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October 11, 2011

VIA E-FILING

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

Re: Fresh Direct, LLC
Case 29-RC-12087

Dear Mr. Heltzer:

This firm is counsel to Fresh Direct, LLC (“Employer” or “FreshDirect”). Pursuant to Section 102.69 of the NLRB’s Rules and Regulations, FreshDirect files Exceptions to the Regional Director’s September 27, 2011 Report on Challenges (“Report”) (attached at Tab A). Specifically, FreshDirect files Exceptions to the findings contained at page 14 that:

Inasmuch as the voting eligibility of [Jorge] Rodriguez must be decided in the unfair labor practice proceeding, I will defer further consideration of the challenge to the ballot of Rodriguez pending disposition of the unfair labor practice issues presented in Case No. 29-CA-064914.

The Regional Director erred in deferring further consideration of the challenge to Rodriguez’s ballot. Rather, the Regional Director should have sustained the challenge to Rodriguez’s ballot so that Case 29-RC-12087 can be processed to finality.

Facts

On August 10, 2011, the Region approved a Stipulated Election Agreement between the parties pursuant to which "all full-time and regular part-time maintenance employees" employed as of August 7, 2011 were eligible to vote in the September 1, 2011 election.

On August 13, 2011, FreshDirect terminated maintenance employee Jorge Rodriguez’s employment due to multiple violations of company policy.

Before the opening of the polls, on September 1, 2011, Rodriguez's name was removed from the *Excelsior* list (and initialed by both parties) because he was no longer employed by FreshDirect. As a result, when Rodriguez went to cast his ballot, the Board Agent challenged his ballot because he was not included on the *Excelsior* list.

Significantly, as of the September 1, 2011 election, no unfair labor practice charge was pending regarding Rodriguez's termination of employment.

Argument

In order for an employee in the stipulated unit to be eligible to vote in a representation election, two criteria must be met. First, he or she must be working as of the payroll cutoff date. *Dyncorp/Dynair Services, Inc.*, 320 NLRB 120 (1995). Second, the employee must also be employed on the date of the election. *Ra-Rich Mfg. Co.*, 120 N.L.R.B. 1444 (1958). Where the employee has been discharged prior to the election day and there is no unfair labor practice charge pending, the discharge is presumed to be lawful. As properly stated in footnote 13 in the Report, "[t]he Board will presume a discharge to be lawful and the voter ineligible to vote in the absence of a charge alleging that an employee has been discharged in violation of the Act. See *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Texas Meat Packers*, 130 NLRB 279 (1961)." Stated differently, under *Texas Meat Packers* and its progeny, the challenge procedure may not be used to litigate alleged unfair labor practice violations.

There can be no dispute that the challenge to Rodriguez's ballot must be sustained. Decades of Board precedent make it crystal clear that eligibility to vote is determined as of the election date – not before and not after. As of the September 1 election, Rodriguez was a former employee whose termination was presumptively lawful because no unfair labor practice charge was pending. Case closed – challenge sustained.

Petitioner cannot circumvent 50+ years of precedent by filing Charge 29-CA-064914 weeks after the election.¹ To reiterate, eligibility to vote is determined as of the date of the election – September 1, 2011, not weeks later. Permitting a party to impact eligibility determinations post-election by changing duties, filing charges, etc. would wreak havoc on the election process as there would never be finality. Under that absurd approach, employees would be disenfranchised of their Section 7 rights to have an expeditious election on the important issue of unionization. Clearly, the challenges process is not the proper venue to litigate the Section 8(a)(3) allegations pertaining to Rodriguez's discharge. Rather, the discharge allegations will be resolved through the normal processing of Charge 29-CA-064914.

¹ Tellingly, Petitioner filed Charge 29-CA-064914 on September 20, which is the day after FreshDirect informed the Region that the challenge to Rodriguez's ballot was to be sustained under *Texas Meat Packers*.

