

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

NEW CENTURY TRANSPORTATION, INC.
Employer

and

Case 04-RC-115860

TEAMSTERS LOCAL UNION LOCAL NO. 107
a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS
Petitioner

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**DECISION ON CHALLENGED BALLOTS, OBJECTION
and
UNALLEGED BOARD AGENT CONDUCT**

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 23 and 24, 2014.¹ Pursuant to a stipulated election agreement approved by the Regional Director of Region 4 of the National Labor Relations Board (NLRB or Board) on November 12, an election was conducted on December 10 in the following unit of employees of the New Century Transportation, Inc. (Employer)

All full-time and regular part-time local drivers and yard jockeys employed by the Employer at its facility located at 45 East Park Drive, Westampton, New Jersey.

Excluded from the unit of employees of the Employer

All other employees, regional (road) drivers, warehouse employees, dock employees, office clerical employees, managers, guards and supervisors as defined in the (National Labor Relations) Act.

The tally of ballots showed

¹ All dates are in 2013 unless otherwise indicated.

	Approximate number of eligible voters.....	236
	Void ballots.....	0
	Votes cast for Petitioner.....	94
5	Votes cast against participating labor organization.....	94
	Valid votes counted.....	188
	Challenged ballots.....	18
	Valid votes counted plus challenged ballots.....	206
10	The challenges were sufficient in number to affect the result of the election.	

The 18 Challenged Ballots

15 The Board Agent challenged 16 ballots of the following voters on the ground that they were not on the election eligibility list: Clyde Bacon, Robert Bell, Steve Bull, Oliver Cane, John Carrigan, Henry Charyk, Russell Denny, Robert Doty, Robert Ford, Paul Laney, Walter Lobger, Steven Long, Carroll Quarles, Ed Rambo, Robert Read, and Walter Smith, Jr.

20 The Teamsters Local Union Local No. 107 (Petitioner) asserts that the challenged voters, with the exception of Carroll Quarles, are employed as local drivers and are included in the unit and eligible to vote. The Employer contends that these voters are employed not as local drivers, but as dedicated drivers, who work at client locations and not at the Employer’s facility and therefore excluded from the unit and not eligible to vote.

25 The Petitioner challenged the ballots of Carroll Quarles (Quarles) and John Spolnicki (Spolnicki) on the ground that they are not in the unit. The Employer contends that Spolnicki is a local driver who is in the unit and eligible to vote.

30 The Employer challenged the ballot of Gerald Sippel (Sippel) on the ground that he has been on workers’ compensation and possesses no reasonable expectation of returning to work as a local driver. The Petitioner contends that the Employer has not rebutted the presumption that Sippel will be restored to work once he is ready and therefore he is eligible to vote.

The Employer’s Objection

35 On December 17, the Employer timely filed an Objection (B Exh. 1)² to conduct affecting the results of the election

40 Repeatedly before the election but after the petition was filed, the union, through its agents or representatives, in an attempt to influence the outcome of the election, disseminated a forged document that appeared to come from Hoover’s, Inc. showing that New Century’s senior management members had received certain bonuses. The senior management members had not, in fact, received the bonuses described in the forged document, and this forgery affected the outcome of the election.

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50 ² Transcript testimony is noted as “Tr.” The Employer exhibits are identified as “E Exh.” The Petitioner exhibits are identified as “P Exh.” and the Board’s exhibits are identified as “B Exh.” The closing briefs for the Employer and Petitioner are identified as “E Br.” and “P Br.,” respectively.

The Unalleged Board Agent's Conduct

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, the NLRB Regional Director of Region 4 initiated an investigation of the challenged ballots and objections.³ During this investigation, it was discovered that Board Agent Randy Girer, who was responsible for coordinating the election and ensuring the safekeeping of the election ballots, had failed to follow the procedures for the handling of the challenge ballot envelopes as set forth in the Representation Casehandling Manual, Section 11340.9(a), "Determinative Challenged and Questioned Interpretation Ballots." The investigation report stated that

It is well established that the Board may set aside an election based on evidence of objectionable conduct that is received or discovered by the Regional Director in the course of the investigation of objections, even though such conduct was not specifically alleged in the objections. *American Safety Equipment Corp.*, 234 NLRB 501 (1978).

The Regional Director determined that the challenged ballots, objections and the unalleged conduct raised substantial and material issues of fact which can best be resolved on the basis of record testimony taken at a hearing. On January 14, 2014, the Regional Director issued a notice of hearing on the challenged ballots, the Employer's objection to the election, and the unalleged conduct of the Board agent (B Exh. 1).

After the close of the hearing, briefs were timely filed by the Employer and the Petitioner, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses⁴, I make the following

a. Background

The Employer, New Century, is an intra and inter-state trucking enterprise with its main office and facility at 45 East Park Drive, Westampton, New Jersey. The Employer's primary business is to transport freight by trucks and trailers to various customers throughout the country. Mark Olszewski has been the president of New Century since February 2013 (Tr. 137).

The Employer employs full and part time drivers for transporting the freight. The drivers are hired or assigned to different categories of drivers, but their duties do not always comport exactly to their designated categories. The Employer claims there are four categories of truck drivers: road drivers, regional drivers, dedicated drivers and local drivers.

James Gonzales (Gonzales) is employed with the Employer as the manager of the dedicated driver services group. Gonzales manages the dedicated services group and oversees the department dispatchers. He said two dispatchers are in the dedicated services group and other dispatchers are assigned to the other categories of drivers.

Gonzales explained the job responsibilities of the four categories of drivers. He testified that the road drivers are truckers that transport freight through several states and are on the

³ On December 13, the Petitioner filed objections to the conduct of the election. The Petitioner subsequently withdrew all its objections on January 20, 2014 (B Exh. 1). The only objection that remains is the Employer's objection, above.

⁴ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

road for several days to several weeks. Gonzales stated that regional drivers deliver within the regional market, which he identified as New York and the New England states. The regional drivers may be away from the Employer’s Westampton facility from 1 to 2 days. He defined a local driver as a driver who begins and ends his day at the Westampton facility, performing local pickups and deliveries. A local driver does not have a sleeper truck and goes home each night.

According to Gonzales, the fourth category is the dedicated drivers. They begin and end the work day at a specific customer’s facility. Such drivers are “dedicated” to a particular client and the drivers have specific routes and schedules assigned by the client. The dedicated drivers do not routinely begin or end the day at the Employer’s Westampton facility. A dedicated driver goes directly from his residence to the specific client’s facility. In contrast, Gonzales said that the local and road drivers are not dedicated to specific clients and do not have set schedules (Tr. 64-68).

b. The Challenged Ballots

There are 18 challenged ballots. With regard to the majority of the challenged ballots, the Employer argues that such ballots were casted by dedicated drivers and therefore, they were ineligible to vote. The Employer maintains that the dedicated drivers were not included in the appropriate unit of employees as defined by the Regional Director for the representation election and therefore, they are excluded from voting.

The Employer argues that there are 70 dedicated drivers, but only 16 of the dedicated drivers’ ballots were challenged. The Employer maintains that the union should not be permitted to “pick and choose” which dedicated drivers it desires in the unit (E Br. at 8). Olszewski testified that he never intended to include the dedicated drivers as part of the agreement for the unit description. He contemplated a unit consisting of 210 local drivers and 10 yard jockeys when entering into the agreement. He maintained that the 70 dedicated drivers were never intended as part of the unit. He also said that the Excelsior list did not include the 70 dedicated drivers (Tr. 138-143; E Exhs.1, 5). Olszewski explained that some of the dedicated drivers received the employer’s campaign literature prior to the October 29 petition because he was unsure at the time as to which drivers the union was going to target for the election (Tr. 270-272; E Exhs. 6, 7).

The Petitioner maintains that the dedicated drivers were actually performing the job responsibilities of a local driver and therefore, they should be in the unit and eligible to vote. The issue is whether the challenged voters are eligible to vote in the election.

To determine whether a challenged voter is properly included in a stipulated bargaining unit, the Board applies the three-part test set forth in *Caesar’s Tahoe*, 337 NLRB 1096 (2002). Under this standard

The Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties’ intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties’ intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test. *Id.* at 1097; also, *Extendicare Health Services*, 347 NLRB 544, 546 (2006).

In this case, the Stipulated Election Agreement neither expressly included nor expressly excluded dedicated drivers. The unit description begins with “all full-time and regular part-time local drivers and yard jockeys employed by the Employer at its facility located at 45 East Park Drive, Westampton, New Jersey” then expressly excludes “all other employees, regional (road) drivers, warehouse employees, dock employees, office clerical employees, managers, guards and supervisors...”

