On March 2, 2020, UNITE HERE, Local 362, AFL-CIO (the Petitioner) filed a representation petition in the above case with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act (the Act), seeking to represent a unit of more than 750 full-time and regular part-time employees employed by Host International, Inc. (HMSHost) (the Employer) at the Orlando International Airport including baristas, bartenders, bussers, cashiers, cooks, crews, dishwashers, hosts, lead employees (also known as shift supervisors), maintenance employees, production employees, runners, runner/drivers, servers, server/bartenders, and utility employees, excluding all office clerical employees, professional employees, guards, managers and supervisors as defined by the Act. A hearing was held by videoconference technology on May 7, June 30 through July 2, and July 27 through July 30, 2020.

1 The correct legal names of the parties, as captioned above, appear in this Decision as stipulated at the hearing.
2 The parties stipulated, and I find, based on the following stipulated facts, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Employer, a Delaware corporation, has facilities located throughout the United States, including a facility located at Orlando International Airport in Orlando, Florida, and is engaged in the sale of food and beverages. During the past 12 months, a representative period, in the course and conduct of its business operations described above, the Employer derived gross revenues in excess of $500,000, and purchased and received at its Orlando, Florida facility goods valued in excess of $50,000 directly from points outside the State of Florida.
3 All dates referenced herein are in 2020, unless otherwise noted.
The issues are: (1) whether shift supervisors are supervisors within the meaning of Section 2(11) of the Act and ineligible for inclusion in any appropriate unit, as the Employer contends, or belong in the petitioned-for unit, as the Petitioner contends; (2) whether employees on furlough or lay-off status are ineligible to vote, as the Petitioner contends, or eligible to vote, as the Employer contends; and (3) whether, if an election is directed, it should be conducted manually, as requested by the Employer, or by mail, as sought by Petitioner. At the hearing, the parties were given the opportunity to appear by video and present witness testimony, exhibits and state their positions on the record. The parties filed post-hearing briefs, which I have carefully considered.

As explained below, based on the record and relevant Board law, I find that the Employer has failed to meet its burden of establishing that the shift supervisors are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that the shift supervisors should be included in an appropriate unit and are eligible to vote.4 I also find that furloughed and/or laid off employees are ineligible to vote in the election because their furloughs and/or lay-offs are not temporary, and they do not have a reasonable expectancy of reemployment in the near future. Finally, because of the extraordinary pandemic circumstances currently existing in Orange County, Florida, where Orlando Airport is located, I have directed a mail ballot election for the health and safety of all concerned in the election process.

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4 The parties stipulated at the hearing that any unit within the meaning of Section 9(b) of the Act that I find appropriate should include all full-time and regular part-time bartenders, bussers, cashiers, cooks, crew members, food preparers, hosts, hostesses, maintenance engineers, runners – no driving, runners – with driving, servers and utility employees employed by the Employer at the Orlando International Airport in Orlando, Florida; and exclude all other employees, Admiral Club floor attendants, floor captains, managers, guards, and supervisors as defined by the Act.
I. FACTS

A. The Employer’s operation at Orlando International Airport.

The Employer operates food and beverage concessions at various locations throughout the United States, including at Orlando International Airport (the Airport). It operates at the Airport pursuant to a concession agreement with Greater Orlando Aviation Authority (GOAA) that is effective until 2025. As part of its operations, before the coronavirus pandemic the Employer operated 26 different restaurants throughout the Airport, including at least six full-service restaurants: Outback Steakhouse (Outback), Bahama Breeze, On The Border, Chili’s, Macaroni Grill, and City Pub. Due to the ongoing pandemic, at the time of the hearing only eight of the restaurants were open – four Starbucks, two Burger Kings, one Chick-fil-A, and one On The Border.\(^5\) The Employer also continues to operate the warehouse/commissary that services the aforementioned restaurants.

Sherry Edwards is the Employer’s Senior Director of Operations at the Airport, and she is the Employer’s most senior employee in operations at that location. In about mid-March the Employer reduced its operations because of the spread of the coronavirus pandemic throughout the United States. Until that time, according to the Employer it employed 861 employees at the Airport in the classifications included in the petitioned-for unit, including 71 shift supervisors. The Petitioner disputes the accuracy of those numbers, but agrees that there are more than 750 employees in the petitioned-for unit, including 63 shift supervisors.

Above the shift supervisors on the Employer’s organizational chart are three Assistant Food & Beverage (F&B) Ops Managers, one Starbucks Assistant Ops Manager, two Starbucks Ops Managers, 25 F&B (Food and Beverage) Ops Managers, and two Assistant Restaurant

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\(^5\) As used herein, the term “restaurant” includes all locations operated by the Employer at the Airport, even if the establishment may not typically be thought of as a restaurant, e.g. Starbucks.
Managers. Above those managers are five F&B Multi-Unit Ops Managers and one General Manager of Outback. Additionally, there is one Warehouse Manager, one F&B Operations Director, one HR (Human Resources) Coordinator, one HR Generalist, one HR Business Partner, one Starbucks Brand Champion, one Commissary Manager, and one Senior Maintenance Manager, all of whom report to Senior Director of Operations Edwards.

B. Due to the impact of the Covid-19 pandemic, the vast majority of the employees in the petitioned-for unit were furloughed.

As the pandemic began to spread throughout the United States, passenger traffic at the Airport plummeted. I take administrative notice of passenger traffic information available on GOAA’s website. In April, the number of passengers traveling through the Airport declined by approximately 96 percent as compared to the prior year. In June 2019, GOAA reported 2,128,331 enplaned passengers, and 2,153,477 deplaned passengers, whereas in June 2020, there were 433,523 enplaned passengers and 442,478 deplaned passengers, decreases from June 2019 of 79.63 and 79.54 percent, respectively. In September 2020, the most recent month for which statistics are available on GOAA’s website, GOAA reported 583,307 enplaned passengers and 582,643 deplaned passengers, decreases from one year earlier, September 2019, of 62.56 percent and 63.54 percent, respectively.

