UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

EXPOSITION STORAGE SERVICES, LLC, **Case No. 28-RC-109730**

Employer,

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 631 affiliated with INTERNATION BROTHERHOOD OF TEAMSTERS,

Petitioner.
_____/

BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON THE CHALLENGED BALLOTS

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I. STATEMENT OF THE CASE.

This is a clear case of buyer's remorse. Here, the Union stipulated to a unit consisting of full-time and regular part-time casual and seasonal carpet preparers and carpet cleaners. After a Board-conducted election consisting of employees within that unit, the Union, apparently not satisfied with the results, sought to change the game by challenging the very individuals identified as being part of that unit.

Exposition Storage Services, LLC ("Employer") is a small company that provides carpet cleaning and carpet preparation services to general service contractors in the tradeshow industry. Because of the nature of the industry, the Employer does not have a need to employ its carpet preparers year-round on a full-time basis. Rather, the Employer lays off its seasonal carpet preparers and subsequently recalls them to work as needed during the larger tradeshows, which generally occur during the latter quarter of the calendar year. The challenged ballots at issue in this case are representative of such employees.

On July 23, 2013, the Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631 ("Union") filed a Representation Petition seeking to represent "[a]ll full-time and part-time carpet preparers and carpet cleaners employed by the Employer at its Las Vegas, Nevada facility." See (J. Ex. 1, Petition). The Union and the Employer entered into a Stipulated Election Agreement providing for a unit consisting of: "All full-time and regular part-time casual and seasonal carpet preparers and carpet cleaners employed by the Employer in Las Vegas, Nevada." See (J. Ex. 2, Stipulated Election Agreement). A National Labor Relations Board ("Board") conducted secret ballot election was held on August 29, 2013, pursuant to the terms of the Stipulated Election Agreement. Id. At the conclusion of the election, the Union challenged four (4) of the cast ballots.

In addition to the ballot challenges, the Union also filed seven (7) objections to the election itself. (BD Ex. 1(a)).

A hearing was held on the matter before Hearing Officer Larry A. Smith in Las Vegas, Nevada, on September 24, 2013. One (1) volume of transcript containing the testimony presented during the hearing was prepared and transmitted to the parties on or about September 27, 2013.

Bryan J. Cohen, Esq. of the law firm of Kamer Zucker Abbott, represented the Employer. Eric Myers, Esq. of the law firm of Davis, Cowell & Bowe LLP, represented the Union. During the hearing, the Union called the following individuals as witnesses: Todd Neely, the Vice President of Exposition Storage Services, LLC; and Roberto Soto, an employee of Exposition Storage Services, LLC. The Respondent called Robert Breedlove, the General Manager of Exposition Storage Services, LLC. References in the brief are to the party testifying, the page of testimony in the transcript, and the relevant transcript lines referenced, e.g., (Neely: TR 47, ll. 18-21). There are also references to Employer's Exhibits (E. Ex.), Union's Exhibits (U. Ex.), Joint Exhibits (J. Ex.), and Board Exhibits (BD Ex.).

After the conclusion of the hearing, the Union withdrew its objections to the election. Hearing Officer Larry A. Smith issued his Report and Recommendations on the Challenged Ballots on December 6, 2013.

II. STATEMENT OF THE ISSUE.

Whether the Hearing Officer erred by finding that the challenged voters were neither seasonal nor casual employees and therefore ineligible to vote in the election?

