

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

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In the Matter of: )  
)  
KIRKSTALL ROAD ENTERPRISES, INC./ )  
QUAY STREET ENTERPRISES, INC. )  
)  
Employer, )  
)  
and )  
)  
WRITERS GUILD OF AMERICA, EAST, INC. )  
)  
Petitioner. )  
\_\_\_\_\_)

Case No. 2-RC-23547

**EMPLOYER'S BRIEF IN SUPPORT OF  
ITS EXCEPTIONS TO THE DECISION DENYING  
ITS ELECTION OBJECTIONS**

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## **PROCEDURAL BACKGROUND AND INTRODUCTION**

This brief is filed in support of the exceptions filed by Kirkstall Road Enterprises, Inc./Quay Street Enterprises, Inc. (the “Employer”) to the Decision issued on August 30, 2011 by Administrative Law Judge Raymond P. Green denying the Employer’s election objections.<sup>1</sup> Rather than address the issue before him – whether a number of employees sufficient to affect the election result were disenfranchised as a result of the Region’s conduct of the mail ballot portion of the mixed mail-manual election – the Judge instead chose to ignore the overwhelming record evidence and wholly uncontroverted testimony of four employee witnesses, each of whom testified that either he or she never received a mail ballot or received and returned a mail ballot that undisputedly was not counted. In addition, the Judge refused to consider the testimony of three additional witnesses (one who testified that he never received a ballot and two who testified that they returned mail ballots that were not counted), finding that they were ineligible to vote in the election despite that the grounds for that conclusion are contradicted expressly by record evidence and well-established Board precedent. The Judge’s disregard for the sworn, uncontroverted testimony of seven employees is a transparent attempt to avoid deciding whether the Region should certify an election decided by five votes where four employees never received a ballot and six other employees marked and pursuant to instructions provided by the Region, returned ballots by mail in postage pre-paid, pre-addressed envelopes from six different locations throughout the United States, but which were never counted (or allegedly received) by the Region.

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<sup>1</sup> By letter from the Executive Secretary dated September 6, 2011, the Employer’s time to file exceptions and any brief in support of exceptions was extended until September 27, 2011.

## I. THE ELECTION

A mixed mail-manual election was held pursuant to a Stipulated Election Agreement by Region 2 of the National Labor Relations Board (the “Region”) in November and December 2010 to determine whether the Writers Guild of America, East, Inc. (the “WGAE”) would become the certified bargaining representative of Producers, Field Producers, Post Producers, Associate Producers, Senior Story Producers and Story Producers employed by the Employer. The manual or in-person election was held at the Employer’s facility on November 30, 2010. Mail ballots were to have been mailed by the Region on November 17, 2010 and returned by December 10, 2010. The ballot count was held on December 13, 2010.<sup>2</sup> (RD Ex. 1(c); Ex. P2).<sup>3</sup>

The Stipulated Election Agreement in paragraph 12(b) states that the Region shall mail a ballot to individuals (a) then engaged by the Employer who are expected to be out of the New York City metropolitan area on the date of the manual election and (b) no longer employed by the Employer other than for reason of their voluntary resignation. (RD Ex. 1(c)). The Agreement also requires that the Employer provide the Region with a list of individuals and addresses of those in categories (a) and (b) (the “mail ballot list”). The Agreement does not prohibit the Region from sending mail ballots to other individuals (other than those no longer employed by the Employer or out of town on the Employer’s business), nor does it prohibit the counting of mail ballots cast by individuals on the *Excelsior* list, but not on the mail ballot list. The Agreement only sets forth those individuals to whom the Region was required to mail a

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<sup>2</sup> The Stipulated Election Agreement provides that “late arriving ballots shall be handled pursuant to Board procedures,” which Region Supervisor Nicholas Lewis testified require that ballots received at any time prior to the ballot count be counted. (Tr. at 286).

<sup>3</sup> Herein, Regional Director Exhibits are referred to as “RD Ex. \_\_\_,” Petitioner Exhibits as “Ex. P\_\_\_,” and Employer Exhibits as “Er. Ex. \_\_\_.” The Stipulated Election Agreement is in evidence as both RD Ex. 1(c) and Ex. P2.

ballot on November 17, 2010. Region 2 Supervisor Nicholas Lewis testified that consistent with its mail ballot election procedure the Region mailed a ballot to any individual requesting one, regardless of whether the individual is on the mail ballot list because it does not want “to disenfranchise or potentially disenfranchise somebody.” (Tr. at 340-41).

An initial Tally of Ballots was issued after the initial ballot count on December 13, 2010. (RD Ex. 1(d)). A second Tally of Ballots was issued on December 21, 2010, which reflects that four of the ten challenged ballots were counted, and a third Tally of Ballots (RD Ex. 1(e)) was issued after a hearing and a decision and order adopting the hearing officer’s report and recommendations on the remaining challenged ballots (RD Ex. 1(j) and (k)). A final Revised Tally of Ballots was issued on July 26, 2011, reflecting that 30 votes were cast for the WGAE and 25 votes were cast against representation by the WGAE.<sup>4</sup> The Revised Tally also reflects that two void ballots were cast and that there are no undetermined challenges. (Ex. P1).

## **II. THE OBJECTIONS AND HEARING**

The Employer timely filed objections to the election on December 20, 2010, asserting that the Region’s conduct of the mail ballot election failed to provide eligible voters with a reasonable notice and opportunity to vote. (RD Ex. 1(f1)). Specifically, the Employer asserted that several voters never received a ballot in the mail while several other voters returned a ballot days prior to the deadline for the return of ballots that were not counted. (*Id.*; RD Ex. 1(f2)). The Employer also asserted that eligible voters telephoned the Region well in advance of the deadline for the return of

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<sup>4</sup> One of the ballots opened prior to the hearing was a mail ballot cast by the alleged discriminatee in an unfair labor practice case, Mark Brice (*see fn. 5 infra*). Mr. Brice received a ballot by overnight mail in Houston, Texas, on December 7, 2010, three days before the deadline for its return. (RD Ex. 4).

ballots and specifically requested that they be sent a mail ballot, but either never received a ballot or returned a ballot that was not counted, and noted that a ballot for a separate mail ballot election being conducted by the Region was included (but not counted) with the ballots cast in the election at issue here, raising questions as to the integrity of the ballots and the Region's conduct of the mail ballot election. (RD Ex. 1(f1)). A Notice of Hearing on the Objections<sup>5</sup> was issued July 12, 2011. (RD Ex. 1(o)).

A hearing was held at Region 2 and the New York office of the Division of Judges on July 27-29, August 3, 11, 12, 15 and 16, 2011. Ten individuals eligible to vote in the election at issue testified that they either never received a ballot in the mail or returned a ballot by mail in the envelope provided by the Region, which, the record reflects, was not counted. Although much evidence and testimony was elicited on a variety of issues, the only real issue in this matter is whether a number of eligible voters sufficient to affect the outcome of the election were not afforded an adequate notice and opportunity to vote in the election.

The vast majority of the ten individuals who testified that they were disenfranchised no longer work for the Employer and did not even work for the Employer at the time of the election. Each testified under oath and without contradiction that he or she either did not receive a ballot or received and returned a ballot pursuant to the Region's instructions that was not counted. The only conclusion that could be drawn from their uncontroverted testimony is that either the postal service lost ten pieces of mail – six of which were mailed to the Region from six different locations throughout the United States – or that the Region erred in sending the ballots

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<sup>5</sup> The Notice also consolidated the objections case with a then-pending unfair labor practice case, which the parties resolved prior to the opening of the hearing. The Region issued an Order severing the two cases and conditionally withdrawing the charge in the unfair labor practice case (2-CA-040320) on July 27, 2011. (RD Ex. 2).

or misplaced them upon their return. Common sense affords only one conclusion - that the Region's conduct disenfranchised at least ten individuals, a number more than sufficient to affect the outcome of the election. Moreover, and importantly, it is indisputable based on the record evidence that a number of eligible voters sufficient to affect the outcome of this election attempted to vote in the election, but that those votes were not counted; and, that several additional voters through no fault of their own (or the Employer) never received a ballot and thus were disenfranchised. This reality undoubtedly reflects that all eligible voters were not afforded an adequate opportunity to vote and that the outcome of the election very well may not reflect the will of the majority of eligible voters.

### **III. THE DECISION**

The Judge found that three employees who testified that they never received a ballot or received and returned a ballot that was not counted were ineligible to vote in the election. Specifically, the Judge concluded that Charles Smith worked fewer than 100 hours in the applicable eligibility period and that Rebecca Morton and Zachary Wozniak were ineligible to vote by mail. Regarding Mr. Smith, neither the Union nor the Region challenged or otherwise objected to his inclusion on the *Excelsior* list or the mail ballot list. The Union only raised the issue of whether he was eligible to vote during the objections hearing. Accordingly, any challenge at this stage to his eligibility to vote is a post-election challenge prohibited by well-established Board precedent. *See, e.g., Solvent Services, Inc.*, 313 NLRB 645 (1994). Regarding Ms. Morton and Mr. Wozniak, the Stipulated Election Agreement does not prohibit employees not included on the mail ballot list from voting by mail ballot. In fact, two employees on the *Excelsior* list but not included on the mail ballot list (like Ms. Morton

and Mr. Wozniak) voted by mail ballot; neither vote was challenged and each was counted. The Decision fails to address these established facts, much less explain how two individuals are ineligible to vote by mail where two identically-situated employees voted by mail.

The Judge also found with regard to two employees, Alicia Gbur and Michael Wechsler, that it was more likely than not that they received but discarded a mail ballot, despite that each testified clearly and without contradiction that he or she never received a ballot. Regarding both, the Judge simply ignores the bulk of the testimony, including direct and uncontroverted testimony concerning whether they received a ballot, and focuses instead on statements taken out of context or which are irrelevant. One of the two reasons cited by the Judge in support of his finding that Ms. Gbur received a ballot that she discarded – that she “refused” to sign a written statement averring to that fact shortly after the election - is contradicted directly by Ms. Gbur’s definitive testimony. (Tr. at 179). The record evidence clearly establishes, therefore, that Ms. Gbur and Mr. Wechsler never received a mail ballot.

Finally, the Judge erroneously declined to credit the uncontroverted testimony of two employees, Jacob Benattia and Jill Sinclair, that they received and returned a mail ballot. Again, the Judge ignores the clear, specific and uncontroverted testimony of each that they received and returned a ballot. He focuses instead on a handful of irrelevant details that anyone testifying about events that occurred nine months prior is likely to forget, such as, in the case of Mr. Benattia, the number and color of the ballot envelopes provided in the mail ballot kit. The Decision provides no reasons for refusing to credit these employees’ testimony (it does not address the witnesses’ demeanor or cite any inconsistencies in the witnesses’ testimony), nor is there

any evidence to support such a conclusion. In a strained attempt to suggest bias and interest, the Judge speculates that Mr. Benattia, who had not been employed by the Employer for more than 13 months at the time of his testimony pursuant to a subpoena, may have been too embarrassed to tell his former employer that he did not vote or was trying to curry favor with an Employer for whom he had not worked for over a year. (Decision at p. 7, n. 6). There is absolutely no record evidence that would support or even suggest any such conclusion – and none was cited in the Decision.

