UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FEDEX HOME DELIVERY, A SEPARATE OPERATING DIVISION OF FEDEX GROUND PACKAGE SYSTEM, INC.	:	
Respondent,	:	
and	:	**CASE NO. 34-RC-2205**
TEAMSTERS UNION LOCAL 671 AFFILIATED WITH IBT,	:	
Petitioner.	:	

COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION ON OBJECTIONS BY THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The Act prohibits both crude and subtle forms of vote buying, which makes the Judge's decision repugnant to the Act. If affirmed, it would stand for the proposition that a party, here the Teamsters, can buy votes during the critical period with impunity simply by arranging for others to make payment. Indeed, the Judge admittedly reached his conclusion "without even discussing the legal issues".[1] (Decision, 2.) His decision adds insult to the injury that was the restrictive evidentiary rulings at the hearing.

The Judge improperly constrained the Company's ability to introduce evidence to support Objection No. 1 — that the Teamsters, their agents, and others with whom they acted in concert, improperly gave free legal services to voters during the critical period. He restricted the Company to the following issue: "did the Union pay to cover for – pay for these lawsuits" – "anything short of that, I'm not going to allow any evidence on or testimony". (Tr. 43 (ALJ).) Following that unduly narrow dictate, the Judge barred the Company from adducing evidence as to the persons involved in the voter lawsuits, their connection to the Petitioner, their activities, and the extent, nature, and timing of the many aspects of the free benefits provided during the critical period. The Judge even barred the Company from asking the Union whether it used the lawsuits in its organizational campaign and from asking voters whether anyone told them how much money they would get from the lawsuits.

Despite the Judge's flawed rulings, the record chronicles undisputed evidence that the Teamsters colluded with plaintiffs' lawyers to promise voters that they would "not be charged" for legal work on lawsuits brought on their behalf. Voters admittedly expected to get money

[1] The Judge previously deferred this endeavor – "I will look at the law once the hearing is over." (Tr. 117) (ALJ).)

from their lawsuits because, in the words of one voter, "that's what lawsuits are for." The voters got something of value, legal services and lawsuits seeking substantial sums of money, but they paid nothing. The Teamsters orchestrated a strategically-timed money for nothing scheme throughout the critical period, which indisputably created a voter obligation to the Teamsters. This destroyed the required laboratory conditions.

As to Objection No. 2, the evidence established that the Company successfully challenged three ballots at the election, but the Board Agent improperly opened, commingled, and counted two of them. In doing so, the Board Agent invoked a claimed mandate from the Board — "I have my instructions. I just hope that these are not going to be determinative". (Decision, 3.) There was no such Board mandate, and the Board Agent's "hope" was dashed when the 12-9 tally yielded a three-vote margin, with two additional challenged ballots. The Board Agent's conduct unquestionably affected the election outcome. The improperly counted challenged ballots would have been determinative, and this would have triggered the Board's determinative-challenged-ballot hearing process. The Judge dodged these undisputed facts by misapplying Board law and creating and imposing on the Company, post-hoc, an extra-procedural challenged-ballot requirement that is not required by NLRB law or procedures. Then, the Judge concluded that the Company failed to meet this extraordinary requirement. This is clear error.

The laboratory conditions were tainted by the free legal services given to voters during the critical period and the Board Agent's misconduct deprived the Company of its challenged ballot due process. The Judge misapplied applicable law in overruling the Company's objections. The Company's exceptions should be granted and the election results should be set aside.

II. STATEMENT OF MATERIAL FACTS[2]

OBJECTION 1: THE TEAMSTERS DESTROYED THE LABORATORY CONDITIONS BY ORCHESTRATING FREE LEGAL SERVICES AND LAWSUITS FOR VOTERS DURING THE CRITICAL PERIOD.

A. The Multi-District Litigation ("MDL") and The Hartford Voter Lawsuits.

1. Plaintiff's lawyers filed class-action lawsuits against the Company and on behalf of contractors in over 30 states. (Tr. 14 (Cohen, MDL Plaintiffs' and Hartford voters counsel).) These actions have been "consolidated" into one action under the Multi-District Litigation statute, and the consolidated litigation is referred to as the "MDL." (Tr. 14 (Cohen, MDL Plaintiffs' and Hartford voters counsel).)

2. At the time the Teamsters filed their petition for an election at the Company's Hartford, CT facility in this matter, the MDL Plaintiffs' lawyers had not yet filed contractor lawsuits in Connecticut. (Tr. 14, 109 (Cohen).) Then, as part of their organizing campaign, the Teamsters and the MDL plaintiffs' lawyers from the self-styled "union law firm" of Pyle, Rome, Lichten, Ehrenberg, & Liss-Riordan, P.C. (see www.prle.com), initiated, facilitated, and caused free legal services to be promised and delivered and lawsuits to be brought on behalf of Hartford voters against the Company in Connecticut Federal Court. (Tr. 14, 109 (Cohen); I. Ex. 2.) The Liss-Riordan firm previously brought two contractor lawsuits against the Company in Massachusetts. (Tr. 14-15 (Cohen).)

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[2] References herein are as follows: hearing transcript (Tr. __ ([Name]).); hearing exhibits (Co. Ex. __.); (R. Co. Ex. __.); (U. Ex. __.); (Bd. Ex. __.); (I. Ex. __.); and (Jt. Ex. __.); and Statement of Material Facts (SMF ¶ __.). Each individual Statement of Material Fact incorporates and makes reference to the supporting transcript citation(s) and/or exhibit(s). For ease of reference, statements of fact made within the Argument section of this Brief refer to the applicable numbered paragraph(s) of the Statement of Material Facts where appropriate.

3. MDL plaintiffs' lawyer Maydad Cohen testified that the Hartford voter lawsuits brought by MDL Plaintiffs' lawyers in the Liss-Riordan firm "either ha[ve] been or [are] very soon going to be made a part of the MDL."[3] (Tr. 14, 16-17 (Cohen).)

B. The Teamsters' "FedEx Project" Is Spearheaded By Teamster Strategist Welker.

4. David Welker is the "Senior Strategic Research & Projects Coordinator" for the Parcel & Small Package Division of the International Brotherhood of Teamsters in Washington, D.C. (R. Co. Ex. 2 (Email from Welker to J. Cureton); 50 (Welker).)

5. Welker is the campaign and project coordinator for the "FedEx Project." (Tr. 56 (Welker).) Among Welker's responsibilities is the content on the Teamster website called "FedExWatch." (Tr. 56-57 (Welker).)

C. As Part Of Its FedEx Project, The Teamsters Work With MDL Plaintiffs' Attorneys To Use The MDL To Solicit Teamster Members And Clients For MDL Attorneys.

6. In connection with the "FedEx Project," the Teamsters collaborated with the MDL plaintiffs' lawyers, who promised and delivered free legal services to Hartford voters during the Teamsters' organizing campaign. (Tr. 56-37, 63 (Welker); *see also* SMF ¶¶ 11-14, 21-23, *infra*.)

7. Welker admitted that the Teamsters worked with and assisted MDL lead plaintiffs' lawyers Lynn Faris and Gerald Cureton in suing the Company on behalf of contractors.[4] (Tr. 62-63, 65 (Welker).)