III. STATEMENT OF FACTS.

A. The Nature of the Employer's Work.

The Employer employs carpet preparers and carpet cleaners to provide carpet-related services to general service contractors in the tradeshow industry. (Breedlove: TR 94, ll. 10-13). The amount of work the Employer performs is based upon the carpet needs of its customers. Notably, the Hearing Officer correctly found that the Employer does not employ any carpet cleaning and carpet preparation employees year-round. (Decision at 4). Accordingly, all of the Employer's employees must fall into one of three categories: part-time, seasonal or casual. As Mr. Breedlove testified, the three largest shows that the Employer performs work for are the Las Vegas Souvenir Show, the Mr. Olympia Show, and the NFR Cowboy Christmas Gift Show. (Breedlove: TR 104, ll. 17-23). Notably, the Mr. Olympia Show and the NFR Cowboy Christmas Gift Show use between 13,000 and 14,000 linear feet of carpet, and the Las Vegas Souvenir Show uses approximately 10,000 linear feet of carpet. Id. The Las Vegas Souvenir Show took place during the week of September 18, 2013, the Mr. Olympia Show took place the last week of September 2013, and the NFR Cowboy Christmas Gift Show took place at the beginning of December 2013. (Breedlove: TR 104, l. 24 – 105, l. 3). Each of these shows takes place around the same time each year. (Breedlove: TR 105, ll. 4-5). Because of the nature of the Employer's work, dealing specifically with carpet, for the company to continue to exist from year to year, it would have to perform work on these carpet-intensive shows. Accordingly, the Hearing Officer incorrectly concluded that because the Employer did not have a contract to perform work on these shows from year to year, that it could not expect to be busy when then shows were conducted in subsequent years. (Decision at 4).

The Employer is a relatively new company, having just begun operations in late 2010. Over the course of the Employer's operation, employee hours have increased and decreased, with the peak hours culminating in the last two quarters of 2012. (U. Ex. 1). Notably, the initial year of operation included employees needed to set up the shop, as well as customer service representatives that the company no longer employs. (Breedlove: TR 113, l. 23 – 114, l. 11). As Mr. Breedlove testified, the most stable year to accurately reflect the Employer's carpet preparation and carpet cleaning operations was 2012. Id. The employee hours peaked during the third and fourth quarters of 2012. (U. Ex. 1).

Because the Employer's primary three shows identified above occur during the latter part of the year, the Employer does not have enough available work to employ its carpet preparers and carpet cleaners full-time on a year-round basis. (Breedlove: TR 114, ll. 12-15). The Employer, therefore, maintains a list of its experienced employees that it contacts when the work is available. (Breedlove: TR 114, ll.16-22). It is from this list of employees that the Employer populated the Excelsior list. Id. Notably, during the representation hearing on July 30, 2013, discussed below, the Employer provided the Union with its recall list to discuss their participation in the election. (U. Ex. 2). The Hearing Officer's finding, therefore, that the Employer did not maintain a recall list was in error. (Decision at 10).

B. The Stipulated Election Agreement.

As noted above, the Union initially sought to represent "[a]ll full-time and part-time carpet preparers and carpet cleaners employed by the Employer at its Las Vegas, Nevada facility." (J. Ex. 1). On July 30, 2013, the Employer and the Union discussed the scope of the appropriate collective bargaining unit prior to their participation in a representation hearing. During the parties' discussion, the Employer presented evidence of the employment of seasonal

and/or casual employees that perform the type of work identified in the Petition to be included in the bargaining unit. The Employer presented the Union with a list of those employees that it deemed to be part of the appropriate unit, representing the employees that the Employer intended to recall during the busier season in the fall. (U. Ex. 2). Notably, the names of each of the challenged voters were included on this list. With the exception of one employee on the list, Ms. Courtney Richter, who had just recently been terminated, the Union agreed that the other employees were appropriate members of the unit. Accordingly, the parties stipulated that the appropriate bargaining unit would consist of: "All full-time and regular part-time ***casual and seasonal*** carpet preparers and carpet cleaners employed by the Employer in Las Vegas, Nevada." See (J. Ex. 2) [emphasis added]. The addition of the phrase "casual and seasonal" employees was specifically intended to represent the employees identified during the discussions, and the memorialized agreement between the parties to include them in the unit. Thus, contrary to the Hearing Officer's finding, the parties did reach agreement prior to the election on the specific individuals allowed to vote. (U. Ex. 2).

Notably, the Stipulated Election Agreement identified the eligible employees as those that had been employed by the Employer "during the twelve-month period ending July 28, 2013, including employees who did not work during that period because they were . . . ***temporarily laid off***." (J. Ex. 2) [emphasis added]. Regardless of this provision, each of the challenged voters actually worked during the relevant time period.

C. Election Challenges.

The Union challenged the ballots of four (4) unit members as that unit is described in the Stipulated Election Agreement. The Union alleged that each of the challenged ballots was cast by an ineligible voter. With regard to the four (4) challenged ballots, each of those individuals

performed work for the Employer primarily during the busy season from September through November.

