

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

<p>AUSTIN MAINTENANCE & CONSTRUCTION, INC.,</p> <p style="text-align:right">Employer,</p> <p>and</p> <p>INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351</p> <p style="text-align:right">Petitioner.</p>	<p>NLRB Case No: 28-RC-266617</p>
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**AUSTIN MAINTENANCE & CONSTRUCTION, INC.’S
REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S
DECISION AND DIRECTION OF ELECTION**

Pursuant to Section 102.67 of the National Labor Relations Board’s (“NLRB” or “Board”) Rule and Regulations, Austin Maintenance & Construction, Inc. (“Austin”) seeks review of the Decision and Direction of Election (“DDE”) issued by the Regional Director of Region 28 on January 5, 2020, and, for the following reasons, respectfully requests that the Regional Director’s decision be reversed and that the International Union of Operating Engineers Local 351 (“Union”) election petition be dismissed.

I. INTRODUCTION

This matter arises out of a representation petition for a unit of certain employees at Austin’s Artesia, New Mexico worksite. The Union’s petition did not seek a wall-to-wall unit. In fact, it did not even include all the employees in one of the included job classifications. Rather, the Union cherry-picked a few classifications and a few levels within those classifications for inclusion in the petitioned-for unit. Accordingly, the Union requested an election in a unit that was not presumptively appropriate.

With no presumption applicable and no stipulated election agreement, the Union bore the

burden to present at least some evidence establishing the appropriateness of the unit. Yet, at the representation hearing, the Union did not present a single exhibit or witness in support of its petitioned-for unit. As a result, there was no record evidence on which the Region could determine that the proposed unit was appropriate.

Nevertheless, with no discussion or explanation, the Regional Director ordered an election in a unit that was substantially identical to the Union's petitioned-for unit. Doing so under these circumstances not only failed to fulfill the Board's statutory obligation to determine the appropriateness of the bargaining unit in this case, but it also effectively made the Union's extent of organizing controlling. *See American Hospital Assn. v. NLRB*, 499 U.S. 606, 611, and 614 (1991) (noting the Board's affirmative statutory obligation to determine the appropriate bargaining unit in each case); 29 U.S.C. § 159(c)(5) (“[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling”). For these reasons, the Regional Director's DDE warrants review because it raises a substantial question of law or policy as a result of its departure from Board precedent.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Union's Petition.

Based in LaPorte, Texas, Austin provides construction, maintenance, turnaround and other plant services. *See* Bd. Ex. 2. Austin maintains a worksite in Artesia, New Mexico at HollyFrontier Corporation's Navajo Refinery. *Id.*; Tr. 19. On September 24, 2020, the Union filed a petition to represent “[a]ll hourly full-time employees employed as Boilermaker 1, 2, and 3, Laborer's, and Foreman,” excluding “[a]ll supervisors as defined by the Act” (the “Petition”). *See* Bd. Ex. 1(a). In addition to those classifications listed in the Petition, Austin also employs individuals as Boilermakers 4, Boilermaker Foremen, Insulators, Janitorial Laborers, Janitorial Foremen, Painters, Scaffold Builder Helpers, Scaffold Builder Specialists, and Scaffold Foremen

at the Artesia worksite. Tr. 14, 31.

On September 29, the Region sent an email regarding the Petition to Beatrice Barraza, a non-exempt, hourly Assistant Field Office Manager for Austin who has no supervisory or human relations responsibilities. *See* Bd. Ex. 1(d) at 1. She believed that the email had been sent to her in error and did not bring the communication to the attention of Austin management or Human Resources. *Id.* at 1-2. On October 13, the Region contacted Ms. Barraza again by email, notifying her that Austin missed its October 7 deadline to file a Statement of Position and alerting her to the upcoming hearing set for October 16. *Id.* at 2. It was not until then that the Regional's email was forwarded to Austin's Vice President of Human Resources, Robert Kasubinski. *Id.* at 2.

As a result, Austin did not learn of the Petition until October 13, when its deadline to submit a Statement of Position had already expired. *Id.* at 2. Upon learning of the Petition, Austin filed a Motion for Extension of Deadline for Position Statement and Postponement of Hearing Date on October 14, 2020. *See id.* The Region denied the motion on October 15, 2020, and the hearing proceeded as scheduled. *See* Bd. Ex. 1(e).

B. The Representation Hearing.

The Region conducted the representation hearing via videoconference on October 16, 2020. Tr. 1. At the hearing, Austin verbally made a Motion for Reconsideration of its previous motion, which the Region denied. Tr. 8-10, 36. Thus, Austin was precluded from "raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue" that it failed to raise in a timely Statement of Position. *See* § 102.66(d); DDE at 6, n.20. The Hearing Officer did, however, request that the parties' state their positions on the appropriate method for conducting an election. Tr. 19. The Union requested a mail ballot election, whereas Austin requested a manual election. Tr. 19-21.

The Hearing Officer also permitted Austin to submit offers of proof regarding two issues

related to the appropriateness of the unit. *See* § 102.66(c); DDE at 6, n. 20. First, Austin made an offer of proof that, if called to testify, Kasubinski would testify that there were approximately 18 other employees in the job titles Boilermaker 4, Insulator, Janitorial Laborer, Painter, Scaffold Builder Helper, and Scaffold Builder Specialist that shared a community of interest with the petitioned-for unit such that they must be included to have an appropriate unit. Tr. 24-25. Second, Austin made an offer of proof that, if called to testify, Site Manager Geneva Look, would testify that Foremen, including three Boilermaker Foremen, one Janitorial Foreman, and one Scaffold Forman, possessed various types of authority that made them supervisors under Section 2(11) of the Act, such that they should be excluded from the unit. Tr. 25-27. The Region denied the Union’s motion to strike Austin’s offers of proof, but it did not receive evidence regarding the issues raised in Austin’s offers of proof. DDE at 6, n.20. The Union did not present any witnesses, offer any exhibits, or submit any offers of proof.

C. The Decision and Direction of Election.

On January 5, 2021, the Regional Director issued his DDE ordering a mail ballot election in the Union’s petitioned-for unit.¹ The Regional Director noted that “[t]he sole issue in this case [was] whether to conduct an election manually or by mail ballot in light of the ongoing COVID-19 pandemic,” and thus, his analysis focused on determining whether a mail ballot election was appropriate under the factors outlined by the Board in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020). DDE at 6. The Regional Director did not analyze the appropriateness of the Union’s petitioned-for unit, yet he still concluded that:

The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Boilermaker 1, Boilermaker 2,

¹ The only change was to refer to “General Laborers” instead of “Laborers.” DDE at 8, n.25.

Boilermaker 3, General Laborers, and Foreman employed by the Employer at its facility in Artesia, New Mexico.

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

Others Permitted to Vote: At this time, no decision has been made regarding whether employees classified as Boilermaker 4, Boilermaker Foreman or General Laborer Foreman are included or excluded from the bargaining unit, and individuals in these classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

Id. at 8.

D. The Election and Certification of Representative.

A secret mail ballot election was held from January 14 – 28. *Id.* at 9. A majority of the valid ballots were cast for the Union. *See* Certification of Representative. On February 17, 2021, the Region certified the Union as the representative of “[a]ll full-time and regular part-time Boilermaker 1, Boilermaker 2, Boilermaker 3, General Laborers, and Foreman employed by the Employer at its facility in Artesia, New Mexico; excluding all other employees, office clerical employees, managers and supervisors as defined in the Act.” *Id.* Austin now timely files this Request for Review.

III. ARGUMENT AND AUTHORITIES

Under Section 102.67(c) of the Board’s Rules and Regulations, the Board “may review any action of a Regional Director delegated to him under Section 3(b) of the Act except as the Board’s Rules provide otherwise.” Review is appropriate where “a substantial question of law or policy is raised because of...[a] departure from, officially reported Board precedent.” *Id.* at § 102.67(d)(1)(ii). In this case, the Regional Director’s DDE satisfies the Board’s requirements for review because the Regional Director directed an election without any record evidence to support a finding that the petitioned-for unit was appropriate, and in doing so, he gave controlling weight

to the Union's extent of organizing.

A. The Regional Director Departed from the Board's Precedent by Directing an Election Where There Was No Evidence Establishing the Appropriateness of the Petitioned-For Unit.

Before conducting an election, Section 9 of the Act requires the Board to determine whether the petitioned-for unit is appropriate for collective bargaining. 29 U.S.C. § 159(b) ("The Board shall decide *in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.") (emphasis added). In connection with this determination, certain units are considered presumptively appropriate. Relevant to this case, an overall ("wall-to-wall") unit of all of an employer's statutory employees is one of the units recognized as presumptively appropriate. *See Airco, Inc.*, 273 NLRB 348, 349 (1984) (observing that a plantwide or overall unit is presumptively appropriate).

When the unit sought by the petitioner is presumptively appropriate, the burden is on the party opposing that unit to show that the unit is inappropriate. *See Guide For Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, p. 72 (September 2003) (citing *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999)). Conversely, when the unit sought is not presumptively appropriate, the burden is on the petitioner to present at least some evidence establishing its appropriateness, even where the employer takes no position as to the unit. *Id.* (citing *Allen Health Care Services*, 332 NLRB 1308 (2000)) (emphasis added). In other words, even if there is no valid challenge to the appropriateness of the petitioned-for unit, in the absence of an applicable presumption or a stipulated agreement, the Board must nonetheless assess whether the petitioned-for unit is an appropriate unit.

This principle is illustrated by *Allen Health Care Services*, where the union sought a unit consisting of the employer's home health aides and personal care aides located at three of the

employer's facilities, excluding all other employees, registered nurses, licensed practical nurses, bookkeepers, maintenance employees, guards, and supervisors as defined in the Act. 332 NLRB at 1308. At the hearing, the employer refused to take a position on the appropriateness of the unit, and the union did not call any witnesses. *Id.* Thus, the record contained no direct testimony regarding the unit's appropriateness. *Id.* Nevertheless, the Regional Director still found the petitioned-for unit to be appropriate—even though no evidence had been introduced. *Id.* Following the employer's request for review, the Board considered whether record evidence was needed on the appropriateness of a petitioned-for unit, which is not presumptively appropriate, where the employer refuses to take a position on the issue. Finding that it has a statutory obligation to determine the appropriateness of the unit in every case, the Board held that "absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence—that the proposed unit is an appropriate one for bargaining before directing an election in that unit." *Id.* at 1309.

Here, as in *Allen Health Care Services*, the Union did not seek a presumptively appropriate wall-to-wall unit.² Rather, it arbitrarily grouped three job classifications (one of which does not even include all the levels of employees in that classification)³ into a unit to the exclusion of several others, which have not been shown to fall within a statutory or policy exclusion.⁴ As a result, there was no presumption weighing in favor of the Union's petitioned-for unit, and the

² Tr. 17 (Union noting its petitioned-for unit does not include janitorial laborers), 31 (Hearing Officer confirming Austin's position that an additional 18 employees should be included in the unit, their job classifications, and the number of employees in each classification).

³ Tr. 14 (Austin has job titles of Boilermaker 1, 2, 3, and 4, but the Union only included Boilermaker 1, 2, and 3 in its petitioned-for unit).

⁴ Even in the construction industry where separate craft or departmental units may be appropriate, two or more groups cannot be arbitrarily grouped to the exclusion of others. *S.J. Graves & Sons Co.*, 267 NLRB 175 (1983). Similarly, an overall unit may be the only appropriate unit where there is no basis for separate grouping. *A.C. Pavement Striping Co.*, 296 NLRB 206, 210 (1989).

Union was required to present “at least some evidence” at the hearing to establish the appropriateness of the unit. Indeed, regardless of whether Austin refused to take a position at the hearing or was precluded from doing so, the appropriateness of the petitioned-for unit still “remain[ed] to be determined.” *Id.* at 1309. Given the Union’s failure to carry its burden, the Hearing Officer’s failure to take evidence on the unit issue, and the Union’s refusal to hold an election in an alternate unit, the Regional Director should have dismissed the Petition. Tr. 32-33 (Union refusing to go to an election in an alternate unit). Instead, he ordered an election in the Union’s petitioned-for unit with no explanation or support. But as the Board held in *Allen Health Care Services*, “the Board cannot direct an election without any record evidence on which a finding of unit appropriateness can be grounded.” *Id.* at 1309. Because the record in this case is devoid of any evidence to establish the appropriateness of the petitioned-for unit, the Regional Director failed to fulfill his statutory obligation and the DDE must be reversed.

B. The Regional Director Further Erred as a Matter of Law Because His Decision Placed Controlling Weight on the Union’s Extent of Organizing.

With no other basis on which to find that the unit was appropriate, the Regional Director’s decision to direct an election in the petitioned-for unit necessarily made the Union’s extent of organizing the controlling factor. Section 9(c)(5) of the Act states, “In determining whether a unit is appropriate...the extent to which the employees have organized shall not be controlling.” 29 U.S.C. § 159(c)(5). Although the Board may rely on a union’s choice of unit as one factor in its analysis, it may not assign this factor exclusive or controlling weight. *See NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 441-42 (1965); *NLRB v. Lundy Packing Co.*, 68 F.3d 1577, 1580 (4th Cir. 1995); *May Dept. Stores Co. v. NLRB*, 454 F.2d 148, 150 (9th Cir. 1972).

In determining whether an order of the Board violates Section 9(c)(5), courts analyze the community of interest factors at issue, whether the Board followed its own precedent, and whether

the Board adequately explained its decision. *See, e.g., Lundy*, 68 F.3d at 1580-83; *May Dept. Stores*, 454 F.3d at 150-52. The Regional Director's DDE in this case fails on each point. There is no evidence in the record regarding whether the employees in the petitioned-for unit share a community of interests, the Regional Director failed to follow Board precedent such as *Allen Health Services*, and the Regional Director failed to provide any explanation for concluding that the Union's petitioned-for unit was appropriate. Accordingly, the only reasonable inference to be drawn from the Regional Director's decision is that it was controlled by the Union's choice of unit; thus it violates Section 9(c)(5).

IV. CONCLUSION

For all of the foregoing reasons, Austin requests that its Request for Review be granted, the Regional Director's Decision and Direction of Election be reversed, and the Union's election petition be dismissed.

