

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

ADVANCED STUDENT TRANSPORTATION, INC.¹

Employer

and

Case 04-RD-107689

ALFRED NELSON

Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 326

Union Involved

HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON OBJECTIONS TO ELECTION

Before: Margarita Navarro-Rivera Hearing Officer

¹ The transcript cover page erroneously identifies the Employer as Advance Student Transportation and the Petitioner as International Brotherhood of Teamsters Local 326. The cover page is hereby corrected to reflect the correct name of the Employer, to include Alfred Nelson, IV as the Petitioner and International Brotherhood of Teamsters Local 326 as the Union Involved.

Appearances:

For the Employer:

Gregory J. Hessinger, Esquire
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2000 Market Street, Suite 2850
Philadelphia, Pennsylvania 19103

For the Petitioner:

Alfred Nelson, IV
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Wilmington, DE 19805-2850

For the Union Involved:

Thomas Kohn, Esquire
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STATEMENT OF THE CASE:

Pursuant to a Stipulated Election Agreement approved by the Regional Director on July 3, 2013,² a representation election was conducted by secret ballot on Friday, August 9, in the following unit:

Included: All full-time and regular part-time school bus drivers and bus monitors employed by the Employer at its facilities located at 1400 First State Boulevard, Wilmington, DE and 5093 Summit Bridge Road, Middletown, DE.

Excluded: All other employees, maintenance employees, mechanics, dispatchers, office employees guards and supervisors as defined in the Act.

The Tally of Ballots, copies of which were made available to the parties at the conclusion of the election, showed the following results:

² All dates referred to herein occurred in 2013 unless otherwise indicated.

Approximate number of eligible voters	229
Void ballots.....	0
Votes cast for Union	64
Votes cast against participating labor organizations.....	82
Valid votes counted.....	146
Challenged ballots.....	9
Valid votes counted plus challenged ballots.....	155

The challenged ballots were not determinative of the results of the election.

On August 14, the International Brotherhood of Teamsters Local 326 (the Union) timely filed Objections to conduct affecting the results of the election. The Objections allege as follows:

1. During the period leading up to the election, the critical issue was the feeling among many of the employees that they were paying excessive Union dues. Shortly prior to the election, the Union sought to calculate dues, which were based upon employee earnings. The Company provided the Union with misinformation in that regard. It overstated the earnings of at least 25, and possibly as many as 80, employees, which, in turn, caused the Union to charge these employees with a higher rate of dues than should have been assessed.
2. During the summer months, employees typically earn less than during the rest of the year. Although dues bills submitted by the Union reflected this decrease in earnings, and thus a lower dues rate, the Company continued to deduct the higher, non-summer, dues rate.
3. Although the normal practice was for the Company to withhold dues from employees' paychecks after it received a bill from the Union, on the day of the election, the Company withheld dues even though it had not received a bill from the Union. Given that the issue of dues payments was what precipitated the decertification petition, the timing of this dues deduction impacted the results of the election.
4. The *Excelsior* list contained approximately 22 erroneous addresses, which hindered the Union's ability to contact all of the eligible voters
5. The Company facilitated the collection of signatures on the decertification petition by permitting two employees, Alfred Nelson, the petitioner, and Tara Natt-Payne, his observer, to solicit employees during work hours to sign that petition and by routing Nelson to a work facility where he normally did not work. Additionally, Briscoe acted as the Company's trainer and, while training employees, solicited them to vote against the Union³.

³ On August 29, the Union withdrew Objection 5.

Pursuant to Paragraph 12 of the Agreement and Section 102.69 of the Board's Rules and Regulations, under the direction and supervision of the Regional Director, the Region conducted a preliminary investigation of Union's Objections. On September 3, the Regional Director issued a Notice of Hearing on Objections to Election ("Notice of Hearing") directing that a hearing be held to take testimony and resolve the factual issues presented by the Objections. A hearing was held before me on September 19, 2013 in Philadelphia, Pennsylvania. At the hearing, all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Both the Employer and the Union also filed post-hearing briefs.

