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14 UNITED STATES OF AMERICA
15 NATIONAL LABOR RELATIONS BOARD
16 REGION 20

17 URS Federal Service, Inc., 18 19 Employer, 20 21 and 22 23 International Association of Machinists and 24 Aerospace Workers District Lodge 725, 25 26 Petitioner.	27 No. 20-RC-170461 28 REQUEST FOR REVIEW
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29 **I. INTRODUCTION**

30 Petitioner files this request for review because the Acting Regional Director’s report raises
31 an important case of first impression regarding interpretation of the Board’s new representation
32 case procedures, as contained in Section 102.69(d)¹ of the Board’s Rules and Regulations. This
33 is an important issue that the Board needs to resolve *now* in order to avoid future uncertainty
34 throughout the Regions regarding the application of that provision.

35 What is at issue in this Request for Review is the provision in Section 102.69(d) that
36 provides that “within 2 business days after the approval of an election agreement, the employer
37 shall provide to the regional director and the parties named in the agreement or direction a list of

38 ¹ This also affects § 102.67(l) which contains the same provision.

1 the full names, work locations, shifts, job classifications, and contact information ... of all
2 eligible voters.” The provision furthermore provides, “the Employer’s failure to file or serve the
3 list within the specified time or in proper forma shall be grounds for setting aside the election
4 whenever proper and timely objections are filed under the provisions of Section 102.69(a) of the
5 Rules and Regulations.”² Here, the employer failed to comply with the direction of the
6 Regulation because it never provided to the Union the voter eligibility list. This case presents the
7 clear and narrow question of whether the employer’s failure to provide that list compels “setting
8 aside the election....”

9 Here, the Acting Regional Director found that the requirement to serve the list was
10 excused because the list was provided to the Region, which then provided it to the Union. As
11 noted below, however, the Region did not provide the list to the Union until eight days before the
12 election, contrary to Board policy, which requires that the voter list be received at least ten full
13 days in advance of the election. See Section 11302.1 of the Case Handling Manual.
14 Furthermore, the employer has offered no explanation for why it did not provide the Voter
15 Eligibility List as required by the Regulation.

16 In summary, this case presents a clear issue to the Board as to whether the mandatory
17 requirement that the employer serve the voter list on the Union may be excused by the subsequent
18 service of the list by the Region.

19 II. A STATEMENT OF THE CASE

20 There is no dispute over the precise issue presented to the Board nor the facts.

21 The parties executed their stipulated election agreement on Thursday, March 3, which
22 provided for a prompt election on March 15. Consistent with the Board’s rules:

23 The Agreement required, consistent with the Board’s Rules and
24 Regulations that ‘[w]ithin two business days after the Regional
25 Director has approved this Agreement, the Employer must provide
to the Regional Director and all of the other parties a voter list ... of
all eligible voters.’

26 See Decision p. 3.

27 _____
28 ² The Region quoted the language of the Rule requiring “setting aside the election” but failed to
further discuss this provision in the Report.

1 The Union did not execute the Board’s waiver form of the right to have the voter list for
2 ten full days before the election. See NLRB form 4483 and Case Handling Manual § 11302.4.
3 This was because, as described by the Acting Regional Director’s Report, “the Employer orally
4 agreed to furnish the list on March 4 [Friday, the day after the Stipulation was approved] and the
5 Petitioner did not execute a separate waiver of its right to have the voter list for at least 10 full
6 days before the election.” See Decision p. 3.

7 Despite the assurances that the list would be provided on Friday, March 4, the employer
8 advised the parties it might not be able to deliver the list until Monday, March 7. Decision p. 3.
9 Nonetheless, “Petitioner counsel sought delivery of the voter list on Saturday March 5, and the
10 Board Agent so informed Employer counsel.” The employer sent the list to the Region on March
11 5 (a Saturday), which then “furnished it to Petitioner upon his return to the office on the morning
12 of Monday March 7.” Although the employer sent the list to the Region on Saturday, March 5, it
13 did not simultaneously serve it on the Union. The employer has offered no explanation for why it
14 served the Voter Eligibility List on the Region and never served it on the Union. The employer
15 had the Union’s and the Union’s Counsel’s email addresses at all times and never served the list
16 at any time.

17 The facts are clear. The Union did not execute a waiver of its right to have the list for ten
18 days before the election. This was based upon the employer’s assurance, initially, that the list
19 would be provided, presumably by the employer, on March 4, Friday. The employer then sought
20 additional delay, and the Union sought to have the list delivery on Saturday. Presumably, had the
21 list been sent on Saturday, as requested by the Union, there would have been no basis to object.

22 Without explanation or justification, the employer sent the list to the Region but, in
23 violation of the Regulation, failed to send it to the petitioner on Saturday, March 5, or Sunday,
24 March 6, or on March 7 or at any other time. Rather, the Region sent it to the Petitioner on
25 Monday, March 7.

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1 What is apparent is that this employer, which also is very experienced³ in labor relations⁴
2 and has been subject to many petitions, was well aware of the rule that the list had to be served on
3 the petitioner. It has offered no explanation that there was some extraordinary circumstances
4 accounting for why it failed to comply with the rule. As the Acting Regional Director concluded,
5 “the Employer deviated from the Rules by failing to serve the list on Petitioner....” Yet it also
6 concluded that “the Region’s timely provision of the list to Petitioner effectively satisfied the
7 Board’s requirement that Petitioner receive the voter list within two business days of approval of
8 the Agreement.” Decision p. 4.

9 This holding effectively rewrites and eviscerates §§ 102.62(a) and 102.67(l) by excusing
10 the employer’s failure to serve the list on the petitioner, as clearly required by the rules.

