

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14**

BILFINGER INDUSTRIAL SERVICES INC.  
Employer,

and

CRAFTSMAN INDEPENDENT UNION  
Union

Case No. 14-UD-194983

and

SCOTT CRADER, AN INDIVIDUAL  
Petitioner.

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**BILFINGER INDUSTRIAL SERVICES, INC.'S  
OPPOSITION TO THE UNION'S REQUEST FOR REVIEW  
AND EXCEPTIONS**

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COMES NOW Bilfinger Industrial Services Inc. (“the Employer” or “Bilfinger”) pursuant to Sections 102.87, 102.69, and 102.67 of the Board’s Rules and Regulations, and submits its opposition to the Exceptions (or, alternatively, Request for Review) filed by the Craftsman Independent Union (“the Union”).

**INTRODUCTION**

This matter is before the Board following a union security deauthorization election in which the employees voted 26 to 3 in favor of “deauthorizing” the union shop provision. The unit consisted of “approximately” 70 eligible voters, and accordingly 36 votes were required to

carry the petition, which therefore failed by a mere 10 votes. Some 39 mail ballots were never returned. A Certification of Results followed.<sup>1</sup>

Timely Objections were filed by the Petitioner and Bilfinger, as it was discovered post-election that the Petitioner was never served with a copy of the Voter List as required by the Board's rules. Bilfinger's counsel sent the Voter List via electronic mail to the email address supplied by the Regional office. That address, however, was incorrect, evidently an artifact resulting from the Region not updating a cut-and-pasted address from some earlier document. Neither the Employer's counsel nor the Region noted the error at the time, and there is no indication the Union or its counsel noticed it, either; if the Union or its counsel noted the error, they said nothing. As a result of using the mistaken address supplied by the Regional Office, the Petitioner Scott Crader was never provided a copy of the Voter List, and was unable to contact eligible voters and encourage them to return their mail ballots.

The Regional Office, to its credit, has acknowledged the mistake was theirs, and has determined that the failure to serve a copy of the Voter List upon the Petitioner constitutes grounds for setting aside the election. A "construction industry" eligibility formula was used, and this was a mail-ballot election, so it was vital for the Petitioner to receive the list in order that he could reach out to all eligible voters. Given that fewer than one-half of the eligible voters returned their mail ballots, and given further the importance of "turnout" in a UD election, which requires the support of a majority of all eligible voters, the failure of service of the Voter List upon the Petitioner has interfered with a fair and free opportunity for the collective voice of all

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<sup>1</sup> The Tally of Ballots reflects 26 "Yes" 3 "No" and 2 challenged ballots. Bilfinger maintains that the correct number of eligible voters was 69, not 70, based on proper application of the eligibility formula. Use of the "70 eligible voters" figure is without prejudice to Bilfinger's right to challenge the eligibility of individuals not satisfying the appropriate eligibility requirements.

eligible employees to be heard. In these circumstances the Regional Director properly directed a rerun election be held.

#### THE UNION'S EXCEPTIONS ARE MERITLESS AND REVIEW IS UNWARRANTED

The Board has long adhered to the principle that where the actions of the Board's own agents interfere with the election process to the detriment of a fair election, the election must be set aside and rerun. *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967) (the Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures; actions of the regional office or its personnel "must not tend to destroy confidence in the election process"). Similarly, "[t]he Board regards it as its responsibility to establish the proper procedure for the conduct of its elections. This procedure requires that all eligible employees be given an opportunity to vote."<sup>2</sup> In *Atlantic Industrial Constructors*, 324 NLRB 355 (1997), the Board set aside an election where the regional director's decision contained an error in the eligibility formula and as a result *two (2)* employees did not vote. Here, more than one-half those eligible failed to return their mail ballots, and Petitioner was deprived of any opportunity to encourage them to do so.

The Board has held for many years that failure to provide a proper *Excelsior* list as required would result in an election being set aside. *Rockwell Mfg. Co.*, 201 NLRB 358 (1973) (list filed 11 days late through inadvertent error, rerun election directed); *Special Citizens Futures Unlimited*, 331 NLRB 160 (2000) (election set aside where list was late and incomplete due to mistakes by employer and regional office). In the cited cases, the list was merely late; in this case, Petitioner never received it at all. Likewise, errors by the Board in connection with the

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<sup>2</sup> From the Board's *Outline on Law and Procedure in Representation Cases*, p. 329 (2008 edition); citing *Yerges Van Liners*, 162 NLRB 1259, 1260 (1967); and *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956).

list have resulted in rerun elections being directed. *J. P. Phillips, Inc.*, 336 NLRB 1279 (2001) (*Excelsior* list served by regional office inadvertently omitted one page of names with result that complete information was not timely supplied; election set aside and rerun).

