

April 6, 2009

Electronically

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: Goffstown Truck Center, Inc. and
Chauffeurs, Teamsters and Helpers Local 633
Case No. 1-RC-22272

Dear Mr. Heltzer:

Attached please find Chauffeurs, Teamsters And Helpers Local 633's Answering Brief to the Employer's Exceptions to the Hearing Officer's Decision and Recommendation on Objections and Motion to Reopen the Record.

Thank you.

Sincerely yours,

/s/ Gabriel O. Dumont, Jr.
Gabriel O. Dumont, Jr.

cc: Rosemary Pye, Regional Director
Peter A. Janus, Esq.

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

In the Matter of

GOFFSTOWN TRUCK CENTER, INC.

Employer

and

CASE 1-RC-22272

CHAUFFEURS, TEAMSTERS AND HELPERS

LOCAL 633, a/w IBT

Petitioner

PETITIONER'S ANSWERING BRIEF

On December 12, 2008, an election was held pursuant to a Petition filed by Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire ("Local 633" or "Union") among certain employees of Goffstown Truck Center, Inc. ("Employer"). The stipulated bargaining unit was as follows:

All full time and regular part time school bus drivers employed by the Employer at its Mammoth Road, Londonderry, NH, facility, but excluding all other employees, guards and supervisors as defined in the Act.

Prior to the commencement of the election, discussions occurred among authorized representatives of the Union, the Employer and Region 1 concerning whether to postpone the scheduled election because of inclement weather. These representatives agreed that the election should and would proceed. *See* Tr. 98-99 & 104.

Out of 53 eligible voters,¹ 45 votes were cast, with 26 of those votes being registered in favor of representation by Local 633 and 19 votes being cast in opposition to representation by

¹ The Tally of Ballots states that the "[a]pproximate number of eligible voters" was 55. As found by the Hearing Officer and discussed *infra*, the Excelsior List, in fact, contained only 54 names. In addition, as discussed further below, at least one of the individuals named on the Excelsior List was not a full time or regular part time school bus drivers and, as such, was not eligible to vote in the election and would have had his vote challenged by the Union had he appeared to vote on December 12.

Local 633. Despite the fact that its authorized representative had approved going forward with the election, the Employer, on December 16, 2008, filed Objections to the Conduct of the Election. The essence of the Employer's Objections to the Conduct of the Election is set forth in paragraph 6 of its Objections, where the Employer states that "there was a determinative number of eligible voters who were denied an adequate opportunity to vote due to the severe weather conditions in existence on December 12, 2008."²

A hearing on the Employer's objections was held on February 2 and 3, 2009, before Hearing Officer Jessica L. Foley. Subsequent to the close of the hearing, the parties filed with the Region post-hearing memoranda. The Employer's memorandum was submitted on February 11, 2009. On March 6, 2009, Hearing Officer Foley issued her Report and Recommendation on Objections.

Included in that Report and Recommendation were the following findings:

1. "[T]hat there were actually 54 eligible voters and that nine employees on that list did not vote in the election." Report and Recommendation at page 6.
2. That "the following four employees did not vote because of the weather – Cheryl Cashin, Cassie Grant, Tammy Jacobs and Tanya Fortin..." *Id.* at page 13.
3. That contrary to the Union's argument, "a fifth employee, Joseph LaFrance, was unable to vote in the election because of the severe weather." *Id.*
4. "[T]hat four employees failed to vote for reasons unrelated to the weather – Shannon Rodham, Kristy Leach, Michael Roberts and Lisa Ciano." *Id.*
5. That "[w]ithout ruling on Michael Roberts' eligibility to vote in the election, I find that he was not precluded from voting in the election on December 12 because of the weather but because of his employment and responsibilities as a full-time firefighter for the Town of Londonderry, New Hampshire." *Id.* at pages 13-14.

² During the hearing, the Employer attempted to raise an additional objection that was not stated or even suggested by its Objections to the Conduct of the Election. Specifically, the Employer sought to argue that phone outages on December 12, 2008 denied it a last opportunity to press its anti-union campaign via telephone. As discussed *infra*, the Hearing Officer correctly excluded the proffered evidence on this untimely and unnoticed objection.

