

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

**UPS GROUND FREIGHT, INC.**

**Employer,**

**and**

**Case No. 04-RC-165805**

**TEAMSTERS LOCAL 773,**

**Petitioner.**

**PETITIONER'S RESPONSE TO EMPLOYER'S REQUEST FOR REVIEW OF  
ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION  
AND DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF  
REPRESENTATIVE**

Pursuant to Section 102.67(f) of the National Labor Relation Board's Rules and Regulations, Petitioner, Teamsters Local 773 (the "Union") submits the following Response to the Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative ("Request for Review") that was filed by the Employer UPS Ground Freight, Inc. (the "Employer"). For the following reasons, the Union submits that the Request for Review should be denied.

**1. Regional Director Walsh's Alleged Bias Does Not Justify Board Review**

In its preliminary statement, the Employer suggests that "all of the Region's actions in this matter have been systematically tainted" by the alleged pro-union bias of Regional Director Dennis Walsh. The bias accusation is not a grounds for review from the Board for the following reasons.

**a. The Employer Has Waived Its Bias Argument**

Any objections to an election must be filed within seven days of the tally of ballots. 29 C.F.R. §102.69(a). On February 9, 2016, the Employer filed objections to the election. There was no mention in its objections of the alleged biases of Regional Director Dennis Walsh.

Although the Employer states that it “reserves the right to file a supplemental brief” on its claim that Walsh’s alleged biases affected the outcome of the election (Request for Review, p. 3, n. 3), the Employer cannot raise an issue that it did not cite in the Objections it filed within the seven day deadline. Parties do not have the right to amend their objections or to file further objections after the expiration of the filing deadline. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984); *Burns Security Services*, 256 NLRB 959 (1981). Accordingly, the Employer’s attempt to raise a new objection concerning Walsh’s alleged bias at this late a date must be rejected.

**b. Walsh Was Not Involved In Any Of The Objected-To Decisions**

Decision and Direction of Election dated January 5, 2016 (“DDE”) and the Supplemental Regional Director’s Decision on Objections to Election and Certification of Representative dated March 11, 2016 (“DOE”) were each issued by Acting Regional Director Harry A. Maier, not Walsh. Similarly, the January 11, 2016 letter denying the Employer’s request to reconsider the decision to conduct a mail ballot was also issued by Maier. During the December 21, 2015 representation hearing, Hearing Officer Kathleen O’Neill periodically consulted with the “Acting Regional Director,” i.e. Maier, and not Walsh. None of the decisions for which the Employer now seeks Board review were decisions made by Walsh. Accordingly, any allegation of bias on the part of Walsh is inapplicable to this case.

## 2. Employer Has No Grounds For Review Of The Supervisory Taint Issue

It is well established that the issue of “supervisory taint” is resolved through an administrative investigation, and not through a representation or objections hearing. *Lampcraft Industries*, 127 NLRB 92, n. 2 (1960). Thus, in a normal supervisory-taint issue, an employer only has the right to provide its evidence of supervisory taint to the Region. There is no written decision, nor do the parties have the right to appeal the Region’s administrative determination.

In this case, at the Employer’s insistence, the hearing officer took testimony on Mr. Cappetta’s supervisory status during the representation hearing.<sup>1</sup> The Region also took additional evidence during its administrative investigation. Neither the Union nor Employer knows what evidence the Region reviewed as part of that investigation. The Employer cannot credibly argue that it was not thoroughly investigated.<sup>2</sup> Accordingly, the Employer raises no basis for Board Review of the Region’s decision on the supervisory-taint issue.

