

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

STERICYCLE, INC.

Employer

and

**Cases 04-RC-260408 and
04-RC-260851**

**INTERNATIONAL ASSOCIATION OF SHEET
METAL, AIR, RAIL AND TRANSPORTATION
WORKERS, LOCAL UNION #44**

Petitioner

**ACTING REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTIONS**

Stericycle, Inc. (the Employer) seeks dismissal of both petitions at issue in this matter on the grounds that neither petitioned-for unit is appropriate, the first because the employees in the proposed unit lack a community of interest with each other, and the second because it comprises a unit solely of managerial employees. The Employer next argues that the election rules in effect when the petitions were filed are invalid, requiring dismissal. Finally, the Employer contends that, should I disagree with it on all three of those issues, the directed elections should be conducted manually. Because I find that both units are appropriate, the election rules are valid, and a manual election would not be proper in either unit, below I direct two mail ballot elections in the petitioned-for units.

The Employer provides medical waste and collection treatment services to commercial customers, including hospitals, throughout the United States, including Central and Eastern Pennsylvania. International Association of Sheet Metal, Air, Rail and Transportation Workers, Local Union #44 (Petitioner) seeks to represent two units of approximately eight onsite service specialists (service specialists) in Case 04-RC-260408, and approximately seven route managers in Case 04-RC-260851, all employed by the Employer at its Hanover Township, Pennsylvania facility (Hanover Township facility). With respect to the service specialists, the Employer relies on the scattered nature of their work locations to dispute the appropriateness of the petitioned-for unit. As to the route managers, the Employer asserts that they exercise managerial discretion requiring their exclusion from coverage under the National Labor Relations Act (Act).¹

¹ The initial petition in Case 04-RC-260408, filed on May 15, 2020, sought a unit of both route managers and service specialists. The Employer timely filed a Statement of Position in response to the petition. On May 27, 2020, Petitioner filed an amended petition in case 04-RC-260408 excluding the route managers from the unit, and filed a new petition in case 04-RC-260851 seeking a unit of route managers. On June 3, 2020, the Employer timely filed Statements of Position in

Additionally, the parties disagree as to the mechanics of any directed election. Petitioner urges that both elections should be conducted by mail so as not to endanger election participants due to the COVID-19 pandemic. The Employer argues that manual elections are appropriate and can still be conducted safely.²

These cases were consolidated for a hearing held before a Hearing Officer of the Board on June 16, 2020³, during which the parties entered into several stipulations, presented evidence and stated their respective positions for both cases on the record. Additionally, the parties were permitted to file post-hearing briefs. Having reviewed the stipulations, evidence, and arguments presented by the parties as well as applicable legal precedent, I find that both petitioned-for units are appropriate under extant Board law, and I will direct an election for both units.

Lastly, although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Acting Regional Director, the parties were permitted to present their positions as to the mechanics of this election by oral argument at the hearing and in post-hearing briefs. I have carefully considered those positions and arguments and, for the reasons discussed below, I find that prompt mail ballot elections are appropriate given the extraordinary circumstances presented by the continuing COVID-19 pandemic, and the scattered nature of the service specialists' work.

I. THE APPROPRIATENESS OF THE PETITIONED-FOR UNITS

a. Factual Overview

i. The Employer's operations

As noted above, the Employer provides medical waste and collection treatment services to commercial customers, including hospitals. Medical facilities are required by law to properly

response to both the amended petition and new petition. At hearing, Petitioner argued that the Employer was foreclosed from advancing its current defenses to the petitions because the Employer did not raise them in the Statement of Position it filed in response to the initial petition. I find no merit in Petitioner's objection. Section 102.63(b)(1) of the Board's Rules and Regulations permits the filing of an amended Statement of Position upon a showing of good cause, a standard satisfied in Case 04-RC-260408 by the petition's amendment. Further, Respondent not only was authorized but was required to file a new Statement of Position in Case 04-RC-260851 under Section 102.63(b)(1).

² The Employer also asserts that the Board's Rules and Regulations governing representation proceedings that were in effect when the petitions were filed are unconstitutional as well as a violation of the law. In advancing this challenge to the Board's Representation rules, the Employer principally relies on Board Member Miscimarra's dissent in *Pulau Corporation*, 363 NLRB No. 8, slip op. at 1 (2015). As detailed below, I reject this argument.

³ Herein, all dates occurred in 2020 unless otherwise noted.

dispose of sharp instruments, defined by the Occupational Safety and Health Administration as a contaminated object that can penetrate the skin, such as needles and syringes. Proper disposal of such instruments in specially designed sharps containers is necessary to protect the safety of healthcare workers, patients, and visitors to the facilities. The Employer assists facilities with on-site collection of sharps and pharmaceutical/medical waste, and with transporting that waste away from the facility.