In addition, the Hearing Officer, in her Report and Recommendation, rejected the Employer's argument that she should ignore the evidence confirming the specific reasons why certain eligible voters did not vote and overturn the election based solely on the fact that there was severe weather on the day of the election and a determinative number of eligible voters did not vote. In this regard, the Hearing Officer stated as follows:

The Employer contends it is not obligated to show that at least seven of the non-voting employees expressly were prevented from voting because of the storm conditions. I disagree, particularly if the Union can show, as it did here, that some of those employees did not vote for reasons unrelated to the weather. If there were no testimony or evidence from those individuals who did not vote, I may have ordered a new election, under the standard set forth in *Baker Victory Services* and *V.I.P. Limousine*, as a determinative number did not vote and the weather conditions were undeniably severe. However, in this case we know the reason why employees did not vote, and the evidence on the record is that, at most, only five eligible voters did not vote for reasons related to the weather, resulting in a non-determinative number of employees who did not vote because of the severe weather. *Id.* at pages 12-13.

Finally, the Hearing Officer, in her Report and Recommendation concluded that, "despite the Employer's contention, 'by these and other acts...' is an insufficient objectionable foundation on which to expand" the objections stated in the Employer's December 17th filing; and that, in any case, "the Region holding the election on the agreed upon date, at the agreed upon time, thereby prohibiting the Employer from completing its campaign" was not "a viable objection and grounds for setting aside the election..." *Id.* at page 15.

On March 30, 2009, the Employer filed its Exceptions to Hearing Officer's Report and Recommendation on Objections and Motion to Reopen the Record. In its Motion to Reopen the Record, purportedly filed "in accordance with provisions of Section 102.48(d)(1) of the Board's Rules and Regulations,"³ the Employer seeks to introduce evidence that was unquestionably available to it at the time of the hearing on objections.⁴

³ Section 102.48(d)(1) is inapplicable to the instant proceeding. The Employer's motion should have been filed pursuant to Section 102.65(e)(1) which is made applicable to the instant matter pursuant to 102.69(f).

Its Exceptions include overlapping challenges to certain of the findings and conclusions of the Hearing Officer. These challenges can be summarized as follows:

1. That the Hearing Officer erred in concluding that the misplaced Excelsior List contained the names of 54, rather than 55, employees;
2. That the Hearing Officer erred in considering and crediting the evidence concerning the actual reasons why individual employees did not vote in the scheduled election;
3. That the Hearing Officer erred in finding that Michael Roberts was precluded from voting because of his full-time employment as a Town of Londonderry firefighter;
4. That the Hearing Officer erred in crediting the testimony of employee Lisa Ciano that her decision not to vote had nothing to do with the weather; and
5. That the Hearing Officer erred in rejecting the Employer's supplemental objection.

As set out below, the Employer's Motion to Reopen the Record should be denied and its Exceptions, in all respects, should be rejected.

ANALYSIS **Motion to Reopen the Record**

Through its Motion to Reopen the Record, the Employer seeks to introduce evidence that it alleges would support its contention that the misplaced Excelsior List, in fact, contained the names of 55, rather than 54, employees. The evidence purports to be email correspondence reflecting communications between Region 1 and Michael Kennedy concerning "an updated Excelsior List." Proposed Employer Exhibit 13. During the first day of the 2-day hearing on the Employer's objections, Michael Kennedy testified; he was questioned specifically regarding any communications between Kennedy and Region 1 representatives concerning changes to the original Excelsior List; and he unequivocally testified that he had no communications with

⁴ As noted *supra*, the Employer filed a post-hearing memorandum on February 11, 2009, but failed to include with that filing its motion to reopen the record.

Region 1 representatives concerning additions or subtractions to the original Excelsior List. *See* Tr. 84-85.

In accordance with Section 102.65(e)(1) of the Board’s Rules and Regulations, “[n]o motion ... to reopen the record will be entertained by the Board ... with respect to any matter which could have been but was not raised pursuant to any other section of these rules...”

Clearly, the Employer had the opportunity to introduce its proposed exhibits at the February 2, 2009 hearing but it failed to do so. Additionally, the hearing was reconvened on February 3 and, during the reconvened hearing, Mr. Kennedy again testified. *See* Tr. 119 *et seq.* Accordingly, the Employer had two opportunities to present the evidence that it now seeks to introduce via its much belated Motion to Reopen the Record.

Furthermore, Section 102.65(e)(1) of the Rules and Regulations requires that the Employer state in support of its motion “why [the proffered evidence] was not presented previously.” In this regard, in its motion, the Employer merely asserts that “[a]t the time of the February 2-3, 2009 hearing, Michael Kennedy had forgotten about this correspondence between himself and Umile.” If alleged faulty memory of a witness who is called as a witness and who testifies on the very matter to which the motion to reopen addresses is an adequate reason for reopening a record, then a hearing can never be considered truly closed.