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<sup>1</sup> The Employer argues that the Region denied it an “appropriate hearing” because the Hearing Officer began the hearing “over an hour late for reasons unexplained[.]” Request for Review, p. 22. On the contrary, the Hearing Officer was prepared to begin the hearing close to the scheduled 10:00 a.m. start time. After she informed the parties that she would only take evidence on the multi-location unit issue, and that Mr. Cappetta would be interviewed privately with a Board Agent as part of the Region’s investigation of the supervisory-taint issue, the Employer objected and insisted that it have the right to examine Mr. Cappetta in the courtroom about his supervisory status. Because Mr. Cappetta was in the building, the Acting Regional Director granted the Employer’s request and the Hearing Officer permitted testimony on the supervisory issue during the representation hearing. The delay the Employer now complains about was of its own making as the Acting Regional Director considered the Employer’s request that it be permitted to take Mr. Cappetta’s testimony notwithstanding the normal practice in an administrative investigation.

<sup>2</sup> The fact that seven drivers may have told the Employer that they were not interviewed by the Region as part of that investigation is immaterial. Request for Review, p. 14. First, employees who were interviewed by the Region might not admit to the Employer that they provided information as part of the administrative investigation. Second, in a unit of thirty-two drivers, evidence that seven drivers were not contacted does not mean that a sufficient number of drivers were not contacted to adequately investigate the taint allegation.

**3. The Board Should Not Review the Decision To Order A Mail Ballot Election**

**a. Employer Cannot Raise This Issue in a Second Request For Review**

This is the second time the Employer has sought a Request for Review over the Acting Regional Director’s decision to conduct a mail ballot election. On January 11, 2016, just after the Decision and Direction of Election issued, the Employer filed a Special Appeal and Request for Review of Acting Regional Director’s Decision to Direct a Mail Ballot Election dated January 11, 2016. On January 29, 2016, the Board denied that request, finding that it “raises no substantial issues warranting review.”

Section 102.67(i)(1) of the National Labor Relations Board’s Rules and Regulations states:

A party may combine a request for review of the regional director’s decision and direction of election with a request for review of a regional director’s post-election decision, if the party has not previously filed a request for review of the pre-election decision. *Repetitive requests will not be considered.*

(Emphasis added) The current Request for Review of the Acting Regional Director’s decision to hold a mail ballot election is concerns the same issue raised by Employer in its January 11, 2016 Request for Review. It should therefore not be considered.

**b. Voter Turnout Supports The Acting Regional Director’s Decision To Order A Mail Ballot Election**

There is one difference between the Employer’s prior argument against a mail ballot election and its current argument. Previously, the Employer claimed that a manual ballot was necessary by noting that a manual ballot is favored over a mail in ballot because, historically,

mail ballots had a lower turn-out rate.<sup>3</sup> Thus, the Employer noted, the Board prefers manual ballots because they increase employee participation in the vote.

However, in this mail ballot election, there were thirty-two (32) eligible voters and thirty (30) cast a vote. Clearly, the Employer's concerns that a mail ballot would produce a low voter turnout did not come to pass. Not surprisingly, the instant Request for Review makes no mention of the argument that a mail in ballot produces lower voter turnout than a manual ballot.

The Acting Regional Director reasonably concluded that a mail-in-ballot was a better use of the Region's resources than the Employer's proposal to hold two polling periods over the course of fourteen overnight hours, or the Employer's alternative proposal to have a single six-hour overnight polling period for a unit of only thirty-two employees. Such a determination was well within the Acting Regional Director's discretion. Additionally and importantly, that decision was borne out by the high level of participation in this election, notwithstanding the Employer's claims that turnout would be low in an election conducted by mail.

#### **4. The Acting Regional Director's Denial Of Employer's Subpoena Requests Was Based On Established Board Rules**

The Employer acknowledges that the Region was following the Casehandling Manual when it denied the Employer's request for two Subpoena *Duces Tecum* because no hearing had been scheduled. Nevertheless, the Employer argues that the Region should have disregarded the

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<sup>3</sup> See e.g. November 25, 2015 letter from Kurt Larkin to Acting Regional Director Harry Maier ("As you know, statistics show that voter turnout in mail ballots is often significantly lower than in traditional manual ballots. So the Region's decision to hold a mail ballot is likely to result in suppressed voter turnout, which is contrary to the purposes of the Act."); Employer's Special Appeal and Request for Review of Acting Regional Director's Decision to Direct a Mail Ballot Election dated January 11, 2016, p. 10 (noting "the widely recognized fact that mail ballots disenfranchise a larger number of voters than manual ballots.")

