UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARTER COMMUNICATIONS (SUCCESSOR TO TIME WARNER CABLE OF NYC)
Employer

and Case 02-RD-220036

BRUCE CARBERRY
Petitioner

and

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
Union

ORDER

The Union's Request for Review of the Regional Director's Supplemental Decision on Challenges and Objections is granted because it raises a material and substantial issue with respect to the Regional Director's decision overruling the Union's challenges to the ballots cast by 581 strike replacement employees and sustaining the Employer's and Petitioner's challenges to the ballots of 651 strikers.[1] Contrary to the Regional Director's apparent assumption, the passage of more than 12 months since the commencement of the strike does not, standing alone, demonstrate that the 581 replacement employees were permanent replacements or that the 651 strikers had been permanently replaced.[2] Under *O.E. Butterfield, Inc.*, 319 NLRB 1004 (1995), the Board presumes that replacements for economic strikers are temporary employees; an employer may overcome that presumption by showing a mutual understanding between itself and the replacements that they are permanent. The Regional Director's decision contains neither evidence nor analysis of whether the 581 replacements were temporary or permanent, or whether all 651 strikers had been permanently replaced.

[1] No party has challenged the Regional Director's decision to sustain the challenges to 20 of the 601 ballots cast by replacement employees and to 15 of the 666 ballots cast by strikers that all contained printed names, rather than signatures.

[2] The Regional Director's reliance on *Wahl Clipper Corp.*, 195 NLRB 634 (1972) is misplaced, because that case merely holds that after a year, only permanently replaced strikers who are reinstated by the eligibility date are eligible to vote. Strikers who have *not* been replaced remain eligible to vote even after a year has elapsed. See, e.g., *Erman Corp.*, 330 NLRB 95, 95 (1999). Here, the question is whether the strikers were permanently replaced in the first instance.

In addition, under *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989), where an employer eliminates positions for economic reasons and operates during a strike with fewer employees than it employed prior to the strike, the employer is required to establish that it permanently eliminated the positions and that its reason for eliminating those positions was not predicated wholly on considerations following from the strike itself. The Union has asserted — and the Employer does not appear to dispute — that the Employer is operating with some 300 fewer employees than it employed at the time the strike commenced. However, the Regional Director did not consider whether the Employer had established that the positions were permanently eliminated under *Lamb-Grays* and, if the positions have not been eliminated, whether any of the 651 strikers held these now-vacant positions when the strike commenced and thereby retain their eligibility.

Finally, under *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359 (1962), if a party alleges that economic strikers have retired or otherwise voluntarily separated from their employment during the strike, that party must affirmatively show by objective evidence (which the Board assesses on a case-by-case basis) that the economic strikers have abandoned their interest in their struck jobs. The Regional Director did not apply this standard to consider the eligibility of the 117 strikers whom the Employer asserts voluntarily separated from its employ.

Accordingly, we remand those matters to the Regional Director for further proceedings consistent with the order, including a hearing, if warranted. In addition, because the Union's Objection 6 may turn on the eligibility issues discussed above, we reinstate this objection and direct the Regional Director to hold it in abeyance pending resolution of the challenges and, if necessary, to consider it along with Objections 1–5. The Request for Review is denied in all other respects.[3]

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| JOHN F. RING, | CHAIRMAN |
| MARVIN E. KAPLAN, | MEMBER |
| WILLIAM J. EMANUEL, | MEMBER |

Dated, Washington, D.C., March 19, 2020.

[3] In denying review of Objection 7, we do not rely on the Regional Director's stated grounds for overruling Objection 7. Instead, we find that although the original Voter List may have been inaccurate (as alleged in Objection 6), the Employer timely submitted it.

Although we deny review of the Union's contention that the Board should, solely for voter-eligibility purposes, determine whether the strike was converted to an unfair labor practice strike, the denial is without prejudice to the Union raising it again if the Union does not ultimately prevail in the election.

Finally, because the Regional Director impounded the ballots following the Union's filing of its Request for Review, we deny the Union's request for impoundment as moot.