By erroneously finding three disenfranchised employees ineligible to vote, ignoring the testimony of two employees and refusing to credit the uncontroverted, definitive testimony of two additional employees, the Judge improperly and transparently avoided having to decide the important issue raised by these objections, whether a number of employees sufficient to affect the outcome of the election were not afforded adequate notice and opportunity to vote. The Board should not and must not shirk this responsibility because it easily could result in the certification of an election that does not reflect the will of the majority of eligible voters.

## **FACTS**

### **I. THE MAIL BALLOT ELECTION**

Ballots for the election at issue initially were to have been mailed to individuals listed on the mail ballot list provided by the Employer on November 17, 2010. (Ex. P2 and P3; Tr. at 290). Ballots in this and other mail ballot elections are included in a mail ballot kit, which in addition to the ballot itself contains (a) a blue envelope (RD 6(a)) in which to put the ballot once marked, (b) a yellow, postage pre-paid envelope addressed to Region 2 (also with a return address to Region 2) (RD 6(b)) in which the blue envelope is to be placed and which is to be placed in the mail by the

individual voter, and (c) an instruction sheet (RD Ex. 3) explaining how the individual is to cast (and mail) his or her ballot. (Tr. at 288, 303-04, 337). The instructions state simply that the voter should place the blue envelope inside the yellow envelope, sign the back of the yellow envelope, and place it in the mail; it does not include an instruction to request a receipt for mailing the ballot or to mail the ballot by any means other than regular mail. (Tr. at 337; RD Ex. 3). Two Notices of Election were issued by the Region, one for the manual election and one for the mail ballot election. (Er. Ex. 1 and 2). Neither notice contains instructions to eligible voters regarding how or when to request a duplicate mail ballot for the election. (*Id.*; Tr. at 351).

Mail ballot kits are prepared by the Region 2 Election Clerk upon receipt of a request from the Board Agent assigned to the matter, in this case, Stephen Berger. (Tr. at 300, 332, 339-40). The Region mails kits to any individual who requests a kit or on whose behalf either of the parties requests a kit. (Tr. at 340-41). The Election Clerk places the kits in the Region's general outgoing office mail, which is collected by a support staff person and delivered to the first floor of the office building in which the Region's office is located. (Tr. at 338). From there, the building mail, including mail from the Region, is collected by the postal service. Region Supervisor Nicholas Lewis testified that he does not inspect the kits before mailing, and that mailings are handled solely by the Election Clerk. (Tr. at 290, 359).

When mail ballots are received by the Region, they first are processed by a Region support staff person along with all other mail received by the Region. (Tr. at 285, 326). Most mail is routed to the Assistant Regional Director ("ARD"), but mail ballot envelopes are to be routed to the Election Clerk. (Tr. at 285). In addition to junk mail, Mr. Lewis estimated that the Region receives 20-30 pieces of official mail per day

that are routed to the ARD. (Tr. at 285, 328). (Approximately 100 matters typically are pending at the Region at any time.) (Tr. at 328). Mr. Lewis acknowledged that mail is at times misdirected by the staff person sorting the mail, that there is only a “standing instruction” regarding the sorting and routing of mail ballots, and that he did not know if the staff person received an oral reminder regarding the handling and routing of mail ballots prior to the Region’s conducting several mail ballot elections, including the instant election, in Fall 2010. (Tr. at 328-29).

At the time of the mail ballot election in the instant matter, the Region also was conducting mail ballot elections relating to petitions filed by the WGAE at three other television production companies (Atlas Media, Lion Television and Optomen Television), as well as at least one other company. (Tr. at 330).<sup>6</sup> The Region typically conducts only two or three mail ballot elections each year, but at the time of the instant election, was conducting at least five mail ballot elections.<sup>7</sup> (Tr. at 330). Mr. Berger was the Board Agent assigned to each of the WGAE mail ballot elections. (Tr. at 300). All mail ballots returned in each of these elections were kept in “ad hoc” cardboard boxes in the Election Clerk’s office. (Tr. at 285-86, 296-97, 333). Because each of the WGAE petitions were filed within a week of each other, they each were assigned case numbers that are sequential or very close in number. (Tr. at 331). The boxes in which the ballots are kept are labeled with the case number and are not sealed. (Tr. at 333). The number of mail ballot elections being conducted and the Region’s method of storing ballots may

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<sup>6</sup> That there was at least one non-WGAE mail ballot election being conducted in late 2010 is evidenced by the fact that two mail ballots for a non-WGAE election were in the bin containing ballots for the Lion Television election, as acknowledged in the Decision at p. 6. (Tr. at 441).

<sup>7</sup> The Decision acknowledges that at least three other WGAE mail ballot elections were being held at the time of the instant election, and that at least one of these elections overlapped with the instant election. In fact, each of the WGAE petitions for which mail ballot elections were held were filed within a week of each other. (Tr. at 331).

explain, as the Judge noted, why ballots from other elections were placed in the bin containing ballots for the instant election and the election at another employer (Decision at p. 6), and why ballots mailed by voters in the instant election were not counted.

If mail ballots are returned prior to the ballot count, they are to be counted pursuant to the Board's rules and procedures. (Tr. at 286). Ballots received after the count are to be placed in the appropriate case file. (Tr. at 286, 334). Mr. Lewis testified that he spoke with the Election Clerk following the Employer's filing of objections and inspected the Election Clerk's office and the case files, but found no evidence that mail ballots in the instant election were returned to the Region after the ballot count on December 13, 2010. (Tr. at 294-95).

The ballots in the instant election were opened and counted on December 13, 2010. Representatives of both parties were present. (Tr. at 306). At the ballot count, a mail ballot from the election at Optomen Television was in the box containing mail ballots for the instant election. (Tr. at 342-43, 430-32). In addition, at the ballot count for the Lion Television election, two mail ballots from a election conducted in a non-WGAE matter were included in the box of mail ballots for the Lion election. (Tr. at 441).

Initially, nine mail ballots were challenged in addition to the one ballot challenged at the manual election. (RD Ex. 1(d)). Approximately one week after the ballot count, the Employer withdrew its challenges to mail ballots cast by John Cahill, Russell Fisher, Charles Ting and Andrea Milhalko. The ballots cast by each of these four individuals were thereafter opened and counted and a Revised Tally was issued. (Er. Ex. 16 and RD Ex. 1(e)). A final Tally of Ballots was issued prior to the commencement of the hearing and following a hearing. (Ex. P1).

The Region sent mail ballots to 63 individuals (*See* Er. Ex. 13), but (allegedly) did not receive (or count) ballots from 16 of those individuals. (Er. Ex. 15). Two individuals not on the mail ballot list and for whom neither party requested a mail ballot voted by mail ballot. Andrea Milhalko, who twice telephoned the Region with Zachary Wozniak (whom the Judge found ineligible to vote by mail) to request a mail ballot, voted by mail (Tr. at 366-67, 396-97, 406; Er. Ex. 16), as did Jessica May, who voted by mail ballot in person at the Region on December 9, 2010, more than a week after the manual election. (Tr. at 388-91; Er. Ex. 15). Both Ms. May's and Ms. Milhalko's ballots were opened and counted without any objection from the Region or the WGAE. (Er. Ex. 15).

## **II. INDIVIDUALS WHO DID NOT RECEIVE A MAIL BALLOT**

### **1. Alicia Gbur**

Alicia Gbur was employed by the Employer through September 2010 in Detroit as an Associate Producer (a position included in the bargaining unit under the terms of the Stipulated Election Agreement) on the television series "The First 48." (Tr. at 170; *See* RD Ex. 1(c)). She is listed on the *Excelsior* and mail ballot lists. (Ex. P3).

At all times relevant to this proceeding, including during and from November and December 2010 (the period of time during which mail ballots were to be sent by and returned to the Region) to the present, Ms. Gbur resided at the exact address listed on the mail ballot list transmitted by the Employer to the Region. (Ex. P3; Tr. at 169-170). Ms. Gbur's mail is delivered directly to her home, where she is the only resident. (Tr. at 171, 186). She was in-town, lived at home and checked her mail regularly at all times during the period of time in which the mail ballots were to have been mailed and delivered. (Tr. at 171). She was then working in television production

on a series for another employer, which was shot exclusively in Detroit, where she resides. (Tr. at 171, 180). Ms. Gbur testified that she was aware that an election was being conducted to determine whether the WGAE would represent certain employees of the Employer, but did not at any time receive a ballot for the election. (Tr. at 171-72).<sup>8</sup>

During the period of time in which mail ballots were to have been mailed, Ms. Gbur received a telephone call from someone asking her if she had received a mail ballot in the election, and she responded that she had not.<sup>9</sup> (Tr. at 172-73). Nevertheless, she testified that she did not receive a ballot after that date (or at any other time). (Tr. at 173). Ms. Gbur testified that she *may* have told Employer Executive Producer Mike Sheridan that she *could* have received and thrown out the mail ballot, but stated that she did not recall doing so. (Tr. at 174-75). As set forth *infra*, however, Ms. Gbur's statement would have been made in response to a question regarding whether she received a duplicate ballot after having been told that she would receive one. Furthermore and importantly, Ms. Gbur testified clearly that she never received a ballot. (Tr. at 173).

## 2. Rebecca Morton

Ms. Morton was employed by the Employer in 2010 as an Associate Producer, a position included in the bargaining unit in the Stipulated Election Agreement. (Tr. at 228; RD Ex. 1(c)). She is listed on the *Excelsior* list for the election,

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<sup>8</sup> Although Ms. Gbur testified in response to repeated questioning that the election was not "on her radar," she also testified that she was aware of the election, that she received e-mails from the WGAE regarding the election and that someone telephoned her during the election period to ask whether she had received a ballot. (Tr. at 171-73, 186). Moreover, she testified that the election was off her radar in response to a question about when exactly it was held, not whether she received a ballot, which she definitively testified that she did not. (Tr. at 172-73).

<sup>9</sup> Because the individual called Ms. Gbur, it is very unlikely that it was a representative of the Region, and very likely was a representative of the WGAE who called her, especially in light of testimony of WGAE employees Tim Tharp and Justin Molito that WGAE representatives contacted eligible voters during the election period to inquire whether they had received a ballot. (Tr. at 399, 412-14, 516). The Region, however, has no record of a request for a duplicate ballot for Ms. Gbur, raising a serious question as to whether the WGAE representative ever requested that she be sent a duplicate ballot. (Tr. at 292).

but is not on the mail ballot list. (Ex. P3). Ms. Morton testified that she telephoned the Region on December 2, 2010, and asked to be sent a mail ballot in the election and gave her address to the representative of the Region, who confirmed that he had her correct address and stated that she would be sent a ballot. (Tr. at 231-32). Mr. Lewis testified that the Region's policy is to send a mail ballot to anyone who requests a ballot, regardless of whether the individual is listed on the mail ballot list. (Tr. at 294-95). Ms. Morton, however, testified that she never received a ballot from the Region, despite that she lived at the same address throughout the election period and checked her mail regularly; nor is there any evidence that the Region mailed her a ballot.<sup>10</sup> (Tr. at 228, 231-33). The reason for Ms. Morton's request for a mail ballot is irrelevant in light of the Region's policy to provide mail ballots to anyone requesting one and the fact that the Stipulated Election Agreement does not prohibit individuals not on the mail ballot list from voting by mail and that two other identically-situated individuals not on the mail ballot list (Jessica May and Andrea Milhalko) voted by mail ballot. (See Er. Ex. 15 and 16; Tr. at 388-91, 396-97). Despite and without addressing these undisputed facts, the Judge did not consider Ms. Morton's testimony because he concluded erroneously that she was ineligible to vote by mail.

