STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and **PELRB No. 313-21**

NEW MEXICO STATE UNIVERSITY BOARD OF REGENTS,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") on May 3, 2022 on New Mexico State University's ("NMSU") Objections to the Card Check ("Objections") conducted on March 17, 2022 pursuant to Section 10-7E-14(C) of the Public Employee Bargaining Act, NMSA 1978, ch. 10, art. 7E (2003, as amended through 2020) ("PEBA"), in connection with the United Electrical, Radio and Machine Workers of America's ("Union") Petition for Initial Certification of a New Bargaining Unit ("Petition").

After reviewing the Director's Report on Objections to Card Check issued on April 18, 2022 ("Director's Report"), the Results of the Card Check, and the pleadings in this matter, hearing oral argument from the parties, and being otherwise sufficiently advised, the Board, by a vote of 3-0, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Union filed its Petition with the NMSU Labor Management Relations Board on May 12, 2021, seeking certification as the exclusive agent for purposes of collective bargaining for a proposed bargaining unit consisting of all full-time and part-time graduate students whose primary job is

instruction and/or research at the NMSU's main campus in Las Cruces and branch campuses in Alamogordo, Carlsbad, Doña Ana and Grants.

2. At a meeting held on July 14, 2021, the NMSU Labor Management Relations Board determined that the authorization cards submitted by the Union met the 30% showing of interest required to move forward with the Petition.

3. The cards were submitted by the Union with its Petition and were signed and dated in the months of January through May, 2021.

4. In early November 2021, jurisdiction over the Petition was transferred to the Board under Section 10-7E-10(F) and (I) of PEBA, after the NMSU Labor Management Relations Board had a membership vacancy exceeding 60 days.

5. On March 17, 2022, the Executive Director and Board staff conducted a card check under Section 10-7E-14(C) of PEBA at the Board offices located at 2929 Coors Blvd. N.W., Suite 303, Albuquerque, NM 87120.

6. The card check was conducted under a Card Check Agreement signed by the Executive Director and the parties. In pertinent part, the Agreement provides that the card checking will be performed by the Executive Director and that each party shall be entitled to "one observer to be physically present to assist and observe in the count."

7. The Executive Director was assisted in conducting the card check by an administrative assistant.

8. The Union and NMSU each had representatives physically present during the card check. The Union had two representatives: James Montalbano, the Union's legal counsel, who signed the results of the card check as the observer for the Union, and Anna Rose, a field organizer employed by the Union. During the card count, NMSU asked for clarification regarding which of the two was the Union's designated observer but did not object to the Union having two people physically present during the count.

9. On two of the electronically submitted authorization cards, the employee's name in the "printed name" section was misspelled. The signatures on both cards were electronically verified. The two cards were challenged because of the misspelled printed names and excluded from the count. After the card check was conducted, the Executive Director was able to contact one of the employees named on the challenged cards, who confirmed that he had submitted the card and had made an error when typing his name.

10. The results of the card check are shown on the Board form titled "Results of Card Check in Lieu of Election," which was signed and dated by the Board's Executive Director and observers for NMSU and the Union on March 17, 2022. The form, which was adapted from the form used to tally the results of an election under Section 10-7E-14(A) of PEBA, referred to "election returns" and "ballots."

11. The results of the card check were reported as follows:

1. Total Number of Employees in Bargaining Unit		939
2. Total Number of Employees to be accreted	N/A	
3. 50% of Employees in Bargaining Unit Equals		469.5
4. Total Interest Cards Indicating Support		498
5. Number of Challenged Cards		6
6. Challenged Cards Rejected by Parties		6
7. Challenged Cards Agreed To By Parties		0
8. Percent of Employees in Bargaining Unit indicating support		53%

12. NMSU filed its Objections to the Card Check on March 24, 2022.

13. The Union filed its Response to NMSU's Objections to Card Check on March 29, 2022.

14. On April 18, 2022, the Executive Director provided his Report on Objections to Card Check and recommended that the Board proceed with a fact-finding hearing under Section 10-7E-14(C) of PEBA at its next scheduled meeting on May 3, 2022 and make appropriate findings.

15. At its May 3, 2022 meeting, the Board heard oral arguments from Dina Holcomb, counsel for NMSU, and Stephen Curtice, counsel for the Union. Neither party presented witness testimony or other evidence at the hearing.

16. NMSU's objections are summarized as follows: (1) the Board did not adopt rules governing the administration of card check proceedings before conducting the card check related to the Petition; (2) the Board did not use an updated bargaining unit list for the card check proceedings; (3) the misspelled printed names on the challenged authorization cards raised concerns about fraud in the card check proceedings; (4) the Card Check Agreement was violated because (a) an administrative assistant conducted the card count along with the Executive Director and (b) the Union had two observers physically present during the card count; (5) the authorization cards were not "sufficiently current" under the Board's rules; and (6) the Board's form used to record the results of the card check is misleading because it is titled "Results of Card Check in Lieu of Election" and states that the "above [tally] is a true statement of the *election returns*" (emphasis added).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter in these proceedings.

2. Section 10-7E-14(C) of PEBA provides:

> As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards.

3. The March 17, 2022 card check was conducted under and in accordance with Section 10-7E-14(C).

4. As the Board previously decided in *In re: United Electrical, Radio and Machine Workers of America and University of New Mexico ("UE v. UNM"),* PELRB No. 307-20 (Jan. 27, 2022), 4-PELRB-2022, the Board's statutory obligation to hold a fact-finding hearing on an employer's challenge to the Board's verification under Section 10-7E-14(C) is self-executing and does not require or depend on the adoption of procedural rules. For the same reasons discussed in that decision, the lack of rules for the conduct of a card check did not render the card check related to the Union's Petition invalid.

5. The Board also decided in *UE v. UNM* that PEBA does not require the Board to use an updated bargaining unit list when conducting a card check proceeding. Section 10-7E-14(C) allows labor organization to submit authorization cards from a majority of employees in the proposed bargaining unit with its representation petition. The Board then verifies "that a majority of the employees in the bargaining unit have signed valid authorization cards," and, if so, certifies the labor organization as the exclusive representative. The Board's verification is based on the authorization cards submitted with the petition, which means the Board necessarily relies on the list of employees in the bargaining unit at the time the petition is filed. As stated in the Board's decision in *UE v. UNM*, "the purpose of a card check is to test majority support as of the time a petition is submitted" (quoting from the Director's Report in *UE v. NMSU* on objections to the card check).

6. The misspelled printed names on the authorization cards do not, by themselves, indicate fraud. The cards were challenged based on the misspellings and properly removed from the count. No showing was made that the challenged cards affected the validity of the remaining cards included in the count.

7. NMSU's objections related to alleged violations of the Card Check Agreement are without merit. The Agreement did not preclude the Executive Director from having a staff member under his supervision assist in conducting the card check. The Agreement's provisions governing observers is based on the Board's rules for observers during ballot counts, which specify that "observers shall not be … labor organization employees" and allow "representatives of the parties in addition to the

observers to observe the counting of ballots." 11.21.2.29 NMAC. Under these rules, the Union had only one eligible observer, Mr. Montalbano, who was physically present at the card check and signed the card check results. NMSU did not show what effect, if any, the alleged violations of the Card Check Agreement had on the validity of the authorization cards or the card check process.

8. NMSU's objection related to whether the authorization cards are "sufficiently current" is premised on the submission of the cards ten months before the card check was conducted. However, as with the list of eligible employees discussed above, the time for determining whether an authorization card is "sufficiently current" is when the representation petition is filed, not at the time of the card check proceedings. See 11.21.2.13(A) NMAC (requiring the Director to investigate the petition within 30 days of filing, including whether the signatures on the showing of interest (in the form of cards or a petition) "are sufficiently current"). NMSU does not claim that the authorization cards were insufficiently current when the Union submitted the Petition to the NMSU Labor Management Relations Board. Because the cards presumably were "sufficiently current" when the NMSU Labor Management Relations Board reviewed the Petition, there are no grounds for the objection.

9. NMSU's contention that the title of the Board's form used to record the results of the card check and references in the form to "election returns" are misleading has no merit. No evidence was presented that parties and other persons participating in the card check were confused or misled by the challenged language on the form or that it affected the validity of the authorization cards or card check proceedings.

10. A majority of the employees in the appropriate bargaining unit have signed valid authorization cards, as evidenced by the Results of the Card Check in Lieu of Election dated March 17, 2022.

IT IS THEREFORE ORDERED:

a. NMSU's objections to the results of the March 17, 2022 card check are hereby DISMISSED; and

b. Board staff are hereby directed to issue a Certification of Exclusive Representation.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

May 16, 2022
DATE

Mark Myers Digitally signed by Mark Myers Date: 2022.05.16 11:35:44 -06'00'
MARK MYERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and **PELRB No. 313-21**

NEW MEXICO STATE UNIVERSITY BOARD OF REGENTS,

Respondent

DIRECTOR'S REPORT ON OBJECTIONS TO CARD CHECK

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego on the New Mexico State University Board of Regents' Objections to the Card Check conducted on March 17, 2022, received on March 24, 2022. A copy of Respondent's objections is attached to this report as Appendix A. The Union filed a Response to NMSU's objections on March 29, 2022, attached as Appendix B, which I took into consideration in making this report. Although NMAC 11.21.2.34 provides for objections to conduct affecting the result of the election there is no similar provision for contesting conduct affecting a card check. A copy of NMAC 11.21.2.34 is attached as Appendix C. In order to provide a mechanism for addressing Respondent's objection in the absence of a specific rule, and in an effort to act consistently with prior objections to other card checks conducted by this Board, I followed the procedure in NMAC 11.21.2.34 as closely as practicable for preparing and presenting this Report.

I address each of NMSU's objections in turn:

1. **The PELRB should have adopted Rules governing the administration of a Card Check prior to conducting the Card Check.**

Two distinct issues appear within NMSU's first objection that the PELRB should have adopted Rules prior to conducting the Card Check. First, the PELRB has not promulgated rules establishing the procedures to be followed by a mandated card check. Second, the PELRB failed to follow its own "established groundrules [sic]" for a card check:

a. **NMSU argues that the Board should promulgate rules establishing proper procedures before performing any card check including that at issue here.**

With regard to whether the PELRB should have adopted Card Check Rules prior to conducting this Card Check, NMSU reminds the Board of its mandatory duty to promulgate rules necessary to accomplish and perform its functions and duties NMSA 1978 § 10-7E-9(A)(2020):

> "The board…shall promulgate rules necessary to accomplish and perform its functions and duties as established in the Public Employee Bargaining Act…"

NMSU then argues that the Board should promulgate rules establishing the procedures to be followed by a "mandated" card check before performing any card check including that at issue here. At the outset staff notes that because the subject card check took place pursuant to NMSA 1978 § 10-7E-14(C) which provides that a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit *may* submit authorization cards from a majority of the employees in an appropriate bargaining unit as an alternative to the provisions of Subsection A of § 14 governing elections, it is not accurate to refer, as NMSU does, to a "mandated" card check. That criticism aside, review of the Board's internal documents affirm that the PELRB has not yet promulgated procedural rules governing the conduct of a card check although the

rulemaking process is underway with an *ad hoc* advisory committee having been assembled for that purpose.

Whether the PELRB "should have" adopted procedural rules for a card check before proceeding with a card check is a matter addressed by the PELRB in re: *United Electrical, Radio and Machine Workers of America & University of New Mexico,* 4-PELRB-2022 (January 27, 2022) (PELRB 307-20). A copy of the Board's Order and the underlying Report on Objections are attached to this Report at Appendix D. I incorporate by reference my findings and analysis in my Report on Objections to the card check as adopted by the PELRB which determined that procedural rules on the conduct of a card check are not specifically mandated by PEBA and the Board has discretion to determine what rules are "necessary to accomplish and perform its functions and duties as established in the (PEBA)." Section 10-7E-9(A) NMSA. Therefore, the Board found that objection to be "without merit" and that the "lack of rules for the conduct of [the UNM] card check does not render the card check invalid." NMSU does not offer for consideration any distinguishing facts that would compel a different result than that reached in the UNM case and I could find none upon my own investigation.

b. **The PELRB did not follow its "established groundrules" of utilizing an updated employee list.**

With regard to the objection that the PELRB failed to follow its own "established groundrules [sic]" of utilizing an updated employee list, those so-called "established groundrules [sic]" to which NMSU refers, are nothing of the sort. NMSU refers to PELRB Form 13, which is a template for drafting a "Stipulated Ground Rules For Card Check". As a template for the drafting of stipulated ground rules (designed for a stipulated card check before the present version of PEBA Section 14(C)), it cannot reasonably be construed as

ground rules itself. The PEBA does not require that the parties agree to Paragraphs 2 and 3 of that template and so do not compel "utilizing an updated list" nor does it presume that a list other than that provided by the employer at the time the Petition was filed constitutes the "best available current 'snap shot' of the petitioned-for bargaining unit."

Here, the parties have entered into a Card Check agreement whereby at ¶ 4 the parties agreed "that the employee list already submitted to the PELRB shall serve as the operative list for purposes of the card check – no updated list is required."

As with NMSU's objection to the absence of procedural rules, an objection that an updated employee list was not utilized during the card check, was found to be without merit by this Board in *United Electrical, Radio and Machine Workers of America & University of New Mexico*, 4-PELRB-2022, wherein the Board adopted my analysis that "[t]he better course is to adopt the approach advocated by the union that the purpose of a card check is to test majority support as of the time a petition is submitted."

NMSU does not offer for consideration any distinguishing facts that would compel a different result than that reached in the UNM case and I could find none upon my own investigation.[1] It does offer an *argument* that this Board should follow the case law established under the National Labor Relations Act (NLRA), for developing a "formula" for providing a list for employees who are "transitory". See, *Steiny and Company, Inc. and Local Union No. 11, Intl Brotherhood of Electrical Workers, AFL-CIO*, 308 NLRB 1323 (1992); *Daniel Construction,* 133 NLRB 264 (1961), modified, 167 NLRB 1078 (1967). Copies of those cases are attached as

[1] In a scholarly article by William A. Herbert, Executive Director of the National Center for the Study of Collective Bargaining, and former Deputy Chair and Counsel to the New York State Public Employment Relations Board entitled "*Card Check Labor Certification: Lessons from New York*" Albany Law Review Vol. 74.1 (2011), the author notes that the timeliness of a Petitioner's showing of interest in what has since been amended to be section 201.4 of the N.Y. PERB's Rules "relates to the date of the proposed certification rather than the date when the Director determines that a certification without an election is appropriate." at 161.

Appendices E and F. Please note that the graduate students in question here are not laid off employees who are not employed at the time they submitted interest cards but have a reasonable expectation of future employment and are thus, arguably, entitled to vote in a union election, as in *Steiny and Company, Inc.* Therefore, this Board should question whether NMSU's graduate students holding assistantships are "transitory employees" as that term is used in *Steiny and Company, Inc.* At a minimum this Board should question the extent to which NMSU's argument that a formula is necessary where workers experience intermittent employment or are employed for short periods, is related to its prior argument that this Board must use an "updated list" – an argument rejected in *United Electrical, Radio and Machine Workers of America & University of New Mexico.* As NMSU notes, in *Steiny and Company, Inc.* the NLRB's rationale in developing such a formula was because it "satisfies the Board's objective of simplifying and expediting the *election process* and of assuring employees 'the constant availability of an *electoral mechanism for expressing their representational desires.*'" *Steiny* at 1325, citing, *John Deklewa & Sons,* 282 NLRB 1375, 1386 (1987). (Emphasis added).

At the risk of re-stating the obvious, the card check at issue here is not an election, but an "alternative" to the electoral process provided by Section 14(A) (NMSA 1978 § 10-7E-14(C) (2020)). A copy of Section 14 of the Act is attached to this Report as Appendix G.

2. **An "Updated" Bargaining Unit List Should Have Been Utilized.** I take this objection to be referring to NMSU's preference for an "updated" employee list investigated as discussed above. In addition I note, as is pointed out by UE in its Response to the objections, that this Board has already rejected that argument in *United Electrical, Radio and Machine Workers of America & University of New Mexico, supra.* Then, as now, the only time majority support is demonstrated in a case proceeding to an election upon an initial showing

of 30% support is following an election. Thus, when proceeding by election, an updated employee list showing eligible voters at the time of the election is necessary.

Under the alternative card check procedure provided for in NMSA 1978 § 10-7E-14(C) the point at which majority status is determined is not at a future election date to be determined but at the time of filing the Petition:

> "a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board…"

All that remains to be done once interest cards purporting to be from a majority of employees submitted with a Petition is for the Board to verify that the submitted cards are "valid" and once that is done, to certify the labor organization as the exclusive representative for those employees:

> "the board…shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit…"

That verification can only be done and only has significance in relation to a list of employees extant as of the time the Petition is filed.

The NLRA does not provide for recognition by card check and for the reasons discussed above, references to the NLRA's formula for determining a list for employees who are "transitory" are immaterial.

3. **Challenged Cards Raised a Concern of Fraud Necessitating an Investigation.**

By this objection NMSU asserts that on two challenged cards, the graduate assistants' names were misspelled in the electronic signature blocks. As the Union points out in its Response to the objections, the misspelling occurred, not in the signature block as alleged, but in the "printed name" section of the electronically submitted card when verified by cross-checking

with the employee list. Based on that cross-check, the Card Check Supervisor challenged the cards, the parties after discussion were not able to resolve the challenge so the cards were segregated and after they turned out not to be material, were not counted. See Results of the Card Check, attached hereto as Appendix H.

Respondent now objects to the cards on the additional ground that a person misspelling his or her own name is indicia of fraud. This Board should determine whether the misspelled names in two instances where the cards were excluded from the count are a sufficient indication of fraud to require an investigation and assuming the two cards were fraudulently submitted, is the fraud material so that an objection to the entire card check would lie. NMSU relies on *Perdue Farms, Inc. v. NLRB*, 935 F. Supp. 713 (E.D. N.C. 1996) for the proposition that the PELRB may not dispense with a mandatory investigation or conduct an investigation contrary to established policy, such that it altogether lacks a basis for ordering an *election*. A copy of the case is attached as Appendix I.

Black's Law Dictionary defines a fraudulent act as: "conduct involving bad faith, a lack of integrity, or moral turpitude" or "conduct satisfying the elements of a claim for actual or constructive fraud." New Mexico Uniform Jury Instruction 13-1633 further delineates the elements of "fraud" actionable in tort:

> "To prove fraud, [a] party claiming fraud must prove:
> First, a representation of fact was made which was not true;
> Second, either the falsity of the representation was known to the party making it or the representation was recklessly made;
> Third, the representation was made with the intent to deceive and to induce [the] (party claiming fraud) to rely on the representation; and
> Fourth, [the] (party claiming fraud) did in fact rely on the representation.
> Each of these elements must be proved by clear and convincing evidence."[2]

[2] The "clear and convincing" standard is consistent with Board Rule NMAC 11.21.2.13 requiring the director shall check the showing of interest against the list of eligible employees in the proposed unit filed by the public employer to determine whether the showing of interest has been signed and dated by a sufficient number of employees and that the signatures are sufficiently current. If signatures meet that requirement, they shall be

Misspelling one's own name as it is being typed onto an electronic interest card is not intrinsically indicia of fraud, by which I mean there are other explanations for a difference between the printed name on an interest card and the signature or the name on the list, such as a simple slip of the typist's finger on a keyboard or an autocorrect function changing one's intended spelling without notice. There is nothing in the mere fact that such a difference exists to suggest a false representation was known to the party making it or recklessly made, with the intent to deceive and to induce NMSU to rely on the representation and that NMSU did in fact rely on the representation. Reliance is impossible in this case as the cards were intercepted by the card check supervisor and were not counted.

Notwithstanding staff's request in this report that the PELRB find that, without more, the mere fact that the printed name on an interest card is not spelled the same as the graduate assistant's name on the employer's list is not indicia of fraud requiring an investigation, because there were only two cards at issue, I attempted to contact each graduate assistant at issue on April 1, 2022 to inquire whether they submitted interest cards on the dates shown on their cards and to ask their explanations for why the printed name block did not match the spelling of their names on the employer's list.

One graduate assistant confirmed submitting an electronic interest card on the date indicated thereon and surmised that his finger must have slipped when completing the printed name block. I took that evidence as confirmation that the mere fact that the printed name on an interest card is not spelled the same as the graduate assistant's name on the employer's list is not indicia of fraud requiring an investigation. This is especially so in consideration of the confirmation email that is sent as each electronic submission is received by the union as part

presumed valid unless the director is presented with "clear and convincing evidence that they were obtained by fraud, forgery or coercion". An investigation is required only once evidence of such fraud, forgery or coercion is presented to the director.

of the organizing process and submitted along with the electronic cards at the time the petition is filed. Additionally, a signature appearing on any electronic interest card submitted to the PELRB is independently verified by the Acrobat pdfFiller platform that serves as an audit trail to show when and by whom a signature was created. pdfFiller serves as a trusted third party or a certificate authority (CA), placing a "verified by pdfFiller" badge on every signature. This badge may only be removed (optionally) by the signer. A redacted copy of such a confirmation is attached as Appendix J.

As of this writing the second graduate assistant at issue has not returned the voicemail message left by staff or responded to an email requesting a call back using contact information provided by union on their list used by the parties at the card check to confirm the identity of disputed cards. We do have a confirming email for that graduate assistant as described above. A copy of the Board's published guidelines for electronic submissions is attached as Appendix K. Staff requests a finding that the confirming email and the third-party signature verification satisfies the requirement of the Uniform Electronic Transactions Act that an electronically submitted signature is attributable to an individual.

Even without a response from the second graduate assistant and in consideration of email verification of electronically submitted interest cards, application of the "Occam's razor" principle of theory construction or evaluation indicates that the simplest explanation - that is, the solution that requires the fewest assumptions - is preferable. In this case, Occam's razor suggests a finding that there is no indicia of fraud necessitating an investigation and that the quantum of evidence results in a finding that no fraud in submission of interest cards occurred and that *Perdue Farms, Inc. v. NLRB* either has no applicability or that its principles have been met.

3. **NMSU Objects That The Card Check Agreement Was Not Followed.**

At the outset, the Board should be aware of a subtle, but critical recasting by the Employer of the Card Check Agreement language at paragraph 10. NMSU asserts that paragraph 10 of the Agreement provides that "… a violation of the Agreement is a basis for an objection and grounds for the card check to be rescheduled or invalidated." That's not what paragraph 10 says. The actual language of paragraph 10 is:

> "Within five workdays following the service of the Results of Card Check a party may file objections to the conduct of the Card Check. A violation of this Card Check Agreement is a basis for an objection *and such a violation may cause the card check to be rescheduled and/or the results to be invalidated.*"

(Emphasis added).

