

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED POWER SERVICES, LLC,)
)
Employer,)
)
and) Case 13-RC-252563
)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL)
WORKERS, LOCAL UNIONS 145, 146, 176, 364 and 601)
)
Joint Petitioners,)

**JOINT PETITIONERS’ RESPONSE IN OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S DECISION ON
CHALLENGED BALLOTS**

Joint Petitioners, International Brotherhood of Electrical Workers, Locals 145, 146, 176, 364 and 601 (hereinafter “IBEW” or “Union”), and the employees they seek to represent employed by the Employer, Allied Power Services, LLC (“Employer” or “Allied”), are eager to know the results of this election and weary of Allied’s never-ending delays.

The petition in this case was filed more than nine months ago, on November 27, 2019. The pre-election hearing was held on December 10 and 11, 2019, and the decision and direction of election issued on January 31, 2020. The ballots were initially scheduled to be counted on March 17, 2020. That count was understandably delayed due to the state wide stay at home order issued in response to the Covid pandemic. However, despite the Board resuming processing election petitions as of April 6, 2020,¹ the count was not promptly rescheduled. Indeed, on May 12, 2020, the Employer filed a motion to further postpone the count indefinitely, which the IBEW vigorously opposed. Shamefully, the count was not conducted until June 24, 2020 (conducted in-person, instead of via video), three months after the originally scheduled date. The Regional Director’s decision on

¹ <https://www.nlr.gov/news-outreach/news-story/nlr-resumes-representation-elections>

challenged ballots was not issued until August 14, 2020. Allied now seeks to further delay this election and the final ballot count through its meritless request for review. These delays must come to an end. The bargaining unit is entitled to know the results at the “earliest date practicable.” 29 CFR 102.67(b).

Allied’s argument in its request for review of the Regional Director’s decision on challenged ballots can be boiled down to a request for a second attempt to present evidence that all electrical superintendents and lead work planners² are statutory supervisors. Actually, it would be Allied’s third attempt, since it made the same arguments in the 2018 RC case (case 25-RC-219264). The intent and expectation at the pre-election hearing in December 2019 was that Allied would only present evidence about what may have changed since the hearing in May 2018.

Allied claims that it must be allowed to present evidence as to each individual voter because it only presented evidence of categorical challenges at the pre-election hearing. Allied’s position is incorrect as a matter of law and logic. For instance, Allied is not saying that it has evidence that some superintendents have additional duties that make them statutory supervisors. It wants “to challenge each electrical superintendent and lead work planner/lead electrical planner on the basis that each voter was, individually, a supervisor[.]” (ER Req. Rev., p. 6). Significantly, at the June 24, 2020, ballot count, the Region asked Allied if it planned to introduce any evidence that was different from what it presented at the pre-election hearing. Allied responded no. It would just be more of the same type of evidence already introduced at the pre-election hearings. Thus, there is

² Although not germane to this request for review, Allied attempts to conflate the “lead work planner” position with the “lead electrical planner” position. The testimony of Edward Meyer at the December 2019 pre-election hearing makes it clear that these are two very distinct positions.

no reason to hold further evidentiary hearings to consider more of the same evidence already found inadequate to establish supervisory status.

In its request for review, Allied states that it is asserting that the electrical superintendents are supervisors because they have the authority to assign work and to direct work (ER Req. Rev., p. 12). As is clear from the decision and direction of election, that is exactly what Allied argued at the pre-election hearing (Ex. B to ER Req. Rev., p. 9-20). By continuing to assert that every single electrical superintendent and lead electrical planner is a statutory supervisor, Allied is, *de facto*, demanding the right to once again present evidence as to those entire job classifications. Thus, any claim that it is merely asserting “individual” challenges is an artifice that must be rejected.

Allied’s claim is based on a strained reading of Section 102.66(d), which states in part: “[n]or shall any party be precluded, on the grounds that a voter’s eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election.” Allied further cites to GC Memo 15-06, and the Board’s comments in 79 Fed. Reg. at 74386. Allied stretches this proviso beyond its breaking point. Allied’s position has been consistent through both the 2018 RC petition and the instant RC Petition that it believes electrical superintendents and lead electrical planners are statutory supervisors. It has also continuously taken this incorrect position that it is entitled to challenge every single employee within these classifications twice, both at the pre-election hearing and as a post-election challenge. Allied’s position makes a mockery of the rule, completely undermining the portion of the comments from the final rule that it quotes, that the purpose of the rules was to “avoid the possibility that a party might ‘use[e] unnecessary litigation to gain strategic advantage[.]’” (ER Req. Rev., p. 10).

Because Allied could have presented any evidence it believes establish the supervisory status of electrical superintendents or lead electrical planners at the pre-election hearing, it has suffered no prejudice by being denied that ability post-election. 29 CFR 102.67(d)(3). In the three days of hearings in May 2018 (in the 25-RC-219264 case) and two days of hearings in December 2019 (in this case), Allied failed to present sufficient evidence that electrical superintendents and/or lead electrical planners are statutory supervisors.

Quite simply, if any additional evidence Allied has to support its position that electrical superintendents and lead electrical planners are statutory supervisors is as strong as it claims, then Allied would have presented that evidence at some point in those five days of hearings. For whatever reason, Allied chose not to present this evidence at the pre-election hearings. Allied has had ample opportunity to present evidence that supports its position. It cannot now legitimately complain otherwise.

CONCLUSION

The Employer has not established a basis for the Board to review the decision of the Regional Director under Section 102.67(d). Accordingly, the Employer's request for review should be denied and the Regional Director directed to promptly open and count the remaining ballots consistent with the August 14, 2020, Decision on Challenged Ballots.

Respectfully submitted,

/s/ Patrick N. Ryan

One of the Attorneys for Joint Petitioners

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that a true and correct electronic copy of the foregoing document was e-filed and served via email to the following before 11:59 p.m., Eastern Standard Time, this 4th day of September 2020:

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