

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

NORTHWESTERN UNIVERSITY,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 13-RC-177943
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION, LOCAL NO. 73,	)	
	)	
Petitioner.	)	

**NORTHWESTERN UNIVERSITY’S EXPEDITED REQUEST FOR REVIEW AND  
MOTION FOR STAY OF REGIONAL DIRECTOR’S SUPPLEMENTAL DECISION  
AND CERTIFICATION OF REPRESENTATIVE**

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## **I. REQUEST FOR REVIEW**

Pursuant to Section 102.67(c) of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. §§ 102.65, 102.67, the University seeks expedited review of the Regional Director's May 26, 2017 Supplemental Decision and Certification of Representative in the instant case issued on the eve of a holiday weekend, shortly before the end of the academic year, and despite the fact that there are determinative challenged ballots subject to a long-pending request for review. The Region certified this unit with a narrow margin of 229 "yes" votes 221 "no" votes, and 25 outstanding challenges to ballots, all of which were lodged by the *Union*, and all of which are subject to the University's pending Request for Review with the Board. Every step of the way the University has taken the position that every person who voted in the election has a voice that should be heard. The Regional Director's abrupt and premature decision to certify the Union as a representative, despite the pending Request for Review, simply furthers the Union's ongoing attempts to disenfranchise eligible voters and gerrymander the election contrary to the Board's mandate.

In the weeks leading up to the Supplemental Decision and Certification of Representative (Attached hereto as Exhibit 1), the Regional Director's representatives made material misrepresentations to the University. These circumstances, compounded with the timing of the recent decision, constitute a clear abuse of authority. As explained herein, the timing and circumstances of the Regional Director's Supplemental Decision and Certification of Representative are severely prejudicial to the University and the voters in the election. For these reasons, the Board should grant review and reverse the Regional Director and/or forthwith stay his Supplemental Decision and Certification of Representative.

## **II. BACKGROUND PROCEDURAL FACTS**

On June 9, 2016 the Service Employees International Union Local 73 ("Local 73" or the

“Union”) filed a petition seeking to represent *all* full-time and part-time non-tenure eligible faculty who teach at seven identified schools within the University. A mail ballot election took place pursuant to a Stipulated Election Agreement, and a ballot count ensued on July 19, 2016. There were approximately 678 eligible voters, of which there were 4 void ballots, 210 votes cast for the Union, 146 ballots cast against representation, and 134 determinative challenged ballots. Despite the fact that the unit definition was agreed upon by the parties and remained fairly close to that initially proposed by the Union, 121 of those challenges were made by the Union.

After the parties submitted Statements of Position on the challenges, 58 ballots were resolved either by agreement or by the Region’s determination, and a second ballot count was held on August 12, 2016. After the second ballot count there were 223 “Yes” votes, 191 “No” Votes and 71 determinative challenged ballots, 65 of which were made by the Union.

A hearing took place on August 23 through 25, 2016. During the hearing, the parties resolved one of the Union’s challenges and there remained 70 outstanding challenged ballots to be litigated at the hearing, 64 of which were lodged by the Union. At the hearing, as both the Hearing Officer and the Regional Director acknowledged, the Union presented no evidence to meet its burden to prove the validity of any its 64 challenges.

After the hearing, the Union withdrew 14 of its challenges. As set forth in the University’s Request for Review filed on January 19, 2017, the Hearing Officer issued her Report and Recommendation on Challenged Ballots on November 22, 2016, properly recommending that 39 of the Union’s challenges be overruled and that the ballots of those voters be opened and counted.

The Regional Director issued a Decision and Order (“D&O”) on January 5, 2017, rejecting many of the Hearing Officer’s reasoned findings, and sustaining 36 total challenges. The substantial errors in the D&O are explained in detail in the University’s January 19, 2017 Request

for Review, which remains pending before the Board. The D&O also overruled 34 of the Union's challenges, ordering those 34 ballots to be opened. The D&O did not certify a representative, nor did the Region schedule a ballot count at that time.

On January 19, 2017, the University filed its Request for Review with the Board as to 25 of the ballots challenged by the Union cast by voters whom the Regional Director decided were ineligible to vote. As set forth in the Request for Review, these 25 voters are non-tenure track faculty expressly contemplated by the inclusion clause of the Stipulated Election Agreement and who have no separate position at the University listed among the specifically enumerated exclusions. The Request for Review remains pending.