The subtle but critical difference is that while a violation of the Agreement is grounds for an objection, whether that objection will result in the card check being rescheduled or invalidated depends upon the merits of the objection itself. An objection for failure to comply with the Card Check Agreement is not sufficient by itself to invalidate the card check results - it is the materiality and merits of the objection, and whether rescheduling and/or invalidating the results is a just remedy under the circumstances, that determines whether the Board *may* grant that relief. With that background in mind, I turn my attention to the specifics of the Employer's objections.

a. **NMSU objects that the Card Check Agreement limited the Card Checking to being conducted by the Executive Director, but both the Executive Director and the Administrative Assistant conducted the card check.**

In its investigation of this objection, staff takes the position that paragraph 5 of the agreement that the Card Check was to be conducted by the Executive Director must be read in conjunction with NMSA 1978 § 10-7E-9(E), whereby this Board has delegated its authority to carry out its functions to the Executive Director and Rule NMAC 11.21.1.28 whereby the Executive Director may delegate any of his authority "to other board

employees" , which includes the Administrative Assistant. Copies of the statute and rule are attached as Appendix L. Inasmuch as the Administrative Assistant acted in this case under the direct supervision of, at the behest of, and as authorized by the Executive Director, he was by law the agent of the Executive Director.[3] Additionally, NMSU does not present any fact or argument that the manner of conducting the card check by the Executive Director and the Administrative Assistant acting in concert affected the Card Check results in any way. Therefore, in this context, the Administrative Assistant was effectively my alter ego as the Card Check Supervisor to conduct the Card Check more efficiently than if I had to act alone and we ask that this Board find that all acts by the Administrative Assistant at the behest of the Executive Director during the Card Check constitute performance of the Card Checking by the PERLB Executive Director, Thomas Griego as though he personally performed those acts and that we therefore complied with paragraph 5 of the Card Check Agreement.

b. **NMSU objects that Petitioner had two observers present throughout the count, both of whom actively engaged in the process of reviewing cards whereas paragraph 6 of the Card Check Agreement limited the parties to "one observer to be physically present to assist and observe in the count."**

It is not accurate to say that the Petitioner had "two observers present throughout the count". Although there were two pro-union persons physically present during the count[4], James Montalbano and Anna Rose, only one of them, Mr. Montalbano, was an "observer"

[3] An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. See, N.M. U.J.I. 13-401; *Tabet v. Campbell*, 101 N.M. 334, 681 P.2d 1111 (1984); *Wolf & Klar Cos. v. Garner*, 101 N.M. 116, 679 P.2d 258 (1984); *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 654 P.2d 548 (1982); *Turley v. State,* 96 N.M. 579, 633 P.2d 687 (1981); *Bank of New Mexico v. Priesthy,* 95 N.M. 569, 624 P.2d 511 (1981); *Barnes v. Sadler Assocs.*, 95 N.M. 334, 622 P.2d 239 (1981); *Vicker's v. North Am. Land Devs.*, 94 N.M. 65, 607 P.2d 603 (1980).

[4] In addition to those persons physically present for the card count, others attended remotely via a Zoom link.

and signed the results of the card check in that capacity. See Appendix H. After reviewing that portion of the audio record of the card check referred to by the Employer in its objections (Appendix A) I concur that at the outset of the count, there was uncertainty and confusion as to who was the observer for Petitioner. However, that question was ultimately resolved in favor of Mr. Montalbano being designated the observer as he is the one signing the card check results in that capacity. The Employer acknowledges that "…counsel for Petitioner [Mr. Montalbano] actively engaged as an observer, solely acted as the observer during a period in which Ms. Rose was absent from the room…".

Any error by the Petitioner by misidentifying Anna Rose as its observer is ineffective and immaterial, not only because any early error was corrected as appears by the signed card check results form and Mr. Montalbano acting as the observer as acknowledged by the Employer, but because Ms. Rose never qualified to serve in the role of observer in the first place and could not have served in that role.

NMAC 11.21.2.29 provides in part that:

> "Observers shall not be supervisory or managerial employees or labor organization employees. However, representatives of the parties in addition to the observers may observe the counting of ballots."

My investigation of the objections verified that Ms. Rose is employed by the Petitioner, United Electrical, Radio and Machine Workers of America, as a Field Organizer. As such she was at all times prohibited from serving as an observer in this matter despite any comments by Petitioner's counsel.

NMSU's objection erroneously presumes that because the parties' card check agreement calls for each party to have one person physically present "to assist and observe in the count" that any such assistance is exclusive so that no one other than a designated observer may assist in

the count. That false presumption is belied by the Card Check Agreement at paragraph 6 – the same paragraph authorizing observers – wherein it was agreed that:

> "If resolution of the disputed cards is needed to address the question of 'majority support' leaders from Labor and Management will meet to discuss."

Participation in the card check by Ms. Rose was at all times consistent with that of a labor organization leader addressing disputed cards in the context of demonstrating majority support as was contemplated by the card check agreement. Accordingly, it does not appear that there is a sufficient factual basis to substantiate NMSU's objection. As with its prior objection, NMSU does not present any fact or argument that the manner of conducting the card check by the Executive Director relying on Ms. Rose's participation as a labor leader to help resolve disputes over submitted cards affected the Card Check results or prejudiced the Employer in any way.

4. **No statements were made regarding what would be reviewed on the cards in order to determine whether a card was a valid card to be counted, whether the cards were reviewed for facial adequacy which requires a determination of whether the cards are "signed and dated" and in the absence of rules regarding how to determine if a card is "sufficiently current" the cards submitted 10 months before the card check was conducted, "might" now be stale.**

NMSU cites no authority for the proposition that prior to conducting a card check PELRB staff is required to make some sort of "statement" regarding what would be reviewed on the cards in order to determine whether a card was a valid card to be counted, or whether the cards were reviewed for facial adequacy, which requires a determination of whether the cards are "signed and dated". NMSU argues that the PELRB has not adopted rules regarding how to determine if a card is "sufficiently current" as required by 11.21.2.13(A) NMAC, implying that the cards submitted 10 months before the card check was conducted, might now be

stale. If it has evidence or even a reasonable suspicion that the cards do not comport with NMAC 11.21.2.13, let it come forward with that information.

To complain that the cards are now 10 months old, presumes the validity of its earlier objection discussed above that an updated list employee list is required. Because an updated list is not required, the passage of 10 months from their submission to the card check is immaterial. Even if the argument was material, cards signed and submitted within a year of an election are considered to be valid. Generally, authorization cards "must have been signed during the union's current organizing campaign," and "cards signed more than a year prior to the union's demand for recognition may be considered 'stale' and thus not count toward the union's majority." See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Ch. 12. III A. 1 -A. 3.

There are cases in which cards over one year in age have been recognized. See *Grand Union Co.*, 122 NLRB 589 (1958), citing *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 554 (6th Cir. 1940) (rejecting the argument that designation cards dated two years before the union's demand for collective bargaining could not be counted, under the "well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter"), *Safeway Stores, Inc.*, 99 NLRB 48, 49, and 56 (1952) (counting as proof of majority status cards that were over one year old and had not been repudiated by the employees); *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514, 529 (1953), *enf'd.* 218 F.2d 917 (9th Cir. 1955).

The record demonstrates that the requirements of NMAC 11.21.2.13 were met in that the cards were reviewed for assurance that the cards are signed, dated and sufficiently current. To arrive at that conclusion it must be remembered that this case originated with the NMSU

Labor Management Relations Board, which accepted the Union's Petition for a Card Check on May 12, 2021, asserting majority support as represented by the accompanying interest cards – the same cards as are at issue here. See Appendix M. At a public meeting on July 14, 2021 NMSU's LMRB cross-referenced the completed signature cards with an employee list prepared by the Employer as of May 3, 2021. See Appendix N. That Board verified 323 of the 498 submitted cards, stopping the card check as soon as it was satisfied that the 30% support required by Part 2 Section 4 of NMSU's LMRB Rules then in effect[5]:

> "With the petition (and at the same time the petition is filed), the petitioner shall deposit with the LMR Board *a showing of interest consisting of signed, dated statements by at least thirty percent of the employees in the proposed unit*. In the case of a petition for a certification election, the signed dated statement for each employee must indicate that the employee wishes to be represented for the purposes of collective bargaining by the petitioning labor organization, and in the case of a petition for a decertification election, must indicate that each employee wishes a decertification election. *Each signature shall be separately dated.* So long as it meets the above requirements, a showing of interest may be in the form of signature cards or a petition or other writing, or a combination of written forms. A showing of interest is not required to be filed in support of a petition for amendment of certification or unit clarification."

(Emphasis added).

In doing so, the NMSU LMR Board was following Part 2 of its rules, patterned after Part 2 of the PELRB's Rules. More specifically, Part 2 concerning a petitioning union's Showing of Interest requires that in order to move forward, a petitioner "shall deposit with the LMR Board a showing of interest consisting of signed, dated statements by at least thirty percent

[5] On April 7 and April 11, 2022 I contacted the parties' representatives, Mark Meinster for UE and Dina Holcomb for NMSU, who were present at the NMSU LMRB July 14, 2021 meeting, to ask for their recollections about how the card check was conducted beyond the information provided in the minutes of that meeting, Appendix P hereto.

of the employees in the proposed unit… Each signature shall be separately dated." A copy of the NMSU LMR Board Rules Part 2 is attached as Appendix O.

Additionally, Part 2 Section 6 of NMSU's LMR Board Rules required it to have checked the showing of interest against the list of eligible employees provided by the employer to determine whether each showing of interest:

> "…has been signed and dated by a sufficient number of employees and that the signatures are sufficiently current. If signatures submitted for a showing of interest meet the requirements set forth in these rules, they shall be presumed valid unless the LMR Board is presented with clear and convincing evidence that they were obtained by fraud, forgery, or coercion."

Further, the LMR Board was required to "…dismiss any petition supported by an *improper or insufficient showing of interest*, consistent with Section 16 (opportunity to present additional showing)…"See Section 6 of Part 2 of the LMRB rules Appendix O.

There was no indicia at the time that any of the submitted cards were not dated or signed as required and although counsel for NMSU objected to counting cards submitted electronically because unlike the PELRB the LMR Board had not promulgated a rule permitting electronic filing, she did not register any objection that the cards were not properly signed and dated or assert any indicia of fraud nor did she allege that the cards were "stale". See Appendix N. No such objections were noted by NMSU in its statement of issues required by Part 2, Section 5 of the LMR Board Rules which called for NMSU upon request to identify "any other issue that could affect the outcome of the proceeding" within 10 days of the filing of a representation petition. See Appendix O. By operation of Section 6 of the LMRB Rules then in effect, the adequacy of a showing of interest "…is an administrative matter solely within the LMR Board's authority and shall not be subject to question or review."

The PELRB recognizes electronic showing of interest/authorization cards as acceptable subject to the New Mexico Uniform Electronic Transaction Act (UETA). See NMSA 1978,

§§ 14-16-2 *et seq*. The UETA states that if the law requires a signature, an electronic signature satisfies the law. NMSA 1978, § 14-16-7(D). However, the electronic signature must be attributable to a person. Detailed PELRB Guidelines For Utilizing Electronic Signatures For A Showing Of Interest is posted on the Board's website and a copy attached as Appendix K. The card check results form indicated that with the exception of six challenged cards, all cards counted were duly signed and dated by employees appearing on the employer's list within a year of the Petition so that at the time of our card check for majority support, the cards had been checked for that purpose at least twice. Partially reviewed by the NMSU LMB on July 14, 2021, by this Board's director upon assuming jurisdiction over the Petition, and again during the card check itself. All questionable signatures or dates were excluded from the count. For that reason there is no factual basis to support an objection on the basis that the cards were not properly dated, signed or were stale despite there being no announcement before the count that the cards were being checked (again) for proper dates and signatures. Accordingly, the indication NMSU seeks that the cards were dated and were not stale is the fact that this Board proceeded with counting the cards to determine majority support on March 17, 2022.

Despite there being insufficient basis to require an investigation into the timeliness of the interest cards submitted, staff expended time and resources to once again check the dates on the interest cards for their temporal proximity to the filing of the Petition. All cards were signed and dated primarily in February, March, April and May of 2021, with one card signed January 5, 2021. The oldest card was signed within five months of the Petition filed with the NMSU LMRB on May 12, 2021. I am unaware of any authority that would support a proposition that cards signed and dated within that time frame would be deemed to be stale and NMSU provides none to support its objection.

As stated previously in this Report, scholarly literature and case precedent on the topic is consistent that cards signed and submitted during the union's current organizing campaign are acceptable. Cards signed more than a year prior to the union's demand for recognition may possibly be considered "stale", although in certain circumstances cards over one year in age may nevertheless be recognized. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW, and cases cited *supra.*

Applying the proper date of the Petition as the baseline, the interest cards in this case were obtained well within that time frame. If one applied the date of the card check March 17, 2022 as the baseline, (which staff posits would not be supported by law), those cards submitted in January and February of 2021 (approximately 260 of the 939 cards submitted) would be beyond the one-year rule of thumb by one or two months. However, this Board should recall that this case originated with the NMSU LMRB in May of 2021. After that Board met in July of 2021 to determine the required 30% showing of interest referenced *supra*, no action was taken on UE's Petition until approximately November 6, 2021 when jurisdiction was transferred to this Board by operation of NMSA 1978, §§ 10-7E-10(F) and 10-7E-10(I) (2020) due to a vacancy on the NMSU LMRB for more than 60 days. This Board should consider whether that delay, for which neither party bore any fault, constitutes sufficient grounds upon which to accept the validity of cards obtained more than a year prior. The Board need not reach that determination however, if it accepts the date of the Petition being filed as the operative date as this investigation suggests.

5. **NMSU objects that the results of the card check were reported on a form entitled "Results of Card Check In Lieu of Election" which is not accurately titled because it was not afforded an opportunity to request an election. In prior Card Checks the results were reported on a form entitled "Results of Card Check Under Section 14(C)".**

I take a two-pronged approach to the investigation of this objection: First, whether as a practical matter, the objection has any merit or materiality and second, whether the objection is grammatically correct. Investigation of this objection compels one to ask the rhetorical question: "Does mere criticism constitutes an objection requiring relief"? Common sense, which requires no citation, compels a conclusion that it does not. NMSU correctly points out that its objections are filed at my invitation, in the absence of a specific rule for contesting conduct affecting a card check. As stated at the outset of this report, although NMAC 11.21.2.34 provides for objections to conduct affecting the result of the election, there is no similar provision for contesting conduct affecting a card check. Nevertheless, Rule 11.21.2.34 is instructive in that it provides "… a party may file objections to conduct *affecting the result of the election*." (Emphasis added).

I can conceive of no way that this particular objection affects the outcome of the card check in any way and NMSU does not demonstrate, or even argue, that it does. It should have done, because in the context of this card check the ordinary meaning of an "objection" as an expression or feeling that shows that you disapprove of something or disagree with it, is utterly pointless amounting to nothing more than sophistry.[6] Accordingly, this objection is mere criticism, not a proper objection affecting the outcome of the card check requiring relief.

NMSU argues that "indicating the card check was done in lieu of an election implies there was an opportunity for an election, which there was not." Assuming for the sake of

[6] According to Merriam-Webster Online: "The original Sophists were ancient Greek teachers of rhetoric and philosophy prominent in the 5th century B.C. In their heyday, these philosophers were considered adroit in their reasoning, but later philosophers (particularly Plato) described them as sham philosophers, out for money and willing to say anything to win an argument. Thus sophist (which comes from Greek sophistēs, meaning 'wise man' or 'expert') earned a negative connotation as 'a captious or fallacious reasoner.' Sophistry is reasoning that seems plausible on a superficial level but is actually unsound, or reasoning that is used to deceive."

argument that this Board determines that criticism to be a proper objection, it's premise is incorrect in two ways: First, use of the term "in lieu of" is appropriate because a card check such as that undertaken here pursuant to NMSA 1978 § 10-7E-14(C), proceeds "[a]s an alternative to the provisions of Subsection A of [section 14]..." governing conducting a secret ballot representation election. According to the American Heritage Dictionary the phrase "In lieu of" is an idiom meaning "in place of; instead of". Accordingly, it is grammatically and linguistically appropriate and correct to refer to the Card Check in this case as being "in lieu of election" because § 14(C) says it is precisely that – an alternative to conducting a secret ballot representation election. Thus, titling the results report form differently than in prior card checks is a distinction without a difference because a form "Results of Card Check Under Section 14(C)" is synonymous[7] with "Results of Card Check in Lieu of Election".

Just as NMSU incorrectly construes the term "in lieu of" as implying that there was an opportunity for an election, it is also incorrect that there was no opportunity for an election. In this respect, NMSU incorrectly presumes that because it "… was not afforded an opportunity to request an election" that there was not "an opportunity for an election". That is a non sequitur. A Card Check undertaken pursuant to § 14(C) of the PEBA is not mandatory:

> "… a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit *may* submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit."

(Emphasis added).

[7] Merriam-Webster Online defines "synonymous" as "alike in meaning or significance".

A Union, for reasons of its own, may decide to proceed with a representation election under § 14(A) even though it may have sufficient interest cards to demonstrate majority support. It is not required to proceed with a card check. Thus, in every Petition for Recognition filed with the PELRB pursuant to § 14(C) there is an "opportunity for an election" although the choice of proceeding under § 14(A) or § 14(C) belongs to the Union, not to the Employer. NMSU is correct that the report form declares "THE ABOVE IS A TRUE STATEMENT OF THE ELECTION RETURNS" when in fact no election was held. In addition, my investigation notes the report form refers to "ballots" when this was a card check, not an election and to the number of employees to be accreted when this was an original certification proceeding. While these are obvious embarrassing overlooked "cutting and pasting" errors adapting the form used by the PELRB for reporting on the results of an election in a circumstance where no standard form for use in a card check exists, I also note that NMSU's representative, the same counsel filing these objections, certified that "the counting and tabulation were fairly and accurately done…" "and that the results were as indicated above."

No objections or requests to correct the form were made at the time of the attestation.

REPORT SUMMARY. Because Section 14(C) requires the Board to "hold a fact-finding hearing" on a challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, I recommend that the Board conduct such a fact-finding hearing at its next scheduled meeting on May 3, 2022 and make appropriate findings thereafter consistent with the conclusions reached in this investigative report including:

1. For the reasons stated herein and in *United Electrical, Radio and Machine Workers of America & University of New Mexico,* 4-PELRB-2022 (January 27, 2022) (PELRB 307-20) the

objection that the PELRB should have adopted Rules governing the administration of a Card Check prior to conducting the Card Check should be dismissed as without merit.

2. The objection that the PELRB did not follow its "established groundrules [sic]" of utilizing an updated employee list in a card check is without merit.

3. The challenged cards in this case do not give rise to a concern of fraud necessitating an investigation, nor do they constitute clear and convincing evidence that they were obtained by fraud, forgery or coercion such as is required by NMAC 11.21.2.13. No such clear and convincing evidence has been presented by NMSU in this case. To the extent any investigation of NMSU's mere suspicion of fraud or forgery was required, that investigation was conducted as set forth in this report and the allegations of fraud or forgery found to be without merit.

4. The Administrative Assistant's participation in the Card Check did not violate the parties' Card Check Agreement and NMSU's objection on that basis is without merit.

5. There were not "two observers present throughout the count" for the Petitioner. NMSU's objection on that basis is without merit.

6. That no statements were made at the Card Check regarding what would be reviewed on the cards in order to determine whether a card was a valid is immaterial. NMSU presents no facts that the cards counted were not valid or timely submitted so that NMSU's objection on that basis is without merit. The result of this investigation is that the cards were signed within one year of both the date of the Petition and the card check itself so that they were not "stale". An unspecified belief that the cards might be stale without any factual support, does not support an objection to the card count and NMSU's objection on that basis is without merit.

7. NMSU's objection that the results of the card check were reported on an inaccurately titled form is immaterial. At most, the Board should direct staff to re-issue an amended report if it believes that to be necessary but proceeding with certification of exclusive representative should not be delayed pending any ordered amendment.

CONCLUSION: For the foregoing reasons, NMSU's objections to the Results of the Card Check conducted in this case should be DISMISSED, and the Board should issue findings of fact in accordance with this recommendation, accept the card check results (with any changes based on the foregoing), and direct staff to issue a Certification of Exclusive Representation.

Issued, Monday, April 18, 2022.

Thomas J. Griego
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

IN THE MATTER BEFORE THE
STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Email 3/24/22

RECEIVED
MAR 24 2022
PELRB Case No. 313-21

UNITED ELECTRICAL, RADIO and MACHINE WORKERS OF AMERICA,

Petitioner,

and

NEW MEXICO STATE UNIVERSITY BOARD OF REGENTS,

Respondent.

RESPONDENT'S OBJECTIONS TO CARD CHECK

NOW COMES Respondent, the New Mexico State University (NMSU), by and through its attorney of record, Dina E. Holcomb, Esq., and hereby files its Objections to the Card Check conducted on March 17, 2021. Such Objections are filed pursuant to direction provided by the Executive Director during the card check and the Card Check Agreement inasmuch as no rule exists for the filing of objections following a card check.

1. **Board Adopted Rules Governing the Administration of a Card Check Should Have Been Adopted Prior to Proceeding to a Card Check.**

On July 1, 2020, the Public Employee Bargaining Act (PEBA) was amended providing a labor organization the right to demand a card check despite an employer's desire for a secret ballot election. § 10-7E-14. Previous to this amendment, a card check could only be conducted by agreement of the labor organization and the public employer. Under the previous version of PEBA, parties agreeing to a card check entered into stipulated groundrules for a card check outlining the procedures to be followed for the card check including, but not limited to, setting the

date for a list of proposed bargaining unit employees to be utilized during the card check and providing an updated list for the "best available current 'snap shot' of the petitioned-for bargaining unit." (See PELRB Form #13 at ¶¶ 2 and 3). Once PEBA was amended, the PELRB should have undergone the process of rulemaking to establish the procedures for a card check pursuant to § 10-7E-9(A), which states, the board "***shall*** promulgate rules necessary to accomplish and perform its functions and duties as established in the (PEBA)". The PELRB has not promulgated rules necessary to establish the procedures to be followed by a mandated card check nor did it follow its established groundrules of utilizing an updated list for the "best available current 'snap shot' of the petitioned-for bargaining unit."

2. <u>An Updated Bargaining Unit List Should Have Been Utilized</u>.

On July 1, 2020, the Public Employee Bargaining Act (PEBA) was amended based on legislation adopted in March 2020 to allow for a card check process. Section 10-7E-9(A) mandates the PELRB to promulgate rules necessary to accomplish its functions and duties established by PEBA. The PELRB should have promulgated rules during the twenty-four (24) month period since the legislation's adoption pertaining to card checks. Respondent attended the card check with little knowledge of procedures that may be followed during the process inasmuch as no established rules exist nor were any outlined to the parties at any time prior to commencing the card check. The only procedural process available to Respondent was that contained in the Card Check Agreement, which inexplicably changed from the Ground Rules for Card Check available on the PELRB's website under standard forms. As stated, one of the groundrules set forth in the on the PELRB's form is that an updated list is used for the card check. An updated list in the instant matter was necessary given the fact that graduate students and assistantships are transitory in nature. Without an updated list, the outdated list includes students who have since graduated

from the University and, therefore, would not be included in the bargaining unit as well as students who no longer hold an assistantship and therefore, also would not be included in the bargaining unit. This would be analogous to allowing employees who have resigned or been terminated from employment to subsequently vote in a representation election despite have no employer-employee relationship or vested interest in the election. In a previous card check conducted in ***AFSCME v. Bernalillo County,*** the PELRB followed its form Ground Rules for a Card Check by utilizing an updated list, yet applied different rules for this card check.[1] Conducting a card-check process based on interest cards submitted by individuals who do not hold any assistantship or who have graduated from the University effectively thrusts representation by a labor organization upon a population of individuals who might not wish to be represented by that organization or any organization at all. In short, doing so undermines the individual's right to select representation as they see fit and as promoted in the PEBA at § 10-7E-14(A).

In the alternative, the PELRB should follow the case law established under the National Labor Relations Act (NLRA), which the Courts have held should be used as guidance in applying PEBA. ***Las Cruces Prof. Fire Fighters v. City of Las Cruces,*** 1997-NMCA-31, ¶ 15. The National Labor Relations Board has developed a formula for providing a list for employees who are transitory, such as in the construction industry. ***Steiny and Company, Inc. and Local Union No. 11, Int'l. Brotherhood of Electrical Workers, AFL-CIO,*** 308 NLRB 1323 (1992); ***Daniel Construction,*** 133 NLRB 264 (1961), modified, 167 NLRB 1078 (1967)(noting a formula is necessary where workers experience intermittent employment or are employed for short periods). As the NLRB noted, developing a formula "satisfies the Board's objective of simplifying and expediting the election process and of assuring employees 'the constant availability of an electoral

[1] This same inconsistency was recently applied in the card check with UE and UNM, PELRB No. 307-20

mechanism for expressing their representational desires.'" ***Steiny*** at 1325, *citing,* ***John Deklewa & Sons,*** 282 NLRB 1375, 1386 (1987).

