

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**PROFESSIONAL TRANSPORTATION, INC.**

**and**

**Case 32-RC-259368**

**UNITED ELECTRICAL, RADIO AND  
MACHINE WORKERS OF AMERICA  
(U.E.), LOCAL 1077**

**BRIEF IN OPPOSITION TO REVIEW  
OF REGIONAL DIRECTOR'S DECISION  
AND CERTIFICATION OF REPRESENTATIVE**

On December 2, 2020 the National Labor Relations Board (“Board”) granted Professional Transportation, Inc.’s (“PTI” or “Employer”) Request for Review of the Regional Directors Decision and Certification of Representative. The grant of review was with respect to the Board policy concerning mail ballot solicitation in Fessler and Bowman, Inc., 341 NLRB 932 (2004).

The Brief of the United Electrical, Radio and Machine Workers of America, Local 1077 (“UE” or “Union”) follows pursuant to Section 102.67(h) of the Board Rules and Regulations. The Board should not reexamine any aspect of its mail ballot policy and should not order an evidentiary hearing on PTI’s Objections to Election. The Regional Director’s Decision and Certification of Representative should be affirmed.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The Board grant of review follows a mail ballot election conducted pursuant to a Stipulated Election Agreement. (Exhibit No. 1 attached). Mail ballot elections are common in this industry, even aside from Covid-19 issues, given the numbers of geographic locations contained in these bargaining units, eleven in this case covering the states of California and Nevada. (Exhibit 1, Paragraph 5) The Tally of Ballots following the election showed 42 votes for Petitioner UE and 27 votes for the Employer, with 5 challenged ballots. (Exhibit No.2 attached)

The Regional Director Decision in this matter denying an evidentiary hearing (Exhibit 3 attached), under the facts of this case, raised no issues impacting substantial questions of policy (Section 102.67(d)(1). Likewise, the Regional Director Decision denying PTI an evidentiary hearing, does not, under the facts of this case, prejudice PTI and certainly does not prejudice the employees of PTI when voted for the Union by a substantial margin. (Section 102.67(d). Nor, are there any compelling reasons for reconsideration of the Board's mail ballot election rules and policies under the facts of this case. (Section 102.67(d)(4).

## **FACTS AND PROCEDURAL BACKGROUND.**

PTI and other companies in this industry, for example the Hallcon Corporation (“Hallcon”), provide crew transportation services in the railroad and other industries in the United States. PTI and Hallcon dispatch its employee drivers to pick up crews at a rail yard and transport the rail crews to hotels/motels for rest and also pick up rail crews in the field and transport them to a rail yard where the trains are located. This work is done under contract from Railroads, in this case the Union Pacific Railroad. The Union Pacific rail yards relevant to this case are at the 11 locations listed in paragraph 5 of the Stipulated Election Agreement. (Exhibit No. 1)

Hallcon held the contract with Union Pacific for those locations and the employees were represented by the UE under a collective bargaining agreement between UE and Hallcon. On March 5, 2020 PTI took over the operations of Hallcon at the 11 locations in California and Nevada. At the same time the Union demanded recognition and requested bargaining from PTI. PTI refused leading to two sets of actions: 1. UE filed the RC Petition in this case, and 2. UE filed Unfair labor Practice charges against the employer.<sup>1</sup>

On April 21, 2020 the Petitioner filed an RC Petition seeking to represent a unit of driver employees of PTI. A Stipulated Election Agreement was entered into for a Unit consisting of:

All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada, who were employed by the Employer during the

---

<sup>1</sup> On July 28, 2020 A Complaint and Notice of Hearing was issued alleging Employer violations of Sections 8(a)(1)(3) and (5) of the Act, principally addressing ,in short, *Burns* successorship issues.

payroll period ending April 21, 2020; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

(Exhibit 1)

A mail ballot election was held, common in this particular industry, even in the absence of Covid-19 issues. The tally of ballots prepared on June 10, 2020 by the Region shows that of the approximately 113 eligible voters, 42 votes were cast for the Union and 27 votes were cast against the Union, with five challenged ballots. (Exhibit 2)

On June 16, 2020 the Employer filed Objections to Union Conduct Affecting Election (Objections) and an offer of proof in support therefore. UE filed a brief response without having the benefit of that offer of proof. On July 9, 2020 the Regional Director denied the Employer objections without a hearing (Exhibit 3). The Regional Director also certified the UE as the certified representative in the petitioned for unit. PTI then filed the Petition for Review that is the subject of this brief.

