

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

In the Matter of:)
)
PREMIER UTILITY SERVICES, LLC,)
A WHOLLY OWNED SUBSIDIARY OF)
USIC LOCATING SERVICES, LLC)
)
Employer)
)
and)
)
COMMUNICATION WORKERS OF)
AMERICA, LOCAL 1101)
)
Petitioner)
)

Case Nos. 29-RC-159452
29-RC-159545

**EMPLOYER'S REQUEST FOR REVIEW OF SUPPLEMENTAL DECISION ON
CHALLENGES AND OBJECTIONS AND NOTICE OF HEARING**

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Premier Utility Services, LLC, a wholly owned subsidiary of USIC Locating Services, LLC (“Employer”), through counsel, hereby files a Request for Review in the captioned matter pursuant to §102.67 and §102.69 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”). **The Employer requests expedited consideration of this Request for Review in light of the Regional Director’s issuance of a Certification of Representative based on the Region’s counting of just 34 of the 89 timely mailed ballots and the imminent threat of disenfranchisement of the 55 voters who timely mailed their ballots but whose ballots the Region did not count. On the same basis and, given the mere six vote margin, the Employer further requests a stay of the Certification of Representative.**

I. RELEVANT PROCEDURAL BACKGROUND AND REGIONAL DIRECTOR'S DECISION ON OBJECTION

On September 3,¹ Communications Workers of America Local 1101 (“CWA”) filed a Petition in Case No. 29-RC-159452 seeking to represent all full-time and regular part-time utility locators and helpers in New York, New York employed the Employer, excluding all other employees, guards and supervisors as defined in the Act. (Bd. Exh. 1(A))² On September 4, International Brotherhood of Electrical Workers Local Union 1049 (“IBEW”) filed a Petition in Case No. 29-RC-159545 seeking to represent all of the Employer’s locators in Nassau and Suffolk Counties and Rockaway Queens, New York working in damage prevention. (Bd. Exh. 1(F)) On September 11, the Regional Director issued an Order Consolidating Cases and Rescheduling Hearing in both cases. (Bd. Exh. 1(K))

Pursuant to this Order, on September 17, a Board Hearing Officer conducted a hearing on a question of representation. On October 2, the Regional Director issued a Decision and Direction of Election, in which he concluded that the single-facility units Petitioners sought were inappropriate, but rather, the appropriate unit was comprised of employees who perform work within the five boroughs of the New York City, Nassau and Suffolk Counties and the Far Rockaway peninsula. (R. Exh. 1, p. 12; D. Exh. A, ¶1) The Regional Director ordered CWA to provide an adequate showing of interest in the expanded unit by October 6, and ordered IBEW to notify the Regional Office if it wished to proceed and, if so, submit any necessary showing of interest by October 6. (R. Exh. 1, p. 13)

¹ All dates are in 2015.

² A hearing officer conducted a hearing on a question of representation, and exhibits used in that hearing are referenced as “Bd. Exh.,” followed by the page number. The Regional Director issued his Supplemental Decision on Challenges and Objections and Notice of Hearing (cited as “D.” followed by the page number and its exhibit cited as “Exh. A,” followed by the page number or “¶” symbol and the paragraph number), which is the subject of this Request for Review, without accepting position statements or conducting a hearing concerning the matters at issue. Therefore, references to other Record documents that the Regional Director or NLRB Freedom of Information Act Branch issued or were filed with the Regional Director or Freedom of Information Act Branch are referenced as “R. Exh.,” followed by the page number.

The Regional Director further determined that a mail ballot election would be held, finding that the proposed bargaining unit consists of approximately 103 to 113 employees scattered throughout New York City and Long Island. (R. Exh. 1, p. 14) The Regional Director specified the following Employer employees constitute an appropriate unit within the meaning of the Act: All full-time locate technicians, locate helpers and cast iron technicians employed by the Employer, who perform work within the five boroughs of New York City, Nassau and Suffolk Counties and the Far Rockaway peninsula, but excluding all guards and supervisors as defined by the Act. (R. Exh. 1, p. 13) He further specified that no decision had been made regarding whether quality assurance coordinators and part-time locate technicians would be included in the bargaining unit and, therefore, employees in those classifications could vote subject to challenge. (R. Exh. 1, p. 13)

The Regional Director ordered that the Region 29 Office would mail ballots to appropriate bargaining unit employees by 5:00 P.M. on Tuesday, October 20. (R. Exh. 1, p. 14; D. Exh. A ¶2) Those employees would be required to sign the outside of the envelope in which the ballot is returned; ballots received in an unsigned ballot envelope would be automatically void. (R. Exh. 1, p. 14) The Regional Director further ordered that all ballots would be commingled and counted at the Region 29 office on Thursday, November 5, at 11:00 A.M., and that, to be valid and counted, the returned ballots must be received in the Region 29 office by close of business on Wednesday, November 4. (R. Exh. 1, p. 14; D. Exh. A ¶2)

On October 7, the Regional Director issued a letter confirming the election details and issuing the Notice of Election, which included CWA, but not IBEW, on the ballot. (R. Exh. 2) At 11:00 A.M. on November 5, the parties were present at the Region 29 office for the ballot count. (D. Exh. A ¶3) At that time, Region 29 Board Agent Kimberly Walters (“Walters”)

notified the parties that the Region had received just four returned ballots, including one that had been hand delivered. (D. 2; D. Exh. A ¶3) Walters stated that she did not know why the Region had received so few returned ballots. (D. Exh. A ¶3)

