MIDWEST TERMINALS OF TOLEDO
INTERNATIONAL, INC.

Employer

And

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION

Petitioner

DECISION AND DIRECTION OF ELECTION

Midwest Terminals of Toledo International, Inc. (Employer) provides longshoring, stevedoring, and warehousing services to customers engaged in interstate and foreign commerce. International Longshoremen’s Association (Petitioner) seeks to represent a unit of all regular full-time and part-time longshoremen, checkers, port laborers, loader operators, front-end loaders, warehousemen, crane operators, power operators, tow motor operators, material handler operators, mechanics, maintenance employees, welders, signalmen, winchmen, linesmen, dispatchers, dock stewards, expeditors, hatch leaders, warehouse leaders, and deck leaders employed by the Employer at its Toledo, Ohio facility. The Employer’s facility, referred to as Facility 1, is located at the Port of Toledo. The Petitioner maintains that there are approximately twenty-five employees in the petitioned-for unit.

The parties disagree on the following issues. First, the Employer argues that it does not employ individuals in twenty of the twenty-one classifications listed in the petitioned-for unit. While the Employer acknowledges that the maintenance classification exists, it maintains that the remaining employees encompassed by the petition are classified as dockworkers. Thus, the Employer argues that the unit description should identify the employees as dockworkers and maintenance employees, as those are the positions that actually exist. According to the Employer, there are approximately forty dockworkers and maintenance employees included in the petitioned-for unit.1 The Petitioner disagrees that the non-maintenance employees are classified as dockworkers, arguing that historically employees have been employed in the petitioned-for classifications and there is no documentary evidence supporting the existence of a dockworker classification. The Petitioner highlights the prior bargaining history between the Employer and International Longshoremen’s Association, Local 1982 (Local 1982), which covered a unit of the petitioned-for classifications.

Second, there is a dispute concerning five individuals involved in the rail operation, identified by the Petitioner as “rail employees.” The Employer argues that these employees are classified as dockworkers and are therefore included in the proposed unit description. The Petitioner argues that the rail employees do not share a community of interest with the petitioned-for employees, contending that they perform different functions with different duties and

1 See Employer Statement of Position, Board Exhibit 3.
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responsibilities, operate different equipment, and work under different direct supervision. In addition, the Petitioner maintains that there is a lack of interchange and functional integration between the rail employees and the petitioned-for employees. Further, the Petitioner notes that the rail employees were not included in the prior bargaining unit, reiterating that the bargaining history between Local 1982 and the Employer should be given significant weight. The Employer maintains that the alleged rail employees share a community of interest with the other petitioned-for dockworkers and must be included in the unit, noting that they share the same job classification, work in the same location under the same management and policies, and perform essentially the same work.

Third, the parties disagree on the inclusion of five other employees: James Hasenfratz, Nathan Weisenberger, Connor VonSeggern, Brett Breininger, and Matthew Stevens. The Employer maintains that all five are dockworkers and should be included in the unit. On the other hand, the Petitioner argues that Hasenfratz, Weisenberger, VonSeggern, and Breininger are not performing bargaining unit work, do not share a community of interest with the petitioned-for employees, and should be excluded from the unit. The Petitioner further argues that VonSeggern and Breininger are not eligible to vote because they do not meet the Davison-Paxon eligibility formula. Regarding Stevens, the Petitioner maintains that he resigned his employment, making him ineligible to vote. The Employer disagrees, contending that Stevens changed his status from a full-time employee to a part-time, on-call employee and is eligible to vote provided he meets the Davison-Paxon eligibility formula.

Fourth, the Employer argues for a manual election while the Petitioner advocates for a mail ballot election. The Petitioner maintains that a mail ballot is warranted because of the ongoing COVID-19 pandemic. The Employer argues that the Regional Director should exercise her discretion and direct a manual election.

Finally, there is a dispute regarding the supervisory status of six individuals, including Samuel A. Dumas, Scott D. Fisher, James S. Hasenfratz, Ryan Richardson, Jordan C. Salhoff and David H. Whetsel. The Petitioner argues that all six individuals are supervisors within the meaning of the Act. At the hearing, the parties agreed to defer litigation of their alleged supervisory status and to allow the individuals to vote subject to challenge at the election, provided they are not ineligible for other reasons.

A hearing officer of the Board held a hearing in this matter and the parties filed briefs with me. I have carefully reviewed and considered the record evidence and the parties’ arguments. As

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2 As will be discussed in more detail below, the Petitioner offers additional reasons for excluding three of the rail employees: David C. Katafiasz, James M. Nietfeld and Samuel A. Dumas. Specifically, the Petitioner maintains that Katafiasz and Nietfeld are not actually employed by the Employer and that Samuel A. Dumas is a Section 2(11) supervisor as defined by the Act.

3 As discussed below, the Petitioner also argues that Hasenfratz is a Section 2(11) supervisor.

4 The parties stipulated to use of this formula, as set forth in Davison-Paxon Co., 185 NLRB 21, 23-24 (1970), to determine voter eligibility.

5 According to the initial listed submitted by the Employer with its Statement of Position, these individuals are classified as dockworkers.
described below, based on the record and relevant Board law, including the Board’s decisions in *PCC Structural, Inc.*, 365 NLRB No. 160 (December 15, 2017) and *The Boeing Company*, 368 NLRB No. 67 (September 9, 2019), 6 I find that an appropriate unit consists of all full-time, regular part-time, and on call 7 maintenance employees and dockworkers performing longshoring, stevedoring and warehousing duties employed by the Employer its Facility 1 location in Toledo, Ohio.

In terms of the alleged rail employees, I find that the petitioned-for employees do not share a meaningful distinct community of interest from those rail employees who work directly with the Employer’s locomotives. However, I find that rail employees David Katafiasz and James Nietfeld are not employees of the Employer and should be excluded from the unit.

Regarding Connor VonSeggern, James Hasenfratz, Nathan Weisenberger, Brett Breininger, and Matthew Stevens, I find that James Hasenfratz and Nathan Weisenberger share meaningfully distinct interests from the petitioned-for employees warranting their exclusion from the appropriate bargaining unit. I find that Brett Breininger and Connor VonSeggern do not share meaningful distinct interests and are eligible to vote provided they meet the Davison-Paxon eligibility formula. Regarding Matthew Stevens, the record evidence contains conflicting information about whether Stevens resigned his employment. However, assuming Stephens is employed by the Employer at the time he casts his ballot and meets the eligibility formula, he is eligible to vote. 8

Regarding Dumas, Fisher, Richardson, Salhoff and Whetsel, I am directing that they be permitted to vote subject to challenge. It affects an insignificant portion of the unit and the parties have agreed that they may vote subject to challenge. However, as I have excluded Hasenfratz from the unit on the basis that he shares meaningfully distinct interests warranting his exclusion from the appropriate bargaining unit, his eligibility is no longer unresolved. As such, Hasenfratz is not an eligible voter.

Finally, due to the ongoing COVID-19 pandemic, I am directing a mail ballot election.

I.  **BACKGROUND**

For decades, Local 1982 represented most of the petitioned-for employees at the Port of Toledo. 9 The petitioned-for maintenance employees and some additional craft job classifications

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6 The Employer claims that it is not seeking to add classifications to the unit because the employees it seeks to include are dockworkers and fall within the proposed bargaining unit. However, the Petitioner claims that those disputed classifications are excluded from the petitioned-for unit. Thus, I find that *PCC Structural, Inc.* and *The Boeing Company* apply. In their briefs, both parties addressed the issues under the *PCC Structural, Inc.* and *The Boeing Company* analysis and framework.

7 Any employee who has worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date is eligible to vote in the election.

8 A party could challenge Stevens’ ballot in the event it believes he is not employed by the Employer.

9 The Employer assumed operations at Facility 1 in 2004. However, Local 1982 was party to agreements with the Employer’s predecessors.
were not included in the prior bargaining unit. The most recent negotiated collective bargaining agreement (CBA) between the Employer and Local 1982 was effective from January 1, 2006 to December 31, 2010. The terms of the CBA remained in effect until January 3, 2018, the date the Employer withdrew recognition from Local 1982. The withdrawal became the subject of an unfair labor practice charge in Case 08-CA-212483. The Acting Regional Director dismissed the charge and on February 7, 2020, the Office of Appeals denied Local 1982’s appeal of the dismissal.

II. THE EMPLOYER’S OPERATION

   A. The Employer’s Operation and Structure

The Employer operates a facility on the Maumee River at the Port of Toledo, which is referred to as Facility 1. Along the Maumee River, the Employer has a dock stretching approximately 4,200 feet. There is approximately 15,000 feet of rail track that runs throughout Facility 1. During the hearing, reference was made to distinctions between the “wet side” and “dry side” of Facility 1. The Employer’s sole witness, Facility 1 Operations Manager Steve Sellers, explained that Saint Lawrence Drive runs through the entire facility and the “wet side” generally refers to the area on the west or north side of this road while the “dry side” generally refers to the area east or southeast of it.