From March 19, 2020 to the beginning of May, the Employer furloughed approximately 754 of the employees in the petitioned-for unit, including approximately 53 shift supervisors. According to the record, approximately 35 of these employees have been recalled from furlough. As of July 27, the record reflects that approximately 103 employees in the petitioned-for unit were working for the Employer at the Airport: 59 crew members, 27 shift supervisors, five bartenders, four cooks, three maintenance engineers, two runner-with driver employees, two

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6 https://orlandoairports.net/about-us/#traffic-statistics
utility employees, and one server. As mentioned above, of the Employer’s 26 restaurants that it operates at the Airport, eight were operating at the time of the hearing.

Employees were notified that they would be furloughed through the Employer’s issuance of a furlough notification. At the time that the furlough notification was issued, employees were told that the mass furlough was caused by the Covid-19 pandemic and the corresponding business decline, and also that the furlough was expected to be temporary. A transition letter that issued with the furlough notification defined a furlough as a type of unpaid absence that was expected to be less than six months in duration, yet would nevertheless last for an undetermined amount of time. Employees were also given the opportunity to use their accumulated paid time off instead of being placed on unpaid leave, and were further told to continuously check the Employer’s [https://www.hmshostassociates.com/](https://www.hmshostassociates.com/) website for updates. Additionally, employees were notified in the transition letter that their benefits, including health benefits, would continue, and that they should apply for unemployment compensation immediately. The Employer also asked employees to keep it apprised of any changes to their contact information.

As the pandemic intensified and continued to disrupt air travel, the Employer provided an update for furloughed employees towards the end of May. Effective June 4, the Employer ended furloughed employees’ participation in active group benefits, including health benefits. Employees were notified that they may have the opportunity to continue benefits through COBRA insurance. Additionally, thereafter furloughed employees were only allowed to use paid time off that would otherwise be paid out upon termination of employment; furloughed employees could no longer use flex time, sick time, and grandfathered sick time. Through the
above website, the Employer has notified furloughed employees that it is unlikely that they would all be recalled to work.7

Sometime between furloughing employees in March and April and the end of June, the Employer re-opened three restaurants: Outback, City Pub, and On The Border. Pursuant to certain orders issued by the Governor of the State of Florida, however, the Employer re-closed Outback and City Pub, and both remained closed at the time of the hearing.8 Additionally, towards the end of June and into early July, the Employer re-opened La Madeleine restaurant, also known as Brioche Doree. However, due to low passenger traffic, that restaurant was again closed. At the time of the hearing the Employer did not have any plans at this time to recall any additional employees.

Typically, members of management may recommend that a certain restaurant reopen if, for example, passenger traffic and enplanements were to increase. Senior Director of Operations Edwards is often the individual who makes such a recommendation. Other management level employees also have the ability to make such recommendations. If Edwards or another member of management recommends that a particular restaurant reopen, that recommendation is forwarded to Vice-President Vicki D’Angelo. D’Angelo reviews the recommendation and forwards it to the Employer’s Executive Committee members, who ultimately decide whether to reopen the restaurant as requested. In weighing whether to reopen a restaurant, the Employer considers factors including passenger traffic, relationships with landlords, brands, the performance of the restaurant before the pandemic, and the performance of locations that will open or are already operating in adjacent locations. The record does not reflect any requests

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7 https://www.hmshostassociates.com/return-to-work-questions/
8 City Pub was re-opened later, but due to low passenger traffic the Employer closed it again.
from Employer management had been made to reopen any additional restaurants at the Airport at the time of the hearing.

C. Shift Supervisors.

Shift supervisors are assigned to work at one or more of the Employer’s restaurants at the Airport. They work alongside other employees in the petitioned-for unit who are assigned to work in the same restaurants. In presenting evidence concerning the question of whether the shift supervisors are supervisors within the meaning of Section 2(11) of the Act, the parties largely focused on shift supervisors who work alongside employees in the crew member classification. At the time of the hearing there were 27 shift supervisors working in the eight open restaurants. Shift supervisors spend a large portion of their day performing the same tasks as crew members, performing tasks such as working at the cash register, preparing food, making drinks, and otherwise assisting customers. In addition to those duties, the shift supervisors are responsible for voiding orders, providing refunds to customers, recording food temperatures, cataloging current inventory, opening and closing restaurants, and reporting broken equipment.

i. Hiring

Shift supervisors do not have the authority, on their own, to hire employees. Assistant F&B (Food and Beverage) Manager Michelle Senorans, who last worked as a shift supervisor in September 2019 before being promoted to her current position, testified that she made recommendations regarding hiring decisions when she was a shift supervisor. Senorans testified that she would inform her managers when the store (restaurant) where she worked needed additional manpower. Additionally, after her manager attended a hiring event or conducted interviews, Senorans spoke to her manager about the needs of the store and the qualifications of applicants, and made hiring recommendations based on the applicants’ answers to interview
questions and experience. However, Senorans acknowledged that her involvement in the hiring process was part of ongoing management training that she was receiving for promotion purposes. She also testified that on two or three occasions, at around the time that she began working as a shift supervisor, she made two or three hiring recommendations after reviewing her managers’ interview notes that were accepted by her manager, but could not recall any details of those hiring recommendations.

According to Multi-Unit Operations Manager Paul Shirley, shift supervisors are involved in the referral of applicants. Shirley testified that in his experience, shift supervisors have often referred applicants to him for an interview, and, according to Shirley, at times shift supervisors have pre-screened the applicants before referring them to him. Additionally, Shirley recalled one occasion, several years ago, in which a shift supervisor who was being trained for a management promotion sat in on applicant interviews with him.

