

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

In the Matter of:	-	X
	:	
KIRKSTALL ROAD ENTERPRISES, INC./QUAY STREET ENTERPRISES, INC.,	:	
	:	
Employer,	:	
	:	
and	:	Case No. 2-RC-23547
	:	
WRITERS GUILD OF AMERICA, EAST, INC., AFL-CIO,	:	
	:	
Petitioner.	:	
	-	X

**PETITIONER'S BRIEF IN OPPOSITION TO
THE EXCEPTIONS FILED BY THE EMPLOYER**

SPIVAK LIPTON LLP
*Attorneys for Writers Guild of
America, East, Inc., AFL-CIO*
1700 Broadway, 21st Floor
New York, NY 10019
Tel: 212-765-2100
Fax: 212-765-8954

TABLE OF CONTENTS

	Page
INTRODUCTION	1
PROCEDURAL BACKGROUND	3
FACTUAL BACKGROUND.....	7
A. The WGAE’s organizing campaign and Kirkstall’s opposition.....	7
B. The Region’s election procedures in connection with this case.....	8
C. The Employer’s objections.....	10
D. The Administrative Law Judge’s decision and the Employer’s Exceptions	11
i. Zachary Wozniak and Rebecca Morton	11
ii. Charles Smith	12
iii. Alicia Gbur and Michael Wechsler	13
iv. Jacob Benattia, and Jill Sinclair.....	14
v. The remaining evidence: Allison Howard, Nora Connor, and Deborah Moe (Mitchell)	15
STANDARD OF REVIEW.....	15
ARGUMENT.....	17
A. The Employer’s exceptions to the factual analysis and conclusions of the ALJ lack merit. The record fully supports the ALJ’s determinations and his credibility resolutions must be upheld (Exceps. ¶¶ 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24)	17
i. The ALJ properly discredited the testimony of Jacob Bennatia and Jill Sinclair.....	18
ii. The ALJ correctly concluded that Alicia Gbur and Michael Wechsler received a ballot, contrary to their unreliable testimony	22

B.	The Employer’s arguments that (i) Charles Smith is an eligible voter and (ii) his testimony should be credited, must both be rejected. (Exceps. ¶¶ 15, 16)	26
C.	The Employer’s reading of the Stipulation with respect to the mail balloting process is plainly belied by the Stipulation’s language and is inconsistent with established Board election requirements. (Exceps. ¶¶ 11, 12, 13, 14)	28
D.	The election was conducted by the Region without irregularity or misconduct, in accordance with all standard procedures. It’s conduct therefore cannot be called into doubt. (Exceps. ¶¶ 1, 2, 3, 25, 26)	31
	i. The Employer applies the wrong standard of review with respect to allegations of misconduct by the Board.	31
	ii. The ALJ’s determinations regarding the Region’s conduct of the election must stand.	34
E.	The Employer’s contention that the Region’s Notice of Election was flawed is untimely and otherwise lacks merit. (Exceps. ¶¶ 4, 5, 6, 7)	39
CONCLUSION		43

TABLE OF AUTHORITIES

Case	Page
<u>Affiliated Computer Services Inc.</u> , 355 NLRB No. 163 (2010).....	15-16
<u>American Medical Response</u> , 356 NLRB No. 42 (2010).....	33
<u>Antelope Valley Bus Co., Inc.</u> , 275 F.3d 1089 (D.C. Cir. 2002).....	41, 42
<u>Berryfast, Inc.</u> , 265 NLRB 82 (1982).....	23
<u>Colorflo Decorator Products, Inc.</u> , 228 NLRB 408 (1977).....	19
<u>Dacas Nursing Support Sys. v. NLRB</u> , 7 F.3d 511 (6 th Cir. 1993).....	27
<u>Daikichi Sushi</u> , 335 NLRB 622 (2001).....	21, 24
<u>East Texas Pulp & Paper Co.</u> , 114 NLRB 885 (1955).....	34
<u>E.S. Sutton Realty</u> , 336 NLRB 405 (2001).....	17, 21, 24
<u>Garda World Security Corp.</u> , 356 NLRB No. 91 (2011).....	31, 32
<u>Gibraltar Steel Corporation</u> , 323 NLRB 601 (1997).....	18, 25
<u>Hollingsworth Management Service</u> , 342 NLRB 556 (2004).....	26
<u>Iowa Lamb Co.</u> , 275 NLRB 185 (1985).....	39
<u>J. Ray McDermott v. NLRB</u> , 571 F.2d 850 (5 th Cir. 1978), <u>cert denied</u> , 439 U.S. 893 (1978).....	37

<u>Jowa Sec. Servs., Inc.,</u> 269 NLRB 297 (1984).....	42
<u>Kirsch Drapery Hardware,</u> 299 NLRB 363 (1990).....	37
<u>KRCA-TV,</u> 271 NLRB 1288 (1984).....	29
<u>Lemco Construction, Inc.,</u> 283 NLRB 459 (1987).....	34 n.11
<u>Mead Southern Wood Products,</u> 337 NLRB 497 (2002).....	34, 38
<u>Mercedes-Benz of San Diego,</u> 357 NLRB No. 67 (2011).....	16, 32
<u>Mission Industries,</u> 283 NLRB 1027 (1987).....	37
<u>NLRB v. A.J. Tower Co.,</u> 329 U.S. 324 (1946).	34
<u>NLRB v. ARA Services, Inc.,</u> 717 F.2d 57 (3d Cir. 1983).....	35
<u>NLRB v. Black Bull Carting Inc.,</u> 29 F.3d 44 (2d Cir. 1994).....	16
<u>NLRB v. Cedar Tree Press, Inc.,</u> 169 F.3d 794 (3d Cir. 1999).....	29
<u>NLRB v. Duriron Co., Inc.,</u> 978 F.2d 254 (6th Cir.1992).....	17
<u>Norris-Thermador Corp.,</u> 119 NLRB 1301 (1958).....	27
<u>North American Aviation,</u> 81 NLRB 1046 (1949).....	27 n.8
<u>North American Plastics Corp.,</u> 326 NLRB 835 (1998).....	29

<u>Polymers, Inc.</u> , 174 NLRB 282 (1969), <u>enforced</u> , 414 F.2d 999 (2d Cir. 1969), <u>cert denied</u> , 396 U.S. 1010 (1970).....	17, 32, 33, 35, 37
<u>Postal Service</u> , 218 NLRB 966 (1975).....	25
<u>Republic Electronics</u> , 266 NLRB 852 (1983).....	39
<u>Regional Emergency Medical Services</u> , 354 NLRB No. 20 (2009).....	15
<u>Rheem Mfg. Co.</u> , 309 NLRB 459 (1992).....	32
<u>Rochester Joint Board v. NLRB</u> , 896 F.2d 24 (2d Cir. 1999).....	35
<u>Rohr Aircraft Corp.</u> , 136 NLRB 958 (1962).....	43
<u>Sahuaro Petroleum</u> , 306 NLRB 586 (1992).....	33
<u>Sawyer Lumber Co., LLC</u> , 326 NLRB 1331 (1998).....	35
<u>Security '76</u> , 272 NLRB 201 (1984).....	27 n.8
<u>Shen Automotive Dealership Group</u> , 321 NLRB 586 (1996).....	21
<u>Sonoma Health Care Center</u> , 342 NLRB 933 (2004).....	16
<u>Standard Dry Wall Products</u> , 91 NLRB 544 (1950), <u>enforced</u> , 188 F.2d 362 (3d Cir. 1951).....	16
<u>Star Baking</u> , 119 NLRB 835 (1957).....	27 n.8

<u>Stretch-Tex Co.,</u> 118 NLRB 1359 (1957).....	16
<u>St. George Warehouse,</u> 351 NLRB 961 (2007).....	40
<u>St. Vincent Hospital,</u> 344 NLRB 586 (2005).....	35, 36
<u>The Jewish Home for the Elderly of Fairfield County,</u> 343 NLRB 1069 (2004).....	21
<u>Triple A Machine Shop, Inc.,</u> 235 NLRB 208 (1978).....	20, 22
<u>Universal Camera v. NLRB,</u> 340 U.S. 474 (1951)	20
<u>Waste Mgmt. of Northwest Louisiana, Inc.,</u> 326 NLRB 1389 (1998).....	33, 34
<u>Wilson & Co.,</u> 37 NLRB 944 (1941).....	29
<u>Wolverine Dispatch, Inc.,</u> 321 NLRB 796 (1996).....	31
 Statutes	
<u>National Labor Relations Act,</u> 29 U.S.C. § 152(5).....	3
 Rules	
<u>NLRB Rules and Regulations,</u> § 103.20	40

References

NLRB Hearing Officer Guide, pp. 168-169	20
<u>NLRB Casehandling Manual (Part Two) Representation Proceedings,</u>	
§ 11302.4	29
§ 11314.7	40, 41
§ 11335.2	29
§ 11336.3	40, 41
§ 11338.2	30

INTRODUCTION

Petitioner Writers Guild of America East, Inc., AFL-CIO (“WGAE” or “the Union”), by and through its attorneys, Spivak Lipton LLP, submits this brief in opposition to the exceptions filed by Kirkstall Road Enterprises, Inc./Quay Street Enterprises, Inc. (“Kirkstall” or “the Employer”), and in support of the decision of Administrative Law Judge Raymond P. Green¹ denying the Employer’s objections to the representation election in this case.

The Employer argues that misconduct by the Region in conducting the mail ballot portion of this mixed manual-mail election caused several individuals to miss their opportunities to vote. The Employer does not allege that the Union engaged in any misconduct in connection with any aspect of the election. It only alleges that (i) certain employees did not receive ballots, and (ii) other employees mailed ballots that never arrived at the Regional Office, and concludes speculatively that the Regional Office must have been at fault. Essentially, the Employer would require the Board to overturn the results of a mail ballot election every time eligible voters claimed, regardless of the record as a whole, that they did not receive mail ballots or that they returned ballots to the Region and those ballots were not counted. Such a rule would impose a devastating and unworkable burden upon the Board in mail-ballot elections. If speculation about such conceivable irregularities were to serve as the basis for overturning election results, virtually no election conducted in whole or part by mail would ever be upheld.

