

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL)	
TRANSPORTATION, INC. (PTI))	
)	
and)	CASE NO. 32-RC-259368
)	
UNITED ELECTRICAL, RADIO,)	
AND MACHINE WORKERS OF AMERICA)	

**BRIEF IN SUPPORT OF REVIEW OF REGIONAL DIRECTOR’S DECISION
AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.67(h) of the Board’s Rules and Regulations, Employer Professional Transportation, Inc. (hereinafter “PTI”) hereby submits this brief to assist the Board in support of its review of the Regional Director’s Decision Overruling Objections and Certification of Representative in Case No. 32-RC-259368.

I. INTRODUCTION

PTI requests that the Board set aside the results of the mail ballot election tainted by the misconduct of the United Electrical, Radio, and Machine Workers of America (hereinafter the “Union”) and order an evidentiary hearing on PTI’s Written Objections to Election previously denied by the Regional Director. During the course of its election campaign, the Union, by its representatives and agents, improperly solicited and offered to collect mail ballots from several, if not many, PTI employees. The Union called PTI employees asking if they needed help completing their ballots and offered to collect and mail these ballots for these employees. By making these improper solicitations upon voting employees, the Union’s actions had the effect of a representative thrusting her head through the curtain of a voting booth, thereby interfering with employees’ free choice and casting doubt on the integrity of the election.

For the reasons set forth in detail below, it is appropriate in light of the increased number of mail ballot elections being held due to the ongoing COVID-19 pandemic, as well as

significant concerns with preventing parties from using modern technology to encroach on a voter's privacy in completing their ballot, for the Board to now reexamine its policy towards solicitation in mail ballot elections as set forth in *Fessler & Bowman*, 341 NLRB 932 (2004), and rule the solicitation of mail ballots (and offers of assistance in completion of a mail ballot) to be objectionable conduct in order to ensure the integrity of Board elections. The Board should also find that the requisite "laboratory conditions" for conducting a Board election were absent and that the Union herein engaged in conduct that should be found impermissible in a mail ballot election.

II. BACKGROUND

PTI provides crew transportation services in the railroad, mining, and energy industries at locations across the United States. For example, PTI dispatches drivers to pick up crews at a railyard and transport that crew to a hotel for rest or deliver a rail crew from a location in the field to a railyard.

On or about March 5, 2020, PTI began operating its business at railyards located in California and Nevada. Previous to PTI, Hallcon Corporation (hereinafter "Hallcon"), another railroad crew transportation company, had operated its business at these locations. These locations include, but are not limited to, Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California, and Sparks and Winnemucca, Nevada (hereinafter collectively referred to as the "Locations"). Prior to PTI's expansion to the West Coast, Hallcon employees at the Locations were represented by the Union.

On April 21, 2020, the Union filed a petition for election at the Locations, designated as Case No. 32-RC-259368. On April 28, 2020, PTI and the Union entered into a stipulated election agreement. Under the stipulated election agreement's terms, the election was to be held by mail ballot. Region 32 mailed ballots to PTI employees on May 15, 2020.

After the Board mailed ballots on May 15, the Union began to improperly solicit and offer to collect mail ballots from several, if not many, PTI employees. (See Exhibit 2 to PTI's Request for Review, p. 1). For example, over the course of the election campaign, and continuing after the Board mailed ballots to eligible employees, Lisa Madrid French (hereinafter "Madrid French"), a PTI driver at the Roseville, California location, received multiple phone calls and voicemails from Union representatives. (See Exhibit 3 to Request for Review, p. 1).

After ballots were mailed out on May 15, Madrid French received a call and voicemail from an Anna Ridge with the Union asking if she had received her ballot yet and asking her to call her back. (See Exhibit A attached to Exhibit 3 to Request for Review). Madrid French received another voicemail from a "Missy" [last name unknown] with the Union wanting to know if she had received her ballot and whether she needed any help filling it out or returning it to the Board. (See Exhibit B attached to Exhibit 3 to Request for Review). Finally, on May 20, Madrid French also received an unsolicited text message from Union representative Anna Ridge asking if she still planned to vote for the Union. (See Exhibit C attached to Exhibit 3 to Request for Review).