1. Trey Bubak.

Trey Bubak was hired by the Employer on September 15, 2012 as a part-time carpet preparer and carpet cleaner. (E. Ex. 3). Mr. Bubak worked 537 hours from September 2012 through January 2013. (E. Ex. 4). When the Employer no longer required his services in the early part of 2013, he was released from his employment.

In late August 2013, the Employer recognized that it was going to have a substantial amount of carpet preparation and cleaning work to perform during the last months of 2013 based on the particular shows that it would be working on at that time. (Breedlove: TR 108, ll. 14-17). Accordingly, in early September 2013, Mr. Bubak was recalled by the Employer to once again perform services as a carpet preparer and carpet cleaner. (Breedlove: TR 102, ll. 20-22). From the time he was recalled through the date of the hearing in this matter, Mr. Bubak worked forty (40) hours. (E. Ex. 4). Mr. Bubak continued to be employed by the Employer through the fall of 2013. Despite the evidence that Mr. Bubak worked a significant amount of time during the fall of 2012 and the fall of 2013, the Hearing Officer incorrectly concluded that Mr. Bubak was not a seasonal employee on the basis that he may or not have been specifically told when he would be needed to return. (Decision at 7). Notably, the Hearing Officer concluded Mr. Bubak was also not a casual employee, but provides no basis for such a conclusion.

2. Michael Forrest.

Michael Forrest was hired by the Employer on February 5, 2011 as a part-time carpet preparer and carpet cleaner. (E. Ex. 3). Mr. Forrest performed 120 hours of work in 2011. (E. Ex. 8). His hours diminished after his work was no longer required at the end of 2011. Mr.

Forrest returned to work for the Employer briefly in April 2012, and ultimately performed 97 hours of work for the Employer in 2012, primarily between August and October, and 24 hours of work in January 2013. (E. Ex. 5). Mr. Forrest performed no other work for the Employer until being recalled to work in late August 2013. Id. From the time he was recalled through the date of the hearing in this matter, Mr. Forrest worked 40.5 hours. (E. Ex. 5). Mr. Forrest continued to be employed by the Employer through the fall of 2013. Again, the Hearing Officer concluded that despite Mr. Forrest's seasonal work for the Employer, he was not a seasonal employee because he did not have an expectation of future employment. (Decision at 11). The Hearing Officer discredited Mr. Breedlove's testimony without any basis. There was no testimony from Mr. Forrest, so the Hearing Officer is speculating that Mr. Forrest did not expect to return to work. Inasmuch as the burden is on the Union to prove the ineligibility of the voters, the Hearing Officer's assumption of ineligibility is improper.

3. Keeter Galusha.

Keeter Galusha was hired by the Employer on September 6, 2012 to work as a part-time carpet preparer and carpet cleaner. (E. Ex. 3). Mr. Galusha performed 129 hours of work for the Employer in 2012, between the months of September and October. (E. Ex. 6). Mr. Galusha had a significant amount of experience in this area of work, so he was paid at a higher rate of pay than other employees. (Breedlove: TR 108, ll. 4-10); (E. Ex. 6). The Hearing Officer concluded that the Employer could not have determined Mr. Galusha's experience in such a limited period of time. (Decision at 8, n.4). The Hearing Officer, however, failed to acknowledge Mr. Galusha's experience would include work performed prior to working for the Employer.

As noted above, in late August 2013, the Employer recognized that it was going to have a substantial amount of carpet preparation and cleaning work to perform during the last months of

2013. (Breedlove: TR 108, ll. 14-17). Furthermore, the Employer was uncertain as to whether it would need to outsource its cleaning services based on its workload. (Breedlove: TR 108, ll. 17-20). Because of Mr. Galusha's lead experience, the Employer sought to recall him to work for the purpose of serving as a lead for the cleaning services. Id. The Employer met with Mr. Galusha in mid to late August to discuss the prospects of his return to work. (Breedlove: TR 108, ll. 11-14). Although Mr. Galusha ultimately chose not to return to work for the Employer, as he was currently employed elsewhere, Mr. Galusha remains on the Employer's recall list in the event he is available to work in the future. (Breedlove: TR 109, ll. 2-4). Notably, at the time the Employer compiled the Excelsior list in early August 2013, it had no reason to believe that Mr. Galusha would not be available to be recalled to work.