Employees based at the Hanover Township facility, the only facility involved herein, primarily service customers in Central and East Central Pennsylvania, a territory that runs 165 miles from west to east and 50 miles north to south. Specifically, the Employer provides service to the following medical facilities:⁴ UPMC Williamsport in Williamsport (UPMC Williamsport); Soldiers and Sailors Memorial Hospital in Wellsboro (Soldiers and Sailors); Muncy Hospital in Muncy (Muncy); UPMC Divine Providence Hospital in Williamsport (UPMC Divine); Geisinger Jersey Shore Hospital in Jersey Shore (Jersey Shore); Moses Taylor Hospital in Scranton (Moses); Scranton Regional Hospital in Scranton (Scranton Regional); Lehigh Valley Hazleton Hospital in Hazleton (Lehigh Valley); Geisinger Wilkes-Barre South Hospital in Wilkes-Barre (Geisinger Wilkes-Barre); Commonwealth Health Berwick Hospital in Berwick (Berwick); Geisinger Woodbine Surgery Center in Woodbine (Woodbine); Danville Medical Center in Danville (Danville); Wilkes-Barre General Hospital in Wilkes-Barre (Wilkes-Barre General); Pocono Medical Center in East Stroudsburg (Pocono Medical Center); Geisinger Community Medical Center in Scranton (Geisinger Community); St. Luke's Monroe in Bartonsville (St. Luke's); Geisinger Bloomsburg in Bloomsburg (Geisinger Bloomsburg); and Geisinger Wyoming Valley in Wilkes-Barre (Wyoming Valley). The services to be provided by the Employer at each facility are outlined in a contract with that facility.

The Hanover Township facility includes offices and a warehouse with at least five full-size dock doors. Those doors are used to load and unload the Employer's 26-foot box trucks driven by route managers during the performance of their work. The route managers report to the Employer's facility daily.

ii. On-site service specialists - Case 04-RC-260408

The eight on-site service specialists work at the customers' facilities where they are tasked with collecting and replacing sharps containers as well as pharmaceutical and controlled substance waste. In contrast to route managers, they report directly to their individually assigned facilities each day. According to the Employer's job description for the position, service specialists travel between customers' healthcare facilities to proactively monitor, collect, and exchange waste containers for various Stericycle programs and services, including, among others, Sharps Management Service, Pharmaceutical Waste and Document Shredding.⁵

⁴ All of the facilities are located in Pennsylvania.

⁵ The evidence reflects that while all eight on-site service specialists are involved with the collection and exchange of sharps and waste, only one service specialist performs document shredding, which takes place at Soldiers and Sailors.

The service specialists share several common terms and conditions of employment: they are all supervised by Jennifer Boswell, the Employer's sharps service supervisor; they wear nearly identical Employer uniforms; they have the same opportunities for advancement; they are offered the same benefits; they are paid on an hourly basis; they are guaranteed a minimum of eight hours of work each day; and they receive the same online training materials.

Additionally, all service specialists use the same application, or app—the SPM3 app—on their Employer-issued cellphone. They use the app to remotely clock in and out at their assigned customer facilities, to receive notice of appointments at those facilities, to log their arrival and departure times for each appointment, and to log that their assigned work has been completed at the end of the workday. At the same time, the day-to-day services performed by the service specialists are determined by each facility's environmental services director, and the service specialists use badges provided by each respective customer facility.

All of the service specialists have specific customers assigned to them. One service specialist services UPMC Williamsport, Soldiers and Sailors, Muncy, UPMC Divine, and Jersey Shore. A different service specialist is assigned to service Moses, Scranton Regional, Lehigh Valley, Geisinger Wilkes-Barre, Berwick, and Woodbine. Danville, an exceedingly large medical campus, is serviced by two service specialists⁶ who have no other assigned customer. Three other service specialists have only one customer each—one is assigned to Wilkes-Barre General, another is assigned to Pocono Medical Center, and the third is assigned to Wyoming Valley. The last service specialist is assigned to service Geisinger Community, St. Luke's, and Geisinger Bloomsburg.

The Employer also uses two of the eight service specialists to work as floaters on days when they do not have assigned appointments at their respective assigned facilities. The floaters cover absences of other service specialists due to vacation or sickness at their respective customer facilities. If a service specialist misses work and the floaters are not available to fill in, Boswell will cover the absence and perform the services herself.

Service specialists' wages and hours can differ, but not materially. Wage rates range from 14 to 24 dollars per hour, depending on the employee's length of service with the Employer. While service specialists are able to determine their own hours each day and need not adhere to a set schedule, the particular days they are to perform services for each client are dictated by the contract between the Employer and client.

iii. Route managers - Case 04-RC-260851

The Employer's seven route managers are in the Employer's transportation department, where they report to Transportation Supervisor Douglas Miller. According to their job description, route managers are responsible for servicing assigned large and small quantity customers by picking up and safely transporting waste in accordance with federal, state, and local rules and

⁶ Although they work at the same facility, their supervisor testified that they work different schedules and in different areas of the complex.

regulations. Before they can transport waste, route managers must ensure that customers have packaged and prepared the waste consistent with applicable rules and regulations.

Each day, route managers leave the Employer's facility in a 26-foot box truck filled with empty, clean product that they deliver to assigned customer healthcare facilities, including hospitals, doctors' offices, and other medical facilities.⁷ They also pick up properly packaged waste from customers and return that waste to the Employer's facility where it is loaded onto different trucks by other employees and shipped to various locations.