Employees on the wet side in the petitioned-for unit are engaged in the loading, the unloading, and the storage of various commodities, including petroleum coke, iron ore, steel coils, aluminum sows, road salt, stone and aggregate products, and agricultural products. Cargo arrives at or leaves the facility by truck, railcars or vessel. Upon arrival, cargo is either stored or shipped, depending on customer directives. Cargo remains in storage or warehouse areas for as long as requested by the customer, ranging from days to years. Cargo that is to be transported outside Facility 1 is loaded onto ships, railcars, and trucks. Once loaded, cargo is moved by third parties from Facility 1 to their next destination.

On the dry side, there are four to five employees performing warehousing duties who are represented by the International Brotherhood of Teamsters, Local 20 (Teamsters Local 20). None of the petitioned-for employees are represented by Teamsters Local 20. There is also an area on the dry side designated as the scale house where commercial vehicles check in to pick up cargo. There are four employees at the scale house who handle inventory, billing, and tracking. Neither the Employer nor the Petitioner maintain that the scale house employees should be included in the unit.

At the Port of Toledo, there is also a location referred to as “Ironville,” a cargo terminal located about one-half mile from Facility 1. There are three entities that operate at Ironville: (1) Midwest Terminals of Toledo II, Inc., which employs dockworkers; (2) Ironville Rail & Transfer LLC, which employs rail and transfer employees; and (3) Toledo Industrial Railroad LLC, which

10 See Petitioner brief, page 5.
11 The Employer introduced a map designating various sections of Facility 1. See Employer Exhibit 1.
employs railroad employees. As will be discussed below, two of the disputed rail employees work for Midwest Terminals of Toledo II, Inc.

The Employer deals exclusively with CSX Railroad (CSX) to move freight by rail. CSX has a location at the Port of Toledo, but it is not located on Facility 1. The Employer leases track from CSX to facilitate the movement of railcars.

Operations Manager Sellers testified that following the withdrawal of recognition, the Employer reorganized and streamlined Facility 1 employees into two classifications: dockworkers and maintenance employees. Sellers explained that the positions were streamlined to allow flexibility with job assignments, allowing the Employer to assign employees a wider range of jobs and tasks, thereby affording the Employer the opportunity to train and promote employees based on their skills. Employees are placed into the dockworker and maintenance classifications at six different levels based on their skills and qualifications, along with certifications to operate certain equipment. The assigned levels determine an employee’s wage rate. Sellers explained that while employees may operate some of the equipment referenced in the petition (material handler, crane, front-end loader), employees are not classified specific to equipment certifications or assignments. In fact, the record reflects that the petitioned-for employees may operate more than one piece of equipment and perform multiple functions for the Employer. Former Facility 1 Human Resource Manager Keith Carr acknowledged the change in nomenclature, explaining that he was told in 2019 that the Employer would refer to all Facility 1 non-maintenance employees as dockworkers.\(^\text{12}\)

No job descriptions or other documents were introduced at hearing referencing the classifications of dockworker, maintenance or any of the petitioned-for classifications. In addition, during the hearing, voluminous Employer records were introduced, including weekly payroll documents and daily timesheets. Individual documents listed each employee by name, but made no reference to the employee’s job classification.

The Petitioner and its witnesses acknowledge that the term dockworker is synonymous with longshoremen.\(^\text{13}\) However, the Petitioner’s witnesses testified that there have been no changes in the day-to-day work and functions at Facility 1 since the 2018 withdrawal of recognition. Thus, the Petitioner argues that the prior unit positions described in its proposed bargaining unit continue to exist.

For clarity, I will refer to the non-maintenance employees in the petitioned-for unit performing longshoring, stevedoring, and warehousing job duties as dockworkers and will address the parties’ arguments and my conclusion regarding the unit description later in my decision.

\(^{12}\) Carr, who was called to testify by the Petitioner, held the position of Human Resource Manager between December 2019 and November 2021.

\(^{13}\) International Longshoremen’s Association Assistant General Organizer James Paylor testified that the term dockworker is a European term for individuals who perform longshoremen work. According to Paylor, longshoremen is the terminology generally used in the stevedoring industry in the United States.
While no organizational chart was introduced covering employees at Facility 1, the record reflects that Sellers and General Manager Mark Hall report to Vice President Drew Johnson, who in turn reports to Chief Executive Officer Alex Johnson. Sellers explained that generally he is responsible for ensuring that cargo is moved in and out of the facility safely and efficiently. While Sellers testified that there are no supervisors who report directly to him, the Petitioner disputes this, claiming that Fisher, Salhoff and Whetsel directly supervise the petitioned-for employees and Dumas supervises the rail employees. As noted above, the Employer identifies these individuals as dockworkers in the initial list submitted with its Statement of Position.

B. Skills, Training, and Job Functions

1. The Undisputed Employees

The undisputed dockworkers work primarily on the wet side of Facility 1. When cargo arrives at Facility 1, it is visually inspected and scanned with a phone to record what the cargo is and when it has arrived, and to log any damage. This is referred to as the checking function. The undisputed dockworkers unload cargo from ships, trucks, and railcars and move cargo throughout Facility 1 for short or long-term storage. Dockworkers also load cargo for transport out of the facility. To facilitate this movement of cargo, dockworkers utilize forklifts of various weight and capacities, cranes, front-end loaders, material handlers, and hand tools. According to Sellers, equipment used to load or unload railcars is the same equipment used to load and unload trucks and ships. The dockworkers signal for cranes by communicating with the operator to ensure safe and efficient movement, known as signaling. The undisputed dockworkers utilize radios to communicate with one another.

The record does not include testimony on the skills or educational requirements necessary to be hired. However, as addressed above, dockworkers are placed into the dockworker classification at six different levels based on their skills and qualifications, along with certifications to operate certain equipment. Certifications are generally issued by a third party training company. The Employer provided a document, revised March 1, 2020, entitled “Job Classification Levels,” listing each of the six levels. It appears that new hires begin their employment as general laborers in a level one classification and advance in pay levels as they obtain certifications relative to specific equipment. For example, a level two employee is qualified to operate a smaller forklift (15,000 pounds or less) while a level three employee operates mid-sized forklifts, ranging from 25,000/35,000 pounds to 60,000 pounds. A level four requires front-end loader and material handler certifications along with signaling and rigging for the crane. A level five employee is considered an entry level crane operator while a level six employee can operate the Liebherr crane (certain type of crane made by Liebherr) along with all other equipment at the facility.

14 Front end loaders are also referred to as wheel loaders in the record.
15 A material handler is a machine that is on wheels with an elevated cab and an attached clamshell.
16 The record does not reflect the types of hand tools used by the dockworkers.
17 See Employer Exhibit 9.
Dockworkers can be assigned to operate different equipment or to perform different tasks depending on their certifications and qualifications. Some dockworkers are certified to operate multiple pieces of equipment. The record reflects that there are only five or six crane operators. Some dockworkers are also certified in signaling and rigging; any individual who has a crane certification also possesses a signaling and rigging certificate.

There are approximately four maintenance employees employed at Facility 1. The limited testimony regarding the maintenance employees reveals that these employees perform preventative maintenance on the equipment and complete repairs on equipment operated by the undisputed dockworkers. The record reflects that maintenance employees work generally from the area near the J Shed, which is a building on the dry side of Facility 1.

All of the undisputed employees receive the same safety training under Employer’s Safety Made Simple (SMS) training program which covers a variety of areas and topics. SMS is an online program where employees complete various modules. The record further reflects the undisputed employees receive training on a drug free workplace as required by the Bureau of Workers’ Compensation.

2. The Disputed Employees

a. Rail Employees

There are five rail employees in dispute: Shawn McChesney, Brandon Stamco, Samuel A. Dumas, David C. Katafiasz, and James M. Nietfeld. McChesney, Stamco, and Dumas work directly with the Employer’s locomotives. Katafiasz and Nietfeld, who are not paid by the Employer but are paid by another entity, Midwest Terminals of Toledo II, Inc. (Midwest II), load cargo near the bio storage area located on the dry side of Facility 1.

I will address McChesney, Stamco, and Dumas as the “locomotive rail employees” and Katafiasz and Nietfeld as the “bio storage rail employees.”

1. Locomotive Rail Employees

In terms of commodities arriving by rail, Sellers testified that the Employer usually receives delivery three days per week from CSX. CSX uses its own locomotives to deliver the loaded or empty railcars to the facility. The railcars arrive at the south end of the facility. At this exchange point, the Employer utilizes two locomotives, owned by the Employer, to transport the railcars to the location on the premises where they are either loaded or unloaded by undisputed dockworkers. Sellers explained that the Employer then returns loaded or unloaded railcars to CSX at the exchange point. The rail equipment is fueled and repaired by an outside third party. According to Sellers, there can be at least 200 railcars on site at any given time.