4. Roberto Soto.

Roberto Soto was hired by the Employer on January 21, 2012 as a part-time carpet preparer and carpet cleaner. (E. Ex. 3). His hours were sporadic through the first half of the year, working just 77.5 hours between January and June 2012. (E. Ex. 7). As the Employer's work increased with the larger trade shows in the latter part of the year, so did Mr. Soto's hours of work. Notably, Mr. Soto performed 258.25 hours of work for the Employer between August and December 2012. (E. Ex. 7). As demonstrated by his earnings records, as with the Employer's other employees, the hours of work began to diminish by the end of November 2012. Id. Mr. Soto testified that he left in December 2012 because he could not get set hours. (Soto: TR 76, ll. 4-7). Notably, he testified that he believed he could be called back to work "later on." (Soto: TR 78, ll. 5). Mr. Soto's testimony in this regard contradicts the Hearing Officer's finding that the challenged voters had ***no*** expectation of future employment.

In late August 2013, Mr. Soto was recalled to work for the Employer. Mr. Breedlove contacted Mr. Soto at that time to determine if he was available to work. (Breedlove: TR 111, ll. 20-24). Mr. Breedlove stated, "Again, our peak season was upon us and he's one of our go-to guys with experience in the carpet prep and cleaning area." (Breedlove: TR 112, ll. 1-3). From his return to work in August 2013 through the date of the hearing, Mr. Soto worked 88 hours. (E. Ex. 7). Mr. Soto continued to be employed by the Employer through the fall of 2013. (Soto: TR 74, ll. 16-17).

IV. LEGAL ARGUMENT.

A. The Challenged Voters are Seasonal Employees.

The Board has defined seasonal employees as those who have a reasonable expectation of reemployment in the foreseeable future, and has found that they are to be included in the bargaining unit. See L & B Cooling, 267 N.L.R.B. 1 (1983); Maine Apple Growers, Inc., 254 N.L.R.B. 501 (1981); Baumer Foods, Inc., 190 N.L.R.B. 690 (1971). In Maine Apple Growers, the Board found that the seasonal packing employees had a reasonable expectation of reemployment. The Board stated:

> In assessing the expectation of future employment among seasonal employees for purposes of voting eligibility, the Board considers such factors as the size of the area labor force, the stability of the Employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the Employer's recall or preference policy regarding seasonal employees.

Id. at 502. Like the Employer in the instant matter, the employer in Maine Apple Growers employed its seasonal employees from a small labor pool, and the employees were in fact rehired in the following season. As Mr. Breedlove testified, the Employer's recall list is made up of its experienced workers, and "go-to" guys. (Breedlove: TR 114, ll.16-22; 112, ll. 1-3). The

Hearing Officer distinguished this case from Maine Apple Growers by noting that the Employer did not rehire "a substantial number of employees each season." (Decision at 9). This statement is misleading inasmuch as the Hearing Officer has concluded that hiring six to eight employees for the busy season is not substantial. However, considering the relatively small size of the Employer's workforce, those employees represent a substantial portion of the workforce.

In Baumer Foods, Inc., the Board found the seasonal employees had a reasonable expectation of future employment and were appropriately included in the unit. The Board noted that the employer hired from the same labor force each year, and gave preference to hiring former seasonal employees. Notably, the Board stated that, "Although the Employer does not maintain a recall list of seasonals, it gives hiring preference to former seasonals who apply for work." Baumer Foods, Inc., 190 N.L.R.B. at 690. The Employer in the instant matter does maintain a recall list and gives preference to its former employees. The Hearing Officer gave a great deal of weight to his conclusion that the employees did not have an expectation of future employment because according to the Hearing Officer, they were not told they would be rehired. Notably, in Baumer Foods, Inc., the Board stated, "as many return each year, and as they work with the regular employees and perform the same duties under common supervision, we find that the seasonal employees at the Employer's New Orleans plant have a reasonable expectation of substantial seasonal employment from year to year." Id. The Board made no reference to the employer contacting former employees or notifying them that they could be recalled. Yet, a finding of seasonality was still made by the Board.

