UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

NRG SERVICES, INC.

Employer

and **Case 28-RC-350562**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS & ALLIED CRAFTS OF THE UNITED STATES, IT TERRITORIES AND CANADA, LOCAL NO. 423

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

Following the filing of the instant petition under Section 9(c) of the National Labor Relations Act (the Act), a hearing was held before a hearing officer of the National Labor Relations Board (the Board). Through this petition, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists & Allied Crafts of the United States, Its Territories and Canada, Local No. 423 (the Petitioner or Union) seeks to represent a unit of full-time, part-time, overhire, and temporary workers employed by NRG Services, Inc. (the Employer) in Albuquerque, New Mexico, but excluding supervisors, managers and security guards as defined by the Act.[1]

The record reflects that there are approximately 122 employees employed in the petitioned-for unit. At the hearing, the Petitioner and Employer stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is

[1] Although the record does not reflect what the term "overhire" means, it has been used in a prior Board proceeding to describe occasional employees hired when workload is heavy. *Guthrie Theater & International Alliance of Theatrical Stage Employees, Local 13*, Case 20-CA-215022, JD-56-19, 2019 WL 3006925 at fn.5 (July 5, 2019).

subject to the jurisdiction of the Board,[2] and that there is no history of collective bargaining between the parties for the petitioned-for employees.

II. ISSUES AND POSITIONS OF THE PARTIES

The following issues were raised at the hearing:

(1) Whether most of the petitioned-for employees are independent contractors and therefore must be excluded from any unit found appropriate by the Regional Director; and

(2) What eligibility formula must be used.

The Employer contends that the appropriate unit consists of approximately a dozen "regular" or W-2 employees, and that the rest of the petitioned-for employees are independent contractors, or 1099 workers, and must be excluded from any unit. The Petitioner takes the opposite position and seeks both the "regular" employees and those that the Employer asserts are independent contractors. The Employer also asserts that if the Regional Director finds that the petitioned-for employees are not independent contractors, only those who have worked five shows or more during the Employer's "busy" season should be eligible to vote because the employees are temporary and/or casual. The Union argues that employees who work an average of four or more hours per week during the preceding quarter should be eligible to vote, pursuant to *Davison-Paxon Co.*, 185 NLRB 21 (1970).

For the reasons detailed below, and after careful consideration of the parties' arguments and the record as a whole, I find that the petitioned-for employees are not independent contractors. I also find that due to the intermittent work at multiple venues that appear is part of the industry, employees who have worked at least two shows in the last twelve-month period prior to the date of this Decision are eligible to vote. Accordingly, as the petitioned-for unit otherwise shares a community of interest, I am directing an election in this matter.[3]

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[2] At the hearing, the parties stipulated to the following commerce facts:

> The Employer, NRG Services, Inc., an Albuquerque, New Mexico Corporation with an office and place of business in New Mexico; and is engaged in the business of providing concert production to the Isleta Amphitheater located at 5601 University Boulevard SE, Albuquerque, New Mexico. During the last twelve (12) months, a representative period, Employer NRG Services, Inc., received gross revenues in excess of $500,000, and purchases and receives at its Albuquerque, New Mexico, facility, good [sic] and materials valued in excess of $50,000 directly from points outside the State of New Mexico.

[3] In its Statement of Position (SOP), the Employer also asserts that an appropriate unit could not include: (1) employees directly employed by a separate entity called Revel ABQ at the Revel Entertainment Center venue (Revel), and (2) temporary employees provided by RedCap Staffing, a temporary labor service provider. These issues appear to have been abandoned by the Employer in its post-hearing brief. However, I address these contentions later in this Decision.

III. FACTS

The Employer is a New Mexico corporation engaged in the business of providing labor to concert productions in the Albuquerque area to unload, unpack, and set up equipment for concerts, and then to take down, pack and load equipment once the event has ended. The Employer's owner is Daniel Chavez (Chavez) and its Operations Manager is Debbie Maestas (Maestas). Reporting to Maestas is General Manager Andrew Zuni (Zuni), Supervisor Cruz Tenorio (Tenorio), Head Rigger Shawn Thompson, Head Down Rigger Jen Seibold, and an office assistant. The Employer first started its operations in 1985.

