

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

PROFESSIONAL)	
TRANSPORTATION, INC.)	
)	
Employer,)	
)	
v.)	Case No. 32-RC-259368
)	
UNITED ELECTRICAL, RADIO, AND)	
MACHINE WORKERS OF AMERICA)	
(U.E.) LOCAL 1077)	
)	
Petitioner.)	
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**BRIEF AMICUS CURIAE OF NELSON MEDINA IN
SUPPORT OF EMPLOYEES' FREE CHOICE**

Along with the accompanying Motion for Leave to File, Nelson Medina, an employee of savage services, hereby files this Amicus Curiae brief in support of Professional Transportation, Inc.'s employees. Mr. Medina is the petitioner in a decertification case against Teamsters Local 848 (Local 848), in Case No. 21-RD-264617 (election objections pending before the Regional Director). On September 18, 2020, Region 21 rejected Mr. Medina's request for a manual election and held a mail ballot election on his petition to decertify Local 848. The ballot count in his case was held on October 27, 2020, and some of the objections filed in his case are similar to those filed in the above captioned case. The respective bargaining unit employees in both cases' free choice was denied due to union mail ballot solicitation.

Introduction

During the vote count in Mr. Medina's mail ballot election, Local 848's attorney objected to the absence of two mail ballots from the Region's stack of collected ballots, claiming that those "missing" ballots were sent to the NLRB office within the Region's set time limit. When the Board agent stated that all ballots received by the Region were in the stack, Local 848's attorney revealed that Local 848 had the tracking numbers of the "missing" mailed ballots, and knew they were delivered. Subsequently, an investigation of the Region's mailroom revealed the two "missing" ballots. The union's possession of the tracking numbers is evidence of Local 848's solicitation and illegal vote harvesting. Because of this improper solicitation, Petitioner Medina filed objections with the Regional Director.

Mr. Medina and the other employees in his bargaining unit are victims of union interference of their freedom to choose whether to be represented or not. Local 848 blatantly destroyed any semblance of a free election conducted under laboratory conditions by soliciting the employees' mail ballots, obviously without the knowledge or consent of the Region or the other parties. Moreover, Local 848's misdeed would not have been discovered but for the fact that the union attorney announced that the union possessed the tracking number of the ballots. It was only the admission by Local 848's attorney that brought the union voter solicitation to light. However, that does not mean this incident was the only voter solicitation that occurred; it is reasonable to suspect those two ballots were just the tip of the iceberg. The election in Mr. Medina's case was very close; Local 848 won the ballot count by a very slim margin. However, even if the count had not been close, there would be no way, other than in a post-election hearing, to know the extent of Local 848's solicitation.

What happened to Mr. Medina and his fellow employees is not an isolated incident. The instant case presents credible evidence that the union here, Local 1077 UE, also solicited votes of at least two employees. Here, the Regional Director dismissed the employer's objections because the solicitation was unsuccessful and the two employees' votes were not determinative of the election's outcome. This case demonstrates the error in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004). Under *Fessler*, unsuccessful solicitation is excused and no hearing is held to determine a party's success in soliciting votes, despite the evidence that the unsuccessful solicitation occurred. Thus, the current rule allows a union to engage in voter solicitation without consequences if those tactics are unsuccessful or if the *known* successful solicitations are not outcome determinative. In either case, solicitation casts doubt upon the Board's ability to conduct a fair election reflecting employee free choice because one party has become an active intermediary between the Board and the voter.

As this case and Mr. Medina's demonstrate, questionable practices of voter solicitation by unions across the country appear widespread. Unions faced with mail ballot elections are likely to engage in voter solicitation knowing that under *Fessler* they are unlikely to ever get caught. As the Regional Director in this case pointed out in his Decision Overruling Objections and Certification of Representative, "the Board has yet to find mere mail ballot solicitation during home visits or other in person encounters to be coercive and thus objectionable, much less mere solicitation by telephone or text message." (Decision at 7). As discussed below, it is time for the Board to take action to end voter solicitation and other practices that interfere with employee free choice in mail ballot elections. This is especially true as elections are increasingly held by mail during the Covid pandemic. *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020).

1. Solicitation of mail ballots undermines the NLRA's goal of achieving laboratory conditions for fair and secure Board-facilitated elections.

Since 1948, the Board's longstanding goal in conducting union representation elections is to create laboratory conditions to permit the employees freedom of choice. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). In a typical manual election there are abundant protections to achieve that goal. Those laboratory conditions include having a neutral board agent at the election's polling place, election observers for each party, prohibition on campaigning in the immediate vicinity of the polling place, and a guarantee of a secret ballot to each employee. Thus, manual elections allow the Board to implement many critical safeguards, but none of those protections are available in a mail ballot election.

With good reason, the Board strongly favors manual elections over mail balloting. Section 11301.2 of the NLRB's Casehandling Manual Part Two: Representation Proceedings ("CHM"), expressly provides that "the Board policy is that representation elections should, as a general rule, be conducted manually." Unfortunately, in this Covid pandemic era, manual elections have become the rare exception. *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020). Furthermore, there is a possibility that post-Covid, the Board may adopt mail elections as the norm, as proposed by Member McFerren. Thus, it is vitally important that the Board establish strong procedures that protect the laboratory conditions in mail ballot elections, and establish sufficient prophylactic measures to minimize the risks posed by mail ballot elections. Ineffective procedures will undermine the laboratory conditions required for a free, fair, and secret ballot election. As the Board recognized in *Fessler*:

Where mail-ballot collection by a party occurs, we find that it casts doubt on the integrity of the election process and election secrecy. For this reason, we hold that where a party collects or otherwise handles voters' mail ballots, that conduct is objectionable and may be a basis for setting aside the election.