Casehandling Manual because, the Employer claims, the Manual is out of date in light of the new representation procedures. Request for Review, p. 20.

That argument is simply nonsense. The new rules made no change to the Board's policy of investigating supervisory taint issues administratively. On the contrary, the General Counsel's memorandum outlining the changes in the Representation procedures specifically noted that the Board would continue that policy under the new rules. GC Memo 15-06, p. 18. As such, the Regional Director properly continued to follow the preexisting policy of not permitting a party to subpoena records in aid of an administrative investigation when there is no hearing pending. The Employer's request for review of the Region's decision to deny its subpoena request should be denied.

**5. The Acting Regional Director's Procedural Decisions Before And During the Representation Hearing Were Valid Exercises Of His Discretion**

In Part IV.A.5 and 6 of the Request for Review, the Employer claims it was prejudiced by various decisions made by the Region in preparation for and during the representation hearing. The Rules give broad discretion to the regional director and hearing officer in deciding various procedural issues, including whether and the extent of any extensions of the deadline for an employer's position statement, whether and for how many days to postpone a representation hearing, whether to continue a hearing to a second day, whether to break for lunch, the time provided to the parties to prepare their closing statement, and whether the parties close orally or through briefs. Now, the Employer claims that any time the Acting Regional Director or Hearing Officer exercised such discretion and did not give the Employer exactly what it wanted, there was a gross violation of the Employer's rights. On its face, the Employer's arguments are

nonsense.<sup>4</sup> If the Region has discretion, it can exercise that discretion. The fact that some (but by no means all) of those discretionary decisions did not go the Employer's way does not pose any threat to the Employer's constitutional or statutory rights.

## **6. A Single Location Unit Is Appropriate**

Through its Request for Review, the Employer seeks to re-litigate the appropriateness of the unit. For the reasons set forth in the Acting Regional Directors DDE, those arguments should be rejected. It is worth noting, however, that the Employer's argument ignores much of the Acting Regional Director's reasoning. The Employer attacks the Acting Regional Director's reliance on *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), when, in fact, the Acting Regional Director considered the multi-facility unit issue under both the *Specialty Healthcare* and traditional standards. See DDE, p. 4 ("The Board did not indicate in *Specialty Healthcare* whether the analytical framework set forth in that case is intended to apply to a multi-facility issue.... Because of the uncertainty regarding the Board's intentions in this area, I will analyze the multi-facility issue using both the traditional and the *Specialty Healthcare* standards.")

The Employer's Request for Review also completely ignores many of the factors that the Acting Regional Director considered that favored a single unit under his analysis of the issue

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<sup>4</sup> Perhaps the most absurd of its arguments is when the Employer claims that the Acting Regional Director violated its rights by only partially granting its request for a two-day postponement of the deadline for its statement of position and the representation hearing. Originally the hearing was scheduled for Friday, December 18, with the statement of position due on Thursday, December 17. The Employer requested a two-day extension on both, and the Regional Director partially granted that request with a one-day extension. As a result, the position statement was due on Friday, December 18 and the hearing took place on Monday, December 21. The Employer complains that *because of its own postponement request*, the Union was granted an unfair advantage because it had the entire weekend to review the Employer's position statement and prepare for the hearing. Request for Review, pp. 21-22.

using the traditional standard. While the Employer raises the fact that drivers have transferred between facilities (Request for Review, p. 27), the Employer does not address the fact that the rates of interchange were far below the number normally required for a single unit. DDE, pp. 9-11. The Employer also makes no mention at all of the large distances between the nine distribution centers it seeks to include in a single unit. DDE, p. 11. Each of those factors were found by the Acting Regional Director to either “clearly favor” the petitioned-for unit, or was deemed to “not weigh in favor of rebutting the single-facility presumption.” DDE, p. 11. Accordingly, the request to review the appropriateness of a single location unit should be denied.