Other factors the Board considers when determining whether employees are regular seasonal employees are: whether they come from the same labor force, Seneca Foods Corp., 248 N.L.R.B. 1119 (1980); whether former employees are given preferential hiring, Bogus Basin

Recreation Assn., 212 N.L.R.B. 833 (1974); and whether the working conditions, duties and benefits are similar for both permanent and seasonal employees, Kelly Bros. Nurseries, 140 N.L.R.B. 82 (1962).

As demonstrated above, the four challenged voters are all seasonal employees with a reasonable expectation of reemployment. The Employer demonstrated that its busy season falls between the months of September and December when the largest tradeshows for which it performs work occur. (Breedlove: TR 104, ll. 17-23). The challenged employee voters had all previously worked for the Employer during the peak season, and with the exception of Mr. Galusha, were all recalled to work for the 2013 busy season. The earnings records for each of the challenged voters clearly demonstrate the seasonality of the work performed, specifically that of Mr. Forrest and Mr. Soto, who although having worked at other times of the year, demonstrated significant increases in hours during the latter months of the year. (E. Exs. 4-7).

B. If the Challenged Voters are Not Seasonal, They are Casual Employees.

Even if the Hearing Officer's conclusion that the challenged voters were not seasonal employees is sustained, the Hearing Officer still erred by not categorizing the employees as "casual." Perhaps the most glaring error on the part of the Hearing Officer's Report and Recommendation is the fact that the Hearing Officer failed to perform any analysis regarding the inclusion of "casual" employees in the unit. The Board defines irregular or sporadic employment as "irregular part-time employees" or "casual" employees. Royal Hearth Restaurant, 153 N.L.R.B. 1331 (1965). The Board uses the term "casual" to define an employee that does not work a sufficient amount of hours to be deemed part-time. See Pat's Blue Ribbon, 286 N.L.R.B. 918 (1987). "The test for whether an employee is a regular [part-time] or a casual part-time employee takes into consideration such factors as regularity and continuity of

employment, length of employment, and similarity of work duties." Id. at 918 (citing Muncie Newspaper, 246 N.L.R.B. 1088 (1979)). Notably, in Pat's Blue Ribbon, the Board found that two of the employees that the hearing officer categorized as casual were in fact regular part-time employees. Id. Accordingly, by the Board's own analysis, either an employee works a sufficient period of time and has a significant continuity of employment to be regular part-time, or they are casual employees. The Board has no other classification of a part-time employee.

If the Hearing Officer is correct that the challenged voters were hired "as needed," then they would clearly fall into the category of "casual" employee. Notably, the Hearing Officer makes only one reference in his analysis to casual employees, stating that the Board applies a similar expectation of employment analysis. (Decision at 5, citing See's Candy Shops, Inc., 231 N.L.R.B. 156, 157 (1977)). In See's Candy Shops, the Board noted that the casual employees that were excluded from the unit were not eligible for rehire and therefore had no expectation of future employment. Id. The Hearing Officer's interpretation of this analysis is simply incorrect. The fact that the casual employees had no expectation of future employment is what made them casual employees. "[W]e shall exclude from the unit as casual employees those employees who are not eligible for recall and thus do not have a reasonable expectation of reemployment in the foreseeable future." Id. The Board did not state that to be defined as a casual employee, the individual must have an expectation of future employment. Rather, it is the exact opposite; by having no expectation of future employment, the employees are classified as casual. Accordingly, if the Hearing Officer found that the challenged voters were not seasonal, by definition, they would have to be deemed casual.

