

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CALUMET RIVER FLEETING, INC.
Employer

Case No. 13-RC-21794
Stipulated Election

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150, AFL-CIO
Petitioner

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DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on April 6-7, 2009.

The issue before the Board is whether the Union challenged the ballot of Angela J. Ksiazek in a representation election conducted on October 15, 2008 and/or whether she was an eligible voter. Ms. Ksiazek's ballot was counted in the election in which ten votes were cast in favor of the Petitioner and ten votes were cast against the Petitioner. Petitioner asserts that it challenged Ksiazek's ballot, that she was not an eligible voter and that a re-run election should be conducted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Union Petitioner and the Employer, I make the following

Findings of Fact

I. Jurisdiction/description of the employer's business

Calumet River Fleeting (CRF), Inc., the employer, is a Wisconsin corporation engaged in the interstate marine towing of freight. CFR operates tugboats on the rivers in the vicinity of Chicago and on Lake Michigan. The freight, such as coke used in steel production, is towed on barges which are attached to the tugboats. In 2007 CRF derived gross revenue in excess of \$50,000 for the transportation of goods in interstate commerce. CRF admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Procedural History

On September 15, 2008, the Petitioner, Local 150 of the International Union of Operating Engineers, filed a petition to represent a unit of the employer's employees described as:

All tug engineers, deckhands, deck engineers, electricians and dockside mechanics engaged in the movement of barges and other transportation functions.

The petitioned for unit excluded:

All other personnel, all supervisory or management personnel, clerical personnel, guards as defined by the Act, and any other classifications not identified above.

On September 26, 2008, the Employer and the Union entered into a stipulated election agreement for a secret ballot election under the supervision of the Regional Director. The election was scheduled for October 15, 2008 between 3:00 p.m. and 8:00 p.m. in the lunchroom of the employer's offices on Indianapolis Boulevard in Chicago, Illinois.

The unit described in that agreement was:

All tug engineers, deck engineers, deckhands, dockside mechanics, and electricians employed by the Employer at or dispatched out of its offices at 10048 Indianapolis Blvd., Chicago, Illinois; excluding all other employees, managers, captains, office clerical employees and guards, professional employees and supervisors as defined in the Act.

The parties also entered into an agreement on September 26, that the employer would not add or delete the names of any persons to or from its *Excelsior list*¹ without the Union's consent. That list, as revised, included the names of 23 individuals, including Angela J. Ksiazek. The Union did not concede that everyone on the list was on it properly or was eligible to vote.

In the October 15, election ten votes were cast in favor of the Petitioner and ten votes were cast against it. Three individuals listed on the Employer's *Excelsior list* did not vote. Two days after the election on October 17, 2008, the Union filed objections to the conduct of the election. It alleges that the Board Agent failed to honor a challenge to Ksiazek's ballot, that he permitted arguments on the merits of the challenge to take place at the balloting station and that he improperly failed to impound Ksiazek's ballot.

On November 10, 2008, the Regional Director concluded that the Petitioner's Objections should be sustained and that a re-run election should be conducted. The Employer timely requested review of the Regional Director's Report. On March 9, 2009, the Board remanded the case to the Regional Director for a hearing on the issues of whether Petitioner challenged Angela Ksiazek's ballot, whether the Board Agent's conduct warranted setting aside the election and whether Ms. Ksiazek was eligible to vote.

¹ Within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case, *Excelsior Underwear*, 156 NLRB 1236 (1966).

The events inside the voting area on October 15, 2008

5 I generally credit the testimony of Board Agent Matthew Persons as to what transpired inside the voting area during the election of October 15, 2008, including those instances in which his testimony clearly and directly contradicts the testimony of the Union's observer, Thomas Runyan and/or the Employer's observer, Terry Willems. I do so because unlike Runyan and Willems, Persons is a generally a disinterested party and because his testimony generally strikes me as credible on its face. Persons had run over fifty Board elections prior to the election at CRF.

10 However, in instances in which Persons' testimony is tentative, particularly his testimony that he *believes* that Union Observer Runyan conceded that Angela Ksiazek performed bargaining unit work and that he *believes* that Runyan conceded that he did not timely challenge Ksiazek's eligibility to vote, Tr. 279, 280, I do not credit him. While impartial, Persons has an understandable interest in a finding that he did not make a mistake in failing to treat Runyan's statements as a challenge which may have determined the outcome of the election.