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18 See Employer Exhibit 8 for a document reflecting the completed training for the employees involved in this proceeding.
19 None of the rail employees testified at the hearing.
The Employer’s two locomotives are tied together and used jointly. The locomotives are attached to the railcars and moved to wherever they need to be loaded or unloaded. A locomotive rail employee operates the locomotives to move railcars throughout Facility 1. While this individual is referred to in the record as the engineer or operator, there is no actual job classification by that name. Rather, the Employer maintains that the engineer or operator is classified as a dockworker. The operator uses controls or levers inside the cab for braking and throttle control. Although Sellers testified that the locomotive is a specialty piece of equipment that requires training, he claims that it is no different than other equipment that the Employer utilizes at Facility 1.

There is another rail employee, referred to as a conductor or groundsperson, who physically connects and disconnects cars from one another, directs the operator where to move the locomotive and where to stop, switches the track, and blocks off intersections. This individual acts as the engineer’s “eyes and ears” and provides updates on the engineer’s location and speed. The Employer maintains that this individual is also classified as a dockworker; there is no actual conductor or groundsperson job classification.

Employees Stamco, Dumas,²⁰ and McChesney, as well as undisputed dockworkers Michael Walterbusch and Joel Gaft, have the certification required to operate the locomotives. The record reflects that Walterbusch and Gaft previously worked as rail employees, but subsequently transferred out of the position.²¹ Stamco operates the locomotive regularly. During his six-month employment with the Employer, Stamco has operated the locomotive about one hundred times. Sellers estimated that Dumas has operated the locomotive at least thirty times during his employment and McChesney has operated it about five times.²² While a crane certification results in a higher classification level, a certification on the locomotive does not directly change an employee’s classification level. In that regard, under the six-level classification system, Stamco and McChesney are level two, and Dumas is level three. On the other hand, an entry level crane operator is classified at level five.

There is no required certification to serve as a groundsperson. According to Sellers, the undisputed dockworkers undergo internal training on the basics of rail movement through the SMS training program. Thus, the Employer argues that theoretically undisputed dockworkers could be assigned the task of groundsperson. However, there is no evidence in the record reflecting that the undisputed dockworkers perform this function.

Stamco, McChesney and Dumas are also certified to operate forklifts. The record reflects that there are occasions when McChesney and Dumas are assigned to vessel work, specifically loading and unloading cargo. Sellers testified that when Stamco operates the forklift, it is generally in support of his locomotive tasks.

²⁰ As noted earlier, the Petitioner alleges Dumas is a 2(11) Supervisor.
²¹ There is no documentation in the record regarding the transfers.
²² Sellers further testified that disputed employee Dave Whetsel, who the Petitioner claims is a 2(11) supervisor, is qualified to operate the locomotive. However, the record does not reflect how often Whetsel has operated the locomotive or in what circumstances he would be assigned that function.
2. Bio Storage Rail Employees

Rail employees Katafiasz and Nietfeld transfer material from railcars directly to trucks. Katafiasz and Nietfeld work primarily in and around the bio storage area southeast of Saint Lawrence Drive, which is the on the dry side of Facility 1. The equipment operated by Katafiasz and Nietfeld is generally fueled by Ironville Facility employees, but occasionally fueled by Katafiasz and Nietfeld. Katafiasz and Nietfeld are not involved in the operation of the locomotive and are not certified to operate the locomotive.

All five rail employees, like the undisputed dockworkers, use radios for communication purposes. In addition, the rail employees, similar to the undisputed employees, receive safety training pursuant to the Employer’s SMS training program.

b. James Hasenfratz

According to the Employer, James Hasenfratz holds the classification of dockworker. However, at the hearing, Sellers also referred to him as the alternate facility security officer. The Petitioner maintains that Hasenfratz is a safety officer and a facility security officer who performs no longshoremen duties. The record reflects that Hasenfratz works in a trailer office with General Manager Mark Hall.

According to Petitioner witness and former Human Resources Manager Carr, Hasenfratz’s functions are administrative in nature. As the safety officer, Hasenfratz monitors and documents safety training, facilitates the onboarding of new employees, and administers safety-related equipment. As the security officer, Hasenfratz monitors daily activities, conducts drills and exercises, and provides reports to TSA and the Coast Guard. Carr noted that he himself was the alternate security officer when he was employed by the Employer, performing Hasenfratz’s duties when Hasenfratz was on leave. In terms of equipment, the record reflects that Hasenfratz uses a computer.

The Employer concedes that Hasenfratz also works at the Ironville facility, which as described above is a cargo terminal located about a half-mile from Facility 1. However, the Employer maintains that Facility 1 is Hasenfratz’s primary work location, and further claims that Hasenfratz could perform Ironville tasks at Facility 1.

Sellers acknowledged that Hasenfratz is not currently performing any loading or unloading of cargo or any checker work. The Employer maintains that Hasenfratz receives the same training as other undisputed dockworkers. However, he is not listed on the Employer’s spreadsheet documenting the SMS safety training program.

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23 It is not clear from the record what equipment Katafiasz and Nietfeld operate.
24 Hasenfratz did not testify at the hearing.
25 Hasenfratz worked as a dockworker at one time before moving to the administrative role.
c. Nathan Weisenberger

The Employer identified Weisenberger as a part-time dockworker. The Petitioner maintains that Weisenberger is aligned with management serving either as a project manager or intern working directly with General Manager Hall. The Employer disputes that Weisenberger is an intern or project manager.

Weisenberger began working for the Employer in 2020 and was assigned to clean and grease equipment and to perform other general cleanup at the facility. Weisenberger also operated a forklift. Former Human Resource Manager Carr explained that Weisenberger, a college student, left for school and returned in the spring of 2021 as a college intern. As an intern, Weisenberger was assigned to assist with and/or to observe different engineer projects at Facility 1. While the Employer concedes that Weisenberger stopped performing general maintenance functions at some point, it disputes Weisenberger’s intern role. However, it was Carr who onboarded Weisenberger when he returned in this new role. Weisenberger utilizes a laptop and, like Hasenfratz, works in the trailer with Hall.

The record reflects that Weisenberger observed and/or assisted on various projects, such as the crane assembly project, the demolition of the C-shed, crane demolition project, and the construction of a new office building. A dockworker who assisted with the crane demolition project testified that Weisenberger sat in his vehicle and observed, acting as a “gopher” when necessary. On the other hand, the undisputed dockworkers on the crane demolition project set up barricades, moved gas cylinders and other materials for the contractors, and escorted trucks in and out of the facility. In terms of the C-Shed project, while it is unclear from the record what Weisenberger’s responsibilities were on this project, the Employer notes that undisputed dockworkers also worked on this project, specifically removing debris.

Documentary evidence and testimony disclosed that Weisenberger did not work from August 19 and December 31, 2021. The Employer highlights in its post-hearing brief specific timesheets during a 10-week period in the summer of 2021 indicating that Weisenberger performed tasks similar to several undisputed dockworkers, such as checking, signaling, and moving material. In terms of the timesheets, the disputed and undisputed employees are required to complete them daily. The timesheet contains a column with a number of commodities listed (i.e., salt, sponge coke, steel coils sugar, etc.). The undisputed dockworkers handwrite the number of hours worked next to the assigned commodity. However, unlike the undisputed employees, Weisenberger did not document the number of hours worked next to each commodity. Instead, Weisenberger made handwritten notations on his timesheets describing the work he performed. Some of his entries include intern-type duties and/or non-dockworker duties, such as meetings with individuals about the upcoming projects and/or other matters, a lunch meeting, “furniture for new building”, “survey location for retention ditch”, “picked up new locks”, “security consulting”,

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26 Weisenberger did not testify at the hearing.
27 The Employer refers to timesheets dated June 1, June 21-22, June 26, July 12-15, July 21-22, and August 11.
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“consult with Ellen from NBS,” calculating weights/scrap prices of the scrap pile, and multiple “miscellaneous operations” which are undefined.28

Weisenberger is not reflected on the Employer’s SMS training program spreadsheet.

d. **Connor VonSeggern, Brett Breininger and Matthew Stevens**

There is limited testimony regarding VonSeggern and Breininger. The Employer maintains that they are part-time dockworkers managed by Sellers and Hall. The Petitioner did not address VonSeggern or Breininger in its brief. However, the record reflects that the Petitioner argued that VonSeggern and Breininger were not performing unit work and were ineligible because they did not meet the *Davison-Paxon* eligibility formula.

The timesheets of VonSeggern and Breininger reflect that they perform the same work as the undisputed dockworkers. There is nothing in the record indicating that their job functions differ from the undisputed dockworkers. A dockworker testified that Breininger does mainly maintenance repair. Although Breininger is reflected on the Employer’s SMS training program spreadsheet, VonSeggern is not.