3. Charles Smith

Charles Smith was employed by the Employer in 2010 as a Post Producer, a position included in the bargaining unit under the terms of the Stipulated Election Agreement. (Tr. at 112, 115; RD Ex. 1(c)). He is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). Although a review of weekly payroll documents (Ex. P26)

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<sup>10</sup> Although Ms. Morton could not recall when she requested a ballot, it must have been prior to the deadline for the return of ballots based on the Region's response that she would be sent a ballot. Furthermore, the actual date of the request is immaterial in light of the fact that she never received the ballot and, therefore, was not afforded the opportunity to vote by mail. (Tr. at 232).

reflects that Smith worked fewer than 100 hours during the applicable eligibility period,<sup>11</sup> neither party (or the Region) objected to his inclusion on either the *Excelsior* or mail ballot lists, or raised any questions as to his eligibility to vote until the middle of the objections hearing.

Mr. Smith resided at all times relevant to the instant hearing at the exact address listed on the mail ballot list transmitted by the Employer to the Region. (Tr. at 111, 113; Ex. P3). He lives in a house with his family and receives mail directly at his home through a mail slot in the door. A temporary tenant lived on the 4<sup>th</sup> floor of the house in November and December 2010, but did not receive mail at the house. (Tr. at 120-23).<sup>12</sup> Mr. Smith testified that he was aware that an election was being held concerning whether the WGAE would represent certain employees of the Employer, that he was in town in November and December 2010, that he checked his mail regularly during that period of time, but that he never received a ballot for the election. (Tr. at 112-13). He also testified that he received at least two mailings from the WGAE (by regular mail) prior to the election. (Tr. at 125-26). One of the mailings, he testified, stated that he would receive a mail ballot for the election in a few weeks (Tr. at 127); accordingly, Mr. Smith was expecting to receive a ballot in the mail (making it unlikely he overlooked the ballot), but never received one. (Tr. at 127-28).

#### 4. Michael Wechsler

Michael Wechsler was employed by the Employer from June 2010 to October 2010 as a Post Producer and a Producer, positions included in the bargaining unit under the terms of the Stipulated Election Agreement. (Tr. at 69; RD Ex. 1(c)). He

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<sup>11</sup> Mr. Smith's summary payroll record, which was used by the Employer to prepare the *Excelsior* list, reflects that he worked greater than 100 hours during the applicable eligibility period, but cannot be reconciled with weekly payroll documents. (Er. Ex. 17; Tr. at 503).

<sup>12</sup> Mr. Smith testified that typically he, not his wife, throws away any junk mail they receive. (Tr. at 128).

is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). At all times relevant to the hearing, including during and from November and December 2010 to the present, Mr. Wechsler resided at the exact address listed on the mail ballot list transmitted by the Employer to the Region. (Tr. at 69-70; Ex. P3).

The Judge found that Mr. Wechsler more likely than not received a ballot at his home address while he was in California and that it was “simply discarded without being opened.” (Decision at p. 7). The record evidence reflects, however, that Mr. Wechsler was in California for less than two days and otherwise was in town during November and December 2010. Specifically, Mr. Wechsler testified that he flew to Los Angeles on Friday, November 19, 2010 and returned on the redeye on the night of Saturday, November 20, 2010.<sup>13</sup> (Tr. at 70, 74). There is no evidence that Mr. Wechsler actually received a ballot in the mail; he, in fact, testified without contradiction and definitively that he checked his mail regularly during this period of time and did not receive a ballot. (Tr. at 70-71). The Judge’s conclusion that he received a ballot during his trip to California is pure conjecture. Moreover, there is no record evidence that the ballot was “simply discarded” by Mr. Wechsler or anyone else.

Although Mr. Wechsler testified that he was not aware that an election was being held to determine whether the WGAE would represent employees at the Employer, but was aware that elections were being held at some television production studios (Tr. at 71), later testimony revealed that Mr. Wechsler received and responded to a text message from Employer Executive Producer Richard Vagg on November 18, 2010

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<sup>13</sup> Mr. Wechsler clearly was not “out-of-town for an extended period of time,” which is consistent with the witness statement he signed. (Ex. P8).

(the day after mail ballots were to have been mailed by the Region), which informed him that he would receive a mail ballot in the instant election. (Tr. at 546).

### **III. INDIVIDUALS WHO RETURNED A MAIL BALLOT PURSUANT TO THE REGION'S PROCEDURES THAT WERE NOT COUNTED**

#### **1. Jacob Benattia**

Mr. Benattia was employed by the Employer from October 2009 until June 2010 as an Associate Producer, a position included in the bargaining unit in the Stipulated Election Agreement. (Tr. at 197; RD Ex. 1(c)). He is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). He testified that in November 2010, he was aware that an election was being held to determine whether the WGAE would represent certain employees of the Employer and that he received a ballot for the election in the mail a couple of days prior to Thanksgiving (November 25, 2010). (Tr. at 198). Mr. Benattia testified definitively and without equivocation that he marked the ballot he received, followed the instructions provided with the ballot and mailed it back to the Region by placing it in a postal box in Miami, Florida, where he was working, two days after Thanksgiving (on November 27, 2010) - 13 days prior to the deadline to return the ballots and more than two weeks prior to the ballot count. (Tr. at 198-99, 221). Mr. Benattia testified clearly and consistently that he was "certain" he returned his ballot, that he "looked through" the materials contained in the mail ballot kit, that he "filled it out," that he signed something, and that he mailed the ballot envelope provided by the Region from a postal box. (Tr. at 199, 208, 223). He also testified accurately that the mail ballot kit included several pieces of paper in a larger manila envelope. (Tr. at 206-07). Despite the overwhelming evidence that Mr. Benattia, as he testified without contradiction, received and returned a mail ballot pursuant to the Region's instructions,

the Judge concluded that he did not receive and return a ballot because he could not recall the number and color of envelopes provided in the mail ballot kit. (Decision at p. 7). Mr. Benattia's ballot was never returned to his home address in Miami as undeliverable.<sup>14</sup> (Tr. at 201). His ballot was not counted (Er. Ex. 15), and the Region alleges that it never received his ballot. (Tr. at 294-95).

2. Nora Connor

Ms. Connor was employed by the Employer in April and May 2010 as an Associate Producer on "The First 48" and as a Field Producer on "Brooklyn Beach." (Tr. at 137). Both positions are included in the bargaining unit in the Stipulated Election Agreement. (RD Ex. 1(c)). She is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). She testified that in November 2010, she was aware that an election was being held to determine whether the WGAE would represent certain employees of the Employer and that she received a ballot for that election in the mail prior to Thanksgiving (November 25, 2010). (Tr. at 137). Ms. Connor testified that she marked the ballot she received, placed it in the envelope provided by the Region and mailed it from a postal box either in Brooklyn (where she resided) or Manhattan (where she worked at the time) after Thanksgiving but prior to December 1, 2010. (Tr. at 138-39).<sup>15</sup> Ms. Connor's ballot was not counted (Er. Ex. 15), and the Region alleges that it never

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<sup>14</sup> Because the postage pre-paid yellow mail ballot envelope provided by the Region lists the Region as the return address (as well as the primary address) (RD Ex. 6(b)), the ballot envelopes would not have been returned to the employees as undeliverable. Nevertheless, in addition to Mr. Benattia, Nora Connor (Tr. at 140), Allison Howard (Tr. at 148, 151-52), Deborah Mitchell (Tr. at 50, 57, 65) and Jill Sinclair (Tr. at 95, 98) all testified that the ballot envelope that each mailed to the Region was not returned as undeliverable.

<sup>15</sup> Whether mailings Ms. Connor received from the WGAE included voting instructions is irrelevant because she returned a mail ballot per the Region's instructions. (Tr. at 138, 143-44). Nor is it relevant that she knew a manual election was conducted because she unquestionably was entitled to vote by mail. *See Star Baking Co.*, 119 NLRB 835, 836 (1957) (overturning election based on employee's failure to receive a mail ballot despite that he knew of and could have voted in the manual election).

received her ballot, despite that it was mailed from a postal box in the envelope provided by the Region. (Tr. at 139, 294-95).

3. Allison Howard

Ms. Howard was employed by the Employer in 2010 as a Field Producer, a position included in the bargaining unit in the Stipulated Election Agreement. (Tr. at 147; RD Ex. 1(c)). She is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). She testified that in November 2010, she was aware that an election was being held to determine whether the WGAE would represent certain employees of the Employer and that she received a ballot for that election in the mail around Thanksgiving (November 25, 2010). (Tr. at 148). Ms. Howard testified that she marked the ballot she received, placed it in the envelope provided by the Region and mailed it from a postal box in Williamsburg, Brooklyn (where she resided at the time) on the afternoon of December 8, 2010. (Tr. at 150-51).<sup>16</sup> Ms. Howard's ballot was not counted (Er. Ex. 15), and the Region alleges that it never received her ballot, despite that it was mailed from a postal box in the envelope provided by the Region. (Tr. at 150, 294-95).

4. Deborah (Moe) Mitchell

Ms. Mitchell was employed by the Employer in 2010 as a Field Producer (a position included in the bargaining unit in the Stipulated Election Agreement) on "The First 48." (Tr. at 49; RD Ex. 1(c)). She is listed on the *Excelsior* and mail ballot lists for the election (under her maiden name "Deborah Moe"). (Ex. P3). She testified that in November 2010, she was aware that an election was being held to determine

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<sup>16</sup> Ms. Howard testified that she traveled to California for work after Thanksgiving and returned home on December 6, 2010. She mailed the ballot on the second day after her return. (Tr. at 149). As the Judge acknowledged (Decision at p. 5), because the Region allegedly never received her ballot, the date and manner of her mailing the ballot are not relevant and only arguably would be relevant if the Region acknowledged that it had received it after the ballot count on December 13, 2010.

whether the WGAE would represent certain employees of the Employer and that she received a ballot for that election in the mail on or about the week of Thanksgiving. (Tr. at 50-51, 54). Ms. Mitchell testified that she marked the ballot she received, placed it in the envelope provided by the Region and mailed the envelope by placing it in a postal box outside a post office in Houston, Texas (where she was assigned to work) at approximately 2:00 p.m. on December 7, 2010, prior to the last daily pick-up from the postal box. (Tr. at 52, 57). Ms. Mitchell's ballot was not counted (Er. Ex. 15), and the Region alleges that it never received her ballot, despite that it was mailed from a postal box in the envelope provided by the Region. (Tr. at 52, 294-95).

5. Jill Sinclair

Ms. Sinclair was employed throughout 2010 by the Employer as an Associate Producer (a position included in the bargaining unit in the Stipulated Election Agreement) on "The First 48." (Tr. at 95; RD Ex. 1(c)). She is listed on the *Excelsior* and mail ballot lists for the election. (Ex. P3). She testified that in November 2010, she was aware that an election was being held to determine whether the WGAE would represent certain employees of the Employer and that she received a ballot for that election in the mail on or about November 22, 2010. (Tr. at 96). Ms. Sinclair testified that she marked the ballot she received, placed it in the envelope provided by the Region and mailed it from a postal box outside a post office in Birmingham, Alabama (where she resides and is assigned to work) on December 6, 2010. (Tr. at 96-97, 101). Ms. Sinclair's ballot was not counted (Er. Ex. 15), and the Region alleges that it never received her ballot, despite that it was mailed from a postal box in the envelope provided by the Region. (Tr. at 96-97, 294-95).

