

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

Conco Quarries, Inc.

Employer

and

Heavy Construction Laborers' Local #663, affiliated
with Laborers' International Union of North America

Petitioner

Case 14-RC-267769

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of equipment movers and operators employed by the Employer at its eight rural quarries in Missouri.¹ The unit proposed by the Petitioner would include approximately six employees working among the active operational rural quarries as of the date the hearing.

The Employer agrees that the proposed unit is appropriate but asserts that the current complement of employees is neither substantial nor representative of the workforce that will eventually be employed in the bargaining unit and, further, that its rural quarry operations are seasonal in nature, therefore, conducting an election at this time would be inappropriate. In this regard, the Employer contends the petition should be dismissed, or in the alternative, that an election should not be held until May 2021. The Employer additionally asserts that proposed unit lead employee Camrin Shoemaker is a statutory supervisor within the meaning of Section 2(11) of the Act based on his authority to assign and responsibly direct the work other employees using independent judgment, and other secondary indicia. Petitioner contends that there is a substantial and representative complement of employees and that the rural quarry operations are not seasonal in nature, therefore, an immediate election is warranted. Petitioner also denies that lead employee Shoemaker possesses any indicia of supervisory authority. Finally, the Employer contends that a manual election is appropriate and that it is possible to conduct a manual election safely notwithstanding the issues related to the COVID-19 pandemic.

¹ In its petition, Petitioner originally sought to represent all employees engaged in hauling, crushing, processing, and loading of aggregate at the Employer's Marshfield and Fair Play rural quarries. At the hearing, the parties' stipulated that any unit found appropriate should include equipment mover and operator (haul truck, loader, mechanic, plant, quality control, rolling stock equipment (dozer, excavator, etc.), quarry maintenance, and water Truck) employees; and Petitioner continued to take the position that the unit should be limited to employees at the Marshfield and Fair Play quarries. In its brief, Petitioner stated it would adopt the position of the Employer that the stipulated unit include employees working among all eight of its rural quarries located in Marshfield, Fair Play, Fair Grove, Bolivar, Buffalo, Montevallo, Pittsburg and Stockton.

A hearing officer of the Board held a video hearing in this matter. Election arrangements, including the voting method, are not litigable matters at a pre-election hearing. Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, Representation-Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). The parties were permitted to present their positions on the voting method and details of election at the hearing and by brief. I have carefully considered those positions and arguments. As explained below, based on the record² and relevant Board law, I conclude that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit and that its rural quarry operations are not seasonal in nature, therefore, it would not effectuate the purposes of the Act to deny or postpone an election among the employees in the existing operations. I further conclude that the Employer has not met its burden to show that lead employee Shoemaker is a statutory supervisor. Based on the record developed in this case, Shoemaker does not exercise authority in the interest of the Employer requiring the use of independent judgment to assign or responsibly direct other employees or possess any other indicia required for a finding of supervisory status. Accordingly, I shall direct an election in the petitioned-for unit, as stipulated. Finally, after carefully considering the arguments made by the parties on the issue of election arrangements in conjunction with the Board's recent guidelines set forth in *Aspirus Keweenaw*, 370 NLRB No. 45 (November 9, 2020) and the six factors therein the Board has ordered me to consider in determining whether or not to order a mail ballot election, I have determined that a mail ballot election is appropriate in view of the circumstances discussed below related to the current state of the COVID-19 pandemic.

I. FACTS

A. Employer's Quarry Operations and Collective Bargaining History

The Employer, a subsidiary of Conco Companies, has been in existence since about 1963 and in the business of producing construction aggregate. For many years, the Employer has operated two union-represented quarries located in Willard and southeast Springfield, Missouri. The Springfield location is known as the Galloway quarry. At the Willard quarry, the Employer has separate collective-bargaining agreements (CBAs) with the Operating Engineers, Teamsters and Laborers' Unions covering its production/maintenance employees.³ At the Galloway quarry, the Employer has a CBA with the Boilermakers Union covering its production/maintenance

² The parties filed briefs which I have duly considered.

³ The Operating Engineers Union represents large equipment loaders; the Teamsters Union represents truck drivers; and the Laborers' Union represents maintenance employees and drillers.

employees.⁴ The Employer also operates redi-mix concrete companies located in Springfield, Hollister, and Nixa, Missouri.⁵

Andrew Baird is the President of the Employer, Chris Upp is the Vice President/General Manager, and Jacci Gamble is the Assistant General Manager. The unit employees at the Willard quarry report directly to Pit Supervisor Jim Smith and Plant Supervisor Dave Stillings who report to Gamble. The unit employees at the Galloway quarry report directly to Site Supervisor⁶ Jason Page who reports to General Superintendent Stacey Tennis. Tennis was the Site Supervisor at Galloway until January when the Employer commenced operations of the rural quarries, as further described below, at which time she became the General Superintendent for Galloway and the rural quarries. The petitioned-for rural quarry employees report directly to Tennis.

The production process for quarry operations at the Willard and Galloway quarries initially begins in the mining area known as “the pit” with unit operators stripping the top of the rock in order to access the reserve rock for processing. Stripping operations involve using large equipment including trucks, loaders, dozers and excavators to strip off six to eight feet of dirt, clay and other material from the rock which is then piled up away from the pit. Then, unit drillers drill holes in the rock so that third-party explosive contractors can blast the rock out of the earth into a “shot rock pile.” Blasting operations occur on average about two to three times per week year-round (about three to four times a week in the spring/summer/fall months and once a week in the winter months). The rock is loaded by unit loaders from the shot rock pile onto front end wheel loader trucks for unit drivers to transport to the plant “dump hopper,” a large bin structure that feeds the rock into a crusher. Processing operations (crushing and sizing) are performed by unit maintenance employees in the stationary plant area of the quarry. Most of the rock is crushed to a one-inch size or smaller. The final product is then sold by non-unit sales employees working at the plant.

The Willard Quarry is the largest quarry operated by the Employer – the union-represented employees there perform all quarry operations there except for blasting, which is performed by a third-party contractor. The Galloway quarry is about one-third of the size of Willard – the union-represented employees there perform all quarry operations there except for drilling and blasting, which are performed by third-party contractors. The Willard quarry specializes in concrete quality stone which it supplies to concrete plants year-round on a regular basis. The Galloway quarry is more construction-driven and follows a general construction pattern which slows down during the winter months of December to April. At both quarries, unit employees have been laid off from time to time on a short-term basis of about one to three days

⁴ Specific classifications at the Galloway quarry include: pressure operator, pit loader, truck driver, water truck, quality control, dozer, excavator, utility, maintenance, and shop mechanic.