20 A pre-election conference was scheduled for 2:30 p.m. At, or very shortly after 2:30 p.m., Persons began the conference with the Employer's Attorney, Scott Gore, and the Employer's Observer, Terry Willems, a bargaining unit employee. Union representatives had not yet arrived. Persons gave Willems the Board's standard written instructions for election observers and explained the observer's duties orally.

25 Sometime after 2:45 the Union's Business Agent, Alan Bingham, and the Union's observer, Thomas Runyan, a bargaining unit employee, arrived at the pre-election conference. Persons gave Runyan the written instructions for observers and reviewed the observer's duties orally. At about 2:55, Bingham and Scott Gore left the voting area, leaving observers Willems and Runyan alone with the Board Agent.

30 Persons, who testified that he was rushed for time, then explained the procedure for challenging ballots. He told Willems and Runyan that if they had been instructed to challenge a voter that they needed to let him know as soon as possible, but before the voter put his or her ballot in the ballot box. Persons explained that he would put a challenged ballot in a sealed envelope.

40 Persons generally instructs observers not to argue about voters during polling. He also tries to keep the amount of discussion about a particular voter down to a minimum while the voter is in the polling area. Indeed, the instructions he gave to Runyan and Willems, Board Exhibit 5, cautioned them, "DO NOT Discuss or argue about the election."

45 Sometime prior to 6:00 p.m., observers Willems and Runyan were reviewing the employer's *Excelsior* list. Runyan remarked with regard to Angela Ksiazek, "that's the one they have a question about."² Persons responded by asking Runyan if he meant that the Union wanted to challenge Ksiazek's eligibility to vote. Runyan looked at Persons "perplexed." Persons then went over the challenge procedure again. Persons believed that Runyan was still confused.

50 ² Runyan and Willems also discussed the Union's intention to question the eligibility of an employee known to them only as "Peanuts." Neither knew this employee's real name. "Peanuts" may have been one of the three employees listed on the *Excelsior* list who did not vote.

Persons then reviewed the reasons for which a voter might be challenged. One example he gave was if the voter did not perform any of the work listed in the bargaining unit description. Persons then read the unit description from the Board's notice of election. Runyan said that he did not think Ksiazek did any of that work. Persons then recalled:

And Mr. Willems immediately said, oh no, she's done deck hand work or dock hand work, she's unloaded the boat before. And then I believe Runyan said, oh yeah, I've seen her do that.³

Persons did not respond to the exchange between Willems and Runyan, but he testified that if the observers would have kept talking about this subject, he was prepared to stop them. Both observers may have suspected that Ksiazek was inclined to vote against the Petitioner on the basis of comments she made at an October 1, company meeting, Tr. 151-52.

Ksiazek arrived at the polling place between 6:00 and 7:00 p.m. When she entered the voting booth, Runyan again said, "that's the one they have a question about." Persons asked if Runyan was challenging her. Runyan looked at Persons but did not respond. After Ksiazek placed her ballot in the ballot box, Runyan said that he did not think she was supposed to put her ballot in the box. Persons replied that Runyan did not challenge her.

The Petitioning Union challenged Angela Ksiazek's eligibility to vote

The Union, by its observer, Thomas Runyon, did in fact effectively challenge Angela Ksiazek's eligibility to vote and Board Agent Persons should have treated his statements as a challenge. Sometime before Ksiazek arrived at the polling place, Runyon stated that the Union had a question about Ksiazek's eligibility. This constitutes a challenge to her eligibility. The Representation Case Handling Manual provides in pertinent part:⁴

11338.2(b) Board Agent

The Board agent must challenge anyone whose name is not on the eligibility list or who has been permitted by the Regional Director or the Board to vote subject to challenge (Sec. 11338.8). Also, the Board agent must challenge a voter if he/she knows or has reason to believe that the voter is ineligible to vote, but in this instance only if none of the parties voices a challenge on that ground.