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October 11, 2011
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Accordingly, the Regional Director erred in deferring consideration of the challenge to Rodriguez's ballot. The challenge to Rodriguez's ballot should be sustained without further delay.

Respectfully submitted,



Alan I. Model

AIM/ck
Enclosure

TAB A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

FRESH DIRECT, LLC.

Employer

and

Case No. 29-RC-12087

LOCAL 805, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Petitioner

REPORT ON CHALLENGES AND NOTICE OF HEARING

Upon a petition filed on July 26, 2011¹, by Local 805 International Brotherhood of Teamsters, herein called the Petitioner or Local 805, and pursuant to a Stipulated Election Agreement signed by the Petitioner and Fresh Direct, LLC, herein called the Employer, and approved by the Regional Director on August 10, an election by secret ballot was conducted on September 1, among the employees in the following unit:

All full-time and regular part-time maintenance employees employed by the Employer at its facility located at 23-30 Borden Avenue, Long Island City, New York, but excluding all production employees, guards and supervisors as defined in the Act.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations showed the following results:

Approximate number of eligible voters	23
Number of void ballots.	0
Number of votes cast for Petitioner	11
Number of votes cast against participating labor organization	8
Number of valid votes counted	19
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	24

Challenges are sufficient in number to affect the results of the election.

¹ All dates hereinafter are in 2011 unless otherwise indicated.

The ballot cast by Kislan Medina was challenged by the Petitioner on the ground that he is a statutory supervisor. The ballot cast by Miriam Sanizaca was challenged by the Board Agent conducting the election pursuant to the parties' stipulation that Maintenance Department plant clericals will vote subject to challenge. The ballots cast by Jorge Perez and Kleber Gordillo were challenged by the Petitioner on the ground that they started work after the payroll period for eligibility. The ballot cast by Jorge Rodriguez was challenged by the Board Agent conducting the election on the ground that his name was not on the voter eligibility list provided by the Employer.

Objections to conduct affecting the results of the elections were not filed by either party.

Pursuant to Section 102.69 of the Board's Rules and Regulations-Series 8, as amended, the Regional Director caused an investigation to be conducted concerning the challenges. During the investigation all parties were afforded a full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

The Employer, a domestic corporation, with its principal office located at 23-30 Borden Avenue, Long Island City, New York, herein called the Long Island City facility, is engaged in the operation of an internet based supermarket selling food and grocery products to customers located in Manhattan, Brooklyn, Queens, Bronx, Westchester, Long Island, New Jersey and Connecticut.

THE CHALLENGES

Background related to challenges to eligibility of Sanizaca and Medina:

The independent investigation established that past petitions have been filed by labor organizations seeking to represent certain employees of the Employer. These included a petition

filed in Case No. 29-RC-11523, on October 29, 2007, by Local 348-S and Local 342, United Food and Commercial Workers International Union, CLC, as Joint Petitioners, wherein the parties agreed upon the composition of the proposed bargaining unit. Thus, on November 26, 2007, the Regional Director issued a Decision and Direction of Election in 29-RC-11538 finding the following employees of the Employer to constitute a unit appropriate for the purposes of collective bargaining: "All full-time and regular part-time employees engaged in production and order processing for the Employer's retail sales to residential and business customers, and who are engaged in maintenance, at the Employer's 23-30 Borden Avenue, Long island City, New York facility, but excluding all other employees, office clerical employees, plant clerical employees, temporary agency personnel, transportation department employees, lab quality assurance employees, managers, professional employees, guards and supervisors as defined in the Act. On January 7, 2008, a Certification of Results issued in Case No. 29-RC-11523. Further, on August 4, 2010, a petition was filed by Local 805 in Case No. 29-RC-11938. Local 805 sought to represent a unit consisting of all employees in the Employer's Maintenance Department, excluding all other employees, guards and supervisors as defined in Section 2(11) of the Act. The Employer contended the petitioned-for unit was inappropriate and that the only appropriate unit must include all production and maintenance employees, excluding plant clericals. On September 16, 2010, the Regional Director issued a Decision and Direction of Election in 29-RC-11938 finding the following employees of the Employer to constitute a unit appropriate for the purposes of collective bargaining: "All full-time and regular part-time maintenance employees employed by the Employer at its facility at 23-30 Borden Avenue, Long Island City, New York, excluding all production employees, guards and supervisors as defined in