Joseph Walling (hereinafter "Walling"), a PTI driver at the Sparks, Nevada location, also received calls from a Union representative requesting to help Walling complete his ballot and offering to collect and return the ballot for him. (See Exhibit 2 to Request for Review, p. 1). These calls were made on May 20, 2020, after the Board had mailed out ballots. (See Exhibit D attached to Exhibit 3 to Request for Review). This Union representative told Walling that the ballots were confusing to fill out and asked Walling to call him so he could walk him through filling out the ballot. (See Exhibit D attached to Exhibit 3 to Request for Review). Walling reported this conduct to PTI branch manager Brian Mudd (hereinafter "Mudd"), who documented this conversation. (See Exhibit D attached to Exhibit 3 to Request for Review).

The scope of the Union’s solicitation and possible collection of ballots likely extended beyond these two employees who came forward to PTI to voice their concern with the Union’s conduct but could not be definitively confirmed because the Region denied PTI an evidentiary hearing.

On June 10, 2020, the Region opened the mail ballots and tallied the votes via FaceTime. Of the 113 eligible voters, the tally was 42 in favor of the Union and 27 against, with 5 challenged ballots. (See Exhibit 4 to Request for Review). On June 16, 2020, PTI timely filed its Objections to Union Conduct Affecting Election, which contained two objections alleging (1) improper solicitation and collection of ballots casting doubt on the integrity of the election process and (2) the Union engaging in coercive tactics to unduly influence employee votes in their election and impair their freedom of choice under the National Labor Relations Act (the “Act”). Simultaneously therewith, PTI filed its Written Offer of Proof Supporting Objections to Union Conduct Affecting Election on June 16, 2020.

On July 9, 2020, the Regional Director issued her Decision Overruling Objections and Certification of Representative. (See Exhibit 5 to Request for Review). The Regional Director’s Decision overruled both of PTI’s objections without ordering an evidentiary hearing.

On July 23, 2020, PTI filed its Request for Review of the Regional Director’s Decision and Certification of Representative. On December 2, 2020, the Board issued an order granting PTI’s requested review as it “raises substantial issues warranting review with respect to the Board’s policy regarding mail-ballot solicitation as addressed in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004).”

III. ARGUMENT

As set forth below, the Union’s actions warrant review with respect to the Board’s policy regarding mail ballot solicitation discussed in *Fessler & Bowman* and necessitates reversal of the Regional Director’s Decision Overruling Objections and Certification of Representative. The

Union's misconduct during the voting period of the mail ballot election also raises substantial issues casting doubt on whether the appropriate "laboratory conditions" for conducting an election were present and whether the Union's actions constitute grounds for setting aside a mail ballot election.

A. The Union's Conduct Raises Significant Issues Regarding the Board's Policy Towards Solicitation of Mail Ballots As Set Forth in *Fessler & Bowman*

Due to the increased dependency on phones in American society and the ubiquitous use of videoconferencing software on personal phones, as well as the urgent need to clarify mail ballot procedures due to the record number of mail ballot elections ordered as a result of the ongoing COVID-19 pandemic, the Board should amend its policy on mail ballot solicitations originally set forth in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004).

In *Fessler & Bowman*, a four-member Board panel unanimously held that the collection of mail ballots constitutes objectionable conduct. However, the Board split on the issue of whether solicitation for the collection of ballots alone is objectionable. Whereas Members Liebman and Welsh, writing for the majority in *Fessler & Bowman*, were of the opinion that solicitation does not constitute objectionable conduct, Chairman Battista and Member Schaumber dissented on the grounds that they would bar a party from soliciting mail ballots, noting that "the integrity of the electoral process demands that the employee control his ballot at all times. Any effort to interfere with that process, whether successful or not, undermines the integrity of the process, and is therefore objectionable. Those considerations apply with particular force to a mail-ballot election." *Id.* at 935.

In finding that the solicitation of mail ballots should be objectionable on the grounds of preserving the integrity of Board elections, Chairman Battista and Member Schaumber correctly noted that:

The most sacred hallmark of a Board election is that employees are guaranteed the secrecy of their ballot. Thus, employees are entitled to an absolute assurance that their ballots will not be seen by any party. A party's solicitation of a marked ballot undermines that assurance. The solicited employee has no way of knowing whether the soliciting party will look at the ballot or not.