Regarding Stevens, the Petitioner argues that he resigned his employment in December 2021 and is not eligible to vote. The Employer, on the other hand, argues that Stevens changed his status from a full-time employee to a part-time, on-call employee.

The record reflects that Stevens was hired in June 2021. It is undisputed that Stevens performed dockworker functions during his employment with the Employer. Sellers testified that in December 2021, Stevens requested to move to part-time status; Stevens’ request to move to part-time status was not documented. A dockworker testified that Stevens stated that he gave the Employer his two weeks’ notice because he found other employment. Another dockworker testified that Stevens called him and told him that he resigned his employment.29

C. **Supervision**

Sellers testified that he and Hall supervise both undisputed employees and the rail employees and there are no official supervisors below them. Sellers testified that he and Hall determine employees’ work on any given day, including the work of the undisputed employees, the locomotive rail employees, and bio storage rail employees. Sellers explained that he coordinates with the scale house to determine the type and amount of materials coming in each day and then assigns work accordingly. Carr agreed that Sellers and Hall have managerial authority over both groups.

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28 The record reflects that there are certain tasks performed at Facility 1 that would fall under the general category of “operations,” such as snow removal, operating a water truck, cleaning equipment, etc.
29 Stevens did not testify at the hearing.
Assignments made by Sellers or Hall are normally relayed to the employees via text message by Whetsel, Salhoff, Fisher, and Dumas. Specifically, the text message, which is normally sent by the close of the preceding shift, notifies employees of their start time, their end time, and their task for the following day. For example, a text message sent to an undisputed dockworker may instruct the employee that he will be assigned to operate a forklift and transfer aluminum. Maintenance employees may be told that they will be performing snow removal. According to Sellers, he delegates the text message notifications to Whetsel, Salhoff, Fisher, and Dumas for efficiency reasons. However, Sellers testified that he and Hall also communicate assignments to employees in certain situations, especially if there are changes to the schedule. It appears that Fisher and Whetsel generally send the text messages to the undisputed dockworkers and Salhoff communicates with the maintenance employees. While Sellers testified that Dumas could send text messages to non-rail employees, he was not aware of that ever occurring.

The Petitioner disputes that Sellers is the immediate supervisor of the petitioned-for employees. The Petitioner argues that the Fisher and Whetsel directly supervise the undisputed dockworkers while Dumas directly supervises the disputed rail employees. An undisputed dockworker testified that he reports to Fisher, Whetsel, Sellers and Hall. The dockworker testified that Fisher oversees the general operation, ensuring that the work is getting done. The dockworker has never seen Fisher operate equipment. The dockworker explained that he notifies Whetsel when he needs time off because Whetsel is responsible for collecting timesheets. Sellers testified that when the dockworkers get to their assigned location, such as the vessel, “the lead person or whoever was there to oversee that job” directs employees to certain areas, such as inside or outside of the boat.

Sellers testified that he and Hall supervise Hasenfratz.

D. Contact

Sellers testified that the locomotive rail employees have daily communications by radio with the undisputed dockworkers who are loading or unloading railcars. According to Sellers, they communicate about where and when the railcars will be moved. However, this was disputed by a dockworker who testified that when he unloads railcars, he rarely communicates with rail employees Stamco and McChesney. Instead, the locomotive rail employees stop the car, disconnect it, and move on. The dockworker further testified that he was not aware of the locomotive rail employees communicating by radio with the undisputed dockworkers. The dockworker estimated that he was within viewing range of Stamco and McChesney approximately fifteen percent of his day and sees them occasionally in the morning, greeting them briefly when he sees them.

30 A dockworker testified that does not generally receive daily text messages regarding his work assignment, as he is always assigned to the front-end loader. However, when his assignment changes, Sellers, Whetsel, or Fisher contact him about the change.

31 The Petitioner did not address Salhoff.

32 There was no other discussion in the record regarding leads or which employees are considered leads.
Regarding bio storage rail employees Katafiasz and Nietfeld, they work primarily in and around the bio storage area on the dry side. There is no evidence that Katafiasz and Nietfeld work outside of their assigned area. According to Sellers, any dockworkers assigned to move railcars could work south of bio storage. For example, Sellers testified that he has seen undisputed dockworkers and former rail employees Gaft and Walterbusch, along with rail employees Dumas, Stamco, and McChesney, in the bio storage area while they were moving railcars. However, there was no evidence regarding the frequency of the contact or the nature of the interactions between the bio storage rail employees and the other employees. Two dockworkers, one of whom has been working at the Port since 1966, testified that they did not know who Katafiasz and Nietfeld were.

Sellers testified that the disputed and undisputed employees have access to all of the breakrooms or break areas at Facility 1.33 However, the Petitioner claims that certain employees take breaks in certain areas. While Sellers testified that there is not a designated breakroom for the locomotive or bio storage rail employees, Carr testified that the locomotive rail employees take their breaks in a different area from the undisputed employees. A dockworker testified that there have been occasions when the locomotive rail employees visited the breakroom to wash their hands or use the washroom, and then left. The record does not address where the bio storage rail employees take their breaks.

The record reflects that the undisputed dockworkers go to the maintenance shop on the dry side of the facility when they experience issues with equipment. One of the dockworkers testified that on those occasions, he takes his equipment to the shop so it can be inspected.

The evidence regarding the alleged safety/security officer Hasenfratz and alleged project manager or intern Weisenberger did not establish frequent contact with the undisputed employees and the disputed rail employees.

E. Interchange

The record provides limited testimony on any permanent interchange between the undisputed employees and the disputed rail employees. As stated above, undisputed dockworkers Walterbusch and Gaft previously operated the locomotives but subsequently transferred from those positions into undisputed dockworker positions. Although not documented, the record reflects that one of the transfers resulted from disciplinary action, suggesting that it was not voluntary.

In terms of temporary interchange, Sellers testified that Gaft operates the locomotive from time to time as needed, estimating that he had done it less than five times in 2021.34 The Petitioner introduced Gaft’s timesheets from June 1, 2021 to December 31, 2021 reflecting that Gaft worked zero hours on the locomotive during that period. In addition, the timecards introduced in the proceeding reveal that Walterbusch has not operated the locomotive since August 26, 2021. There was no other testimony suggesting that undisputed employees either operate the locomotive or serve as a groundsperson.

33 Sellers described approximately four breakrooms or break areas.
34 It is unclear from the record when Gaft transferred from the locomotive rail position.
There is no evidence that undisputed employees perform the work of Katafiasz and Nietfeld in the area of bio storage, or vice versa. Similarly, no testimony was provided concerning undisputed employees performing work of the alleged and/or security officer Hasenfratz or alleged intern Weisenberger.

According to Sellers, the locomotive rail employees are not exclusively assigned to locomotive work. The Employer introduced timesheets reflecting that McChesney and Dumas were assigned to vessels to load and/or unload materials. Dumas’ timesheets covering the period from June 1, 2021 to December 30, 2021 reflect that he performed loading and/or unloading of materials on about sixteen days totaling about 91.5 hours. Similarly, McChesney’ timesheets covering the period from June 1, 2021 to December 30, 2021 reflect that he loaded and unloaded cargo on about fifteen days totaling about 134.5 hours.

F. Terms and Conditions of Employment

The disputed and undisputed full-time employees receive the same employee benefits, including the same health and dental insurance, life insurance, retirement savings plan, accidental death, and short-term disability insurance. The record suggests that part-time employees do not enjoy all of the benefits that full-time employees do.

The disputed and undisputed employees are subject to the same employee handbook, which covers various things such as attendance, vacation, holidays, sick leave, bereavement leave, discipline, drug testing, and overtime. In addition, employees are subject to the same safety policy handbook.

The disputed and undisputed employees are all paid hourly. Full-time employees, including the undisputed and disputed employees, are governed by the Employer’s job classification pay levels addressed earlier in the decision. There are six wage levels, with level one being the lowest and level six being the highest. Although full-time employees are assigned levels based on their skills and experience along with certifications on specific equipment, part-time employees are not designated a wage level and instead receive a base rate, which was not identified during the hearing.

Sellers testified that the locomotive rail employees and bio storage rail employees are also placed into classification pay levels. The March 1, 2020 document setting forth the pay levels makes no reference to locomotives. Carr, who was involved in establishing the level schedule, testified that the levels were meant for the traditional dockworker. According to Carr, rail employees did not meet any of the requirements for the level system, but were placed into a level simply to set their pay rate.