### **THE LEGAL FRAMEWORK**

“Representation elections are not lightly set aside” *NLRB v. Hood Furniture Mfg. Co.*, 941 f.2d 325, 328 (5<sup>TH</sup> Cir. 1991) as there is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Id.* at 328. The burden of proof is on the part seeking to set aside a Board-supervised election, and that burden is a “heavy one.” *Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 fn. 163 (1985).

The objecting party must show not only that objectionable acts occurred by the other party’s agent, but also that they “interfered with the employees exercise of free choice to such an

extent that such acts materially affected the results of an election.” *NLRB v. Gulf States Cannery*, 634, F.2d 215, 216 (5<sup>th</sup> Cir. 1981). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) Conduct is objectionable “if it has the tendency to interfere with the employees’ freedom of choice.”

Section 102.66(c) of the Board’s Rules and Regulation provides that the objecting party’s offer of proof presented to the Region shall identify each witness the party would call to testify concerning the issue and summarizing each proffered witness testimony. If a Regional Director determines that the evidence described in an offer of proof accompanying objections would not constitute grounds for setting aside the election even if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections without a hearing. Section 102.69(c)(1)(i) of the Board’s Rules and Regulations.

The Board places the burden on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip.op. 1, fn 2 (2017). The objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation, conclusory statements or suspicion. See *Allen Tyler & Son, Inc.*, 234 NLRB 212, 212 (1978). To merit investigation by a regional director and to warrant a hearing, the offer or proof must be “reasonably specific in alleging facts which *prima facie* would warrant setting aside an election.” *Audubon Cabinet Company*, 119 NLRB 349, 350-351 (1957) and *The Daily Grind*, 337 NLRB 655 (2002).

In *XPO Logistics Freight, Inc.*, 2017 WL 1294849, fn. 1 (Apr. 6, 2017), the Board denied the employer’s request for review of the Regional Director’s decision overruling objections and issuing a certification of representative where the employer’s evidence in support of its

objections failed to “constitute grounds for setting aside the election if introduced at a hearing under Sec. 106.67 (c)(1)(i).” With respect to one of the objections in that case, the Board noted that the employer “neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union, nor specified the objectionable statements they assertedly made.” *Id.* The Board went on to explain that its conclusion that the employer’s offer of proof was deficient “stems not from its failure to submit a voluminous offer of proof, but from the Employer’s failure to allege and support conduct, which, if credited, *would* warrant setting aside the election.”

### **THE SPECIFIC OBJECTION AT ISSUE: THE FACTUAL ALLEGATIONS**

The Employer objection in this matter alleges that Union agents “improperly solicited and offered to collect mail ballots” from employees. (Exhibit 3, p. 4-6) The Employer Offer of Proof identified two employee witnesses, one manager witness, and produced copies of email and text-messages correspondence.

The first employee witness (Witness # 1) would testify to receiving at least two voicemails and a text message from alleged Union agents asking her if she needed help with her ballot or if she “needed help getting (the ballot) sent back one way or the other.” The Employer submitted a copy of the transcripts of two voicemail messages to support this proffered testimony.

The transcripts of the voicemail messages read, in relevant part:<sup>2</sup>

Hi (Witness #1), it’s (alleged agent #1) from the Union. I’m just calling to see if you have received your ballot yet from the labor board. They should be coming today or tomorrow. So, give me a call back and let me know if you have.

Hi (Witness #1), this is (alleged agent #2). I’m from the – I’m from the Union. I talked to you in the yard a couple of times and I just wanted to see if you got, if you guys got your ballot today. If

---

<sup>2</sup> The transcripts and emails referenced are taken verbatim from the Regional Director decision. (Exhibit 3)

you can give me a call back. My number is (redacted). And if need help filling it out, but if you need help on getting it sent back one way or the other, I can help you with that. Just because it's so complicated.

The Employer's offer or proof summarized the second employee witness's (Witness #2) testimony in conclusory fashion based on double hearsay from a manager witness. He would testify generally that an alleged, unidentified Union agent allegedly offered to help complete his mail ballot. There are no specific facts proffered regarding the identity of the caller or what was actually said.