Upon my review, I find that the language in the stipulated agreement as unclear and ambiguous. It is not seriously disputed that there are four categories of drivers. If the intent of the parties was to include or not to include dedicated drivers as a job classification in the unit, they would have expressly done so.⁵ Where the objective intent is unclear or the stipulation ambiguous, the Board considers community of interest principles to determine whether the disputed employees belong in the unit.⁶ *Genesis Health Ventures*, 326 NLRB 1208 (1998); and *Lear Siegler, Inc.*, 287 NLRB 372 (1987).

In defining an appropriate unit for collective bargaining the Board focuses on whether the employees in the unit share a “community of interest” that is distinct from other employees that arguably could be included in the unit. *Overnite Transportation Co.*, 322 NLRB 723, 724 (1996); and *The Boeing Co.*, 338 NLRB 152, 153 (2001). The Board considers the following community-of-interest factors: method of wages or compensation, hours of work, employment benefits, whether the employees have common supervision, the degree of dissimilar qualifications, training and skills, job functions, interchangeability and contact among employees, work sites, and other working terms and conditions of employment. *Kalamazoo Paper*, 136 NLRB 134, 137 (1962). “[T]he manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination.” *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951).

I would note that a difference in the situs of employment between dedicated and local drivers is not in itself determinative, especially when there is evidence of a community of interest in their employment joining the groups. *McCann Steel Co.*, 179 NLRB 635, 636 (1969); and *Peerless Products Co.*, 114 NLRB 1586 (1956). Conversely, employees stationed away from the plant may be excluded from the plant unit where they do not have sufficient interests in common with the in-plant employees. *Sealite, Inc.*, 125 NLRB 619 (1959); and *Sheffield Corp.*, 123 NLRB 1454 (1959). Here, the eligibility to vote question is resolved by weighing *all* the relevant factors against the major determinant of community of interest. *Trumbull Memorial Hospital*, 338 NLRB 900 (2003); and *Hotel Services Group*, 328 NLRB 116 (1999).

1. *The Challenge to the Ballots of Quarles and Spolnicki*

The Board agent challenged the ballot of Carroll Quarles (Quarles) as not on the eligibility list to vote. The Petitioner also challenged Quarles’ ballot because he is not a local driver. The Employer does not disagree with the Petitioner and claims that Quarles is employed as a dedicated driver at a client’s distribution warehouse in Curtis Bay, Maryland and is ineligible to vote. Quarles drives from his residence to the warehouse and begins and ends his

⁵ I agree with the Petitioner that the Excelsior list, which did not include the 16 challenged voters, is not determinative of the intent of the parties to exclude such drivers from the unit. *Desert Palace, Inc.*, 337 NLRB 1096, 1099-1100 (2002).

⁶ The Board will apply the community of interest standard to determine eligibility in the absence of extrinsic evidence revealing the parties’ intent. *Arbors at New Castle*, 347 NLRB 544, 547 (2006).

day at the Curtis Bay facility. Quarles receives his daily assignments and instructions from the supervisors at the Curtis Bay facility (Tr. 70, 71).

5 The Petitioner challenged the ballot of John Spolnicki. Spolnicki is a local driver, but works from the Employer's leased facility on Long Island, New York. He is not assigned to a particular client and receives his daily instructions from the Employer. He drives to Long Island and begins and ends his day at the Long Island facility. There are 12 other drivers with the same arrangement as Spolnicki and were eligible to vote (See, Excelsior list at E Exh. 5). The challenge was withdrawn by the Petitioner during the hearing (Tr. 87-89; 147, 148).

10 The parties stipulated, and I find and recommend, that the challenged ballot of Quarles should neither be opened nor counted and that Spolnicki, as a local driver, was eligible to vote and that his ballot opened and counted (E Br. at 10; P Br. at 2; P. Exh. 1 at 2).

15 *2. The Challenge to the Ballot of Steven Bull*

The Board agent challenged the ballot of Steven Bull (Bull) as not being on the election eligibility list. The Petitioner argues that Bull is a local driver and eligible to vote. The Employer contends that Bull is a yard jockey dedicated to a client's facility and ineligible to vote.

20 Bull has been employed as a road driver with the employer since 2007. However, Bull testified that in June 2009, he accepted a local driver position when the driver manager, Gary Wagner, asked if he wanted to work as a local driver. Bull worked as a local driver until June 2012, when he accepted an offer by Jimmie Marshall, the Pickup & Delivery (P&D) Manager, to work as a yard jockey with a client company, Castrol Oil, in Warminster, Pennsylvania. Since 25 June 2012, Bull commutes Monday through Friday directly from his residence to the client's facility at Warminster and at the end of the day, returns to his residence. He works 50 hours per week at the Warminster facility.

30 As a yard jockey, Bull is assigned to move the trailers around the facility to load and unload the trucks. Bull testified he has no work-related activities at the Employer's facility in Westampton while he is working as a yard jockey. However, he said that approximately 5 years ago, the Employer agreed to let him work Saturdays and on 3 or 4 holidays during year to make local deliveries from Westampton (Tr. 149-154, 156).

35 Jimmie Marshall (Marshall) was and is the Pickup and Delivery (P&D) Manager with the Employer (Tr. 82). He testified that Bull is a yard driver dedicated to Castrol Oil. Marshall said that Bull works approximately 45-50 hours at the Castrol facility from Monday through Friday and takes instructions from the Castrol supervisors. Marshall confirmed that Bull begins and ends his work day at Castrol. Marshall said that Bull had requested extra hours of work in 40 addition to his work at Castrol. Marshall agreed to allow Bull to work Saturdays and some holidays for extra money at the Employer's facility in Westampton (Tr. 93-95). Marshall testified that Bull interacts with him and not with the local dispatchers for instructions (Tr. 97). Olszewski testified that Bull is a dedicated driver and is only permitted to work on Saturdays and 45 during the holidays to earn extra money (Tr. 273).

Bull testified that he was invited to attend an employer-sponsored breakfast meeting of the local drivers on November 2 by two daytime dispatchers named Bill Tracey and Graham Berger. He believed that the invitation to attend the breakfast meeting was made on October 29 50 (the Monday prior to the Saturday breakfast meeting). Bull said that he also received campaign literature from the Employer regarding the upcoming election (E Exh. 7). He said that the literature explained how things would change if the company became a union shop. He did not

believe the literature was either pro or anti-union. Bull said he did not attend the breakfast meeting because he was working that Saturday (Tr 152, 153, 159, 160).

5 I find that merely being invited to attend an employer-sponsored breakfast meeting regarding the pending election is not indicative that the Employer considered Bull a local driver. As such, in light of the stipulated agreement's ambiguity, and the absence of extrinsic evidence of the parties' intent, his eligibility must be determined under the community of interest standard. *Caesar's Tahoe*, above at 1097.

10 In applying the community-of-interest factors to Bull's job description, I find there are significant differences in Bull's work activities in comparison with the duties of a local driver. Bull has no work-related business at the Employer's facility during the regular work week from Monday through Friday. He arrives at and ends his work day at the Castrol site. Bull also
15 answers to a different supervisor since his assignments are provided by the Castrol supervisors (unlike the local drivers at the Employer's Long Island facility). Bull's job functions are uniquely contained within the Castrol facility and he has little or no work-related interchangeability and contact with the New Century employees during the work week. His job description is clearly
20 that of a yard jockey but with insignificant periods of time at the Employer's facility to show that he belongs to the unit. While Bull shares some community-of-interest factors, such as vacation time, employee benefits, and job skills, I find, however, as set forth above, Bull has a substantial separate community of interest from the yard jockeys and local drivers employed at the Employer's facility in Westhampton. This separate community of interest is perhaps most
25 distinct in the vast difference in their job responsibilities and the fact that Bull works only Saturdays and 4 holidays per year at the Employer's facility.

Accordingly, I find that Bull is properly excluded from the bargaining unit and not eligible to vote in the election. I recommend that the challenge to the ballot of Steven Bull sustained and it be neither opened nor counted.

30 *3. The Challenge to the Ballot of John Carrigan*

The Board agent challenged the ballot John Carrigan (Carrigan) on the ground his name was not on the election eligibility list. The Petitioner contends that Carrigan is a local driver. The Employer contends that Carrigan, similar to Bull, is a dedicated driver assigned to the
35 Employer's customer, Castrol Oil, and ineligible to vote.

40 Carrigan did not testify, but Marshall said that he is a dedicated driver for Castrol Oil in Warminster. Marshall testified that Carrigan begins his shift at the Employer's Westhampton facility. Aside from some Castrol freight that he has to deliver to another customer that ships through Westhampton, Carrigan has no other contacts with other local drivers. Marshall said that Carrigan receives his directions from Castrol except when instructed by the Westhampton dispatcher as to which trailer to hook up and bring back to Westhampton at the end of his shift (Tr. 95-97).

45 Accordingly, I find that Carrigan is a dedicated driver with little community of interest to the local drivers at Westhampton and not eligible to vote. The record shows that his contacts with the Westhampton facility are minimal at best. I recommend that the challenged ballot of John Carrigan sustained and it be neither opened nor counted.

