

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

United States Infrastructure  
Corp. (USIC),

Employer,

and

Ralph Finley,

Petitioner,

and

Case No. 11-RD-000732

Communications Workers of  
America, Local 3682,

Union

ANSWERING BRIEF TO EMPLOYER'S EXCEPTIONS  
TO REGIONAL DIRECTOR'S REPORT AND  
RECOMMENDATIONS ON CHALLENGED BALLOTS

COMES NOW, the Communications Workers of America, Local 3682 (hereinafter "CWA" or the "Union"), pursuant to Section 102.69 of the Board's Rules and Regulations and files this its answering brief to the employers exceptions to the Regional Director's Report and Recommendations on Challenged Ballots. CWA would show that the Regional Director's Report and Recommendations are well supported by the facts and applicable law and are due to be adopted by the Board.

**Question Presented**

Where father and daughter are both eligible voters in a mail ballot election, have the same address, and receive and fill out there ballots at the same time, should their ballots be opened and counted where they inadvertently swapped their return envelopes? The Regional Director answers this question in the affirmative relying on Space Mark, Inc., 325 NLRB 1140 (1998). The Union respectfully submits that her Report and Recommendations are well founded and due to be adopted by the Board.

### **Statement of Facts**

As CWA attempted to negotiate a successor agreement with USIC, the employer engaged in hard bargaining, and Mr. Finley sought to convince his fellow employees that they would get a better deal without a union. He filed the petition in the instant case. Because of the spread out nature of the bargaining unit, the vote was conducted by mail and the count took place on September 28, 2011. Of the ballots cast, 53 were cast for representation, 54 were cast against, and USIC challenged the ballots of employees Maurice Grizzard and his daughter Erin Bass who share the same mailing address. In the circumstances, the employer's challenges to these two ballots make them outcome determinative.

On information and belief, the Region interviewed father and daughter and verified that they received and marked their ballots at the same time and inadvertently swapped the return envelopes. For this reason, at the count, the key number on their outer yellow envelopes did not match their names and did not bear the corresponding signature. This is the entire basis for the employer's 75 exceptions to the Regional Directors Report and Recommendations, 14 page brief, and 20 page evidentiary submission. There is no evidence of fraud or ineligibility. There are no facts to suggest anything but an innocent swapping of return envelopes. Maurice Grizzard and Erin Bass want their votes to count.

### **Argument**

While extolling the virtues of insuring the "integrity of the voting process" and protecting employee rights, one suspects that what is really afoot here is that unless USIC can disenfranchise Maurice Grizzard and Erin Bass, the Union will again be certified as

the employees' bargaining representative and it will have to return to the bargaining table.

The concluding assertion contained at page 12 of the employer's brief that there exists "a reasonable doubt concerning whether only eligible voters participated in the election and whether each of those eligible voters cast only one ballot" goes beyond exalting form over substance; it raises pettifoggery to a new level. What ever happened to fundamental fairness and the application of common sense, particularly as they apply to the protection of rights of eligible voters to cast ballots and have them counted? Nowhere does the employer contend that the signatures are invalid, only that the proper signature is not on the appropriate envelope.

While the employer pays lip service to the recognized standard, whether "reasonable doubt is raised about the fairness or validity of the process," Mission Industries, 283 NLRB 1027 (1987), for the reasons set forth below, it has failed miserably in demonstrating that it has met this standard.

First, despite the employer's claim to the contrary, the Board's Casehandling Manual, Part Two, does not require the result it seeks in this case. Second, the cases cited and relied upon by the employer do not require the result it seeks, either..

The only issues clearly addressed in the Casehandling Manual are unsigned mail ballots and those on which the voter's name is printed and not signed in script, isxsues not found in this case. Moreover, care should be given to consider the "Purpose of the Manual" set forth at the very beginning of the Casehandling Manual which states:

"Although it is expected that the Agency's Regional Directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion,

there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act."

Accordingly, the Casehandling Manual provides scant support for the employer's position.

So what do the cases cited by the employer really say? Brink's Armored Car, 278 NLRB 141 (1986) announced, in *dicta*, that the Board would frown on circumventing the U.S. Mail in a mail ballot election, by allowing an employee on the Excelsior list to hand deliver a mail ballot package to a putative employee not on the list. The Board reasoned, in these circumstances:

"The normal presumption of accurate mail delivery or, alternatively, delivery in person at a Regional Office to a voter with proper identification, would not be available."  
*Id.* At 141.

Mission Industries, 283 NLRB 1027 (1987) is a case where the Board's Regional Office received a mail ballot in a return envelope that was missing the stub that would have reflected the employee's signature and key number. The only identifying information on the return envelope was the postmark "Santa Barbara." The Board Agent at the count voided the ballot. The employer representative at the count observed that there were four employees whose names were not checked off the list of eligible voters. The employer then interrogated all four of these employees obtained statements from them which were submitted to the Regional Director in support of its objections to the election. These statements reflected that two employees claimed to have mailed ballots

(not received) but not from Santa Barbara. One employee who lived in Santa Barbara stated that he did not mail his ballot. The fourth employee, who did not live in Santa Barbara, stated that his wife mailed his ballot in Santa Barbara. The Regional Director concluded that this information was sufficient to identify the fourth voter with the void ballot and recommended that this ballot be opened and counted. The Board declined to adopt this recommendation, in these circumstances, reasoning:

“The absence of an identification stub, in itself, raises a reasonable doubt concerning whether only eligible voters participated in the election and whether each of these voters cast only one ballot.” *Id* at 1027.

