

Nos. 15-1230 & 15-1248

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NCR CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

(A) Parties and Amici: NCR Corporation (“the Employer”), petitioner/cross-respondent herein, was a respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board’s General Counsel was a party in the case before the Board. The International Brotherhood of Electrical Workers Local 2222 (“the Union”) was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board’s Decision and Order in Case No. 01-CA-150154, issued on July 13, 2015, and reported at 362 NLRB No. 146. The Board seeks enforcement of that order against the Employer.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases currently pending before, or about to be presented before, this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 2nd day of December, 2015

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition for review of NCR Corporation (“the Company”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order issued by the Board on

July 13, 2015, and reported at 362 NLRB No. 146. (A 336-38.)¹ The Board's Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §§ 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Company's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, which allows the Board, in that circumstance, to cross-apply for enforcement. *Id.* § 160(e), (f).

The Board's Decision and Order is based, in part, on findings made in a representation (election) proceeding, Board Case No. 01-RC-130289. The petitioner before the Board was International Brotherhood of Electrical Workers Local 2222 ("the Union"). In that proceeding, the Board found the refusal to tally ballots received after the conclusion of the count was not objectionable and did not require setting aside the election, in which the Union prevailed. The record in that representation case is also before the Court pursuant to Section 9(d) of the Act, 29

¹ Citations are to the joint appendix filed on November 4, 2015. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

U.S.C. § 159(d). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964); *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996). The Court may review the Board's actions in the representation proceeding for the limited purpose of deciding whether to enforce, modify, or set aside the Board's unfair-labor-practice order in whole or in part. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act, *id.* § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court. *See Freund Baking Co.*, 330 NLRB 17, 17 n.3 (1999) (citing cases).

STATEMENT OF ISSUE

Whether the Board acted in its broad discretion in overruling the Company's objection to the conduct of the mail-ballot election and thus properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the duly certified collective bargaining representative of the Company's customer engineers.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

The Board seeks enforcement of its Order finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1), by refusing to

recognize and bargain with the Union as the collective-bargaining representative of a unit of customer engineers and customer engineer specialists. The Company does not dispute that it is refusing to bargain with the Union, but claims the Board abused its discretion in failing to count seven ballots that arrived at the Board's Regional Office after the ballots had been counted. The Board's findings in the representation and unfair-labor-practice proceedings are summarized below.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

A. The Representation Proceeding

The facts underlying this case are undisputed. On June 9, 2014, the Union filed a petition with Region 1 of the Board ("the Region") seeking to represent a unit of approximately 41 customer engineers employed in the Company's 113J Territory, which encompasses Massachusetts and part of Rhode Island. (A 30, 336-37; 18-19.) On June 19, the Company and the Union (together, "the parties") signed a Stipulated Election Agreement ("the Agreement") in which they agreed to conduct the election by mail. (A 30-31, 336; 20-22.) Under the terms of the Agreement, the parties waived their right to a pre-election hearing and agreed to specific terms of a secret-ballot election under the Regional Director's supervision. (A 30-32, 336; 20-21.) The parties also agreed that all post-election procedures would be governed by the Board's Rules and Regulations. (A 22.)

Paragraph 4 of the Agreement provided that the election would proceed as follows:

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 01, on July 21, 2014 at 5:00 PM. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 01 office by close of business on August 4, 2014. The mail ballots will be counted at the Region 01 office located at 10 Causeway St Fl 6, Boston, MA 02222-1001 at 10:00 AM on August 5, 2014.

Any person who has not received a ballot by July 25, 2014 should immediately contact the NLRB Region 01 office located at 10 Causeway St Fl 6, Boston, MA 02222-1001 or (617) 565-6700 and request a ballot.

(A 31; 20.)

In accordance with the Agreement, the Company provided the Region with a list containing the names and addresses of 41 eligible voters. (A 32; 20, 96-97.)

On July 9, 2014, the Region mailed a standard Notice of Election for Employees Voting by U.S. Mail (“the Notice”) to all employees identified by the Company.