The manager witness would testify that Witness #2 reported to him his conversation with the unidentified Petitioner agent. The manager then reported that conversation to another management official by e-mail dated May 20. The e-mail reads, in relevant part:

(Witness #2) called me today asking about the vote. He asked me if it was secret ballot. I advised him yes, it is and that he doesn't have to tell anyone if and or how he voted. He said he got a call for (sic) a guy from the union telling him that the ballots are out and are confusing to fill out and wanted (Witness #2) to call him when he gets it so they could walk him thru filling out the ballot. I informed Joseph that No one can fill out the form for him. No one can tell him how to do it and that no one else can pick it up and or mail it for him. I told him that the instructions for filling it out are in the letter from the NLRB and in the email that Steve sent out.<sup>3</sup>

The alleged conduct in this Objection; namely, offers to assist voters in filling out ballots typically arises in the context of face-to-face interactions, such as home or jobsite visits by union agents. In *Grill Concepts Services, Inc. d/b/a/ The Daily Grind*, 2019 WL 2869823 (June 28, 2019), the Board was faced with nearly identical alleged objectionable conduct. In determining whether the alleged offers of assistance were coercive and interfered with employee free choice, it analyzed the conduct like it would with a union home visits. The Board, at page 1, of that decision stated:

---

<sup>3</sup> Steve is presumably Steve Kessler, a PTI representative.

Generally speaking, union home visits during election campaigns are lawful and unobjectionable as long as the visitors do not threaten or coerce eligible voters during the visits. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), revd. On other grounds, 133 NLRB 1092 (1961). If objectionable threats or coercion occur during home visits, the Board follows its usual practice of applying an objective standard in evaluating whether a party's conduct has the tendency to interfere with employee free choice in the election and thus warrants setting the election aside. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991). The objecting party bears the burden of demonstrating that objectionable misconduct occurred and that it warrants setting the election aside. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005); *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

Relying on *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), the Board found no objectionable conduct because no employees actually handled their ballots over to the union.

The same is true here.

### **FESSLER BOWMAN**

The Board in *Fessler Bowman* split on an aspect of issues of mail ballot solicitations, though not on the factual issues presented in this case. In *Fessler Bowman* the Board held:

“For this reason we hold that where a party collects or otherwise handles voters’ mail ballots, that conduct is objectionable and may be the basis for setting aside the election.

*Fessler Bowman* at p. 934. In that case the Union actually collected ballots.

The Board majority went on to find that the “Union’s solicitation of voters’ did not constitute objectionable conduct.” The solicitation in *Fessler Bowman* was in person. While PTI tries to argue there was solicitation here, there was no in person contact in this case.<sup>4</sup>

In *Fessler Bowman* members Battiste and Schaumber proposed a bright line rule that elections should be set aside even where there was unsuccessful solicitation and even where that solicitation was not shown to be determinative. *Fessler Bowman* at 936.

---

<sup>4</sup> The *Daily Grind* case appears to suggest that in person solicitation might be objectionable

What does the Employer proffer show, and what does it not show in this case

Witness #1, would testify to receiving the above voicemail messages from two alleged Petitioner agents in which one offered to help with “not filling it out...but getting it back one way or the other...because it’s so complicated.” Such a telephonic offer to assist is too ambiguous to constitute ballot solicitation, and too ambiguous to be considered coercive. Whatever the intended meaning of the “offer”, “the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.” *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989), quoting *Beaird-Poulan Division*, 247 NLRB 1375, 1370 (1980), *enfd.* 649 F.2d 589 (8<sup>th</sup> Cir. 1981). “Rather, the test is based on the objective standard.” *Id.* See also *Teamsters Local 299 (Overnite Transportation Co.)*, 328 NLRB 1231 *fn.* 2 (1999). Assuming *arguendo* that Witness #1 subjectively construed the offer to assist as coercive; when viewed objectively, it was too ambiguous to reasonably be construed as solicitation of the voter’s ballot or as otherwise coerced.