¹ “ALJ” refers to Administrative Law Judge. The ALJ’s Decision is referred to as “ALJD.” All references to the transcript of the July 27 to 29, and August 3, 11, 12, 15, and 16, 2011 hearings (“Hearing”) appear as “Tr. ___.” Exhibits introduced by the Petitioner during the Hearing are referred to as “U. Ex. ___.” Joint exhibits are referred to as “Jt. Ex. ___.” Employer exhibits are referred to as “Er. Ex. ___.” Exhibits introduced by the General Counsel are referred to as “Bd. Ex. ___.” References to the Employer’s Exceptions appear as “Excep. ¶ ___.” References to the Employer’s Brief in Support Exceptions appear as “Er. Br. at ___.”

On August 30, 2011, ALJ Green issued a decision holding that the Employer's objections have no merit and should therefore be dismissed in their entirety. Based on a careful examination of the record, he found that the Employer presented no "evidence of misconduct by the Board's Regional Office in the manner in which this election was conducted." (ALJD at 2.) Indeed, the evidence in this case convinced him that the Region's personnel did their best to enfranchise all potential voters. (Id.) He also determined, based on the record as a whole, that several witnesses who the Employer alleges were disenfranchised gave testimony that was not credible, and that others were ineligible to vote by mail in the first place. (See ALJD at 6-9.)

Kirkstall filed 26 exceptions to the ALJ's decision. Most can be characterized simply as disagreements with the ALJ's well-reasoned findings. The ALJ was well within his right to make factual determinations and credibility resolutions as he did and his decision is amply supported by the record. On the basis of unexplained mail errors, the Employer seeks through its exceptions, a determination that the election results be overturned. The evidence at the Hearing, however, overwhelmingly supports the ALJ's determination that the Region endeavored to enfranchise all potential voters and that there was no reason to believe that the Region engaged in any misconduct. The election cannot be overturned on the basis of the Employer's unsupported assumptions.

For these and the reasons that follow, the WGAE respectfully requests that the Board adopt the ALJ's findings and conclusions, uphold the results of this election (which took place approximately 10 months ago) and in the interest of promoting the finality of valid election results, certify the WGAE as the exclusive bargaining representative of the unit described below.

PROCEDURAL BACKGROUND

The Petitioner, WGAE, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (“the Act”) (29 U.S.C. § 152(5)), and seeks to represent various creative professionals performing production duties employed by Respondent Kirkstall, a television film production company, with principal offices in New York, New York. (See Pet. Ex. 2.) Kirkstall executive producers Richard Vagg and Michael Sheridan are among the supervisors of the unit employees. (Tr. 541-43; 241-47.)

The WGAE filed the representation petition in this case with Region 2 of the NLRB (the “Region”) on October 12, 2010. (Bd. Ex. 1(a).) On November 1, 2010, Kirkstall and the WGAE, after negotiations that were facilitated by the Region (Tr. 285), executed a Stipulated Election Agreement (“the Stipulation”) and agreed to a “Mixed Mail-Manual Election.” (Pet. Ex. 2, ¶ 12.) Manual balloting took place on November 30, 2010, while the employees who were permitted to vote by mail had to return their ballots for arrival at the Region by the close of business on Friday, December 10, 2010. (Id.)

The stipulated bargaining unit included, “[a]ll full-time and regular part-time Producers, Field Producers, Post-Producers, Associate Producers, Senior Story Producers and Story Producers, employed by the Employer at and out of its facility located at 609 Greenwich Street, 9th Floor, New York, NY” and excluded, “Editors, and all other employees, and guards, and supervisors as defined in the Act.” (Id. at ¶ 13.) The Stipulation included a payroll period formula taking into account that the petitioned-for unit consisted wholly of freelance employees (e.g., Tr. 10, 439) who might work for several different employers over the course of a year. In this case, “[e]ligible to vote [were] those individuals included within the Appropriate Bargaining

Unit ... who worked 100 hours or more in the 34 weeks prior to October 9, 2010, regardless of the week or weeks within that 34-week period when such hours were worked.” (Pet. Ex. 2, ¶ 11.)

The Stipulation provided that the following subset of employees within the stipulated bargaining unit were entitled to receive mail ballots:

- (a) [eligible voters] then engaged by the Employer who are expected to be out of the New York City metropolitan area on location engaged for an Employer production on the date of manual voting (November 30); and
- (b) who are no longer engaged by the Employer on a project other than for reason of his or her voluntary resignation (an individual’s completion of a project for the Employer shall not, by itself, constitute a resignation) or unlawful discharge.

(Pet. Ex. 2, ¶ 12.)

As described above, the only employees who were working for Kirkstall during the election period who were entitled to vote by mail were those who were working on-location for the Employer at a site outside of New York City on the date of the manual vote, November 30, 2010.

In addition to the standard *Excelsior* list, which included 81 names (Pet. Ex.3.), Kirkstall was required by the Stipulation to simultaneously provide the Region and the WGAE with a “mail ballot list” providing the names and addresses of voters who were eligible under the Stipulation to vote by mail. (Pet. Ex. 2, ¶ 12.) The mail ballot list identified 56 out of the 81 employees on the *Excelsior* list as eligible mail ballot voters. (Pet. Ex. 3.) The Employer’s mail ballot list was riddled with errors. It listed incorrect or outdated addresses for 12 individuals, a number that amounted to 21% of the mail ballot voters. (See Pet. Ex. 23.) The Employer also excluded entirely from the mail ballot list four individuals who were not performing work for

Kirkstall at the time of the election, but were eligible to vote according to the Stipulation's eligibility formula. (Tr. 396-99; Er. Ex. 8.)

The parties agreed to a detailed procedure by which additional mail ballots could be requested for individuals not listed on the November 10, 2010 mail ballot list. Of particular significance, it provided that if a party subsequently learned that an employee currently employed by Kirkstall had to work offsite on the date of the manual balloting, the party would immediately notify the Region and the other party of that development and the Region would then immediately send the voter a mail ballot.² The record does not indicate that the Employer requested a mail ballot for any such employees.

In compliance with the terms of the Stipulation, on November 17, 2010, the Region sent a mail ballot to every voter included on the mail ballot list. (Tr. 290.) Moreover, the Region successfully delivered mail ballots to all 12 of the voters for whom the Employer provided incorrect addresses on the mail ballot list, as well as to the four eligible mail ballot voters whom Kirkstall entirely neglected to include on the mail ballot list. (Tr. 385, 392-93; Er. Exs. 8, 13.)

² The full language of the Stipulation on that point provided that,

In the event that either party learns that an eligible voter, whose name is not included on the mail ballot list, will either (a) no longer be performing work for the Employer prior to November 30, 2010, other than for reason of his or her voluntary resignation (an individual's completion of a project for the Employer shall not, by itself, constitute a resignation) or unlawful discharge, or (b) will be performing work, on November 30, 2010 for the Employer offsite (i.e., not at the 609 Greenwich Street facility), that party shall immediately inform the Region and the other party of the circumstance and the Region shall immediately send that eligible voter a mail ballot.

(Pet. Ex. 2, ¶ 12.)

The manual balloting took place as scheduled on November 30, 2010. (Pet. Ex. 2, ¶ 12.) As indicated above, the mail balloting portion of the election concluded on the close of business on Friday, December 10, 2010. (Id.) Following the Board's standard procedure, the mail and manual ballots were comingled and a tally of ballots was issued on December 13, 2010 showing 25 ballots cast for the Petitioner, 24 votes cast against representation, with ten determinative challenged ballots, and two void ballots. (Bd. Ex. 1(d).) All ten challenges were made or maintained by the Employer.

The Employer withdrew four of its ten challenges within days of the ballot count. (See Er. Ex. 16.) A revised tally of ballots was then issued on December 21, 2010, showing 28 ballots cast for the Petitioner, 25 votes cast against representation, with six determinative challenged ballots. (Bd. Ex. 1(e).) As reflected in a more recent revised tally of ballots dated July 26, 2011, all remaining challenged ballots were resolved in favor of the Union. (Bd. Ex. 1(j)-(k).) The July 26 tally shows 30 votes in favor of representation with 25 against. (Pet. Ex. 1.)

Following the initial ballot count, the Employer filed the instant objections to the mail-ballot portion of the election. The Employer stated in its December 20, 2010 objections, and again in its January 6, 2011 submission of evidence in support thereof, that: (1) eligible voters submitted ballots that were not counted (it is undisputed that the allegedly mailed ballots were never received by the Region); (2) eligible voters failed to receive a mail ballot; and finally (3) a ballot for a separate mail ballot election being conducted by the Region was found (but not counted) among the ballots in this election. (Bd. Ex. 1(f), 1(f)(2).)

FACTUAL BACKGROUND

A. The WGAE's organizing campaign and Kirkstall's opposition.

Throughout the course of the Union's organizing campaign, and particularly in connection with the mail balloting process, the Union communicated with eligible voters in this election by various means. WGAE organizer Tim Tharp ("Tharp") testified that he corresponded with voters via phone, email and text message. (Tr. 409.) Tharp testified that he sent campaign materials to voters by mail primarily using the addresses listed on the *Excelsior* list. (Tr. 410.) The informational material sent to voters informed them generally about their right to vote in the election. (Tr. 411-12; Pet. Ex. 19.) Notably, the mailings included contact information for the NLRB allowing voters to reach the Region directly with any questions. (Id.) None of the mailings were returned to the WGAE as undeliverable. (Tr. 413.)

The WGAE also sent emails to voters for whom it had email addresses informing them about their voting rights in the election. (Tr. 415; Pet. Exs. 20-22.) The emails provided a hyperlink to the NLRB's website where voters could gather more information, as well as guidance on requesting a mail ballot if an eligible mail voter had not received one. (Pet. Exs. 20-22.)

