the opening of the hearing. Indeed, IKEA's Statement of Position arrived in Petitioner's email in-box just *eight minutes* after Wedeking, Petitioner's representative, clocked out of work. (Ex. 3, ¶4, Ex. B; Ex. 4). And there is no question the Petitioner had adequate time to consider IKEA's positions on the petitioned-for unit as the Responsive Statement of Position was filed on October 7, 2020, a day before it was due. (Bd. Ex. 1(f)).

The application of Section 102.66(d)'s preclusion rule in the circumstances of this case is both inconsistent with the rule's intended purpose and punishes inadvertent error with absolutely *no impact* on the Union's ability to respond to IKEA's positions, the Region's to attempt to facilitate a stipulated election agreement, or the overall integrity of the pre-election litigation process. In fact, as set forth above, the primary impact of the preclusion rule in this case was that the appropriateness of the petitioned-for unit was determined not on the merits, but by application of a draconian procedural rule. The Regional Director expressly recognized that the outcome of this case may well have been different if not for the application of the preclusion rule. (DDE p. 18). This is neither fair nor just. The preclusion rule should be applied to prohibit pre-hearing gamesmanship and unfair litigation tactics when parties refuse to take positions on unit issues, not to punish inadvertent, non-prejudicial mistakes. Consequently, there are compelling reasons for

the Board to reconsider the circumstances under which Section 102.66(d)'s preclusion rule should be applied, and the Board should grant review to do so.

IV. CONCLUSION

For the reasons stated above, the Board should grant review of the Regional Director's Decision and Direction of Election. Given the importance of the legal issues raised, a stay of the election scheduled for November 17, 2020 is necessary under the circumstances and should be granted.

Respectfully submitted,

BAKER HOSTETLER LLP

Dated: November 12, 2020

/s/ Jeremy Hart
M.J. Asensio
Jeremiah L. Hart
Baker & Hostetler LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215
Phone: 614.228.1541
Fax: 614.462.2616
Email: masensio@bakerlaw.com
jhart@bakerlaw.com

Nancy Inesta
Baker & Hostetler LLP
11601 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90025-0509
Phone: 310.820.8800
Fax: 310.820.8859
Email: ninesta@bakerlaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 12, 2020, an electronic copy of this brief was filed electronically with the National Labor Relations Board. A copy was filed electronically with:

Mori Rubin
Regional Director
National Labor Relations Board, Region 31
11500 W. Olympic Blvd, Suite 600
Los Angeles, CA 90064

A Copy was sent by electronic mail to:

Nathan Seidman
Assistant Regional Director,
National Labor Relations Board, Region 31
Nathan.Seidman@nlrb.gov

Michael Wedeking
United Maintenance Technicians of Tejon
mike_wedeking@yahoo.com

/s/ Jeremy Hart
Jeremy Hart
*Attorney for IKEA Distribution Services,
Inc.*

Exhibit 1

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

IKEA DISTRIBUTION SERVICES, INC.

Employer

Case 31-RC-266527

and

**UNITED MAINTENANCE
TECHNICIANS OF TEJON**

Petitioner

DECISION AND DIRECTION OF ELECTION

On September 23, 2020,¹ United Maintenance Technicians of Tejon (Petitioner or Union) filed a representation petition (the Petition) under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent certain employees of Ikea Distribution Services, Inc. (Employer). The petitioned-for unit was modified at the hearing to include all full-time and regular part-time maintenance technicians and power equipment technicians employed by the Employer at its facility in Lebec, California.² There are approximately 15 employees in the petitioned-for unit.

On September 23, Region 31 of the National Labor Relations Board (the Region) served a copy of the Petition on the Employer and notified the Employer of its obligation to file a Statement of Position, serve that Statement of Position on all parties, and to do so in a timely manner by noon Pacific time on Monday, October 5. On the same date, the Region issued a Notice of Representation Hearing setting a videoconference hearing for Wednesday, October 14. The Employer filed its Statement of Position with the Region on October 5, raising the substantive issue of the appropriateness of the petitioned-for unit.³ The Employer, however, failed to timely serve its Statement of Position on the Petitioner.

A videoconference hearing on the Petition was held on October 14, 15, and 16 before a Hearing Officer of the National Labor Relations Board (the Board). At the hearing, the Employer did not dispute that it failed to serve its Statement of Position on the Petitioner in a timely

¹ All dates hereinafter refer to 2020 unless otherwise noted.

² At the hearing, the parties agreed to remove the Preventative Maintenance Technicians classification from the petitioned-for unit because that classification is no longer being used at the facility at issue.

³ In its Statement of Position, the Employer asserted that the appropriate unit is as follows: All full-time and regular part-time employees employed at the Employer's Tejon Distribution Center in Lebec, California in the following classifications: Auditor, Cleaner, Internal Hauler, Maintenance Technician, Preventative Maintenance Technician, Power Equipment Technician, Recovery Co-worker, Stock Controller, and Warehouse Co-worker and excluding all other employees including, but not limited to, temporary, office clerical, administrative, confidential and professional employees, guards, and supervisors as defined by the Act.

manner.⁴ Thus, pursuant to Section 102.63(b)(1) and 102.66(d) of the Board's Rules, I directed the Hearing Officer to preclude the Employer from litigating issues contained in its Statement of Position because it failed to timely serve a copy of it on the Petitioner. At the beginning of the hearing, the Employer made a verbal motion to reconsider my decision on the preclusion issue. The motion was denied.

Section 102.63(b)(1) of the Board's Rules states an employer named in an RC petition "shall" file a Statement of Position with the Regional Director and serve a copy of that Statement of Position on the other parties named in the petition. Section 102.66(d) of the Board's Rules, "Preclusion," states, in relevant part:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response...

The Board addressed preclusion and the operation of Section 102.66(d) in *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1, fn.1 (2017). In that case, the Board concluded that the Regional Director was correct to preclude the employer from litigating the appropriateness of the petitioned-for unit based on the employer's failure to timely serve its statement of position on the petitioner. *Id.*

The Employer argues that precluding it from presenting evidence regarding the appropriateness of the petitioned-for unit denies it due process, is an unduly harsh penalty that is arbitrary and capricious, and prevents the Region from fulfilling its obligations under Section 9(b) of the Act. While a procedural rule will at times prevent a substantive issue from being addressed, that is not an unintended consequence of a preclusion rule but the intent. Sections 102.63(b)(1) and 102.66(d) of the Board's Rules are clear in their operation, and nothing in the Employer's verbal motion to reconsider articulated at the hearing provides a valid basis for ignoring the preclusion dictated by the Board's Rules. Thus, I hereby affirm my ruling and find that the Employer was properly precluded from litigating the unit issue raised in its Statement of Position.

Section 102.66(d) of the Board's Rules, however, does not preclude the Regional Director from addressing an issue.⁵ See *Brunswick Bowling Products, LLC*, 364 NLRB No. 96 (2016); *Williams-Sonoma Direct, Inc.*, 365 NLRB No. 13, slip op. at 1, fn. 1 (2017). This is clear from the plain language of Section 102.66(d), which places no limitation on any person other than the defaulting party. It is also clear from the context of the provision within the structure of the Act and the Rules, including Section 102.66(b), which authorizes the Regional Director to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the Regional Director determines that record evidence is necessary, even if the parties have not taken adverse positions on the issue. *Brunswick*, 364 NLRB slip op at 4.

⁴ I also note that the Employer did not file a motion for an extension of time to file and serve its Statement of Position nor did it provide an explanation for failing to serve its Statement of Position in a timely manner.

⁵ The Employer recognized as much in its verbal motion to reconsider.

The Board recently clarified the standard to apply when determining the appropriateness of a petitioned-for unit in situations like here, where no party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit.⁶ In *Macys West Stores, Inc.*, 32-RC-246415, fn. 1 (unpublished May 27, 2020), the Board stated:⁷

[W]here no party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, it is unnecessary to apply the three-step analysis set forth in *The Boeing Company*, 368 NLRB No. 67 (2019), which applies “when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit.” *Id.*, slip op. at 2. It is true that steps one and three of *Boeing*--the requirement that any appropriate unit have an internal community of interest, and that consideration must be given to the Board’s decisions on appropriate units in the particular industry involved-- reference broad principles that are generally applicable to unit determinations. Step two, however--which considers “whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit,” *ibid.* (internal quotations omitted)--only applies if a party contends that additional employees must be included in the unit to render it appropriate, a situation that is not present in this case.

Accordingly, since the Employer here was precluded from asserting that additional employees must be included in the petitioned-for unit to render it appropriate, consistent with the Board’s decision in *Macys West Store*, in the following section I will apply steps one and three of *Boeing* in determining the appropriateness of the petitioned-for unit.

In addition to the appropriateness of the petitioned-for unit, the other matter to be decided in this case is whether an election should be held manually at the Employer’s Lebec, California facility or by mail ballot, considering the continuing COVID-19 pandemic.⁸ The Employer argues that any election should be by manual ballot at its Lebec facility and that it can safely hold an open-air election at the facility in compliance with all local, state, and federal guidelines and consistent with the protocols described in General Counsel Memorandum 20-10. The Employer further states that it will provide all materials required by General Counsel Memorandum 20-10. The Petitioner supports either a mail or manual ballot election.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding and relevant Board law, I find that the petitioned-for unit, as modified at the hearing to include only maintenance technicians and power equipment technicians, share a community of interest sufficient to establish that it is an

⁶ At the hearing, I directed the Hearing Officer to permit the Employer to submit a post-hearing brief on the limited issues of the appropriate legal standard to apply in determining the appropriateness of the unit at issue and its position on the method of election. On October 23, the Employer filed a post-hearing brief and argued that the appropriate standard to apply in this matter is the traditional community of interest test set forth in *PCC Structural*, 365 NLRB No. 160 (2017). While the Employer cites to *The Boeing Co.*, 368 NLRB No. 67 (2019) and the three-step process articulated therein, it does not cite to *Macys West Stores, Inc.*, *supra*.