(A 32; 10-12.) The Notice contained the following language:

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 01, on **Monday, July 21, 2014**. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 01 office by close of business on **Monday, August 4, 2014**. The mail ballots will be counted at the Region 01 office located at 10 Causeway St Fl 6, Boston, MA 02222-1001 at 10:00 AM on **Tuesday, August 5, 2014**.

Any person who has not received a ballot by **Monday, July 28, 2014** should immediately contact the NLRB Region 01 office located at 10 Causeway St Fl 6, Boston, MA 02222-1001 or (617) 565-6700 and request a ballot.

(A 32; 11 (emphasis in original).)²

On July 21, the Region mailed ballots to all eligible voters in accordance with the Agreement. (A 32.) By close of business on August 4, a total of 28 ballots had been returned to the Region by U.S. Mail. (A 32.) On the morning of August 5, the parties mutually agreed to delay the count until 11:00 a.m. in order to include any ballots that might arrive in that day's mail. (A 32.) Three additional ballots were delivered, bringing the total to 31. (A 32.) When the ballots were counted, the Region determined that the Union had won the election by a vote of 17 to 14, with no void or challenged ballots. (A 31; 24.)

On August 7, two workdays after the official count was completed, seven additional ballots were delivered by U.S. Mail to the Region. (A 32.) One ballot was postmarked in Brockton, Massachusetts on August 1, another was postmarked

² On July 10, 2014, Company counsel emailed the Region regarding minor language discrepancies between the Agreement and the Notice. (Add. pg. 3.) Specifically, the Notice advised employees to contact the Region if they had not received a ballot by Monday, July 28, 2014, rather than by July 25. (Add. pg. 3.) On July 11, both the Company and the Union agreed not to modify the Notice. (Add. pg. 1, 5.)

in Boston on August 4, and the remaining five were postmarked in Providence, Rhode Island on July 31. (A 32.)

On August 8, the Company requested that the Regional Director open and count the ballots received the previous day; the Union objected to this request. (A 32; 25-27.) The Acting Regional Director denied the request orally on August 11. (A 32.) On August 12, the Company filed objections to the conduct of the election, arguing that the Acting Regional Director's refusal to count the late ballots compromised the integrity of the election. (A 31; 28-29.)

On September 9, 2014, the Regional Director issued a Report on Objections recommending that the Board overrule the Company's sole objection. (A 30-35.) The Regional Director found that the Notice was clearly worded and that reasonable employees would not read it to mean that their ballots would be counted as long as they were mailed in time to arrive by August 4, regardless of when they were actually received. (A 33.) The Regional Director similarly rejected the argument that the language of the Agreement allowed that all ballots be counted so long as they were mailed in time to reach the Region by August 4. (A 33-34.) Because the Agreement directed that the vote count was to be the next day, on August 5, the Regional Director found that the Notice of Election further emphasized to voters that their ballots must arrive in time to be counted. (A 33.)

The Company filed a request that the Board review the Regional Director's Report. (A 336; 38-51.) On April 2, 2015, the Board denied the request for review and certified the Union as the employees' collective-bargaining representative. (A 336-37; 306-07.) Thereafter, the Company refused to recognize or bargain with the Union. (A 337.)

B. The Unfair-Labor-Practice Proceeding

On April 15, 2015, the Union filed a charge with the Board, alleging that the Company unlawfully refused to recognize and bargain with the Union. (A 336.) After investigating the Union's charge, the Board's General Counsel issued an unfair-labor-practice complaint alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (A 336.) The Company filed an answer admitting its refusal to bargain, but claiming that it acted lawfully because the Board improperly certified the Union. (A 336.) The General Counsel then filed a motion for summary judgment, and the case was transferred to the Board. (A 336.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On July 13, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) granted the General Counsel's motion for summary judgment and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A 336.) The Board found that all

representation issues raised by the Company were or could have been litigated in the representation proceeding. (A 336.) It also found that the Company neither offered to adduce newly discovered or previously unavailable evidence nor alleged any special circumstance that would require the Board to reexamine the Regional Director's Decision. (A 336.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A 337.) Affirmatively, the Board's Order requires the Company to bargain in good faith with the Union and, if an understanding is reached, embody the understanding in a signed agreement. (A 337.) The Board's Order also requires the Company to post paper copies of a remedial notice and to distribute this notice electronically to its employees, if the Company customarily communicates with them by such means. (A 337.)