Notwithstanding Ms. Sinclair's wholly uncontroverted, sworn testimony that she received and returned a mail ballot in the envelope provided to her by the Region, the Judge refused to credit her testimony because she could not recall who at the Employer telephoned her after the election to inquire whether she had received and returned a ballot. (Decision at pp. 7-9). Ms. Sinclair, however, testified that she was contacted by someone at the company and that she "must have" spoken with Employer legal and business affairs director Jason Guberman, but that she could not after nine months recall the details of these conversations. (Tr. at 103-05). Despite that Ms. Sinclair specifically recalled taking the mail ballot envelope to the post office to mail it because she knew it had to be received by the end of that same week (Tr. at 101), the Judge found that the evidence does not support crediting her uncontroverted testimony.

6. Zachary Wozniak

Mr. Wozniak was employed by the Employer in 2010 as a Field Producer, a position included in the bargaining unit in the Stipulated Election Agreement. (Tr. at 35; RD Ex. 1(c)). He is listed on the *Excelsior* list for the election, but is not on the mail ballot list. (Ex. P3). Mr. Wozniak telephoned the Region on December 2, 2010 with co-worker Andrea Mihalko and spoke with Board Agent Stephen Berger; Ms. Mihalko and Mr. Wozniak gave Mr. Berger their addresses and requested that they be sent mail ballots for the election at the Employer. (Tr. at 36, 41-42). Mr. Lewis testified that the Region's policy is to send a mail ballot to anyone who requests a ballot. (Tr. at 340-41).

Ms. Mihalko and Mr. Wozniak telephoned Mr. Berger again on December 6, 2010 to inform him that neither had received a ballot in the mail. Mr. Wozniak testified that Mr. Berger did not seem to remember that they had called to request a ballot only four days prior and again asked them for their addresses. (Tr. at 42-43). Mr.

Wozniak received a ballot in the mail on December 8, 2010, immediately marked the ballot and placed it in the return envelope provided by the Region and mailed it approximately 20 minutes after having received it. (Tr. at 44-45). The Region alleges that it never received Mr. Wozniak's ballot. (Tr. at 294-95). Ms. Mihalko received and returned a mail ballot, and her vote was counted in the election. (Tr. at 396-97, 406; Er. Ex. 16). The Judge did not address Mr. Wozniak's uncontroverted testimony concerning his receipt and return of a mail ballot, finding instead that he was ineligible to vote by mail, despite that two identically-situated employees who also were not on the mail ballot list (Jessica May and Ms. Mihalko) voted by mail and despite that the Stipulated Election Agreement does not prohibit an employee from voting by mail even if not included on the mail ballot list. (RD Ex. 1(c)); Er. Ex. 15; Tr. at 388-89, 396-97, 406).

### **ARGUMENT**

**I. THE JUDGE IGNORED THE OVERWHELMING WEIGHT OF THE RECORD EVIDENCE AND UNCONTROVERTED SWORN TESTIMONY IN ERRONEOUSLY FINDING THAT MS. GBUR AND MR. WECHSLER RECEIVED BALLOTS THAT THEY DID NOT RETURN. (Exceptions 1-3, 8-10, 17-20 and 26)**

That the Region erred and failed to ensure that Ms. Gbur and Mr. Wechsler (as well as Mr. Smith and Ms. Morton, whose failure to receive a ballot the Judge does not address or apparently question) received a mail ballot is far more likely than the Judge's speculation that they lost or discarded ballots they received. Both Ms. Gbur and Mr. Wechsler testified that they resided at the address provided to the Region and checked their mail regularly at the time of the election, but did not receive a ballot. Given that each knew that an election was being held and that he or she would receive a ballot and that the ballot would have arrived in a large manila envelope from a governmental agency, one simply cannot conclude based on the record evidence that

each more likely received and discarded the ballot, especially in light of the sworn, uncontroverted testimony of each that he or she did not receive (or thus, discard) a ballot. The Judge's finding, therefore, is contrary to the weight of the evidence and must be overturned. Moreover, the relevant inquiry is whether the record evidence establishes that employees *may have been* disenfranchised, not whether they actually were disenfranchised. *Wolverine Dispatch*, 321 NLRB 796 (1996). The record evidence here clearly establishes that eligible voters very likely (not possibly) were disenfranchised.

**A. Ms. Gbur's Uncontroverted Testimony Establishes That She Did Not Receive a Mail Ballot. (Exceptions 1-3, 17-19 and 26)**

The Judge found it more likely than not that Ms. Gbur received a ballot in the mail, but never mailed it back. He bases this conclusion on two alleged facts, one of which is wholly and unquestionably contrary to the record evidence. First, the Judge concludes that Ms. Gbur *may* have received but thrown out her ballot. Second, apparently in support of his finding that Ms. Gbur received a ballot, the Judge asserts erroneously that Ms. Gbur "refused to sign a statement prepared for her by a company attorney averring that she had not received a ballot." (Decision at pp. 6-7).

First, Ms. Gbur testified specifically and definitively that she did *not* refuse to sign the written statement concerning her failure to receive a ballot. (Tr. at 179). Moreover, the e-mail from Mr. Guberman to Ms. Gbur attaching the draft statement clearly states that the company would make any revisions to the written statement requested by Ms. Gbur. Specifically, it states: "If there's anything in the statement that is inaccurate, please let me know ASAP and we will adjust." (Ex. P14).<sup>17</sup> Thus, the

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<sup>17</sup> That the witness statements were drafted by the company is of no moment; the evidence reflects that they unquestionably were based on information provided by the employees, and they are consistent with the employees' hearing testimony. There is absolutely no evidence that any of the employees were coerced in any way in giving a statement or testifying (most testified pursuant to a subpoena) at the hearing or had

Judge's conclusion that she refused to sign the statement is belied not only by Ms. Gbur's uncontroverted testimony directly to the contrary, but also by clear and unambiguous documentary evidence.

Second, although Ms. Gbur testified that she *may* have told Employer Executive Producer Mike Sheridan that she *possibly* could have thrown out the ballot (Tr. at 175-76), she also testified definitively that she did not receive a ballot and that she confirmed this to someone (very likely, someone from the WGAE) prior to the election and that the individual told her that he would ensure she received a ballot. (Tr. at 172-73). Moreover, Mr. Sheridan's e-mail dated December 13, 2010, in which he states that Ms. Gbur either never received a ballot or threw it away with her newspapers, clearly is in reference to a duplicate ballot that Gbur was informed she would receive. The e-mail states: "She said a guy from the WGA called and that he was going to send one, but either she never received it or it got caught in a pile of newspapers and she threw it out." This statement does not refer to any initial ballot sent by the Region, but to the duplicate ballot Ms. Gbur expected to receive. Importantly, there is no evidence that the WGAE requested or that the Region sent Ms. Gbur a duplicate ballot. (See Er. Ex. 13; Tr. at 292-93). Thus, the statement that she *could* have thrown out a ballot referred to a duplicate ballot that was never sent, and therefore has no bearing on whether Ms. Gbur was disenfranchised; that she expected to receive a duplicate ballot does, however, explain why Ms. Gbur thought she could have thrown it out when it never arrived.

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any incentive to commit perjury by testifying untruthfully. No unfair labor practice charge was filed at any time concerning the Employer's request that employees sign statements, despite that the statements were provided to the Region and the WGAE in January 2010. (RD Ex. 1(f2)). Furthermore, the record evidence establishes conclusively that the Employer asked only whether employees had received a ballot in the mail and, if so, whether they had returned it. (Tr. at 204, 235, 256-58). The Employer is well within its rights when investigating the Region's conduct of the election to ask whether employees received a ballot and whether (not how) they voted. *See Acme Bus Corp.*, 316 NLRB 274, 275 (1995) (employer would not have violated employees' Section 7 rights by asking whether they declined to vote in the election as a result of reading a union leaflet stating incorrectly that the election had been postponed).

Moreover, the mail ballot kit is mailed to eligible voters in a large manila envelope with a governmental return address – not something that one would reflexively throw away without inspecting; and, both parties corresponded with eligible voters prior to the election so Ms. Gbur likely would have been expecting to receive a ballot in the mail. (See Tr. at 264-64, 412, Ex. P19-22, P29, P30). Regardless, the Judge’s stated reasons for finding that she received but did not return a ballot are contradicted by the record evidence. Ms. Gbur did not refuse to sign a statement concerning her ballot and did not receive a duplicate ballot that she could have discarded. In light of these circumstances, Ms. Gbur’s uncontroverted testimony that she never received a mail ballot despite that she lived at the exact address provided to the Region (Ex. P3) must be credited.

**B. Mr. Wechsler’s Uncontroverted Testimony Establishes That He Did Not Receive a Mail Ballot. (Exceptions 1-3, 20 and 26)**

The Judge erroneously found that the weight of the evidence does not support a finding that Mr. Wechsler did not receive a ballot. There is no evidence, however, justifying the Judge’s speculative conclusion that Mr. Wechsler likely received a ballot while in California on November 19 or 20, 2010, or that the ballot was thereafter “simply discarded.” Mr. Wechsler testified definitively and without contradiction that he did not receive a ballot. (Tr. at 71).

There is no record evidence supporting the Judge’s speculative finding that Mr. Wechsler received a ballot on November 19 or 20, 2010 when he was in California, other than that Mr. Wechsler was in California for less than two days. The Judge does not explain, nor is there any evidence to explain, how the ballot allegedly “was simply discarded,” or by whom it allegedly was discarded. The Judge speculates,

therefore, that Mr. Wechsler received at his home address, which he also uses as a business address, a large manila envelope with the return address of a governmental agency and that either someone other than Mr. Wechsler discarded the envelope presumably immediately upon receipt and prior to Mr. Wechsler's return from California the next or same day and without ever mentioning it to Mr. Wechsler, or that Mr. Wechsler himself discarded it, but testified under oath for some unexplained and unexplainable reason that he never received it. Neither scenario is remotely likely, much less more likely than that Mr. Wechsler never received a ballot, as he testified. The record evidence, therefore, simply does not support the Judge's speculative finding that ignores Mr. Wechsler's uncontroverted testimony that he never received a ballot.<sup>18</sup>

**C. That the Region Failed to Deliver Ballots to Ms. Gbur and Mr. Wechsler Is Far More Likely Than the Judge's Unsupported, Speculative Findings. (Exceptions 1-3, 8-10, 17-20 and 26)**

The Region took no precautions and instituted no procedures to ensure that mail ballots were delivered to eligible voters. It treated the ballots as any other piece of outgoing mail – placing it in a central collection area for the Region for a support staff person unconnected with the administration of the election to take to another central collection area for the entire building, where it was to be mailed by someone else. (Tr. at 338). The mailing of ballots was handled exclusively by the Election Clerk, who was also administering at least four other mail ballot elections at the time – twice the number of mail ballot elections typically held in an entire year at the

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<sup>18</sup> Although the Judge noted Mr. Wechsler's inability to recall whether he knew at the time of the election, which was approximately nine months prior to his testimony, that an election was being held at the Employer, his finding that Wechsler's ballot was received and discarded while he was in California does not relate to such testimony. Regardless, Mr. Wechsler received a text message from Executive Producer Richard Vagg to which he replied on November 18, 2010, one day after the mail ballots were to have been mailed, stating, "Hey, Mike, you're going to be receiving a WGA ballot as you were working at (the Employer) during the eligible period," which demonstrates that Mr. Wechsler, in fact, knew of the election and that he would receive a ballot, and, therefore, was not likely to "simply discard" it. (Tr. at 546).

