

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**XPRESS GLOBAL SYSTEMS, LLC<sup>1</sup>**

**Employer**

**and**

**Case 32-RC-268597**

**TEAMSTERS LOCAL 70, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

XPress Global Systems, LLC (Employer) operates a distribution center and warehouse in Hayward, California (Employer's facility). Petitioner, Teamsters Local 70, International Brotherhood of Teamsters (Petitioner or Union) seeks, by the instant Petition, to represent a bargaining unit of approximately 7 clerks and dockworkers employed by the Employer at this facility.

The Employer maintains that the smallest appropriate unit consisting of dockworkers and clerks also must contain the 7 drivers employed at the Employer's facility. Petitioner maintains the petitioned-for unit limited to clerks and dockworkers is an appropriate unit. The parties also disagree regarding the method of election, with the Employer seeking a manual election and Petitioner a mail ballot election.

A hearing officer of the National Labor Relations Board (Board) held a videoconference hearing on November 30, 2020.<sup>2</sup> Both parties filed briefs after the conclusion of the hearing. As explained below, based on the record, the briefs, and relevant Board law, I find the petitioned-for unit is appropriate and I have directed an election accordingly. Because of the severity of the ongoing COVID-19 pandemic in Alameda County, where the Employer's facility is located, I have directed the election take place by mail.

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<sup>1</sup> The names of the parties appear as amended at hearing.

<sup>2</sup> All dates 2020 unless otherwise indicated.

## RECORD EVIDENCE

The Employer operates a warehouse and distribution center for floor covering products. Rolls of carpet, vinyl, and other floor coverings are stored in racks, and floor tiles and similar products are stored on pallets at the Employer's facility. Trucks can access the warehouse by 21 dock doors that allow for loading and unloading. The Employer currently employs 7 drivers, 1 clerk, and 6 dockworkers at the facility, all of whom report to the service center manager, the only supervisor or manager at the facility. The clerk and service center manager both have offices at the Employer's facility, and break and conference rooms are also located there.

The facility is open from approximately 3:30 a.m. to 9:00 p.m., Monday to Friday. All employees are scheduled for 8-hour shifts but have staggered start times. Break times are a function of start times, with employees taking a break 2 and 6 hours into their shift, and a lunch break at the 4-hour point in their shift. Dockworkers begin working as early as 3:30 a.m., and drivers' staggered start times begin at 6:00 a.m. The clerk begins at 7:00 a.m. Employees will occasionally work beyond 8 hours, and on the weekends, as needed.

Drivers are classified as either "class A" or "class B," depending on the level of commercial driver's license (CDL) they hold. The Employer's single class A driver, also referred to as a line-haul driver, uses a large truck for deliveries of over 100 miles while the six class B drivers makes local deliveries with smaller vehicles. When drivers report for work they clock in, perform a pre-trip inspection of their vehicle, check the accuracy of their loads, and then leave the facility to deliver their loads. At the point of delivery, drivers use a pallet jack or forklift to remove the customer's order. Throughout the day drivers utilize the electronic logging device in their vehicle to track information such as when they take their breaks and lunch. If drivers have questions or encounter issues during their deliveries, they will contact the clerk at the Employer's facility. At the end of the day, drivers return to the Employer's facility and clock out.

Dockworkers load and unload incoming and outgoing freight, sort and manage product within the warehouse, and maintain inventory. Loading freight typically involves loading a truck, but they will also load a customer's vehicle if the customer picks up directly from the facility, referred to as a will-call order. Dockworkers use forklifts, pallet jacks, and barcode scanners to move and monitor inventory.

The clerk takes telephone calls from customers and is responsible for will-call orders. As noted, the clerk will talk to drivers while they are on the road if they have questions, talks to customers to answer their questions, and coordinates returns. The clerk may also provide information regarding orders to the dockworkers if they have questions. The service center manager assigns work to each of the classifications.