Dated: March 3, 2021

Respectfully submitted,

/s/ Arrissa K. Meyer

Arrissa K. Meyer
LITTLER MENDELSON, P.C.
2001 Ross Ave., Suite 1500
Dallas, Texas 75201
214.880.8180 (Telephone)
214. 880.0181 (Fax)
akmeyer@littler.com

*Counsel for Employer Austin Maintenance &
Construction, Inc.*

CERTIFICATE OF SERVICE

I certify that, on this March 3, 2021, the foregoing was electronically filed through the Board's website and will be sent by means allowed under the Board's Rules and Regulations to these Parties:

Via e-filing at nlr.gov
Cornele A. Overstreet
Regional Director
Rodolfo Martinez
Field Attorney
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3009

Via e-mail
Butch M. Ballez
IUOE Local 351
6967 Commerce St.
El Paso, Texas 79915
butch.ballez@local351.com

/s/ Arrissa K. Meyer

Arrissa K. Meyer

4820-4118-4478.2 016768.1088

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

<p>AUSTIN MAINTENANCE & CONSTRUCTION, INC.,</p> <p style="text-align:right">Employer,</p> <p>and</p> <p>INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351</p> <p style="text-align:right">Petitioner.</p>	<p>NLRB Case No: 28-RC-266617</p>
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**APPENDIX IN SUPPORT OF AUSTIN MAINTENANCE & CONSTRUCTION,
INC.'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Employer Austin Maintenance & Construction, Inc. submits the following exhibits in support of its Request for Review of Regional Director's Decision and Direction of Election:

- Exhibit 1 Transcript from the hearing on October 16, 2020
- Exhibit 2 Petition, dated September 24, 2020
- Exhibit 3 Employer's Motion for Extension of Deadline for Position Statement and Postponement of Hearing Date, dated October 14, 2020
- Exhibit 4 Order Denying Employer's Motion to Postpone Hearing and Motion for Extension of Time to File Statement of Position, dated October 15, 2020
- Exhibit 5 Stipulation, dated October 16, 2020
- Exhibit 6 Decision and Direction of Election, dated January 5, 2021
- Exhibit 7 Certification of Representative, dated February 17, 2021

Dated: March 3, 2021

Respectfully submitted,

/s/ Arrissa K. Meyer

Arrissa K. Meyer

LITTLER MENDELSON, P.C.

2001 Ross Ave., Suite 1500

Dallas, Texas 75201

214.880.8180 (Telephone)

214. 880.0181 (Fax)

akmeyer@littler.com

*Counsel for Employer Austin Maintenance &
Construction, Inc.*

CERTIFICATE OF SERVICE

I certify that, on this March 3, 2021, the foregoing was electronically filed through the Board's website and will be sent by means allowed under the Board's Rules and Regulations to these Parties:

Cornele A. Overstreet
Regional Director
Rodolfo Martinez
Field Attorney
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3009

Butch M. Ballez
IUOE Local 351
6967 Commerce St.
El Paso, Texas 79915
butch.ballez@local351.com

/s/ Arrissa K. Meyer

Arrissa K. Meyer

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EXHIBIT 1

Sheet 1 Page 1

1 UNITED STATES OF AMERICA
 2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
 3 REGION 28
 4
 5
 6 In the Matter of:
 7
 8 AUSTIN MAINTENANCE & CONSTRUCTION,
 9 INC.,
 10
 11 Employer,
 12 and Case No. 28-RC-266617
 13
 14 INTERNATIONAL UNION OF OPERATING
 15 ENGINEERS, LOCAL 351,
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 17 Petitioner.
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 19
 20 The above-entitled matter came on for hearing pursuant
 21 to notice, before RODOLFO MARTINEZ, Hearing Officer, via
 22 videoconference, on Friday, October 16, 2020, at 9:00 a.m.
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Page 3

1 I N D E X
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 3 WITNESSES DIRECT CROSS REDIRECT RE CROSS DIRE VOIR
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 5 No testimony taken.
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Page 2

1 A P P E A R A N C E S
 2
 3 On Behalf of the Employer:
 4
 5 ARISSA K. MEYER, Attorney
 6 Littler Mendelson, PC
 7 2001 Ross Avenue, Suite 1500
 8 Dallas, TX 75201-2931
 9 akmeyer@littler.com
 10 (240) 880-8280
 11
 12 On Behalf of the Petitioner:
 13
 14 JUAN DE LA TORRE, Business Representative
 15 BUTCH BALLEZ, Labor Organizer
 16 International Union of Operating Engineers, Local 351
 17 6967 Commerce Street
 18 El Paso, TX 79915
 19 butch.ballez@local351.com
 20
 21 Also Present:
 22
 23 JANET ISMAIL, Attorney
 24 Austin Maintenance & Construction, Inc.
 25
 26 ROBERT KASUBINSKI, Vice President of People
 27 Austin Maintenance & Construction, Inc.

Page 4

1 E X H I B I T S
 2 EXHIBIT FOR IDENTIFICATION IN EVIDENCE
 3 BOARD'S
 4 B-1(a) through 1(g)
 5 B-2 6 7
 6 B-3 30 30
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PROCEEDINGS

(Time Noted: 9:07 a.m.)

HEARING OFFICER MARTINEZ: Good morning. The hearing will be in order. This is a formal hearing in the matter of Austin Industrial, Case No. 28-RC-266617. The Hearing Officer appearing for the National Labor Relations Board is Rodolfo Martinez.

All parties have been informed of the procedures at formal hearings before the Board by a service of a Description of Procedures in Certification and Decertification Cases with a Notice of Hearing. I have additional copies of this document for distribution if any party wants more.

Does anybody need another copy of that document?

MS. MEYER: No.

MR. DE LA TORRE: No.

HEARING OFFICER MARTINEZ: Okay. Will counsel representative for each party please state their appearances for the record? For the Petitioner, please?

MR. DE LA TORRE: Juan De La Torre.

HEARING OFFICER MARTINEZ: And do we have anybody else here appearing on behalf of the --

MR. BALLEZ: Butch Ballez.

HEARING OFFICER MARTINEZ: Butch Ballez?

MR. BALLEZ: Yes.

identification.)

HEARING OFFICER MARTINEZ: The exhibit has already been shown to all the parties. Are there any objections to the receipt of the exhibit into the record?

MR. DE LA TORRE: No objection.

MS. MEYER: No objection.

HEARING OFFICER MARTINEZ: All right. So I will go ahead and email Board Exhibit 1. And please just let me know once you receive it.

COURT REPORTER: This is the court reporter. I received it.

HEARING OFFICER MARTINEZ: Thank you.

MR. DE LA TORRE: The Union has received it.

MS. MEYER: The Employer has received it.

HEARING OFFICER MARTINEZ: Thank you.

I'm hearing no objections. Board Exhibit 1 is received into evidence.

(Board's Exhibit 1(a) through 1(g) received in evidence.)

HEARING OFFICER MARTINEZ: Are there any motions to intervene in these proceedings to be submitted to the Hearing Officer for a ruling by the Regional Director at this time?

(No response.)

HEARING OFFICER MARTINEZ: Let the record show no response.

Are there any prehearing motions made by any party that

HEARING OFFICER MARTINEZ: Okay. And for the Employer?

MS. MEYER: Arrissa Meyer here on behalf of Austin Maintenance & Construction, Inc.

HEARING OFFICER MARTINEZ: Any other appearances?

MS. MEYER: Janet and Robert, do you want to introduce yourself?

MS. ISMAIL: Sorry. Janet Ismail, in-house attorney for Austin Maintenance & Construction, Inc.

MR. KASUBINSKI: Robert Kasubinski, vice president of people for Austin Maintenance & Construction, Inc.

HEARING OFFICER MARTINEZ: Any other appearances?

(No response.)

HEARING OFFICER MARTINEZ: Let the record show no response.

Are there any other persons, parties, or labor organizations in the hearing room who claim an interest in this proceeding?

(No response.)

HEARING OFFICER MARTINEZ: Let the record show no response.

I now propose to receive the formal papers. They have been marked for identification as Board Exhibit 1(a) through 1(g) inclusive, Exhibit 1(g) being an index and description of the entire exhibit.

(Board's Exhibit 1(a) through 1(g) marked for

need to be addressed at this time?

MS. MEYER: Yes. The Employer would like to make a motion for reconsideration of Austin's motion to postpone and motion for extension of time to file a Statement of Position.

HEARING OFFICER MARTINEZ: So if I heard you correctly -- I apologize -- that you want -- the Employer would like to move for a reconsideration, and what else?

MS. MEYER: Move for a reconsideration of the motion I filed prior to this hearing to postpone the hearing and motion for extension of time to file a Statement of Position.

Could you hear me?

HEARING OFFICER MARTINEZ: Yes, I heard that. Thank you.

MS. MEYER: Okay. Perfect.

HEARING OFFICER MARTINEZ: So, of course, the motion and the order denying the motion is a part of the record as the formals. Is there an additional argument you'd like to present on that now?

MS. MEYER: Yes, I would. So after reviewing the Regional Director's orders, it appears that all of the Board's attempts at communication and service, as well the Union's, went to the same individual who, as stated in the motion, is a non-exempt hourly admin, not someone who would typically be served or anyone who has managerial or human resources duties. It is a material error that the Board and

1 the Union can just serve any individual who happens to be an
 2 employee of the Employer and have it constitute valid service
 3 on a party. In any other proceeding, the individual who was
 4 served would not be able to bind the company with her
 5 statement, so why would her receipt of these emails from the
 6 Board and the Union be sufficient to bind the company with
 7 respect to the service or have her knowledge be imputed to
 8 the Company?

9 Additionally, regarding the Regional Director's point
 10 that these Statement of Position deadlines had already
 11 expired by the time Austin filed its motion for extension, as
 12 previously stated, the Employer could not request an
 13 extension before the Statement of Position deadline had
 14 expired because it was not aware of that deadline.

15 Further, you know, the Regional Director states that the
 16 Employer does not contend that it did not receive the
 17 Region's dockets. To be clear, Austin has done a diligent
 18 search and has not been able to locate any docket packet that
 19 was sent through the mail to either address listed on the
 20 affidavit of service. The only docket packet it received was
 21 the one email by Mr. Martinez to Ms. Barraza on October 13th.

22 Further, there's no evidence that the Region's docket
 23 packet actually included the petition. It certainly wasn't
 24 included in the one, the docket packet that the Employer
 25 received on October 13th. And it's impossible for the

1 HEARING OFFICER MARTINEZ: So the Petitioner, I take it,
 2 opposes this motion to --

3 MR. DE LA TORRE: That is correct. The Union opposes.

4 HEARING OFFICER MARTINEZ: Okay. And let me just follow
 5 up again with Employer. So it's the Employer's position that
 6 the Board's Rules and Regulations require the service of the
 7 docket packet, the petition, and communication from the
 8 Region and the Board related to this RC case to somebody
 9 who's a manager or supervisor under the Act, or an agent?

10 MS. MEYER: I acknowledge that the Board's Rules and
 11 Regulations don't specifically state who must be served, but
 12 I mean common sense dictates that you can't just serve any
 13 employee of the Employer and have that constitute a valid
 14 service. It needs to be someone who is empowered to act on
 15 behalf of the Company in actually handling these documents.

16 HEARING OFFICER MARTINEZ: Okay. And I believe your
 17 position statement -- or not your position -- I'm sorry -- in
 18 your motion that you filed, this person's job title is
 19 assistant office manager?

20 MS. MEYER: I believe she is assistant field office --

21 HEARING OFFICER MARTINEZ: So I take it there's some
 22 type of office field manager that's above her?

23 MS. MEYER: Yes. There is an office field manager that
 24 is above her. And there's also an overall site manager who
 25 is the head person at the site. It's the field -- the

1 Employer to be able to file a Statement of Position without
 2 seeing that petition.

3 So for these reasons, in addition to the reasons that
 4 were stated in the Employer's previous motion, Austin
 5 requests that the Regional Director and the Hearing Officer
 6 reconsider its motions.

7 HEARING OFFICER MARTINEZ: Okay. So, if I heard you,
 8 you said that this individual named in the petition as
 9 Employer's representative, she's not a manager or a
 10 supervisor under the Act?

11 MS. MEYER: Correct.

12 HEARING OFFICER MARTINEZ: Would she be an agent under
 13 the Act?

14 MS. MEYER: No, I don't believe so. She's not
 15 authorized to act on behalf of the Company.

16 HEARING OFFICER MARTINEZ: Okay. So the position is
 17 she's not an agent or manager or supervisor under the Act?

18 MS. MEYER: Correct.

19 HEARING OFFICER MARTINEZ: Okay. And the Petitioner,
 20 let's hear your position on the motion, please.

21 MR. DE LA TORRE: We believe Ms. Barraza is an extension
 22 of the Company. According to all employees that are employed
 23 there at the site have been told she is doing the HR for that
 24 worksite, so that is why we sent all petition and information
 25 guidelines from NLRB to her.

1 assistant field office manager is like an accounting type
 2 position. It's administrative.

3 HEARING OFFICER MARTINEZ: And the employees interact
 4 with her regularly?

5 MS. MEYER: I'm not sure.

6 HEARING OFFICER MARTINEZ: Okay. Based on that,
 7 Petitioner, is there anything else you wanted to add?

8 MR. DE LA TORRE: No. Well, I mean, just -- I want to
 9 add that in their position, they did clarify that she was an
 10 office field manager. That's what they stated in their
 11 position.

12 HEARING OFFICER MARTINEZ: And you're talking about the
 13 motion that was filed --

14 MR. DE LA TORRE: The motion that -- correct.

15 HEARING OFFICER MARTINEZ: -- to the Region? Okay.

16 MR. DE LA TORRE: She's assistant field office manager.

17 HEARING OFFICER MARTINEZ: Assistant field office
 18 manager?

19 MR. DE LA TORRE: Correct.

20 HEARING OFFICER MARTINEZ: Okay. All right. So I will
 21 have to refer this motion to the Regional Director for a
 22 ruling.