The election in this case occurred around the same time as several other mixed-mail manual elections where the WGAE was the petitioner at production companies called: (i) Atlas; (Tr. 426) (ii) Optomen (Tr. 428); and (iii) Lion Television (Tr. 427). Those elections were also conducted by Region 2, and none resulted in objections to the mail ballot process. (Tr. 426-429, 443-44.)

The Employer mounted a staunch counter-campaign to the Union's organizing effort. As the ALJ noted, "the evidence shows that the Company made it clear to the employees that it desired that they vote against union representation." (ALJD at 2.) Regrettably, the Employer's resistance to the WGAE's organizing campaign went beyond dissuading employees to vote against unionizing. And it also involved more than its highly flawed mail ballot list which placed considerable pressure on the Region to timely deliver ballots to all voters who were entitled to them (as discussed fully herein, the Region performed that job extremely capably, notwithstanding the difficulties caused by the Employer). Here, as the record fully discloses, the Employer made numerous egregious material misrepresentations in connection with the evidence it submitted to the Region in support of its objections. As discussed more fully below, (i) one individual was entirely ineligible to vote; (ii) two were not entitled to receive a mail ballot pursuant to the terms of the Stipulation; (iii) the Employer alleged that one did not receive a ballot even though she told the Employer that she might have thrown her ballot in the garbage; and (iv) the Employer alleged that one was not out of town for an extended period of time during the mail balloting period when he actually was—a fact bearing heavily on the question of whether he received a mail ballot.

B. The Region's election procedures in connection with this case.

At the outset, it should be emphasized that the Region as a general matter, "erred on the side of doing what was necessary to give the person a chance [to vote]." (Tr. 401.) It not only delivered ballots in accordance with the Stipulation to every individual included on the mail

ballot list,³ it also succeeded in delivering replacement ballots to the 12 voter for whom the Employer provided incorrect addresses. In fact, the Region went so far as to send ballots by overnight mail to several of those voters and further contacted employees by telephone to confirm their receipt of replacement ballots. (Tr. 399-400; Bd. Exs. 3, 4.) Eleven of the 12 voted. (Tr. 392-93; Er. Exs. 10, 13.) As indicated, it also successfully delivered mail ballots to the four eligible mail ballots who were excluded from the mail ballot list. (Tr. 396-99; Er. Ex. 8.)

NLRB Supervisory Examiner Nicholas Lewis (“Lewis”) gave detailed and uncontroverted testimony that the Region sent a voter kit to every eligible mail voter on the mail ballot list in accordance with the Stipulation. (Tr. 291.) Mr. Lewis testified that the Region sent such voter kits out on November 17, 2010. (Tr. 289-90.) He further provided uncontroverted testimony that no voter kits were returned to the Region as undeliverable at any time before or after the deadline for receipt of ballots. (Tr. 291-92.) Moreover, he testified without contradiction that the Region did not receive back any mail ballots in this case after the deadline of December 10, 2010. (Tr. 294.)

Upon learning of the Employer’s objections to the mail ballot process, Mr. Lewis personally investigated the validity of those allegations by physically searching the Region’s office to locate any potentially late arriving ballots or voter kits that were returned as undeliverable. (Tr. 295.) He checked other mail election case files to ensure that no arriving ballots or undeliverable ballots were misplaced. (Tr. 296-97.) The only other individuals who could have found a ballot envelope astray were Region staff members Stephen Berger and

³ Of course, Kirkstall contends that Gbur and Wechsler did not receive their mail ballots; an allegation wholly rejected by the ALJ, for the reasons discussed herein.

Carmen Martinez. (Tr. 335.) Mr. Lewis testified that he questioned them and told them to similarly check for missing ballots. (Id.) Lewis testified that he “looked through every desk drawer and file in that office” checking for misplaced ballots and found none. (Id.)

On the basis of these facts, the ALJ held that “the evidence in this case convinces me that the Region’s personnel did their best to enfranchise all potential voters” and there was no “evidence of misconduct by the Board’s Regional Office in the manner in which this election was conducted.” (ALJD at 2.) The Employer nonetheless registered various objections to the conduct of the election.

C. The Employer’s objections.

As described above, the Employer has objected first on the basis that several individuals never received a mail ballot, and second that voters returned ballots before the deadline which were not counted. Finally, it alleges that “a ballot for a separate mail ballot election being conducted by the Region was included (but not counted) with the ballots ... in this election.” (See Bd. Ex. 1(o).)

In support of its objections, the Employer relies on evidence that four individuals allegedly did not receive mail ballots: Alicia Gbur (“Gbur”), Charles Smith (“Smith”), Rebecca Morton (“Morton”), and Michael Wechsler (“Wechsler”). In support of its allegation that employees mailed ballots that were not counted by the Region, the Employer relies on the testimony of six individuals: Nora Connor (“Connor”), Jacob Benattia (“Benattia”), Allison

Howard (“Howard”), Jill Sinclair (“Sinclair”), Deborah Moe (Mitchell) (“Moe”), and Zachary Wozniak (“Wozniak”).⁴

D. The Administrative Law Judge’s decision and the Employer’s Exceptions.

As shown by the ALJ’s detailed decision in light of the thorough record, the Employer did not meet its heavy burden of proving that the election should be set aside and a second election ordered. The Employer’s exceptions to the ALJ’s decision broadly attack the ALJ’s (i) credibility and fact determinations and (ii) legal conclusions. The ALJ’s findings regarding each individual who was allegedly disenfranchised and the Employer’s resulting exceptions are summarized below.

i. Zachary Wozniak and Rebecca Morton

The ALJ *twice* concluded that Wozniak and Morton were not eligible to receive mail ballots and that it was therefore “of no consequence” that they did not receive such ballots. (ALJD at 6.)

The ALJ found first, in an interlocutory order prior to the close of the Hearing, that Wozniak and Morton could not have been disenfranchised because they were not eligible to vote by mail. (See Bd. Ex. 1(v) (Order of Hon. Raymond Green, August 8, 2011; Tr. 280) (“The

⁴ The Employer also initially alleged that a seventh individual, Jamie Iracleanos (“Iracleanos”), mailed a ballot that was not counted. However, no evidence whatsoever was produced in support of its claim that Iracleanos was disenfranchised. (See ALJD at 3, n.1.) It should also be noted that problems with Iracleanous’ balloting originated with the Kirkstall-produced mail-ballot list. The record shows that Kirkstall provided, “Lake Mary, Florida 32749” as Iracleanous’ city. (Pet. Ex. 3; Tr. 377-78.) The actual zip code for Iracleanous’ address is 32746. (Er. Ex. 11; Tr. 377-78.) Once the Region was provided with the correct zip code for Iracleanos, it promptly sent him a replacement ballot—by overnight mail—and confirmed delivery of that ballot. (See ALJD at 3; Tr. 407-8; Bd. Ex. 5.)

evidence has already shown that two of the people who allegedly did not receive ballots, Rebecca Morton and Zachary Wozniak, were not eligible to receive mail ballots.”.) In his decision, the ALJ again reiterated that pursuant to the terms of the Stipulation, neither of these voters was entitled to receive a mail ballot. With respect to Wozniak, the ALJ further noted that “the only reason that Wozniak asked for a mail ballot is that he showed up late at the manual ballot election after it was over.” (ALJD at 6.)

The Employer excepts to the ALJ’s decision on Morton and Wozniak arguing, incredibly, that they *were* entitled to mail ballots. The Employer urges this conclusion in spite of the clear language of the Stipulation that restricted mail voting to employees, (i) who were no longer performing work for the Employer on November 30, 2010, or (ii) performing work, offsite (outside of New York City) on November 30, 2010. (Pet. Ex. 2, ¶ 12.) The ALJ held that both Morton and Wozniak were working in the New York City area and were employed by the Employer on November 30, 2010, and furthermore, “[n]either party requested that these two individuals be sent a mail ballot.” (ALJD at 6.) The Employer contends, however, that the ALJ erred in finding Morton and Wozniak ineligible to vote by mail because “an employee scheduled to vote in person could have voted by mail.” (Er. Br. at 36.)

ii. Charles Smith.

The ALJ’s decision similarly provides that Smith was ineligible to vote by any means, let alone by mail. (ALJD at 6.) In that regard, the ALJ relied on uncontroverted documentary evidence, in the form of Kirkstall’s payroll records. (Id.) The records establish that Smith only worked 33.6 hours for Kirkstall during the eligibility period, far less than the 100 that were required. (Id.; see also Tr. 468; Pet. Ex. 26.) “Accordingly, his alleged failure to receive a mail

ballot was irrelevant.” (Id.) The Employer excepts, arguing that Smith was “listed on the *Excelsior* list and was not challenged” and was therefore eligible to vote. (Er. Br. at 37.)

iii. Alicia Gbur and Michael Wechsler.

The Employer offered evidence that Gbur and Wechsler never received a mail ballot from the Region. However, on the basis of their respective testimonies, the ALJ found that Gbur and Wechsler did receive a ballot and by their own fault, disposed of it instead of completing it and mailing it back. (ALJD at 7.) The record also establishes that neither Gbur nor Wechsler contacted the Region to request a duplicate mail ballot. (Tr. 171-173, 293, 301.)

As for Gbur, the ALJ found, “after listening to her testimony and reviewing various documents relating to her,” that she received a ballot, but discarded it rather than exercising her voting privilege. (ALJD at 6.) The Employer’s exceptions charge that the ALJ erred in failing to credit Gbur’s testimony (in spite of the rebuttal of that testimony by other record evidence). (Er. Br. at 24-25.)

The ALJ found that Wechsler was not a truthful witness. (ALJD at 7.) Based on the ALJ’s view of the record as a whole, he found that Wechsler’s testimony was in part “simply not true.” (Id.) Notably, portions of Wechsler’s testimony were totally contradicted by documentary evidence. (Id.) Wechsler, the ALJ found, was also away from home for several days at the time his ballot would have been received (the week prior to the 2010 Thanksgiving holiday). (Id.) The record shows that he receives large quantities of mail at his home and that on the basis of these facts it was more likely than not that he received a ballot, yet it was swept up and discarded. (Id.)