Region. (Tr. at 290, 330, 359). Mr. Lewis, the only witness who testified on behalf of the Region, acknowledged that he did not inspect or otherwise ensure that the ballots were addressed or mailed properly. (Tr. at 359). The envelopes easily could have been mislabeled with the incorrect name or address under such circumstances, or they could have been misdirected or misplaced by either the support staff person who collected the general office mail or by the person charged with mailing all of the mail delivered to the building's central mail collection area.

Furthermore, the problems that numerous employees encountered in receiving mail ballots demonstrates that this was not an insolated problem and lends considerable support to the unmistakable conclusion that four individuals (Ms. Gbur, Mr. Wechsler, Ms. Morton and Mr. Smith) did not receive ballots as a result of the Region's conduct. The Region's case file in this matter revealed that it sent duplicate ballots to several employees despite that the Region was provided the employee's correct, current address on the mail ballot list. Specifically, Charles Stancliff was mailed a duplicate ballot at the address listed on the mail ballot list on November 29, 2010, almost two weeks after the ballots were to have been mailed. (Er. Ex. 5; Ex. P3; Tr. at 358). Similarly, the Region mailed duplicate ballots to Jyllian Gunther and Paula Davenport at the addresses listed on the mail ballot list on November 24 and November 29, 2010 respectively. (Er. Ex. 6 and 7; Tr. at 361-63).<sup>19</sup> Furthermore, the WGAE requested that a mail ballot be sent to Stacy Dobrinsky by e-mail dated November 23, 2010, and on December 3, 2010 sent another e-mail to the Region stating that Ms.

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<sup>19</sup> WGAE Organizer Justin Molito's testimony that the WGAE requested duplicate ballots for Ms. Gunther and Ms. Davenport only because neither had responded to the WGAE's inquiry as to whether they had received a ballot is not credible. First, these are the only two employees that he testified the WGAE requested a duplicate ballot for under these circumstances. (Tr. at 515-21). Second, the e-mails requesting duplicate ballots for each, contrary to Mr. Molito's testimony, both state expressly that Ms. Gunther and Ms. Davenport *did not receive* a ballot. (Er. Ex. 6 and 7).

Dobrinsky still had not received a ballot and requested that another ballot be sent to the same address it had provided to the Region ten days earlier. (Er. Ex. 12; Tr. at 381).

In addition, the WGAE provided the Region with substitute addresses for 12 individuals on November 16, 2010, one day prior to the mailing of the ballots. (Er. Ex. 8; Tr. at 363-65). These addresses apparently were not forwarded to the Election Clerk by Mr. Berger until November 23, 2010 (one week later), as reflected by a handwritten note from the Election Clerk. (Er. Ex. 9; Tr. at 370-71). More than a week later, on December 1, 2010, the WGAE informed Mr. Berger that five of the 12 individuals for which it provided addresses to the Region two weeks prior (on November 16, 2010) still had not received a ballot. (Er. Ex. 10). The delays and apparent outright failure of the Region to mail ballots to eligible voters is further demonstrated by the fact that Mr. Wozniak and Ms. Mihalko had to telephone the Region twice before receiving a ballot in the mail and by the fact that during the second call, Mr. Berger seemingly did not recall or have a record of the fact that they had telephoned and requested a ballot four days earlier (Tr. at 42-43), and by the fact that in the week prior to the deadline for the return of mail ballots, the Region sent mail ballot kits to four individuals by overnight mail. (RD Ex. 4 and 5).<sup>20</sup> The record evidence, therefore, clearly establishes that it is much more likely than not that Ms. Gbur and Mr. Wechsler, as each testified,

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<sup>20</sup> Mr. Lewis also testified that the Region, contrary to its customary policies and procedures, telephoned as many as five individuals the week prior to the deadline for return of mail ballots to ask whether they had received mail ballot kits by overnight mail before sending another duplicate kit by overnight mail. (Tr. at 399-40). That the Region not only selectively sent ballot kits to a small number of employees by overnight mail, but also, contrary to its policies, called certain employees to ensure delivery is troubling in light of the fact that it took no efforts whatsoever to ensure delivery of mail ballots to other employees who did not receive ballots, including those who testified at the hearing. This fact further illustrates the very real possibility that the election result does not reflect the will of the majority of eligible voters, but the will of those individuals whom both the WGAE and the Region went to greater lengths to enfranchise. (Three of the four individuals to whom the Region sent ballots by overnight mail during the week prior to the deadline for return of mail ballots – Stacy Dobrinsky, Mark Brice and Jamie Iracleanos – were individuals on whose behalf the WGAE had requested duplicate ballots.) (See Er. Ex. 10, 11 and 12).

did not receive a mail ballot in the election and thus were disenfranchised as the result of the Region's conduct.

Finally, and importantly, the relevant inquiry in this matter is whether, employing an objective standard of review, employees *may have been* disenfranchised, not whether they *actually* were disenfranchised. *Wolverine Dispatch*, 321 NLRB 796, 796-797 (1996). Certainly here, the four employees, including Ms. Gbur and Mr. Wechsler, who never received a mail ballot *may have been* disenfranchised as a result of the Region's conduct and through no fault of their own or the Employer. It is undisputed that the Employer provided the Region with correct addresses for each of these four individuals, and each testified without contradiction that he or she did not receive a ballot. As the Board held in *Star Baking Co.*, 119 NLRB 835 (1957), the failure to deliver a single mail ballot to a potentially determinative voter requires that a new election be held. *Id.* at 836. *See also Security '76*, 272 NLRB 201 (1984) (return of seven ballots as undeliverable is tantamount to failure to provide adequate notice of election); *North American Aviation*, 81 NLRB 1046, 1048, n.9 (1949) (overturning election where reasonable doubt existed as to whether all employees were given a fair opportunity to vote).

**II. THE JUDGE IGNORED THE OVERWHELMING WEIGHT OF THE RECORD EVIDENCE AND UNCONTROVERTED SWORN TESTIMONY IN ERRONEOUSLY REFUSING TO CREDIT THE TESTIMONY OF MS. SINCLAIR AND MR. BENATTIA. (Exceptions 1-3, 21-24 and 26)**

The Judge erroneously refused to credit the uncontroverted testimony of Jill Sinclair and Jacob Benattia that they returned a mail ballot. Both Ms. Sinclair and Mr. Benattia testified definitively and without contradiction that they received a ballot in the mail, marked the ballot and returned it in the envelope provided by the Region by

placing it in a postal box in Birmingham and Miami respectively in advance of the deadline for return of ballots. (Tr. at 96-97, 101, 198-99). There is absolutely no evidence that either Ms. Sinclair or Mr. Benattia (or any other employee witness) testified falsely. Their testimony was not contradicted by any prior inconsistent statements. No other witnesses testified that either did not return a ballot. Each had a specific recollection of how and when they mailed the ballot envelope. (See Tr. at 101, 198-99).

The Judge made no finding regarding either Ms. Sinclair's or Mr. Benattia's demeanor or other visual evidence of untruthfulness; nor did the Judge find that the uncontroverted testimony of either was inconsistent. In refusing to credit their testimony, the Judge did not truly make a credibility determination regarding either Ms. Sinclair or Mr. Benattia, but essentially ignored their testimony and concluded (erroneously) that the evidence did not support a finding that either returned a ballot. Regardless, where, as here, a judge's credibility findings are not based on a witness' demeanor, "the Board itself may proceed with an independent evaluation" of the testimony. *Canteen Corp.*, 202 NLRB 767, 769 (1973), citing *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950) ("the Act commits to the Board itself . . . the power and responsibility of determining the facts as revealed by a preponderance of the evidence"); see also *Valley Steel Products Co.*, 111 NLRB 1338, 1345 (1955); *Starcraft Aerospace Inc.*, 346 NLRB 1228, 1231 (2006) ("to the extent that credibility findings are based upon factors other than demeanor . . . the Board itself may proceed with an independent evaluation").

A proper determination of credibility "requires consideration of multiple factors," including a "witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable references drawn

from the record as a whole.” *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003) (overturning credibility determination that failed to reference witness’ demeanor or consider the weight of the evidence). The record evidence here overwhelmingly demands the conclusion that Ms. Sinclair and Mr. Benattia returned a ballot in accordance with their uncontroverted, sworn testimony.

**A. Ms. Sinclair’s Uncontroverted, Sworn Testimony Must Be Credited. (Exceptions 1-3, 23, 24 and 26)**

Ms. Sinclair testified without contradiction that she received a ballot in the mail on or about November 22, 2010, marked it and placed it in the return envelope provided by the Region and mailed it on December 6, 2010 by placing it in a postal box at the post office in Birmingham, Alabama, where she resided and worked. (Tr. at 96-97, 101). Her testimony was clear, unequivocal, consistent, specific and uncontroverted. No other witness testified that she did not return a ballot in the manner she described under oath. The Judge made no findings regarding her demeanor or behavior while testifying. The Board, therefore, must evaluate the weight of the evidence to determine independently whether Ms. Sinclair’s testimony must be credited. *See, e.g., Canteen Corp., supra.*

The Judge’s finding regarding Ms. Sinclair’s testimony is not supported by the record evidence. The Judge refused to find that Ms. Sinclair returned a ballot solely because she could not remember which company employee telephoned her *after* the election, nine months prior to her testimony, to inquire whether she returned a mail ballot. (Decision at pp. 7-9). Ms. Sinclair, however, did testify that she was contacted by someone at the company regarding whether (not how) she voted in the election and also acknowledged that she “must have” spoken with Mr. Guberman, but that she could not

after nine months recall the details of these conversations. (Tr. at 103-05). To whom Ms. Sinclair spoke after the election concerning whether she voted in the election is not relevant in any way to whether she returned a ballot by mail.

Moreover, Ms. Sinclair's testimony was uncontroverted and consistent. She testified that she specifically recalled taking the ballot envelope to the post office to mail it, in part because she knew it had to be received by the end of that same week. (Tr. at 101). The Judge erroneously ignored Ms. Sinclair's unequivocal and uncontroverted testimony regarding the only relevant factual issue (whether she returned a mail ballot) and instead focused solely on her inability to recall (nine months later) with whom at the Employer she spoke (*not* whether she spoke with someone) after the election, an inquiry that is unquestionably irrelevant.<sup>21</sup>

Having made no findings regarding Ms. Sinclair's demeanor, the Judge's conclusion is not entitled to deference and must be overturned in light of the overwhelming weight of the record evidence, including most importantly Ms. Sinclair's clear, uncontroverted testimony concerning the only material issue – whether she returned a mail ballot. *See Canteen Corp.*, 202 NLRB at 768 (overturning credibility determination despite inconsistencies in the witness' testimony concerning material facts where the judge made no findings regarding the witness' demeanor and the witness' testimony, while uncorroborated, was “also completely uncontradicted” and supported by a review of the record evidence); *Starcraft Aerospace*, 346 NLRB at 1231

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<sup>21</sup> Indeed, even if the WGAE had filed an unfair labor practice charge concerning the Employer's contact with employees regarding whether they voted (which it did not and which would have been unfounded), the identity of the supervisor to whom she spoke would not be relevant. Yet, the Judge justified his decision to ignore Ms. Sinclair's clear, uncontroverted testimony regarding whether she mailed a ballot on her inability to remember information from after the election that is not only irrelevant to the instant matter, but would even have been irrelevant had she been testifying in any matter at which her conversation with company employees could have been relevant.

