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**Premier Utility Services, LLC a wholly owned subsidiary of USIC Locating Services, LLC and Communications Workers of America, Local 1101, Petitioner.** Cases 29–RC–159452 and 29–RC–159545

April 5, 2016

ORDER DENYING REVIEW

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Employer’s request for review of the Regional Director’s Supplemental Decision on Challenges and Objections and notice of hearing is denied as it raises no substantial issues warranting review.<sup>1</sup>

Dated, Washington, D.C. April 5, 2016

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Mark Gaston Pearce, Chairman

<sup>1</sup> The Employer’s request for a stay of the Certification of Representative is also denied.

We share our dissenting colleague’s concern about the United States Postal Service’s late delivery of many mail ballots after the ballot count. However, we find that the Regional Director’s decision not to count the late-received ballots was fully consistent with Board precedent and policy, and did not constitute an abuse of discretion. The Board will generally permit mail ballots received after the due date, but before the count, to be opened and tallied. *Watkins Construction Co.*, 332 NLRB 828, 828 (2000). See also NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11336.5(c). However, the Board customarily does not permit mail ballots received *after* the count to be opened. *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015). As explained in *Classic Valet*, the Board’s Rule, permitting mail ballots received after the due date but before the count to be opened, while excluding ballots received after the ballot count, already provides a grace period for late-arriving ballots and strikes an appropriate balance between the interests of effectuating employee choice and the substantial policy considerations favoring the finality of elections. Moreover, in this case, at the joint request of the parties, the Region postponed the ballot count by 1 week. Unlike our dissenting colleague, we do not find that the Regional Director erred by refusing to count ballots received after the additional grace period provided by the postponed ballot count expired. *Id.*, slip op. at 1 (“Absent [Board’s Rule], election results could well be delayed for significant periods of time as mail ballots trickle into the regional office.”). See also *Versail Mfg., Inc.*, 212 NLRB 592, 593 (1974) (noting that “there are strong policy considerations favoring prompt completion of representation proceedings”).

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

I would grant review of the Regional Director’s decision to overrule the Employer’s objection regarding the mail-ballot election in this case, in which the final tally counted only 34 votes out of 101 eligible voters. I believe there is a substantial question regarding the failure to count 55 additional ballots, at least 48 of which were postmarked before the end of the voting period. It is true that, based on considerations that favor finality in NLRB elections, the Board usually will only count mail ballots received *before* votes are counted on the tally date, *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981), and the Board usually will *not* count mail ballots received thereafter, *Classic Valet Parking, Inc.*, 363 NLRB No. 23 (2015). However, consistent with my dissent in *Classic Valet Parking*, I believe that “in an extremely unusual case . . . when our regular procedures have been deficient,” the Board’s normal rules must be balanced against our statutory responsibility to assure that employees have been reasonably permitted to freely exercise their rights under the Act. *Id.*, slip op. at 2 (quoting *Tekweld Solutions, Inc.*, 361 NLRB No.18, slip op. at 4 (2013) (Member Miscimarra, dissenting in part)). Cf. Sec. 9(b) (“The Board shall decide [the appropriate bargaining unit] in each case . . . in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act.”).

The Employer is a utility company that operates throughout the five boroughs of New York City and Long Island. There were approximately 101 eligible voters who live and work in these five boroughs. A mail-ballot election was conducted from October 20 to November 4, 2015. As of November 5, the original tally day, the Region had received just 4 ballots. The parties agreed to postpone the tally for 1 week to November 12. After the 1-week postponement—which itself deviated from the Board’s normal procedures—the Region still had received only 34 valid ballots,<sup>1</sup> approximately one-third of the 101 eligible voters. Subsequently, the Region received an additional 55 ballots, *including 48 ballots that were postmarked before November 4*, the last day of the original voting period. In other words, of the 82 ballots mailed during the original voting period, the

<sup>1</sup> After the 1-week postponement, the tally as of November 12 was 20 votes for the Petitioner and 14 votes against representation.

majority of votes cast—48 ballots—are not even being counted. If these votes are counted, the outcome may still favor representation by the Petitioner. However, this will never be known unless the votes are counted.

In my view, the Board's normal mail-balloting procedures suffered an unacceptable breakdown here in spite of everyone's reasonable efforts. Under our statute, questions concerning union representation are to be resolved based on the principle of majority support.<sup>2</sup> I recognize that the Board has no responsibility to ensure

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<sup>2</sup> See Sec. 9(a) ("Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.") (Emphasis added.)

votes are cast by each and every eligible voter. However, in the present circumstances, the rule favoring finality should give way in favor of allowing employees who reasonably attempted to exercise their rights under the Act to have a say in their representation. I would therefore grant review, and I respectfully dissent from the majority's failure to do so.

Dated, Washington, D.C. April 5, 2016

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Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD