UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

CUMMINS INC. Employer and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW[1] Petitioner and DIESEL WORKERS UNION Intervenor	Case 25-RC-266363

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks an election in a unit of production and maintenance employees employed at the Employer's Columbus and Seymour, Indiana manufacturing plants. The two issues before me are whether there is a contract that constitutes a bar to the election under the contract bar doctrine and whether to conduct a manual or mail ballot election given the current constraints of the COVID-19[2] pandemic.

The Employer and Intervenor assert that two extension agreements they entered into following the first three years as well as expiration of their 2015-2020 long-term collective bargaining agreement (CBA) constitute a bar to the holding of an election. Accordingly, the Employer and Intervenor seek to have the petition dismissed. The Employer and Intervenor also argue that a manual election is appropriate and can be conducted safely notwithstanding the current conditions of the COVID-19 pandemic.

[1] Petitioner's name appears as amended by stipulation of the parties.
[2] Throughout this decision, the terms "COVID-19," "COVID," and "coronavirus" are used interchangeably.

Petitioner contends that the first extension agreement between the Employer and Intervenor, with a duration of less than 90 days, cannot constitute a bar, and further that neither of the two extension agreements qualify as a bar because they are mere contract extensions rather than negotiated agreements which contain substantial terms and conditions of employment. Thus, Petitioner asserts that its petition was timely filed after the expiration of the third year of the 2015-2020 CBA. Petitioner also argues that a mail ballot election should be conducted in light of the COVID-19 pandemic.

A hearing officer of the Board held a video hearing in this matter. Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,[3] the parties were permitted to present their positions as to the mechanics of this election at the hearing and by brief.[4] I have carefully considered those positions and arguments. As explained below, based on the record[5] and relevant Board law, I conclude that there is no contract bar to the holding of the election and, therefore, there is no basis on which to find a bar to Petitioner's petition for representation of employees at issue in this case. I also find that in view of the circumstances discussed below related to the current state of the COVID-19 pandemic, an election by mail is appropriate.

I. FACTS

The Employer manufactures diesel and natural gas engines and other related parts and equipment at its Columbus and Seymour, Indiana manufacturing plants. The petitioned-for unit employees include approximately 841 production and maintenance employees who work at the Columbus and Seymour plants and nearby facilities.[6] The Employer and Intervenor have a long bargaining history going back to about 1938 and the petitioned-for unit employees have been represented by the Intervenor in successive CBAs for many years.[7]

The Employer and Intervenor were parties to a CBA effective from April 27, 2015 through April 26, 2020.[8] On about March 30, the Employer and Intervenor were scheduled to commence face-to-face negotiations for a successor CBA, anticipating about three weeks of bargaining for a successor agreement. However, due to challenges and restrictions resulting from the COVID-19 pandemic, the Employer and Intervenor were unable to meet in person.

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[3] See, *Representation-Case Procedures*, 84 Fed. Reg. 65924, 65944, fn. 82 (2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)). See also, *2 Sisters Food Group, Inc*., 357 NLRB 1816, 1819 (2011); *Halliburton Services*, 265 NLRB 1154, 1154 (1982).

[4] Only the Employer, in its brief, addressed the issue of the mechanics of an election and how a manual election should and could be conducted in a safe manner.

[5] All parties filed briefs which I have duly considered.

[6] Petitioner's petition as well as the recognition clause in the expired 2015-2020 CBA specifically notes the existence of the Employer's Columbus Engine Plant (excluding Light Duty Diesel) (CEP), Columbus Fuel Systems Plant (CFSP), and Seymour Engine Plant (SEP), together with their outlying facilities, in the Columbus and Seymour, Indiana area – these facilities are collectively referenced in the record as "the Base Business" and the petitioned-for unit is referenced as "the Base Business unit."

[7] The CBAs between the Employer and Intervenor are referenced in the record as "Base Business contracts."

[8] All dates are in 2020 unless otherwise noted.

Consequently, on March 30, via telephone discussion,[9] the Employer and Intervenor entered into a "CONTRACT EXTENSION AGREEMENT"[10] which reads as follows:

> "[The Employer] and [Intervenor] are parties to the DWU Base Business Collective Bargaining Agreement ("CBA") with effective dates from April 27, 2015 through and including April 26, 2020. In anticipation of scheduling challenges caused by the Coronavirus pandemic, the parties hereby agree to extend the duration of the DWU Base Business CBA through and including May 24, 2020. Provided the parties reach agreement on a new CBA and it is ratified by the [Intervenor] membership on or before May 24, 2020, [the Employer] agrees to apply retroactively to April 27, 2020 any negotiated increases to base wages and/or shift premiums that are effective in 2020."

Thereafter, due to ongoing disruptions caused by the COVID-19 pandemic, the Employer and Intervenor were still unable to meet in person for collective bargaining and jointly decided to further postpone negotiations for a successor CBA. Consequently, on May 3, as the expiration of the first contract extension agreement was approaching, via telephone,[11] the Employer and Intervenor entered into a second "CONTRACT EXTENSION AGREEMENT" which reads as follows:

> "[The Employer] and [Intervenor] are parties to the DWU Base Business Collective Bargaining Agreement ("CBA") with effective dates from April 27, 2015 through and including April 26, 2020. In anticipation of scheduling challenges caused by the Coronavirus pandemic, the parties previously agreed in writing to extend the duration of the CBA through and including May 24, 2020.
>
> Due to the continuing disruptions caused by the pandemic, the parties hereby agree to lengthen the current extension of the CBA up to and including September 27, 2020 (the "extension period").
>
> The parties further agree as follows:
>
> (1) Holidays: The parties will follow the holiday schedule set forth in Article 15 of the CBA through the extension period. The July 4 holiday falls on a Saturday in 2020, which means Friday July 3, 2020 will be observed as the holiday[12]."