11 The Board should grant this Request for Review to address that squarely placed question
12 as to whether the employer’s failure to serve the voter list requires, as the rule states, that the
13 objections be sustained. The failure to grant Review will leave this Decision as a precedent for
14 other Regions and throw the meaning of these rules into doubt and uncertainty.

15 **III. THE REQUEST FOR REVIEW SHOULD BE GRANTED BECAUSE THE**
16 **BOARD’S NEW RULES REQUIRE (1) THAT THE EMPLOYER SERVE THE**
17 **VOTER ELIGIBILITY LIST ON THE UNION, AND (2) THAT THE FAILURE TO**
18 **SERVE THE LIST CONSTITUTES AUTOMATIC OBJECTIONABLE CONDUCT.**

19 The Board’s final rule published in the Federal Register confirms that the Board made it
20 clear that the service of the voter list by the employer is mandatory. It is not discretionary.
21 Further, the failure to serve the Voter Eligibility List “shall be grounds for setting aside the
22 election whenever proper and timely objections are filed....” Section 102.62(d)⁵

23 ³ URS has been involved in many election cases since the new Regulations went into effect. See
24 Case No. 32-RC-165555, Case No. 21-RC-172474, Case No. 31-RC-147597, and Case No. 21-
25 RC-150980. Moreover, Lester Jordan, who represented the employer in this case, is also listed as
26 the employer representative in those cases. Presumably, he knew the rules and, it may be
27 inferred, deliberately did not comply here. The Report echoes this: “that the parties were keenly
28 aware of the time constraints posed by their agreed-upon March 15, election date.” Decision p. 3
(footnote omitted).

⁴ Cf. Footnote 5 of Decision.

⁵ Again, the Report did not address the language of the rule that “The Employer’s failure to file or
serve the list ... shall be grounds for setting aside the election.”

1 We detail below the references in the final rule that make it clear the Board understood
2 that this was mandatory. We further detail below the references in the final rule that make it clear
3 the Board understood that a failure to comply would lead to a new election.

4 The Board noted in footnote 130, “that employers will have responsibility for service of
5 the voter list on non-employer parties....” See footnote 130 at 79 F.R. 74335. Moreover, as
6 noted in the text accompanying footnote 130, the final rule clarified that the employer had “two
7 *business* days, rather than two calendar days ... to furnish the list to the non-employer parties to
8 the case” (Emphasis in original.) The Board specifically noted that it was doing away with
9 the prior practice that the Regional Director would make “the voter list available to the non-
10 employer parties ... since the Rule requires direct service of the voter list from the employer to
11 the non-employer parties.” This is the first indication in the Notice of the Final Rule that the
12 Board contemplated that the employer was responsible for serving the list. The Board noted
13 subsequently that it was adopting “the proposal that the Employer furnish the work locations ...
14 of all eligible voters in amended § 102.62(d).” See 79 F.R. 74341.

15 This footnote was in the context of identifying the reasons why additional information
16 should be provided by the employer. Nonetheless, it is an indication that the Board was making it
17 clear that the Rule required employer service of the voter list. See also 79 F.R. 74346 (“the Board
18 notes that the voter list amendments require the employer to furnish a copy of the voter list to the
19 regional director”). That reference also makes it clear that the reason that the Regional Director is
20 being served with the voter list is for agency use and not simply to serve upon the other parties.
21 The Board, moreover, was very clear that it had “decided to explicitly provide in §§ 102.6(d) and
22 102.67(l) the final rule that the employer has two business days after the Regional Director directs
23 an election or approves the parties’ election agreement to furnish the list to the nonemployer
24 parties and the regional director.” See footnote 220 at 79 F.R. 74353.

25 The Board, moreover, explained exactly why the burden was being placed upon the
26 employer to serve the voter list. It was doing so because there had been prior experience with
27 delay when the Regional Director was expected to serve the prior *Excelsior* list. The Board thus
28 stated, “The Final Rule eliminates this unnecessary administrative burden—as well as potential

1 source of delay in resolving litigation—by providing for direct service of the list by the employer
2 on all parties. See amended §§ 102.620(d), 102.67(l).” 79 F.R. 74356. Nothing could be clearer
3 behind the Board’s purpose in requiring employer service. This was to avoid exactly the problem
4 created in this case where the employer failed to serve the list on the Union.

5 The Board again, in footnote 248, made it clear that the service of the voter list was
6 mandatory: “Thus, amended § 102.62(d) and §102.67(l) shall provide in pertinent part that ‘The
7 employer’s failure to file or serve the list within the specified time or in proper format shall be
8 grounds for setting aside the election whenever proper *and timely* objections are filed.’”

9 (Emphasis in original.)

10 The Board again made it clear that this is mandatory. It substituted the word
11 “must” for the word “shall”:

12 Accordingly, as the amendments to §§ 102.62(d) and §§102.62(d)
13 make clear, once an election is agreed to or directed, the employer
14 must furnish the nonemployer parties to the case and the regional
15 director with an (up-to-date) list of the full names, work locations,
16 shifts, job classifications and contact information

15 See 79 F.R. 74369.

16 In summary, every indication in the Federal Register in the Notice of Final Rule is that the
17 Board considered it mandatory that the employer serve the voter list.

18 The same language that is in § 102.62(d) is in §102.62(l), involving directed elections.
19 Thus, the Board twice used the language that is mandatory, both in stipulated as well as directed
20 elections. Both rules provided additional evidence that the Board contemplated that the employer
21 must serve the voter list.