⁷ The Board’s decision is available on the Board’s public website at <https://www.nlr.gov/case/32-RC-246415>.

⁸ Throughout this decision, the terms “COVID-19,” “coronavirus,” and “virus” are used interchangeably.

appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Furthermore, based on the entire record, relevant Board law, and the extraordinary circumstances of a pandemic, I shall direct a mail-ballot election commencing on the earliest practicable date.

I. THE EMPLOYER'S OPERATIONS

The Employer provides warehousing and logistic services at its facility in Lebec, California (the Facility). The Facility includes a distribution center that consists of one large warehouse that houses six buildings under one roof, which are numbered 1 through 6.⁹ Employer product arrives at the distribution center, is sorted into different areas within the distribution center, and is shipped to other distribution centers, retail stores, and/or individual customers.

The distribution center includes Operations and Facilities.¹⁰ Employees within Operations and Facilities work toward the shared goal of making sure that the Employer's product reaches its destination. Within Operations, there is Customer Distribution (referred to as CD or CDC) and Store Distribution (referred to as SD). The CDC is based in Building 6 and handles situations where an individual customer places an order for product.¹¹ More specifically, when an individual customer places an order for a particular product, the CDC employees get the product from within the distribution center and prepare it to be shipped via FedEx to the individual's home. The SD is based in Buildings 1 through 5 and handles situations where a retail store places an order for product or when another distribution center needs product. Most hourly/non-exempt¹² employees work within Operations, including the auditor, internal haulers, recovery co-workers, stock controllers, and general warehouse co-workers.¹³

Facilities is charged with making sure the distribution center is operational and safe for all employees to complete their jobs in a safe manner. Within Facilities, there are the maintenance technicians, power equipment technicians, cleaners, and a sustainability developer.¹⁴ There is a maintenance shop located between Buildings 1 and 4, which is the hub for maintenance, which includes the maintenance technicians and the power equipment technicians.¹⁵ Ultimately, maintenance employees are there to make sure that the Employer's process for ensuring that its products reach their destination is not stopped for some reason and, if it is stopped, the maintenance team is there to make sure it is mitigated and lessened as much as possible so that the process can continue.

⁹ The record is unclear as to whether the distribution center is the only building at the Facility. Nevertheless, the distribution center and buildings 1-6 are the only buildings at issue in this matter.

¹⁰ The record is unclear as to whether the Safety Department falls within Operations and/or Facilities or is its own separate department. I note, however, that it is regularly referred to as the Safety Department.

¹¹ An individual can place an order by phone or online.

¹² Throughout the record it appears that the terms hourly and non-exempt are used interchangeably and, therefore, I will use these terms interchangeably throughout this decision.

¹³ There are 367 general warehouse co-workers, 10 stock controllers, 10 recovery co-workers, 9 internal haulers, and 1 auditor.

¹⁴ There are 14 maintenance technicians, 1 power equipment technician, 7 cleaners, and 1 sustainability developer.

¹⁵ The witnesses regularly referenced the maintenance hub or the maintenance shop, which refer to the same location between Buildings 1 and 4.

Jermaine Gordon is the current Site Manager at the Facility. He oversees SD Warehouse Manager Ken Brown, the SD Operational Support Manager (vacant position), the HR Manager (vacant position), Safety & Security Manager Victor Avila, Business Navigator Diane Young, Facilities Manager Aaron Lucas, CD Warehouse Manager Stephanie Rivas, and CD Operational Support Manager Jose Estrada. Facilities Manager Aaron Lucas oversees all of Facilities, including Maintenance Team Leads William Villanueva, Robert Jones, and Mitchell Newman, and Cleaners/Waste Sorters¹⁶ Team Lead Robert Spivey. He also oversees the sustainability developer. Lucas's office is located in Building 1, but the Maintenance Team leads have offices/desks in the maintenance shop between Buildings 1 and 4.

Hourly employees enter through the same entrance of the Facility. Hourly employees share the same common break room area for lunch.¹⁷ Hourly employees wear an Employer badge, which includes the employee's name, hire date, and employee number and is used to clock in and out. The badges do not indicate an employee's particular department or job title. Employees have access to an employee locker room, where they can get dressed before or after their shift. The employee locker room is used by various classifications of employees, including some maintenance technicians.

Full-time hourly employees are designated into different hours levels, which represents how many hours they are normally scheduled to work each week. The different levels include the following: (i) HL2, which represents 20-34 hours per week; (ii) HL3, which represents 34-40 hours per week; and (iii) HL4, which represents 38-40 hours per week. At the Facility, nearly all full-time hourly employees are within HL2 or HL3 and all maintenance are full-time HL3s.¹⁸

There are three shifts available to full-time hourly employees, including the first shift, second shift, and third shift. However, the start and end times for the second and third shifts differ between departments. For example, for maintenance technicians, the shift schedule is as follows: first shift is approximately 5:00 a.m. to 1:30 p.m., second shift is approximately 1:00 p.m. to 9:30 p.m., and third shift is approximately 9:00 p.m. to 5:30 a.m. Whereas for SD employees, the shift schedule is approximately as follows: first shift 5:00 a.m. to 1:30 p.m., second shift is 3:00 p.m. to 11:30 p.m., and third shift is 8:30 p.m. to 5:00 a.m.

The Employer pays a \$0.50 shift differential for hourly employees working the second shift and a \$1.00 shift differential for hourly employees working the third shift. The shift differential is applicable to cleaners, internal haulers, recovery co-workers, stock controllers, general warehouse co-workers, maintenance technicians, and power equipment technicians.

The Employer offers some hourly employees an alternate work schedule, which means that they work four 10-hour days. The record is not clear as to which classifications can take advantage of the alternate work schedule or how many hourly employees do. However, some testimonial evidence suggests that maintenance technicians do not qualify for an alternate work

¹⁶ Waste Sorters are often referred to as Cleaners.

¹⁷ Employees are also allowed to leave the Facility for lunch.

¹⁸ The record is not clear as to whether this reference to "maintenance" includes both the power equipment technician and the maintenance technicians.

schedule.¹⁹ Whether someone works an alternate work schedule or not will impact whether that employee is eligible for overtime. More specifically, if an employee does not work an alternate work schedule, then they are generally eligible for overtime.

The record does not reflect the precise wage rates or wage ranges for the Employer's hourly employees. However, the Employer's Interim Unit People and Culture Manager testified that the cleaner is the lowest pay grade position, and then progressing up in pay are the recovery and warehouse co-workers, then the stock controller and internal hauler, and then finally the maintenance technicians. The record is not clear as to whether the power equipment technician is at the top of this structure with the maintenance technicians.

All hourly employees are subject to the same work rules and policies, including the Employer's Code of Conduct.²⁰ In addition, all hourly employees, excluding part time workers, are eligible for the same Employer benefits, including, but not limited to, medical, dental, vision, and retirement. All hourly employees participate in the Employer's onboarding experience on their first day of employment. All hourly employees also participate in the Employer's online digital trainings, including the following: active shooter; bomb threats general information; data privacy fundamental; data privacy test; data privacy training; data privacy training for California store co-workers; earthquake safety; emergency notification Code 1000; fire and accident prevention; fire and safety training retail; handling and sharing information; harassment awareness for IKEA co-workers and specialists; how to report an emergency; how to use a fire extinguisher; insect, snake and animal safety; ladder safety; lifting safety; lockout tagout general information; medical emergency and accident reporting; pedestrian safety in the warehouse; product safety and compliance alarm; responding to a fire; safety and social distancing; safety and social distancing module 1; safety and social distancing module 2; safety knives; severe weather safety; supply chain security; and workplace hazard communication.

A. Maintenance Technicians

There are approximately fourteen maintenance technicians that work at the Facility. Four maintenance technicians work the 1st shift, three work the 2nd shift, and seven work the 3rd shift. After maintenance technicians clock in for work, they report to the maintenance shop between Buildings 1 and 4. Maintenance technicians have lockers in the maintenance shop, which is where they store their Employer-issued tools (including, but not limited to, screwdrivers, wrenches, sockets, pliers).²¹ The maintenance shop includes cabinets that hold replacement parts for various pieces of equipment and it has computers for the maintenance technicians to use. Maintenance technicians have around 15 Employer-issued keys, which are

¹⁹ There is no record evidence clearly establishing whether or not maintenance technicians qualify for an alternate work schedule.

²⁰ The Employer's work rules and policies include the attendance policy, the behavior standards policy, the co-worker discount and credit purchase policy, the general safety policy, the harassment, discrimination and retaliation prevention policy, the holiday incentive pay policy, the information security policy, the mobile device policy, the pay practices policy, the problem resolution policy, and the rest breaks and meal periods policy.

²¹ This is not a personal locker room like the shared locker room described previously. If a maintenance technician wants to change clothes or shoes before or after a shift, they would do that in the shared locker room, not the maintenance locker room.

used to access restricted areas like solar panels, electrical panels, and the hazardous materials storage building, among others.²²

The job posting for the maintenance technician position states that its function is DC Operations²³ and that its core responsibilities include the following: (i) performing maintenance, troubleshooting, and repair on all equipment; (ii) performing inspection and adjustments as prescribed by the manufacturer; (iii) performing other duties as assigned; and (iv) contributing to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

In addition to the general job functions and duties set forth in the job posting, there was substantial testimony regarding the specific job duties that maintenance technicians perform. More specifically, on each shift, maintenance technicians work a rotation that includes either working on the floor, working preventative maintenance, working on projects, and working in the ASRS.²⁴ When working on the floor rotation, the maintenance technician handles issues relating to the conveyor system. The maintenance technician will drive around on the floor and if he receives a warning that something has broken down on the conveyor, he will go and address that breakdown.²⁵

When working preventative maintenance, the maintenance technician receives a list of jobs related to preventative maintenance and will spend the shift going through the list and completing those tasks. Preventative maintenance can include jobs like working plumbing in bathrooms, fixing something on the outside fence line, working on the solar panels on the roof, etc. When working projects, the maintenance technician will receive work orders or requests through the CAFM system (which is described in more detail below) and will respond to immediate requests for maintenance work. It is not clear the extent of the differences between working the projects rotation and the preventative maintenance rotation.

