UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

CANNASEUR’S CHOICE, LLC,

Employer

and

UNION FOOD AND COMMERCIAL
WORKERS UNION LOCAL 21,
AFFILIATED WITH UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO

DECISION AND DIRECTION OF ELECTION

Cannaseur’s Choice, LLC (the Employer), located in Renton, Washington, grows and processes marijuana for sale primarily to retail stores. On September 14, 2021, United Food and Commercial Workers Union Local 21, Affiliated with United Food and Commercial Workers International Union, AFL-CIO (the Petitioner), filed a petition to represent certain employees at the Employer’s facility, specifically, all fulfillment associates, growers, inventory machine operators, and trimmers.

On October 12, 2021, a hearing was held before a Hearing Officer of the National Labor Relations Board. The Employer argued that the employees in the petitioned-for unit were agricultural employees within the meaning of the Act and therefore the petition should be dismissed. The Petitioner argued to the contrary, that the employees described in the petitioned-for unit are employees within the meaning of the Act. The Employer also asserts that the Senior Fulfillment Associate and the Cultivation or Grow Lead are Supervisors within the meaning of the Act and should therefore be excluded from the petitioned-for unit, while the Petitioner argues that they are employees and should be excluded.1 Finally, the parties do not agree on the method of election, with the Employer requesting it be held manually and the Petitioner asking for a mail-ballot election. There are approximately 32 employees in the petitioned-for unit.

Both parties filed post-hearing briefs on October 25, 2021.

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1 In the alternative, the Union urges that the Senior Fulfillment Associate and the Cultivation Lead be allowed to vote subject to challenge.
THE EMPLOYER'S OPERATION

The Employer holds licenses issued by the State of Washington to grow, process, and weigh marijuana.

Specifically, the buds or flowers of the marijuana plants (plants) grown by the Employer are dried and trimmed and then packaged by the Employer as a variety of products, including the buds themselves, pre-rolled “joints” and infused joints that have been infused with concentrates such as keif, distillate, hash, or CBD isolate. The Employer also makes other concentrates like Bubble Hash.

The above products are marketed by the Employer under a number of brand names, including Proper Cannabis, Cosmic Supply Company, Khemia, Vibe, Moon Drops, and Soul Shine. The Employer does not sell its product to retailers outside the State of Washington and does not sell product of other cannabis processors. Most of its product consists of whole buds, that the consumer can imbibe by vaporizer, pipe, or bong. Consumers can also grind the buds to roll their own joints rather than buying pre-rolls.

The Employer maintains a 40,000 square foot warehouse (the Facility) in Renton, Washington where product is grown, harvested, dried, ground, and packaged for retail sale. A photograph of the Facility introduced at the hearing shows a low one-story structure in what appears to be a light-industrial mall. Most of the facility consists of indoor grow rooms where the cannabis is cultivated and grown, and a separate trim room where the harvested and dried product is trimmed to create buds. Adjacent to the grow rooms are climate-controlled rooms where the extraction technicians create Bubble Hash and kief extraction. After harvesting, curing, and drying, the product is stored in an inventory room that includes several machine operators who maintain and operate the pre-roll machines that create the pre-rolls or “joints” that are packaged and sold by the Employer. The facility also contains an inventory department that handles returns and rejects and monitor inventory, and a fulfillment department that packages and ships orders. The warehouse also has common locker rooms, restrooms, and a breakroom.

EMPLOYEE CLASSIFICATIONS

The Cannabis Cultivation Associates

The Cannabis Cultivation Associates, or “Growers,” work in the grow room portion of the facility: currently, there are ten climate-controlled grow rooms, eight of which are active and

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2 CBD, or Cannabidiol, is the second-most prevalent active ingredient in cannabis and is a common component in medical marijuana: it is usually derived from the hemp plant and is lawful in most states.

3 The Employer purchases live resin (an extraction used to make concentrates) from other sources which it packages and sells to retailer. It also purchases some CBD isolate from outside sources.

4 The Employer has partnered with Khemia, a women-owned company in California, to distribute their brand in Washington State. The Employer does not receive any product from them, however.
two are "veg" rooms that house the "mother plants" from which cuttings are taken and cloned. Once rooted, the plant is moved to one of the eight "flower" rooms to be tended and continue growing. When a new plant is at least 8 inches high, the Employer begins to track its progress in its tracking system using barcodes; plants that are not vigorous enough are culled out at this point and destroyed. All of the grow rooms utilize artificial light. After about eight weeks, the plants are moved to the dry room to dry out and "cure" for about a week and then to the trim room for further handling. All of the cloning, growing, harvesting and drying is done according to some predetermined schedule not described in the record.

Behind the grow rooms are soil mixing areas where the Growers store soil and nutrients and also store plants that don't make the cut. Growers may use shovels or perhaps a rake but no typical farm implements like tractors. On those occasions when they are short-staffed or need additional help, employees in the Trim Department can assist them.

The Employer maintains a job description for the Growers that describes these employees' responsibilities as watering and maintaining plants, washing and filling pots, harvesting plants and hanging them in the dry room, and assisting other departments as needed. They may also de-leaf the plants, removing leaves that would block light from the flowers, put the plants on trellises as they grow, and plant new plants after the harvest. The Growers also control the humidity and heat in the grow rooms. Once the plants are deemed ready to harvest, the Growers take them to the dry room to be readied for trimming.

No prior cannabis experience, education, or specific training is required to be a Grower, and employees must pass a background check and be over the age of 21. They are paid hourly between $16 and $18.50/hour and work Mondays through Fridays, and some weekends as required for plant watering and maintenance. Ideally, there are 6 Growers, and currently only 3. They report to the Director of Cultivation.

The Grow Department is overseen by the Cultivation Lead, who, according to the job description recently generated by the Employer, supervises, delegates work, trains, assists in hiring, and manages the daily work schedules and tasks for the Growers. This employee attends weekly operational meetings, and reports to the Director of Cultivation. The incumbent Cultivation Lead has held this position for only about a month at the time of the hearing and has not yet exercised many of the functions listed therein, including: preparing performance evaluations; participating in hiring; transferring Growers in the department (for which she would have to consult with the Director of Operations and the Director of Cultivation); assigning tasks or overtime (again, after discussion with the Director of Operations and the Director of Cultivation); or reprimand or counsel employees. Thus, while these tasks are included in the job description, their performance to date is largely speculative.

