

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21**

BLOCK TOPS, INC.

Employer

and

Case 21-RC-075974

GLASS, MOLDERS, POTTERY, PLASTICS &
ALLIED WORKERS, AFL-CIO, CLC,
G.M.P. LOCAL UNION NO. 137

Petitioner

REPORT ON OBJECTIONS AND CHALLENGES

This Report¹ contains my recommendations regarding the Petitioner's objections to the election conducted on April 13, 2012² and concerning the determinative challenged ballots cast during the election. The Petitioner's objections allege:

- 1) The Employer by its agents including but not limited to Adrian Mendoza on or around Wednesday, April 11th two days before the election and during a captive audience meeting call by the owner and Attorneys in their presence and with a list of all employees prepared by the employer requested that they sign it to opposed the Union and to negotiate with the employer directly;
- 2) Agents of the Petitioner and/or the employer campaigned in the voting area;
- 3) The employer engaged in direct dealing with employees and offer to negotiate with them with out the Union;
- 4) The Employer and/or the Petitioner harassed supporters of the Union;

¹ This report has been prepared under Section 102.69 of the Board's Rules and Regulations, Series 8, as amended.

² The collective-bargaining unit agreed appropriate in this matter is composed of: "All full-time and regular part-time production employees including design room employees, machine operators, mechanics, drivers, installers, shipping and receiving employees, and janitors employed by the Employer at or out of its facilities located at 1560 South Harris Court, Anaheim, California and 2591 Pioneer Avenue, Suite G, Vista, California; excluding all other employees, office clerical employees, professional employees, managers, guards and supervisors as defined in the Act."

- 5) The Employer through its agents intimidated and coerced Union supporters;
- 6) The Employer offered promises of benefits to employees;
- 7) The Employer interrogated employees about union and or protected activities.

As described below, I conclude that the Petitioner's objections be overruled. I further recommend that 6 challenged ballots be sustained. Inasmuch as the remaining 5 challenged ballots will not affect results of the election, it is recommended that a Certification of Results be issued.

Procedural History

The petition in this matter was filed on March 6, 2012³. Pursuant to a Stipulated Election Agreement approved on March 15, an election by secret ballot was conducted on April 13 among the employees in the above-noted unit. The tally of ballots served on the parties at the ballot count conducted on April 13, showed that of approximately 44 eligible voters, 11 cast ballots for, and 21 against, the Union. There were no void ballots and 11 challenged ballots, such that challenged ballots were sufficient in number to affect the results of the election. The Union timely filed objections to the conduct of the election, a copy of which is attached hereto as Attachment A. The Objections were timely served upon the Employer.

The Challenged Ballots

During the election, the ballots cast by Juan Contreras, Ernesto Padilla, Jose A. Malvaez, Arnulfo Gonzalez, Daniel Martinez and Arnulfo Aguilar were challenged by the Employer on the ground that they were laid off on March 9, 2012.

³ Unless otherwise specified, all dates herein are 2012.

The ballots cast by Phil Houser and Frederico Romero were challenged by the Petitioner on the ground that they are supervisors as defined by Section 2(11) of the Act.

Further, the Petitioner challenged the ballots cast by Agustin Ramos, Pat Ford, and Marty Tovar on the ground that they worked out of the Employer's Vista, California facility.

It is well settled that in order to be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date and (2) in employee status on the date of the election. See *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt, Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1951); *Bill Heath, Inc.*, 89 NLRB 1555 (1949); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993).

The party seeking to exclude an individual from voting has the burden of establishing that the individual is ineligible to vote. See *Sweetener Supply Corp.*, 349 NLRB 1122 (2007).

In *Case 21-CA-076322*, filed by the Petitioner on March 9, the Petitioner alleged that Contreras, Padilla, Malvaez, Gonzalez, Martinez and Aguilar were unlawfully terminated by the Employer. The investigation therein revealed insufficient evidence to establish that any of the employees named in the charge were terminated for any union or protected, concerted activities. The April 27, dismissal of the charge has not been appealed by the Petitioner⁴.

⁴ The Petitioner's appeal was due by May 11.