Witness #2 offers no specific testimony. Rather, the Employer offered a summary of his testimony based hearsay twice removed; i.e. that an unidentified Union agent called and offered to assist him in filling out his ballot. Missing are any “factual specifics about who said or did what to whom that, if credited by a factfinding, could support a determination that the conduct was coercive.” *XPO Logistics Freight, Inc. v. NLRB*, *supra*. As the Regional Director found it does not contain the specifics necessary to warrant a hearing, much less set aside the election results. The only details offered are a report as to what Witness #2 told the manager witness who emailed another manager. In that e-mail, the manager witness explained that Witness #2 told him that an unidentified Union agent called him and asked for a return call so he could “walk him through filling out the ballot” because they are “confusing to fill out.” There is nothing

more regarding the hearsay exchange between Witness #2 and an unidentified Union agent in this email. Indeed, the only mention or notion of someone else “filling out the form” came from the manager witness himself. According to the e-mail, Witness #2 made no mention of solicitation, and as discussed above, the offer or proof regarding Witness #2 lacks the requisite specificity to warrant a hearing. Taken together, the alleged “facts” offered fall far short of making a *prima facie* showing of objectionable conduct

### CONCLUSION

There is no reason, under the particular facts of the case as alleged by PTI, for the Board to reexamine any aspect of its mail ballot policy. The Regional Director’s Decision Overruling Objections and Certification of Representative should be affirmed.

Respectfully submitted,

/s/Michael J. Healey, Esq.

Michael J. Healey, Esq.

Pa. ID No. 27283

247 Fort Pitt Boulevard, 4<sup>th</sup> Floor

Pittsburgh, PA 15222

412-391-7711

ATTORNEY FOR UNITED ELECTRICAL,  
RADIO AND MACHINE WORKERS OF  
AMERICA

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**STIPULATED ELECTION AGREEMENT**

**Professional Transportation, Inc.**

**Case 32-RC-259368**

The parties **AGREE AS FOLLOWS:**

**1. PROCEDURAL MATTERS.** The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

**2. COMMERCE.** The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

Professional Transportation, Inc. is an Indiana corporation with places of business located in California and Nevada where it is engaged in the transportation of rail crews throughout the United States. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$250,000 and purchases and receives goods, supplies and materials in excess of \$50,000 directly from points located outside the states of California and Nevada.

**3. LABOR ORGANIZATION.** The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

**4. ELECTION.** The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 32, on May 15, 2020. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 32 office by close of business on June 5, 2020. The mail ballots will be counted at a location to be determined by the Regional Director at 10:00 a.m. on June 10, 2020. The parties will have the opportunity to participate remotely, if necessary, by including using Facetime to observe the count.

Any person who has not received a ballot by May 22, 2020, should immediately contact the NLRB Region 32 office located at 1301 Clay Street, Suite 300N, Oakland, CA 94612-5224 or Nicholas L. Tsiliacos 510.671.3046 and request a ballot.

**5. UNIT AND ELIGIBLE VOTERS.** The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.



Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 21, 2020**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls or by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

**6. VOTER LIST.** Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

**7. THE BALLOT.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by, UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA (U.E.), LOCAL 1077?" The choices on the ballot will be "Yes" or "No".

**8. NOTICE OF ELECTION.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

**9. NOTICE OF ELECTION ONSITE REPRESENTATIVE.** The following individual will serve as the Employer's designated Notice of Election onsite representative: Steve Kessler, Manager, 3700 E Morgan Ave., Evansville, IN 47715-2240; steve.kessler@unitedevv.com

Initials: \_\_\_\_\_

**10. ACCOMMODATIONS REQUIRED.** All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

**11. OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

**12. TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

**13. POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

**PROFESSIONAL TRANSPORTATION, INC.**

(Employer)

**By:**

/s/ Jacob R. Fulcher 4/28/20  
(Signature) (Date)

**Print Name:** \_\_\_\_\_

**UNITED ELECTRICAL, RADIO, AND  
MACHINE WORKERS OF AMERICA (U.E.),  
LOCAL 1077**

(Petitioner)

**By:**

/s/ Michael J. Healey 4/28/20  
(Signature) (Date)

**Print Name:** \_\_\_\_\_

**Recommended:**

/s/ Nicholas L. Tsiliacos  
NICHOLAS L. TSILIACOS, Field Examiner  
(Date) 4/28/20

**Date approved:**

4/28/20

/s/ Valerie Hardy-Mahoney / hv

**Regional Director, Region 32  
National Labor Relations Board**

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

Date Filed

04/21/2020

Case No. 32-RC-259368

Date Issued 06/10/2020

City Oakland

State CA

Type of Election:  
(Check one:)

(If applicable check  
either or both:)

