

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO
Employer

and

Case 05-RC-078154

FEDERATION OF AGENTS AND
INTERNATIONAL REPRESENTATIVES (FAIR)
Petitioner

REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement¹ approved on April 16, 2012,² a secret-ballot election was conducted, by mail, under my supervision. The mail ballots were sent to eligible voters on May 14. The ballots were commingled and counted on May 29 with the following results:

Approximate number of eligible voters	40
Void ballots	0
Votes cast for Petitioner	18
Votes cast against participating labor organization	16
Valid votes counted	34
Challenged ballots	1
Valid votes counted plus challenged ballots	35

The challenged ballot did not affect the election results.

¹ The unit is: "All full-time International Organizers employed by the Employer; but excluding all project organizers, office clerical employees, professional employees, guards, and supervisors as defined in the Act." The eligibility period is the payroll period ending March 30, 2012.

² Unless otherwise specified, all dates are 2012.

On June 4, the Petitioner filed timely objections to conduct affecting the results of the election, which are attached as Exhibit A.³

THE OBJECTIONS

Objection 1

Disenfranchised voters:...At the ballot count, the Employer announced that several employees whose votes were not received by the NLRB had stated that they had mailed ballots by priority mail and had tracking numbers which demonstrated that their ballots had been received by the United States Postal Service on or before May 18 and delivered to the Post Office in Washington, D.C. and should have been delivered to the Resident Office well before the ballot count on May 29. In addition, three employees...who had mailed ballots on or about May 18, flew to Washington to vote in person because they were told that their ballots had not been received yet....[F]our employees...mailed ballots which the Postal Service states should have been delivered to the Resident Office well before the ballot count on May 29....When employees are given the opportunity to vote by mail, they should not be denied the right to vote because of proven errors by the Postal Service or the interface between the Board and Postal Service....

In support of Objection 1, Employer provided Postal Service website material describing priority mail service, affidavits from Employees A, B (notarized but unsigned by the employee), C, and D; apparently self-composed statements from Employees B, C, D, F, and G; Postal Service track and confirm printouts for Employees A, B, C, D, E, F, and G; a Postal Service response to request for delivery information for Employee A; and a delivery confirmation receipt for Employee D.

According to the affidavits and tracking printouts, the four employees (Employees A, C, D, and E) whose ballots were not received at the time of the count (and who did not

³ The petition was filed on April 5. I will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962).

cast ballots in person) mailed their ballots between May 18 and 22 via priority mail⁴ from locations throughout the United States. The Resident Office did not receive any of these ballots prior to the count on May 29. Two were received on May 31, one was received on June 8, and one was never delivered.

With respect to the three employees (Employees B, F, and G) who flew to Washington to vote in person and whose votes were counted in the tally, they sent their ballots via priority mail between May 21 and 23. The Resident Office received these ballots on May 31, June 4, and June 8.

Three additional ballots were returned to the Resident Office after the tally of ballots that were not mentioned in the Employer's objection. Two ballots of eligible voters were received on June 4 and June 5. The date these ballots were mailed is unknown. The third ballot was cast by an individual who did not appear on the Excelsior list, and it was received on May 30.

The Board will issue certifications where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election. *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987). Employees' opportunity to vote is not compromised by mail delivery problems that prevent the timely receipt of potentially-determinative ballots. See *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1094-96 (D.C. Cir. 2002) (upholding certification where four employees did not receive mail ballots and election decided by three votes). *J. Ray McDermott and Company v. NLRB* 571 F.2d 850 (5th

⁴ The affidavit of Employee C states that the ballot was sent "certified mail with tracking" but the accompanying Track & Confirm printout shows it was mailed by priority mail. The affidavit of Employee D states that he "expressed mailed the ballot back with a delivery confirmation receipt." The accompanying delivery confirmation receipt has the priority mail box checked.

Cir. 1978) is particularly instructive. In that case, three potentially-determinative mail ballots were not received, and each individual testified that they mailed a timely ballot. Id. at 853. The Regional Director found that the election was conducted fairly and that the non-receipt of ballots was an unplanned occurrence beyond the control of the parties, the Board, or the individual voters. Id. at 855. The Fifth Circuit noted that, “it cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery.” Id.

Here, the untimely receipt (or non-receipt) of the ballots of Employees A, C, D, and E was an unplanned occurrence beyond the control of the parties, the Board, or the individuals. The parties stipulated to a two-week period for sending and receipt of the mail ballots, and this time period for receipt of mail ballots is in accord with the NLRB Casehandling Manual, Section 11336.2(d). The parties did not agree to waive the stipulated count date. See *Sadler Bros. Trucking & Leasing Co.*, 225 NLRB 194, 194 (1976). The election was decided by 34 employees out of an estimated 40 eligible voters, which clearly is a representative complement. The ballots of Employees A, C, D, and E were not counted because they were not received at the time of the count, due to apparent problems with the mail delivery.⁵ Under the circumstances, the failure to count these

⁵ The Employer’s reliance on *Queen City Paving Company*, 243 NLRB 71 (1979), and *Kerrville Bus Company*, 257 NLRB 176 (1981) is unavailing. First, these cases pre-date the Board’s current rule on counting mail ballots, namely, that all ballots received on or before the time of the count should be tallied. *Watkins Construction Co.*, 332 NLRB 828, 828 (2000). Thus, the Board’s inquiry into whether employees could reasonably anticipate timely receipt in *Queen City Paving* and *Kerrville Bus* is legally irrelevant under extant Board law. Second, these cases merely required that ballots mailed to the regional office in a timely manner, and received after the due date *but before the count*, be included in the tally. Thus, these cases are readily distinguishable.

untimely or undelivered ballots is not grounds to set aside the election.⁶ Thus, Objection 1 is overruled.