50 *4. The Challenge to the Ballot of Walter Harrison Smith*

The Board agent challenged the ballot of Walter Harrison Smith (Smith) as not being on

the election eligibility list. The Employer contends that Smith is a dedicated yard jockey with client Crayola and ineligible to vote.

5 Smith testified that he was hired by New Century in April as a local driver. His letter of employment confirmed that his offer of employment as a local driver, but his vacation schedule sheet shows that he is designated as dedicated driver (Tr. 161, 162; P Exhs. 11, 15). Smith testified that he is a yard jockey and assigned to work exclusively with Crayola. Smith said that he works approximately 55 hours at the Crayola facility from Monday through Friday. Smith arrives and ends his day at Crayola and has not worked at the Employer's Westhampton facility since the start of his employment. Smith testified that he received his work assignments from the Crayola supervisors. Smith stated that for extra money, he would work Saturdays at Crayola (Tr. 164-167).

15 In applying the community-of-interest factors to Smith's job description, it is clear that Smith is dedicated to Crayola despite his initial offer of employment as a local driver. Smith has no work-related business at the Employer's facility during the regular work week from Monday through Friday. He arrives at and ends his work day at Crayola. Smith takes his work assignments from the Crayola supervisors and his job functions are uniquely contained within the Crayola facility. Smith has little or no work-related interchangeability and contact with the employees of New Century during the work week. His job description is clearly that of a yard jockey but assigned exclusively to the Crayola facility.

25 Accordingly, I find that Smith is a dedicated yard jockey properly excluded from the bargaining unit and not eligible to vote. I recommend that the challenge to the ballot of Walter Harrison Smith sustained and it be neither opened nor counted.

5. The Challenge to the Ballot of William Lobger

30 The Board agent challenged the ballot of William Lobger (Lobger) as not being on the eligibility list. The Employer contends that Lobger is a dedicated driver assigned to the Employer's customer, Air Products, in Tamaqua, Pennsylvania and ineligible to vote.

35 Lobger testified that he works exclusively with Air Products and has no work-related reasons to report to the Employer's Westhampton facility. Lobger commutes from his home directly to Air Products in Tamaqua and returns home the same day. Lobger receives his work assignments from Air Products supervisors in making his local deliveries (Tr. 180-185). On occasions, Lobger would also work out of the Crayola facility (Tr. 174-176).

40 Lobger testified that he received literature from the employer regarding the union organizing campaign and was invited to attend the November 2 employer-sponsored breakfast meeting. Lobger said he was asked to attend by a dispatcher named Justin Shields because he was considered a local driver (Tr. 178, 179).

45 Gonzales testified that Lobger begins and ends his shift at Air Products and takes his assignments from the Air Products supervisors. Lobger has specific routes to deliver or pickup containers from Air Products to the New York or New Jersey seaports (Tr. 69, 70).

50 I find that Lobger is a dedicated driver assigned exclusively to Air Products with little or no work-related contacts with employees at the Employer's facility. Although Lobger makes local deliveries, his assigned site is in Tamaqua and not Westhampton. Lobger has no work-related business at the Employer's facility during the work week. He arrives at and ends his work day at Air Products and takes his work assignments from the Air Products supervisors.

Lobger has little or no work-related interchangeability and contact with the employees of New Century during the work week. His job description is clearly that of a dedicated driver assigned exclusively with Air Products.

5 Accordingly, I find that Lobger is a dedicated driver properly excluded from the bargaining unit and not eligible to vote. I recommend that the challenge to the ballot of William Lobger sustained and it be neither opened nor counted.

6. *The Challenge to the Ballot of Clyde Bacon*

10 The Board agent challenged the ballot of Clyde Bacon (Bacon) as not being on the election eligibility list. The Employer contends that Bacon, like Lobger, is a dedicated driver assigned to the Employer's customer, Air Products, in Tamaqua and ineligible to vote.

15 Bacon did not testify. Bacon is responsible for picking up and delivering Air Products containers to and from the seaports of New York and New Jersey. Gonzales testified that Bacon is dedicated to one company with specific routes. Bacon begins and ends his work shift in Tamaqua and receives his work assignments from the Air Products supervisors (Tr. 69).

20 I find that Bacon is a dedicated driver assigned exclusively to Air Products with little or no work-related contacts with employees at the Employer's facility. Although Bacon makes local deliveries, his assigned job site is Tamaqua and not Westhampton. Bacon has little or no work-related business at the Employer's facility during the regular work week from Monday through Friday. He arrives at and ends his work day at Air Products. Bacon takes his work
25 assignments from the Air Products supervisors.

 Accordingly, I find that Bacon is a dedicated driver properly excluded from the bargaining unit and not eligible to vote. I recommend that the challenge to the ballot of Clyde Bacon sustained and it be neither opened nor counted.

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7. *The Challenge to the Ballot of Robert Bell*

 The Board agent challenged the ballot of Robert Bell (Bell) as not being on the eligibility list to vote. The Employer contends that Bell is a dedicated driver, assigned primarily with the
35 Employer's customer, Bostik at the Paulsboro facility and ineligible to vote.

 Bell testified that he was hired by the Employer as a truck driver in 2002 doing overnight road trips. Bell said that about seven or eight years ago, he requested a change of position to a local driver. He said that this request was approved by Jim Lewis, who was the liaison between
40 the drivers and the Employer. Bell said that his position as a local driver has not changed since that time (Tr. 189, 190).

 Marshall testified that Bell is a dedicated driver assigned to Bostik. However, Marshall also testified that Bell begins and ends his day at the Employer's Westhampton facility.
45 Marshall said that Bell may be instructed to make a couple of yard jockey moves or deliveries when there is no work at Bostik. Marshall said that once the work is completed, Bell would head out to Bostik for yard jockey work and local deliveries. Marshall said that Bell receives his assignments from the Bostik supervisors, but when Bell needed to contact the Employer, he would go through the local dispatcher, Danny Matta (Tr. 89-92).

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 Bell starts and ends his day at the Employer's Westhampton facility. He punches his timecard, picks up his trip sheets, goes to his trailer and begins some deliveries on his way to

the Bostik facility in Paulsboro. At the end of the work day, Bell returns to the Westhampton facility, cleans up and punches out. During the work day, Bell would deliver freight to several customers, to include, Bostik, Chelton House and Heritage Bags, in different geographic areas. He stated that he was once dedicated to the Bostik facility, but now makes deliveries and jockey
 5 for various customers (Tr. 190-194, P Exh. 19).

Bell testified that he attended the November 2 breakfast meeting at the request of his dispatcher, Matta, and received a call at his home from Bill Tracey. He said that both told him that there would be local drivers' meeting. Bell stated that he also received literature on the union organizing campaign from the employer during this time frame (Tr. 193-195).
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I find that Bell is a local driver. Bell begins and ends his day at the Employer's facility. Bell is assigned to Bostik, but I credit his testimony, which was corroborated with his daily time sheets, that he also makes local deliveries and pickups for several customers during the day while on call with Bostik. Bell also testified that he takes his work assignments from the local driver dispatcher.
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In considering the community-of-interest factors, Bell is integrally involved with the local drivers at the Employer's facility with regard to such matters as the method of wages or compensation, hours of work, commonality of supervision, the degree of similar qualifications, training and skills, job functions, interchangeability and contact among employees, work sites, and other terms and conditions of employment that he should and would be eligible to vote.
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Accordingly, I find that Bell is a local driver assigned to the Employer's Westhampton facility and is eligible to vote in the election. I recommend that the challenge to the ballot of Steven Bell overruled and it be opened and counted.
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8. The Challenge to the Ballots of Oliver Cane and Robert Ford

The Board agent challenged the ballots of Oliver Cane (Cane) and Robert Ford (Ford) as not being on the election eligibility list to vote. The Employer contends that Cane and Ford are dedicated drivers for the Employer's customer, Hopewell Nursery, and ineligible to vote.
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Neither Cane nor Ford testified. Gonzales said that both drivers are dedicated to Hopewell Nursery. Neither drivers begin or end their work shift at the Employer's Westhampton facility. Gonzales testified that both drivers deliver plants and shrubberies to Home Depot stores throughout New Jersey, New York and Long Island. When the deliveries are complete, they return with their empty trailers to Hopewell. Gonzales said that the drivers usually return home on the same day, but they may have overnight deliveries. They also use special equipment needed to lift the plants and shrubberies from the trailers to the ground. Gonzales said that the work for both drivers is seasonal from March until October. He said that from November to February, they are assigned as road drivers (Tr. 73-75, 79).
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In applying the community-of-interest factors to the job description of Cane and Ford, I find it clear that they are not local drivers. They have no connection with the other employees at the Employer's Westhampton facility; their supervision and assignments are provided by the nursery. Both drivers begin and end their day at the nursery, but would have occasional overnight deliveries. When Cane and Ford are not dedicated to the nursery, it is not disputed that they are road drivers. As such, Cane and Ford are dedicated to the nursery from March through October and would be excluded due to their job classification as road drivers from November to February.
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Accordingly, I find that Cane and Ford are properly excluded from the bargaining unit and not eligible to vote in the election. I recommend that the challenge to the ballots of Oliver Cane and Robert Ford sustained and they be neither opened nor counted.⁷

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9. The Challenge to the Ballot of Robert Read

The Board agent challenged the ballot of Robert Read (Read) as not on the eligibility list to vote. The Employer contends that Read is a dedicated driver for the Employer's customer, Leslie Pool, and ineligible to vote.