After consulting with the Regional Director, Walters offered that the parties could agree to postpone the ballot count to see if the Region received additional mail ballots in the interim. (D. Exh. A ¶4) She further stated that this postponement would not affect the parties' ability to file objections based on the lack of ballots received. (D. Exh. A ¶4) Employer's counsel requested that the Region contact the United States Postal Service to inquire about the delay in mail ballot receipt. (D. Exh. A ¶4) Without waiving the right to object to the conduct of the election, the parties agreed to postpone the ballot count one week, until 9:30 A.M. on November 12, to allow additional time for ballots to be received. (D. Exh. A ¶4)

At 9:30 A.M. on November 12, the parties reconvened at the Region 29 office. (D. Exh. A ¶5) Without sharing with the parties the number of ballots received, Walters conducted the mail ballot count. (D. Exh. A ¶5) Before beginning the count process, Walters read aloud the postmark dates of numerous envelopes, all of which bore October postmarks. (D. Exh. A ¶5)

Of the 101 mail ballots Region 29 sent to unchallenged voters, as of November 12, the Region had received just 32 returned mail ballots, including two duplicate ballots that it did not count. (D. Exh. A ¶6) Of seven ballots sent to voters allowed to vote subject to challenge, three were returned and the Region received one ballot from an employee not on the voter list. (D. Exh. A ¶6)

The Region opened and counted the 30 valid returned ballots. (D. 2) The Board Agent conducting the election challenged four ballots because their names did not appear on the

voter list. (D. 2) The November 12 Tally of Ballots shows approximately 101 eligible voters, two void ballots, 17 ballots cast for CWA, 13 votes cast against CWA, 30 valid votes counted, and 4 challenged ballots, a number sufficient to affect the election results. (D. 2)

On November 17, the Employer timely filed Employer's Objection to Conduct Affecting Results of Election ("Objection"). (D. 2; D. Exh. A) The Employer's Objection stated that, upon information and belief, the Region 29 office did not receive the majority of ballots cast, including tens of ballots timely mailed by voters from various work locations in time for the ballot count. (D. Exh. A ¶7) The Employer contended that "[t]his conduct permanently and impermissibly disenfranchised eligible voters due to conduct outside their control, constituting objectionable conduct affecting the results of the election." (D. Exh. A ¶7) The Employer sought either (a) additional time be allowed to ensure the receipt of all or virtually all mailed ballots, and the additional ballots be counted and added to the November 12 Tally of Ballots, or (b) the election be set aside and a new election ordered, preferably by manual ballot. (D. Exh. A, p. 3)

In support of its Objection, the Employer filed an Offer of Proof in Support of Employer's Objection to Conduct Affecting Results of Election ("Offer of Proof"). (R. Exh. 3) In its Offer of Proof, the Employer submitted the names of 55 eligible voters whose ballots were not counted who would testify that they completed a mail ballot and mailed it in the Region 29-provided envelope using the services of the United States Postal Service in sufficient time for the Region 29 office to receive it before the scheduled November 4 ballot count and before the actual November 12 ballot count. (D. 4, R. Exh. 3, ¶1(a) through (ccc) and ¶2) Those employees' ballots were not counted on November 12. (D. 4) As noted in the Objection, only 14% of the Bronx and Queens work locations' eligible voters' ballots were counted, while 55%

of the Manhattan work location's eligible voters' ballots were counted and 45% of the Brooklyn work location's eligible voters' ballots were counted. (R. Exh. 3, third page) Thus, it appeared that ballots from the borough in which the Region 29 office is located and the nearby Manhattan borough were far more likely to have arrived in a timely manner than those from other Employer work locations. (R. Exh. 3, third page)

Notwithstanding the foregoing facts, on November 20, without holding a hearing on the Objection or seeking any other evidence, the Region 29 Regional Director issued a Supplemental Decision on Challenges and Objections and Notice of Hearing ("Decision"), in which he overruled the Employer's Objection. (D. 6) The Regional Director based his decision on the need for finality to the Board's election process. (D. 6)

On December 2, the parties entered into a Stipulation concerning the appropriate bargaining unit, which resolved all challenges. (R. Exh. 4) On December 3, the Region 29 Office counted the challenged ballots and issued a Revised Tally of Ballots, showing 20 votes cast for Petitioner and 14 votes cast against Petitioner, with a total of 34 valid votes counted plus challenged ballots. (R. Exh. 5)

In correspondence received from the Region on December 7, the Region conceded that, since November 12, it has received 58 additional ballots, with only three of them postmarked after November 4. (R. Exh. 6, first page) Forty-eight ballot envelopes clearly show postmarks prior to November 4, and seven ballot envelopes have illegible or no postmark. (R. Exh. 6, first page) The Regional Director, through the Board Agent, refused the Employer's request for copies of the ballot envelopes received before and after the November 12 ballot count and other relevant documents to assist in its support of this Request for Review. (R. Exh. 6, pp. 1-2) He further stated that the Employer needed to submit any requests for additional

information or documents to the NLRB's Freedom of Information Act ("FOIA") office. (R. Exh. 6, pp. 1-2) Accordingly, that same day, the Employer submitted an expedited Freedom of Information Act ("FOIA") request to the Board's FOIA Branch requesting relevant documents to support its Request for Review. (R. Exh. 7).