Based on the evidence presented at the hearing, including the testimony of the witnesses and my assessment of their demeanor and credibility as well as the contentions made in the post-hearing briefs,⁴ I recommend that the Objections be overruled. Based upon my recommendation that the Union's Objections be overruled, I recommend that a Certification of Results issue⁵.

To provide a context for my discussion, I will first present an overview of the procedural history of this case and set forth the relevant legal principles. I will then present the facts and my credibility findings as to the Objections. Lastly, I will set forth my Recommended Order.

BACKGROUND FACTS:

The Employer, Advanced Student Transportation, Inc. (Employer), transports New Castle County, Delaware students to and from school and to extra-curricular activities. Eighty percent of the Employer's business involves home to school and school to home transportation and the rest of the business involves the transportation of students to extra-curricular activity trips. Bradley Krapf is the President, Jim Flokes is the Vice President of school bus operations and Darrell Mosley⁶ is the operations manager. Mosley is based in Wilmington, Delaware. The

⁴ I reviewed, considered, and gave appropriate weight to all testimony in light of the entire record. The facts found in this report are based on the record as a whole, as well as my observation of the witnesses. Contradictory testimony not specifically mentioned was not disregarded, but was rejected as excessively vague, not credible, and/or irrelevant to the issues posed by the Objections.

⁵ Throughout this report references to exhibits are as follows: E followed by a number refers to Employer exhibit numbers and U followed by a number refers to Union exhibit numbers.

⁶ The transcript identifies Mr. Mosley as Daryl. The transcript is hereby corrected to reflect the correct spelling of Mr. Mosley's name as Darrell.

Employer maintains facilities in Middletown and Wilmington, Delaware. There are 60 or 70 employees in the Middletown facility and about 140 to 150 in the Wilmington facility. There are two office employees in the Middletown facility and a small maintenance facility. In addition to Mosley, the Wilmington facility has a number of dispatchers, administrative people trainers, local payroll personnel and a larger maintenance facility. The Employer also maintains a facility in Salem where it employs 45 to 50 employees.

Eileen Deegan is the Controller for George Krapf, Jr. & Sons and performs accounting services for all entities within the Krapf bus companies. The Employer is one of the Krapf bus companies. Janet Moran is the Vice President of Human Resources for George Krapf, Jr. & Sons and provides human resource services for the Employer.

The Employer and the Union were parties to a collective bargaining agreement effective by its terms from August 23, 2010 through August 22, 2013.

GENERAL LEGAL PRINCIPLES ON OBJECTIONS:

In determining whether a party's conduct warrants setting aside an election, it is necessary to determine whether the particular conduct reasonably tended to interfere with the free and uncoerced choice in the election. *Baja's Place, Inc.*, 268 NLRB 868 (1984). The standard for finding conduct objectionable is less stringent than for finding conduct an unfair labor practice. *In re Detroit Medical Center Corp.*, 331 NLRB 878 (2000). The Board applies the standard set forth in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) as to whether the misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." *Metaldyne Corp.*, 339 NLRB 352 (2003); *Waste Management of Pennsylvania*, 314 NLRB 376 (1994); *Mercy General Hospital*, 334 NLRB 100 (2001).

A party seeking to upset the results of a Board-conducted election must meet a heavy burden of showing that objectionable conduct occurred during the critical period and impaired the conditions necessary for a fair election. *Crown Bolt, Inc.*, 343 NLRB 776, 777 ((2004). As a general rule, the period during which the Board will consider conduct as objectionable—often called the "critical period"—is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