Several current shift supervisors testified that they have no authority to hire or make recommendations to hire, and are not involved in any aspect of the hiring process. They testified that they have never been present during the interview of an applicant, have never reviewed a manager’s interview notes in order to provide a hiring recommendation, and have not been asked to refer potential applicants for hire.

ii. Transfers between restaurants

Multi-Unit Operations Manager Shirley testified that shift supervisors have the authority to transfer employees from one restaurant to another. He recalled that at around the beginning of 2020, one shift supervisor transferred one employee from a Starbucks to a Burger King to assist the restaurant. Shirley does not know how the transfer came about, inasmuch as the shift supervisor did not work in both restaurants. In addition, he does not know whether the shift
supervisor was instructed to send the employee from Starbucks to Burger King. Two current
shift supervisors testified that they do not have the authority to transfer employees from one
restaurant to another.

iii. Suspending, laying off, recalling, discharging, and rewarding employees

The record is devoid of any evidence that shift supervisors have the authority to suspend,
lay off, recall, discharge, or reward employees, or effectively recommend those actions.
Multiple witnesses testified that shift supervisors do not have authority to take or recommend
any of those actions.

iv. Promotion of employees

Multi-Unit Operations Manager Shirley testified generally that shift supervisors have the
authority to effectively recommend certain employees for promotion. He recalled a single
occasion where a shift supervisor identified an employee who should be considered for a
promotion. According to Shirley, the shift supervisor began training the employee on some of
the shift supervisors’ administrative duties, and recommended to Shirley that the employee be
considered for promotion. However, a manager ultimately made the decision to promote the
employee, and Shirley was unsure whether the deciding manager independently interviewed the
employee being considered for promotion. Although Shirley testified that he was unsure of
whether the promoted employee was interviewed by the operations manager before being
promoted, earlier in his testimony he conceded that the candidate for promotion likely went
through at least two rounds of interviews with managers. A current shift supervisor testified that
she has never been involved in the promotion of an employee to shift supervisor, nor has she
ever conducted employee evaluations. Another current shift supervisor testified that he has
never written an employee evaluation.
v. The assignment of work

At the Employer’s Starbucks locations in the Airport, employees are assigned to different workstations: cash register, hot drink bar, cold drink bar, warming, and customer support. At Chick-fil-A, there are several stations as well, including the cash register, the kitchen, the salad area, and the french fries station. Each day, employees are assigned to one of those stations, or they can be moved between stations throughout their shift. The shift supervisor is the individual who decides where employees will work during each shift, and may move employees to the various stations during any given shift. Shift supervisors do not make employee schedules, but they are responsible for assigning employees to particular workstations during their scheduled shifts.

Multi-Unit Operations Manager Shirley testified that shift supervisors are expected to rotate crew members daily to ensure that the crew members develop and are trained on all of the stations. Employees are cross-trained on all stations in the restaurant to which they are assigned. Multiple former and current shift supervisors testified that a shift supervisor may consider an employee’s ability and strengths to perform work at certain stations when deciding where to assign the employee, although no concrete examples were provided. One shift supervisor testified that he chooses particular station assignments for certain employees based on the fact that they worked at those stations before he began working as a shift supervisor. One crew member has worked the salad station for so long that the shift supervisor did not change that assignment. The same shift supervisor also testified that he often asks crew members, especially if they are newer, which station they would like to try and/or work at. Some crew members are limited in where they can be assigned to work. For instance, some crew members cannot work
the cash register until a manager takes the necessary steps to enter them into the Employer’s computer system.

Shift supervisors may also change a station assignment during the shift based on the volume of customers, how the crew members are performing on that particular day, and whether there has been a call-out (another crew member has called off of work). Shift supervisors who work in the Employer’s Starbucks locations are provided with formal training documents explaining how to assign employees to particular stations. However the training documents were not entered in the record, and the record does not reflect whether the Employer provides shift supervisors at its other restaurants at Orlando Airport with training about making station assignments.

Assistant F&B Manager Senorans and Multi-Unit Operations Manager Shirley also testified that shift supervisors have the authority to send employees home early if work is slow, call employees in to work if a shift needs to be covered because of an absence, or keep employees late beyond their scheduled quitting times, even if it means working overtime. However, shift supervisors may not require an employee to come to work to cover the shift of another crew member, or stay at work beyond their scheduled quitting time. If a crew member declines to do come to work or to work extra hours there are no negative consequences. According to Shirley, shift supervisors understand the importance of managing the payroll and controlling labor hours, and those considerations factor into the decision to send crew members home early.

In contrast to the testimony of Senorans and Shirley, two current shift supervisors testified that they do not have the authority to send employees home early if work is slow. One of them testified that after she sent an employee home before the end of the employee’s shift
because the employee was visibly ill, she was “chewed out” by her manager for doing that. Both shift supervisors also testified that they do not have the authority to require associates to work overtime, and that they would seek permission from a manager before asking a crew member to stay beyond their scheduled quitting time. Finally, they testified that they do not have the authority to call a crew member in to work. Indeed, one of the shift supervisors testified that on one occasion she called an employee in to work to cover a night shift, and she was “chewed out” by her manager because that employee was close to qualifying for overtime hours that week.

Shift supervisors are involved in coordinating break times for crew members. Employer policy dictates that crew members take a pre-determined 30-minute break around five hours into their shift. Assistant F&B Manager Senorans testified that when she was a shift supervisor, she determined crew member break times based on when their shifts began. Sometimes break schedules must be altered because of the volume of work, and shift supervisors are able to make those determinations. In some circumstances, crew members coordinate their own breaks without the shift supervisors needing to get involved.

vi. The discipline of employees

According to Assistant F&B Manager Senorans, shift supervisors have the authority to reprimand employees if they are engaging in behavior that warrants discipline. Senorans testified that shift supervisors may coach and counsel employees, as well as send them home early without pay, if an employee’s conduct warrants such action, without consulting or seeking approval from a manager. A coaching consists of pulling the employee to the side, discussing the matter with the employee to find out what is occurring and why the employee is behaving improperly, and counseling the employee to try to solve the problem (i.e. change the behavior). Coaching and counseling are not documented by the Employer.
Senorans recalled an instance when she sent an employee home because the employee was repeatedly on her phone and had not listened to prior coaching sessions. At that time, the Employer had a policy regulating the personal use of telephones by crew members while working. Senorans further testified that since she has been an Assistant F&B Manager, there was an occasion when a shift supervisor sent an employee home for “goofing off” and not taking the job seriously without previously seeking approval from a manager to do so. As is the case with a coach and counseling session, if an employee is sent home by a shift supervisor, that action is not documented by the Employer. Senorans also testified that on another occasion when she was a shift supervisor, she raised an employee conduct issue to her manager, and ultimately the manager determined that a disciplinary write-up was warranted. Senorans testified that she was present when the discipline was issued to the employee, on December 23, 2018, and she signed the “witness” line on the disciplinary form.

