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

In Re

FJC SECURITY, INC. Employer And FEDERAL CONTRACT GUARDS OF AMERICA, INTERNATIONAL UNION Petitioner And UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, INTERNATIONAL UNION Incumbent Union	:	CASE NO. 16-RC-10932

INCUMBENT UNION'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATION ON OBJECTIONS AND CHALLENGED BALLOTS

As noted in the Hearing Officer's Report and Recommendation on Objections and Challenged Ballots (hereinafter "Report"), a Decision and Direction of Election ("hereinafter "DDE") was issued by the Regional Director on May 12, 2010. That Decision followed the list of eligible voters submitted by the Employer on April 28, 2010. A mail-ballot election was held and on June 2, 2010, a Tally of Ballots was served upon the parties. On June 8, 2010, the Petitioner filed objections. On July 8, 2010, a hearing was held regarding the Petitioner's Objections and the Board's challenge to eight votes cast by individuals who were not on the eligibility list submitted by the Employer.

On July 23, 2010, the Report was mailed to the parties and contained the following findings:

1. The locations in 16-RC-10858, the stipulated unit, and the DDE are the same,
2. The history of the bargaining unit and the unit description in Case 16-RC-10858 were not determinative of the unit in this case, [1]
3. None of the cases cited by the Incumbent in its post-hearing memorandum are relevant,
4. The Employer failed to post Board Notices at any of the locations specified in the DDE,
5. The Employer submitted the eligibility list late, and
6. At least one eligible voter, Hector de La Rosa, was entitled to vote but did not receive a mail-ballot.[2]

Based on the foregoing, the Hearing Officer recommended the following:

1. The challenges to the eight voters at issue be overruled and their ballots be opened and counted,
2. The Petitioner's Objections be sustained,
3. That, if the revised Tally of Ballots favors the Petitioner, that the election be certified, and
4. That, if the revised Tally of Ballots favors the Incumbent, that the election be set aside.

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[1] Incredibly, the Hearing Officer cited only the facts presented by the Petitioner's witnesses in crediting their testimony but examined the manner in which the Incumbent's witnesses testified in discrediting their testimony. The Hearing Officer went so far as to assume one witness, Hector De La Rosa, was not credible because he used the words "community of interest" and "hearsay."

[2] The Hearing Officer made no finding regarding the eligibility of four other employees.

However, given the evidence established at the hearing, and the applicable law, findings 1, 2, 3, and 6 are improper as are the Hearing Officer's recommendations. As such, the Incumbent makes the following exceptions:

EXCEPTIONS

1. The history of the bargaining units, as well as the unit description in 16-RC-10858 are controlling and, therefore, the challenged ballots must not be counted,
2. That, even though the Hearing Officer sustained the objections, and sustained an objection imputed to the Petitioner, the election must not certified based upon which labor organization wins the election.

A. The Challenged Ballots.

In his Report, the Hearing Officer takes administrative notice of the Certification of Representation in Case No. 16-RC-10858. The Hearing Officer then states that the unit description in the DDE, and in case 16-RC-10858, are the same. However, they are not. In Attachment A of the Certification in 16-RC-10858, the locations listed do not include the Social Security building in Brownsville or the Federal Courthouse in Brownsville, while those sites are included in the DDE. As the Hearing Officer notes, at the hearing on April 1, 2010, the parties stipulated that the unit description in 16-RC-10858 was the appropriate unit. Any reference to the Social Security offices, or the Federal Courthouse, in Brownsville at the hearing or in the DDE were simply a mistake.

Furthermore, at the hearing, there was ample evidence regarding the bargaining history of Incumbent's Locals 218 and 225. The Hearing Officer found that this evidence was not relevant to the issue of voter eligibility. And he further found that the case law

cited by the Incumbent which held that prior unit descriptions and bargaining history are relevant were not controlling in this case. These findings are in error.

The Hearing Officer held that the Board's decision in *National Public Radio*, 328 NLRB 75 (1999) does not support the Incumbent's position because, in this case, the parties "agreed on the record to include all of the locations specified in the Certification of Representation in Case Number 16-CA [sic]-10858." Indeed, the parties did agree to that unit description. But what the Hearing Officer overlooks is the fact that the unit description in 16-RC-10858 does **not** include the Social Security offices and the Federal Courthouse in Brownsville. Therefore, according to *National Public Radio*, the unit description stipulated by the parties (contained in 16-RC-10858) is controlling and not the DDE which includes those two locations in error.[3]

The Hearing Officer also discounts the case law cited regarding the applicability of the bargaining history of the Employer and Locals 225 and 218 by arguing that those cases deal with accretion cases. However, accretion is a doctrine, not a certain type of case, and can be applied in various cases. The Board defines accretion as the addition of a smaller group of workers to a larger, existing unit. *Safety Carrier, Inc.*, 306 NLRB 960 (1992). That is clearly what is being done in this case.