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5 The product is not cultivated from seeds, but from cuttings cloned from plants to preserve genetic lines.
The new Cultivation Lead currently works in the Vegetation Room where the plant clippings are cloned, and has now, on a 60-day trial basis, taken on more responsibility with regard to Grow Room product traceability and audits, inventory of the plants, nutrients and soil, and scheduling their deleafing. Many of these tasks would be subject to approval by the Director of Cultivation, although the record does not specify which ones. Although the Cultivation Lead would ostensibly be responsible for training other Growers, she does not have experience in the flower room so she would need to delegate that task to another unspecified employee.

**The Cannabis Trimmers**

After spending approximately a week in the dry room being cured, the plants are moved *en masse* every Friday into the Trim room to be handled by the Trimmers.

The job description maintained by the Employer for the Trimmers lists their responsibilities as hand-trimming flowers from plants, performing post-trim upkeep, and assuring accuracy and consistency while trimming and weighing product. There are several specific groups within the Trimmers: the “Bucker” takes the harvested plants moved out of the dry room and manually separates the sellable product – the flower or “bud.” 6 The flowers or buds are then put through a “twister” or “Strawberry” machine that lightly trims them pre-sorts them by size. Trimmers known as “Sorters” then take the product and hand-manicure to remove excess stems. The cleaned buds are then run through the sorting machine again into various bins according to size. 7 Typically, there would be one Bucker, one Sorter, and 3 hand trimmers.

Once sorted into the bins, the product goes to the hand Trimmers, who further manicure the stems and fan leaves using their hands and small clippers or scissors, leaving only the flower or bud in a form suitable for sale. After trimming, the larger buds proceed to the fulfillment department for weighing and packaging and are not processed any further but sold in that form. 8 The smaller, or “B” buds are ground and rolled into pre-rolls or joints.

This position requires a minimum of 3 years’ experience trimming cannabis and the ability to hand-trim at least 2 pounds of cannabis per 8-hour shift: although the Bucker and Sorter are paid hourly, the Trimmers are paid on a piece-rate basis of $0.16 a gram over their $15/hour pay. As with the other positions at this facility, the Trimmers must pass a background check and be over 21 years old but no special education or training is required. Currently, the Bucker position is vacant and the other Trimmers are apparently filling in.

There is also a Trim Supervisor since January 2021 who is accountable to Employer’s management to train, supervise, delegate to, and manage the daily work of the Trimmers,

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6 The Employer testified that it did not currently have anyone working solely as a Bucker.
7 Specifically, the flowers are sorted into four size categories: the smallest are eventually ground up for prerolls, and the others are packaged into jars and marketed based on size.
8 The trim (usually stems and leaves) that are not suitable for package sales proceed to the inventory department are sold wholesale under the Soulshine brand. The unusable stems and leaves are weighed, recorded, and destroyed.
according to the job description recently created by the Employer. This individual reports directly to the Director of Operations and attends regular operations and other departmental meetings. The Trim Supervisor coordinates with the Inventory and Grow Managers to craft workflow to meet operational needs and also monitors the plants to determine if they have properly dried and are ready to be bucked – the process whereby the buds are separated from the stems.

The Trim Supervisor is able to step in and perform most of the tasks in the Trim department if needed and spends most of his time weighing product after it has been trimmed and entering the data into the tracking system. He or she also calibrates the humidifiers in the dry room and periodically deep-cleans the department. Like the Trimmers, no special education or training is required for this position. The Trim Supervisor is paid hourly, but there is no evidence that he is paid commission for completing a certain amount of work during the shift like the Trimmers.

The Trim Supervisor does not necessarily assign work to the Trimmers, since each one has their own specific task to perform (i.e., bucking, sorting, or trimming). This individual has the authority to evaluate Trimmers: however, it does not appear that promotions are based on these evaluations since there is no promotion ladder. On one occasion, according to the Employer, the Trim Supervisor recommended that a Trimmer get a raise based on performance and the Employer agreed. The evaluations are generally used to note where an employee has excelled or needs improvement. The current Trim Supervisor testified that he had counseled each of the Trimmers in the past about performance and behavior issues in the presence of the Director of Operations: however, the record is not clear whether this was a disciplinary action or just a regular review. The Trim Supervisor is not held responsible for the performance of the other Trimmers, even though he tracks their productivity to ensure that they are meeting the established goals. There is no evidence that the Trim Supervisor has ever disciplined other employees.

With regard to hiring of Trimmers, the Director of Operations makes the initial screening of applicants and the Trim Supervisor sits in on the interview: on one unspecified occasion, the Trim Supervisor recommended the hire of a trimer and the Director of Operations agreed even though she initially had doubts. When a Trimmer requests time off or calls out sick, they are supposed to advise the Trim Supervisor and then put the request into the Employer's automated payroll system where it is reviewed and approved by Director of Operations. Likewise, the Director of Operations must approve any overtime requests.

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9 The Employer concedes that the Trim Supervisor has not seen or reviewed a copy of the job description for this position, inasmuch as it was only created in late September 2021.
10 The Employer produced several evaluations that had been recently generated by the Trim Supervisor but conceded that they had not yet been reviewed by or given to the employees involved. No evidence was provided as to whether the Trim Supervisor had even performed evaluations in the past.
11 No specific example of this promotion or the name of the employee was provided.
The individual currently holding the position of Trim Supervisor testified that little of his time had been spent on the management duties described above, since few interviews have been conducted since he took this position and he completed evaluations only one time in September 2021 but has not yet reviewed them with the Trimmers. As noted above, the majority of his time is spent monitoring productivity and product.

