

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

AMAZING LIGHT ELECTRICAL CONTRACTING, LLC

Employer

and

Case 28-RC-6739

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION NO. 611, AFL-CIO¹**

Petitioner

**PETITIONER'S EXCEPTIONS TO HEARING OFFICER'S
REPORT TO THE BOARD ON THE EMPLOYER'S OBJECTIONS
AND
SUPPORTING BRIEF**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO, Petitioner in the above numbered case, pursuant to Sec. 102.69 of the Board's Rules and Regulations hereby excepts to the Hearing Officer's Report to the Board on the Employer's Objections (herein "Report") dated December 17, 2010² issued by Hearing Officer Nancy S. Brandt (herein "HO" of the Twenty-Seventh Region, and submits the accompanying supporting brief.

EXCEPTIONS

1. Petitioner excepts to the HO's finding that doubt was cast on the fairness and validity of the election by the manner in which the Board Agents conducted the pre-election conference and post-election count (Report at 1-2).

¹ The name of Petitioner has been corrected as reflected in the Amended Stipulated Election Agreement (Bd. Exh. 6) approved September 28, 2010.

² All dates herein refer to 2010, unless otherwise indicated.

2. Petitioner excepts to the HO's recommendation that the election results be set aside (Report at 1-2, 30).
3. Petitioner excepts to the HO's finding that the Employer was not afforded an opportunity to review the voter eligibility list resulting in a denial of the opportunity to challenge the ballot of Robert Jones (Report at 22).
4. Petitioner excepts to the HO's finding that the failure to show the Employer the voter eligibility list before the opening of the polls allowed Jones to vote unchallenged and thereby affected the results of the election (Report at 26-27).
5. Petitioner excepts to the HO's finding "that 'reasonable doubt as to the fairness and validity of the election' was created because the Board Agents conducted the vote count in the presence of a Union representative, but without an Employer representative or Employer observer present, even though they had expressly told Silva to return to the Facility after the election" (Report at 27).
6. Petitioner excepts to the HO's finding that "because the Board Agents did not provide Silva an opportunity to contest the eligibility of Jones, and then conducted the vote count without an Employer representative present, the cumulative effect on the validity of the election is similar to that present in *Fresenius*" (Report at 28).
7. Petitioner excepts to the HO's recommendation "that the election be set aside because of the appearance of irregularities based on these two deviations from established Board election procedures called into question the fairness and validity of the election process (Report at 30).

8. Petitioner excepts to the HO's finding that Robert Jones was not eligible to vote on the date of the election (Report at 35).
9. Petitioner excepts to the HO's finding that Guadalupe Gallegos was ineligible to vote in the election (Report at 37).
10. Petitioner excepts to the HO's recommendation that the Employer's Objections be sustained (Report at 40).
11. Petitioner excepts to the failure and refusal of the HO to find that both Robert Jones and Guadalupe Gallegos were eligible voters on the date of the election.
12. Petitioner excepts to the failure and refusal of the HO to find that the Employer's Objections were untimely challenges to the votes of both Robert Jones and Guadalupe Gallegos, although after finding Gallegos to be ineligible, she did find (Report at 37) that "...the Union has raised a valid argument that the Employer's Objection as to Gallegos is an untimely challenge to his eligibility to vote."
13. Petitioner excepts to the failure and refusal of the HO to recommend that the Employer's Objections be dismissed and that a certification of representative be issued certifying the Petitioner as the exclusive collective bargaining representative of the employees in the stipulated appropriate bargaining unit.

SUPPORTING BRIEF

PRE-ELECTION CONDUCT

Albert Silva, co-owner of the Employer with his wife, faxed the eligibility list to Board Agent David Garza of the Albuquerque Resident Office (fax number 505.248-5134) on September 27 (Bd. Exh. 3). In that fax, he mentions that the "voter eligibility lists" were mailed "last week." The list that he faxed was then emailed to Petitioner and

the undersigned. The importance of Silva faxing the eligibility list is that the Employer prepared it and Silva had from at least September 27 to the date of the election, October 8, in which to review it and inform the Board office of any changes he wished to make. Moreover, on the date of the election, Silva knew full well that both Jones and Gallegos were listed as eligible voters, all without reviewing the list of only 2 voters.