When working on the ASRS system rotation, the maintenance technician will monitor the system for faults and breakdowns, watching for anything that may slow the production of the system. The maintenance technician will also perform preventative maintenance on all components of the ASRS system.

In order to complete these job duties, maintenance technicians have a wide range of skills, including knowing how to work plumbing, how to fix light fixtures, how to work electrical systems, how to weld, how to work with schematics, how to work hydraulic systems, how to perform carpentry work (such as erecting a podium or building something), and how to turn wrenches. The maintenance technician job posting specifically requires experience with hand tools and their proper use; proven electrical, mechanical, and/or plumbing skills; ability to

²² There is testimonial evidence that certain areas of the Facility are restricted to maintenance employees because they require these keys.

²³ The record does not explicitly state what DC Operations stands for; however, it appears to stand for Distribution Center Operations.

²⁴ The ASRS, which stands for Automated Storage and Retrieval System, is located in the middle of Building 6 and it is a system designed to bring product out of the racking area without having human interaction. Essentially, it is a high-tech way of sorting product. It is large, approximately 50 feet wide, 100 feet in length, and 30 feet high.

²⁵ The record is not clear regarding what the maintenance technician drives.

troubleshoot electrical problems by reading and following a schematic; welding and fabrication skills; advanced computer skills working in a variety of software; the ability to lift 50 to 75 lbs.; an educational degree (high school diploma, general education degree, college diploma, etc.); an Ikea forklift driver certification; and a minimum of 2 years prior industrial maintenance experience is required.

Maintenance technicians also maintain licenses for various types of equipment, including the following: Scissor Lift, Crane, Counterbalance, Order Picker, Electronic Pallet Jacks, Reach Inc. Kooi Forks, Boom Lift, and Clamp Truck. Each maintenance technician has a license for at least one of these pieces of equipment. Maintenance technicians also perform maintenance work on or with a variety of equipment, including, but not limited to, the following: (i) walkies, which are designed to pick up pallets; (ii) reaches, which are designed to pick product off racks; (iii) counterbalances (a.k.a. forklifts), which are designed to offload trailers; (iv) C trains at dock doors to move product around; (v) conveyors; (vi) batteries; (vii) wrapping paper used to shrink wrap product; and (viii) fire extinguishers.

Maintenance Team Lead Mitchell Newman supervises the four maintenance technicians and the power equipment technician that work the first shift, which is from about 5:00 a.m. to 1:30 p.m. Newman is responsible for making sure that the employees he supervises have their jobs for the shift and he also leads a pre-shift meeting.²⁶ Team leads are not designated to a specific area in the Facility; rather, they are typically either in the maintenance shop (on the computers) or on the floor.

Maintenance technicians get their work assignments in a variety of ways. Maintenance technicians can receive a work order through the CAFM system, which is an application program for the maintenance employees. The CAFM work-order system is the preferred way for maintenance technicians to receive work orders because it will track the work orders and log them. In other words, management, including team leads, can track which work orders have been completed and which are outstanding through the CAFM system. Essentially, anybody who needs something done by maintenance will put in a service request and then the team leader or management will take the service request and make it into a work order, which is then distributed to the maintenance technician – typically through CAFM. A CAFM work order could be for something as small as a repair needed on a water fountain or as big as a repair needed on a conveyor belt, the ASRS system, or racking.

While maintenance technicians typically receive their work assignments from their direct supervisor/team lead, they can and do receive assignments from other team leads as well. For example, maintenance technicians can also get a work assignment by receiving a call on the radio. Team leaders from within maintenance and outside maintenance can place a call on the radio and ask for a maintenance technician to come address an issue. All maintenance technicians have a radio.²⁷ Maintenance technicians can also get a work assignment by being

²⁶ The record does not include evidence about who attends these meetings, how often they are held, or where they are held.

²⁷ Other leads and employees communicate with the maintenance employees through these radios. The level of access to the radios differs depending on job classification. For example, cleaners have radios and internal haulers have a radio in their trucks. General warehouse co-workers, however, do not have radios but there is a radio in

flagged down by another employee or any team lead. For example, if a general warehouse co-worker has an issue with their forklift and sees a maintenance technician walking by, that general warehouse co-worker can flag down the maintenance technician to see if they can fix the issue right there, on-the-spot.

Maintenance technicians are required to wear a long sleeve fire retardant shirt, pants, and steel-toed boots. They are not allowed to wear shorts. A uniform company launders their uniforms and brings them to the Facility. When the maintenance technicians work in the ASRS in Building 6, they are required to wear hard hats. Maintenance technicians will also sometimes wear safety gloves and eye protection when working on certain equipment.

B. Power Equipment Technicians

There is currently one power equipment technician that works at the Facility. He works on the first shift. The power equipment technician clocks in for work and then reports to the maintenance shop. The record is not clear as to whether the power equipment technician uses the lockers in the maintenance shop or stores any Employer-issued tools there. There is no evidence regarding whether the power equipment technician has Employer-issued keys.

The job posting for power equipment technician describes the position function as DC Operations and states that its core responsibilities include the following: (i) diagnosing and repairing all material handling equipment; (ii) performing inspection and adjustments as prescribed by the manufacturer; (iii) performing other duties as assigned; and (iv) contributing to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

In order to complete the job duties of power equipment technician, the job posting requires knowledge of how to use forklifts and other power equipment; basic MS Computer skills; exhibit a mechanical aptitude; experience with hand tools and their proper use; proven electrical, mechanical, and/or plumbing skills; welding and fabrication skills; advanced computer skills working in a variety of software; ability to obtain an IKEA forklift driver certification; the ability to lift 50 to 75 lbs; an educational degree (high school diploma, general education degree, college diploma, etc.); a valid driver's license; a Ikea forklift driver certification; a minimum of 3-5 years of experience working on electrical forklifts required; and prior material handling equipment training preferred. In addition, the evidence indicates that the power equipment technician maintains licenses for the following types of equipment: Electronic Pallet Jack, Counterbalance, Scissor Lift, and Reach inc. Kooi Forks.

The power equipment technician reports to Team Lead Newman. Although there is minimal testimonial evidence about the specific job duties of the power equipment technician, the record reveals that the power equipment technician turns wrenches on the power equipment²⁸ and works on forklifts, reaches, and the general power equipment. It appears that the power

Building 1 and there are radios in Buildings 2 and 5, where general warehouse co-workers run the silos (silos are special forklifts). There are also radios in the cranes, which the general warehouse co-workers operate.

²⁸ The record is unclear as to what precisely "turning a wrench" means.

equipment technician has a work area within the maintenance shop and performs most of his work there.

The record is not clear as to how the power equipment technician receives work orders. The record does not reveal whether the power equipment technician carries a radio or walks through the buildings at all. The record also does not reveal whether the power equipment technician is required to wear the same uniform as the maintenance technicians and/or whether the uniform is laundered by the uniform company. It is unclear whether the power equipment technician qualifies for an alternate work schedule.

There is some evidence of transfers between the classifications of maintenance technicians and power equipment technician. Specifically, the documentary evidence indicates that one employee was a maintenance technician from September 2010 through May 2012, was a power equipment technician from May 2012 through August 2020, and then returned to the maintenance technician classification in August 2020. Another employee was a power equipment technician from June 2008 through August 2020, at which time he became a maintenance technician. However, there is no evidence of temporary assignment of duties and/or temporary interchange between the classifications.

C. Other Employees

There are approximately 404 other hourly employees employed by the Employer at the Facility. There are approximately 367 General Warehouse Co-Workers, approximately 10 Stock Controllers, approximately 10 Recovery Co-Workers, approximately 9 Internal Haulers, approximately 7 Cleaners, and 1 Auditor.²⁹

²⁹ The job posting for General Warehouse Co-workers states that its function is DC Operations and that they report to the Warehouse Team Leader. It further states that the core responsibilities include the following: (i) assume major responsibility for shipping, receiving, block/storage; (ii) unload and properly handle all inbound/outbound merchandise; (iii) secure merchandise properly to allow for safe movement through the distribution center; (iv) verify articles received against corresponding paperwork, note any discrepancies to ensure 100% inventory accuracy; (v) remove and properly document all damages found or caused on inbound/outbound merchandise; (vi) properly store/stage all pallets in assigned locations; (vii) rotate to all location functions as assigned; (viii) maintain and clean and safe work area in all locations within the distribution center; (ix) attend work and contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers; and (x) perform other duties as assigned.

The job posting for Stock Controller states that its function is Inventory and that they report to the Inventory Control Team Leader. It further states that the core responsibilities include the following: (i) support overall IKEA inventory routines; (ii) proactive cooperation and contribution with colleagues inside and outside the department with the aim to minimize all inventory adjustments/deviations; (iii) process daily ship zero report including counting of address; (iv) process daily stock control paperwork and requests; (v) cycle count annually and correct/report deviations; (vi) audit picked pallets based on agreed requirements; (vii) ensure that goals and KPIs are met and results delivered; (viii) perform other duties as assigned; and (ix) contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

The job posting for Recovery Co-worker states that its function is DC Operations and that they report to the Quality Team Leader. It further states that the core responsibilities include the following: (i) proactive cooperation and contribution with colleagues inside and outside the departments with the aim to minimize all internal damages or other costs related to IKEA products; (ii) perform investigations with 48 hours of receipt of request based on the information received; (iii) complete all repairs in accordance with work orders and protocol; (iv) ensure smooth flow of product through the Recovery/Repair area; (v) check all damages, ensure all articles which are considered to be

In addition to the different duties and skills described in the job postings for the petitioned-for classifications and the other hourly employees, the record also revealed other differences. The other hourly employees have different team leads and different managers. The maintenance technicians' uniforms are different from the uniforms of the other hourly employees. The evidence also reflects that the system for working overtime is different between the maintenance technicians and the other hourly employees.³⁰

There is substantial testimonial evidence regarding the daily interactions between the maintenance technicians and these other hourly employees.³¹ The evidence reflects that the other hourly employees use various pieces of equipment to perform their job duties. Some of the other employees, including the general warehouse co-workers, use a system called a d-log in performing their job duties. The evidence essentially indicates that the maintenance technicians and the power equipment technician perform maintenance work on much of the equipment that the other hourly employees use to complete their job duties.