[9] Telephone negotiations for the March 30 contract extension agreement were between Intervenor President Daniel Steward and five Employer representatives: Vice-President of Human Resources (HR) Mark Osowick; President and Chief Operating Officer Tony Satterthwaite; Labor Relations Manager Kelvin Tippit; Director of Labor Relations Harold Wilson; and Executive Director for Engineering/HR Theo Smith. The record is silent regarding the specific date(s) of such telephone discussion(s).

[10] At the hearing, the Employer and Intervenor referred to the two contract extension agreements as "supplemental agreements." In its brief, the Employer references the contract extension agreements as "supplemental CBAs." In my decision herein, I will refer to the two agreements as "extension agreements."

[11] Telephone negotiations for the May 3 contract extension agreement were between Intervenor President Steward and four Employer representatives: Osowick, Satterthwaite, Wilson, and Smith. The record is likewise silent regarding the specific date(s) of such telephone discussion(s).

[12] There is no dispute that the petitioned-for unit employees were paid for the July 4, 2020 holiday.

During late August to late September, the Employer and Intervenor met for bargaining for a new successor CBA. Petitioner filed its instant petition on September 21 while the Employer and Intervenor were engaged in these negotiations. Shortly following the filing of the petition, the Employer and Intervenor reached a successor CBA, effective September 28, 2020 to 2025, which was ratified by the Intervenor membership on about September 27. Under the economic terms of the successor CBA, the petitioned-for unit employees are to receive retroactive pay to April 27 with a final payout date of on or before November 30.[13]

II. ANALYSIS – CONTRACT BAR

A. Board Law

The contract bar doctrine will ordinarily prevent the holding of an election where a valid collective-bargaining agreement is in place. When a petition is filed for an election among a group of employees who are covered by a collective-bargaining agreement, the Board must decide whether the asserted contract exists in fact and whether it conforms to certain requirements. If the Board does find that a contract exists and that the requirements are met, the contract is held to bar an election under the contract bar doctrine. These requirements include that the agreement be fully executed in writing, signed and dated by all parties prior to the filing of the petition, and contain substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship. *Waste Management of Maryland, Inc*., 338 NLRB 1002, 1002-1003 (2003); *Television Station WVTV,* 250 NLRB 198, 199 (1980); *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162-1163 (1958). There is no contract bar when the agreement asserted as a bar is less than 90 days duration or when the contract is for an indefinite duration. *Crompton Company, Inc.,* 260 NLRB 417, 418 (1982).[14] The party asserting that a contract acts as a bar bears the burden of proving such. *Road & Rail Services, Inc.,* 344 NLRB 388, 389 (2005); *Roosevelt Memorial Park, Inc.,* 187 NLRB 517-518 (1970). The Board established the contract bar doctrine in an effort to balance the statutory policies of stabilizing labor relations and facilitating the exercise of free choice by employees in the selection of their bargaining representatives. *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860-861 (1999), citing *Appalachian Shale*, 121 NLRB at 1162-1163.

In *General Cable Corporation*, 139 NLRB 1123, 1125 (1962), the Board set forth the three-year contract bar rule, stating that a collective-bargaining agreement will only serve as a bar to a rival union's representation petition for a period of three years. A representation petition may be filed within the appropriate open period prior to the third-year anniversary date of the contract, or after the third-year anniversary date of any contract more than three years in duration. The Board has consistently held that parties to a long-term collective-bargaining agreement can "reactivate" the contract bar after the initial term of "reasonable duration" has

[13] As of the hearing date, no retroactive pay had been paid to petitioned-for unit employees. On about October 5, the Intervenor filed a grievance under the successor CBA demanding retroactive pay for all unit employees employed since April 27.

[14] Although the Board in *Crompton* found that a short-term extension agreement of two-months duration did not bar a petition because its termination date was indefinite due to conditional language, the Board further stated that even if the agreement were for a definite term, it would still not bar a petition because of its brief duration of less than 90 days. *Id.* at 418.

passed (i.e., three years), but before a rival representation petition is filed, by executing "(1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period . . .." *Southwestern Portland Cement Company*, 126 NLRB 931, 933 (1960). As noted above, such agreement or amendment will serve as a bar if it contains "substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship." *Appalachian Shale,* 121 NLRB at 1163-1164. The Board limits its inquiry in such cases to the four comers of the document alleged to bar an election and excludes consideration of extrinsic evidence. *South Mountain Healthcare and Rehabilitation Center*, 344 NLRB 375, 375 (2005); *Waste Management of Maryland,* 338 NLRB at 1003. The Board's rationale for limiting extrinsic or parole evidence is that the terms of the agreement must be clear from its face so that employees and outside unions may look to it to determine the appropriate time to file a representation petition. *South Mountain Healthcare*, 344 NLRB at 375, citing *Cooper Tire and Rubber Company*, 181 NLRB 509, 509 (1970).

B. Application of Board Law

There is no dispute that the original 2015-2020 CBA could not serve as a bar to Petitioner's petition because under *General Cable*, 139 NLRB at 1125, the 2015-2020 CBA could operate as a bar only for as much of its term that did not exceed three years. Regarding the question of whether the extension agreements between the Employer and Intervenor "reactivated" the contract bar, I conclude they did not for the following reasons.