Several current shift supervisors testified that they do not have the authority to issue discipline, nor have they ever issued discipline. Additionally, they testified that they do not have the authority to recommend discipline, but simply report facts of problems with employee conduct to a manager, and the manager ultimately determines whether disciplinary action is warranted. The current shift supervisors further testified that they do not have the authority to send employees home for conduct-related reasons, and that they would be required to obtain approval from a manager before sending an employee home. There is no evidence that coaching and counseling, or being sent home early, is used as a basis for more severe discipline, or has any further effect on an employee’s employment status with the Employer.
vii. The responsible direction of crew members

Assistant F&B Manager Senorans and Multi-Unit Operations Manager Shirley testified that shift supervisors may be held accountable for the performance of crew members. According to both of them, if a shift supervisor does not ensure that crew members adequately perform assigned tasks, the Employer will use coaching and counseling to correct the shift supervisor’s inaction. Neither provided an example of a shift supervisor being disciplined or otherwise held accountable for the deficiencies of crew members. If a shift supervisor does particularly well, the Employer will give that supervisor a “HMS Shout-Out” on Instagram to let them know what a great job they have done.

viii. Adjusting crew members’ grievances

According to Multi-Unit Operations Manager Shirley, shift supervisors have the authority to resolve crew members’ workplace issues without clearing the resolution with management. However, no examples were provided to support that testimony. In the case of a crew member requesting to take vacation, Shirley testified that the shift supervisor is encouraged to obtain the necessary information from the crew member and relay that information to management for ultimate decision.

ix. Secondary indicia of supervisory status pertaining to shift supervisors

Like the crew members that they work alongside, shift supervisors are paid hourly wages and are eligible for overtime if they work more than 40 hours in a week. With limited exception, shift supervisors receive the same benefits that crew members receive. However, shift supervisors are provided free meals, whereas crew members are only offered a discount on food prices at certain restaurants. Shift supervisors may make slightly more per hour than crew members. They are not entitled to a bonus.
Some shift supervisors wear uniforms that differ slightly from the uniforms worn by crew members. Shift supervisors working at the Employer’s Burger King locations at Orlando Airport wear a different shirt than crew members, and the shirt has an Employer logo. It does not, however, say manager or supervisor. A shift supervisor who works at Starbucks testified that she does not wear a uniform that differs from the uniform worn by crew members. A shift supervisor who worked at Chick-fil-A before being furloughed testified that he wore a different colored shirt than the crew members, and his shirt had an Employer logo, whereas the crew members’ shirts do not.

Assistant F&B Manager Senorans testified that as a shift supervisor, she attended scheduling meetings with her managers, as well as pre-shift meetings with the crew members. The scheduling meetings were conducted to discuss scheduling needs, and she would offer input regarding the needs of the store as it pertained to crew member schedules. Pre-shift meetings would be conducted with crew members to discuss their station assignments, training topics, and any goals that management had for the store. The pre-shift meetings are not required. Two current shift supervisors testified that they have never attended any scheduling or pre-shift meetings, never held pre-shift meetings with crew members, and that they were never instructed to hold pre-shift meetings.

D. Increasing Covid-19 cases and positivity rates in Orange County, Florida

Orlando International Airport, where the unit employees work, is located in Orange County, Florida. Information from the Florida Department of Health, Division of Disease Control and Health Protection regarding confirmed Covid-19 cases shows that there have been 4,104 Covid-19 cases per 100,000 people in Orange County, including 390 cases from
November 21. The Florida Department of Health also reports a steady weekly rise in the numbers of new confirmed Covid-19 cases in Orange County during the past 5 weeks, as follows: 1,493 new cases for the week starting October 18, 2020; 1,774 for the week starting October 25; 2,057 for the week starting November 1; 2,790 for the week starting November 8; and 3,084 for the week starting November 15, the most recent week.

In addition, for the past 5 weeks, the weekly positivity rate for Orange County has exceeded 5 percent for the past 5 weeks. The Florida Department of Health reports that for the week starting October 18, 2020 the weekly positivity rate for Orange County was 5.59 percent; for the week starting October 25 it was 5.81 percent; for the week starting November 1 it was 7.13 percent, for the week starting November 8 it was 8.52 percent, and for the week starting November 15 it was 7.67 percent. The website of the Orange County, Florida government shows that the 14-day positivity rate for Orange County was 7.8 percent for the period from November 8 to November 21, the most recent information available.

During last 5 weeks, statewide in Florida the numbers of confirmed new Covid-19 cases weekly have also increased, and the weekly positivity rates for Covid-19 have exceeded 5 percent, with rates for the week beginning is 8.38 percent.

II. ANALYSIS

A. There is insufficient evidence to establish that the shift supervisors are supervisors within the meaning of the Act.

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

9 See rates map tab at https://experience.arcgis.com/experience/96dd742462124fa0b38dded9b25e429.
10 See health metrics tab at https://experience.arcgis.com/experience/96dd742462124fa0b38dded9b25e429.
11 See health metrics tab at https://experience.arcgis.com/experience/96dd742462124fa0b38dded9b25e429.
13 See health metrics tab at https://experience.arcgis.com/experience/96dd742462124fa0b38dded9b25e429.
any individual having authority, in the interest of the employer, to hire, transfer, 
suspend, lay off, recall, promote, discharge, assign, reward or discipline other 
employees, or responsibly direct them, or to adjust their grievances, or effectively to 
recommend such action, if in connection with the foregoing the exercise of such 
authority is not of a merely routine or clerical nature, but requires the use of 
independent judgment.