Finally, the requirement that the Voter List be *served* as required by the Board's Rules has been strictly construed. This is made abundantly clear by the decision rendered as recently as December of last year in *URS Federal Services, Inc.*, 365 NLRB No. 1 (December 8, 2016). In that case, the election was set aside due to the employer's failure to *serve* the list as required, despite the fact that the union in that case in fact timely *received* a copy of the list. The Board quoted the applicable provision of its Rules and Regulations, and stated:

Section 102.62(d) of the Board's Rules and Regulations, as amended, expressly requires that the employer in a representation case '*shall provide to the regional director and the parties ... a list of the full names...[and other information] of all eligible voters.... Finally, Section 102.62(d) provides that an employer's failure to file or serve the list 'shall be grounds for setting aside the election whenever proper and timely objections are filed.'* Id., emphasis added.

The Board added, "Section 102.62(d) does not allow regional directors discretion to excuse such a failure." 365 NLRB No. 1, slip op. p. 2.

Under the holding in *URS Federal*, then, the Board must reject as entirely beside the point the Union's altogether unsupported and speculative contention that the Petitioner "could" or "must" have received the Voter List from another source – a claim that the Petitioner in any case denies in a sworn affidavit.<sup>3</sup> Under the Board's Rules, failure to file *or serve* the list "*shall be grounds for setting aside the election whenever proper and timely objections are filed*"

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<sup>3</sup> Pursuant to Section 102.69(d) of the Board's Rules and Regulations, Bilfinger requests that affidavits and other documentation submitted in support of the objections be included in the record on review, should review be granted.

(emphasis added).<sup>4</sup> Similarly, Bilfinger notes that the Union’s claim that “the Petitioner was [Bilfinger’s] employee, and as such, [Bilfinger] had access to his correct contact information” is demonstrably false. One need only consult the Voter List Bilfinger filed to see that the Petitioner Scott Crader’s entry on the list reflects no associated email address. If Bilfinger had Mr. Crader’s address at the time the Voter List was filed, Crader’s email address would appear on the Voter List.

### CONCLUSION

Petitioner, through no fault of his own, was never served with a copy of the Voter List as required by the Board’s rules. There is no material dispute regarding that fact. The list was sent instead to some unknown email address supplied in error by the agents of the Board. There is no material dispute regarding that fact. Accordingly, the Regional Director properly set aside the election.

WHEREFORE, the Exceptions should be overruled, and the Request for Review denied, and a rerun election should be conducted consistent with the Regional Director’s determination.

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<sup>4</sup> The fundamental unfairness of not conducting a rerun election is further demonstrated in the fact that Missouri will become the nation’s 28<sup>th</sup> “Right to Work” state when its newly-enacted statute takes effect on August 28<sup>th</sup> of this year. The employees in the unit in this case, however, will be obliged to continue paying dues to the Union for the term of their contract, and accordingly a UD election provides their only opportunity to benefit from the protections afforded by this change in state law. That result should not be the consequence of a mistake on the part of the Board in directing that the list be sent to an erroneous email address.

Dated: June 9, 2017.

Respectfully submitted,



LITTLER MENDELSON, P.C.  
Stephen D. Smith  
One Metropolitan Square, Suite 1500  
211 North Broadway  
St. Louis, Missouri 63102  
(314) 660-2151  
[ssmith@littler.com](mailto:ssmith@littler.com)

Attorneys for Employer  
Bilfinger Industrial Services Inc.

#### CERTIFICATE OF SERVICE

Filed electronically and served by email on the following on the date above indicated:

Petitioner:

scrader32@gmail.com  
Scott Anthony Crader  
RR5, Box 3975 K  
Marble Hill, MO 63764

Union:

stanpatgarber@sbcglobal.net  
Stanley Garber, Attorney  
6544 North Minnetonka Avenue  
Chicago, IL 60646-2723

Regional Director

Leonard.perez@nlrb.gov  
Leonard J. Perez  
Regional Director  
National Labor Relations Board, Region 14

