

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

Automatic Fire Systems, Inc.,	:	
	:	
Employer,	:	
	:	
and	:	NLRB Case No. 11-RC-6757
	:	
Road Sprinkler Fitters Local	:	
Union No. 669, U.A., AFL-CIO,	:	
	:	
Petitioner.	:	
_____	:	

Opposition to Employer’s Exceptions to Hearing Officer’s Report and
Recommendation

Pursuant to 102.69, Petitioner files the following opposition to Employer’s Exceptions to the Hearing Officer’s Report and Recommendations on the objections in the above-referenced case.

The Employer filed exceptions to three findings/recommendations in the Hearing Officer’s Report. The Union will address each in turn:

1. The Employer faults the hearing officer for failing to consider evidence regarding the challenged ballots despite its attempt to present such evidence *after* the trial in the form of a Motion for Reconsideration. As the Hearing Officer noted in her response to that Motion, this evidence could have

been presented at the hearing as the information was made known to the parties prior to the vote count on June 23, 2011. Hearing Officer's Response at p. 2 (Sept. 9, 2011). However, the Employer failed to present this evidence at the hearing and cannot fault the Hearing Officer for failing to consider evidence not made a part of the record. The Employer admittedly had an observer present at the election and could have called that person as a witness at the August 18, 2011, hearing but failed to do so, instead choosing to submit the evidence regarding the challenged ballots after the hearing.

2. Regarding their second objection, a Hearing Officer's credibility resolutions typically stand unless a "clear preponderance" of the evidence demonstrates otherwise. *Standard Dry Wall*, 91 NLRB 544 (1950). While the Hearing Officer did not go so far as to find that the Employer exercised bad faith in its omissions of *Steiny* voters from the *Excelsior* list, she correctly refused to draw an adverse inference from Petitioner's counsel's refusal to testify and found Employer's counsel's vague recollection of the conversations regarding the *Excelsior* list insufficient. Hearing Officer's Report at p. 9, fn. 9&10.

3. And finally with regard to their final exception to the Hearing Officer's Recommendation on the remedy calling for a re-run, the Union submits that this is the only fair and just result in this instance. A remand to the Regional Director to make a determination as to the challenged ballots would not be appropriate.

Resolving just one of the challenged ballots as the Employer suggests would deny the Petitioner due process. On that note, even if the Board determined that the Regional Director's alternative remedy be used, the Union would still be denied due process, as it has not had an opportunity to present evidence on the challenged ballots to the Region.

Furthermore, it appears that at least two of the challenged voters were *Steiny*-eligible voters who were not listed on the *Excelsior* list. These are the very voters whom the Union was denied access to by the Employer's failure to include them on the *Excelsior* list. Their ballots cannot be resolved without first allowing the Union's access to them prior to the vote. To allow otherwise defeats the very purpose behind the *Excelsior* ruling.

For these reasons as well as those listed in Petitioner's Exception to the Hearing Officer's Report and Recommendation, we respectfully submit that the Hearing Officer's Recommendation of a re-run election is the only proper remedy in this case.

Dated: September 22, 2011

Respectfully submitted,

/s/ Natalie C. Moffett
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Certificate of Service

I hereby certify that on September 22, 2011, I filed Petitioner's Opposition to the Employer's Exceptions to Hearing Officers Report and Recommendations on Objections with the Executive Secretary via the NLRB's e-filing portal and also forwarded a copy by electronic mail to the following:

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