Id. at 934-935. Without the Board majority imposing a penalty for solicitation, however, Chairman Battista and Member Schaumber acknowledged that parties would remain free to solicit mail ballots "with assurance that an unsuccessful solicitation will not be the basis for a valid objection and with reasonable confidence that a successful solicitation will go undetected."

Id. at 936. By merely disapproving of parties soliciting mail ballots in lieu of punishing the actual underlying misconduct, the Board majority's approach in *Fessler and Bowman* does not sufficiently safeguard voters from parties soliciting ballots. Voters who respond favorably to the solicitation, and in turn may allow their ballots to be collected, may be unlikely to disclose the solicitation, allowing the extent and impact of a party's misconduct to remain undisclosed and calling into question the legitimacy of the election.

As a result of the increased adoption of mobile phones and smart devices, the threat of parties to an election soliciting mail ballots has risen dramatically in the years since the Board issued its decision in *Fessler & Bowman* in 2004. In November 2004, only 65% of American adults owned a cell phone. *Demographics of Mobile Device Ownership and Adoption in the United States*, Pew Research Center (June 12, 2019), <https://www.pewresearch.org/internet/factsheet/mobile/>. In January 2007, Apple revealed the first model of its iPhone, which was released in June 2007. *Apple Reinvents the Phone with iPhone*, Apple (Jan. 9, 2007), <https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/>. By February 2019, more than a decade after the iPhone was released and ushered in the era of smartphones with touch screen interfaces, 96% of adults in the United States reported owning cell phones suited for personal calls and sending text messages, and 81% of all American adults

owned smartphones capable of using videoconferencing applications. *Demographics of Mobile Device Ownership and Adoption in the United States*, Pew Research Center (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/>. In 2019 nearly three-quarters of all U.S. adults also reported owning a desktop or laptop computer, and nearly half own tablet computers. *Id.* These devices have changed how Americans communicate, as individuals are no longer limited to phone conversations, but can now send text messages and video calls with the push of a button across numerous popular applications.

When the Board issued its decision in *Fessler & Bowman* in 2004, communication over these devices was still limited to phone calls and text messages. Text messaging was still in its infancy and not widely used, however. In March 2005, of the 134 million American adults who reported having cell phones, only 27% of owners reported sending or receiving a text each month. Lee Rainie, *The Rise of Cell Phone Text Messaging*, Pew Research Center (March 14, 2005), <https://www.pewresearch.org/internet/2005/03/14/the-rise-of-cell-phone-text-messaging/>. Ten years later, 97% of cell phone owners in 2015 reported using their personal phones to send text messages. Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center (April 1, 2015), <https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/>.

Videoconferencing technology has also proliferated and become a ubiquitous feature of modern devices with the releases of the popular videoconferencing software programs Skype in August 2003, FaceTime in September 2010, and Zoom in 2013. To highlight the increased use of videoconferencing software, the tech company Zoom alone reported more than 200 million daily meeting participants in March 2020 at the outbreak of the pandemic. Eric S. Yuan, *A Message to Our Users*, Zoom (April 1, 2020), <https://blog.zoom.us/a-message-to-our-users/>. These applications allow parties to easily solicit mail ballots through mobile phones and other common household devices at the push of a button, allowing parties to communicate face-to-face

and monitor a voter filling out their ballot, thereby destroying the laboratory conditions of Board election. The potential for misconduct through these applications has been compounded by the ongoing COVID-19 pandemic, which has necessitated the Board conduct a record number of mail ballot elections in 2020. At first blush, parties are now free to utilize any these popular applications in an attempt to solicit ballots and manipulate the outcome of elections being conducted remotely with very limited Board oversight and regulation.

In consideration of these significant changes in communication and the need to ensure that mail ballot elections are being conducted under as close to laboratory conditions as possible, the Board should take this opportunity to reconsider its policy towards mail ballot solicitation for the first time since 2004 and rule that the solicitation of ballots constitutes objectionable conduct. Taking this approach will better serve the Act’s stated purpose of protecting “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” (29 U.S.C. § 151).