Route managers are paid hourly, with wage rates ranging from 19 to 25 dollars per hour. They are guaranteed eight hours of pay daily regardless of how quickly they finish, so long as they have completed all of their assignments. All route managers have an Employer-provided cellphone and a corporate communication device, called a PDT, which is a computer they use to work while in the field.

Route managers exercise some discretion in performing their work. They may refuse to pick up waste from a customer if the waste is improperly packaged or if there is not enough waste to fill the box, and they have authority to decide how much product to drop off at particular customers based on each customer's needs. They are permitted to adjust their schedules to accommodate customer needs and can choose when to take their lunch and break times. While their initial routes are scheduled by Employer dispatcher Shannon Zippilli, route managers are permitted to change the order in which they complete their route assignments. And although the route manager job description indicates that they must get prior approval from the transportation supervisor before working overtime, Miller testified that in practice, route managers may work overtime without prior approval.

Route managers do not have the authority to hire, fire, discipline, suspend, assign work, direct the work of others, transfer, layoff or recall, adjust grievances, or recommend any of the preceding actions, nor do they attend supervisor meetings. They do not have the authority to make purchases on behalf of the Employer, although they can make recommendations on safety ideas, safety concerns, and product ideas. They do not have access to employee personnel files, nor do they have access to other confidential management information.

b. Positions of the Parties

i. Employer's positions as to the proposed units

The Employer maintains that the service specialists in Case 04-RC-260408 lack a sufficient community of interest to constitute an appropriate unit. In support, the Employer cites several factors. First, the service specialists report to work at their individually assigned customer facilities, many geographically remote from each other, and not to the Employer's facility. Second,

⁷ Although the record isn't entirely clear on this point, there are two route managers who appear not to have regular daily routes. One of them covers for the other drivers as needed; the other is involved in loading trucks and safety matters.

the service specialists' performance of services is overseen by the respective environmental services directors of their assigned facilities. Third, each facility issues its own individual badge for the service specialist assigned to the facility, and each facility has its own set of rules and policies that service specialists must follow, such as emergency evacuation procedure and sexual harassment training. Finally, there is no interchange among service specialists, there are no transfers between assignments, there is no daily contact among service specialists, and service specialists do not rely on each other to complete their individual daily assignments. Based on the foregoing, the Employer contends that each service specialist constitutes their own one-person unit, and under extant law, one-person units are not considered by the Board to be appropriate for collective bargaining.

Regarding the route managers that are subject of Case 04-RC-260851, the Employer argues that they possess managerial authority and therefore are not protected by the Act, making the petitioned-for unit inappropriate. As support for its view, the Employer emphasizes the route managers' authority to reject medical waste from facilities that have not packaged the waste properly and their stated ability to provide more or less product to customers based on their independent judgment, because such decisions can have a financial impact on the Employer's business. Additionally, the Employer contends that route managers have the ability to choose the sequence by which they will make their assigned customer appointments, thus evincing managerial status. The Employer also points to its recent decision, at the suggestion of a route manager, to purchase a particular object to better secure the facility doors.

ii. Petitioner's positions as to the proposed units

Contrary to the Employer, Petitioner argues that service specialists share a community of interest, making the petitioned-for unit in Case 04-RC-260408 appropriate. According to Petitioner, the service specialists involved herein are all assigned to the Employer's facility, supervised by Boswell, and have identical working conditions and access to the same benefits. When one service specialist is absent, a floater – one of the other unit service specialists – is able to cover that missed assignment, suggesting the work is interchangeable. Additionally, the service specialists all use the same methods for clocking in and out of their shifts, and all have the same Employer-provided equipment.

Petitioner further contends that the route managers are not managerial and, accordingly, that the petitioned-for unit in Case 04-RC-260851 is appropriate. Petitioner argues that route managers do not possess any authorities that are managerial in nature. In that regard, Petitioner cites to record evidence showing that route managers are assigned to particular routes, their start times are based on those routes, and the route managers' work is contractually determined between the Employer and the customer. The route managers have no role in negotiating those contracts. Thus, Petitioner asserts the unit of route managers is appropriate for collective bargaining.

c. Board Law

i. The Board's community-of-interest standard applicable to the petitioned-for unit in Case 04-RC-260408

The Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. *Boeing Co.*, 337 NLRB 152, 153 (2001). In determining whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See, e.g., *Wheeling Island Gaming*, 355 NLRB 637 (2010). A major determinant in an appropriate unit finding is the community of duties and interests of the employees involved. In evaluating the community of interest among a petitioned-for unit of employees, the Board, in each case, must 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, Inc., 365 NLRB No. 160, slip op. at 13 (2017), citing *United Operations*, 338 NLRB 123 (2002).