SUMMARY OF ARGUMENT

The Board did not abuse its discretion in overruling the Company's objection to the conduct of this mail-ballot election. The Company alleged that the Regional Director improperly failed to count ballots received by the Board after the Board had already conducted its official vote count. The Regional Director

rejected the Company's attempt to deviate from the Board's established procedure, and the Board denied the Company's request for review of that decision.

The Company entered into a Stipulated Election Agreement, upon which the Notice to Employees was based, setting forth exactly how the election was to be conducted. The Notice provided that voters must return the ballots "so that they will be received" by the Region on August 4. The Notice also specified that the ballots would be counted on August 5. The Board did not abuse its discretion in finding that those provisions clearly put employees on notice that ballots received by the Board after August 5 would not be counted. The Board's refusal to count ballots received after the official ballot count is consistent with its longstanding precedent. Accordingly, the Board properly upheld the results of the August 5 vote count, which showed that employees chose union representation by a vote of 17-14, and certified the Union. Therefore, the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

ARGUMENT

THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN OVERRULING THE COMPANY'S OBJECTION TO THE CONDUCT OF THE MAIL-BALLOT ELECTION, AND THUS PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

A. Introduction and Standard of Review

Under Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), an employer commits an unfair labor practice when it “refuses to bargain collectively with the representatives of his employees.” Here, the Company admits that it refused to bargain with the Union. Its sole defense is that the Board abused its broad discretion in overruling the Company’s election objection. Accordingly, if the Board acted within its discretion in overruling the objection and certifying the Union, the Company’s refusal to bargain violated Section 8(a)(5) and (1) of the Act.³ *See, e.g., Serv. Corp. Intern. v. NLRB*, 495 F.3d 681, 684, 686 (D.C. Cir. 2007); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882, 886 (D.C. Cir. 1998).

“Congress has entrusted the Board with 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

³ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” to them by the Act. A violation of Section 8(a)(5) of the Act produces a derivative violation of Section 8(a)(1). 29 U.S.C. § 158(a)(1); *see Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

U.S. 324, 330 (1946); accord *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1074-75 (D.C. Cir. 2007); *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996). As this Court has previously observed, “[it] is without authority to impose upon the NLRB the kind of election procedures that it may deem most appropriate.” *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002). “[T]he case for [judicial] deference [to the Board] is stron[g], as Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort ‘the employees’ ability to make a free choice.’” *C.J. Krehbiel Co.*, 844 F.2d at 885 (citation omitted). The scope of judicial review is, therefore, “extremely limited.” *Timsko Inc. v. NLRB*, 819 F.2d 1173, 1176 (D.C. Cir. 1987).

As courts have recognized, “[n]ot every election that fails to achieve perfection should be set aside, otherwise the employees’ choice of a representative might never be accomplished” *Vitek Elec., Inc. v. NLRB*, 763 F.2d 561, 571 (3d Cir. 1985); accord *Amalgamated Serv. & Allied Indus. Joint Bd. v. NLRB*, 815 F.2d 225, 227 (2d Cir. 1987). Thus, the Board’s discretion in conducting representation elections extends to “the determination of whether or not the opportunity afforded all eligible voters to exercise their rights was sufficiently ‘adequate’ or ‘equal’ as to reflect accurately the ‘majority’ required by the statute.” *Int’l Tel. & Tel. Corp., Ind. Prod. Div. v. NLRB*, 294 F.2d 393, 395 (9th Cir. 1961).

Moreover, “[t]he fundamental purpose of a Board election is [only] to provide employees with a meaningful opportunity to express their sentiments concerning representation” *Lemco Constr., Inc.*, 283 NLRB 459, 460 (1987).