23 Any other prehearing motions that need to be addressed
 24 at this time?

25 MS. MEYER: Nothing else for the Employer.

1 MR. DE LA TORRE: Nothing from the Union.
 2 HEARING OFFICER MARTINEZ: Okay. And we have been
 3 discussing earlier -- I've shown the parties a draft of Board
 4 Exhibit 2. The Employer has proposed some modifications to
 5 that, but we'll address that before the close of the hearing,
 6 but it's my understanding that Employer is not disputing
 7 jurisdiction? Sorry. The Employer is not disputing that the
 8 NLRB has jurisdiction over the matter and over the Employer?
 9 MS. MEYER: That is correct.
 10 HEARING OFFICER MARTINEZ: Okay. And I also believe
 11 that there is no dispute that the Union is a labor
 12 organization under the Act?
 13 MS. MEYER: That's correct.
 14 HEARING OFFICER MARTINEZ: And I also have an
 15 understanding that there is no collective bargaining history
 16 involving the petitioned-for employees?
 17 MS. MEYER: Correct.
 18 HEARING OFFICER MARTINEZ: And also that there are no
 19 bars to the conduct of an election?
 20 MS. MEYER: Correct.
 21 HEARING OFFICER MARTINEZ: Okay. So I hope to get all
 22 of this in writing in Board Exhibit 2, but we'll get there
 23 before the end of the hearing.
 24 And the next thing is I wanted to -- we already maybe
 25 touched upon it, however, I just wanted to go into the unit

1 change the name of the title. To be honest, I mean, that's
 2 something that could have been done during the normal
 3 guidelines, right, I mean, of the process. I guess our
 4 position is the same. They missed the opportunity to discuss
 5 the matter on job titles in the unit. From our end, that's
 6 the information that we have on the job titles for the
 7 employees that we petitioned, and we're assuming those are
 8 the correct titles.
 9 HEARING OFFICER MARTINEZ: Okay. So it's the
 10 Petitioner's position that the description of the job titles
 11 in the unit, that's what they should be?
 12 MR. DE LA TORRE: That's correct.
 13 HEARING OFFICER MARTINEZ: Okay. I was just inquiring
 14 into that, just getting some information on that. Of course,
 15 you know, under Section 102.66(d), a party will be precluded
 16 from raising issues, presenting any evidence related to any
 17 issue, cross-examine any witness, or presenting argument on
 18 any issue that a party failed to raise in a timely Statement
 19 of Position. But I'm just inquiring into that just to have
 20 for the record.
 21 But it sounds like the Union, the Petitioner is saying
 22 that how you described the job classifications, that's how it
 23 should be, that's the unit?
 24 MR. DE LA TORRE: That is correct.
 25 MS. MEYER: I mean, regardless of whether or not we can

1 description as stated in the petition. And it states that
 2 the petitioned-for a unit is all hourly full-time employees
 3 employed as Boilermaker 1, 2, and 3, Laborer, and Foreman.
 4 So my question is this, and for the Employer, are these the
 5 correct job classifications for these petitioned-for
 6 employees?
 7 MS. MEYER: So the Employer does have job titles of
 8 Boilermaker 1, 2, 3 and 4. The title Laborer is -- the
 9 Employer refers to those individuals as a General Labor
 10 Laborer.
 11 HEARING OFFICER MARTINEZ: General Laborer?
 12 MS. MEYER: And Foreman, we have some questions on this
 13 one because each craft has their own foreman. So, for
 14 example, there is a boilermaker foreman, there is a
 15 janitorial foreman, there's a scaffold foreman, and the
 16 Petitioner has not specified which foremen it believes should
 17 be included in the unit.
 18 HEARING OFFICER MARTINEZ: Okay. So let me get the
 19 Petitioner's position first on the job classifications of the
 20 petitioned-for employees. You've heard Employer's position
 21 on what those job titles should be, so what's the Union's
 22 position on that?
 23 MR. DE LA TORRE: We're not clear as far as what's the
 24 Company's position on this matter. I don't know if they're
 25 trying to add more employees to the unit or they just want to

1 present evidence, it benefits everyone to have clear and
 2 accurate job titles if we're going to be defining a unit.
 3 MR. DE LA TORRE: Is the Company willing to stipulate --
 4 I mean, reach in a stipulated agreement? I mean, we could do
 5 that.
 6 MS. MEYER: No, we're not willing to state as to the
 7 appropriateness of the unit, but we were trying to get more
 8 clarification as to these job titles, specifically foreman.
 9 The title foreman does not indicate who should be included or
 10 not included in this unit because there are multiple
 11 different types of foremen. Are you saying all foremen or
 12 just foremen for the boilermakers and the laborers?
 13 MR. DE LA TORRE: I'm sorry. I saw your mouth moving.
 14 I wasn't sure if you said -- anybody said anything.
 15 No, like I said, I mean obviously that will be -- I
 16 mean, we would have been able to do it at any time, right? I
 17 mean, we would have been able to go back to the employees and
 18 answer the question, right? I mean, right now it's a little
 19 bit too late. The unit, the way it was described and the way
 20 it was presented in the petition, that's the way we believe
 21 that is correct and that is the way we're going to go with
 22 it. Like I said, unless the Company is willing to stipulate
 23 an agreement, then we should stipulate agreement, then we can
 24 discuss and just be clear on the title if we need to twist
 25 it, I mean, one word for another, we can do that, but --

1 unless that's the intent.
 2 MS. MEYER: For example, I mean, you've just listed the
 3 term laborers. There are also janitorial laborers, like I
 4 mentioned earlier. You know, these job titles aren't even
 5 clear to reflect exactly who you're trying to put in the
 6 unit, regardless of whether or not we think that's
 7 appropriate. And it behooves everyone, including the
 8 employees, and better protects their Section 7 rights, to
 9 make sure we have a clear understanding of who's going to be
 10 included in the petitioned-for unit. And there is really no
 11 way for us to prepare a voter list, which we'll be required
 12 to do, if we don't understand what job titles are in and
 13 outside of the unit. And, I mean, that's important
 14 regardless of whether or not, you know, we file a Statement
 15 of Position or were aware of the petition in time to do
 16 anything about this before the hearing.
 17 MR. DE LA TORRE: The laborers we're referring to are
 18 the general laborers. If we were going to include
 19 janitorial, we would have included janitorial. But we're not
 20 petitioning for janitorial. We're petitioning for the
 21 laborers.
 22 MS. MEYER: Okay. And what about the foremen?
 23 MR. DE LA TORRE: As far as foreman, that's the job
 24 title that they gave to the Union. And that's included in
 25 our petition.

1 MR. DE LA TORRE: No, not that we are aware.
 2 HEARING OFFICER MARTINEZ: Okay. Thank you.
 3 So of course we went back to address jurisdiction, and
 4 if we can't get it in writing to go over it on the record, so
 5 that's one issue I believe still remains to be addressed at
 6 the hearing. So another issue that I would like to address
 7 at the hearing -- I just want to get the parties' position on
 8 these just for the record. Of course, I'm aware of the
 9 preclusion rule; however, I still want to get the parties'
 10 position, like I said, have on the record.
 11 So appropriate method for conducting an election,
 12 whether it should be a mail ballot or in person, and I
 13 believe the Petitioner petitioned for a mail ballot election?
 14 MR. DE LA TORRE: That's correct.
 15 HEARING OFFICER MARTINEZ: Okay. So can you just please
 16 tell the Employer's position on that?
 17 MS. MEYER: The Employer's position is that we would
 18 like a manual election. This is the NLRB's preferred
 19 election method that maximizes voter participation and free
 20 choice. These employees work at the HollyFrontier Navajo
 21 Refinery, which is defined as an essential business under the
 22 New Mexico public health orders. It has been operating
 23 throughout the pandemic, and these employees are working in
 24 person, on site, every day. They're essential employees, and
 25 the Employer has numerous safety precautions in place that

1 MS. MEYER: I just don't know how we can even prepare a
 2 voter list of who the foremen are if we don't know which
 3 foremen they're after or all the foremen.
 4 HEARING OFFICER MARTINEZ: Okay. Anything else anybody
 5 wants to add? I appreciate the efforts or, you know, seeing
 6 that the parties can talk about negotiate a stip, but
 7 anything else anybody wants to add on this point of the unit?
 8 MS. MEYER: With respect to job titles?
 9 HEARING OFFICER MARTINEZ: Yes, with respect to the job
 10 titles. No?
 11 MS. MEYER: No. I believe I've made my points.
 12 MR. DE LA TORRE: Not for the Union.
 13 HEARING OFFICER MARTINEZ: Thank you.
 14 So I did want to point out that, you know, even though a
 15 party is precluded under Section 102.66(d), that does not
 16 preclude a party from -- on the grounds that a voter's
 17 eligibility or inclusion was not contested at the pre-
 18 election hearing from challenging the eligibility of any
 19 voter during the election. So I just wanted to put that out
 20 there.
 21 But moving on, are there any petitions pending in any
 22 other Regional Office involving other facilities of the
 23 Employer?
 24 MS. MEYER: No, not that we're aware.
 25 HEARING OFFICER MARTINEZ: Petitioner?

1 would make, you know, holding a manual election appropriate.
 2 For example, the Employer follows CDC guidelines. They
 3 do social distancing. Masks are required. There are daily
 4 temperature checks. The Company communicates to the employee
 5 owners not to arrive at work with a temperature or any other
 6 signs of COVID. And the Company has numerous policies in
 7 place related to safety during the pandemic as well, such as
 8 a response plan, a flowchart for supervisors to deal with
 9 COVID-related issues. There's a jobsite mask requirement,
 10 like I already mentioned, and then there are also frequently
 11 asked questions in place that issues advice related to
 12 COVID-19.
 13 Additionally, the Employer is willing to comply with all
 14 safeguards as required by GC Memorandum 20-10 regarding
 15 conducting manual elections in person. We feel like this is
 16 a small petitioned-for unit. We can control, you know -- or
 17 control the relief times and ensure that there are only small
 18 numbers of people voting at a time and undertake any other
 19 safety precautions that the Region feels is necessary to go
 20 forward with a manual election.
 21 HEARING OFFICER MARTINEZ: And does Petitioner care to
 22 respond to that?
 23 MR. DE LA TORRE: Yeah. First, if the NLRB agrees, the
 24 Union won't oppose a manual election only if we can reach a
 25 stipulated agreement with the Company.

1 HEARING OFFICER MARTINEZ: Okay. So the Petitioner will
 2 only agree to a manual election as to a stipulated election
 3 agreement?
 4 MR. DE LA TORRE: Correct. And if the NLRB agrees to
 5 it.
 6 HEARING OFFICER MARTINEZ: Okay. And will there be any
 7 impediment to doing a mail ballot election, meaning any
 8 issues with voters maybe not being home, not being able to
 9 receive their ballot, being sent to assignment somewhere
 10 else? Any such issues with the time period, that there would
 11 be a problem somewhere that they wouldn't be expecting their
 12 mail? Anything along those lines?
 13 MS. MEYER: In general, the Employer has concerns about
 14 how the mail is operating these days. I think you've all
 15 seen the news about mail being delayed and going missing. So
 16 I'm not aware of any specific concerns related to the
 17 petitioned-for unit, just the general concerns about the
 18 state of the mail these days.
 19 HEARING OFFICER MARTINEZ: Petitioner, are you aware of
 20 any impediments that I've just described?
 21 MR. DE LA TORRE: No. The Union doesn't have any
 22 concerns.
 23 HEARING OFFICER MARTINEZ: Okay. And I want to ask the
 24 same question for, in a hypothetical there's a manual
 25 election, any time period that will be an impediment to

1 MR. DE LA TORRE: Correct.
 2 HEARING OFFICER MARTINEZ: Is that right?
 3 MR. DE LA TORRE: That's correct.
 4 HEARING OFFICER MARTINEZ: Okay. So, of course, this is
 5 where Petitioner, the Union will be -- Petitioner will be
 6 entitled to have the voter list for 10 days. Would
 7 Petitioner be willing to waive any or all of the days it's
 8 entitled to have the voter list?
 9 MR. DE LA TORRE: Yes.
 10 HEARING OFFICER MARTINEZ: And how many days would the
 11 Petitioner waive?
 12 MR. DE LA TORRE: Five days.
 13 HEARING OFFICER MARTINEZ: Five days?
 14 MR. DE LA TORRE: That's correct. Five days.
 15 HEARING OFFICER MARTINEZ: Five days. Okay. Thank you.
 16 And anything else anybody wants to add on the method of
 17 the election?
 18 MS. MEYER: In terms of more specific --
 19 HEARING OFFICER MARTINEZ: Anything that -- while we're
 20 on the subject.
 21 MR. DE LA TORRE: Not from me.
 22 MS. MEYER: Yes. I mean, I would like to raise issues
 23 about the appropriateness of the unit and supervisory status.
 24 For example, the Petitioner has not requested a wall-to-wall
 25 unit. Therefore, they're not seeking a unit that's

1 holding an in-person election?
 2 MS. MEYER: I'm not aware of any impediments. I believe
 3 the employees' shifts last from 6:30 a.m. to 3:30 p.m., and
 4 the Employer would be willing to, you know, let employees
 5 work on -- or let employees vote on company time.
 6 HEARING OFFICER MARTINEZ: Okay. And I wanted to just
 7 get on the record now what would be the proposed date then
 8 for a manual election?
 9 MS. MEYER: So we would propose holding a manual
 10 election the week of November 9th time frame.
 11 HEARING OFFICER MARTINEZ: So any day during the week of
 12 November 9th, 2020?
 13 MS. MEYER: Yes.
 14 HEARING OFFICER MARTINEZ: And, Petitioner, what's your
 15 position on the date, in case a manual election is --
 16 MR. DE LA TORRE: The Union's position is if it doesn't
 17 go outside the guidelines, we will go with it.
 18 HEARING OFFICER MARTINEZ: And which guidelines are you
 19 referring?
 20 MR. DE LA TORRE: As far as the amount of days for an
 21 election to be held.
 22 HEARING OFFICER MARTINEZ: Okay. So what I think I'm
 23 hearing is as long as the time frame for the election is
 24 within the Board's guidelines and regulations and rules, the
 25 Petitioner would be okay with that date.