3. Challenged Cards Raised a Concern of Fraud Necessitating an Investigation.

During the card check process, Respondent's observer was provided two (2) separate electronic cards for review concerning the spelling of the student's name. On each card, the student's name was misspelled in the electronic signature: one whose first name was misspelled and one whose last name was misspelled. Respondent objected to the cards on the grounds that it was suspect that a person would misspell their own name as well as the misspelling resulted in the name not matching the name on the eligibility list. Misspelled names on electronic cards raises concern about the authenticity and potential for fraud in executing the cards. These issues necessitate investigation into the validity of at least the electronic cards, and possibly all cards. ***Perdue Farms, Inc. and United Food and Commercial Workers Union,*** 328 PELRB No. 130 (1999)(holding an administrative investigation must be conducted when evidence exists of possible fraud on showing of interest cards); 11.21.2.34 NMAC. An investigation is necessary inasmuch as any forged cards interfere with the graduate student assistants, if deemed public employees, rights to choose or not choose to be represented by a labor organization protected by PEBA. § 10-7E-5 NMSA 2003 (2020); ***Perdue Farms, Inc. v. NLRB,*** 935 F. Supp. 713 (E.D. N.C. 1996).

4. The Card Check Agreement Was Not Followed.

The parties were provided a proposed Card Check Agreement by the PELRB on or about February 28, 2022. The draft provided by the PELRB and ultimately agreed to by the parties, established the following procedures:

> 5. CARD CHECK SUPERVISOR. The Card Checking will be performed by PERLB Executive Director, Thomas Griego.
>
> 6. OBSERVERS. Each party shall be entitled to one observer to be physically present to assist and observe in the count. Observers are not to disrupt the process, make comments/arguments regarding the qualification or disqualification of cards, names, except to make objection to a disputed card.
>
> 10. OBJECTIONS. Within five workdays following the service of the Results of Card Check a party may file objections to the conduct of the Card Check. A violation of this Card Check Agreement is a basis for an objection and such a violation may cause the card check to be rescheduled and/or the results to be invalidated.

The Card Check Agreement limited the "Card Checking" to being conducted by the Executive Director. Contrary to the Agreement, two (2) individuals were utilized to conduct the card check, the Executive Director and the Administrative Assistant. While such process was more expedient, it was contrary to the Card Check Agreement proposed by the PELRB and agreed to by the parties.

The Card Check agreement also limited the parties to "one observer to be physically present to assist and observe in the count." Petitioner had two (2) observers present throughout the count, both of whom actively engaged in the process of reviewing cards. At the outset of the count, counsel for Respondent questioned who was the observer for Petitioner and counsel for Petitioner identified Anna Rose as its observer. However, counsel for Petitioner actively engaged as an observer, solely acted as the observer during a period in which Ms. Rose was absent from the room, and signed the Results of Card Check in Lieu of Election as Petitioner's observer contrary to the initial designation of Ms. Rose as the observer.

Paragraph 10 of the Card Check Agreement proposed by the PELRB and agreed to by the parties establishes a violation of the Agreement is a basis for an objection and grounds for the card check to be rescheduled or invalidated. By signing the Card Check Agreement, the parties committed to accepting the terms and conditions in good faith, however, Petitioner failed to follow

the agreed-upon terms and the process proposed and agreed upon was not adhered to nor enforced by the PELRB.

5. <u>There Was No Indication Given that the Cards Were Dated and Were Not Stale</u>.

At the outset of the card check, no statements were made regarding what would be reviewed on the cards in order to determine whether a card was a valid card to be counted. No statement was made whether the cards were reviewed for facial adequacy which requires a determination of whether the cards are "signed and dated". 11.21.2.13(A) NMAC. The PELRB also has not adopted rules regarding how to determine if a card is "sufficiently current". 11.21.2.13(A) NMAC. The cards submitted originally submitted ten (10) months before the card check was conducted, during the Spring semester of 2021. The parties are now three (3) semesters beyond the original filing. Not only must cards be dated but the cards must be sufficiently current to be considered valid. 11.21.2.13(A) NMAC; ***A. Werman & Sons, Inc. and United Shoe Workers of America, CIO,*** 114 NLRB 629 (1955).

6. <u>The Results of Card Check Does Not Comport with Previous Forms</u>.

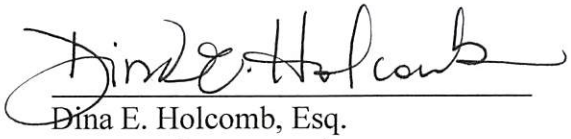
In the instant matter a "Results of Card Check In Lieu of Election" was issued, however, the card check was not conducted "in lieu of an election" inasmuch as Respondent was not afforded an opportunity to request an election. In two (2) other card checks conducted by the PELRB, the results are shown on a form titled "Results of Card Check Under Section 14(C)". ***Toas Professional Firefighters Ass'n. v. Town of Taos,*** 63-PELRB-2021; ***CWA and State of New Mexico Office of African American Affairs,*** 16-PELRB-2020. Indicating the card check was done in lieu of an election implies there was an opportunity for an election, which there was not.

The form also declares "THE ABOVE IS A TRUE STATEMENT OF THE ELECTION RETURNS." Again, since there was not an election, this statement is untrue.

CONCLUSION AND RELIEF SOUGHT

Without waiver of its objections as stated in its Motion for Summary Judgment, Respondent respectfully requests the PELRB stay certification of the results of the card check until such time as it adopts rules for such procedure including, but not limited to, adopting a rule requiring that an updated list based on the date of the card check be the appropriate list to be utilized for all card checks as well as procedural rules governing the process and an investigation is conducted into the validity of the showing of interest cards. In the alternative, Respondent requests setting aside the card check results for the reasons set forth herein.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Objections to Card Check was emailed on this 24th day of March 2022, to:

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James Montalbano
Counsels for Petitioner
900 Gold Avenue SW
Albuquerque, NM 87102
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james@youtzvaldez.com

Alexis Baca

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

Email 3/29/22

RECEIVED
MAR 29 2022
PELRB

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and

PELRB Case No. 313-21

NEW MEXICO STATE UNIVERSITY BOARD OF REGENTS,

Employer.

PETITIONER'S RESPONSE TO OBJECTIONS TO CARD CHECK

COMES NOW Petitioner, United Electrical, Radio and Machine Workers of America (UE), by and through its counsel of record, Youtz & Valdez, P.C. (Shane Youtz, Stephen Curtice, James Montalbano), and hereby files this Response to Respondent's Objections to Card Check.

1. The PELRB Has the Authority and the Obligation to Conduct Card Checks Even in the Absence of Regulations.

As noted, the Union filed the Petition in this case on May 12, 2021. Now, nearly eleven months later, NMSU wants to further delay the processing of the petition until after the PELRB has adopted regulations governing card checks. This Board has already rejected this same argument in *UE & UNM*, PELRB Case No. 307-20, 4-PELRB-2022. The relevant statute is NMSA 1978, § 10-7E-14(C) (2020). It provides in full:

> As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit **may** submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which **shall**, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on

> the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards.

(Emphasis added).

Under the plain language of the statute, a labor union with a reasonable basis for claiming majority support "may" (but is not required to) submit authorization cards from a majority of employees to the Board "[a]s an alternative to the [election] provisions of Subsection A." If that happens, this Board "**shall**, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit." (Emphasis added). The use of "may" and "shall" in this section is important. *See Cerrillos Gravel Prods., Inc. v. Bd. of Cty. Comm'rs of Santa Fe Cty*., 2004–NMCA–096, ¶ 10, 136 N.M. 247, 96 P.3d 1167 ("The word 'may' is permissive, and is not the equivalent of 'shall,' which is mandatory."). Under this section, if the union submits authorization cards from a majority of employees, as it "may" do, then this Board has a non-discretionary duty and obligation (i.e. "shall") to "certify the labor organization as the exclusive representative."

Nor is it the case that the absence of regulations would permit this Board to avoid this non-discretionary duty and obligation imposed on it by statute. For, the PELRB can (and must) act even in the absence of any regulations. *See Ill. Fed. of Teachers v. Bd. of Trustees, Teachers' Retirement System*, 548 N.E.2d 64, 66-67 (Ill. App. 1989) ("Where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by the enabling statute. This authority need not always be exercised through a process of formal rule making."); *Nevins v. New Hampshire Dept. of Resources and Econ. Dev.*, 792 A.2d 388, 391 (N.H. 2002) (noting "that promulgation of a rule … is not necessary to carry out what a statute demands on its face" and that

the agency still has the duty to carry out its statutory mandate despite not having promulgated rules). The Union would welcome regulations governing card checks; however, even in their absence, this Board is required by statute to conduct a card check under the terms specified in the statute.

2. The Purpose of a Card Check is to Test Majority Support at the Time a Petition is Submitted; Accordingly, the Employee List Submitted by NMSU at the Time of the Petition is the Correct List.

Ignoring the language of the statute, NMSU claims that the correct employee list was not the one it submitted at the time of the Petition, but rather an updated one from eleven months later. This Board has already rejected this same argument in *UE & UNM*, PELRB Case No. 307-20, 4-PELRB-2022. This is inconsistent with the statutory scheme following the 2020 amendments to PEBA. Prior to the 2020 amendments, majority support was demonstrated by an election, unless the parties agreed otherwise. For the election procedure, a union need only submit cards from 30 percent of the bargaining unit in order to proceed. Thus, the only time majority support would be demonstrated is following an election. Thus, the rules governing elections require an updated voter list at the time of the election.

All of that changed in 2020. As noted, the Legislature provided mandatory card check "[a]s an alternative to the" election procedure. Under that alternative procedure, "a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit." This new procedure does not have an analog in the NLRA, making UNM's reliance on NLRB decisions problematic at best.

Thus, unlike the election procedure—where the only time employees express their preference is in the election—under the new procedure authorized by the Legislature, employees are free to express their preference by the execution of authorization cards. The only question for resolution in that case is whether there have been sufficient "yes votes" (i.e. authorization cards) submitted to demonstrate, at that time, that the Union enjoyed majority support. Obviously, then, the appropriate employee list to be utilized is the list submitted at the time of the petition; under the statute, the PELRB is required to compare the authorization cards submitted against the list of employees at that time to determine whether "a majority of the employees in the appropriate bargaining unit have signed valid authorization cards."

A contrary rule would invite mischief on the part of employers. In this case, the delay between petition and determination of majority support—nearly a year—has been extreme. It is certainly hoped that such a delay would not happen again in the future. However, allowing the use of a future employee list to determine whether the Union demonstrated majority support at the time of the petition only invites employers to seek to delay proceedings in the hopes that changes in employment would weaken support for the union. That should not be encouraged.

3. The Only Two Cards to Which NMSU Currently Objects Were Not Counted and Did Not Form a Part of the Majority Showing; Moreover, the Typographical Error that Lead to them Not Being Counted is Not Evidence of Fraud or Forgery.

NMSU claims, incorrectly, that for two of the cards "the student's name was misspelled ***in the electronic signature***." (Emphasis added). Actually, their signatures were not misspelled; however, the field in which the names are typed contained a misspelling. In one, a single letter was missing. In the other, the last three letters got cut off. In the digital age, with autocorrect and other functions, typographical errors are unfortunately more common. However, as the Results of Card Check in Lieu of Election show, those two cards—part of the six challenged cards—were not counted. Rather, they were "rejected by parties." That is, the card check process worked

exactly as it should—where there was an issue with a card, it was challenged. Because the challenged cards could not alter the result—even without them, there were 498 valid cards or 53% of the bargaining unit—the challenge did not need to be resolved.

Moreover, because NMSU is incorrect that there was an issue with the signature, but rather the typed area where the name is entered, there is no evidence of fraud or forgery necessitating any "investigation." There is no evidence, or even suggestion, that the individual's signature was invalid. The typographical error resulted in the card not being counted towards the showing of majority support. Out of 504 cards submitted, only six were challenged as having any issue whatsoever. Respondent's objection to cards that were not counted as part of the showing of majority support has no merit.

4. At the Card Check, NMSU Did Not Object to the Presence of the Union's Counsel.

Both NMSU and the Union had two observers; NMSU's second observer appeared remotely by Zoom. At no point during the proceeding did NMSU object to the presence of the Union's counsel. Had it done so, the Union's counsel would have stepped out of the room and observed via zoom, as did NMSU's second observer. Now, despite its failure to timely object, NMSU wants this Board to require the Executive Director to re-do the card count on this basis. NMSU does not explain—nor can it—how it was prejudiced in any way, or how the presence of the second observer could have resulted in a different outcome. There is no basis for NMSU to seek a different result based on the presence of an individual to which it did not object.

5. All of the Authorization Cards Are Dated to Within Four Months of the Petition.

At the Card Count, the Executive Director and his assistant verified that each card should be counted. Presumably, this included verification that they had been dated and were not stale. Now, without any evidence to the contrary—and without inquiring at the card count—NMSU objects that some might be stale. The Union asserts that it first started obtaining authorization

cards in February 2021, three or four months prior to the submission of the Petition. This is well within the year the PELRB's Practice Manual Suggests as a good rule of thumb for gauging the staleness of cards. PELRB Practice Manual, at 24 (Feb. 28, 2018). All cards are dated, and none are stale. Again, NMSU suggests that the current-ness of the cards should be tested at the time of the card check, more than a year since the Petition was submitted. This ignores the language of the statute and would also invite mischief on the part of employers, as set forth in the previous section. That should not be encouraged.

6. NMSU's Objections to the Results Form Are Trivial and Without Merit.

NMSU makes some exceedingly trivial objections to the language used in the results tally. However, it does not object to the only important information on that form—the number of employees in the bargaining unit and the valid cards indicating support. Those two numbers are the only thing that really matters, and they show that the Union had demonstrated support from 53% of the bargaining unit when it submitted its petition to the NMSU labor board. NMSU has shown no reason to ignore that manifest support for the Union.

Conclusion

Because the Respondent's Objections to Card Check has no basis in fact or law, Petitioner respectfully requests that this Board certify the results of the Card Check.

Dated: March 29, 2022

Respectfully Submitted,

YOUTZ & VALDEZ, P.C.

/s/ Stephen Curtice

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I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served on the following parties this 29th day of March, 2022, via e-mail:

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11.21.2.34 OBJECTIONS: Within five days following the service of a tally of ballots, a party may file objections to conduct affecting the result of the election. The director shall, within 30 days of the filing of such objections, investigate the objections and issue a report thereon. Alternatively, the director may schedule a hearing on the objections within 30 days of the filing of the objections. A determination to hold a hearing is not reviewable by the board and shall follow the same procedures set forth in Subsections B, C and D of Section 19, Section 20 and Section 21 above. A party adversely affected by the director's or hearing examiner's report may file a request for review with the board under the same procedures set forth in Section 22, above. If the director, hearing examiner or board finds that the objections have merit and that conduct improperly interfered with the results of the election, then the results of the election may be set aside and a new election ordered. In that event, the director in his or her discretion may retain the same period for determining eligibility to vote as in the election that was set aside, or may establish a new eligibility period for the new election.
[11.21.2.34 NMAC - N, 3/15/2004]

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and **PELRB NO. 307-20**

UNIVERSITY OF NEW MEXICO,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board ("Board") on January 4, 2022 on University of New Mexico's (UNM) Objections to the Card Check ("Objections") conducted on December 27, 2021 pursuant to NMSA 1978, § 10-7E-14(C) (2020) in connection with the United Electrical, Radio and Machine Workers of America's Petition for Initial Certification of a New Bargaining Unit ("Petition"). The Board, after reviewing the numerous pleadings in this matter, hearing oral argument from the parties and being otherwise sufficiently advised, by a vote of 3-0, enters find the following:

FINDINGS OF FACT

1. The United Electrical, Radio and Machine Workers of America (the "Union") filed its Petition with the Board on December 9, 2020.
2. The Petition contemplates a new bargaining unit consisting of all full-time and part-time graduate students engaged in instruction and/or research at the University's campuses at Albuquerque, Gallup, Taos, Los Alamos and Valencia County.
3. On March 16, 2021, the Board's Executive Director reported to UNM and to the Union that he had checked the showing of interest cards submitted against the employee list provided by UNM and found that a sufficient number of valid interest cards had been submitted to advance the Union's petition.

4. Following a five-day hearing held in March and April 2021, the Board's Executive Director issued a Hearings Officer's Report and Recommended Decision dated June 11, 2021, finding that graduate students are not public employees as that term is described by the Public Employee Bargaining Act, NMSA 1978, Section 10-7E-1 to 26 (2003, as amended through 2020) ("PEBA"), and recommending dismissal of the Petition.
5. Upon consideration of the June 11, 2021 Hearings Officer's Report and Recommended Decision and the record created before the Executive Director, on August 17, 2021, the Board issued its Order, concluding that graduate students fall within PEBA's definition of regular employees and directing the Executive Director to proceed with processing the Petition.
6. Following an August 27, 2021 Status and Scheduling Order and supplemental briefing by the parties, the Executive Director issued a Hearings Officer's Report and Recommended Decision dated October 4, 2021 providing a lengthy analysis in support of finding that graduate students are regular public employees, the Union's petitioned-for job titles form an appropriate bargaining unit, and the Union is a labor organization under PEBA.
7. On November 9, 2021, the Board issued its Order adopting the Executive Director's recommended decision concerning the appropriate bargaining unit for UNM graduate students, as stated in the October 4, 2021 Hearings Officer's Report and Recommended Decision, and directed the card check to proceed "without delay."
8. On December 17, 2021, the Executive Director and Board staff conducted the card check at the Board offices located at 2929 Coors Blvd. NW, Suite #303,

Albuquerque, NM 87120 beginning at 9 a.m. and continuing into the afternoon. The public was invited to observe via a Zoom link.

9. Counsel for the union and counsel for the employer were present during the card check. They were able to observe the proceedings and to lodge objections while the card check was conducted.
10. During the card check, both physical and electronic cards were counted.
11. The results of the card check are memorialized on the Board Form titled Results of Card Check in Lieu of Election signed and dated by the Executive Director on December 17, 2021.
12. The results of the card check were reported as follows:

1.	Total Number of Employees in Bargaining Unit	1547
2.	50% of Employees in Bargaining Unit Equate	774
3.	Total Interest Cards Indicating Support	887
4.	Number of Challenged Cards	73
5.	Challenged Cards Rejected by Umpire	72
6.	Challenged Cards Agreed To By Parties	1
7.	Percent of Employees in Bargaining Unit indicating support	57.3

13. UNM filed its Objections to Card Check on December 27, 2021, essentially on the grounds that the Board has not adopted rules governing the process of card checks in lieu of elections.
14. The Union files its Response to UNM's Objections to Card Check on December 29, 2021., stating that even in the absence of rules governing the conduct of card checks, PEBA confers upon the Board express authority to certify a labor organization as the exclusive representative of all public employees in an appropriate

bargaining unit upon verification that a majority of the employees in the bargaining unit have signed valid organization cards.

15. On December 30, the Executive Director provided his Report on Objections to the Card Check, in which he notes "it makes no sense to lock the union into a time frame for gathering interest cards at one point, then allowing the employer to choose another later point for verifying the cards when, as it acknowledges the transitory nature of the graduate students' employment over one third of the original list are no longer in the unit. Unless a card check can be completed within the same semester in which a union submits its Petition for Recognition, this Board risks entering into a never-ending cycle of a filed Petition for Recognition, followed by scheduling a card check, followed by an amended employee list from the employer on the eve of the scheduled card check, followed by another rescheduled card check date giving the union time to update its interest cards. That this may be accomplished within a single semester is belied by the fact that it has taken this Board over a year to reach this stage of the proceeding. The better course is to adopt the approach advocated by the union that the purpose of a card check is to test majority support as of the time a petition is submitted."
16. The Executive Director then recommended that the Board proceed with a fact-finding hearing, as contemplated by Section 10-7E-14(C) of PEBA, during its January 4, 2022 meeting, Agenda Item 7a, and make appropriate findings thereafter.
17. Notwithstanding the Executive's Director clear recommendation, counsel for UNM informed the Board that it was not clear to UNM whether it would be allowed or required to present witnesses at the January 4 meeting.
18. After hearing from both counsel for UNM and the Union, the Board proceeded to hear oral argument from both.

19. UNM's objections may be summarized as follows: procedural rules were not adopted by the Board before proceeding with the card check; an updated employee list was not utilized during the card check; multiple lists were used; the total number of graduate students in the bargaining unit differed from the initial check to the final check; and not all cards were dated.
20. The Union argued that even in the absence of procedural rules, the Board is bound by PEBA to certify a labor organization as the exclusive representative of all public employees in an appropriate bargaining unit upon verification that a majority of the employees in the bargaining unit have signed valid organization cards. See NMSA 1978, Section 10-7E-14 (C) (2003, as amended through 2020).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject in these proceedings.
2. Section 10-7E-14 provides:

   C. As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards.

3. The December 17, 2021 Card Check was conducted pursuant to and in accordance with PEBA Sec. 10-7E-14(C).
4. Procedural rules on the conduct of a card check are not specifically mandated by PEBA and the Board has discretion to determine what rules are "necessary to accomplish and perform its functions and duties as established in the (PEBA)." Section 10-7E-9(A) NMSA.
5. UNM's first objection, that procedural rules were not adopted by the Board before proceeding with the card check, is without merit. The card check encompasses the simple task of counting the cards. Furthermore, the parties were present during the card check to lodge their objections as the counting proceeded.
6. The lack of rules for the conduct of this card check does not render the card check invalid.
7. The card check, unlike an election, merely requires the Board to count the cards and then verify they are from graduate students on the employee list.
8. UNM's second objection, that an updated employee list was not utilized during the card check, is without merit. A majority of the employees of the proposed bargaining unit signed valid authorization cards within 3 months of the petition which were submitted with the petition.
9. UNM's third objection, that multiple lists were used, is not supported by the evidence. Only one list was used. Furthermore, if the electronic cards that were not counted were included in the tally, it would have increased the showing of support for the Union.
10. UNM's fourth objection, that the total number of graduate students in the bargaining unit, differed from the initial check to the final check, is without merit.

The difference was 1547 compared to 1542, five students. The number is inconsequential to the outcome of the card check.

11. Further, UNM raised no objection to the initial count of 1542 when it was first reported in March of 2021.
12. UNM's fifth objection, that not all cards were dated, is without merit. The Executive Director reported that the cards were all signed within three months of the Petition submitted on December 9, 2020.
13. In addition, the Executive Director reported that one card had a date that was nonsensical in the context of the proceeding. Removing that one card would be inconsequential to the outcome of the card check.
14. A majority of the employees in the appropriate bargaining unit have signed valid authorization cards.

IT IS THEREFORE ORDERED:

a. UNM's objections to the results of the December 17, 2021 card check are hereby DENIED; and
b. Board staff is hereby directed to issue a Certification of Exclusive Representation.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

01/27/2022
DATE

MARK MYERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

Petitioner,

and **PELRB No. 307-20**

UNIVERSITY OF NEW MEXICO BOARD OF REGENTS,

Respondent

DIRECTOR'S REPORT ON OBJECTIONS TO CARD CHECK

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego on the University of New Mexico Board of Regents' Objections to the Card Check conducted on December 17, 2021, received on December 27, 2021. Although NMAC 11.21.2.34 provides for objections to conduct affecting the result of the *election* there is no similar provision for contesting conduct affecting a card check. UNM's Objections are accepted for review pursuant to my direction during the card check. I address each objection in turn.

1. Whether the PELRB "should have" adopted procedural rules for a card check before proceeding with a card check in this case is a matter of opinion and debate, but the absence of such rules does not bar the card check or render it objectionable. I acknowledge that NMSA (1978) § 10-7E-9(A) (2020), requires that the PELRB "shall promulgate rules necessary to accomplish and perform its functions and duties as established in the (PEBA)" but it is silent as to when rules promulgation must take place in relation to an amendment to the Act and in consideration of the Board's budget for publication of public comment on new rules and paying compilation commission

fees. Nor does § 9(A) provide that a pending card check Petition should be stayed pending the months long process of enacting rules.