In Manncraft Exhibitors Services, 212 N.L.R.B. 923 (1974), the hearing officer found that the employer's temporary employees were casual employees and therefore excluded from

the unit. The facts of Manncraft are very similar to those in the instant matter. In Manncraft, the employer was engaged in the convention services business. The employer employed three classifications of employees: "a nucleus of full-time permanent employees who work in excess of 40 hours per week; regular part-time permanent employees . . . who are called by the Employer as needed to meet business requirements; and standby employees who, like the regular part-timers, are listed by the Employer and called when insufficient personnel are available from the previous groups." Id. The Regional Director rejected the inclusion of the part-time employees, finding that they were "temporary casuals based upon the facts that they enjoy permanent employment elsewhere, are free to reject Employer's work offers without reason, and work irregularly as the Employer's need arises and their discretion approves." Id. Notably, unlike the Stipulated Election Agreement here, the agreement in Manncraft specifically ***excluded*** casual employees. The Board in Manncraft concluded, however, that the part-time employees were not casuals and therefore should be included in the unit. Again, in the instant matter, if the Hearing Officer concluded that the challenged voters were not seasonal as they did not have an expectation of future employment, then they would have to be categorized as casual part-time employees based on their "as needed" employment. Inasmuch as the Stipulated Election Agreement includes "casual" employees, the challenged voters would be eligible to vote as part of the unit.

In Royal Hearth, the Board found that the employee in question did not work enough hours to be deemed part-time and was therefore excluded from the unit as a casual employee. Royal Hearth, 153 N.L.R.B. at 1333. Notably, however, in Royal Hearth, the unit description specifically ***excluded*** casual employees from the unit description. Id. at 1332. The Board has an established "policy of not including temporary or casual employees in bargaining units ***unless***

the parties agree to include them." Stop 127, Inc., 172 NLRB 289, 290 (1968) [emphasis added]; B. J. Carney Co., 157 NLRB 1285 (1966). **Here, the Union and the Employer specifically agreed to include both "*casual* and seasonal employees" in the unit**. (J. Ex. 2).

> It is settled Board policy to accept stipulations from parties as to bargaining unit composition and voter eligibility unless the stipulations contravene statutory provisions of the Act or established Board policy. If the objective intent of the parties is expressed in the stipulation in clear and unambiguous terms, the Board holds the parties to their agreement.

Voltec, Inc. & Int'l Union of Operating Engineers, Local 95, 95a, 95o, Afl-Cio, E 6-CA-27384, 1997 WL 33315866 (N.L.R.B. Div. of Judges Jan. 3, 1997).

As discussed *supra*, the parties engaged in lengthy discussions about the composition of the unit, specifically addressing the seasonal nature of the work performed by the unit employees. Notably, the Employer provided a list of the employees it deemed to be seasonal, or if not seasonal, casual, to the Union prior to entering into the Stipulated Election Agreement. (U. Ex. 2). Each of the challenged voters was named on that list. Id. **The language of the Stipulated Election Agreement is unambiguous, and clearly establishes the intent of the parties to include the challenged "casual employee" voters within the unit**.

Inasmuch as Board policy allows for the inclusion of casual employees in the unit if the parties agree to such an inclusion, and inasmuch as the Board holds the parties to their agreement, even if the challenged voters were deemed to be casual rather than seasonal employees, they are still properly included in the unit of eligible voters. The Hearing Officer's failure to address the fact that the parties agreed to include casual employees in the unit, and his failure to acknowledge the challenged voters as casual if they are not seasonal, was in clear error. As discussed *supra*, each of the four challenged voters worked a significant number of hours during the fall of 2012, within the twelve month period preceding the eligibility date. These

employees were laid off, and three of the four were subsequently recalled. These three recalled employees were each performing unit work at the time of the election on August 29, 2013. It is undisputed that these individuals are employees of the Employer performing unit work. If they are not full-time, part-time, seasonal or casual employees, then what are they?

V. CONCLUSION.

The evidence is clear that each of the challenged ballots were submitted by seasonal employees who are appropriate members of the unit stipulated to by the Union. Even if the employees were not seasonal, they would have to be deemed casual employees, and they would still be appropriate members of the unit stipulated to by the Union. (J. Ex. 2). For the aforementioned reasons, the Hearing Officer's Report and Recommendations on the Challenged Ballots should be rejected, and the challenged votes should be opened and counted.

DATED this 10th day of January, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 10th day of January, 2014, the undersigned, an employee of Kamer Zucker Abbott, electronically filed the foregoing Exceptions and Brief In Support Of Exceptions to the Hearing Officer's Report and Recommendations on the Challenged Ballots, via the National Labor Relations Board E-Gov Electronic Filing system, and mailed copies of the same as follows:

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