22 First, both rules provide as follows: “A certificate of service on all parties shall be filed
23 with the Regional Director when a voter list is filed.” Here, the employer utterly failed to file the
24 certificate of service.⁶

25 Second, both rules state as follows: “The employer’s failure to file or serve the list within
26 the specified time or in proper format shall be grounds for setting aside the election whenever
27 proper and timely objections are filed under the provisions of § 102.69(a).” This language does

28 ⁶ The Report did not address this language.

1 not provide the discretion that the Regional Director assumed to deny the objection because the
2 Region served the voter list. Rather, it says “the employer’s failure to file or serve ...” is the
3 basis for automatic objections.⁷

4 Finally, both rules contain the following statement: “The Employer shall be estopped from
5 objecting to the failure to file or serve the list within the specified time or in a proper format if it
6 is responsible for the failure.”⁸ Here, it is clear the employer was “responsible for the failure.” It
7 was not the Regional office. More importantly, as noted above, the Board was eliminating the
8 problems that had occurred in the past under the *Excelsior* list rule, where Regional offices
9 sometimes did not promptly provide a copy of the list to the other parties. The obligation is
10 squarely placed upon the employer to provide that list.

11 In summary, every indication in the Federal Register in the Notice of Final Rule is that the
12 Board contemplated that it would be clearly the employer’s responsibility to serve the list.

13 **IV. THE REPORT RELIES ON FAULTY AND CONTRADICTORY REASONS**
14 **UNDERMINING THE BOARD’S NEW ELECTION RULES.**

15 Here, the Region’s attempt to excuse the failure by claiming that it had the list timely
16 doesn’t satisfy the clear language of the rule.

17 The Report relies upon contradictory reasoning. First, although acknowledging that the
18 Employer agreed to provide the Voter Eligibility List on Friday, March 4, it reasoned that “the
19 terms of the Agreement are unambiguous and trump the Employer’s oral assurances.” Decision
20 p. 5. This is contradictory because “[t]he Agreement required, consistent with the Board’s Rules
21 and Regulations that ‘[w]ithin 2 business days after the Regional Director has approved this
22 Agreement, the Employer must provide to the Regional Director and all of the other parties a
23 voter list” Decision p. 3. The Report ignores the clear language of the Agreement. This is all
24 internally inconsistent.

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27 ⁷ The Report relies on pre-Rule Decisions of the Board. This is backwards since the new Rules
were written to change and clarify past issues and problems.

28 ⁸ This language was ignored by the Report.

1 The Region, in contradiction, finds that “Petitioner did not execute a separate waiver of its
2 right to have the list for the full 10 days, but it executed the Agreement which, by its clear and
3 unequivocal terms, established a voter-list due date inside the 10-day period.” Decision p. 5. If
4 the Union did not execute the waiver, that is equally clear and unambiguous. Moreover, it made
5 sense, since the employer had assured the Region and the Petitioner that it would comply and
6 submit the list on Friday, March 4. And, as noted above, by “its clear and unequivocal terms,”
7 the Employer was supposed to serve the Voter Eligibility List on the Petitioner, which it failed to
8 do and which the Report ignores.

9 Moreover, the fact is the Union did not timely receive the list. As noted above, the Board
10 policy requires the Union receive the list ten days in advance of the election. The Union was well
11 aware that, given the approval date of the stipulation, it might not receive the list until Friday,
12 March 4, as it had been assured by the employer. It was willing to live with that, since that would
13 have been ten days from the date of the election. But when the employer advised the Region and
14 the Petitioner that it might not be able to comply, the Union asked that it receive it on the next
15 day, Saturday. That would have been bare compliance. The employer could have easily
16 complied by serving the list on Saturday, March 5, to the Petitioner. It chose not to do so. It has
17 offered no excuse. Thus, the list provided by the Region, although “2 business days” from the
18 date of the approval of the election, was less than ten days before the election. Had the Union
19 executed the waiver, this argument would not affect this case. It did not do so.

20 The Report speculates that there was no adverse impact on the Union’s campaign. See
21 Decision p. 7-8. That begs the question of whether there has been compliance with “clear and
22 unequivocal terms” of the Election Agreement and the Rule. Moreover, the shortened period for
23 the election means non-compliance is likely to have more adverse effects on the Union’s
24 campaign. Finally, this speculation undermines the carefully and clearly drawn Rule regarding
25 service and timely service. The Region undermines the Rule by suggesting that it be interpreted
26 against its clear terms by the idea that “in an election-objections context, the easy and efficient
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1 use of e-mail, social media, and readily-available telephone numbers to communicate with scores
2 of employees in rapid succession [changes the effects of the Rule.]”⁹

3 The Report ignores other mandatory language of the Rules. For example, the Rules
4 provide: “The Employer shall be estopped from objecting to the failure to file or serve the list
5 within the specified time or in a proper format if it is responsible for the failure.” The Report
6 does not even comment on this provision.

7 The Report is, however, clearly correct that this is “a case of first impression.” Decision
8 p. 6. Review should be granted.

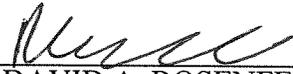
9 **V. CONCLUSION**

10 This Request for Review presents a clear, narrow and precise issue to the Board. Either
11 the Rule requires that the employer serve the voter list or it does not. Here, moreover, when the
12 Union ultimately received the list on March 7, it was late. The Board should uphold the language
13 of its recently adopted Rule and the Election Agreement and reverse the Acting Regional
14 Director’s Report’s evisceration of the rule, which will lead to multiple litigation in other cases.
15 Moreover, it will allow the employer to send these lists to the Region, hoping that it will be a day
16 or two before the Region sends the list to the Union, and the employer will be excused by this
17 Decision of complete and timely compliance. This Decision eliminates the clarity with which the
18 Rule was written by the Board.