8. Welker admitted also to pre-Hartford election discussions with MDL lead plaintiffs' lawyers Faris and Cureton about Teamsters financial assistance in connection with

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[3] Teamsters organizing strategist David Welker referred to the Hartford voter lawsuits discussed herein as the "Connecticut member case of the MDL." (Tr. 75 (Welker).)

[4] Welker knew that Faris and Cureton were plaintiffs' lawyers on the Plaintiffs' MDL Steering Committee. (Tr. 64-65 (Welker).)

MDL lawsuits against FedEx on behalf of contractors. (Tr. 67-68 (Welker).) Welker conceded further that the Teamsters use the MDL and the assistance of the MDL plaintiffs' attorneys in Teamster organizing campaigns against the Company – just as they did in Hartford. (Tr. 69-70 (Welker).)[5]

9. Welker previously worked with MDL plaintiffs' and Hartford voter lawsuit attorney Shannon Liss-Riordan in connection with a Teamster campaign at the Company's Northboro Home Delivery facility. (Tr. 59-62 (Welker); Co. Ex. 7 (E-mail from Welker to Liss-Riordan).) Welker knew of Liss-Riordan at that time because MDL lead attorney Faris "often" mentioned Liss-Riordan's name in his conversations with Welker.[6] (Tr. 59-62 (Welker); Co. Ex. 7 (E-Mail from Welker to Liss-Riordan).)

10. Welker testified that the Teamsters use their website for the dual purpose of soliciting members for the Teamsters and clients for the MDL attorneys. (Tr. 67 (Welker).) Welker testified that the Teamsters' website, "FedExWatch.com," is digitally linked to the MDL

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[5] When asked about the Teamsters' collaboration with MDL plaintiffs' lawyers in distributing Teamster organizing campaign communications to contractors, Welker denied this, claiming that such communications are distributed "solely by employees and reps of local unions." (Tr. 71 (Welker).) This testimony is belied by Welker's prior statement to MDL plaintiffs' attorney Cureton to whom he gave Teamster campaign flyers about FedEx lawsuits along with instructions for Cureton to distribute them at FedEx facilities. (R. Co. Ex. 2 (E-mail from Welker to MDL Plaintiffs' counsel Cureton).) For the reasons set forth below, the Judge erred in rejecting this Exhibit. Specifically, Welker instructed Cureton to "**hit the facility(s) starting next week" and to tell contractors "to go to the lawsuit web site fedexgrounddriverslawsuit.com for more info**." (*Id.* (emphasis added).) This is additional proof of Teamster collaboration with MDL plaintiffs' attorneys in connection with Teamster organizing campaigns – advertising material aimed at soliciting and influencing contractors to become both Teamster voters/members and MDL attorney clients.

[6] In connection with the Teamsters' campaign, Welker instructed Liss-Riordan in an email entitled "**MA/Northboro and beyond**" that he was "crashing on a deadline," and he asked her for a "complete list of FedEx Ground/HD facilities in MA". (Tr. 59-62 (Welker); Co. Ex. 7 (emphasis added).) Liss-Riordan responded that same day stating, "I will check with my lead plaintiff who has a lot of information and will get it to you quickly." (*Id.*)

plaintiffs' lawyer's website called fedexdriverslawsuit.com, which is itself linked to the Teamsters' website. (Tr. 56-57 (Welker).)

11. Welker testified also that the Teamsters produced campaign communications to voters during the Hartford campaign that advertised the MDL lawsuits to Hartford voters. (Tr. 70-71 (Welker).)

It is against this backdrop of an openly functioning Teamster alliance with MDL plaintiffs' attorneys and their collaborative use of "money for nothing" lawsuits to influence Hartford voters throughout the critical period that Objection No. 1 must be viewed. As discussed below, the Judge not only failed to do so, but also improperly excluded relevant evidence.

D. Teamsters Strategist Welker Kicked-Off The Teamsters' Free Legal Services And Lawsuits Vote Influencing Scheme.

12. Teamsters Local 671 President, Organizer and Business Agent Anthony Lepore testified that Local 671 began its effort to organize Hartford Home Delivery contractors in late 2006. (Tr. 29-30, 228 (Lepore).)

13. Teamster Strategist Welker testified that he first went to Hartford to meet with and speak to Hartford contractors at the Local 671 Union Hall in December 2006. (Tr. 52, 55 (Welker).) Welker distributed a copy of the home page for the MDL plaintiffs' fedexdriverslawsuit.com website to Hartford contractors, and he claims to have introduced Hartford voters to the lawsuits against the Company and "**directed**" them to the MDL Plaintiffs' lawyers' website. (Tr. 53-55 (Welker).)

E. The Teamsters And Their Partners-In-Organizing-and-Litigation Used And Arranged For Agents And Surrogates To Initiate, Promise, And Deliver Free Legal Services To Voters During The Critical Period.

14. On February 2, 2007, Teamsters Local 671 filed a petition for election at the FedEx Home Hartford facility in the above-referenced case. (Tr. 30 (Lepore).) Shortly

thereafter, Local 671 President and Organizer Lepore arranged for Boston-based Teamsters Local 25 Organizer Sullivan to be present at his Hartford organizing meetings. (Tr. 37-38 (Lepore).)

15. Sullivan testified that he assisted Local 671 in its campaign to get Hartford contractors to vote for Local 671. (Tr. 188 (Sullivan).) Sullivan admitted that he enlisted the services of William Gardner[7] to campaign on behalf of Local 671 and that he and Gardner traveled and appeared together and spoke to Hartford voters at least two Local 671 organizing meetings – once at the Local 671 Union Hall and once at a local hotel, days before the election. (Tr. 188-189 (Sullivan); 31-32 (Lepore).)[8]

16. Teamster Organizer Sullivan provided transportation for Gardner from Boston to Hartford to meet with and speak to Hartford voters on behalf of Local 671. (Tr. 193 (Sullivan).)[9]

17. Teamster strategist Welker admitted that the Teamsters engaged Gardner to campaign on behalf of the Teamsters at Hartford and to organize Hartford contractors. (Tr. 72-73 (Welker).)[10] Welker admitted also that the Teamsters posted a video-advertisement on the

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[7] Boston-based contractor Gardner is a Plaintiff in an MDL Massachusetts lawsuit brought by the Liss-Riordan firm in 2005. (Tr. 9-10 (Dumont).)

[8] Sullivan claimed that he could not recall the dates of organizing campaign meetings at which he appeared with Gardner. (Tr. 190-191 (Sullivan).) He guessed, however, that the first one, which took place at the Local 671 Union Hall in Hartford, was before the petition was filed, and he recalled that the next one, at the Hampton Inn in Hartford, was "right before the actual vote." (Tr. 191 (Sullivan).) Sullivan's self-serving surmise about the date of the first meeting is incorrect because an email from Gardner to Local 671 President Lepore, on which Sullivan himself was an addressee (*see* SMF ¶¶ 21-22, *infra*.), refers to a meeting at the Local 671 union hall on February 25, which was weeks after the petition was filed (February 2, 2007) and well into the critical period. (Co. Ex. 2 (E-mail from Gardner to Lepore); Tr. 30 (Davis).)

[9] Further, Gardner was represented by Teamsters Local 25 counsel in the Objections proceeding. (Tr. 10, 15 (Conti).) It was on the advice of Teamster Local 25 counsel that Gardner did not honor his subpoena and appear at the hearing or produce subpoenaed documents. (Tr. 19 (Conti).) ("He's not here on my advice on this").)