(overturning judge's credibility determination based on a "flawed analysis" that "failed to acknowledge the uncontradicted testimony" concerning a material fact).

Similarly, the Board has overturned judges' credibility determinations where such determinations ignored material testimony or were based on an evaluation of false or inconsistent testimony concerning non-material facts. *See Canteen Corp.*, 202 NLRB at 768 (weight of the evidence demanded crediting witness' testimony despite inconsistencies regarding certain facts); *Double D Construction Group*, 339 NLRB at 305 (2003) (overturning credibility determination based on witness' prior false statement unrelated to material issue because it was against the weight of the evidence); *El Rancho Market*, 235 NLRB 468, 470 (1978) (overturning implausible credibility determinations where the judge ignored or misstated relevant testimony). Here, unlike in *Canteen Corp.* and *Double D Construction Group*, the Judge does not even rely on any allegedly false statement or inconsistency, but on his own speculation that Ms. Sinclair's inability to remember details of a brief conversation nine months prior to her testimony justifies disregarding her uncontroverted, clear testimony regarding the only relevant issue. As in *El Rancho Market*, the Judge's finding ignores (here, uncontroverted) testimony concerning material facts. Because the Judge's finding regarding Ms. Sinclair's testimony is wholly unsupported by and contrary to the record evidence, it must be overturned.

**B. Mr. Benattia's Uncontroverted, Sworn Testimony Must Be Credited. (Exceptions 1-3, 21, 22 and 26)**

The Judge also erroneously refused the credit the sworn, uncontroverted testimony of Mr. Benattia that he received and returned a mail ballot in the envelope and pursuant to the instructions provided by the Region. In support of this conclusion,

the Judge makes no findings regarding Mr. Benattia's demeanor, but relies solely on Mr. Benattia's inability to recall, when testifying nine months after having received the mail ballot kit and returning the ballot envelope, whether the mail ballot kit contained instructions or exactly how many envelopes were included in the mail ballot kit and the color of those envelopes. The Judge concluded that he would expect Mr. Benattia to remember "at least some of the details" concerning his receipt and return of a mail ballot. (Decision at p. 7).

Mr. Benattia, in fact, remembered several details, and the Judge simply ignored those important details about which he testified. Specifically, Mr. Benattia testified that he received the mail ballot kit a couple of days prior to Thanksgiving, that he "looked through (the materials)," that he "signed something" (the back of the ballot envelope must be signed) (RD Ex. 6(b)), and that he "filled it out" and mailed it by placing the ballot envelope in a postal box a couple of days after Thanksgiving. (Tr. at 198-99, 208, 221). When asked whether he placed his ballot in an envelope, he testified that he "believed it was what it was sent in." (Tr. at 199). Mr. Benattia also accurately remembered that the kit contained several pieces of paper and that it was delivered in a large manila envelope. (Tr. at 206-07).

The Judge failed to acknowledge any of these important, material facts that Mr. Benattia remembered concerning his receipt and return of a mail ballot. (See Decision at p. 7). Accordingly, and because it is contrary to the record evidence, the Judge's finding concerning Mr. Benattia's testimony must be overturned. *See El Rancho Market, supra* at 470 (overturning determination where the judge "ignored, misstated or confused" the record evidence); *Valley Steel Products Co.*, 111 NLRB 1338,

1345 (1955) (judge’s “numerous omissions of relevant testimony” compelled Board “to substitute (its) own credibility findings”).

Furthermore, Mr. Benattia’s testimony is uncontroverted; no other witnesses testified that Mr. Benattia did not receive and return a mail ballot. That the Judge ignored the uncontroverted testimony of Mr. Benattia regarding the only material issue in the hearing further demands that his determination be overturned. *Starcraft Aerospace, supra; Canteen Corp., supra.*

Likely recognizing that the weight of the evidence demands finding that Mr. Benattia returned a ballot, especially given the passage of time between the hearing and the events to which Mr. Benattia was testifying, the Judge speculates in a footnote that Mr. Benattia may have lied about returning a ballot either because he was too embarrassed to admit that he did not vote or because he was trying to curry favor with the Employer. (Decision at p. 7, fn. 6). This speculation is just that – speculation; it is wholly unsupported by any evidence, and the Judge does not suggest that any evidence supports his speculation. Moreover, it is not itself credible. At the time of the hearing, Mr. Benattia had not been employed by the Employer, which is based in New York whereas Mr. Benattia lives in Miami, for more than a year. (Mr. Benattia has not contacted the Employer seeking employment since his employment ended.) (Tr. at 225). The Judge does not posit any fact or reason, other than that Mr. Benattia is a freelance employee, in support of his speculation that Benattia either was too embarrassed to admit he did not vote in an election in which several employees did not vote (in furtherance of which he committed perjury at a hearing held in New York – he lives in Miami – pursuant to subpoena (Tr. at 197, 201)), or was attempting to curry favor with a former employer for whom he had not worked for or sought work with in

over a year; nor is any such fact or reason in the record. The Judge's speculative finding, therefore, is implausible, contrary to the record evidence, and must be overturned; and, Mr. Benattia's uncontroverted testimony must be credited. *See El Rancho Market, supra* at 470 (judge failed to make specific findings regarding certain material issues and made vague, implausible findings regarding other material issues).

**III. THE JUDGE'S FINDING THAT THREE UNQUESTIONABLY DISENFRANCHISED EMPLOYEES WERE INELIGIBLE TO VOTE BY MAIL IS ERRONEOUS. (Exceptions 1-7, 11-16 and 26)**

The Judge erroneously found that Zachary Wozniak and Rebecca Morton were ineligible to vote by mail because they were not included on the mail ballot list for the election. The Stipulated Election Agreement only requires that the Employer submit a list of employees to whom the Region shall provide mail ballots; it does not prohibit employees not on the mail ballot list from voting by mail, as evidenced by the fact that two employees not on the mail ballot list in fact voted by mail. (RD Ex. 1(c)); Er. Ex. 15; Tr. at 388-90, 396-97, 406). The Judge also erroneously concluded that Charles Smith was ineligible to vote in the election where neither the Region nor the WGAE contested his eligibility until the hearing on objections, which constitutes a post-election eligibility challenge prohibited by the Board's Rules and precedent.

**A. Zachary Wozniak and Rebecca Morton Were Eligible to Vote By Mail Ballot and, Therefore, Were Disenfranchised by the Region's Conduct of the Election. (Exceptions 1-7, 11-14 and 26)**

The Stipulated Election Agreement does not prohibit any employee from voting by mail as opposed to voting in person. The Agreement only provides that certain employees (those no longer employed by the Employer and those employed outside New York City on the date of the manual election) shall be listed on the mail ballot list and shall receive mail ballots from the Region. (RD Ex. 1(c), ¶12(b)). The Agreement

contains no restriction on an employee's ability to vote by mail ballot, or indeed, in person. It does not provide that any mail ballot cast by an individual not on the mail ballot list is invalid, even where the individual also cast a ballot in person. *Id.* Thus, an employee scheduled to vote by mail could have voted in person and an employee scheduled to vote in person could have voted by mail. Moreover, the Stipulated Election Agreement certainly contains no provision that would even suggest that sending a mail ballot to an individual not on the mail ballot list violates the Agreement; and, the Region sent a mail ballot to any individual who requested one, or on whose behalf a ballot was requested. (Tr. at 340-41).

Two employees who were employed by the Employer in its New York office at the time of the election and who, therefore, were not on the mail ballot list, Jessica May and Andrea Mihalko, nevertheless voted by mail ballot. Ms. Mihalko voted by mail and Ms. May filled out a mail ballot at the Region's office on December 9, 2010, the day before the deadline for return of mail ballots and ten days after the manual election. (*See* Er. Ex. 15; Tr. at 388-90, 396-97, 406). It is undisputed that neither Ms. May nor Ms. Mihalko is on the mail ballot list. (Ex. P3). Neither party requested that Ms. Mihalko receive a mail ballot, and it appears that Ms. May simply showed up at the Region and cast a vote. (Tr. at 406). Neither party challenged Ms. May's ballot, nor did the Region challenge her ballot (Er. Ex. 15); the Employer initially challenged Ms. Mihalko's ballot, but withdrew that challenge shortly after the ballot count. (Er. Ex. 16). Both ballots were opened and counted.

At least two individuals who under the Judge's reasoning were ineligible to vote by mail ballot, therefore, actually voted by mail ballot. Neither the Region nor the WGAE challenged either ballot. Thus, the Judge's finding that Ms. Morton and Ms.

Wozniak were ineligible to vote by mail ballot is belied by the language of the Stipulated Election Agreement, the Board's procedures, and the parties' own actions.<sup>22</sup> Their failure to receive a mail ballot, therefore, is relevant; each was disenfranchised by the Region's conduct. That Mr. Wozniak was disenfranchised is even more stark and unassailable given that he telephoned the Region on December 2, 2010 and December 6, 2010 to request a mail ballot with Ms. Mihalko, who, as set forth above, received her ballot, voted, and whose vote was counted. (Tr. at 36, 42-43, 396-97). The Judge offers no explanation why Ms. Mihalko was entitled to vote by mail, but the identically-situated Mr. Wozniak is not – nor is there any such reason.

**B. Charles Smith Is Listed on the *Excelsior* List and Was Not Challenged; Therefore, He Was Eligible to Vote and His Disenfranchisement Is Relevant. (Exceptions 1-3, 15-16, 26)**

The Judge found that Charles Smith was not eligible to vote in the election at issue and thus that his testimony regarding the Region's failure to provide him with a ballot is irrelevant. Questions concerning the eligibility of Mr. Smith are both unavailing and untimely, and the Judge's finding erroneous. Mr. Smith is on both the *Excelsior* and mail ballot lists and, therefore, should have been provided with a ballot by the Region, which he was not. (Tr. at 113). It is this fact which is clearly relevant to whether the Region followed the applicable election procedures and afforded him an adequate opportunity to vote. Questioning the eligibility of Mr. Smith at this stage is a post-election challenge to voter eligibility, which is prohibited by both the Board's rules and well-established precedent. *See, e.g., Solvent Services, Inc.*, 313 NLRB 645 (1994); NLRB Casehandling Manual §11362.1 ("The merits of post-election challenges, whether

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<sup>22</sup> As the Judge noted in the hearing, the parties can agree to count mail ballots cast by individuals not on the mail ballot list. (Tr. at 391).

filed as such or in the guise of objections, should not be considered.”) and §11392.5.