There is also evidence showing that there are some employees who started out as general warehouse co-workers and then worked their way to become maintenance technicians. However, there is no evidence of other classifications performing the work of a maintenance technician or

saleable are packaged as close to the original packaging as possible, operate re-pack table to create new packaging when necessary; (vi) create and monitor tracking reports measuring results and productivity; (vii) always consider the sustainability impact when deciding when and how to recover product; (viii) perform other duties as assigned; and (ix) contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

The job posting for Internal Hauler states that its function is DC Operations and that they report to the Flow Team Leader. It further states that the core responsibilities include the following: (i) operate yard truck in a safe manner at all times; (ii) coordinate with Flow and Operations to position all trailers and containers for loading and receiving; (iii) maintain a clean and safe work area; (iv) adhere to Internal hauler rules and processes, use creative problem solving skills and analytical skills in reaching decisions and direction; (v) ensure that goals and KPIs are met and results delivered; (vi) contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers; and (vii) perform other duties as assigned.

The job posting for Cleaner states that its function is DC Operations and that they report to the Facilities Team Leader or Manager. It further states that the core responsibilities include the following: (i) operate and maintain sweeper/scrubber machines; (ii) recycling responsibilities, emptying banana boats through the DC, able to empty and trouble shoot bailers; (iii) outside cleaning of docks, parking lots and light landscaping and painting work; (iv) maintain a clean and safe work area in all locations within the distribution center; (v) respond to requests for assistance from maintenance and warehouse staff; (vi) performs other duties as assigned; and (vii) contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

The job posting for Auditor states that its function is DC Operations and that they report to the Inventory Control Team Leader/Manager. It further states that the core responsibilities include the following: (i) collaborate with the Stock Control department to support overall IKEA inventory routines; (ii) audit departmental spreadsheets for discrepancies; (iii) keep track of damages and discrepancy statistics in Excel; (iv) perform general warehouse duties as needed; (v) perform other duties as assigned; and (vi) contribute to an environment where the IKEA culture is a strong and living reality that embraces the diversity of co-workers and customers.

³⁰ Generally, the maintenance technicians do not need pre-approval for overtime and the warehouse co-workers get overtime through a system where a sheet is posted at the SD hub and then the co-workers can sign up if they are interested in working overtime.

³¹ Given that this testimony is not relevant to the issue at hand – which is whether the petitioned-for employees have an internal community of interest to establish that it is *an* appropriate unit – it is not detailed in this decision.

a power equipment technician; nor is there any evidence of temporary assignments between the two petitioned-for classifications and the other classifications.

II. APPROPRIATENESS OF THE PETITIONED-FOR UNIT

A. Relevant Board Law

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

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time, it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc.*, 256 NLRB 1069 (1981). The Act does not require a petitioner to seek representation of employees in the most appropriate unit, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996) (emphasis added).

The appropriateness of the petitioned-for unit is not challenged here in light of the untimely service of the Employer’s Statement of Position and the resulting preclusion. However, I am nevertheless required to determine whether the unit sought is an appropriate unit under Section 9(b) of the Act. In determining the appropriateness of a petitioned-for unit where no party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board applies steps one and three of *Boeing* -- the requirement that any appropriate unit have an internal community of interest and that consideration must be given to the Board’s decisions on appropriate units in the particular industry involved. *Macys West Stores, Inc.*, 32-RC-246415, fn. 1 (unpublished May 27, 2020).

When deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; (4) are functionally integrated with the employer’s other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 6 (2017) (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)). With regard to organization of the plant, the Board has made clear that it will not approve of fractured units – that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). All relevant factors must be weighed in determining community of

interest, including the Board's established guidelines for appropriate unit configurations in specific industries. *PCC Structural*s, 365 NLRB No. 160, slip op. at 11.

B. Application of Board Law to the Instant Case

Based on the record evidence, I find that the evidence is sufficient to establish that the employees in the petitioned-for unit, including maintenance technicians and power equipment technicians, share an internal community of interest to make the unit an appropriate within the meaning of the Act. I further find that the facility, industry, or employer precedent does not alter this conclusion.

i. Employer's Organization

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. In certain circumstances, the Board will approve a unit despite the fact other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1291 (2000).

Here, it is undisputed that the maintenance technicians and the power equipment technician are grouped within Facilities. In addition, these two classifications make up the maintenance group within Facilities. Other classifications are included within Facilities, including the cleaners and the sustainability developer, but they are not considered part of maintenance.³² Thus, the fact that the petitioned-for unit does not include all classifications within Facilities does not mandate that the unit is inappropriate, specially in cases like this one where there is another grouping – the maintenance department – within the larger Facilities.

Thus, this factor weighs in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

ii. Skills and Training

This factor examines whether the petitioned-for employees can be distinguished from one another based on qualifications, skills, or trainings. Evidence that employees must meet similar requirements to obtain employment, that they have similar job descriptions or licensure requirements, that they participate in the same Employer training programs, or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *The Phoenician*, 308 NLRB 826 (1992).

Here, the maintenance technicians and power equipment technicians must meet similar requirements to obtain employment and they have similar licensure requirements. The job postings indicate that maintenance technicians and power equipment technicians are required to have the following same skills or experience: (i) experience with hand tools and their proper use; (ii) proven electrical, mechanical, and/or plumbing skills; (iii) welding and fabrication skills; (iv)

³² While cleaners sometimes go to the maintenance shop, they are not based out of that shop. The record is not clear where the sustainability developer is based when working.

advanced computer skills working in a variety of software; (v) an IKEA forklift driver certification or the ability to obtain one; (vi) ability to lift 50 to 75 lbs; and (vii) an educational degree. Differences include that a maintenance technician must have (i) the ability to troubleshoot electrical problems by reading and following a schematic; and (ii) a minimum of 2 years prior industrial maintenance experience, whereas a power equipment technician must have (i) knowledge of how to use forklifts and other power equipment; (ii) basic MS Computer skills; and (iii) a required minimum of 3-5 years working on electrical forklifts and preferred prior material handling equipment training. The similarity of requirements is greater than the differences between them.

With respect to licenses, the documentary evidence shows that the maintenance technicians maintain licenses for various types of equipment, including the following: Scissor Lift, Crane, Counterbalance, Order Picker, Electronic Pallet Jacks, Reach Inc. Kooi Forks, Boom Lift, and Clamp Truck. It also shows that the power equipment technician maintains licenses for the following types of equipment: Electronic Pallet Jack, Counterbalance, Scissor Lift, and Reach Inc. Kooi Forks. Therefore, the two classifications possess many of the same licenses for various types of equipment. I note, however, that there is insufficient evidence to determine the extent to which maintenance technicians and power equipment technicians use similar equipment in performing their job functions.

The evidence also indicates that maintenance technicians and power equipment technician participate in the same online digital trainings, which apply to all employees.

Overall, this factor weighs in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

iii. Job Functions and Work

This factor examines whether the petitioned-for employees can be distinguished from one another on the basis of job duties or functions or the work they perform. 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 employees work together as a crew, support a finding of similarity of functions. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994).

Here, the job postings indicate that maintenance technicians and power equipment technicians have similar job duties or functions. Specifically, the postings indicate that both classifications are responsible for diagnosing or troubleshooting and repairing equipment and performing inspections and adjustments as prescribed by the manufacturer.. There is no evidence about whether the power equipment technician physically performs any work outside the maintenance shop. Thus, while the record evidence fails to show a high degree of overlap in job functions or performing one another's work, the job postings support a finding of similarity of functions. In other words, both classifications are responsible for repairing and maintaining equipment and therefore perform the same basic function.

The record does not reveal precisely whether the maintenance technician and power equipment technician use similar equipment. Nor does it reveal how the power equipment technician receives work orders.

Overall, though, despite the lacking evidence on details of the power equipment technician's daily tasks, the fact that both classifications perform the same basic function makes this factor weigh slightly in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

iv. Functional Integration

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

Here, the maintenance technicians and the power equipment technician, as a group, fulfill the role of making sure that the Employer's equipment and facilities function so that the Employer's products reach their destination. Ultimately, all the hourly employees work toward the shared goal of making sure that the Employer's products reach their destination, but if the process for making sure that the products reach their destination is stopped for some reason, the maintenance team is there to make sure the disruption is mitigated and lessened as much as possible so that the process can continue. The maintenance technicians and power equipment technician provide maintenance services on various pieces of equipment that are used throughout this process, including conveyors, forklifts, and the ASRS, among others. Thus, although the two classifications may provide different specific maintenance acts during their job duties, they ultimately serve the same purpose.

Thus, this factor weighs in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

v. Contact Among Employees

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

Here, the limited testimonial evidence establishes that the power equipment technician essentially works inside the maintenance shop for the duration of his shift. The maintenance shop

is where the maintenance technicians are based when they are not working in another location throughout the buildings. However, the testimony about the maintenance technicians' various rotations, which includes working on the floor, working preventative maintenance, working on projects, and working in the ASRS does not make clear how much of this work is done in the maintenance shop. Therefore, it is not clear how much work-related contact there is between them. For example, we do not know how often they may work beside each other, whether they ever work on the same piece of equipment, whether the power equipment technician will go out on the floor with the maintenance technician, or whether the power equipment technician also accesses the areas restricted by Employer-issued keys.