GENERAL LEGAL PRINCIPLES ON EXCELSIOR LIST INACCURACIES

The eligibility list requirement set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966), has two purposes: "(1) to insure an informed electorate by affording all parties an equal opportunity to communicate with eligible voters, and (2) to expedite the resolution of questions concerning representation by minimizing challenges based solely on lack of knowledge as to the

voter's identity." *Women in Crisis Counseling*, 312 NLRB 589 (1993). The Board does not apply the *Excelsior* rule mechanically. *Id.* At 589, citing *Program Aids Co.*, 163 NLRB 145, 146 (1967). "The omission of names from an *Excelsior* list is far more likely to frustrate the Board's purposes than inaccuracies in addresses. A party with an employee's name but an inaccurate address at least has a key piece of information which can be used to identify and communicate with the person by means other than mail. Moreover, the Board's greater tolerance of address inaccuracies in *Excelsior* lists reflects a pragmatic recognition that an employer reasonably should know the names of employees in its current work force but may be less able, without prompt disclosure from the employees themselves, to maintain a completely accurate list of their current address." *Id.* at 589.

Among the considerations for determining whether an Employer has substantially complied with the *Excelsior* rule are the percentage of incorrect addresses and whether the Employer acted in a "grossly negligent manner." *Merchants Transfer Co.*, 330 NLRB 1165 (2000). The Board has found gross negligence when the Employer was aware that many of the addresses were incorrect when it furnished the list, *Merchants Transfer*, *supra*, or when it was made aware of the mistakes and did little or nothing to correct them in a timely manner, *Laidlaw Medical Transportation*, 326 NLRB 925 (1998).

FACTS & FINDINGS:

Objections 1, 2 and 3 all deal with the deduction of dues and I shall treat them together. Objection 4 alleges that the Employer provided inaccurate addresses in the *Excelsior* list and I shall discuss and dispose of that objection separately.

OBJECTION 1: During the period leading up to the election, the critical issue was the feeling among many of the employees that they were paying excessive Union dues. Shortly prior to the election, the Union sought to calculate dues, which were based upon employee earnings. The Company provided the Union with misinformation in that regard. It overstated the earnings of at least 25, and possibly as many as 80, employees, which, in turn, caused the Union to charge these employees with a higher rate of dues than should have been assessed.

OBJECTION 2: During the summer months, employees typically earn less than during the rest of the year. Although dues bills submitted by the Union reflected this decrease in earnings, and thus a lower dues rate, the Company continued to deduct the higher, non-summer, dues rate.

OBJECTION 3: Although the normal practice was for the Company to withhold dues from employees' paychecks after it received a bill from the Union, on the day of the election, the Company withheld dues even though it had not received a bill from the Union. Given that the issue of dues payments was what precipitated the decertification petition, the timing of this dues deduction impacted the results of the election.

The Union called Vice President and Business Agent Leonard McCartney (McCartney), current office Manager Jennifer Duncan (Duncan)⁷ and Secretary/Treasurer and Business Agent Paul Thornburg (Thornburg) to testify in support of the dues objections. Employees Edward Drake (Drake) and Anthony Dello Buono, Jr. (Dello Buono) were also called to testify by the Union concerning dues.