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21 Dated: June 24, 2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

22
23 By: _____


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24
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28 ⁹ This Report eviscerates other mandatory provisions such as that “the list [must be] in proper format.”

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

URS FEDERAL SERVICE, INC.

Employer

and

Case 20-RC-170461

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT LODGE 725, AFL-CIO**

Petitioner

**REGIONAL DIRECTOR'S REPORT REGARDING OBJECTIONS TO
ELECTION AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to a petition that International Association of Machinists and Aerospace Workers, District Lodge 725 (Petitioner or Union) filed on February 25, 2016,¹ and a Stipulated Election Agreement that the Regional Director approved on March 3, a Board agent conducted a secret-ballot election on March 15 among the employees of URS Federal Service, Inc. (Employer) in the following appropriate bargaining unit to determine whether they wish to be represented for the purposes of collective bargaining by the Petitioner:

All Material Handling Laborers, Forklift Operators, and Production Control Clerks employed by URS/AECOM at the Sierra Army Depot in Herlong, California:

Upon conclusion of the election, a Board agent counted the ballots and served a copy of the official *Tally of Ballots* on the parties. The *Tally* shows that of the approximately 186 eligible voters, 54 votes were cast for, and 91 votes were cast

¹ All dates refer to calendar year 2016.

against, representation by the Petitioner.² There were 2 challenged ballots, a number insufficient to affect the election result.

THE OBJECTIONS

On March 22, the Petitioner filed timely objections to the conduct of the election or to conduct affecting the election (Objections) with an accompanying offer of proof in support thereof.³ A copy of the Objections was served on the Employer. The Objections read verbatim as follows:

1. URS interfered with the laboratory conditions of the election by failing to provide a voter eligibility list to the Union.
2. URS interfered with the laboratory conditions of the election by failing to post the NLRB's required notice in all applicable break rooms.
3. By means of direct threats to employees of benefit loss, URS interfered with the laboratory conditions of the election.
4. URS engaged in surveillance of union meetings resulting in destruction of the laboratory conditions of the election.
5. The employer treated union and employer election observers differently thus destroying laboratory conditions.

Objection 1: URS interfered with the laboratory conditions of the election by failing to provide a voter eligibility list to the Union.

In support of this Objection, the Petitioner accurately asserts that the Employer never provided the Petitioner with the voter eligibility list. Rather, the Employer transmitted the list to the Region on Saturday March 5, which in turn timely provided the list to Petitioner the next business day, Monday March 7; eight days before the election.

² The *Tally* erroneously approximated the number of eligible voters at 150. The voter list contained 186 names.

³ Only conduct which occurred during the "critical period" (between the February 25 filing date of the petition and the March 15 election) can form the basis for objectionable conduct. *E.L.C. Electric, Inc.*, 344 NLRB 188, 189 n. 6 (2005), citing *Ideal Electric Co.*, 134 NLRB 1275 (1961).

Neither in its Objections nor in its offer of proof did Petitioner object to receiving the list less than 10 full days before the election, but I shall nevertheless address the issue.⁴ The parties executed, and the Regional Director approved, their Stipulated Election Agreement (Agreement) on Thursday March 3, which provided for the election to occur on March 15. The Agreement required, consistent with the Board's Rules and Regulations that, "[w]ithin 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters."

The second business day after approval of the Agreement fell on Monday March 7; eight days before the election. E-mail correspondence between a Board agent and the parties, as well as the agent's phone log, show that the parties were keenly aware of the time constraints posed by their agreed-upon March 15 election date.⁵ Notwithstanding the March 7 due date for the voter list, the Employer orally agreed to furnish the list on March 4 and the Petitioner did not execute a separate waiver of its right to have the voter list for at least 10 full days before the election (e.g., NLRB Form 4483).

Despite its earlier assurances, the Employer informed the Board agent on March 4 that it was unable to furnish the list that day and that it might not deliver until Monday March 7. Petitioner counsel sought delivery of the voter list on Saturday March 5, and the Board agent so informed Employer counsel. However, rather than serve Petitioner with the list on March 5, the Employer e-mailed the list to the Board agent, who then furnished it to Petitioner upon his return to the office on the morning of Monday March 7.

Petitioner did not seek to delay the election, or contend or proffer any evidence to establish that its receipt of the list on March 7 hindered its ability to communicate with

⁴ Board policy requires that the other party(ies) to an election receive the voter list at least 10 full days in advance of the election. See *Mod Interiors*, 324 NLRB 163 (1997); and Section 11302.1 of NLRB Casehandling Manual (Part Two), Representation Proceedings.

⁵ Petitioner's counsel is an experienced labor attorney who is presumably well acquainted with the Board's revised Rules. She testified on behalf of Weinberg, Roger & Rosenfeld at the Board's public hearing regarding implementation of the Rules on April 11, 2014.

the approximately 186 eligible voters who work at a single facility in the remote mountain town of Herlong, California.⁶

Analysis

Under modifications to the Representation Case Procedures that went into effect April 14, 2015, Section 102.62(d) of the Board's Rules and Regulations (Rules) provides that: "within 2 business days after the approval of an election agreement. the employer shall provide to the regional director *and the parties* named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information. .of all eligible voters." (*Emphasis added*). This Section of the Rules further provides that, "The Employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a) of the Rules and Regulations."