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Read did not testify, but Gonzales said that Read is dedicated to the Leslie pool company in Swedesboro, New Jersey. He said that Read delivers pool supplies to various retail stores throughout the Region, from Virginia to New England, New York and Pennsylvania. Read may also have overnight deliveries due to the large geographic area. Read receives his instructions and assignments from the Leslie supervisors. Gonzales said that Read's dedicated assignment to Leslie Pool is seasonal in nature, from March through October. Gonzales indicated that Read is a local driver during the rest of the year (Tr. 75-79).

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I find that Read is integrally involved with the local drivers at the Employer's facility with the method of wages or compensation, hours of work, employment benefits, commonality of supervision, the degree of similar qualifications, training and skills, job functions, interchangeability and contact among employees, work sites, and other working terms and conditions of employment from November through February. As such, Read would share a community of interest with the local drivers for sufficient periods of time to demonstrate that he has a substantial interest in the unit's wages, hours and conditions of employment.

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Accordingly, I find that Read is a local driver assigned to the Employer's Westhampton facility for sufficient periods of time and is eligible to vote. I recommend that the challenge to the ballot of Robert Read overruled and it be opened and counted.

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10. The Challenge to the Ballot of Russell Denny

The Board agent challenged the ballot of Russell Denny (Denny) on the ground he was not on the election eligibility list. The Petitioner contends he is a local driver. The Employer contends that Denny is a dedicated driver assigned to the Employer's customer, WorldPac.

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Denny testified that he started as a local driver, but for the past 5 years, he has been dedicated to one customer, WorldPac. Denny said that he is assigned to WorldPac, but commutes to the Employer's Westhampton facility because he needs to pick up his tractor and trailer before heading to WorldPac. Denny explained that he begins his work shift at 7:30 p.m. and makes night deliveries exclusively for WorldPac. At the end of his shift, he would leave his tractor and trailer at Westhampton because his commute home is shorter from Westhampton than from the WorldPac facility. Denny said the Employer gave him this accommodation, otherwise he would not have accepted the WorldPac assignment (Tr. 245-249; 251-254). Denny's vacation and pay statements reflect that he is a local driver (Tr. 116, 243-246; P Exhs. 3 and 21).

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⁷ The Petitioner agrees with the Employer that Cane and Ford are ineligible to vote due to their status as road drivers (P Br. at 10).

Marshall testified that Denny is a dedicated driver to WorldPac. He said that Denny's shift starts at 7:30 p.m. and commutes to Westhampton in order to pick up his tractor and trailer before heading to WorldPac. Marshall said that Denny has long distance deliveries assigned to him by WorldPac and his last deliveries are often in Virginia before returning for the day.

5 Marshall said that Denny does not have the time to park his trailer at WorldPac before the end of his work shift, so he is permitted to leave his truck and trailer at Westhampton (Tr. 97-99).

10 In applying the community-of-interest factors to Denny's job description, I find that Denny is not a local driver. Denny's daily shift starts at 7:30 p.m. Denny has no connection with the other employees at the Employer's Westhampton facility and his supervision is provided by WorldPac. The only reason that Denny needs to be at the Westhampton facility is to retrieve his tractor and trailer at the beginning of his work shift and to park his truck at the end of this work shift. Aside from this minor connection to Westhampton, Denny has no substantial interest with the terms and conditions of employment of the local drivers. I find it not significant that Denny's
15 pay statements and vacation schedule reflect that he is a local driver because the overriding circumstances demonstrate that he does not share a community of interest with the local drivers.

20 Accordingly, I find that Denny is not eligible to vote in the election. I recommend that the challenge to the ballot of Russell Denny sustained and that it be neither opened nor counted.

11. The Challenge to the Ballot of Robert Doty

25 The Board agent challenged the ballot of Robert Doty (Doty) on the ground he was not on the election eligibility list. The Employer contends that Doty is a dedicated driver assigned to the Employer's customer, WorldPac, and ineligible to vote.

30 Doty testified that he has dedicated routes assigned to WorldPac. Doty begins and ends his day at WorldPac. Doty said he has three established routes for WorldPac to various geographic areas, including Pennsylvania, Long Island, New York and Connecticut (Tr. 256-259). Doty has few contacts with the local drivers at the Westhampton facility. Doty's pay statement and vacation schedule designated him as a local driver (Tr. 117; P Exhs. 4, 22), which I find as not being significant. It is the type of work, location of the work, supervision of the assigned work, and other community-of-interest factors that are critical in the determination
35 of eligibility and not the mere designation of a job title on a pay statement. As such, I find that Doty is not a local driver and not eligible to vote.

40 Accordingly, I find and recommend that the challenged ballot of Robert Doty sustained and it be neither opened nor counted.

12. The Challenge to the Ballot of Henry Charyk

45 The Board agent challenged the ballot of Henry Charyk (Charyk) on the ground he was not on the election eligibility list. The Petitioner contends he is a local driver. The Employer contends that Charyk is a dedicated driver assigned to WorldPac and ineligible to vote.

50 Charyk was not a witness. Marshall testified that Charyk is a dedicated driver to WorldPac. Marshall said that Charyk begins and ends his day at WorldPac's South Brunswick, New Jersey facility. Charyk takes his assignments and supervision from WorldPac and makes deliveries at night to Boston, Massachusetts and returns to WorldPac. His round trip from South Brunswick to Boston is accomplished on a daily basis. On occasions, Charyk may have to contact the local dispatcher at Westhampton because there are no dedicated dispatchers at

night. The discussions usually involve resetting the alarm at the delivery site that was inadvertently triggered by him (Tr. 105, 106).

5 I find that Charyk is not eligible to vote in the election. Charyk shares no community of interest with the employees in the unit. Charyk works at night, has little or no contacts with the daytime local drivers, he takes his assignments and supervision from WorldPac, and begins and ends his day at WorldPac. As such, Charyk is not employed by the Employer at its Westhampton facility.

10 Accordingly, I find that Charyk is not eligible to vote in the election. I recommend that the challenge to the ballot of Henry Charyk sustained and that it be neither opened nor counted.

13. The Challenge to the Ballot of Steven Long

15 The Board agent challenged the ballot of Steven Long (Long) on the ground he was not on the election eligibility list. The Employer contends that Long is a dedicated driver assigned to WorldPac and ineligible to vote. The Petitioner argues that Long is a local driver.

20 Long was not a witness. Marshall testified that Long is dedicated to WorldPac, but begins his work shift at 6:00 p.m. at the Employer's Westhampton facility. Long, in addition to WorldPac, has another customer to deliver freight in Freehold, New Jersey. Marshall said that Long would first go to Freehold, does a trailer switch and would return an empty trailer to Westhampton. Long's initial run to Freehold for the Employer usually takes more than 2 hours. Upon his return to Westhampton, Long would then head to WorldPac around 8:30 p.m. Long makes three deliveries for WorldPac and ends his route in Baltimore, Maryland. Long would pickup WorldPac freight in Baltimore and return to Westhampton. Marshall explained that WorldPac does not have sufficient parking at its facility for all the dedicated drivers so Long is permitted to park his tractor and trailer at Westhampton after his night shift and retrieve his truck for the following work day (Tr. 101-104).

30 I find that Long begins and ends his shift at the Employer's Westhampton facility. Marshall testified that Long would first deliver freight for another customer in Freehold and return to Westhampton before taking deliveries for WorldPac. On a daily basis, Long may work up to 2 ½ hours on other assignments before heading to WorldPac. I find that Long is integrally involved with the local drivers at the Employer's facility with regard to community-of-interest factors such as the method of wages or compensation, hours of work, employment benefits, commonality of supervision, the degree of similar qualifications, training and skills, job functions, interchangeability and contact among employees, work sites, and other working terms and conditions of employment. As such, Long shares a community of interest with the local drivers on a daily basis to demonstrate that he has a substantial interest in the unit's wages, hours and conditions of employment.

45 Accordingly, I find that Long is a local driver. I recommend that the challenge to the ballot of Steven Long overruled and it be opened and counted.