The investigation has revealed that Contreras, Padilla, Malvaez, Gonzalez, Martinez and Aguilar were not employed in the unit on both (1) the eligibility date⁵ and (2) on the date of the election. In the absence of a complaint, the Board will not consider some unfair labor practice issues in objections or challenge proceedings especially those involving Section 8(a)(3) violations. *Texas Meat Packers*, 130 NLRB 279 (1961), and *McLean Roofing Co.*, 276 NLRB 830 fn, 1 (1985). Contreras, Padilla, Malvaez, Gonzalez, Martinez and Aguilar are not alleged in any complaint as having been unlawfully terminated or otherwise discriminated against. Accordingly, for the reasons above, it is recommended that the challenges to the ballots cast by Juan Contreras, Ernesto Padilla, Jose A. Malvaez, Arnulfo Gonzalez, Daniel Martinez and Arnulfo Aguilar be sustained.

Based on the foregoing, sustaining the above six challenged ballots no longer makes the other five remaining challenged ballots determinative. Accordingly, the Region need not address the eligibility of the remaining five challenged ballots of Phil Houser, Frederico Romero, Agustin Ramos, Pat Ford, and Marty Tovar.

The Objections and Analysis

Objection No. 1

The Employer by its agents including but not limited to Adrian Mendoza on or around Wednesday, April 11th two days before the election and during a captive audience meeting call by the owner and Attorneys in their presence and with a list of all employees prepared by the employer requested that they sign it to opposed the Union and to negotiate with the employer directly.

⁵ The payroll period for eligibility stipulated to by the parties herein is the period ending Friday, March 9, 2012.

Objection No. 2

Agents of the Petitioner and/or the employer campaigned in the voting area.

Objection No. 3

The employer engaged in direct dealing with employees and offer to negotiate with them with out the Union.

Objection No. 4

The Employer and/or the Petitioner harassed supporters of the Union.

Objection No. 5

The Employer through its agents intimidated and coerced Union supporters.

Objection No. 6

The Employer offered promises of benefits to employees.

Objection No. 7

The Employer interrogated employees about union and or protected activities.

On April 20, the undersigned notified the Petitioner by letter that, under Section 102.69(a) of the Board's Rules and Regulations, the party filing objections shall furnish to the Regional Director the evidence available to it in support of the objections. Accordingly, the Petitioner was given until the close of business on April 27, to supply such evidence or its objections would be subject to being overruled without further investigation. The Petitioner, however, has neither presented evidence in support of the objections, as described in the undersigned's letter of April 20, nor timely requested any further extension of time in which to present such evidence, nor has any extension been granted.

The Board has long held that parties filing objections must present specific and timely evidence in support of their objections before the Region is required to investigate the objections. *Howard Johnson Co.*, 242 NLRB 1248 (1979). This includes a list of the witnesses and a brief description of the testimony of each. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Section 11392. et seq. and Rules 102.69. See also, *Heartland of Martinsburg*, 313 NLRB 655 (1994); and *Holliday Corp.*, 266 NLRB 621 (1983). This evidence must be filed within 7 days of filing objections unless the Regional Director allows additional time. *Craftmatic Comfort Mfg. Corp.*, 299 NLRB 514 (1990); and *Goody's Family Clothing*, 308 NLRB 181 (1992). Inasmuch as the Petitioner has failed to submit any evidence in support of its objections, it is recommended that they be overruled.

Conclusion

The undersigned having recommended that the Petitioner's objections be overruled, that the six challenged ballots of Juan Contreras, Ernesto Padilla, Jose A. Malvaez, Arnulfo Gonzalez, Daniel Martinez and Arnulfo Aguilar be sustained, and the results showing that a majority of the valid votes have not been cast for the Petitioner, it is further recommended that a Certification of Results issue.

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition

thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on June 1, 2012 at 5:00 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁶ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under

⁶ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Los Angeles, California on May 18th, 2012.

A handwritten signature in cursive script that reads "Olivia Garcia". The signature is written in black ink and is positioned above a horizontal line.

Olivia Garcia
Regional Director
Region 21
National Labor Relations Board