35 On certain dates, Dumas and McChesney worked only a portion of the day loading and unloading cargo.
36 See Employer Exhibit 3.
37 See Employer Exhibit 4.
38 See Employer Exhibit 9.
As addressed above, Katafiasz and Nietfeld are not paid by the Employer. Instead, they are paid by Midwest II. The record contains scant evidence on the relationship between the Employer and Midwest II. There was no assertion made by the Employer that a joint or single employer relationship exists between it and Midwest II. Notably, the record reflects that a previous transfer from Midwest II to the Employer was moved to the Employer’s payroll following the transfer. 39

The wage rates for undisputed dockworkers range from $22.05 to $34.00 and the wage rates for maintenance employees range from $18.90 to $25.60. Payroll records reveal that the wage rates for rail employees range from $22.05 to $25.20 per hour. Katafiasz and Nietfeld both receive $23.53 per hour. The wage rate of alleged safety officer/facility security officer Hasenfratz is $25.00 per hour while the wage rate of alleged project manager/intern Wiesenberger is $22.05 per hour.

The disputed and undisputed employees are required to complete timesheets to record their hours and the work performed. As explained above, the undisputed dockworkers handwrite the number of hours worked next to the commodity in which they were assigned. There is an option for “rail,” where the rail employees would note their hours. There is a section for the maintenance employees to notate the time spent on certain equipment. Documents introduced show Katafiasz and Nietfeld complete a timesheet which is slightly different than the timesheets completed by undisputed dockworkers, namely the commodities listed differ from those handled by the undisputed dockworkers. The record suggests that the dry side, where Katafiasz and Nietfeld work, handles different products than the wet side. Hasenfratz’s timesheet is completely different than those completed by the undisputed dockworkers and disputed rail employees, referencing, among other things, administrative work and Ironville work. As addressed above, while Wiesenberger completed the same timesheet as the undisputed dockworkers, he did not note his hours next to the commodities like the undisputed dockworkers and instead handwrote various tasks that he performed.

In addition, the Petitioner introduced a document that the Employer uses to track attendance for its employees. Katafiasz and Nietfeld are not listed with the Employer’s Facility 1 employees. Instead, they are referenced under the Ironville employees.40

In terms of shifts, it appears that employees worked varied shifts depending on the needs of the company. The Employer’s initial list submitted with its Statement of Position reflects that the individuals have “no set shift.” However, one of the undisputed dockworkers testified that he generally works from 8:00am to 4:30pm.

39 Former Midwest II employee Ronald Durbin moved to the Employer’s payroll in September 2021. See Petitioner Exhibit 8.
40 See Petitioner Exhibit 7. While Hasenfratz and Wiesenberger are not listed on the Employer’s document tracking attendance, it is unclear if they had any absences during that period which would have caused them to appear on the document.
III. BOARD LAW

The Petitioner is not required to seek a bargaining unit that is the only appropriate unit or even the most appropriate unit. The Act merely requires that the unit sought by the Petitioner be an appropriate unit. Wheeling Island Gaming, 355 NLRB 637, fn. 2 (2010), citing Overnite Transp. Co., 322 NLRB 723 (1996); P.J. Dick Contracting, Inc., 290 NLRB 150 (1988). “The Board’s inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends.” The Boeing Company, 368 NLRB No. 67, slip op. at 3 (2019).

In PCC Structurals, supra, the Board returned to the traditional community-of-interest standard for determining whether a unit is appropriate. In PCC Structurals, the Board specifically found that the traditional community-of-interest test is the “correct standard for determining whether a proposed bargaining unit constitutes an appropriate unit for collective bargaining when the employer contends that the smallest appropriate unit must include additional employees.” Id. In each case, the Board is required to determine:

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

PCC Structurals, supra, slip op at 5, citing United Operations, Inc., 338 NLRB 123 (2002). The Board must analyze “whether employees in the proposed unit share a community of interest sufficiently distinct from the interests of employees excluded from the unit to warrant a separate bargaining unit.” PCC Structurals, supra, slip op. at 5. (emphasis in original)

The Board has clarified that the traditional community-of-interest test, as articulated in PCC Structurals, involves a three-step analysis.

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.41

The Boeing Company, supra, slip op. at 3. “[T]he traditional community-of-interest standard is not satisfied if the interests shared by the petitioned-for-employees are too disparate to form a community of interest within the petitioned-for unit.” Id., citing Saks & Co., 204 NLRB 24, 25 (1973); Publix Super Markets, Inc., 343 NLRB 1023, 1027 (2004). In step two of the analysis,

41 There are no industry-specific guidelines applicable to this case.
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“the Board must determine whether the employees excluded from the unit ‘have meaningfully distinct interests in the context of collective-bargaining that outweigh similarities with unit members.’” The Boeing Company, supra, slip op. at 4. “[W]hat is required is that the Board analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit.” Id.

IV. APPLICATION OF BOARD LAW TO THIS CASE

Step One: Shared Interests Within Petitioned-for Unit

Applying the facts above to the three-step analysis in Boeing, first it must be shown that the proposed unit shares an internal community of interest. Neither party disputes that the petitioned-for group shares a community of interest and the record supports a shared internal community of interest.

The dockworkers and maintenance employees all fall under the supervision and management of Sellers and Hall. Sellers is involved in the daily assignments for both the undisputed dockworkers and maintenance employees. Dockworkers and maintenance employees are all involved in longshoring, stevedoring, and warehousing process at Facility 1. The dockworkers interact and communicate with one another during the loading and unloading process, including the signaling process. Many of the dockworkers rotate into different functions, suggesting a shared skill set and interchange within the group. Maintenance employees are also an integral part of the process, as they ensure that the dockworkers have functioning equipment to facilitate this movement of cargo. In addition, the dockworkers and maintenance employees have consistent contact as the maintenance employees perform cleaning, repairs and maintenance on various equipment used by dockworkers.

Moreover, the terms and conditions of employment enjoyed by the petitioned-for dockworkers and maintenance employees are largely identical. Both classifications are governed by the same employee handbook and safety policy handbook. In addition, they are eligible for the same benefits. The employees in both classifications receive training under the Employer’s SMS training program. Dockworkers and maintenance employees are subject to classification pay levels. Payroll records also demonstrate the hourly wage rates for maintenance employees, similar to dockworkers, fall within a range governed by their classification level. Dockworkers and maintenance employees both complete daily time sheets to record their time.

While the job functions of the maintenance employees and dockworkers differ and there is no evidence of interchange between the two groups, I find that the other factors clearly point to a shared internal community of interest.
Step Two: Shared Interest between the petitioned for and disputed classification

First, I will address my determination that the undisputed employees do not share a meaningful distinct community of interest from excluded locomotive rail employees. Second, I will discuss my determination that the bio storage area rail employees share meaningfully distinct interests that warrant their exclusion from the appropriate bargaining unit. Third, I will address my finding that employees James Hasenfratz and Nathan Weisenberger share meaningfully distinct interests that warrant their exclusion from the appropriate bargaining unit. Finally, I will discuss my conclusion that dockworkers Brett Breininger, Connor VonSeggern, and Matthew Stevens are included in the unit and are eligible to vote, provided they meet the eligibility formula.

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. See Check Printer, Inc., 205 NLRB 33 (1973). In this case, the undisputed dockworkers, maintenance employees, and locomotive rail employees all perform stevedoring, longshoring and warehousing work at Facility 1. The Employer maintains that the locomotive rail employees are also classified as dockworkers. There is no evidence that the Employer divides its operation into departments. Thus, I find that this factor weighs in favor of finding that the undisputed employees do not share a community of interest meaningful distinct from the locomotive rail employees.

In addition, I find that the undisputed employees and locomotive rail employees have similar skills which weigh in favor of finding that the classifications share an indistinct community of interest. The community-of-interest test examines whether disputed employees can be distinguished from one another based on duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that disputed

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42 In its brief, the Petitioner argues that there is a question about whether the Board has jurisdiction over the rail employees because the individuals are arguably performing work covered by the Railway Labor Act. When an employer is not itself a railcarrier, the National Mediation Board (NMB) applies a two-part test to determine whether that agency nonetheless has jurisdiction over the employer. First, the NMB determines whether the work the employer performs is traditionally performed by the railcarrier. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be met for the NMB to assert jurisdiction. See, e.g., Air Serv Corp., 33 NMB 272, 285 (2006) In determining whether the second part of the test is satisfied, the NMB holds that “the . . . carrier must effectively exercise a significant degree of influence over the company's daily operations and its employees' performance of services in order to establish RLA jurisdiction.” ABM Services-West, 45 NMB 27, 34 (2018) Factors the NMB has traditionally considered in making this latter determination include (1) the extent of the carrier's control over the manner in which the company conducts its business, (2) the carrier's access to the company's operations and records, (3) the carrier's role in the company's personnel decisions, (4) the degree of carrier supervision of the company's employees, (5) whether company employees are held out to the public as carrier employees, and (6) the extent of carrier control over employee training. No one factor is elevated above all others. Id at 34-5. See also Oxford Electronics, Inc., 369 NLRB No. 6 slip op. at 2, (January 6, 2020). Here, even assuming the first part of the test is met, I find that CSX does not exercise sufficient control over the Employer to establish RLA jurisdiction. The only evidence of arguable control is CSX’s ability to request dismissal of employees who violated an of CSX’s safety protocols or policies, such as operating a cell phone or not wearing proper equipment, while on CSX property. However, there is no evidence in the record that this has happened, nor is there any evidence of what, if any, input CSX has regarding discipline the employee may receive.
employees must meet similar requirements to obtain employment, that they have similar job
descriptions or licensure requirements, that they participate in the same employer training
programs, or that they use similar equipment supports a finding of similarity of skills. *Casino
Azar*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Serv.,
313 NLRB 657 (1994).