On December 14, the Regional Director issued a Certification of Representative certifying that a majority of the valid ballots were cast for CWA. (R. Exh. 8) On December 23, the FOIA Officer denied the Employer's information request in its entirety. (R. Exh. 7) The time to appeal that decision has not yet elapsed. (R. Exh. 9, p. 3)

II. POINTS ON WHICH THE EMPLOYER REQUESTS REVIEW

The Employer requests review of the Regional Director's Decision on the following points:

1. The Regional Director's finding of fact that, pursuant to a Decision and Direction of Election, issued by the Regional Director on October 2, an election by secret ballot was conducted from October 20 until November 4, with the count on November 5. (D. 1)
2. The Regional Director's failure to find that the Regional Director and the parties agreed to postpone the count until November 12 to allow more time for ballots to be received. (D. 2)
3. The Regional Director's finding of fact that pursuant to Section 102.69 of the Board's Rules and Regulations, he caused an investigation to be conducted concerning the Employer's objection, during which the parties were afforded full opportunity to submit evidence bearing on the issues. (D. 3)
4. The Regional Director's failure to find that he did not request position statements or affidavits or conduct a hearing on the Objection. (D. 4-6)

5. The Regional Director's failure to state any legal basis for not requesting position statements or affidavits or conducting a hearing on the Objection while maintaining that he caused an investigation to be conducted concerning the Employer's Objection, during which the parties were afforded full opportunity to submit evidence bearing on the issues. (D. 4-6)
6. The Regional Director's failure to find that the Region 29 office did not receive the majority of ballots cast, including tens of ballots timely mailed by voters from various work locations in time for the ballot count. (D. 4-6; D. Exh. A ¶7)
7. The Regional Director's failure to find that the Region 29 office's failure to receive the majority of ballots cast, including tens of ballots timely mailed by voters from various work locations in time for the ballot count, permanently and impermissibly disenfranchised eligible voters due to conduct outside their control, constituting objectionable conduct affecting the results of the election. (D. 4-6; D. Exh. A ¶7)
8. The Regional Director's failure to find that, based on the conduct specified in the Objection that affected the result of the election, additional time should be allowed to ensure the receipt of all or virtually all timely-mailed ballots and that the timely-mailed ballots should be counted and added to the November 12 Tally of Ballots. (D. 4-6; D. Exh. A, p. 3)
9. The Regional Director's failure to find that, if allowed to testify, each of the listed 55 eligible voters would testify that he completed a mail ballot and mailed it in the Region 29-provided envelope using the services of the United

States Postal Service in sufficient time for the Region 29 office to receive it before the scheduled November 5 ballot count and actual November 12 ballot count. (D. 4-6; R. Exh. 3, ¶1)

10. The Regional Director's failure to find that, as shown on the official voter list, no mail ballots from any of the 55 listed employees was counted at the November 12 ballot count. (D. 4-6; R. Exh. 3, ¶2)
11. The Regional Director's failure to find that, based on its receipt of 30 ballots during the week of November 4-12, the Employer reasonably believed that the Employer would also be able to present evidence at hearing that, since November 12, the Region 29 office continued to receive timely mailed ballots from eligible voters. (D. 4-6; R. Exh. 3, ¶3)
12. The Regional Director's failure to find that the listed employees mailed their ballots at a time when it could be reasonably anticipated that they would be timely received by the Board through the normal course of the mails. (D. 4-6; R. Exh. 3, ¶1, third page)
13. The Regional Director's failure to find that the Brooklyn-based Region 29 office received proportionally far more ballots from Manhattan and Brooklyn work location voters than those mailed by voters working in the other boroughs and Long Island. (D. 4-6; R. Exh. 3, third page)
14. The Regional Director's failure to find that 55% of all Manhattan eligible voters' ballots were counted and 45% of all Brooklyn eligible voters' ballots were counted, while only 33% of all Staten Island eligible voters' ballots were counted, 29% of Nassau County eligible voters' ballots were counted, 19% of

Suffolk County eligible voters' ballots were counted and only 14% of Bronx and Queens eligible voters' ballots were counted. (D. 4-6; R. Exh. 3, third page)

15. The Regional Director's failure to find that ballots from Brooklyn and Manhattan voters were far more likely to have arrived in a timely manner than those from voters in other Employer work locations. (D. 4-6; R. Exh. 3, third page)
16. The Regional Director's failure to find that conduct over which the listed employees had no control permanently and impermissibly disenfranchised them. (D. 4-6; R. Exh. 3, third page)
17. The Regional Director's failure to find that it behooves the Board to afford employees the broadest possible participation in the Board elections as long as the election procedures are not unduly interfered with or hampered. (D. 4-6; R. Exh. 3, third page)
18. The Regional Director's failure to find that, in this case, counting late-arriving ballots would not unduly interfere with or hamper the election procedures, particularly, where as in this case, there are challenged ballots sufficient to determine the outcome of the election and, thus, no final election determination could be made based on the information that was then available. (D. 4-6; R. Exh. 3, third and fourth pages)
19. The Regional Director's failure to find that, since more employees timely mailed ballots that were not counted than were counted, the risk of disenfranchisement is particularly acute. (D. 4-6; R. Exh. 3, fourth page)