As per common practice a pre-election conference was scheduled. By letter (Bd. Exh. 7) of September 28, from Regional Director Cornell A. Overstreet to Silva, the Regional Director notified Silva as follows:

The Board agent conducting the election will meet with all parties at **2:30 p.m. (local time), on October 8, 2010, at the voting location, at the Conference Room located at Employer's office at 4301 Carlisle Boulevard, Suite A-2 Albuquerque, New Mexico**, for the purpose of reviewing the list of eligible employees and to review the arrangements of the election. At this time, each party should have present one (1) person who will act as its observer during the conduct of the election. The observers selected cannot be supervisors and should be employees of the Company. (Emphasis in original.)

The election was scheduled to begin at 3:00 p.m. and end at 4:00 p.m. (Bd. Exhs. 6 & 8).

As the HO recites (Report at 17), Silva did not arrive at the building housing his office until about 2:55 p.m. on October 8. Thus there was no time for the pre-election conference that was to begin at 2:30 p.m. Board Agent Garza did engage in conversation with Silva and answered his questions. Significantly, Silva did not say anything about Jones or Gallegos being ineligible to vote.

The HO assumes that a pre-election conference was held in the five minutes before the polls opened (Report at 17-18, 22, 25-26). Moreover, Silva did not need to review the eligibility list—the Employer prepared it and Silva mailed and faxed it. He knew the names of the two voters on the list. Moreover, while the HO recognizes

(Report at 25) that “the situation was exacerbated by Silva’s belief that he could be the Employer’s observer during the election because he did not equate his status as owner as being tantamount to the term ‘supervisor’ used in the Stipulated Election Agreement,” she rejected discrediting his testimony (fn. 25). Significantly, however, Silva was explicitly told in the letter setting the pre-election conference quoted above that observers should be employees of the Company. If need be, he could have hired someone to be the Company’s observer. Furthermore, after the election and after the vote count, Silva then commented that Jones had quit (Report at 19-20). This shows that Silva knew before the election when speaking to Garza that according to Silva, Jones had quit. The HO even found that Jones had quit on September 25 (Report at 35). Silva had more than ample opportunity even before the election date and before the opening of the polls to inform the Board Agents that he considered Jones to be ineligible because he had quit. He did not do so. Silva is solely responsible for there not being a pre-election conference, for not being asked to review the eligibility list, and for not challenging the ballot of Jones either through an observer or by asking the Board Agent to challenge Jones for him pursuant to Casehandling Manual Sec. 11338.2(b).

The HO cites and quotes from *Atlantic Industrial Constructors, Inc.*, 324 NLRB 355 (1997) (Report 24-25). In that case the Board’s Regional Director was directly responsible for two ineligible voters casting ballots because of an error in the eligibility formula in the Regional Director’s Decision and Direction of Election. She claims that the failure to verify the eligibility list in this case to be “analogous” to the error in *Atlantic*. The two errors are not even comparable much less analogous. Here, Silva was

responsible for there not being a pre-election conference and for not mentioning before the election that he contended that Jones had quit.

In any event, Jones was an eligible voter under the stipulated eligibility formula in the Amended Stipulated Election Agreement (Bd. Exh. 6, paragraph 2), as will be demonstrated *infra*.

POST-ELECTION CONDUCT

This is described in the Report at 19-20. In summary, when Silva returned at 4:05 p.m., the ballot box had been opened, the ballots removed, the ballots counted and the Tally of Ballots had been filled out. Silva could see the two ballots on the table and that they were both marked in the “yes” box. Supposedly, a “union representative” was present.³ The HO found (Report at 27) “that ‘reasonable doubt as to the fairness and validity of the election’ was created because the Board Agents conducted the vote count in the presence of a Union representative, but without an Employer representative or Employer observer present, even though they had expressly told Silva to return to the facility after the election.” The HO relies on *Fresenius USA Manufacturing, Inc.*, 352 NLRB 679 (2008), admittedly one of the two-member Board decisions (Report at 28 and footnote 27). As quoted by the HO, however, *Fresenius* involved not only a denial to the employer to monitor the ballot count, but also because of the apparent color blindness of the Board agent, he may have “incorrectly distributed ballots to voters.” Nothing in this case even approaches such an error.

