

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DISTRICT OF COLUMBIA

AMERICAN RED CROSS,)	
CAROLINAS BLOOD SERVICES REGION,)	
)	Case No. 11-RC-6732
Employer,)	
and)	
)	
TEAMSTERS LOCAL UNION NO. 71)	
a/w INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS,)	
Petitioner.)	

**TEAMSTERS LOCAL UNION NO. 71 ANSWERING BRIEF IN SUPPORT OF
ALJ RECOMMENDATIONS AND IN OPPOSITION TO EMPLOYER
EXCEPTIONS ON OBJECTIONS TO ELECTION**

Petitioner Teamsters Local Union No. 71, affiliated with the International Brotherhood of Teamsters, presents this Answering Brief, pursuant to 29 C.F.R. Sections 102.69 and 102.114(i), supporting the recommendations of the Administrative Law Judge¹ that a certification of representative be issued to Teamsters Local Union No. 71 in this case. ALJD, page 10, lines 35 to 41.

Because the Employer does not except to the ALJ’s substantive determination of the ineligibility of challenged voter Faye Long, and does not except to the Regional Director’s determination that the remaining challenged voter’s vote is non-determinative, the Employer’s objections to Board agent conduct in the handling of the two challenged

¹ The July 22, 2010 Tally of Ballots shows 68 votes cast for Petitioner Teamsters Local Union # 71, with 66 votes cast against Petitioner and the challenged ballots of Long and Baza. The September 21, 2010 Decision on Challenges and Objections was issued by the Honorable Joel P. Biblowitz, Administrative law Judge, herein after cited as “ALJD at page __, line__”, after a hearing on August 18, 2010 convened by the Regional Director’s Second Supplemental Decision on Challenged Ballots and Objection, Order Directing Hearing and Notice of Hearing issued August 11, 2010, Board Exhibit 1(c). The Employer’s Exceptions and Brief was filed October 5, 2010.

ballots during the July 22, 2010 election is not material to the outcome of the election and the ALJ's recommendation that Employer's objections be overruled should be adopted. Watkins Construction Co., 332 NLRB 828 (2000) (procedural irregularities with regard to challenged ballots are only material if the ballots are cast by eligible voters and would have affected the results). See, also, J.C. Brock Corp., 318 NLRB 403 (1995).

The Employer's four exceptions only seek review of the ALJ's recommendations relating to the Employer objection and an employee-filed objection regarding Board Agent conduct in processing and handling two of the seven challenged ballots in the election concluded by tally delivered on July 22, 2010 in the above-referenced case. See, Exception No. 1, Exception No. 2, second Exception No. 2 and Exception No. 4 of American Red Cross submitted October 5, 2010. There are no exceptions taken to the ALJ's findings and recommendations regarding the substantive ineligibility of Brenda Faye Long, one of the voters whose ballot was challenged.² Compare Employer Exceptions referencing only ALJD 10:25-30, ALJD 9:46-48 and ALJD 9:1-29, and ALJ's findings and conclusions regarding the ineligibility of the challenged voter of Faye Long and the non-determinative status of challenged voter Ruth Baza at ALJD page 2, line 25 through page 6, line 3 and page 7, line 50 through page 8, line 52.

Therefore, the ALJ's findings and recommendation (ALJD page 8 lines 1 through 39) that the challenge to the ballot of Ms. Long be sustained, because this employee exclusively performs the work of scheduler found by the Regional Director's June 25,

² The Employer's supporting brief provides no exceptions, analysis or reference to the challenges or the substantive voter eligibility issues. A passing reference in the very last sentence of the Conclusion at page 14 of the Employer's brief in support of exceptions that "[a]lternatively, if a second election is not ordered, the Red Cross requests that the vote of its employee Brenda Faye Long be opened and counted along with the vote of Ruth Baza" is insufficient to preserve any exceptions to the ALJ's recommendations on eligibility and determinative status of the challenged voters.

2010 Decision and Direction of Election to lack a community of interest with the appropriate unit in this case, should be adopted *pro forma* by the Board. See, Delta Diversified Enterprises, Inc., 314 NLRB 946, footnote 2 (1994)(Employer did not except to hearing officer's substantive disposition of challenged ballots). Further, the Board should adopt *pro forma* the recommendation of the ALJ, based upon the direction of the Regional Director in the August 11, 2010 Second Supplemental Decision and Order Directing Hearing, at page 4, that the ballot of challenged voter Ruth Baza is not determinative in this election and should remain unopened and uncounted. See, ALJD page 8, lines, 38 to 41, page 8, lines 50 to 52 and page 10, lines 38 to 39 ("If my finding of Long's ineligibility is upheld, there would be no reason to open and count Baza's ballot").