The three requirements to establish supervisory status are that the putative supervisor possesses 
one or more of the 12 enumerated supervisory functions stated in Section 2(11) of the Act; the 
putative supervisor uses independent, rather than routine or clerical, judgment in exercising that 
authority; and the putative supervisor holds that authority in the interest of the Employer.  NLRB 
Care & Retirement Corp. of America, 511 U.S. 571, 573–74 (1994)).

Supervisory status may be shown if the alleged supervisor has the authority either to 
perform a supervisory function or to effectively recommend the same.  The statutory definition 
of a supervisor is read in the disjunctive.  Possession of any one of the enumerated powers, if 
accompanied by independent judgment and exercised in the interest of the employer, is sufficient 
to confer supervisory status. Kentucky River, 532 U.S. at 713.  Supervisory status may likewise 
be established if the individual in question has the authority to effectively recommend one of the 
powers, but effective recommendation requires the absence of an independent investigation by 
superiors and not simply that the recommendation be followed.  Children’s Farm Home, 324 
NLRB 61, 65 (1997).

If such authority is used sporadically, the putative supervisor will not be deemed a 
statutory supervisor. Coral Harbor Rehabilitation and Nursing Center, 366 NLRB No. 75, slip 
op. at 17 (2018).  The supervisor has to at least act or effectively recommend such action 
“without control of others and form an opinion or evaluation by discerning and comparing data.” 
Oakwood Healthcare, 348 NLRB 686, 692-693 (2006).  Judgment is not independent when the
putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. To be independent “the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* at 693, citing *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986), finding that “the exercise of some ‘supervisory authority’ in a routine, clerical, perfunctory, or sporadic manner does not confer supervisory status”). If a choice is obvious, the judgment is not independent. *Oakwood Healthcare*, 348 NLRB at 693.


i. **Suspension, lay off, recall, discharge, or rewarding of employees**

As noted above, there is no record evidence that the shift supervisors suspend, lay off, recall, discharge, or reward employees, nor is there any evidence that shift supervisors can effectively recommend such actions. Consequently, I find that the Employer has not met its burden to establish that shift supervisors possess the authority to engage in the aforementioned actions, or effectively recommend the same.
ii. **Transfer, promotion, and adjustment of employee grievances**

There is insufficient record evidence to establish that shift supervisors have the authority to transfer, promote, or adjust employee grievances, or effectively recommend such actions. For each of these three supervisory indicia, the Employer offered exceedingly generalized testimony that shift supervisors have the authority to engage in the actions or effectively recommend the same. As noted above, Multi-Unit Operations Manager Shirley testified generally that shift supervisors have the authority to transfer employees between restaurants, but he recalled only one instance where a shift supervisor sent a crew member from a Starbucks to a Burger King to assist. In addition, Shirley was unable to recount any details regarding the transfer, and was unsure how the transfer came about. Given that the shift supervisor did not work at both the Starbucks and the Burger King, it is doubtful and illogical that the shift supervisor would have the authority to transfer the crew member to a restaurant where the shift supervisor did not work. Shirley’s testimony was of the generalized and conclusory nature that Board has said is insufficient to establish supervisory status.

With respect to shift supervisors’ authority to recommend promotions or adjust grievances, Multi-Unit Operations Manager Shirley testified in a similar general manner regarding a current shift supervisor’s recommendation to promote a crew member after working with and training the crew member. However, there is no evidence that the shift supervisor’s recommendation was considered by the manager who decided to make the promotion, or whether that shift supervisor simply identified a potential candidate who was then independently interviewed and evaluated by management. Shirley’s testimony suggests that a manager may have independently interviewed the candidate before promoting him. Moreover, a current shift supervisor testified that she has never been involved in the promotion of another employee, and
she and a second current shift supervisor testified that they have never performed an employee evaluation.

The evidence here falls well short of the evidence relied on by the Board in *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999), cited by the Employer, to establish that employees were statutory supervisors. There, the Board found that the putative supervisors interviewed employees for promotions and transfers based on in-plant job postings, made recommendations as to which applicant should be selected, and that their recommendations were followed 80 to 90 percent of the time. Once again, the evidence relied on by the Employer is generalized and conclusory statements, and thus is insufficient to prove that shift supervisors have the authority to effectively recommend crew members for promotion.

There is also insufficient evidence to show that shift supervisors are authorized to adjust employee grievances. Shirley generally testified that shift supervisors have such authority, but provided no examples or details to support this assertion. When asked whether a shift supervisor could honor a crew members’ vacation request, he testified that shift supervisors are encouraged to gather the necessary information and provide that information to management for an ultimate decision. This testimony, and the record as a whole, supports the conclusion that at most shift supervisors provide report certain information about crew members to management, that they are not vested with the authority to adjust employee grievances or effectively recommend the same, and that they do not exercise independent judgment with respect to the resolution of employee grievances.

In summary, I find that the Employer has not met its burden to establish that shift supervisors possess the requisite authority to transfer, promote, or adjust employee grievances, or effectively recommend the same.
iii. Hiring

As with other supervisory indicia discussed above, there is insufficient record evidence to establish that shift supervisors possess the authority to effectively recommend hiring. “Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish 2(11) supervisory authority. North General Hospital, 314 NLRB 14, 16 (1994). “In connection with the authority to recommend actions, Section 2(11) requires that the recommendation must be effective.” Jerry’s United Super, 289 NLRB 124, 141 (1988). “A supervisor exercises the power to effectively recommend hire if the supervisor’s recommendations are followed with no independent investigation by supervisors.” Peacock Productions of NBC Universal Media, 364 NLRB No. 104, slip op. at 6 (2016).