³ The HO recites (Report at 18) that even though Silva was not introduced to this man, Silva “believed” that he must have been a Union Representative. In footnote 23 at 19, the HO converts this “belief” testimony into testimony that the man was in fact a Union representative. This is sheer speculation on the part of both Silva and the HO.

The HO also relies in part upon *Paprikas Fono*, 273 NLRB 1326 (1984). *Paprikas*, however, involved far more serious conduct, namely, the Board agent not properly impounding the challenged ballot envelopes, opening a sealed envelope containing challenged ballot envelopes and inspecting those envelopes without the parties being present (see Report, footnote 28 at 29).

Here there is only a failure of the Board Agents to wait a little longer before conducting the vote count. This hardly approaches creating the requisite “reasonable doubt as to the fairness and validity of the election.”

ELIGIBILITY OF JONES AND GALLEGOS

First, as argued in Petitioner’s Motion to Vacate Order Directing Hearing on Objections and Notice of Hearing (Bd. Exh. 1(c) and at the hearing as recited by the HO, the Objections are disguised post-election challenges to the ballots of Jones and Gallegos, and should never have been considered. Casehandling Manual Sec. 11362.1 and Sec. 11392.5. The latter section reads in pertinent part:

NOTE: Postelection challenges to voters’ eligibility filed in the guise of objections should not be considered. Sec. 11362.1.

Nevertheless, the HO found both Jones and Gallegos to be ineligible although she later found (Report at 37) that “...the Union has raised a valid argument that the Employer’s Objection to Gallegos is an untimely challenge to his eligibility to vote.”

The HO misquotes the agreed-upon voter eligibility language (Report at 12), and claims in footnote 14 that “citations were omitted.” The pertinent agreed-upon voter eligibility language in the Amended Stipulated Election Agreement (Bd. Exh. 6) reads:

In addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if

they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. *Steiny and Company, Inc.*, 308 NLRB 1323, 1325-1326 (1992). Employees who have been terminated for just cause or who quit voluntarily prior to the completion of the last job on which they were employed are not eligible.

The only issue here is whether Jones and Gallegos “quit voluntarily prior to the completion of the last job on which they were employed.”

The HO sets forth the facts regarding the employment of Jones and Gallegos at pages 12 to 16 of her Report. On September 20⁴ laid off both Jones and Gallegos because of lack of work. Their last project was the VCA project. According to the HO (Report at 13): “They had not worked the previous Friday, September 17, because the VCA project was completed September 16, but for installation of one component that had not yet arrived, and some punch list work.” Thus September 16 was the last time that Gallegos worked for the Employer. Silva, however, recalled Jones on September 23 to complete the punch list work on the VCA project. This was done that day and the next day, a Friday. Silva had obtained a new project on the east side of Albuquerque (Report, footnote 16 at 14) and offered work on that project to start the next week to Jones who accepted. The next day, Saturday the 25th, however, Jones telephoned Silva and left a message that he was taking a higher paying job out of town. Thus Jones never was on the site of the new project and never did any work on that project. The HO determined (Report at 35) that Jones quit on September 25.

Gallegos was hired by another employer during the same week as the layoff. On October 6, he sent an e-mail to Silva informing him that he “was hired on with another

⁴ This was the same day that the informal conference was held at 9:00 a.m. at Region 28’s Albuquerque Resident office when the Parties agreed upon a Stipulated Election Agreement (Report at 11).

contractor.” It is undisputed that Gallegos intended to quit his employment with the Employer.

It should be undisputed that Gallegos quit only after completion of the VCA project, the last project or job on which he was employed. Under the *Steiny* rule and the Amended Stipulated Election Agreement, he was clearly eligible to vote. Instead of applying the *Steiny* rule, however, the HO relied upon “standard voter eligibility” cases to find Gallegos ineligible (Report at 36-37). She did not even address Petitioner’s argument that Gallegos had quit after completion of the last job on which he was employed. The HO clearly erred.