The recommended findings and recommended conclusions of the Administrative Law Judge, ALJD at pages 9 and 10, confirm that the record evidence does not support the matters raised by the Employer's Objection No. 1 or the unalleged objection filed by an employee and these objections should be overruled in their entirety. At page 5 of its brief in support of exceptions, the Employer raises for the first time a different objection to Board agent conduct relating to the custody of the ballot box, citing Section 11324 of the Casehandling Manual. This argument should also be rejected as immaterial to this proceeding, and in any event unsupported by the record. The burden is on the Employer to present more than speculation in support of these types of objections. Elizabethtown Gas Co. v. NLRB, 212 F.3d 257, 262-263 (4th Cir. 2000)(the party seeking to overturn the election bears a heavy burden and must prove by specific evidence not only that improprieties occurred, but also that they prevented a fair election).

THE EMPLOYER’S OPERATIONS AND THE BARGAINING UNIT

The Regional Director’s Decision and Direction of Election (“DD&E”) issued June 25, 2010, at pages 4 through 6, summarizes the nature of the employment and the work of the bargaining unit³. The following paragraphs recount those findings.

The Employer, American Red Cross, Carolinas Blood Services Region, is a member of the Southeast Division of the American Red Cross, which division includes the states of North Carolina, South Carolina, Georgia and Alabama. The Employer is also a part of the Biomedical Services Division of the American Red Cross with the Charlotte location being the regional headquarters for the Carolinas Blood Services Region. It is the function of the Employer to collect and distribute blood products and provide blood treatment services throughout North Carolina and a few counties in Georgia, South Carolina, and Tennessee. The Employer maintains five service areas in its region which include: Charlotte, Asheville, Winston-Salem, Durham, and Wilmington, North Carolina.

There is a collection staff at each of these locations who collect blood through bloodmobile drives and at fixed sites and return it to the locations for distribution. The collection staff reports to their assigned team supervisor, who in turn, reports to the

³ The Regional Director determined that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

“All full time and regular part-time collection specialists I and II, collection technicians I and II, mobile unit assistants I, II, and III, mobile unit supply clerk, and mobile unit technician, for the blood collections operations department of the Charlotte, North Carolina, service area, of the Employer, excluding nurses, medical technologists, administrative assistants II and III, autologous directed services coordinator, compliance specialist II, mobile unit assistant specialist, training specialist, assistant team supervisor, collection manager, collection operations supervisor, compliance manager, mobile unit supervisor, scheduling supervisor, scheduler, team supervisors, office clerical employees, and professional employees and supervisors as defined by the Act”. DD&E at page 22.

collection operations supervisors. The collection operations supervisors report to the collections managers who supervise the entire blood collection operations in a particular service area. The collections managers report to the collection director who reports directly to the CEO of the Carolinas Blood Services Region.

The Charlotte service area of the Employer, covering the employees identified in the petition, includes employees working from two Charlotte facilities: (1) St. Vardell Street, referred to in the record as the Clanton Road facility, which also is where the administrative offices for the Charlotte service area are located; and (2) a fixed-site donation facility at 2425 Park Road. A second fixed-site donation facility, which appears not to be regularly staffed with employees, is also located in the neighboring community of Huntersville, North Carolina. The Park Road facility also houses the regional administrative offices of the Employer, the HLA lab and one of two regional reference laboratories.

Besides the two fixed-site donation locations for the Charlotte service area, the Employer also conducts blood collection operations from mobile units originating from both its Park Road and Clanton Road facilities. The mobile blood collection process typically begins with employees in the donor resource department contacting churches, schools, and other organizations to schedule blood drives. After the donor resources department schedules a blood drive, the scheduler assigns blood collection staff to specific drives to collect blood. The blood collection staff then goes to the location to conduct the blood drive. The Charlotte service area employees typically operate 6 to 8 blood drives per day; the majority of blood collected by the Employer is through these efforts of its mobile units. Donors may donate whole blood by phlebotomy or may donate

blood components by apheresis. Collection employees at the Park Road location are generally responsible for the apheresis operation since it requires the use of special equipment, which involves collecting blood from the donor, harvesting particular blood components and returning the blood to the donor.