According to Assistant F&B Manager Senorans, when she was a shift supervisor several years ago, she would recommend the hiring of employees after reviewing a manager’s interview notes, and the recommendations were accepted. Additionally, Multi-Unit Operations Manager Shirley testified that in his experience, shift supervisors have referred applicants for hire and have sometimes pre-screened applicants prior to those applicants receiving an interview. First, neither Senorans nor Shirley’s testified about any examples to support their assertions. Only general, conclusory testimony was offered. Additionally, the Employer did not present evidence that in either circumstance, the recommendations were followed with no independent interview or other investigation of the applicants by the managers who made the hiring decisions. Finally, two current shift supervisors testified that they have no authority to effectively recommend hire or involvement in the hiring process. For the foregoing reasons, I find that the Employer has failed to meet its burden to prove that shift supervisors have the authority to hire or effectively recommend the hiring of employees.
iv. Discipline

The Employer also contends that shift supervisors have the authority to discipline and effectively recommend disciplinary actions. “To confer supervisor status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management.” *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 8 (2016). “[A]uthority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority.” *Id.* “Warnings that simply bring substandard performance to the employer’s attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisor authority.” *Id.*

In support of its position, the Employer’s witnesses testified that shift supervisors have the authority to coach and counsel crew members, as well as send employees home for poor performance. On the other hand, the two current supervisors testified that they do not have the authority to discipline or effectively recommend discipline, and when one of them sent an employee home early because the employee was not feeling well, she was reprimanded for doing so. Further, the record reflects that when a crew member receives a coach and counseling, that action is not documented or recorded in the employee’s personnel file. Similarly, if an employee is sent home early for performance reasons, there is no negative effect on that employee’s employment status, nor is anything documented in the employee’s personnel file, and the Employer’s evidence regarding sending employees home early lacks specificity and is directly contradicted by the evidence that a shift supervisor who was reprimanded by her manager because she sent an employee home early. For these reasons, and based on the record as a
whole, I find that there is insufficient evidence to show that shift supervisors have authority to discipline employees or to effectively recommend discipline.

v. Assignment of work and responsible direction of employees.

The definition of assignment of work requires the individual in question to designate an employee to a place (e.g., location, department) or time (shift or overtime), or to give significant overall tasks to an employee. Entergy Mississippi, Inc., 357 NLRB2150, 2153 (2011); Oakwood Healthcare, 348 NLRB at 689. “The authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” Oakwood Healthcare, 348 NLRB at 693. “The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks.” Croft Metals, 348 NLRB 717, 722, fn. 14 (2006). Shifting employees around in order to complete projects does not, by itself, require the use of independent judgment. See Hexacomb Corp., 313 NLRB 983, 984 (1994). Additionally, knowing which coworkers have the greater experience or skill, and using that information when making an assignment, does not establish the exercise of independent judgment. See Millard Refrigerated Services, Inc., 326 NLRB 1437, 1438 (1998).

Where employees are cross-trained and expected to perform all available tasks, moving employees around to cover breaks does not involved the use of independent judgment. See Los Angeles and Power Employees’ Ass’n, 340 NLRB 1232, 1233-1234 (2003). Rather, the “determination of order of lunch and other breaks is essentially clerical.” NLRB v. Hilliard Development Corp., 187 F.3d 133, 146 (1st Cir. 1999).

“Responsibility for making work assignments in a routine fashion does not make one a supervisor, nor does the assumption of some supervisory authority for a temporary period create
supervisory status.” Coral Harbor, 366 NLRB No. 75, slip op. at 17-19 (2018). The responsible direction of work requires that the person directing and performing the oversight of the employee is held accountable to direct the work and exercise corrective action over other employees. Oakwood Healthcare, 348 NLRB at 690-691. “To establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary.” Id. at 692. “It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id.

In asserting that shift supervisors are statutory supervisors, the Employer relies heavily on their ability to assign employees to particular workstations within a restaurant. First, the record evidence focuses, in near entirety, on the assignment of work in the Orlando Airport’s Starbucks and Chick-fil-A restaurants, shedding light on the assignment of work in only those locations. There is no record evidence to establish what, if any, authority shift supervisors have as far as assigning work to employees in the other restaurants operated by the Employer at Orlando Airport. For the reasons discussed below, the record fails to establish that work assignments made by any of the Employer’s shift supervisors establish supervisory status within the meaning of the Act.

The Employer requires all crew members to be cross-trained on all stations in each restaurant. As Multi-Unit Operations Manager Shirley testified, the Employer expects shift supervisors to move crew members through the various stations daily in order for all crew members to be properly cross trained and gain experience at each station. Shift supervisors who work at Starbucks are provided with formal training materials that teach them how to assign crew members to particular stations. Thus, although shift supervisors may choose to assign crew
members to various stations on any given day, the Employer has policies and procedures in place that dictate to the shift supervisors, to a large degree, how the assignments are to be made.

Other circumstances also limit the discretion the shift supervisors have to make work assignments, and eliminate their need to exercise independent judgment. For example, a manager must clear an employee to work the cash register by making an entry in the Employer’s system before a shift supervisor may assign the employee to work the cash register. The shift supervisors have no authority to grant such clearance. Moreover, if an employee absence requires the shuffling around of crew members to make sure all stations are covered, such action evinces nothing more than routinely re-positioning the available crew members to make sure workstations are covered.

Furthermore, the record is insufficient to establish that shift supervisors have the authority to call employees into work, keep employees beyond their scheduled quit time even if that decision will have overtime ramifications, or send employees early. At best, the evidence is inconclusive, because the Employer’s witnesses were unable to provide specific testimony as to the alleged authority of shift supervisors to take such action. In addition, the record is clear that the shift supervisors do not have the authority to require employees to start work early or stay beyond their scheduled quitting time. Even if shift supervisors have the authority to send employees home for lack of work, the record discloses that doing so is in furtherance of Employer policies that dictate stringent awareness of employee weekly labor hours with an eye towards avoiding overtime. “[T]he decision to send employees home . . . based solely on the observation that there is no more work to be done . . . does not involve the use of independent judgment.” Millard Refrigerated Services, Inc., 326 NLRB at 1438.
With respect to the supervisory indicium of responsible direction of employees, the record is devoid of evidence that shift supervisors are held accountable for the poor performance of crew members. Although there is some generalized testimony that a crew member’s unsatisfactory work performance may require a manager to direct a shift supervisor to make sure the crew member completes the assigned tasks, that does not prove that the Employer will act against the shift supervisor if the crew member fails to improve.