⁵ These companies’ names are Concrete Company of Springfield, Concrete Company of the Ozarks, and Christian County Concrete Company, respectively. The record indicates that the Concrete Company of Springfield and Christian County Concrete Company are Laborers’ Union-represented facilities.

⁶ The record indicates that the Site Supervisor position at Galloway is a bargaining unit position. It is unknown whether the Pit Supervisor or Plant Supervisor positions at Willard are likewise bargaining unit positions.

due to inclement weather. No unit employees have been laid off for extended periods. All quarry operations are regulated by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA), a federal agency which develops and enforces safety and health rules for all U.S. mines.

In about July 2019, CRH, a global diversified construction building materials supplier based in Ireland, purchased the assets of the Employer. At this time, the Employer became a wholly owned subsidiary of CRH.

B. Employer's Rural Quarry Operations and the Universal Crew

In about late 2019, CRH advised the Employer that effective January 1, 2020,⁷ it would inherit operations for eight rural quarries all located in Missouri, in Marshfield, Fair Play, Fair Grove, Bolivar, Buffalo, Montevallo, Pittsburg and Stockton.⁸ At this time, Stacey Tennis, who was the Site Supervisor at Galloway, was promoted to General Superintendent. As General Superintendent, Tennis is in charge of the Galloway quarry and all of the rural quarries. As noted, the Galloway unit employees report directly to Site Supervisor Page who reports to Tennis, and the petitioned-for employees at the rural quarries report directly to Tennis.

Based on the rural nature and smaller size of the rural quarries, the Employer determined it would utilize a mobile crew with portable equipment that could work among all of the rural quarries. The Employer also determined that it would hire one "universal crew" that would be cross-trained to perform all quarry duties. In this regard, the "Portable Quarry Crew" job description for rural quarry workers states that "production/maintenance positions are interchangeable depending on production/maintenance needs" and that "primary positions" include loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, and dozer/excavator/large equipment operator. These are largely the same quarry duties performed by the Willard and Galloway unit employees except that all stripping, drilling and blasting operations at the rural quarries are performed by third-party contractors.

Although the Employer was assigned the rural quarry operations in January, because of the large amount of inventory it inherited along with the operations, rural quarry sales loaders⁹ employed by the predecessor employer continued working at the Fair Play rural quarry selling existing inventory until about April to May when inventory became low and the Employer commenced hiring of its universal crew. The Employer originally planned to start up operations at all of the quarries at this time, however, due to the condition of the quarries and the need for more updating and maintenance than expected, as well as the COVID-19 pandemic contributing to difficulties in hiring qualified employees for its universal crew, startup operations were significantly delayed. As of the date of the hearing the Employer had hired the six petitioned-for employees who started working in about May at the Fair Play rural quarry for approximately

⁷ All dates hereafter are in 2020 unless otherwise stated.

⁸ Previously, the rural quarries were operated by Ashgrove Aggregates, another subsidiary of CRH.

⁹ The parties agree that sales loaders should be excluded from any unit found appropriate herein.

eight weeks and then moved to the Marshfield quarry to start up operations there.¹⁰ As Marshfield operations grew more rapidly than expected and the Employer continued to face challenges in hiring, there were not sufficient employees to cover operations at both Marshfield and Fair Play resulting in the Employer engaging a third-party contractor to perform work at Fair Play. During this time, from about April to June, and again more recently in November, the Employer also engaged a third-party contractor at the Fair Grove rural quarry to cover work demands there that could not be met by the universal crew. To date, only the Fair Play, Marshfield and Fair Grove rural quarries are active and operational. The Employer has no firm plans to activate operations at any of its five remaining rural quarries in the near future but has taken some steps to start up operations at its Buffalo and Stockton rural quarries. These steps include engagement of some vendors and procurement of some purchase orders. However, the Employer has not entered into any lease agreements or acquired necessary assets to start operations there anytime soon. The Employer hopes to start activating those quarries in about Summer 2021.

The Employer anticipates that two universal crews of about 10 employees each will be necessary to run all eight of its rural quarries, for a total of 20 rural quarry employees. Based on the progression of rural quarry operations to date, the Employer anticipates it will take at least one year to build up to its first universal crew of 10 employees.

General Manager Upp and General Superintendent Tennis have been in charge of all hiring for the rural quarries. The hiring process consists of Upp and Tennis advising Human Resources (HR) Generalist Robin Patnode¹¹ as to the number of job openings available which Patnode posts to the Employer's internal intranet as well as on various state and federal job boards including veterans and disabled employees organizations. Patnode conducts initial screening of applications, forwards viable candidates to Upp and Tennis for review, and sets up interviews of desired applicants. Upp and Tennis interview applicants and make hiring determinations and job offers and rejections are conveyed by Patnode.

The petitioned-for employees were all hired in as 30-day probationary employees at \$17.00 per hour plus benefits including paid time off (PTO), vacation, health insurance, life insurance, disability insurance, and 401(k) benefits. They work an average of 53.5 hours of work per week with 11-hour days Monday through Thursday and a 9.5 hour day on Fridays.¹²

Like the Galloway quarry, the rural quarries are construction-driven and follow a construction pattern which is weather-driven to an extent resulting in slowdowns during the winter months from about December to April. None of the petitioned-for employees on the

¹⁰ Two other employees were hired as rural quarry crew employees for a short time – one was a no-call-no-show and thereafter terminated and one was a voluntary quit/termination. One other employee, as further described below, transferred from the Willard quarry to the rural quarries as a lead for about one month then transferred back to Willard as a sales loader.

¹¹ Patnode reports to HR and IT Director Randy Harwood. The record does not indicate their work locations.

¹² Payroll records of hours worked by rural quarry employees since hire show that to at least November 7, all of the petitioned-for employees worked 50 plus hours per week.

universal crew have been laid off or notified of layoff, or otherwise displaced at any time since their hire. To the contrary, the Employer intends for the petitioned-for employees to work as much as possible at the rural quarries unless they cannot work due to weather. In the last three months, the Employer has interviewed candidates for hire to its universal crew and extended a job offer to one candidate.¹³ Additionally, hiring for the universal crew remains a priority for the Employer going into the winter months and will be a top priority as Spring nears in March to April 2021.