The party challenging an election bears the “heavy” burden of showing that the election should be set aside. *Antelope Valley Bus Co.*, 275 F.3d at 1095; *Kwik Care Ltd.*, 82 F.3d at 1126. On review, the Board’s underlying findings of fact are “conclusive” under Section 10(e) of the Act (29 U.S.C. § 160(e)) if they are supported by substantial evidence on the record as a whole, even if “the court would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

B. The Board Did Not Abuse Its Discretion by Refusing to Count Ballots Received After the Votes Had Been Counted

The Company agreed to a mail ballot election and voluntarily entered into a Stipulated Agreement setting forth the terms for how that election was to be conducted. (A 31; 20-22.) The Agreement provided, and the accompanying Notice to employees stated, that the Board would mail ballots “to employees employed in the appropriate collective-bargaining unit” on July 21, 2014, at 5:00 p.m. (A 31; 11, 20.) The Agreement and Notice further provided that, for an employee’s ballot to be counted, “[v]oters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 01 office by the close of business on” August 4, 2014. (A 31; 11, 20.) Finally, the Agreement

and Notice specified that “[t]he mail ballots will be counted at the Region 01 office” at 10:00 a.m. on August 5, 2014. (A 31; 11, 20.)

Consistent with the Agreement, on August 5, the Region opened and counted the 31 ballots that had been received by that time.⁴ (A 31.) The count revealed that the employees chose the Union as their bargaining representative by a vote of 17-14. (A 31.) Despite the clear language of the Agreement stating that the ballots would be counted on August 5, the Company claims that the Region should have opened and counted seven additional ballots that arrived in the Region two days later. The Company claims the Region should have counted them because the postmark dates reveal that employees sent them in sufficient time for them to have been received by August 4, even if they, in fact, did not arrive until two days after the count. (Br 22-24.) More specifically, the Company argues that because the Agreement and Notice stated only that ballots must be mailed “so that they will received” by August 4, not that they had to arrive by August 4, all that was required of employees was to mail their ballots “early enough, in their reasonable estimation, to be received at the [Region] by August 4.” (Br 17-21.)⁵

⁴ The parties agreed to include three ballots that were received the morning of the day of the count but before the tally was conducted. (A 32.)

⁵ It should be noted that the Company’s argument may only offer a rationale for opening six of the seven ballots the Region received on August 7. The seventh ballot--postmarked on August 4--arguably was not sent in time for the Board to have received it by August 4. (A 32.)

The Board did not abuse its discretion in rejecting this claim. First, the Board concluded that the requirement that employees must mail ballots “so that they will be received” by August 4 was not misleading. (A 33.) It would be reasonably understood to mean that ballots must arrive at the Region by August 4. (A 33.) As the Board stated, “[t]hat sentence has been utilized in Board Notices for many years, and makes it clear that the ballots must be received in the Region by August 4 in order to be counted.” (A 33.)

Moreover, as the Board explained, the Company’s argument completely ignores the sentence that followed in both the Notice and Agreement, which explicitly stated that the ballots would be counted on August 5. (A 33; 20.) The Board emphasized that this “clears up any possible confusion as to when the voters had to have their ballots arrive in order to be counted.” (A 33.)

Indeed, Board precedent shows that, while it has counted ballots that arrived after the due date, but before the count, it has consistently refused to count ballots that arrived after the count. *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015) (finding that Regional Director correctly rejected 10 ballots received after completion of the count). *See Watkins Constr. Co.*, 332 NLRB 828, 828 (2000) (“[A] ballot should be counted if it is received before the count begins.”); *Am. Driver Serv., Inc.*, 300 NLRB 754, 754 (1990) (allowing a late ballot because it “was received prior to the time of the first ballot count”); *Kerrville Bus Co.*, 257

NLRB 176, 177 (1981) (allowing late ballots because they “were received by the Board prior to the counting of ballots”). Likewise, while NLRB Representation Casehandling Manual Sec. 11336.5(c) directs the Board to count ballots received after the close of business on the return date, those ballots must be received by the time of the count.⁶ Here, the Company bound itself to the Board’s postelection procedures, as the Agreement explicitly states, “All procedures after the ballots are counted shall conform with the Board’s Rules and Regulations.” (A 22.)