Moreover, the Board is reluctant to leave a single employee out of a unit where that would result in the employee being unable to exercise the Section 7 right to representation. See *Klochko Equipment Rental*, 361 NLRB No. 49, slip op. at 1 fn. 1 (2014); *Vecellio & Grogan*, 231 NLRB 136, 136–137 (1977); *Victor Industries Corp. of California*, 215 NLRB 48, 49 (1974).

ii. The Board's treatment of "managerial employees" as it applies to the route managers in Case 04-RC-260851

While the Act does not make specific reference to "managerial employees," the Supreme Court determined that this category of employees is excluded from the protection of the Act. *Yeshiva University*, 444 U.S. 672 (1980). Managerial employees include

those [employees] who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer. These employees are "much higher in the managerial structure" than [the supervisors] explicitly mentioned by Congress, which "regarded [managers] as so clearly outside the Act that no specific exclusionary provision was thought necessary." Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents

management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

Id. at 682-83 (internal citations omitted). The definition of managerial employee has been construed narrowly because employees who fall within that category are denied substantial statutory rights. *Curtis Industries*, 218 NLRB 1447, 1448 (1975). The party asserting managerial status bears the burden of proof. *Republican Co.*, 361 NLRB 93, 96 (2014).

Exercise of some discretion does not, by itself, prove that a category of personnel are managers. In *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971), the Board found certain employees were not managers even though they made “some decisions and exercise[d] some judgment” because they only did so “within established limits set by higher management.” The Board found that those employees played “no part in the formulation or effectuation of the Employer’s policies.” *Ibid.* See also *George L. Mee Memorial Hospital*, 348 NLRB 327, 333 (2006); *S. S. Joachim & Anne Residence*, 314 NLRB 1191 (1994); *Sampson Steel & Supply, Inc.*, 289 NLRB 481, 482 (1988); *Central Maine Power Co.*, 151 NLRB 42, 45 (1965); *American Radiator & Standard Sanitary Corp.*, 119 NLRB 1715, 1717 (1958).

d. Application of Board Law to the Facts

i. The Employer’s argument that the Representation Rules are invalid has been rejected by the Board

As an initial matter, the Board has already addressed and rejected the Employer’s argument that the Representation Rules applicable to these petitions are invalid. In *Pulau Corp.*, 363 NLRB No. 8 (2015), the Board denied an employer’s requests for review of a Regional Director’s Decision and Direction of Election and Decision and Certification of Representative, which were based in part on the employer’s argument that the Representation Rules were facially invalid. The Board held that the employer’s arguments were fully addressed in the Board’s rulemaking proceeding. As I am bound by the Board’s decision, I reject the Employer’s arguments here concerning the facial validity of those rules. I will now discuss the appropriateness of the petitioned-for units.

ii. The on-site service specialists share a community of interest, thus making the petitioned-for unit in Case 04-RC-260408 appropriate for purposes of collective bargaining

Applying the Board’s community-of-interest standard, I find the petitioned-for unit of service specialists based at the Employer’s facility to be appropriate because those employees are readily identifiable as a group and share a community of interest given the totality of their work.

According to the service specialist job description, all service specialists are organized in the same department—the Employer’s In-Service Department—where they report to the same supervisor, Jennifer Boswell. Further, even though each service specialist may work at a different client medical facility, the evidence overwhelmingly shows that they all share the same skills, training, and job functions and perform the same work at their respective assigned facilities. Each

service specialist is tasked with proactively monitoring, collecting, and exchanging waste containers at their individually assigned facilities. They receive the same training on how to perform those duties, including dealing with bloodborne pathogens and packaging medical waste.⁸ This commonality in skills, training, job functions and work is underscored by the fact that two service specialists act as floaters and are able to fill in at other medical facilities to cover absences.

In arguing that the service specialists do not share common training, skills, work and supervision, the Employer relies heavily on the fact that each of them is subject to their respective client facilities' individual policies, practices, training, and issuance of facility-specific badges. I am not persuaded by that argument. While it may be true that each client facility has different protocols and practices that are unique to the facility, and that the services being performed by each service specialist are overseen by the particular facility's environmental services director, that does not detract from the substantial record evidence that the service specialists' terms and conditions of employment are governed by the Employer and Boswell's supervision. If they need to miss work, service specialists call Boswell, not the client facilities where they perform services. Moreover, when one client facility asked Boswell to remove the service specialist assigned to it, Boswell did so but did not terminate that employee, showing that the client's request to have the service specialist removed from the assignment did not jeopardize that employee's standing with the Employer. Moreover, when a service specialist must miss work, the employee's skills, training, and job functions are so transferrable that the Employer is able to use two floaters to fill in and cover the absences, even though those floaters do not regularly work at the particular client facilities needing coverage. The use of floaters to cover absences evinces at least some employee interchange.

Furthermore, while there is no evidence in the record of functional integration with other employees, nor evidence of frequent contact between service specialists, the record does show that all service specialists have the same terms and conditions of employment, including access to the same benefits. Wage rates differ among service specialists, but they are all paid on an hourly basis and the rates differ based only on level of experience and tenure with the Employer. See *K. Van Bourgondien & Sons*, 294 NLRB 268, 274 (1989) (differing wage rates not evidence of a lack of community of interest where the differences depend on tenure with the employer). All service specialists have access to the same level of benefits, including sick and vacation leave. All are issued Employer cellphones which they use to clock in and out of their shifts. Even though service specialists may work different hours during their workdays, all are guaranteed eight hours of pay daily.