C. Lead Employee Camrin Shoemaker

When the universal crew commenced operations at the Fair Play rural quarry in May, General Superintendent Tennis spent all of her time at Fair Play supervising the new employees. Brandon Smith, an experienced unit production employee from the Willard quarry transferred to Fair Play as a lead to help train new employees. Smith performed the same production/maintenance work as the universal crew employees. Under the direction of Tennis, Smith advised employees of the work plan for the day and oversaw day-to-day operations with Tennis. Smith also did some ordering of parts. In about June, Smith transferred back to the Willard quarry as a sales loader and about 30 days thereafter, universal crew employee Camrin Shoemaker replaced Smith as lead.

Shoemaker was hired onto the universal crew at Fair Play in May at \$17.00 per hour and, as noted, replaced Smith as lead in about July. In about November, he received a \$1.00 per hour raise as a lead. There is no separate job description for lead employee. Shoemaker does not possess any authority to hire or fire other employees and he has not been involved in any employee discipline matters. As a lead, Shoemaker spends 80 percent of his time performing the same production/maintenance work he performed before becoming a lead and performed by the other petitioned-for employees. For the remaining 20 percent of his time, Shoemaker performs lead duties which include advising employees of the work plan for the day and overseeing day-to-day operations with Tennis. Most job assignments are performed routinely by the petitioned-for employees who have been cross-trained to perform all quarry duties and do not require a great degree of direction. To a large extent, employee assignments are based on prior experience by the employee in the various primary skills (e.g., loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, or dozer/excavator/large equipment operator). As a lead, Shoemaker also decides which employees will cover for employees who are late or absent from work. Shoemaker also has some contact with customers and is currently being trained in parts ordering; he has done some limited ordering of parts such as screen cloths, conveyor belting, and idler rollers. He has also been trained to oversee periodic safety inspections by the MHSA and is responsible for ensuring that safety guidelines are being following by third-party contractors during blasting operations. In Tennis' absence, Shoemaker

¹³ The candidate did not respond to the offer and it was thereafter rescinded by the Employer due to lack of response.

is the highest-ranking employee on-site at the rural quarries. If any issues arise in Tennis' absence, Shoemaker contacts Tennis or upper management for further direction.

II. ANALYSIS

A. Board Law – Expanding Unit

Notwithstanding an employer's plan to expand its workforce, the Board will direct an immediate election when the current complement of employees is "substantial and representative" of the unit workforce to be employed in the near future. *Yellowstone International Mailing, Inc.*, 332 NLRB 386, 386 (2000); *Toto Industries (Atlanta), Inc.*, 323 NLRB 645, 645 (1997). In determining whether the employee complement is "representative and substantial" so as to warrant holding an immediate election, the Board in general finds that if approximately 30 percent of the eventual employee complement is employed and 50 percent of the eventual job classifications are filled, then the employee complement is substantial and representative and an election is appropriate. *Custom Deliveries, Inc.*, 315 NLRB 1018, 1019 fn. 8 (1994) (other citations omitted). In adopting these figures, the Board drew guidance from the standards enunciated for contract bar purposes in *General Extrusion Company, Inc.*, 121 NLRB 1165, 1167-1168 (1958). However, the Board has avoided the use of hard and fast rules in expanding unit determinations. *Clement-Blythe Companies*, 182 NLRB 502, 502-503 (1970). It considers the size of the employee complement at the time of the hearing, the nature of the industry, the time expected to elapse before a full, or substantially large, complement of employees is on hand, and other variables. *Id.* Thus, the Board will direct an election even when the *General Extrusion* formula has not been satisfied. See, e.g., *Endicott Johnson de Puerto Rico, Inc.*, 172 NLRB 1676, 1676-1677 (1968) (Board directed an election where employees were working in less than 50 percent of the planned job classifications).

The Board will only consider expansions that are to take place in the reasonably foreseeable future and not those that are indefinite, speculative or remote in time. In *Wittman Steel Mills, Inc.*, 253 NLRB 320, 320 (1980), the Board found that the only reasonable projected expansion of the employer's operations against which to measure the substantiality of the present workforce were those expected to take place in the next four to five months. Any expansion beyond that depended on the purchase of new equipment and the erection of a new building and because the employer had not yet purchased the equipment or begun construction of the new building, the proposed expansion was considered too indefinite and speculative to use as a standard by which to measure the present complement of employees. *Id.* Likewise, in *Bekaert Steel Wire Corp.*, 189 NLRB 561, 562 (1971), the Board determined that 37 employees in four job classifications were clearly representative of the contemplated work force of 49-55 in the employer's present operation. The date of further expansion plans was uncertain and it would not effectuate the purposes of the Act to delay an election among employees in the existing operation solely because of the employer's planned addition of another production facility in the future. See also, *Gerlach Meat Company, Inc.*, 192 NLRB 559, 559 (1971).

B. Application of Board Law to the Facts – Expanding Unit

In light of the record evidence and applicable Board law, I find that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit.

At the time of the hearing, the Employer employed six employees in the petitioned-for unit who have worked at three rural quarries (Fair Play, Marshfield and Fair Grove) since the Employer acquired its eight rural quarries in January. The record evidence demonstrates that the Employer has no firm plans to activate operations at the five remaining rural quarries in the near future and has only taken some limited steps to activate two of those quarries (Buffalo and Stockton) which vaguely include engaging some vendors and procuring some purchase orders. The Employer has not entered into any lease agreements nor has it acquired necessary assets to commence operations at other quarries anytime soon. The Employer's best prediction is that it is hopeful to start activating operations at the Buffalo and Stockton rural quarries in about Summer 2021. No new job classifications are expected. The Employer anticipates that it will be necessary to build up to two universal crews of 10 employees each to run all eight quarries and that based on the progression of rural quarry operations to date, it will take at least one year to reach its first universal crew of 10 employees.

Initially, I note that the record evidence is not sufficient to show that Employer's anticipated expansion of its five remaining rural quarries will take place in the reasonably foreseeable future. By the Employer's own projections, further expansion to two additional rural quarries in Buffalo and Stockton is not expected to begin until at least Summer 2021, over six months from now. The predicted date of these expansions and hiring plans for the next phase of startup operations at Buffalo and Stockton is largely uncertain and speculative and it would not effectuate the purposes of the Act to delay an election among employees in the existing operation solely based on the Employer's *hope* to expand two additional rural quarries in Summer 2021 at the earliest and any remaining rural quarries at some unknown future date thereafter.

Next, I note that at the present time the current workforce occupies 100 percent of the classifications and comprises 60 percent of the size of the unit projected to exist in Summer 2021 at the earliest, which is more than six months from now. Even assuming the Employer were to expand its operations and reach its ultimate complement of 20 employees in the near future, which it acknowledges is not likely, the present complement of six employees would constitute 30 percent of the eventual total employee complement which would warrant an immediate election.