The Board agent will not make challenges for parties when such parties have observers present. *Galli Produce Co.*, 269 NLRB 478 (1984). **However, if any party does not have an observer, the Board agent should, upon request and on good cause alleged by the party, state that party's challenge to a voter whose eligibility that**

³ The testimony of Runyan and Board Agent Persons differs very little in any material respect. However, neither Runyan's testimony nor Willems' testimony indicates that Runyan verbally agreed with Willems that Ksiazek had performed deckhand work or that Runyan had seen Ksiazek unload a boat. Given Persons imprecise recollection of what Runyan said on this point and the lack of any evidence that Ksiazek ever unloaded a boat or performed the work done by a deckhand, I find that Runyan did not verbally agree with Willems. On the other hand, I credit Persons that Business Agent Bingham said nothing to him indicating a desire to challenge Ksiazek's eligibility to vote.

⁴ It is well settled that the provisions of the Casehandling Manual are not binding procedural rules. These provisions are merely intended to provide operational guidance in the handling of representation cases, *Queen Kapiolani Hotel*, 316 NLRB 655, n. 5 (1995).

party questions (emphasis added). The Board agent should advise the party that he/she does not assume responsibility for assuring that the voter's ballot will be challenged. The challenge is not made by the Board, but is in terms of stating the party's challenge (e.g., "the union has challenged your right to vote on the ground that you are a supervisor").

When directed by the Regional Director or the Board, the Board agent's challenge is to be expressed in terms of the basis for the Regional Director's or the Board's reservation. (For example, "the Regional Director (or the Board) has been unable to decide whether you are eligible to vote based on the union's contention that you are a supervisor rather than an employee.") **The voter should then be voted under the challenge.** (emphasis added). The reason for the challenge should be stated at the time the challenge is made.

The Instructions to Election Observers, Board Exhibit 5, which was provided to Runyon and Willems also equates questioning the eligibility of a voter with a challenge. Under duties, these instructions provide:

Challenge of Voters: An observer has the right to challenge a voter for cause. A Board Agent may also question the eligibility of a voter. Any challenge must be made before the voter's ballot has been placed in the ballot box.

In view of the above, I find that the Board Agent applied an overly technical definition of what constitutes a challenge to Ksiazek's eligibility. Runyon's initial statement should have been treated as a challenge. Moreover, when the Board Agent inquired as to the basis for the challenge, Runyon clearly expressed his opinion that Ksiazek did not perform bargaining unit work.⁵ Even if the initial statement about the Union's questions did not constitute a challenge, the Board Agent should have treated Runyon's statement regarding her lack of unit work as a challenge.

I do not find that Runyon thereafter agreed with the Employer's observer Willems that Ksiazek had performed unit work. Board Agent Person's testimony on this issue very tentative on this issue and is not sufficiently corroborated by Runyon (Tr. 109) or Willems, who denied

⁵ On this basis alone, I find the instant case distinguishable from *Carmel Convalescent Hospital*, 252 NLRB 274 (1980) relied upon by the Employer. In the instant case, unlike the situation in the *Carmel* matter, Union Observer Runyon clearly articulated the basis upon which the Petitioner wished to challenge a specific employee. Moreover, in the *Carmel* matter, the Board noted in footnote 2 that there was no evidence that any ineligible voter was permitted to vote. In the instant case, the opposite is true.

The *Carmel* decision cites *H & L Distributing Co.*, 206 NLRB 169 (1973) in which the Board in a footnote stated:

...there is no evidence that the Union faced with an inability to obtain its own observer, presented facts to the Board agent sufficient to give him reason to believe that the prospective voters were, in fact, ineligible. Had the Union done so, the Board agent would not have been precluded from challenging these individuals and, indeed, may have been under a duty to do so.

There is no need to reach the issue as to whether Board Agent Person was under a duty to challenge Angela Ksiazek. It is sufficient to find that the Union provided him with sufficient facts with which he should have interpreted Runyon's statements as a challenge.

that Runyon questioned Ksiazek's eligibility with the Board Agent at any time, Tr. 189-91.⁶ Willems testified that after a private conversation between himself and Runyon:

5 I asked him why would he challenge her, that I had seen her deck before and she works on the dock.

Q. What did he say?

10 A. He seemed kind of surprised with, that he didn't know she had decked. Then he just left it alone. He didn't say any more.

Tr. 190.

15 That Runyon did not concede that Ksiazek was eligible to vote is also indicated by the fact that when she arrived at the voting area, he again told the Board Agent that the Union had questions about her eligibility. The Board Agent should have treated this statement as a challenge, particularly in the context of Runyon's earlier statements that Ksiazek did not perform unit work. Finally, Runyon's comments immediately or almost immediately after Ksiazek left the
20 polling area clearly indicate that he intended his statements prior to Ksiazek casting her ballot to be a challenge. He said, "I didn't think she was supposed to put her ballot in the box," Tr. 280.