By contrast, to interpret the Agreement as allowing the Board to count any ballot mailed with sufficient time to arrive by August 4 would not be reasonable. The Company’s interpretation would require ballots to be counted regardless of when they were actually received, even if they are received weeks or months after the scheduled date of the count. (A 33.) The Company therefore seeks for the Board to determine whether each ballot was sent within a reasonable time, but such “individualized determination[s] . . . would prove time-consuming and potentially lead to extensive post-election litigation.” *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 797 (3d Cir. 1999) (in a mixed manual-mail election, Board procedure authorized mail ballots only for those who could not vote in person because of

⁶ “Although the casehandling manual is not binding on the Board, a regional director’s decision to follow those guidelines does not constitute an abuse of discretion.” *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796 (3d Cir. 1999); *accord Shepard Convention Servs., Inc. v. NLRB*, 85 F.3d 671, 674 n.7 (D.C. Cir. 1996).

employer action; company wanted broader availability and for the Board to make individualized determinations that considered the employees' own decisions or conditions). The Board must balance the conflicting interests of affording employees the broadest participation in election proceedings while still insuring the prompt completion of election proceedings. (A 35.) *See Abbott Ambulance of Ill. v. NLRB*, 522 F.3d 447, 451 (D.C. Cir. 2008) ("Greater accuracy might be achieved . . . but the Board could reasonably decide that the gain in accuracy would be outweighed by the delay and uncertainty attending such a system."). As the Board explained, to permit ballots to be counted that are received days or even weeks after the count would improperly and unnecessarily shift the balance of the conflicting interests against the prompt completion of election proceedings and unduly hamper and delay the entire election process. (A 35.)

Under the Company's proposed standard, the outcome of an election could be changed after votes are counted, or even after an employer and union began bargaining. The Board's interpretation of the Agreement and Notice is consistent with its precedent and furthers an election process that allows the parties to potentially begin collective bargaining the day after the tally of ballots. The Board did not abuse its discretion in rejecting the alternative of waiting to see if late ballots arrive, and postponing the election results even further while the parties litigate over whether those ballots were timely mailed.

C. The Company's Remaining Contentions Lack Merit

The Company repeatedly argues (Br 13-21) that voters were improperly disenfranchised. However, it is important to emphasize that there is no suggestion in this case that the Board itself engaged in any irregularity that caused employees to be improperly disenfranchised.⁷ Instead, the “irregularity” the Company complains of stems from the terms of the Stipulated Election Agreement that it voluntarily signed. (Br 16-21.) Ample precedent supports the Board’s refusal to let a party claim that the Board’s adherence to the terms of the Election Agreement caused an irregularity. *See Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990) (early ballot was not irregular because the voter submitted it according to a procedure agreed to by both parties); *Aaron Med. Transp., Inc.*, Case 22-RC-070888, 2013 WL 6673598 *1 n.1 (Dec. 18, 2013) (election hours are not an irregularity where the election was conducted according to hours specified in the agreement).

Likewise, to the extent that the Company’s claims are challenges to the wording of the Agreement or Notice, because preelection agreements promote the

⁷ Thus, the cases the Company relies on are inapposite. For example, in *Garda World Sec. Corp.*, 356 NLRB No. 91 (2011), disenfranchisement existed because a voting session closed before the agreed-upon time and new voters had appeared before the agreed-upon deadline. Similarly, in *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996), voters were disenfranchised by a mid-session closing of the polls.

prompt and certain completion of representation proceedings, the Board, with court approval, declines to permit the parties to challenge them after the election. *Cnty. Care Sys., Inc.*, 284 NLRB 1147, 1147 (1987) (employer may not challenge election date to which it stipulated); *accord NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 330-31 (5th Cir. 1991) (Board properly overruled employer's objection to stipulated election date); *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 787-88 (7th Cir. 1988) (employer "voluntarily waived its right to litigate" objection to the date of the election by signing preelection stipulation that set the date).