Here, the undisputed dockworkers and the locomotive rail employees operate equipment
at Facility 1 within the Employer’s longshoring, stevedoring and warehousing process. The
petitioned-for dockworkers operate various types of equipment, such as forklifts of various weight
and capacities, cranes, front-end loaders, and material handlers. The locomotive rail employees
operate locomotives and also utilize forklifts when necessary. The skill level needed to operate
the locomotive appears to be similar to that needed to operate other equipment used at Facility 1.
This is illustrated by the fact that there have been transfers between the petitioned-for dockworkers
and locomotive rail employees. While the groundsperson is performing functions unique to the
locomotive, there does not appear to be any variance in the skill level to perform these duties. In
fact, there is no certification requirement for the groundsperson task. While the undisputed
dockworkers and the locomotive rail employees operate equipment and have job functions unique
to their part of the process, the same is true for employees within the petitioned-for unit. 43 In that
regard, not all petitioned-for dockworkers are certified to operate the crane. Similarly, the
maintenance employees perform tasks that differ from other employees in the petitioned-for unit.
Moreover, there is some job overlap between the undisputed employees and the locomotive rail
employees, as the locomotive rail employees are occasionally assigned to load and unload cargo.
Thus, I find that the undisputed employees and the locomotive rail employees have similar skills
and job functions, weighing in favor of finding that they share an indistinct community of interest.

I further find that the Employer’s stevedoring, warehousing, and longshoring operation is
functionally integrated and weighs in favor of finding that the petitioned-for employees do not
share a community of interest meaningful distinct from the excluded rail employees. Functional
integration exists when all of the employees in the sought-after unit work on different phases of
the same product or a single service as a group. *Arvey Corp.*, 170 NLRB 35 (1968); *Transerv Sys.,
311 NLRB 766 (1993) (observing “that most deliveries involve both a messenger and a driver,
which evidences a high degree of functional integration among, and frequent contact between,
drivers and bicyclists”) It is apparent from the record that the Employer’s operation is highly
integrated and its primary objective can only be accomplished through the coordinated efforts of
the petitioned-for dockworkers, the maintenance employees, and locomotive rail employees. They
are all engaged in the process of loading, unloading, and storing the cargo of customers at Facility
1. There is no dispute that dockworkers unload cargo from ships, trucks, and railcars. Without
the movement of railcars throughout the facility by locomotives operated by engineers and guided
by a groundsperson, dockworkers would be deprived of a significant portion of their assignments.
Cargo would not be loaded or unloaded but for the work performed by the locomotive rail
employees. Thus, their work is functionally integrated.

43 Cf. *Publix Super Markets*, 343 NLRB 1023, 1028 (2004) (In reaching conclusion that the Regional Director’s unit
determinations were not appropriate, Board relied on fact that the differences among the petitioned-for units were
nearly as great as the differences between the units)
In addition, I find that petitioned-for employees and locomotive rail employees share almost identical terms and conditions of employment, weighing in favor of including the locomotive rail employees in the petitioned-for unit. Terms and conditions of employment include whether employees: receive similar wage ranges and are paid in a similar fashion (for example hourly); have the same fringe benefits; and are subject to the same work rules, disciplinary policies, and other terms of employment that might be described in an employee handbook. See, e.g., Overnite Trans. Co., 322 NLRB 347, 349 (1996).

All full-time employees, including the disputed and undisputed employees, have access to the same employee benefits, including health and dental insurance, life insurance, retirement benefits, accidental death, and short-term disability insurance. They are all subject to the same policies and procedures concerning attendance, vacation, holidays, sick leave, bereavement leave, discipline, drug testing, and overtime. In addition, they all adhere to the same safety policy handbook. The undisputed employees and locomotive rail employees complete the same timesheets to record their hours of work. Moreover, they are subject to the same classification levels, which in turn determine wage rates.

I also find that shared supervision weighs in favor of finding that the petitioned-for employees and the locomotive rail employees should be included in the same unit. While common supervision weighs in favor of placing the employees in dispute in one unit, separate supervision does not mandate separate units. Casino Aztar, 349 NLRB 603, 607, fn. 11 (2007). While the record contains minimal testimony regarding the day-to-day supervision of the undisputed employees and locomotive rail employees, the evidence reflects that Sellers and Hall determine the work assignments for both groups.

There are factors, such as interchange and contact, that might distinguish the undisputed employees from the locomotive rail employees. Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” Hilton Hotel Corp., 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. Executive Res. Assoc., 301 NLRB 400, 401 (1991) (citing Spring City Knitting Co. v. NLRB, 647 F.2d 1011, 1015 (9th Cir. 1981)). Also, relevant for consideration of interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. Hilton Hotel Corp, 287 NLRB 359 (1987).

There is little evidence of significant interchange between the petitioned-for employees and the locomotive rail employees. While there is evidence that two undisputed dockworkers,
Gaff and Walterbusch, were at one time locomotive rail employees, there is no other evidence in
the record of permanent transfers between the two groups. Moreover, as noted above, permanent
transfers are given less weight by the Board. In terms of temporary transfers, while there is
evidence that Dumas and McChesney occasionally load and unload materials, such tasks are
limited in frequency. There is no evidence that the undisputed employees regularly fill in for the
locomotive rail employees. The documentary evidence revealed that Walterbusch most recently
operated the locomotive in August 2021.

In addition, there is not overwhelming evidence of employee contact between the
petitioned-for employees and the locomotive rail employees. Sellers testified that the locomotive
rail employees and the undisputed dockworkers communicate when cars are transferred for loading
and unloading. However, one of the dockworkers disputed this, claiming that the locomotive rail
employees simply stop the car, disconnect it, and move on. There was some testimony that the
undisputed employees interact occasionally near the break areas. In addition, Dumas and
McChesney occasionally load and unload materials on the wet side of Facility 1. Thus, while there
is some contact, it appears to be limited.

However, I find that the interests that the undisputed employees share with the locomotive
rail employees are more significant than those that differentiate them. See The Boeing Company,
368 NLRB No. 67, slip op. at 3 (2019) (Board found that the petitioned-for unit did not share a
community of interest that was sufficiently distinct from the interests of excluded employees even
though there was lack of contact and interchange between the petitioned-for employees and
excluded employees and different wage rates and license requirements).

In support of its position that the locomotive rail employees should be excluded, the
Petitioner argues that the parties’ bargaining history should be given significant weight. The
Employer, on the other hand, maintains that bargaining history is not controlling and is irrelevant
here because there is no existing bargaining relationship, and the previous contract was between
the Employer and Local 1982, not the International. I am not persuaded by the Petitioner’s
argument that the locomotive rail employees should be excluded based on the parties’ bargaining
history. While it is true that the locomotive rail employees were excluded from the prior unit, the
maintenance employees, who the Petitioner seeks to include, were also excluded. Thus, the unit
sought is not identical to the previously recognized unit.

While I find that the locomotive rail employees should be included in an appropriate
bargaining unit, I find that the bio storage rail employees share meaningfully distinct interests that
warrant their exclusion from the appropriate bargaining unit. Katafiasz and Nietfeld, unlike the
undisputed and locomotive rail employees, are not paid by the Employer and are paid by a different
entity, Midwest II. I find this difference significant in the context of collective bargaining. The
record does not reflect why they are paid by Midwest II, nor does it provide much detail on the
relationship between the Employer and Midwest II. They complete different timesheets than the
undisputed employees and locomotive rail employees and are listed with the “Ironville” employees for purposes of tracking attendance. Thus, it does not appear that Katzfiasz and Nietfeld are employees of the Employer and their inclusion would not conform to an administrative function or grouping of the Employer’s operation.

While the Employer argues that an employee’s employer is not determined by which entity pays them, other factors support the conclusion that the bio storage rail employees share meaningfully distinct interests that warrant their exclusion from the appropriate bargaining unit. There is no evidence of any interchange or contact between the bio storage rail employees and the other employees. Katzfiasz and Nietfeld work on the dry side of Facility 1 whereas the undisputed dockworkers work primarily on the wet side. The two undisputed dockworkers, one of whom has been working at the Port since 1966, testified that they did not know who Katzfiasz and Nietfeld were. There is no record evidence of work-related contacts between the bio storage rail employees and the undisputed employees or the locomotive rail employees. The timesheets of Katzfiasz and Nietfeld reflect that they work with different materials than the undisputed dockworkers. Thus, the record does not suggest strong functional integration between the bio storage rail employees and the undisputed or locomotive rail employees.