14. The Challenge to the Ballot of Paul Laney

50 The Board agent challenged the ballot of Paul Laney (Laney) on the ground he was not on the election eligibility list. The Petitioner contends that he is a local driver. The Employer contends Laney is a dedicated driver assigned to the Employer's customer, WorldPac, and ineligible to vote. The employer also maintains that Laney announced his retirement before the election date and subsequently retired before the end of the year. The Employer argues that

Laney should not be entitled to vote because he would have no legitimate interest in the outcome of the election due to his retirement (E Br. at 14, 15).

Laney did not testify. Marshall said that Laney is a dedicated driver assigned to WorldPac. Marshall said that Laney would begin his day at 2 p.m. at Westhampton where he would pick up an empty trailer and take it to WorldPac in South Brunswick, New Jersey. Marshall explained that Laney would retrieve his truck at Westhampton before heading to WorldPac because WorldPac did not have sufficient parking for the tractors and trailers (Tr. 99-101; 104). During his work shift, Laney would load up and make local WorldPac deliveries to Edison, New Jersey. He would then unload and pickup freight for deliveries to Washington, D.C. Marshall said that Laney would also pickup freight for delivery to the Employer's Westhampton facility on Laney's return trips from D.C. Marshall stated that Laney may receive other assignments while at the Westhampton facility (Tr. 99-101).

I find that Laney is a local driver. Laney begins and ends his day at the Employer's Westhampton facility. On this point, Marshall testified that Laney would deliver the Employer's freight while in Westhampton and may even perform extra work for the Employer beyond his eight (and half) hour day because "...he was a very nice guy." On a daily basis, Laney is integrally involved with the other local drivers at the Employer's facility with the method of wages or compensation, hours of work, employment benefits, commonality of supervision, the degree of similar qualifications, training and skills, job functions, interchangeability and contact among employees, work sites, and other working terms and conditions of employment. As such, Laney shares a community of interest with the local drivers on a daily basis to demonstrate a substantial interest in the unit's wages, hours and conditions of employment.

I also find without merit the Employer's assertion that Laney had no legitimate interest in the outcome of the election because he retired soon after the election. It is irrelevant that Laney announced his retirement prior to the election on December 10. As a general rule, the Board does not determine eligibility based on events occurring after an election. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003); and *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 820 fn. 15 (2003). Thus, an employee employed on the date of the election is eligible to vote despite an intention to quit after the election. *St. Elizabeth Hospital v. NLRB*, 708 F.2d 1436 (9th Cir. 1983); *NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1471 (7th Cir. 1983); *Harold M. Pitman Co.*, 303 NLRB 655 (1991); *Personal Products Corp.*, 114 NLRB 959 (1955); and *Whiting Corp.*, 99 NLRB 117 (1951), revd. on other grounds 200 F.2d 43 (7th Cir. 1952). Similarly, at the time of the election, Laney was still employed by the Employer and eligible to vote despite announcing his intention to retire in late December. It is pure speculation on the part of the Employer that Laney would not have any interest in the outcome of the election because of his pending retirement. On the contrary, depending on the outcome of the election, Laney could have equally decided not to retire after the election.

Accordingly, I find that Laney is a local driver. I recommend that the challenge to the ballot of Paul Laney overruled and it be opened and counted.

15. *The Challenge to the Ballot of Edward Rambo*

The Board agent challenged the ballot of Edward Rambo (Rambo) on the ground he was not on the election eligibility list. The Petitioner contends that he is a local driver. The Employer contends that Rambo is a dedicated driver assigned to the Employer's customer, National Chemical, and ineligible to vote.

Rambo did not testify, but Marshall said that Rambo does yard jockey work at the National Chemical facility from 7:30 a.m. to 6 p.m. Rambo starts and ends his day at the Employer's Westhampton facility in order to drive his tractor and trailers to the National Chemical facility. Marshall testified that Rambo has some interaction with the local driver dispatcher because Rambo needs to contact the local dispatcher for instructions as to which trailer to return (Tr. 106-108).

Accordingly, I find that Rambo is a dedicated driver who shares little community of interest with the local drivers at Westhampton and not eligible to vote. The record shows that his contacts with the Westhampton facility are minimal at best. I recommend that the challenge to the ballot of Edward Rambo sustained and it be neither opened nor counted.

16. *The Challenged Ballot of Gerard Sippel*

The Employer challenges the ballot of Gerard Sippel (Sippel) on the basis that he was absent from work due to an on-the-job injury and collecting worker's compensation at the time of the election. It has long been settled that the party seeking to exclude an individual from voting bears the burden of establishing that the individual was, in fact, not eligible to vote. *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). Thus, it is the burden of the Employer to demonstrate that Sippel was not eligible to vote. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007) (The burden of proof rests on the party asserting ineligibility to vote).

There is no real dispute that Sippel is a local driver employed at the Employer's Westhampton facility and would be eligible to vote in the election.⁸ At the time of the election, Sippel was employed as a local driver but stopped working by October 4 after undergoing spinal surgery. Sippel said that he had spinal surgery in 2013 and there was a need for an additional operation in 2014. He is presently on leave from his job on worker's compensation. Sippel said that he had surgeries before and was always able to return to work on full duty. Sippel testified that, at this time, his physician informed him that there were some complications with his prior surgery and his recovery time from the last operation would take longer before he could return to full duty. Sippel did not know when he could return to work. However, Sippel indicated he was able to return to work under a light duty status in approximately 4 or 5 months from his previous surgery. Sippel surmised that he would be able to return to work after "two to three months" from his latest surgery because it involved only some loose spinal screws (Tr. 260-262, 264).

The Employer's challenge is the assertion that Sippel was not likely to return to work due to his injury. Dr. Joseph Zerbo testified in support of this challenge. Dr. Zerbo is a board certified orthopedic surgeon, but was not the treating physician or surgeon for Sippel. Dr. Zerbo testified that he did review Sippel's medical records and concluded that Sippel would not likely return to work. Dr. Zerbo opined that Sippel would have significant difficulties in stooping, bending backwards or forward at his waist and is significantly compromised in lifting more than 50 lbs. Dr. Zerbo further opined that Sippel would be limited to sitting only 30 minutes at a time (Tr. 222-235). Dr. Zerbo believed that Sippel would have extertional limitations in performing the full duties of his position. Dr. Zerbo testified that although Sippel's post-operative assessment by the treating physician indicated that the patient was doing well, this did not mean that Sippel would be able to return full time with no work-related limitations (Tr. 236-237).

⁸ The only challenge to Sippel's ballot is his leave of absence while on worker's compensation and not because his job classification was anything other than a local driver.

The Employer argues that there was no reasonable expectation that Sippel will return to work as a local driver and thus, his employment has been effectively terminated due to his unsuccessful spinal surgeries. The Petitioner argues that the Employer misapplied the “reasonable expectation of future employment” standard to situations where there is an eligibility issue involving employees on medical leave.

I agree with the Petitioner.⁹ The general rule regarding employees on sick leave is that they are presumed to remain in that status until recovery, and a party seeking to overcome that presumption must make an affirmative showing that the employee has resigned or been discharged. *Edward Waters College*, 307 NLRB 1321 (1992); *Atlantic Dairies Cooperative*, 283 NLRB 327 (1987); *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Sylvania Electric Products*, 119 NLRB 824 (1958); *Home Care Networks, Inc.*, 347 NLRB 859 (2006); *Agar Supply Co.*, 337 NLRB 1267 (2002); and *Abbott Ambulance of Illinois v. NLRB*, 522 F.3d 447 (CADC 2008), affirming the Board’s *Red Arrow* policy.

The Employer argues that Sippel’s situation is similar to the employee in *Cato Show Printing Co.*, 219 NLRB 739, 754 (1975). In *Cato*, the Board agreed with the Administrative Law Judge that an employee had no reasonable expectation to resuming his employment with the employer because he suffered the loss of all his fingers on one hand and half-a-thumb on the other hand. However, the *Cato* case is clearly distinguishable from Sippel’s situation. The employee in *Cato* was a printing press operator who was injured on the job. He required the use of his fingers on both hands to operate the printing press. Unlike the employee in the *Cato*, who would never be able to operate a printing press without his fingers, I find there is a reasonable medical likelihood that Sippel’s back problems would improve. In addition, unlike here, the Administrative Law Judge in *Cato* stated that “No one from Respondent ever indicated to Noga (the injured employee) he could expect to return to work or that he had been granted a leave of absence.” Here, there was indeed an expectation on the part of the Employer that Sippel would return to work since Sippel actually returned to work on least 2 prior occasions. In addition, Sippel had in fact been granted a leave of absence by the Employer. These two factors clearly distinguished Sippel’s circumstances from the *Cato* case.