With respect to Wechsler, the Employer argues that another conclusion is more likely—namely that Wechsler did not receive a ballot because of an error by the Region. (Er. Br. at 24-25.) That conclusory assertion is belied by the fact that the Region sent ballots to each and every voter on the mail ballot list. (Tr. 289-90.)

iv. Jacob Benattia and Jill Sinclair.

The ALJ discredited both Benattia’s and Sinclair’s testimony that they each returned a mail ballot. He noted that each witness was simply unable to recall various material facts about the balloting process. Benattia, for example, when asked about the “details of the mailing that he received from the NLRB, his memory was not so good. He could not recall how many envelopes were in the mailing, whether there were any instructions enclosed, or whether items were in any colors other than white.” (ALJD at 7.)

Sinclair, similarly had a poor recollection of the circumstances surrounding the election. (ALJD at 7-9.) The ALJ noted that Sinclair’s apparent ability to remember sending in a ballot could not be squared with her inability to remember other material facts, such as how she learned that her ballot was at issue. (Id.) “Testifying about the surrounding details,” the ALJ found, “seems to have been rather ... difficult” for Sinclair. (Id. at 9.)

The ALJ’s decision also provided a footnote regarding the slanted, self-interest of these employees and the “possibility that an employee in this type of situation might plausibly seek to curry favor with [] management people who can determine if he or she will be employed by the Company in the future.” (Id. at 7, n.6.)

The Employer’s exceptions urge simply that the ALJ erred in failing to credit the testimony of these two witnesses. Yet, the Employer’s exceptions nevertheless fail to point out

any specific evidence of Board conduct that resulted in the ballots of these employees not being counted, even if their testimony is to be credited. This, like the Employer's other exceptions, lacks merit and should be overruled.

v. The remaining evidence: Allison Howard, Nora Connor, and Deborah Moe (Mitchell)

With respect to the remaining individuals, Connor, Howard, and Moe, the ALJ concluded that "there is evidence that ... they mailed ballots that were not received by the Board's Regional Office." (ALJD at 9.) The decision thus makes plain that any irregularities in the processing of those mail ballots was not the result of errors by the Region, but by possible imperfections in the mail system. (See also ALJD at 2.) (There is no "evidence of misconduct by the Board's Regional Office in the manner in which this election was conducted.") Having made the above findings of fact, the ALJ concluded that these remaining individuals, assuming their entire testimony could be credited and they had returned ballots to the Region as they alleged, could not have affected the results of the election. (ALJD at 9.)

The Employer responds with a catch-all exception stating "the Judge erred in finding that the Objections have no merit..." and further alleging that the ALJ "erred in finding that the mail ballots cast by Nora Connor, Deborah [Moe] Mitchell and Allison Howard could not affect the outcome of the election." (Excepts. ¶¶ 25-26.) Stated simply: Kirkstall's objections do not have merit, and the ALJ's determinations must stand.

STANDARD OF REVIEW

In ruling on exceptions the Board reviews the entire record in light of the exceptions and briefs. Regional Emergency Medical Services, 354 NLRB No. 20 slip op. at 1 (2009). It is well-settled that "[r]epresentation elections are not lightly set aside." Affiliated Computer Services

Inc., 355 NLRB No. 163 slip op. at *1 (2010). ([T]he burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one....”) Sonoma Health Care Center, 342 NLRB 933, 933 (2004). See also NLRB v. Black Bull Carting Inc., 29 F.3d 44, 46 (2d Cir. 1994) (“A party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden.”).

The facts must raise a reasonable doubt as to the fairness and validity of the election. Polymers, Inc., 174 NLRB 282 (1969). The objecting party does not succeed in voiding election results by simply alleging that the election “fall[s] short of perfection.” NLRB v. Duriron Co., Inc., 978 F.2d 254, 256-57 (6th Cir. 1992). It is not “sufficient for a party to show merely a ‘possibility’ that the election was unfair.” Black Bull Carting, 29 F.3d at 47. Here, the Employer fails to carry its “heavy” burden, because its evidence, as the ALJ properly found, does not show that the election results should be overturned.

The Employer has excepted to several of the ALJ’s findings on the basis that the credibility resolutions in support of those findings are incorrect. It is axiomatic that the Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enforced, 188 F.2d 362 (3d Cir. 1951). See also Mercedes-Benz of San Diego, 357 NLRB No. 67 slip op. at *2 (2011), citing Stretch-Tex Co., 118 NLRB 1359, 1361 (1957) (administrative law judge sitting as hearing officer). Here, the ALJ’s findings on all material matters are not only correct, but are also consistent with the evidence and soundly based on the testimony of witnesses.

ARGUMENT

- A. The Employer's exceptions to the factual analysis and conclusions of the ALJ lack merit. The record fully supports the ALJ's determinations and his credibility resolutions must be upheld.**
(Exceps. ¶¶ 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24)

The credibility findings of the ALJ in this case should not be reversed. Such findings are entitled to deference from the Board, and there is no basis for upsetting them. As provided above, those determinations are given great weight particularly where, as here, they are thoroughly reasoned.⁵ The Employer also alleges that various portions of the ALJ's findings are unsupported by the record. In contrast to the speculative conclusions that the Employer derives and asserts in connection with its exceptions, the ALJ's findings are anchored firmly to facts in the record.

This case thus differs drastically from others in which the Board has set aside an ALJ's resolutions. For example, in E.S. Sutton Realty, 336 NLRB 405, 407 (2001), the Board found a clear preponderance of all the relevant evidence required reversal of the ALJ's findings where the judge relied on documentary evidence that "she herself described as inaccurate and incomplete," to the exclusion of witness testimony. E.S. Sutton, 336 NLRB at 405. The Board noted that, witness "testimony was inconsistent with the record evidence, although the judge mistakenly concluded that this was immaterial." Id. at 406. The ALJ in this case has not made glaring errors such as those. As made clear in his decision, he carefully weighed the record as a whole in reaching his determinations. (See ALJD at 9.)

⁵ Keep in mind that the Employer endeavors to overturn the ALJ's credibility resolutions by its heavy reliance on the testimony of the discredited witnesses themselves. (For example, "Mr. Wechsler testified definitively and without contraction that he did not receive a ballot." (Er. Br. at 24.)) Such reliance represents the Employer's mere disagreement with the ALJ's resolutions, yet provides no evidence in favor of overturning them.

i. The ALJ properly discredited the testimony of Jacob Bennatia and Jill Sinclair.

The ALJ, in light of the testimony elicited from Bennatia and Sinclair, could not conclude that they returned a ballot to the Region they alleged. The ALJ's determinations regarding Bennatia and Sinclair should be sustained because, as he noted, neither witness demonstrated a complete or reliable recollection of the events surrounding the election. In addition to their lack of memory, the ALJ further found that employees such as these, who work on a freelance basis may testify in a way which makes their future employment more likely, e.g., in a way that is sympathetic to the Employer. (ALJD at 7, n.6.) The ALJ is unconditionally permitted to base his credibility determinations on a witness's memory or his perceived bias. E.g., Gibraltar Steel Corporation, 323 NLRB 601, 601 n.4 (1997) (Adopting hearing officer's credibility determination in objections hearing where witnesses' "partisan interest ... general memory for detail ... conflicting testimony ... and self-serving answers" were considered.) (emphasis added).

Bennatia's testimony, the ALJ found, does not plausibly lead to the inference that he actually returned a mail ballot. As the ALJ noted, "[h]e could not recall how many envelopes were in the mailing, whether there were any instructions enclosed, or whether the items were in any colors other than white." (ALJD at 7.) These conclusions are fully supported by the record. (See Tr. 206-208.) Bennatia also could not remember with certainty whether a ballot was even among the items in the voter kit. (Tr. 207.) He could not remember the address that the ballot was to be mailed to. (Tr. 219.) Nor could he remember the date that he mailed the ballot. (Tr. 221-22.) Furthermore, the ALJ's conclusion that he was a freelancer who does not have a permanent position is fully established by the record. (Tr. 225-26.)

Even more telling is Bennatia's testimony that he "signed a couple of papers," though could not remember "what [he] was signing exactly." (Tr. 208.) This is a secret ballot election. Voters would obviously have no reason to sign any "papers." Voters are required to sign the identification stub on the rear of the yellow ballot return envelope. Bennatia, however, stated that he signed some "papers." (Id.) The Employer's assertion that Benattia signed the ballot envelope is pure speculation. (See Er. Br. at 33.) It cites no record testimony to support its claim that Benattia signed the envelope; it simply makes that assumption. The Employer had ample opportunities to clarify the precise document that Benattia signed by questioning him about that topic on direct examination. A review of the record shows that the Employer failed to do so. Adverse inferences may be drawn where a party refrains from questioning its own witness about matters which would seem sensible and the omission does not seem accidental. See Colorflo Decorator Products, Inc., 228 NLRB 408, 410 (1977). Such an inference is appropriate here.

In sum, in light of Benattia's indistinct recollections, he was properly discredited. On the basis of this record, it cannot be said that a clear preponderance of all the relevant evidence compels a different conclusion.

With respect to Sinclair, the ALJ found that her recollection about many basic details of the events surrounding the question of her ballot "was virtually non-existent." (ALJD at 7.) The ALJ quoted from several questions that Sinclair was asked on cross-examination. Sinclair responded, "I don't remember," "I don't know," or "not that I remember," to at least nine substantive questions regarding her contact with Kirkstall, and a sworn witness statement that Kirkstall's attorneys prepared for her to sign in support of its objections. (ALJD at 7-9.; see also Pet. Ex. 9-10; Tr. at 103, 105-06, 109.) As just one example, Kirkstall's in-house counsel asked

Sinclair to sign and return her sworn witness statement to him by FedEx delivery. The statement would in turn be submitted to an agency of the federal government. Yet Sinclair had no recollection whatsoever of that correspondence. (ALJD at 7-9.)