On May 2, 2017, a representative of the Region notified the University that the Regional Director wished to schedule a supplemental ballot count, at the Board's request, of the 34 ballots ordered be opened in the Regional Director's D&O. The Region related that the scheduling of the count was done "in consultation with Headquarters." (Exhibit 2, Declaration of Anneliese Wermuth (hereinafter "Wermuth Dec.") ¶ 2, Exhibit A; Exhibit 3, Declaration of Jenny Goltz ("hereinafter "Goltz Dec.") ¶¶ 2-3.) That ballot count was scheduled for May 12, 2017. (Goltz Dec. ¶ 4)

Before the count, counsel for the University communicated several times with the Region on the accounting of ballots, including which would be opened, which were no longer in dispute and would not be opened, and which were still the subject of the Request for Review. (Wermuth Dec. ¶¶ 3-6.) However, when the Region transmitted a proposed stipulation to the parties it did not include the 25 challenged ballots. (*Id.*) Counsel for the University twice requested that the stipulation include that information. (*Id.*)

At the ballot count on May 12, 2017, prior to the ballots being opened, the Union sought a

private audience with the Region, which was accommodated. (Wermuth Dec. ¶ 7.) The University’s counsel requested to be a part of that discussion and was refused. (*Id.*) After that private discussion, the parties convened in the hearing room for the count and a discussion on the stipulation and the tally of ballots ensued. The Union, at that point, took the position that the 25 ballots that were part of the University’s Request for Review with the Board should not be reflected on the final tally or in the stipulation. (Wermuth Dec. ¶¶ 8-9.) The Union insisted that the pending Request for Review was meaningless because the Region had ruled on those 25 ballots, and the outcome of the election should be determined without regard to those 25 ballots that remain in dispute and are subject to the pending Request for Review. (*Id.*) The University objected vigorously at the time and stated that it would not stipulate to the ballot count on those terms. (*Id.* ¶ 10.) The University also indicated that, if the Region proceeded with the count, it would not sign a stipulation and would file an emergency motion with the Board. (*Id.*)

After consulting with the Assistant Regional Director, the Region’s representative explained to the parties that the stipulation would expressly indicate that the count itself only addressed the ballots no longer in dispute, and that the tally sheet would include the 25 ballots as “unresolved challenged ballots.” (Wermuth Dec. ¶¶ 13-14, Exs. G and H; Goltz Dec. ¶¶ 11-12.) The University understood, based on those unequivocal statements, that should the remaining 25 ballots remain determinative after the 34 ballots were opened and counted, the election results would not be final and the Union would not be certified. It was only upon those conditions that the University agreed to proceed with the count. (Wermuth Dec. ¶ 10.)

After the 34 ballots were opened, the Region’s representative prepared, and the parties signed, a Second Revised Tally of Ballots which indicated 229 “yes” votes, 221 “no” votes, and 25 “unresolved challenged ballots.” (Wermuth Dec. ¶ 15 and Exhibit H.) Thus, as stated in the

Second Revised Tally of Ballots, the number of “valid votes counted plus unresolved challenged ballots” was 473. (*Id.*) Both parties and the Region signed the tally, which read “The remaining unresolved challenged ballots, if any, shown in the Final Tally column *are sufficient to affect the results of the election.*” (Wermuth Dec. ¶15-16, Ex. H) (emphasis added.)

The Region did not indicate any intention to adopt the Union’s position, i.e., disregarding the 25 challenged ballots subject to the University’s Request for Review, or attempt to certify a representative. In fact, the University’s agreement to proceed with the count was based on representations by the Region. It was only at nearly 2:00 p.m., two weeks after the third ballot count and on the eve of the Memorial Day holiday weekend, that the Region first indicated its agreement with the Union’s position about the impact of the Request for Review. (Wermuth Dec. ¶ 18; Goltz Dec. ¶ 16.) At that time, the Acting Regional Director issued a “Supplemental Decision and Certification of Representative” in which, based on the January 5, 2017 D&O finding that the 25 challenges subject to the Request for Review “were determined to be ineligible,” he stated that a majority of the “valid ballots have been cast” for the Union and certified it as the exclusive collective-bargaining representative of the employees in the unit. (Exhibit 1, Supplemental Decision and Certification of Representative.) Essentially, the Region adopted wholesale the Union’s position, despite previously indicating it would not, despite signing a revised tally that explicitly provided that the “unresolved” ballots were sufficient to affect the election outcome, and certified the representative based on that position. The Supplemental Decision and Certification of Representative did not cite any authority for the proposition that the Regional Director to certify a representative while there are determinative challenges subject to a pending Request for Review and could not provide any when asked to do so in a subsequent phone call. (Wermuth Dec. ¶ 19.)