The drivers, clerk, and dockworkers all receive the same new hire orientation, a self-directed computer-based program. Drivers and dockworkers both receive forklift training, conducted in-person. All employees attend a monthly safety meeting. The pay

range for a class A driver is \$24.50-\$30.05 an hour, and a class B driver is \$22.34-\$28.71. Clerks earn between \$16.75 and \$22.64 an hour, and the pay range for dockworkers is \$18.00-\$22.60 an hour. Employees receive the same health, disability, paid time off, and holiday benefits. All employees are covered by the same employee manual, which includes policies on discipline, breaks, and overtime.

There is no evidence of temporary or permanent transfer between the driver, clerk, or dockworker positions. The only evidence of any cross-classification work are the references to drivers occasionally assisting with loading a vehicle.<sup>3</sup> Some tasks are performed with duplication in mind, for example as a safety precaution both drivers and dockworkers are required to check a truck in position for loading has its wheels chocked.

All employees at the Employer's facility are required to perform the same COVID-19 self-check when reporting to work. One employee tested positive for COVID-19 in July, and after quarantining returned to work. There is no evidence of workplace transmission.

## ANALYSIS AND CONCLUSION

### A. Appropriate Unit

When examining the appropriateness of a unit, the Board need not determine whether the unit sought is the only appropriate unit or the most appropriate unit, but rather whether it is "an appropriate unit." *Wheeling Island Gaming*, 355 NLRB 637, 637 n.1 (2010), citing *Overnite Transportation Co.*, 322 NLRB 723 (1996). If the petitioned-for unit is deemed inappropriate, the Board considers alternate unit proposals. *Overnite Transportation*, 322 NLRB at 723 ("[t]he Board's declared policy is to consider only whether the unit requested is an appropriate one, even though it may not be the optimum or most appropriate unit for collective bargaining").

The Board reiterated the traditional community of interest factors in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017). In making a community of interest determination, the Board considers whether the employees in question: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *PCC Structurals*, slip op. at 11 (citing *United Operations*, 338 NLRB 123 (2002)). The Board considers all the factors together, as no single factor is controlling. *Id.*

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<sup>3</sup> Questioned regarding how often drivers assist in loading the service center manager stated, at various points in the record, "it varies day to day," "it just depends" and other statements that do not quantify how frequently this occurs.

In *The Boeing Co.*, 368 NLRB No. 67 (2019), the Board described the three-step analysis to be applied under *PCC Structural*s when a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit. *Id.*, slip op. at 2. The first step considers the shared interests within the petitioned-for unit, examining whether the interests of the included employees are too disparate, preventing a community of interest. *Id.*, slip op. at 3. The second step considers the shared interests of the petitioned-for and excluded employees, and specifically whether the excluded employees have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members. *Id.*, slip op. at 4. Third, the Board considers whether special considerations, such as guidelines for specific industries, are present. *Id.*

The three-step analysis articulated in *The Boeing Co.* is properly applied here as the Employer asserts the smallest appropriate unit must include the drivers. The parties stipulated to the first step, that the dockworkers and clerk share have shared interests to make their inclusion in a unit appropriate and based on the record evidence I accept that stipulation. There is no evidence, and no party contends, that a guideline for a specific industry is applicable in this case, the third step. Accordingly, the question of appropriateness in this case is limited to the remaining step: whether the drivers have meaningfully distinct interests in the context of collective bargaining that outweigh the similarities they share with the clerk and the dockworker classifications. Based on the community of interest factors discussed below, I find such an interest does exist and the petitioned-for unit is appropriate.<sup>4</sup>

## **B. Community of Interest Factors**

### **1. Department Organization**

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. Thus, for example, generally the Board would not approve a unit consisting of some, but not all, of an employer's production and maintenance employees. See, *Check Printers, Inc.* 205 NLRB 33 (1973). However, in certain circumstances the Board will approve a unit in spite of the fact that other employees in the same administrative grouping are excluded. *Home Depot USA*, 331 NLRB 1289, 1289 and 1291 (2000).