Although the Company originally proffered its own language requiring ballots to be received by the Board by August 4, it voluntarily signed the Agreement's language that the Board here reasonably interpreted. (A 30-32; 20, 86-89; Br 17.) And it never even raised any concerns about the Agreement specifying August 5 as the count date. (A 30-32; 20.)⁸ Having agreed to the Board's language prior to the election, the Company should not now be permitted to contest, in a postelection objection, the very procedures it agreed to before the election.

⁸ The Board "does not require mail ballots to be counted the day after ballots are due. Rather, the Board leaves those dates to be selected by the parties[.]" (A 35.) If the Company wanted to build in more time for late-arriving ballots, it should not have entered into an agreement specifying that the count would occur the day after the ballots were due. In other words, if the parties had agreed to a buffer of a few days between the ballot deadline and the count, the Board could have, consistent with its established practice, counted the ballots that arrived past the due date but before the count.

The notices of election cited by the Company (Br 10-11, 17-19) do not advance its cause. As an initial matter, many of them are identical to the notice in this case in that they require that voters “must” return ballots “so that they will be received” by the specified date. (A 30, 33; 20, 116-18, 120-30, 144, 151-52, 155-60, 164-88, 192-28, 231-47, 253-73, 275-84; see also the notices retrieved from Company counsel’s database. A 298, 300-02.) In any event, all these notices specify dates on which the ballots will be tallied. As a result, under Board precedent, all of them would prevent the counting of ballots received after the vote count had occurred.⁹

Finally, the Board need not find an election by mail invalid “whenever a potentially decisive number of votes, no matter how small, is lost through the vagaries of mail delivery. Such a rule might unduly deter the use of mail balloting in cases like this in which a mail election . . . might prove more representative of, and fairer to, the voting employees.” *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th Cir. 1978). Here, 31 ballots were counted out of 41 eligible voters, for a 76% participation rate. (A 31; 24.) This is a higher participation rate than

⁹ The Company argues that the Board should permit all votes to be counted as long as they were postmarked by a certain date, the way in which the Board considers whether election objections were timely filed. (Br 22-24.) As discussed above, the Board’s and the parties’ interest in having the ballot count be final at the time of the ballot count, and not be revised when any post-count ballot arrives, is well established and well supported by the policy considerations discussed above.

this Court found acceptable in *Antelope Valley*, where 66% of the eligible voters returned ballots. *Antelope Valley*, 275 F.3d at 1095-96.¹⁰

¹⁰ As explained above (pp. 2-3), if the Court denies enforcement of the Board's unfair labor practice order, the Board will resume processing the representation case consistent with the Court's order. Specifically, the Board will open either six or seven of the ballots depending on whether the Board determines that a ballot postmarked on August 4 was mailed in time to reasonably be expected to arrive on August 4. See note 5, above.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Robert J. Englehart

ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Kyle A. deCant

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Deputy Associate General Counsel

December 2015

ADDENDUM

From: [Bloom, Howard M. \(Boston\)](#)
To: [Redbord, Robert P.](#)
Subject: RE: 01-RC-130289
Date: Friday, July 11, 2014 9:41:22 AM

No need to change the Notice then.

If the company has a place to physically post, which I am exploring, you would have to send out a Notice or Notices to the person responsible for that posting, I assume?

Howard

Howard M. Bloom
Attorney at Law
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Boston, MA 02116

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From: Redbord, Robert P. [mailto:Robert.Redbord@nrlb.gov]
Sent: Friday, July 11, 2014 9:33 AM
To: Bloom, Howard M. (Boston)
Subject: RE: 01-RC-130289

They were mailed to all unit employees by regular mail. If we send a Corrected notice, we would send them to the same people in the same way.