The Employer provides the necessary workers to several venues throughout Albuquerque for concerts and events. The largest of these is the Isleta Amphitheatre (Isleta), a venue for Live Nation to hold concerts with the capacity to host 12,000 people. Isleta opened in 2000, and the Employer has been providing workers for that venue since that time period. The concerts at Isleta occur during what the Employer refers to as its busy months, from late April or early May to October. After October, it becomes too cold for concerts to be held in an outdoor amphitheater setting. There are about 13 to 24 shows a year at Isleta, with an average number somewhere between the two. The other venues are Tingley Coliseum (Tingley), Kiva Auditorium (Kiva), and Revel, which are all smaller than Isleta and hold indoor events year round.[4] The Employer also provides labor for some other events at the University of New Mexico and at the New Mexico State Fair.

Prior to the COVID-19 pandemic, the Employer's workforce consisted mainly of "regular" employees who completed W-2 forms and had deductions taken from their paychecks. However, in 2021, upon the advice of its certified public accountant, the Employer decided to switch most of its employees to independent contractor status. It required the workers to complete W-9 forms. However, the Employer also decided that several of the most senior employees would be kept as "regular" employees as a type of reward for service. These employees are referred to as regular employees, or W-2 workers, and those whom the Employer claims to be independent contractors are referred to as 1099 workers. The Employer did not actively inform any workers at the time that they were becoming independent contractors, although it did provide clarification to individual workers if they later made specific inquiries. The Employer did not negotiate or sign any individual agreements with the 1099 workers.

The Employer receives requests for workers for events held at the various locations in Albuquerque referenced above. The Employer notifies its workers of upcoming work via an app called "When I Work." A message is sent to all workers with the details of the upcoming job via

[4] The Employer's SOP indicates that some individuals are directly employed by a separate entity called Revel ABQ. Evidence adduced during the hearing indicates that the Employer's owner also owns the Revel venue and that some individuals are directly employed by Revel, rather than the Employer. However, the record reflects that the Employer employs some individuals at the Revel venue. The petition only seeks to represent employees employed by the Employer, not employees directly employed by Revel ABQ or Revel. Accordingly, I do not find employees of Revel ABQ or Revel to be part of an appropriate unit. However, I find employees employed by the Employer who perform work at the Revel venue are part of an appropriate unit.

the app and the workers may choose whether to accept or not.[5] Individuals are selected for the job on a first-come-first-served basis. If a worker accepts an offer too late, then that worker may ultimately not be needed. Because there are only so many shows a year, several workers work for multiple employers performing similar work at various other venues.

All workers are paid an hourly wage by the Employer based on their classifications and experience within those classifications. These classifications include stagehands, electrical workers, ground riggers, up-riggers, forklift drivers, show call/spot ops, leads, runners, and wardrobe.[6] Workers' status as W-2 or 1099 workers have no bearing on their wages or job responsibilities. The Employer requires workers to report to the job site 15 minutes before the official start time. The workers are not paid for this 15-minute period. The workers at the job site are divided up and assigned by Zuni or Cruz based on the needs of the tour.[7] Zuni or Cruz will assign stagehands as needed to various departments on set, including pyro, carpentry, audio, and video. Based on the needs of the client, Zuni or Cruz will also move stagehands between departments. Electrical workers appear to be specialized and are assigned to work in the electrical department. Ground riggers and up-riggers also appear to be a specialized classification and they position themselves on the stage and above the stage to position, secure, lift and attach equipment above the stage. The forklift operators use forklifts to stack, unstack, and move heavy cases of equipment around the site as needed. They remain with their forklifts while working. Leads are the experienced stagehands who assist the Employer by teaching and training less experienced stagehands.

However, according to the Employer's owner, there really is no difference in skill levels between the various classifications and prior experience is not especially necessary. Although each event is a little different, the workers are instructed on how to use the equipment on the job, and once they use it a few times they understand how to do the work going forward.

At the venue, the workers are also required to take instructions from the venue or concert crews who are not a part of the Employer's management team. For example, spot ops are stationed in a perch and receive instructions from the tour's lighting director during an event.