the Act.” On October 13, 2010, the Regional Director approved Local 810’s withdrawal of its petition in Case No. 29-RC-11938 and the election was canceled.

Miriam Sanizaca:

As noted above, the Board Agent conducting the election challenged the ballot of Miriam Sanizaca pursuant to the parties’ stipulation that Maintenance Department plant clericals will vote subject to challenge. The Petitioner contends that Sanizaca is a clerical worker who is not eligible to vote. The Employer contends that Sanizaca is a plant clerical who is eligible to vote. For the reasons noted herein, I direct that a hearing be held regarding the eligibility of Miriam Sanizaca.

The independent investigation established that upon signing the Stipulated Election Agreement, the Employer and the Petitioner also signed a side agreement stating that, “1. It is hereby stipulated by both parties signing below that, for the purpose of the election to be conducted by the National Labor Relations Board in the instant case that Maintenance Department Plant Clericals will vote subject to challenge. 2. The only Maintenance Department Plant Clerical at the facility is Miriam Sanizaca.”

The Petitioner contends that Sanizaca is a plant clerical² who does not share a community of interest with Maintenance employees and who the Board has previously excluded from the Maintenance Department bargaining unit. In this regard, the Petitioner contends that the Region’s Decision and Direction of Election in Case No. 29-RC-11523 issued on November 26, 2007, explicitly separated plant clericals from a production and maintenance unit. The Petitioner

² The Petitioner refers to Sanizaca as a “clerical worker” in its introductory summary and thereafter more specifically refers to her as a plant clerical.

contends essentially that since a bargaining unit of production and maintenance employees that excluded plant clericals was appropriate at this facility, a bargaining unit of maintenance employees that excludes plant clericals is also appropriate. The Petitioner also contends that the Region's Decision and Direction of Election in Case No. 29-RC-11938 excluded plant clericals from the bargaining unit inasmuch as it failed to mention plant clericals in its discussion of job classifications in the Maintenance Department.³ The Petitioner argues that the 2007 and 2010 decisions established that a maintenance unit that excludes plant clericals is appropriate. The Petitioner also notes that the Employer did not seek to include plant clericals in the maintenance bargaining unit at the hearing in Case No. 29-RC-11938. The Petitioner concludes that the Employer's position that the plant clerical must now be included in the bargaining unit is inconsistent with the Board's prior decisions and the Employer's own position in the prior representation hearings. Thus, the Petitioner contends that a hearing on the eligibility of Sanizaca is unnecessary. The Petitioner contends that a named employee witness will testify, if necessary, that Sanizaca is a clerical employee who works in the office with supervisor Carlos Izquierdo and who has insufficient contacts and community of interest with maintenance employees to require her inclusion in the bargaining unit.

The Employer contends that Sanizaca is a "plant clerical" as defined in Board precedent and eligible to vote in the unit of maintenance employees. The Employer asserts that Sanizaca's work is limited to plant clerical functions. Her job responsibilities include, but are not limited to, the intake of job orders/requests from other plant departments needing repair or maintenance of equipment. Once the job orders are sent to Sanizaca via e-mail or phone, Sanizaca retrieves

³ The Petitioner also contends that the Maintenance Department list provided by the Employer as Employer Exhibit 4 in Case No. 29-RC-119381 did not include the plant clerical working in the Maintenance department at the time.