There are factors that weigh in favor of inclusion. While the testimony was limited regarding the skills and job functions of Katzfiasz and Nietfeld, the record reflects that they transfer material from railcars directly to trucks. Thus, their job functions are arguably similar to the undisputed dockworkers. In addition, although paid by a different entity, they receive the same employee benefits as the undisputed employees and locomotive rail employees. In terms of supervision, the record reflects that they are supervised by Sellers and Hall. However, these factors are not sufficient to negate the bio storage rail employees’ distinct community of interest, including the lack of administrative grouping, the lack of job overlap or temporary or permanent interchange with any other employees, lack of contact with the undisputed and locomotive rail employees, and the lack of functional integration. See United Operations, 338 NLRB 123, 125 (2002) (The fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact, or functional integration).

Turning next to Hasenfratz, I find that he shares meaningfully distinct interests that warrant his exclusion from the appropriate bargaining unit. While the Employer claims that he is considered a dockworker, the evidence disclosed that Hasenfratz performs primarily safety and security functions. The evidence does not reflect that he performs functions performed by the undisputed dockworkers. Hasenfratz’s duties are clearly administrative in nature, which is supported by his timesheets and the record testimony. He shares an office with the General Manager and uses a laptop to perform his duties. Unlike the other employees, Hasenfratz was not listed on the SMS training program report. Hasenfratz’s job functions are distinct from the undisputed dockworkers and locomotive rail employees and this factor weighs heavily against inclusion.
Moreover, there was no evidence establishing any interchange, frequent interaction, or functional integration between Hasenfratz and the undisputed employees or the locomotive rail employees, which also weighs heavily against inclusion. In fact, it was former Human Resource Manager Carr, not other dockworkers, who substituted for Hasenfratz in his absence. In addition, the record reflects limited contact between Hasenfratz and the undisputed employees and locomotive rail employees. While Hasenfratz shares common supervision with the undisputed employees and locomotive rail employees and receives the same benefits, these factors do not outweigh the others addressed above.

Similarly, I find that Weisenberger shares meaningfully distinct interests that warrant his exclusion from the appropriate bargaining unit. While the Employer argues that Weisenberger performs dockworker tasks, the record testimony and documentary evidence establishes that Weisenberger spends a significant portion of his time performing administrative functions and intern-type duties. The record reflects that when Weisenberger started with the Employer, he was operating a forklift and cleaning and maintaining equipment. However, when Weisenberger returned in the spring of 2021, he converted to an intern role.

The Employer argues that any differences in job tasks that Weisenberger occasionally performs do not outweigh his strong community of interest with the disputed employees. I disagree and find that other factors weigh in favor of finding that the undisputed employees and locomotive rail employees have a distinct community of interest from Weisenberger. Weisenberger, like Hasenfratz, works in the office trailer with Hall and did not complete the SMS training requirements. In addition, there was limited evidence establishing frequent interaction between Weisenberger and the undisputed employees or the locomotive rail employees. While the Employer argues that Weisenberger has worked on various projects with the undisputed dockworkers, there is minimal evidence in the record concerning the nature of the interactions between him and the dockworkers. In fact, one dockworker testified that on one project, Weisenberger sat in his vehicle and observed. Moreover, there is no evidence that the undisputed dockworkers substitute for Weisenberger in his intern role. While Weisenberger enjoys the same benefits as the other employees and shares supervision, these factors are not sufficient to negate Weisenberger’s distinct community of interest, including the Weisenberger’s distinct job functions, the lack of job overlap and interchange, and lack of contact with the undisputed and locomotive rail employees.

Finally, the record reflects that Brett Breininger and Connor VonSeggern hold the same job classification as the undisputed dockworkers and have the same job functions and skills. They enjoy the same benefits, and are subject to the same terms and conditions of employment, and work under the same supervision as the undisputed employees. Thus, Breininger and VonSeggern should be included in the unit and are eligible to vote, provided they meet the eligibility formula set forth in Davison-Paxon Co., 185 NLRB 21, 23-24 (1970). Regarding Matthew Stevens, it is undisputed that he performed dockworker functions through December 2021. The only issues are whether he is still employed by the Employer and whether he meets the eligibility formula. The record evidence contains conflicting information about whether Stevens resigned his employment. In the event he is employed on the date he casts his ballot and meets the eligibility formula, he is
eligible to vote. If a party believes that he is not eligible on the date he casts his ballot, it may challenge his ballot.

V. DIRECTED UNIT

As explained above, the Employer maintains the employees in this proceeding fall into two classifications: dockworkers and maintenance employees. The Petitioner disputes the Employer’s position that the non-maintenance employees performing the petitioned-for work are classified as dockworkers, arguing that the Employer moved away from the historical contractual craft-type classifications to the general term of dockworker to distance itself from Local 1982.

The Petitioner’s witnesses testified that the work performed by Facility 1 employees has not changed. The Employer agrees that the work has not changed, as the petitioned-for employees continue to operate cranes, forklifts, and other equipment referenced in the Petitioner’s unit description. Instead, the Employer changed the way it classified employees.

I recognize that the Employer failed to introduce any documents, such as payroll records or job descriptions, referencing the non-maintenance employees on the wet side of the dock as dockworkers. Notably, the payroll records and timesheets in the record do not make reference to any of the petitioned-for classifications either. Thus, the record does not support that employees are classified based on the specific equipment that they are operating. In fact, employees may be assigned to operate more than one piece of equipment. Record testimony does reflect that after the Employer withdrew recognition, it made the decision to reference the non-maintenance employees on the wet side as dockworkers. In fact, Carr testified that he was told in 2019 that the Employer would refer to all non-maintenance employees as dockworkers. Regardless of the motivation behind the change, when directing an election, the bargaining unit should be described by employees’ actual job classifications. Thus, I am directing an election in the following unit:

All full-time, regular part-time, and on call maintenance employees and dockworkers performing longshoring, stevedoring and warehousing duties employed by the Employer its Facility 1 location in Toledo, Ohio; excluding all other employees, scale house employees, warehousemen on the east or dry side of Facility 1, office clerical employees, confidential employees, managers, guards, and supervisors as defined in the Act.

VI. METHOD OF ELECTION

The Employer argues for a manual election while the Petitioner advocates for a mail ballot election.

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44 I note that the record does not contain testimony on some of the individual classifications sought by the Petitioner.
45 Any employee who has worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date is eligible to vote in the election.
The employees physically report to the Employer’s facility to perform their work and have been doing so since the onset of the pandemic. The Employer’s facility is located in Lucas County. Most of the employees live in Lucas County. The remaining employees reside in the nearby Ohio counties of Wood, Ottawa, Sandusky, and Fulton and Monroe County in Michigan.

According to the Johns Hopkins’ “COVID-19 Status Report” for Lucas County, Ohio, reported on May 25, 2022, the number of new COVID cases over the last fourteen days has increased. Although the John Hopkins’ data shows zero cases reported on all days except May 13 and May 20, it appears that Johns Hopkins uses publicly released data from the Ohio Department of Health, which reports new Covid-19 metrics on Thursdays. The data shows 824 reported cases on May 13 and 1166 reported cases on May 20, suggesting an increase during the relevant 14-day period.

The 14-day trend in the number of new cases has also increased in the Ohio counties of Wood, Ottawa, Sandusky, and Fulton:

- Wood: 14-day trend in the number of new confirmed cases has increased from 220 cases on May 13 to 269 cases on May 20.
- Ottawa: 14-day trend in the number of new confirmed cases has increased from 67 cases on May 13 to 71 cases on May 20.
- Sandusky: 14-day trend in the number of new confirmed cases has increased from 44 cases on May 13 to 73 cases on May 20.
- Fulton: 14-day trend in the number of new confirmed cases has increased from 40 cases on May 13 to 53 cases on May 20.

In Monroe County, Michigan, the 14-day trend in the number of new confirmed cases has decreased from 523 cases on May 12, 2022 to 520 cases on May 19, 2022.

In addition, as of May 25, 2022, the CDC reported that the 7-day positivity rate in Lucas County was 15.81 percent. In terms of the other counties where employees reside, the positivity rates as of May 25, 2022 are as follows: Wood – 16.91 percent; Ottawa – 8.31 percent; Sandusky – 11.26 percent; Fulton – 8.14 percent; Monroe, Michigan – 23.65 percent.