Noranda Aluminum, Inc., 186 NLRB 217 (1970), cited by the Employer, is distinguishable from this case. In that case, the Board primarily considered a community of interest issue between cable employees and other plant employees and found that "the requested unit [did] not possess a degree of functional distinctness and autonomy which would warrant a finding that the cable plant employees have a separate community of interest apart from the other employees and [could] not be represented as a separate appropriate unit." *Id.* at 218. With regard

to the Board's secondary finding that a representative number of employees had not yet been employed to warrant an immediate election, the Board noted that, unlike here, a representative number of classifications had likewise not been filled. *Id.* Likewise, the facts in *Some Industries, Incorporated*, 204 NLRB 1142 (1973), cited by the Employer, are significantly distinguishable. In that case, the pre-election hearing was held on March 14, 1973 and the record evidence therein demonstrated that while "[a]t the time of the hearing, the plant was engaged only in the production of plastic pipe and had four extrusion machines in operation...[t]he [e]mployer stated that it was *in the process of* expanding its operations by adding more equipment as well as new lines of products, thus necessitating the hiring of more employees and the filling of new job classifications." *Id.* at 1142. Importantly, the employer had ordered additional machinery which was expected to be operational by the end of March 1973 (the same month as the pre-election hearing) and would result in the hiring of six more employees. *Id.* The Board ultimately found that the present complement was not representative of that which would be employed in the near future as 10 to 15 new classifications would be added within the seven months following the hearing date. *Id.* at 1143. Such timing is not present here.

Accordingly, I find that the Employer currently employs a substantial and representative complement of employees in the petitioned-for unit to warrant an immediate election in this matter.

C. Board Law – Seasonal Unit

In determining whether an operation is seasonal, the Board examines whether the number of employees in the year-round complement is relatively substantial. *See, Sitka Sounds Seafoods, Inc.*, 325 NLRB 685, 686 (1998) (non-seasonal operation where a significant group of employees – 50 to 60 employees out of the 92 eligible voters – performed work through the year); *Saltwater, Inc.*, 324 NLRB 343, 344 (1997) (non-seasonal operation where employer employed 26 employee minimum during down months versus 85 employee maximum during peak months); *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1414 (1978) (seasonal construction operation where employer employed 60 employees during peak season and 25 employees during slack season); *Industrial Forestry Association*, 222 NLRB 295, 295 (1976) (seasonal operation where employer employed 33 employees in peak season and reduced to six employees in low season); *Mark Farmer Company, Inc.*, 184 NLRB 785, 785 (1970) (substantial complement found where doll manufacturer employed eight permanent employees and where hire of additional employees in advance of holiday sales was speculative); *Bordo Products Company*, 117 NLRB 313, 317 (1957) (seasonal operation where plant closed after peak season, and where employer employed 1,200 employees in peak and reduced to 107 employees in off season).

If the employer is engaged in virtually year-round production operations, the employer's operation may be deemed "cyclical" and an immediate election directed. *See, Saltwater Inc.*, 324 NLRB at 344 (seven peak months non-seasonal); *The Baugh Chemical Company*, 150 NLRB 1034, 1034 (1965) (10-month operations non-seasonal). In examining seasonality and the timing

of elections, the Board considers continued ties to employment for low-season and laid off employees. *Aspen Skiing Corporation*, 143 NLRB 707, 711 (1963) (Board did not delay election to peak season where 14 of 50 employees employed during summer low season, all of whom had come from the winter, peak-season crew).

D. Application of Board Law to the Facts – Seasonal Unit

In light of the record evidence and applicable Board law, I find that the Employer's operation is not seasonal in nature.

Most importantly, the Employer has not established any fluctuation in the substantial complement of employees year-round. While I recognize that there is a peak season for the rural quarries from April through November¹⁴ which follows a construction pattern, this is a nine-month period which weighs in favor of concluding that the operations are cyclical, rather than seasonal, in nature. The same type of cyclical operations exist at the Galloway quarry. Moreover, although the petition herein has been filed during the Employer's slower season, none of the petitioned-for employees have been laid off or notified that they will be laid off, or otherwise displaced at any time since their hire. To the contrary, the Employer intends for the petitioned-for employees to work as much as possible at the rural quarries unless they cannot work due to weather. To this end, in the last three months, the Employer has interviewed candidates for hire for the universal crew and extended a job offer to one candidate. The Employer acknowledges that hiring for the universal crew remains a priority going into the winter months and will be a top priority as Spring nears in March to April 2021. This undercuts the Employer's argument that its rural quarry operations are seasonal.¹⁵

Accordingly, I find that the record evidence is not sufficient to show that the Employer does not employ a substantial complement of employees in the petitioned-for unit throughout the entire year to support the Employer's position that the rural quarry operations are seasonal in nature such that an election in this matter should be delayed.

E. Board Law – Supervisory Issue

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

¹⁴ The Employer argues that the election should be delayed to May 2021 when a substantial complement of employees would be present in the proposed unit.

¹⁵ In contrast, as acknowledged by the Employer in its brief, in finding the employer's operations to be seasonal in *Dick Kelchner Excavating*, 236 NLRB at 1416, the Board determined that "[t]he exact date for the resumption of the [e]mployer's normal operations [could] not be determined on [the record therein]." Likewise, the Board found in *The Cleveland Cliffs Iron Company*, 117 NLRB 668,670 (1957), also cited by the Employer, that "the exact date for resumption of the normal operation" of the seasonal employer's vessels could not be determined. Such is not the case here.

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

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

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

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

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

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

F. Application of Board to the Facts – Supervisory Issue

There is no claim or record evidence that the lead employee Shoemaker possesses authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward, adjust grievances of, or discipline other employees. Rather, the Employer asserts that Shoemaker is a statutory supervisor based on his authority to assign work to and responsibly direct other employees, and other secondary indicia of supervisory status.