[10] Welker and Gardner corresponded about lawsuits and money during the critical period – by email dated March 15, 2007, Welker responded to Gardner's email to him about a "Class Action Motion"

(Continued . . . .)

popular internet website "youtube.com" that features Gardner promoting the Teamsters and giving Teamster union organizing advice to contractors at other terminals. (Tr. 73 (Welker); *see also* http://www.youtube.com/teamsters.)

18. Local 671 Organizer Lepore testified that Teamsters Local 25 provided him with campaign flyers. (Tr. 33, 39-40 (Lepore).) A Teamster campaign flyer dated April 23, 2007 (shortly before the May 11 Hartford election) directed Hartford voters to "[g]o to the FEDEXHD video clip at http://www.youtube.com/teamsters." (R. Co. Ex. 3.) Lepore acknowledged also that Gardner sent him a campaign flyer that the Teamsters had used in an earlier FedEx Home Delivery campaign in Boston. (Tr. 33, 39-40 (Lepore); R. Co. Ex. 3 (Flyer from Gardner to Lepore).)

F. Teamsters' And MDL Plaintiffs' Attorneys' Agent And Surrogate William Gardner Followed Welker's Lead In Promoting Hartford Voter Lawsuits And Connecting Voters To Attorneys With Whom The Teamsters Collaborate.

19. On February 25, 2007, during the critical period, Gardner and Sullivan spoke to contractors on behalf of the Teamsters at the Local 671 Hartford Union Hall. (Tr. 188-189 (Sullivan).) Gardner gave contractors information that they hoped was "useful" to what he called Local 671's "**future FedEx union members.**" (Tr. 35-36 (Lepore); Co Ex. 3 (Feb. 26, 2007 E-mail from Gardner to Lepore) (emphasis added).)

20. In an e-mail from Gardner the following day, February 26, Local 671 Organizer Lepore received a copy of Gardner's "Mass[achusetts] FedEx class action complaint," along with the following message from Gardner:

(Tr. 74 (Welker); R. Co. Ex. 3.), stating to him that the Teamsters were "watching this very closely" and that the "folks [contractors] in Boston" would be the first to get money as a result of the lawsuits. (*Id.*)

> I spoke with our Class action att[orneys] and they would like to speak via telephone to any Home Delivery or Ground drivers **who would be interested in becoming a plaintiff for a C[onnecticut] class action.**

(*Id.*) (emphasis added).) Pursuant to his discussion with "Class action att[orneys]," Gardner gave Lepore the contact information for attorney Maydad Cohen of the MDL/Liss-Riordan firm for his use. (*Id.*)

21. MDL attorney Cohen testified that Gardner was the first to call him about getting a Connecticut lawsuit against FedEx on behalf of Hartford voters. (Tr. 101, 106 (Cohen).) According to Cohen, Gardner told him at that time:

- that he met Hartford voters at the Teamster Local 671 organizing meeting;
- that the voters were interested in "a lawsuit against FedEx;" and
- that he would be hearing from Hartford voters about a lawsuit against the Company.

(Tr. 102-103 (Cohen).)

According to Cohen, he subsequently had communications with Hartford voters about bringing a lawsuit against the Company on their behalf, and to that end another lawyer from his firm, named-partner Harold Lichten, met with Hartford voters during the critical period.[11] (Tr. 103-104 (Cohen).)

Despite this undisputed record evidence placing Gardner at ground zero of the collaboration between the Teamsters and the MDL plaintiffs' lawyers in connection with the Teamsters' Hartford election campaign, and as discussed below, the Judge improperly barred the

[11] Cohen claimed to not recall the date when Gardner called him; however, he did "know that it was after one of the [Teamster organizing] meetings that [Gardner] attended" "in Connecticut with Connecticut drivers." (Tr. 101-102 (Cohen).) Cohen testified that he did not know whether anyone from the Teamsters attended the meeting. (Tr. 104 (Cohen).) As discussed herein, the Judge's erroneous rulings at the hearing barred the Company from adducing further details on this and other matters.

Company from compelling Gardner's compliance with his properly served subpoena to testify and produce documents. (See § III A (4), p. 22-24, infra.)

G. Teamster Local 671 President Lepore Followed-Up On Gardner's Hartford Voter Lawsuit Promotion Work With Lead Organizer Dizinno.

22. Local 671 President Lepore admitted that he received Gardner's February 26 email and attached class action complaint upon being presented with a copy of the email and attachment. (Tr. 33, 35-36 (Lepore).)

23. Lepore admitted further that he discussed a lawsuit against the Company with Hartford voter and self-proclaimed lead Teamster organizer Robert Dizinno. (Tr. 35-36 (Lepore); Co. Ex. 2 (E-mail from Gardner to Lepore) ("Dizinno and I had conversations concerning this").)[12] According to Lepore, Dizinno thereafter "updated [him] on the status of [the lawsuit]." (Tr. 36 (Lepore).)[13]

24. Dizinno claimed that he "spearheaded" "the union and the lawsuit."[14] (Tr. 222 (Dizinno).) Although Dizinno reluctantly conceded that he met and/or spoke with Lepore, Welker, including a meeting between with Welker "when [Dizinno] got involved with the Union", Sullivan, and Boston-based contractors about unionizing, and with MDL plaintiffs' attorney Cohen (Tr. 217-224 (Dizinno)), his testimony about when and how he learned about

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[12] Dizzinno is a driver who operates over a Hartford Home Delivery route in Manchester, CT, and he voted subject to challenge at the May 11 election. (Tr. 217 (Dizinno).)

[13] When asked whether he had discussed a lawsuit for voters with voters other than Dizinno, the best answer Lepore could muster was "I don't think so." (Tr. 37 (Lepore).)

[14] In addition to his critical period discussions and status updates about the Hartford voter lawsuits with Lepore, Dizinno told other voters about a lawsuit during the critical period (*see* SMF ¶¶ 25, 28), the Teamsters published his photo in a Teamster campaign communication, which quoted Dizinno as saying "I look forward to having the chance to vote to join the Teamsters" (*see* SMF ¶ 30). Also, Dizinno appeared at the Hartford terminal along with the Local 671 President, Organizer, and Business Agent Lepore and Local 671 Secretary/Treasurer Dave Lucas at the May 11 election, and he served as the Teamsters' election observer. (Tr. 228-229 (Lepore); 164 (Hodavance).)

voters getting a free lawsuit against the Company and with whom he spoke about it was evasive and self-servingly vague. He claimed to not remember anything, except selectively self-serving things. (Tr. 217-224 (Dizinno).)

25. When Lepore was asked whether lawsuits were discussed at the Local 671 organizing meetings, he answered, "I don't remember" and "I don't recall that." (Tr. 31-32, 34 (Lepore).) When presented with the February 26 email that he received from Gardner following-up on a meeting at his union hall, which referred to a lawsuit for Hartford voters and attached a draft civil complaint, Lepore claimed that he did not recall any discussion about lawsuits because he was "in and out of that meeting" and because he did not "remember that part of it." (Tr. 34-35 (Lepore).)[15]

26. Lepore's account was rebutted by Hartford voter Sebastian Maulucci who testified that he attended a Teamster organizing meeting at the Local 671 Union Hall where Boston-based contractors discussed their lawsuit against FedEx in Massachusetts. (Tr. 127-128 (Maulucci).)