Lastly, while not dispositive of the issue raised in this case, it is worth emphasizing that the Employer's position would necessarily create eight separate one-person bargaining units. As a result, each service specialist involved herein would be unable to exercise the Section 7 right to seek representation. When evaluating the appropriateness of a petitioned-for unit, the Board is reluctant to leave a single employee out of a proposed unit, let alone eight individual employees as the Employer contemplates here. As service specialists are assigned to individual client

⁸ The Employer recently implemented COVID-19 specific training, and all service specialists were required to complete the training.

facilities and there is no evidence that any of them work alongside each other or any other of the Employer's employees on a daily basis, these employees, if the Employer's position were found to have merit, would never have the opportunity to exercise their Section 7 right to representation.

On balance, given my consideration of all the above factors, I conclude that the record establishes that the service specialists employed out of the Employer's facility share a community of interest sufficient to make the petitioned-for unit in Case 04-RC-260408 appropriate for purposes of collective bargaining, and I will direct an election in that unit.

iii. Route managers are not managerial employees under extant law, and are thus appropriate as a unit for purposes of collective bargaining in Case 04-RC-250851

I find that the Employer has not met its burden to establish that route managers are managerial employees such that they should be precluded from protection of the Act. On the contrary, I conclude that route managers are decidedly not managerial employees, thus rendering the petitioned-for unit in Case 04-RC-250851 appropriate for purposes of collective bargaining.⁹ The record is devoid of evidence that the route managers formulate and effectuate management policies, or have any involvement at all in that process. Moreover, there is no evidence that route managers are "aligned" with management, or that they exercise anything more than limited discretion—there is no evidence that the discretion exercised by route managers rises to the level contemplated by extant law as that which cloaks an employee with managerial status. Also, route managers are paid hourly, not salary, and are paid overtime for any time worked above eight hours each day.

The Employer argues that the route managers are managerial in nature because they exercise discretion to determine the amount of product they provide to customers and to refuse to pick up waste if that waste is improperly packaged or insufficient to fill a box, and to sequence the stops in their daily routes in any order they choose. I do not agree. The route manager job description makes clear, as did the testimony of Transportation Supervisor Douglas Miller, that route managers must communicate to Miller any changes to route pickups, including address changes, customers not having waste ready for pickup, re-routes, and adjustments in container sizes, prior to any decision being made to resolve the issue. The job description specifically instructs that route managers must report such issues to Miller "for resolution."

Furthermore, the record establishes that federal, state, and local rules and regulations govern the transport of medical and biohazardous waste. Accordingly, while route managers have the discretion to refuse to accept a client's medical waste, they do so because federal, state, and local rules and regulations mandate it. Likewise, the Employer requires route managers to adhere to applicable government regulations by transporting customer medical waste only if it can be done safely. Thus, if route managers refuse a particular medical waste pickup, they are merely doing so within the confines of established Employer policy and government regulation—they are not doing so independent of Employer policy.

⁹ The Employer challenges the appropriateness of this petition solely on the grounds that the route managers are managerial employees.

Finally, route managers' ability to sequence the stops in their individual daily routes is not indicative of managerial status. The Employer sets the routes assigned to each route manager; route managers do not choose their own routes or customers. Further, the Employer requires the route managers to plan their daily schedule based on customer needs, and to sequence their routes to minimize productivity costs as well as vehicle maintenance costs. Accordingly, route managers are simply following Employer-established practices and policies when they sequence their routes in the most efficient and customer-focused manner. They are not exercising discretion independent of Employer policy, nor are they formulating and effectuating Employer policy in how they set the order of their appointments.

Based on the foregoing, I find that route managers are not managerial employees, and thus the petitioned-for unit in Case 04-RC-260851 is appropriate for purposes of collective bargaining, and I will direct an election in that unit.

II. TYPE OF ELECTION: MANUAL OR MAIL

a. Factual Overview

i. The COVID-19 Pandemic Generally

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been over 3.4 million confirmed cases of COVID-19 in the United States, and more than 136,000 deaths.¹⁰ Beginning in mid-June, the United States has experienced a significant upward surge in the number of new cases daily, with new record highs achieved in six of the last ten days, peaking at nearly 60,000 new cases on July 10. I also take administrative notice of the information, guidance and recommendations of the Centers for Disease Control and Prevention (CDC), an agency of the United States Government.¹¹ The CDC recommendations for dealing with this public health threat include, among others, the avoidance of large gatherings, the use of cloth face coverings, and social distancing. The CDC further states that the virus can survive for a short period on some surfaces, and that it is possible to contract COVID-19 by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes.¹² To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol."¹³ Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its "Considerations for Election Polling Locations and Voters" states that

¹⁰ *Coronavirus in the U.S.: Latest Map and Case Counts*, NEW YORK TIMES, July 15, 2020 <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

¹² <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself>.