The sole basis of Petitioner's Objection 1 is the Employer's failure to serve the voter list on Petitioner. However, it is uncontroverted that the Employer submitted the list to the Region within the time specified in the parties' Agreement and the Board's Rules, and that the Region sent the list timely to Petitioner. When the Board modified its Rules, it eliminated the extraneous step of requiring the Board's regional offices to serve election parties with the voter list. Indeed, experience showed that, at times, it resulted in undue delay. See e.g., *The Ridgewood Country Club*, 357 NLRB 2247 (2012). Although the Employer deviated from the Rules by failing to serve the list on Petitioner, the Region's timely provision of the list to Petitioner effectively satisfied the Board's requirement that Petitioner receive the voter list within two business days of approval of the Agreement. To hold otherwise would exalt form over substance. Accordingly, I find the Employer's failure to also serve Petitioner insufficient to warrant setting aside the election results, and I hereby overrule Objection 1.

⁶ Analysis of the voter list reveals that the supermajority of eligible voters live in the nearby vicinity of Herlong, within approximately 35 miles of the work site.

As discussed above, Petitioner did not file an election objection to receiving the voter list less than 10 full days before the election. However, it is well established that if the Regional Director “receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election.” *Nelson Tree Service, Inc.*, 361 NLRB No.161 (2014); citing *American Safety Equipment, Corp.*, 234 NLRB 501, 501 (1978), *enfd. denied on other grounds* 643 F.2d 693 (10th Cir. 1981). Confronted with this arguably objectionable conduct, I address the issue below, but for the reasons that follow, I do not find that the election was tainted.

To begin, the Board’s policy regarding the submission of the voter list at least 10 full days prior to the election is grounded on the *Excelsior* rule; i.e. “to provide employees with the full opportunity to be informed of the arguments concerning representation.” *Bon Appetit Management Co.*, 334 NLRB 1042, 1043 (2001). The Board nevertheless permits parties to an election to waive their right to receive the list for part or all of the 10 days in order to shorten the time to election.⁷ Here, Petitioner received the list from the Region on March 7; eight days before the election. Petitioner did not execute a separate waiver of its right to have the list for the full 10 days, but it executed the Agreement which, by its clear and unequivocal terms, established a voter-list due date inside the 10-day period. While it’s possible that the Employer’s oral assurances to provide the list on March 4 influenced Petitioner’s decision to execute the Agreement, the terms of the Agreement are unambiguous and trump the Employer’s oral assurances.⁸ Whatever Petitioner’s reason for signing the Agreement, by doing so, I find that it waived its right to have the voter list for the full 10 days.

Even assuming for the sake of argument that the Petitioner did not waive its right to the list for the full 10 days by executing the Agreement, the Board has long held that the voter list requirements are not to be mechanically applied and should be evaluated in light of all the relevant circumstances, including; the number of days the list is

⁷ See Fed. Reg. Vol. 79, No. 240, page 74474 (December 14, 2014); *The Ridgewood Country Club*, *supra*.

⁸ It is equally likely that the Employer’s assurances caused Petitioner to forego separately waiving its right to have the list for the full 10 days.

overdue; the number of days the other party(ies) to the election had the list prior to the election, and the number of employees eligible to vote in the election. *Pole-Lite Industries, Ltd.*, 229 NLRB 196 (1977), *McGraw Edison Co.*, 234 NLRB 630 (1978). By way of example, see *Gerland's Food Fair*, 272 NLRB 294 (1984) (new election ordered where list received 6 days before election); *McGraw Edison Co.*, supra (rerun election when list received 8 days before election); *Coca-Cola Co. Foods Division*, 202 NLRB 910 (1973) (list received "only hours before the election"); *Pole-Lite*, supra (union's receipt of the voter eligibility list three calendar days and one working day late ruled unobjectionable); *Bon Appetit Management Co.*, 334 NLRB 1042 (2001) (union's receipt of the eligibility list one day late in a unit of 200 employees not objectionable); *Taylor Publishing Co.*, 167 NLRB 228 (1967) (not objectionable when regional office received the list one day late, the union received the list nine days prior to the election, and the unit exceeded 1,000 employees).

It bears noting, however, that there is a paucity of Board law regarding the application of the voter list requirements since the Board implemented its revised Rules. Indeed, this appears to be a case of first impression, as I found none. Prior to the revisions, employers were required only to provide employees' names and addresses. They are now required to furnish, among other information, employees' telephone numbers and e-mail addresses; information that the Employer supplied in this case. Put simply, extant Board law governing the application of the voter list requirements is outdated because it contemplated communication with voters through home visits, mailing hard-copy literature, and off-site meetings with groups of employees. The Board also considered the degree of employee scatter and the hindrance of combing through telephone directories to find employees' phone numbers. See e.g., *McGraw Edison Co.*, supra at 631-632; *Bon Appetit*, supra; and *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998). The Board has yet to address, in an election-objections context, the easy and efficient use of e-mail, social media, and readily-available telephone numbers to communicate with scores of employees in rapid succession.

Without belaboring the point, suffice it to say that the voter information and means of communication now available to election parties have altered the landscape that formed the basis of existing precedent. In the absence of precedent under the revised Rules, I shall attempt to harmonize the guidance that existed under the old Rules with the revised Rules and modern-day circumstances. To be sure, in cases that issued under the Board's old Rules, the Board held that "prejudice can be presumed when the list is not received outside the minimum 10-day period"⁹ and that "the relevant inquiry is whether the delay- however caused- interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that that they can fully and freely exercise their Section 7 rights." *Alcohol & Drug Dependency Services*, supra at 520; citing *Mod Interiors*, supra. The above-cited and related cases present myriad circumstances in which the Board, based on the unique facts of each case, upheld or overturned the results of an election when delivery of the voter list was delayed. However, I am not aware of a single Board case in which the "delay" (if it can be characterized as such here) was caused by the election parties' own doing; i.e. by the terms of their election agreement. The Board's decision in *Red Carpet Bldg. Maintenance Corp.* 263 NLRB 1285 (1982) presents the most analogous set of facts that I could find.