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48 Twenty-four of the employees live in Lucas County, five reside in Wood County, four reside in Ottawa County, live in Sandusky County, one lives in Fulton County, and four reside in Monroe County, Michigan.
II. BOARD LAW AND GUIDANCE

The Board has delegated its discretion to determine the arrangements for an election to Regional Directors. San Diego Gas & Electric, 325 NLRB 1143, 1144 (1998) (citing NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946); Halliburton Services, 265 NLRB 1154, 1154; National Van Lines, 120 NLRB 1343, 1346 (1958)). This discretion includes the ability to direct a mail ballot election in “extraordinary circumstances,” and the Board recognizes that the ongoing pandemic is indeed extraordinary. Aspirus Keweenaw, 370 NLRB No. 45 (November 9, 2020)

In Aspirus, the Board reiterated its longstanding preference for manual elections while also providing “more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the backdrop of COVID-19.” Id., slip op. at 4. The Board set forth six situations to be considered in assessing the propriety of mail ballots due to the COVID-19 pandemic. The Board did not give increased weight to any of the situations and specifically found that only one situation need be present. Specifically, the Board stated: “If one or more of these situations is present, that will normally suggest the propriety of using mail ballots under the extraordinary circumstances presented by this pandemic.” Id., slip op. at 4. The Board indicated 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 his or her discretion. Id. slip op. at 8. Those six situations are: 50

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 GC Memo 20-10, “Suggested Manual Election Protocols”;

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50 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.

51 On July 6, 2020, the General Counsel issued GC Memo 20-10 to assist Regional Directors in determining when a manual election could be conducted safely. The memo set forth detailed suggested manual election protocols. See also, GC Memo 21-01, dated November 10, 2020, stating “[a]side from elements set forth in GC Memo 20-10, upon which the Aspirus Keweenaw Board relies in part, the instructions set forth in this memorandum supersede all other instructions on the subject.”
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; and/or

6. Other similarly compelling circumstances.

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 held 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 5.52 With respect to the latter, the Board noted that many locales do not report the 14-day testing positivity rate. Often, a 7-day average is more available from local or county health departments, and the Board has found such metrics to be sufficient. See, Sysco Central California, Inc., 32-RC-272441, fn. 1 (September 28, 2021) (unpublished) (using 7-day percent positive date from the county where employer’s facility is located as justifying the direction of a mail-ballot election); 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). The Board has held that is also appropriate to consider data from other areas if part of the workforce comes from locations outside the county where the facility is located. Aspirus, slip op. at 8.

Regarding situation 5, the Board in Rush University Medical Center, 370 NLRB No. 115, slip op. at 2 (April 27, 2021), recently clarified its direction and stated that Regional Directors:

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.

III. POSITIONS OF THE PARTIES

The Employer maintains that Aspirus does not mandate that mail ballot elections be directed if any of the six situations are present. Rather, the Employer argues that the Board ensured that its decision would not be interpreted as establishing bright line rules usurping from Regional Directors the discretion to determine the appropriate method for conducting elections.

The Employer maintains that most of the employees in the petitioned-for unit are fully vaccinated, including those who were vaccinated at Facility 1 by Lucas County Health Department personnel. The Employer also argues that if employees can work alongside each other, takes

52 In Aspirus, the Board considered the 5 percent positivity rate threshold articulated by the World Health Organization in its guidance for reopening and decided to apply the 5 percent standard in analyzing the appropriateness of a mail ballot versus manual election.
breaks together, and eat meals with each other in the indoor break rooms, there is no credible reason they could not vote alongside each other.

The Employer further argues that *Aspirus* is outdated because it issued before the availability of COVID-19 vaccines and was decided when hospital and death rates were much higher than they are today. The Employer notes that the Omicron variant is resulting in less severe infections than prior variants of COVID-19. Thus, the Employer maintains that given the current state of the pandemic, vaccine availability, and the relaxation of government regulations at all levels, noting in particular the lifting of face covering requirements in public spaces, there is no reason that the election cannot be conducted manually, which is the preferred balloting method. The Employer argues that even if the positivity rate is above 5%, the Employer has proposed extensive precautions and safeguards to ensure that the election is conducted safely.

The Employer has agreed to comply with all COVID safety protocols as set forth in GC 20-10. The Employer offered to erect a tent at Facility 1 so that the election could be held outdoors. The Employer also proposed that employees be released to vote in phases to reduce contact between employees, observers, and Board Agents conducting the election.

The Petitioner, on the other hand, argues that the safest method of conducting the election due to the ongoing pandemic is by mail ballot. In support of its position, the Petitioner states that the positivity rate in Lucas County is above the 5 percent threshold established in *Aspirus*. In addition, the Petitioner maintains that the need for a mail ballot election is underscored by the fact that an employee died in early February 2022 from COVID-19.

I have considered the parties’ positions and I find that a mail ballot is appropriate in this case. With respect to situations 1, 3, 4, and 5, the Regional office responsible for conducting this election is not in a mandatory telework status, the Employer’s proposed election site does not appear to violate any mandatory state or local health orders, the Employer has committed to abide by the protocols set forth in *GC Memorandum 20-10*, and there is no current COVID-19 outbreak at the facility. However, for the reasons addressed below, I find that the presence of situation 2 makes conducting a mail-ballot election the most appropriate and responsible method for conducting a secret ballot election at this time.

Turning to situation 2, the 14-day trend in the total number of new COVID cases in Lucas County is increasing and the positivity rate is well above 5 percent. According to the John Hopkins “COVID-19 Status Report” for Lucas County, the data shows that the 14-day trend in the number of new confirmed cases has increased from 824 reported cases on May 13, 2022 to 1166 reported cases on May 20, 2022. In addition, the 7-day positivity rate in Lucas County is 15.81 percent. The 14-day trend in the total number of new COVID cases in the other Ohio counties where employees reside is also increasing and the positivity rates in all counties where employees reside are all above 5 percent.

The Employer argues that *Aspirus* is outdated, in part, because the decision predates the release of vaccines. However, the Board has continued to rely on *Aspirus*, including the 5 percent positivity rate threshold, even since the availability of vaccines. While many Americans have been vaccinated, the CDC continues to track positivity rates to assess the likelihood of transmission in
the community. Thus, while the vaccines have improved conditions around the country, elections continue to be directed based on the Board’s guidance set forth in *Aspirus*.

Accordingly, given the existence of situation 2, I find that a mail-ballot election is appropriate in this case.

**VII. CONCLUSION**

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

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

2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.53

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

4. The parties stipulated, and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.

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

6. The following employees of the Employer, as stipulated by the parties, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

   **Included:** All full-time, regular part-time, and on call 54 maintenance employees and dockworkers performing longshoring, stevedoring and

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53 The parties stipulated, and I find, that Midwest Terminals of Toledo International, Inc. (Employer), an Ohio corporation, provides longshoring, stevedoring and warehousing services to shipping companies engaged in interstate and foreign commerce from its 3518 Saint Lawrence Drive, Toledo, Ohio facility, the sole facility involved herein. Annually, the Employer, in conducting its business operations described above, derives gross revenues in excess of $500,000 for these services.

54 Any employee who has worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date is eligible to vote in the election.
warehousing duties employed by the Employer its Facility 1 location in Toledo, Ohio

Excluded: All other employees, scale house employees, warehousemen on the east or dry side of Facility 1, office clerical employees, confidential employees, managers, guards, and supervisors as defined in the Act.

OTHERS PERMITTED TO VOTE: The parties agree that Samuel A. Dumas, Scott D. Fisher, Ryan Richardson, Jordan C. Salhoff and David H. Whetsel may vote in the election, but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

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 Longshoremen’s Association.

A. Election Details

The election will be conducted by United States mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 4:45 p.m. (EDT) on Monday, June 13, 2022, by personnel of the National Labor Relations Board, Region 8, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, June 20, 2022, or otherwise requires a duplicate mail ballot kit, should communicate immediately with the National Labor Relations Board by calling the Region 8 Office at (216) 522-3715.

The mail ballots will be commingled and counted by the Region 8 office at 2:00pm on July 13, 2022 by videoconference. In order to be valid and counted, the returned ballots must be received by the Region 8 office prior to the counting of the ballots. A meeting invitation for the videoconference will be sent to the parties’ representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.
B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending May 27, 2022, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election. In a mail-ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board’s designated office.

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, and, in a mail-ballot election, before they mail in their ballots to the Board’s designated office; (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 June 1, 2022. 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

55 As noted above, the parties stipulated to use of this formula, as set forth in Davison-Paxon Co., 185 NLRB 21, 23-24 (1970), to determine voter eligibility. At the hearing, the Petitioner argued that for purposes of the eligibility formula, the payroll period ending date should be the date preceding the date of the hearing. The payroll period ending date used in directing an election is the latest completed payroll period preceding the date of issuance of the Notice of Election. I see no reason to deviate from the Board’s usual practice.
The list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list must be electronically filed with the Region by using the E-filing system on the Agency’s website at www.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 accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board’s Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board’s Rules and Regulations.
Midwest Terminals of Toledo International, Inc.
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A request for review must be E-Filed through the Agency’s website and may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency’s E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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

Dated: May 27, 2022

IVA Y. CHOE
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
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