Consistent with Board precedent, I find that an employee who at the time of the election had the status of an employee on sick leave was regarded as sharing and retaining a substantial interest in the terms and conditions of employment. This is so in this case because the Employer still considered Sippel employed by continuing to accept his health insurance premiums and there is nothing to indicate that Sippel was removed from the payroll records and seniority list. *Delta Pine Plywood Co.*, 192 NLRB 1272 fn. 1 (1971).

c. The Unalleged Board Agent’s Conduct

Girer testified that she has been a field attorney for the Board since 1989 and from 2000; she has been stationed at the Philadelphia Regional Office. Girer is experienced in conducting elections and has done so on 15-20 occasions, but has not conducted one for over 10 years. She conducted an election at the employer’s facility on December 10. The election occupied a small sectioned off corner of the employer’s warehouse. Girer said that the voting area was sectioned off by the Employer with vertical planks and black opaque plastic sheeting with two

⁹ The test applicable to the eligibility of laid-off employees is “whether there exists a reasonable expectancy of employment in the near future.” *Pavilion at Crossing Pointe*, 344 NLRB 582 (2005); *Higgins, Inc.*, 111 NLRB 797 (1955); and *Madison Industries*, 311 NLRB 865 (1993). This test is not applicable to situations when employees are on sick leave or extended medical leave.

tables, chairs and the voting booth (Tr. 10, 11, 33-35).

5 During the election, there were 18 challenged ballots. Girer testified that the challenged voter placed his/her ballot into a challenged ballot envelope (NLRB-4646), which was then sealed and placed in the ballot box. Before the challenged ballot is placed in the ballot box, Girer wrote down the name of the case, case number and name of the challenged voter, date of the election, and the basis for the challenge on the challenged ballot envelope. She then gave the ballot to the challenged voter; explain the challenge procedure and the voter is then permitted to go in the voting booth to vote. She said that once the voter leaves the voting booth, she hands the challenge ballot envelope to the voter. She said that the voter places the ballot in the challenged envelope, the envelope is sealed with tape by the voter, and the voter places the envelope in the ballot box. Girer said the same procedure was used for each of the challenged ballots (B Exhs. 2, 3; Tr. 11-15; 59-61).

15 After the election was closed, Girer proceeded to open the ballot box, showed the parties the ballots, and dropped the ballots on the table. The challenged ballots were separated and set aside while the remaining ballots were opened and counted by Girer. Girer tallied the ballots and request that the parties keep each other's count of the ballots. The ballots were placed in either a "yes" or "no" pile. At the end of the count, the parties were given a tally of the ballots and they then left the area. With regard to the challenged ballots, Girer placed each of the NLRB-4646 (which contained a challenged ballot) into a determinative challenged ballot envelope (NLRB-5126). The NLRB-5126 is an 8 1/2 x 14 manila envelope containing all the challenged ballots. Girer placed NLRB-5126 in a file folder in her briefcase. Girer admittedly did not ask the parties to stay while she placed the challenged ballots in the NLRB-5126, did not have the parties sign the flap of the NLRB-5126, and did not seal the NLRB-5126 in the presence of the parties (RD 3, Tr. 15-19, 39).

30 After the NLRB-5126 was secured in her briefcase, Girer proceeded to clean up the area, took down the voting partitions, took down any voting signs, retrieved her briefcase and left the facility. She said it took her approximately 10 minutes to clean up the area and only 30 seconds to take down the signs. She also said that her briefcase was always in her line of vision. She left the facility around 11:30 p.m. Girer insisted no one entered the area from the time the parties left after the vote count and when she left the facility (although someone walked by the room). Girer said that upon arriving at her residence, she took the briefcase in the house. She did not open her briefcase or the NLRB-5126 envelope during the night (Tr. 19-21; 31-41; E Exh. 1).

40 The following morning, December 11, Girer drove to the Regional office and took out the case file containing the NLRB-5126 from her briefcase. It was at this point, Girer reviewed the election handing manual and realized the NLRB-5126 was supposed to be sealed in the presence of the parties and signed at the conclusion of the election. She immediately contacted her supervisor and the assistance Regional Director was also contacted. The supervisor instructed her to take the information that she had previously completed on the NLRB-4646 envelope of the 18 challenged ballots and to fill out this same information on the exterior front portion of the NLRB-5126. She then placed the 18 challenged ballots back into the NLRB-5126 and sealed the envelope with tape and signed her name over the tape. The NLRB-5126 was given to the assistant to the Regional Director and placed in the Regional office safe. Girer stated that placing the challenged ballots in the safe was a standard operating procedure for all challenged cases. Since that time, she has not seen the challenged ballots nor have any of the ballots been opened. Girer noted that no one has access to the safe except for the assistant Regional Director and the Deputy Regional Attorney (Tr. 21-27, 30; B Exh. 4).

Girer believed her mistake was "ministerial" in nature and informed the parties of the same by email on December 12 (B Exh. 5). The email, in part, state

To the parties:

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I am writing to advise you of a ministerial mistake I made, at the end of the election, specifically that I failed to seal the 18 challenged ballot envelopes into a larger envelope in your presence and to solicit the parties' signature across the seal of the envelope as required by the Representation Casehandling Manual.

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I can assure you that the 18 challenged ballot envelopes remained in my possession at all times after the election until Wednesday morning, when they were secured in the office safe.

15

Girer said that her error was ministerial because although she neglected to carry out the specific instructions in the Casehandling Manual, the challenged ballots were never disturbed. She believed that the security of the ballots had not been tampered or compromised. Girer admitted that she did not follow the procedure in the manual when she failed to place the challenged ballots in the NLRB-5126 in the presence of the parties; failed to complete the information on the front of the envelope in the presence of the parties; failed to seal the envelope in the presence of the parties; and failed to have the parties signed their names over the sealed tape. The Regional office prepared a stipulation for the parties to waive the right to file objections to the election solely on the basis of the Board agent's failure to impound and seal the challenged ballot envelopes at the election site in the presence of the parties or alternatively, as a possible resolution, the Regional office would consider running another election. The union agreed, but the Employer refused to stipulate (B Exh. 5; Tr. 27-32; 37-38; 42-45, 47, 48).

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Discussion and Analysis

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In order to set aside an election based on Board agent conduct, there must be evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969); *American Medical Response*, 356 NLRB No. 42 (2010); and *Allied Acoustics*, 300 NLRB 1181 (1990). The case here involves the sanctity of the ballots and where the Board agent's conduct, although not necessarily violative of neutrality principles, could be construed as a sufficiently serious departure from Board election procedures to warrant setting aside the election.

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In this regard, elections have been set aside, based on violations of the *Polymers* standard, in a number of cases. In *Madera Enterprises*, 309 NLRB 774, 775 (1992), the Board agent failed to keep a list of challenged voters, placed all ballots both challenged and unchallenged into an envelope, and sealed the envelope. When the Employer asked for a list of challenged voters, the Regional personnel broke the seal, and opened the ballots, removed the challenged ballots envelopes, and returned the challenged ballots to the envelope, which still contained the unchallenged ballots. The Board concludes that the Board agent's conduct in breaking the seal, and opening the envelope outside presence of the parties, constituted conduct which reasonably would destroy confidence in the election process.

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In *Paprikas Fono*, 273 NLRB 1326, 1328-1329 (1984), a Board agent failed to place challenged ballots in an envelope sealed with tape. The Regional personnel subsequently opened the envelope to inspect the condition of the challenged ballots, outside the presence of the parties. The Board held that the conduct denied parties the opportunity to monitor the

challenge and assure themselves that challenges were secure. This conduct created a "reasonable doubt" as to the fairness and validity of the election and in *Austill Waxed Paper*, 169 NLRB 1169, 1110 (1968) where the ballot box was left unattended, for 2-5 minutes, due to an altercation outside the polling place.

5

On the other hand there are numerous Board and Court decisions, applying the *Polymers* standard and finding that the conduct did not raise a reasonable doubt as to the fairness and validity of the election. *Cedars-Sinai Medical Center*, 342 NLRB 396, 608-609 (2004) (Blank ballots left unattended and ballot box not sealed); *Robert Orr-Sysco Food Services*, 338 NLRB 614, 623 (2002) (Board agent failed to detail reasons for the challenge, contrary to Casehandling Manual); *Newport News Ship Building*, 239 NLRB 82, 90 (1978) (Ballot box not sealed, union representative carried ballot box from one to another polling place, and company representative was denied permission to inspect ballot boxes); *Kirsch Drapery*, 299 NLRB 363, 364 (1990) (Board agent opened polls a half hour late, allowed parties to assemble voting equipment, placed challenged ballot in box, rather than instructing voter to place it in box, and violated Casehandling guidelines in resolving challenge. The Board reverses Hearing Officer, and finds separately or collectively, their misconduct do not raise a reasonable doubt as to fairness and validity of election); *Trico Products*, 238 NLRB 380, 381 (1978) (The Board agent left envelope with blank ballots unattended for 5 minutes while erecting voting booth. When Board agent retrieved ballots, she noticed a small tear in envelope); *Niagara Wires*, 237 NLRB 1347 (1978) (Portion of initials of company representative was under the tape rather than over it); *Keystone Metal Moulding*, 236 NLRB 697 (1978) (Board agent did not request that observers inspect the seal, before opening the box, and observers could not see or confirm that box had not been tampered with. Further Board agent failed to have observers sign certification of conduct at end of first voting session); *Benavent & Fourmier*, 208 NLRB 636 (1974) (Board agent left voting area for 2-5 minutes, and left ballots on table and box unsealed); *Polymers*, above, (Ballot box was left unguarded in locked car of Board agent between sessions. Box not sealed properly, since easily removable masking tape was used); *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1332-1333 (5th Cir. 1980) (Envelopes containing ballots were not sealed with tape, no label with name of person who sealed envelope, and no memo in file stating where challenged ballots were stored, all in violation of Casehandling Manual); *Bell Foundary Co. v. NLRB*, 827 F. 2d 1340,1346-1347 (9th Cir. 1987) (Board agent left ballot box unattended for five minutes before start of afternoon session); and *NLRB v. Capitan Drilling Co.*, 408 F.2d 676, 677 (5th Cir. 1968) (One seam on ballot box was not sealed with tape).