Accordingly, the Union respectfully requests that the Employer’s Motion to Reopen the Record be denied.⁵

⁵ As discussed *infra*, the Hearing Officer’s ultimate conclusion would still be correct even if the actual number of employees listed on the Excelsior List had been 55.

Exceptions

The Hearing Officer did not err in concluding that the misplaced Excelsior List contained the names of 54, rather than 55, employees.

The Region and the parties were confronted with an unusual, if not unprecedented, challenge of having to determine the number of individuals identified on the Excelsior List and the identity of the employees who did not vote in the December 12th election, because the Excelsior List that was used by the Region to track voter participation was lost. However, consistent with the findings of the Hearing Officer, the record contains evidence from which it can be conclusively established that there were 54 names on the Excelsior List that was used on December 12.⁶

In this regard, Michael Kennedy, who is the Chief Operating Officer, Atlantic Region, for Student Transportation of America, Inc. (parent of Goffstown Truck Center), testified that the original Excelsior List was prepared and submitted to the Region under his direction. Tr. 84-85. Mr. Kennedy testified further that he did not approve, authorize or learn of any changes to the Excelsior List, as originally prepared and submitted to the Region at his direction. Tr. 85. Petitioner Exhibit 1 is the Excelsior List and Fax transmittal page that was forwarded by the Region to the Local 633. That document contains 54 names. Given the testimony of Mr. Kennedy, there is no basis to infer that the Excelsior List used for the election conducted on December 12 had a number of names other than 54.⁷

⁶ The Tally of Ballots (Region Exhibit 5) states that the “[a]pproximate” number of eligible voters was 55 – a number that is obviously close to the number of names on the two copies of the Excelsior List that are in evidence. *See* Region Exhibit 4 & Petitioner Exhibit 1.

⁷ Certainly, there are instances where the initial Excelsior Lists, as furnished to the Region by employers, are amended prior to the actual elections. However, such changes cannot and do not occur without the knowledge of the employers.

Accordingly, the record contains ample evidence to support the Hearing Officer's finding that "there were actually 54 eligible voters and that nine employees on that list did not vote in the election." Report and Recommendation at page 6.⁸

The Hearing Officer did not err in considering and crediting the evidence concerning the actual reasons why individual employees did not vote in the scheduled election.

It is well-settled that the party that raises the objections to the conduct of the election has the burden of proof on all relevant issues. *See, e.g., Safeway, Inc.*, 338 NLRB 525 (2002); *St. Vincent Hospital, LLC.*, 344 NLRB 586, 587 (2005) *citing NLRB v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). In the instant case, the Employer, in its Exceptions, argues that it could satisfy its burden of proof by merely establishing that there was severe weather on the day of the scheduled election and that a determinative number of eligible voters did not vote. The Employer seemingly argues further that it was error for the Hearing Officer to consider evidence that conclusively established that certain of the eligible voters' decisions not to vote were unrelated to and unaffected by the weather. In effect, the Employer is arguing that while it was permissible for the Employer to offer evidence, either through direct testimony (*see, e.g., Tr. 40 et seq.*) or exhibits (*see, e.g., Employer Exhibit 12*), concerning instances in which a limited number of employees did not vote because of the weather, it was error for the Hearing Officer to consider analogous testimony establishing that the weather did not affect voter conduct in certain instances.

In arguing for a new election, it is not enough for the Employer to establish that there was severe weather on December 12, 2008 (which there was), and that a determinative number of eligible voters did not vote in the election (which there were). Rather, the Employer must

⁸ While the Employer alleges in its Motion to Reopen the Record that a revised list was transmitted to the Region, the Region's file does not contain a copy of the proffered list nor does it apparently have any record of transmitting such a list to Local 633. *See Tr. 52-53.*

establish that the severe weather was the cause of the diminished voter participation. For example, in *Baker Victory Services, Inc.*, 331 NLRB 1068 (2000), the Board, in considering the impact of the record evidence concerning the obligation of eligible voters to report to work despite the weather, stated as follows:

Since we cannot discern with any degree of certainty the extent to which the difference in reporting obligations may have affected voter turnout, however, we do not accord controlling weight to this particular piece of evidence in assessing the impact of the weather on the election. Nevertheless, we do believe that the employees' obligation to report to work merits consideration as one among several factors in the analysis of the overall effect of the weather conditions on voter participation. 331 NLRB at 1071.