the order and posts it for a maintenance employee to fulfill. Sanizaca also maintains the inventory of supplies and materials that are needed by the maintenance employees to perform their duties. Because Sanizaca's function is so integral to Maintenance Department operations, she has a desk in the Maintenance Department. She spends 100% of her time with or working for the maintenance employees. Sanizaca also creates purchase orders and verifies the invoices and orders uniforms for maintenance employees. Sanizaca has regular contact with Maintenance Department employees throughout her work day as she has to interface with them about job orders, supplies, equipment, uniforms and any other questions the maintenance employees may ask of her to facilitate the performance of their job duties. Sanizaca does not answer any outside phone lines, open mail, type correspondence for Supervisor Izquierdo or perform other typical office clerical duties. The Employer argues that even assuming Sanizaca is an office clerical, the parties did not stipulate to exclude office clericals from the voting unit. Rather, the parties limited the exclusions in the Stipulated Election Agreement to "all production employees, guards, and supervisors as defined in the Act." Thus, even if Sanizaca is considered by the Region to be an office clerical rather than a plant clerical, she remains eligible to vote as a "maintenance employee."

Here, the parties signed an agreement stating that Plant Maintenance Plant Clericals would vote subject to challenge and that Miriam Sanizaca was the only Maintenance Department Plant Clerical. Thus, the parties' side agreement shows that they did not intend to include or exclude Sanizaca from the unit, but rather that her eligibility would be determined at a later date, if necessary. In these circumstances, where the parties did not intend to include or exclude the plant clerical from the unit of eligible employees, the eligibility of Sanizaca must be determined by the Board's community of interest test. See e.g. *Air Liquide America Corp.*, 324 NLRB 661

(1997) (where the Board, contrary to the hearing officer, found that the stipulated unit did not clearly reflect an intent to exclude from the unit an outside sales representative whose job title was not included in the unit description inasmuch as the parties' *Norris Thermador* agreement showed that they intended that this employee vote subject to challenge at the election. Thus, the Board determined his eligibility in accordance with traditional Board principals). With regard to the Petitioner's contention that prior decisions excluded plant clerical employees from the bargaining unit and that the eligibility of plant clerical employees has already been decided, I note that in Case No. 29-RC-11523, the parties did not dispute the specific job classifications to be included in or excluded from the proposed bargaining unit, and thus, the eligibility of plant clerical employees was not at issue. Similarly, in Case No. 29-RC-11938,⁴ the eligibility of plant clericals was not at issue.⁵ Thus, in the prior cases, there was no finding concerning the eligibility of plant clerical employees.

In view of the foregoing, there appear to be substantial and material issues concerning the eligibility of Sanizaca, including issues of fact and credibility that would be best resolved by a hearing. I therefore direct that a hearing be held concerning the challenge to the ballot of Miriam Sanizaca.

Kislan Medina:

As noted above, the Petitioner challenged the ballot cast by Kislan Medina on the ground that he is a statutory supervisor. The Employer denies that Medina is a statutory supervisor. For the reasons noted herein, I direct that a hearing be held regarding the eligibility of Kislan Medina.

⁴ While the Petitioner contends that the Region's Decision and Direction of Election in Case No. 29-RC-11938 excluded plant clericals from the bargaining unit inasmuch as it failed to mention plant clericals in its discussion of job classifications in the Maintenance Department, there is no specific exclusion of plant clerical employees in the unit found appropriate in Case No. 29-RC-11938.

⁵ Indeed, the Employer sought to exclude the plant clerical classification in Case No. 29-RC-11938.