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It is therefore appropriate to analysis the Board agent's conduct under the *Polymers* standard and determine whether if it creates a "reasonable doubt as to the fairness and the validity of the election." *Polymers*, above, *Sawyer Lumber Co.*, 326 NLRB 1331, 1332 (1998).

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The parties do not dispute that Girer applied the appropriate casehandling procedure with regard to explaining the appropriate procedure involving a challenged ballot to the voter; in completing the information on the challenged envelope NLRB-4646; allowing the challenged voter to vote; having the voter place the challenged ballot in the NLRB-4646; and having the voter sealed the envelope and place the envelope containing the challenged ballot in the ballot box. This procedure taken is consistent with the Representation Casehandling Manual 11338.3.

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The only issue is whether Girer's failure to follow the appropriate procedure with regard to her handling of the challenged ballots warrants setting aside the election. The Representation Casehandling Procedure Manual at 11340.9(a) states in part

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Information regarding determinative challenged voters or questioned Interpretation ballots should be listed on the front of Form NLRB-5126, a large envelope designed for

5 this purpose. The case name and number, the election date, a description of the
contents of the envelope, the total number of large envelopes when more than one is
used, and the name of the Board agent who is to seal the envelope(s) should be
included on the face of Form NLRB-5126. The determinative challenged ballot
envelopes and/or the questioned interpretation ballot envelopes should then be placed,
in the presence of the parties' representatives, into the Form NLRB-5126 envelope(s).
After sealing the Form NLRB-5126 envelope(s), the Board agent and the parties'
representatives should sign their names across the flap. The flap should then be
secured with transparent tape in such a manner as to ensure against accidental
10 opening.

15 Girer admittedly did not place the challenged ballots into the NLRB-5126 envelope in the
presence of the parties and did not have the parties sign the 5126 envelope across the flap after
sealing the envelope. The information on the face of the envelope to be completed by the
Board agent was not done until a day later in the Regional office. The flap of the NLRB-5126
envelope was then sealed by Girer and the 5126 placed in the office safe.

20 The Employer contends that the election should be overturned because of the failure of
Girer to comply with 11340.9 of the Casehandling Procedure Manual. The Employer contends
that during the time that the parties left the election area and when Girer placed the challenged
ballots in the Regional office safe, that somehow, the ballots could have been tampered. The
Petitioner argues that all of the challenged ballots have been accounted for and are currently in
the Regional office safe.

25 As noted in the cases above, the mere failure of the Board agent to follow the
Casehandling Procedure Manual would not in of itself overturn the election. Despite not
following the appropriate procedure, I credit the testimony of Girer that the integrity and security
of the ballots was not adversely affected nor tampered with by anyone. Girer credibly testified
that the challenged ballots were placed and sealed in the NLRB-4646 envelope by the voter,
signed and sealed by the voter, and placed in the ballot box. Girer also credibly testified that all
30 the ballots were placed in the NLRB-5126 and secured in her briefcase. She testified, without
contradictions, that she took no more than 10 minutes to take down the partitions and posters
while she was always in plain sight of her briefcase. Girer then proceeded to leave the facility,
lock the briefcase in the trunk of her car and drove home. Once home, Girer placed the
briefcase by the door. At the time, Girer lived alone and no plausible allegation has been raised
35 that someone had tampered with her briefcase at her residence. On the following morning,
Girer secured her briefcase, placed it in the car and drove to the Regional office. At the office,
Girer reviewed the casehandling manual and discovered she did not follow the exact procedure
for the challenged ballots. She immediately contacted her superiors and then sealed the NLRB-
40 5126 after completing the front of the envelope with the pertinent information.

45 I have closely reviewed her testimony and find that there is no reasonable doubt as to
the fairness and the validity of the election. It is well settled that the Board will not set aside
elections based upon speculation that its election standards have been impugned or violated.
"It requires more than mere speculation to overturn an election." *J. C. Brock*, 318 NLRB 403,
404 (1995), *Sawyer Lumber, supra*, at 1332 ("Speculation about the possibility of irregularity...
does not raise a reasonable doubt as to the fairness and validity of the election"); *Newport
News*, above, 239 NLRB at 86 ("The speculation of the Employer concerning the accuracy or
legitimacy of the ballots is no substitute for specific evidence relating to actual conduct or events
50 which raises material issues that the Board's election standard have been impugned"); *Pride
Motor Products*, 233 NLRB 182 (1977) (The Board "does not set aside an election based on
mere speculation that election standards have been impugned"); *Bell Foundry v. NLRB*, above,

827 F.2d at 1346 ("The mere possibility of irregularity of representation election does not preclude certification"); *NLRB v. Capitan Drilling*, 408 F.2d at 677 (Uncorroborated speculation that ballot box could have been tampered with, insufficient to necessitate an evidentiary hearing or the setting aside of the election); and *Trico Produces, supra*, 238 NLRB at 381 ("It is not every conceivable possibility of irregularity which requires setting an election aside but only reasonable possibilities").

Further, the Board in *Polymers*, above, enlarged upon the definition of reasonable. The Board held

We do not think, however that the word "possibility" could ever be construed in this context to have the connotation of 'conceivable'. The concept of reasonableness of the possibility must be imported into this text in order for it to have meaning. 174 NLRB at 282 fn. 6.

The Circuit Court specifically affirmed the Board's analysis in this regard. "A *per se* rule of possibility would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained." 414 F.2d at 1004.

I find that the Employer's contention with respect to the Board agent's conduct is no more than "speculation" that it may be possible that the challenged ballots, although not properly sealed and signed by the parties, were tampered. I find this speculative argument with no corroborating testimony to be insufficient to warrant the conclusion that reasonable doubt as to the fairness or validity of the election has been demonstrated. The situation here is distinguishable from *Paprikas Fono*, above, cited by the Employer. Here, while the Board agent failed to place challenged ballots in an envelope sealed with tape, unlike *Paprikas Fono*, Gierer credibly testified that she did not open the envelopes to inspect the condition of the challenged ballots outside the presence of the parties. Here, Gierer merely rewrote the information already contained on the NLRB-4646 envelope to the front of the NLRB-5126 envelope. No evidence was proffered that Gierer actually unsealed the challenged ballots. Although, as described above, Gierer failed to comply with the casehandling manual, it is well settled that the provisions of the casehandling manual are not binding procedural rules. *Correctional Health Care Solutions*, 303 NLRB 835 (1991). In any event, I conclude that the challenged ballots in this case were secured "in a way to assure against tampering, mishandling, or damage." They were placed in an envelope, sealed and never opened to this day.

Based on the foregoing analysis and authorities, I find that the conduct of the Board agent did not raise a reasonable doubt as to the fairness and validity of the election. *Polymers*, above. I conclude that the Employer failed to show "that the Board agent's alleged misconduct would create a reasonable possibility of an incorrect outcome in the election, and the allegations were not of the sort that would create presumption of such taint". *Enloe Medical Center*, 345 NLRB 874 (2005).

Accordingly, I find that the unalleged conduct of the Board agent in not following the Representation Casehandling Manual for securing the challenged ballots did not taint the election process and recommend that the election not be set aside on this basis.

d. The Employer's Objection

On December 17, the Employer filed an Objection to conduct affecting the results of the election (B Exh. 1). The Employer alleges

5 Repeatedly before the election but after the petition was filed, the union, through its agents or representatives, in an attempt to influence the outcome of the election, disseminated a forged document that appeared to come from Hoover's, Inc. showing that New Century's senior management members had received certain bonuses. The senior management members had not, in fact, received the bonuses described in the forged document, and this forgery affected the outcome of the election.

10 The Employer states that the biggest issue throughout the election campaign was the union's assertion that the local drivers had not received a wage increase for at least 5 years and had their wages reduced by 5 percent in 2009 while two senior executives received large bonuses. The Employer contends that the union repeatedly used a forged document in its campaign that inappropriately affected the outcome of the election.