In its exceptions, the Employer simply disregards the ALJ's findings that Sinclair's testimony was incomplete and therefore unreliable. Instead, it insists that her testimony should be credited because of her alleged "uncontroverted" statements that she dropped a ballot in the mail. However, the Employer relies only on discrete answers given to a subset of questions during her live testimony. If, as is the case here, the witness evinces general lack of memory for detail, her testimony should not be credited. See NLRB Hearing Officer's Guide, pp. 168-69, citing, Universal Camera v. NLRB, 340 U.S. 474 (1951). (Noting importance of "specificity of the witness' testimony; how detailed it was; its vagueness . . . whether the witness provided conclusionary responses or implausible explanations.")

Even assuming the record did not provide such a complete picture of these witnesses' failing memories, the ALJ is not obligated to detail all of the intricacies of his credibility resolutions. The Board may find that "there are substantial evidentiary factors in support of the Hearing Officer's credibility finding which [she] failed to note specifically in [her] report." Triple A Machine Shop, Inc., 235 NLRB 208, 209 (1978). Here, it is plain that the ALJ based his decision on "the record as a whole." (ALJD at 9.)

The Employer also suggests that the ALJ's conclusions regarding Benattia and Sinclair are not entitled to deference because he made no express findings on their demeanor. (Er. Br. at 31-33.) The Employer misunderstands and exaggerates the Board's emphasis on demeanor-based determinations. Even assuming that the ALJ's conclusions were not based on witnesses'

demeanor, the conclusions are still due great weight. “[T]he Board should reverse a judge’s credibility resolutions only in rare cases.” Sutton Realty, 336 NLRB at 405, n.1 (2001). Indeed, the Board acknowledges that ultimately “where demeanor is not determinative, an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, ‘and reasonable inferences which may be drawn from the record as a whole.’” Daikichi Sushi, 335 NLRB 622, 623 (2001) quoting, Shen Automotive Dealership Group, 321 NLRB 586, 589 (1996). As the Board found in Daikichi Sushi, “[t]his is exactly what the judge did here.” Id.

As noted above, the ALJ here did not resolve credibility on the basis of the employees’ lack of memory alone, he also considered “the record as a whole” Id. In this case, the freelance nature of the witnesses’ employment relationship is an important factor. As noted above, the ALJ found it inherently probable that witnesses were testifying in a way that they believed would favor the Employer, with whom they may seek employment again in the future.⁶ The Board has recognized, “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.” The Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069, 1069 (2004) (citation omitted). Here, a related but inverse condition is at play. These employees, instead of testifying adversely to their pecuniary interests, have acted in support of their professional well-being by testifying favorably for the Employer. Therefore, that testimony is unlikely to be reliable. It is thus reasonable to infer, on the basis of the record in this case that these employees had a self-interest in mind during the proceedings.

⁶ When asked on cross-examination if he hoped to work for Kirkstall again, Benattia, for example testified “I’m a freelancer so I hope to work, period, for any Company.” (Tr. 225-26.)

ii. The ALJ correctly concluded that Alicia Gbur and Michael Wechsler received a ballot, contrary to their unreliable testimony

The ALJ's determination that Gbur and Wechsler discarded the mail ballots that the Region sent them is amply supported by the record. With respect to Gbur, the ALJ ruled, "[a]fter listening to her testimony and reviewing various documents relating to her situation, I conclude that she received a ballot but never mailed it back." (ALJD at 6.) The ALJ found it probable that Gbur "mixed the ballot up with her old newspapers" and threw it out in the trash. (*Id.* at 7.) The ALJ further noted that Gbur did not sign a witness statement about the election. (*Id.*) He thus inferred that she failed to sign because she was not sure whether she (a) received a ballot and threw it out, or (b) did not receive a ballot. The Employer takes exception to these findings, alleging variously, that Gbur may have thrown away a duplicate ballot but not an initial ballot, and that she did not, contrary to the ALJ's finding, fail to sign a witness statement. (Er. Br. at 22-24.)

The ALJ's credibility resolution regarding Gbur is due deference. His findings were obviously based on her demeanor when testifying. The decision makes plain that his finding was made on the basis of "listening to her testimony." (ALJD at 6.) In so noting, the ALJ signals that he has inherently based his determination, in part, on Gbur's demeanor. See e.g. Triple A Machine Shop, Inc., 235 NLRB at 209 ("[W]e believe it is appropriate to infer that the Hearing Officer found the testimonial demeanor of [witnesses] to be persuasive of their veracity."). Where the ALJ has expressly relied on his impressions of the witness in this way, his credibility determinations should not be disturbed.

Furthermore, contrary to the Employer's assertion, the record plainly establishes facts upon which the ALJ could conclude that Gbur threw away her ballot with some newspapers.

Documentary evidence conclusively supports this determination. On December 13, following the first tally of ballots in this case, Kirkstall executive producer Michael Sheridan wrote the following in an email about Gbur's ballot: "either she never received it or it got caught in a pile of newspapers and she threw it out." (Pet. Ex. 16.)

Gbur's testimony confirms that she had such a conversation with Sheridan. (Tr. 174-75.) Ultimately, in response to questions at the Hearing, Gbur *acknowledged* that she received a ballot but she did not know what happened to her ballot, at which point her testimony on that issue ceased. The transcript provides,

JUDGE GREEN: Did you throw it out or don't? [*sic*]

THE WITNESS: I don't know. I don't recall.

JUDGE GREEN: All right. So you don't know what happened to the ballot you received.

THE WITNESS: Correct, correct.

JUDGE GREEN: All right. That's probably good enough.

(Tr. 175.)

On the basis of this record, the ALJ's credibility resolutions must stand. He properly inferred that Gbur's ballot was thrown away. Regardless of whether she threw away a duplicate ballot, or her initial ballot, her failure to vote was the result of her own conduct, not the Region's election procedures. Objections cannot be sustained where an employee's failure to vote is the result of his own conduct. See Berryfast, Inc., 265 NLRB 82, 82 (1982) (Objection overruled where employee's "own conduct was instrumental in her not voting ... she did not show up at the plant in person and attempt to vote."). Election results cannot be overturned on the basis that employees simply fail to exercise their right to vote.

With respect to Wechsler, the ALJ also concluded that the portion of his testimony asserting that he never received a ballot from the Board cannot be credited. The ALJ found it probable that Wechsler's ballot arrived at his home and was "simply discarded without being opened." (ALJD at 7.) The ALJ based that finding on the following facts: "he owns his own business which he operates out of his home;" he was in California "at around the time the ballot would have been received;" he "receives a great deal of mail: personal, business and 'junk' mail." (Id.) The Employer nonetheless excepts, asserting that the ALJ even in spite of the record facts he recites, has "speculated." (Er. Br. at 24-25.) As discussed above, the Judge may properly make credibility determinations on the basis of "inherent probabilities." Daikichi Sushi, 335 NLRB at 623.

Furthermore, as made clear by the record, the testimony of Wechsler was inconsistent with other documentary evidence—a fact that the Employer failed to mention in its argument in favor of his testimony. The ALJ found that Wechsler "testified that ... he was not even aware that there was an election being held at Kirkstall." (ALJD at 7.) However, the ALJ observed, that "assertion is simply not true inasmuch as the unequivocal evidence shows that Richard Vagg, an executive producer sent a text message" notifying Wechsler that he would be receiving a ballot. (Id.) The ALJ thus chose to credit reliable documentary evidence over Wechsler, and in turn make a determination on Wechsler's truthfulness. Sutton Realty, 336 NLRB at 407 (2001) (Testimony that was inconsistent with documentary evidence "should have given [ALJ] pause about [witness's] credibility in general."). Additionally, Wechsler's testimony was inconsistent with a witness statement he signed and offered in support of the Employer's objections. His statement provides that, "I was not out of town for any extended period of time

from November 17 to the present....” (Pet. Ex. 8.)⁷ His testimony at the hearing contradicts that statement. As the ALJ’s decision noted, Wechsler testified that he was actually in Los Angeles for “about three days,” “right before Thanksgiving.” Testimony that conflicts with prior written statements obviously detracts greatly from a witness’s credibility. E.g. Postal Service, 218 NLRB 966, 967 (1975) (ALJ’s credibility resolutions rejected by the Board where credited testimony “was in direct conflict with [witness’s] earlier affidavit.”) The ALJ thus had ample reasons to discredit Wechsler’s.

Finally, Wechsler’s partisan attitude also shows that his testimony was sharply slanted in favor of the Employer. Kirkstall executive producer Richard Vagg testified he “knew” Wechsler would sign a witness statement in support of the Employer’s objections. (Pet. Ex. 31; Tr. 548-49; see also Pet. Ex. 6.) Vagg obviously believed that Wechsler would hastily join in the Employer’s efforts to overturn the election results. Wechsler’s partisan interest is even more abundantly clear in light of additional documentary evidence, namely, text messages with Vagg in which Wechsler indicates his voting preferences. (See Pet. Ex. 6; see also Gibraltar Steel, 323 NLRB at 601 n.4 (1997) (“[P]artisan interest” a basis for determining credibility).)

The record regarding Gbur and Wechsler thus fully supports the ALJ’s factual determination, and his resolutions regarding their credibility must be sustained. Consequently, their testimony provides no evidence upon which it could be plausibly inferred that the Region’s conduct of the election resulted in their nonreceipt of ballots. The creditable and more

⁷ Wechsler’s statement is undated, but the record shows that Wechsler signed it on or about December 20, 2010. (See Pet. Ex. 6.)

compelling evidence establishes that Region mailed a voter kit to each and every individual listed on the mail-ballot list. (Tr. 291.)⁸

B. The Employer’s arguments that (i) Charles Smith is an eligible voter and (ii) his testimony should be credited, must both be rejected. (Exceps. ¶¶ 15, 16)

The Employer’s arguments that Smith is eligible to vote, and that the circumstances surrounding his ballot are relevant, are both unavailing. The Board has held that objections cannot be sustained when an ineligible voter was subject to an election impropriety. See Hollingsworth Management Service, 342 NLRB 556, 556 (2004). As discussed above, the ALJ repeatedly indicated that Charles Smith was not an eligible voter and he was thus ineligible to receive a ballot by any means. (See Attachment A; ALJD at 6.) The Stipulation provides that, “[e]ligible to vote are those individuals ... who worked 100 hours or more in the 34 weeks prior to October 9, 2010.” (Pet. Ex. 2, ¶ 11.) The record establishes, and the ALJ found that Smith worked only 33.6 hours for Kirkstall during the 34-week eligibility period. (Tr. 467; Pet. Ex. 26.)