**7. Inclusion Of Certified Safety Instructors And Dispatchers Are Not Determinative And Are Therefore Not An Issue For The Request For Review**

The election results were twenty-seven votes in favor of the Union, one vote against, with two challenged ballots, the ballots of Frank Cappetta and Carl David. Although hired as Road Drivers, Mr. Cappetta is also both a dispatcher and is certified as a safety instructor. Likewise, Mr. David was hired as a road driver but also works as a certified safety instructor. The Employer contests that certified safety instructors and dispatchers should be excluded from the unit, which is why it challenged their ballots.

Because the two challenged votes were not determinative, they were not opened. Also because there was no ruling on the inclusion or exclusion of those positions, the Certification states that “[t]he dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit covered by this certification, inasmuch as I directed that they vote subject to challenge and resolution of their inclusion or exclusion was unnecessary because their ballots were not determinative of the election results.” DOE, p. 9 n. 5. Such certification language is consistent with the Board’s practice. Casehandling Manual, Section 11474; Part X of

General Counsel Memorandum 15-06. The Employer provides no compelling reason to depart from the Board's standard practice in this case and thus no review should be granted on this issue.

#### **8. The Employer's Challenges To The New Representation Rules Have Already Been Rejected By The Courts**

The Employer includes several arguments challenging the Representation Rules that became effective on April 14, 2015, as well as General Counsel Memorandum 15-06. In doing so, the Employer repeats the arguments made in *Chamber of Commerce v. NLRB*, 1:15-cv-00009 (D.D.C. 2015); *Assoc. Builders and Contractors of Texas, Inc. v. NLRB*, 1:15-cv-00026 (W.D.Tex. 2015), and *Baker DC, LLC v. NLRB*, 1:15-cv-571 (D.D.C. 2015), either by reiterating those arguments in the text of its Request for Review, or by incorporating the Pleadings and Briefs from those cases into its Request for Review by reference. Request for Review, Exhibit D. Although the Employer attached 103 pages of pleadings and briefs from those cases to its Request for Review, left unmentioned is the fact that in each case, the court rejected those challenges to the new representation rules. *Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd.*, 118 F. Supp. 3d 171 (D.D.C. 2015)<sup>5</sup>; *Associated Builders & Contractors of Texas, Inc. v. N.L.R.B.*, No. 1-15-CV-026 RP, 2015 WL 3609116 (W.D. Tex. June 1, 2015). Furthermore, the Board has already held that it will not entertain a Request for Review on the basis of those arguments. *Pulau Corp. & Teamsters, Chauffeurs, Warehousemen, Indus. & Allied Workers of Am., Local 166, Int'l Bhd. of Teamsters, Petitioner*, 363 NLRB No. 8

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<sup>5</sup> The two D.C. cases were consolidated. *Chamber of Commerce*, 118 F. Supp. 3d at 177.

(Sept. 16, 2015). Accordingly, the Employer's requests for review concerning the Board's new representation procedures should be rejected.

## **CONCLUSION**

For the foregoing reasons, and for the reasons set forth by the Acting Regional Director in the January 5, 2016 Decision and Direction of Election and the March 11, 2016 Supplemental Regional Director's Decision on Objections to Election and Certification of Representative, the Union respectfully requests that the Board deny the Employer's Request for Review of those decisions.

Respectfully submitted,

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Dated: April 8, 2016

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Union's Response to Employer's Request for Review of Acting Regional Director's Decision and Direction of Election and Decision on Objections to Election and Certification of Representative to be served upon the following by U.S. Mail, postage prepaid, on the date indicated below:

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