Initially, I find that under *Crompton*, 260 NLRB at 418, the first extension agreement entered into on March 30 extending the duration of the 2015-2020 CBA through and including May 24 (i.e., 56 days), notwithstanding its definite period, could not serve as a bar because its term is less than 90 days. In this regard, the *Crompton* Board held that agreements of such short duration "provide little in the way of industrial stability" and "no period during which employees may act to remove a bargaining representative with which they are disenchanted." Thus, the first extension agreement could not bar a petition filed during its term. *Id.*

In spite of the short duration of the first extension agreement, it, as well as the second extension agreement do not constitute a bar to Petitioner's petition. Regarding the first extension agreement, besides extending the 2015-2020 CBA to May 24, it sets forth the Employer and Intervenor's agreement that the Employer will apply any future negotiated wage increases retroactively to April 27 "*provided the parties reach agreement on a new CBA and it is ratified…on or before May 24*." (emphasis added). The Employer and Intervenor assert that this part of the first extension agreement constitutes an amendment to the 2015-2020 CBA and a substantial change in the terms and conditions of the petitioned-for unit employees to reactivate the contract bar. However, this extension agreement is clear that any obligation on the part of the Employer to apply wage increases retroactively is contingent on the Employer and Intervenor reaching a new executed and ratified successor CBA. Without negotiating a successor CBA providing for wage increases, there was no agreement between the Employer and Intervenor on retroactive pay. I do not find this provision of the first extension agreement to be an amendment to the 2015-2020 CBA or a substantial change in the terms and conditions of employment of the

petitioned-for unit employees. Regarding the second contract extension, besides extending the 2015-2020 CBA to September 27, it sets forth the agreement of the Employer and Intervenor to follow the holiday schedule as set forth in Article 15 of the 2015-2020 CBA specifically with respect to the July 4, 2020 holiday occurring during the extension period. Likewise, the Employer and Intervenor argue that this part of the second extension agreement constitutes an amendment to the 2015-2020 CBA and a substantial change in the terms and conditions of the petitioned-for unit employees. However, other than this sole provision regarding the July 4, 2020 holiday, the second extension agreement does not contemplate or contain any detailed provisions with respect to any other provisions or scope of the 2015-2020 CBA. All other matters (e.g., wages, benefits, hours of work, assignments, holidays, vacation, grievance and arbitration procedure, functions of management, nondiscrimination, seniority, etc.) were left open by the Employer and Intervenor. I do not find this provision of the second extension agreement to be an amendment to the 2015-2020 CBA or a substantial change in the terms and conditions of employment of the petitioned-for unit employees. Accordingly, I find that the extension agreements at issue did not embody substantial terms and conditions of employment sufficient to stabilize the bargaining relationship and constitute a bar to Petitioner's petition.

Other than the provisions contained in the extension agreements relating to retroactive pay and the July 4, 2020 holiday as noted, the remainder of the extension agreements provide for contract extensions of the expired 2015-2020 CBA. As acknowledged by the Employer in its brief, "the mere extension of an expired agreement will not bar an election." See *Union Bag & Paper Corp*., 110 NLRB 1631, 1634 (1955) (an extension of an expired agreement made pending the negotiation of a new agreement does not constitute a bar). By executing each extension agreement, the Employer and Intervenor merely extended their five-year 2015-2020 CBA to a five-year plus two months and five-year plus five months agreement, respectively. In this regard, the first extension agreement provides "…the parties hereby agree to extend the duration of the CBA through and including May 24…;" the second extension agreement provides "…the parties hereby agree to lengthen the current extension of the CBA up to and including September 27… ." Consequently, because the 2015-2020 CBA could only operate as a bar for as much of its term that did not exceed three years and because the instant petition was filed after the end of the three-year term of the CBA, which was on April 27, 2018, it was timely filed.

Nevertheless, the Employer and Intervenor argue that their extension agreements are more than mere contract extensions. Specifically, they argue that having been entered into after the end of the first three years of the long-term CBA and before the filing of the petition, they incorporated by reference the terms and conditions of the long-term CBA and constituted written amendments that expressly reaffirmed the long-term agreement and indicated their clear intent to be bound for specific period of less than three years. In this regard, the Employer and Intervenor argue that the extension agreements should act as a bar under *Southwest Portland Cement*, 126 NLRB at 933-934. In *Southwest Portland Cement,* the parties to the long-term contract in question executed an amendment via a "supplemental agreement" with respect to "wages, vacation, and health and welfare benefits" after the then-two-year reasonable period of the contract. *Id.* at 932. Unlike here, the supplemental agreement in *Southwest Portland Cement* contained a substantial amendment which met the Board's test of expressly "reaffirm[ing]the original agreement and clearly indicat[ing] an intent on the part of the parties to be bound for a specific period." As noted above, the extension agreements in question here do not contain

amendments or substantial changes in terms and conditions of employment to demonstrate the parties' reaffirmation of their 2015-2020 CBA.[15] Rather, these short-term extension agreements, as well as the rest of the record, demonstrate the Employer and Intervenor's anticipation in negotiating a new successor CBA in place of the 2015-2020 CBA and their intent to no longer be bound by the old CBA. In this regard, the content of the extension agreements indicates that, to a large extent, they were written for the narrow short-term purpose of addressing the challenges of the parties in meeting for in-person negotiations in light of the COVID-19 pandemic. It is clear that the Employer and Intervenor did not intend for either of the extension agreements to be a new CBA embodying new terms and conditions. Additionally, while the extension agreements refer to the 2015-2020 CBA, they do not incorporate the terms and conditions of employment of that CBA. Similarly in *Union Bag*, 110 NLRB at 1633-1634, the Board found a memorandum of agreement (MOA) negotiated by the parties after contract expiration which stated "this agreement shall remain in full force and effect until a revised agreement is mutually agreed upon by the parties signatory to this agreement" did not constitute a bar. Rather, the Board held that such MOA was "clearly of a temporary nature to be effective only until the parties agree upon a revised agreement." *Id*. at 1634.[16]