McCarthy, who served as the Union's office manager for 12 years and was responsible for processing the dues for the Union, credibly testified that in the school bus industry, dues are based on the hourly rate. If the hourly rate is \$11.00 or less the dues rate is two (2) times the hourly rate, and if the hourly rate is more than \$11.00 the dues rate is two and one-half (2 ½) times the hourly rate. McCartney also testified that Schedule A of the parties' collective bargaining agreement (agreement) sets forth the rates for a three year period based upon the driver's seniority. The rates sets forth in Schedule A are used to calculate dues during 10 months of the year, but not for the summer months of July and August. McCartney further testified that Article 12, Section 7 of the agreement provides that summer work is paid at 80% of the rates sets forth in Schedule A. As a result, summer dues are lower than the winter dues. According to McCartney's credited testimony, the Union obtains a list from the Employer of the employees who are working during the summer. Union Exhibit 2 shows that on July 1, 2013, the Employer provided a list of summer employee names and rates to the Union. McCartney testified that he received the list because Duncan was on vacation. McCartney found the list to be accurate and applied the rates provided to the individuals and changed the rates in the Union's computer system. McCartney testified that he does not check the Employer's math for accuracy, he simply relied on the information the Employer provided. After McCartney changed the dues rate in the computer system, he placed all other employees on seasonal withdrawal and generated dues invoice which he sent to the Employer. The Employer returns the invoice to the Union with a check for the month's dues. Although he did not elaborate, McCartney testified that at some point the Union started receiving calls that the dues were too high and as a result the Union's Executive Board commenced looking into restructuring the dues structure. As a result there was a delay in the Union providing the August dues invoice and in fact the invoice was not provided to the Employer until August 13, 2013, four days after the election. No one from the Union contacted the Employer to let the Employer know that it was reviewing the dues structure and that the August invoice would be delayed. By the same token no one from the Employer inquired as to why the Union invoice was delayed. McCartney finally testified that this was the first time in three years that the Employer deducted dues without an invoice from the Union.

Duncan testified that she has been responsible for dues invoicing for the past nine months. Once she receives a dues check from the Employer, she processes the check and on the same day, she prepares a pre-billing invoice that she submits to the Employer for the following month's dues⁸. Duncan testified that during the regular school year months the dues are based

⁷ Duncan also testified about the inaccurate addresses in the Excelsior list.

⁸ Thornburgh testified that the Union usually receives the dues check from the Employer around the 21st of the month and that the pre-bill for the next month is generated on the same day.

on what the Union has in its computer system and that during the summer months of July and August the dues are based on the Employer's list of employees and their summer rates. Duncan did not submit the August dues invoice to the Employer until August 13, 2013, four days after the election.

Thornburg testified that both before and during the election campaign employees were complaining that dues were too high⁹. Thornburg further testified that there were multiple discussions within the Local Executive Board about the dues structure and how it could be changed and still meet the constitutional requirements of the International Brotherhood of Teamsters. These discussions were held months prior to the election and during the summer.

The Union also called employees Edward Drake (Drake) and Anthony Dello Buono (Dello Buono) to testify in support of its dues objections. Drake, who has worked for the Employer in the Middletown yard for ten years and is the Union chief shop steward, testified that the number one issue for employees has always been dues and that when the issue first came up last year or the year before he was told to tell employees to call the Union. He also testified that one of the main issues brought up by the Employer during the campaign was the issue of dues and how much employees could save by voting no. Dello Buono, who has worked for the Employer at the Salem facility for seven years, testified that the major issue of concern to the employees was dues¹⁰.

Controller Eileen Deegan (Deegan) and President Bradley Krapf (Krapf) testified on behalf of the Employer concerning the dues objections.

Deegan¹¹ testified that every month the Union prepares and sends a dues invoice to operations manager Darrell Moseley (Mosley). Mosley checks the invoice to determine if anyone on the invoice has been terminated and if it is correct. Mosley does not do anything to the rates submitted by the Union. According to Deegan, August 9, was a pay day. Deegan testified that the Employer's agreement with the Union is that dues are deducted from employees' pay on the second payroll of the month. August 9 was the second payroll of the month. In order to issue checks in a timely manner Deegan had to have the Union's invoice by August 7, however Deegan had not received the invoice by August 7. Deegan could not reach

⁹ I do not credit Thornburg's testimony that seven or eight employees complained to him that dues had been taken out of their paychecks on the day of the election. Although the Employer did not object to this testimony, I find that Thornburg's testimony is hearsay as no employee with direct knowledge was called to testify about this. Accordingly, I am disregarding this aspect of Thornburg's testimony.

¹⁰ I find that the dues complaints were not a new issue in the campaign, in fact employee complaints about dues have been an ongoing problem since at least 2011, well before the filing of the petition herein. Thus, I find that the employee dues complaints are not germane to the Union's objections.