Similarly regarding Jones, the HO did not address whether Jones quit after the completion of “the last job on which [he] was employed.” Instead, the HO determined that the “*Daniel/Steiny* formula nonetheless provides that when an employee expressly quits during a time in which he is actually employed, the employee loses his eligibility to vote” (Report at 35). Not true! The *Daniel/Steiny* formula assumes that employees , while still employed, will finish jobs or projects and then quit. That is exactly what happened here. It may be argued that since Jones agreed to start a new project on the following Monday, he therefore was employed on that job. Employees in the construction industry, however, may have any number of reasons to decline starting work on new projects or jobs even after agreeing to do so. Sometimes such employees may take referrals to a job, get there and for whatever reason decide not to take the job. Maybe they do not care for the general foreman or maybe they just do not like the job. They may actually take the next job for the same employer. Agreeing to take a job

should not be interpreted to mean that the employee is employed on that job. Being employed on a job should mean at least having started work on the job.

As the HO notes at page 36 of her Report, “there is a dearth of construction industry cases involving determinations as to when an employee is deemed to have quit for purposes of *Daniel/Steiny* eligibility.” More importantly, such dearth exists regarding application of the implied rule that employees are eligible if they have not quit before completing the last job on which they were employed. The closest action to quitting is declining an offer of recall. Thus, Petitioner relied upon and relies upon *Iberia Road Markings Corp.*, 353 NLRB 1009 (2009), and *MetFab, Inc.*, 344 NLRB 215 (2005). In *Iberia* the employee in question, Danny Travers, was laid off in December 2005. He “applied for unemployment benefits later that winter, and sought and obtained employment as a chef” (353 NLRB at 1019). ALJ Mendy E. Landow found insufficient evidence that Travers had quit, and therefore held (353 NLRB at 1020) “...there is insufficient probative evidence that Travers voluntarily quit his employment prior to the last job for which he was employed, *Daniel Construction*, supra; *Steiny & Co.*, supra.”

MetFab is closer on point. *MetFab* involved employee Raymond Casillas and two other employees. ALJ Michael A. Marcionese placed the burden of proof on the Respondent employer to “show that these otherwise eligible voters were not entitled to vote.” The Board adopted this conclusion, 344 NLRB 215, footnote 3. As the HO quoted more fully from the *MetFab* decision (Report at 32), the ALJ found and the Board so adopted the following, 344 NLRB 215 at 222:

I find that Casillas retained his eligibility to vote in the election notwithstanding the fact he declined an offer of recall in November 2003. There is nothing in the Board’s decisions in *Steiny* or *Daniel Construction*

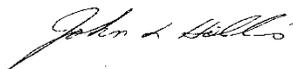
that expressly holds that an employee who has worked the requisite amount of time for an employer loses eligibility by declining recall.

Contrary to the HO's conclusions (Report at 34), the ALJ did not find that "an employee turning down a recall offer was not tantamount to an employee quitting his employment" and did not expressly note "that an employee who has quit is not eligible to vote under the *Daniel/Steiny* formula." The ALJ did note, 344 NLRB 215 at 222, the specific exceptions "for an employee who has voluntarily quit or been terminated for cause prior to the completion of the last job on which he worked." This is an inaccurate paraphrasing of the exceptions, but the ALJ's intent is clear.

Even though Jones first agreed on September 24 to begin work on a new project on the following Monday, changed his mind and took a different job for a different employer and so notified Silva on Saturday, September 25, this should not disqualify him from being an eligible voter. The last job on which he worked for the Employer was the VCA project which was completed even through the punch list work. Under the *Daniel/Steiny* formula, just quitting does not make an employee ineligible. It is only where the employee or former employee quits before the "completion of the last job on which they were employed" that such employee is ineligible.

Accordingly, and upon the entire record, the Board should dismiss the Employer's Objections, find both Robert Jones and Guadalupe Gallegos to have been eligible voters, and issue a Certification of Representative. Petitioner respectfully so requests.

Respectfully submitted,



John L. Hollis
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail to the following on this 31st day of December, 2010:

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