The Petitioner contends that Medina is a "Lead" worker and statutory supervisor. The Petitioner contends that the Region's Decision and Direction of Election in Case No. 29-RC-11938 identified the maintenance employees in the bargaining unit as consisting of 21 employees in the following job classifications: Senior Technician, Technician A, Technician B, Technician C, Helper A, Helper B and Helper C.⁶ The Petitioner contends that the decision "excludes" one lead (Kislan Medina) and one manager (Carlos Izquierdo), noting that the Maintenance Department list provided by the Employer and received in evidence as Employer Exhibit 4 in the hearing in Case No. 29-RC-11938 "listed Kislan Medina as a 'Maintenance Senior Technician Lead,' a job title excluded from the decision's description of the bargaining unit."⁷ The Petitioner argues that the 2010 decision in Case No. 29-RC-11938 established that a maintenance unit that excludes lead employees is appropriate. The Petitioner also notes that testimony was presented at the representation hearing in Case No. 29-RC-11938 that Medina, the lead employee, is a statutory supervisor who responsibly directs workers and issues discipline and that this evidence was not contradicted by the Employer. Thus, the Petitioner concludes that a hearing on the eligibility of Medina is unnecessary. The Petitioner contends that a named employee witness will testify, if necessary, that Medina's duties include responsibly directing workers and issuing discipline.

The Employer contends that Medina is an hourly maintenance employee who lacks any supervisory indicia under the Act. More specifically, the Employer contends that Medina is a skilled maintenance employee who has been in the maintenance department for many years. His

⁶ The independent investigation established that the decision in Case No. 29-RC-11938 noted that "The Maintenance Department has 21 employees and 1 lead employee, Kislan Median and 1 manager, Carlos Izquierdo."

⁷ I note here that the decision referred to does not specifically exclude Maintenance Senior Technician Lead from the unit. It appears that the Petitioner contends that the failure to refer to the lead classification in the unit description is the equivalent of excluding it.

duties include among other things, electrical repair work, repairing/patching flooring throughout the plant, refurbishing offices, painting, installing tile and monitoring the ammonia system. All maintenance employees know that Medina is a skilled maintenance employee and have worked hand-in-hand with him for years. Like all maintenance employees, Medina is paid on an hourly basis, wears the same uniform, records his time in the same manner, reports to the same supervisor (Carlos Izquierdo), utilizes the same maintenance shop, uses the same tools and enjoys the same wages and benefits (although he is on the higher end of the wage matrix given his tenure and skills). Medina is not treated differently than the other maintenance employees. He does not attend management meetings or have different benefits/perks. The Employer also notes that its employ of Izquierdo as the maintenance supervisor undercuts the Union's claim that Medina is also a supervisor. The small size of the maintenance department and the practice of having 5 to 6 employees working at a time do not warrant two supervisors.⁸ Furthermore, Gary Jimenez manages the Maintenance Department to support Izquierdo.

With regard to the Petitioner's contention that Medina should be excluded as a lead person, the Board has adopted a three-prong approach, set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), when resolving whether a challenged voter is properly included in the stipulated unit. Under this three prong test, "the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of

⁸ The Employer notes that there are only 20 employees to cover maintenance operations 24 hour a day, 7 days a week.

contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community of interest test." *Id.* at 1097.

Thus, in determining whether Medina is properly included or excluded from the unit, the first step is to determine whether the stipulation is ambiguous by comparing the express language of the stipulated unit with the disputed classification. Here, the clear language of the unit description in the Stipulated Election Agreement includes all full-time and regular part-time maintenance employees employed by the Employer at its facility located at 23-30 Borden Avenue, Long Island City, New York, and excludes all production employees, guards and supervisors as defined in Section 2(11) of the Act. No classifications of maintenance employees are specifically addressed in the unit description in a manner that might cast doubt on the parties' intent to include the entire category of maintenance positions. In this regard, I note that the Petitioner asserts that Medina is a "lead worker" and acknowledges that the Employer has classified Medina as a "Maintenance Senior Technician Lead."⁹ The Employer's position statement refers to Medina simply as a "maintenance employee." While "maintenance employee" is expressly included in the unit, the titles of "lead worker" and/or "Maintenance Senior Technician Lead" are not set forth expressly in the included or excluded classifications. However, other categories of Maintenance Department employees, including Technician A, Technician B, Technician C, Helper A, Helper B, and Helper C, which are referred to in the Petitioner's position statement, are also not expressly included in the unit description. In these circumstances, I find that the stipulated unit unambiguously includes the entire category of