1 presumptively appropriate, so there's no presumption in favor
 2 of their unit, meaning that the appropriateness of the unit
 3 needs to be determined and the Union must present some
 4 evidence in support of why they're carving out just the
 5 boilermakers and the laborers and the foremen as opposed to
 6 including all the rest of the employees at the site who are
 7 engaged in similar maintenance activities. I'd also like to
 8 provide offers of proof on the appropriateness of the unit
 9 and the supervisory status of the foremen.
 10 HEARING OFFICER MARTINEZ: Okay. And what do you have
 11 as an offer of proof?
 12 MS. MEYER: So with respect to the appropriateness of
 13 the unit, if called to testify, Vice President of People
 14 Robert Kasubinski would testify that there are possibly 18
 15 other employees that share a community of interest with the
 16 employees in the petitioned-for unit such that they must be
 17 included in the unit for it to be appropriate. And that
 18 includes the Boilermakers 4, the Insulators, the Janitorial
 19 Laborers, a Painter, Scaffold Builder Helpers, Scaffold
 20 Builder Specialist. He would testify that these employees
 21 share a high degree of functional integration. They work on
 22 the same equipment to provide these maintenance services to
 23 the customer as the boilermakers and the laborers. There is
 24 also common supervision. Each of these groups report to a
 25 foreman who reports up to the site manager. And so all of

1 these employees ultimately report directly up to the site
 2 manager.
 3 Specifically with respect to the Boilermakers 4, they're
 4 doing the exact same kind of work as Boilermakers 1, 2, and
 5 3. It doesn't make sense that they would not be included,
 6 and that's going to leave a residual unit of a couple
 7 boilermakers that are not included. These employees also
 8 have a high degree of interchange and contact among each
 9 other. They're all working on the same site and, like I
 10 said, on the same equipment right next to each other. They
 11 also share general working conditions. They work the same
 12 shifts. They participate in the same update and safety
 13 meetings. They are all paid on an hourly basis. They have
 14 comparable wages, and they receive the same benefits and
 15 participate in the same benefit plans.
 16 So, again, this offer of proof would relate to the fact
 17 that there are additional job classifications that must be
 18 included to have an appropriate unit.
 19 HEARING OFFICER MARTINEZ: Okay.
 20 MS. MEYER: I also --
 21 HEARING OFFICER MARTINEZ: Sorry. Anything additional?
 22 Any additional?
 23 MS. MEYER: Yes. Yes. I have an offer of proof with
 24 respect to supervisory status as a foreman. And if called to
 25 testify, Site Manager Geneva Look would testify that the

1 site manager.
 2 Finally, the foremen receive significantly higher wages
 3 than the next highest level employee within their
 4 classification. So, for example, foremen typically receive 6
 5 to 10 dollars an hour more than the employees below them.
 6 HEARING OFFICER MARTINEZ: Thank you.
 7 MS. MEYER: Thank you.
 8 HEARING OFFICER MARTINEZ: And does the Petitioner have
 9 anything to say on that?
 10 MR. DE LA TORRE: The Petitioner would like to object to
 11 the statement made, just made by the Company to go into the
 12 record because this hearing is just -- the nature of the
 13 hearing that we're presenting here is for the Employer's
 14 motion for an extension of the deadline on the position
 15 statement. This hearing is not to discuss, I mean, what the
 16 Company just said. I mean, they missed the deadline. If
 17 this would have been done during the guidelines set by the
 18 NLRB elections, then I understand that could have been
 19 alleged and discussed during a normal hearing to grant a
 20 petition election, but not right now. This is for something
 21 else. So I object for whatever they said in regards with
 22 their position for the record -- I mean to go into the record
 23 because, like I said, this isn't the nature of this hearing.
 24 HEARING OFFICER MARTINEZ: So you're objecting then to
 25 what she said going into the record or objecting as -- answer

1 foremen possess authority that makes them supervisors under
 2 Section 2(11) of the Act such that they should be excluded
 3 from the unit. And when I say foremen, I'm referring to the
 4 boilermaker foreman, the janitorial foreman, and the scaffold
 5 foreman, since we don't have clarity on which foremen the
 6 Union is seeking to include in the unit.
 7 Ms. Look would testify that foremen at Austin Artesia,
 8 New Mexico site effectively recommend that employees be
 9 hired, discharged, disciplined, transferred, suspended,
 10 promoted, rewarded, and laid off. They are empowered to
 11 grant time off from work, including allowing employees to
 12 leave work early, take time off for medical reasons, and
 13 grant and deny employee requests for leave of absence. They
 14 also assign work to employees, determine when overtime is
 15 required, and select employees for overtime assignments.
 16 They also give performance evaluations that lead to wage
 17 increases. They are also responsible for directing
 18 employees' work, including being in charge of the operations
 19 on a particular shift and in a particular work area and
 20 without having to consult a higher-level authority. They
 21 inspect employees' work and they have the authority to order
 22 employees to redo or correct that work. And specifically for
 23 boilermakers and janitors who are in the -- or boilermakers
 24 and janitors, the foreman is the highest-ranking employee in
 25 their classification, as I said, reporting directly to the

1 that question.
 2 MR. DE LA TORRE: Yes, we object for what they just
 3 said. I didn't want to interrupt her, but for that to go
 4 into the record. I mean --
 5 HEARING OFFICER MARTINEZ: So you want me to strike her
 6 offers of proof from the record?
 7 MR. DE LA TORRE: That's correct. Yes.
 8 HEARING OFFICER MARTINEZ: Okay. Employer, it sounds
 9 like we have a motion to strike the offers of proof on the
 10 record. What's your position?
 11 MS. MEYER: Our position is we're entitled to provide
 12 offers of proof. I am making those offers of proof to
 13 preserve these arguments for a future request for review.
 14 And --
 15 MR. DE LA TORRE: I understand that could've been done,
 16 Ms. Myer, I mean, during a typical hearing for an election.
 17 MS. MEYER: I was actually speaking. I'm sure you'll
 18 have your turn to speak next. I would still like to respond
 19 to the allegation that this is not the proper place to do
 20 this. I mean this is a representation hearing. Regardless
 21 of whether or not the Employer even participated, the
 22 Regional Director has to make a decision on these issues.
 23 And like I said, the Union is not seeking a presumptively
 24 appropriate unit, and so there has to be some record evidence
 25 to support the Union's request. And I, like I said, I'm just

1 pointing that out, and I am providing my offers of proof for
 2 a future request for review.
 3 MR. DE LA TORRE: Okay. And there are proper times to
 4 allege that and present your position. You missed the
 5 deadline because your company failed to come back with a
 6 position statement within the right time. Like I said, we
 7 did our part by presenting and filing the petition and
 8 sending it to the correct person that we had the information
 9 from the employers [sic] and who they see as an HR
 10 representative. Whether her title is different and is an
 11 assistant manager, that will be plenty enough, I mean, as an
 12 extension of the Company for that employee to communicate
 13 with either corporate, HR, vice president, the information
 14 that she received. Therefore, like I said, I mean, the issue
 15 here on the line is that the Company missed the deadline
 16 to -- I mean, everything and to present their position
 17 statement.
 18 HEARING OFFICER MARTINEZ: Okay. Sorry.
 19 MR. DE LA TORRE: And we're willing to, like I said, I
 20 mean, discuss changing a title or so if there's a typo or
 21 something that we're missing. But as far as the community of
 22 interest and everything else they're discussing, like I said,
 23 I think it's outside of the right timeline.
 24 HEARING OFFICER MARTINEZ: Okay. Thank you.
 25 So I'll refer the motion to strike the offers of proof

1 petitioned for.
 2 HEARING OFFICER MARTINEZ: Okay.
 3 MS. MEYER: Yes. The Employer believes that, from what
 4 we understand -- well, I take that back. In the Employer's
 5 count there would be 26 employees in the petitioned-for unit
 6 based on our current understanding of what job titles are
 7 included, best guess, as of course, you know, we don't fully
 8 understand the foreman issue. And then we have an additional
 9 18 employees that we believe should be included.
 10 HEARING OFFICER MARTINEZ: Okay. So Employer's estimate
 11 is 26 employees in the petitioned-for unit as described in
 12 the petition?
 13 MS. MEYER: Correct.
 14 HEARING OFFICER MARTINEZ: Okay. And then the Employer
 15 believes an additional 18 should be added to the petition?
 16 MS. MEYER: Correct.
 17 HEARING OFFICER MARTINEZ: And do we know the total
 18 number of employees in each category that the Employer is
 19 saying should be included?
 20 MS. MEYER: Yes, I do. So there are two employees in
 21 Boilermaker 4 category, there are two Insulators, seven
 22 Janitorial Laborers, one Painter, two Scaffold Builder
 23 Helper, and four Scaffold Builder Specialists.
 24 HEARING OFFICER MARTINEZ: And will the Employer -- I'm
 25 sorry. I apologize. Would the Labor Organization, the

1 to the Regional Director for a ruling. Okay?
 2 MR. DE LA TORRE: Okay.
 3 HEARING OFFICER MARTINEZ: Can we just go off the record
 4 for a few minutes, please?
 5 (Off the record from 9:49 a.m. to 10:13 a.m.)
 6 (Board's Exhibit 2 marked for identification.)
 7 HEARING OFFICER MARTINEZ: The parties to this
 8 proceeding have executed a document which is marked as Board
 9 Exhibit 2. That exhibit contains a series of stipulations
 10 including, among other items, that the Petitioner is a labor
 11 organization within the meaning of the Act, there's no
 12 contract bar, and the Employer meets the jurisdictional
 13 standards of the Board.
 14 Are there any objections to the receipt of Board
 15 Exhibit 2?
 16 MS. MEYER: No objection.
 17 MR. DE LA TORRE: No objection.
 18 HEARING OFFICER MARTINEZ: Hearing no objection, Board
 19 Exhibit 2 is received in evidence.
 20 (Board's Exhibit 2 received in evidence.)
 21 HEARING OFFICER MARTINEZ: Okay. So I just want to go
 22 over a few more things. I just wanted to know what's the
 23 total number of employees in the petitioned-for unit as well
 24 as any alternate unit.
 25 MR. DE LA TORRE: Should be 23 is what the Union

1 Petitioner here, would you proceed to election in any
 2 alternate unit if the unit sought is found to be
 3 inappropriate by the Regional Director or the Board? Any
 4 position on that case?
 5 MR. DE LA TORRE: No, not from the Union.
 6 HEARING OFFICER MARTINEZ: No?
 7 MR. DE LA TORRE: No.
 8 HEARING OFFICER MARTINEZ: Okay.
 9 Is there any evidence and anything else that the parties
 10 want to raise at this point?
 11 MS. MEYER: Nothing from the Employer.
 12 MR. DE LA TORRE: Nothing from the Union.
 13 HEARING OFFICER MARTINEZ: Okay. So neither party has
 14 any evidential witnesses then to present today. Okay. Thank
 15 you.
 16 I do have a few other items. Does any party anticipate
 17 a need for the Notice of Election or the ballots to be
 18 translated?
 19 MS. MEYER: Yes. We believe they should be translated
 20 into Spanish and English.
 21 HEARING OFFICER MARTINEZ: And Petitioner?
 22 MR. DE LA TORRE: No objection.
 23 HEARING OFFICER MARTINEZ: Any -- I guess, Petitioner,
 24 so anything in addition to Spanish, any other languages?
 25 MR. DE LA TORRE: No.

1 HEARING OFFICER MARTINEZ: Okay.
 2 And the Employer, I need the information for the
 3 Employer's onsite representative. So what is the name,
 4 address, email address, fax number, and telephone number of
 5 the Employer's onsite representative to whom the Regional
 6 Director should transmit the Notice of Election if an
 7 election is directed?
 8 MS. MEYER: Sure. The Employer's onsite representative
 9 will be Geneva Look, G-e-n-e-v-a L-o-o-k. And so the
 10 information should be addressed to HFB, in care of Austin
 11 Industrial, and the address is 501 East Main, Artesia, New
 12 Mexico 88210, and the phone number is 832-657-3385.
 13 HEARING OFFICER MARTINEZ: And does the facility have a
 14 fax number?
 15 MS. MEYER: Bob, are you aware if there's a fax number
 16 at the site?
 17 MR. KASUBINSKI: I'm sorry. I'm not aware, but I can
 18 certainly check on it.
 19 MS. MEYER: And also do you have an email address for
 20 Geneva?
 21 MR. KASUBINSKI: Yes. I can give that to you. So for
 22 Geneva, the email address is glook@austinindl.com. And once
 23 again, I'll have to check to see if they have fax capability.
 24 HEARING OFFICER MARTINEZ: Okay. Thank you. I'll
 25 revisit that before I close the hearing, on the fax number.

1 of the election, say in a hypothetical that it's done in a
 2 manual election. The Board's proposal would be to hold it on
 3 site at the -- is it a customer facility?
 4 MS. MEYER: Yes, it is.
 5 HEARING OFFICER MARTINEZ: Okay. And --
 6 MS. MEYER: The HollyFrontier Corporation site.
 7 HEARING OFFICER MARTINEZ: And I take it the Employer
 8 will make arrangements to make sure that individuals that
 9 need to be present for the election, the pre-election
 10 conference, and count, they will have access to the site?
 11 MS. MEYER: Yes. We can arrange that.
 12 HEARING OFFICER MARTINEZ: Okay. And in the event that
 13 that's necessary, I mean, you can just let the Region know if
 14 there's anything that the Board agent will have to do to gain
 15 access to the site, if he has to get permission from
 16 somebody.
 17 MS. MEYER: Sure.
 18 HEARING OFFICER MARTINEZ: So at this point, before I go
 19 any further, I just need to consult with the Region regarding
 20 the motions that are received here today from the Employer as
 21 well as the Union. So I think this is a good time to take a
 22 break. If anybody needs to take a break, we could do that
 23 now while I talk with the Region. So why don't we revisit in
 24 a few minutes and we'll go back on the record then. Okay?
 25 We're off the record. Thank you.