Fessler & Bowman, Inc., 341 NLRB 932, 934 (2004).

2. The Board should adopt a bright line rule for objectionable solicitation of mail ballots articulated by the dissent in *Fessler*

The *Fessler* ruling creates two loopholes that permit unions to solicit votes and allow intimidation or undue influence to impact employee free choice. First, *Fessler* created a bizarre rule that makes the successful solicitation of ballots objectionable but unsuccessful solicitation lawful, pinning the unlawfulness of the act on the counterfactual. This topsy-turvy rule relies on employees, who the union successfully victimized to come forward and admit that they were duped by the union, assuming they are even aware that the union conduct was prohibited. Conversely, an employee who realizes the solicitation was prohibited and opts to keep his ballot secret is told that there is no remedy because the misconduct was resolved by the employee's act of standing up to the union, or the lack of impact on the outcome.

However, the risk of any attempt (whether successful or not) to solicit or collect ballots is obvious: an employee approached by one or more union agents asking about the status of his ballot would likely feel intimidated. Such solicitations, often done at the employee's home, would be reasonably understood as intimidation, since the employee knows: 1) the union is watching his voting process; 2) the union knows who has voted and who has not; and 3) the union knows who cooperates with its efforts and who does not. An employee may feel peer pressure to cooperate with the union, or may not know risks of cooperating (e.g., altered or destroyed ballots). Solicitation and union interference in the voting process is likely to intimidate the employee to vote for the union.

Consider the reaction if an employer attempted to solicit ballots. Would not such solicitation intimidate employees, whether they gave their ballot to the employer or not? Would

an employee who resisted be told that the employer's conduct was not prohibited because the employee stood up to the employer? The burden to police ballot solicitation by unions or employers should not be placed on employees. Rather, it is the Board's duty to create fair procedures that limit interference by parties and insure free elections.

Second, holding that solicitation, even if successful, must be sufficient to alter the election's outcome (as demonstrated in a post-election hearing) begs the question. It assumes that the solicitation was sufficiently limited in scope and no additional investigation is required as to the extent of the possible union solicitation. Hearings are required to fully uncover the extent of the union's solicitation.

In short, the Board should take this opportunity to draw a bright line in mail ballot elections, as set forth by then Chairman Battista and Member Schaumber in their dissent in *Fessler*. No solicitation of ballots should be permitted, as this is akin to the actual collection of ballots condemned by all Board members in *Fessler*. As the *Fessler* dissent properly pointed out, limiting objectionable conduct to successful solicitations while allowing unsuccessful solicitations fails to protect employees' right of free choice. The reason is clear. An employee who resists the union's solicitation to "help" with the ballot is the employee most likely to complain about the union's conduct. However, since the employee resisted and the union therefore did not acquire the ballot, the Board under *Fessler* would not find any objectionable conduct. However, the employee who succumbs to a union's solicitation is unlikely to complain, either through fear of the union, embarrassment at not resisting the union, or ignorance that the union's conduct was improper. Therefore, the current *Fessler* rule allows unions to interfere with employee free choice knowing that they are very unlikely to get caught.

The *Fessler* dissent also pointed out that *any* unlawful solicitation should be objectionable, even if the solicited ballots were not outcome determinative. There are at least two reasons that the dissent should be adopted. First, solicitation is probably more widespread than merely affecting the complaining employees and should be treated, at the least, as sufficient evidence for further inquiry. A full hearing could better illuminate the extent of the solicitation. Second, as mail ballot elections become even more frequent, the Board must take steps to insure, as closely as possible, that those elections meet the laboratory conditions of manual elections. Union solicitation of even one employee necessarily alters those laboratory conditions, requiring a Board remedy that could include a new election.

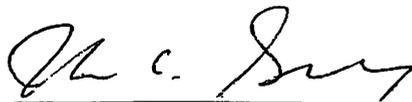
Again, given the frequency of mail ballot elections in the Covid era, current law regarding union solicitation is wholly inadequate to protect employee free choice. It is time for the Board to recognize that all ballot solicitations, successful or not, are unlawful. The dissent in *Fessler* should be adopted and all parties should be prohibited in mail elections from visiting the private homes of employees or making unsolicited calls for the purpose of soliciting or collecting ballots.

Conclusion

Since 1948, the NLRB has striven to insure laboratory conditions in its elections. As detailed above, *Fessler* undercuts that goal in mail ballot elections by inviting coercion against bargaining unit employees and denying their opportunity for a free and fair representation election. In this case and in Mr. Medina's parallel case, the effect of a union soliciting ballots raises doubt as to the fairness and validity of the election. Moreover, the current rule impacts

mail ballot elections conducted across the country, and must be changed to better protect all employees' right to free choice.

Respectfully submitted

A handwritten signature in black ink, appearing to read "John Scully", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Nelson Medina's Amicus Curiae brief in support of Professional Transportation's employees in case 32-RC-259368 was submitted by e-filing to Region 32 of the National Labor Relations Board December 16, 2020.

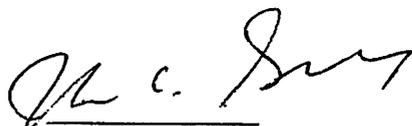
A copy of the motion and the brief was also served upon the following by electronic mail on December 16, 2020:

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John Scully