¹³ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

officials should consider alternative voting methods where permitted, and that “[i]ncreasing mail voting...could help mitigate the impacts of COVID-19...”¹⁴

ii. The COVID-19 Pandemic in the Commonwealth of Pennsylvania

In addition to the federal recommendations described above, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. Pennsylvania imposed strict guidelines early in the pandemic. In March, Pennsylvania issued a Proclamation of Disaster Emergency, directed the closure of all non-life sustaining businesses, and ultimately issued a statewide Stay-at-Home order.¹⁵

On April 20, Pennsylvania Governor Tom Wolf announced a plan for the phased reopening and easing of restrictions using a system of colored phases – red, yellow, and green – to apply to individual counties as they reached milestones in lowering their incidence of positive cases.¹⁶ As of July 13, all Pennsylvania counties have moved into the “green phase” of reopening.¹⁷ Under that phase, all businesses must continue to adhere to both CDC and Pennsylvania Department of Health guidance. Public health experts continue to advise individuals to avoid unnecessary social contact and to conduct business remotely when possible in order to avoid spikes in cases in the coming weeks.¹⁸ Congregate care restrictions remain in place, and hospital restrictions are determined by the individual facilities.

Pennsylvania currently ranks tenth in the nation in confirmed COVID-19 cases with 96,671 cases and 6,931 deaths.¹⁹ Luzerne County, where the Employer’s facility is located, has accounted for 3017 of those confirmed cases and 181 of those deaths.²⁰ Nearby Lackawanna and Monroe Counties, where the Employer does business, have accounted for 1761 and 1471 of those confirmed cases, respectively.²¹

¹⁴ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

¹⁵ The first Stay-at-Home Order issued on March 23 and was based upon community-specific incidence of positive testing, included seven counties in urban areas. Luzerne County was made subject to the Order on March 27.

¹⁶ <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

¹⁷ The Employer’s facility, along with the customer facilities described herein, are located in the following Pennsylvania counties: Columbia, Lackawanna, Luzerne, Lycoming, Monroe, Montour, Tioga, and York.

¹⁸ Joel Achenbach, *Coronavirus hot spots erupt across the country; experts warn of second wave in South*, WASHINGTON POST, May 20, 2020, https://www.washingtonpost.com/health/coronavirus-hot-spots-erupt-across-the-country-experts-warn-of-possible-outbreaks-in-south/2020/05/20/49bc6d10-9ab4-11ea-a282-386f56d579e6_story.html.

¹⁹ <https://www.cdc.gov/covid-data-tracker/#cases>

²⁰ <https://www.cdc.gov/covid-data-tracker/#county-map>

²¹ <https://www.cdc.gov/covid-data-tracker/#county-map>

Although Pennsylvania decreased its rate of new cases substantially from its peak, in the past three weeks it has experienced an upward trajectory in the number of new cases daily. It is among 42 states currently experiencing increases in cases.²² Many of these states, such as California, had previously loosened restrictions, as cases in those states had seemingly decreased.²³ In the past two and a half weeks, the United States has set multiple daily records for the number of new COVID cases, and on July 10, the United States reported an all-time high of 68,241 new cases.²⁴ In Pennsylvania, Luzerne County itself is one of only 19 counties that have seen an increase in COVID cases over the last 14 days, including bordering counties Lackawanna and Monroe where petitioned-for unit employees work.²⁵ Those 19 counties have contributed to an overall increase in the number of COVID cases in Pennsylvania in the past week.²⁶

iii. COVID-19 and Healthcare Facilities

The record is clear that the petitioned-for unit employees work in healthcare facilities, including hospitals and other medical facilities. Thus, they are in frequent contact with healthcare workers who are among employees at the highest risk of contracting COVID-19. As of May 24, an estimated 168,000 health care workers in the United States had the virus. Of those, Pennsylvania ranked among the states with the highest number of reported cases with 4,600.²⁷ As of mid-June, at least 679 healthcare workers in the United States had died from the virus.²⁸ And as the numbers of new cases have spiked in recent weeks throughout the United States, healthcare workers again find themselves without sufficient PPE, leaving them more susceptible to COVID-19 infection.²⁹ According to the United States Department of Labor, Occupational Safety and Health Administration, even healthcare workers who provide care to members of the general public not known or suspected to have COVID-19 are still at medium risk of infection.³⁰

b. Position of the Parties

The Employer argues that a manual election is still appropriate in these cases, citing the Board's longstanding policy favoring manual elections. In support, the Employer asserts that Luzerne County, where the Employer's facility is located, has entered the "green Phase" of the Commonwealth of Pennsylvania's economic reopening plan, and thus is in an area returning to a

²² <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>, *supra*.

²³ John Myers, Taryn Luna and Phil Willon, Newsom eases California reopening rules, allowing more counties to restart their economies, L.A. TIMES, May 18, 2020, <https://www.latimes.com/california/story/2020-05-18/newsom-reopening-coronavirus-benchmark>

²⁴ <https://www.nytimes.com/2020/07/10/world/coronavirus-updates.html>

²⁵ <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

²⁶ <https://www.npr.org/sections/health-shots/2020/03/16/816707182/map-tracking-the-spread-of-the-coronavirus-in-the-u-s>

²⁷ <https://www.registerednursing.org/cdc-estimates-nurse-healthcare-worker-covid19-cases-likely-understated/>

²⁸ <https://www.theguardian.com/us-news/2020/jun/17/covid-19-coronavirus-healthcare-workers-deaths>

²⁹ <https://www.washingtonpost.com/health/2020/07/08/ppe-shortage-masks-gloves-gowns/>

³⁰ www.osha.gov/SLTC/covid-19/healthcare-workers.html

“new normal.” Moreover, the Employer contends that a mail ballot in these cases will disenfranchise voters as fewer employees will vote, and further claims that the U.S. mail is not reliable.