Stipulation

8(b) (7)

Board Direction

Mail Ballot

Consent Agreement

RD Direction  
Incumbent Union (Code)

PROFESSIONAL TRANSPORTATION, INC.  Employer  and  UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA (U.E.), LOCAL 1077  Petitioner
--

### TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of tabulation of ballots case in the election held in the above case, and concluded on the date indicated above, were as follows:

- 1. Approximate number of eligible voters 113
- 2. Number of Void ballots 0
- 3. Number of Votes cast for Petitioner 42
- 4. Number of Votes cast for \_\_\_\_\_
- 5. Number of Votes cast for \_\_\_\_\_
- 6. Number of Votes cast against participating labor organization(s) 27
- 7. Number of Valid votes counted (sum 3, 4, 5, and 6) 69
- 8. Number of challenged ballots 5
- 9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 74
- 10. Challenges are (not) sufficient in number to affect the results of the election.
- 11. A majority of the valid votes counted plus challenged ballots (Item 9) has (not) been cast for Petitioner

For the Regional Director

*[Signature]*

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

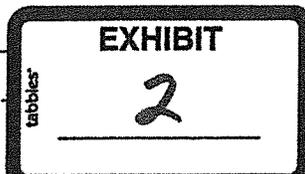
For Professional Transportation, Inc.

# Steve Kessler, COO verbal authorization via FaceTime

For United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077

1st Sean Fulkerson verbal authorization via FaceTime

For



UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32

PROFESSIONAL TRANSPORTATION, INC.

Employer

and

UNITED ELECTRICAL, RADIO, AND MACHINE  
WORKERS OF AMERICA (U.E.), LOCAL 1077

Case 32-RC-259368

Petitioner

**REGIONAL DIRECTOR'S DECISION OVERRULING OBJECTIONS AND  
CERTIFICATION OF REPRESENTATIVE**

Based on a petition filed on April 21, 2020<sup>1</sup> and pursuant to the parties' Stipulated Election Agreement, an election was conducted by mail from May 15 to June 5 to determine whether a unit of driver employees of Professional Transportation, Inc. (the Employer) wish to be represented for purposes of collective bargaining by United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077 (Petitioner). That voting unit consists of:

All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada, who were employed by the Employer during the payroll period ending April 21, 2020; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

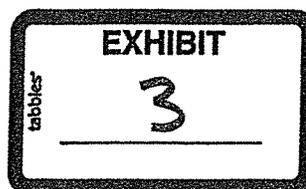
The tally of ballots prepared on June 10 shows that of the approximately 113 eligible voters, 42 votes were cast for and 27 votes were cast against the Petitioner, with five challenged ballots, a number that is insufficient to affect the election results.

**THE EMPLOYER'S OBJECTIONS**

On June 16, the Employer timely filed Objections to Union Conduct Affecting Election (Objections) and an offer of proof in support thereof. A copy of the Employer's Objections is

---

<sup>1</sup> All dates refer to calendar year 2020.



Regional Director's Decision Overruling Objections and Certification of Representative

attached hereto, and after first setting forth the Board's standards for setting aside elections and for evaluating offers of proof, I address them below, summarizing the allegations contained therein.

Board Standards for Setting Aside Elections and for Evaluating Offers of Proof

"Representation elections are not lightly set aside" *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted) and "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Id.* at 328. The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Id.* at 328. The burden of proof is on the party seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 fn. 163 (1985). The objecting party's burden encompasses every aspect of a *prima facie* case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984).

The standard used to determine whether objectionable conduct occurred varies depending upon who is alleged to have committed the misconduct. Where, as here, the objecting party alleges that the other party to the election, or its agent, committed the objectionable conduct, the objecting party must show not only that the acts occurred by the other party's agent, but also that they "interfered with the employees exercise of free choice to such an extent that they materially affected the results of an election." *NLRB v. Gulf States Cannerys*, 634 F.2d 215, 216 (5th Cir. 1981). See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) -conduct is objectionable "if it has the tendency to interfere with the employees' freedom of choice.").