The unit description in 16-RC-10858 specifically excludes the Social Security offices and Federal Courthouse in Brownsville from the bargaining unit. A separate unit is based in Laredo, Texas and is represented by Incumbent's Local 225. The recognition clause of the most recent collective bargaining agreement for that local establishes that those two locations are part of that unit. Incumbent Ex. 2; Tr. Pp. 126, 208. The Hearing

[3] The Hearing Officer also notes that the time for filing exceptions to the DDE has long passed, but, similar to *National Public Radio*, the issue is decided upon the Board's challenges. It is not necessary for one party to file exceptions to a DDE for it to be set aside and the challenges sustained.

Officer, however, failed to even address this evidence in the Report. Therefore, the bargaining history is highly relevant to this case in that it, along with the unit description in 16-RC-10858 and Local 225's most recent collective bargaining agreement, establish that the employees at the Social Security offices in Brownsville, and the Federal Courthouse in Brownsville, are not part of the bargaining unit in this case. Their addition, through their ability to vote in this election, will materially change not only this unit, but also the bargaining unit that encompasses the Laredo, Brownsville Social Security and Brownsville Federal Courthouse locations ("Laredo Unit"). And, since a part of a unit cannot simply be split off, the entire Laredo Unit will be decertified. *White-Westinghouse Corp.* 229 NLRB 667, 672 (1977).

Given the fact that the evidence clearly establishes that the Social Security offices and Federal Courthouse are not part of 16-RC-10858, and that the unit description in that case was stipulated by the parties as the appropriate unit in this case, the employees at those locations must not be permitted to cast votes in this election. The Hearing Officer has blindly adhered to the premise that the unit description in the DDE is controlling, even if it is in error. However, given the evidence, and based on Board precedent, the unit description in 16-RC-10858 is controlling. As such, employees working at sites which are not listed in that description (including the eight challenged ballots) must not be permitted to vote, and the ones that did vote, must not be counted. This interpretation is also supported by the fact that opening those votes will effectively decertify a unit by transferring locations from one to another.

B. If the Ballots are Counted, All Employees at those Site must Vote.

The Hearing Officer made certain findings that proper notices were not made, the eligibility list was not timely, and that it was incomplete. Moreover, not only was the list incomplete, but the Hearing Officer found that eligible voters (assuming the challenged ballots are counted) were not made aware of the election. The Incumbent reasserts its position regarding the challenged ballots stated above. However, if the challenged ballots are to be counted, then the Board must permit all eligible voters to vote.

As at the hearing, the Incumbent takes no evidentiary position regarding the posting of notices or the timeliness of the eligibility list. However, it was clear from the record that Hector de La Rosa was employed by the Employer at a location listed on the DDE. The Hearing Officer found that he was an eligible voter. The Hearing Officer then stated that the employment status of four other employees (asserted by Petitioner as eligible voters) could not be verified. This is odd since the Hearing Officer used Employer's Exhibits 3-5 to verify the employment of the eight challenged ballots. Therefore, the exhibits should be used to verify the employment of all the alleged eligible voters, and the Board must find that, if the unit description in the DDE is upheld, all the employees in that unit are eligible to vote, including the thirteen (nine verified by the Hearing Officer and four who should be verified) employees identified at the hearing.

Based upon this, if the challenged voters are permitted, and since the Hearing Officer has identified others whom should have vote but were not given the opportunity, the election must be set aside. The Hearing Officer's recommendation to certify the election if it comes out in favor of the Petitioner but not the Incumbent is in error. Not only does the recommendation favor one organization over another, it may disenfranchise employees whom it has identified as being eligible to vote, but who, if the election is

certified, will never have the opportunity to vote. The Board has long held that it must not force a group of employees to join a bargaining unit without first allowing the employees the chance to vote. *Melbet Jewelry Co., Inc.*, 180 NLRB 107 (1969).

Based on the foregoing, the Incumbent requests that the challenges to the eight ballots cast be sustained. In the alternative, if the Board determines that the challenged voters are eligible, the Board must hold a rerun election so as not to disenfranchise those voters who had no notice of the election.

Respectfully submitted,

/s/ Robert B. Kapitan

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