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<sup>4</sup> On brief the Employer argues, separate from a community of interest analysis, that the Board disapproves of "fractured" units, citing to cases such as *Gateway Equipment Co.*, 303 NLRB 340 (1991), *United Rentals, Inc.*, 341 NLRB 540 (2004), and *Seaboard Marine, Ltd.*, 327 NLRB 556 (1999). The principle articulated in *United Rentals* and *Seaboard Marine* – bargaining units must not be composed of a "gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees" – is explicitly identified in *PCC Structural*s as the basis for the community of interest test. *Id.*, slip op. at 7. To the extent the Employer argues these cases present some additional consideration beyond a community of interest analysis I disagree. *Gateway Equipment Co.* presented a unique and inapplicable situation as it involved inclusion of a single driver, where exclusion would have left the driver "completely without representational rights," the language cited by the Employer. *Id.* at 342. That is not the case here.

Here, the Employer's operations are relatively small, and there is no evidence of departments or administrative divisions within operations at the Employer's facility. Accordingly, I find this factor has little probative value in the instant case.

## 2. Skills, Training and Job Functions

This factor examines whether disputed employees can be distinguished from one another based on job functions, duties, or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions. Evidence that disputed employees have similar requirements to obtain employment; that they have similar job descriptions or licensure requirements; that they participate in the same Employer training programs; and/or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Company, Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992).

Here, the primary function of drivers distinguishes them from the clerks and dockworkers. Drivers, whether class A or class B, are skilled in operating a vehicle large enough to require a specialized license, and indeed operating such a vehicle is how drivers spend most of the day. Dockworkers and clerks spend all, or almost all, of their workday performing their respective job functions as described above, inside the warehouse facility. They do not drive the Employer's trucks. While drivers and dockworkers both are trained in the use of forklifts, and use them, they also have separate tools specific to their job function, such as the drivers' electronic logging system, and the dockworkers handheld scanners. The only evidence of the drivers and dockworkers performing the same work is the reference to drivers assisting with loading trucks on occasion, and this is not quantified in the record. Overall, the record contains ample evidence of separate skills and job functions, with minimal to no evidence of overlap.

On brief, the Employer argues that several decisions where the Board included drivers in a bargaining unit support its position, but in each instance the facts, and particularly the facts related to the job duties of the employees involved, are distinguishable to the instant case. In *Calco Plating*, 242 NLRB 1364 (1979), the Board required inclusion of drivers in a production and maintenance unit, but the drivers involved worked alongside production and maintained employees on specific, identified tasks between a third and half of their work time. *Id.* at 1364-1365. Further, production and maintenance employees also operated the employer's trucks and also performed deliveries. *Id.* at 1364. Here, the record does not establish that drivers work alongside clerk or dockworkers for any significant amount of time. Rather, the record shows that drivers spend most of their making deliveries. Further, the record neither quantifies the time drivers spend working in the warehouse nor identifies any jobs they perform

beyond vague references to helping to load trucks, and it is undisputed dockworkers do not make deliveries.

The Employer also cites to *Standard Oil Co.*, 147 NLRB 1226 (1964) and *American Sunroof Corp.*, 243 NLRB 1128 (1979) but, while factually similar to *Calco* and each other, these cases differ greatly from the instant case. In *Standard Oil*, drivers spent a minimum of 25 percent of their work time at the employer's facility loading and unloading trucks and performing maintenance on their vehicles. *Id.* at 1227. Further, these drivers spent part of the year, when the demand for drivers was low, acting as dockworkers and clerks and spent 100 percent of their work time at the employer's facility. *Id.* In *American Sunroof* the drivers performed the same detailing work that was performed by the production and maintenance employees and, in addition to the drivers, the production and maintenance employees operated the employer's trucks. *Id.* at 1130.<sup>5</sup> There is no evidence in this case of the type of overlap in job duties present in these cases. Significantly, there is no evidence that dockworkers or clerks hold a commercial driving license that would permit them to perform the functions of a driver.