⁹ As noted above, the Petitioner referred to the Maintenance Department list provided by the Employer and received in evidence as Employer Exhibit 4 in the hearing in Case No. 29-RC-119381, which listed Kislak Medina's job title as "Maintenance Senior Technician Lead."

maintenance positions, including lead maintenance employee. See e.g. *Cardinal Health Care, Inc.*, 352 NLRB 104 (2008) (where the Board held that an abbreviated reference to coordinators in the unit description unambiguously included all coordinators in the unit). With regard to the Petitioner's contention that prior decisions excluded lead employees from the bargaining unit and that the eligibility of lead employees has already been decided, I note that the question of whether or not to include the lead maintenance employee or lead employees in general was not at issue in Case Nos. 29-RC-11523 or 29-RC-11938. There was no finding that the lead maintenance employee or lead employees in general should be excluded from the unit found appropriate in either of those decisions.

However, even assuming the lead maintenance employee position is included, there is still a dispute as to whether Medina is a statutory supervisor. In view of the foregoing, there appear to be substantial and material issues concerning the eligibility of Medina, including issues of fact and credibility that would be best resolved by a hearing. I therefore direct that a hearing be held concerning the challenge to the ballot of Kislán Medina on the ground that he is a statutory supervisor.

Jorge Perez and Kleber Gordillo:

As noted above, the Petitioner challenged the ballots cast by Jorge Perez and Kleber Gordillo on the ground that they started work after the payroll period for eligibility. The Employer contends that both employees were employed by the Employer doing unit work during the payroll period for eligibility and that the challenges to their ballots should be overruled. For the reasons noted herein, I direct that a hearing be held regarding the eligibility of Jorge Perez and Kleber Gordillo.

It is well established that to be eligible to vote in a Board election, an employee must be employed in the unit during the payroll period for eligibility and on the day of the election. *Plymouth Towing Company, Inc.*, 178 NLRB 651 (1969); *Choc-ola Bottlers, Inc.*, 192 NLRB 1247 (1971); *Stockham Valve & Fittings, Inc.*, 222 NLRB 217, fn. 2 (1976). In the instant case, the payroll period for eligibility ended on August 7 and the date of the election was September 1.

The Petitioner contends that Jorge Perez and Kleber Gordillo are not eligible to vote because they were not employed in the Maintenance Department until after the payroll period for eligibility. The Petitioner contends that a named employee witness will testify that, although it is possible that one or both men were already on the Employer's payroll working in other departments, Perez and Gordillo did not start work in the Maintenance Department until after August 7. The Petitioner provided documentary evidence of Plant Maintenance Department schedules for the periods June 6 through 12, June 13 through 19, June 20 through 26, June 27 through July 3, July 25 through 31, August 1 through 7, August 8 through 14, August 15 through 21 and August 22 through 28. The Petitioner contends and it appears that these plant maintenance schedules show that Perez and Gordillo did not appear on the schedule until after August 7.¹⁰

The Employer contends that Jorge Perez and Kleber Gordillo are eligible to vote because they were employed and working in the Maintenance Department during the payroll period for eligibility. More specifically, with regard to Perez, the Employer contends that he applied for work on August 3, successfully passed his background check and drug screening on August 3, was hired and commenced work on August 5. Perez worked on August 5 and August 6 for a total of 13 hours as a maintenance employee before the August 7 payroll cut-off date. His

¹⁰ The poor quality of the copy of the schedule for the payroll period for eligibility makes it difficult to decipher.