Angelia Ksiazek was not an eligible voter

25 First and foremost, there is absolutely no evidence that Angelia Ksiazek performed bargaining unit during the payroll period ending September 14, 2008, which was specified as the payroll period for eligibility in the Stipulated Election Agreement. Ksiazek appears to have been paid \$500 on September 17, 2008, but there is absolutely no reliable evidence as to what
30 kind of work she performed for the Employer in early September. The Employer did not produce any crew evaluation forms for the period August 17, to September 15, 2008. It also did not produce any logs to suggest that she worked on a tug boat during this period on any date other than August 25. I therefore draw the inference suggested by the Union at page 29 of its brief that either Ksiazek was performing some other kind of work—such as clerical work, or she was not working at all for the Employer.⁷

35 To determine whether a challenged voter properly is included in a stipulated bargaining unit, the Board applies the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). Under this standard, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in
40 the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

45 _____
⁶ For this reason, I decline to take any of Willems' testimony at face value. I note that even the Employer's brief, at pp. 5-6, does not rely on Willems' version of the events in the voting area.

50 ⁷ Both Ksiazek and Terry Doyle, the Employer's Manager, testified that Ksiazek was laid off from her job as a dispatcher in November 2008. However, Employer Exhibit 1 shows that she was paid well into December. Thus, the Union's suggestion at page 30 of its brief that Ksiazek was being compensated for reasons other than labor may be well-founded.

I find that the stipulation in the instant case was not ambiguous and that Angela Ksiazek was not a member of the bargaining unit pursuant to the stipulation. The Employer in its November 21, 2008 Memorandum in Support of its Request for Review of the Regional Director's Report, Union Exhibit 11, asserted that Ksiazek was a unit member on the grounds that she was a deckhand. This indicates that as of the date of this memorandum, the Employer considered the stipulation to be unambiguous. Assuming, however, that there is some ambiguity, the stipulation clearly evidences an intent to include only skilled employees in the unit and not to include unskilled employees such as Ksiazek.⁸

The stipulated election agreement described the bargaining unit of eligible voters as consisting of only the following types of employees: tug engineers, deck engineers, deckhands, dockside mechanics, and electricians. Angelia Ksiazek was none of the above.⁹

Ksiazek and Terry Doyle, CRF's office manager and representative at the instant hearing, testified, and I find, that Ksiazek was not a dockside mechanic, Tr. 39, 54. Ms. Ksiazek similarly never performed the work an electrician or tug engineer.

The duties performed by a deckhand are those described by witnesses Nicholas Zuccolo and Timothy Eaker. A deckhand is responsible the maintenance of tug boats on the water and hooking up and unhooking freight barges to the tug boats. A deckhand may also assist the tugboat captain in maneuvering the boat in the water by communicating with the captain via radio or hand signals. Angelia Ksiazek never performed any of this type of work.

In response to a question by the employer's counsel to describe the type of work she performed as a deck hand, Ksiazek responded:

First of all in the morning, we do our fleeting. That's when they, there's a certain area that the Company owns that's their docking space. And that's where they sweep the barges and they have a charge.

They charge the barge company for fleeting them let's say overnight. They go through, we take, write down the numbers for the barge companies. While in our fleet. Then we go ahead and we get our calls from our dispatchers.

They call us up. They tell us to go pick up certain barges and move them from one dock, from Amesco to KeyCDX or wherever they need to go.

With that we go up, the captain pulls up to the barge. You, excuse me, climb on the barge and you take your lines and tie them around...

Tie them around the cleat on the barge. And they secure to the front of the boat. And then they take off and they move them.

⁸ Assuming a community of interest analysis was appropriate, I would not find Ksiazek to be a bargaining unit member. Unlike other unit members, she worked only a few hours a week prior to the election. Furthermore, Ksiazek lacked the skills, training and qualifications (e.g. the MMD) that other unit members possessed.

⁹ I discredit Terry Doyle's testimony that all deck hands have a mixed title of deck hand/dock worker and the Employer's contention in that regard at page 3 of its brief. The lists submitted by the Employer to the Union, Employer Exhibit 7, establish that this is not so.