**The Extraction Technicians**

The Extraction Technicians, or Lab Techs, are part of the Inventory Department and work in the “Bubble Room” outside the grow area. Using an array of equipment, including washing and rinsing machines, they basically create various concentrates which are either sold in that form or used to enhance other products like pre-rolls. According to the job description maintained by the Employer, they perform a myriad of tasks, including preparing and maintaining the various machines to produce Bubble Hash\(^{12}\) and Dry Sift Kief\(^{13}\) products from the trim and buds. They collect hash, micro-plane the product to a sand-like texture, and then weigh and calculate product. In addition, they grind and strain stems, infuse pre-roll distillate, and press hash and kief. Chemicals used in this process include ethanol and dry ice. The resulting products proceed to the fulfillment department for packaging and sales.

There is currently only one Extractor, or Lab Tech who reports to the Wholesale Inventory Manager. This employee needs to have prior bubble hash and extractor experience.

**The Machine Operators**

Product that is not suitable for sale in flower or bud form along with stems and some other clippings, are sent to the Machine Operators who are part of the Inventory Department. Basically, these smaller buds and leavings are mechanically ground up and turned into several kinds of pre-rolls or joints. All the machines except the grinder, which is outside the inventory room where the product is stored, are located in the climate-controlled pre-roll machine room adjacent to the Bubble Hash room where the Extraction Technician works.

According to the job description maintained by the Employer, these employees operate large scale equipment, weigh, measure, and monitor raw ingredients to produce the Employer’s products. The Employer testified that this description was recently created for the “Montreal” machine which is used to make pre-rolls. Basically, the machine is loaded with rolling paper and a filter cone into which the ground-up cannabis is added and tamped down and then crimped to create a pre-roll. There are also two other “Green” machines operated by the Machine Operators that create pre-rolls without the crimping at the end of the process, as well as two grinding machines that grind the product for the pre-rolls. Currently, there are 4 Machine Operators: one on the Montreal machine, two on the others, and one grinder. One of them is responsible for creating a daily log of the product produced.

\(^{12}\) Bubble Hash is created by washing and agitating the trim to form a hard concentrate of cannabis.

\(^{13}\) Kief is a byproduct formed from the crystals on the plants that contain cannabinoids.
All Machine Operators also maintain, clean, and calibrate their equipment, maintain their work area, and may create or revise Standard Operating Procedures (SOPs) and batch records. In addition to a high school diploma or equivalent with proficiency in basic math skills, these employees must have a minimum of 3 years’ experience in a manufacturing environment, preferably with pharmaceutical machines or electromechanical engineering. As with the Employer’s other employees, the Machine Operators must be at least 21 years old and pass a background check.

The Machine Operator on the Montreal machine is paid approximately $22 an hour, while the others are paid in the $16/hour range.

The Inventory Associates

The Inventory Associates also work in the Inventory Department and report to the Wholesale Inventory Manager. These employees, according to the job description maintained by the Employer, are responsible for basic inventory tasks including intake and processing returns/rejects, maintaining the backlot inventory, auditing product, and uploading required information. The Inventory Associates also perform some fulfillment duties like creating sample orders, allocating orders, and replacing items. These employees also work closely with the Wholesale Inventory Manager to audit the traceability of product in compliance with State law, and upload required Certificates of Analysis tests that measure THC, CBC, microbes, and other elements of the product. As noted above, the Inventory Associates also work with the Growers a few days a week assisting with the harvesting. In addition, they backup the Machine Operators on the grinding machines and work in fulfillment a few hours a week if needed.

The Fulfillment Associates

As described above, product comes to the Fulfillment Department in the form of whole buds or pre-rolls from the Trim Department, as well as from the Extracting Department.

The Fulfillment Associates prepare and build finished goods packaging and prepare product for shipment to retailers, including heat sealing pre-rolls in sleeves to order. Based on the job description maintained by the Employer, they weigh and package dried and cured buds from the trim department and package them in jars or bags, and occasionally grind cannabis for pre-rolls and tamp them to order.15 These orders are then bagged or boxed and labeled for

14 Oversight of the State’s traceability system is performed by Cultevera through a third-party entity that tracks the traceability, compliance, inventory, product manifests and invoices, and orders for cannabis vendors throughout the State.
15 According to the Employer, the Fulfillment Associates no longer do tamping or grinding, since these functions are now performed with machines by the Machine Operators as described above. The Fulfillment Associates do make certain pre-rolls that must be made in a “knock box” that shakes product into the pre-roll cones that then have to be finished by hand.
shipment to retailers. The Fulfillment Associates are required to have prior cannabis processing experience, be over 21 years old, and pass a background check, but no other specific education or training is required: they are paid $16-$17/hour to start. Typically, there would be between 12 to 14 Fulfillment Associates employed by the Employer. The record does not reveal how many employees are currently in this classification.

The Employer currently has one Senior Fulfillment Associate on a trial basis to assist the Fulfillment Manager, who, according to the recent job description created by the Employer, assigns tasks to the Fulfillment Associates and ensures that they stay on task while achieving departmental goals. This employee also performs other fulfillment duties such as pulling flowers, restocking packaging materials, pulling pre-rolls, and maintaining a clean and safe work environment. The job description for this job further provides that the Senior Fulfillment Associate assists in training and answering questions for the fulfillment team. The Senior Fulfillment Associate can ostensibly fill in for the Fulfillment Manager (although there is no evidence that she has done so), but does not have the independent authority to hire, discipline, counsel, transfer, assign overtime, or adjust grievances of other employees, nor does she hire or perform evaluations. Aside from the regular age and background check requirements, no special education or training is required for this position.

The Employer concedes in its post-hearing brief that the Senior Fulfillment Associate does not have the authority to hire, fire, discipline, counsel, or transfer employees, nor can she authorize overtime or deal with employee grievances. She is paid at a level commensurate with the Fulfillment Associates.

**APPLICABLE BOARD LAW ON AGRICULTURAL WORKERS**

The Employer has taken the position that the Cultivation Associates/Growers and the Trim Associates/Trimmers are agricultural workers who cannot be in any appropriate unit. The Petitioner takes the opposite view that they are employees under the Act and may therefore be in the petitioned-for unit. Neither party disputes that a unit containing the remaining employees – the Extraction Technicians, Machine Operators, Inventory Associates and Fulfillment Associates – may comprise an appropriate unit.