Accordingly, this factor does not weigh in favor of finding that the maintenance technicians and power equipment technician share a community of interest, but it does not necessarily cut against it.

vi. Interchange

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

Here, there is no evidence of temporary work assignments between maintenance technicians and the power equipment technician. However, there is evidence that one employee was a maintenance technician from September 2010 through May 2012, then was a power equipment technician from May 2012 through August 2020, and then returned to the maintenance technician classification in August 2020. There is also evidence that another employee was a power equipment technician from June 2008 through August 2020, at which time he became a maintenance technician.

Thus, while this factor does not strongly support finding that the maintenance technicians and power equipment technician share a community of interest, it does not necessarily cut against such a finding.

vii. Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion (e.g., hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. However, the fact employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate area. *Bradley Steel, Inc.*, 342

NLRB 215 (2004); *Overnite Transportation Co.*, 322 NLRB 347 (1996). Similarly, sharing a common personnel system for hiring, background checks and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corp.*, 221 NLRB 1145 (1996).

Here, the maintenance technicians and the power equipment technician are hourly employees. Although the record evidence is not clear as to whether they receive similar wage rates or are within the same wage ranges, it is undisputed that they have the same fringe benefits, are subject to the same Employer work rules and policies, and are subject to the same Employer code of conduct.

The record is not clear as to whether the power equipment technician wears the same fire-retardant long sleeve shirt and pants as the maintenance technician. The testimony indicates that maintenance technicians are issued a uniform so that they can be highly visible when they are on the floor, but it is not clear whether this includes the power equipment technician, nor is it clear whether the power equipment technician ever works on the floor such that he would need a uniform to be highly visible. However, the record indicates that they both wear the same badges and steel-toed boots.

Overall, there are more similarities in terms and conditions than differences and, therefore, this factor weighs in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

viii. Supervision

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

Here, the maintenance technicians and the power equipment technician share the same direct supervisor - Maintenance Team Lead Mitchell Newman. Although there is no evidence regarding Newman's authority to hire, to fire, or to discipline his direct reports (or effectively recommend those actions), or regarding whether Newman evaluates or rates his direct reports, Newman testified that he is responsible for monitoring his reports' workload and making sure that everyone has their work on a daily basis. In other words, it appears that he directs and/or

assigns work to his direct reports. The testimony further indicates that Newman's direct reports receive most of their work from their team lead, as opposed to from other team leads or coworkers.

Thus, this factor weighs in favor of finding that the maintenance technicians and power equipment technician share a community of interest.

ix. Summary of Community of Interest Factors Analysis

Based on the foregoing, considering all the community of interest factors, the evidence supports finding that the maintenance technicians and power equipment technician share an internal community of interest, therefore satisfying step one of *Boeing*. In reaching this conclusion, I rely on the grouping of the maintenance technician and power equipment technician under maintenance within Facilities, the common skills and training required to obtain employment in the two classifications, as well as the similar licensure requirements. I also rely on the fact that the two classifications perform the same basic function and to the extent that there is some overlap in certain job functions, this too supports finding a community of interest. The petitioned-for employees also have common terms and conditions of employment and share supervision. Furthermore, the functional integration between the two classifications also supports finding that they share a community of interest. I acknowledge, though, that interchange was effectively neutral and that there is insufficient specific evidence of contact among the employees other than the fact that they work out of the maintenance shop. This lack of evidence, even if it indicated differences between the two classifications, would not be enough to outweigh all the other factors detailed above that support finding an internal community of interest.

I also must recognize that had the Employer timely served the Statement of Position on the Petitioner and, therefore properly asserted that additional employees must be included in the petitioned-for unit to render it appropriate, step two of *Boeing* would have applied and a different conclusion may have been reached. However, that is not the situation and/or question before me.

Thus, considering all the factors as a whole, I find that the evidence establishes that the petitioned-for unit of maintenance technicians and power equipment technicians share an internal community of interest.

x. Facility, Industry, or Employer Precedent

Having satisfied step one of *Boeing*, step three of *Boeing* considers facility, industry, or employer precedent. Here, there does not appear to be any special facility or industry guidelines that apply to this case that would change my determination on the appropriateness of the petitioned-for unit. With respect industry guidelines, in *Boeing* the Board cited situations involving public utilities, defense contractors, and retail establishments as examples of industries that may have industry-specific guidelines. 368 NLRB No. 67, slip op. at 1 (2019). None of those situations are present in the instant matter. In addition, *Boeing* generally involved the production and maintenance industry and the Board determined that no industry-specific guidelines were applicable to the case. *Id.*

Moreover, the fact that the Petitioner seeks a less-than-plantwide unit in this industry does not require that it meet a higher burden. In *Boeing*, the Board specifically stated that no case “establishes that a less-than-plantwide manufacturing unit is presumptively inappropriate, or that a petitioner seeking such a unit bears any heightened burden of proving that it is appropriate.” 368 NLRB No. 67, slip op. at 6. Rather, “the Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate.” *Id.*, citing *Montgomery Ward & Co.*, 150 NLRB 598, 601 (1964) (citing cases) (petitioned-for unit of automotive service center service department employees was appropriate, even though the employer contended that only a storewide-unit was appropriate). Accordingly, the necessary industry and facility considerations do not change my determination that the petitioned-for unit is *an* appropriate unit.

With respect to the consideration of employer precedent, it is true that the record does not contain evidence regarding the Employer’s precedent because the Hearing Officer did not call one of the Employer’s offered witnesses. Specifically, the Employer offered a witness that would have been able to testify to the makeup of bargaining units at the Employer’s facilities across the country.³³ However, even if the Hearing Officer had called the witness and the witness had testified as outlined in the offer of proof, that would not change the outcome of my determination that the petitioned-for unit is an appropriate unit. Based on the offer of proof, the testimony would have shown that at some of the Employer’s other distribution centers, there is one IAM bargaining unit that covers the maintenance and production employees. Here, however, IAM is not seeking to represent only the maintenance technicians and the power equipment technician. Rather, an entirely different union is seeking to represent maintenance employees and, therefore, the Employer precedent does not establish that a smaller unit within the larger unit would be inappropriate.

Thus, considering steps one and three of *Boeing*, I find that the evidence establishes that the petitioned-for unit of maintenance technicians and power equipment technicians share a community of interest sufficient to establish that it is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

III. METHOD OF ELECTION

A. The COVID-19 Pandemic in the United States

On March 13, President Donald J. Trump issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”³⁴ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and

³³ The Employer submitted an offer of proof that Associate General Counsel for Labor Relations Carlisle Michael Bostic would testify concerning the makeup of bargaining units at the Employer’s facilities across the country, including in Westampton, New Jersey; Perryville, Maryland; Tacoma, Washington; Savannah, Georgia; and Joliet, Illinois. Specifically, Mr. Bostic would testify that at these facilities, there is one IAM bargaining unit that includes maintenance coworkers along with all other production employees at the distribution centers.

³⁴ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed November 2, 2020).

Prevention (CDC),³⁵ an agency of the United States government, has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and recommends that people avoid close contact with other individuals who do not live in the same household.³⁶ According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.” *How It Spreads*.³⁷ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. *How to Protect Yourself & Others*.³⁸

The CDC has also published reports regarding pre-symptomatic and asymptomatic transmission of COVID-19, including the *Emerging Infectious Disease Journal* (Online Report) for July, “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Pre-symptomatic or Asymptomatic.”³⁹ The Online Report emphasizes, “transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” Despite these unprecedented efforts to limit transmission, as of November 5, over 9.4 million people in the United States have been infected with COVID-19 and 233,129 people have died.⁴⁰

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”⁴¹ These voting alternatives

³⁵ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (last accessed November 2, 2020).

³⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed November 2, 2020); “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed November 2, 2020).

³⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed November 2, 2020).

³⁸ *Ibid.*

³⁹ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed November 2, 2020). See also, “The implications of silent transmission for the control of COVID-19 outbreaks.” *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“even if all symptomatic cases are isolated, a vast outbreak may nonetheless unfold ... we found that the pre-symptomatic stage and asymptomatic infections account for 48% and 3.4% of transmission, respectively”). This article was subsequently updated on July 28, 2020 to observe that, based on current data, that “silent transmission during pre-symptomatic and asymptomatic stages are responsible for more than 50%” of infections (last accessed November 2, 2020).

⁴⁰ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴¹ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last accessed November 2, 2020). See also Governor of the State of California Executive Order N-64-20. <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to

recommended by the CDC include mail ballots. The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes," but "it is unlikely to be spread from domestic or international mail, products or packaging." *Am I at risk for COVID-19 from mail, packages, or products?*⁴² To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol." *Running Errands.*⁴³

B. The COVID-19 Pandemic in California and Kern County

The Employer's Lebec, California facility is located in Kern County. Many state and municipal governments have issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 4, the Governor of the State of California (Governor) declared a "State of Emergency to Help State Prepare for Broader Spread of COVID-19."⁴⁴ On March 19, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations for the Federal Critical Infrastructure Sectors.

On May 4, the Governor issued a press release⁴⁵ announcing that based on California's progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is "still dangerous and poses a significant public health risk." The Governor further announced that while California would be moving from Stage 1 to Stage 2, its "counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020." *Ibid.* Despite these measures, however, reported cases of COVID-19 have continued to climb in California to its current level of 944,576 cases and 17,815 deaths as of November 5.⁴⁶

The California Department of Public Health (CDPH) monitors data related to COVID-19 for each of California's 58 counties, including Kern County. If a county did not remain below established thresholds for a seven-day average for positive cases per day, elevated disease transmission, increasing hospitalization, and limited hospital capacity, it was placed on the County Monitoring List, which was then used to reinstitute health measures such as closing business sectors and restricting gatherings and travel.

ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...") (last accessed November 2, 2020).

⁴² See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed November 2, 2020).

⁴³ See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (updated August 3, 2020; last accessed November 2, 2020).

⁴⁴ See <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/> (last accessed November 2, 2020).

⁴⁵ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/> (last accessed November 2, 2020).

