

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DFWS INC. d/b/a THE GUILD SAN JOSE
Employer

and

Case 32-RC-248845

UNITED FOOD & COMMERCIAL WORKERS
UNION, LOCAL 5
Petitioner

ORDER

The Employer's Requests for Review of the Regional Director's Decision Affirming the Hearing Officer's Findings and Recommendations and Order to Open and Count Determinative Challenged Ballots and the Regional Director's Certification of Representative are denied as they raise no substantial issues warranting review.¹ The Employer's request to stay the certification is denied as moot.

¹ In its Request for Review of the Decision Affirming, the Employer contends that the Regional Director erred in overruling the Employer's objections, but only requests that the Board incorporate its objections and the arguments from its post-hearing brief into its Request for Review should the revised Tally of Ballots result in victory for the Petitioner. Indeed, the Request for Review at no point raises any argument with respect to its objections nor does it provide any support for its assertion that the Regional Director's assessment of its objections was erroneous. However, Sec. 102.67(e) of the Board's Rules and Regulations makes clear that "[a] request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." Accordingly, the Employer has not properly presented any arguments relating to its objections to the Board, and we therefore decline to consider them.

In denying the Employer's Request for Review of the Order to Open and Count, although the Regional Director arguably deviated from Sec. 11364.9 of the Board's Casehandling Manual, Part II, by opening and counting the overruled challenged ballots while a request for review was pending with the Board, it is well-established that a procedural deviation from the Casehandling Manual, standing alone, is not enough to merit a rerun election, and that the Board requires more than mere speculative harm to overturn an election. See *Polymers, Inc.*, 174 NLRB 282, 283 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970); *J. C. Brock Corp.*, 318 NLRB 403, 404 (1995). The Employer has not identified any harm here. The opening of the affected ballots did not breach voter secrecy – which Sec. 11364.9 seeks to protect – because no individual voter could have been identified. Moreover, because we are

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

Dated, Washington, D.C., May 27, 2020.

denying review of the Regional Director's determinations with respect to the challenged ballots, those ballots would have been counted in any event, meaning that any arguable procedural error could not have affected the results of the election. Because the Employer's Request for Review of the Decision Affirming was docketed within the 14 days provided for under Sec. 102.67(c) of the Board's Rules and Regulations, we do not, however, rely on the Regional Director's characterization that it was "untimely."

Regarding the Employer's request to stay the certification, we find that the Regional Director's decision to issue a certification while a request for review remained pending was permissible under the representation-case procedures currently in effect. We observe, however, that the Regional Director's decision in this regard raises many of the concerns that led the Board to recently adopt changes to its representation-case procedures to prohibit this practice. See 84 Fed. Reg. 69524 (Dec. 18, 2019). Those amendments will not take effect until May 31, 2020, however. 85 Fed. Reg. 17500 (Mar. 30, 2020).