¹¹ I credit Deegan's testimony in its entirety. I found her to be a very straight-forward honest witness, who answered questions put to her candidly and succinctly.

Mosley to inquire about the invoice because he was in a back to school meeting. As a result, she decided to use the July invoice for the August dues deduction to avoid problems with the Union and to be consistent with what had been done in the past. Deegan reasoned that if they were wrong by applying the July rates they would refund the money to the employees in their next paycheck. I credit Deegan's testimony that she did not check with anyone when she decided to use the July rates for the August dues deductions and that she did not know anything about the decertification effort that was underway. Deegan was not involved in the Employer's campaign and never saw any campaign materials. Lastly, Deegan testified that 180 out of the total of 228 employees are on direct deposit and never see a paycheck on payday.

Krapf credibly testified that the Employer does not calculate the dues to be deducted from the employees' paychecks. Krapf testified that the Employer decided to honor the Union's 2011 request to deduct the dues on the second week of the month. Krapf further testified that the June invoice provided by the Union for the June (E-2) reflects the driver rates for the regular school year and that the June invoice is the same invoice for the 10 months of the school year. I credit Krapf's testimony that he did not know that Deegan had made the decision to deduct the dues during the week they were supposed to be deducted.

I find that the Union failed to meet its burden of establishing that the conduct complained of regarding the dues (Objections 1, 2 and 3) taken as a whole, warrants a new election or that it has "the tendency to interfere with employees' freedom of choice" and could have affected the outcome of the election." *Metaldyne Corp*, supra; *Waste Management of Pennsylvania*, supra; *Mercy General Hospital*, supra.

Objection 1 alleges that the Employer provided the Union with misinformation concerning rates causing the Union to charge employees at a higher rate of dues. Nothing can be further from the truth. In fact McCartney, the Union's own witness, did not support this allegation as he testified that the information provided by the Employer in U-2 was accurate and that he based the July dues invoice on the information contained in U-2. There is no dispute that the summer rates are lower than the school year rates, indeed U-2 reflects the lower summer rates. It was the Union that provided the July dues invoice, the Employer merely deducted the dues in accordance with the Union's invoice. I have credited Deegan's testimony that she acted reasonably and in good faith when the Union failed to provide an invoice for the August dues, and she went ahead and used the July invoice to deduct the dues. She reasoned that any overcharge or undercharge could be corrected during the next payroll period. Thus, I conclude that dues deductions for July and August were not inflated and were based on the lower summer rates. Accordingly, I recommend that Objection 1 be overruled.

Objection 2 alleges that the Employer continued to deduct dues at the higher rate despite the fact that the Union submitted bills with lower rates. Again, I find that this allegation is not supported by the record. As stated above, the dues deductions for July and August were based on information from the Employer which the Union conceded was accurate. Additionally, my review of U-3 and E-2 clearly shows that the rates in U-3 (the rates used by the Employer to deduct the July and August dues, are the lower summer rates, while E-2 (the rates used by the Employer to deduct the June rates) are the higher school year rates. Thus, I find, contrary to the Union's allegation, that at all times during the deduction of dues in July and August, the

Employer used the lower summer rates. Accordingly, I recommend that Objection 2 be overruled.

Objection 3 alleges that the Employer deviated from past practice by deducting dues on the day of the election and prior to the receipt of the Union's invoice for dues. I also find that this objection is not supported by the record. Since at least 2011 at the Union's request, the Employer has always deducted dues on the second payroll of the month. The record established that August 9 was the second payroll of the month. In my view, the Employer acted properly by deducting the dues on the second payroll period. I also find that it was the Union who deviated from the practice by failing to provide a dues invoice consistent with its practice during the period of the parties' collective bargaining agreement and relationship. Accordingly, I recommend that Objection 3 be overruled.