The Board, in making a determination whether a particular worker is an agricultural laborer, considers the totality of the situation, not isolated factors, and status is not decided on an employer wide basis, but classification by classification. *AgriGeneral L.P.*, 325 NLRB 972, 972 fn. 1 (1998). The burden of proving that individuals are exempt as agricultural laborers rests on the party asserting the exemption. *Id.* at 972. For these reasons, I will discuss whether each classification in the petitioned-for unit is covered by the Act.

Section 2(3) of the NLRA defines “employees” who are covered under the Act to explicitly exclude “any individual employed as an agricultural laborer.” 29 U.S.C. Section 152(3); *Holly Farms Corp.*, 517 U.S. 392, 397 (1996). In determining who qualifies as an
agricultural laborer the Board, consistent with Congressional directives, looks to the following definition of agriculture contained in Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. Section 203(f). That section defines “agriculture” as:

“farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities...the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”

The FLSA definition of agriculture further includes both the “primary” aspects of agriculture, defined generally as farming and enumerating practices such as “the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities,” and the “secondary” aspects of agriculture, those “performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.” Jack Frost at 660; see Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 762-763 (1949). The Department of Labor regulations acknowledge the “incident to or in conjunction with” language used does not provide a bright line or “precise definition” of what is and is not secondary agriculture, but the regulations do state that generally work only falls under this clause if it is “subordinate to farming operations,” “does not amount to an independent business,” and not “more akin to manufacturing than to agriculture.” 29 C.F.R. § 780.144.

With regard to the “secondary” aspect of agricultural work, considerable weight is given to whether employees significantly change the product from its raw, natural state. The Federal courts have addressed this aspect of Section 3(f) and have frequently looked to whether the Employer’s operation substantially transforms the product. Mitchell v. Budd, 350 U.S. 473, 475, 481 (1956). Specifically, in Mitchell v. Budd the Supreme Court examined tobacco bulking — a fermenting process required to make the product marketable — and determined that the employees involved were not engaged in secondary agriculture because the bulking process transformed the product from its original or raw state. Id at 481; see also Maneja v. Waialua Agr. Co., 349 U.S. 254, 268 (1955) (employees engaged in sugar milling are not agricultural laborers). Several years prior to Mitchell v. Budd, the First Circuit Court of Appeals considered the process of stemming tobacco, removing the central vein or rib from the tobacco leaf, and determined workers engaged in this task were not agricultural workers because they were fundamentally changing the form of the tobacco leaf. Puerto Rico Tobacco Mktg. Co-op. Ass’n v. McComb, 181 F.2d 697, 698-99 (1st Cir. 1950). However, in Pictsweet Mushroom Farm, 329 NLRB 852 (1999) the Board found that mushroom slicers were agricultural laborers because slicing was only small part of operation, the raw state of mushrooms was unchanged by slicing.

the slicing operation was not “factory-like,” and slicing was common among mushroom growers in general.

Notably, however, the Board has not specifically ruled on whether employees of a marijuana enterprise are agricultural laborers or statutory employees, but as discussed below many of the employees at issue in this case perform functions similar to those performed by employees in other industries who the Board found to be agricultural workers.

Early in its adjudication, the Board addressed the grey area between agricultural and industrial work performed in greenhouses in *Park Floral*, 19 NLRB 403 (1940), concluding that growers who cultivated, watered, and cut plants in an indoor environment were not agricultural workers because of the “industrial nature” of their work. The Board in *Park Floral* distinguished the grower’s manipulation of temperature and other environmental factors as “removed from natural conditions” present in cultivation performed outdoors on a farm.

At that time, however, the FSLA’s definition of agricultural worker had not yet been incorporated by reference into the Act. Subsequent cases – while not expressly overturning *Park Floral, supra*, found that workers who worked in greenhouses or grow rooms performing a substantial amount of primary agricultural functions were agricultural workers. See, for example, *William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) (rose growers who cut, watered, tied, pinched, sorted for salability, and packed roses exempt); *Hershey Estates*, 112 NLRB 1300, 1301 (1955) (employees who cut, harvested, watered, and fertilized flowers and maintained greenhouse temperature and ventilation exempt). Thus, primary agricultural work no longer needs to be performed outdoors in a traditional farm setting.

The Board has also addressed the concept of an employer’s business that included both agricultural and nonagricultural activities. For example, the raising of poultry is primary farming but hauling products to or from a farm is not primary farming. Such hauling may, however, be secondary farming if it is work performed “by a farmer or on a farm as an incident to or in conjunction with such farming operations...” *Bayside Enters.Inc. v. NLRB*, 429 U.S. 298, 300-301. Another example would be a sugar plantation where most of the operations are agricultural, but the workers employed in the plantation’s sugar-producing plant are not agricultural employees. *Id.*, at 301, citing *Majeja v. Waialua Agricultural Co.*, supra, 349 U.S. 254, 264-270. Thus, while primary agriculture is generally relatively straightforward and defined as “the cultivation and tillage of the soil, ... the production, cultivation, growing and harvesting of any agricultural or horticultural products,” secondary agriculture includes incidental activities under some circumstances. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996) (quoting 29 U.S.C. Section 203(f); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949); *Bayside Enters, supra*, at 300-301.

In evaluating the status of employees who perform both agricultural and non-agricultural work, the Board applies a “regularity test in determining the significance of nonexempt work

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17 29 U.S.C. Section 203(f),
handled by employees who are engaged in agricultural work in the secondary sense” but applies a different “substantiality” rule in determining whether to assert jurisdiction over workers engaged in farming in the primary sense, *Camsco Produce Co., supra; Produce Magic, Inc.*, 311 NLRB 1277 (1993). In *Produce Magic*, for example, the Board found cutter-packers to be employees under the NLRA because 50 percent of their time was spent performing non-agricultural work, which was substantial.