Similarly, in *V.I.P. Limousine*, 274 NLRB 641 (1985), the Board, in ordering a new election, relied on statements from eleven eligible voters that the employer had attached to its objection "which allege[d], in essence, that the 'blizzard' conditions caused many of them to be trapped in traffic and thus prevented them from returning to the Employer's facility to vote in the election." 274 NLRB at 641.⁹

In the instant case, the Employer, unlike the employer in *V.I.P. Limousine*, was only able to produce or elicit evidence, via exhibits or testimony, that, at best, established that five eligible voters (out of a total of 54) were denied an opportunity to vote because of the severe weather, *i.e.* Cheryl Cashin (*see* Region Exhibit 3), Tammy Jacobs (*see* Region Exhibit 2), Tanya Fortin (*see* Employer Exhibit 12),¹⁰ Cassie Grant (*see* Tr. 115)¹¹ and Joseph LaFrance (*see* Tr. 134-136).¹²

⁹ In *V.I.P. Limousine*, there had been approximately 89 eligible voters and 37 votes for the petitioner and 30 against.

¹⁰ Ms. Fortin apparently was hired on October 20, 2008 and, according to Mr. Kennedy, was laid-off as part of the January 2, 2009 reduction in force. *See* Tr. 125, 140 & 143. Additionally, Mr. Kennedy testified that Ms. Fortin had worked previously for the Employer but was unsure of when or the circumstances surrounding her leaving the Employer. Tr. 141-143. According to the Employer's payroll records (Petitioner Exh. 3), Ms. Fortin had worked a total of 10 hours prior to the eligibility cut-off date. Given that Ms. Fortin had previously worked and left the employ of the Employer and given further that Ms. Fortin was laid-off shortly after the election, a strong argument can be made that Ms. Fortin was not eligible to vote under the standards applicable to new hires. *See, e.g., New York Display & Dye Cutting Corp.*, 341 NLRB 930, 930-31 (2004).

¹¹ In light of the fact that the Employer clearly made a concerted effort to obtain statements from drivers that would support the Employer's objection, the absence of evidence that active drivers other than Tammy Jacobs, Cheryl

Local 633, on the other hand, was able to establish, via testimony or stipulation, that the decisions not to vote of three eligible voters were unrelated to the weather, *i.e.* Shannon Rodman (*see* Tr. 32), Kristy Leach (*see* Tr. 63) and Lisa Ciano (*see* Tr. 55-56), and that a fourth casual employee, Michael Roberts, did not vote because of the requirements of his full-time job on the date of the election.¹³ *See, e.g., Cast North America (Trucking) LTD*, 325 NLRB 980, 985 (1998) (election not set aside where employees were prevented from voting by personal activities away from the polling place that were outside their normal scope of employment); *Versail Mfg.*, 212 NLRB 592 (1974) (same).

In cases involving objections based on the denial of the opportunity to vote, the Board routinely considers not only whether certain eligible voters were improperly denied an opportunity to vote by certain conduct or circumstances but also whether the number of eligible voters denied that opportunity by such conduct or circumstances could have been determinative. *See, e.g., Cast North America (Trucking) LTD, supra.* There is no basis for arguing that this type of analysis does not or should not apply to cases involving objections based on allegations of severe weather.

In sum, what the Employer herein is asking the Board to do is to ignore undisputed evidence that establishes that the outcome of the election could not have been affected by the

Cashin, Cassie Grant and Tanya Fortin did not vote because of the weather on December 12, clearly compelled the conclusion that there was not “a determinative number of eligible voters who were denied an adequate opportunity to vote due to the severe weather conditions in existence on December 12, 2008.”

¹² It is undisputed that Mr. LaFrance did not vote because his medical condition did not permit him to drive. Thus, while the weather may have affected his ability to secure a ride, it was a personal matter outside the normal scope of his employment that resulted in his failure to vote. As such, the Hearing Officer was not correct when she included Mr. LaFrance among the five employees who did not vote because of the inclement weather.

¹³ As discussed *infra*, Michael Roberts also clearly was not an eligible voter.

severe weather. Local 633 respectfully suggests that such a result would be wholly contrary to the purposes of the Act.¹⁴

The Hearing Officer did not err in finding that Michael Roberts was precluded from voting because of his full-time employment as a Town of Londonderry firefighter.