In reaching this conclusion, I have considered the Employer and Intervenor's reliance on *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982), and find it misplaced. While the parties in *Shen-Valley*, like the Employer and Intervenor here, agreed to a five-year contract, in *Shen-Valley*, the parties signed an amendment to the contract[17] reaffirming the contract and restating its expiration date *during the first three years of the initial long-term contract*. Relying on *Southwestern Portland Cement,* the *Shen-Valley* Board found that the parties' amendment was, in effect, a premature extension of the contract because it was executed during the three-year period of "reasonable duration" and extended the contract beyond three years.[18] *Id.* at 959. The Board held that the premature extension governed the timeliness of a decertification petition which was filed after the initial three-year anniversary date of the long-term contract. Since the petition was not timely filed, it was dismissed. *Id.* at 959-960. To the contrary, the parties here signed extension agreements *following* the expiration of the three-year anniversary date (as well as the five-year expiration date) of their 2015-2020 CBA – they did not sign an amendment reaffirming the long-term contract and its expiration date prior to the three-year anniversary date of the initial 2015-2020 agreement. Their purported amendment was therefore not a premature

[15] In its brief, the Intervenor argues that Petitioner "*agrees* that the supplemental agreements extended and reaffirmed the Contract [and] … [t]hat is enough, under *Southwest Portland Cement* and *Shen-Valley Meat Packers* to reactivate the contract bar and should end the analysis" – while Petitioner does not dispute that the extension agreements extended the dates of the 2015-2020 CBA, the record does not support the Intervenor's assertion that Petitioner agrees that the extension agreements reaffirmed such CBA.

[16] I also note that in *Union Bag*, the parties therein also agreed that they would "arrange a conference for the purposes of negotiating a revised agreement as soon as mutually convenient." *Id.* at 1633.

[17] The amendment in *Shen-Valley* contained various provisions organized according to sections of the parties' original CBA which explicitly provided that the amendment "is in effect through the remainder of the agreement," permitting renegotiation of hourly wage rates at specific intervals consistent with the provisions original CBA. *Id*. at 958. The Board found that the parties' amendment expressly affirmed the long-term agreement and indicated a clear intent on the part of the contracting parties to be bound for a specific period. *Id.* at 959. Here, by contrast, the extension agreements do not contain substantial terms and conditions of employment as noted.

[18] The Board has long held that an amendment entered into during the term of an original contract, which extends the expiration of that original contract, will be deemed a premature extension. *Deluxe Metal Furniture Company*, 121 NLRB 995, 1001-1002 (1958).

extension of the initial agreement as in *Shen-Valley* such that the term of their extension agreements would govern the timeliness of the petition. See also *M.C.P. Foods, Inc*., 311 NLRB 1159, 1159 (1993) (relying on *Shen-Valley,* the Board found the parties reaffirmed their five-year contract and its expiration date *prior to* the three-year anniversary date of the initial agreement. The Board stated: "[t]he amendment is therefore, as in *Shen-Valley*, a premature extension of the initial agreement and in other circumstances,[19] the term of the contract following the amendment would govern the timeliness of the petition.).

Additionally, I have considered Petitioner's reliance on *Madelaine Chocolate Novelties, Inc.*, 333 NLRB 1312 (2001). While not relying on *Madelaine*, which involved a different fact scenario distinguishable from this case, to support my findings, I do not agree with the Employer and Intervenor that Petitioner's reliance on *Madelaine* is wholly misplaced. In *Madelaine*, prior to the third anniversary of a four-year CBA, the parties entered into a new CBA that adopted, for the first year only, the terms and conditions of employment contained in the fourth year of the prior CBA, and provided a re-opener for the negotiation of all economic terms and conditions of employment for the next three years of the contract. The Board found that the mere adoption of the terms and conditions of the fourth year of their prior contract, to which the parties were already obligated, as the first year of their new contract, and a promise to engage in bargaining at some future date did not amount to substantial changes to the terms and conditions of employment, but rather amounted to "nothing more than an agreement to begin negotiations in the near future." *Id.* at 1312. The *Madelaine* Board further noted that "the parties did not engage in substantive negotiations for any additions or modifications to the terms and conditions of employment…." *Id.* at 1312. As noted, the extension agreements as well as the rest of the record herein likewise demonstrate the intent of the Employer and Intervenor to commence negotiations for a successor CBA in the near future and do not establish that that the Employer and Intervenor engaged in substantive negotiations for substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.

Accordingly, I find that there is no contract bar to the instant petition.

III. CONDUCTING THE ELECTION MANUALLY OR BY MAIL BALLOT

A. The Parties' Positions

Although Petitioner did not address the mechanics of an election in this matter during the hearing or in its brief, it did submit a responsive statement of position asserting that a mail ballot election should be held for public health and safety purposes and to ensure the safety of voters, Board employees and all interested parties, and given the current state of the COVID-19 pandemic in the State of Indiana.

[19] I note that in *M.C.P.*, the Board did not dismiss the petition specifically because it was filed during the open period relative to the third anniversary date of the original, overly long contract, and thus would have deprived the petitioner therein of the window period of the original contract. *Id.* at 1159.