B. The Board Should Adopt Chairman Battista and Member Schaumber’s Proposed Bright-Line Rule Against Solicitation of Mail Ballots As Advocated in *Fessler & Bowman* and Find that the Union Committed Objectionable Conduct Requiring the Mail Ballot Election Be Set Aside

In order to better protect the integrity of mail ballot elections, the Board should adopt Chairman Battista and Member Schaumber’s proposal in *Fessler & Bowman* of “a bright-line rule that elections should be set aside, upon the filing of timely objections, whenever a party is shown to have collected or solicited mail ballots.” *Fessler & Bowman* at 936. Under this approach the Board would direct a new election be held if solicitation of mail ballots occurs, “even if it cannot be shown that a particular number of objectionable events were outcome determinative.” *Id.* Unlike the approach taken by the Board majority in *Fessler & Bowman*, which merely stated the members’ disapproval of solicitation of mail ballots without prescribing

an actual deterrent, Chairman Battista and Member Schaumber's proposed bright-line rule prevents such misbehavior by punishing conduct that calls into question the sanctity of Board elections. Adopting this bright-line rule will thus better serve the Board and protect the integrity of its mail ballot elections in light of the challenges posed by advances in technology and the ongoing COVID-19 pandemic.

If Chairman Battista and Member Schaumber's proposed bright-line rule is adopted, the Board should apply the rule to this decision and find that the Union herein committed objectionable conduct during the mail ballot election that serves as grounds for setting aside the election results. Crucially, whereas union representatives in *Fessler & Bowman* solicited the collection of previously completed ballots to ensure their return, the Union in the instant case both engaged in solicitation and attempted to actually assist voters in completing their ballots, thereby destroying these employees' right to select a representative of their own choosing free from outside interference. While the exact scope of the Union's attempts to solicit employee mail ballots is unknown due to the Regional Director's refusal to order a hearing on PTI's objections, PTI timely produced evidence that the Union engaged in the solicitation of employee mail ballots and attempted to "assist" these voters in completing their ballots.

PTI's Written Offer of Proof specifically identified an employee, Lisa Madrid French, who received a call from a "Missy" [last name unknown] presenting herself as a representative of the Union. (See Exhibit 3 to Request for Review). According to the transcript of this phone call, Missy asked Madrid French if she needed help "filling out" her ballot and "getting it sent back one way or another." (See Exhibit B attached to Exhibit 3 to Request for Review). PTI's Written Offer of Proof also identified PTI driver Joseph Walling as having been contacted on May 20, after ballots had been mailed, by a Union representative offering to help Walling fill out his ballot because the ballots "are confusing." (See Exhibit D attached to Exhibit 3 to Request

for Review). These Union representatives' communications with PTI employees thus showed a willingness on the Union's part not only to solicit and collect ballots, but also to assist these employees in the actual completion of their ballots, a step far beyond the conduct the Board majority discouraged in *Fessler & Bowman*.

Because mere solicitation of ballots constitutes grounds for setting aside an election under Chairman Battista and Member Schaumber's bright-line rule regardless of whether a party can show that the number of objectionable events would be outcome determinative, the Union's solicitation of PTI employees' mail ballots alone constitutes sufficient grounds for setting aside this election.

C. The Union's Conduct Destroyed the Requisite "Laboratory Conditions" of the Election, Calling into Question the Election's Integrity

By engaging in the solicitation and attempted collection of employee mail ballots, the Union also compromised the "laboratory conditions" necessary to protect employees' right to vote free of coercion. "The 'laboratory conditions' test represents an ideal atmosphere in which a free choice may be made by employees, protected from interference by employer, union, Board agent, or other parties." *Home Town Foods, Inc. v. NLRB*, 416 F.2d 392, 396 (5th Cir. 1969). The "laboratory conditions" test is intended to further the Board's long-established standard set forth in *General Shoe Corp.* for evaluating campaign conduct:

Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.

General Shoe Corp., 77 NLRB 124, 126 (1948).