Lastly, the Employer argues that the necessary protocols to ensure social distancing, a clean and sanitized voting location, and the proper donning of PPE either will be, or already have been, implemented to secure the safety of manual elections. In that regard, the Employer proposes using its large warehouse for the election to provide for proper ventilation and social distancing. Additionally, it assures that tables can be set up to guarantee six-foot social-distancing margins, as can signs or marks on the floor, and that all objects used during the election, such as observer buttons, voting booth, and writing utensils, either be sanitized or replaced after use. With respect to the service specialists, the Employer suggests a “roving” ballot box, wherein the Board Agent will travel among customer locations to allow each service specialist to cast a vote.

Conversely, Petitioner argues that a mail ballot is appropriate for both petitioned-for units. Citing the daily increase in COVID-19 cases, Petitioner contends that mail ballot elections are necessary given the health risks posed by the pandemic. Noting that the Board has permitted mail ballot elections in appropriate circumstances, Petitioner asserts that the current environment is one that necessitates the use of mail balloting.

c. Agency Directive and Legal Authority

Section 11301.2 of the Board’s Casehandling Manual (Representation) provides, in part:

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual Section sets forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are “scattered,” either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section states that “[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director,” citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that the regional director may use discretion to order a mail ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the regional director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *ibid*.

On April 17, 2020, the Board issued an announcement regarding the COVID-19 pandemic titled, “COVID-19 Operational Status,” which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

The Board has already applied the guidelines in *San Diego Gas & Electric* to the extraordinary circumstances created by the COVID-19 pandemic in numerous unpublished Orders, including on May 8 in *Atlas Pacific Engineering Company*, Case 27-RC-258742. There, the Regional Director in Region 27 directed a mail-ballot election notwithstanding the employer’s argument that a manual election could be safely conducted among engineering employees at its facility. The Board stated that in determining whether the COVID-19 pandemic constituted an extraordinary circumstance, the Regional Director properly considered the detailed plan for conducting a manual election in a safe manner proposed by the Employer. The Board then denied the employer’s request for review of the Regional Director’s Decision and Direction of Election, stating:

[i]n finding that a mail-ballot election is warranted in this case, we rely on the extraordinary federal, state, and local government directives that have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting this election should remain on mandatory telework Under all of the foregoing circumstances, we are satisfied that the Regional Director did not abuse her discretion in ordering a mail-ballot election here.³¹

d. Analysis

i. The COVID-19 pandemic necessitates holding mail ballot elections in both cases

The circumstances surrounding the COVID-19 virus are nothing but extraordinary. Like the rest of the United States, Pennsylvania has been strongly affected by the virus, and the number of daily confirmed cases has been steadily rising for three weeks. Given the extraordinary circumstances caused by the COVID-19 pandemic that still exist in Pennsylvania and most other states in the United States, and given that the employees in both petitioned-for units regularly work in healthcare and other medical facilities, where the virus is more likely to be found and to

³¹ *Atlas Pacific Engineering Company*, 27-RC-258742, at fn. 1 (May 8, 2020).

spread quickly, I find it appropriate to exercise my discretion to direct a mail ballot election in both cases.³² That decision is soundly supported by Board law, including *Atlas Pacific Engineering Company*.

The Employer relies on Luzerne County being in the “green phase” of the Commonwealth’s economic re-opening to argue that manual elections are appropriate. It cites to the regulations that govern “green phase” re-openings, among other things permitting gatherings of under 250 people, and the gradual reopening of many segments of the economy. The Employer proposes that the pre-election conferences, the elections, and the ballot counts can all be conducted using proper social distancing, donning of proper personal protective equipment, and the use of hand sanitizer and disinfectant for all high-touch surfaces. Finally, the Employer argues that mail ballot elections have a higher likelihood of voter disenfranchisement and lower voter turnout. I find the Employer’s arguments unavailing, and its proposed election procedures ineffective in alleviating the significant health risks of holding these elections manually.

Of significant importance in these cases is the location where the service specialists and route managers provide services, namely hospitals and other medical facilities. The Board has upheld regional directors’ decisions to direct mail ballot elections due to the current COVID-19 pandemic for employees who work in the healthcare industry, who no doubt similarly adhere to various personal protections that the Employer proposes to use in conducting these elections manually. See *Roseland Community Hospital*, Case 13-RC-256995 (May 26, 2020); and *Twinbrook Health & Rehabilitation Center*, Case 06-RC-257382 (June 5, 2020). Indeed, a major reason that a mail ballot election is appropriate in these cases is because they involve services being performed by unit employees at hospitals and other healthcare facilities.