While both the Employer and Intervenor argue for a manual election, only the Employer addressed the mechanics of an election in this matter in its brief. In asserting that a manual election would be safe under the circumstances and pose minimal risks to all individuals present, the Employer points out that it has had a deep commitment to and has been a leader in employee health and safety before as well as during the COVID-19 pandemic. In this regard, I acknowledge the Employer's commitment to the health safety of its employees which has been reflected internally in its "Code of Conduct" and "Safe Work Playbook,"[20] as well as externally by its receipt of prestigious safety honors. The Employer also points out its safety measures already in place at its facilities – the Employer lists its standard COVID-19 protocols as: daily employee wellness site-entry health temperature checks and screening with strict plan for denying entry to and sending home employees with COVID symptoms or exposure with follow-up monitoring by Employer's "Response Center" team; mandatory company-issued surgical-grade mask-wearing; disinfectants and hand sanitizer throughout all work areas; regular adherence to floor markings for six-feet social distancing between employees; and protective barriers between employee work stations. The Employer proposes that multiple safeguards, in addition to these already in-place comprehensive safety non-COVID and COVID protocols, could be implemented for a manual election to reduce the risk of COVID-19. The Employer argues that these proposed safeguards are in accordance with and far exceed the suggestions included in the July 6 General Counsel Memorandum 20-10 entitled "Suggested Manual Election Protocols" (GC 20-10) and include:

- deep cleaning/sanitization and sterilization of election sites 24 hours prior to the voting period,[21] followed by inspection by Board Agent and parties via video conference;
- provision of a large room at each facility capable of providing floor markers for six-feet social distancing and separate entrance and exit ways – specifically, the "MFG Team Room" at the Columbus Engine Plant (CEP) location is approximately 2,400 square feet; the "Employee Communication Center" (ECC) at the Columbus Fuel Systems Plant (CFSP) is approximately 1,950 square feet; and "Room W107" at the Seymour Engine Plant (SEP) is over approximately 1,600 square feet;
- floor markings for six-feet social distancing outside of polling areas;
- placement of HEPA filtering machines in each voting area;
- separate shielded and socially distanced tables for Board Agent, observers, voting booth and ballot box at each voting area;
- single-use disposable writing instruments and glue sticks or tape for voting procedures at each voting area;
- mandatory mask-wearing with masks, gloves, hand sanitizer and wipes available on-site and throughout each voting area;
- additional cleaning of touch points in each voting area during 9:00 a.m. to 2:00 p.m. hiatus on election day;
- limitation on number of attendees at pre-election conference and ballot count;

[20] Specifically the Employer states that its Safe Work Playbook published in June in response to the COVID-19 pandemic is based on guidance in large part from the US Centers for Disease Control and Prevention (CDC), the World Health Organization (WHO) and other national as well as local agencies.

[21] In the event of a manual election, the Employer proposes a one-day election from 6:00 a.m. to 9:00 a.m. and 2:00 p.m. to 5:00 p.m. at three separate locations further discussed herein.

- limitation on number of voting participants in the polling area to one at a time with contactless interactions between voters and Board Agents and observers;
- certification by the Employer 24 to 48 hours preceding election certifying that polling area is clean and the COVID status of individuals at each facility, including those who are COVID-positive or have had contact with a COVID-positive individual; awaiting COVID results; or exhibiting COVID symptoms;
- certification of COVID status at time of election by all party representatives, observers, and anyone seeking to participate in any election proceedings;
- 14-day post-election notification by parties of COVID status of any election participants.

The Employer further argues that manual elections are normally favored by the Board and provide the best opportunity for employees to exercise their right to vote. In its brief, the Employer also argues that the United States mail is not reliable, particularly during the current pandemic and in relation to the timing of the US presidential election, which could result in the disenfranchisement of mail ballot voters.

B. Board Law, Agency Directives and Legal Authority

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors, including the ability to direct a mail ballot election where appropriate. *Ceva Logistics US*, 367 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB at 1144 (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)). "It is well established that a Regional Director has broad discretion in determining the method by which an election is held, and whatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Nouveau Elevator Industries, Inc.*, 326 NLRB 470, 471 (1998) (citing *San Diego Gas* 325 NLRB at 1144 fn. 1; *National Van Lines* 120 NLRB at 1346).

The Board's longstanding policy is that elections should, as a general rule, be conducted manually; however, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.[22] This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other "extraordinary circumstances." In exercising discretion in such situations, a Regional Director should also consider the desires of all the parties, the likely ability of voters to read and

[22] I note the provisions of the Case handling Manual are not Board directives or procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) ("the General Counsel's nonbinding Casehandling Manual"); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *San Diego Gas*, 325 NLRB at 1145 fn. 5 (and cases cited therein). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

understand mail ballots, the availability of addresses for employees, and what constitutes the efficient use of Board resources. *San Diego Gas*, 325 NLRB at 1145. Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, Board law indicates Regional Directors may use discretion to order a mail ballot election under the guidelines in *San Diego Gas*, including extraordinary circumstances, and Regional Directors should tailor the method of conducting an election to "enhance the opportunity of all to vote." Ibid.

The Board recognized the ongoing COVID-19 pandemic to constitute "extraordinary circumstances" and reaffirmed Regional Directors' discretion regarding election mechanics in its April 17 "COVID-19 Operational Status Update."[23] 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.

The Board has continued to affirm the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas*, above,[24] and its recent Orders[25] explain:

> The Board will continue considering whether manual elections should be directed based on the circumstances then prevailing in the Region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.[26]

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[23] https://www.nlrb.gov/news-outreach/news-story/covid-19-operational-status-update.

[24] See, for example, *Atlas Pacific Engineering Co.*, 27-RC-258742 (unpublished May 8, 2020) (relying 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" to deny review of Regional Director's decision to order a mail ballot election).

[25] See *Quickway Transportation, Inc*., 09-RC-257941 (unpublished October 26, 2020) (denying review of Regional Director's decision to order a mail ballot election); *Savage Services Corporation,* 21-RD-264217 (unpublished October 1, 2020) (same); *Jersey Shore University Medical Center,* 22-RC-263932 (unpublished October 1, 2020) (same); *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020) (same); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020) (same); *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020) (same); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020) (same); *PACE Southeast Michigan*, 07-RC-257047 and 07-RC-257046 (unpublished August 7, 2020) (same); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020) (same); *Brink's Global Services USA, Inc*., 29-RC-260969 (unpublished July 14, 2020) (same).