Section 102.69(a) of the Board's Rules and Regulations provides that when filing objections to an election, the objecting party must include a short statement of the reasons for the objections, and an offer of proof in the form described in Section 102.66(c). Section 102.66(c) of the Board's Rules and Regulation provides that the offer of proof shall identify "each witness the party would call to testify concerning the issue and summarizing each witness testimony." If the Regional Director determines that the evidence described in an offer of proof is insufficient

Regional Director's Decision Overruling Objections and Certification of Representative

to sustain the proponent's position, the evidence shall not be received. If the Regional Director determines that the evidence described in an offer of proof accompanying objections "would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections." Section 102.69(c)(1)(i) of the Board's Rules and Regulations. See also NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1.

The Board places the burden on the objecting party to furnish evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. op. 1, fn. 2 (2017), citing *Transcare New York, Inc.*, 355 NLRB 326 (2010). The Board has long held that an objecting party must provide probative evidence in support of its objections; it is not sufficient to rely on mere allegation, conclusory statements, or suspicion. See *Allen Tyler & Son, Inc.*, 234 NLRB 212, 212 (1978) ("In the absence of any probative evidence, [the Board] shall not require or insist that the Regional Director conduct a further investigation simply on the basis of a 'suspicious set of circumstances"). In short, to merit investigation by a regional director and to warrant a hearing, the offer of proof must be "reasonably specific in alleging facts which *prima facie* would warrant setting aside an election." *Audubon Cabinet Company*, 119 NLRB 349, 350-351 (1957); *Care Enterprises*, 306 NLRB 491 (1992). The Board has repeatedly upheld Regional Directors' decisions to overrule objections when the supporting offer of proof is deficient. See e.g., *Builders Insulation, Inc.*, 338 NLRB 793 (2003); *The Daily Grind*, 337 NLRB 655 (2002) (unsupported allegations are insufficient to trigger administrative investigations); *Heartland of Martinsburg*, 313 NLRB 655 (1994); *Holladay Corp.*, 266 NLRB 621 (1983); *North Shore Ambulance*, 2017 WL 1737910 (NLRB) (May 3, 2017) (Citing *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, 1010 fn. 1(1992), and Secs. 102.69(a) and 102.69(c)(1)(i) of the Board's Rules and Regulations, wherein the Board held that the Regional Director properly overruled the Employer's Objection "without a hearing based on the Employer's deficient offer of proof").

In *XPO Logistics Freight, Inc.*, 2017 WL 1294849, fn. 1 (Apr. 6, 2017), the Board denied the employer's request for review of the Regional Director's decision overruling objections and issuing a certification of representative where the employer's evidence in support of its

Regional Director's Decision Overruling Objections and  
Certification of Representative

objections failed to "constitute grounds for setting aside the election if introduced at a hearing under Sec. 106.67 (c)(1)(i)." With respect to one of the objections in that case, the Board noted that the employer "neither identified the alleged Union agents or supporters who purportedly threatened employees into supporting the Union, nor specified the objectionable statements they assertedly made." *Id.* The Board went on to explain that its conclusion that the employer's offer of proof was deficient "stems not from its failure to submit a voluminous offer of proof, but from the Employer's failure to allege and support conduct which, if credited, *would* warrant setting aside the election." Citing NLRB Casehandling Manual, Part Two- Representation Proceedings, Sec. 11395.1. (emphasis in original).

In *XPO Logistics Freight, Inc.*, 365 NLRB No. 105. fn. 1(2017), the test-of-certification case that arose after the Board's denial of the employer's request for review, *supra*, the Board granted the General Counsel's motion for summary judgment. The employer then appealed the Board's decision to the Court of Appeals for the District of Columbia. In denying the employer's petition for review that challenged the Board's decision to overrule its objections without a hearing in the underlying representation case, the D.C. Circuit noted that an evidentiary hearing is "called for only when a party makes a *prima facie* showing of substantial and material issue of fact, which if true, would warrant setting aside the election." *XPO Logistics Freight, Inc. v. NLRB*, 2018 WL 2943938, \*2 (D.C. Cir. May 25, 2018) (citations omitted). The Court also noted that the *prima facie* showing "cannot be conclusory" and must "point to specific events and specific people." *Id.* (citations omitted). It therefore agreed that the employer's offer of proof was "devoid of factual specifics about who said or did what to whom that, if credited by a factfinder," could support a determination that the conduct was coercive. *Id.*

**Objection 1:**

Employer's Objection 1 alleges that Petitioner agents "improperly solicited and offered to collect mail ballots" from employees.