H. The Push to Lock-In Voters With Written Promises Of Free Legal Services On The Heels Of The Hartford Regional Director's Decision And Direction Of Election.

27. On April 11, 2007, the Hartford Regional Director issued his Decision and Direction of Election, finding Hartford single work area contractors to be "employees" (the Company asserts that they are Independent Contractors) and directing an election to occur within 30 days. (Jt. Ex. 1 (R. DDE) at 32.)

[15] For this reason, among others, Lepore was not a proxy witness for Gardner. Neither was Sullivan, who admitted that he was not present in the meetings at all times and that there were meetings he did not attend. (Tr. 190-192 (Sullivan).)

28. In the wake of the April 11 Decision and Direction of Election, Dizinno, along with Hartford contractors/voters (and named Plaintiffs in the Hartford voter lawsuits) Chiappa, Magno, and Edwards, posed for a photo used in a Teamster campaign communication entitled "NLRB Rules Connecticut FedEx Drivers are Employees." (Tr. 224-225 (Dizzino); R. Co. Ex. 4 (Teamster Communication with photo).) The Teamsters' communication shows Dizinno flanked on his left by Chiappa and on his right by Edwards and Magno, standing in front of a FedEx Home Delivery logo, and it refers to the Hartford Regional Director's April 11, 2007 Decision. (Tr. 217 (Dizinno); R. Co. Ex. 4 (Teamster Communication with photo).) In the Teamsters' communication, Dizinno is quoted as saying "I look forward to having the chance to vote to join the Teamsters". (R. Co. Ex. 4 (Teamsters Communication with photo).)

29. Also on the heels of the Decision and Direction of Election and around the same time when Dizinno, Chiappa, Magno, and Edwards were making Teamster campaign communications, these same four Hartford voters and at least two other voters, Garret Anderson and David Trojanowski, met with MDL plaintiffs' attorneys about lawsuits against the Company. (Tr. 205 (Anderson).)

30. Written agreements were offered to these six Hartford voters on or about April 16 and/or 17 promising them that they would "not be charged an hourly rate for the firm's work on the case". (Tr. 151, 153, 186 (Cohen); Interested Party Ex. 2.)[16] Each of the six voters accepted the offers by signing them on April 16 or 17, 2007. (*Id.*)

I. Hartford Voters/Named Plaintiffs In The Hartford Voter Lawsuits Got Valuable Legal Services And An Expectancy Of Money For Nothing.

[16] The Retainer Agreements offered to and accepted by the Hartford voters during the critical period do not require any payment by the voters and provide only for the MDL Plaintiffs' attorneys to get a percentage of any amounts recovered, and only if there is a recovery (whether by settlement or judgment). (*Id.*)

31. Dizinno, Magno, Edwards, Anderson, 4 of the 6 voter/named plaintiffs in the Hartford voter lawsuits, testified that they were given free legal services – each acknowledged that he paid nothing for legal services rendered to him during the critical period. (Tr. 217-218, 221 (Dizinno); (197-198 (Magno); 201-202 (Edwards); (204-205 (Anderson).)

32. Dizzino testified that he expects to receive money from the lawsuit brought on his behalf – in his words, "that's what lawsuits are for." (Tr. 221 (Dizzino).) Likewise, Magno and Anderson each testified that he expects to receive money from the Hartford voter lawsuits brought on his behalf, and both admitted that they have not paid for the legal services rendered to them during the critical period. (Tr. 198 (Magno); 205 (Anderson).)[17]

33. MDL plaintiffs' attorney Cohen confirmed that none of the Hartford voters on whose behalf his firm performed legal services during the critical period paid for those services. (Tr. 108, 118 (Cohen); *see also* 115-116 (Dumont).)[18]

34. Within days after the election, the Liss-Riordan law firm formally filed the Hartford voter lawsuits in the U.S. District Court for the District of Connecticut. (Co. Exs. 10-11 (Hartford Voter Civil Complaints).) The lawsuits name as Plaintiffs the openly pro-union voters. (Co. Exs. 10-11 (Hartford Voter Civil Complaints); R. Co. Ex. 4 (Teamster Communication with photo).) The Complaints, like the complaint that Gardner gave to Local 671 Organizer Lepore during the critical period seek substantial sums of money for Hartford voters. (Co. Exs. 10-11 (Hartford Voter Civil Complaints); Co. Ex. 2 (E-Mail from Gardner to Lepore with complaint attachment).)

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[17] Voters Magno, Edwards, and Anderson each testified that he recalled first having received information about a potential Hartford voter lawsuit against the Company during the critical period. (Tr. 197 (Magno); 202-203 (Edwards); 206 (Anderson).)

[18] In addition to consultations, the Hartford voter civil Complaints were prepared by the Liss-Riordan firm. (Tr. 105-106, 110-111, 113 (Cohen); Co. Exs. 10-11 (Hartford Voter Civil Complaints).)

OBJECTION 2: THE BOARD AGENT IMPROPERLY DISREGARDED THE COMPANY'S CHALLENGES TO THE BALLOTS OF CHIAPPA AND DIZINNO BASED UPON CHANGED CIRCUMSTANCES.

J. The Company Properly Challenged The Ballots of Contractor Chiappa And His Driver Dizinno Based on Post-R-Case Hearing Changed Circumstances, And The Board Agent Accepted The Company's Challenges.

35. At the May 11, 2007 election, Robert Hodavance, of Morgan, Lewis & Bockius LLP, represented the Company in its dealings with Region 34. (Tr. 162 (Hodavance).) Prior to the start of the election, the Region 34 Board Agent, Nestor Diaz, conducted a pre-election conference with Hodavance, Teamster President Lepore, and Robert Dizinno, the Teamsters' observer. (Tr. 163-164 (Hodavance).)

36. At the pre-election conference, Hodavance told Diaz that the Company was going to challenge the ballots of Contractor Paul Chiappa and his driver Robert Dizinno. (Tr. 163 (Hodavance).) Hodavance informed Diaz that the challenges were based on the fact that circumstances had changed during the two and one-half months since the time of the R-case hearing on February 26-March 2, 2007 such that Chiappa and Dizinno were now in positions that would be ineligible to vote.[19] (Tr. 163 (Hodavance); Decision, at 3.) Hodavance further informed Diaz that the Company would challenge the ballot of Garrett Anderson. (Tr. 163 (Hodavance).) Diaz stated in response that he was "accept[ing] all of the challenges." (Tr. 163 (Hodavance).).

37. In accordance with Hodavance's representation during the pre-election conference, the Company's observer challenged the votes of Dizinno and Chiappa, as well as

[19] The Regional Director's Decision and Direction of Election defined the unit as: "All contract drivers employed by the Employer at its Hartford terminal; but excluding drivers . . . hired by the contract drivers . . . multi-route contract drivers . . . and supervisors as defined in the Act." (Jt. Ex. 1 (R DDE) at 32.)

Anderson. (Tr. 164 (Hodavance).) Diaz wrote on the challenged ballot envelopes for Chiappa and Dizinno that the basis for their challenges was that they were "not a single route driver." (Tr. 242 (Diaz); B. Ex. 3.) The Union challenged one ballot. (Tr. 163 (Hodavance).) There were a total of 4 challenged ballots. (Tr. 239-240 (Diaz).) Following the election, the ballots were impounded pending the outcome of the Company's Request for Review. (Tr. 164 (Hodavance).)