⁸ In connection with its claims that Gbur and Wechsler never received a ballot, the Employer cites several cases, none of which are applicable here. (See Er. Br. at 28.) In North American Aviation, 81 NLRB 1046 (1949), the Board overturned an election when a “chain of” several egregious events taken together “create[d] a reasonable doubt” as to the fairness of employees’ opportunities to vote in a mail ballot election (for example, the ballot return envelopes lacked postage). No such similar factors are present here. In Star Baking, 119 NLRB 835, 836 (1957), the Board directed a new election where an investigation showed that an eligible employee was “not furnished with a ballot” and therefore “did not have an opportunity to vote in the election.” Here, however, the record conclusively establishes that the Region sent a ballot to each voter on the mail ballot list. (Tr. 289-90.) In Security ‘76, 272 NLRB 201 (1984), a Regional Office erred by not taking remedial action when “7 [mail ballots] were returned by the Postal Service as undeliverable.” Kirkstall’s reliance on Security ‘76 is perplexing since there were *no* ballots returned to the Region as undeliverable in this case. (Tr. 291.)

The Employer contends, stunningly, that despite its acknowledgment that Smith worked less than the requisite number of hours, he “was eligible to vote.” (Er. Br. at 37.) The Employer argues in its exceptions that Smith was included on the *Excelsior* list. (*Id.*) However, inclusion or exclusion from the *Excelsior* list is simply not determinative of voter eligibility. The Employer apparently confuses an *Excelsior* list with a *Norris-Thermador* list. See Norris-Thermador Corp., 119 NLRB 1301 (1958); Dacas Nursing Support Sys. v. NLRB, 7 F.3d 511, 514 (6th Cir. 1993) (“Unlike an *Excelsior* list ... under a *Norris-Thermador* agreement, the employee list itself constitutes the stipulation ... Once executed, the agreement normally is dispositive of questions as to voter inclusion and preclusion.”).

The Employer makes an additional unconvincing argument that the ALJ’s finding regarding Smith must be overturned, because the WGAE has asserted a post-election challenge to Smith’s eligibility. (Er. Br. at 38.) That contention is nonsensical. No party had the opportunity to challenge Smith’s ballot, because he did not cast a ballot. The WGAE did not present evidence of Smith’s work-hours as a means of challenging Smith’s eligibility; it was offered to rebut the Employer’s allegation that Smith was an individual who was “disenfranchised” by the Region’s conduct. As the ALJ correctly noted, because Smith was not entitled to vote in the first place, his testimony was irrelevant. (ALJD at 6.)

Moreover, the Employer’s conduct in these proceedings shows its understanding that Smith was not eligible to vote. At every step of the way in the pursuit of its objections, Kirkstall deliberately sought to obscure from the Board the fact that Smith did not work the requisite number of hours during the voter eligibility period, thus rendering him ineligible to vote. As the ALJ noted, the Employer represented to the Region in its January 6, 2011 letter in support of its objections that Smith “was an eligible voter who did not receive a ballot.” (ALJD at 6, n.4.)

Yet, it knew at that time that “Smith had not worked sufficient hours within the prescribed time period to be an eligible voter.” (*Id.*) Further, Jason Guberman, Kirkstall’s in-house attorney, acknowledged on cross examination that the witness statement that he prepared for Smith to sign in support of the Employer’s exceptions was deceptively drafted in a way that would mask his ineligibility. (Tr. 476-77.) Smith’s statement provides only that, “I worked more than 100 hours...for the Employer,” without specifying whether those 100 hours were within the 34-week eligibility period. (Pet. Ex. 11.) (Unlike the other witness statements that Kirkstall prepared listing specific dates of employment.) (*See e.g.* Pet. Ex. 7.)⁹

In sum, the Employer’s contentions that Smith was an eligible voter and that his testimony should be found relevant and credible are baseless.

**C. The Employer’s reading of the Stipulation with respect to the mail balloting process is plainly belied by the Stipulation’s language and is inconsistent with established Board election requirements.
(Exceps. ¶¶ 11, 12, 13, 14)**

The Employer, incredibly, has attempted to persuade the ALJ and now the Board that the Stipulation allows any employee to vote by mail, not only those listed on the mail-ballot list. Its argument is disingenuous and unintelligible and must be rejected out of hand.¹⁰ The Employer argues that employees Morton and Wozniak were eligible to vote by mail because the Stipulation

⁹ Moreover, when the WGAE issued a subpoena *duces tecum* in this proceeding seeking production of Smith’s pay records during the voter eligibility period, the Employer again sought to obscure Smith’s ineligibility by petitioning (unsuccessfully) to revoke the subpoena. (*See* Bd. Ex. 1(t).)

¹⁰ Having been caught lying about the mail-voting eligibility of Smith, Wozniak and Morton, the WGAE can only conclude that the Employer continues to pursue this absurd argument as a way of justifying its untruthfulness.

“contains no restriction on an employee’s ability to vote by mail ballot,” and “an employee scheduled to vote in person could have voted by mail.” (Er. Br. at 36.)

The Employer’s argument is simply frivolous. The Stipulation states on its face that the parties agreed to a “Mixed Mail-Manual Election,” and included detailed and unambiguous criteria as to which voters were eligible to vote by mail. (Pet. Ex. 2, ¶ 12.) That is what the parties voluntarily agreed to. Had the Employer wanted to allow every employee to vote by mail, it could have so agreed.

Moreover, the fundamental purpose of a mixed-mail manual election is to permit certain designated employees an opportunity to vote by mail while others are required to vote manually. See NLRB Casehandling Manual (Part Two) Representation Proceedings § 11335.2, citing, North American Plastics Corp., 326 NLRB 835 (1998). (“A mixed manual-mail election is an election in which one portion of the unit votes manually and the other portion votes by mail ballot.”) (Emphasis added.) By definition, a mixed mail-manual election thus restricts certain employees to manual voting, while others are designated for mail.

The Employer’s incorrect reading of the Stipulation provides that *any* employee can vote by mail if she so chooses. That contention also runs contrary to the Board’s bright-line rule that it “does not provide absentee ballots.” See id. at § 11302.4 citing, NLRB v. Cedar Tree Press, Inc., 169 F.3d 794 (3d Cir. 1999); KRCA-TV, 271 NLRB 1288 (1984); Wilson & Co., 37 NLRB 944 (1941). The Employer’s construction of the Stipulation would, in effect, require the Board to provide absentee ballots—a procedure that is obviously unpermitted by Board law and guidelines. The ALJ, thus correctly acknowledged that Wozniak and Morton were ineligible to

vote by mail and evidence of their mail balloting process was irrelevant to the ultimate inquiry of whether the fairness of the election can be called into doubt.

Finally, the Employer also contends that two employees, Jessica May and Andrea Mihalko, were not on the mail ballot list, yet voted by mail. (Er. Br. at 36; Pet. Ex. 3.) That means, the Employer argues, that because these two broke the mold, any other employee could have followed. The Employer thus contends that the unambiguous language in the Stipulation is thus abrogated by evidence that two employees voted by mail even though they were not designated to do so. Such a contention cannot be taken seriously. The clear terms of the Stipulation must obviously be followed.

Furthermore, it was only due to the inadvertence of the WGAE's election observer that these designated manual votes were not challenged on the basis that they cast mail ballots. The Employer notes that the Region also failed to challenge their ballots. However, the Employer demonstrates a misunderstanding of the Board's challenge procedures. Board agents are restricted to challenging voters that are absent from the eligibility list entirely. See NLRB Casehandling Manual (Part Two) Representation Proceedings § 11338.2(b). Otherwise, "the Board agent will not make challenges for parties when such parties have observers present." Id. Thus, the Board agent had no occasion to challenge these two individuals. They inadvertently voted by mail due to the fault of the parties, not the Region. The parties' inadvertence therefore proves nothing in furtherance of Kirkstall's allegation of misconduct by the Board.

D. The election was conducted by the Region without irregularity or misconduct, in accordance with all standard procedures. Its conduct therefore cannot be called into doubt.
(Exceps. ¶¶ 1, 2, 3, 25, 26)

Upon mailing the ballots in this case, the record establishes that the Region followed all of its ordinary mail-ballot election procedures. The Employer thus cannot be heard to argue that the Region “instituted no procedures to ensure that mail ballots were delivered to eligible voters.” (Er. Br. at 25.) The Employer points to no authority for its contention that the Region was obligated to use additional safeguards aside from those it ordinarily sets in place. As noted above, the ALJ found that there was no “evidence of misconduct by the Board’s Regional Office in the Manner in which this election was conducted.” (ALJD at 2.) In short, the Board has done nothing wrong. The Employer offers no specific evidence that the conduct of the Region’s agents compromised the integrity of the election process.

i. The Employer applies the wrong standard of review with respect to allegations of misconduct by the Board.

The Employer urges that Garda World Security Corp., 356 NLRB No. 91 slip op at *2 (2011) provides the appropriate standard to be applied in examining post-election objections to Board agent conduct that may have resulted in voter disenfranchisement. The Garda Board announced a standard that could be applied when an “election irregularity is sufficient to affect the election outcome.” Id. The Garda rule, however, is only a permutation of a standard that the Board applies, “when the number of employees possibly disenfranchised due to polls being closed when scheduled to be open is sufficient to affect the election outcome.” Wolverine Dispatch, Inc., 321 NLRB 796 (1996). It is thus clear first, that this line of cases is only applicable to manual elections. Second, these cases are inapplicable here since the Employer has provided no specific evidence of conduct by a Board agent (let alone conduct analogous to

unscheduled poll closings) that resulted in the possible disenfranchisement of any eligible voter in this election.