Staff and the parties were ordered in 73-PELRB-2021 "to proceed with the card check without delay". UNM's request to stay that card check was dismissed by this Board in 75-PELRB-2021. Staffed conducted the card check without delay as ordered. Section 14(C) of the PEBA requires only that a labor organization have a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit whereupon this Board shall verify that a majority of the employees in that unit submitted authorization cards. Reduced to its essence that verification requires nothing more than checking the cards against the employer's list of those in the putative unit and counting them to see if they constitute a majority. The absence of rules does not affect that straightforward process or the results as certified on the results form submitted for review on January 4, 2022 at the Board meeting. Because Section 14(C) also requires the Board to "hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, I recommend that the Board regard its scheduled review of its January 4, 2022 meeting Agenda item 7a as such a fact-finding hearing and make appropriate findings thereafter.

If the Board of Regents believed a conference to set agreed-upon ground rules for conducting this card check including changes to the submitted employee list, it could have and should have requested such a conference. As it was, an updated employee list was not submitted until the evening before the scheduled card check and not received by the Director until a few short hours preceding the check. None of the NLRB case authorities cited in this objection as recommendations in favor using an updated list were made known prior to these objections. UNM might have done much more to avoid the "confusion" about which it now complains but did not. If the absence of procedural rules led to some measure of confusion on UNM's part, there can be no confusion as to

the ultimate outcome of the check – a majority of employees in the unit at the time the petition was filed submitted authorization cards so that the requirement for certification under Section 14(C) was met. Board staff verified that a majority of the employees in the UNM unit at the time the Petition was filed submitted authorization cards.

2. The fact that over one third of the original list would no longer be in the bargaining unit at the time of the card check is a two-edged sword. Before accepting the 11th hour updated list proposed by UNM the Union should have been given an opportunity to update its interest cards. It makes no sense to lock the union into a time frame for gathering interest cards at one point, then allowing the employer to choose another later point for verifying the cards when, as it acknowledges the transitory nature of the graduate students' employment over one third of the original list are no longer in the unit. Unless a card check can be completed within the same semester in which a union submits its Petition for Recognition, this Board risks entering into a never-ending cycle of a filed Petition for Recognition, followed by scheduling a card check, followed by an amended employee list from the employer on the eve of the scheduled card check, followed by another rescheduled card check date giving the union time to update its interest cards. That this may be accomplished within a single semester is belied by the fact that it has taken this Board over a year to reach this stage of the proceeding.

The better course is to adopt the approach advocated by the union that the purpose of a card check is to test majority support as of the time a petition is submitted. Accordingly, the employee list submitted by UNM at the time of the petition is the correct list. Because a Petitioning Union need only submit interest cards from 30 percent of a bargaining unit to justify an election it is appropriate to check ballots cast against an updated voter list showing those eligible to vote at the time of the election – that is the only way a Union can

demonstrate its majority support, not having had to submit interest cards from a majority of the unit at the time the Petition was filed. As the Union points out in its Response to UNM's objections the Legislature provided for a card check "[a]s an alternative to the" election procedure, provided that a majority of the employees in an appropriate bargaining unit submit authorization cards for the Petitioning union. If as was done here, a majority of employees submitted interest cards along with the union petition majority support is established subject to verification of that fact by this Board. The reason for an updated list whereby a union can show support beyond its threshold 30 percent to proceed with an election, no longer applies. The list that is material for verification in a proceeding under Section 14(C) is the list of employees in the unit at the time the petitioning union makes its good faith claim that its interest cards demonstrate majority support unless the parties agree otherwise as was done in *AFSCME and Bernalillo County*, PELRB 303-20. Therefore, I conclude that my rejection of UNM's proffered updated employee list is not a valid objection and a plain reading of Section 14 of the Act weighs in favor of rejecting such a last-minute submission.

3. Multiple Lists Were not Utilized During the Cark Check. To say that "multiple lists were used during the card check" is misleading. One list, and one list only was the ultimate determinant relied upon by the two Board staff counting the cards - the list provided by the employer and discussed in points one and two above.

Staff did separately list names of those submitting interest cards that it did not find on the employer's list submitted as part of the investigation of this Petition to determine whether there was sufficient support to move ahead with either an election or a card check, but reference to those listed names was merely a prompt to staff that it had seen a problem with the card before in the initial proceeding and to seek clarification from the parties as to

whether the person submitting the card had been wrongly excluded from the list, used a different name than that on the list (such as a nick-name, or maiden name) or was on the list and staff overlooked it in the initial review. Clarification of such names took place throughout the count. With only one exception, the Union and UNM agreed on the record that a questioned card should be counted, after verifying that other information such as address or phone number matched that for the name on the employer list. That process explains the difference in the number of cards verified during the card check and those in the initial determination, where the parties were not present to agree to cards that differed from the employee list.

That there is no rule or procedure addressing the use of or preparation of a list of names segregated out for further inquiry at the actual card count is immaterial. Ultimately, the segregated names either were or were not on the employer's eligibility list. If they were, by agreement, they were counted. If they were not, they were not counted. Reference to a list of the names on interest cards that Board staff could not clearly identify as being on the eligibility list prior to the clarification provided at the actual card count does not state a basis for an objection at UNM's concerns on that point should be dismissed as immaterial to the eventual outcome. Likewise, while it may be argued that the administrative assistant, who was counting the electronically submitted authorization cards, should have set aside the 55 cards that he rejected for clarification by the parties, that argument cannot be the basis of an objection by UNM because had any of those cards been counted, the Union's demonstration of majority support would only have increased. No other outcome was possible. UNM's concerns on this point should be dismissed as well because it is immaterial to the eventual outcome and UNM was not prejudiced thereby.

4. As a result of the Card Check in Lieu of Election I determined that the total number in the bargaining unit was 1547 graduate students based. However, on March 16, 2021, I found that the total number of graduate students in the putative unit to be 1542. I agree with UNM that ideally, since the same list was utilized to count employees both times, the numbers should be exactly the same, but it should come as a surprise to no one that we do not live in an ideal world. The list as originally submitted by UNM contained multiple duplicate names because it did not sort its list so as to account for those employees receiving more than one assistantship. Staff did its best during its initial investigatory phase to ferret out those duplicates and apparently missed its mark by five names. That under-counting was corrected at the card check with the result that the better number was determined to be 1547. No objection to using that number was raised at the time of the card check. This also explains the difference between 887 interest cards found to match the employer's list on at the time of the card count and the 811 interest cards I determined matched the list March 16, 2021. The latter number is simply more accurate. If I miscounted the total number of cards submitted on March 16, 2021 by five, I apologize. Undercounting the cards by a total of five at the initial investigation stage is immaterial to the outcome of the proceeding.

A rule for determining the number to be utilized for the card count, would not have helped – the numbers are what they are and that final number may only be determined after additions and subtraction are considered at the card check as they were in this case. For the reasons stated above, the absence of a rule does not stay this Board in fulfilling its statutory obligation under Section 14 of the Act.

The time for seeking correction of my initial count should have been immediately after I informed the parties of those numbers by letter on March 16, 2020. UNM's silence on that

point should constitute a waiver of the objection and raising it now some nine months later for the purpose of overturning the card check does not demonstrate good faith.

5. On December 11, 2020 I wrote to the parties informing them that after initial review of the interest cards submitted, I found a sufficient number of them to be "adequate" so that the Union's Petition may proceed. In addition to that letter my March 16, 2021 letter in response to UNM's letter dated March 10, 2021 requesting that I fulfill my obligation to check the submitted showing of interest against the employee list, confirmed my earlier determination that a sufficient number of valid interest cards were submitted to advance the Union's Petition. I repeated that finding of facial adequacy at the card check.

My review for facial adequacy of interest cards submitted with any Petition includes, as UNM suggests, not only checking that the cards are separately dated and signed, but that the showings of interest state that each employee signing wishes to be represented for the purposes of collective bargaining by the petitioning labor organization. See page 27 of the PELRB Practice Manual concerning "Basic Petition for Recognition – General" and NMAC 11.21.2.11. My assertion that the cards have been reviewed for facial validity necessarily includes an assertion that they were reviewed to ensure that they were signed and dated. Once verified in this manner, the interest cards shall be presumed valid unless the director is presented with clear and convincing evidence that they were obtained by fraud, forgery or coercion. See NMAC 11.21.2.13. No such allegations have been raised in this case.

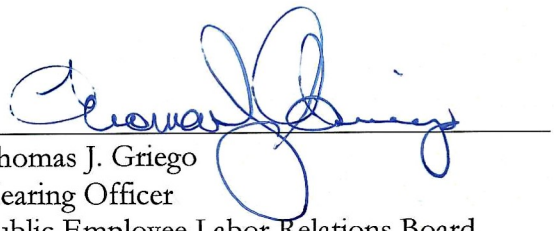
Upon receipt of UNM's objections, staff double checked all submitted interest and found no basis for its assertion that "upon information and belief…not all cards were dated, thereby making such cards invalid." Staff did single out one card that was in fact signed and dated, but the date made no sense in the context of this proceeding. Consequently, the Board may

choose to treat that card as a challenge in favor of UNM and remove it from the count. Such removal does not affect the outcome of the card check.

6. The interest cards were not stale. If UNM has reason to believe the submitted cards were not signed and dated within a reasonable time relating to the Petition, it should have raised that issue before now. An unspecified belief that it might be so without any factual support, does not support an objection to the card count. However, following the filing of this objection, while checking to make sure all cards were dated, staff also again checked the dates themselves for their temporal proximity to the filing of the Petition. All cards were signed and dated in September, October, November and December of 2020, the oldest being within three months of the Petition submitted December 9, 2020. I am unaware of any authority that would support a proposition that cards signed and dated within that time frame would be deemed to be stale and UNM provides none to support its objection. Although it is not citable authority, PELRB staff, after reviewing case law on the subject has suggested in its Practice Manual at page 24 that one year is a good rule of thumb for gauging the staleness of cards and the interest cards in this case were obtained well within that time frame. UNM's advocacy for a shorter time period relates to its argument that we should have used its updated employee list to account for an ever-changing list of employees on a semester basis and should be considered by this Board in that context.

CONCLUSION: For the foregoing reasons, UNM's objections to the Results of the Card Check conducted in this case should be DISMISSED, and the Board should issue findigs of fact in accordance with this recommendation, accept the card check results (with any changes based on the foregoing), and direct staff to issue a Certification of Exclusive Representation.

Issued, Thursday, December 30, 2021.



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Steiny and Company, Inc. *and* Local Union No. 11, International Brotherhood of Electrical Workers, AFL–CIO, Petitioner. Cases 21–RC–18897, 21–RC–18898, and 21–RC–18899

September 30, 1992

DECISION ON REVIEW AND DIRECTION OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The issues in this case are (1) whether the Board should continue to apply an eligibility formula to construction industry elections; and (2) if so, what formula should be used.

On December 12, 1991, the Regional Director for Region 21 issued a Decision and Direction of Election in which she found two separate units appropriate for collective bargaining. The first unit included employees working in the Employer's commercial and industrial division;[1] the second included employees working in the traffic and signal division.[2]

After concluding that the Employer had not shown compelling reasons why its operations should be distinguished from others in the construction industry, the Regional Director applied to both units the eligibility formula in *S. K. Whitty & Co.*, 304 NLRB 776 (1991), modifying *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

The Employer filed a timely request for review of the Regional Director's decision to apply the eligibility formula, arguing that she erred in applying the formula, that the Board should clarify when, if at all, such a formula should be used, and that the Board should overrule or substantially modify *S. K. Whitty*. The Employer also requested that the Board stay the election and hold oral argument. On January 21, 1992, the Board granted the Employer's request for review, and its requests for oral argument and to stay the election.

On March 4, 1992, the Board scheduled oral argument in this case. The notice of hearing requested that the parties address the following questions:

> 1. What should be the appropriate standard for voter eligibility on the facts of this case? Is this Employer properly characterized as one who has a nucleus of regular employees who work year-round from job to job but also hires additional employees on a project-by-project basis?
>
> 2. Should the Board reconsider the *Daniel Construction* (133 NLRB 264 (1961)), modified at 167 NLRB 1078 (1967)) eligibility formula as revised by *S. K. Whitty*, 304 NLRB 776 (1991)?
>
> 3. To what extent should representation principles, especially eligibility formulae developed in the nonconstruction industry context under Section 9(a), be applied in construction industry cases? See *John Deklewa & Sons*, 282 NLRB 1375, 1386 fn. 45 (1987).

On April 8, 1992, the Employer, the Petitioner, the Building and Construction Trades Department (AFL–CIO), the Associated General Contractors of America, Inc. (AGC), and the Associated Builders and Contractors, Inc. (ABC) presented oral argument before the Board.[3] The parties have filed briefs on review and the amici curiae have filed statements of position.

I. FACTS AND CONTENTIONS OF THE PARTIES

The Employer is an electrical contractor involved in projects throughout the State of California. For at least 30 years, the Employer and the Petitioner have been parties to a series of agreements under Section 8(f) of the Act that cover a number of classifications. Virtually all the employees in the units found appropriate are covered by 8(f) agreements effective by their terms from June 1, 1989, to May 31, 1992. The Employer obtains employees exclusively from the Petitioner's hiring hall pursuant to the terms of the collective-bargaining agreements.

The commercial and industrial division unit works primarily on long-term projects lasting from approximately 1 to 4 years, while the traffic and signal division unit works primarily on short-term projects lasting from 30 to 60 days. Although the Employer operates from project to project, it attempts to ''hang on'' to or transfer employees from one project to another when a project ends or another needs assistance. When transfers of existing employees do not meet its employment needs, the Employer contacts Petitioner's hiring hall for referrals. Employees are then referred from the Petitioner's hiring hall ''out-of-work'' list.

If the Employer has no further work, an employee is ''terminated.'' Terminated employees can be rehired by the Employer if their name comes up for referral by the Petitioner from the out-of-work list.[4] But according to Robert H. Alston, the Employer's vice president and manager of the commercial and industrial division, referral of former employees at the current time would be ''highly unusual'' as local condi-

[1] All journeymen wiremen, apprentices, material handlers, journeymen alarm installation technicians, alarm installation technicians, communication and systems installers, communication and systems technicians, senior communication and systems technicians, and journeymen sound electricians employed by the Employer within Los Angeles County.

[2] All journeymen traffic signal installers, utility technicians and utility technician trainees employed by the Employer within Los Angeles County.

[3] The AFL–CIO, the AGC, and the ABC appeared as amici curiae.

[4] No provision in the agreements provides for specifying particular employees from the list. Employees discharged for cause are ineligible for rehire.

tions in the construction industry have caused ''a lot'' of individuals (300) to be placed on the out-of-work list.

The Employer introduced a list of all unit employees employed during the past 2-1/2 years.[5] The list indicates that during the period covered, 201 individuals had been employed in the commercial and industrial division, with 92 having been terminated and 109 being currently employed. Eighty-three individuals had been employed in the traffic unit; 63 of those had been terminated and 20 are currently employed. The list did not indicate the number of projects worked by each employee.

The Employer and amici AGC and ABC generally contend that the Board should abandon the eligibility formula of *Daniel/S. K. Whitty*, supra, and apply the criteria traditionally used for determining the eligibility of laid-off employees when formulas developed on the basis of characteristics of a particular industry do not resolve the eligibility issue.[6] In so contending, the Employer argues that the construction industry is not now materially different from other industries, and, thus the traditional individualized multifactor eligibility test for laid-off employees would adequately address the needs in construction industry elections as it has for non-construction industry elections. Amici ABC and AGC argue that construction industry employment practices are so diverse that no rigid formula could properly take them into account. The traditional test calling for consideration of numerous factors to determine eligibility of each laid-off individual, these amici contend, is a more flexible test than any numerical formula and thus one that can better take into account distinct characteristics of each employer and assure that only those employees who have a continuing interest in the employer's terms and conditions of employment will be deemed eligible. Both the Employer and the two amici argue that a numerical formula such as *Daniel/S. K. Whitty* would improperly permit laid-off employees who may never work again for the Employer to vote in the election.

Alternatively, the Employer argues that even if the Board adheres to the *Daniel/S. K. Whitty* formula, the evidence does not support application of the formula here, because the record fails to show policies under which terminated employees had customarily been reemployed on the Employer's subsequent projects.

The Petitioner argues that the Board should return to the formula in *Daniel* and overrule *S. K. Whitty*. Amicus AFL–CIO argues that eligibility should be determined by the *Daniel* formula for all construction industry elections unless it is shown that an employer does not hire a substantial portion of its employees on an intermittent basis. The AFL–CIO also proposes that, should the Board conclude that the *Daniel* formula gives insufficient weight to the interests of future employees, it should simply expand the *Daniel* formula to add employees who have a recent history of reemployment.

[5] The hearing began September 3 and concluded September 23, 1991.

[6] See, e.g., *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983), where the Board stated that laid-off employees who have a reasonable expectancy of recall in the near future are eligible to vote, and that in determining this expectancy, the Board looks to the employer's past experience and future plans, the circumstances of the layoff, and what the employees were told about the likelihood of recall.

II. DISCUSSION AND CONCLUSION

The Regional Director applied the *Daniel/S. K. Whitty* formula to this Employer because she considered the Employer's ''sporadic'' employment patterns to be typical of the construction industry. Because the Regional Director also found that the Employer had a ''relatively stable work'' force, we granted review to determine what eligibility formula, if any, should be applied. We then broadened our inquiry to consider the additional questions set forth in the notice announcing the oral argument. After a careful review of the record, including the briefs and oral argument by the parties and amici, we have decided to: (1) continue use of an eligibility formula in the construction industry; (2) return to the *Daniel* formula; and (3) apply the formula to virtually all construction employers.

A. *Use of a Formula*

We continue to believe that a formula is necessary and appropriate for determining eligibility in the construction industry. The construction industry is different from many other industries in the way it hires and lays off employees. We recognized these differences in the first *Daniel* decision and again in our decisions modifying the *Daniel* formula when we stated that construction employees may experience intermittent employment, be employed for short periods on different projects, and work for several different employers during the course of a year. *Daniel*, 133 NLRB at 267; *Daniel*, 167 NLRB at 1079; *S. K. Whitty*, 304 NLRB at 777. We also have recognized the fluctuating nature and unpredictable duration of construction projects. See generally *Clement-Blythe Cos.*, 182 NLRB 502 (1970). Recent cases in which we have applied the *Daniel/S. K. Whitty* formula belie the Employer's argument that the industry has significantly changed in this respect, as they all have involved employers whose employees engage in various degrees of intermittent employment. See, e.g., *Oklahoma Installation Co.*, 305 NLRB 812 (1991); *S. K. Whitty*, supra; *Wilson & Dean Construction Co.*, 295 NLRB 484 (1989); and *Dezcon, Inc.*, 295 NLRB 109 (1989).

We note that numerical formulas have also proved their worth in some sectors outside the construction industry. The common denominator in these other spe-

cial industries is a pattern of employment that does not reflect a prevalence of employees working regular workweeks for extended uninterrupted periods of time with the same employer. In fact, use of a formula is consistent with the Board's approach when faced with other unusual employment patterns in other special industries. Thus, the Board has used eligibility formulae to address short-term, sporadic, and intermittent employment in *American Zoetrope Productions*, 207 NLRB 621, 623 (1973) (entertainment); *Hondo Drilling Co.*, 164 NLRB 416 (1967), enfd. 428 F.2d 943 (5th Cir. 1970) (oil drilling); *Seaboard Terminal Co.*, 109 NLRB 1095 (1954) (longshore); *Berlitz School of Languages*, 231 NLRB 766 (1977) (teachers); and *Avis Rent a Car System*, 173 NLRB 1366 (1968) (auto shuttlers). Indeed, citing *American Zoetrope* as one example, the Board recognized in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), that in general terms the Board is ''not inexperienced in developing election rules and procedures to accommodate short-term and sporadic employment patterns.'' Id. at fn. 45. Our experience in this industry and others indicates that we should continue to use an eligibility formula.

A formula here also satisfies the Board's objective of simplifying and expediting the election process and of assuring employees ''the constant availability of an electoral mechanism for expressing their representational desires.'' *John Deklewa & Sons*, 282 NLRB at 1386. If a formula is not used for this industry, the intermittent nature of work will require the individual determination of the eligibility status of large numbers of laid-off employees; in this case alone approximately 155 employees have been terminated or laid off. Individualized eligibility determinations necessarily would result in greatly prolonged litigation without, we believe, sufficient improvement in the accuracy of our determinations of the reasonable expectancy of the future employment of the particular individuals involved to warrant such an expenditure of investigative resources. Because use of an all-encompassing eligibility formula would lessen this prolonged litigation, it is preferable in this respect to individualized determinations. Any delay in the election process caused by extended litigation would be especially critical in the construction industry because of the limited duration of many projects. See *Clement-Blythe*, supra.[7]

[7] Our concern over the potential for prolonged litigation and greater expenditure of investigative resources is heightened by the burgeoning number of elections in the construction industry after *John Deklewa & Sons*, 282 NLRB 1374 (1987). In the years since *Deklewa*, the number of construction industry elections has increased from 199 in 1986 to 255 in 1987, 365 in 1988, 500 in 1989, and 434 in 1990. And the number of eligible voters increased from 4346 in 1986 to 11,253 in 1990. See 51–55 NLRB Ann. Reps., Appendices, Table 16 (Construction).

Although amici AGC and ABC point to an alleged ''diversity'' of construction industry employers and their employment patterns as an argument for individualized determinations of laid-off employees,[8] we do not find their arguments persuasive. Neither of these amici have established that any changes in the industry have resulted in an elimination of common denominators for the industry: intermittent employment, work for short periods or work for different employers. Although we recognize that there are variations in how pronounced these characteristics are among employers and employees, it does not follow that these variations are a reason for not applying a formula at all, or for applying the formula to some construction employers and not to others. See section C, infra.

The Employer and amici ABC and AGC argue that a formula enfranchises laid-off employees who may never work again for the Employer, to the detriment of current employees. But there is no assurance under any method of determining eligibility that the employees found eligible to vote will continue to work for the Employer for a significant period after the election. Even eligible employees working on the day of the election may soon quit, or be discharged or laid off; yet, their votes will determine the representation rights of future employees. Nor, even if we were to make individual determinations with respect to the likelihood of recurrent employment of each employee not currently working, would those determinations be guaranteed to be foolproof. An election necessarily occurs at a single moment in an employer's otherwise fluid work force history. A formula serves as an easily ascertain-

[8] Amici cite two studies of construction industry employment patterns. See Northrup, *Open Shop Revisited*, 11, 32, 407 (1983); and ''Annual Hours of Construction Workers. Analysis of Worker Characteristics.'' Construction Labor Research Council at p. 7 (1983). The Northrup study notes the diversity of the employers in the industry while also noting that some segments of the industry are able to maintain a more stable work force. The Labor Research Council study similarly indicates that while there is a wide range of work experiences, there are a sizable number of construction workers who work close to a full year and are likely to work for one employer. According to the study, the opposite is true of employees working a low number of hours. Both studies, however, acknowledge that turnover is still an element in segments of the construction labor market. Because turnover is an indicator of sporadic employment, neither study in our view establishes that employment in the industry is no longer intermittent. Amicus AGC cites a third study of unionized construction workers which found that in the single year covered, employees on average worked for two contractors, were laid off 1.5 times and worked 25.2 weeks per project. Mahoney and McFillen, Univ. of Michigan Center for Construction Engineering and Management, *Unionized Construction Workers and Their Work Environment* 60 (1984). Although this study may indicate limited intermittent employment and work for just a few contractors for the employees surveyed, the study was limited to construction workers in a single major midwestern city over a 1-year period and therefore, cannot be applied to the industry as a whole. Id. at 45. In any event, the study still confirms that construction employees even in this particular city on average work for more than one contractor and are subject to layoffs and rehire by projects.

able, short-hand, and predictable method of enabling the Board expeditiously to determine eligibility by adopting ''a period of time which will likely insure eligibility to the greatest possible number of employees having a direct and substantial interest in the choice of representatives.'' See *Alabama Drydock Co.*, 5 NLRB 149, 156 (1938). We conclude that continued adherence to use of a formula in the construction industry is not only warranted but can best meet this goal.