While the WGAE asserted that it had no opportunity to challenge Mr. Smith’s eligibility because he never voted, that is not the case. The WGAE received and reviewed the *Excelsior* and mail ballot list (Tr. at 410), which included Mr. Smith’s name (Ex. P3), prior to the election and thus had ample opportunity to contest his inclusion at that time, but did not. (Tr. at 507-08). *Jacob Zimmerman d/b/a Jo-Art Manufacturing Co.*, 116 NLRB 1889 (1956) (finding an objection regarding the eligibility of employees who did not appear on the eligibility list and who made no attempt to vote, which was made after the election, was a post-election challenge and thus without merit); *Gerber Prods. Co.*, 95 NLRB 1300 (1951) (holding that an objection that the eligibility list used at the election was incorrect was “in the nature of a post-election challenge, which presents no basis for setting aside the election”). In fact, the WGAE informed the Region on November 16, 2010 that it believed that two individuals (Eileen Lucas and Megan Robertson) were improperly excluded from the *Excelsior* list. (Er. Ex. 8). Furthermore, to the extent that the WGAE did not have the opportunity to challenge Mr. Smith’s vote, it is because the Region failed to ensure that Mr. Smith received a mail ballot. The WGAE, therefore, is precluded based on applicable Board precedent and Rules from now asserting this post-election challenge to Mr. Smith’s eligibility, and the Judge’s erroneous finding must be overturned.

**IV. AN ELECTION MUST BE SET ASIDE AND A RE-RUN ELECTION ORDERED WHERE, AS HERE, ELIGIBLE VOTERS SUFFICIENT TO AFFECT THE OUTCOME WERE NOT AFFORDED AN ADEQUATE OPPORTUNITY AND NOTICE TO VOTE. (All Exceptions)**

In order for the decision of the majority in a representation election to be binding and a representation certification issued, an adequate opportunity to participate

in voting must be provided to all eligible employees. *International Total Services*, 272 NLRB 201 (1984). “It is the responsibility of the Board to establish the proper procedure for the conduct of its elections, which procedures require that all eligible voters, not merely a representative number, be given the opportunity to vote.” *Star Baking Co.*, 119 NLRB 835, 836 (1957). The conduct of a representation election is the Board’s responsibility and may not be waived by any party. *Alterman-Big Apple, Inc.*, 116 NLRB 1078, 1080 (1956) (union’s knowledge when it executed the stipulated election agreement that a certain complement of eligible voters would be away from the polling place during the election did not absolve the Region of its responsibility to ensure that *all* voters were afforded an adequate opportunity to vote).

In mail ballot cases, all eligible voters must be afforded “an adequate notice and opportunity to vote,” and not be “prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election.” *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987). “The fundamental purpose of a Board election is to provide employees with meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining.” *Id.*

The Board applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its own election proceedings. Under that standard, an election will be set aside if the objecting party shows that the number of voters *possibly* disenfranchised by an election irregularity is sufficient to affect the election outcome. *Garda World Security Corporation*, 356 NLRB No. 91, \*2 (2011), citing *Wolverine Dispatch*, 321 NLRB at 796-797. The mere *possibility* that even a single voter was disenfranchised is sufficient basis for the Board to set aside a representation election where that vote could be determinative. *Id.* (objecting party

need not prove that voters did not vote due to complained-of actions, only that it is possible that they did not vote for such reasons); *Wolverine Dispatch*, 321 NLRB at 796-97 (objecting party need not prove that eligible voters attempted to vote during the short period of time that the Board agent was away from the polling site, only that “it is possible that [] eligible voters arrived at the polling area to vote during the hiatus”).

The Board must set aside an election where standards are not adequately maintained, whether through fault of the Board, or others. In such cases, “the requisite laboratory conditions are not present and the [election] must be conducted over again.” *North American Aviation*, 81 NLRB 1046, 1048, n.9 (1949), quoting *Matter of General Shoe Corporation*, 77 NLRB 124, 127 (1948).

In several cases, the Board has ordered that an election be re-run as the result of the Region’s failure to provide an adequate notice and opportunity to vote in a mail ballot election. For example, in *North American Aviation, Inc.*, 81 NLRB 1046 (1949), the Board in ordering a new election found that a “chain of events leads us to the conclusion that the desires of eligible employees involved herein *may not have been* given adequate opportunity for expression,” and that there was a “*reasonable doubt* as to whether *all* eligible employees were given a fair opportunity to vote in an election the results of which under Section 9(e) of the Act are to be tested by the majority of those eligible to vote.” *Id.* at 1049 (emphasis added). Similarly, in *Star Baking Co.*, 119 NLRB 835 (1957), the Board rejected the Employer’s assertion that a representative election had been held where 28 of the 34 employees returned mail ballots and ordered that a new election be held because one employee, whose vote was determinative, did not receive a mail ballot. *Id.* The Board also rejected the Employer’s argument that it must be shown that the disenfranchised employee would have voted if he had received a

ballot, finding that because the employee was stationed 45 miles from the polling place, he did not have an adequate opportunity to vote despite that he knew he could have voted in person. *Id.* at 836.

Thus, the non-receipt of mail ballots by employees is tantamount to a failure to provide notice of the election and an opportunity to vote, and effectively and improperly disenfranchises those voters. *See International Total Services*, 272 NLRB at 201. *See also Security '76*, 272 NLRB 201 (1984) (seven undelivered mail ballots tantamount to a failure to provide notice and an adequate opportunity to vote); *Oneida County Community Action Agency*, 317 NLRB 852 (1995) (Region's failure to mail duplicate ballots to two employees could have affected the result and necessitated setting aside the election). Even acknowledging "the normal hazards of conducting an election by mail, the Board may find that all the facts, taken together, require that an election be set aside." *North American Aviation*, 81 NLRB at 1048-1049.

**A. Ten Eligible Voters Unquestionably Were Denied an Adequate Opportunity and Notice to Vote.**

1. Four Employees Who Never Received a Mail Ballot Clearly Were Disenfranchised as the Result of the Region's Conduct (Exceptions 1-3, 8-11, 13, 15-20, 25 and 26)

The uncontroverted testimony reflects that at least four eligible voters were disenfranchised because they never received a mail ballot to vote in the instant election. Alicia Gbur, Michael Wechsler, Charles Smith and Rebecca Morton all testified that they lived at the address provided to the Region during the election period, were in

town and checked their mail regularly, but never received a ballot. These employees were not afforded an adequate opportunity to vote.<sup>23</sup>

Neither of the Notices of Election provided by the Region to the Employer contain any language instructing voters that they could request or how to request a duplicate mail ballot for the election. (Er. Ex. 1 and 2). Thus, employees who did not receive a mail ballot were not informed in any way by the Region regarding the procedure for requesting a duplicate ballot. Almost all of employees who received a duplicate ballot are those employees on behalf of whom one of the parties requested a duplicate ballot. Whether employees who worked off-site observed the Notices (there is no record evidence on this point) is irrelevant in light of the fact that the Region failed to even provide constructive notice to employees of their ability to request a duplicate ballot. *See Star Baking, supra* (“it is the responsibility of the Board to establish proper procedure for the conduct of its elections” and its failure to send a ballot to an employee who was stationed 45 miles from the polling site necessitated a re-run election even though the employee knew of the election and could have voted in person). *Cf. Antelope Valley Bus Co., Inc.*, 275 F. 3d 1089, 1092 (D.C. Cir. 2002) (finding that a notice of

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<sup>23</sup> The Judge did not address and implicitly rejected the WGAE’s assertion that the Employer is estopped from filing objections based on its own conduct. There is no evidence whatsoever that the Employer engaged in any unlawful conduct that would support any such assertion. The WGAE’s argument seemingly is based on the fact that duplicate ballots sent by the Region to certain individuals were to addresses different from those provided on the mail ballot list. Yet, each the four individuals who testified that he or she never received a ballot (the only individuals relevant to the WGAE’s assertion) resided at the time of the election at the same address provided on the mail ballot list by the Employer. (See Ex. P3; Tr. at 69, 111, 169, 228). Thus, it unquestionably is not the fault of the Employer (or the individuals) that ballots were not received by any of these four individuals. Furthermore, three of the 12 “new addresses” provided by the WGAE added only the individual’s apartment number to the address supplied by the Employer and eight of the 12 new addresses were in a different state than the address provided by the Employer (Er. Ex. 8, Ex. P23), reflecting that these individuals likely were not then at their permanent address, but working in the field for a different employer. (See Tr. at 439-40; Decision at p. 3). Finally, there is no evidence that the Employer did not submit to the Region the most recent address it had for each of these 12 individuals, nor did the WGAE file an objection regarding the Employer’s submission of addresses for the mail ballot election. *See Dr. David M. Brotman Memorial Hospital*, 217 NLRB 558, 559 (1975) (an employer is not obligated to investigate and secure additional information, but must provide information in its possession concerning the correct mailing addresses of employees).

election setting forth expressly how to request a duplicate ballot under the facts of that case may provide adequate notice to employees).<sup>24</sup>

Importantly, the *Antelope Valley* court expressly held that its decision does not run afoul of the Board's decision in *Star Baking* because the Board in *Star Baking* found that the disenfranchised employee was stationed 45 miles from the polling place and it was not feasible for him to vote in person, whereas the Antelope Valley employees had an adequate opportunity to vote had they followed the instruction to request a duplicate ballot. *Id.* at 1092. In the instant matter, the four employees (three were no longer employed at the time of the election) who did not receive a ballot were not advised how to obtain a duplicate ballot and three of the four no longer worked for the Employer at the time of the election. Thus, under any standard or analysis, they did not have adequate notice of the election or opportunity to vote.

Furthermore, it is the Board's responsibility to inform voters concerning its procedures, including how to obtain a replacement or duplicate ballot. The Region is not relieved of its responsibility to ensure adequate notice and opportunity for all eligible employees to vote by actions of the parties. Communications to eligible voters by either the WGAE or the Employer do not constitute adequate notice.<sup>25</sup>

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<sup>24</sup> The *Antelope Valley* court noted that all four employees who did not receive ballots and did not request duplicate ballots were in the employer's office where the notice of election was posted during the election period and that two employees acknowledged having read the notice, but took no steps to request a duplicate ballot because they were "too busy" or because "it's not (her) job." In addition, three of the four allegedly disenfranchised employees did not collect their own mail. *Antelope Valley*, 275 F. 3d at 1093-94, 1096 at n. 12.

<sup>25</sup> The WGAE's argument that a flyer it provided to certain employees constitutes adequate notice fails for several reasons, most notably because there is no evidence that the employees who never received mail ballots received the flyer, as WGAE organizer Tim Tharp acknowledged. (Tr. at 435). Similarly, that the WGAE sent e-mails to certain employees noticing the election and the ability to request a duplicate ballot is of no moment. The first such e-mail (Ex. P21) states only that ballots for the election had been mailed and should be returned to the Board by December 10, 2010. This e-mail was opened by only 19 of its 32 recipients (63 individuals were mailed ballots), but there is no evidence of the date on which the e-mail was opened or that any eligible voter read the e-mail. The second e-mail (Ex. P22), which was opened (not read) at an undetermined time by only 26 of the 51 recipients, encourages recipients who have not

Finally, the WGAE's assertion at the hearing that mail ballots could have been thrown out by individuals having mistaken them for junk mail or by roommates of the voters, is belied by the testimony of the individual voters themselves. Ms. Gbur lives by herself in a single-family home. (Tr. at 170). Mr. Smith lives with his family in a two-family home, but the other temporary tenant at the time of the election was not receiving mail at the house. (Tr. at 120-23). Mr. Wechsler lives with his wife in an apartment. (Tr. at 73). Ms. Morton also lives in an apartment and was told by the Region that she would be mailed a ballot. (Tr. at 228). Mr. Smith testified that he throws out junk mail at his house, that he was aware that an election was being held and that he would receive a mail ballot, but that he never received it. (Tr. at 112-13, 127-28). Ms. Morton called and requested a ballot from the Region so she certainly was aware that an election was being held and was expecting a ballot in the mail. (Tr. at 231-32).