1 So, Employer, if an election is directed, may the Region
 2 communicate with your election observer regarding election
 3 procedures and issues that arise during the election, the
 4 pre-election conference, or the ballot count?
 5 MS. MEYER: Can you send the communication to me and I
 6 will communicate --
 7 HEARING OFFICER MARTINEZ: Send the communication to you
 8 and you will communicate with the observer?
 9 MS. MEYER: Yes.
 10 HEARING OFFICER MARTINEZ: Okay.
 11 And, Petitioner, same question, if an election is
 12 directed, may the Region communicate with your election
 13 observer regarding election procedures and any issues that
 14 arise during an election, the pre-election conference, or the
 15 ballot count?
 16 MR. DE LA TORRE: You can also send it to me.
 17 HEARING OFFICER MARTINEZ: So it will be okay for the
 18 Region to communicate with the observer and copy you as well
 19 on it?
 20 MR. DE LA TORRE: Through me, and I'll -- I can refer
 21 it.
 22 HEARING OFFICER MARTINEZ: Okay. So send it -- so
 23 that's a no. Okay.
 24 And I believe we may have touched upon this briefly
 25 earlier, but I just want to revisit. So as far as the method

1 (Off the record from 10:24 a.m. to 10:43 a.m.)
 2 HEARING OFFICER MARTINEZ: So we're back on the record.
 3 So I would like to address the motions made so far in
 4 the hearing. I will start with the Employer's motion for
 5 consideration of the Employer's motion to postpone hearing
 6 and motion for extension of time to file a Statement of
 7 Position. So the Director will deny that motion, and I'll
 8 refer you to the order denying the Employer's motion to
 9 postpone hearing and motion of extension of time to file a
 10 Statement of Position that issued yesterday, October 15,
 11 2020.
 12 And regarding the Union's -- the Petitioner's motion to
 13 strike the Employer's offers of proof from the record, that
 14 motion will also be denied.
 15 There are a few other items before we end here today.
 16 One item was I believe there's no fax number at the
 17 Employer's site in Artesia, New Mexico; is that correct?
 18 Okay. And I want to ask about the payroll period for
 19 the petitioned-for unit. When was the last payroll period
 20 ending date?
 21 MS. MEYER: The payroll period is weekly, and it ends on
 22 Sunday. So from today, the last payroll would be Sunday the
 23 11th. Or if we're looking at before the petition was filed,
 24 that would be Sunday the 20th, September 20th.
 25 HEARING OFFICER MARTINEZ: Of 2020, of course.

1 (Board's Exhibit 3 marked for identification.)
 2 HEARING OFFICER MARTINEZ: And I distributed what has
 3 been marked as Board Exhibit No. 3, and that is a description
 4 of voter list requirements at the hearing in certification
 5 and decertification cases, which explains the Employer's
 6 obligation to furnish a voter list should an election be
 7 directed in this matter.
 8 Are there any objections to the receipt of Board
 9 Exhibit 3?
 10 MS. MEYER: No objection.
 11 MR. DE LA TORRE: No objection.
 12 HEARING OFFICER MARTINEZ: Hearing no objections, Board
 13 Exhibit 3 is received in evidence.
 14 (Board's Exhibit 3 received in evidence.)
 15 HEARING OFFICER MARTINEZ: Any party is entitled, upon
 16 request, a reasonable period at the close of the hearing for
 17 oral argument. Does any party wish to make such a request at
 18 this time?
 19 MS. MEYER: Yes. The Employer would like to make a
 20 brief statement.
 21 HEARING OFFICER MARTINEZ: Okay. Go ahead, please.
 22 ORAL ARGUMENT
 23 MS. MEYER: Thank you.
 24 As previously stated in our offer of proof, we believe
 25 that the Petitioner has sought a unit that is not

1 in person. These are essential employees who are already
 2 working on site, reporting to work every day, and so there's
 3 no reason that they cannot vote at the worksite on company
 4 time.
 5 Thank you.
 6 HEARING OFFICER MARTINEZ: Thank you.
 7 Would Petitioner like to make a oral argument at this
 8 time?
 9 ORAL ARGUMENT
 10 MR. DE LA TORRE: Just a small comment on what the
 11 Company just said. It is not a requirement for the
 12 Petitioner to prove community of interest when the petition
 13 is filed; therefore, that was something that was not done
 14 during that time. And besides that, we don't have any other
 15 comments.
 16 HEARING OFFICER MARTINEZ: Thank you.
 17 And I believe the court reporter has all the exhibits
 18 that were introduced today?
 19 COURT REPORTER: I do.
 20 HEARING OFFICER MARTINEZ: Thank you. And if you're
 21 able to, can you estimate the estimated length of the
 22 transcript?
 23 COURT REPORTER: Probably 45 pages, something like that,
 24 I imagine.
 25 HEARING OFFICER MARTINEZ: Okay. Thank you.

1 presumptively appropriate, and therefore the burden is on the
 2 Petitioner to produce at least some evidence supporting the
 3 appropriateness of the unit, and that applies even when the
 4 Employer takes no position as to the unit. And the cite for
 5 that proposition is Health Acquisition Corp. d/b/a Allen
 6 Health Care Services, 332 NLRB 1308, from the year 2000. We
 7 believe that the Petitioner has failed to meet this burden.
 8 It has not presented any evidence or any witnesses explaining
 9 why they carved out the boilermakers and the laborers and
 10 some unidentified foremen as an appropriate unit.
 11 In contrast, the Employer has presented offers of proof
 12 that this is not an appropriate unit because it leaves out
 13 approximately 18 employees that share a community of interest
 14 with the petitioned-for unit employees. And we also contend,
 15 as we did in our offer of proof, that the foremen, which we
 16 understand to include three boilermaker foremen, one
 17 janitorial foreman, and one scaffold foreman, have
 18 supervisory duties that require that they be excluded from
 19 the unit.
 20 And on those bases, we object to the Petitioner's
 21 petitioned-for unit.
 22 Finally, we also request that the Regional Director
 23 order a manual election as encouraged by GC Memo 20-10. The
 24 Employer is willing to undergo -- or agree to any necessary
 25 safety precautions to ensure that that election will be held

1 Any party desiring to submit a brief to the Regional
 2 Director shall be entitled to do so within 5 business days
 3 after the close of the hearing. Copies of the brief shall be
 4 served on all of the parties to the proceeding and a
 5 statement of such service shall be filed with the Regional
 6 Director together with the brief. No reply briefs may be
 7 filed except upon special permission of the Regional
 8 Director.
 9 Does any party to wish to waive the filing of post-
 10 hearing brief?
 11 MS. MEYER: No. The Employer does not wish to waive
 12 that.
 13 MR. DE LA TORRE: The Union will waive it.
 14 HEARING OFFICER MARTINEZ: Okay. So as Employer has not
 15 waived that, brief shall be due on October 23rd, 2020, 5
 16 business days.
 17 The parties are reminded that pursuant to Section 102.5
 18 of the Board's Rules and Regulations, briefs and other case
 19 documents must be filed by electronically submitting,
 20 e-filing on the Agency's website, www.nlr.gov, unless the
 21 party filing the document does not have access to the means
 22 for filing electronically or filing electronically would
 23 impose an undue burden. Briefs or other documents filed by
 24 means other than e-filing must be accompanied by a statement
 25 explaining why the filing party does not have access to the

1 means for filing electronically or filing electronically
2 would impose an undue burden.
3 Filing a brief or other document electronically may be
4 accomplished by using the e-filing system on the Agency's
5 website at www.nlr.gov. Once the website is active, click
6 on the e-filing document, enter the NLRB case number, and
7 follow the detailed instruction. The responsibility for
8 receipt of the document rests exclusively with the sender. A
9 failure to timely file the brief will not be excused on the
10 basis that the transmission could not be accomplished because
11 the Agency's website was offline, unavailable for some other
12 reason, absent a determination of technical failure of the
13 site with notice of such posted on the website.
14 The parties are reminded that they should request an
15 expedited copy of the transcript from the court reporter.
16 Is there anything at this point that any party wishes to
17 address or raise? Anything further?
18 MS. MEYER: Nothing further from the Employer.
19 MR. DE LA TORRE: Nothing further from the Union.
20 HEARING OFFICER MARTINEZ: So if there's nothing
21 further, then the hearing will be closed.
22 (Whereupon, at 10:53 a.m., the hearing in the above-entitled
23 matter was closed.)
24
25

1 CERTIFICATION
2 This is to certify that the attached proceedings before
3 the National Labor Relations Board (NLRB), Region 28, in the
4 matter of AUSTIN MAINTENANCE & CONSTRUCTION, INC., Case No.
5 28-RC-266617, via videoconference, on October 16, 2020, was
6 held according to the record, and that this is the original,
7 complete, and true and accurate transcript that has been
8 compared to the recording, at the hearing, that the exhibits
9 are complete and no exhibits received in evidence or in the
10 rejected exhibit files are missing.
11
12
13
14
15
16
17 _____
18 Natasha Bachman
19 Official Reporter
20
21
22
23
24
25

EXHIBIT 2

Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

Employees Included

All hourly full-time employees employed as Boilermaker 1,2,and 3, Laborer's, and Foreman

Employees Excluded

All supervisors as defined by the Act.

EXHIBIT 3

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

<p>AUSTIN INDUSTRIAL, Employer, and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351 Petitioner.</p>	<p>NLRB Case No: 13-RC-252563</p>
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**EMPLOYER AUSTIN MAINTENANCE & CONSTRUCTION, INC.'S MOTION
FOR EXTENSION OF DEADLINE FOR POSITION STATEMENT AND
POSTPONEMENT OF HEARING DATE**

Pursuant to §102.63(a)(1) and (b)(1) of the Board’s Rules and Regulations, Employer Austin Maintenance & Construction, Inc. (“Austin”), incorrectly named as Austin Industrial¹, hereby moves to extend the deadline to file its Statement of Position and to postpone the representation hearing in this case, for the special circumstances set forth below, which constitute “good cause.”²

The International Union of Operating Engineers Local 351 (the “Union”) filed the petition in this matter on September 24, 2020 (“Petition”). On September 29, 2020, the NLRB Field Attorney Rodolfo Martinez sent an email to Austin employee Beatrice Barraza regarding the Petition. *See* Exhibit A-1, Martinez Emails to Barraza. Ms. Barraza is a non-exempt, hourly Assistant Field Office Manager at Austin’s Artesia, New Mexico worksite. *See* Exhibit A. She is not a Human Resources employee, she has no managerial or supervisory responsibilities, and she believed the email had been sent to her in error. *Id.* As a result, this communication was not

¹ The employees at the establishment identified in the Petition are employed by Austin Maintenance & Construction, Inc. *See* Exhibit A, Declaration of Robert Kasubinski.

² Austin’s counsel spoke with Union organizer Butch Ballez, who indicated that the Union opposes this motion.

brought to the attention of Austin management or Human Resources. *Id.*

On October 13, Mr. Martinez reached out to Ms. Barraza again by email, notifying her that Austin missed its October 7th deadline to file a Statement of Position and alerting her to the upcoming hearing set for October 16 at 10:00 a.m. *See* Exhibit A-1. Mr. Martinez also attached the Letter to Employer in RC or RD case (“Letter to Employer”), dated September 25, 2020, with the Notice of Petition for Election (Form 5492), the Notice of Representation Hearing, and Affidavit of Service, the Description of Procedures in Certification and Decertification Cases (Form 4812), the Statement of Position form and Commerce Questionnaire (Form 505), and the Responsive Statement of Position form (Form 506) enclosed. *See* Exhibit A-2. A copy of the Petition was not included. *Id.* Mr. Martinez’s emails and the Letter to Employer were then forwarded to Austin’s Vice President of Human Resources, Robert Kasubinski. *See* Exhibit A.

The Affidavit of Service enclosed with the Letter to Employer states that the Petition and attachments were served on Austin by electronic mail at Ms. Barraza’s email address and by regular mail at the Artesia site and Austin’s headquarters in La Porte, Texas. However, Austin did not receive a copy of the Petition until October 13, 2020.³ *Id.* Immediately upon learning of the existence of the Petition, Austin promptly engaged legal counsel, who contacted Mr. Martinez to obtain a copy of the Petition and an extension of past and upcoming deadlines. *See* Exhibit B, Martinez Email to Meyer.

Unfortunately, by the time Austin received Mr. Martinez’s communications on October 13, several deadlines in the Region’s Letter to Employer had already passed. The deadline to post the Notice of Petition was October 2, and the Statement of Position deadline was noon on October 7. As a result, the time the Notice of Petition will be posted for employees has been substantially

³ Austin is also not aware of being served with a copy of the Petition by the Union. *See* § 102.60(a).

reduced, and Austin will be precluded from raising any issue, evidence, or argument at the representation hearing other than those relating to the Board's jurisdiction. *See* § 102.66(d). Additionally, Austin only received three working days' notice of the representation hearing scheduled on October 16. *See Croft Metals, Inc.*, 337 NLRB 688, 688 (2002) (requiring that employers receive five working days' notice of hearing).

In light of these circumstances and the delay in Austin's receipt of the Petition until October 13, Austin requests that the Regional Director: (1) extend its deadline to submit its Statement of Position to noon on October 20, 2020; (2) extend the Union's deadline to submit its Responsive Statement of Position to October 26, 2020; and (3) postpone the representation hearing to October 29, 2020.⁴ This extension will allow Austin to review the Petition, to substantively discuss the issues presented in the Petition with its counsel, and to identify whether it will be possible to reach a Stipulated Election Agreement or whether a hearing is necessary. Not only is it equitable to allow the employer to fully participate in this important process, but it will ultimately be more efficient and better effectuate the purposes of the Act. Accordingly, Austin respectfully requests that the Regional Director find good cause for extending the deadline for the Statement of Position and postponing the hearing.

⁴ Austin's counsel is already scheduled to attend a mail ballot count in Case No. 16-RC-264358 on October 16 at 10:00 a.m. CST, and it is unclear whether it will be completed before the hearing in this case begins at 10:00 a.m. MT.

Dated: October 14, 2020

Respectfully submitted,

/s/ Arrissa K. Meyer

Arrissa K. Meyer
LITTLER MENDELSON, P.C.
2001 Ross Ave., Suite 1500
Dallas, Texas 75201
214.880.8180 (Telephone)
214. 880.0181 (Fax)
akmeyer@littler.com

Counsel for Employer

CERTIFICATE OF SERVICE

I certify that, on this October 14, 2020, the foregoing was electronically filed through the Board's website and will be sent by means allowed under the Board's Rules and Regulations to these Parties:

Cornele A. Overstreet
Regional Director
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3009

Butch M. Ballez
IUOE Local 351
6967 Commerce St.
El Paso, Texas 79915
butch.ballez@local351.com

/s/ Arrissa K. Meyer

Arrissa K. Meyer

EXHIBIT A

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28**

<p>AUSTIN INDUSTRIAL, Employer, and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351 Petitioner.</p>	<p>NLRB Case No: 13-RC-252563</p>
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DECLARATION OF ROBERT KASUBINKSI

I, Robert Kasubinski, hereby declare and state:

1. I am the Vice President of Human Resources for Austin Maintenance & Construction, Inc. (“Austin”). I have held this role since May 9, 2016. Except where otherwise indicated, all of the information set forth herein is based on my personal knowledge, and if called to testify and sworn as a witness, I could and would competently testify thereto.