THE ALJ'S RECOMMENDATION TO SUSTAIN THE CHALLENGE TO THE ELIGIBILITY OF FAYE LONG AND TO ADOPT THE REGIONAL DIRECTOR'S FINDING THAT THE CHALLENGED VOTE OF RUTH BAZA IS NOT DETERMINATIVE SHOULD BE ADOPTED BY THE BOARD

The findings and recommendation of the Administrative Law Judge (ALJD page 8 lines 1 through 39) that the challenge to the ballot of Ms. Long be sustained, because this employee exclusively performs the work of scheduler found by the Regional Director's June 25, 2010 Decision and Direction of Election to lack a community of interest with the appropriate unit in this case, should be adopted *pro forma* by the Board. See, Delta Diversified Enterprises, Inc., supra, 314 NLRB at 946, footnote 2 (1994)(Employer did not except to hearing officer's substantive disposition of challenged ballots).

Neither the Employer's Exceptions or the Employer's brief in support of exceptions make any argument that challenges the findings of the Administrative Law Judge that the record testimony of witnesses for both the Petitioner and the Employer "... clearly establishes that Long has not performed blood collection work as a collection specialist for, at least, fourteen months. Rather during that period, she has worked exclusively as a scheduler, or a retention scheduler." ALJD page 8, lines 1 through 4. The undisputed record supports the ALJ finding that "the work performed by Long is totally different from the work performed by unit employees" including different tasks, different supervision, different working conditions and minimal interaction related to the

blood collection work of the bargaining unit. ALJD page 8, lines 9 through 26. The ALJ's uncontested finding that Long does not share a community of interest with the bargaining unit, relying upon the unchallenged findings and determination of the Regional Director's June 25, 2010 Decision and Direction of Election, conclusively resolves this dispute as to the certification of representative in this case. ALJD page 8, lines 25 to 39 ("These findings apply to Long's work as well, and I therefore recommend that the petitioner's challenge to the ballot of Long be sustained".)

Further, the Board should adopt *pro forma* the recommendation of the ALJ, based upon the direction of the Regional Director in the August 11, 2010 Second Supplemental Decision and Order Directing Hearing, Board Exhibit 1(c) at page 4, that the ballot of challenged voter Ruth Baza is not determinative in this election and should remain unopened and uncounted. See, ALJD page 8, lines, 38 to 41, page 8, lines 50 to 52 and page 10, lines 38 to 39 ("If my finding of Long's ineligibility is upheld, there would be no reason to open and count Baza's ballot"). The Employer has not taken exception to this finding / recommendation and makes no argument in its brief that addresses this point. This concession by the Employer also conclusively resolves this dispute as to the certification of representative in this case.

THE ALJ'S FINDINGS AND RECOMMENDATIONS THAT EMPLOYER'S OBJECTIONS AND THE UNALLEGED EMPLOYEE OBJECTION TO ELECTION BE OVERRULED SHOULD BE ADOPTED BY THE BOARD

The Employer's Objection filed July 29, 2010 and attached to the Second Supplemental Decision in this case, Board Exhibit 1(c), only alleges a failure of the Board agent to follow a truncated reading⁴ of the Case Handling Manual, Section 11338.7. Employer's second Exception No. 2 and Exception No. 4 attempt to address the ALJ's recommended findings that the Board agents' conduct did not meet Board standards. It is well settled that the provisions of the Casehandling Manual are not binding rules and are merely intended to provide guidance. Children's National Medical Center, 322 NLRB 205, 205 fn. 1 (1996); Queen Kaptolani Hotel, 316 NLRB 655, 656 n.5 (1995). The ALJ's findings at ALJD page 9, lines 16 through 29, appropriately resolve this matter. Elections will not be invalidated based on minor deviations from the guidelines that are not shown to raise a "reasonable doubt as to the fairness and validity of the election", Sawyer Lumber Co., LLC, 326 NLRB 1331 (1998).

The Employer's original objection seems to assert that the Board agent should have refused the challenges raised by Petitioner's observers at the time they were made. However, the record supports the ALJ's recommended findings and conclusions that this theory is unsupported by facts or law. ALJD page 9, lines 14 to 29 ("obvious infirmities" to Employer's argument). The record of this hearing shows that Petitioner's observers had real evidence that the challenged voters were in the scheduler job classifications specifically excluded by the Decision and Direction of Election. ALJD page 9, lines 26

⁴ Employer ignores the first paragraph of CHM Section 11338.7 relating to employees in specifically excluded classifications and ignores the last paragraph of the Section that reads: "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".

to 29 (“That Long had not worked in the included job classification for at least fourteen months clearly constituted reasonable doubt, and the Board Agent was correct in accepting the challenge without any showing of changed circumstances”). As shown above, this recommended finding is undisputed by the Employer.