Finally, in Thompson Roofing, Inc., 291 NLRB 743 (1988) the Board declined to open and count a mail ballot where the voter’s name was printed on the stub, rather than signed in script, citing The Board’s Case Handling Manual (Part Two), Section 11336.4. The obvious concern with printing a name, as opposed to signing one’s name in script, is that it is easier to forge a printed name. The Board found this a closer case, however, resulting in a lengthy dissent by Chairman Stephens who reasoned that in circumstances where there was no evidence of fraud and no doubt that the eligible voter was the one who signed the stub on his own return envelope, the ballot should have been opened and counted.

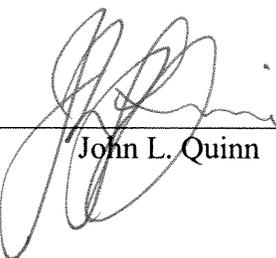
The unifying principle in all these cases is that the standard to be applied in such cases is whether the challenging party can establish “reasonable doubt ... about the fairness or validity of [the mail ballot election] process.” 283 NLRB at 1027; *compare*, Thompson Roofing, inc., 291 NLRB at 743, fn. 1 (“reasonable doubt”); and Brink’s Armored Car, 278 NLRB at 141 (“reasonable doubt as to their fairness or validity”). Consistent with this principle, the most recent case, relied upon by the

Regional Director, is Space Mark, Inc., 325 NLRB 1140 (1998). In this case, the employee was working for extended periods of time at a remote location in Alaska, away from his home in Utah. When he found out that his ballot kit had been sent to his home and not his work location, he asked his wife to fill it out on his behalf, pursuant to a power of attorney, as he did not believe that there was enough time to have it forwarded to him in Alaska. The employee then notified the Board's Anchorage Resident Office and explained the problem and was sent a duplicate ballot to his remote work location. The employee properly filled out the duplicate ballot and mailed it back to the Resident Office. At the count, the Resident Office voided the first ballot received, the one sent by his wife, by agreement of the parties. The employer then challenged the second ballot, relying on Section 11336.4 of the Boards Casehandling Manual, which provides that when the original and replacement ballot are both received by the Regional Office, the ballot with the earlier postmark is the one that should be opened and counted. The employer was technically correct that the Resident Office did not comply with the Casehandling Manual. However, the Region's Hearing Officer recommended that the replacement ballot be opened and counted. It is clear that the Region's Hearing Officer followed the admonition in the Casehandling Manual:

“in [his] exercise of professional judgment and discretion, there will be situations in which [he] will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act.”

The employer then filed exceptions to the Hearing Officer's Report and Recommendations. In denying the employer's exceptions and adopting the Hearing Officer's Report and Recommendations, the Board approved a deviation from the requirements of the Casehandling Manual and the Hearing Officer's reasonable exercise of "professional judgment and discretion . . . , consistent with the purposes and policies of the Act." While the facts in Space Mark are not identical to the case at hand, it still stands for the proposition that employees should not be disenfranchised by formalistic picayune readings of challenges. This is particularly so where there is no evidence or fraud or misconduct, no dispute over the identity of the eligible voters, and no dispute over the true intent of the employees casting their ballots. The inquiry always has been, in the circumstances, has the challenging party established "reasonable doubt" concerning the fairness or validity of the mail ballot election process. CWA would respectfully submit that the employer has not made the Requisite showing and that the Regional Director's Report and Recommendations are due to be adopted.

Respectfully submitted, this 22<sup>nd</sup> day of December, 2011.



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John L. Quinn

John L. Quinn  
CWA District Counsel  
3516 Covington Highway  
Decatur, GA 30032

T (404) 296-5553  
F (404) 294-1785  
[jquinn@cwa-union.org](mailto:jquinn@cwa-union.org)

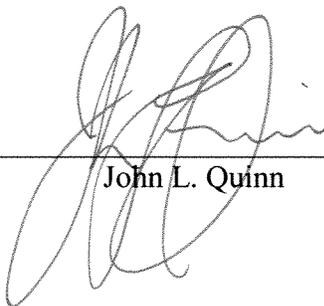
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this answering brief has this day been served via email on the following parties:

Jane P. North, Regional Director  
NLRB Region 11  
4035 University Parkway, Suite 200  
Winston-Salem, NC 27116-1467  
[Jane.North@nrb.gov](mailto:Jane.North@nrb.gov)

Cynthia K. Springer, Esq.  
Baker & Daniels LLP  
300 N. Meridian Street, Suite 2700  
Indianapolis, IN 46204  
[Cynthia.springer@bakerd.com](mailto:Cynthia.springer@bakerd.com)

Mr. Ray Finley  
11999 W. Finch Ave.  
Middlesex, NC 27557-9320  
[rayfinley@embarqmail.com](mailto:rayfinley@embarqmail.com)



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John L. Quinn