2. On October 13, 2020, I received a copy of emails sent on September 29, 2020 and October 13, 2020 by National Labor Relations Board Field Attorney Rodolfo Martinez to employee Beatrice Barraza regarding a petition filed by the International Union of Operating Engineers Local 351 (“Union”). A true and correct copy of these emails is attached as Exhibit A-1. Ms. Barraza is a non-exempt, hourly Assistant Field Office Manager who works at the Artesia, New Mexico worksite. She is not a Human Resources employee, she has no managerial or supervisory responsibilities, and she believed the September 29, 2020 email had been sent to her in error. As a result, this communication was not brought to the attention of management or Human Resources until Mr. Martinez reached out to Ms. Barraza again by email on October 13.

3. Mr. Martinez attached to his October 13th email the Letter to Employer in RC or RD case (“Letter to Employer”), dated September 25, 2020, with the Notice of Petition for Election

(Form 5492), the Notice of Representation Hearing, and Affidavit of Service, the Description of Procedures in Certification and Decertification Cases (Form 4812), the Statement of Position form and Commerce Questionnaire (Form 505), and the Responsive Statement of Position form (Form 506) enclosed. A true and correct copy of the Letter to Employer is attached as Exhibit A-2. A copy of the Petition was not included with the Letter to Employer.

4. The Affidavit of Service enclosed with the Letter to Employer states that the petition and attachments were served on Austin on September 25, 2020 by electronic mail at Ms. Barraza's email address and by regular mail at the Artesia site and Austin's headquarters in La Porte, Texas. However, to the best of my knowledge, Austin did not receive a copy of the Petition until October 13, 2020. I am also not aware of Austin being served with a copy of the Petition by the Union.

5. The correct employer of the employees in the petitioned-for unit is Austin Maintenance & Construction, Inc.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 14th day of October, 2020 in Deer Park, Texas.

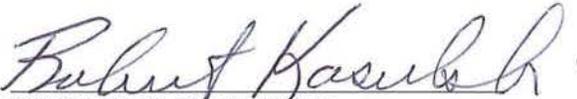

ROBERT KASUBINSKI

EXHIBIT A-1

From: Martinez, Rodolfo <Rodolfo.Martinez@nlrb.gov>
Sent: Tuesday, October 13, 2020 11:27 AM
To: Beatrice Barraza <bbarraza@austinindl.com>
Subject: [EXT] RE: 28-RC-266617 Austin Industrial

Good morning Ms. Barraza:

I am following up on my email below and the Region's correspondence (see attached) regarding the petition in the above referenced matter. Please contact me ASAP because a hearing is currently scheduled for **Friday, October 16, 2020 at 10:00 a.m.** The Employer's Statement of Position was due noon Mountain Time on Wednesday, October 7, 2020, but no filing was received by the Region. Accordingly, per Section 102.66(d) of the Board Rules and Regulations:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that

the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Moreover, the hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue as to which the Regional Director determines that record evidence is necessary. However, If the parties agree to the terms of the election and the Regional Director approves a Stipulated Election Agreement the hearing would be canceled. The answers I need for a Stipulated Election Agreement are outlined in my email below. Failure to supply the information may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court. If you have any questions, you can reach me by email or my office number below.

Rodolfo Martinez

Field Attorney
United States Government
National Labor Relations Board
Region 28 – Albuquerque Resident Office
P.O. Box 244 (For USPS Mail)
421 Gold Avenue SW Suite 310
Albuquerque, NM 87103-2181

Office: (505) 313-7222

Cell: (202) 674-1986

Fax: (505) 206-5695



Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission.

From: Martinez, Rodolfo
Sent: Tuesday, September 29, 2020 12:50 PM
To: bbarraza@austinindl.com
Subject: 28-RC-266617 Austin Industrial

Good afternoon:

I am the Board agent assigned to process the petition in the above referenced case. It is important that you contact me regarding the petition because a hearing is scheduled for Friday, October 16, 2020 and the Employer's Statement of Position is due by noon Mountain Time on Wednesday, October 7, 2020. If all the parties agree to the terms of the election and the Regional Director approves a stipulated election agreement the hearing will be canceled. Below are the items I need for a stipulated election agreement:

1. When was/is the end of the most recent pay period?

- Is the payroll weekly or bi-weekly?

2. Will the NLRB need to provide foreign language ballots/Notice of Election?

3. The petitioned for unit:

INCLUDED: All hourly full-time employees employed as Boilermaker 1,2,and 3,
Laborer's, and
Foreman

- Are these the official job titles?
- Are there any concerns/objections with the petitioned for unit?

4. The petitioned-for time, date, and location of the election: Mail ballot election.

- Any objections to a mail ballot election?
- Given the current pandemic, would the Employer agree to a mail-ballot election?

5. Will employees vote on their own time or on company time?

6. Who will serve as the Employer's designated onsite representative (who do we send the election notices to for posting)?

- Please include the individual's job title, first and last name, phone number, fax number, physical location, and email address.

7. The Petition names the Employer as "Austin Industrial."

- Is this the correct legal name of the Employer of the petitioned for employees?

8. Please fill out and return the commerce questionnaire.

Thank you for your anticipated cooperation. If you have any questions you can contact me by e-mail or the phone number below.

Rodolfo Martinez

Field Attorney
United States Government
National Labor Relations Board
Region 28 – Albuquerque Resident Office
P.O. Box 244 (For USPS Mail)
421 Gold Avenue SW Suite 310
Albuquerque, NM 87103-2181

Office: (505) 313-7222

Cell: (202) 674-1986

Fax: (505) 206-5695



Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission.

This email originated from an external organization.

EXHIBIT A-2



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099

Agency Website: www.nlr.gov
Telephone: (602)640-2160
Fax: (602)640-2178



Download
NLRB
Mobile App

URGENT

September 25, 2020

Austin Industrial
501 East Main
Artesia, NM 88210
Email: bbarraza@austinindl.com

Re: Austin Industrial
Case 28-RC-266617

Ladies and Gentlemen:

Enclosed is a copy of a petition that International Union of Operating Engineers Local 351 filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, the Petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures, including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney Rodolfo Martinez whose telephone number is (505) 313-7222. The mailing address is PO Box 244, Albuquerque, NM 87103-0244. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Deputy Regional Attorney David T. Garza whose telephone number is (505) 313-7217. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by **Friday, October 2, 2020** in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate electronically

with employees in the petitioned-for unit, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Mountain Time on Wednesday, October 7, 2020**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon Mountain Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and

presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Responsive Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of an employer's Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in the employer's Statement of Position, such that it is received no later than **noon Mountain Time on Tuesday, October 13, 2020.**

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM on Friday, October 16, 2020 via teleconference**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);
- (b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized 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 cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



Cornele A. Overstreet
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

cc: Austin Industrial
2801 East 13th Street
La Porte, TX 77571-9633

CAO/RM/mhz



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that International Union of Operating Engineers Local 351 has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 28-RC-266617 seeking an election to become certified as the representative of the employees of Austin Industrial in the unit set forth below:

INCLUDED: All hourly full-time employees employed as Boilermaker 1, 2, and 3, Laborer's, and Foreman

EXCLUDED: All supervisors as defined by the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (505)248-5125.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28



AUSTIN INDUSTRIAL

Employer

and

Case 28-RC-266617

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 351

Petitioner

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Friday, October 16, 2020** and on consecutive days thereafter until concluded, via teleconference, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Austin Industrial must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Mountain time on **Wednesday, October 7, 2020**. Following timely filing and service of a Statement of Position by Austin Industrial, International Union of Operating Engineers Local 351 must complete its Responsive Statement of Position responding to the issues raised in the Employer's Statement of Position and file it and all attachments with the Regional Director and serve it on the parties named in the petition such that it is received by them no later than **noon** Mountain on **Tuesday, October 13, 2020**.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Mountain on the due date in order to be

timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: September 25, 2020

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28

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

AUSTIN INDUSTRIAL

Employer

and

Case 28-RC-266617

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 351**

Petitioner

AFFIDAVIT OF SERVICE OF: Petition dated September 24, 2020, Notice of Representation Hearing dated September 25, 2020, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 25, 2020, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Austin Industrial
501 East Main
Artesia, NM 88210
Email: bbarraza@austinindl.com

International Union of Operating Engineers
Local 351
6967 Commerce Street
El Paso, TX 79915
Email: butch.ballez@local351.com

Austin Industrial
2801 East 13th Street
La Porte, TX 77571-9633
Email: bbarraza@austinindl.com

September 25, 2020

Date

Mary H. Zorn, Designated Agent of NLRB

Name

/s/ Mary H. Zorn

Signature

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) a copy of the petition, (2) this form, (3) a Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) a Notice of Petition for Election, and (6) a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlr.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. In an **RC** or **RD** case, if the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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/sites/default/files/attachments/basic-page/node-4559/Optional_Forms_for_Voter_List.docx

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a response to each party's Statement of Position. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion."

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a

unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs must be e-filed through the Board's website, www.nlr.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election 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 cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of election unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlr.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No. 28-RC-266617	Date Filed September 24, 2020

INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.
Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)		1d. Cell No.:	1f. e-Mail Address
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b.)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.			
Added		Excluded	
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx . A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D)			
State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s)	8c. Time(s)	8d. Location(s)	
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)	
9. Representative who will accept service of all papers for purposes of the representation proceeding			
9a. Full name and title of authorized representative		9b. Signature of authorized representative	
		9c. Date	
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:		9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME

Austin Industrial

CASE NUMBER

28-RC-266617

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)**2. TYPE OF ENTITY** CORPORATION LLC LLP PARTNERSHIP SOLE PROPRIETORSHIP OTHER (Specify)**3. IF A CORPORATION or LLC**A. STATE OF INCORPORATION
OR FORMATION

B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS**5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR****6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).****7. A. PRINCIPAL LOCATION:****B. BRANCH LOCATIONS:****8. NUMBER OF PEOPLE PRESENTLY EMPLOYED**

A. Total:

B. At the address involved in this matter:

9. DURING THE MOST RECENT (Check appropriate box): CALENDAR YR 12 MONTHS or FISCAL YR (FY dates)

YES NO

A. Did you **provide services** valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value.
\$B. If you answered no to 9A, did you **provide services** valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided.
\$C. If you answered no to 9A and 9B, did you **provide services** valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$D. Did you **sell goods** valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$E. If you answered no to 9D, did you **sell goods** valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount.
\$F. Did you **purchase and receive goods** valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$G. Did you **purchase and receive goods** valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$H. **Gross Revenues** from all sales or performance of services (**Check the largest amount**):
 \$100,000 \$250,000 \$500,000 \$1,000,000 or more If less than \$100,000, indicate amount.I. **Did you begin operations within the last 12 months?** If yes, specify date: _____**10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?** YES NO (If yes, name and address of association or group).**11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS**

NAME

TITLE

E-MAIL ADDRESS

TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)

SIGNATURE

E-MAIL ADDRESS

DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the lists described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You should E-File your Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required Lists: In addition to filing a Responsive Statement of Position to another party's Statement of Position, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and 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/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional_Forms_for_Voter_List.docx)

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RESPONSIVE STATEMENT OF POSITION - RC OR RD PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 28-RC-266617	Date Filed September 24, 2020

INSTRUCTIONS: If a party has submitted and served on you a timely Statement of Position to an RC or RD petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

Austin Industrial			,
1a. Full Name of Party Filing Responsive Statement of Position		1c. Business Phone	1e. Fax No.
		1d. Cell No.	
		1f. E-Mail Address	
1b. Address (Street and Number, City, State, and ZIP Code)			
2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute: a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505] <input type="checkbox"/> No Dispute (no further response required) <input type="checkbox"/> Dispute (response required below) Response to Statement of Position:			
Full Name and Title of Authorized Representative		Signature of Authorized Representative	Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT
Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.
Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

EXHIBIT B

From: Martinez, Rodolfo
To: [Meyer, Arrissa](#)
Subject: RE: 28-RC-266617 Austin Industrial
Date: Tuesday, October 13, 2020 7:16:33 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[PET.28-RC-266617.Signed RC Petition.pdf](#)

[EXTERNAL E-MAIL]

Good afternoon Arrissa,

Please e-file the request with the Regional Director(and serve on Petitioner). Also, the Employer must include a proposed alternate date and the position of the Petitioner regarding the postponement. Attached is the petition that was served on the Employer on 9/25/20.

- Rodolfo Martinez

From: Meyer, Arrissa <AKMeyer@littler.com>
Sent: Tuesday, October 13, 2020 5:42 PM
To: Martinez, Rodolfo <Rodolfo.Martinez@nlrb.gov>
Cc: Garza, David T. <David.Garza@nlrb.gov>
Subject: RE: 28-RC-266617 Austin Industrial
Importance: High

Rodolfo,

I have just been engaged to represent Austin Industrial with respect to the petition referenced below, and will be filing a Notice of Appearance shortly.

Today is the first date that anyone in human resources or management at Austin learned of the existence of this petition – the individual you were emailing below, Beatrice Barraza, is a non-exempt, hourly office assistant in the field who assumed that she had received in the email in error. Your email did not make it to the proper individuals until this afternoon after you followed-up with Ms. Barraza. Nor is the Company aware of receiving anything by mail. Further, I did not see a copy of petition included in the attached letter that you sent, so to the best of my knowledge, the Company has still not received the actual petition.

Unfortunately, several deadlines came and went before the Company even learned of the petition. The Notice of Election was supposed to be posted on October 2, and the Employer's Statement of Position was due on October 7. I also understand that a hearing is scheduled for this Friday, October 16.

In light of these circumstances, I would like to request an extension of each of these deadlines to

allow me to review the petition, gather information to respond to your questions below, and identify whether it will be possible to reach a stipulated election agreement or whether a hearing is necessary. Not only is it equitable that the employer be given a chance to fully participate in this important process, but I also believe it will ultimately be more efficient and better effectuate the purposes of the Act.

I appreciate your consideration of this matter. Please also send me a copy of the petition at your earliest convenience.

Thanks,

Arrissa Meyer

Shareholder

214.880.8180 direct, 972.989.4860 mobile, 214.880.0181 fax

AKMeyer@littler.com



Fueled by ingenuity. Inspired by you.