Taken together, I find that the drivers have a primary job function that is theirs alone and is not performed by the employees in the petitioned-for unit. This is strong evidence of a distinct interest such that the unit sought is appropriate.

### 3. Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. This factor examines whether the Employer's workflow involves all employees in a unit sought by a union. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, 311 NLRB 766 (1993); *Budget Rent A Car Systems*, 337 NLRB at 885.

Here, while each classification has a separate function, they work together to complete the delivery process of certain items. Dockworkers load the trucks, drivers drive and unload the trucks, and the clerk assists both should questions arise. While this represents a degree of functional integration, I note that not all products are delivered. I find significant that in the case of a will-call customer the driver has no role, only the clerk and dockworkers participate. Considering that one line of business has all three classifications working together but another line of business completely contains no role for a driver, I find functional integration is essentially a neutral factor, with facts that demonstrate a degree of functional integration and facts that demonstrate the opposite.

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<sup>5</sup> The Employer also references *Hicks Oil & Hicksgas, Inc.* 293 NLRB 84, 108 (1989) for support, but cites to the analysis of a specific driver by the administrative law judge in the context of a bargaining order. The Board in its decision did not address the finding regarding that employee and I do not find it probative in the instant case.

#### **4. Contact and Interchange**

Interchange refers to temporary work assignments or transfers between two groups of employees. Frequent interchange “may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills.” *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). Also relevant for consideration regarding interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. *Hilton Hotel Corp.*, supra.

The record in this case contains almost no evidence of contact, and no evidence of interchange, either temporary or permanent. Regarding contact, the Employer notes drivers could use the shared break room, occasionally assist with the loading trucks, and clock in and clock out at the Employer’s facility. However, these are the exceptions that prove the rule; drivers spend most of their day outside the facility and outside of contact with the clerk and dockworkers. As noted previously, there is no evidence of temporary or permanent interchange between the drivers and the petitioned-for classifications. The lack of contact and interchange in the instant case is a factor weighing strongly in favor of finding the petitioned-for unit appropriate.

#### **5. Terms and Conditions of Employment**

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion, such as hourly or salary, whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate area. *Bradley Steel, Inc.*, 342 NLRB 215 (2004); *Overnite Transportation Company*, 322 NLRB 347 (1996); *American Security Corporation*, 221 NLRB 1145 (1996).

The employees in question have the same fringe benefits, are subject to the same work rules, are paid on an hourly basis, and have similar working hours, but the wage scales reflect that drivers earn approximately 25 percent more than the clerk or dockworkers. Further, there is minimal overlap in pay rates; the starting wage for a class A driver is several dollars above the top wage of a clerk or dockworker, and the starting wage for the more numerous class B drivers is only about 30 cents lower than the top wage on the clerk and dockworker scale. Although some terms and conditions of employment are shared, I find the significant wage difference between the drivers and employees in the petitioned-for unit makes this factor a consideration in favor of Petitioner’s position.

## 6. Supervision

Another community-of-interest factor is whether the employees in dispute are commonly supervised. In examining supervision, it is necessary to consider the identity of employees' supervisors who have the authority to hire, to fire or to discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work, and providing guidance on a day-to-day basis. *Executive Resources Associates*, supra at 402; *NCR Corporation*, 236 NLRB 215 (1978). *Casino Aztar*, supra at 607, fn 11.

The employees in the petitioned-for unit all report to the service center manager, the only manager or supervisor at the facility. There is no dispute that the service center manager is the only individual who directs or assigns work at the facility. This shared supervision is evidence in support of the Employer's contention that the smallest appropriate unit includes the drivers.