**The Cultivation Associates or Growers are agricultural workers exempt from coverage under the NLRA and FSLA because they are involved in the production, cultivation, growing, and harvesting of agricultural or horticultural commodities**

The Employer grows cannabis plants beneath fluorescent lights inside a temperature-controlled building year-round rather than seasonally on an outdoor farm or in a traditional greenhouse setting. The record testimony shows that the Employer’s Cultivation Associates or Growers clone, plant, cull, water, nurture, strip, fan, and top the growing plants in the Grow Rooms. When the plants reach a prescribed height, the Growers harvest the plants and move them to an area to be dried out and then, when ready, move them to the Trim Room.

The primary definition of “agriculture,” explicitly holds that those engaged in the “cultivation, growing and harvesting of any agricultural or horticultural commodities” are engaged in agriculture. All of the cultivators’ duties described in the record are undertaken with the goal of allowing plants to grow strong and healthy.

In addition to the tasks involved in directly growing and cultivating the cannabis plants, the Growers also harvest the plants. The minor physical alterations performed to the plant after the Growers remove the living plants from the soil mixture in which they grew does not so modify the plants that the work performed becomes industrial in nature. Accordingly, this aspect of the Grower’s work is primarily agricultural as well within the meaning of Section 3(f) of the FLSA and Section 2(3) of the NLRA.

Likewise, the Growers are engaged in agricultural activity when they subsequently remove the harvested plants to the drying or curing room. The drying process apparently alters the chemical composition of the cannabis and renders it marketable, and the Growers accordingly must monitor the room’s humidity and temperature so that the curing process is successful. As was discussed above, such changes in the nature of a product are often seen as the dividing line between agricultural function and manufacturing.

However, even where there is some change from the raw or natural state in preparation for market, workers managing drying processes are engaged in secondary agriculture where the work is performed as an incident to or in conjunction with farming operations. For example, the FLSA deems preparation of tobacco for market to include “handling, grading, drying, stripping from stalk, tying, sorting, storing, and loading,” to be secondary agriculture in 29 C.F.R. § 780.151. However, workers handling drying processes do not perform agricultural labor where
the plants have been significantly altered from their raw and natural state, as during the bulking of tobacco, *Mitchell v. Budd*, supra.

In this regard, the Growers do not significantly transform the natural product from its raw state when they remove the plants to the drying room to be cured. For example, compare *Pictsweet Mushroom Farm*, *supra*, 329 NLRB 852, 853 (raw state of mushrooms essentially unchanged after slicing, slicing operation not "factory-like") with *Maneja v. Waialua Agr. Co.*, *supra*, 349 U.S. 254, 268, 274-75 (sugar milling is a nonagricultural processing function that substantially transforms the raw sugar cane plant) and *Mitchell v. Budd*, 350 U.S. 473, 475 (1956) (tobacco bulking process substantially changes the physical properties and chemical content of tobacco).

Further, in the instant case, the cannabis plants arrive in the cure room in their natural state, and any internal chemical changes occur naturally as a result of the Growers manual work as they hang the plant material on racks and move the racks as needed. In this regard, the cannabis does not undergo the extreme changes or physical transformation found in the bulking or fermenting of tobacco or the dehydration and pulverization of alfalfa. Rather, the drying of cannabis is much more comparable to the initial drying of tobacco, which is established by statute as an agricultural activity. At the very least, the drying activities performed by the Growers is secondary agricultural activity within the meaning of Section 3(f) of the FLSA.

Accordingly, I find that the Cultivation Associates or Growers sought by the Petitioner are engaged in both primary and secondary agriculture within the meaning of Section 3(f) of the FLSA and Section 2(3) of the NLRA and must therefore be excluded from any appropriate unit. 18

The *Trim Associates are agricultural workers and exempt from coverage under the NLRA because they perform work incident to or in conjunction with farming operations*

The record shows that the Trim Associates, or Trimmers utilize machines to "buck" or remove the flower or bud from the curing plant and to lightly trim and pre-sort them by size. Other Trimmers then manicure the bud by hand, after which they are again sorted.

The Courts and the Board have not always been consistent in drawing a bright line between agricultural and manufacturing work, and it does not appear to have specifically addressed this issue in the cannabis industry. Generally, when a commodity is transformed from the cultivation stage to something removed from its original state, the Board has not considered it agricultural work but rather something closer to manufacturing. Common examples of this

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18 Although there is no Board authority to support my position, I take notice of the consistent conclusions recently reached in cases with similar facts, specifically the Advice Memorandum in *Agri-Kind*, 04-CA-260089 (Oct. 21, 2020), and the Regional Director's Decision and Order in *New England Treatment Access, LLC and UFCW Local 1445 Case 01-RC-264290* (Oct. 23, 2020).
distinction include tobacco being turned into cigarettes, or fruit being cut up and canned.\textsuperscript{19} Conversely, the Board has found that the slicing of mushrooms was not sufficiently transformative of the product because it was commonly done not in a “factory-like setting.”\textsuperscript{20}

Based upon the foregoing, the Petitioner argues that the line between agricultural and manufacturing work should be drawn at the point where the plant is “chemically transformed” into a consumer product, much like when the tobacco leaves are fermented. The Petitioner asserts that the Employer’s processes cease to be agricultural when the product is transferred from the “field” and modified from its raw and natural state by the Trimmers, and that therefore the Cultivation Associates or Growers are the “last employees” to work with the product in the raw and natural state.

The Petitioner relies on \textit{Mitchell v. Budd, supra}, 350 U.S. 473, 475, where the Supreme Court drew the line between agricultural and manufacturing pursuits in the tobacco industry at the point when the tobacco was fermented, thus finding that the subsequent manual deveining that occurred after the curing was not agricultural. Likewise, the Petitioner argues, the line in the instant case should be drawn after the curing phase, and therefore the Trimmers are engaged in manufacturing and not agriculture. I note, however, the Court in \textit{Mitchell v. Budd} conceded that its line was to some extent arbitrary but had to be drawn at some point, and that “the best that could be done was to draw a line of distinction with respect to each commodity at some practical point.” Id. at 475. In the instant case, I conclude that, based on an analysis of the nature of the commodity and the Employer’s overall operation, that the line can best be drawn after the trimming is performed since the curing of the product did not result in the kind of transformation contemplated by the Court in \textit{Mitchell v. Budd, supra}.\textsuperscript{21} Thus, I conclude that the work performed by the Trimmers is incidental to the Employer’s primary agricultural operation and constitutes secondary agricultural activity within the meaning of FSLA 3(f).