20. The Regional Director's failure to find that a party's failure to meet a deadline for the filing of some matter may be excused if there is a showing that he mailed the matter at a time when he could reasonably anticipate its timely receipt. (D. 4-6; R. Exh. 3, fourth page)
21. The Regional Director's failure to find that when an employee's ballot is postmarked three days prior to the closing time for mailing ballots, it is reasonable for the employee to assume that, in the normal course of the mails, his ballot would be received by the Regional Director prior to the closing date. (D. 4-6; R. Exh. 3, fourth page)
22. The Regional Director's failure to find that, given that Region 29 did not receive nearly two-thirds of the timely cast ballots, the risk of disenfranchisement is particularly acute here. (D. 4-6; R. Exh. 3, fourth page)
23. The Regional Director's failure to find that employees' failure to meet the ballot receipt deadline should be excused based on a showing that they mailed the ballots at a time when they reasonably could anticipate their timely receipt. (D. 4-6)
24. The Regional Director's failure to find that excusing employees' failure to meet a filing deadline based on a showing that they mailed the ballots at a time when they reasonably could anticipate their timely receipt is compelling in this case where nearly two-thirds of the timely cast ballots were not received. (D. 4-6; R. Exh. 3, fourth page)
25. The Regional Director's finding of fact that, in Case 11-RD-000732, the region's office belatedly found six ballots which were timely and properly

submitted, and were in the Region's safe at the time of the ballot count, but inadvertently had not been counted. (D. 5)

26. The Regional Director's finding that this case is distinguishable from Case 11-RD-000732, where the region counted all ballots received by the date of the ballot count, as there is no evidence the region had received the later-counted ballots as of the date of the original ballot count. (D. 6, R. Exh. 3, fifth page)
27. The Regional Director's failure to find that, in Case 11-RD-000732, during preparation for a challenged ballot hearing to be held on remand from the Board approximately one year after the original ballot count, the region found six timely postmarked ballots in its safe, but there was no evidence that the region had received those ballots in time to be counted during the original ballot count; nonetheless, the region counted the ballots approximately one year after the original ballot count. (D. 4-6; R. Exh. 3, fourth and fifth pages)
28. The Regional Director's failure to find that, in Case 11-RD-000732, even though the region was unable to determine why additional timely uncounted mail ballots were in the safe a year after the original mail ballot count, the region did determine it was appropriate to count those ballots and it did so. (D. 4-6; R. Exh. 3, fifth page)
29. The Regional Director's failure to find that, as in Case 11-RD-000732, it would be appropriate to count the late-received ballots in this case. (D. 4-6)
30. The Regional Director's failure to find as a matter of law that the Region's receipt of so few return ballots prior to the ballot count permanently and impermissibly disenfranchised the voters. (D. 4-6)

31. The Regional Director's failure to find that the Region's lack of receipt of mail ballots by November 12 from 55 voters who would testify that they completed and mailed their ballots in sufficient time for the Region 29 office to receive those ballots before the November 4 ballot receipt cutoff date demonstrates a fundamental failure in the integrity of the mail ballot process. (D. 4-6)
32. The Regional Director's failure to find that the Region's lack of receipt of mail ballots by November 12 from 55 voters who would testify that they completed and mailed their ballots in sufficient time for the Region 29 office to receive those ballots before the November 5 ballot count demonstrates a fundamental failure in the integrity of the mail ballot process. (D. 4-6)
33. The Regional Director's failure to find that as a matter of law that, while there are strong policy considerations favoring prompt completion of representation proceedings, the Region's failure to receive mail ballots by November 12 from 55 voters who would testify that they completed and mailed their ballots in sufficient time for the Region 29 office to receive those ballots before the November 4 ballot receipt cutoff date is outweighed by the need to allow employees the broadest possible participation. (D. 4-6)
34. The Regional Director's failure to find that the Region's lack of receipt of mail ballots by November 12 from 55 voters who would testify that they completed and mailed their ballots in sufficient time for the Region 29 office to receive those ballots before the November 4 ballot receipt cutoff date

demonstrates a lack of balance between effectuating employee choice and providing finality of election results. (D. 4-6)

35. The Regional Director's failure to order that late-received ballots be counted for a reasonable period that allows for the receipt of the remaining timely mailed ballots. (D. 4-6, Exh. A, p. 3; R. Exh. 3, fifth page)

36. The Regional Director's failure to order that the election be set aside and a new manual ballot election be held. (D. 4-6, Exh. A, fifth page; R. Exh. 3, fifth page)

37. The Regional Director's conclusion of law that this case is akin to a case where a voter appears at the polls after the count of ballots. (D. 5)

38. The Regional Director's failure to find that, while it cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes, not matter how small, is lost through the vagaries of mail delivery, in this case, the election is invalid because far more timely postmarked ballots were not counted than were counted. (D. 5)

39. The Regional Director's failure to order that the Regional Office will count ballots received after the ballot count but on or before the challenged ballots are counted and/or the revised Tally of Ballots is prepared. (D. 4-6)

The Employer contends that the Regional Director's Decision raises a substantial question of law or policy because of the absence of or departure from officially reported Board precedent related to circumstances raised in points 5-9, 13, 16-24, 29-34, 38 and 39. The Employer further contends that the Regional Director's Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the Employer's (and

employees’) rights as to the facts raised in points 1-6, 9-15, 20, 21, and 23-28. The Employer contends that as to points 3-5, 7-11, 16-24, and 29-39, the rulings in the proceeding have resulted in prejudicial error. The Regional Director's Decision also, as a whole, raises compelling reasons for reconsidering the Board's holding in *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015) and its progeny to determine the appropriate means of handling the new circumstances presented in this case.

III. ISSUES

1. Whether the Regional Director’s reliance on *Classic Valet Parking*, 363 NLRB No. 23 (2015), and its progeny in this case is clearly erroneous, prejudicially affecting the voters’ and Employer’s rights, when, unlike in any of those cases, far more voters’ votes were not counted than were counted solely because of the delay in receipt of mail ballots and due to no fault of the voters.