B. *Return to the Daniel formula*

We have decided to re-adopt the *Daniel* formula because it has proven to be an effective, efficient, and familiar means of determining voter eligibility in this industry for over 30 years. The *Daniel* formula provides that, in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. 133 NLRB at 267. The *Daniel* formula was later clarified to exclude those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. 167 NLRB at 1081.

Very recently, in *S. K. Whitty*, the Board modified the *Daniel* formula.[9] First, the Board added a ''recurrency'' factor. Under *Daniel* it was sufficient to have worked one period totaling at least 30 days within the 12 months immediately preceding the eligibility date, or to have had some employment within the past year and at least 45 total days in the 2 years preceding the eligibility date.[10] *S. K. Whitty* modified this formula in two ways. First, for employees who had worked less than 90 days, it added a recurrency factor so that the employee must have worked for more than one period of employment to be eligible to vote. Second, if the employee had worked for only one period, it must have been 90 days rather than 30 days, to demonstrate a ''sustained'' period of employment. Id., slip op. at 7.

In *S. K. Whitty* we attempted to establish, through a priori reasoning, a revised formula we believed to be more likely to identify employees with a reasonable expectancy of future employment. We added the recurrency factor because we thought *Daniel* was overinclusive. We increased the single period of employment to 90 days because we thought 30 days might be an insufficient period. But it now appears that *S. K. Whitty* may have created more problems than it solved. Our careful reconsideration of the issue now causes us to believe our decision in *Whitty* may have operated unfairly, in practice, to deny eligibility to construction employees who had as direct and substantial interest in the choice of a representative as others we have enfranchised.

For example, the retention of an employee for a single sustained period may suggest employer satisfaction and likelihood of recall should a layoff occur. Yet, the *S. K. Whitty* modifications would deny eligibility to an employee with up to 89 days of consecutive employment in the past year who is laid off shortly before the election, while it would grant eligibility to an employee with a total of 30 days of employment who meets the recurrency test by having worked a minimum of two periods of employment. In this example, the recurrency requirement would operate to deny eligibility to an employee with nearly three times the total amount of employment as the employee who meets the recurrency requirement. Moreover, in this example, the employee with 89 days of employment would be denied eligibility even if he or she had worked more recently than the recurrent employee. Although the recurrency requirement represented a good-faith effort by the Board to add a measure of reasonable expectancy of reemployment to the *Daniel* formula, we fear that in practice it has not taken into account the employees who, despite the absence of *recurrent* employment, nevertheless have a direct and substantial interest in the selection of a representative because of their single, long-term period of employment.

We also note that each of the parties and amici in this case reject the modifications made to *Daniel* by *S. K. Whitty*, albeit for different reasons. The Employer and amici ABC and AGC see *S. K. Whitty* as a further extension of the use of an unnecessary eligibility formula. Petitioner and amicus AFL–CIO see the *S. K. Whitty* modifications as being without any foundation and unnecessary in view of the 30-year use of the *Daniel* formula. In any event, it is clear that all parties and amici are dissatisfied with this *S. K. Whitty* modification of *Daniel*.[11]

Our own concerns over the result of the *S. K. Whitty* modifications, as well as the rejection of those modifications by the parties and amici, have led us to

[9] Member Devaney dissented in *S. K. Whitty*, as he would have adhered to the *Daniel* formula. He has continued to believe that the *Daniel* formula constitutes the best vehicle for determining voter eligibility in the construction industry.

[10] An employee could have worked for several periods to achieve the 30 or 45 days, but this was not required; a single employment stint would suffice.

[11] None of the parties or amici suggested any viable alternative formula. The Employer and the ABC suggested use of a formula but only as part of the traditional test, which we have rejected. While urging a return to the *Daniel* formula, the AFL–CIO suggested expanding the formula to include employees who have a recent history of reemployment, regardless of their total period of employment. Because we have decided to return to *Daniel*, and the AFL–CIO's alternative is not significantly different, we find no valid reason to engraft this modification onto the familiar *Daniel* test.

rethink the issue, and to conclude that we should return to the *Daniel* formula. The *Daniel* formula is well-settled, time-tested, and familiar to construction industry employers and unions alike. It has been used in elections and administered by the Board for over 30 years.[12] It is our considered judgment that the ease of administering the *Daniel* formula and the familiarity to all concerned outweigh any perceived limitations. As the Board noted in one of its earliest decisions establishing an eligibility formula, ''absolute accuracy [in determining eligibility] is probably unattainable here.'' *Alabama Drydock, supra at 156. As Daniel* has stood the test of time and proven to be an effective formula for determining voter eligibility in the construction industry, we choose at this time to return to it.[13]

We do not disagree with our concurring colleague's expression of interest in ultimately utilizing the Board's rulemaking procedures to base future decisions in this area on a more empirical footing. We note, however, that, both in oral argument and in their briefs, no party or amicus seemed particularly anxious to engage in rulemaking as a means of studying this issue afresh.[14] And, because of the short-term duration of most construction projects, to defer resolution of a particular case for the relatively extended rulemaking process is unfair to the parties in that case.

[12] The Board has conducted over 6000 elections in the construction industry in the past 30 years with a minimum amount of reported difficulty regarding eligibility. See 26–55 NLRB Ann. Reps., Table 16 (Construction).

[13] Although we return to the *Daniel* formula, as modified, and overrule the *S. K. Whitty* modification, we make one slight modification to *Daniel*. To avoid any confusion regarding the meaning of the Board's use of the term ''days,'' all references to the number of days of employment necessary within the periods specified in the formula will be revised to add the words ''working'' days, i.e., ''30 working days,'' and ''45 working days.'' The purpose of this change is to make clear that if an employee works any portion of a working day, it is counted as 1 day for purposes of the formula.

[14] At oral argument, counsel for the Employer stated that the Board did ''not need rulemaking'' to take into account the diversity of the construction industry, that such an approach would ''bog'' down the Board and would constitute an ''unnecessary approach.'' Counsel for the AGC stated that rulemaking was ''not the most desirable approach . . . for the Board to take here.'' Similarly, counsel for the ABC stated that rulemaking was not needed, as it would serve ''no useful purpose.'' Furthermore, neither the Petitioner nor the AFL–CIO forcefully urged that the Board engage in rulemaking. At oral argument, counsel for the Petitioner stated that rulemaking might be an ''option'' the Board would have to pursue. In its brief, the AFL–CIO noted that Congress had sanctioned the model of the construction industry as one characterized by short-term, transient employment, and that any attempt to modify that model should ''require extremely strong proof developed on a record with the full opportunity for all parties to challenge the presentation of others.'' The AFL–CIO suggested that rulemaking would be of no avail to the Employer's, AGC's, and ABC's assertion that intermittent employment was no longer the norm.

C. *Breadth of Application of the Formula*

We have decided that the *Daniel* formula is applicable in all construction industry elections. We find no reasonable, feasible, or practical means by which to distinguish among construction industry employers in deciding whether a formula should be applied.

Because there is admittedly some degree of variety among construction employers and their hiring patterns, any attempt to distinguish between employers requires an elaborate and burdensome set of criteria to be applied and litigated at each hearing. These criteria, for example, must distinguish between employers who hire project-by-project, and those who have a so-called stable or core group of employees. The employers with a stable group would presumably resemble industrial employers and, perhaps, obviate the need for the *Daniel* formula. Our experience, however, indicates that the line between these two types of employers is not distinct. Indeed, many employers are a hybrid of these two models of employment. Moreover, such criteria also would have to define the proper period for examination of the employer's records regarding hiring and layoff ''patterns.'' Even assuming that reasonable criteria could be established, we believe the litigation required at the hearing would be an undue burden on the parties and the Board.[15]

Adoption of a set of criteria for deciding whether *Daniel* applies would mean, in effect, application of yet another formula—a formula on top of a formula. Engrafting another level of analysis onto eligibility determinations in this industry would undermine our objective of simplifying and speeding the election process.

Further, we believe this additional level of analysis is unnecessary because application of the *Daniel* formula itself will, to a substantial extent, answer the question whether a particular construction employer is similar or dissimilar to an industrial employer, or whether it operates with or without a stable core of employees. Thus, if no employees are eligible by virtue of the formula, that shows the employer has an entirely stable work force whose voter pool should not and will not be augmented by intermittently employed employees. On the other hand, if application of the formula renders a number of other voters eligible, to that extent it has been demonstrated that the employer hires intermittently from a group of employees with signifi-

[15] We note that in *John Deklewa & Sons*, 282 NLRB at 1383, where the Board abandoned the so-called conversion doctrine, it pointed to the practical difficulties associated with use of the doctrine. More specifically, the Board noted the ''complex and protracted nature'' of the litigation necessary to demonstrate preliminarily whether a work force is permanent and stable or project by project. Id. at fn. 37, citing *Construction Erectors*, 265 NLRB 786 (1982).

cant contacts to that employer as determined by the formula.

Use of a formula by no means excludes core employees, however that term may be defined; it simply enfranchises employees who, although working on an intermittent basis, have sufficient interest in the employers' terms and conditions of employment to warrant being eligible to vote and included in the unit. For these reasons, we have decided to apply the *Daniel* formula regardless of the construction employer's method of operation.[16]

Accordingly, for the reasons set forth above, the eligibility formula in *S. K. Whitty* is overruled, and the Regional Director's Decision and Direction of Election is modified to apply the eligibility formula of *Daniel Construction*, 133 NLRB 264 (1961), as modified, 167 NLRB 1078 (1967), and consistent with this decision.[17] This case is remanded to the Regional Director with instructions to conduct an election pursuant to her Decision and Direction of Election as modified, except that the payroll eligibility period shall be that period ending immediately before the date of this decision, and the Employer shall furnish an *Excelsior* list (*Excelsior Underwear*, 156 NLRB 1236 (1966)) within 7 days from the date of this decision, as otherwise described in the Regional Director's decision.

[16] One exception to the application of the formula in the construction industry exists where the employer clearly operates on a seasonal basis. See *Dick Kelchner Excavating Co.*, 236 NLRB 1414, 1416 fn. 10 (1978). The parties also are free to stipulate not to use the *Daniel* formula. Of course, all employees eligible under the Board's traditional eligibility standard also would be eligible.

[17] That aspect of *S. K. Whitty* concerning whether any eligibility formula should be applied when a construction employer has no successful bid or committed work for the immediate future is not disturbed by our decision here. Cf. *Fish Engineering & Construction*, 308 NLRB 836 (1992) (Member Devaney, dissenting); *Davey McKee Corp.*, 308 NLRB 839 (1992).

ORDER

It is ordered that Cases 21–RC–18897, 21–RC–18898, and 21–RC–18899 be remanded to Region 21 for action consistent with these findings.

MEMBER RAUDABAUGH, concurring.

I concur with my colleagues' decision to return to the eligibility formula used in *Daniel Construction Co.*[1] However, I believe that the Board should engage in rulemaking in this area. The Board applies the *Daniel* formula to all employers in the construction industry. Without a broad empirical study of employment patterns in the industry, it is difficult to say whether that formula is appropriate and whether there should be some exceptions to it for certain segments of that industry. My colleagues note that the parties and amici are not ''particularly anxious'' to engage in rulemaking. In my view, this is simply reflective of the particular result that each organization seeks to achieve. I believe that from an objective and neutral standpoint, there are insufficient data to establish any particular rule, and there are insufficient data to establish the all-encompassing rule established by my colleagues. However, in the absence of such a study, I agree that the *Daniel* formula should be applied. It has the advantage of historical usage and familiarity. Hence, I concur.

[1] 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

Daniel Construction Company, Inc. *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Petitioner. Case 11–RC–1453

October 27, 1967

SUPPLEMENTAL DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND JENKINS

Pursuant to a Decision and Direction of Election issued by the National Labor Relations Board on September 21, 1961,[1] as amended on October 19, 1961, an election was conducted on November 16, 1961, among the employees in the unit found appropriate by the Board. The Petitioner, which lost the election, filed objections to the election and unfair labor practice charges. Upon the issuance of a complaint, the Regional Director consolidated the cases[2] for hearing. On July 18, 1963, the Trial Examiner issued his Intermediate Report, finding that the Employer had engaged in and was engaging in certain unfair labor practices and recommending that the election held in Case 11–RC–1453 be set aside and a new election be held.

The Board, on January 31, 1964, adopted the Trial Examiner's Intermediate Report with certain additions and modifications.[3] The Respondent Employer filed a petition for review of the Board's Order with the United States Court of Appeals for the Fourth Circuit. The court enforced the Board's Order in the unfair labor practice case, but declined to review the findings and order entered in the representation case.[4] The Employer's petition for a writ of certiorari was denied by the Supreme Court on October 11, 1965.[5]

Thereafter, on November 8, 1965, the Employer filed with the Board a motion to reopen the record in the representation case for the purpose of receiving evidence as to the appropriateness of the unit and as to the formula utilized by the Board in determining the voting eligibility of employees generally, and of certain employees in particular who customarily transfer between supervisory and nonsupervisory jobs. The Employer contended that since the hearing it had made extensive changes in its organization affecting the validity of the Board's appropriate unit finding and that more accurate employment records provided a basis for a more realistic eligibility formula. On December 13, 1965, the Board ordered the Employer to file a statement in support of its motion, and, on January 24, 1966, the Employer filed a bill of particulars in support of motion to reopen. On February 8, 1966, the Board issued an order reopening record and remanding proceeding to Regional Director for further hearing in the above-entitled proceeding, such hearing to be confined to the voting eligibility formula and the exact scope of the division wide unit. In response to a joint motion filed by the parties on April 28, 1966, the Board, on May 6, 1966, amended the above order to provide for a separate hearing on the scope of the divisionwide unit and defer hearing on the standards for determining eligibility pending the Board's determination of the unit issue.

On October 18, 1966, the Board issued a Supplemental Decision,[6] in which it found that the Employer had failed to show organizational changes warranting a modification in the scope of the divisionwide unit previously found appropriate[7] and remanded this proceeding to the Regional Director for Region 11, pursuant to it order of May 6, 1966, for the purpose of reopening the record and holding a hearing to receive evidence relating to the voting eligibility formula. On March 7, 1967, a hearing was held before Hearing Officer Larry L. Eubanks. Thereafter, the Employer and Petitioner submitted briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

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

The Employer's request to reopen the record for the purpose of receiving evidence relating to the voting eligibility formula is based on its contention that, since the original hearing in 1961, more accurate employment records have been maintained which provide a basis for a more realistic eligibility formula in a new election.

In its original Decision and Direction of Election the Board adopted the following eligibility formula:

> . . . in addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days

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[1] *Daniel Construction Company, Inc.*, 133 NLRB 264

[2] Cases 11–RC–1453 and 11–CA–1893

[3] 145 NLRB 1397 By such action, the Board remanded the representation case to the Regional Director for the purpose of holding another election

[4] *Daniel Construction Co , Inc* v *N L R B* , 341 F 2d 805 (C A 4)

[5] 382 U S 831

[6] *Daniel Construction Company, Inc* , 161 NLRB 52

[7] The Board affirmed its previous unit determination, as set forth in 133 NLRB 264, and found the appropriate unit for collective bargaining to be

> All journeymen plumbers and pipefitters, pipefitter welders and pipefitter helpers employed by the Company in its Greenville division, including but not limited to construction work in the States of North Carolina, South Carolina, Tennessee, Alabama, Georgia, and Florida, excluding all other building trades craftsmen, engineers, draftsmen, foremen (working and nonworking), general foremen, clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act

> or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 or more days within the period of 24 months, immediately preceding the eligibility date for the election hereinafter directed, shall be eligible to vote.

In adopting the foregoing eligibility formula, the Board emphasized the nature of the construction industry, in which many employees experience intermittent employment and may work for short periods on different projects. In this connection, the Board noted that it is not unusal for employees to be employed by several different employers in 1 year, and that plumbers and pipefitters may experience short layoffs caused by material shortages or because pipefitters' work is dependent on the work of various other crafts. The Board also took note of the fact that the Employer had experienced in early 1961 a temporary restriction in the number of plumbers and pipefitters employed, but concluded that the fact that some employees might have been temporarily laid off because of that restriction in no way detracted from their continuing interest in the Employer's working conditions.

At the March 7, 1967, hearing, the only evidence introduced by the Employer consisted of a computerized compilation of certain payroll records for the years 1964, 1965, and the first 10 months of 1966. From this payroll data the Employer compiled a number of statistical exhibits. The only testimony was that of the Employer's accounting division manager, who explained how the payroll data was compiled and what the Employer's exhibits, based on this data, purported to show.

The Employer contends that the Board's original voter eligibility formula is unrealistic. The Employer points out that the Board noted in rejecting its requested eligibility formula in 1961 that the Employer had not offered, and in fact, had refused to present evidence to support its request. Since 1964, however, the Employer has maintained a data processing system, which has enabled it to keep more complete employment histories of its employees. The Employer contends that the payroll data, introduced at the hearing, demonstrates factually that the grounds relied on by the Board in arriving at its original voting eligibility formula no longer exist. Specifically, the Employer contends that the temporary restriction of early 1961, referred to by the Board in its Decision, no longer exists, and that the Board's conclusions that many employees "may work for short periods of time on different projects" because of the "nature of this industry" and that employees "may experience short layoffs due to material shortages or because the pipefitting work is dependent on the work of various other crafts" are no longer warranted. To support its contentions, the Employer has attempted to show that there has been an increasing degree of stability in its work force from 1964 to 1966.

As in 1961, the Employer requests that voting eligibility be limited to those employees on the payroll and employed on a constant and continuing basis for a period of 6 months immediately preceding the Direction of Election. The Employer contends that the 6-month continuous employment requirement is necessary to prevent employees who are temporarily employed prior to the Direction of Election from gaining eligibility. In the alternative, the Employer requests that if the Board persists in using a formula which allows employees who are no longer employed to vote, that formula should be limited to include only those employees who were employed at least 6 months during the 12 months preceding the Direction of Election. Further, to insure that only those former employees who have some continuing interest in the Employer's working conditions be permitted to vote, the formula should be limited to employees laid off in the reduction of force at the completion of a job, and should not include terminated employees who voluntarily quit or were discharged, as such employees have no interest in the employment relationship.

Contrary to the Employer, the Petitioner contends that the statistical data introduced by the Employer at the hearing fully supports the utilization of the Board's original voting eligibility formula in a second election. The Petitioner points out that no evidence was introduced that contradicts the Board's original finding that intermittent employment is the hallmark of the construction industry, or that short layoffs due to material shortages and the dependence of pipefitters' work on the work of other crafts are any less relevant today than they were in 1961. The original voting eligibility formula, according to the Petitioner, would insure the fullest participation in the election by all employees who have reasonable expectation of future employment with the Employer. Moreover, the Petitioner deems it highly significant that the Employer is the dominant industrial contractor in the 6-State area in which it operates, since this means that employees on layoffs from one project have a greater expectation of future employment with the Employer on one of its other projects.

If, however, the Board decides that a modification in the voting eligibility formula is warranted, the Petitioner contends that all employees who have been employed by the Employer for at least 30 days during the 12 months preceding the Board's Supplemental Decision and Direction of Election, together with all employees on the payroll at the time of such Decision, should be eligible.

Upon examination of the entire record in this proceeding, we are not persuaded that the original voting eligibility formula or standard, as set forth in

the Board's 1961 Decision,[8] is either unrealistic or requires significant modification.

The essence of the Employer's contentions is that the grounds relied on by the Board in its 1961 voting eligibility determination are no longer valid. We are able to agree with the Employer, however, only with respect to one of these grounds, specifically, that the temporary restriction in the number of plumbers and pipefitters employed that occurred in early 1961 no longer exists.

To support its contention that the Board's 1961 findings that employees work for short periods of time on different projects and for different employers because of the "nature of the construction industry," and that employees "may experience short layoffs due to material shortages or because the pipefitting work is dependent on the work of various other crafts" are no longer true, the Employer relies on its statistical data, which it contends reveals a trend toward longer term employment. As evidence of such a trend, the Employer points out that the percentage of total employees who worked 121 days or more per year has increased from 1964 to 1966. However, careful investigation of the Employer's employment data does not persuade us that such a trend is obvious; rather, the data, as the Petitioner suggests, appears to indicate only that the length of employment in each employment range[9] is variable. To illustrate, the percentage of employees working 181 days or more in 1964 constituted 18.5 percent of the total work force, 22.4 percent of the work force in 1965, and 18.2 percent of the work force in 1966. Employees working between 121 to 180 days in 1964 were 13.4 percent of the work force, 12.6 percent in 1965, and 17.8 percent in 1966. The number of employees in the 6-to 30-day-employment range was 23.5 percent in 1964, 20.3 percent in 1965, and 25.7 percent in 1966. Likewise, the percentage of employees in the 31-to 60-, 61-to 90-, and 91-to 120-day-employment ranges varies from year to year. From this data, we conclude that the trend toward longer term employment or stabilization, which the Employer contends has occurred between 1964 and 1966, can, at best, only be described as minimal.[10]

The Employer further contends that the Board's 1961 finding that "employees work for short periods of time on different projects" or "experience short layoffs" is contradicted by its data, which reveals that employees who worked less than 120 days averaged working on less than 2 jobs during 1964 and 1965 and averaged working on only 2.1 jobs in 1966. In our opinion, however, this data does not, in fact, contradict the Board's 1961 finding. We note that the average number of jobs worked by employees in the employment ranges of 121 to 180 days and 181 days and over is not significantly higher than it is in the other employment ranges.[11] If anything, this data reveals that the average number of jobs worked per year has increased for all employment ranges. Moreover, as the Board indicated in its original Decision, many of the Employer's projects are under construction for 18 months or longer; this would substantially lower the average number of jobs worked per year.[12] On the other hand, the employment data reveals that some employees worked on as many as 30 to 56 projects in the 34-month period covered by the Employer's data and as many as 14 to 25 projects in 1 year.

Most significantly, however, while the Employer has calculated the average number of jobs worked per year by its employees, the evidence does not indicate whether employment on these jobs was continuous in nature or whether layoffs due to material shortages or to the fact that pipefitters work is dependent on the work of other crafts are common.

At the Petitioner's request, the Employer introduced data which shows the average number of total unit employees by month. This data indicates that there is great fluctuation in the number of employees employed by the Employer, even on a monthly basis, and tends to confirm the Board's originial finding with respect to the prevalence of intermittent employment in this industry.[13] In addition to showing the great fluctuation in the number of employees involved in the Employer's operation, this data also persuades us that the Employer's requested formula, which, among other things, would limit voting eligibility to those on the payroll at the time of the Board's Direction of Election, would disenfranchise a large number of employees who have a reasonable expectation of future employment with the Employer.

[8] *Daniel Construction Company, Inc*, 133 NLRB 264

[9] The Employer computed the number of days each employee worked in the years 1964, 1965, and the first 10 months of 1966 The employees were then grouped into certain categories or employment ranges based upon varying numbers of days worked in each year The specific categories or employment ranges utilized by the Employer were 6 to 30 days, 31 to 60 days, 61 to 90 days, 91 to 120 days, 121 to 180 days, and 181 or more days worked per year By agreement of the parties, employees who worked 5 days or less were excluded from the survey Using the total number of employees who worked in each year, the Employer was then able to compute the percentage of its total work force (excluding those who worked 5 days or less) which fell into each employment range

[10] In examining the statistical data with respect to employment ranges, we note that figures for 1966 include only the first 10 months of the year

[11] In the employment range of 121 to 180 days, the average number of jobs worked in 1964, 1965, and 1966 was 2 1, 2 9, and 3 0, respectively, and in the employment range of 181 days and over, the average number of jobs for 1964, 1965, and 1966 was 2 4, 2 7, and 3 3, respectively

[12] In this connection, we found ourselves handicapped in evaluating the Employer's data, since no evidence was introduced by the Employer as to the average length of time it takes to complete a project

[13] For example, the number of employees by month varies from 1,182 in June 1965 to 2,399 in October 1965, and from 1,677 employees in February 1966 to 2,494 employees in April 1966 Moreover, although the Employer employed a total of 4,477 employees from January 1 to October 31, 1966, the greatest number of employees employed in 1 month was 2,494

In conclusion, on the basis of the evidence presented by the Employer, we are unable to discern any significant change in the nature of this industry or the Employer's particular operation since the Board's original Decision in 1961.