Q. And you perform this type of work?...

5 A. Yes. I have. I have never connected barges with wires before. What they'll do is when they're doing more than one barge or if they're doing, you know, two wide, two deep they'll use a wire. It's like a cable and they'll connect them to, it's a stringer and they have a come along that they pull to squeeze the barges together to stabilize them as they're moving them.

10 But I've never tied so to say tied up barges that way.

Tr. 84-85.

15 I deem this answer, particularly Ksiazek's use of plural pronouns, to be evasive as to what deckhand work Ksiazek actually performed herself and find that the record establishes she did not perform any of the normal duties of a deckhand.

20 Indeed, I find that prior to the October 15, election, Ksiazek had spent only one day, August 25, aboard a tug that was not moored to the employer's dock. Moreover, while it is unclear what work she actually performed on that date, she performed none of the duties of deckhand. During this period Ksiazek did not have a Merchant Mariner's Document (MMD) which the Coast Guard requires for deckhands. Similarly, Respondent never gave Ksiazek a document entitled "deckhand duties and responsibilities," which it gave deckhand Nicholas Zuccolo.

25 A deck engineer's primary duties are to maintain the engine room on a tug while it is on the water. This includes checking gauges that measure the water level and the temperature in the expansion tank that keeps the engine cool. Angela Ksiazek never performed these duties either.

30 The employer, however, contends that Ksiazek was eligible because she was dockhand, a type of employee not specifically mentioned in the unit description. However, in an affidavit Ksiazek gave the NLRB on October 29, 2008, she identified herself as a deckhand; she did not describe herself as a dock worker, Tr. 97. It is not clear exactly what constitutes a "dockhand" or what work Ksiazek actually performed for the employer.

35 A list of employees sent by the Employer to the Union on September 26, describes two of twenty three employees, Ksiazek and Mladen Bobic, as "deckhand/dock" and one, Brian Snow, as a dockworker. Bobic performed a substantial amount of electrical work for the Employer, such as running electrical wires to a panel box, Tr. 233, 245, 247. He also had worked on tugboats as a deckhand on at least two occasions. Snow was also a deckhand who performed extensive carpentry work for the Employer on the dock, Tr. 233, 247-48.

45 Between July 2008 and the election of October 15, Ksiazek was a part-time employee working 25 hours a week. She spent most of her time of the tug *Des Plaines*, which was moored to the employer's dock and served as an office and storage facility. There she worked under the direction of Terry Hoeckendorf, the employer's port engineer, with whom she has a personal relationship and with whom she owns real property.¹⁰

50 ¹⁰ I give little probative weight to Employer's exhibit 6, which consists of 29 "crew daily evaluation forms" most of which were prepared by Terry Hoeckendorf. Hoeckendorf did not testify as to when these forms were prepared and there are other apparent irregularities with the

Continued

Ksiazek testified that:

5 Aside of the little bit of decking I did as a dock hand. That summer we were painting all the boats.¹¹ So we were scraping all the paint off the boats, sanding them down, using grinders on them, painting, cleaning...

I cleaned out the bilges on the boats. That's when you remove the platforms out of the engine room and you just climb down in there with a scraper and you scrape the oil...

10 She testified that she also took apart water lines and drains and replaced bad pipes, and ran errands to obtain parts. Further she stated that she cut ropes into 50 foot lengths and put eyes in the segments. On one occasion she testified that she trimmed out some wood paneling with a miter saw.

15 However, due to Ksiazek's insistence that she worked as a deck hand, Tr. 81, 83, which I find to be false, I decline to take any of her testimony at face value. Ksiazek testified that she

20 documents on their face. They do not appear to be a complete set of such reports for the period Ksiazek worked. For example, there are no such documents for the period August 17-September 15. The employer's payroll records, Employer Exhibit 2, indicate that Ksiazek was paid for 25 hours per week of work during this period.

25 Similarly, there are no such records for any date after October 11, although the Employer's payroll records indicate 83.5 hours of work, if Ksiazek was still be paid at a \$10 per hour rate. I infer that Ksiazek was training to take over the job of Bob Wandalowski, one of the Employer's dispatchers immediately after October 11.