Objection 2

At the ballot count, the Employer's observer challenged the ballot of [Employee H] because it appeared that the ballot envelope had been opened and then taped shut. The Region's election officer took the envelope to a Resident Office superior, who denied the challenge. Accordingly, [Employee H's] ballot was counted. ... [The ballot envelope of Employee H] clearly shows a slit through the word "[Employee H's last name]," a slit sufficiently big that the envelope could have been opened and the ballot altered. Because this ballot could be determinative, the election should be set aside and a new election directed.

In support of Objection 2, Employer provided a copy of Employee H's ballot envelope. A copy of that envelope is attached as Exhibit B. No other evidence was submitted in support of this objection.

At the count, the Employer's observer challenged the ballot of Employee H on the basis of the integrity of the ballot. The observer claimed that the ballot appeared to have been tampered with, that is, reopened after the flap of the envelope was signed and then taped back together. The Union disagreed. There does appear to be a slight gap running through parts of Employee H's signature on the right side of the envelope. In response to the challenge, the Board agent inspected the ballot envelope, conferred with the Resident

⁶ I also reject the Employer's alternative argument that the challenged ballot procedure for late-arriving voters at a manual election should be applied to the mail election context. See Casehandling Manual § 11324.1. That challenge process presupposes that the late ballots are cast and in the NLRB's possession prior to the count, which is not the case here. The Board has found pre-count receipt to be "most significant" in mail ballot elections. *Am. Driver Serv.*, 300 NLRB 754, 754 (1990). Further, the practicability of the Employer's proposed approach is doubtful. If adopted, the tally of ballots would not reflect the final count of challenged ballots. As a result, the Region could not determine whether the challenged ballots are determinative until some indeterminate time after the tally when all late ballots are received (or never delivered). This would be akin to allowing voters in a manual election to cast a challenged ballot even after the count, which Section 11324.1 does not contemplate. In any event, the purpose of Section 11324.1 is to protect a party's entitlement to present extraordinary circumstances justifying counting a late-arriving voter's ballot. See § 11324.1. Given the Board's approval of certifications where potentially-determinative ballots were lost in the mail, delays in mail processing would not constitute extraordinary circumstances.

Officer, and determined that there did not appear to be evidence of tampering. The Board agent informed the parties that she would open the ballot and count it. The Employer's observer did not insist on challenging the ballot at that point. This action was in accordance with Casehandling Manual Section 11338.2(a), which allows an observer to challenge a voter "for cause." In addition, the Board recognizes that there is some discretion in the conduct of an election, and that Board agents should not blindly accept frivolous challenges while avoiding argument over the merit of a challenge. See *Fulton Bag & Prods. Co.*, 121 NLRB 268, 270 n.5 (1958) (Board agent may ascertain reason for the challenge, which serves to prevent groundless challenges and unnecessary delay; observer may, for good cause, insist upon right to challenge and Board agent is obliged to accept the challenge). Thus, I find that the Board agent's refusal to accept the challenge in the absence of the observer's insistence upon lodging a challenge was appropriate under the circumstances.

In any event, the Employer suffered no prejudice as a result of the Board agent's denial of the challenge. Each opened envelope contained exactly one ballot. None of the ballots included markings in both the "yes" and "no" boxes; none showed any erasures or alterations; and none were excluded from the count due to stray marks or other irregularities. The Employer has not offered any evidence beyond the envelope itself to support its allegation of possible tampering. Thus, the Employer's concern that Employee H's vote could have been altered after-the-fact is unfounded under the circumstances, and Objection 2 is overruled.

SUMMARY

In summary, I recommend the dismissal of the Employer's Objections. I recommend that the appropriate Certification of Representative issue.

Dated at Baltimore, Maryland this 21st day of June 2012.

(SEAL)

/s/ Wayne R. Gold

Wayne R. Gold, Regional Director
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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 by 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 **JULY 5, 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 by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁷ 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, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. 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.

⁷ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, D.C., and a copy so 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.

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BEFORE THE
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**FEDERATION OF AGENTS AND
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Petitioner,

NLRB Case No. 05-RC-078154

and

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Employer.

EMPLOYER'S OBJECTIONS

Pursuant to 29 C.F.R. §102.69(a), Employer International Brotherhood of Teamsters, by its undersigned counsel, submits the following Objections to Conduct Affecting the Results of the Election. Both Objections relate to the counting of the ballots on May 29, 2012. Supporting evidence will be filed separately.