15 Christopher Buschmeier (Buschmeier) testified that he was a part-time organizer for the union during the election campaign from early fall 2013 leading to the election. Buschmeier confirmed that the pressing union campaign issue with the Employer involved the lack of a wage increase and the 5 percent wage reduction in 2009. Buschmeier said that his role as a union organizer was to speak to the workers and to publish some campaign literature. Buschmeier signed some union campaign letters and was a prominent spokesperson on a union DVD espousing the benefits of union membership (Tr. 277-282). As part of the campaign, the union disseminated a document to the employees from a 2009 Hoovers company financial report (Hoovers document) regarding the salaries and bonuses of two senior executives employed by New Century.¹⁰

25 The Employer alleges that the Hoovers document contained forged information. The Hoovers document stated that senior executive Jerry Shields received \$204,632 in salary with a bonus of \$33,194.00 for a total compensation package of \$237,826 and that Brian Fitzpatrick received \$360,362 in salary with a bonus of \$64,438 for a total package of \$424,800 (E Exh. 8). The Employer maintains that the two executives never received bonuses in 2009.

30 Buschmeier recalled sending the Hoovers document to the employees as part of the election campaign but denied knowing that the document contained forged information. Buschmeier said that the Hoovers document was received from the IBT's communication department in Washington, D.C. Buschmeier said the document was requested by one of the local business agent as part of the election campaign. He recalled receiving the Hoovers document in September. Upon receiving the document, Buschmeier contacted the IBT financial representative by email and asked whether he could use the document for the election campaign. The response was affirmative since he was informed that IBT purchased the document off the internet for \$40 dollars. Buschmeier said he did not verify the accuracy of the Hoovers document with anyone (Tr. 285-294, 300).

45 Buschmeier further testified that Jack Haas (Haas) circled in red ink the salaries and bonuses of the two executives and drew in a dialogue box containing the words, "In 2009 when you took a 5% pay cut...your execs took a large bonus."

Buschmeier said that the Hoovers document received by him did not contain the circle or the dialogue box. Buschmeier said it was Haas' suggestion to circle the salaries and bonuses

50 ¹⁰ Hoovers is a subsidiary of Dun & Bradstreet and provides financial and other information on companies.

of the Employer’s executives and to put the language in the dialogue box to emphasize the disparity in wages between the executives and the workers (Tr. 296-308; E Exh. 10).

5 Sippel testified that he was also involved with the union election campaign. He posted the Hoovers document on the union Facebook as part of the campaign shortly after the November 2 breakfast meeting. The Hoovers document posted by Sippel contained the same red circle and language in the dialogue box that was penned by Haas. In addition to the document, Sippel’s posting had a picture of his face and the following language, “Little helpful information for all you doubters.” Sippel said that his wife assisted him with the posting and that she received the Hoovers document from Buschmeier. Sippel said that he did not verify the accuracy of the information on the Hoovers document when it was posted on Facebook (Tr. 10 315-327; E Exh. 13).

15 Olszewski testified that he became aware of the Hoovers document shortly after the November breakfast meeting. He wrote a letter to the local drivers on December 6, rebutting the union’s contentions that Shields and Fitzpatrick received bonuses. He said that the document was a “phony” (Tr. 346-349; P Exh. 23). In his letter, he wrote

20 The document upon which Local 107 has repeatedly relied on regarding these supposed “bonuses”, as many of you may have seen, is a document found on a Facebook page that is entitled “Jerry Sippel New Century Transportation”. This is not a document created by the Company. It supposedly is a report from Hoovers, a company that publishes financial information on companies. The document is a PHONY!

25 New Century first learned of this posting when it received a call from an attorney who works for Dunn & Bradstreet, the national credit rating company which owns Hoovers. Dunn & Bradstreet’s lawyer called New Century because Dunn & Bradstreet believed it had discovered information on this Facebook page that was contrary to information that had actually been published about New Century by Hoovers. In fact, the information on this page concerning the supposed “bonuses” received by Mr. Shields and Mr. Fitzpatrick in 2009 was forged by someone and has been repeatedly used by Local 107 in order to deceive you. Mr. Shields and Mr. Fitzpatrick received no bonuses in 2009. The so-called “bonuses” actually were restricted stock shares, car allowance monies and 401(k) match monies, which the forger added up and falsely called “bonuses”. Those restricted stock shares are now worthless, and neither man ever made a penny off those shares. Do you really want to be represented by people who will falsify a financial company’s publication and use false numbers to try to deceive you?

40 Jerry Shields (Shields) testified that he has been the senior vice-president of operations with the Employer since 2000. Shields denied receiving any type of bonuses with the Employer. In 2009, Shields said he received car allowance of \$14,400 and stock options worth \$18,050. At the time, the Employer was contemplating going public and had filed a registration statement with the Securities and Exchange Commission. Shields said he never received the stock options because the company decided not to go public with an initial public offering. Shields said that in a similar fashion, Brian Fitzpatrick also received stock options, but he was not able to collect when the company failed to go public. He said that Fitzpatrick never received a bonus in 2009 (Tr. 341-344; E Exh. 9).

50 *Discussion and Analysis*

The Employer contends that the Hoovers document is a forgery because it stated that

Employer executives received bonuses in 2009, which was not true. The Petitioner contends that the Hoovers document was purchased on the internet and no alterations were made on the document regarding salaries or bonuses of the executives, only that the information was either circled or a comment made about the executives' compensation.

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When the election results are close or, as here, a dead heat, the objection must be carefully scrutinized. Here, the Petitioner and the Employer issued considerable written propaganda circulated among employees during the election campaign. In *Midland National Life Insurance Co.*, 263 NLRB 127, 130 (1982), the Board held that it would “no longer probe into the truth or falsity of the parties' campaign statements.” Accordingly, the Board declines to set aside elections on the basis of a party's misleading statements or a party's misrepresentations of Board actions made during election campaigns. The Board will not “probe into the truth or falsity of the parties' campaign statements” and “will not set elections aside on the basis of misleading campaign statements.” *Midland* at 133; see also *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195 (2004).

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Midland, however, did not end the concern over “forged documents which render the voters unable to recognize propaganda for what it is.” *Midland*, above at 133. Thus, if the voters are unlikely able to assess the documents as forgeries, the Board will set aside the election. *Mt. Carmel Medical Center*, 306 NLRB 1060 (1962).

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Here, the Employer maintains that the Hoovers document was a forgery. I credit the testimony of Buschmeier that he received the Hoovers document from IBT which was purchased over the internet from Dun & Bradstreet. It has not been proven by the Employer that the bonus information was forged and inserted by the Petitioner. Shields testified that the information on the bonuses was obtained by the Employer's SEC filing for an initial public offering. The bonus information from the SEC filing is sufficiently identical to the Hoovers document for a reasonable person to surmise that the Hoovers subsidiary received the bonus information about the executives from the SEC filing. The only change made by the Petitioner was to circle the salaries, bonus and total compensation of the two executives and add language to the dialogue box. It is clear that this was not a material alteration of the financial information in the document. Additionally, Olszewski testified that he wrote a letter rebutting the accuracy of the bonuses to the local drivers.

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Most significantly, the Employer never proffered the original Hoovers document to substantiate the forgery. As such, I agree with the Petitioner that it is impossible to determine whether the purported forgery was altered from the original document in any material fashion. Further, in *Albertson's Inc.*, 344 NLRB 1357 (2005), the case cited by the Employer, is distinguishable. In that case, the letter distributed by the union was “clearly fake” and the union remained silent even after the employer provided clear evidence to the union that it was not authentic. Here, as indicated above, there is no evidence that the circulated document was fraudulent. Even assuming the Hoovers document was a fake, the Employer sufficiently rebutted the accuracy of the information, allowing the employees as “mature individuals who are capable of recognizing campaign propaganda ... and discounting it.” *Id.* at 130 (quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977)). See also *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB No. 71 (2011).

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Based on the above, I recommend that the Employer's objection be overruled.

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CONCLUSIONS

A. The Challenged ballots

As detailed above, I recommend that the ballots of the following employees be opened and counted:

5 Steven Bell
Paul Laney
Steven Long
Robert Read
Gerard Sippel
10 John Spolnicki

As detailed above, I recommend that the ballots of the following employees remain closed and uncounted:

15 Clyde Bacon
Steven Bull
Oliver Cane
John Carrigan
Henry Charyk
20 Russell Denny
Robert Doty
Robert Ford
William Lobger
Carroll Quarles
25 Edward Rambo
Walter Smith

B. The Unalleged Conduct

30 Based on the above, I find the Board agent's conduct did not affect the integrity of the election and recommend this matter be closed by the Regional Director.

C. The Employer's Objection

35 As explained above, I recommend the Employer's Objection be overruled.¹¹

40 Date: Washington, D.C. March 24, 2014

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Kenneth W. Chu
Administrative Law Judge

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¹¹ Under the provision of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by April 7, 2014.