The Board has held that it would assert jurisdiction over workers performing activities incidental to or in conjunction with farming operations “if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question.” \textit{AgriGeneral LLP}, 325 NLRB 972 (1998). Moreover, the FLSA, whose interpretations inform the Board’s definition of agricultural work, has noted that employees who prepare product for marketing who are not employees of the employer-farmer are not agricultural workers within the meaning of Section 3(f).\textsuperscript{22} However, there is no evidence that the Trimmers at issue handle any

\begin{itemize}
\item \textsuperscript{19} See, for example, \textit{In re Wm. P. McDonald Corp.}, 83 NLRB 427 (1949), where the Board found that the boxing and crating of fruit to ship to market was deemed agricultural because the fruit at issue remained in its natural state.
\item \textsuperscript{20} \textit{Pictsweet Mushroom Farm}, 329 NLRB 852 (1999).
\item \textsuperscript{21} I note that neither party developed the record to describe the cannabis drying or “curing” process in any detail. Whereas the curing of tobacco leaves occurs after they have been dried and requires several months of drying, re-wetting, manipulating, monitoring, and fermenting, the process that the cannabis plants are subjected to appears to be merely hanging the harvested plants in a room to dehydrate for a proscribed period. After drying or “curing, the cannabis product is not subjected to any further organic transmutation. Thus, this procedure differs from the fermenting transformative procedure used in tobacco processing.
\item \textsuperscript{22} Examples provided by the FLSA are employees of a fruit grower who dry or pack fruit not grown by the employer; storage operations conducted by a farmer for products grown by someone else; employees of a tobacco
\end{itemize}
product other than that grown by the Employer. Thus, their work is incidental to the primary agricultural work performed by the Growers.

Moreover, the FLSA has often emphasized the importance of the relationship of the practice at issue to farming generally and noted that the inclusion of incidental practices in the definition of agriculture was not intended to include typical factory workers or industrial operations. Rather, in determining whether a given practice is performed "as an incident to or in conjunction with" farming operations under the meaning of Section 3(f), consideration must be given to the nature of the practice and the circumstances under which it performed in light of the common understanding of what is agricultural and what is not, as well as the extent to which the practice is ordinarily performed by farmers incidentally to their farming operations. In the instant case, the tasks performed by the Trimmers are commonly performed by farmers as part of the processing of their crops.23

Specifically, the FLSA has noted that in the tobacco industry, the "handling, grading, drying, stripping from stalk, tying, sorting, storing and loading" are activities that may be performed in the "preparation for market of the indicated commodities and may come within Section 3(f)." The work performed by the trimmers – sorting, trimming, and grading – is markedly similar. Contrary to the Petitioner’s assertion, the use of machines for preliminary sorting and trimming is not dispositive, inasmuch as farmers engaged in primary agricultural activity often utilize machines or mechanical aids.

Based upon the foregoing and the record as a whole, I have concluded that the Trim Associates are secondary agricultural workers, and that the removal of the flower or "bud" from the rest of the plant and its subsequent sorting and trimming does not constitute the kind of physical transformation of the product contemplated by the Board to render a process manufacturing rather than agricultural. Therefore, they are excluded employees and cannot be included in any appropriate unit.

The Extraction Technicians, Machine Operators, Inventory Associates, and Fulfillment Associates are not agricultural employees and are subject to the jurisdiction of the Act

The parties do not dispute that the Extraction Technicians, Machine Operators, Inventory Associate, and Fulfillment associates perform work that is not agricultural in nature but more like manufacturing.

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23 See 29 CFR Part 780 Section 780.146 – Importance of Relationship to the Practice of Farming Generally.
24 See 29 CFR Part 780 Section 780.151 – Particular Operations on Commodities. This section also includes the weighing, binning, drying, cleaning, and grading of grain, seed, and forage crops within Section 3(f). Id.
In this regard, some of the plants are further manipulated through an “extraction and infusion process” with chemicals and machines by the Extraction Technicians to form retail products such as concentrates, ointments, and tablets. There can be no dispute that at this point, the product has been substantially transformed from its natural state as leaves, stems, and buds into entirely different products, akin to the earlier cited instances of sugar cane being processed into sugar. Based thereon, I conclude that the work performed by the Extraction Technicians is more like manufacturing than agriculture and that they are therefore employees within the meaning of the Act.

Likewise, the Machine Operators utilize various machines to transform the product into pre-rolled “joints,” adding paper, filters, and other accoutrements much like the process that turns tobacco into cigarettes that can be smoked by the consumer. This is clearly a manufacturing process and thus the Machine Operators are within the jurisdiction of the Act.

The Fulfillment Associates package the product into a variety of options, including jars for the buds and shrink-wrapped packages for the pre-rolls or joints. Such packaging of commodities pursuant to specific customer orders does not appear to fall within the FLSA’s list of particular operations performed on commodities that it considers to fall within the purview of Section 3(f), since it goes beyond mere packing of commodities into crates or boxes to be transported to another location for further processing in preparation for marketing.²⁵

The Inventory Associates, while not strictly engaged in manufacturing, are solely involved in the inventory and audit of product, processing returns, and filling orders. Thus, they are not involved in either primary or secondary agricultural pursuits as defined by FSLA standards.

Moreover, the evidence shows that the Fulfillment and Inventory Associates handle product from producers other than the Employer, inasmuch as the Employer purchases cannabis product from other growers (including buds, resin, CBD isolate and hash) to be packaged and distributed by its employees. As noted above, the Board can assert jurisdiction over individuals performing any activities incidental or in conjunction with farming operations if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees at issue. AgriGeneral, supra, 325 NLRB at 972.