K. The Company Again Notified The Board Prior To The Ballot Count That Circumstances Had Changed Surrounding Chiappa And Dizinno.

38. On May 22, 2007, the Board denied the Company's Request for Review, and the Region scheduled the ballot count for June 1, 2007. (Tr. 165 (Hodavance).)

39. Prior to the ballot count, on or about May 30, 2007, Board Agent Diaz contacted both Lepore and Hodavance separately by telephone to discuss the procedure for counting the ballots. (Tr. 165 (Hodavance); Decision, at 4.) During Diaz' telephone conversation with Hodavance, Hodavance reiterated to Diaz that the Company was maintaining its challenges of Chiappa and Dizinno based on changed circumstances, as well as its challenge of Anderson. (Tr. 165 (Hodavance); Decision, at 3, 4.)

L. The Board Agent Invoked A Board-Directed Mandate In Disregarding The Company's Changed Circumstances Basis For The Challenged Ballots.

40. At that time, Diaz told Hodavance that "he had been instructed by the Board to count the ballots of Dizinno and Chiappa." (Tr. 165 (Hodavance).)

41. Hodavance then asked Diaz if he was still going to count the ballots of Chiappa and Dizinno "even with the fact that there were changed circumstances from the time of the hearing to the time of the election?" (Tr. 165 (Hodavance); Decision, at 4.) Diaz replied that only "if either one were no longer employed as of the time of the election, or either one had been promoted into a … pre-existing supervisory position … that might make a difference." (Tr. 165 (Hodavance).)

42. Hodavance then told Diaz that the counting and commingling of Dizinno's and Chiappa's ballots was inappropriate because there were changed circumstances surrounding their eligibility. (Tr. 165 (Hodavance).) Diaz replied that he had his "instructions" and that he just "hope[d]" that Chiappa and Dizinno's ballots were not "determinative of the outcome of the election." (Tr. 165 (Hodavance).)

M. Under A Claimed Board-Directed Mandate And Over The Company's Objections, The Board Agent Opened The Challenged Ballots Of Chiappa And Dizinno, Commingled, And Counted Them.

43. On June 1, following Hodavance's conversation with Diaz regarding the ballot count, Hodavance, Hartford Terminal Manager Scott Hagar, Lepore, several other representatives of the Teamsters, and Diaz met at the Region 34 office in Hartford for the ballot count. (Tr. 166 (Hodavance); 232 (Lepore).)

44. Diaz repeated that he had "received instructions from the Board to count those two ballots," i.e., the Chiappa and Dizinno ballots. (Tr. 166 (Hodavance).) In response, Hodavance one more time objected to the counting of the challenged ballots based on changed circumstances surrounding Dizinno and Chiappa. (Tr. 166 (Hodavance); Decision, at 4.)

45. Diaz opened Chiappa's and Dizinno's ballots, commingled them, and counted the ballots. (Tr. 166 (Hodavance).) The Board Agent properly preserved the remaining two challenged ballots – one by the Company and one by the Union. (Tr. 166 (Hodavance).)

46. The vote tally was 12 votes for the Union and 9 votes for No Union. (Jt. Ex. 3 (vote tally from election).) Had the Board Agent not opened and counted the Chiappa and Dizinno ballots, the challenged ballots would have been outcome determinative. (*Id.*)

III. ARGUMENT

A. OBJECTION 1: THE TEAMSTERS DESTROYED THE LABORATORY CONDITIONS BY ORCHESTRATING FREE LEGAL SERVICES AND LAWSUITS FOR VOTERS DURING THE CRITICAL PERIOD.

1. Providing Free Legal Services During The Critical Period Destroys The Required Laboratory Conditions.

During the pre-election critical period, the Board requires conditions that are consistent with a "laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees." *Sara Lee Bakery Group, d/b/a International Baking Company and Earthgrains*, 342 N.L.R.B. 136 (2004) (citing *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), *enfd*. 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952).) Giving something of value to voters during the critical period destroys the laboratory conditions because it "reasonably tend[s] to interfere with the employees' free and uncoerced choice in the election." *Phillips Chrysler Plymouth, Inc.*, 304 N.L.R.B. 16 (1991).[20] Simply put, the Act prohibits crude and subtle forms of vote buying. *Freund Baking Co.*, 165 F.3d 928, 931 (D.C. Cir. 1999).

Giving free legal services to voters, as was done here, is objectionable as a matter of law because voters objectively get "'something for nothing,' and the 'something [is] quite valuable.'" *Nestle's Ice Cream Co. v. NLRB*, 46 F.3d 578, 584 (6th Cir. 1995); *Freund Baking Co. v. NLRB*, 165 F.3d 928 (1998) (provision of free legal advice regarding lawsuit against company during critical period constituted objectionable conduct).

[20] Significantly, whether voters know who actually paid for the valuable benefit they received or whether there was a payment is not material. *See, e.g., Wagner Elec. Co.*, 167 N.L.R.B. at 533 (value of the benefit and identity of provider not a consideration).

The voters' apparent benefactor – whether it be the union or the company – is immaterial.[21] *See, e.g., Wagner Elec. Co.*, 167 N.L.R.B. 532, 533 (1967) (union-arranged life insurance for voters constitutes a "tangible economic benefit" that disturbed the laboratory conditions); *see also Mailing Servs.*, 293 N.L.R.B. 565 (1989) (free medical screening arranged by union inappropriately disturbed the laboratory conditions despite the fact the value was not know by voters); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235 (1984) ($16.00 union jacket constitutes a tangible benefit that affected the outcome of the election); *General Cable Corp.*, 170 N.L.R.B. 1682 (1968) ($5.00 gift certificate impermissibly indebted voters to the union). Here, no-cost legal services and lawsuits seeking significant sums of money was far more destructive to the requisite laboratory conditions than fixed value gift certificates or clothing.

Freund Baking Co. is instructive. In that case, like here, a lawsuit was prepared on behalf of voters during the critical period by an attorney who represented other employees in similar lawsuits against the company. 165 F.3d at 930. The D.C. Circuit held as follows:

> **The Union's sponsorship of the employees' lawsuit against the Company clearly violated the rule against providing gratuities to voters in the critical period before a representation election.**

Id. at 935 (emphasis added). As here, the union *in Freund* claimed that it did not pay for the lawsuit. *Id.* at 932. The D.C. Circuit found this fact to be immaterial: "**It is the appearance of support, not the support itself, that may have interfered with the voters' decisionmaking.**" *Id.* (emphasis added).

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[21] Moreover, even conduct not connected to a party can destroy the laboratory conditions. *See PPG Indus. Inc.*, 350 N.L.R.B. No. 25 (2007) (conduct of pro-union employees for which the union was not responsible was sufficiently objectionable to justify overturning the election); *Hollingsworth Mgmt. Serv.*, 342 N.L.R.B. No. 50 (2004) (electioneering by pro-union employees constituted objectionable conduct); *HCF Inc.*, 321 N.L.R.B. 1320 (1996) (conduct by union supporter constitutes objectionable conduct); *Ursery Companies Inc.*, 311 N.L.R.B. 399 (1993) (letters from Congresspeople sent to voters during the critical period can constitute objectionable conduct).