⁴⁶ <https://www.Covid19.CA.Gov>.

On July 2, the Governor ordered 19 counties (Health Officer Orders), including Kern County, that had been on the County Monitoring List for three consecutive days to “close all bars, pubs, brewpubs, and breweries, whether operating indoors or outdoors” and cease indoor services for restaurants, wineries and tasting rooms, family entertainment centers and movie theaters, zoos, museums, and cardrooms.⁴⁷ The Health Officer Orders also noted, “[p]ublic health studies have shown that the risk of transmission is exacerbated in indoor spaces, particularly when lacking appropriate ventilation.”

On July 13, after 29 counties, including Kern County, had remained on the County Monitoring List for at least three consecutive days, the Governor expanded the restrictions from the previous Health Officer Orders to the rest of the state and reinstated additional closures for Kern County and others on the County Monitoring List to include the indoor operations of gyms and fitness centers, places of worship, indoor protests, offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.⁴⁸ On August 28, California unveiled its Blueprint for a Safer Economy, a new framework replacing the County Monitoring List for reopening its economy in light of COVID-19. As of November 5, Kern County remained in the top tier of counties most impacted by COVID-19, where the virus is “substantial” and “[s]ome non-essential indoor business operations are closed.”⁴⁹ Notably, Kern County was previously listed as “moderate,” which means that its current designation as “substantial” indicates that conditions in the county are getting worse.

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of November 5, according to data released by the Kern County Department of Public Health, there have been 34,973 confirmed cases of COVID-19 in Kern County and 428 people have died from COVID-19.⁵⁰ In fact, as of November 5, Kern County had the sixth highest total number of positive cases among the 58 counties in California.⁵¹

C. The Employer’s Response to COVID-19 and Proposed Safety Precautions for a Manual Election

As an essential business, the Employer remains operational during the COVID-19 pandemic, and its employees continue to report to work at the Facility and perform their regular duties.⁵² The record does not include information about whether the Employer has implemented safety protocols and social distancing practices in line with state and local health orders as it has continued to operate during the COVID-19 pandemic, such as (a) mandating face coverings or

⁴⁷ See <https://kernpublichealth.com/wp-content/uploads/2020/07/Order-Closing-Indoor-Services-and-Sectors-Kern.pdf> (last accessed November 2, 2020)

⁴⁸ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf> (last accessed November 2, 2020).

⁴⁹ “Blueprint for a Safer Economy.” <https://covid19.ca.gov/safer-economy/> (last accessed November 5, 2020).

⁵⁰ See https://kernpublichealth.com/covid-19_dashboard/ (last accessed November 5, 2020).

⁵¹ See https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no (last accessed November 5, 2020).

⁵² While this was not made explicitly clear on the record, it became evident based on the testimony of various witnesses.

masks for all employees and visitors when within 6 feet from another individual,⁵³ (b) employees' hands must be washed before and after every shift, break, smoke break, restroom visit, or in the event an employee is visibly soiled with an unknown substance; (c) all work areas are to be sanitized before the end of every shift (to include tools used by employees throughout their shifts); (d) employees are required to monitor hygiene and health at all times; (e) thermometers are on hand and used every day to monitor employee temperatures at the beginning of every shift; and (f) health status forms have been completed by all employees and must be immediately updated when an employee's health status changes. The record also does not include information about whether personal protective equipment (PPE) is provided by the Employer or the employees.

As of the end of the hearing, the Employer reported that since August 1, thirteen of its employees at the Facility had tested positive for COVID-19. It did not have information regarding the number of employees who have exhibited symptoms of COVID-19 or were subject to a quarantine for any reason related to COVID-19.

The Employer argues that any election should be by manual ballot at its Lebec, California facility and that it can safely hold an open-air election at the facility in compliance with all local, state, and federal guidelines and consistent with the protocols described in General Counsel Memorandum 20-10. The Employer states that it will provide all materials required by General Counsel Memorandum 20-10, including, but not limited to, disposable pencils without erasers for each voter to mark their ballot; glue sticks or tape to seal challenge ballot envelopes; separate tables placed at least 6 feet apart for the Board Agent, ballot booth, and ballot box; plexiglass barriers of sufficient size to protect the observers and the Board Agent and to separate the observers and Board Agent from voters and one another as well as others they may come in contact with during the pre-election conference and/or ballot count; and masks, sanitizer, and gloves for the observers. Further, the Employer states that all voters, observers, party representatives and other participants will be required to wear CDC-conforming masks in all areas related to the election, and signs will be placed immediately adjacent to the Notice of Election to notify all involved parties of this requirement.

In the event the Regional Director were to direct an election, the Employer proposed an election on Wednesday, December 16, from 4:30 a.m. to 6:00 a.m. and 2:30 p.m. to 4:00 p.m. It also asserted at the hearing that Spanish language ballots would be needed.

D. The Petitioner's Position

The Petitioner supports either a mail or manual ballot election. If a manual election were directed, the Petitioner proposed polling times from 9:00 a.m. to 11:00 a.m.; 5:00 p.m. to 8:00 p.m.; and 11 p.m. to 2:00 a.m. The Petitioner also agreed that Spanish language ballots would be needed.

⁵³ There is evidence that the Employer has required employees to complete trainings on social distancing.

E. Agency Directives and Legal Authority

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. Regional Directors have an obligation to appropriately exercise their discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has acknowledged that circumstances may necessitate adaptations on the Board's part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that "circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions." 120 NLRB at 1346, citing *Shipowners' Assn. of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, "[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted." *Id.*; see also *NLRB Casehandling Manual (Part Two) Representation Procedures* Sec. 11301.2 (Casehandling Manual).⁵⁴ Thus, "[o]nly where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him [or her] to conduct representative elections will the Board nullify an election and prescribe other election standards." *National Van Lines*, 120 NLRB at 1346.

The Board has determined that there are some instances in which a mail ballot election is appropriate because "of circumstances that would tend to make it difficult for eligible employees to vote in a manual election." *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that "extraordinary circumstances" may warrant a departure from the specific guidelines articulated in that case. *Id.*

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, a Regional Director may exercise discretion to order a mail ballot election where conducting an election manually is not feasible and, under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. In addressing the COVID-19 pandemic, the Board has recognized the

⁵⁴ I note the provisions of the *Casehandling Manual* are not binding procedural rules; the *Casehandling Manual* is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Aaron Medical Transportation, Inc.*, Case 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007)); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

discretion afforded to Regional Directors in election matters. In this regard, when the Board issued an announcement titled “COVID-19 Operational Status”⁵⁵ on April 17 regarding the COVID-19 pandemic, it stated in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On July 6, General Counsel Peter Robb issued a memorandum titled “Suggested Manual Election Protocols.” (GC 20-10). In that memorandum, the General Counsel acknowledges that the protocols suggested therein are not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, and he reiterates that Regional Directors have the authority, delegated by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted.” The General Counsel further notes Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

Among other suggestions in GC 20-10, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, come into contact with someone who tested positive within the preceding 14 days, are not awaiting test results, and are not exhibiting COVID-19 symptoms.⁵⁶ GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation.

In several recent Orders, the Board has continued to find the ongoing COVID-19 pandemic to be “extraordinary circumstances” as contemplated by *San Diego Gas*.⁵⁷ With

⁵⁵ See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

⁵⁶ I note the self-certifications in GC 20-10 specify only three symptoms of COVID-19: a fever, cough, or shortness of breath. However, the CDC and State of California all list 11 symptoms: 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, and diarrhea. The CDC also explains that the list is not all inclusive. See CDC’s “Symptoms of Coronavirus,” <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>; and California’s “Symptoms and risks,” <https://covid19.ca.gov/symptoms-and-risks/> (last accessed November 2, 2020).

⁵⁷ See, e.g., *Brink’s Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020) (denying review of Regional Director’s decision to order a mail ballot election); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4,

respect to GC 20-10, the Board did not formally adopt its guidance, noting only the following: “The Board will continue to consider whether manual elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.” *Brink’s Global Services USA, Inc.*, 29-RC-260969, fn. 2 (unpublished July 14, 2020).⁵⁸

I note that the Board has denied review of Regional Directors’ decisions to conduct mail ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves).⁵⁹ Similarly, in *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020), the Board denied the employer’s request for review and upheld my decision to order a mail ballot election even though the Employer proposed many of the same safety protocols and also proposed an outdoor polling place.⁶⁰

F. Analysis

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail ballot election is appropriate requires considering in each case both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. I recognize that the Board has traditionally preferred manual elections. However, I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety concerns in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

I acknowledge that absent the public health concerns arising from the pandemic, I would order a manual election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. I recognize some degree of reopening has begun, in the United States generally and in California specifically. I also recognize that in Kern County, not only does COVID-19 remain present in the local community, but it continues to be classified as “substantial.” As noted above, current Federal, State, and Kern County public health guidance continues to strongly recommend discouraging gatherings to reduce the risk of exposure to and spread of COVID-19, and a mail ballot election minimizes such risk.

2020) (same); *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020) (same); *Tredroc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same).

⁵⁸ The Order is available on the Board’s public website at <https://www.nlr.gov/case/29-RC-260969>.

⁵⁹ The Regional Director’s Decision and Direction of Election, dated May 7, 2020, and the Board’s May 18, 2020 Order are available on the Board’s public website at <https://www.nlr.gov/case/16-RC-256972>.

⁶⁰ My Decision and Direction of Election and the Board’s Order are available on the Board’s public website at <https://www.nlr.gov/case/31-RC-262633>.