maintenance tasks included but were not limited to estimating materials necessary to install outlets for produce cart picking, oiling the motors and fans in the mechanical room, replacing outlets and broken/burned light bulbs and cleaning the mechanical room. The Employer provided documentary evidence consisting of a copy of Perez's Timecard and Earnings Statement for the week ending August 7, indicating "Plant Maintenance/Technician" and that he worked a total of 13 hours. With regard to Gordillo, the Employer contends that Gordillo commenced performing maintenance work as of August 1, including working on August 1 through 3 and August 4 through 6. Gordillo's maintenance tasks included but were not limited to removing old floor tiles and replacing them with new tiles, re-framing and installing new sheetrock, plastering and sanding, painting and moving furniture. The Employer provided documentary evidence consisting of a copy of Gordillo's Timecard and Earnings Statement for the week ending August 7, indicating "Plant Maintenance Technician" for about 63 hours¹¹ and "Shipping-UTF/FDA Lead" for about 18 hours and 22 minutes.¹² The Employer concludes that the Union will not be able to sustain its burden of proof that Perez and Gordillo started work in the Maintenance Department after the August 7 payroll eligibility cut-off date.

Thus, the parties dispute the dates that the Perez and Gordillo commenced working in the Maintenance department. In view of the foregoing, there appear to be substantial and material issues concerning the eligibility of these two individuals, including issues of fact and credibility that would be best resolved by a hearing. I therefore direct that a hearing be held concerning the challenge to the ballots of Jorge Perez and Kleber Gordillo.

¹¹ The breakdown on the document shows 40 hours regular time, 6 hours and 43 minutes overtime and 16 hours and 14 minutes shift premium under the Plant Maintenance/Technician classification.

¹² The breakdown on the document shows 9 hours and 11 minutes regular time, and 9 hours and 11 minutes shift premium in the Shipping-UTF/FDA Lead classification.

Jorge Rodriguez:

As noted above, the Board Agent conducting the election challenged the ballot cast by Jorge Rodriguez because his name was not included on the voter eligibility list provided by the Employer. The Petitioner contends that Rodriguez is an eligible voter and the Employer contends that he is not eligible. In this regard, the independent investigation revealed that on September 20, the Petitioner filed an unfair labor practice charge in Case No. 29-CA-064914, alleging that on or about August 13, the Employer, in violation of Section 8(a)(1) and (3) of the Act, discharged Jorge Rodriguez in retaliation for his protected concerted activities. The charge is currently under investigation.

Inasmuch as the voting eligibility of Rodriguez must be decided in the unfair labor practice proceeding,¹³ I will defer further consideration of the challenge to the ballot of Rodriguez pending disposition of the unfair labor practice issues presented in Case No. 29-CA-064914.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held concerning the eligibility of Miriam Sanizaca, Kislán Medina, Jorge Perez and Kleber Gordillo. I have also deferred further consideration of the challenge to the ballot of Jorge Rodriguez pending disposition of the unfair labor practice issues presented in Case No. 29-CA-064914.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

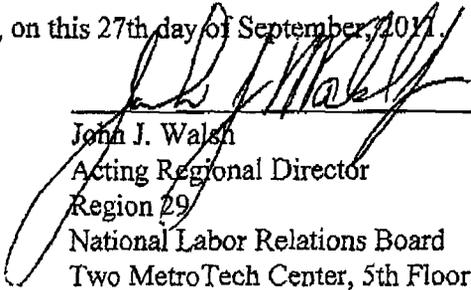
¹³ The Board will presume a discharge to be lawful and the voter ineligible to vote in the absence of a charge alleging that an employee has been discharged in violation of the Act. See *Times Square Stores Corp.*, 79 NLRB 361 (1948); *Texas Meat Packers*, 130 NLRB 279 (1961).

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the challenged ballots of Miriam Sanizaca, Kislán Medina, Jorge Perez and Kleber Gordillo.

IT IS FURTHER ORDERED that the hearing officer designated for the purposes of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Regional Director simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that at 9:30 a.m. on October 4, 2011, and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board on the issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

Signed at Brooklyn, New York, on this 27th day of September, 2011.



John J. Walsh
Acting Regional Director
Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201