

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION ONE**

In the Matter of:	)	
	)	
SIGNATURE BREADS, INC.	)	
	)	
Employer,	)	
	)	
and	)	Case No. 01-RC-111773
	)	
	)	
UNITED FOOD & COMMERCIAL WORKERS	)	
INTERNATIONAL UNION, LOCAL 1445, AFL-CIO	)	
	)	
Petitioner.	)	
	)	

**PETITIONER’S OPPOSITION TO EMPLOYER’S REQUEST FOR SPECIAL PERMISSION TO APPEAL, AND APPEAL, FROM REGIONAL DIRECTOR’S RESCHEDULING OF ELECTION FOR OCTOBER 31, 2013**

Petitioner United Food & Commercial Workers International Union, Local 1445 AFL-CIO (Union or Petitioner) hereby opposes Employer Signature Breads, Inc.’s baseless request for special permission to appeal from the Regional Director’s rescheduling of an election postponed by the government shutdown. The request is nothing more than a last-ditch effort to disenfranchise more than two dozen voters simply by asking the National Labor Relations Board to entertain its request, in hopes that the election will be postponed in the interim. Here, employees, including about 27 slated for termination, were scheduled to vote on Friday, October 4, 2013. The election was canceled for reasons beyond the control of the Region or the parties. In rescheduling the election, the Regional Director consulted the parties. The Petitioner requested that the election be held no later than October 30, 2013, whereas the Employer sought to postpone the election until November 1, 2013, for the express reason of disabling 27 eligible voters from voting. The Regional Director then exercised his discretion to reschedule the election for October 31, resulting in 27 eligible voters being able to vote over the Employer’s opposition.

The Employer's request fails to meet the high standard of extraordinary circumstances necessary for the Board to grant special permission to appeal a garden-variety decision about election mechanics. In the alternative, the Request should be denied on the merits, as the Regional Director did not abuse his discretion by, after consulting both parties and considering their positions, scheduling the election for a date that maximizes possibility of participation of eligible voters. In no event should the Board prevent the election from occurring as scheduled.

**I. The Board Should Summarily Deny Special Permission To Appeal And/or Deny the Request on the Merits.**

In an obvious effort to postpone the scheduled election through meritless litigation rather than the merits of its claims, the Employer has requested special permission to appeal pursuant to Sections 102.29, 102.69 and 102.78 of the National Labor Relations Board's Rules and Regulations. While the cited sections do not expressly provide for a pre-election appeal to the Board about a Regional Director's decision on the mechanics of the election, the Board on rare occasion has granted such a request in extraordinary circumstances. *Austal USA, LLC*, 357 NLRB No. 40 (2011).

The Request's citation to *Austal USA, LLC*, 357 NLRB No. 40 (2011) may be revealing as to the Employer's intentions, but it ultimately is unavailing to its arguments. That case dealt with unrepentant employer misconduct that forced the NLRB to set aside not one, but two elections.<sup>1</sup> The employer committed "blatant" unfair labor practices, often by exploiting its control and authority over the premises. The employer's belligerent misconduct created a nexus in other words between the location of unceasing unlawful employer behavior and the election. As such, the Regional Director's decision to schedule a third election at the locus of the unlawful behavior, without any apparent consideration of the Union's objections, provided extraordinary circumstances to warrant Board review and a remand. The petition here does not involve a history of contentious unfair labor practices by the union regarding

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<sup>1</sup> Hopefully, the citation to *Austal USA, LLC*, is not a prediction of future election-day behavior.

the timing or scheduling of an election.<sup>2</sup> There are no extraordinary circumstances presented by this petition to warrant review.

**II. The Employer Failed to Establish That Regional Director Abused Discretion By Refusing To Grant Employer's Request to Disenfranchise 27 Voters.**

Section 102.78 of the Rules and Regulations provide: "If no agreement such as that provided in section 102.79 has been made, the Regional Director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements for the balloting." "It is well settled that the mechanics of an election, such as the date, time, place, and method are left to the discretion of the Regional Director. See *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998)." *Ceva Logistics US, Inc.*, 2011 WL 3739695, 1-2 (2011). Section 11302.1 of the Casehandling manual states:

An election should be held as early as is practical. ... The date selected should be one that balances the desires of the parties and operational considerations, along with the desirability of facilitating employee participation and the prompt and timely conduct of the election. The petitioner, as the moving party in representation cases, whether union, employer, or employee, must be prepared to proceed to an election promptly.