The current controlling standard applicable to this case is not stated in Garda. It can be found in the Board's more recent decision in Mercedes-Benz of San Diego, 357 NLRB No. 67 slip op. at *2 (2011). The Board there held that in objection cases alleging Board misconduct, "[t]he only question properly before the Board...is whether the Board agent's actions ... rais[e] a 'reasonable doubt as to the fairness and validity of the election.'" Id. citing, Rheem Mfg. Co., 309 NLRB 459, 460 (1992) quoting, Polymers, Inc., 174 NLRB 282 (1969), enforced, 414 F.2d 999 (2d Cir. 1969).

Notably, in Garda, Chairman Liebman observed that a better approach to examining cases involving Board agent misconduct would be to determine whether based on the facts, "the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." Garda, 356 NLRB No. 91 slip op at *2 n.4, citing Polymers, Inc., 174 NLRB 282, 282 fn.6 (1969), enfd., 414 F.2d 999 (2d Cir. 1969), cert. denied, 396 U.S. 1010 (1970). In Garda, though, "no party urged the Board to adopt that standard." Id. In light of Mercedes-Benz of San Diego, it appears that the Board has now adopted the Polymers inquiry in considering objections based on alleged Board agent misconduct.

In Polymers, the court recognized the consequences of an inflexible rule that ignores the facts of each case:

A per se rule [setting an election aside if there is a] possibility [of irregularity] would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained.

Polymers, 414 F.2d at 1004.

Accordingly, in light of the Board's authority, the appropriate inquiry in this case is whether the Region's conduct raises a reasonable doubt as to the fairness and the validity of the election.¹¹ See also American Medical Response, 356 NLRB No. 42 slip op. at *2 (2010), Member Hayes dissenting ("My colleagues and I agree that, under long-established precedent, the appropriate standard for evaluating objections alleging Board agent misconduct is whether it raises a reasonable doubt as to the fairness and the validity of the election.") (citation omitted).

As the Board noted in Polymers, "the failure to achieve absolute compliance with [election procedures] does not necessarily require that a new election be ordered." 174 NLRB at 282. However, in this case, the Employer has offered no plausible grounds for even beginning that inquiry—it has not offered specific evidence that the Board failed to comply with its election procedures. (ALJD at 2.)

Alternatively, where election irregularities are not traceable to a party or an agent of the NLRB, the Board has noted that

when the conduct of a party to the election causes an employee to miss his opportunity to vote, the Board will set aside the results of the election if the vote would have been determinative of the outcome of the election. When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to vote is not a basis for setting aside the election.

Waste Mgmt. of Northwest Louisiana, Inc., 326 NLRB 1389, 1389 (1998) (emphasis added).

See also Sahuaro Petroleum, 306 NLRB 586, 587 (1992) (Objections overruled where two

¹¹ The Employer also seeks to rely on Lemco Construction, Inc., 283 NLRB 459, 460 (1987), for the general proposition that election results will be upheld so long as "employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election." However, that case is inapplicable here. As discussed here, the Board has clarified the standard to be applied when a party alleges that the Board's conduct interferes with the election, as the Employer has alleged here.

employees were disenfranchised but “the conditions that caused the disenfranchisement” were not attributable to a party or the Board). Thus, unless the Board’s conduct of the election caused the alleged disenfranchisement of voters in this case, the election results cannot be set aside.

As the ALJ held here, there is “evidence that” Connor, Moe and Howard, “mailed ballots that were not received by the Board’s Regional Office.” (ALJD at 9.) However, the record conclusively establishes that ballots from those individuals were never received by the Region. The election cannot be set aside on these facts because any irregularities were “beyond the control of a party or the Board.” Waste Mgmt. of Northwest Louisiana, 326 NLRB at 1389.

ii. The ALJ’s determinations regarding the Region’s conduct of the election must stand.

The Employer nonetheless excepts to the ALJ’s findings that the Region was harmless in conducting this election and that it engaged in necessary effort to ensure that eligible voters were given an opportunity to vote.

It has long been held that the Board has “a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946). Likewise, Board agents have “broad discretion in deciding the details of an election, and unless he acts arbitrarily or capriciously, the Board will abide by his judgment on these matters.” Mead Southern Wood Products, 337 NLRB 497, 498 (2002) citing, East Texas Pulp & Paper Co., 114 NLRB 885, 887 (1955). The Board’s agents in this case only deviated from the election procedures insofar as they *enabled* more employees to vote rather than limiting the pool. As the ALJ found, the Region, in this case not only followed all standard election procedures with respect to the mail ballot process, it went above the call of duty and strived to ensure that all

voters received a ballot by mail. (ALJD at 2.)¹² The Employer has provided no evidence that the Region deviated from any of its mail ballot processes in a way that raises a reasonable doubt as to the fairness and validity of the election.

As discussed above, the Board and courts have held, “the test is not whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity.” NLRB v. ARA Services, Inc., 717 F.2d 57, 68 (3d Cir. 1983) citing Polymers, Inc., 174 NLRB 282, 283 (1969). See also Sawyer Lumber Co., LLC, 326 NLRB 1331, 1331 (1998) (“When the integrity of the election process is challenged, the Board must decide whether the facts raise a reasonable doubt as to the fairness and validity of the election.”) (internal quotation marks and citation omitted.); see also St. Vincent Hospital, 344 NLRB 586, 587 (2005), quoting Rochester Joint Board v. NLRB, 896 F.2d 24, 27 (2d Cir. 1999) (“[T]here is not a per se rule that representative elections must be set aside following any procedural irregularity.”) (internal quotation marks omitted).

In St. Vincent Hospital, the employer objected to the presence of two unidentified employees together in a manual voting booth at the same time. 344 NLRB at 587. The Board found that though the “incident may not have represented an ideal election condition, we disagree that it compromised the integrity of the election.” Id. Importantly, the Board held that “there was no evidence that [the two employees] communicated or that either observed how the other was marking his or her ballot.” Id. In sum, therefore, there was no evidence to suggest that the irregularity resulted in any damage to the validity or fairness of the election process.

¹² Indeed, the Region completely succeeded in delivering mail ballots to a geographically diverse mail ballot electorate located in 11 different states. (See Pet. Ex. 3.)

The same principles are applicable in this case. The objecting party in St. Vincent pointed out an irregularity—two employees in the voting booth—and asked the Board to find, without further evidence of wrongdoing, a failure of the Board’s processes. Here, the Employer similarly points to an unusual glitch—mail voters allegedly returned ballots that never reached the Region—and asks the Board to conclude, without further evidence of wrongdoing that the Region was inexplicably to blame for that error. The Employer makes no showing that the Board’s actions caused any of those alleged ballots to fall short of their destination. As detailed below, in the present case, as in St. Vincent, “all the record shows” is an abnormality, and “[a]bsent any further showing” the Board should be “unwilling to presume that [the election] was compromised.” Id.

The Employer has not produced any specific evidence that the integrity of the election was compromised in any way by the Region’s conduct. The Employer instead focuses on an incident preceding the tally where a mail ballot from another election had been intermixed (but not counted), among the Kirkstall ballots. The ALJ thoroughly considered that incident in his decision. (See ALJD at 6.) (“There were ballots coming in from employees at two employers. This might explain why at the Kirkstall election count ... a mail ballot from another election was in the bin containing the Kirkstall mail ballots.”) The ALJ also noted that at a later mail ballot tally involving the WGAE as petitioner (the Lion Television election), “two mail ballots showed up that belonged to another election that had occurred much earlier....” (Id.; Tr. 441.) However, the record is abundantly clear that the two ballots that “showed up” were not Kirkstall ballots, nor were they ballots for a WGAE election. (Tr. 441.) That later incident was thus wholly unrelated to the presenting question here—whether there is a reasonable doubt as to the fairness and validity of *this* election.

The Employer contends that these incidents give rise to an assumption that the Region is not generally competent in properly conducting mail ballot elections. However, two isolated incidents cannot establish that the Region has a tendency to misplace ballots and therefore misplaced ballots in this case. Mr. Lewis testified that in the decades that he has worked for Region 2 that he is unaware of any case in which objections were sustained based on the circumstances present in this case. (Tr. 298.) Furthermore, the Board had held that even a series of harmless deviations from election processes do not necessarily require setting aside election results. Kirsch Drapery Hardware, 299 NLRB 363, 364 (1990) quoting Polymers, 174 NLRB at 282 (“deviations from the guidelines ... considered separately or cumulatively [] ‘do not raise a reasonable doubt as to the fairness and validity of the election.’”).

Moreover, objections cannot be sustained whenever a party alleges that the perplexities of the mail system have prevented an employee from voting. See Mission Industries, 283 NLRB 1027, 1027 n.2 (1987) (“[T]he apparent failure of the Regional Office to receive the ballots of Employees B and C ... did not warrant setting aside the election.”). In J. Ray McDermott v. NLRB, 571 F.2d 850, 855 (5th Cir. 1978), cert. denied, 439 U.S. 893, the Fifth Circuit Court of Appeals held that, “[i]t cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery.” The court further recognized that, “[s]uch a rule might unduly deter the use of mail balloting in cases like this in which a mail election, though less readily supervisable than a ballot box election, might prove more representative of, and fairer to, the voting employees.” Id.

If employers and labor organizations faced the possibility that election results would be overturned whenever employees allege that they mailed ballots yet their ballots were never received by a Regional Office, no party to an election agreement would ever agree to an election

by mail. Indeed, in the history of the National Labor Relations Act, the Board has never overturned a representation election on the sole basis that voters sent ballots in the mail and those ballots were not received, and therefore not counted by a Regional Office.