The Employer determines the wage rates for W-2 and 1099 workers, and pays both the same hourly wages. W-2 and 1099 workers also receive overtime pay. Stagehands earn $15 an hour, while stagehand leads may make up to $18 an hour. Riggers earn starting pay at $22 an hour and as they gain experience it goes up to $25 an hour. The most experienced riggers earn

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[5] In situations where not enough workers accept the job, the Employer contracts with RedCap Staffing to provide additional labor to meet the client's needs on a case-by-case basis. The record indicates that the Employer requests a specific number of RedCap Staffing employees as needed and then pays RedCap Staffing a lump sum for providing the employees. RedCap Staffing pays its employees for the work they perform, not the Employer. There is no indication or argument from the Union that it is petitioning to represent the employees of RedCap Staffing as part of the petitioned-for unit. Accordingly, I do not find employees of RedCap Staffing to be part of an appropriate unit.

[6] Owner Daniel Chavez testified that there are workers casually referred to as "loaders" who do not appear to have their own separate classification, but their duty is to unload trucks and pass things to the stagehands. Loaders usually remain with the trucks while working. To the extent "loaders" are identified under a different classification on Attachment "A" to the Employer's SOP, they share a community of interest with other petitioned-for employees.

[7] An apparent reference to the performers and their crews working at the venue during a show.

up to $32 an hour. Electrical workers earn between $22 and $27 an hour based on experience. Forklift drivers make between $16 to $20 an hour based on experience. Show call/spot ops earn between $16 to $18 an hour based on experience. When the Employer sends workers to a job, they work a minimum of four hours.

All W-2 and 1099 workers are covered by the Employer's workers' compensation insurance policy. W-2 and 1099 workers are all required to wear shirts provided by the Employer with the Employer's name when working at an event. Both the W-2 and 1099 workers are required to bring their own equipment, such as a crescent wrench and gloves. Riggers must bring their own harnessing equipment. However, some equipment is provided by the Employer as well.

Most shows or events are only for a day, and during that day the workers work for about several hours to unload and set up, which is referred to as the load in, and then work again after the event to break down and pack up, which is referred to as the load out. For example, a stagehand shift for one event can run from about 8:00 a.m. to 3:00 or 4:00 p.m. for the load in, and then again from 10:00 p.m. to 2:00 or 3:00 a.m. for the load out.

The workers receive paid breaks during their work, and it is either Zuni or Cruz who directs them on when to take breaks, after consulting with the tour crew. The record reflects that Zuni, Cruz, or the third-party crew chief could tell employees when they can leave for the day.

The Employer has a handbook but has not distributed it for at least three years prior to the hearing, so it does not hold anyone accountable to its terms. However, the Employer does apply a set of policies it last distributed inconsistently to both W-2 and 1099 workers about a year or two before the hearing. The Employer also disciplines 1099 workers.

IV. ANALYSIS

Preliminarily, I note that, although the Employer does not claim that the any the employees in specific petitioned-for job classifications lack a community of interest with each other, I have considered the issue in accordance with *Austin Maintenance & Construction, Inc.*, Case 28-RC-266671 (May 28, 2021) (unpublished), and find, based on the facts outlined above, that the record sufficiently demonstrates that the petitioned-for employees, regardless of whether they are W-2 or 1099 workers, are a readily identifiable group who all perform work at concert events, that they share the same supervision, that the same work rules apply to them, and that they work side-by-side as an integrated unit at events and, thus, share a community of interest. The Employer does not contend that the petitioned-for unit excludes additional employees who are not sufficiently distinct from the petitioned-for employees.

As detailed below, I find that the Employer has not met its burden of establishing that its 1099 workers are independent contractors under the Act. Although some indicia favor a finding of independent-contractor status, most are either inconclusive or support an employee finding.