The Employer was also on notice at the July 22nd pre-election meeting in the presence of the Board agents that the Petitioner had grounds to challenge the ballots of Long and Baza based on their duties as schedulers. See, Transcript page 235, lines 3 through 11 (When Petitioner’s agent described the basis for the challenges to Long and Baza at the pre-election meeting a man from the National Red Cross representing the Employer at the meeting turned and said “So?”). The ALJ appropriately found that the exercise of the challenge procedure by Petitioner’s observers and the handling of the challenges by the Board agent did not raise a "reasonable doubt as to the fairness and validity of the election." Kirsch Drapery Hardware, 299 NLRB 363, 364 (1990) (quoting Polymers, Inc., 174 N.L.R.B. 282 (1969), enforced, 414 F.2d 999 (2d Cir. 1969)).

The allegations of the unasserted objection as to the Board agent’s handling of the challenged ballots of Faye Long and Ruth Baza do not raise a "reasonable doubt as to the fairness and validity of the election." Kirsch Drapery Hardware, Id at 364. (Board agent placed properly signed and sealed challenge envelope containing employee ballot in ballot box, rather than instructing voter to place it in box, not objectionable). The undisputed testimony in the present record confirms that both Faye Long and Ruth Baza exercised their votes in secret in the voting booth and inserted and sealed the ballot in a properly marked challenge envelope. Transcript page 222, lines 4 through 10; ALJD page 6, lines 45 to 50; ALJD page 7, lines 15 to 17 and lines 24 to 28. The evidence would

also support a finding that Ruth Baza placed her challenge envelope into the ballot box as instructed by the Board agent, Transcript page 244, lines 2 through 14, Testimony of Amy Lee; ALJD page 7, lines 24 to 28; ALJD page 9, lines 38 and 39.

There is also credible evidence in the record that Faye Long may have refused to place the sealed challenge envelope containing her marked ballot in the ballot box as instructed by the Board agent, thereby abandoning her ballot envelope on the voting table⁵. Transcript pages 236 to 237; ALJD page 7, lines 17 to 18. However, because the evidence shows that the sealed challenged ballot envelope and the secret ballot of Faye Long remains secured, there is no evidence of conduct of the Board agents which cast reasonable doubt on the fairness or validity of the election.

The Employer's brief, at pages 5 through 8, attempts to base a speculative legal argument in a last gasp exception to the ALJ's credibility determinations that relied upon the testimony of Union Observer Current. The ALJ credited Current's testimony that "when the polls closed, he and the other observers were present when the Board Agent sealed the ballot box and the observers initialed it after it was taped. At the time, all the challenged ballots were in the ballot box." ALJD page 7, lines 42 to 44. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence supports a conclusion that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). There is no basis for reversing the credibility findings of the ALJ in this case. To the extent there is any other conclusion to be derived from the evidence, it is purely speculation by Employer's

⁵ A voter's own conduct may void a ballot. General Photo Products, 242 NLRB 1371, 1372 (1979).

counsel and the burden to support such speculation with admissible evidence fails on the Employer. None was presented.

As noted by the ALJ at page 2, lines 29 to 31 of the ALJD, the Employer who maintains the burden of proof on its objection, failed to call either Faye Long or Ruth Baza as witnesses on this point⁶. Affiliated Computer Services, Inc., 355 NLRB No. 163, at slip opinion page 5 (8/27/2010)(representation elections are not lightly set aside; burden is on the objecting party to show by specific evidence that there has been prejudice to the election). Therefore, an evidentiary inference may be applied that the testimony of Ms. Long and Ms. Baza would conclusively show that the procedures utilized by the Board agent in this election did not raise a reasonable doubt as to the fairness and validity of the election. It is undisputed that the challenge ballot envelopes of Faye Long and Ruth Baza (Form NLRB-4646) were properly sealed after they each cast their ballot in secret and have not been opened since each voter sealed their secret ballots on July 22, 2010.

The unchallenged record evidence confirms that before, during and after the election, no one was permitted to handle any ballot except the individual who voted that ballot, and as to the challenges, a Board agent handled the properly sealed challenge ballot envelopes. The ALJ's findings and recommendations showing that these challenge ballot envelopes were retained and protected at all times by the Board agents in the "large envelope", Form NLRB-5126, are supported by the record and the findings of the ALJ.

⁶ The adverse inference rule is applied when a party fails to introduce relevant evidence within its control. Smithfield Packing Co., 344 NLRB 1, 8 (2004); Mid States Sportswear, Inc., 168 NLRB 559, 560 (1967). The rule is usually applied against the party having the burden of persuasion on an issue. Avery Heights, 343 NLRB 1301, 1324 (2004); KBMS, Inc., 278 NLRB 826, 848-849 (1986). The burden is on the objecting party, the Employer here, to show by specific evidence that there has been prejudice to the election, NLRB v. Mattison Machine Works, 365 U.S. 123, 123-124 (1961).