1. Assignment of Work

The Board in *Oakwood* defined assigning work as “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood*, 348 NLRB at 689. Consistent with *Kentucky River*, the *Oakwood* Board adopted an interpretation of “independent judgment” that applies to any supervisory function at issue “without regard to whether the judgment is exercised using professional or technical expertise.” *Id.* at 692. The Board explained that “professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” *Id.* The Board then set forth standards governing whether the exercise of the Section 2(11) acts are carried out with independent judgment: “actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as ‘independent’ under the Act lies somewhere in between these extremes.” *Id.* at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that “an individual must at minimum act, or effectively recommend action, *free of the control of others* and form an opinion or evaluation by discerning and comparing data.” *Id.* (emphasis added). Further, the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Id.*

Regarding the element of place, there is no record evidence about Shoemaker assigning employees to specific areas. While there is some record evidence that assignments are based on prior experience such that an employee may be assigned to a particular place, the record does not show that Shoemaker makes such determinations. The record demonstrates that all of the petitioned-for employees have been cross-trained to equally perform all quarry duties and does not disclose assignments by the leads with respect to place which requires them to use judgment involving a degree of discretion that rises above the “routine or clerical” as contemplated in *Oakwood*. *Id.*

As to the element of time, the record is absent of any evidence regarding who is in charge of scheduling matters at the rural quarries. There is no record evidence or claim that Shoemaker is involved in or has any authority regarding the scheduling or schedule changes of any employees. The Employer has not established any exercise of supervisory authority regarding the scheduling of other employees. See, *Golden Crest*, 348 NLRB at 728-730 (2006). Thus, the record does not support that Shoemaker appoints employees to a time as contemplated in *Oakwood*.

With respect to the element of duties, the Employer argues that Shoemaker uses independent judgment in assigning and directing the duties and tasks of the petitioned-for employees. As noted, all of the petitioned-for employees have been cross-trained to equally perform all quarry duties. While there is some record evidence that assignments are based on prior experience by the employee in the various primary rural quarry skills (e.g., loader operator, haul truck operator, water truck operator, quality control, plant operator, mechanic, or dozer/excavator/large equipment operator), the record does not show that Shoemaker makes such determinations. Although Shoemaker may advise employees of the work plan for the day, there is no record evidence demonstrating that he performs any detailed analysis with a degree of independence necessary to constitute independent judgment of the employees' abilities in relation to production/maintenance needs.

The Employer also argues that Shoemaker "uses independent judgment to redirect employees to meet customer needs." In this regard, it points to Shoemaker's interfacing with customers regarding product inventory resulting in alterations and adjustments to the production schedule and the employees' assignments. I find such evidence is tenuous and conclusory and does not confer any supervisory authority. The record overall demonstrates that all of these employees' assignments are routine in nature and based on their title, rather than any particular expertise, and the evidence is insufficient to establish that the direction provided to them by Shoemaker requires the use of independent judgment or involves a "degree of discretion that rises above routine or clerical." *Oakwood*, 348 NLRB at 693.¹⁶

2. Responsible Direction

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

The record evidence establishes that Shoemaker is in charge of day-to-day direction of the petitioned-for employees especially when General Superintendent Tennis is absent. In this

¹⁶ I further find that Shoemaker's limited authority to order parts does not appear to involve any significant exercise of independent judgment of the type involved in assessing supervisory status, and moreover, this function is not included in the enumerated list of supervisory indicia found in Section 2(11).

regard, Shoemaker ensures that quarry rules and standards are being followed. However, the record is absent of any evidence showing that Shoemaker provides feedback to Tennis or upper management regarding the deficient performance of other employees. The Employer has not established that Shoemaker is *accountable* for his actions in directing the petitioned-for employees. In this regard, the record is absent of any evidence showing that Shoemaker has suffered any adverse consequences such as discipline concerning the deficient performance of any employees. Additionally, there is no evidence that General Superintendent Tennis or anyone else in management has advised Shoemaker he will or even may be subject to consequences himself concerning deficiencies and errors of other employees.¹⁷ In sum, the overall record does not demonstrate that the Employer has *actually* held Shoemaker accountable or has imparted clear and formal notice to him that he will be held accountable for the job performance of any employees. See, *Golden Crest*, supra at 731. Thus, I find that the Employer has not met its burden to establish that Shoemaker responsibly directs employees as contemplated by *Oakwood*.¹⁸

3. *Other Secondary Indicia*

While the Board has held that secondary indicia can be a factor in establishing supervisory status, it is well established that where putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia alone are insufficient to establish supervisory status. *Golden Crest*, 348 NLRB at 730, fn. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

There is no record evidence that Shoemaker participates in any evaluation procedures for employees or that any feedback provided by him about employees is incorporated into any employee performance reviews. Shoemaker does not participate in any management meetings. The limited record evidence regarding Shoemaker's involvement in training employees in rural quarry operations does not support supervisory authority. The Board has frequently found that employees with training or instructional duties are not supervisors within the meaning of the Act. See, *The Washington Post Co.*, 242 NLRB 1079, 1083 fn. 15 (1979) (citing *House of Mosaics*, 215 NLRB 704, 712 (1974) ("having the responsibility of training new employees does not invest employees with supervisory authority within the meaning of the Act.")). I also note that

¹⁷ At the hearing, the Employer presented some evidence regarding an incident at the Fair Play quarry which took place in about June to July when the lead position was vacant, and Tennis was exclusively supervising employees at Fair Play. A production employee was refusing to perform digging work with other production employees and Tennis directed the employee to perform the work. The employee walked off job and did not return to the job site. Although no similar situation has occurred since Shoemaker has become the lead, the Employer argues this will be within Shoemaker's responsibilities and constitutes supervisory authority. Not only is such evidence speculative and conclusory (the record does not indicate that the employee who walked off the job was disciplined, suspended or terminated by anyone), it does not demonstrate that Shoemaker possesses any supervisory authority within the meaning of Section 2(11).

¹⁸ The Employer's argument that it anticipates that as it expands to opening the other rural quarries and the universal crew grows, it may be necessary to have a second lead and that within one to two years, Shoemaker may be performing supervisory duties exclusively, is speculative and conclusory.

although there are times when Shoemaker is the highest-ranking official on quarry premises, if any issues arise in Tennis' absence, Shoemaker contacts Tennis or upper management for further direction. At any rate, the Board has continually found that highest rank is a secondary indicium which does not confer 2(11) status where, as here, the putative supervisor is not shown to possess any of the primary indicia of supervisory status. *Golden Crest*, 348 NLRB at 730 fn. 10; *Training School at Vineland*, 332 NLRB at 1412.¹⁹

The Employer's reliance on *Alliance Sand Company*, 107 NLRB 1273 (1954) and *United States Gypsum Company*, 116 NLRB 638 (1956) is misplaced and the facts therein are distinguishable from this case. In *Alliance Sand*, the Board found that an assistant superintendent at a sand quarry was a statutory supervisor primarily based on that fact that he was above shift foremen who were determined to be statutory supervisors based on their authority to hire and discharge and/or effectively to recommend such action. *Id.* at 1275. Additionally, the assistant superintendent therein had involvement in effectively recommending hiring as well as the discipline of other employees. *Id.* In *United States Gypsum*, the Board found that head mechanics were statutory supervisors based on their authority to "recommend changes in the status of crew members." *Id.* at 642. Additionally, the head mechanics spent "approximately half their time in overseeing their crews' work," were "regarded as supervisors by the employees working under them," and did not report to the same management individual as the other employees. *Id.* In contrast, the record herein demonstrates that Shoemaker spends 80 percent of his time performing the same production/maintenance work he performed before becoming a lead and performed by the other petitioned-for employees and 20 percent of his time performing lead duties.²⁰

Accordingly, I find that the record evidence is insufficient to establish Shoemaker is a supervisor within the meaning of Section 2(11) of the Act and thus he is eligible to vote in the election.

III. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. The Parties' Positions

Petitioner asserts that a mail ballot election should be held given the current state of the COVID-19 pandemic in Missouri and particularly Polk County where the Employer proposes a

¹⁹ Most recently, in *Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 3 (2015), the Board reiterated that "nothing in the statutory definition of 'supervisor' implies that the service as the highest ranking employee on site requires finding that the employee must be a statutory supervisor." (other citations omitted).

²⁰ The Employer's argument in its brief that Shoemaker's ratio of production/maintenance time to lead/supervisory time "is projected to now 'flip'" is speculative and conclusory as exemplified by the Employer's own witness, General Superintendent Tennis, who testified: "Eventually it should flip...it is going to be a gradual flip, depending on how many people we get hired, and you know, the speed of it. So [Shoemaker] will slowly go to seventy, sixty [percent], you know, and in a year or two years, it could be all supervision."

manual election would be held.²¹ In this regard, Petitioner primarily contends that the second factor cited by the Board in *Aspirus*, related to the 14-day testing positivity rate in Polk county, as well as in other counties where the employees may regularly interact, is easily satisfied in this case. Petitioner references data at the time of its brief filing from the U.S. Centers for Disease Control and Prevention (CDC) showing a 6.14 percent positivity rate in Polk County.²² Petitioner additionally contends that a mail ballot election is appropriate in this case given Missouri Governor Mike Parson's non-mandatory health warnings related to group gatherings. Finally, Petitioner points to record testimony referencing that some petitioned-for employees recently tested positive for COVID-19.

Despite being advised at the hearing that election arrangements should be addressed via brief per the requirements of *Aspirus* and the data websites referenced therein, other than reiterating the Board's decision in *Aspirus*, the Employer does not make any specific arguments or provide any data in favor of holding a manual election in this case. The Employer merely asserts in a conclusory manner that I should "follow the Board's reaffirmed 'general rule' that elections 'be conducted manually.'" Without stating how it will do so (e.g., by providing a large sanitized and disinfected voting area capable of social distancing and separate entrance and exit; requiring mask-wearing by all election participants; providing hand sanitizer, masks, plexiglass shields, and other PPE to voters and election participants; limiting number of attendees at pre-election conference and ballot count as well as number of election observers; etc.), the Employer merely claims that the *Aspirus* guidelines "clearly can be met in this case." The Employer does not address any state or local health orders or affirm that any proposed manual election sites could be established in a way that avoids violating them relating to maximum gathering size. The only specific factor acknowledged by the Employer is that it agrees to abide by the GC Memo 20-10 protocols. While specifically acknowledging that the Board's guidelines in *Aspirus* require certification, by affidavit, of the current COVID-19 status at its relevant facilities, the Employer provides no such certification by affidavit. The Employer does not address whether there is a current COVID-19 outbreak at its facilities nor does it affirmatively declare an absence of individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). Moreover, the Employer does not acknowledge recent increases in the number of new COVID-19 positive tests in the nation, state and/or counties, or provide data either on the 14-day trend in the number of new confirmed cases of COVID-19 or the 14-day testing positivity rates in counties where facilities are located.

²¹ Petitioner notes that "it would be irrelevant and a waste of Board resources to conduct an analysis of the relative risk at all eight quarry locations because the Employer has not presented any evidence that any of the unit employees will be working at any of those other quarries immediately preceding an election and because the Employer's Statement of Position only identifies the Fair Play [quarry in Polk County]." As discussed above, three of eight rural quarries (Fair Play, Marshfield and Fair Grove) are currently active and operational.

²² Without providing data results, Petitioner also recommends accessing the Georgia Tech "COVID-19 Event Risk Assessment Planning Tool" (<https://covid19risk.biosci.gatech.edu/>) for additional data for Polk County or other counties in Missouri.

B. Applicable Framework When Considering a Mail Ballot Election

The Board has delegated its discretion in determining election arrangements to Regional Directors. *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). In *Aspirus*, the Board reiterated its longstanding preference for manual elections under *San Diego Gas* while also providing more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of COVID-19. The Board set forth “six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic,” noting that “[w]hen one or more of these situations is present, a Regional Director should consider directing a mail ballot election” under the extraordinary circumstances presented by the COVID-19 pandemic. *Aspirus*, 370 NLRB slip op. at 1. Those six situations are:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either 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;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The employer fails or refuses to commit to abide by the GC Memo 20-10²³ protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and
6. Other similarly compelling considerations.

Accordingly, I analyze the instant petition using the prevailing circumstances in the state and county where the facilities are located and in light of the Board’s recent guidance in *Aspirus*.

C. A Mail Ballot Election Is Appropriate

In assessing the six situations, I find that the Employer has failed to provide appropriate assurances under the fifth situation and that moreover, the second situation—COVID testing rates in the immediate area—mandates that I order a mail ballot election. The first situation is not grounds for a mail ballot election as Region 14’s offices are not subject to mandatory telework status. The fourth situation is also not grounds for a mail ballot election as the Employer has affirmed its commitment to following GC Memo 20-10 protocols, albeit without any detail as

²³ See also, GC Memo 21-01 stating “[a]side from elements set forth in GC Memo 20-10, upon which the *Aspirus Keweenaw* Board relies in part, the instructions set forth in this memorandum supersede all other instructions on the subject.”

noted. Under the third situation, I find that the proposed manual election site could be established consistent with local guidelines. Below, I shall discuss my assessment of the third, fifth, and second situations in connection with the Fair Play, Marshfield and Fair Grove rural quarries located in Polk County, Webster County and Greene County²⁴, respectively.²⁵