The Board recognized the authority of *Freund Baking* in *Superior Truss & Panel, Inc.*, 334 N.L.R.B. 916 (2001) without regard for prior Board case law in cases such as *BHY Concrete Finishing, Inc.*, 323 N.L.R.B. 505 (1997) (finding the filing of a lawsuit during the critical period unobjectionable). In the 2001 *Superior Truss* case, the Board provided that if the union engaged in discussions with voters regarding a potential *lawsuit* unrelated to the election process, the laboratory conditions could have been compromised. In finding that no such lawsuit was at issue, the *Superior Truss Board* found material that there was no evidence that "the [u]nion ever contemplated the filing of a lawsuit similar to that in *Freund*." *Id*.[22] In this case, the Teamsters purposefully orchestrated the preparation and filing of such lawsuits for voters at no cost to them.

2. The Teamsters, Their Agents and Partners, And Their Surrogates Collaborated To Offer, Promise, And Provide Free Legal Services To Voters During The Critical Period.

Teamster strategist Welker openly leveraged the Teamster alliance with the MDL plaintiffs' attorneys in introducing Hartford voters to the MDL and directing them to the MDL attorneys. (SMF ¶ 13.) The Teamsters then orchestrated through agents and surrogates, including Welker, Lepore, Sullivan, Gardner, and Dizinno, to arrange for voters to meet during the critical period with MDL-plaintiffs-attorneys to receive (1) formal promises that they would "not be charged" for legal services, (2) the valuable benefit of those services, including lawsuits brought on their behalf, and (3) the enticement of money to be won from those lawsuits.

The valuable legal services arranged by the Teamsters indebted Hartford voters to favor the Union. This "something for nothing" scheme is the vice that destroys the laboratory

[22] The Board's analysis in *BHY Concrete Finishing, Inc.*,323 N.L.R.B. 505 (1997) should not control the disposition of this matter because it was issued before *Freund Baking*, which decision was acknowledged by the Board's later decision in *Superior Truss*.

conditions.[23] The Teamsters openly connected themselves to the MDL plaintiffs' attorneys, including the Liss-Riordan firm, through, among other things, campaign strategist Welker, their respective organizing/lawsuit websites (to which Welker "directed" voters), their prior coordination on contractor lawsuits against the Company, Teamster-organizing-agent Gardner, and lead Hartford organizer Dizinno, whom the Teamsters publicized and who testified to having "spearheaded" both the Teamsters' campaign and the Hartford voter lawsuits. (SMF ¶¶ 19-24.) A reasonable voter in these circumstances would conclude what the facts establish – the Teamsters and their partners worked hand-in-hand to give them a strategically-timed valuable benefit in connection with its election campaign, which was designed to, and in fact did, influence the outcome of the election.[24]

As a matter of law and fact, those efforts impermissibly influenced voters and they tainted the laboratory conditions and affected the election outcome. The vote as tallied was decided by 3 votes. (SMF ¶ 46.) Twice that number were voters who also are named plaintiffs in the Hartford voter lawsuits who were given written promises for free legal services and were beneficiaries of such services during the critical period. (SMF ¶ 30.) The material impact of the Teamster-orchestrated money for nothing vote-getting scheme is undeniable.

3. The Judge Erred By Prohibiting Relevant Evidence.

The Company was denied its due process rights to develop a full record when the Judge excluded relevant evidence and refused to compel the attendance of key witnesses and the production of important documents. At the hearing, the Judge acknowledged that the Company "is entitled to get a full record and question whoever – whomever knows about the situation and

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[23] Objectionable conduct, even if not performed by a party itself, will be attributed to a party in setting aside an election if the actor operated with the apparent authority of the party.

[24] The Connecticut lawsuits could have been prepared long before the critical period.

is involved in it." (Tr. 136 (ALJ).) The Judge improperly constrained the issue on Objection No. 1 as follows: "did the Union pay to cover for – pay for these lawsuits," and he made it clear that "anything short of that, I'm not going to allow any evidence on or testimony so let's move on." (Tr. 43 (ALJ); *see also* Tr. 90 (Judge stating, "I've limited [the evidence] to who paid the attorneys").)

Following that unduly narrow dictate, the Judge barred the Company from adducing testimonial and documentary evidence as to the persons involved, their activities, and the extent, nature, and timing of them. The Judge even sustained the Teamsters' objection to the Company's question to a voter about whether anyone told him how much money he would get from the lawsuit, and he barred the Company from questioning the Union about its use of the Hartford voter lawsuits in its Hartford organizing campaign. (Tr. 198 (ALJ.).) He did so, apparently only because the suits were formally filed shortly after the election — "Okay, since the lawsuit was filed after the election, I'll sustain . . . the objection." (Tr. 44-45 (ALJ).) The material fact, however, is that the immediate benefit of the free legal services indisputably was received by voters during the critical period. (SMF ¶ 21, 30-31.) On April 16 and 17, a few weeks before the election, six voters received written promises that they "would not be charged" for legal work on their lawsuits against the Company. (SMF ¶ 30.) The fact that the Teamsters and their partners waited until after the election to formally file the Hartford voter lawsuits so that the Teamsters could say they did so after the election is immaterial and in no way mitigates the critical period activities.

The Judge's rulings at the hearing and in his Decision ignore the Board's critical period jurisprudence and the fact that the Union arranged for free legal services for voters during the critical period "by and through its agents and others with whom it acted in concert". *See*

Objection No. 1. The Company reiterated this invocation of Board law regarding agency and attribution in the context of pre-election laboratory conditions at the hearing – to no avail:

> **Judge:** Even if [the Union and the plaintiffs' lawyers] are working in concert . . . I'm looking for more direct evidence, for example payments by the Union to the employees or to the attorneys.
>
> **Davis:** [W]ith all due respect, Your Honor . . . it's not limited to just payments.
>
> **Judge:** I disagree . . . let's move on. (Tr. 58-59.)

Under the Judge's did-the-party-pay construct, an employer (and/or a pro-employer employee), for example, could arrange with impunity for voters to receive free advice from a financial planning advisor, along with any resultant monetary gains, during the critical period. The Act does not countenance such a maneuver; it should not sanction the materially similar scheme undertaken by the Union here.

4. The Judge Erred By Prohibiting The Company From Compelling the Production of Testimony and Documents by Admitted Teamster Organizer and Liss-Riordan Firm Solicitor Gardner.

Before the hearing, the Company properly served subpoenas for testimony and documents upon those persons whom it suspected at the time were involved in the offering and providing of free legal services to voters during the critical period – both directly and indirectly. *See* Objection No. 1 (referring to the Teamsters and "**its agents and others with whom it acted in concert**") (emphasis added). (Tr. 11-13, 17-19.) One such person was Teamster surrogate William Gardner. (*See* Tr. 9 (Sonneborn); 19 (ALJ).

Initially, the Judge saw the obvious relevance of Mr. Gardner. Over the Union's objections, the Judge stated that he would allow "questions to Mr. Gardner regarding what if anything he said to the eligible voters prior to the election about [the Connecticut voter lawsuit]". (Tr. 19 (ALJ).) In response, counsel for Local 671 and for Gardner went so far as to propose that

others at voter meetings attended by Gardner could be proxy witnesses. The Judge noted, however, that he was there "to hear the evidence" and he instructed counsel as follows:

> [H]ave Mr. Gardner come here first thing in the morning and we'll make him the first witness. I think even if other witnesses were present when he spoke, if he comes and testifies to what he said, I think that would be more direct . . . I'd like to hear his testimony." (Tr. 21-22 (ALJ).)