Based upon the foregoing and the record as a whole, I conclude that the Extraction Technicians, Machine Operators, Inventory Associates, and Fulfillment Associates are employees within the meaning of the Act and may be included in an appropriate unit.

²⁵ Id.
SUPERVISORY STATUS OF CERTAIN EMPLOYEES

The Employer asserts that the Trim Department Supervisor and the Cultivation Lead are statutory supervisors within the meaning of Section 2(11) of the Act and must therefore be excluded from any appropriate unit.

With regard to the former, most of the Trim Department Supervisor’s duties are confined to the oversight of the Trim Department and monitoring the productivity of the Trimmers with regard to established parameters. In this regard, he meets regularly with the Trimmers to assess their performance and set goals. Some portion of this individual’s workday is spent performing the same duties as the Trimmers.

Inasmuch as his duties are incident to and in conjunction with those employees whom I have already found to be agricultural workers outside the jurisdiction of the Act, I find that the Trim Department Supervisor is engaged in secondary agricultural activity and therefore excluded from any appropriate unit on that basis. Therefore, I do not need to reach a conclusion on whether the Trim Department Supervisor is a supervisor under the Act.

With regard to the Cultivation Lead, I reach the same finding regarding the exclusion of this employee on the basis of having found that the Cultivation Associates are agricultural workers under FLSA Section 3(f) and therefore I do not need to reach a conclusion regarding whether the Cultivation Lead is a supervisor under the Act.

METHOD OF ELECTION

The Petitioner has requested, based upon the ongoing Coronavirus pandemic, that a mail-ballot election is appropriate, while the Employer asserts that a manual election be held. This issue, although raised during the hearing, is a nonlitigable matter. I note that neither party addressed this issue in any detail in their respective post-hearing briefs except to essentially reiterate their initial positions.

The Board has delegated its discretion in determining election arrangements to Regional Directors. San Diego Gas & Electric, 325 NLRB 1143, 1144 (1998). On November 9, 2020, the Board set forth “six situations that suggest the propriety of mail ballots due to the Covid-19 pandemic,” noting that “[w]hen one or more of these situations is present, a Regional Director should consider directing a mail-ballot election.” Aspirus Keweenaw, 370 NLRB No. 45, slip op. at 1 (2020). Those six situations are:

26 See Section 102.66(g)(1) of the Board’s Rules and Regulations, as amended, and also Representation Case Procedures, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing Manchester Knitted Fashions, Inc., 108 NLRB 1366, 1367 (1954)).

27 Although the Board has occasionally referred to the Aspirus situations as “factors,” the Aspirus decision makes clear that the six situations are not part of a multifactor analysis and, as stated above, if even one of the situations is present it is not an abuse of discretion to direct a mail-ballot election.
1) The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2) Either the 14-day trend in the number of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3) The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health/ orders relating to maximum gathering size;
4) The employer fails or refuses to commit to abide by the GC Memo 20-10 protocols;
5) There is a current Covid-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and,
6) Other similarly compelling considerations.

Id. The Board further held that a Regional Director who exercises discretion to direct a mail-ballot election when one or more of these situations exists will not have abused that discretion. Id., slip op. at 8. See also, id., slip op. at 9 (then-Member McFerran, concurring) (stating “until the pandemic ends, the strong presumption should be that a mail-ballot election is appropriate”); Sysco Central California, Inc., 32-RC-272441 fn. 1 (Sept. 28, 2021) (unpublished) (Chairman McFerran stating that “a default preference for mail ballots for the duration of the COVID pandemic is warranted”).

Primarily at issue in the instant case is Situation 2. For Aspirus situation 2, the Board instructed Regional Directors to “generally focus their consideration on recent statistics that reflect the severity of the outbreak in the specific locality where the election will be conducted” and stated that “a mail-ballot election will normally be appropriate if either (a) the 14-day trend in the number of new confirmed Covid-19 cases in the county where the facility is located is increasing, or (b) the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher.” Id. slip op. at 5 (emphasis added).

For the first part, the Aspirus Board did not specifically detail how the 14-day trend in the number of new cases should be evaluated, but it did direct that “the 14-day period should be measured from the date of the Regional Director’s determination, or as close to that date as available data allow” and that county-level data for the potential polling place should be accessed through the “Coronavirus Resource Center” website maintained by Johns Hopkins University. 370 NLRB slip op. at 5, fn. 20 & 22. The most recent Johns Hopkins’ data for King County, where the Employer’s facility is located, indicate the 14-day trend in the number of new confirmed cases has fluctuated from 129 on November 22 to 705 on December 6, 2021, with

28 Regarding the other Aspirus Situations 1, 3, and 6, respectively: the Regional Office, including Subregional and Resident Offices, has been in a permissive-telework status since mid-June 2020; there are currently no state or local health ordinances in effect related to maximum gathering size; and, there are no other similarly compelling considerations.
daily highs within that period of 1065 on November 28 and 777 on December 1.\textsuperscript{29} Although there appear to be days during those two weeks that few or no new cases were reported, the number of reported cases is clearly trending upward. The King County Department of Health confirms this conclusion, describing the level of transmission as “substantial,” and noting a 51% increase in the daily average of cases in the past 7 days.\textsuperscript{30} Based thereon, I find that the first part of Aspirus Situation 2 is present.

Regarding the second part of Situation 2, the Board noted that many locales do not report the 14-day testing positivity rate. Rather, experience has shown a 7-day average is more often available from state, county, and municipal health agencies, and the Board has found such metrics to be sufficient.\textsuperscript{31} At the current time, however, no data is available regarding positivity rates in King County, where the Employer's facility is located.\textsuperscript{32} However, only one part of Situation 2 needs to be present in order to find that a mail-ballot election is appropriate, and I find that it is appropriate based on the increasing trend in the number of new reported cases over the last 14 days as described above.