In *Red Carpet*, the Board declined to set aside the election even though the petitioner received the list just 6 days before the election and lost the election 28-20. The election parties reached an election agreement on April 1 for an election to be held on April 23; however, unbeknownst to petitioner, the regional director did not approve the agreement until April 7, just 16 days before the election date.¹⁰ Accordingly, the voter list was not due in the regional office until April 14; only 9 days before the election. Petitioner, believing that the agreement was approved on April 1, contacted the regional office on April 8 to inquire about the list. A Board agent incorrectly advised the petitioner that the list was due on April 12. The petitioner again called concerning the list

⁹ *The Ridgewood Country Club*, supra; *Alcohol & Drug*, supra.

¹⁰ Under the Board's old *Rules* and its *Excelsior* decision, in order to comply with the voter list requirements, the minimum time required to election was 17 days following approval of the election agreement, absent a waiver of some or all of the 10 days with the list.

on April 14, and was told that the regional office would receive it that day. The employer timely furnished the list to the regional office, but mail service delayed delivery to the petitioner until April 17.

The Board concluded that the delayed receipt of the voter list did not frustrate the purposes behind the *Excelsior* rule, noting that:

[T]he Petitioner voluntarily entered into a stipulation providing for a representation election 22 days later. By agreeing to hold the election at an early date, the Petitioner presumably chose to maximize the impact among employees of its prior organizing activities which had led to the filing of the petition. By doing so, however, with the election scheduled in such a brief time frame, the Petitioner sacrificed the opportunity for prolonged utilization of the *Excelsior* list. *Id* at 1286.¹¹

Rejecting petitioner's argument that it was prejudiced by tardy receipt because employees were dispersed and difficult to contact, the Board explained that "the Petitioner knew this at the time it agreed to the date for the election and therefore assumed the consequences of its agreement." *Id* at 1286.¹² Unlike the petitioner in *Red Carpet*, who could reasonably expect that prompt approval of the election agreement would provide a five-day cushion for timely receipt of the voter list, here, Petitioner executed the Agreement knowing full well that it provided for delivery of the voter list 8 days before the election. Therefore, it is likewise reasonable to conclude that Petitioner "assumed the consequences of its agreement." I note further that, in contrast to the challenges that the petitioner faced in *Red Carpet*, Petitioner in this case enjoyed two more days with the list and was armed with all the information and technology necessary to proselytize the entire unit immediately upon receipt of the list and thereafter *ad infinitum* using an array of modern methods. In these circumstances, and in the absence of Board precedent to the contrary, I conclude that the purpose behind the *Excelsior* rule was not frustrated.

¹¹ The Board went on to cite petitioner's failure to seek postponement of the election, an effort the Board has since decided is unnecessary for election parties to preserve their objection to late receipt of the list. See e.g., *The Ridgeway Country Club*, *supra*.

¹² The Board no longer requires a showing of prejudice. As noted above, the Board now infers some degree of prejudice if the list is received less than 10 days before the election, and the relevant inquiry is whether the purpose behind the *Excelsior* rule was frustrated by the delay. Compare *Alcohol & Drug*, *supra* (rerun election when list received 5 days before election due to employer's tardy submission and regional office's delay in mailing).

Objection 2: URS interfered with the laboratory conditions of the election by failing to post the NLRB's required notice in all applicable break rooms.

In support of this Objection, the Petitioner identified three of its agents who would testify generally about "the locations of the postings," but Petitioner attributed specific testimony to only two of the three. One agent would testify that, after the election, he saw the Notice posted on the door to the polling room. The second agent would testify that he saw the Notice on election day in the site manager's office, which is reportedly located a considerable distance away from where employees perform their day-to-day tasks. That same agent would testify that several unidentified employees told him on March 10 (the first day the Notices of Election were to be posted) that they did not see any Notices.

Petitioner also proffered one employee witness who asserted in his Board affidavit that he did not see a Notice posted in the break room that he uses in his building. According to the employee witness, there are approximately 15-20 buildings at the work site, and he does not know if any other break rooms lacked a Notice. Petitioner did not disclose the total number of break rooms that are available to employees or identify any others that might have also lacked a Notice.

The Employer operates out of the Sierra Army Depot and shares the vast majority of its space with the United States Army and several other employers. It is unknown how much space is exclusive to the Employer throughout the facility, save the site manager's office. There is no claim or evidence that the Employer regularly posts notices for employees in any of the facility's break rooms.

Analysis

Section 103.20 of the Board's *Rules and Regulations* provides that "Employers shall post copies of the Board's official Notice of Election in conspicuous places at least three full working days prior to 12:01 a.m. of the day of the election." That rule further provides that the term "working day" shall mean an entire 24-hour period excluding

Saturdays, Sundays, and holidays. The parties' Agreement contains nearly identical language and adds that, "failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed."

However, there is no requirement that the Employer post a specific number of Notices, nor does it specify the exact locations where Notices are to be posted. The Agreement provides that, "The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted." Notably, the Board has never required that employees receive *actual* notice of an impending election. In *Jowa Security Services*, 269 NLRB 297, 298 (1984), the Board held that with respect to posting the Notice of Election:

The standard has always been that reasonable measures must be taken to assure that unit employees are aware of their right to freely exercise their franchise in a Board-conducted election. This is traditionally accomplished through the posting of the official notice of election in conspicuous places prior to the election. There is no requirement, for example, that eligible employees who are off duty during the posting period be individually notified of the election. See *Rohr Aircraft Corp.*, 136 NLRB 958 (1962). It is sufficient to show that reasonable steps were taken to apprise employees of their election rights.