Thus, based on the facts outlined above and for the reasons detailed below, I find that it is appropriate to direct a mail ballot election in this case because: the current pandemic conditions constitute extraordinary circumstances that merit deviation from a manual election; a mail ballot election is the safest method of conducting an election under the circumstances; and, in comparison to a manual election, a mail ballot election avoids disenfranchising voters due to the pandemic.

i. The Risks Associated With the COVID-19 Pandemic Constitute Extraordinary Circumstances

Although questions regarding the transmission of SARS-CoV-2 and the nature of COVID-19 abound, the basics of the pandemic from a public health perspective are at this point quite familiar: it is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees' union representation preferences in light of the current COVID-19 situation in Kern County. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. The Employer's employees remain working at the Employer's facility because they perform essential services, and because of the nature of the work, no alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

Manual election procedures inherently require substantial interaction, and that interaction generates risk. I appreciate the Employer's efforts to mitigate this risk by making certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 in Kern County, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. Moreover, since August 1, thirteen employees at this facility have tested positive for COVID-19 and the Employer did not provide the statistics as to the number of its employees who have exhibited symptoms or been quarantined because of the current COVID-19 pandemic. Even without this additional information, the fact that thirteen employees have tested positive since August 1 represents a greater risk associated with holding a manual election at the Employer's facility.

With respect to the inevitable interactions and risk of exposure necessitated by a manual election, voters, observers, and party representatives, as well as the Board agent, would all need to travel to and appear at the Lebec facility to participate in the election. In addition, the Board agent would likely have to stay overnight near the facility in order to conduct an election that accommodates petitioned-for employees on three different Employer shifts. Party representatives, the observers, and the Board agent usually would gather for approximately 15 to 30 minutes for the pre-election conference, including inspection of the voting area, though I recognize that GC 20-10 suggests that this may could take place by video. Even though the Employer has proposed utilizing an open-air tent separate from the facility, the Board agent and

observers would need to share the same tent area for a period of at least three to six hours during the polling periods, plus the vote count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must provide a ballot to each voter, which per GC 20-10 could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election, the Board agent and observers might need to use a restroom at the facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, which is typically done in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend together beyond simply the voting period windows. In addition to the Board agent and observers being exposed to each other for an extended period of time, they also would be exposed, albeit briefly, to many people during the course of conducting the election. Furthermore, the Employer proposed two separate voting periods, the first starting at 4:30 a.m. and the last ending at 4:00 p.m., which raise additional concerns because such an election would require the Board agent coming from the Regional Office in West Los Angeles to spend the entire day in a public place in Kern County, and at least one night, further increasing the Board agent's potential exposure to COVID-19.⁶¹

As noted above, the Employer has incorporated many of the accommodations used to combat the spread of COVID-19 in its plan for a manual election, such as social distancing, the use of plexiglass shields, and face coverings. However, in my view, in light of the current circumstances in Kern County, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This increased interaction may be minimal, such as an employee standing in a line 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.

Furthermore, the fact that a large percentage of virus transmission is through pre-symptomatic or asymptomatic carriers exacerbates the risk for all election participants. According to the CDC, the "current best estimate" is that 50% of COVID-19 transmission occurs

⁶¹ I also note that the Mayor of the City of Los Angeles issued an order on August 7, 2020 requiring residents of the City of Los Angeles to remain at home, with some exceptions (August 7, 2020 Order); see "[Public Order Under City of Los Angeles Emergency Authority](#)" (last accessed November 2, 2020). Although a Board agent traveling from the City of Los Angeles to Lebec to conduct the election would not necessarily violate the August 7, 2020 Order, I do note that a Board agent traveling from Los Angeles for the election (including – as noted above – having to spend a large part of the day in some public place in Kern County) would be counter to the August 7, 2020 Order's directive that "Angelenos must minimize contact with others as much as possible," insofar as it is possible here to eliminate such contact by conducting a mail ballot election.

while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic⁶² and would neither be identified nor have sought testing. Setting aside the observers and Board agent, who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.⁶³ Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling area and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. Here, while voters may proceed in and out of the open-air tent in an orderly manner, the number of people to whom the observers and the Board agent will be exposed to over an extended period of time still presents significant risk. Further, a manual election would require a Board agent to travel approximately 80 miles at a time when travel is discouraged.

Again, given the fact that thirteen employees at this facility have tested positive since August 1, and absent the information regarding the number of employees who have exhibited symptoms or been directed to quarantine, I must assess the risks involved at the Employer’s facility in particular. Simply stated, the inherent risk in conducting a manual election during the current pandemic has been exacerbated by the Employer’s employees already having been exposed to or infected with the COVID-19 virus.

After considering all the current circumstances described above, I find holding a manual election at the Lebec facility would entail significant risk to all involved. Accordingly, I find this risk constitutes extraordinary circumstances that make a mail ballot election appropriate.

ii. A Mail Ballot Election is the Safer Alternative

A mail ballot election does not present greater risks due to the need to touch the mail. As cited previously, CDC guidance states that the virus is unlikely to be spread from products or packaging that are delivered by mail. Further, the CDC’s guidance on mitigating this risk, that an individual wash their hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol after collecting mail, is far easier to implement than the risk mitigation involved with the Employer’s manual election proposal. Thus, I find that a mail ballot election is the safest method of conducting an election under the circumstances.

⁶² “Pandemic Planning Scenarios” (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed November 2, 2020). See also “Temporal dynamics in viral shedding and transmissibility of COVID-19” (April 15, 2020). *Nature*. <https://www.nature.com/articles/s41591-020-0869-5> (“We estimated that 44% ... of secondary cases were infected during the index cases’ presymptomatic stage ...”)

⁶³ “Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions.” *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020. https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed November 2, 2020). See also, “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed November 2, 2020).

iii. Disenfranchisement is a Greater Risk in a Manual Election

As I stated previously, absent the current pandemic, I likely would order a manual election in this case. As the Board recognized in *San Diego Gas*:

[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. Furthermore, the timeframe of the mail ballot election I am ordering will provide plenty of time for mail to be delivered, even if slightly delayed, and in my view any potential delay in the mail does not justify the risk of catching a potentially deadly virus posed by a manual election.

I also note that conducting manual elections under the current circumstances poses a risk of disenfranchising voters. The Board's manual election procedures do not contain an absentee or remote voting option; if a manual election is ordered, an employee must appear in person at the polls to vote. Obviously, any employee currently infected or infected between now and the date of a manual election and who remained infected on the date of the election would be unable to vote. Moreover, any voter exposed to the virus or awaiting test results and subject to the recommended 10-day quarantine period would likewise be unable to vote in the election. In light of the current conditions in Kern County, the potential for voter disenfranchisement is real. Furthermore, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation. A mail ballot election would avoid the potential disenfranchisement of employees who are unable to vote because they contracted COVID-19, recently were exposed to it, or simply had a fever on the day of the election.

iv. A Mail Ballot Election is Appropriate Under the Current Extraordinary Circumstances

While I do not find a manual election to be impossible, I have determined that, under the current circumstances in Kern County, conducting a mail ballot election is the most responsible and appropriate method of holding an election without undue delay. Admittedly, the suggested manual election protocols outlined in GC 20-10, along with the Employer's proposed procedures for a manual election, would reduce the risk of contracting COVID-19 if exposed to it during the election. However, even assuming these protocols could adequately be enforced without disenfranchising voters or postponing or canceling the election, there is no evidence in the record or publicly available, and backed by scientific studies, to establish that following these protocols would reduce the risk to an acceptable level under current circumstances at the location where the election would take place. To the extent that the protocols would reduce the risk, I find that the remaining risk of exposure to and of contracting COVID-19 given the current conditions in the State of California and in Kern County specifically still establishes the kind of "extraordinary

circumstances” that make directing a mail ballot election appropriate. Moreover, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages alternative methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board’s duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees’ union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency’s obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

IV. CONCLUSIONS AND FINDINGS

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

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.⁶⁴
3. The parties stipulated and I find that 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. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. I find that the following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

⁶⁴ The Employer, IKEA Distribution Services, Inc., a Delaware corporation with a place of business located in Lebec, California, is engaged in the business of providing warehousing and logistic services. Within the last 12 months, a representative period, the Employer provided services valued in excess of \$50,000 in States other than the State of California.

Included: All full-time and regular part-time maintenance technicians and power equipment technicians employed by the Employer at its Lebec, California facility.

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

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 15 employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **UNITED MAINTENANCE TECHNICIANS OF TEJON**.

A. Election Details

For the reasons I have explained above, the election will be conducted by mail.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at **5:00 p.m. on Tuesday, November 17, 2020**. Ballots will be mailed to voters by the National Labor Relations Board, Region 31. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Tuesday, November 24, 2020**, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by calling the Region 31 Office at (310) 235-7352.

The returned ballots must be received by the Region 31 office by **5:00 p.m. on Tuesday, December 8, 2020**. All ballots will be commingled and counted by the Region 31 office at **2:00 p.m. on Thursday, December 10, 2020**. In order to be valid and counted, the returned ballots must be received by the Region 31 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Saturday, October 24, 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 by mail as described above.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Monday, November 9, 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.** The Petitioner has waived its right to possess the voter list for 10 days prior to the date of the election and waives its right to file objections over this issue.

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.

The list must be filed electronically with the Region and served electronically on the other parties named in this Decision. The list must 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 in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. English and Spanish-language versions of the Notice of Election will be sent by the Region separately. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for

review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Los Angeles, California this 5th day of November 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1753

EXHIBIT 3

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

IKEA DISTRIBUTION SERVICES, INC.,	:	
	:	
Employer,	:	
	:	
and	:	Case 31-RC-266527
	:	
UNITED MAINTENANCE, TECHNICIANS OF TEJON	:	
	:	
Petitioner.	:	

DECLARATION OF JEREMY HART

I, Jeremy Hart, pursuant to 28 U.S.C. §1746, hereby declare as follows:

1. I have personal knowledge of the matters set forth in this declaration and would be competent to testify thereto at a hearing in this matter.
2. I am an attorney with BakerHostetler LLP. I am one of the attorneys of record for IKEA Distribution Services, Inc. (“IKEA”) in this matter.
3. At 11:22a.m. PST on October 5, 2020, on behalf of IKEA, I filed a Statement of Position in Case 31-RC-266527 with Region 31 of the National Labor Relations Board. A true and accurate copy of the E-Filing Confirmation for the Statement of Position is attached hereto as Exhibit A.
4. I served IKEA’s Statement of Position on Petitioner United Maintenance Technicians of Tejon by email to Michael Wedeking on October 5, 2020 at 1:41p.m. PST. A true and accurate copy of the service email to Mr. Wedeking is attached hereto as Exhibit B. The service email was sent from Ohio and so reflects a service time of 4:41p.m. EST.