Labor & Employment Law Solutions | Local Everywhere
2001 Ross Avenue, Suite 1500, Lock Box 116, Dallas, TX 75201-2931

From: Martinez, Rodolfo <Rodolfo.Martinez@nrb.gov>

Sent: Tuesday, October 13, 2020 11:27 AM

To: Beatrice Barraza <bbarraza@austinindl.com>

Subject: [EXT] RE: 28-RC-266617 Austin Industrial

Good morning Ms. Barraza:

I am following up on my email below and the Region's correspondence (see attached) regarding the petition in the above referenced matter. Please contact me ASAP because a hearing is currently scheduled for **Friday, October 16, 2020 at 10:00 a.m.** The Employer's Statement of Position was due noon Mountain Time on Wednesday, October 7, 2020, but no filing was received by the Region. Accordingly, per Section 102.66(d) of the Board Rules and Regulations:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that

the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Moreover, the hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue as to which the Regional Director determines that record evidence is necessary. However, If the parties agree to the terms of the election and the Regional Director approves a Stipulated Election Agreement the hearing would be canceled. The answers I need for a Stipulated Election Agreement are outlined in my email below. Failure to supply the information may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court. If you have any questions, you can reach me by email or my office number below.

Rodolfo Martinez

Field Attorney
United States Government
National Labor Relations Board
Region 28 – Albuquerque Resident Office
P.O. Box 244 (For USPS Mail)
421 Gold Avenue SW Suite 310
Albuquerque, NM 87103-2181

Office: (505) 313-7222

Cell: (202) 674-1986

Fax: (505) 206-5695



Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission.

From: Martinez, Rodolfo
Sent: Tuesday, September 29, 2020 12:50 PM
To: bbarraza@austinindl.com
Subject: 28-RC-266617 Austin Industrial

Good afternoon:

I am the Board agent assigned to process the petition in the above referenced case. It is important that you contact me regarding the petition because a hearing is scheduled for Friday, October 16, 2020 and the Employer's Statement of Position is due by noon Mountain Time on Wednesday, October 7, 2020. If all the parties agree to the terms of the election and the Regional Director approves a stipulated election agreement the hearing will be canceled. Below are the items I need for a stipulated election agreement:

1. When was/is the end of the most recent pay period?

- Is the payroll weekly or bi-weekly?

2. Will the NLRB need to provide foreign language ballots/Notice of Election?

3. The petitioned for unit:

INCLUDED: All hourly full-time employees employed as Boilermaker 1,2,and 3,
Laborer's, and
Foreman

- Are these the official job titles?
- Are there any concerns/objections with the petitioned for unit?

4. The petitioned-for time, date, and location of the election: Mail ballot election.

- Any objections to a mail ballot election?
- Given the current pandemic, would the Employer agree to a mail-ballot election?

5. Will employees vote on their own time or on company time?

6. Who will serve as the Employer's designated onsite representative (who do we send the election notices to for posting)?

- Please include the individual's job title, first and last name, phone number, fax number, physical location, and email address.

7. The Petition names the Employer as "Austin Industrial."

- Is this the correct legal name of the Employer of the petitioned for employees?

8. Please fill out and return the commerce questionnaire.

Thank you for your anticipated cooperation. If you have any questions you can contact me by e-mail or the phone number below.

Rodolfo Martinez

Field Attorney
United States Government
National Labor Relations Board
Region 28 – Albuquerque Resident Office
P.O. Box 244 (For USPS Mail)
421 Gold Avenue SW Suite 310
Albuquerque, NM 87103-2181

Office: (505) 313-7222

Cell: (202) 674-1986

Fax: (505) 206-5695



Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission.

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Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

Employees Included

All hourly full-time employees employed as Boilermaker 1,2,and 3, Laborer's, and Foreman

Employees Excluded

All supervisors as defined by the Act.

EXHIBIT 4

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

AUSTIN INDUSTRIAL

Employer

and

Case 28-RC-266617

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 351**

Petitioner

**ORDER DENYING EMPLOYER’S MOTION TO POSTPONE HEARING AND
MOTION FOR EXTENSION OF TIME TO FILE STATEMENT OF POSITION**

On September 25, 2020,¹ a Notice of Representation Hearing issued in the above matter requiring the Employer to submit a Statement of Position by 12:00 noon (Mountain Time) on October 7, and scheduling a hearing to commence at 10:00 a.m. on October 16.

On September 25, the Region emailed the Employer representative named in the petition the Region’s docket packet and petition filed in the above matter. On September 29, the Board agent investigating the petition emailed the Employer representative soliciting the Employer’s position regarding the petition. On October 8, the Board agent emailed the Employer (and Petitioner) a Skype pre-hearing meeting invitation, noting that it involved this matter, and scheduling a telephonic conference on October 13 at 10:00 a.m. Mountain Time. On October 13, the Petitioner appeared at the Skype pre-hearing meeting, but the Employer did not. On that same date, the Board agent called the Employer’s representative, but received no response. Moreover, on October 13, the Board agent emailed the Employer representative regarding the petition and noted that the Employer failed to file a Statement of Position and reminded the representative of the scheduled hearing. None of the Region’s emails were returned as undeliverable.

¹ All subsequent dates are in 2020, unless otherwise specified.

Later in the day, counsel for the Employer notified the Region that she had been retained and requested an extension of time for the Employer to file its Statement of Position and requested a postponement of the hearing. Counsel for the Employer's email did not state the Petitioner's position on the requests. Shortly afterwards, the Board agent informed Counsel for the Employer that such requests had to be e-filed with the Regional Director and had to include the Petitioner's position.

On October 14, the Employer filed a Motion to Postpone Hearing Date, requesting a postponement of the hearing on the grounds that it did not have a copy of the petition until October 13 and that the individual named on the petition with whom the Region communicated is not a human resources employee and has no managerial or supervisory responsibilities and did not forward the Region's correspondence to the Employer's headquarters until October 13 because she believed the email was sent to her in error. The Employer also claims that it is "not aware" of being served with the petition by the Union. Counsel for the Employer also contends that she is scheduled to attend a ballot count in another case at 10:00 a.m. CST on October 16 and that it is "unclear" whether it will be completed before the hearing in this case begins. On October 14, the Employer also filed a Motion for Extension of Deadline for Position Statement² requesting the extension dates relative to its request to postpone the hearing for the same reasons. The Union opposes postponement.

Section 102.63 (b)(1) of the Board's Rules and Regulations requires that an employer file its Statement of Position in a representation case "at noon 8 business days following the issuance and service of the Notice of Hearing." In turn, the "Regional Director *may postpone the time for filing and serving* the Statement of Position upon request of a party

² This motion will be treated as a request for an extension of time to file a Statement of Position.

showing good cause.” §102.63(b)(1)(emphasis added). The Boards Rules and Regulations, however, do not grant Regional Directors the authority to excuse employers who fail to meet the deadline for filing their Statements of Position. Moreover, Regional Directors must “set the hearing for a date 14 business days from the date of service of the notice” except in unusually complex cases. §102.63(a)(1). Regional Directors may postpone hearings but “only upon request of a party showing good cause.” *Id.*

The Employer, by its motions, has failed to show good cause to warrant filing an untimely Statement of Position. First and foremost, as the deadline for the Employer to file its Statement of Position expired at noon on October 7, the Employer’s request is not a request for an extension of time (that deadline passed). Rather, the Employer is asking to be relieved of its failure in not filing its Statement of Position on time. The petition was served upon the Employer on September 25 and the Employer does not contend that it did not receive the Region’s docket packet. The Employer also does not contend that it did not receive the Board agent’s correspondence, emails, or phone calls regarding the hearing in this matter.

Likewise, the Employer does not contend that the Petitioner failed to serve it with the petition. Rather, the Employer argues that the petition and correspondence should have been sent to a different representative of the Employer because the representative of the Employer named in the petition who received the petition is not a manager or a supervisor. More importantly, Respondent cites no authority standing for the proposition that petitions must be served on a manager or a supervisor. The Board’s Rules and Regulations do not set forth such a requirement. *See* §102.63 (“the Regional Director shall prepare and cause to be served *upon the parties* . . . a Notice of Hearing before a Hearing Officer at a time and place fixed therein”) (emphasis added); *see also* Fed. R. Civ. P. 7(a)(1).

Finally, the Employer failed to explain why one of its employees ignored correspondence, emails, and phone calls from the Board agent. More specifically, the Employer failed to explain why an employee of the Employer failed to pass along information regarding the petition to more senior representatives, if necessary, or inform the Board agent that that the correspondence and emails were sent in error to the wrong representative. Based on the aforementioned, the Employer has not shown good cause for postponing the hearing.

Accordingly,

IT IS ORDERED that the Employer's Motion to Postpone Hearing Date in this matter is denied.

IT IS FUTHER ORDERED that the Employer's Motion for Extension of Deadline to file a Statement of Position in this matter is denied.

Dated at Phoenix, Arizona, this 15th day of October 2020.

/s/ Cornele A. Overstreet

Cornele A. Overstreet Regional Director

EXHIBIT 5



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION



Austin Maintenance & Construction, Inc.

Employer

and

**International Union of Operating Engineers Local
351**

Case 28-RC-266617

Petitioner

STIPULATION

The parties in this matter stipulate and agree that:

1. The undersigned have been informed of the procedures at the formal hearings before the National Labor Relations Board (the Board) by service of the Description of Representation Case Procedures in Certification and Decertification Cases and the Hearing Officer has offered to us additional copies.
2. To the extent that the formal documents in this proceeding do not correctly reflect the names of the parties, all said documents may be considered as amended to correctly reflect the names set forth herein.
3. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act) and is subject to the jurisdiction of the Board.

Commerce facts are as follows:

The Employer, Austin Maintenance & Construction, Inc., a Delaware corporation with headquarters located in LaPorte, Texas and with a worksite located in Artesia, New Mexico, provides construction, maintenance, turnaround and other plant services. In conducting its operations during the 12-month period ending September 24, 2020, the Employer purchased and received at its worksite in Artesia, New Mexico goods valued in excess of \$50,000 directly from points outside the State of New Mexico.

4. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

6. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar or other bar to an election in this matter.

7. Upon approval of this Stipulation by the Hearing Officer, it may be admitted without objection, as Board Exhibit No. 2 in this proceeding.

For the Employer



For the Petitioner

RECEIVED:

Rodolfo Martinez

Hearing Officer

10/16/20

Date

Board Exhibit No. 2



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION



Austin Maintenance & Construction, Inc.

Employer

and

**International Union of Operating Engineers Local
351**

Case 28-RC-266617

Petitioner

STIPULATION

The parties in this matter stipulate and agree that:

1. The undersigned have been informed of the procedures at the formal hearings before the National Labor Relations Board (the Board) by service of the Description of Representation Case Procedures in Certification and Decertification Cases and the Hearing Officer has offered to us additional copies.
2. To the extent that the formal documents in this proceeding do not correctly reflect the names of the parties, all said documents may be considered as amended to correctly reflect the names set forth herein.
3. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (the Act) and is subject to the jurisdiction of the Board.

Commerce facts are as follows:

- The Employer, Austin Maintenance & Construction, Inc., a Delaware corporation with headquarters located in LaPorte, Texas and with a worksite located in Artesia, New Mexico, provides construction, maintenance, turnaround and other plant services. In conducting its operations during the 12-month period ending September 24, 2020, the Employer purchased and received at its worksite in Artesia, New Mexico goods valued in excess of \$50,000 directly from points outside the State of New Mexico.
4. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
 5. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.

6. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar or other bar to an election in this matter.

7. Upon approval of this Stipulation by the Hearing Officer, it may be admitted without objection, as Board Exhibit No. 2 in this proceeding.



For the Employer

For the Petitioner

RECEIVED:

10/16/20



Hearing Officer

Date

Board Exhibit No. 2

EXHIBIT 6

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**AUSTIN MAINTENANCE &
CONSTRUCTION, INC.**

Employer¹

and

Case 28-RC-266617

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 351**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. SUMMARY

On September 24, 2020,² the petition in this matter was filed by International Union of Operating Engineers Local 351 (Petitioner) filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking to represent a unit of boilermakers 1, 2, and 3, Laborers, and Foreman employed by Austin Industrial, whose correct name is Austin Maintenance & Construction, Inc., (Employer) at its jobsite located at 501 East Main, Artesia, New Mexico (Employer's jobsite).

A hearing was held before a hearing officer of the National Labor Relations Board (Board) via videoconference on October 16.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the parties' Stipulation, the entire record, and the extraordinary circumstances of the COVID-19 pandemic, I am directing an election by mail ballot in the unit I have found appropriate as described below to commence on the earliest practicable date.

II. FACTS

A. Employer's Operations

The Employer, which is engaged in the business of providing construction, maintenance, turnaround, and other plant services, is an essential business that has remained operational during the COVID-19 pandemic. As a result, its employees continue to report for work and perform

¹ The parties stipulated that to the extent formal documents in this proceeding do not correctly reflect the names of the parties, all said documents may be considered as amended to correctly reflect the names of the parties as set forth in the stipulation, and I find the correct name of the Employer to be Austin Maintenance & Construction, Inc.

² All dates are for the year 2020 unless otherwise indicated.

their regular duties, albeit with at least some changes in regular operations to incorporate social distancing and sanitizing to the extent possible at the Employer's facility.

B. The COVID-19 Pandemic

The impact of the COVID-19 pandemic on daily life has been profound. As of December 30, 19,232,843 people in the United States contracted confirmed cases of COVID-19 and 334,029 people have died from it.³ The Centers for Disease Control and Prevention (CDC) has determined that the best way to prevent the illness is to avoid being exposed to the virus.⁴ Many of the measures recommended by CDC to prevent the spread of the virus are well-known at this point: maintain a six-foot distance between individuals, work or engage in schooling from home, avoid social gatherings, avoid discretionary travel, and practice good hygiene.⁵ With respect to travel, the CDC advises that travel increases the chances of contracting and spreading COVID-19, and recommends that before traveling, individuals should learn if COVID-19 is spreading in their local area or in any of the places they are going.⁶

A recent report published by the CDC, *COVID-19 Pandemic Planning Scenarios* (CDC Planning Report),⁷ contains a best estimate that 40% of individuals infected with COVID-19 are asymptomatic, meaning that they never exhibit symptoms during the course of their COVID-19 infection, yet they are just as infectious as symptomatic individuals. This CDC Planning Report further estimates that the mean time from exposure to symptom onset of COVID-19 is approximately six days.

The CDC has also recently issued COVID-19 guidance for businesses, *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020*, (Interim Guidance)⁸ containing recommendations to establish policies and practices for social distancing to reduce the transmission of COVID-19, including: increasing physical space between employees at the worksite by modifying the workspace; using signs, tape marks, or other visual cues such as decals or colored tape on the floor, placed six feet apart, to indicate where to stand when physical barriers are not possible; implementing flexible meeting and travel options (e.g., postpone non-essential meetings or events in accordance with state and local regulations and guidance); closing or limiting access to common areas where employees are likely to congregate and interact; and delivering services remotely (e.g., phone, video, or web).