We now turn to a discussion of the eligibility formula or standard requested by the Employer. Under that proposed standard (those on the payroll at the time of the Direction of Election, who have been continuously employed during the 6 months preceding the Direction of Election) an employee to attain voting eligibility would have to be employed 132 consecutive workdays prior to the Direction of Election.[14] We are unable to determine from the Employer's data what percentage of employees would be eligible under this proposed formula, since the Employer's employment data does not indicate whether employment was continuous. For the purposes of discussion, however, we will assume that the Employer's data shows continuous employment, instead of merely the total number of days worked each year, and that those who worked the requisite number of days would be on the payroll when the election is directed. As qualified by these assumptions, the Employer's proposed formula would have allowed only 36 percent of the employees employed in 1966 to vote, 35 percent in 1965 and 31.9 percent in 1964.[15] Moreover, it appears that substantially fewer than 31 to 36 percent of the employees would be eligible to vote under the Employer's formula, since the result obtained does assume not only continuous employment, but that the employees who worked the requisite number of days were actually on the payroll at the time of the Direction of Election, an assumption that appears doubtful in view of the great fluctuation in the total number of employees per month.[16] Clearly, the Employer's proposed eligibility formula is overly restrictive since a substantial number of employees who not only have a reasonable expectation of future employment with the Employer, but may, in fact, be employed at the time of the Direction of Election will be disenfranchised. Likewise, the alternative eligibility standard requested by the Employer (those employees who have worked at least 6 months in the 12 months preceding the Direction of Election) is overly restrictive since it also would limit employee participation in the election to 36 percent, according to the Employer's 1966 data.

On the other hand, a rough approximation taken from the Employer's data indicates to us that the Board's original formula would permit approximately 75 percent of the employees to vote. In our opinion, the Board's original voting eligibility formula will assure that those employees who have a reasonable expectation of future employment with the Employer, and thereby have a continuing interest in the Employer's working conditions will be eligible to vote. At the same time, however, we are not unmindful that the standard or formula applied must not be so broad in application that it will permit individuals who have no likelihood of future employment with the Employer to decide the question whether the employees will have representation. For this reason, we think that the desired result can be achieved by excluding those individuals who have quit voluntarily or have been terminated for cause prior to the completion of the last job for which they were employed. Therefore, we will reaffirm the Board's original eligibility formula with the aforementioned modification.

Accordingly, we find that, in addition to those employees in the unit who were employed during the payroll period immediately preceding the date of the issuance of the Regional Director's Notice of Second Election in this proceeding, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, shall be eligible to vote.

[Direction of Election[17] omitted from publication.]

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[14] The number of days (132) was arrived at by using the Employer's estimate of 22 working days per month

[15] These figures were taken from the Employer's data The percentage of employees in the employment ranges of 121 to 180 days and 181 days and over for each year were used, although obviously some of the employees in the 121-to 180-day range did not work 132 days

[16] See fn 14, *supra*

[17] The Petitioner contends that the Employer should be required to supply the names and addresses of all eligible employees in accordance with the rule in *Excelsior Underwear Inc* , 156 NLRB 1236 We agree The original election in this proceeding was held in 1961 The record was reopened on the Employer's motion (which motion the Petitioner opposed) for the purpose of receiving evidence concerning the extensive changes the Employer claims were made in its operation since the first election Hearings were held on the scope of the unit and eligibility formula, thus for all practical purposes the basic issues in any representation case have been relitigated For these reasons, we consider the circumstances in this case to be analogous to a first election Accordingly, we will provide that the *Excelsior* rule be applied in this case

An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director The Regional Director shall make the list available to all parties to the election No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed *Excelsior Underwear Inc* , 156 NLRB 1236

10-7E-14. Elections.

A. Whenever, in accordance with rules prescribed by the board or local board, a petition is filed by a labor organization containing the signatures of at least thirty percent of the public employees in an appropriate bargaining unit, the board or local board shall conduct a secret ballot representation election to determine whether and by which labor organization the public employees in the appropriate bargaining unit shall be represented. Upon acceptance of a valid petition, the board or a local board shall require the public employer to provide the labor organization within ten business days the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of any public employee in the proposed bargaining unit. This information shall be kept confidential by the labor organization and its employees or officers. The ballot shall contain the name of any labor organization submitting a petition containing signatures of at least thirty percent of the public employees in the appropriate bargaining unit. The ballot shall also contain a provision allowing public employees to indicate whether they do not desire to be represented by a labor organization. An election shall only be valid if forty percent of the eligible employees in the bargaining unit vote in the election.

B. Once a labor organization has filed a valid petition with the board or local board calling for a representation election, other labor organizations may seek to be placed on the ballot. Such an organization shall file a petition containing the signatures of not less than thirty percent of the public employees in the appropriate bargaining unit no later than ten days after the board or the local board and the public employer post a written notice that the petition in Subsection A of this section has been filed by a labor organization.

C. As an alternative to the provisions of Subsection A of this section, a labor organization with a reasonable basis for claiming to represent a majority of the employees in an appropriate bargaining unit may submit authorization cards from a majority of the employees in an appropriate bargaining unit to the board or local board, which shall, upon verification that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards, certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit. The employer may challenge the verification of the board or local board; the board or local board shall hold a fact-finding hearing on the challenge to confirm that a majority of the employees in the appropriate bargaining unit have signed valid authorization cards.

D. If a labor organization receives a majority of votes cast, it shall be certified as the exclusive representative of all public employees in the appropriate bargaining unit. Within fifteen days of an election in which no labor organization receives a majority of the votes cast, a runoff election between the two choices receiving the largest number of votes cast shall be conducted. The board or local board shall certify the results of the election, and, when a labor organization receives a majority of the votes cast, the board or local board shall certify the labor organization as the exclusive representative of all public employees in the appropriate bargaining unit.

E. An election shall not be conducted if an election or runoff election has been conducted in the twelve-month period immediately preceding the proposed representation election. An election shall not be held during the term of an existing collective bargaining agreement, except as provided in Section 10-7E-16 NMSA 1978.

History: Laws 2003, ch. 4, § 14; 2003, ch. 5, § 14; 2020, ch. 48, § 7.

ANNOTATIONS

The 2020 amendment, effective July 1, 2020, revised certain bargaining unit election procedures; in Subsection A, added "Upon acceptance of a valid petition, the board or a local board shall require the public employer to provide the labor organization within ten business days the names, job titles, work locations, home addresses, personal email addresses and home or cellular telephone numbers of any public employee in the proposed bargaining unit. This information shall be kept confidential by the labor organization and its employees or officers."; in Subsection C, after "Subsection A of this section", deleted "a public employer and", after "appropriate bargaining unit may", deleted "establish an alternative appropriate procedure for determining majority status. The procedure may include a labor organization's submission of" and added "submit", after "an appropriate bargaining unit", deleted "The board or local board shall not certify an appropriate bargaining unit if the public employer objects to the certification without an election" and added the remainder of the subsection; and in Subsection E, changed "Section 16 of the Public Employee Bargaining Act" to "10-7E-16 NMSA 1978".

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

RESULTS OF CARD CHECK IN LIEU OF ELECTION

EMPLOYER:	**New Mexico State University**
LABOR ORGANIZATION:	**United Electrical, Radio and Machine Workers of America**
PELRB CASE NO.	**313-21**
DATE OF CARD CHECK:	**Thursday, March 17, 2022**
LOCATION OF CARD CHECK	**PELRB Offices, 2929 Coors Blvd. N.W. Suite 303 Albuquerque, N.M. 87102**

1.	Total Number of Employees in Bargaining Unit	939
2.	Total Number of Employees to be accreted	N/A
3.	50% of Employees in Bargaining Unit Equals:	469.5
4.	Total Interest Cards Indicating Support	498
5.	Number of Challenged Cards	6
	Challenged Cards Rejected By Parties	6
	Challenged Cards Agreed To By Parties	0
8.	Percent of Employees in Bargaining Unit indicating support	53%

THE ABOVE IS A TRUE STATEMENT OF THE ELECTION RETURNS.

Umpire: _____ Date: March 17, 2022
Thomas J Griego

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulation were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

Observer For Union: _____ Date: 3/17/22
James Montalbano

Observer For Employer: _____ Date: 3/17/2022
Dina Holcomb

Perdue Farms, Inc. *and* United Food and Commercial Workers Union, Local 204, a/w United Food and Commercial Workers International Union, AFL–CIO, Petitioner. Case 11–RC–6094

June 30, 1999

DECISION AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 4, 1996, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Second Election issued by the Board on February 2, 1996, reported at 320 NLRB 805 (1996). The tally of ballots shows 755 for and 947 against the Petitioner, with 53 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings[1] and recommendations, and finds that the election must be set aside and the case remanded to the Regional Director for further appropriate action consistent with this decision.[2]

A. Hearing Officer's Report and Recommendations

We adopt the hearing officer's findings that the Employer committed objectionable conduct prior to the second election among employees at Perdue's chicken processing plant in Lewiston, North Carolina, by the following conduct:

• During a new employee orientation meeting in December 1995 or January 1996, the Employer's human resources clerk, Barbara Artis,[3] told the employees that if the Union got in Perdue would close the plant and put in an airport, that employees would be fired if they were caught wearing union T-shirts, hats, or other union paraphernalia, and that if they went on strike they would be fired and lose benefits and would be unable to file for unemployment.

• During December 1995 meetings with employees to introduce a new seniority pay program, the Employer indicated that eligibility in the program was limited to nonunion employees and threatened loss of the benefit if the Union were selected to represent the employees. Thereafter, during captive audience meetings in March 1997, various supervisors told employees that they would lose their eligibility for seniority pay if they selected the Union and that the Employer had refused requests for the benefit made by unions at represented plants.

• During captive audience meetings in March 1996, the Employer's vice president, Larry Winslow, threatened employees with loss of benefits, loss of employment, and plant closure by telling them that before the Union came in he would close the plant down and move it to South Carolina and that employees would lose their benefits.

• In March 1996, Supervisor Jim Melvin asked an employee what she would do if the plant closed down.

• In January 1996, Human Resources Manager Bob Bullock announced a new job bid system and a management training program, which were implemented in February 1996, in order to discourage support for the Union.

Based on this conduct, we find, for the reasons set forth by the hearing officer, that the Employer engaged in objectionable conduct and that the second election must be set aside.

B. The Forgery Allegations

The Employer has excepted to the hearing officer's Report and Recommendations on Objections on the ground, among others, that the Petitioner's showing of interest submitted in support of the petition contained forged authorization cards and that the petition should be dismissed.

1. The first election

The Union filed its petition in this case on June 2, 1995, seeking to represent a unit of approximately 2200 production and maintenance employees at the Employer's facility in Lewiston, North Carolina.[4] An elec-

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

The Employer also contends that the Regional Director's rulings and the hearing officer's rulings, findings and conclusions displayed bias against the Employer. On careful examination of the entire record, we are satisfied that the Employer's contentions are without merit.

In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 4, 8, 10, and 12.

[2] In view of the procedural history of this case, which has resulted in unusually long delays in the resolution of the question concerning representation, we deny the Employer's request to postpone ruling on the merits of the Union's objections.

Member Hurtgen would not rule on the objections at this time. In his view, there is a threshold question concerning the validity of the showing of interest. If that showing was tainted, the original representation petition was unsupported and invalid. Thus, he would resolve that issue before ruling on union objections.

[3] Based on Artis' acknowledgement that she was responsible for communicating the Employer's rules, policies, and procedures to new employees, the hearing officer found that she was an agent of the employer. See *Hausner Hard–Chrome of KY, Inc*., 326 NLRB No. 36 (1998); *Great America Products*, 312 NLRB 962 (1993); and *Southern Bag Corp*., 315 NLRB 725 (1994).

[4] The Employer challenged the showing of interest underlying the petition in a letter to the Regional Director dated June 9, 1995. In that letter, the Employer contended that the authorization cards did not clearly indicate "which plant the signing employee works in," leading to potential confusion of the cards with those solicited at another Perdue plant by a different union. In response to the Employer's request, the Region matched the authorization cards against payroll lists furnished by the Employer and concluded that a sufficient 30-percent showing of interest had been made.

tion pursuant to a Stipulated Election Agreement was conducted on June 28, 1995, which the Union lost 851 to 952, with 53 nondeterminative challenged ballots. The Union filed timely objections to the first election, which culminated in the Board's Decision and Direction of Second Election on February 2, 1996.[5] The Regional Director scheduled the second election for April 4, 1996.

Less than 2 weeks before the scheduled date for the second election, the Employer became aware that two former organizers for the Union were alleging that they and others had forged some 400 signatures on authorization cards intended to support the Union's petition, and that the forgeries had occurred at the direction of the Union's local president and with full knowledge of International officials. On March 27, 1996, the Employer forwarded affidavits from the two former organizers to the Regional Director, along with a request that the allegations be investigated. At the same time the Employer notified the Regional Director that it had alerted the Federal Bureau of Investigation and the Department of Labor's Division of Labor Racketeering of the forgery allegations. The Employer asked that the April 4 election be held as scheduled but that the ballots be impounded pending a decision on the fraud allegations.

In response to the Employer's request, the Regional Director asked the Employer to furnish employment records that could serve as handwriting exemplars for comparison with the authorization card signatures. After conducting an examination of the handwriting samples furnished by the Employer, the Regional Director stated that he found no evidence of the widespread forgery alleged by the former organizers. He indicated that although he had some doubts about the authenticity of some authorization cards it did not appear that the questionable cards were sufficient in number to affect the Union's showing of interest. Accordingly, the Regional Director proceeded with the second election on April 4.

2. The second election

The Union lost the second election by a vote of 947 to 755, with 53 nondeterminative challenged ballots, and the Union filed the instant objections. A hearing on the objections was scheduled for May 21, 1996.

On May 9, 1996, based on the former organizers' allegations of forgery, the Employer filed with the Regional Director a motion to dismiss the petition or certify results of the *first* election, or, in the alternative, to hold in abeyance the hearing on the Union's objections to the second election. A few days later, on May 14, 1996, the Employer filed another motion to postpone the May 21 hearing on the Union's objections to the second election. The Acting Regional Director denied the Employer's motions on May 15, 1996, relying on the previous investigation of the petition, including the Regional Director's comparison of signatures on the authorization cards to the handwriting exemplars provided by the Employer.

On May 16, 1996, the Employer filed with the Board a request for review of the Acting Regional Director's denial of its motions,[6] raising the allegations of forgery. By order dated May 20, 1996, the Board denied the Employer's request for review "without prejudice to the employer's right to raise these issues in any appropriately filed exceptions to the Hearing Officer's report that ultimately issues."

3. The proceedings in Federal court

Meanwhile, on May 17, 1996, while the Employer's request for review was pending before the Board, the Employer filed a complaint in the Eastern District Court of North Carolina, Northern Division, seeking, inter alia, to compel the Board to conduct a further investigation into the fraud allegations. After a hearing, on May 29, 1996, the district court granted the Employer's motion for a temporary restraining order, enjoining the Board from conducting further proceedings or issuing any further orders relating to the Union's objections to the April 4 election until such time as the Board investigated the forgery allegations.[7] The temporary injunction expired June 8, 1996. Thereafter, on July 23, the court issued a preliminary injunction prohibiting the Board from further proceedings on the Union's petition until the court was satisfied that the Board had conducted a thorough investigation into the forgery allegations.[8] Between the expiration of the temporary restraining order on June 8 and the issuance of the preliminary injunction on July 23, the Region completed its hearing on the Union's objections to the second election but the court's injunction prohibited the hearing officer from issuing a report.

The United States Court of Appeals for the Fourth Circuit vacated and dismissed the district court's injunction on March 14, 1997.[9] The court of appeals ruled specifically that the district court's injunction was premature in that the Board had promised in its May 20, 1996 decision on the Employer's request for review, that the Employer would be permitted to raise the fraud and forgery allegations in "appropriately filed exceptions to the hearing officer's report" issued in this case.[10]

On June 17, 1997, the hearing officer issued his report and recommendations on the objections to the second election. In this report, he found, as noted above, that the

[5] 320 NLRB 805 (1996).

[6] In addition to the May 9 motion to dismiss the petition and certify the results of the first election or hold the hearing in abeyance and the May 14 motion to postpone the hearing on objections to the second election, the Employer had filed a motion for a more definite statement on May 6, which the Regional Director also denied.

[7] *Perdue Farms, Inc. v. NLRB*, 927 F.Supp. 897 (E.D.N.C. 1996).

[8] 935 F.Supp. 713 (E.D.N.C. 1996).

[9] *Perdue Farms, Inc. v. NLRB*, 108 F.3d 519 (4th Cir. 1997).

[10] Id. at 520–521. At oral argument, the Board's attorney assured the court that the Board would fully consider the Employer's contention that forgeries had occurred and that the representation petition should be dismissed because of those forgeries.

Employer had made various threats of unspecified reprisals, plant closure, loss of benefits and loss of employment, and promised and granted benefits during the campaign.

4. The Department of Justice investigation

As noted above, at the same time as the Employer notified the Region of the forgery allegations, it also provided notice of the allegations to criminal law enforcement authorities, namely, the Federal Bureau of Investigation and the Department of Labor's Division of Labor Racketeering. Soon thereafter, the Regional Director was informed by the United States Attorney for the Western District of North Carolina that the fraud and forgery allegations were the subject of a criminal investigation.

The Region cooperated fully in the criminal investigation. At the outset, the assistant U.S. Attorney handling the investigation asked that the Region not do anything to interfere with his investigation, including disclosing even that the matter was under investigation.[11] To avoid interfering with the investigation, the Regional Director refrained from conducting his own further investigation of the fraud allegations.[12] By letter dated March 5, 1999, the United States Attorney informed the Board that it had concluded its investigation into the allegations that union officials had engaged in election fraud and found no "sufficient credible and admissible evidence to warrant criminal prosecution."

5. Analysis

The Board has long held that the showing of interest is a matter for administrative determination and is not litigable by the parties. See, e.g., *Gaylord Bag Co.*, 313 NLRB 306 (1993); *Globe Iron Foundry*, 112 NLRB 1200 (1955). Once presented with evidence that gives the Regional Director reasonable cause to believe that the showing of interest may have been invalidated by fraud or other means, however, further administrative investigation should be made,[13] provided the allegations of invalidity are accompanied by supporting evidence. Compare *Globe Iron Foundry*, supra, with *Goldblatt Bros.*, 118 NLRB 643 fn. 1 (1957).

In this case, the Regional Director did perform a signature comparison in accordance with the manual. However, he felt constrained from conducting a full investigation of the fraud allegations by the simultaneous investigation of the United States Attorney and his desire to avoid doing anything that would interfere with that criminal investigation. Now that the criminal investigation has concluded in a finding that no criminal prosecution is warranted, the Region may fully inquire into the Employer's allegations, in accordance with the appropriate sections of the casehandling manual and with the Board's commitment to the court of appeals that the forgery allegations would be fully considered. Accordingly, we remand the case to the Regional Director for such further inquiry regarding the allegations of fraud and we direct the Regional Director to issue a supplemental decision on his findings.[14]

C. Conclusion

Based on our adoption of the hearing officer's report and recommendation sustaining the Petitioner's Objections 1, 2, 3, 5, 6, 7, 9, 11, and 13, we find that the second election must be set aside. We further find that a third election should be held if the Regional Director finds, upon further inquiry, that the Union's petition was supported by a valid showing of interest.

[Direction of Third Election omitted from publication.]

[11] The Board was instructed not to reveal the existence of the Department of Justice investigation even to the District Court during the hearings for the temporary restraining order and the preliminary injunction. Eventually, because the existence of the investigation had apparently been disclosed by other sources, the Board was informed by the U.S. Attorney's Office that it could reveal this information in its appeal of the district court's order.

[12] At the time, the Board had been informed that the criminal investigation was expected to be completed sometime in the fall of 1997.

[13] Secs. 11028.1 and 11028.2 of the Board's Casehandling Manual provide, in pertinent part,

> 11028.1 *Possible Forgeries; Investigation:* If it appears that signatures are in the same handwriting, or if a party alleges and furnishes evidence that there are forgeries, such investigation should be made as is necessary and suitable action taken, including possible referral to other law enforcement agencies.
>
> The investigation should include, but not be limited to, attempts to obtain affidavits from the person or persons responsible for procuring and submitting the cards. A signature comparison should be made preferably against the employer's records. Persons purporting to have been signatories should be questioned.
>
> . . . .
>
> 11028.2 *Showing Believed To Be Fraudulent; Procedure:* If it is established that reasonable grounds exist for believing any part of the showing to be fraudulent, suitable action should be taken, including possible referral to other law enforcement agencies.
>
> a. If the remaining valid showing falls below the required amount (30 percent, 10 percent, etc.), the petition or intervention based on the showing should be dismissed or denied, as the case may be, in the absence of withdrawal or disclaimer. The stated ground should be that the evidence of interest submitted "was of questionable authenticity."
>
> b. If the remaining valid showing satisfies the interest requirement, but if an officer or responsible agent of the union was responsible for or had knowledge of and condoned submission of the fraudulent cards, casehandling advice should be requested of the Board through the Office of the Executive Secretary.

[14] In view of our remand, we grant the Petitioner's motion to strike the Employer's exhibits to its exceptions to the hearing officer's report and recommendations. This evidence, if relevant, may be made part of the record in the inquiry into the showing of interest.

United Electrical, Radio & Machine Workers of America (UE)

☆ *Fights for DECENT PAY and CONDITIONS* ☆

I hereby request and accept membership in the above-named union, and authorize it to represent me, and in my behalf to negotiate and conclude all agreements as to hours of labor, wages, and all other conditions of employment.

Email [redacted]@nmsu.edu Verified by PDFFiller 02/05/2021 Telephone 575 [redacted] 5

Signature [signature] Date 02/05/2021

(Write - Do Not Print) (Must be filled in)

Street [redacted] S Espina St [redacted] City las Cruces Zip 88001

Employed by New Mexico State University Dept. [redacted]

Occupation GA Bldg. Shift Floor

Name [redacted]

Form 50-2 Received by

PELRB GUIDELINES FOR UTILIZING ELECTRONIC SIGNATURES FOR A SHOWING OF INTEREST

The New Mexico Public Employee Labor Relations Board (NMPELRB) is subject to the New Mexico Uniform Electronic Transaction Act (UETA).[1] NMSA 1978, §§ 14-16-2 and 18. The UETA was enacted in 2001. The UETA applies to electronic records and electronic signatures relating to a transaction unless otherwise excluded by law. NMSA 1978, §§ 14-16-3. The UETA states that if the law requires a signature, an electronic signature satisfies the law. NMSA 1978, § 14-16-7(D). However, the electronic signature must be attributable to a person. NMSA 1978, § 14-16-9. The UETA mandates that:

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under Subsection (a) is determined from the context and surrounding circumstances at the time of its creation, execution or adoption, including the parties' agreement, if any, and otherwise as provided by law. NMSA 1978, § 14-16-9.

The UETA provides that government agencies who accept electronic signatures on electronic records may define the format for the signature. NMSA 1978, § 14-16-18.

NMPELRB's current rules include a process for filing a showing of interest by submitting petitions or cards signed by electronic signatures.