Finally, Kirkstall draws the Board's attention to the Region's apparent delay in sending duplicate ballots to voters in response to the WGAE's requests for such ballots. (Er. Br. at 27.) However, it points to no rule, authority, or even guideline dictating the procedures which the Board must follow in connection with its distribution of duplicate ballots. No procedure was violated thus leading to no conclusion that the election's validity can be called into doubt. As noted above, Board agents are generally allowed "broad discretion" regarding such matters. Southern Wood Products, 337 NLRB at 498. Furthermore, it is inherently implausible that any such delay could raise doubts about the fairness and validity of this election since no late-arriving ballots were received in the mail by the Region after the tally (Tr. 294) and 11 of the 12 individuals for whom the WGAE requested a ballot voted. (Tr. 385, 392-93; Er. Exs. 8, 10, 13.)¹³ While the Employer seems to fault the Region for this inconsequential delay, if any party is to blame, it is the Employer itself. Had the Employer provided correct addresses for those individuals, it would have obviated the need for replacement ballots, and these employees would have received their voter kits in the first instance. A party cannot plausibly object to a condition

¹³ It should also be noted that one week after the mail ballots were sent, the WGAE also requested replacement ballots on behalf of two additional voters (Paula Davenport and Jylian Gunther). (See Er. Exs. 6, 7.) Unlike the other 12 voters for whom the WGAE requested replacement ballots, the addresses provided on the mail ballot list for those two were correct. The Union nonetheless requested replacement ballots as a prophylactic measure, because at the time of WGAE's request, they had not confirmed for the WGAE that they had received their mail ballots. (Tr. 516-19.) (Like the other freelancers in this unit, they travel frequently.) Both cast ballots in the election. (See Er. Ex 15.) Accordingly, the WGAE's requests for replacement ballots for these two voters—both of whom voted—does not demonstrate in any way that the validity or fairness of the election was compromised.

that its own conduct was the root cause of. See Republic Electronics, 266 NLRB 852, 853 (1983) (“[A] party to an election is ordinarily estopped from profiting from its own misconduct....”).

E. The Employer’s contention that the Region’s Notice of Election was flawed is untimely and otherwise lacks merit. (Exceps. ¶¶ 4, 5, 6, 7)

In connection with its argument that eligible voters did not receive a mail ballot, the Employer alleges that the Notices of Election provided to the Employer by the Region did not contain a statement instructing voters on the procedure for requesting a duplicate ballot. (See Er. Exs. 1, 2; Tr. 346-51.) The Employer’s argument fails for several reasons and must be rejected.

First, the Employer did not raise that protest in its December 20, 2010 objections to the Region. (See Bd. Ex. 1(f).) Nor did the Regional Director identify it as an issue in his notice directing a hearing on objections. (See Bd. Ex. 1(l).) Kirkstall raises this issue for the first time in its post-hearing brief to the ALJ, and again here in its exceptions. Such belated objections are not sustainable, and should not be considered. The Employer merely introduced the Notices as evidence, briefly questioned Mr. Lewis about them on cross-examination, and then summarily alleged on the record, that the notices did not instruct the employees to contact the Region and request a replacement ballot if they had not received one. (See Er. Exs. 1, 2; Tr. 346-52.) Such discrete actions, however, hardly constitute full litigation of the issue. The Board has held that a hearing officer errs when considering a new issue in connection with election objections where, “the Regional Director did not identify it as an issue in his order directing hearing ... the hearing officer did not inform the parties he would consider it in his report ... the issue was not fully litigated ... and was wholly unrelated to the issues set for hearing.” Iowa Lamb Co., 275 NLRB 185, 185 (1985). Each of those elements are present in this case. Neither the Regional Director

nor the Employer raised the issue before the Hearing, and it was not fully litigated. At issue in this case are unspecified mistakes by the Region in connection with its mailing and receipt of ballots. Those issues are unrelated to the contents of the Notice of Election. A review of the record also shows that the ALJ did not inform the parties that he would consider claims regarding the Notices. Accordingly, any alleged omissions from the Notices cannot provide a basis for overturning the election results.

In any event, the Employer points to no rule or regulation that requires the Regional Director to include specific language in election notices. Citing no authority, the Employer summarily alleges that “it is the Board’s responsibility to inform voters concerning its procedures, including how to obtain a replacement or duplicate ballot.” (Er. Br. at 43.) The NLRB Casehandling Manual (Part Two) Representation Proceedings § 11336.3—the only detailed guidance that the Board appears to provide regarding mail ballot election Notices—describes language that “*should* appear on the notice of election.” (Emphasis added.) No binding Board rule, however commands that the notice of election *must* state how and when employees may request a mail ballot. In comparison, other notice requirements *must* be met. “Notices *must* be posted by the employer 3 full working days prior to the day of the election and failure to do so shall be grounds for setting the election aside.” *Id.* at § 11314, citing, NLRB Rules and Regulations § 103.20. The Casehandling Manual, furthermore, is not binding authority on the Board, as the Board and courts have repeatedly held. St. George Warehouse, 351 NLRB 961, 971 (2007) (Members Lieberman and Walsh, dissenting). It is only intended to provide operational guidance. *Id.*

Further, the only two eligible mail voters who theoretically could have been affected by a lack of notice regarding replacement ballots were Gbur and Wechsler. And, as noted above, the

ALJ, based on his thorough examination of the record, concluded that Gbur and Wechsler in fact received their ballots. In addition, it is undisputed that Gbur and Wechsler did not work for Kirkstall during the election period, and would not have seen the notice of election posted at the Employer's offices. (Tr. 69-70, 171.) The Board's guidance directs that the Notices should be posted "at the employer's business location frequented by voting employees" NLRB Casehandling Manual (Part Two) Representation Proceedings § 11336.3. Here, however, there were no Kirkstall business locations that were visited, let alone frequented by employees such as Gbur and Wechsler.

Gbur in particular lives in Ferndale, Michigan. (Pet. Ex. 3.) The Employer makes no attempt to explain why or how she would have appeared in Kirkstall's New York City offices at the time the election was being conducted in order to see the posted notice of election. Wechsler lives in Hoboken, New Jersey. (*Id.*) Though he too, as a nonemployee of Kirkstall at the time the election was being conducted, had no reason to enter its New York City offices. Indeed, the NLRB Casehandling Manual (Part Two) Representation Proceedings § 11314.7(b) regarding "persons who are not actually working during the [Notice] posting period," provides only that "Notices should be distributed by mail or in person to eligible . . . voters if the Regional Director thinks this advisable" On the basis of these facts, it cannot be said that an omission from the Notice of Election raises a reasonable doubt as to the fairness and validity of the election.

The Employer cites Antelope Valley Bus Co., Inc., 275 F.3d 1089, 1092 (D.C. Cir. 2002), in support of its claim that the Board erred in posting the election. However, that case undermines rather than supports the Employer's claim. The court in Antelope Valley held that "[e]ven in a manual election it is not necessary to prove actual notice. Reasonable notice is sufficient." 275 F.3d at 1094-95. In light of the circumstances discussed above, reasonable

notice was provided to the voters in this case. It would be unreasonable, on the other hand, to require the Region to post replacement ballot information in a notice of election at the Employer's facility where it would have never reached the very audience that it was intended for (i.e. mail voters employees no longer working for the Employer, or those working offsite).

Moreover, the record shows that both Gbur and Wechsler had actual knowledge of the election. (Tr. 416-19, 546; Pet. Ex. 20.) These voters thus had a higher degree of notice than is required by Board authority. See Antelope Valley, 275 F.3d at 1095 n.7, citing Jowa Sec. Servs., Inc., 269 NLRB 297, 298 (1984) (“The Board has never required that employees receive actual notice of an impending election. Rather, the standard has always been that reasonable measures must be taken to assure that unit employees are aware of their right to exercise freely their franchise This is traditionally accomplished through the posting of the official notice of election in conspicuous places prior to the election.”).

In this case, all of the mail voters including Gbur and Wechsler, received various communications informing them of the election prior to the balloting period. Gbur received emails from the WGAE informing her of the election and specifying steps to take if she had not yet received a ballot. (Pet. Exs. 20, 22.) Wechsler was also made aware that he could anticipate ballot. (Tr. 546.) Most importantly, as noted above, the WGAE sent notices by mail to all individuals on the *Excelsior* list titled, “Your Union Election FAQ.” (Pet. Ex. 19; Tr. 412-14.) That document provides that, “if you need to request a replacement or duplicate ballot contact the NLRB at (212) 264-0300” (the general phone number for Region 2). (Pet. Ex. 19.) WGAE organizer Tharp, who personally mailed the “Your Union Election FAQ” document, testified specifically that it was sent to Gbur and Wechsler. (Tr. 412-14.) None of the WGAE's mailings were returned to the WGAE as undeliverable. (Id.) Nonetheless, neither Gbur nor Wechsler

requested a replacement ballot. (Tr. 171-73, 293, 301.) The Board has noted, in overruling notice-related objections, “[s]ignificantly the [objecting party did not] here contend that the individuals in question did not have actual knowledge at the time of the election.” Rohr Aircraft Corp., 136 NLRB 958, 960 (1962). In that case, the Board also expressly noted that a labor organization that was party to the election “did itself notify” employees of the “Board’s Direction of Election.” Id. Here, the same is true, while actual notice of the process for requesting a duplicate may not be required, the employees at issue in this case had such notice.

CONCLUSION

For the foregoing reasons, and in light of the record as a whole, the Employer’s exceptions are meritless. The Petitioner respectfully requests that the Board reject the exceptions and wholly adopt the ALJ’s findings, conclusions and decision on objections in this case.

Respectfully submitted,

SPIVAK LIPTON LLP
Attorneys for Petitioner
1700 Broadway, 21st Floor
New York, New York 10019
Tel: (212) 765-2100
Fax: (212) 765-8954
Email: egreene@spivaklipton.com

By: 
Eric R. Greene

Dated: New York, New York
October 11, 2011

STATEMENT OF SERVICE

I hereby certify that on October 11, 2011, true copies of Petitioner's Brief in Opposition to the Exceptions Filed by the Employer were served electronically upon the following parties:

J. Patrick Butler, Esq.
Attorneys for Employer
Kauff McGuire & Margolis LLP
950 Third Avenue, 14th Fl.
New York, NY 10022
butler@kmm.com

Elbert Tellem
Acting Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
elbert.tellem@nlrb.gov

Gregory Davis, Esq.
Senior Field Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
greg.davis@nlrb.gov

Rhonda Gottlieb, Esq.
Board Attorney
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
rhonda.gottlieb@nlrb.gov

Dated this 11th day of October, 2011.



ERIC R. GREENE