As the objecting party, the Employer bears the burden of providing specific evidence in support of its objections. *NLRB Casehandling Manual, Part Two-Representation Case Proceedings (CHM)*, Section 11392.10. The Employer may satisfy this burden by identifying witnesses who would provide direct rather than hearsay testimony in support of its objections, specifying which witnesses would address which objections and what specific testimony they would offer if called at hearing. See *CHM*, Section 11392.6; *Daily Grind*, 337 NLRB 655 (2002); *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983). Here, although the Employer named four witnesses, only three were identified as having first-hand knowledge of where Notices were specifically posted. The testimony proffered by those three witnesses would merely establish that Petitioner agents did not see any Notices posted

until they visited the facility on the day of the election, and that one employee did not see a Notice in his break room during the posting period.

The Petitioner agents' proffered testimony consists entirely of hearsay with regard to the alleged non-posting of Notices prior to the election, and I also find unavailing the testimony of one employee witness concerning the absence of a Notice in one break room in one of 15-20 buildings. In sum, even accepting Petitioner's offer of proof at face value, it is insufficient to establish that there are material and substantial issues of fact that warrant a hearing, much less that the Employer failed to comply with the Board's Notice posting requirements. Accordingly, I overrule *Objection 2*.

Objection 3: By means of direct threats to employees of benefit loss, URS interfered with the laboratory conditions of the election.

This objection encompasses two separate allegations of Employer threats of a loss of benefits. The first allegation involves an anti-Union flier that the Employer distributed to employees and posted underneath the Notice of Election. Petitioner asserts that the flier itself contains threats of a loss of benefits, which interfere with employee free choice. Although not encompassed by the Objection, in its offer of proof, Petitioner asserts that the Employer posted this flier in a manner that would lead employees to conclude that it had been generated by the Board, rather than by the Employer.

The Petitioner provided a copy of the flier, which is appended hereto. Distilled down, the flier provides answers to hypothetical questions about how the outcome of the instant election and resultant contract negotiations could potentially impact the unit employees' terms and conditions of employment. For example, the flier lists the annual amount of union dues assertedly paid by Petitioner-represented employees at three of the Employer's other work locations. It also indicates that any changes to employees' benefits would be determined through negotiations between the Petitioner and the Employer and that benefits could "increase, decrease, or remain unchanged" depending on the outcome of bargaining.

The second allegation of this Objection involves statements that an Employer agent made to a group of employees. As part of its initial offer of proof, the Petitioner provided the names of three witnesses who would testify “regarding the threats.” Because the Petitioner’s Objection and initial offer of proof were ambiguous as to whether its witnesses would testify to the aforementioned flier or to other, unspecified threats, the Regional Director provided Petitioner with an opportunity to perfect its offer of proof. In response, the Petitioner clarified that one of its agents would testify that unidentified employees informed him that the site manager told employees that they would lose their health and welfare benefits and/or that their healthcare costs would significantly increase if the Petitioner prevailed in the election. No additional information was provided about when the alleged threats were made, where, or to whom.

The Petitioner also identified one employee witness who would testify that the site supervisor told employees several days before the election that they would possibly lose a number of benefits if the Petitioner won the election. The Region interviewed this witness, and in his Board affidavit, the witness testified that a couple of days before the March 15 election, the site supervisor addressed him and a group of approximately 11 other employees for 15 minutes after their daily morning meeting. The site supervisor distributed to each employee the aforementioned attached flier and then proceeded to read aloud from the flier as he reviewed it with the employees. Specifically, the employee witness recalled that, although the flier indicated that benefits could increase or remain unchanged, he didn’t recall the supervisor reading that portion of the handout aloud. Rather, the site supervisor only told employees that if they elected the Petitioner, they “could potentially lose” their health benefits and 401(k), depending on negotiations with the Petitioner.

Analysis

When an employer representative’s words reasonably convey the impression, during an election campaign, that employees will be automatically excluded from participating in an existing benefits plan upon their choosing a union to represent them in collective bargaining, this constitutes objectionable conduct sufficient to set aside the

election. *Hertz Corp.*, 316 NLRB 672, 695 n.2 (1995) (employer interfered with election by creating impression that employees would lose their 401(k) plan immediately on choosing union representation); see also *Federated Logistics & Operations*, 340 NLRB 255, 268 (2003) (employer violated § 8(a)(1) by threatening that, if the union were selected, employees could lose their 401(k) plan). In *Hertz*, the Board made clear that an employer violates § 8(a)(1) of the Act when it makes a statement about a benefit plan “that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining.” *Hertz*, *supra* at 695 (citing *Niagara Wires*, 240 NLRB 1326 (1979)). That impression is not dispelled by the representative’s reference to future negotiations, unless that reference makes clear that employees will not, in fact, lose coverage during the period of negotiations. *Hertz*, *supra* at 672, n.2.

Where the speaker couches predictions about eligibility for benefits in terms of future negotiations, the Board will examine the entire message to determine whether the predictions, in context:

“effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore,” or – conversely – whether they indicate that any “reduction in benefits will occur only as a result of the normal give and take of collective bargaining.”

Carpenter Tech. Corp., 346 NLRB 766 (2006) (citing *Federated Logistics & Operations*, 340 NLRB 255 (2003), *enfd.* in relevant part 405 F.3d 920, 924-927 (D.C. Cir. 2005)). Ultimately, the prediction will be deemed unlawful if it gives the impression that “existing benefits may be lost upon selection of a union and may be regained only after the vagaries or uncertainties of negotiations.” *Id.* (citing *Ryder Truck Rental*, 341 NLRB 761 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005)).