Transcript page 222, lines 4 through 15; ALJD page 7, lines 42 to 47; ALJD page 9, lines 44 to 48. At the close of the poll on July 22, 2010, all sealed challenged ballot envelopes were in the sealed ballot box. ALJD page 7, lines 42 to 44.⁷

CONCLUSION

For the reasons stated above and at the hearing, Petitioner respectfully submits that the ALJ's recommendation that the challenge to the ballot of Faye Long should be sustained and that the challenged ballot of Ruth Baza is not determinative should be adopted, *pro forma* by the Board. Petitioner also submits that the Employer Objection No. 1, including the unalleged employee objection, regarding Board agent conduct, should be overruled, either as recommended by the ALJ or procedurally as not materially affecting valid, determinative ballots. Certification of Representative for Teamsters Local Union No. 71 in this bargaining unit should issue.

The Board should adopt the recommendation of the Administrative Law Judge as the results of his findings at the hearing and direct issuance of a certification that a majority of the valid ballots have been cast for Teamsters Local Union No. 71, affiliated with International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit: All full time and regular part-time collection specialists I and II, collection technicians I and II, mobile

⁷ The ALJ, at ALJD pages 9 and 10, also appropriately distinguished the facts in Fresenius USA Manufacturing, Inc., 352 NLRB 679 (2008), which in any event is not an authoritative Board decision after the Supreme Court decision in New Process Steel, L.P. v. NLRB, ___ U.S. ___, 130 S. Ct. 2635, 177 L. Ed. 2d 162 (2010). The ALJ appropriately distinguished the facts in Laszo & Paulette Fono, t/a, Paprikas Fono, 273 N.L.R.B. 1326, 1328 (1984), ALJD page 10. Columbine Cable Co., Inc., 351 NLRB 1087, 1088 fn6 (2007) involved a close question regarding two voters casting their ballots without a polling booth in the presence of employees after the polls closed and found inapposite a case where a Board agent handled a challenged ballot (taking it from the voter and putting it in a challenge envelope instead of allowing the voter to put it in the envelope) and did not involve the observation of the voter as he cast his ballot. Kirsch Drapery Hardware, 299 NLRB 363 (1990). Employer Exception No. 4 lacks merit.

unit assistants I, II, and III, mobile unit supply clerk, and mobile unit technician, for the blood collections operations department of the Charlotte, North Carolina, service area, of the Employer, excluding nurses, medical technologists, administrative assistants II and III, autologous directed services coordinator, compliance specialist II, mobile unit assistant specialist, training specialist, assistant team supervisor, collection manager, collection operations supervisor, compliance manager, mobile unit supervisor, scheduling supervisor, scheduler, team supervisors, office clerical employees, and professional employees and supervisors as defined by the Act.

Respectfully submitted

TEAMSTERS LOCAL UNION NO. 71
Petitioner,

By Counsel

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Dated: October 12, 2010

CERTIFICATE OF SERVICE

I, JAMES F. WALLINGTON, counsel for the Petitioner, do hereby certify that I have served the foregoing TEAMSTERS LOCAL UNION NO. 71 ANSWERING BRIEF IN SUPPORT OF ALJ RECOMMENDATIONS AND IN OPPOSITION TO EMPLOYER OBJECTION TO ELECTION in Case No. 11-RC-6732 upon the following representatives of the Employer by electronic mail and United States Postal Service, postage prepaid, in accordance with 29 C.F.R. Section 102.114(a) and (i), on this 12th day of October, 2010: Benjamin A. Johnson, Esq., Robinson, Bradshaw & Hinson, P.A., 140 East Main Street, Suite 420, Rock Hill, SC 29731 and Charles E. Johnson, Esq. and Sarah A. Coble, Robinson, Bradshaw & Hinson, P.A., 101 North Tryon Street, Suite 1900, Charlotte, NC 28246; John B. Langel, Esq., Ballard Spahr, LLP, 1735 Market Street, 51st Floor, Philadelphia, PA 19103-7599; Isaac P. Hernandez, Esq., Ballard Spahr LLP, 1 East Washington Street, Suite 2300, Phoenix, AZ 85004-2555, and upon Counsel for the Regional Director Ronald C. Morgan, National Labor Relations Board, Region 11, 4035 University Parkway, Suite 200, Winston-Salem, NC 27106.

/s/ James F. Wallington

James F. Wallington