Further, although not directly addressing Board elections, I note that the CDC has specifically issued guidance on elections, *Considerations for Election Polling Locations and*

³ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁴ See *How to Protect Yourself and Others* at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁵ *Id.*

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html#Domestic-Travel>.

⁷ See <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>.

⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

Voters (CDC Election Guidance),⁹ stating that officials should offer alternatives to in-person voting if allowed. Specifically, this CDC Election Guidance provides as follows:

Maintaining Healthy Operations

- **Where available in your jurisdiction, offer alternative voting methods that minimize direct contact and reduce crowd size at polling locations**
 - Consider offering alternatives to in-person voting if allowed in the jurisdiction.

Many state and local governments have also issued restrictions tailored to the situation in specific communities. On March 11, New Mexico Governor Michelle Lujan Grisham declared a statewide Public Health Emergency because of the community spread of COVID-19. Governor Grisham renewed the declaration of a Public Health Emergency through August 28. On July 30, the Secretary of the New Mexico Department of Health issued a Public Health Order to amend the State of New Mexico's restrictions on mass gatherings and business operations, which were implemented in response to the spread of COVID-19 within the state. The New Mexico Department of Health ordered that "**all New Mexicans should be staying in their homes for all but the most essential activities and services**".¹⁰ (emphasis in original). The State of New Mexico also prohibited all "mass gatherings" where five or more unrelated individuals would be in a single room or connected space. Where certain businesses were deemed "non-essential," those business were required to operate at no more than 25% of the maximum capacity. Certain "essential businesses" were permitted to open on the condition that they must comply with the pertinent "COVID-Safe Practices (CSPs)" section(s) of the "All Together New Mexico: COVID-Safe Practices for Individuals and Employers" and any identified occupancy restrictions.¹¹ Moreover, on October 29, Governor Grisham issued Executive Order 2020-075 directing all persons who travel into New Mexico from out of state to self-quarantine for at least 14 days during the duration of the public health emergency.¹²

For this petition, holding a manual election would require the meeting of a Board agent and party representatives from potentially three different states at the Employer's facility located in Artesia, New Mexico. The Regional Office processing this petition is located in Phoenix, Arizona and Petitioner's representative is located in El Paso, Texas. The Employer's counsel of record has an office in Dallas, Texas. Artesia, located in Eddy County, New Mexico, where the

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

¹⁰ See Public Health Order issued December 30: <https://cv.nmhealth.org/public-health-orders-and-executive-orders/>

¹¹ Requiring, among other protocols, avoiding unnecessary travel, providing for meetings to take place remotely, closing common areas where personnel are likely to congregate, and requiring face coverings in public spaces. See <https://cv.nmhealth.org/covid-safe-practices/>

¹² <https://cv.nmhealth.org/public-health-orders-and-executive-orders/>

Employer's facility is located, is situated approximately 246 miles south of Albuquerque, New Mexico.

Although communities nationwide have taken steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in New Mexico and throughout the United States. As of December 29, the following chart illustrates the confirmed cases and deaths from COVID-19 in the relevant counties in the State of New Mexico, Arizona, and Texas:

	Confirmed Cases COVID-19	Deaths from COVID-19
Eddy County, New Mexico ¹³	4,455	67
Bernalillo County, New Mexico ¹⁴	40,038	551
Maricopa County, Arizona ¹⁵	512,489	8,718
El Paso County, Texas ¹⁶	97,710	1,622
Dallas County, Texas ¹⁷	167,900	1,955

III. THE ELECTION METHOD

A. The Petitioner's Position

The Petitioner requests a mail ballot election.

B. The Employer's Position

The Employer argues that voting should be conducted entirely by manual election, and contends that manual elections are the Board's preferred election method and that manual elections maximize voter participation and free choice. The Employer also raised general concerns over the current state of mail operations.

The Employer proposes a manual election be conducted at an unspecified date during the week of November 9 at unspecified time intervals during the Employer's work hours from 6:30 a.m. to 3:30 p.m. The Employer proposes a voting location at the Employer's HollyFrontier

¹³ See <https://cvprovider.nmhealth.org/public-dashboard.html>.

¹⁴ *Id.*

¹⁵ See <https://www.azdhs.gov/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/covid-19/dashboards/index.php>.

¹⁶ <https://dshs.texas.gov/coronavirus/AdditionalData.aspx>.

¹⁷ *Id.*

Corporation jobsite without specifying the size of the room or the number of entry or exit points of the voting area at its proposed location.

Additionally, the Employer contends that its employees in the petitioned-for unit are essential employees who report to work each day and that the Employer is willing to agree to any necessary safety precautions to ensure a manual election. The Employer notes that Spanish language ballots and Notices will be necessary.

C. Analysis

Under Section 9 of the Act, the Board is charged with the duty to conduct secret ballot elections to determine employees' union representation preference and to certify the results of such elections. The Board's obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local community are facing public health and economic crises. I am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic.¹⁸ Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.¹⁹

¹⁸ In its April 17, 2020 press release, the Board stated that Regional Directors have discretion with respect to when, where and if an election can be conducted in accordance with existing Board precedent and the Board specifically noted that Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance. See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

¹⁹ See, *Atlas Pacific Engineering Company*, 27-RC-258742 (Order Denying Request for Review, May 8, 2020); *Touchpoint Support Services, LLC*, 07-RC-258867 (Order Denying Request for Review, May 18, 2020); *Johnson Controls, Inc.*, 16-RC-256972 (Order Denying Request for Review, May 18, 2020); *Roseland Community Hospital*, 13-RC-256995 (Order Denying Request for Review, May 26, 2020); *Seminole Electric Cooperative, Inc.*, 12-RC-256815 (Order Denying Request for Review, May 28, 2020); *2101 LLC d/b/a Intercontinental Truck Body*, 19-RC-258144 (Order Denying Request for Review, May 28, 2020); *Twinbrook Health & Rehabilitation Center*, 06-RC-257382 (Order Denying Request for Review, June 5, 2020); *Vistar Transportation, LLC*, 09-RC-260125 (Order Denying Request for Review, June 12, 2020); *TDS Metrocom, LLC*, 18-RC-260318 (Order Denying Request for Review, June 23, 2020); *Roseland Community Hospital*, 13-RC-259788 (Order Denying Request for Review, June 25, 2020).

The sole issue in this case is whether to conduct an election manually or by mail ballot in light of the ongoing COVID-19 pandemic.²⁰ The Employer's preference is for a manual election. The Petitioner's preference is for a mail-ballot election.

On November 9, the Board issued its decision in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), in which it outlined six situations "that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by [the COVID-19] pandemic." *Id.* slip op. at 4. The six situations are as follows:

- (1) The NLRB 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 avoid violating mandatory state or local health orders relating to maximum gathering size.

²⁰ On September 25, Region 28 (the Region) of the Board served the petition on the parties and issued a Notice of Representation Hearing in this matter requiring the Employer to submit a Statement of Position by 12:00 noon (Mountain Time) on October 7, and scheduling a hearing to commence on October 16. On October 14, the Employer filed a Motion to Postpone Hearing Date, requesting to postpone the hearing on the grounds that the petition was not properly served and that the Employer did not receive a copy of the petition until October 13, and a Motion for Extension of Deadline for Position Statement seeking filing dates relative to its request to postpone the hearing due to the alleged improper service (collectively Employer's Motions). On October 15, I issued an Order denying the Employer's Motions for lack of good cause.

At the hearing, the Employer moved to reconsider my October 15 decision to deny the Employer's Motion to Postpone Hearing Date and Motion for Extension of Deadline for Position Statement (collectively "Employer's Motions) and restated the arguments previously raised in Employer's Motions. The Petitioner opposed Employer's motion for reconsideration arguing that the petition in this case was properly served on the Employer.

The Employer presented substantially similar arguments at the hearing which it previously raised in Employer's Motions. Accordingly, I denied the Employer motion for reconsideration and referred the Employer to the Order issued on October 15. In light of the Employer's failure to timely file a position statement, no evidence was received at hearing.

The Employer made an offer of proof regarding the appropriateness of the petitioned-for unit and the Petitioner objected and moved to have the Employer's offer of proof stricken from the record. Offers of proof can be solicited regarding issues to be litigated at a hearing. Nevertheless, evidence of any issue not properly raised in a timely statement of position is precluded under the Board's Rules and Regulations Section 102.66(d). As such, I denied the Petitioner's motion to strike the Employer's offer of proof and no evidence was received regarding the issues raised in the Employer's offer of proof.

- (4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols.
- (5) There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status.
- (6) Other similarly compelling considerations.

The Board noted that the presence of only one of the above situations will constitute extraordinary circumstances allowing for a mail-ballot election. *Id.*

Here, I find that the second factor is determinative. The Employer's operations are located in Artesia, New Mexico in Eddy County. Eddy County had 87 COVID-19 cases per 100,000 population the week ending December 14, and 86.5 COVID-19 cases per 100,000 population the week ending December 28.²¹ As of December 28, Eddy County had a 21.45% COVID-19 test positivity rate over a 14-day period.²²

Because the positivity rate is more than four times the rate the Board has cited as the threshold for conducting a mail ballot election, the circumstances warrant a mail-ballot election. As the Board stated in *Aspirus Keweenaw*, when this factor is met, "the interest in public safety will ordinarily indicate the propriety of a mail-ballot election." For this reason, I am directing a mail-ballot election in this matter.²³

Additionally, the Employer asserts, and the Petitioner does not oppose, that the Notice of Election and ballots need to be translated into Spanish. Accordingly, the Region will make sufficient arrangements to provide Spanish and English election Notices and mail ballots for this election.

IV. CONCLUSION

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

²¹ See <https://cvprovider.nmhealth.org/public-dashboard.html>.

²² See *Id.*

²³ I note that, in considering the fifth factor under *Aspirus Keweenaw*, the record contains no details as to whether there has been a COVID-19 outbreak at the Employer's facility. Nevertheless, because of the high test positivity rate, a mail-ballot election is warranted.

Although the Board issued its decision in *Aspirus Keweenaw* after the hearing in this matter closed and after the parties submitted their post-hearing briefs, I find that further briefing by the parties on the appropriate election method in light of new Board caselaw is unnecessary. Here, the second factor of *Aspirus Keweenaw* is based on an objective observation of either the 14-day trend in the number of new confirmed cases of COVID-19 or the 14-day testing positivity rate. As this factor requires no interpretation of law, further briefing on this issue would only serve to delay a decision in this matter.

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²⁴
2. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
3. There is no history of collective bargaining between these parties in the proposed bargaining unit identified above and there is no contract or other bar in existence to an election in this case.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time Boilermaker 1, Boilermaker 2, Boilermaker 3, General Laborers,²⁵ and Foreman employed by the Employer at its facility in Artesia, New Mexico.

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

Others Permitted to Vote: At this time, no decision has been made regarding whether employees classified as Boilermaker 4, Boilermaker Foreman or General Laborer Foreman are included or excluded from the bargaining unit, and individuals in these classifications may vote in the election but their ballots shall be challenged since their eligibility has not been determined. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

²⁴ The parties stipulated to the following commerce facts: The Employer, Austin Maintenance & Construction, Inc., a Delaware corporation with headquarters located in LaPorte, Texas and with a worksite located in Artesia, New Mexico, provides construction, maintenance, turnaround and other plant services. In conducting its operations during the 12-month period ending September 24, 2020, the Employer purchased and received at its worksite in Artesia, New Mexico goods valued in excess of \$50,000 directly from points outside the State of New Mexico.

²⁵ The Petitioner noted that by naming Laborers in the petitioned-for-unit that it sought to represent General Laborers. The Petitioner's attempt to clarify the petitioned-for-unit will be treated as a motion to amend the petition. Employer did not oppose the Petitioner's clarification but noted that the petition refers to Laborers and that such a category was broad enough to include Janitorial Laborers. In light of the Petitioner's clarification and no opposition stated by Employer, I grant the Petitioner's motion and find that the petitioned-for-unit includes General Laborers.

There are approximately 23 employees in the unit found appropriate. There are approximately four (4)²⁶ additional employees in the other classifications permitted to vote.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers Local 531.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. At **2:00 p.m. on January 14, 2021**, ballots will be mailed to voters by an agent of Region 28 of the National Labor Relations Board. 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 **January 21, 2021**, should communicate immediately with the National Labor Relations Board by either calling the National Labor Relations Board Region 28 Office at (602) 640-2160 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 28 office by close of business (4:45 p.m.) on **January 28, 2021**.

All ballots will be commingled and counted by an agent of Region 28 of the National Labor Relations Board at a location to be determined by the Regional Director at **10:00 a.m. on February 4, 2021**.²⁷ The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

²⁶ The Employer noted that there are two (2) employees in the Boilermaker 4 category and that each category of employee has a foreman, which according to the petitioned-for categories of employees, Boilermaker and General Laborer, would yield one (1) Boilermaker Foreman and one (1) General Laborer Foreman.

²⁷ If, on the date of the count, the Region 28 office is closed, or the staff of the Region 28 office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period of time before the count, the parties will be provided information on how to participate in the count by videoconference.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the weekly payroll period ending **January 3, 2021**, 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 who are present in the United States may vote.

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 **January 7, 2021**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election 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.

VI. 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.

Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to

the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations, and must be accompanied by a certificate of service.

Filing a request for review electronically may be accomplished 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. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

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

Dated at Las Vegas, Nevada this 5th day of January 2021.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

EXHIBIT 7

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**AUSTIN MAINTENANCE &
CONSTRUCTION, INC.**

Employer

and

Case 28-RC-266617

**INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 351**

Petitioner

TYPE OF ELECTION: STIPULATED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

UNIT: All full-time and regular part-time Boilermaker 1, Boilermaker 2, Boilermaker 3, General Laborers, and Foreman employed by the Employer at its facility in Artesia, New Mexico; excluding all other employees, office clerical employees, managers and supervisors as defined in the Act.



Signed at Phoenix, Arizona on
the 17th day of February 2021.

/s/ Cornele A. Overstreet

Cornele A. Overstreet
Regional Director, Region 28
National Labor Relations Board

Attachment: Notice of Bargaining Obligation

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.