5. The Statement of Position was served on Petitioner at 1:41p.m. PST instead of prior to 12:00p.m. PST on October 5, 2020 due to an inadvertent oversight. I served the Statement of Position on Petitioner as soon as I realized my error.

6. On October 14, 2020, at the pre-election hearing in this matter, the Regional Director for Region 31 of the National Labor Relations Board precluded IKEA from litigating any issues raised in its Statement of Position under Section 102.66(d) of the Board's Rules and Regulations due to the delay in serving the Statement of Position on Petitioner. I have reason to believe that the preclusion rule set forth in Section 102.66(d) of the Board's Rules and Regulations is inconsistently applied by the Regional Offices of the National Labor Relations Board.

7. On October 20, 2020, I filed a Freedom of Information Act request seeking all instances from April 14, 2015 to present in which the Regional Offices of the National Labor Relations Board have applied or chosen not to apply Section 102.66(d) to preclude or not to preclude any party from taking any action or fully participating in any representation hearing. A true and accurate copy of my October 20, 2020 Freedom of Information Act request confirmation is attached hereto as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 12, 2020

/s/ Jeremy Hart
Jeremy Hart

Exhibit A

Hart, Jeremy

From: NLRBRegion31@nrlb.gov <e-Service@service.nrlb.gov>
Sent: Monday, October 5, 2020 2:27 PM
To: Hart, Jeremy
Subject: RE: 31-RC-266527 - Statement of Position in R Case

[External Email: Use caution when clicking on links or opening attachments.]

Confirmation Number: 1056902200

You have successfully accomplished the steps for E-Filing document(s) with the NLRB Region 31, Los Angeles, California. This E-mail notes the official date and time of the receipt of your submission. Please save this E-mail for future reference.

Date Submitted:	Monday, October 5, 2020 11:22 AM (UTC-08:00) Pacific Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 31, Los Angeles, California
Case Name:	IKEA Distribution Services, Inc.
Case Number:	31-RC-266527
Filing Party:	Employer
Name:	Jeremy Hart
Email:	jhart@bakerlaw.com
Address:	200 Civic Center Dr. Suite 1200 Columbus OH 43215
Telephone:	(614) 462-5127
Attachments:	Statement of Position in R Case: 31-RC-266527-- IKEA Statement of Position--For Filing.pdf

DO NOT REPLY TO THIS MESSAGE. THIS IS A POST-ONLY NOTIFICATION.
MESSAGES SENT DIRECTLY TO THE EMAIL ADDRESS LISTED ABOVE WILL NOT BE READ.

Exhibit B

Hart, Jeremy

From: Hart, Jeremy
Sent: Monday, October 5, 2020 4:41 PM
To: 'mike_wedeking@yahoo.com'
Subject: IKEA Distribution Services, Inc. 31-RC-266527
Attachments: 31-RC-266527-- IKEA Statement of Position--For Filing.pdf

Mr. Wedeking:

Attached please find IKEA Distribution Services, Inc. Statement of Position in the above referenced matter.

Thank you,

Jeremy Hart

Jeremy Hart

BakerHostetler

200 Civic Center Drive | Suite 1200
Columbus, OH 43215-4138
T +1.614.462.5127

jhart@bakerlaw.com
bakerlaw.com



Exhibit C

Hart, Jeremy

From: admin@foiaonline.gov
Sent: Tuesday, October 20, 2020 3:53 PM
To: Hart, Jeremy
Subject: FOIA Request NLRB-2021-000064 Submitted

[External Email: Use caution when clicking on links or opening attachments.]

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: NLRB-2021-000064
- Requester Name: Mr. Jeremy Hart
- Date Submitted: 10/20/2020
- Request Status: Submitted
- Description: From April 14, 2015 to present, all National Labor Relations Board documents and/or records, including but not limited to electronic mail, hearing transcripts, internal memoranda, Regional determinations, notes, motions, rulings, or any other document or record of any kind, including documents from any Regional Office, related in any way to any Region's application or non-application of 29 CFR 102.66(d) to preclude or not to preclude any party from taking any action or fully participating in any representation hearing.

Exhibit 4

Wedeking, Michael P

10032956

10/05/2020, Selected Date

ALL HOME

Date	Schedule	In	Out	Transfer	In	Out	Transfer	Pay Code	Amount	Shift	Daily
Mon 10/05		4:58AM	9:18AM		9:48AM	1:33PM				8.0	8.0

Totals Add-on

All

Account

Account	Pay Code	Amount
	USA REGULAR	8.0

Exhibit 5

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

MACY'S WEST STORES, INC.

Employer

and

Case 32-RC-246415

TEAMSTERS LOCAL 287

Petitioner

ERRATA

An Order Directing Hearing and Notice of Hearing on Challenged Ballots and Objections to Conduct of the Election issued on September 23, 2019. The Employer's name in the Heading was incorrect. Attached is a corrected first page.

Dated at Oakland, California on the 24th of September 2019.

/s/ Valerie Hardy-Mahoney

Valerie Hardy-Mahoney
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street Suite 300N
Oakland, CA 94612-5224

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

MACY’S WEST STORES, INC.

Employer

and

Case 32-RC-246415

TEAMSTERS LOCAL 287

Petitioner

**ORDER DIRECTING HEARING AND NOTICE OF HEARING ON CHALLENGED
BALLOTS AND OBJECTIONS TO CONDUCT OF THE ELECTION**

Based on a petition filed on August 12, 2019,¹ and pursuant to a Stipulated Election Agreement, an election was conducted on September 4 and 5, to determine whether a unit of employees of Macy’s Valley Fair Women’s (the Employer) wish to be represented for purposes of collective bargaining by TEAMSTERS LOCAL 287. That voting unit consists of:

All full-time and regular part-time PB Merchandising Associates, Merchandising Associates, Pricing Associates, Receiving Associates, Signing Associates, Visual Merchandisers, Shoe Expeditors, Merchandising Flex Associates, Cosmetics Macy’s Paid Stock Associates, Pricing Flex Associates, Receiving Flex Associates, Signing Flex Associates, Pricing Team Leads, Receiving Team Leads, Shoe Expediter Leads, Signing Team Leads, and Support Team Leads employed by the Employer at its facilities located at 2801 Stevens Creek Boulevard, Santa Clara, CA, 3051 Stevens Creek Boulevard, Santa Clara, CA, 925 Blossom Hill Road, San Jose, CA, 2210 Tully Road, San Jose, CA, and 300 Stanford Shopping Center, Palo Alto, CA; excluding all other employees, employees represented by a labor organization, VP Merchandising Associates, Cosmetics VP Stock Associates, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election

Others permitted to vote: The parties have agreed that Vendor Paid Stock Associates and JC Support may vote in the election, but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in these classifications or groups are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

¹ All dates refer to 2019 unless otherwise specified.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

MACY'S WEST STORES, INC.

Employer

and

Case 32-RC-246415

TEAMSTERS LOCAL 287

Petitioner

AFFIDAVIT OF SERVICE OF: Errata, dated September 24, 2019.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 24, 2019, I served the above documents by electronic mail upon the following persons, addressed to them at the following addresses:

KYMIYA ST. PIERRE, ATTORNEY
JACKSON LEWIS PC
200 SPECTRUM CENTER DR., STE 500
IRVINE, CA 92618-5005
kymiya.st.pierre@jacksonlewis.com
Fax: (949)885-1380

LAURA A. PIERSON-SCHEINBERG, ATTORNEY
JACKSON LEWIS P.C.
50 CALIFORNIA STREET 9TH FLOOR
SAN FRANCISCO, CA 94111-4615
laura.piersonscheinberg@jacksonlewis.com
Fax: (415)394-9401

HEATHER STALLION, STORE MANAGER
MACY'S VALLEY FAIR WOMEN'S
2801 STEVENS CREEK BOULEVARD
SANTA CLARA, CA 95050
heather.stallion@macys.com

HEATHER STALLION, STORE MANAGER
MACY'S VALLEY FAIR MEN'S
3051 STEVENS CREEKS BOULEVARD
SANTA CLARA, CA 95050
heather.stallion@macys.com

SEAN E. TIREMAN, DISTRICT DIRECTOR,
OPS & AP
MACY'S VALLEY FAIR WOMEN'S
2801 STEVENS CREEK BLVD
SANTA CLARA, CA 95050
sean.e.tireman@macys.com

ANTHONY G. PIERCE, STORE MANAGER
MACY'S OAKRIDGE
925 BLOSSOM HILL ROAD
SAN JOSE, CA 95123
anthony.g.pierce@macys.com

EFRAIN LANDEROS, STORE MANAGER
MACY'S EASTRIDGE
2210 TULLY ROAD
SAN JOSE, CA 95112
efrain.f.landeros@macys.com

SCOTT KRANSKY, ASSISTANT STORE MANAGER
MACY'S STANFORD
300 STANFORD SHOPPING CENTER
PALO ALTO, CA 94304
scott.kransky@macys.com

DAVID A. ROSENFELD, ESQ.
WEINBERG ROGER AND ROSENFELD
1001 MARINA VILLAGE PKWY, STE 200
ALAMEDA, CA 94501-6430
drosenfeld@unioncounsel.net;
nlrbnotices@unioncounsel.net
Fax: (510)337-1023

PABLO BARRERA
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 287
1452 NORTH 4TH STREET,
SAN JOSE, CA 95112-4778
organize@mail.com
Fax: (408)453-2034

September 24, 2019

Date

Alice Lafontaine, Designated Agent of NLRB

Name

/s/ Alice Lafontaine

Signature