[26] On July 6, General Counsel Peter Robb issued GC 20-10 setting forth suggested election protocols while specifically noting that it is not binding on Regional Directors because the Board not the General Counsel has authority over matters of representation. Among other things, the General Counsel proposes, as agreed to by the Employer, self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, or come into contact with someone who tested positive within the preceding 14 days, and are not awaiting test results, along with identifying the number of individuals exhibiting COVID-19 symptoms.

As the Board's Orders instruct, I analyze the instant petition using the prevailing circumstances in the region.[27]

C. A Mail Ballot Election Is Appropriate

COVID-19 has created a public health crisis, responsible for upwards of 229,000 deaths in this country.[28] Currently, the number of new COVID-19 cases continues to climb with a total number of confirmed cases reaching over 9 million and the virus surging in several areas of the country.[29] Unfortunately, Indiana is no exception. The United States as well as Indiana are currently in declared states of emergency due to COVID-19.[30] In assessing local conditions, I must consider the current state of the pandemic in Indiana, and particularly the Columbus and Seymour areas where employees work. As of July 27, a statewide mask mandate ("*MASK UP HOOSIERS*") went into effect until further notice.[31] This mask mandate has remained in place even with the state's move on September 26 to Stage five of the Governor's "Back on Track" reopening plan which allows restaurants, bars, fitness centers and stores to operate at full capacity, but requires all Indiana residents to maintain social distance and keep their masks on except while eating or drinking.[32] As of November 2, Indiana ranks 9th in the nation in confirmed COVID-19 cases with approximately 184,589 cases and 4,364 confirmed deaths.[33] Currently, since about the end of September, the numbers of new infections and hospitalizations across Indiana are spiking dramatically.[34] Over the week of October 24-31, there was an average of 2,604 cases per day, an increase of 51 percent from the average two weeks earlier.[35] On October 29, the Indiana State Department of Health (ISDH) reported that the state set a daily high of newly reported coronavirus cases at 3,205; this was the second consecutive day that over 3,000 people in Indiana had tested positive for the disease – these are the highest levels the state has seen during the pandemic.[36] Indiana is one of 17 states with recent record-high hospitalizations.[37] The October 28 IDHS daily update of its coronavirus dashboard reported 1,733 Hoosiers as currently hospitalized with the coronavirus, the highest since early April (that number was down slightly to 1,662 on October 29). Indiana's 32 newly

[27] While the Board has stayed several directed mail ballot elections since late August, including one case in this Region, stating the requests for review "raised substantial issues warranting review," it has not specified the issues that caused it to grant review, delineated factors outside of *San Diego Gas* to be considered during the COVID-19 pandemic, established a different standard for determining the method of election, or issued any other ruling that impacts my conclusions and findings herein.

[28] https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (accessed November 2).

[29] *Id.*

[30] On October 30, Indiana Governor Eric J. Holcomb issued executive order 20-47 extending the state's public health emergency that was due to expire November 1 for another 30 days until December 1. See https://www.coronavirus.in.gov/ (accessed October 30).

[31] https://www.in.gov/gov/files/Executive%20Order%2020-37%20Face%20Covering%20Requirement.pdf; https://www.coronavirus.in.gov/maskuphoosiers/index.htm (accessed October 30).

[32] https://www.coronavirus.in.gov/ (executive order 20-46) (accessed October 30); https://www.backontrack.in.gov/; Back on Track Indiana Stage Five Continued (accessed October 30).

[33] https://www.nytimes.com/interactive/2020/us/indiana-coronavirus-cases.html (accessed November 2).

[34] https://covidtracking.com/data/state/indiana (accessed October 30).

[35] Indiana Coronavirus Map and Case Count, *New York Times*. Retrieved from https://www.nytimes.com/interactive/2020/us/indiana-coronavirus-cases.html (accessed October 30).

[36] https://www.coronavirus.in.gov/ (accessed October 30).

[37] https://www.cnbc.com/2020/10/30/us-reports-nearly-90000-new-covid-cases-a-record-high-as-e.html (October 30).

recorded COVID-19 deaths on November 1 raised the state's pandemic death toll to 4,364, including confirmed and presumed coronavirus infections.[38]

The Employer's CEP and CSFP are located in Columbus in Bartholomew County and its SEP is located in Seymour in Jackson County.[39] Notably, the Employer does not address coronavirus statistics and numbers in these counties where the election is to take place, which have not been spared from COVID-19, both counties having recently experienced an uptick in positive cases and where coronavirus cases continue to grow. Dr. Eric Fish, president and chief executive office of Jackson County's Schneck Medical Center in Seymour recently reported that the hospital "reached a mark Monday [(October 19)] that it didn't want to be at seven months into the COVID-19 pandemic. … Around 30% of the 11 critical care beds and 22 medical beds are occupied with COVID-19 positive patients. … '[o]ver the past two or three weeks, as our community has opened up, as the state has opened up, we've seen a marked increase in COVID-19 cases in the community…." – the week before October 21, Jackson County was one of four counties at 2.5 and among 21 Indiana counties falling under the orange designation from the ISDH.[40] As a result of the orange designation, all four Jackson County public school corporations switched their middle and high schools to hybrid rather than exclusive in-person schedules – Dr. Fish also reported that the coronavirus outbreaks are typically coming from residents failing to follow the protocols of mask wearing, social distancing and avoiding large gatherings.[41] As of October 29, a total of 1,254 Jackson County residents tested positive for coronavirus, an increase of 21 from October 28 – this made the seven-day positivity rate (a rolling seven-day average of the number of positive tests per 100,000 residents of Jackson County) of the county 10.2%.[42] Bartholomew County's "Community COVID-19 Indicators" likewise show that the per capita positivity rate (a rolling seven-day average of the number of positive tests per 100,000 residents of Bartholomew County) is increasing and has progressed from "moderate spread" on October 6-9 to "substantial spread" on October 10-28.[43] The Bartholomew County COVID-19 task force recommends the following actions, effective