As the hearing unfolded, additional evidence was adduced that further buttressed the relevance of Gardner as a witness:

- Teamsters' Strategist Welker and Teamsters' Organizer Sullivan admitted that the Teamsters enlisted Gardner to campaign on behalf of Local 671, and Gardner and Sullivan traveled and appeared together and spoke to Hartford voters at several Local 671 organizing meetings (SMF ¶ 15-17);

- The Teamsters posted a video-advertisement on the popular internet website "youtube.com" featuring Gardner promoting the Teamsters to contractors at other FedEx terminals (SMF ¶ 18);

- During the critical period, Gardner provided Local 671 organizer Lepore with Teamster FedEx organizing campaign material (SMF ¶ 18);[25];

- Gardner was the first to contact the attorneys who subsequently rendered free legal services to voters during the critical period – he told MDL plaintiffs' lawyer Cohen that he met voters at the Local 671 organizing meeting; that the voters were interested in "a lawsuit against FedEx;" and that he would be hearing from them; and (SMF ¶ 21);

- During the critical period, Gardner sent Lepore a copy of draft civil complaint against the Company, along with a message that he spoke with attorneys at the Liss-Riordan firm (whose contact information he provided) who wanted to speak to voters "interested in becoming a plaintiff for a C[onnecticut] class action." (SMF ¶ 20, 22 .) (Co. Ex. 3).)

Despite this evidence, the Judge inexplicably retreated from his initial position and ultimately barred Gardner's testimony and documents : "William Gardner, he is an employee at the other location and I would grant the petition to revoke that one, I don't see any relevance of that one." (Tr. 135 (ALJ).) The Judge even barred the Company from asking Teamster

[25] In the Objections proceeding, Gardner was provided legal representation by Teamsters Local 25 counsel. (SMF ¶ 16.)

witnesses whether the Teamsters paid Gardner for his organizing and other activities on their behalf. (Tr. 193 (ALJ).)

5. The Judge Erred by Limiting the Company's Right to Adduce Relevant Testimonial and Documentary Evidence From the Liss-Riordan Firm.

The Company also served a subpoena for testimony and documents upon Hartford voter lawsuit attorney Shannon Liss-Riordan and her firm. (Co. Ex. 10). The Company sought testimony and documents probative of the firm's and the Teamsters' involvement in the Hartford voter lawsuits, particularly the extent and value of the legal services rendered, who arranged and paid for them, the timing of the services, and the persons involved in meetings and discussions with voters during the critical period. (*Id.*; Tr. 84, 122.)

For all of the same reasons stated above, the Judge also improperly limited the subpoenas to oral testimony from Liss-Riordan firm attorney Cohen and to the subject of "who paid for the services" for the Hartford voter lawsuits. (Tr. 96; 108-109 (ALJ) (sustaining objection precluding the Company from examining the value of legal services rendered).) The hopelessly vague and document-free testimony by purported Gardner and Liss-Riordan witness proxies was no substitute. *See* SMF ¶¶ 15-17, 19-21. Based upon the evidence introduced at the hearing, Gardner and Liss Riordan were unquestionably key witnesses with relevant documents and testimony. *See id*. The Judge erred in excluding this evidence.

In sum, the Board's "principal duty in conducting a representation election is to 'ensure the fair and free choice of bargaining representatives by employees'" by accurately ascertaining employees' sentiment regarding representation and unionization. *Freund Baking Co.*, 165 F.3d 928, 931 (D.C. Cir. 1999) (quoting *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973). As both the Board and the courts have long recognized, "this goal cannot be achieved when either the employer or the union engages in campaign tactics that induce workers to cast their votes upon

grounds other than the advantages and disadvantages of union representation." *Freund*, 165 F.3d at 931. To this end, the Act bars "**both crude and subtle forms of vote-buying on the part of the union.**" *Id*. As alleged in Objection No. 1, the Teamsters, through agents, partners, and/or surrogates, arranged for voters to receive free legal services with a prospect for money and the promise of ongoing legal services – all during the critical period. This destroyed the laboratory conditions, and the election results must be set-aside.

B. OBJECTION 2: THE BOARD AGENT IMPROPERLY DISREGARDED THE COMPANY'S CHALLENGES TO THE BALLOTS OF CHIAPPA AND DIZINNO BASED UPON CHANGED CIRCUMSTANCES.

1. An Assertion Of "Changed Circumstances" Justifies A Challenge And Requires A Separation Of Ballots And Recourse To The Board's Challenged Ballot Procedure.

A party to an election has the right to challenge a voter's eligibility, including where the circumstances surrounding a voter's eligibility change between the time of an R-case hearing and the time of the election. When there are challenged ballots that cannot be cleared by the parties before the vote count, Board process requires a tally of the unchallenged ballots in the first instance to determine whether the challenges are outcome determinative. *NLRB Rules and Regulations*, §102.69(c) states that "**if the challenged ballots are sufficient in number to affect the results of the election**, the Regional Director **shall**, consistent with the provisions of section 102.69(d), **initiate an investigation, as required, of such objections and challenges**[.]") (emphasis added).

Board procedures defer resolution of unresolved challenged ballots until after the vote count. *See NLRB Casehandling Manual Representation Proceedings*, § 11338.6, Merit of Challenge Not to be Argued ("[a]rguments on the merits of a challenge **should not be permitted**") (emphasis added); Clearing Challenges (stating "[i]t is important that a challenge

clearance situation not be allowed to devolve into an **argument on the merits** or to delay the count unduly.") (emphasis added).

The Board's Casehandling Manual mandates as follows:

> In **all situations** where reasonable doubt exists concerning whether the prospective voter falls within an included or excluded category or whether changed circumstances have altered the voter's eligibility status, the challenged ballot procedure should be used.

NLRB Casehandling Manual Representation Proceedings, § 11338.7, Specific Exclusions and Inclusions in Decision (emphasis added); *NLRB Representation Case Handling Outline*, § 22-111, Challenges (challenges based on changed circumstances must be considered by the Regional Director); § 11340.3; *Dickerson-Chapman, Inc.*, 313 N.L.R.B. 907, 908 (1994) (quoting a previous Board Order in recognizing that changed circumstances regarding voter status can and should be raised through the challenge procedure).

The material parts of the Board's challenged ballot procedure are as follows: (1) prior to the ballot count, the parties are offered the opportunity to resolve challenges by consent; (2) the **un**challenged ballots are counted to determine whether challenged ballots are outcome determinative; and (3) where challenged ballots are outcome determinative, the Region secures the unopened challenged ballot envelopes until the challenges are resolved by administrative investigation and/or hearing. *See NLRB Casehandling Manual Representation Proceedings*, §§ 11338.1-11338.10, 11340.1-11340.11, 11344.1-11344.3. The challenged ballot procedures are specific and designed to "assure that [the Board's] role in the conduct of elections is not subject to question." *Paprikas Fono*, 273 N.L.R.B. 1326 (1984). Procedural deviation alone is a basis to set aside an election. *Id.* (setting aside an election where the "normal procedures for handling determinative challenges were not followed").