A. Independent-Contractor Status

1. The Legal Standard

The party seeking to exclude individuals performing services for another from protection of the Act on the grounds that they are independent contractors has the burden of proving that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). The current test for determining independent contractor status is set forth in *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), which reversed *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and reinstated the legal test set forth in *FedEx Home Delivery*, 361 NLRB 610 (2014) (*FedEx II*). Independent-contractor status is evaluated "in light of the pertinent common-law agency principles." As part of this assessment, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." "In the context of weighing all relevant, traditional common-law factors, including those identified in the Restatement, the Board also considers whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." *The Atlanta Opera*, slip op. at 12. Moreover, the Board "should give weight only to actual (not merely theoretical) entrepreneurial opportunity, and that it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." *Id.*

As part of this independent-business analysis, the Board will consider whether the putative contractor has a realistic ability to work for other companies, has proprietary or ownership interest in their work, and has control over important business decisions. *Id.,* slip op. at 13. The Board must necessarily consider whether the employer has effectively imposed constraints on an individual's ability to render services as part of an independent business. For example, limitations placed on an individual's ability to work for other companies or restrictions on the individual's control of important business decisions. This necessitates examining whether the terms and conditions under which the individuals operate are set unilaterally by the company. *Id.*

The factors considered by the Board, which are not exhaustive, include: (1) extent of control by the employer; (2) whether or not the individual is engaged in a distinct occupation or business; (3) whether work is usually done under the direction of the employer or by a specialist without supervision; (4) skill required in the occupation, (5) whether the employer or individual supplies instrumentalities, tools, and place of work; (6) length of time for which individual is employed; (7) method of payment; (8) whether or not work is part of the regular business of the employer; (9) whether or not the parties believe they are creating an independent-contractor relationship; and (10) whether the principal is or is not in business. *Id.*, slip op. at 15-18. The Board then considers whether the evidence tends to show that the individual is, in fact, rendering services as an independent business. *Id.*, slip op. at 18-19.

2. Analysis

a. Extent of Control by the Employer

The record reflects that the Employer exercises some control over the 1099 workers. The Employer assigns the workers to their positions at the events and there is general testimony from employees that Zuni and Cruz provide supervision at the event. While there is evidence that the control exerted by the Employer is based on instructions to it from the tour or venue, the Employer still directs employees to perform the work.

However, the evidence also indicates that the 1099 workers receive instructions directly from third parties, like the tour crew, which they must obey in carrying out their tasks. For example, the tour crew's lighting director communicates instructions directly to spot ops in their perches during events.

In a case involving a similar set of facts, the Board concluded that employees working for an employer providing labor to local stage productions were not independent contractors. The court of appeals disagreed with that conclusion in a subsequent technical 8(a)(5) proceeding based in large part on the issue of control. *Crew One Productions, Inc. v. NLRB*, 811 F.3d 1305, 1311-12 (11th Cir. 2016). The court concluded that "only the event producers and touring crews control the means of the work performed by stagehands, and [the employer] lacks the expertise to direct the stagehands in their work for any particular client." *Id.* at 1311. Here, Cruz and/or Zuni will direct the employees as they work during the event, even though they themselves may receive the details for those instructions from a third party. That an employer directs its employees in accordance with its client's instructions is nevertheless control. Accordingly, this would weigh against a finding of independent-contractor status.

The record also indicates that the crew members and officials of the third-party also provide instructions to the 1099 workers which they must obey. This could indicate that the 1099 workers are independent contractors because the Employer does not control the details of the work being performed in such instances. This is how the Eleventh Circuit Court of Appeals viewed the matter when it denied enforcement of the Board's order in *Crew One Productions*.

However, there is other evidence of control which the Board has traditionally examined when applying the *FedEx II* standard, as clarified by *The Atlanta Opera.* The Employer sets the beginning and end times of the shift. It also directs workers when to take breaks and when they are dismissed. The Employer's supervisors give assignments to workers and can move them to various departments on site, albeit based on the needs of the tour or venue. Here, the Employer also acknowledges that it has the authority to issue discipline to the 1099 workers, which is also evidence of control. See *Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB 1039, 1042 fn.6 (2017); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 889, 892-93 (1998).