In scheduling the election, the Regional Director may seek "[t]o maximize the opportunity for all eligible employees to vote." *Ceva Logistics, supra*. The Regional Director's decision about the mechanics of an election is subject to an abuse of discretion standard, which means "discretion exercised to an end or purpose not justified by and clearly against reason and evidence." *S.F. Executive Board, Culinary Workers*, 196 NLRB 633, 634 (1972). A Regional Director's failure to articulate the exercise of discretion does not, by itself, constitute an abuse or even justify a remand. *Odebrecht Contractors of Florida, Inc.*, 326 NLRB 33, 33 (1998) (affirming Regional Director's decision to order mail ballot, despite lack of any reasoning for said order). Here, the Employer claims that the Regional abused his discretion by failing to disenfranchise eligible voters scheduled for termination and apparently disregarding the Employer's

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<sup>2</sup> The Petitioner has filed an amended unfair labor practice charge against the Employer regarding a pattern of unlawful behavior, but has elected to proceed with the election despite this behavior. 01-CA-115065.

preference for a Friday election. The Employer's own motion refutes this argument, as it alleges that the Regional Director indisputably acknowledged and considered the Employer's concerns.

Here, the Employer seeks to prevent about 27 employees scheduled for termination after October 31 from voting. It complains that the Regional Director failed to privilege the interests of eligible voters scheduled to continue working after October 31 over those eligible voters scheduled for termination. The Employer does not cite any authority for the idea that the Regional Director must favor the interests of certain voters or otherwise create a tiered system of eligible voters. Under the Employer's reasoning, a Regional Director would have no choice but to defer an election until after a scheduled mass layoff or termination. (Such reasoning also would mandate the exclusion of new, part-time or intermittent employees because their commitment to the workplace necessarily diverges from longer-term employees). This argument flies in the face of the Employer's stated willingness to have the election on October 25, 2013. Employer's Request at 4. It also flies in the face of Board law that entitles employees as of the cut-off date and date of election to vote. As the Employer cannot deny that the Regional Director genuinely considered the employer's proposed election dates, the Regional Director refusal to exclude consideration of eligible voters did not amount to an exercise devoid of reason or fact.

The Employer also complains that the Regional Director ignored the Employer's stated preference for Friday elections. But the Employer's request omits any persuasive basis for this operational predilection for Fridays. The Employer prefers to have an election on a Friday and communicated that preference to the Regional Director. While Friday may be "operationally the best" for the Employer, the Employer's Request provides no evidence or even argument as to why that is so. It does not state claim the Employer cannot accommodate elections on other weekdays, that certain activities do or do not occur on Fridays, or even that attendance is materially better on Fridays. The Employer also failed to even allege why any other day of the week is less desirable or even impossible for an election. It is, in part, the Employer's conclusory argument to the Regional Director, rather than

his exercise of discretion, that is to blame for the scheduling of the election on October 31. Given the lack of evidence or argument behind its preference for Friday, the Regional Director did not abuse his discretion in refusing the Employer's demand that the election be scheduled only on a Friday.

Finally, the Employer's contention that the Regional Director considered only the Union's preference for an election prior to November 1 suffers from obvious logical flaws. In this case, the Union would not voluntarily agree to an election prior to November 1, whereas the Employer would not voluntarily agree to an election on any day but a Friday on or after November (especially once October 25 became unworkable). The parties' positions are mutually exclusive. The logical extension of the Employer's argument, that he exclusively considered the Union's preference, is that the Regional Director would have abused his discretion even if he granted the Employer's preference for a post-October 31 Friday election. The Employer's Request acknowledges that it discussed a variety of options with the Regional Director – October 25, 29, 30, and 31. The Request admits that the only factors that the Employer put forward for the Regional Director was a) a desire to exclude the 27 employees scheduled for termination; b) an operational preference, without substantiation, for Friday after October.<sup>3</sup> These concerns, on their face and upon scrutiny, are far less compelling than the concerns presented by the petitioner in *Austal*. As the Union preferred a date earlier than October 31, its considerations were obviously not the only factors considered by the Regional Director.

Faced with a lack of harmony between the parties on the date and lacking any evidence that the Employer could not operationally accommodate a Thursday election, the Regional Director selected a date that maximized voter turnout and facilitated the purpose of scheduling an election as quickly as possible. This latter concern was more pressing in light of the government shutdown that postponed the scheduled election by nearly four weeks.

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<sup>3</sup> Contrary to the Employer's speculation at footnote 1 of its Request, at least one election postponed by the shutdown has been rescheduled before November 1. See *Falmouth Healthcare, LLC*, 1-RC-113172 (October 30).

**III. CONCLUSION**

For the above reasons, the Union asks that the Board deny the request procedurally and/or on the merits.

Respectfully Submitted,

UFCW LOCAL 1445, AFL-CIO

By Its Attorney,

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Dated: October 24, 2013

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above document was filed this date through the National Labor Relations Board's Electronic Filing System and that a copy was served upon counsel for the Employer by electronic mail to [freemanm@jacksonlewis.com](mailto:freemanm@jacksonlewis.com) and to the Regional Director, [jonathan.kreisberg@nrb.gov](mailto:jonathan.kreisberg@nrb.gov).

/s/ Patrick N. Bryant  
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