2. Whether, in a mail ballot election, when far more voters’ votes were not counted than were counted solely because of the delay in receipt of mail ballots and due to no fault of the voters, this warrants the establishment of a policy that provides for the counting of late-received ballots.

IV. ARGUMENT

A. Existing Legal Precedent Does Not Support The Regional Director’s Decision.

The case before the Board here is one of first impression, as no prior reported cases involve the post-ballot count receipt of a majority of the mail ballots cast in an election. While the Regional Director relies on prior Board law in his Decision, he has failed to apply the relevant Board rationale correctly to these facts.

1. **The Regional Director's Purported Application Of Board Precedent Does Not Further The Board's Express Rationale Favoring Finality To The Election Results.**

The Regional Director relies on *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015), 2015 WL 6447491, and its progeny in his Decision, claiming that Board precedent values finality to representation proceedings. (D. 4-5) The rationale in that line of cases does not apply here. The Board's *Classic Valet Parking* decision followed *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981), for the proposition that, while "the Board has a strong interest in effectuating employee choice," it balances that interest with its interest in the finality of election results. Based on this rationale, in *Kerrville Bus Co.*, the Board ordered that the Regional Director count ballots received after the ballot receipt deadline but before the ballot count. *Id.* at 176. The *Kerrville Bus Co.* Board did not address the situation before the Board here – whether the Board should open timely mailed ballots received **after** the ballot count.

However, in *Classic Valet Parking, Inc.*, the Board did address the opening of ballots received after the ballot count. The Board justified its position that the Regional Office should not open ballots received after the ballot count by stating that allowing the late-received ballots to be counted would result in long-delayed ballot counts. *Classic Valet Parking*, 2015 WL 6447491 at *1. However, in that case, the ballot challenges were insufficient to affect the election result; therefore, there would be no additional ballots counted or revised Tally of Ballots.

Those facts are inapposite to ours. In this case, no finality of election results occurred upon issuance of the initial Tally of Ballots. Rather, a new Tally of Ballots would be required regardless of the counting of the late-received ballots since there were challenged ballots sufficient to affect the election result. Upon issuing the Decision, the Regional Director scheduled a challenged ballot hearing for December 3. As it turned out, on December 2, the

parties stipulated to counting the challenged ballots. The Board Agent counted the challenged ballots on December 3 and issued a revised Tally of Ballots. Absolutely nothing prevented the Board Agent from counting the approximately 55 additional ballots the Regional Office had received since the November 12 ballot count along with the challenged ballots. Nothing about counting the ballots on December 2 would have delayed the finality of the mail ballot election. While one would not know to a certainty when the Regional Director issued the Decision that the challenged ballots would be counted later, he knew that this was a distinct possibility since there were four challenged ballots representing challenges to three different job classifications. And, regardless of the ultimate decision on the challenged ballots, the Regional Director knew that a new Tally of Ballots would need to be prepared to reflect whatever decision resulted on the challenged ballots, an additional objections period would ensue and, only after the objections period, could a Certification issue. Therefore, when issuing the Decision, it was apparent that there would be a process-driven delay in issuing a final Tally of Ballots and Certification. Accordingly, in this circumstance, the *Classic Valet Parking* rationale for refusing to count the timely mailed late-received ballots because doing so would interfere with the finality of the election result simply fails to hold water.

2. **The Regional Director Ignored The *Queen City Paving Co.* Board's Reliance On The Voters' Reasonable Expectation That Their Ballots Would Be Timely Received.**

Moreover, while the Regional Director dismisses the Employer's reliance on *Queen City Paving Co.*, 243 NLRB 71, 73 (1979), stating the *Queen City Paving Co.* Board did not rule that ballots received after the ballot count necessitates a new tally, it also did not rule that ballots received after the ballot count do not necessitate a new tally. It simply did not address that issue. In *Queen City Paving Co.*, the Board decided that the Region **should** count one ballot that it received after the closing time for casting ballots, reasoning,

a party's failure to meet a deadline for the filing of some matter may be excused if there is a showing that he mailed the matter at a time when he could reasonably anticipate its timely receipt. [Voter's] ballot was postmarked 3 days prior to the closing time for casting ballots. It was reasonable for [voter] to assume that, in the normal course of the mails, his ballot would be received by the Regional Director prior to the closing date.

Id.

The Board did not hinge its decision to overrule the Board Agent's ballot challenge on the fact of its receipt prior to the ballot count. To the contrary, it based its decision on the voter's reasonable expectation that, by mailing his ballot three days prior to the closing time for casting ballots, there would be sufficient time for his ballot to reach the Regional Office prior to the closing date. *Id.*

This rationale applies even more to our facts, where at least 48 voters mailed their ballots at a time when they could reasonably anticipate their timely receipt prior to the closing date. Yet, the Regional Office did not receive them by the closing date or by the date that they actually conducted the ballot count, which was more than a week **after** the originally scheduled closing date. As in *Queen City Paving Co.*, the voters reasonably assumed that, in the normal course of the mails, the Regional Director would receive their ballots prior to the closing date. Applying the *Queen City Paving Co.* rationale to our facts, the Regional Director should have counted the late-received ballots because the voters reasonably anticipated their timely receipt.