OBJECTION 1: DISENFRANCHISED VOTERS

On May 29, 2012, the Region counted the ballots in a mail-ballot election. Of the 36 votes received, 18 employees cast votes in favor of FAIR, 16 cast votes against representation by FAIR, and there was 1 challenged ballot. The Region challenged one additional ballot cast by a person not on the Excelsior List, but FAIR consented to the challenge and the ballot was disregarded.

At the ballot count, the Employer announced that several employees whose votes were not received by the NLRB had stated that they had mailed ballots by priority mail and had tracking numbers which demonstrated that their ballots had been received by the United States Postal Service

on or before May 18 and delivered to the Post Office in Washington, D.C. and should have been delivered to the Resident Office well before the ballot count on May 29. In addition, three employees (James Curbeam, Jim Leonhardt and Terry Stark) who had mailed ballots on or about May 18, flew to Washington to vote in person because they were told that their ballots had not been received yet.

We will submit documents showing that four employees (Arica, Hanson, O'Neil, and Westfield) mailed ballots which the Postal Service states should have been delivered to the Resident Office well before the ballot count on May 29. We will submit statements from these employees within the time permitted for the submission of supporting evidence.

The NLRB's representation procedures are designed to permit employees to vote on whether or not they desire to be represented by a Union. When employees are given the opportunity to vote by mail, they should not be denied the right to vote because of proven errors by the Postal Service or the interface between the Board and the Postal Service.

The Board's initial general rule with respect to late-received mail ballots was set forth in NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11336.4:

Envelopes received after the close of business on the return date should be kept separated from those timely received. The Board agent should void these ballots as "untimely" at the checkoff. However, if all parties agree to waive the deadline, such ballots will be opened and counted.

The Board relaxed this rule at least twice. In *Queen City Paving Co.*, 243 NLRB 71, 73 (1979), the Board directed that a ballot mailed 3 days before the deadline be opened and counted because "it was reasonable for [the employee] to assume that, in the normal course of the mails, his ballot would be received by the Regional Director prior to the closing date." In *Kerrville Bus Co.*, 257 NLRB 176 (1981), the Board further relaxed the rule by directing that, in addition to five ballots that had been

mailed at a time when the employees could reasonably anticipate timely receipt, two additional ballots should be counted although timely receipt could not have been anticipated (one was mailed on a Sunday, the day before the due date, and the other on the due date). Citing several factors to be considered, the Board concluded that the ballots should be counted as a matter of fundamental statutory policy to afford employees the broadest possible participation in Board elections as long as the election procedures are not unduly interfered with or hampered.

The current rule, Section 11336.5(c), was revised to incorporate *Kerrville* to the extent that ballots are received after the close of business on the return date. Nevertheless, the Board should adhere to the *Queen City* and *Kerrville* decisions and not disenfranchise employees who voted in time for their votes to be counted but for the Postal Service's or the Region's error.

Here, the United States Postal Service guarantees three day delivery for priority mail. Each of the seven employees paid extra to ensure that his vote would be counted. Each of the seven received confirmation that his ballot had reached Washington, D.C., in time to be counted. Three employees called the Resident Office and flew to Washington to vote in person. Four employees relied on the Postal Service and their votes were not counted. This is not consistent with the Board's policy furthering the right to vote.

The election should be set aside and a new election directed.

Alternatively, we request that the ballots be counted and the tally of ballots signed on May 29 be corrected. The Board followed this procedure in *Oneida County Community Action Agency, Inc.*, 317 NLRB 852 (1995).

OBJECTION 2 - THE BALLOT OF RICHARD FORD

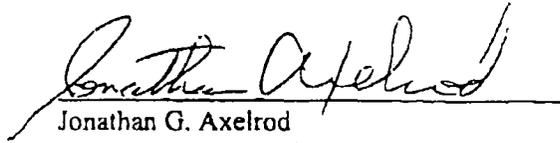
At the ballot count, the Employer's observer challenged the ballot of Richard Ford because it appeared that the ballot envelope had been opened and then taped shut. The Region's election officer took the envelope to a Resident Office superior, who denied the challenge. Accordingly, Mr. Ford's ballot was counted.

Attached hereto is a copy made in the Resident Office of the Ford ballot envelope. It clearly shows a slit through the word "Ford," a slit sufficiently big that the envelope could have been opened and the ballot altered. Because this ballot could be determinative, the election should be set aside and a new election directed.

CONCLUSION

For the reasons stated herein, the Region should initiate an investigation.

Respectfully submitted,



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BROTHERHOOD OF TEAMSTERS

June 4, 2012

IDENTIFICATION STUB

Seal Envelope. Sign Your Name Across the Flap. DO NOT PRINT.

Richard Ford

I BELIEVE I AM AN ELIGIBLE VOTER.
I PERSONALLY VOTED THE WITHIN BALLOT.

CASE NUMBER 5-RC-78154

ELIGIBILITY KEY NUMBER 7

2012 MAY 22 P 11:11
MAY 22 2012

Exhibit B