### **III. GROUNDS FOR REVIEW**

Board Rule 102.67(c) provides the following relevant grounds for review, the following which are present here:

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

### **IV. THE BOARD SHOULD GRANT REVIEW AND REVERSE THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE**

#### **A. The Circumstances and Timing of the Acting Regional Director's Supplemental Decision and Certification of Representative Constitute a Clear Abuse of Authority and Are Prejudicial to the University and the Voters**

As described above, the Regional Director, through his representatives, made a number of material misrepresentations regarding his position vis-à-vis the 25 challenged ballots, and delayed issuing the Supplemental Decision and Certification of Representative until the eve of a holiday weekend at one of the busiest times of the academic year. He certified the representative despite knowing full well that the University has a pending Request for Review with the Board, despite having indication from the Board that it intended to decide whether to accept the University's request for review imminently, and despite acknowledging that those challenged votes are potentially determinative of the election. These timing and circumstances clearly constitute an abuse of the Regional Director's authority and severely prejudices the University and the voters who have cast ballots that remain sealed as a result of the Union's challenges (the vast majority of which have been overruled).

Indeed, at the third ballot count on May 12, 2017, the University made its position abundantly clear that it did not agree with the Union's position that an exclusive bargaining representative could be certified if the 25 challenged ballots subject to the University's Request

for Review were potentially determinative of the election and indicated that it would not stipulate to a ballot count and would seek emergency relief should the Board adopt the Union's position. The Regional Director gave every indication at that time that it agreed with the University's position as to the impact of the 25 votes; the Second Revised Final Tally (which the Regional Director and the Petitioner both signed) even stated that those 25 votes "are sufficient to affect the results of the election." If it was the Regional Director's position at that time that he intended to adopt the Union's argument and certify a representative with potentially determinative votes pending, he made no such disclosure at the time. The University stipulated to a ballot count on May 12, 2017 only because it was misled to understand that, if after the 34 ballots were opened on May 12, 2017 the remaining 25 ballots remained determinative, the Union would not be certified as the exclusive bargaining representative for the unit unless and until the Board made a dispositive ruling on the Request. As such, the University was severely prejudiced insofar as it was prevented from seeking the emergency relief it explicitly stated it intended to seek had the Region disclosed its true position at the ballot count.

The prejudice to the University is compounded by the questionable timing of the Acting Regional Director's Supplemental Decision and Certification of Representative. The Acting Regional Director now claims that he was "authorized" by Board rules to certify the representative as early as January 5, 2017 but did not do so. By this logic, he also could have certified the unit after the May 12, 2017 ballot count. Yet, he waited until late in the afternoon on May 26, 2017, just before the end of the academic year and immediately preceding the Memorial Day holiday weekend,<sup>1</sup> to issue this Supplemental Decision and Certification of Representative. This smacks

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<sup>1</sup> The sense of urgency is truly unclear in light of the fact that the election took place in July 2016 and in light of the fact that there was indication from the Board that it would decide the University's Request for Review shortly. It is not clear why the Region could not wait to certify a representative until after final determination from the Board on the pending request for review.

of partisanship and is a clear abuse of the Regional Director's authority and discretion under the statutory delegation of authority and the Board's Rules and Regulations.