Based on the above, I find that there is insufficient evidence to show that shift supervisors have authority, in the interest of the Employer, to assign work to employees or responsibly direct employees, or to effectively recommend such action, in a manner that requires the use of independent judgment.

In summary, I find that the Employer has failed to establish that shift supervisors possess any of the enumerated indicia of supervisory status included in Section 2(11) of the Act. The fact that shift supervisors spend a large portion of their day performing the same tasks as crew members, such as cashier, food and drink preparation, and customer assistance, supports this conclusion, as does the fact that there are only minor distinctions between pay and benefits available to certain shift supervisors and crew members. The Employer’s claim that shift supervisors possess the requisite statutory supervisory authority even if they do not exercise it is not substantiated by the record as a whole. Consequently, I find that the shift supervisors are appropriately included in the petitioned-for unit and are eligible to vote.

**B. Employees in the petitioned-for unit who are currently furloughed and/or laid off are ineligible to vote in the election.**

In determining whether laid-off employees are eligible to vote in an election, the question is “whether there exists a reasonable expectancy of employment in the near future.” *Higgins, Inc.*, 111 NLRB 797, 799 (1955). Eligibility is assessed based on the facts existing on or before
the eligibility date, not on the date of the election. *Osram Sylvania, Inc.*, 325 NLRB 758 (1998) (overruled on other grounds). “The Board examines several factors in determining voter eligibility, including the employer’s past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.” *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). “A party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote.” *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998), quoting “*Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986).

In *Osram Sylvania, Inc.*, supra, the employer conducted two mass layoffs spanning a period of approximately one month. The layoffs resulted from the employer’s general decline in sales and the loss of a major contract, as well as its decision to modify its production process. *Osram Sylvania, Inc.*, 325 NLRB at 760. Employees were told that the layoff was for an indefinite duration, the employer could give them no firm and realistic dates for their possible return to work, and that their chances for recall were uncertain. *Id.* Further, the employer told employees that they could look for other jobs or apply for unemployment compensation, and asked employees to keep the employer informed about their contact information. *Id.* The Board found that 29 of the laid off employees who were recalled after the eligibility date, but before the election, did not have a reasonable expectancy of reemployment at the time of the eligibility cutoff date because the employees had been informed that their layoff was for an indefinite duration, and they were given no assurances that their layoffs would be for a short duration. *Id.* Additionally, the Board relied on evidence that the employer’s business prospects had not improved appreciably by the eligibility date. *Id.*
Recently, the Board analyzed the eligibility of laid off employees to vote in the circumstances of the COVID-19 pandemic. In *NP Texas LLC d/b/a Texas Station Gambling Hall and Hotel*, 370 NLRB No. 11 (2020), the employer indefinitely suspended its casino operations and laid off all of its employees after the Governor of Nevada issued an emergency directive ordering the state’s cessation of gaming operations due to COVID-19. The employer closed all 20 of its properties in the state, including the property where the petitioned-for employees worked. Although employees were advised in early March 2020 that they would likely be recalled, they received a termination letter that explained that it was unpredictable whether or when the employer would resume normal operations and terminated the employees’ employment as of May 1. Consistent with its practices for terminated employees, the employer paid out unused accrued vacation and floater days to the terminated employees, required them to return their uniforms, cleaned out their lockers and allowed them to reclaim the contents, and helped them process unemployment claims. Although the employer reopened several of its properties, the facility where the petitioned-for employees worked remained closed at the time of the hearing, with no plan to reopen. *Texas Station*, 370 NLRB No. 11, slip op at 2.

As the Board also held in *Texas Station*, in the absence of evidence of a past practice regarding layoffs, where laid off employees are given no estimate as to the duration of the layoff or any specific indication as to when, if at all, they will be recalled, no reasonable expectancy of recall exists. Id. The Board noted that when an employer has no reasonable way to predict when it will recall employees, and makes only vague statements as to the possibility of a recall, there is no basis for finding that any employees in the petitioned-for unit had a reasonable expectancy of recall. 370 NLRB No. 11, slip op. at 3, citing *Foam Fabricators*, 273 NLRB at 512; *Sol-Jack*
Co., 286 NLRB 1173, 1173-1174 (1987); S & G Concrete Co., 274 NLRB 895, 896 (1985); see also, S & G Concrete, 274 at 897 and fn. 13 and 14.

In the instant case, the record does not support a finding that furloughed or laid off employees have a reasonable expectancy of employment in the near future. Initially, the Employer does not have a history of furloughing or recalling employees. Next, the Employer’s actions since the mass furloughs started in March support a finding that furloughed employees do not have a reasonable expectancy of recall in the near future. At the time the hearing concluded nearly five months had passed since the furloughs began at the end of March, yet only 35 of the 754 furloughed employees had been recalled. The Employer has attempted, on occasion, to re-open restaurants at the Airport, but the spread of the novel coronavirus, including spikes in cases during the Summer and currently, continue to make it difficult to predict when there will be sufficient passenger traffic to warrant reopening of restaurants at the Airport. Only eight of the 26 restaurants operated by the Employer were open as of the close of the hearing. There is no evidence that the Employer has immediate plans to re-open additional restaurants at the Airport or to recall any additional employees.