### C. Conclusion Regarding Appropriate Unit

After considering all the community of interest factors with not one factor controlling, I find that the drivers have a meaningfully distinct interest in the context of collective bargaining that outweighs any similarities they share with clerks and dockworkers. The drivers, clerks, and dockworkers report to the same supervisor, and some discrete facts support the Employer's position. However, on balance, I find almost all of the community of interest factors do not support including drivers with the petitioned-for unit of dockworkers and clerks. Notably, the differences between the drivers and the petitioned-for unit of dockworkers and clerks in skills, training, and job functions, contact and interchange, and the terms and conditions of employment, particularly in regard to wage differences, support Petitioner's argument. Dockworkers and clerks spend most of their time inside the warehouse while the drivers primary job function of delivering goods occurs outside the facility with minimal physical contact with dockworkers or clerks. Significantly, there is no evidence of interchange. There is no evidence that any dockworker or clerk has a commercial driver's license that would make them eligible to perform the functions of a driver. While there is some functional integration with certain deliveries, there is no functional integration at all for will-call orders. For these reasons, based on the totality of the record, I agree with Petitioner, and I conclude that the petitioned-for unit is an appropriate one.

## METHOD OF ELECTION

The COVID-19 pandemic has had a profound impact on daily life in the United States. Because of the risk of infection associated with gatherings and in-person activities, the pandemic has also impacted on the way the Board conducts its elections. The Centers for Disease Control and Prevention (CDC), has determined "[t]he best way to prevent illness is to avoid being exposed to the virus," as the recently approved vaccine has not reached any significant number of individuals yet to provide herd immunity or easily accessible antiviral treatments. "Minimizing person-to-person



transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”<sup>6</sup> According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.”<sup>7</sup> Indeed, the CDC now recognizes that the virus is spread through contact, droplet, and airborne transmission that can occur both indoors and outdoors.<sup>8</sup> Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people.<sup>9</sup>

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 officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”<sup>10</sup> The CDC further states 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,” but “it is unlikely to be spread from domestic or international mail, products or packaging.”<sup>11</sup> 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.”<sup>12</sup>

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

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<sup>6</sup> CDC, *Protect Yourself* (updated November 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Department of Homeland Security, *Predicting the Decay of SARS-CoV-2 in Airborne Particles* (July 16, 2020), <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet>.

<sup>7</sup> CDC, *How it Spreads* (updated October 28, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

<sup>8</sup> <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html>

<sup>9</sup> CDC, *Protect Yourself*, *supra*.

<sup>10</sup> CDC, *Considerations for Election Polling Locations*, (updated November 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”); see also California Office of the Governor of the State of California, *Executive Order N-64-20* (May 8, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/05.08.2020-EO-N-64-20-signed.pdf> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”).

<sup>11</sup> CDC, *Frequently Asked Questions, Am I at risk for COVID-19 from mail, packages, or products?* (updated December 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/faq.html>.

<sup>12</sup> CDC, *Running Errands* (updated September 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html>.

Regional Directors to determine the arrangements for an election. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998); citing *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958); *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas & Elec.* at 1144-1145. Whatever decision a Regional Director does make should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. *National Labor Relations Board Casehandling Manual Part Two Representation Proceedings*, Sec. 11301.2.<sup>13</sup> 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. *Id.* 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 unspecified extraordinary circumstances. *San Diego Gas*, *supra* at 1145.

After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April, with many Regional Directors, including myself, directing primarily mail ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in determining when a manual election could be conducted safely, on July 6 the General Counsel issued a memorandum titled "Suggested Manual Election Protocols," *Memorandum GC 20-10*, setting forth detailed suggested manual election protocols.

In *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the COVID-19 pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its long-standing policy favoring manual elections and outlined six situations that suggest the propriety of mail ballots due to the COVID-19 pandemic. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under "mandatory telework" status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;

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<sup>13</sup> I note that the provisions of the *Casehandling Manual* are not binding procedural rules: it is issued by the General Counsel of the National Labor Relations Board (General Counsel) and not the Board and is intended to provide guidance to regional personnel in the handling of representations cases. See *Patient Care*, 360 NLRB 637, 638 (2014), citing *Solvent Services*, 313 NLRB 645, 646 (1994).

3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;
4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

The Board ordered this new guidance would be applied retroactively to all pending cases, including this case.