OBJECTION 4: The Excelsior list contained approximately 22 erroneous addresses, which hindered the Union's ability to contact all of the eligible voters

Duncan testified for the Union concerning the Excelsior list. Duncan testified that Thornburg went through the list and made notations for Duncan to check certain of the addresses on the Excelsior list against the Union's Titan system, a system used by the Union to track dues. During the campaign the Union sent campaign literature to employees. Duncan testified that twenty-four (24) of the employee addresses were inaccurate and returned to the Union by the post office. According to Duncan, the Union was able to find correct addresses for eleven employees, but was unable to secure corrected addresses for thirteen of the employees. I do not credit Duncan's testimony. With respect to the total number of inaccurate addresses, I note that one employee (David Mason) was not an eligible voter as the documentary evidence (E-4) clearly shows that he was terminated prior to the election and thus is not an eligible voter. Another employee (Marlin Rivers) is listed in the Union exhibits both on the list of employee names that were corrected and on the list of the employees whose addresses were never corrected. Thus, I would not count Rivers as an inaccurate address. Taking Mason and Rivers out of the equation would bring the Union's number to 22 inaccurate addresses. As the Union secured correct addresses for 11 employees, brings the number down to 11 inaccurate addresses. I also note that despite the fact that the Excelsior list contained the correct addresses of four of the employees (Cieara Fisher, Harold Merrell, Marlin Rivers and Rashad Wescott); the Union continued to send its mailings to the incorrect addresses. Thus, I conclude that there were seven (7) inaccurate addresses in the Excelsior list. The tally of ballots shows that there were 229 eligible voters. Thus, I conclude that the inaccuracy rate for addresses in the instant case is 3.05%. Even assuming that 24 is the correct number of inaccurate addresses, the inaccuracy rate would be 9.54%.

Janet Moran (Moran), the Vice President of Human Resources for George Krapf, Jr provides Human Resources services for the Employer. Moran, whose testimony I credit, testified that she directed Colleen Leonard to prepare the Excelsior list from the Employer's HRO Paychex system, a payroll system used by the Employer for all of its employee

communications. An employee's address can be incorrect in the system if that employee has failed to inform the Employer that his/her address has changed. Moran also testified that dispatchers are responsible for filling out employee change status forms whenever they are notified that an employee's address has changed, but again this would hinge on the employees reporting the change to the dispatcher.

In view of the foregoing, I conclude that the number of inaccuracies (3.05%) in the *Excelsior* list was not substantial enough to require setting aside the election. Additionally, there is no evidence (or any contention by the Union) that the inaccuracies were the result of bad faith or gross negligence by the Employer. Assuming *arguendo* that 24 was the number of inaccuracies in the list, I still conclude that 9.54% was not substantial enough to require setting aside the election. The Board has regularly that, in the absence of gross negligence, similar or greater percentages of inaccurate addresses were not considered to be extensive enough to require setting aside the election. *Women in Crisis*, supra (30 percent inaccurate rate); *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (22% inaccuracy rate and 4% omissions); *Lobster House*, supra (16% inaccuracy rate); *Mountaineer Park, Inc.* 343 NLRB 1473 (2004) (13.79% inaccuracy rate); *Washington Fruit and Produce Company*, 343 NLRB 1215 (2004) (28% inaccuracy rate). Accordingly, I recommend that Objection 4 be overruled.

V. CONCLUSION AND RECOMMENDED ORDER:

Based on the foregoing, the record as a whole, and applicable legal principles, I recommend that the Union's Objections 1, 2, 3 and 4 be overruled. I also recommend that and that a Certification of Results issue¹².

¹² Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this Report may be filed with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001.

Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by the close of business on **November 29, 2013**, 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 filed electronically, the exception will be considered timely if the transmission of the entire document through the Agency's website **is accomplished 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. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Signed at Philadelphia, Pennsylvania, this 15th day of November, 2013.

/s/ Margarita Navarro-Rivera
MARGARITA NAVARRO-RIVERA
Hearing Officer, Fourth Region
National Labor Relations Board

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A request for an 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.

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 instruction. 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.