Applying the above principles here, I find that the Employer’s flier does not convey the message that employees will be automatically excluded from participating in their current benefit plans upon certification of the Petitioner as their 9(a) representative.

Rather, the flier clearly communicates to the reader that any changes in the status quo are subject to good-faith negotiations.

Turning to the Petitioner's allegation that the Employer's flier made it appear that the Board consented to the Employer's campaign messaging, there is nothing in the flier, or elsewhere for that matter, to suggest that the Board co-authored or endorsed the contents of the flier. Indeed, the only mention of the Board is the Employer's statement that, "It is very difficult to get rid of a union once it has been certified by the National Labor Relations Board." Furthermore, the site supervisor clearly identified himself as the author of the letter and the document was printed on "AECOM" letterhead that prominently features the name of the Employer's parent company.¹³ The Petitioner does not claim, and there is no evidence to establish, that the Employer conveyed to employees in any other manner that the Board endorsed its campaign message or otherwise favored the Employer in the election. Compare *SDC Investment*, 274 NLRB 556, 557 (1985) (objectionable where a party alters a sample ballot and misleads employees to believe that the Board favors one party over another).

Finally, with respect to the site supervisor's alleged threat of a loss of benefits, the evidence established that he told employees in a meeting that they "could potentially lose" some of their benefits as a result of negotiations with the Petitioner. However, the supervisor read directly from the flier found unobjectionable above while the employees followed along with their own copy of the flier. Although the supervisor read aloud only the potential negative that could result from contract negotiations, the flier itself contained the entirety of the conditional, lawful language: "Benefits could increase, decrease, or remain unchanged based upon the outcome of negotiations." In this context, the supervisor's comments would not reasonably tend to interfere with employee free choice in the election. *Hertz*, supra.

In sum, the evidence proffered by the Union is insufficient to raise any material or substantial issue of fact that would warrant a hearing or overturning the election result. Accordingly, I overrule Objection 3 in its entirety.

¹³ The Employer recently became a subdivision of AECOM but continues to do business as URS Federal Service, Inc.

Objection 4: URS engaged in surveillance of union meetings resulting in destruction of the laboratory conditions of the election.

In support of this Objection, the Petitioner identified three of its agents who would testify that on February 23, two alleged Employer supervisors stood in the back of the room at the Employer's facility while the agents spoke to approximately 8 or 9 employees about the upcoming election. The witnesses asserted that the alleged Employer supervisors appeared to be typing on their cell phones for the duration of that meeting. The witnesses indicated that "almost all" of the employees in attendance at that meeting signed an authorization petition in front of the alleged Employer supervisors. Petitioner's witnesses would further testify that during another informational meeting that the Petitioner held at the Employer's facility for employees on February 24, one alleged supervisor stood in the back of the meeting for approximately five minutes and then returned to speak with employees at the conclusion of the meeting.

Analysis

As I noted above, only conduct which occurred during the "critical period" (between the February 25 filing date of the petition and the March 15 election) can form the basis for objectionable conduct. *E.L.C. Electric, Inc.*, supra. Here, the alleged surveillance on February 23 and February 24 falls outside the February 25 filing date of the instant Petition. Accordingly, I overrule Objection 4.

Objection 5: The employer treated union and employer election observers differently thus destroying laboratory conditions.

In support of this Objection, the Petitioner identified one employee who would testify that the Employer paid its own election observer for time served, but did not compensate Petitioner's observer.

Analysis

Employers are permitted to compensate their own election observers while denying compensation to observers of the other election party(ies). *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347 (2006); *Golden Arrow Dairy*, 194 NLRB 474, 478-479 (1971).¹⁴ Petitioner's observer was not compelled to act in that capacity during his regular hours of work, and the Petitioner could have designated an off-duty employee to act as an observer instead. *Id* at 479.

The disparate payment of observers is readily distinguishable from instances where an employer's treatment of election observers was found to be objectionable. See *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004) (employer found to have violated the Act by permitting their observers to work on the day of the election while not allowing the union's observers to work that day); *Quick Shop Markets*, 200 NLRB 830, 833 (1972) (objectionable if either party pays an election observer in a manner that is "grossly disproportionate" to their services rendered).

Here, the Petitioner does not allege that its observer was not permitted to work on the day of the election, that he was forced to use some form of leave, or that the Employer paid its observer in a "grossly disproportionate" manner. Because the Employer's payment to its observer does not rise to the level of objectionable conduct, I overrule Objection 5.

CONCLUSION

The Petitioner failed to raise any material and substantial issue of fact that would warrant a hearing, much less necessitate setting aside the election results. Accordingly, for the reasons set forth above, I hereby overrule the Petitioner's Objections in their entirety.

¹⁴ *Golden Arrow* applied the Board's rationale set forth in *Electronic Research Co.*, 190 NLRB 778 (1971) to election observers. *Electronic Research II* held that an employer did not violate the Act by paying the employer's witnesses who testified at an NLRB hearing while denying compensation to witnesses who testified on behalf of the union during the same proceedings.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Association of Machinists and Aerospace Workers, District Lodge 725, AFL-CIO, and that it is not the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All Material Handling Laborers, Forklift Operators, and Production Control Clerks employed by URS/AECOM at the Sierra Army Depot in Herlong, California.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by June 24, 2016.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: June 10, 2016



DANIEL J. OWENS
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On June 24, 2016, I served the following documents in the manner described below:

Request for Review

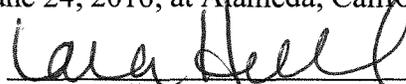
- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Jordan Lester
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Mr. Joseph F. Frankl
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Regional Director
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 24, 2016, at Alameda, California.



Lara Hull