With regard to the third situation, whether the proposed manual election site can be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size, on November 19, 2020, Governor Parson issued Executive Order 20-19 extending state's public health emergency to March 31, 2021.²⁶ On the same date, Governor Parson issued a statewide "Public Health Warning" advising that the state would take a "balanced approach" to Missouri's COVID-19 response and setting forth advisories for personal behavior, business, travel, and local government. These advisories make specific recommendations with regard to mask-wearing; social distancing; handwashing; limiting large gathering interactions and travel outside the state; staying home when sick; and modifying physical workspaces and developing disease response plans in workplaces. The state recommends that all residents wear a cloth face covering when in a public setting where other social distancing measures are difficult to maintain (e.g., grocery stores and pharmacies), especially in areas of significant community-based transmission.²⁷ The COVID-response state policies give leeway to counties and cities to put in place stricter restrictions against the virus. The Polk County Health Center²⁸ recently issued a public advisory due to the current positivity rate and red zone²⁹ status in Polk County. The advisory states that Polk County residents are "expected to wear a mask and practice physical distancing when with those outside their household" and are "strongly encouraged to stay home and limit gatherings to close contacts only during the holiday season."³⁰ The Webster County Health Unit maintains an updated list of "community exposures" and advises county residents "to be mindful of keeping the social distance of at least 6 ft, wear a mask if you're going to be out in public, use good hand hygiene and hand sanitizer, and if you're sick, please stay home."³¹ Effective November 23, Marshfield Mayor Natalie McNish implemented Executive Order 2020-06 with a citywide requirement for

²⁴ At the hearing, the Employer erroneously referenced Fair Grove as being in Dallas County.

²⁵ While the Employer proposes the Fair Play rural quarry as the manual election site, as discussed above, the Marshfield and Fair Grove rural quarries are also active and operational and could be viable election sites as well. Therefore, my analysis will address these three communities.

²⁶ "Governor Parson Signs Executive Order 20-19 Extending State of Emergency in Missouri." <https://governor.mo.gov/press-releases/archive/governor-parson-signs-executive-order-20-19-extending-state-emergency>. To view Executive Order 20-19, [click here](#). (accessed December 14).

²⁷ <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/statewide-orders.php> (accessed December 14)

²⁸ A governing body "to protect and promote the health and safety of the people in Polk County by responding appropriately to identified public health needs."

²⁹ The White House Coronavirus Task Force gives a red zone designation to states with positivity rates above 10 percent, or with more than 100 new weekly cases per every 100,000 people, as further discussed below.

³⁰ <https://polkcountyhealthcenter.org/> (accessed December 14).

³¹ <http://webstercohealth.com/COVID-19/> (accessed December 14).

face coverings in public places.³² Greene County’s June 12 COVID-19 Resolution “strongly recommend[s] that all citizens follow and adhere to health guidelines published by the Center for Disease Control and Prevention pertaining to the novel coronavirus outbreak known as COVID-19 and take personal responsibility upon themselves for their own health, well-being and protection and for the same of those they may come into contact with” and “offer[s] a sampling of ... measures citizens are encouraged to take for their protection” including recommendations for handwashing and surface disinfecting measures; social distancing; avoiding large gatherings; and considering wearing a mask, or in the alternative, covering coughs and sneezes.³³ Although Greene County does not have any enforceable restrictions, the City of Springfield-Greene County Health Department has had a face covering ordinance that effective from July 16 through January 9, 2021. The ordinance requires face coverings in public places inside the Springfield city limits.³⁴

With regard to the fifth situation and the current COVID-19 status at the Employer’s facility, in *Aspirus*, the Board stated:

...for the duration of the pandemic, we require that in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). The Employer must also supplement its initial submission and certify any changes to the facility’s COVID-19 status after a manual election is directed, up to the day of the election itself. Based on these certifications, the determination that there is a COVID-19 outbreak at the employer’s facility or the employer’s failure or refusal to provide the required certifications will ordinarily indicate the propriety of a mail ballot election. 370 NLRB slip op. at 7

The Employer does not address whether there is a current COVID-19 outbreak at its facilities. The Employer does not affirmatively declare an absence of individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous 14 days). While the Employer agrees that it would abide by GC 20-10 as noted, which includes certifying any changes to its facility’s COVID-19 status after a manual election is directed, up to the day of the election itself, I note that it has not met the requirements of the fifth factor in *Aspirus*.

I am left to analyze the second situation described by the Board in *Aspirus*, that is, whether either the 14-day trend in the number of new confirmed cases of COVID-19 in Polk, Webster and

³² <http://www.marshfieldmo.gov/news-events/mayor-s-blog/item/207-executive-order-2020-06-face-coverings-in-public-places> (accessed December 14). See, [Executive Order 2020-06 - Signed 1.pdf](#).

³³ <https://www.greencountymo.gov/> (accessed December 14).

³⁴ <https://www.springfieldmo.gov/5244/Masking-Ordinance-and-Phase-3A-3B-FAQs> (accessed December 14).

Greene Counties where the facilities are located is increasing, or the 14-day testing positivity rate in counties is five percent or higher. In *Aspirus*, the Board indicated that county-level data for the potential manual polling place should be accessed through Johns Hopkins University. 370 NLRB slip op. at 5, fn. 22.

According to its “COVID-19 Status Report” for Polk County, Johns Hopkins data shows the 14-day trend in the number of new confirmed cases at 11 cases on December 1 and at 6 cases on December 14, with a daily high within that range of 37 on December 5.³⁵ Data contained in the Johns Hopkins COVID-19 Status Report for Webster County shows the 14-day trend in the number of new confirmed cases at 32 cases on December 1 and at 17 cases on December 14, with a daily high within that range of 57 on December 5.³⁶ Data contained in the Johns Hopkins COVID-19 Status Report for Greene County shows the 14-day trend in the number of new confirmed cases at 246 cases on December 1 and at 110 cases on December 14, with a daily high within that range of 454 on December 13.³⁷

Number of Cases in Last 14 Days—Polk County	
-14 (12/1/20)	11
-13	9
-12	18
-11	14
-10	37
-9	36
-8	11
-7	9
-6	23
-5	15
-4	26
-3	0
-2	25
-1 (12/14/20)	6

Number of Cases in Last 14 Days—Webster County	
-14 (12/1/20)	32
-13	-1
-12	-1
-11	5
-10	57
-9	22
-8	15
-7	19
-6	21
-5	18
-4	20
-3	0
-2	43
-1 (12/14/20)	17

Number of Cases in Last 14 Days—Greene County	
-14 (12/1/20)	246
-13	95
-12	151
-11	132
-10	179
-9	214
-8	203
-7	134
-6	188
-5	157
-4	123
-3	0
-2	454
-1 (12/14/20)	110

These numbers show a 14-day trend of new confirmed cases in Polk, Webster and Greene Counties remaining overall steady and in a significantly high range for those counties. This situation, standing alone, while not showing an outright upward trajectory, is concerning and supports the propriety of a mail ballot election.