[38] https://www.nytimes.com/interactive/2020/us/indiana-coronavirus-cases.html (accessed November 2).
[39] The Employer states that out of the 841 petitioned-for unit employees, 86 are located at CEP, 342 are located at CFSP, and 268 are located at SEP. The remaining employees in the petitioned-for unit work very near to one of the three proposed voting locations: 34 Columbus Central Facilities (CCF) employees actually perform work at either CEP, CFSP, or SEP, and could vote there; 22 employees who work at Seymour Machining Center (SMC), located adjacent to SEP, could vote at SEP; nine employees who work at Service Support Center (SSC), two miles away from CEP, could vote at CEP; and two employees whose work location is the Intervenor union hall, across the street from CEP, could vote at CEP.
[40] http://www.tribtown.com/2020/10/21/schneck-reports-more-hospitalizations-due-to-covid-19/ (October 21); https://www.coronavirus.in.gov/2393.htm (accessed October 29) (counties are given a color designation if they have a seven-day positivity rate (all tests) of 10 to 14.9% (orange) or 15% or greater (red) and 100 to 199 new cases (orange) or 200 or more new cases (red). The color coding is released at noon each Wednesday and reflects data from the previous Monday through Sunday. On Mondays, the ISDH calculates the weekly scores for the metrics. To calculate test positivity rate, ISDH uses Monday's seven-day average for the all-tests positivity rate for each county. To calculate each county's new weekly cases, ISDH identifies all new positive cases that were collected and resulted in the period from Monday through Sunday. This number is then divided by each county's total population and multiplied by 100,000. After calculating the individual scores for each of the metrics, the two scores are averaged together to determine the total county score. The ranges are 0 to 0.5 (blue), 1 to 1.5 (yellow), 2 to 2.5 (orange) and 3 (red)).
[41] http://www.tribtown.com/2020/10/21/schneck-reports-more-hospitalizations-due-to-covid-19/ (October 21).
[42] http://www.tribtown.com/2020/10/30/state_reaches_singleday_record_for_covid19_cases/ (October 29).
[43] https://covid19communitytaskforce.org/data/ (accessed October 30).

October 30: non-essential gatherings be limited to no more than 250 people; child care and adult day care facilities should institute social distancing and minimize large gatherings; individuals over 60 years of age or those with known underlying health issues should limit public exposure; congregate meal services in senior centers should consider suspending congregate meal services and arrange for home delivery; businesses should consider utilizing telework policies, if available.[44] It is not possible for me to know if these numbers described above represent an increase in the number of infections, a reflection of more widespread testing or better reporting. However, it is sufficient to establish that there is no seen improvement in COVID conditions and that there continues to be spread of COVID, factors which lead me to conclude there is too much risk to holding a manual election at this time or in the near future.

The United States Center for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person and that a person may become infected "when a person who has COVID-19 coughs, sneezes, sings, talks, or breathes" or by "touching the surface or object that has the virus on it and then touching their own mouth, nose, or eyes." [45] The CDC also warns: "**It is important to realize that you can be infected and spread the virus but feel well and have no symptoms**" (emphasis in original).[46] Guidance issued by the CDC recommends limiting in-person visits to stores as well as in-person contact for deliveries whenever possible.[47] 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."[48]

In its brief, the Employer cites my September 30 decision ordering a mail ballot in JDRC Managed Services, 25-RC-265109, apparently disputing my CDC reference regarding in-person elections. The Employer states that "the CDC recommends that election polling settings include longer voting periods and other feasible options for reducing the number of voters who congregate indoors in polling locations." As I stated in my decision in JDRC, although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its "Polling Locations and Voters – Recommendations for Election Officials and Poll Workers" guidance states that officials should consider offering alternatives to in-person voting if allowed…to **minimize direct contact and reduce crowd size at polling locations**…." (emphasis in original).[49] The CDC further states in this section that "[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread. Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times." Although this election would not likely involve significant travel to the facility by a Board Agent and party representatives,

[44] https://www.bartholomew.in.gov/emergency-management#covid-19-new-updates (accessed October 30).
[45] "Frequently Asked Questions," CDC. https://www.cdc.gov/coronavirus/2019-ncov/faq.html (accessed October 30).
[46] "Overview of Testing for SARS-CoV-2 (COVID-19)" (updated September 18, 2020). CDC. https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html (accessed October 30).
[47] https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html (accessed October 30).
[48] *Id*.
[49] https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (updated October 29) (accessed October 30).

nevertheless the CDC continues to maintain that "[b]ecause travel increases your chances of getting infected and spreading COVID-19…[**s]taying home is the best way to protect yourself and others from COVID-19.**" (emphasis in original).[50] At this time, sending a Board agent and party representatives to conduct the election at three separate facilities would risk the exposure of everyone at each facility. Voters, along with other employees who may come into contact with each other, Board agents, and party representatives, would risk being exposed to the virus and spreading it to participants, the community, and their families. Therefore, the number of people placed at risk for exposure is much greater than just the number of employees eligible to vote. Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, it now well-established, although the exact percentage is uncertain, that certain individuals infected with COVID-19 will remain asymptomatic and display no symptoms. It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board Agent, who, along with the observers, will be in the voting area for a very long and sustained period of time. A mail ballot election eliminates this risk.