Certifying a representative at this juncture, a year after the petition was filed and when the Board is imminently expected to decide whether to accept review of the D&O, is illogical, prejudicial and contrary to the Board's own mandate, which is to protect employees' freedom to exercise their rights under Section 7 of the Act. Disenfranchising a large number of voters by sustaining meritless challenges to ballots cast is inconsistent with that mandate. *See C.W. Post Center of Long Island University*, 198 NLRB 453, 454 (1972). Furthermore, the Rules clearly give the University a mechanism to seek review of the Regional Director's decisions in the D&O, which it did when it filed its Request for Review on January 19, 2017. With a small margin, which is eclipsed by challenged ballots in a number that is more than double the margin, it is inappropriate for the Region to certify a representative pending a request for review and, by extension, before the true tally of ballots is conclusively known. This is particularly the case in light of the fact that the vast majority of the Union's 121 challenges already decided have been overruled. Under these circumstances, not only would such a certification be premature, it also totally undermines the right conferred upon parties to seek review of a Regional Director's erroneous and prejudicial decisions.

There is additional prejudice to the University because it will be forced either to bargain with the Union prior to knowing the true outcome of the election, or refuse to bargain and risk being charged with an unfair labor practice if it ultimately turns out that a majority of votes were cast in favor of the Union. Either choice results in severe prejudice to the University.

The circumstances under which the Supplemental Decision and Certification of Representative were issued prejudice not only the University, but the non-tenure track faculty in

the proposed unit itself. Every step of the way the University has taken the position that the 25 voters at issue are squarely within the definition of the unit proposed *by the Union*, and that their voices should be heard in the election. The Board has not yet accepted or denied the Request for Review. Indeed, at the May 12, 2017 ballot count, the Region disclosed that the *Board* had requested the 34 ballots be counted, suggesting that it planned to accept review if the results still were not determinative.<sup>2</sup> If the Board ultimately determines that some or all of those ballots be opened, depending on the number of “no” ballots that ultimately were cast, it may be the case that a majority of eligible votes are *not* cast in favor of the Union. Yet, the Acting Regional Director has certified the representative without truly knowing the outcome of the election. That decision not only prejudices the 25 voters whose voices have been silenced, but has the potential to prejudice the unit as a whole if it turns out that there were not a majority of valid ballots cast in the Union’s favor.

**B. The Acting Regional Director’s Decisions That the 25 Challenged Ballots Subject to the University’s Request for Review are Clearly Erroneous and Prejudicial to the University and the Voters Who Cast Those Votes**

For all of the reasons set forth in the University’s Request for Review filed with the Board on January 19, 2017, the Regional Director’s decisions on the substantial factual issues of whether the 25 voters at issue were eligible to vote in the election were erroneous and prejudicial to the University and those 25 voters. The University’s substantive position on those 25 ballots as set forth in the January 19, 2017 Request for Review is hereby incorporated by reference herein.

**V. THE BOARD SHOULD STAY THE REGIONAL DIRECTOR’S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE**

The University expects that a demand to bargain from the Union is imminent in light of the

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<sup>2</sup> If the Board did not intend to accept review it could have done so, in which case the Region would have scheduled the third, and final ballot count. There would have been no reason to ask the Region to schedule this interim ballot count if it was not still considering review of the Regional Director’s D&O.

Regional Director's Supplemental Decision and Certificate of Representative, at which point it will be faced with the Hobson's choice of recognizing the Union and bargaining without truly knowing if the unit was correctly certified, or refusing to bargain and incurring a technical unfair labor practice charge. In light of this and the substantial prejudice articulated above, the Board should either immediately reverse the Regional Director or stay his Supplemental Decision and Certificate of Representative pending resolution of these important issues.

## **VI. CONCLUSION**

For all of the reasons set forth above, Northwestern University requests that the Board accept the request for review and reverse the Regional Director's decision to certify a representative in the instant case and stay certification of representative.

Respectfully submitted,

s/ Jenny Goltz

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

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Employer,	)	
	)	
And	)	Case No. 13-RC-177943
	)	
SERVICE EMPLOYEES INTERNATIONAL	)	
UNION LOCAL 73 CLC/CTW,	)	
	)	
Petitioner.	)	

**CERTIFICATE OF SERVICE**

I, Jenny Goltz, state under oath that I caused a copy of Northwestern University's Expedited Request for Review of Regional Director's Decision and Order to be served upon the Regional Director of the National Labor Relations Board by e-filing and on the following attorney by e-mail this 26th day of May, 2017:

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