Accordingly, on the whole, I find sufficient evidence to support a finding of employee status.[8]

b. Whether or Not the Individual is Engaged in a Distinct Occupation or Business

The record indicates that the 1099 workers in this case hold themselves out as employees of the Employer and conduct their work under the Employer's brand. To this end, they are required by the Employer to wear the Employer's branded shirt while working on a job. Cf. *Sisters' Camelot*, 363 NLRB 162, 163-64 (2015). Accordingly, the 1099 workers appear integrated into the Employer's operations. This factor favors employee status.

c. Whether the Work Is Usually Done Under the Direction of the Employer or By a Specialist Without Supervision

For the reasons referenced above, it appears that the 1099 workers are subject to supervision and direction of the Employer's on-site officials, but are also subject to supervision and direction by third parties as to the details of their work. Under such circumstances, I find that this factor is inconclusive.

d. Skill Required in the Occupation

The record indicates that certain of the petitioned-for workers, such as the stagehands and forklift operators, are not particularly skilled and undergo on-the-job training. On the other hand, there is some evidence indicating that certain petitioned-for workers possess skills specific to their work, such as the riggers and electrical workers. Nevertheless, the probativeness of this evidence is diminished by the testimony of the Employer's owner that none of the classifications require any special experience and that the workers learn on the job. Accordingly, I find this factor to be inconclusive. See *Minnesota Timberwolves Basketball, LP*, 365 NLRB 1214, 1222 (Board finds this factor to be inconclusive where some crew positions require a high degree of skill but other evidence indicates the presence of lower-skilled positions, employer-provided training, and alignment of employee skills with employer's core business objective).

e. Whether the Employer or Individual Supplies the Instrumentalities, Tools, and Place of Work

The Employer requires 1099 workers (and W-2 workers) to provide their own tools in many instances. All workers must bring a crescent wrench to the job site and gloves. Riggers must bring their own equipment. There is some evidence that the Employer also provides a few tools as needed, but the responsibility generally appears to lie with the workers. Under such circumstances, where workers provide their own equipment in most situations, this factor tilts towards independent-contractor status.

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[8] Although the Eleventh Circuit also considered similar facts and still found the control factor to favor independent-contractor status, I apply Board precedent in light of the Board's longstanding policy of nonaquiescence. See, e.g., *Pathmark Stores, Inc.*, 342 NLRB 378 fn.1 (2004).

f. Length of Time for Which Individual is Employed

The record indicates that the Employer maintains the potential for long-term working relationships with the 1099 workers, and that most have worked on multiple events for the Employer over the course of several years. This tends to demonstrate employee status. However, the 1099 workers can also choose whether and when to accept jobs from the Employer, while working for other companies as well. This tends to establish independent-contractor status. Accordingly, I find this factor to be inconclusive. See *Sisters' Camelot*, 363 NLRB at 165 (Board found this factor to be inconclusive where evidence showed employees had potential long-term working relationship with employer but also maintained control over how frequently to work for the employer).

g. Method of Payment

The Employer does not withhold amounts from 1099 workers' paychecks or provide fringe benefits, which traditionally indicates independent-contractor status. However, this is offset somewhat by the Employer's provision of workers' compensation insurance coverage to 1099 workers.

Pay is also provided to 1099 workers on an hourly basis along with overtime. Pay is also set solely by the Employer. Operations Manager Maestas testified that the Employer has given pay increases in response to rare requests from individual 1099 workers, but no details are reflected in the record, nor is there evidence that any rates were above the ranges decided upon by the Employer for each classification. I therefore give this testimony less weight since the burden rests with the Employer as the party asserting independent-contractor status here.

On the whole, this factor is inconclusive.

h. Whether the Work is Part of the Regular Business of the Employer and Whether the Principal Is or Is Not in the Business

These two factors are closely related and favor a finding of employee status. The Employer is engaged in the business of providing labor to set up and take down the sets for third parties. A pool of qualified labor is the primary service the Employer provides to the third parties who rely on these workers to present concerts and other forms of entertainment at various venues. The 1099 workers are an integral part of that business model, as the Employer could not perform its business without them.

i. Whether the Parties Believe They Are Creating an Independent-Contractor Relationship

Certain employees appear to understand that they have 1099 status. The Employer requires employees to complete W-9 forms, but does not explain the significance to the workers. However, there does not appear to be specific evidence of opportunities to bargain over those terms. Accordingly, this factor is inconclusive. See *The Atlanta Opera*, 372 NLRB No. 95, slip op. at 18; *Sisters Camelot*, 363 NLRB at 165.