30 The employer's manager, Terry Doyle, testified that Ksiazek began training for the dispatcher's position only a few days before Wandalowski's last day of employment, October 30. However, I infer she began training for the position as early as October 11 and that this explains the marked increase in Ksiazek's compensation between October 15 and 25. Wandalowski told CRF he was leaving on or about October 1. CRF offered Ryan Broach Wandalowski's position within a week of October 1. Broach declined the offer within a few days. CRF then offered the dispatcher's job to Ksiazek. Nicholas Zuccolo testified that tugboat captain Bob Lund told him in mid-October that Ksiazek was on-board his tug as part of her training to become a dispatcher. While Zuccolo's testimony is hearsay with regard to the truth of Lund's assertion, it is consistent with the rest of the record. It would be more likely that CRF would begin training Ksiazek for the dispatcher's job immediately upon offering it to her, as opposed to waiting until a few days before Wandalowski's departure. If Ksiazek began training for the dispatcher position in mid-October, it would explain why the Employer has no "crew evaluation forms" with her name on them after October 11.

40 Ksiazek's name appears last on 23 of the 26 forms, suggesting that they may have been added to the original document. Finally, while some employees wrote their initials to the right of the line containing their name and hours worked, Ksiazek never did so. Finally, these documents do not appear to be consistent with Ksiazek's testimony about her payroll records, Employer Exhibit 2.

45 Employer Exhibit 6 reflects 90 hours of work, including some days of work lasting 12-13 hours during the two week period September 29-October 9, 2008. On October 15, the Employer paid Ksiazek \$440, which would be consistent with 44 hours at her hourly rate of \$10. Ksiazek testified that she worked 25 hours a week, which is consistent with the first fifteen documents in Employer Exhibit 6 reflecting a five hour workday. Ksiazek gave no testimony that would be consistent with the hours of work shown on Employer Exhibit 6 for September 15-October 11.

¹¹ The painting Ksiazek performed was on the exterior of the tug boats, Tr. 97.

“decked” with Nicholas Zuccolo. The employer’s records show that Zuccolo and Ksiazek were aboard the tug *Niki* on August 25, 2008. While Ksiazek never testified to what work she performed that day, I credit Zuccolo’s uncontradicted testimony that the first time he saw
 5 Ksiazek on a boat he saw her in wheelhouse with the tug captain the entire shift and that she did not perform any of the normal duties of a deckhand.¹²

Ksiazek testified that she worked with Jeff, whom I assume to be Jeff Rogers, the only Jeff listed on the *Excelsior* list. Jeff Rogers, a witness called by the Employer, however, testified
 10 that he worked alongside Ksiazek on a single occasion. He testified that he observed her painting the stationary *Des Plaines* on the dock on only two occasions. Rogers never worked with Ksiazek on a moving boat. While he testified that he saw her on the *Bonnie G. Selvick* on two occasions, he did not testify as to what Ksiazek was doing. Moreover, three of the four occasions on which Ms. Ksiazek’s presence on a boat is documented occurred after the
 15 October 15 election.

I conclude that Angela Ksiazek was not a bargaining unit member eligible to vote in the October 15, 2008 election.

20 *Assuming that the Union did not challenge Angela Ksiazek’s eligibility in a timely fashion, the results of the October 15, 2008 election should be set aside.*

The Board will not accept an untimely challenge to a voter’s eligibility unless, as discussed in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 333 (1946), the “Board’s agents or the
 25 parties benefiting from the Board’s refusal to entertain the issue [knew]of the voter’s ineligibility and suppress[ed] the facts.” In this case, the Employer knew that Angela Ksiazek was not a deckhand and misrepresented the facts in asserting that she was a deckhand in its September 24 and September 26 emails to the Union. In light of this lack of candor, the election should be re-run even assuming that the Petitioner did not challenge Ksiazek’s ballot. The Employer’s
 30 inclusion of Ksiazek on the *Excelsior* list appears to be an attempt to pack the unit with an individual known to be hostile to the Petitioner.

Conclusion

35 I recommend that the Petitioner’s Objections to the conduct of the election of October 15, 2008, be sustained, that the results of that election be set aside and that the Regional Director hold a second election as soon as possible.

40 Dated at Washington, D.C. this 20th day of May, 2009.

 Arthur J. Amchan
 Administrative Law Judge

50 ¹² Zuccolo recalled this being October 16, rather than August 25. In any event there is no evidence that Ksiazek performed deckhand duties on any of the occasions during which she spent her shift on a water-bound tugboat.