From: Bloom, Howard M. (Boston) [mailto:BloomH@Jacksonlewis.com]
Sent: Friday, July 11, 2014 9:31 AM
To: Redbord, Robert P.
Subject: RE: 01-RC-130289

Bob – to whom were the Notices mailed, and at what address? If you send out new Notices, will they go out today? By regular mail?

Thanks,
Howard

Howard M. Bloom
Attorney at Law
jackson|lewis
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4th Floor
Boston, MA 02116

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From: Redbord, Robert P. [<mailto:Robert.Redbord@nlrb.gov>]
Sent: Friday, July 11, 2014 9:22 AM
To: Bloom, Howard M. (Boston)
Subject: RE: 01-RC-130289

Howard: as far as the time of day that we put the ballots in the mail, we do not routinely put that information in the Notice of Election to employees, even if it appears in the Agreement.

As far as the contact date, you are correct that the Agreement has a different notification date. I think the reason for that is the program that prints the Notices for us automatically has one week from the mailing date as the notification date; anything less than a week doesn't give the Postal Service a full chance to deliver the ballot. We routinely ask people who call before a week passes to wait a couple more days.

That said, I realize the Agreement provided for less than a week as the contact date – I am not sure why that happened – so if either party wants the Notices revised to reflect that date and remailed, we shall do so. Please let me know.

From: Bloom, Howard M. (Boston) [<mailto:BloomH@Jacksonlewis.com>]
Sent: Friday, July 11, 2014 9:10 AM
To: Redbord, Robert P.
Subject: FW: 01-RC-130289

Bob – I don't know if Megan is on vacation, so I'm forwarding the email below to your attention.

Howard

Howard M. Bloom
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From: Bloom, Howard M. (Boston)
Sent: Thursday, July 10, 2014 3:42 PM
To: 'Millar, Megan M.'
Subject: 01-RC-130289

Hi Megan – I received a Notice of Election today and it appears to be wrong. It doesn't contain the time the ballots are to be mailed out and it has a different date for people who haven't received a ballot to contact the Region.

Howard

Howard M. Bloom
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From: [Redbord, Robert P.](#)
To: [Powell, Fatima](#)
Cc: [Redbord, Robert P.](#)
Subject: NCR
Date: Friday, July 11, 2014 10:05:55 AM

Fatima: I got an email from the Employer saying no need for new notices. I called the Petitioner's representative Steve Smith this morning, who also said no need for new notices.

Robert P. Redbord
Deputy Regional Attorney
National Labor Relations Board
10 Causeway St.
Sixth Floor
Boston, MA 02222
Tel: 617-565-6748
Fax: 617-565-6725
Email: Robert.Redbord@nlrb.gov

 Go Green! Do not print this email unless it's necessary!

ADDENDUM OF STATUTES AND REGULATIONS

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

It shall be an unfair labor practice for an employer –
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive

The relevant provision of the Board's Representation Case Manual is as follows:

Section 11336.5(c) Late or Unsigned Envelopes:

Ballots contained in envelopes received before the count should be counted, even if they are received after the close of business of the return date. *Kerrville Bus Co.*, 257 NLRB 176 (1981). Ballots that are returned in envelopes with no signatures or with names printed rather than signed should be voided. *Thompson Thompson Roofing, Inc.*, 291 NLRB 742 (1988). With regard to a question about whether a name on an envelope is printed, should there be no agreement among the parties and if the Board agent determines that the name is printed, the Board agent should declare the ballot as void. However, a party may contest the Board agent's determination and if that occurs the Board agent should treat the ballot as a challenged ballot.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NCR CORPORATION)	
)	
Petitioner)	Nos. 15-1230
)	15-1248
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	1-CA-150154

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,098 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 2nd day of December 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NCR CORPORATION)	
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Petitioner)	Nos. 15-1230
)	15-1248
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent)	1-CA-150154

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Howard M. Bloom
Jackson Lewis PC
75 Park Plaza, 4th Floor
Boston, MA 02116

s/Linda Dreeben _____
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 2nd day of December, 2015