j. Whether the Evidence Tends to Show That the Individual is in Fact Rendering Services as an Independent Business

The workers may pursue employment options with multiple employers within the industry when not working for the Employer on a specific production, which suggests these workers have some measure of entrepreneurial opportunity. However, the record indicates that the main reason for this is intermittent and variable work throughout the year, which makes it unrealistic to work for the Employer alone. The significance of this evidence is therefore diminished under the circumstances. *The Atlanta Opera*, 372 NLRB No. 95, slip op. at 18; *Sisters' Camelot*, 363 NLRB at 166; *Lancaster Symphony*, 357 NLRB 1761, 1765 (2011).

Once they accept a job, the 1099 workers have no control over what work they will perform or where they will perform the work. They also do not have the authority to hire assistants or replacements for their work. The Employer, in conjunction with the third-party client, decides when workers may start – including requiring them to arrive 15 minutes before their start times, when workers may take breaks, and when workers may leave. The 1099 workers do not have a proprietary or ownership interest in the work they perform. *The Atlanta Opera*, 372 NLRB No. 95, slip op. at 18. In sum, the 1099 workers are not free to make entrepreneurial decisions that could result in additional or less income when working

On the whole, I find that the evidence does not show that the 1099 workers are rendering services as part of an independent business.

k. Conclusion: The 1099 Workers Are Employees

In sum, the majority of the common-law factors are either inconclusive or indicate that the 1099 workers are employees rather than independent contractors. Consequently, I find that the Employer has failed to meet its burden of establishing that the 1099 workers are independent contractors and therefore that they are employees covered by the Act.

B. <u>The Voter Eligibility Formula</u>

The Employer and Union disagree over the appropriate voter eligibility formula to use in this proceeding. The Union proposes using the Board's formula set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970). The Employer asserts that most of the 1099 workers are temporary or casual employees and proposes that only those who work at least five shows during the Employer's "busy" season be allowed to vote.

Within the entertainment industry, the Board devises flexible eligibility formulas to acknowledge that employees are hired on a day-by-day or event-by-event basis. *DIC Entertainment*, *L.P.,* 328 NLRB 660 (1999). The Board's duty is to devise eligibility formulas that are compatible with the particular facts of the case. *American Zoetrope*, 207 NLRB 621 (1973).

Here, the record indicates that the employees work jobs that usually last one day. In *American Zoetrope*, supra, the Board concluded that where most jobs lasted one or two days at most, having completed the job would be the best measure for likelihood of future employment rather than the amount of hours worked. Accordingly, it found those employees who worked on at least two productions during the preceding year was an appropriate eligibility formula. *Id.* at 623. The similarities between the type and duration of jobs at issue in this case and *American Zoetrope* lead me to find this rationale persuasive. Accordingly, those eligible to vote in this election will be all those employees who worked at least two events within the last twelve months preceding the issuance of this decision.

While the Union would have me apply the *Davison-Paxon* formula, I note that the uneven distribution of jobs throughout the year may skew the number of eligible voters depending on the date this decision issues. The Employer's proposal would skew eligibility in favor of those who work the most within an ambiguous three-month period during its "busy" season. This is not coextensive with evidence indicating that the greatest amount of work exists from late April to October. Moreover, the Employer's proposed formula possibly excludes those employees who work regularly at other venues' indoor events during the rest of the year. The *American Zoetrope* formula would capture the broadest group of industry employees with a future interest in employment.[9]

V. CONCLUSIONS AND FINDINGS

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

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

2. As stipulated by the parties, the Employer is engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. As stipulated by the parties, the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

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

[9] The Employer did not explicitly raise the issue of whether the petitioned-for employees are seasonal employees in its SOP. However, in accordance with *Austin Maintenance & Construction, Inc.*, Case 28-RC-266671 (May 28, 2021) (unpublished), I have considered the issue based on the record evidence and decline to find the petitioned-for employees to be seasonal. Rather, I find that the record indicates that employment opportunities exist throughout the year and that the eligibility formula here sufficiently identifies employees' reasonable expectation of future employment.