After careful examination of the record, the parties' respective positions, and the current state of the COVID-19 virus in California and Alameda County, where the Employer's facility is located, I have determined that a mail-ballot election is the appropriate option because the 14-day trend in the number of new confirmed cases of COVID-19 in Alameda County is increasing. In reaching this decision, I have applied the six considerations set forth in *Aspirus Keweenaw, supra*, to the facts of this case.

Applying these factors, I first note that the Regional office is not currently in mandatory telework status. I have addressed the second factor below as it is determinative in this case. Regarding the third factor, although California has recently imposed new restrictions on gatherings, I do not find any state, county or local measure regarding maximum gathering size would be implicated by a manual election. Finally, I find the Employer's commitments regarding precautions for a manual election are consistent with *GC Memo 20-10*, and there is no basis to find a COVID-19 outbreak is ongoing at the Employer's facility. Based on the above, and the lack of any other compelling circumstances, I conclude the method of election here is a question of the extent of COVID-19 in the community, the second consideration.

In addressing the second consideration – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

Here, regarding the first part, the John Hopkins University COVID-19 Status Report for Alameda County, California on December 15 reports a (-1) value of 1,191 cases, and a (-14) value of 54, a massive increase.<sup>14</sup> Additionally, the COVID-19 reporting site maintained by the State of California reports 14-day positivity rate data for Alameda County of 8.2 percent as of December 15, well above the 5 percent threshold

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<sup>14</sup> <https://bao.arcgis.com/covid-19/jhu/county/06001.html>

identified by the Board.<sup>15</sup> These figures reflect the ongoing widespread transmission in California, which as of December 15 has a 10.62 percent 14-day positivity rate.<sup>16</sup> The Board in *Aspirus* stated if either the number of new cases is increasing or the 14-day positivity rate in the county where the facility is located is 5 percent or higher it suggests the propriety of a mail-ballot election. Here, both criteria are met. I find the current state of the pandemic in Alameda County makes a mail ballot election appropriate.

## CONCLUSIONS

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

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
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.<sup>17</sup>
3. The labor organization involved claims 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. 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:

Included: All full-time and regular part-time clerks and dockworkers employed by the Employer at its facility located at 26318 Corporate Avenue, Hayward, California;

Excluded: All drivers, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

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<sup>15</sup> <https://covid19.ca.gov/state-dashboard/>

<sup>16</sup> <https://coronavirus.jhu.edu/testing/testing-positivity>

<sup>17</sup> During the hearing the parties stipulated to the following commerce facts:  
XPress Global Systems, LLC, a Georgia limited liability corporation, with an office and place of business located in Hayward, California, is engaged in the business of providing floor coverings distribution and warehousing. During the last twelve months, the Employer derived gross revenue in excess of \$500,000, and during that same period, purchased and received goods or services in excess of \$5,000, directly from businesses located outside the State of California.

## DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **TEAMSTERS LOCAL 70, INTERNATIONAL BROTHERHOOD OF TEAMSTERS**.

### A. Election Details

I have determined that a mail ballot election will be held. Petitioner has not waived the ten days it is entitled to have the voter list described below.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on January 7, 2021**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300-N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by January 14, 2021, should communicate immediately with the National Labor Relations Board by either calling the Region 32 Office at **(510) 637-3300** or our national toll-free line at **1-866-667- NLRB (1-866-667-6572)**.

**All ballots will be commingled and counted at the Regional Office on January 27, 2021.**<sup>18</sup> In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

### B. Voting Eligibility

Individuals eligible to vote are those in the unit who were employed during the payroll period ending **Saturday, December 12, 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.

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<sup>18</sup> If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

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

### **C. Voter List**

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

To be timely filed and served, the list must be *received* by the regional director and the parties by **December 17, 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](http://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](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

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

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

#### **D. Posting of Notices of Election**

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

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

#### **RIGHT TO REQUEST REVIEW**

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

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://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, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be

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impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Oakland, California this 15<sup>th</sup> day of December 2020.

/s/ Christy J. Kwon

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Christy J. Kwon  
Acting Regional Director  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5224