In short, once a challenge is accepted, its merit — if first proved to be outcome determinative – must be resolved through the Board's challenged ballot procedure. *See NLRB Casehandling Manual Representation Proceedings*, § 11338.7; *Dickerson-Chapman, supra*, 313 N.L.R.B. at 908. Accordingly, a party has an expectation that challenged ballot procedures will be strictly followed by the Region and the right to an opportunity of establishing the ineligible status of a voter via the challenged ballot procedure when it makes a "changed circumstances" basis to challenge ballots.

Here, before the election, Hodavance stated to the Board Agent that "the circumstances for [] two individuals had changed from the time of the end of the hearing to the time of the election and they were now in positions that would be ineligible to vote." (SMF ¶ 36; Decision, at 3.) The Board Agent responded by stating that he would "accept all of the challenges," which he did. (*Id.*)[26] Despite having accepted the Company's changed circumstances basis for two challenged ballots, the Board Agent indisputably neglected thereafter to follow the Board's process for clearing them. Instead, he acted on (1) mistaken "instructions from the Board" that the challenged ballots "should be opened" without regard for the offered and accepted changed circumstances basis for them and (2) a "hope" that the challenged ballots would not prove to be determinative. (SMF ¶ 36; Decision, 3.)

As established at the hearing, there were no such instructions – the Board Agent misinterpreted and/or misunderstood the Board's decision on the Company's Request for Review as directing him to open and count the challenged ballots of Chiappa and Dizinno irrespective of the fact that the Company offered and he accepted a "changed circumstances" basis for the

[26] The Judge properly credited the testimony presented by the Company with regard to the challenges made to the ballots of Chiappa and Dizinno. *See* Decision, at 4 (stating "I credit the testimony of Hodavance regarding his conversations with Board Agent Diaz.").

challenges. (SMF ¶ 38.)[27] As to the Board Agent's "hope," it was dashed when the ballots were tallied — the two additional challenges would have been outcome determinative. (SMF ¶¶42, 46.)

The Board Agent deprived the Company of its due process to prove the ineligibility of outcome determinative challenged voters. Had the Board Agent followed Board procedure, the challenged ballots would have been outcome determinative (*see* SMF ¶ 46), and the Region would have conducted an administrative investigation and/or hearing. *NLRB Casehandling Manual Representation Proceedings*, §11361.1. The Board Agent's error materially affected the outcome of the election. As noted at the hearing, "[t]his is a case of the toothpaste being out of the tube and it can't be put back in." (Tr. 210 (Davis).) As such, the Board Agent's error requires that the election be set aside.

2. The Judge Erred In Finding That The Company Failed To Carry its Burden Where The Board Agent Short-Circuited the Challenged Ballot Process.

Citing *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) and *Nurses United for Improved Patient Healthcare*, 338 N.L.R.B. 837 (2003), the Judge concluded that the Company "did not satisfy its burden by adequately establishing that there was a change of circumstances since the close of the hearing in the job responsibilities of Chiappa and Dizinno, and that the Region properly opened and counted their ballots." (Decision, at 4-5.)

In both cases cited by the Judge, however, the Board concluded that the challenging party failed to meet its burden **only after first having had the opportunity to do so in a hearing on the merits**. Ironically, this is the Company's salient point of Objection No. 2 – the Board

[27] The Judge acknowledged at the hearing that the Board Agent's claimed understanding of the Board's decision on the Request for Review was "incorrect," and then he preempted further examination on the point. (Tr. 252-253 (Diaz).)

Agent's conduct in opening and commingling properly offered and accepted challenged ballots before the count indisputably deprived the Company of that same due process – to have a hearing on the merits on the eligibility of these two voters. (SMF ¶¶ 36, 39, 44.) Notably, moreover, for no materially distinguishing reason the Board Agent followed the Board's challenge-ballot-clearing procedure as to the remaining two challenges. (SMF ¶ 45.) Instead of addressing the Board Agent's error, the Judge attempted to sidestep it by creating, post-hoc, an extraordinary requirement and then finding that the Company did not meet it.[28] This attempt is legally infirm.

Similarly flawed is the Judge's reliance on the testimony from voter Dizinno about his alleged current status. The Judge recognized the fact that the Objections Hearing was not the proper forum for litigating the issue of changed circumstances where the challenged ballots had already been opened, commingled and counted and where no challenged ballot procedure had previously taken place or was pending. (Tr. 211, 214 (ALJ).). Accordingly, he did not permit evidence on the matter. *Id.* The Judge, however, back-doored his own ruling in relying in his Decision upon testimony from Dizinno "that he was currently driving a route for the [Company] in Manchester, Connecticut, which would be a unit position" — testimony that the Judge credits on the merits of the eligibility issue. (Decision, at 5.) Also, this testimony is immaterial because

[28] The Region's insinuation, made for the first time at the hearing, that some additional post-challenge action was required on the part of the Company, which apparently was adopted by the Judge, is contrary to the challenged ballot procedure, which (1) permits parties to challenge ballots, (2) requires a tally of the non-challenged ballots, and (3) provides a means to resolve outcome determinative challenges through a post-election administrative investigation and/or hearing. See NLRB Rules and Regulations, §102.69(c). The Board Agent here indisputably short-circuited this mandatory process after step (1). Also, the Region never made any request for additional information, and the Board Agent's representations indicated in any event that doing so would have been futile, as the Board itself had allegedly directed the Region to open the challenged ballots.

Dizinno's status at the time of the election is what matters, not two months after the fact.[29] Significantly, moreover, the Judge's conclusion that "driving a route" "would be a unit position" is incorrect in any event because the unit description includes only "contract drivers" and excludes "drivers . . . hired by contract drivers" and "multiple route contract drivers[,]" both of which "drive a route." (Decision, at 1.) Accordingly, "driving a route" is not *ipso facto* a unit position. In this vein, the Judge apparently made the same error as the Board Agent when he opened the challenged ballots. This is yet another reason why the Company's exceptions to the Judge's Decision should be sustained.

In sum, the evidence shows that the Company offered, and the Board Agent accepted, a changed circumstances basis for the challenged ballots of Chiappa and Dizinno. The Board-mandated process establishes that the proper time for evidence and argument on challenges is after it has been determined that the challenged ballots are outcome determinative. Here, the Board Agent opened, commingled and then counted challenged ballots without having first determined whether they would be outcome determinative. The Board Agent short-circuited established Board process and deprived the Company of its rightful opportunity and due process to prove the merit of the challenged ballots. The election procedure was materially tainted. The results produced must be set aside.

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[29] *See Nichols House Nursing Home*, 332 N.L.R.B. 1428, 1429 (2000) (stating "[t]he Board has consistently held that an employee's actual status as of the eligibility date and the date of election governs that employee's eligibility to vote.") (citations omitted).

IV. CONCLUSION

Based on the foregoing, the Company's exceptions should be granted and the election results should be set aside and a new election ordered.

Respectfully submitted,

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DATED: August 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of FedEx Home Delivery, A Separating Operating Division of FedEx Ground Package System, Inc.'s Exceptions to the Decision and Recommended Order of the Administrative Law Judge and its Brief in Support thereof, which were electronically filed today using the Board's electronic filing system, were served as indicated below on:

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this 16th day of August, 2007, with prior telephone notification of the electronic filing today to the same.

/s/ Richard J. DeFortuna
Richard J. DeFortuna