Currently, NMPELRB's rules require a filing of a showing of interest as follows:

11.21.2.11 SHOWING OF INTEREST: With the petition and at the same time the petition is filed, the petitioner shall deposit with the director a showing of interest consisting of signed, dated statements, which may be in the form of cards or a petition, by at least thirty percent of the employees in the proposed unit stating, in the case of a petition for a certification election, that each such employee wishes to be represented for the purposes of collective bargaining by the petitioning labor organization, and, in the case of a petition for a decertification election, that each such employee wishes a decertification election. Each signature shall be separately dated. So long as it meets the above requirements, a showing of interest may be in the form of signature cards or a

[1] The Global and National Commerce Act ("E-sign Act") is a similar federal law concerning rules for electronic signature but applies to transactions affecting interstate and foreign commerce. 15 USC § 7001. Therefore, the NMPELRB is not subject to the E-sign Act, however, most of the provisions under the state UETA track the federal E-sign Act.

petition or other writing, or a combination of written forms. No showing of interest need be filed in support of a petition for amendment of certification or unit clarification.

Requirements for submitting documents using electronic signatures is located under NMPELRB's general provisions section, Rule 11.21.1 NMAC. The general provisions section of the rules is intended to provide clarification, procedures and structure when implementing the New Mexico Employee Bargaining Act. NMSA 1978, §§ 10-7E-1 through 10-7E-26. As part of those procedures, NMPELRB adopted rules allowing a party to submit documents signed by electronic signature. "Document" is defined under the rule as "any writing, photograph, film, blueprint, microfiche, audio or video tape, data stored in electronic memory, or data stored and reproducible in visible or audible form by any other means." 11.21.1.7(B)(8) NMAC. A petition or cards for a showing of interest is included under the definition of document, and therefore, fall under the requirements for filing with the Director or the Board.

In order to submit documents signed by electronic signature, NMPELRB requires the following:

11.21.1.10 FILING WITH THE DIRECTOR OR THE BOARD (in relevant part):
C. Signatures: Parties or their representatives filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document. All electronically filed documents shall be deemed to contain the filer's signature. The signature in the electronic document may represent the original signature in the following ways:

(1) by scanning or other electronic reproduction of the signature; or

(2) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

NMPELRB, as provided by rule, accepts electronic signatures on documents, including petitions and cards showing of interest, and defines the manner in which electronic signatures may be accepted in compliance with the UETA. NMAC 11.21.1.10(C) and NMSA 1978, § 14-16-18(B).

A. Requirements for Acceptance of Electronic Signatures

An acceptable submission supported by electronic signature in support of a showing of interest must have the following elements to establish its authenticity and provide a mechanism for the Agency to investigate allegations of forgery or fraud where appropriate.

1. **Submissions supported by electronic signature must contain the following:**

    a. the signer's name;

    b. the signer's email address or other known contact information (e.g., social media account);

    c. the signer's telephone number;

    d. the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no

longer wishes to be represented by ABC Union for purposes of collective bargaining);

e. the date the electronic signature was submitted; and,

f. the name of the employer.[2]

2. Declaration

A party submitting either electronic or digital signatures must submit a declaration identifying what electronic or digital signature technology was used and explaining how its controls ensure:

a. that the electronic or digital signature is that of the signatory employee, and

b. that the employee herself signed the document; and

c. that the electronically transmitted information regarding what and when the employees signed is the same information seen and signed by the employees.[3]

3. Confirmation Transmission

When the electronic signature technology being used does not support digital signatures that can be independently verified by a third party as in the example in the second paragraph of n.2, above, the submitting party must submit evidence that, after the electronic signature was obtained, the submitting party promptly transmitted a communication stating and confirming all the information listed in 1a through 1f above (the "Confirmation Transmission")

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[2] If an employee fails to name the petitioned-for employer in his/her electronic submission, then, at the time that the showing of interest is provided to the Agency, the petitioner shall attest, in writing, that the employee is currently employed by the petitioned-for employer.

[3] For example, a party submitting a simple electronic signature could submit a declaration explaining that electronic signatures were collected through a website set up by the organizers, and asserting that the organizers believe that the employee herself signed the showing of interest because the employee submitted her contact information to the website, and because the organizers sent a Confirmation Transmission as described in Paragraph 3 below. For illustrative purposes only, see Example 1, attached to this form. Similarly, a party submitting showings of interest collected via email could submit a declaration explaining that the submitter knows the showing was signed because the text of the email contains evidence that the employee acted with the intent to sign the showing of interest, and that the submitting party believes the employee herself signed the showing of interest because (1) the email was sent from an address known to be used by the employee and (2) because the organizers sent a Confirmation Transmission as described in Paragraph 3 below. See Example 2.

Additionally, a party using digital signature technology based on public key infrastructure ("PKI") could submit a declaration identifying this technology. Because commercially available PKI solutions allow for identity verification by an independent third party, a submitting party can rely on PKI technology when asserting that it knows that the electronic signature is that of the signatory employee, that the employee herself signed the document, and that what is being submitted is the same information seen and signed by the employee. Therefore, if these solutions are used, the Confirmation Transmission described in Paragraph III (A)(3) need not be sent.

a. The Confirmation Transmission must be sent to an individual account (i.e., email address, text message via mobile phone, social media account, etc.) provided by the signer.[4]

b. If any responses to the Confirmation Transmission are received by the time of submission to the PELRB of the showing of interest to support a petition, those responses must also be provided to the PELRB.

The requirements set forth above are more stringent than what is currently required for non-electronic signatures. Presently, signature lists are not required to contain any personal contact information. However, the contact information (email address, phone number or other social media account) is easy to obtain electronically from the signer and will enable the PELRB to promptly investigate forgery or fraud, where appropriate.[5] Moreover, the Confirmation Transmission will allow an employee, who receives the notification but did not actually intend to sign the document, with the means to alert the Agency, the employer, a union, or others that he or she did not, in fact, electronically sign a showing of interest.

These additional requirements for electronic signatures should reassure those who expressed reservations about acceptance of electronic signatures, that the Agency takes seriously their concerns and is committed to ensuring the integrity of the process. It should be further stressed that parties will not be required to submit electronic signatures in support of their showing of interest and can continue to submit written signatures on paper for all or part of their showing of interest. However, when parties choose to submit electronic signatures, it is important that the public, employees, and other parties have confidence in the process and in the PELRB's ability to investigate potential forgery or fraud, when appropriate.

B. How to Submit the Electronic Signature to the PELRB

If you wish to submit an electronic signature in support of a showing of interest, your submission must provide the information required in Section A, above. Additionally, your submission must meet all requirement set forth in the PELRB Rules (NMAC Title 11, Chapter 21).

The information you have establishing electronic signatures could be in different forms.

For example, it could be an email sent soliciting information and support to which the signer replied or it could be a copy of a webpage soliciting information along with a spreadsheet showing data received after the electronic signer clicked a "Submit" button. The petitioner will retain ownership of the documents submitted pursuant to NMAC 11.21.1.21 and they will be returned to the petitioner when the file is closed.

[4] For illustrative purposes only, a sample Confirmation Transmission to support an RC and RD petition are attached to this memorandum as Examples 3 and 4, respectively.

[5] As is now the case with handwritten signatures, an electronic signature submitted in support of a showing of interest that meets the requirements set forth herein will be presumed to be valid absent sufficient probative evidence warranting an investigation of possible fraud. Mere speculation or assertions of fraud are not now, and will not in the future, be sufficient to cause the Agency to investigate.

Example 1

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Public Workers Local 1,

Petitioner

PELRB No:

State or National Affiliation: _____
(If Applicable)

and

City of Centerville,

Respondent

DECLARATION IN SUPPORT OF ELECTRONIC SIGNATURES USED IN SUPPORT OF PETITION FOR INITIAL CERTIFICATION OF A NEW BARGAINING UNIT

I, Margaret Alpha, under penalty of perjury under the laws of the State of New Mexico, hereby declare the following:

1. I am the Business Agent for Public Workers Local 1 (Union), the petitioner in *Workers Local 1 & City of Centerville,* which was filed concurrently with this Declaration.

2. Each individual employee interested in joining the Union organizing drive went to the website we set up. They filled out their names, email addresses, phone numbers and employer name on an online form containing language providing that they wished to be represented for collective-bargaining purposes by the Union and clicked on "I agree".

3. The electronic signatures we are providing identify the signing employee, because that is the information that they typed onto the form.

4. Upon receipt of the email, a Union agent sent a Confirmation Transmission to the employees' email accounts stating and confirming all the information that the employees sent and that the Union received in the employees' emails. We are also including any responses to the Confirmation Transmission that we received from signatory employees prior to the filing of this showing of interest.

Example 2

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Public Workers Local 1,

Petitioner

PELRB No:

State or National Affiliation: _____
(If Applicable)

and

City of Centerville,

Respondent

DECLARATION IN SUPPORT OF ELECTRONIC SIGNATURES USED IN SUPPORT OF PETITION FOR INITIAL CERTIFICATION OF A NEW BARGAINING UNIT

I, Joseph Beta, under penalty of perjury under the laws of the State of New Mexico, hereby declare the following:

1. I am the Business Agent for Public Workers Local 1 (Union), the petitioner in *Public Workers Local 1 & City of Centerville,* which was filed concurrently with this Declaration.

2. The petitioner collected electronic signatures from unit employees for the purposes of its showing of interest in the following manner:

Agents of the Union directed each individual employee who wanted the Union to represent him or her for the purposes of collective bargaining to send an email to organizing@PWUlocal1.org. They included their name, email address, phone number and employer name in the email, with language indicating that they wished to be represented for collective-bargaining purposes by the Union. The electronic signatures we're providing identify the signing employees, because the employees sent the emails from email addresses that are known to be used by the employees.

Upon receipt of the email, a Union agent sent a Confirmation Transmission to the employees' email accounts stating and confirming all the information that the employees sent and that the Union received in the employees' emails. We are also including any responses to the Confirmation Transmission that we received from signatory employees prior to the filing of this showing of interest.

Example 3

To: jane.smith@gmail.com
Subject: Confirmation of Submission of Electronic Authorization to Public Workers Local 1 to Represent You for the purposes of collective bargaining

Dear Jane Smith:

This email is to confirm that Public Workers Local 1 received an electronic submission of authorization from you to represent you and other employees of The City of Centerville for purposes of collective bargaining.

The information that we received from you was as follows:
a. **Name**: Jane Smith
b. **Email address:** jane.smith@gmail.com
c. **Telephone number:** (555) 555-5555
d. **Language You Agreed To:** "I wish to be represented by Public Workers Local 1 for purposes of collective bargaining."
e. **Date Submitted:** June 30, 2020
f. **Employer Name:** City of Centerville

If you did *not* submit this authorization, please immediately reply to this email and let us know that you did not submit the authorization.

If you submitted the information and it is correct, you do not need to do anything. We will provide you with further information about our efforts to represent you.

If you submitted the information but you see there is an error in some of the information provided, please reply and provide the corrected information.

Thank you.
Public Workers Local 1
www.PWUlocal1.org

Example 4

To: jane.smith@gmail.com
Subject: Confirmation of Electronic Submission That You Do Not Want to be Represented by Public Workers Local 1

Dear Jane Smith:

This email is to confirm that I received an electronic submission from you stating that you do not wish to be represented by Public Workers Local 1 for purposes of collective bargaining.

The information that I received from you was as follows:
a. **Name**: Jane Smith
b. **Email address:** jane.smith@gmail.com
c. **Telephone number:** (555) 555-5555
d. **Language You Agreed To:** "I do not wish to be represented Public Workers Local 1 for purposes of collective bargaining."
e. **Date Submitted:** June 30, 2020
f. **Employer Name:** City of Centerville

If you did *not* submit this authorization, please immediately reply to this email and let me know that you did not submit the authorization.

If you submitted the information and it is correct, you do not need to do anything. I will provide you with further information about our efforts to no longer be represented by Public Workers Local 1.

If you submitted the information but see there is an error in some of the information provided, please reply and provide the corrected information.

Thank you,
Oscar Organizer

10-7E-9. Board; powers and duties.

A. The board or a local board shall promulgate rules necessary to accomplish and perform its functions and duties as established in the Public Employee Bargaining Act, including the establishment of procedures for:

(1) the designation of appropriate bargaining units;

(2) the selection, certification and decertification of exclusive representatives; and

(3) the filing of, hearing on and determination of complaints of prohibited practices.

B. The board or a local board shall:

(1) hold hearings and make inquiries necessary to carry out its functions and duties;

(2) conduct studies on problems pertaining to employee-employer relations; and

(3) request from public employers and labor organizations the information and data necessary to carry out the board's or the local board's functions and responsibilities.

C. The board or a local board may issue subpoenas requiring, upon reasonable notice, the attendance and testimony of witnesses and the production of evidence, including books, records, correspondence or documents relating to the matter in question. The board or a local board may prescribe the form of subpoena, but it shall adhere insofar as practicable to the form used in civil actions in the district court. The board or a local board may administer oaths and affirmations, examine witnesses and receive evidence.

D. The board or a local board shall decide issues by majority vote and each shall issue its decisions in the form of written orders and opinions.

E. The board or a local board may hire personnel or contract with third parties as each deems necessary to assist it in carrying out its functions and each may delegate any or all of its authority to those third parties, subject to final review of the board or local board.

F. The board or a local board each has the power to enforce provisions of the Public Employee Bargaining Act through the imposition of appropriate administrative remedies, actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded by the board or local board.

G. Local board rules shall conform to the rules adopted by the board and shall not be effective until approved by an order of the board. On good cause shown, the board may approve rules proposed by a local board, which rules vary from rules of the board. All rules promulgated by a local board shall comply with state law. A rule promulgated by the board or a local board shall not require, directly or indirectly, as a condition of continuous employment, a public employee covered by the

Public Employee Bargaining Act to pay money to a labor organization that is certified as an exclusive representative.

H. The board shall maintain current versions of its rules and current versions of the rules of each local board on a publicly accessible website. That website shall also include a current listing of the members of the board and the members of each local board. Each local board shall notify the board, within thirty days of revisions of its rules or changes in its membership, of any such revisions of its rules or changes in its membership.

History: Laws 2003, ch. 4, § 9; 2003, ch. 5, § 9; 2020, ch. 48, § 4.

ANNOTATIONS

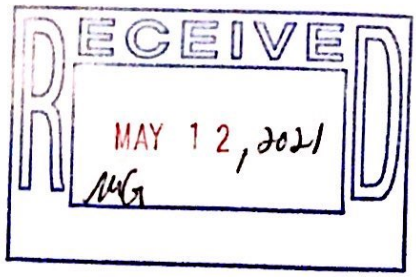
The 2020 amendment, effective July 1, 2020, provided certain powers and duties to local labor boards, and revised certain powers and duties of the public employee labor relations board; added "or a local board" or "and local board" after each occurrence of "board" throughout the section; in Subsection E, after "functions", added "and each may delegate any or all of its authority to those third parties, subject to final review of the board or local board"; in Subsection F, after "administrative remedies", added "actual damages related to dues, back pay including benefits, reinstatement with the same seniority status that the employee would have had but for the violation, declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions. No punitive damages or attorney fees may be awarded by the board or local board"; in Subsection G, added the first three sentences of the subsection, and deleted "The issue of fair share shall be left a permissive subject of bargaining by the public employer and the exclusive representative of each bargaining unit."; and added Subsection H.

Retroactive application of statute of limitations. — The six-month limitation period enacted by 11.21.3.9 NMAC, effective March 15, 2004, did not apply retroactively to bar the plaintiff's claim of breach of the plaintiff's union's duty of fair representation that the plaintiff first became aware of in 2002 and which the plaintiff filed on March 22, 2004. *Akins v. United Steel Workers of Am.*, 2009-NMCA-051, 146 N.M. 237, 208 P.3d 457, *aff'd,* 2010-NMSC-031, 148 N.M. 442, 237 P.3d 744.

11.21.1.28 DIRECTOR'S AUTHORITY: Except as otherwise provided in these rules, the director shall have authority to delegate to other board employees or outside contractors any of the authority delegated to the director by these rules. In every case where these rules or the Act provide for the appointment of a hearing examiner, the director or the board shall appoint the hearing examiner, and may appoint the director or a board member as the hearing examiner. [11.21.1.28 NMAC - N, 3/15/2004]

BEFORE THE NEW MEXICO STATE UNIVERSITY LABOR MANAGEMENT RELATIONS BOARD

In re:



UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Petitioner,

and

Case No. _____

NEW MEXICO STATE UNIVERSITY BOARD OF REGENTS,

Employer.

PETITION FOR INITIAL CERTIFICATION OF A NEW BARGAINING UNIT

COMES NOW Petitioner, United Electrical, Radio and Machine Workers of America (UE), and hereby files this Petition seeking certification as the exclusive bargaining representative for purposes of collective bargaining, for the below-described unit of public employees employed by New Mexico State University ("NMSU"), and as grounds therefore states as follows:

1. The Contact information for Petitioner is:

   Mark Meinster
   United Electrical Workers (UE)
   4 Smithfield Street, 9th Floor
   Pittsburgh, PA 15222
   (773) 405-3022
   mark.meinster@ueunion.org
   Petitioner

   State or National Affiliation: United Electrical, Radio and Machine Workers of America (UE).

2. The Contact information for NMSU is:

   Dr. John Floros
   Office of the President

MSC 3445
P.O. Box 30001
Las Cruces, NM 88003-3445
Employer

Office of University General Counsel
New Mexico State University
P.O. Box 30001 MSC3UGC
Las Cruces, NM 88033
(575) 646-2446
gencouncsel@nmsu.edu
Employer's Representative

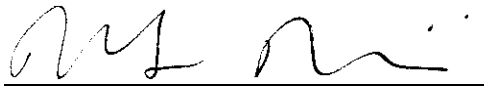
3. The petitioned-for unit consists of all full-time and part-time graduate employees whose primary job is instruction and/or research and who are employed at the Main Campus (Las Cruces), as well as the branch campuses located in Alamogordo, Carlsbad, Doña Ana, and Grants unless identified on the exclusion list below in Paragraph Six.
4. The petitioned-for unit includes the following positions:
    a. Graduate Teaching Assistant
    b. Graduate Research Assistant
    c. Graduate Assistant Other (including GA Business and Financial, GA Management, GA Computer-Eng-Science, GA Com Svc-Legal-Arts-Media, GA Hlthcare Practitioner-Tech, GA Student Grad Spec)
5. The petitioned-for unit excludes all supervisory, managerial, and confidential employees
6. The geographic work location of the petitioned-for unit is the Main Campus (Las Cruces), as well as the branch campuses located in Alamogordo, Carlsbad, Doña Ana, and Grants.
7. The Petitioner estimates the proposed unit includes approximately 907 employees as of the current spring semester 2021.
8. There is not a collective bargaining agreement (CBA) in effect covering any of the employees in the proposed unit at this time.

9. The required showing of interest, in excess of 50 percent of the proposed bargaining unit, is being filed concurrently with this Petition for Certification.

10. Pursuant to Section 11(C) of the New Mexico State University Labor Management Relations Resolution (2020), Petitioner seeks a card check to determine its exclusive representative status.

DECLARATION

I declare that I have read the above petition and certify under penalty of perjury that the statements herein are true to the best of my knowledge and belief.

Signature:  Dated: May 12, 2021

Title: International Representative

For: United Electrical, Radio and Machine Workers of America (UE)

Dated: May 12, 2021

Respectfully Submitted,

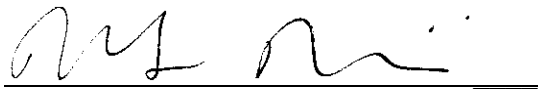
UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE)

Mark Meinster
United Electrical Workers (UE)
4 Smithfield Street, 9th Floor
Pittsburgh, PA 15222
(773) 405-3022
mark.meinster@ueunion.org
Petitioner

I HEREBY CERTIFY that a true
and correct copy of the foregoing
pleading was served on the following
parties this 12th day of May 2021:

Maura Gonsior
Director, Employee Labor Relations
NMSU Labor Management Relations Board
elr@nmsu.edu
P.O. Box 30001 MSC 3HRS
Las Cruces, NM 88033

Roy Collins, II
General Counsel
Office of University General Counsel
New Mexico State University
P.O. Box 30001 MSC3UGC
Las Cruces, NM 88033
(575) 646-3012
collins0@nmsu.edu
Counsel for Employer



Mark Meinster

New Mexico State University
Labor Management Relations Board
Minutes
07/14/2021
Meeting held at New Mexico State University in the Domenici Hall, Room 109 Las Cruces, NM 88003 at 1:00 PM

New Mexico State University Labor Management Relations Board
Larry Patrick Martinez, Fermin Rubio, Nancy Oretskin

Present:
Larry Patrick Martinez, Fermin Rubio, Nancy Oretskin

Absent:

Opening:
Pledge of Allegiance

Agenda:

A. **Call to Order**
The meeting began at 1:02pm

B. **Approval of June 15, 2021 Meeting Minutes**
Board members approved Minutes.

C. **Public Comment**
No public comment.

D. **Check Showing of Interest Against List of Graduate Assistants**
Board members – checked showing of interest by cross referencing completed signature cards (both electronic and handwritten) against list of grad students. Board members were able to confirm the required 30% showing of interest with 323 votes.

Dina Holcombe, Attorney representing NMSU – Wants board members to note the objection that there were no rules that included electronic signature as an acceptable form of signature through local board rules.
Mark Meinster, Union Representative - Wants to note for the record that they are following state labor rules by being able to accept electronic form of signature.

EXHIBIT 4

E. **Adjournment**

Unfinished Business:

New Business:

Mr. Rubio made a motion to accept the 323 verified signature cards as the required 30% showing of interest. Ms. Oretskin seconded the motion. The motion was approved.

Mr. Rubio made a motion to postpone the scheduling of the status conference till after the UNM case concludes. Ms. Oretskin seconded the motion. The motion was approved.

Announcements:

No announcements.

Closing:

The meeting was adjourned at 2:59PM, July 14, 2021

NMSU LABOR MANAGEMENT RELATIONS (LMR) BOARD
RULES - PART 2

Section 1. COMMENCEMENT OF CASE: A representation case is commenced by filing a representation petition with the LMR Board. The petition shall include, at a minimum, the following information: 1) the petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any; 2) the name, address and phone number of the public employer whose employees are affected by the petition; 3) a description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit; 4) the geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit; 5) a statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone number of the labor organization that is party to such agreement; and 6) a statement of what action the petition is requesting. In addition, a petition seeking a certification or decertification election shall be supported by a thirty percent showing of interest in the existing or proposed bargaining unit. A petition shall contain a signed declaration by the person filing the petition that its contents are true and correct to the best of his or her knowledge and, in the case of a decertification petition, that the filer is a member of the labor organization to whom the decertification petition applies.

Section 2. SERVICE OF PETITION: Upon filing a petition, the petitioner shall serve it upon the employer and any incumbent labor organization. Within 10 days of the filing of a petition, the LMR Board shall cause notice of the filing of the petition to be sent to any other interested party.

Section 3. FILING OF COLLECTIVE BARGAINING AGREEMENT: Along with a representation petition, the petitioner shall file with the LMR Board a copy of any collective bargaining agreement, then in effect or recently expired, covering any of the employees in the petitioned-for unit.

Section 4. SHOWING OF INTEREST: With the petition (and at the same time the petition is filed), the petitioner shall deposit with the LMR Board a showing of interest consisting of signed, dated statements by at least thirty percent of the employees in the proposed unit. In the case of a petition for a certification election, the signed dated statement for each employee must indicate that the employee wishes to be represented for the purposes of collective bargaining by the petitioning labor organization, and in the case of a petition for a decertification election, must indicate that each employee wishes a decertification election. Each signature shall be separately dated. So long as it meets the above requirements, a showing of interest may be in the form of signature cards or a petition or other writing, or a combination of written forms. A showing of interest is not required to be filed in support of a petition for amendment of certification or unit clarification.

Section 5. INFORMATION REQUESTED OF PARTIES:
Within 10 days of the filing of a representation petition, the LMR Board shall, by written letter, request of any party that appears to have an interest in the proceeding (including any public employees involved and any incumbent labor organizations), the party's position with respect to: 1) the appropriateness of the bargaining unit petitioned for, 2) a statement of any issues of unit inclusion or exclusion that the party believes may be in dispute, and 3) any other issue that could affect the outcome of the proceeding.