The Petitioner’s argument that the furloughed employees have a reasonable expectancy of recall in the near future is based on the supposition that all restaurants will re-open and the Employer will need to staff them. The Petitioner argues that the furloughed employees will eventually be recalled, noting that neither the Employer nor GOAA has terminated the concessions agreement, nor is there any reason to believe the Orlando International Airport will be shuttered as a result of the pandemic. While all of that may be true, the law is clear that temporarily furloughed employees must have a reasonable expectancy of reemployment in the near future to be eligible to vote in an election, and given the current environment, it is far from
certain that the furloughed employees will be recalled in the near future or otherwise. Even if the Airport regains its pre-pandemic traffic and all restaurants reopen, there is no guarantee that the same staff will be available or that the Employer will seek to recall or re-employ them.

The Employer’s communications to furloughed employees further support a finding that they do not have a reasonable expectation of recall. When the furlough was first announced, furloughed employees were told that the Employer expected the mass furlough to be temporary, and that the furlough was anticipated to be a short duration, for an undetermined amount of time. Furloughed employees were initially allowed to use all of their paid time off in lieu of unpaid leave and their benefits continued. Thus, as in Osram Sylvania, when the Employer initially announced the furlough, it instructed furloughed employees to immediately file for unemployment compensation and asked them to stay in contact. However, in late May the Employer notified furloughed employees that because the pandemic was not easing as the Employer had hoped, and because passenger traffic continued to be low, Employer benefits for the furloughed employees would end as of June 4. In that same notification, the Employer informed furloughed employees that after June 4, they would only be able to use accrued paid time off that would otherwise be paid out upon termination of employment. Additionally, the Employer’s website for furloughed employees provided website links to other websites for jobs and employers who were hiring at the time. Furloughed employees were told that opportunities for recall would depend on the ability of the Employer to open restaurants slowly with a focus on safety, and the return of passenger traffic. Thus, the Employer’s communications to furloughed employees since late May have highlighted the continued disruption of COVID-19 to the employer’s business, and made it clear that the furloughed employees did not have a reasonable expectancy of recall in the near future.
The Employer’s ability to re-open restaurants and recall employees is dependent on passengers returning to the Airport and the area, which is impacted by the ongoing transmission of the virus. Early in the pandemic, there was hope that by the summer, the disruption caused by the pandemic would have slowed and there would be a return to normalcy, but that did not occur and the possibility and timing of a return to pre-pandemic levels of employment at the Employer’s Orlando Airport operations remains unknown. Given the causal connection between the pandemic and the Employer’s drop in business, and the uncertainty surrounding when increased passenger traffic will occur such that the re-opening of restaurants and recall of furloughed employees will be necessary, I find that the furloughed employees do not have a reasonable expectation of recall in the near future, and are ineligible to vote unless they have been recalled or otherwise re-employed by the Employer and resumed working in unit positions as of the payroll eligibility date which immediately precedes the issuance of this Decision.

Unlike the *Texas Station* case, in which the employer had laid off all of its employees and the Board dismissed the petition because there were no eligible voters, in the instant case the Employer has operated with a reduced workforce under pandemic conditions for the past 8 months and it appears that the Employer will continue to operate under pandemic conditions and with a similarly sized reduced workforce for a further prolonged period of indefinite duration. I find that in these circumstances, the current operations of the Employer at Orlando Airport are its “new normal,” that a substantial and representative complement of employees is currently working for the Employer, and that a question concerning representation of the unit employees exists at this time.¹⁴

¹⁴ The Employer argued that if furloughed employees are found eligible to vote, then the election should be stayed until such time as a substantial and representative complement of employees (i.e. including the furloughed employees) return to work. However, I have found that the furloughed employees are ineligible to vote. The
C. A mail-ballot election is the safest and most appropriate method for conducting this election.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), the Board provided guidance to Regional Directors for use in determining the method of voting during the Covid-19 pandemic, to be applied retroactively. Among the situations which the Board determined to warrant a Regional Director’s decision to conduct a mail ballot is when “[e]ither the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.” 370 NLRB No. 45, slip op. at 5. Both of those situations currently exist in Orange County, Florida, within Orlando International Airport, where the Employer’s facilities are located. I therefore direct a mail ballot election, the details of which are below.

III. CONCLUSIONS AND FINDINGS

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. As stipulated by the parties, no collective-bargaining agreement covers the employees in the petitioned-for-unit, and no other bar exists to conducting an election.

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Employer has not urged dismissal of the petition based on lack of a substantial and representative complement of unit employees if furloughed employees are found ineligible to vote.
6. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

   All full-time and regular part-time bartenders, bussers, cashiers, cooks, crew members, food preparers, hosts, hostesses, maintenance engineers, runners – no driving, runners – with driving, servers, shift supervisors, and utility employees employed by the Employer at the Orlando International Airport in Orlando, Florida; excluding all other employees, Admiral Club floor attendants, floor captains, managers, guards, and supervisors as defined by the Act.

IV. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election by mail 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 UNITE HERE, Local 362, AFL-CIO.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective bargaining unit. At 9:30 a.m. on December 9, 2020, ballots will be mailed to voters by the National Labor Relations Board, Region 12, from its office at 201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602-5824. Voters must sign the outside of the envelope in which the ballot is returned. Any ballots 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 December 17, 2020, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at (202) 615-2279 or (813) 228-2661 or our national toll free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be comingled and counted at the Region 12 office, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida on January 6, 2021, at 10:00 a.m. In order to be valid and
counted, the returned ballots must be received in the **Region 12 office in Tampa** prior to the counting of the ballots. Due to the above-described extraordinary circumstances of the Covid-19 pandemic, I further direct that the ballot count will take place remotely by videoconference on the Zoom for Government videoconference platform.

The parties have agreed, and I conclude, it is appropriate that the Notice of Election and ballots will be in English, Haitian Creole, and Spanish.

**B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending on November 19, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

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

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

To be timely filed and served, the list must be received by the regional director and the parties by November 25, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee’s last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency’s website at www.nlrb.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\(^\text{15}\) in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

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

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\(^{15}\) The Notices of Election printed in English, Haitian Creole and Spanish shall be provided to the parties separately after translations to Haitian Creole and Spanish have been completed.
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 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.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. 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.


[Signature]
David Cohen, Regional Director
National Labor Relations Board, Region 12
201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824