Michael Roberts appeared and testified that he didn't vote in the December 12th election. Tr. 15. Mr. Roberts, who is a full-time firefighter for the Town of Londonderry, is a casual driver who only works a very limited number of times as a driver for extracurricular activities. Tr. 21-23, 29 & 130. To be eligible to vote in the election, Mr. Roberts would have needed to work an average of 4 hours per week in the quarter prior to the eligibility date, *i.e.* October 31, 2008. *See, e.g., Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). According to the Employer's payroll records (Petitioner Exh. 2), Mr. Roberts worked less than 35 hours during the last quarter prior to October 31, 2008; and, as such, was not eligible to vote in the election.¹⁵

In addition, as noted above, Mr. Roberts is a full-time firefighter. Tr. 21 & Region Exh. 1. On December 12, Mr. Roberts was required to report to duty as a result of the storm. Tr. 15. In his email to Michael Kennedy (Region Exh. 1), Mr. Roberts states that "[b]ecause of my full time job, a firefighter for the town of Londonderry, I was unable to vote on the 12th of December." Thus, while there certainly was a relationship between the presence of severe weather and the reason why Mr. Roberts did not vote, Mr. Roberts, admittedly, did not vote because of the requirements of his full-time job and not because of the severe weather. *Cf. Cast North America (Trucking) LTD, supra* (election not set aside where employees were prevented

¹⁴ Even if it is assumed that there were 55 names on the Excelsior List used by the Region and, assumed further that the additional employee did not vote because of the weather, that would give the Employer only 6 potential voters who did not vote because of the weather – not a sufficient number to have affected the outcome of the election.

¹⁵ Under *Baker Victory Services*, an objecting party must establish that "eligible voters" were denied a reasonable opportunity to vote because of severe weather conditions. As such, it was clearly appropriate for the Union to establish that Mr. Roberts had not been eligible to vote and, therefore, the effects of the weather and his full-time employment status on his inability to vote in the scheduled election were not relevant.

from voting by personal activities away from the polling place that were outside their normal scope of employment); *Versail Mfg., supra* (same).

The Hearing Officer did not err in crediting the testimony of employee Lisa Ciano that her decision not to vote had nothing to do with the weather.

There is no basis for attacking Ms. Ciano's credibility. Her testimony, when read as a whole, is not inconsistent and certainly is believable. Ms. Ciano had been in a work-related accident, had lost her bus driving license and did not expect to get her license reinstated. According to Ms. Ciano, she had not intended to vote because "she was not really going to be part of the outcome." Tr. 60. The Employer offered no evidence to undermine these facts and her plausible explanation of how these facts influenced her decision not to vote.

The Hearing Officer did not err in rejecting the Employer's supplemental objection.

The Employer, during the hearing, attempted to raise an additional objection that was not contained in its Objections to the Conduct of the Election. Specifically, the Employer sought to argue that phone outages on December 12, 2008 denied the Employer a final opportunity to press its anti-union campaign. In support of its argument that it should have been allowed to present evidence concerning this additional objection, the Employer cited the following language from its Objections to the Conduct of the Election: "By these and other acts in the conduct of the election, eligible voters were denied an adequate and reasonable opportunity to vote, thereby prejudicially affecting the results of the election held on December 12, 2008, in the above-captioned matter."

In *Factor Sales, Inc.*, 347 NLRB No. 66 (2006), the Board stated as follows regarding the required specificity for objections:

We agree that the Employer was denied due process because we find that the wording of Objection 7 failed to provide the "meaningful notice . . . and . . . full and fair opportunity to litigate" that are the fundamental requirements of procedural due process. *Lamar*

Advertising of Hartford, 343 NLRB No. 40, slip op. at 5 (2004). To be “meaningful,” the notice must provide a party with a “clear statement” of the accusation against it. *Id.* “It is axiomatic that a [party] cannot fully and fairly litigate a matter unless it knows what the accusation is.” *Champion International Corp.*, 339 NLRB 672, 673 (2003).

In the instant case, the Hearing Officer clearly was correct in ruling that the Employer’s Objections to the Conduct of the Election did not contain the requisite clear statement of an objection concerning the impact of the phone outage on the ability of the Employer to continue its anti-union campaign right up to the moment of the election.

CONCLUSION

For the reasons set out in detail above, Local 633 respectfully requests that this Honorable Board deny the Employer’s Motion to Reopen the Record and to reject, in all respects, the Employer’s Exceptions to the Hearing Officer’s Report and Recommendation.

For the Petitioner,
Chauffeurs, Teamsters and Helpers Local 633,
By its Attorney,

/s/ Gabriel O. Dumont, Jr.
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CERTIFICATE OF SERVICE

I, Gabriel O. Dumont, Jr., attorney for the Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire, hereby certify that this document, filed through the ECF System, will be sent electronically this day to Peter A. Janus, Esq., Counsel for the Respondent, Goffstown Truck Center, Inc., at pjanus@siegelconnor.com and Regional Director Rosemary Pye at Rosemary.pye@nrb.gov.

Signed under oath on April 6, 2009.

/s/ Gabriel O. Dumont, Jr.
Gabriel O. Dumont, Jr.