A. From the public employer involved, the LMR Board , within 10 days of the filing of a representation petition, shall also request a list of the employees who would be eligible to vote if the petitioned-for unit were found to be appropriate, based on the payroll period that ended immediately preceding the filing of the petition. The public-employer shall be instructed to file such a list within 10 days of the LMR Board's request. The LMR Board shall make the list available to the parties.

Section 6. INITIAL INVESTIGATION OF PETITION: After a petition has been filed, the LMR Board shall investigate the petition. The investigation shall include the following steps and shall be completed within 30 days of the filing of the petition.

A. The LMR Board shall check the showing of interest (if applicable) against the list of eligible employees, in the proposed unit filed by the public employer to determine whether the showing of interest has been signed and dated by a sufficient number of employees and that the signatures are sufficiently current. If signatures submitted for a showing of interest meet the requirements set forth in these rules, they shall be presumed valid unless the LMR Board is presented with clear and convincing evidence that they were obtained by fraud, forgery, or coercion. In the event evidence of such fraud, forgery, or coercion is presented to the LMR Board, the LMR Board shall investigate the allegations as expeditiously as possible and shall keep the showing of interest confidential during the investigation. The LMR Board shall dismiss any petition supported by an improper or insufficient showing of interest, consistent with Section 16 (opportunity to present additional showing) and shall explain in writing the basis of the dismissal. The LMR Board's determination as to the sufficiency of a showing of interest is an administrative matter solely within the LMR Board's authority and shall not be subject to question or review.

B. The LMR Board shall determine the facial validity of the petition, including the facial appropriateness of the petitioned-for unit and may request the petitioner to amend a facially inappropriate petition. In the absence of an appropriate amendment, the LMR Board shall dismiss a petition asking for an election in, or a clarification to, a facially inappropriate unit, or that is otherwise facially improper, in which case the LMR Board shall explain its reasons in writing.

C. The LMR Board shall determine whether there are significant issues of unit scope, unit inclusion or exclusion, labor organization or public employer status, a bar to the processing of the petition, or other matters that could affect the proceedings. The LMR Board shall make the determination pursuant to the provisions of Subsection C of Section 10 of the Resolution and Section 10-7E-24 NMSA 1978 of the Public Employee Bargaining Act.

Section 7. SETTLEMENT/STIPULATION OF UNIT ISSUES: If the LMR Board finds that there are significant issues affecting the proceeding that are or may be in dispute, the LMR Board shall confer with all parties to attempt to resolve the issues and to enter into a written stipulation stating the agreement. Any such stipulation shall be subject to approval of the LMR Board upon review, which may be requested by the LMR Board .

Section 8. NOTICE OF FILING OF PETITION: Unless the LMR Board has determined that there is need for a representation hearing pursuant to Section 12, then within 30 days of receipt of a petition, the LMR Board shall issue a notice stating that the petition has been filed, naming the petitioner, stating the unit petitioned-for, and stating the procedures for intervention as set forth in Section 9, below, including the date by which an intervenor must file its petition and showing of interest. The LMR Board shall issue sufficient copies of the notice to the employer, and the

employer shall post such copies in places where notices to employees are normally posted. The notices shall remain posted continuously for at least five days.

Section 9. INTERVENTION:

A. At any time within 10 days after the employer's posting of the notice of filing of petition, a labor organization other than the petitioner may file with the LMR Board an intervenor's petition seeking to represent some or all of the employees in the petitioned-for unit. The intervenor's petition shall contain the same information set forth in Section 1 above.

B. The intervenor's petition shall be accompanied by a showing of interest showing that at least thirty percent of the employees in the petitioned-for unit wish to be represented by the intervenor for purposes of collective bargaining. The showing of interest shall otherwise meet the requirements set forth in Section 4 above.

C. An intervenor that has presented a sufficient showing of interest in the unit found to be appropriate shall be placed on the ballot and shall be considered a party to the proceeding.

D. Upon application, an incumbent labor organization shall have automatic intervenor status if it is not the petitioner, pursuant to the provisions of Subsection B of Section 10-7E-24 NMSA 1978 of the Public Employee Bargaining Act.

Section 10. CONSENT ELECTION: Where the parties are in agreement on all issues required to be resolved in order to proceed to an election, and the LMR Board is satisfied that the issues are so resolved, including unit scope, the LMR Board shall draw up a consent election agreement to be signed by all parties and by the LMR Board. The LMR Board shall proceed to an election on the basis of the agreement.

Section 11. INVESTIGATION, REPORT, NOTICE OF HEARING: In the absence of a consent election agreement, the LMR Board shall investigate the outstanding issues and shall issue and serve a report and direction of election, a report and dismissal of petition, or a notice of hearing within 45 days of the posting of the notice of filing of petition. If there is a dispute between the parties regarding unit composition, or the LMR Board is satisfied that the issues can best be resolved in a hearing, the LMR Board shall issue and serve a notice of hearing without first conducting a further investigation. A hearing concerning unit composition, where the parties are in dispute on that issue, shall be set for a date not later than 30 days following the LMR Board 's notice of hearing or the LMR Board 's receipt of notice of the dispute, whichever is sooner.

Section 12. REPRESENTATION HEARING:

A. In the absence of a consent election agreement, and where there are significant unit issues that, in the LMR Board's view, should be resolved in a hearing, the LMR Board shall issue a notice of hearing.

B. The LMR Board shall appoint the hearing examiner and may appoint itself to serve as hearing examiner.

C. The hearing examiner shall take evidence sufficient to make a full and complete record on all unresolved unit issues and any other issues necessary to process the petition. Details such as the time, date, and place of the election, and whether there will be manual or mail ballots or a combination, shall not be resolved through the hearing process, but shall be resolved instead through the pre-election conference process described in Section 18.

D. The hearing examiner may examine witnesses, call witnesses, and call for introduction of documents.

NMSU LABOR MANAGEMENT RELATIONS (LMR) BOARD RULES - PART 2

Section 13. BRIEFS: If any party requests permission to file a post-hearing brief, the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than 10 days following the close of the hearing. Briefs shall be filed with the LMR Board and copies shall be served on all parties.

Section 14. LMR BOARD /HEARING EXAMINER REPORTS: The LMR Board /hearing examiner shall issue his or her report following the close of the hearing. Except in extraordinary circumstances, which shall be set forth in the report, the report shall be issued no longer than 15 days following the close of the hearing or the submission of post-hearing briefs, whichever is later. The report shall make findings of fact, conclusions of law, and recommendations for the determination of issues, and shall adequately explain the hearing examiner's reasoning. The LMR Board /hearing examiner shall serve the report on all parties.

Section 15. LMR BOARD REVIEW OF HEARING EXAMINER REPORTS AND DECISIONS:

A. If the LMR Board has appointed a hearing examiner then within 10 days after service of the hearing examiner's report, any party may file a request for LMR Board review of the hearing examiner's recommended disposition. The request for review shall state the specific portion of the hearing examiner's recommended disposition to which exception is taken and the factual and legal basis for such exception. The request may not rely on any evidence not presented to the hearing examiner. The request must be served on all other parties.

B. Within 10 days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

C. Whether or not a party has filed a request for review, the LMR Board, within 60 days, shall review any recommended disposition regarding the scope of a bargaining unit made by the hearing examiner. In addition, the LMR Board shall review any other issue properly raised by a party in a request for review. The LMR Board shall conduct its review on the basis of the existing record and may, in its discretion, hear oral argument.

D. Within 60 days following review, the LMR Board shall issue its decision ordering an election, dismissing the petition, setting a further hearing, or otherwise disposing of the case. The LMR Board may adopt or incorporate in and attach to its decision all or any portion of the hearing examiner's report.

Section 16. OPPORTUNITY TO PRESENT FURTHER SHOWING OF INTEREST:

A. When the LMR Board finds that the petitioner or an intervenor has submitted an insufficient showing of interest in the unit petitioned for, the LMR Board shall notify the petitioner or intervenor, and that party shall have the opportunity to submit an additional showing of interest. The LMR Board shall then review the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention.

B. In the event that the LMR Board or hearing examiner determines that a unit other than the unit petitioned for is appropriate, and it appears to the LMR Board that the showing of interest filed by the petitioner or an intervenor is insufficient in the unit found appropriate, the LMR Board shall notify the petitioner or intervenor and give such party a reasonable amount of time in which to file an additional showing. If the party fails to file a sufficient showing within that time, the LMR Board shall dismiss the petition or deny intervenor status.

NMSU LABOR MANAGEMENT RELATIONS (LMR) BOARD RULES - PART 2

Section 17. ELIGIBILITY TO VOTE:

A. Employees in the bargaining unit shall be eligible to vote in the election if they were employed during the last payroll period preceding date of the consent election agreement or the direction of election issued by the LMR Board and are still employed in the unit on the date of the election.

B. Employees in the bargaining unit who are eligible to vote but who will be absent on the day of voting because of hospitalization, temporary assignment away from normal post of duty, leave of absence, vacation at a location more than 50 miles distant from the polling place, or other legitimate cause, may request an absentee ballot from the LMR Board . Except for good cause shown, such a request must be received by the LMR Board at least 10 days before the election, in which case the LMR Board , after preliminarily determining the employee's eligibility to vote, shall provide the employee with a ballot to be submitted to the LMR Board by mail. To be counted, an absentee ballot must be received by the LMR Board at least one day before the ballot count. The LMR Board shall establish procedures to permit an absentee ballot to be challenged, as provided in Section 23, below.

C. The employer whose employees comprise the bargaining unit shall submit to the LMR Board and to all other parties a list of all employees eligible to vote in the election no later than 10 days before the commencement of the election balloting. Employees whose names do not appear on the list but who believe they are eligible to vote may cast ballots through the challenged ballot procedure set forth in Section 23, below.

Section 18. PRE-ELECTION CONFERENCE:

A. At a reasonable time at least 15 days before the election, the LMR Board shall conduct a pre-election conference with all parties to resolve such details as the polling location(s), the use of manual, electronic, or mail ballots, the hours of voting, the number of observers permitted, and the time and place for counting the ballots. The LMR Board shall notify all parties by mail or email, if available, of the time and place of the pre-election conference, at least five days in advance of the conference. The conference may proceed in the absence of any party.

B. The LMR Board will attempt to achieve agreement of all parties on the election details, but in the absence of agreement, shall determine the details. In deciding the polling location(s) and the use of manual, mail, or electronic participation in the election by employees in the bargaining unit there shall be a strong preference for on-site balloting.

C. The parties may stipulate to a consent election agreement without the necessity of a pre-election conference subject to approval of its terms by the LMR Board, in which case the requirement for a pre-election conference shall be waived.

Section 19. NOTICE OF ELECTION:

A. The LMR Board shall issue and serve on the parties a notice of election setting forth all of the details of the election, as described in Section 18 above, no later than 10 days before the election. The notice of election shall also describe the bargaining unit whose members are eligible to vote and shall describe the challenged ballot procedure. The notice shall include a sample ballot.

B. The LMR Board shall provide a sufficient number of copies of the notice of election to the employer whose employees are eligible to vote so that the employer may post a notice of election in all lounges or common areas frequented by unit employees and in all places where notices to employees are commonly posted. The employer shall post the notices in all such areas at least 10 days before the election and shall take reasonable measure to assure that they are not removed, covered, altered, or defaced.

NMSU LABOR MANAGEMENT RELATIONS (LMR) BOARD RULES - PART 2

Section 20. BALLOTS AND VOTING:

A. All voting shall be by secret ballot prepared by the LMR Board. Position on the ballot shall be determined randomly. Ballots in an initial election shall include a choice of "no representation."

B. All elections shall be conducted by the LMR Board, whether electronically, by mail in ballots, or on-site elections, subject to the provisions of Part 1, Section 22 regarding the LMR Board's authority to delegate duties.

C. Any voter who arrives at a polling area before the polls close will be permitted to vote.

D. Public employers whose employees are eligible to vote in an election shall allow their employees in the voting unit sufficient time away from their duties to cast their ballots and shall allow their employees who have been selected as election observers sufficient time away from their duties to serve as observers. This rule does not impose on public employers an obligation to change the work schedules of employees to accommodate voting hours.

Section 21. ELECTIONEERING: No electioneering shall be permitted within 50 feet of any room in which balloting is taking place.

Section 22. OBSERVERS: Each party shall be entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of ballots. The LMR Board has complete discretion to determine the number of observers. Observers shall not be supervisory or managerial employees or labor organization employees. However, representatives of the parties in addition to the observers may observe the counting of ballots.

Section 23. CHALLENGED BALLOTS:

A. Any party to an election, through its observer, or the election supervisor, may challenge the eligibility to vote of any person who presents himself or herself at the polls, and shall state the reason for the challenge. The LMR Board shall challenge any voter whose name does not appear on the list of employees eligible to vote.

B. The LMR Board shall furnish "challenge envelopes." On the outside of each challenge envelope, the LMR Board shall write the name and job classification of the challenged voter, the name of the party making the challenge, and the reason for the challenge.

C. Following the voting and before the votes are counted, the LMR Board shall attempt to resolve the eligibility of challenged voters by agreement of the parties. The ballots of challenged voters who are agreed eligible shall be mixed with the other ballots and counted.

D. Challenged ballot envelopes containing unresolved challenged ballots shall not be opened and the challenges shall not be investigated unless, after the other ballots are counted, the challenged ballots could be determinative of the outcome of the election.

E. If the challenged ballots could be determinative of the outcome of the election, the LMR Board shall: 1) declare the vote inconclusive; 2) investigate as soon as possible the challenged ballots to determine voter eligibility; and 3) issue a report thereon or a notice of hearing within 15 days of the election.

F. Following resolution of determinative challenged ballots, the LMR Board shall count the ballot of voters found to be eligible, adding the results of the earlier count and issuing a revised tally of ballots.

NMSU LABOR MANAGEMENT RELATIONS (LMR) BOARD RULES - PART 2

Section 24. TALLY OF BALLOTS: Immediately following the counting of ballots, the election supervisor shall serve a tally of ballots upon one representative of each party. The tally shall show the number of votes cast for each labor organization listed on the ballot, the number of votes cast for no representation, the number challenged ballots, and the percentage of employees in the unit who cast ballots. The tally shall also state whether the results are conclusive, and, if so, what the conclusive vote is. If the tally shows that fewer than forty percent of the employees in the unit voted, or that the choice of "no representation" received fifty percent or more of the valid votes cast, then the tally shall reflect that no collective bargaining representation was selected.

Section 25. RUN-OFF ELECTIONS: In an election where there are three or more choices on the ballot, if no ballot choice receives a majority of the valid votes cast, and at least forty percent of eligible voters voted, the LMR Board shall set a run-off election in which voters will be permitted to cast ballots for the two choices that received the highest number of votes. A new tally shall be issued and served following the counting of the votes of a run-off election. A run-off election must be conducted within 15 days following completion of the initial election.

Section 26. CERTIFICATION: If no objections are filed pursuant to Section 27, below, then the LMR Board shall issue as may be appropriate either a certificate showing the name of the labor organization selected as the exclusive representative and setting forth the bargaining unit it represents, or a certification of results, showing that no labor organization was selected as bargaining representative. The results of each election shall be reviewed by the LMR Board and appropriate action taken at the next regularly scheduled meeting of the LMR Board after the objection period following the election.

Section 27. OBJECTIONS: Within five days following the service of a tally of ballots, a party may file objections to conduct affecting the result of the election. The LMR Board shall, within 30 days of the filing of such objections, investigate the objections and issue a report thereon. Alternatively, the LMR Board may schedule a hearing on the objections within 30 days of the filing of the objections. A determination to hold a hearing is not reviewable by the LMR Board and shall follow the same procedures set forth in Subsections B, C and D of Section 12, Section 13, and Section 14 above. A party adversely affected by the LMR Board 's or hearing examiner's report may file a request for review with the LMR Board under the same procedures set forth in Section 15, above. If the LMR Board or hearing examiner finds that the objections have merit and that conduct improperly interfered with the results of the election, then the results of the election may be set aside and a new election ordered. In that event, the LMR Board in its discretion may retain the same period for determining eligibility to vote as in the election that was set aside, or may establish a new eligibility period for the new election.

Section 28. AMENDMENT OF CERTIFICATION: A petition for amendment of certification may be filed at any time by an exclusive representative or an employer to reflect such a change as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. The LMR Board shall dismiss such a petition within 30 days of its filing if the LMR Board determines that it raises a question concerning representation and the petitioner may proceed otherwise under these rules. If the LMR Board finds sufficient facts to show that the amendment should be made, after giving all parties notice and an opportunity to submit their views, the LMR Board shall issue an amendment of certification within 30 days of the

filing of the petition.

Section 29. CERTIFICATION OF INCUMBENT BARGAINING REPRESENTATIVE STATUS: A labor organization that was recognized by the public employer as the exclusive representative of an appropriate bargaining unit on March 11, 2021, shall be recognized as the exclusive representative of the unit. Such labor organization may petition for declaration of bargaining status under Subsection B of Section 10-7E-24 NMSA 1978 (2003).

Section 30. UNIT CLARIFICATION:

A. Where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, either the exclusive representative or the employer may file with the LMR Board a petition for unit clarification.

B. Upon the filing of a petition for unit clarification, the LMR Board shall investigate the relevant facts, and shall either set the matter for hearing or shall issue a report recommending resolution of the issues within thirty (30) days of the filing of the petition. In the LMR Board's investigation or through the hearing, the LMR Board or hearing examiner shall determine whether a question concerning representation exists and, if so, shall dismiss the petition. In such a case, the petitioner may proceed otherwise under these rules.

C. If the LMR Board or hearing examiner determines that no question concerning representation exists and that the petitioned-for clarification is justified by the evidence presented, the LMR Board or hearing examiner shall issue a report clarifying the unit within 30 days of the filing of the petition if no hearing is determined necessary, or within 30 days of the hearing if a hearing is determined necessary. If the LMR Board determines that a question concerning representation exists, the petition shall be dismissed.

D. A hearing examiner determination on a unit clarification petition shall be subject to review by the LMR Board under the same procedures set forth in Section 15, above.

Section 31. ACCRETION:

A. The exclusive representative of an existing collective bargaining unit may petition the LMR Board to include in the unit employees who, as of the time the petition is filed: 1) do not belong to any existing bargaining unit, 2) share a community of interest with the employees in the existing unit, and 3) whose inclusion in the existing unit would not render that unit inappropriate.

B. If the number of employees in the group sought to be accreted is less than ten percent of the number of employees in the existing unit, the LMR Board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petitioner may proceed by filing a unit clarification petition under these rules. Such a unit clarification petition to be processed, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit. No group of employees may be accreted to an existing unit without an election if the LMR Board determines that such group would constitute a separate appropriate bargaining unit.

C. If the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit, the LMR Board shall presume that their inclusion raises a question concerning representation, and the petitioner may proceed only by filing a petition for an election under these rules. Such a petition, in an accretion situation, must be accompanied by

a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit.

Section 32. VOLUNTARY RECOGNITION:

A. A labor organization representing the majority of employees in an appropriate collective bargaining unit and the public employer, after a petition for certification has been filed, may enter into a voluntary recognition agreement in which the employer recognizes the labor organization as the exclusive representative of all of the employees in the unit. Such petition shall be accompanied by a showing of majority support, which shall be verified in accordance with the procedures of Section 4, above.

B. Prior to LMR Board approval of any voluntary recognition, the LMR Board shall post notice of filing of petition in the manner provided for in Section 8, above. The LMR Board shall also give notice to any individuals or labor organizations that register with the LMR Board to be informed of such petitions.

C. If an intervenor does not file a petition for intervention within 10 days, then the LMR Board shall consider the petition for approval of the voluntary recognition if accompanied by consent of the employer.

D. The LMR Board shall treat a voluntary recognition relationship so established and approve the same as a relationship established through LMR Board election and certification, unless the LMR Board finds the agreed-to bargaining unit to be inappropriate. In that event, the LMR Board may require the filing and processing of a petition as provided for in these rules, and the conduct of an election, before recognizing the relationship.

E. If an intervenor files a proper petition pursuant to Section 9 above, within the 10-day time period, then the LMR Board may not approve a voluntary recognition, and the LMR Board shall proceed in the manner set forth for representation petitions.

Section 33. PETITION WITHDRAWAL: The petitioner in a representation proceeding may request permission of the LMR Board to withdraw the petition at any time prior to an initial election. The LMR Board has discretion to grant or deny a withdrawal request only after soliciting the positions of all parties.

Section 34. SEVERANCE PETITION: A severance petition is a representation petition filed by a labor organization that seeks to sever or slice a group of employees who comprise one of the occupational groups listed in Section 10 of the Resolution from an existing unit for the purpose of forming a separate, appropriate unit. It must be accompanied by a thirty percent showing of interest among the employees in the petitioned-for unit. It may be filed no earlier than 90 days and no later than 60 days before the expiration date of a collective bargaining agreement or may be filed at any time after the expiration of the third year of a collective bargaining agreement with a term of more than three years.

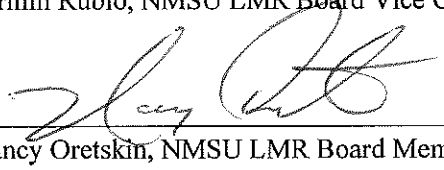
Section 35. DISCLAIMER OF INTEREST: Any labor organization holding exclusive recognition for a unit of employees may disclaim its representational interest in those employees at any time by submitting a letter to the LMR Board and the employer disclaiming any representational interest in a unit for which it is the exclusive representative. Upon receipt of a letter disclaiming an interest under this rule, the LMR Board shall cause to be posted in a place or places frequented by employees in the affected bargaining unit stating the union has chosen to relinquish representation

of the employees.

ADOPTED by the NMSU Labor Management Relations Board at its rulemaking meeting this 26th day of May, 2021, in Las Cruces, New Mexico.

Larry Patrick Martinez, NMSU LMR Board Chair

Fermin Rubio, NMSU LMR Board Vice Chair



Nancy Oretskin, NMSU LMR Board Member

2929 Coors N.W. Suite 303 • Albuquerque, NM 87120
(505) 831-5422 Telephone • (505) 831-8820 Facsimile

Certification of Representation

The undersigned hereby certifies that **United Electrical, Radio and Machine Workers of America** (Union) has demonstrated a sufficient basis such that it should be recognized as the exclusive bargaining representative for those employees in the following bargaining unit comprised of employees of **New Mexico State University** at its Main Campus (Las Cruces), as well as the branch campuses located in Alamogordo, Carlsbad, Doña Ana, and Grants:

Graduate Teaching Assistants - "Teaching Assistant"; Graduate Research Assistants - "Research Assistant"; Graduate Assistants – Other - "Grad Asst-Other"; Graduate Assistant Research Fellow - "Grad Assist Fellow"; and "Research Assistant PSL- "Research Asst-PSL".

The undersigned makes this certification based on the following:

1. By a Petition filed with the New Mexico State University Labor Management Relations Board on **May 12, 2021,** the Union informed **New Mexico State University** that it was prepared to demonstrate sufficient support among employees in the unit for its recognition as the exclusive collective bargaining representative for those employees.
2. After assuming jurisdiction over the Petition on **November 17, 2021** the Board's Executive Director determined On **November 22, 2021** that the Petition was facially valid and that a preliminary review demonstrated a sufficient showing of interest to proceed toward a card check as requested.
3. The Executive Director used a unit employee list provided by the Employer to the NMSU Labor Management Relations Board as of **May 3, 2021**. That list shows that there were **939** employees in the unit thereby confirming the preliminary finding of sufficiency.
4. A card check took place on **March 17, 2022** at the PELRB offices in Albuquerque, New Mexico. The results were:

498 interest cards were submitted. Six cards were challenged by the Director and all of those were excluded from the card check. Therefore, a majority of 53% of eligible employees submitted interest cards seeking representation by the Union. Accordingly, after review by the PELRB at its **May 3, 2022** meeting, the undersigned hereby certifies that the Union is certified as the exclusive bargaining representative for the unit described above.

ISSUED in Albuquerque, New Mexico on this 19th day of May, 2022 by:

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director