2. Employees Who Returned Mail Ballots That Were Not Counted Clearly Were Disenfranchised as the Result of the Region's Conduct (Exceptions 1-3, 8-10, 12, 14, and 21-26)

Six individuals (Zachary Wozniak, Deborah Mitchell, Jill Sinclair, Nora Connor, Allison Howard and Jacob Benattia) testified that they received a mail ballot to vote in the election, marked the ballot, placed it in the return envelope provided by the Region and mailed the envelope from a postal box or mail collection site.<sup>26</sup> The ballot envelope is addressed to Region 2 and also contains the Region's address as the return address. The envelope contains a pre-paid postage stamp. (RD Ex. 6(b)). The only

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received a mail ballot to call the WGAE and request one, which could not possibly constitute adequate notice because it directs employees to contact a party, not the Region, to request a duplicate ballot. Finally, Mr. Wechsler did not receive either e-mail because the WGAE did not have his e-mail address (Tr. at 436), and there is no evidence that Mr. Smith either received or opened either e-mail. Regardless, it is the Region's responsibility to ensure that employees receive adequate notice of an election – a responsibility that cannot be outsourced to one of the parties to the election. *Star Baking, supra*; *Alterman-Big Apple, supra*.

<sup>26</sup> Wozniak mailed his ballot via the mail slot in his apartment building. The others mailed their ballot by placing it in a blue postal box.

place that the ballots could have been delivered, therefore, is to the Region (assuming that the envelopes were properly addressed by the Region and contained the pre-paid postage stamp), although each of the six employees testified that he or she did not receive the envelope returned as undeliverable. Yet, the Region asserts that it did not receive any of the mail ballots returned pursuant to the Board's instructions by these six individuals. (Tr. at 294-95).

It simply is inconceivable that six mail ballots with both a return address and delivery address of Region 2 were mailed at or about the same time from six different locations throughout the United States (Miami, Houston, Birmingham, Parsippany, Brooklyn, and either Brooklyn or Manhattan), but that none were delivered to the Region. The only reasonable explanation is that the Region received and misplaced these ballots. It simply defies common sense to conclude that the "vagaries of the mail system" could explain six lost ballots mailed from six different locations. The only commonality in the mailing of each of the six ballots is that they were addressed to the same location – Region 2.

There are many plausible explanations for what happened to these lost ballots – none of which involve the postal service's failure to deliver six ballot envelopes to the Region. For example, the ballots are delivered with the rest of the mail received by the Region, which typically is at least 20-30 official pieces of mail a day in addition to junk mail. The mail is sorted by a support staff person who is not involved in the mail ballot election in any way and who is entrusted to route returning ballots directly to the Election Clerk (Tr. at 285, 326), even though most mail is routed to the ARD; moreover, the staff person received no written instruction (and likely no oral instruction, as Mr. Lewis' testimony must be read) regarding the routing of returning mail ballot envelopes.

(Tr. at 328-29). Furthermore, the Region typically conducts only two to three mail ballot elections each year, but at the time of the instant election was conducting at least five mail ballots elections. (Tr. at 330, 441). Indeed, Mr. Lewis acknowledged that mail is at times misdirected by the support staff persons even absent these complicating circumstances. (Tr. at 328). Those ballot envelopes that reach the Election Clerk are then placed in one of several unsealed “ad hoc” cardboard boxes, each of which was labeled with a five-digit case number very similar to the numbers on the other boxes because the WGAE petitions were all filed in close proximity and assigned sequential or nearly sequential case numbers. (Tr. at 331-33). It is not difficult to imagine circumstances in which the returning envelopes were misplaced, as the Judge acknowledged. (Decision at p. 5).

This conclusion is buttressed by the numerous errors that were uncovered during the election process. First, a mail ballot from another WGAE election (at Optomen Television) was in the box containing mail ballots for the instant election at the time of the ballot count. (Tr. at 342-43). Second, two ballots from an election not even involving the WGAE were found in the box containing mail ballots for the Lion Television election at the time of that ballot count. (Tr. at 441). Third, a list of names and addresses to whom the Region sent duplicate mail ballots in another election was in the case file for the instant election. (Er. Ex. 4; Tr. at 356-57). Combine these errors with the number of duplicate ballots requested and sent, the time that elapsed prior to duplicate ballots being sent, the second and third requests for duplicate ballots, and the numerous and unquestionable problems that the Region encountered in ensuring that individuals received mail ballots makes clear that the Region’s conduct of the mail ballot election disenfranchised the six individuals who returned ballots that were not counted.

The record evidence makes clear, therefore, that the Region failed to provide all employees in this election an adequate opportunity and notice to vote. The Board consistently has rejected the notion that an election should be certified and objections denied because the majority of mail ballots were delivered and returned. See *Star Baking, supra*; *Lemco Construction, supra*. Indeed, several Board decisions make very clear that the Board's mandate is to ensure that *all* employees are afforded a meaningful opportunity to vote. *North American Aviation, supra*; *Wolverine Dispatch, supra*; *Alterman-Big Apple, supra*.

The Board's decisions in *Star Baking, Security '76, North American Aviation, Garda Security* and *Wolverine Dispatch*, among others, all demand the conclusion that the ten individuals who testified without contradiction that they did not receive or received and returned a ballot that was not counted in this election were not afforded an adequate opportunity to vote. The WGAE's reliance on the Fifth Circuit's decision in *J. Ray McDermott & Co., Inc. v. NLRB*, 571 F.2d 850 (5<sup>th</sup> Cir. 1978) is misplaced. In that case, the court expressly gave deference to the Board's decision that the Region was not responsible for three lost mail ballots allegedly returned by employees. The court, however, did not disclose the reasons for the Board's conclusion or the evidence upon which the conclusion is based, and it appears that the Board merely upheld without comment the unpublished decision of the hearing officer and Regional Director. The court did note that the hearing officer relied on the Board's decision in *Versail Mfg., Inc.*, 212 NLRB 592 (1974), in which the Board declined to overturn a manual election based on the alleged disenfranchisement of a long-haul truck driver who missed voting in the election because he took a detour from his route to visit friends and returned to find that his trailer was missing. The Board concluded that his

inability to vote was caused by his personal frolic and resulting delay and was not the fault of the Region. *Id.* at 593.

The *McDermott* hearing officer's reliance on the decision in *Versail Mfg.* seemingly evidences that the allegedly disenfranchised voters failed to vote through some fault of their own, whereas here it cannot be said that the ten employees who testified were disenfranchised through any fault of their own. Furthermore, the *McDermott* court noted that the election at issue there was itself a re-run of a previously overturned election and held that the need for finality in the representation process was an important consideration following a re-run election. There is no such concern in the instant matter.<sup>27</sup>

The "rule of reason" that must be applied here, therefore, is one that ensures that an election reflects the will of the majority of eligible voters by affording all eligible voters an adequate and equal opportunity and notice to vote. The failure of so many voters to either receive a ballot or have their ballot counted, especially in light of the considerable evidence of the Region's misplacement of ballots and inability to deliver ballots in a timely manner to numerous eligible voters, cannot be explained by the "vagaries of the mail," but only by the Region's conduct. There is no question that where at least ten employees did not receive a ballot or returned a ballot that was not counted in an election decided by only five votes, the only way to ensure that most basic

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<sup>27</sup> The WGAE's reliance on the Board's decision in *Mission Industries*, 283 NLRB 1027 (1987) is even more misplaced. In that decision, the Board merely noted in a footnote that the parties had not filed exceptions to the Regional Director's finding that the Region's failure to receive two mail ballots warranted setting aside the election. Not only did the Board not issue a ruling on that decision, but did not even discuss the reasons or evidence underlying the Regional Director's decision. Accordingly, the decision is of absolutely no consequence.

and essential requirement of the Act to ensure that a representation election reflects the will of the majority of eligible voters is to order a new election.<sup>28</sup>

### CONCLUSION

The uncontroverted, clear and definitive testimony of ten individuals established conclusively that four eligible voters failed to receive a ballot and that six eligible voters returned a ballot that was not counted. This testimony and the record evidence demonstrate without a doubt that the Region failed to provide these employees, whose votes are determinative in the election, with an adequate opportunity and notice to vote.

The Judge, contrary to overwhelming testimonial and documentary evidence, found that three individuals were ineligible to vote by mail and disregarded the testimony of four individuals, thereby reducing the number of disenfranchised voters below the five vote margin and enabling him to avoid having to order a new election, as the weight of the record evidence demands. Despite that their testimony was uncontroverted, specific and definitive, the Judge elected to ignore the testimony of Alicia Gbur and Michael Wechsler, instead finding that their inability to recall wholly

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<sup>28</sup> The WGAE's assertion, which the Judge did not address and implicitly rejected, that the Employer submitted written statements and testimony only from voters who it believed would have voted against representation by the union is wholly unsupported and irrelevant, at least for the purposes advanced by the WGAE. Mr. Sheridan and Mr. Guberman testified that management employees did not discuss how disenfranchised employees may have voted. (Tr. at 256-58, 496). No employee who testified stated that the management employee(s) to whom he or she spoke asked anything more than whether the employee received a ballot and, if so, whether he or she returned it. This testimony, in fact, is buttressed by Mr. Sheridan's e-mail that states that Ms. Mitchell volunteered that she voted against representation and that he did not know how Ms. Sinclair or Ms. Gbur would have voted. (Ex. P16). How any of the employees who testified would have voted certainly has no bearing on whether each was entitled to vote and whether each was disenfranchised by the Region's conduct of the election. That some may have voted for the Employer is not evidence that the testimony they gave under oath is not truthful, especially in light of the fact that most are no longer employed by the Employer – and have not been for many months. The only possible relevance to how these employees voted or may have voted is that it underscores the very real possibility that the Region's conduct, if it is not remedied, could result in the certification of an election result that does not reflect the will of the majority of all eligible voters, which truly would be a miscarriage of justice and an abdication of the Board's responsibility under the Act. *See North American Aviation*, 81 NLRB at 10489.

irrelevant information nine months after the events to which they were testifying somehow justified ignoring their clear testimony regarding the only relevant issue, whether each received a mail ballot in the election. Similarly, absent any evidence even suggesting that the employees were motivated to testify falsely and without making any findings regarding their demeanor or truthfulness, the Judge ignored the uncontroverted, definitive testimony of Jacob Benattia and Jill Sinclair that they returned a mail ballot in the election.

In light of the record evidence, which includes the Region's failure to provide any safeguards against losing, misdirecting or misplacing mail ballots, its considerable difficulties in delivering ballots to numerous eligible voters and its misplacement of mail ballots in elections held at the same time as this election, it would be contrary to established Board precedent and the purposes and policies of the Act, to certify an election in which ten voters were disenfranchised and the result of the election cannot be said with any certainty to reflect the will of the majority of all eligible voters. Accordingly, the Judge's decision should be overturned, the Employer's objections sustained, and a new election ordered.

Dated: September 27, 2011  
New York, New York

Respectfully submitted,

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**CERTIFICATION OF SERVICE**

I certify that on September 27, 2011, I caused true copies of the foregoing Employer's Brief in Support of its Exceptions to the Decision Denying its Election Objections to be served by e-mail and overnight mail upon:

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