One may argue that "the procedure is the procedure," and deviating from the established procedure would be improper. But, as it did in *Queen City Paving Co.*, the Board has balanced its general preference for following its established procedures with "policy concerns that voters who wish to participate should not unnecessarily be disenfranchised." *Aesthetic Designs, LLC* 339 NLRB 395, 396 (2003). Thus, when an eligible voter voted in a mail ballot

election using the sample ballot instead of the official ballot provided with the official election kit, the Board counted the ballot to prevent disenfranchisement of the voter. *Id.* In this case, 48+ eligible voters voted in a mail ballot election by doing precisely what the instructions told them to do, yet the Regional Office did not count their ballots. When, in the interest of preventing voter disenfranchisement, the Board has found it appropriate to count a vote that was cast in a manner contrary to the Board's express instructions, it follows that it should be even more concerned with preventing voter disenfranchisement when the voters did precisely as instructed.

3. **The Regional Director Ignored Board Precedent Emphasizing The Importance Of Establishing A Ballot Count Procedure That Gives All Eligible Employees An Opportunity To Vote.**

The Board has set aside a stipulated election when 11 of 115 eligible voters were working away from the worksite during the election period because “they were not afforded the opportunity to cast their ballots” and neither the Regional Director nor the Board found it necessary to “attempt[] to assess responsibility for the disenfranchisement of these employees.” *Alterman-Big Apple, Inc.*, 116 NLRB 1078, 1079-80 (1956). The Board stated that, “[i]t is the Board’s responsibility to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible employees be given an opportunity to vote.” *Id.* at 1080 (citing *Repcal Brass Mfg. Co.*, 109 NLRB 4 (1954)). *See also*, *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967) (election set aside when employee unable to vote “through no fault of his own” because working away from plant during election); *Y-Tech Svcs., Inc.*, 362 NLRB No. 7, WL 400916 (2015) (same); *Glenn McClendon Trucking Co., Inc.*, 255 NLRB 1304, 1304, 1305 (1981) (three truck drivers working away from polling place during election deemed disenfranchised in election with a one vote margin, as they had no opportunity to vote due to no fault of their own). While technically, the employees in our case had an opportunity to vote, as they were sent mail ballot kits, their “opportunity” was illusory. In reality, they had no

opportunity to cast a meaningful vote since they did precisely what the Board instructions told them to do yet the Regional Director did not count their votes through no fault of their own.

It is worthy of note that this is not a case where voters failed to vote due to indifference. In *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987), the Board stated,

[W]hen a Board election is met with indifference, it must be assumed that the majority of the eligible employees did not wish to participate in the selection of a bargaining representative and are content to be bound by the results obtained without their participation. Only if it can be shown by objective evidence that eligible employees were not afforded an 'adequate opportunity to participate in the balloting' will the Board decline to issue a certification and direct a second election.

In this case, the objective evidence shows that eligible employees were not afforded an adequate opportunity to participate in the balloting, as 48 ballots were timely cast and mailed (plus seven additional arguably timely cast and mailed ballots), yet none of these ballots was counted due to no fault of the voters. The voters did not fail to cast ballots out of apathy; to the contrary, they very much wanted to vote and, as evidence of such desire, they did precisely what the Board instructions directed them to do. It is difficult to imagine a circumstance that would do more to disenfranchise voters than to deny them their right to have their timely mailed ballots counted.

4. **The Regional Director's Purported Application Of Existing Board Law Is Undermined By The Unprecedented Number Of Late-Received Ballots.**

This case is distinguishable from the cases on which the Regional Director relies in an important respect. None of the cases upon which the Regional Director relies involves such an enormous difference between the number of timely received ballots and those received after the ballot count:

- In *Versail Mfg.*, 212 NLRB 592, 593 (1974), 160 votes were cast in a manual election, but one voter did not arrive at the election site in time to vote for reasons unrelated to any unfairness in the election mechanics.
- In *J. Ray McDermott & Co. v. NLRB*, 571 F2d 850, 855 (5th Cir. 1978), 75 timely mailed ballots were counted and just three ballots were received late.
- In *Kerrville Bus Co.*, 257 NLRB 176 (1981), 161 ballots had been counted; as previously discussed, the Board ordered that the Region count the seven late-received mail ballots that had been received prior to the ballot count.
- In *Queen City Paving Co.*, 243 NLRB 71 (1979), the Board held that one late-received ballot out of 67 ballots cast **should** be counted when it was received after the deadline and before the ballot count.
- In *Watkins Construction Co.*, 332 NLRB 828, 828 (2000), 22 ballots were counted; one ballot was received after the cutoff but before the ballot count and was counted.
- In *Classic Valet Parking Inc.*, 363 NLRB No. 23 (2015), 16 timely mail ballots were counted and 10 late-received ballots were not counted; only five of the late-received ballots were postmarked five days or more before the count.

None of these elections involved circumstances in which the Regional Office received more mail ballots **after** the ballot count than it received **prior to** the mail ballot count. Therefore, none of them is analogous in that regard to our case, where the Regional Office received **just 4 of 109** ballots as of the ballot cutoff and received **just 34 of 109** ballots in time for the *postponed* ballot count. The Regional Office received an additional **55 mail ballots** after

the ballot count, 48 of which had postmarks on or before the cutoff date, and seven of which had either missing or illegible postmarks. In other words, even if we count only the 48 mail ballots with undisputedly valid postmarks, the Regional Office counted only 41% of the timely mailed ballots. This means that, at a minimum, **the Region did not count the ballots of 59% of the voters who did precisely what the instructions in the mail ballot kit told them to do.** It bears repeating that it is hard to imagine a circumstance that could disenfranchise voters more than failing to count these ballots.