Moreover, Situations 4, and 5 described in Aspirus, supra, are also present to some extent in the instant case. Regarding Situation 4, I note that the Employer did commit to abide by the GC Memorandum 20-10 protocols for conducting a safe election during the COVID-19 pandemic. However, the Employer did not provide – either in its initial Statement of Position or its post-hearing brief – any details about where or how it proposed a manual election be conducted at its facility. Specifically, it did not describe an area or areas in or outside the facility where a manual election could be held or whether there was appropriate ingress and egress for the voters consistent with GC 20-10. Thus, I cannot determine whether a manual election can be conducted onsite without further information and therefore conclude that Aspirus Situation 4 justifies holding a mail-ballot election.

Regarding Aspirus Situation 5, the Board “require[s] that in all cases where a party requests a manual election, the employer shall certify, by affidavit, as part of its submission regarding election arrangements, how many individuals present in the facility within the preceding 14 days have tested positive for COVID-19 (or are awaiting test results, are exhibiting characteristic symptoms, or have had contact with anyone who has tested positive in the previous

\textsuperscript{31} See, for example Stericycle, Inc., 04-RC-260581 (Feb. 22, 2021) (unpublished) (denying review of mail-ballot election where 7-day testing positivity rate was 8.01% in county where employer’s facility was located).
\textsuperscript{32} The Centers for Disease Control (CDC) provides updated 7-day positivity percentages across the United States, but there is no current data available for King County, where the Employer’s facility is located. https://covid-cdc.gov/covid-data-tracker/#county-view (accessed Dec. 7, 2021) Also, due to a significant backlog, the Washington State Department of Health ceased uploading all metrics and testing data until about December 30, 2021. https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard (accessed Dec. 7, 2021). The King County Department of Health has not updated positivity rates since August 30, 2021. https://Kingcounty.gov/depts/health/covid19/date-daily-summary
14 days.” *Aspirus, supra*, 370 NLRB No. 45, slip op. at 7. The Board has clarified that Regional Director “should determine whether the COVID-19 cases at the facility would reasonably be expected to affect the conduct of a manual election. Relevant considerations in this regard include whether (1) the number or physical location of such COVID-19 cases, or the likelihood that those cases will result in unit employees being exposed to COVID-19, indicates that a manual election would pose a threat to health or safety; or (2) current COVID-19 cases among unit employees would result in their disenfranchisement by a manual election.” See *Rush University Medical Center*, 370 NLRB No. 115, slip op. at 2 (2021). The Employer did not provide any information, either before, during, or after the hearing, regarding whether there has been a current outbreak at the facility, nor has it provided any of the information described above by affidavit or otherwise. Such failure to provide this information makes it impossible to determine whether COVID-19 cases at the site pose a risk or threat to health and safety or would disenfranchise unit employees at a manual election, and conducting a manual election when COVID-19 might be present would either expose other unit employees if a voter who tested positive appeared at the polling place or disenfranchise an employee who was infected, exposed, or tested positive for the virus if they stayed home to avoid exposing their co-workers. Accordingly, I further find that a mail ballot election is warranted under *Aspirus* Situation 5.

Based upon the foregoing circumstances, I find that a mail-ballot election is appropriate in the unit described below.

**CONCLUSIONS**

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the Board. Based on the entire record in this proceeding, I find:

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

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

3. 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.

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33 The Petitioner stated that it was willing to proceed to an election should I find an appropriate unit other than that petitioned for.

34 The parties stipulated, and I so find, that The Employer, Cannaseur’s Choice LLC, is a Washington limited liability company with a facility located in Renton, Washington, where it is engaged in the cultivation and retail sale of cannabis for medicinal and recreational purposes. Within the past 12 months, a representative time period, the Employer, in conducting its cultivation and retail sale operations in Washington, has derived gross revenues in excess of $500,000, and has purchased and received goods valued in excess of $50,000 from enterprises who received the goods directly from points outside of the State of Washington.
4. The following employees of the Employer constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All Extraction Technicians, Machine Operators, Inventory Associates, Fulfillment Associates, and Senior Fulfillment Associates employed by the Employer at its Renton, Washington facility

Excluded: All other employees, Allocations Manager, Director of Cultivation, Director of Operations, Driver, Fulfillment Manager, Interim Growth Supervisor, Inventory Manager, Marketing, Marketing Director, Wholesale Inventory Manager, Cultivation Associates, Cultivation Lead, Trim Associates, Trim Department Supervisor, and guards and supervisors as defined in the Act.

There are approximately 21 employees in the appropriate unit.

DIRECTION OF ELECTION

The Board will conduct a secret-ballot election among the employees in the bargaining unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 21, AFFILIATED WITH UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO.

A. Election Details

The election will be conducted by United States mail. On Tuesday, December 28, 2021, the ballots will be mailed to voters by a designated official from the National Labor Relations Board, Region 19. 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 by mail and do not receive a ballot in the mail by Tuesday, January 4, 2022, should communicate immediately with the National Labor Relations Board by either calling the Region 19 Office at (206) 220-6300 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Ballots will be due on 3:00 p.m. PST on Tuesday, January 25, 2022. All ballots will be commingled and counted on Thursday, January 27, 2022, at 1:00 p.m. PST by an agent of Region 19 of the National Labor Relations Board with participants present via electronic means. No party may make a video or audio recording of the ballot count. If, at a later date, it is determined that a ballot count can be safely held in the Region 19 office, the Region will inform the parties with sufficient notice so that they may attend.
B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

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

The Petitioner has waived 10 days to receive the voter list. Thus, to be timely filed and served, the list must be received by the Regional Director and the parties by Tuesday, December 14, 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.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

The list must be filed electronically with Region 19 and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency’s website at www.nlrb.gov. Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.
Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board’s Rules, the Employer must post copies of the Notice of Election attached to this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

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

RIGHT TO REQUEST REVIEW

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

A request for review may be E-Filed through the Agency’s website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.
Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. 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.

Dated at Seattle, Washington: December 10, 2021

Ronald K. Hooks

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 Second Avenue, Suite 2948
Seattle, Washington 98174