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

   INCLUDED: All employees of NRG Services, Inc. who worked at least two events within the last twelve months preceding September 10, 2025 in Albuquerque, New Mexico.[10]

   EXCLUDED: All managers, security guards, and supervisors as defined by the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories, and Canada, Local No. 423**.

A. Election Details

The Employer and Union both request a manual election. The Employer proposes to conduct the election at a warehouse on its premises next to its office while the Union seeks an election at the Isleta Amphitheater. I find neither location suitable. The workforce reports directly to various venues throughout Albuquerque rather than to a centralized location. Accordingly, the Employer's warehouse next to its office is not a suitable location for a manual election because employees do not regularly venture there for work. Isleta Amphitheater is also not a suitable venue because neither party has control over it. Accordingly, I shall order a mail-ballot election pursuant to *San Diego Gas & Elec.*, 325 NLRB 1143 (1998). Although manual elections are the Board's preferred method, mail-ballot elections may be appropriate in certain situations. Specifically, mail ballots may be appropriate in cases where eligible voters are scattered due to job duties across a wide geographic area, scattered due to significantly varying work schedules so that they are not present at common location at common times, or where there is a strike, lockout or picketing in progress. *Id.* at 1145. Here, the employees are scattered both in terms of geographic location and scheduling due to the intermittent nature of the work and multiple venues in Albuquerque where they may be required to report.

The Union indicated that Spanish language ballots are necessary.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **2:00 p.m. (Pacific Time Zone) on Wednesday, September 24, 2025**, ballots

[10] The Union petitions for all full-time, part-time, overhire, and temporary employees. Relatedly, the Employer asserts in its SOP that temporary or casual employees do not share a community of interest with other employees in the petitioned-for unit. In reality, all employees appear to work irregularly due to the nature of the entertainment industry, and the Board has found such units appropriate. See, e.g., *American Zoetrope*, 207 NLRB at 622-23; *Medion, Inc.*, 200 NLRB 1013, 1013-14 (1972). Accordingly, I modify the unit description to include all employees, provided they meet the eligibility criteria specific to this case which will identify those possessing a sufficient interest in continuing employment.

will be mailed to voters from the National Labor Relations Board, Region 28. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Wednesday, October 1, 2025**, should communicate immediately with the National Labor Relations Board by either calling the Regional Office at (602) 640-2160 or the Agency's national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 28 office by close of business on **Wednesday, October 15, 2025**. All ballots will be commingled and counted by an agent of Region 28 of the National Labor Relations Board on the earliest practicable date after the return date for mail ballots.[11] In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are all employees in the appropriate unit who were employed by the Employer on at least two events during the twelve-month period preceding issuance of this Decision. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. Additionally, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Ineligible to vote are: (1) employees who have been discharged for cause; (2) employees who quit voluntarily prior to completion of the last job for which they were employed; (3) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (4) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal e-mail addresses, and available home and personal cell telephone numbers) of all eligible voters.

[11] If the Regional Director determines it is appropriate to conduct the ballot count by videoconference, by Zoom for Government, a reasonable period of time before the agreed-upon ballot count, the parties will be provided information by the assigned Board agent regarding how to participate in the ballot count by videoconference.

To be timely filed and served, the list must be received by the Regional Director and the parties by **Friday, September 12, 2025.** The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

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

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted at its facilities. The Notice must be posted at its facilities so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some and/or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees.

The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays.

However, a party shall be stopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution.

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

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A copy of the request for review must be served on each of the other parties as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must contain a complete statement of the facts and reasons on which it is based.

Procedures for Filing Request for Review: Pursuant to Section 102.5 of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E- Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. A request for review filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. The request for review must comply with the formatting requirements set forth in Section 102.67(i)(1) of the Board's Rules and Regulations. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide.

A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business **(5 p.m. Eastern Time) on September 24, 2025**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time on September 24, 2025.**

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which must also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each

of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

DATED at Phoenix, Arizona, this 10th day of September 2025.

/s/ Cornele A. Overstreet
Cornele A. Overstreet
Regional Director