A relevant case that the Regional Director failed to cite is *Garda World Security Corp.*, 356 NLRB No. 91, 2011 WL 318088, *1 (2011). In *Garda World Security Corp.*, the Board rejected the hearing officer's recommendation that election objections be overruled. *Id.* In that case, the hearing officer had found that the Board agent started taking down the election equipment before the end of the first voting period, when three eligible voters arrived to cast their ballots. *Id.* The Board Agent told the voters they could vote under challenge or return for the second voting period; they left without voting. *Id.* While the hearing officer found that the Board agent closed the polls early, he did not recommend setting aside the election. *Id.* The Board, however, stated that it "applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its own election proceedings." *Id.* at 2. (citing *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996)) (Board agent took ballot box and left polls briefly mid-session). "Under that standard, **an election will be set aside if the objecting party shows that the number of voters possibly disenfranchised by an election irregularity is sufficient to affect the election outcome.**" *Garda World Security Corp.*, 2011 WL 318088 at *2 (emphasis added; citations omitted). The Board found that, where there was a one-vote margin and 20 eligible voters did not vote, a determinative number of voters were potentially

disenfranchised. *Id.* Accordingly, the Board set aside the election and directed that a new election be held. *Id.*

Here, where the Region did not count at least 48 actual properly cast votes in an election where the margin is just six votes, a determinative number of voters have been disenfranchised. Just as one would expect a Board agent to keep the polls open in a manual election until the end of the voting period, so would one expect the postal service to deliver mail ballots to the Regional Office in a reasonably timely manner. Both suppositions are intrinsic to the Board procedures. Put another way, when the Board established its manual voting procedure, it reasonably expected that its Board agents would keep the polls open during the entire proceeding, and when it established its mail ballot voting procedure, it similarly reasonably expected that the postal service would timely deliver returned mail ballots. Thus, our facts are analogous to those in *Garda World Security Corp.* in that an election irregularity – failure of the postal service to deliver mail ballots in a timely manner – sufficiently affected the election outcome. While in *Garda World Security Corp.* the election was set aside because disenfranchised voters had not had the opportunity to vote, in our case, the Board could remedy the disenfranchisement by simply ordering that the timely cast ballots be counted.

One might argue that, in *Garda*, a Board agent caused the disenfranchisement there, while no party to the election did so in this case. That, however, was not the case in *Baker Victory Services, Inc.*, 331 NLRB 1068, 1068 (2000), and *VIP Limousine, Inc.*, 274 NLRB 641, 641-42 (1985), where bad weather – not the actions of any party – was the culprit, yet the Board set aside the elections in both of those cases to prevent voter disenfranchisement. Thus, established Board precedent fails to support making a distinction between disenfranchisement caused by a party and that caused by “outside factors” beyond the parties’ or voters’ control.

5. **Even Though The Voters Precisely Followed The Mail Ballot Instructions, The Ballot Count Favored Voters In Certain Assigned Work Locations, Undermining The Board's Express Commitment To Maintaining The Integrity Of The Mail Ballot Election Process.**

The Regional Director discusses the Board's commitment to providing finality of election results, but fails to discuss another important Board value – maintaining the integrity of the mail ballot election process. It is noteworthy that, of the 34 counted ballots, the Brooklyn-based Region 29 Office received a disproportionate number of them from voters assigned to Brooklyn and Manhattan work locations. In other words, those voters who have work locations with better mail delivery service to the Region 29 Office had a disproportionately greater chance of having their ballots received and counted than those in other work locations. While, particularly with the Employer having no access to the ballot envelope postmarks, there is no way for it to tell where the voters deposited their mail ballots into the mail, it is likely they did so close to work and/or home. The facts tell the story. Following are the statistics on the percentage of eligible voters' ballots that the Region counted, by voter work location:

- Manhattan: 55%
- Brooklyn: 45%
- Staten Island: 33%
- Nassau County: 29%
- Suffolk County: 19%
- Bronx: 14%
- Queens: 14%

(R. Exh. 3, third page)

Of the 55 eligible voters whose ballots were not counted who, if allowed to testify, would have testified that they timely mailed in their mail ballot, 12 were assigned to

Suffolk County, 11 were assigned to Nassau County, 11 were assigned to Queens, 9 were assigned to Brooklyn, 6 were assigned to Manhattan, 3 were assigned to the Bronx, and 3 were assigned to Staten Island. (R. Exh. 3, first and second pages) Notably, the Region 29 Office was far less likely to receive the ballots from Long Island than from the five boroughs. (R. Exh. 3, first and second pages) And the total of those voters who would attest that they timely mailed their ballot – 55 – matches the number of mail ballots the Region 29 Office actually received after the ballot count that had a valid postmark or illegible/no postmark. (R. Exh. 6)

Accordingly, whether the Regional Office counted voters' ballots was unrelated to whether the voters followed the Board's instructions and timely deposited their mail ballot; rather, it appears far more related to where they deposited their mail ballot. Deciding not to count voters' ballots, which were not timely received due to arbitrary factors, fails to support the Board's commitment to maintaining the integrity of the mail ballot process.

Incidentally, our facts are unlike those in *Kirkstall Road Enterprise, Inc.*, 2012 WL 3548194, *2 (2012), in which voters testified that they mailed their ballots but those ballots were not counted, where none of the ballots were returned as undeliverable and “none of those ballots ever turned up at the Regional Office.” In our case, **most** of the timely cast ballots turned up at the Regional Office after the ballot count (and **all but four** of them turned up at the Regional Office after the ballot count closing date).