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 facilities. The Board Agent, observers and party representatives participate in a pre-election conference in which they must inspect the voting area and check the voter list. Board Agents and observers must be present in the same space for the duration of the election period at each facility. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal, state and local guidance, all of which advise avoiding in-person contact if possible, which a manual election necessitates. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Although an in-person count may be infeasible, arrangements can be made for a virtual remote count that provides all the safeguards of a traditional count.

Acknowledging the inherent risks and effect of mail delivery procedures on the outcome of a mail ballot election, as noted by the Employer, there is no indication that the United States Postal Service is unable to deliver mail. There is no evidence that the mail service in Indiana, the state in which the mail ballots will be sent and received, has been disrupted.[51] Further, I note that any mail ballot election, held at any time under any circumstances, includes procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate.[52] Even in the midst of this pandemic, the Region has already successfully conducted a number of

[50] U.S. Center for Disease Control and Prevention, Coronavirus in the United States- Considerations for Travelers available at https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (accessed October 30)
[51] The Employer specifically notes in its brief that "the United States Postal Service is inundated with an overwhelming amount of mail-in ballots from the November 3, 2020 General Election, which increases the likelihood that voters' mail ballots will be lost or delayed, and not counted as a result." I note that given the timing of my decision, mail ballots in this matter would issue after the November 3 US presidential election.
[52] I note that neither party has argued that the petitioned-for employees would be unable to understand the mail balloting procedure and there is no contention that the addresses of the eligible employees are not known or up to date.

mail ballot elections. Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their vote in a manual election, as there is no absentee ballot or remote voting options under the Board's manual election rules. I find that a mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status while protecting the safety and health of employees at the Employer's facilities, contrary to the Employer's assertion that "a mail ballot election will result in significantly diminished voter participation." Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election "at the earliest date practicable" consistent with the Board's Rules and Regulations Section 102.67(b) to insure the fair and free choice of bargaining representatives by employees.

In its brief, the Employer proposes various safety measures to mitigate COVID-19 which it contends *exceed* the suggestions made in GC 20-10 such that "holding a mail ballot election based on COVID-19 concerns would be improper." In asserting that a manual election would be safe under the circumstances and pose minimal risks to all individuals present, it points out that it regularly requires daily employee temperature checks and other screening procedures for COVID-19 symptoms, as well as mandated use of masks other personal protective equipment (PPE); social distancing; implementation of strict sanitization and disinfection procedures, and imposition of preventative quarantines for exposed employees. However, the Employer does not address or provide information regarding how many of its employees or residents or visitors to its facility have tested positive for COVID-19, or quarantined or isolated due to suspected infection or contact with COVID-19, including the dates on which they tested positive, quarantined, or isolated, which would be helpful in analyzing whether the safety measures it has implemented at its facilities are attributable to decreased cases of the Employer's employees.[53] I have carefully considered the Employer's suggestions and the suggestions in GC 20-10. I note the GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation. A mail-ballot election avoids these concerns. Ultimately, as GC Memo 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel within the state.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote promptly.

[53] Without providing any information regarding employee testing, the Employer vaguely reports that "less than one month ago, over 700 employees in the petitioned-for unit voted in person on a new [CBA]… [and] there is no evidence whatsoever that it resulted in any exposure to or spread of COVID-19."

IV. CONCLUSION

Based upon the entire record in this matter, 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.[54]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[55]

3. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act and claim to represent certain employees of the Employer.

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

5. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.

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

> ***Included***: All full-time and regular part-time production and maintenance employees employed by the Employer at its Columbus Engine Plant (excluding Light Duty Diesel), Fuel Systems Plant, and Service Support Center in Columbus, Indiana and at its Seymour Engine Plant and Seymour Machining Center in Seymour, Indiana.
>
> ***Excluded***: All employees supplied by a staffing agency, office clerical employees, plant clerical employees, professional employees, managerial employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a mail ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they

[54] At the end of the hearing, Intervenor counsel made a motion for a protective order requesting that documents provided to Petitioner pursuant to a subpoena be returned or used for the limited purpose of this hearing. The hearing officer ruled there was good cause shown for a protective order and ordered that all documents received by Petitioner, other than those submitted into the record in this proceeding, must be returned to Intervenor (and any electronic copies deleted). I note that Petitioner did not raise this ruling in its brief. I affirm the hearing officer's ruling.

[55] The parties stipulated that the Employer is an Indiana corporation with places of business located in Columbus, Indiana, and Seymour, Indiana, where it is engaged in the manufacture of diesel and natural gas engines and other related parts and equipment. During the past twelve months, a representative period of time, the Employer purchased and received at its Columbus, Indiana, and Seymour, Indiana facilities goods valued in excess of $50,000.00 directly from suppliers located outside the State of Indiana.

wish to be represented for purposes of collective bargaining by either **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW**, or **Diesel Worker Union**, or neither.

ELECTION DETAILS

I have determined that the election will be conducted through mail ballot. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit by personnel of the National Labor Relations Board, Region 25, on **November 23, 2020**, at 11:00 a.m. ET. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by **December 1, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 25 Office at (317) 226-7381 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted via electronic means **December 23, 2020** at 11:00 am ET. In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

VOTING ELIGIBILITY

Eligible to vote are those in the unit who were employed during the weekly payroll period ending November 1, 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.

VOTER LIST

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

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **November 10, 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.nlrb.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.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.

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

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

RIGHT TO REQUEST REVIEW

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

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

Although 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, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. 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: November 6, 2020.

Patricia K. Nachand

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