Moreover, while the daily numbers of new confirmed cases in Pennsylvania are currently below the peak level, the trajectory of new cases is rising steadily. Many states that previously eased restrictions are currently experiencing dramatic increases in cases or are having “second waves.” There is, therefore, no guarantee that manual elections can be safely conducted in these cases in the near future. The conduct of these elections by mail ballot has the benefit of eliminating the uncertainty that manual elections could be delayed.

In so finding, I have considered the accommodations and arrangements offered by the Employer but find that they are inadequate under the circumstances. Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. All but the voters would need to gather for approximately 30 minutes for the pre-election conferences, including the check of the voter list and the parties’ inspection of the voting areas. The Board agent and observers would share a voting area for the duration of the proposed manual elections, spanning two hours, an exposure sufficient to risk exposure to the virus. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. At the conclusion, the

³² There is no contention that the route managers are scattered by location or schedule. Absent public health concerns, this would almost certainly not be an election where a mail ballot would be ordered.

agent would count the ballots, typically in the same voting area, with the observers, party representatives, and other employees who wish to attend.

On this point, I acknowledge that the General Counsel recently issued guidance in GC Memorandum 20-10 providing suggested protocols for safely conducting manual elections. In the circumstances of his case, however, where the Employer is engaged in an industry that exposes its employees to daily contact with hospitals and other medical facilities, locations with a high risk for COVID-19 exposure, I would not direct a manual election even though the Employer has agreed, in a supplemental brief filed on July 14, that it would follow those protocols.

Instead, to alleviate the significant health risks associated with conducting manual elections during this pandemic and in the industry served by the Employer, I find that the most responsible measure to ensure a safe election is by conducting mail-ballot elections. Mail ballots will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, their families, and the public to COVID-19, and it will ensure that the employees in the units herein will have the opportunity to vote promptly.

The Employer's remaining arguments favoring a manual election over a mail ballot election are unavailing. "From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail." See *London Farm Dairy*, 323 NLRB 1057 (1997) (internal citations omitted). Furthermore, the Board has previously rejected arguments that mail ballot elections will result in voter disenfranchisement or that they are ripe for lower voter participation. See *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, 323 NLRB at 1058. While long-standing Board policy favors manual elections, mail ballot elections continue to be an often-utilized voting method and continue to have their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

ii. Due to the nature of the service specialists' work, a mail ballot election is appropriate notwithstanding considerations of the pandemic

While the election in the petitioned-for unit of route managers likely would have been conducted manually in a non-pandemic environment, the scattered nature of the service specialists fits squarely within those circumstances identified by the Board as being appropriate for mail ballot elections, even in the absence of a pandemic. Aside from two service specialists who work on the same medical campus, all other service specialists work individually at different locations, some of which are many miles apart. The service specialists do not report to a common location at common times. They work at different locations, and they can work different hours. By the Board's definition, the service specialists eligible to vote are "scattered," thus making a mail ballot election appropriate in this case irrespective of the COVID-19 pandemic.

For the foregoing reasons, I direct mail-ballot elections to be conducted in both cases in accordance with the election details discussed below.

CONCLUSION

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

1. The 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.
3. The parties stipulated, and I find, that International Association of Sheet Metal, Air, Rail, and Transportation Workers, Local Union #44 is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees in the units sought in either petition, there is no contract bar or other bar to an election in either of these cases, and there is no collective bargaining history for the employees in either unit.
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 constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Case 04-RC-260408:

Included: All full-time and regular part-time on-site service specialists employed by the Employer from its Hanover Township, Pennsylvania facility.

Excluding: All other employees, office clerical employees, confidential employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

Case 04-RC-260851:

Included: All full-time and regular part-time route managers employed by the Employer at its Hanover Township, Pennsylvania facility.

Excluding: All other employees, office clerical employees, confidential employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Association of Sheet Metal, Air, Rail, and Transportation Workers, Local Union #44.

A. Election Details

The elections will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining units on July 29, 2020. Voters must return their mail ballots so that they will be received by close of business on September 2, 2020. The mail ballots for both elections will be counted on September 9, 2020 at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date.

If any eligible voter in either election does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 p.m. on August 12, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the units who were employed during the payroll period ending July 4, 2020 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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

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

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available

personal email addresses, and available home and personal cell telephone numbers) of all eligible voters in both elections.

To be timely filed and served, the list must be *received* by the regional director and the parties by July 20, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue in both cases and that accompany this Decision in conspicuous places, including all places where notices to employees in the units found appropriate are customarily posted. Both Notices and the ballots will be published in the following languages: English. Both Notices must be posted so all pages of both Notices are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the units found appropriate, the Employer must also distribute both Notice of Elections electronically to those employees. The Employer must post copies of both Notices at least 3 full working days prior to 12:01 a.m. of the day of the elections 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 in either case included herein may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the elections on the grounds that it did not file a request for review of this Decision prior to the elections. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay either election in this matter unless specifically ordered by the Board.

Dated: July 16, 2020



HAROLD A. MAIER
Acting Regional Director, Region Four
National Labor Relations Board