6. **The Regional Director's Decision Concerning The Region 11 Election Was Clearly Erroneous On The Record, Prejudicially Affecting The Employer's and Employees' Rights**

In the Decision, the Regional Director claims that Region 11 belatedly found six timely and properly submitted ballots in its safe that “inadvertently had not been counted.” (D. 5) He further stated that “[t]his case is distinguishable from the instant case where the Region counted all the ballots which were received by the date of the count. There is no allegation or

evidence that on November 12, the Region was in possession of additional valid ballots which were not counted.” (D. 6) In discounting the applicability of the Region 11 case, the Regional Director assumes facts not in evidence. In the Employer’s Offer of Proof, on which the Regional Director apparently relied, there was no assertion that the Region 11 Office did not count all of the ballots it had received by the date of the count. (R. Exh. 3, fourth and fifth pages) There was no allegation or evidence that on the date of the original Region 11 ballot count, the Region possessed additional valid ballots that were not counted. (R. Exh. 3, fourth and fifth pages) Thus, the Employer’s assertion that Region 11 counted timely submitted mail ballots more than a year after the original mail ballot count under circumstances similar to those presented here is accurate, and the Region 29 Regional Director’s decision not to follow suit was erroneous.

B. The Lack Of Receipt Of The Majority Of Timely Cast Ballots Solely Due To Mail Delivery Delays Warrants Establishment Of A Policy Allowing The Counting Of Timely Cast Late-Received Ballots.

As briefly mentioned above, in *Baker Victory Services, Inc.*, 331 NLRB 1068, 1068 (2000), the Board overruled the Regional Director’s certification of representative and instead set aside an election because severe weather conditions on election day, “reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote.” On the election day, excessive snowfall caused the election location to be closed, although certain staff were expected to report and certain programming continued as scheduled. *Id.* at 1069. In one voting group, 32 of 51 eligible employees voted and in the other voting group, 19 of 21 eligible employees voted, resulting in an overall 70.8% voter turnout rate. *Id.* The Regional Director, applying the “representative complement” standard set forth in *Glass Depot, Inc.*, 318 NLRB 766 (1995), determined that, based on the testimony of five employees about why they did not vote, the weather conditions on election day did not constitute an “extraordinary circumstance” under Board law. *Baker Victory Services, Inc.*, at 1068.

When reviewing the Regional Director's *Baker Victory Services, Inc.* decision, the Board expressly rejected the *Glass Depot* standard. *Id.* Instead, it applied the standard established in *VIP Limousine, Inc.*, 274 NLRB 641 (1985), which provides that "an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote." *Baker Victory Services, Inc.*, at 1068. The Board discussed the *VIP Limousine* facts, in which 67 of 89 eligible employees voted in an election for which the 22 nonvoters' votes would be outcome determinative. *Id.* In deciding to set that election aside, the Board reasoned,

The Board is responsible for establishing the proper procedure for the conduct of its elections. In carrying out this responsibility, a primary concern of the Board is whether employees are given a sufficient opportunity to vote. While the Board is not required to guarantee that every voter is able to get to the polls, **when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted.** If there is a reasonable possibility that this occurred and a determinative number of votes are called into question, to maintain the Board's high standards, the election must be set aside.

Id. at 1069-70 (emphasis added). In applying this standard, the Board found that setting aside the election "best effectuates the Board's goal of ensuring maximum voter participation and properly places the focus on the right of all eligible employees to cast ballots in the election." *Id.* at 1070. The Board found that, even though nearly 71% of the eligible employees actually voted in the election, under the *VIP Limousine* standard, "all voters were not afforded an adequate opportunity to vote" because of the snowfall and the facility closing, meaning a significant number of employees were not required to report to work. *Id.* at 1071-71.

Applying the *VIP Limousine* standard to our facts, as in that case (and its progeny), a factor beyond the control of the Board or the parties – poor mail delivery service –

deprived eligible employees of a sufficient opportunity to vote. These circumstances destroyed the requisite laboratory conditions under which elections must be conducted, affecting a determinative number of votes. As previously explained, the Board mailed out 109 ballot kits on October 20, and voters were required to return their ballots by November 4 for a scheduled November 5 ballot count. On November 5, the Board had received only four returned mail ballots. A week later, during the rescheduled ballot count, the Board had received and counted just 34 returned ballots. As of December 7, the Board received an additional 48 returned ballot envelopes that clearly showed postmarks prior to November 4 and an additional seven returned ballot envelopes with illegible or no postmark. (R. Exh. 6) In this case, slow mail delivery due to an unknown cause, rather than bad weather, was the culprit.

Failing to count the ballots of the Employer's employees in this case would be even more egregious than failing to count the ballots in *VIP Limousine*. Unlike the *VIP Limousine* voters, who arguably could have put forth more effort to get to the polls in bad weather even though they were not required to work, the Employer's employees actually completed and timely mailed in their ballots, with absolutely nothing more they could have done to ensure that the Region counted their votes. When future voters learn that whether their vote actually counts is beyond their control and, instead, solely depends on the vagaries of the postal service, and when they learn that, in this case, only 38.2% of the **properly cast** votes can determine an election outcome, they cannot help but doubt the mail ballot process's integrity and the Board's "high standards." Thus, to preserve the integrity of the mail ballot procedure, it behooves the Board to establish a reasonable policy allowing properly cast late-received ballots to be counted.

V. CONCLUSION

Based on the foregoing, the Employer's Request for Review should be granted and the late-received ballots bearing postmarks on or before November 4, 2015, should be counted or, alternatively, the election should be set aside and a new, manual election should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2015, a true and correct copy of the foregoing document was served via email to the following party of record and the Regional

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