Here, the Union's conduct destroyed the laboratory conditions needed to ensure that the mail ballot election was held free from undue interference by the parties on the voting

employees. Crucially, the scope of the Union's misconduct cannot be fully ascertained due to the Regional Director's failure to direct an evidentiary hearing following the counting of the mail ballots. However, PTI's Written Offer of Proof identified two witnesses, Madrid French and Walling, who would speak on the issue of inappropriate contact from the Union.

These employees' proposed testimony and the supporting text messages and voicemails offered as proof by PTI show that the Union pressured multiple PTI employees to solicit and collect ballots in an attempt to influence the election's outcome. Although the full scope of the Union's campaign to influence the outcome of the election is unknown in the absence of a proper evidentiary hearing before the Regional Director, these established incidents show that the Union was willing to destroy the intended environment in which employees could cast their votes free from outside pressure, thereby calling into doubt the integrity of the mail ballot election. Because the election was not conducted in laboratory conditions free from the Union's interference, the Board should set aside the results of the mail ballot election and order a new election be held.

D. The Union's Electioneering While Employee's Possessed Mail Ballots Should Be Prohibited as in a Manual Election

There is little doubt that the Union's communications with PTI's employees in possession of mail ballots would be considered prohibited electioneering had a manual election been held instead. In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board set aside the results of a manual election in which a union representative stood near the employee voter line and made comments concerning the weather and similar innocuous topics unrelated to the election. In doing so, the Board ruled that "sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election. . . . The final minutes before an employee casts his vote should be

his own, as free from interference as possible.” *Milchem, Inc.*, 170 NLRB 362, 363 (1968). See also, *In re L & J Equip. Co.*, 278 NLRB 485 (1986) (Board set aside manual ballot election after a union agent spoke for 10 to 15 minutes with employees waiting in line to vote despite no evidence as to the content of these conversations); *Tyson Fresh Meats*, 343 NLRB 1335 (2004) (Board set aside decertification election won by union by tally of 708 votes to 657 votes due to union stewards having conversations of at least 5 minutes with employees in line to vote).

The importance of maintaining laboratory conditions is just as vital in a mail ballot election as a manual election, perhaps even more so due to the lack of oversight by the Board once the ballots are mailed. Unquestionably, the Union engaging in conversation with employees who had already received their ballots would be prohibited in a manual election. Unlike in *Milchem*, where the content of a union agent’s conversation with employees in line to vote focused on banal topics such as the weather justified holding a new election, the Union’s communications with PTI employees here were clearly related to and intended to influence the outcome of the ongoing election. PTI employees Madrid French and Walling were both contacted by Union representatives after the ballots were mailed out on May 15 and asked to contact the Union once they received their ballots so Union representatives could help complete the ballots. In the case of Madrid French, multiple Union representatives reached out through both phone calls and text messages to make sure her ballot was “sent back one way or another” and inquired as to whether she still intended to vote for the Union after she had received her ballot. (See Exhibits A, B, and C attached to Exhibit 3 to Request for Review).

The Union’s inappropriate conversations with PTI employees while mail ballots were being sent out and received is analogous to a union representative chatting up an employee in the voting booth in a manual election, with the key difference being that the Union’s communications here were in private with no other party present to witness the objectionable

conduct. Because the Union engaged in misconduct that would constitute valid grounds to set aside a manual election, the Board should set aside the mail ballot election results and order a new election be held free of the Union's coercive tactics.

IV. CONCLUSION

The grounds discussed above individually and collectively support the Board setting aside the results of the mail ballot election. PTI respectfully requests that the Board review and overturn the Regional Director's Decision and Certification of Representative and order a new election be held free from the taint of the Union's misconduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby states that on December 15, 2020, the above Brief in Support of Review of Regional Director’s Decision and Certification of Representative was electronically filed through the Board’s E-filing system on its website <http://www.nlr.gov>. Copies of the same were also served the same day by electronic mail on Valerie Hardy-Mahoney, the Regional Director of Region 32, at Valerie.Hardy-Mahoney@nlrb.gov, Board agent Nicholas Tsiliacos at Nicholas.Tsiliacos@nlrb.gov, and the United Electrical, Radio, and Machine Workers of America on attorney Michael Healey at mike@unionlawyers.net.

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