³⁵ <https://bao.arcgis.com/covid-19/jhu/county/29167.html> (accessed December 14).

³⁶ <https://bao.arcgis.com/covid-19/jhu/county/29225.html> (accessed December 14).

³⁷ <https://bao.arcgis.com/covid-19/jhu/county/29077.html> (accessed December 14).

As further noted by the Board in *Aspirus* with regard to the second factor, the 14-day “percent positive” or “testing positivity rate” statistic is “based on the number of positive and total tests in the locality” and is “suggestive of transmission rates in the locality among people who have not been tested.” 370 NLRB slip op. at 5. Johns Hopkins University notes that “[b]ecause a high percentage of positive tests suggests high coronavirus infection rates (due to high transmission in the community), a high percent positive can indicate it may be a good time to add restrictions to slow the spread of disease.”³⁸

On May 12, 2020 the World Health Organization (WHO) advised governments that before reopening, testing positivity rates should remain at five percent or lower for at least 14 days,³⁹ and the Board has decided to use this five percent standard in analyzing the appropriateness of a mail ballot versus manual election. State-by-state statistics for 14-day testing positivity rates reported by Johns Hopkins (“Which U.S. States Meet WHO Recommended Testing Criteria?”) show that as of December 14, Missouri has a higher than recommended positivity rate of 16.54 percent.⁴⁰ While Johns Hopkins reports county-level statistics for 14-day trends in the number of new confirmed cases, as noted above, it does not report statistics for 14-day testing positivity rates on a county-by-county basis. However, the State of Missouri reports seven-day positivity rates county-by-county as calculated by the Whitehouse Coronavirus task force.⁴¹ These statistics show that for the reporting period of December 5 to December 11, the seven-day positivity rates for Polk County,⁴² Webster County,⁴³ and Greene County⁴⁴ were 10.1 percent, 18.9 percent and 19.9 percent, respectively.

The above statistics showing the 14-day trend in the number of new confirmed cases and the testing positivity rates above five percent are sufficient to meet the second situation enunciated by the Board in *Aspirus* and establish that there is current evidence of widespread COVID-19 infection in the communities surrounding the Employer’s facility with no expected improvement in COVID conditions, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

Given the above conditions, I find the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of further infection and the risk of unnecessarily exposing employees, Board agents, party representatives,

³⁸ <https://www.jhsph.edu/covid-19/articles/covid-19-testing-understanding-the-percent-positive.html>.

³⁹ <https://coronavirus.jhu.edu/testing/testing-positivity> (accessed December 14).

⁴⁰ <https://coronavirus.jhu.edu/testing/testing-positivity> (accessed December 14).

⁴¹ The State of Missouri notes with that each county positivity rate “reflects the total number of positive PCR tests in the past 7 days, divided by the total number of PCR tests in the past 7 days” – this is the same method used by the CDC. A PCR test is a nasal swab molecular diagnostic test that detects the virus’s genetic material versus an antigen/rapid diagnostic tests that detects specific proteins from the virus – see, <https://www.fda.gov/consumers/consumer-updates/coronavirus-disease-2019-testing-basics> (accessed December 14).

⁴² <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

⁴³ <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

⁴⁴ <https://showmestrong.mo.gov/public-health-county/> (accessed December 14).

and their families to COVID-19, and it will ensure that the unit employees have the opportunity to vote promptly.

Based on the above, a mail ballot election is warranted at this time.

CONCLUSION

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 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.⁴⁵
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit⁴⁶ appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Included: All full-time and regular part-time, hourly-paid Equipment Mover and Operator (Haul Truck, Loader, Mechanic, Plant, Quality Control, Rolling Stock Equipment (Dozer, Excavator, etc.), Quarry Maintenance, and Water Truck) employees employed by the Employer at its rural quarries currently located in Bolivar, Buffalo, Fair Grove, Fair Play, Conway (Marshfield), Milo (Montevallo), Pittsburg, and Stockton, Missouri.

Excluded: All other employees, temporary employees, Inside Sales Support, Scale Clerk/Operators, Sales Loaders, other sales employees, dispatchers, office

⁴⁵ The parties stipulated that the Employer is a State of Missouri corporation engaged in the business of producing construction aggregate from its headquarters located at 431 South Jefferson, Suite 250, P.O. Box 50685, Springfield, Missouri, with quarry facilities located at various locations in Missouri. During the past year, a representative period, the Employer, in the course and conduct of its business operations, purchased and received goods and services valued in excess of \$50,000 directly from sources located outside the State of Missouri. During that same period, the Employer sold and shipped goods and services valued in excess of \$50,000 directly to customers located outside the State of Missouri. The Employer annually derives gross annual revenues in excess of \$500,000.

⁴⁶ The parties stipulated to the inclusions and exclusions to the unit during the hearing. The unit description below is in accord with the stipulation but the language was modified to more closely conform to language generally used to describe bargaining unit.

clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a mail 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 **Heavy Construction Laborers' Local #663, affiliated with Laborers' International Union of North America.**

A. ELECTION DETAILS

I have determined that the election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate voting group at 3:00 p.m. on **Monday, December 28, 2020**, by personnel of the National Labor Relations Board, Region 14, from the office of the National Labor Relations Board, Subregion 17 – 8600 Farley Street – Suite 100, Overland Park, Kansas 66212-4677. 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 **Monday, January 4, 2021**, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Subregion 17 Office at (913) 275-6525.

The ballots will be commingled and counted by the Subregion 17 office at 2:00 p.m. on **Tuesday, January 19, 2021**. In order to be valid and counted, the returned ballots must be received by the Subregion 17 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which will be 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 weekly payroll period ending December 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 by mail as directed 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 cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Thursday, December 17, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

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

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

RIGHT TO REQUEST REVIEW

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

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

Conco Quarries, Inc.
Case 14-RC-267769

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.

DATED at St. Louis, Missouri, this 15th day of December 2020

A handwritten signature in blue ink, appearing to read "W. B. Cowen", is written above a horizontal line.

William B. Cowen, Acting Regional Director
National Labor Relations Board, Region 14/Subregion 17
8600 Farley Street, Suite 100
Overland Park, Kansas 66212-4677