**Offer of Proof:**

In its offer of proof in support of this Objection, the Employer identified two employee witnesses, one manager witness, and produced copies of email and text-message correspondence.

Regional Director's Decision Overruling Objections and  
Certification of Representative

The first employee witness (Witness # 1) would testify to receiving at least two voicemails and a text message from alleged Petitioner agents asking her if she needed help with her ballot or if she "needed help getting (the ballot) sent back one way or the other." The Employer submitted a copy of the transcripts of two voicemail messages to support this proffered testimony, as well as a copy of a text message from one alleged Petitioner agent, which posed the question of whether this witness still intended to vote for the Petitioner.<sup>2</sup>

The transcripts of the voicemail messages read, in pertinent part:

Hi (Witness #1), it's (alleged agent #1) from the Union. I'm just calling to see if you have received your ballot yet from the labor board. They should be coming today or tomorrow. So, give me a call back and let me know if you have.

Hi (Witness #1), this is (alleged agent #2). I'm from the — I'm from the Union. I talked to you in the yard a couple times and I just wanted to see if you got, if you guys got your ballot today. If you can give me a call back. My number is (redacted). And if need help filling it out, not filling it out, but if you need help on getting it sent back one way or the other, I can help you with that. Just because it's so complicated.

The Employer's offer of proof summarized the second employee witness's (Witness #2) testimony in conclusory fashion. He would testify generally that an alleged, unidentified Petitioner agent called him and offered to help him complete his mail ballot and to collect and return the ballot for him. There are no specific facts proffered regarding the identity of the caller or what was actually said.

The manager witness would testify that Witness #2 reported to him his conversation with the unidentified Petitioner agent. The manager then reported that conversation to another management official by e-mail, dated May 20. The e-mail reads, in relevant part:

(Witness #2) called me today asking about the vote. He asked me if it was secret ballot. I advised him yes, it is and that he doesn't have to tell anyone if and or how he voted. He said he got a call for (sic) a guy from the union telling him that the

---

<sup>2</sup> The text message is not included herein because merely asking an employee if s/he continues to support Petitioner, without more, is not objectionable conduct. See e.g., *Fessler & Bowman*, *infra*.

Regional Director's Decision Overruling Objections and  
Certification of Representative

ballots are out and are confusing to fill out and wanted (Witness #2) to call him when he gets it so they could walk him thru filling out the ballot. I inform Joseph that No one can fill out the form for him. No one can tell him how to do it and that no one else can pick it up and or mail it for him. I told him that the instruction for filling it out are in the letter from the NRLB and in the email that Steve sent out.

Analysis:

The alleged conduct in this Objection; namely, offers to assist voters in filling out ballots and to collect ballots for delivery, typically arises in the context of face-to-face interactions, such as home or jobsite visits by union agents. By way of recent example, in *Grill Concepts Services, Inc. d/b/a/ The Daily Grill*, 2019 WL 2869823 (June 28, 2019), the Board was faced with nearly identical alleged objectionable conduct. In determining whether the alleged offers of assistance were coercive and interfered with employee free choice, it analyzed the conduct under the "union home visits" framework. The Board, at page 1, summed up the case law as follows:

Generally speaking, union home visits during election campaigns are lawful and unobjectionable as long as the visitors do not threaten or coerce eligible voters during the visits. *Plant City Welding & Tank Co.*, 119 NLRB 131, 133-134 (1957), revd. on other grounds, 133 NLRB 1092 (1961). If objectionable threats or coercion occur during home visits, the Board follows its usual practice of applying an objective standard in evaluating whether a party's conduct had the tendency to interfere with employee free choice in the election and thus warrants setting the election aside. See, e.g., *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Phillips Chrysler Plymouth*, 304 NLRB 16, 16 (1991). The objecting party bears the burden of demonstrating that objectionable misconduct occurred and that it warrants setting the election aside. *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005); *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

The Board went on to cite the decision in *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), in which the Board unanimously found ballot collection during a union's jobsite visits to constitute objectionable conduct. Relying on that decision, the Board found no objectionable conduct because no employees actually handed their ballots over to the union. The same is true here. However, the inquiry doesn't end there. The Board also considered whether mere (unsuccessful) mail-ballot solicitation constituted objectionable conduct, noting that the *Fessler & Bowman* Board split on that issue. Finding that no objectionable solicitation occurred, but without resolving the legal question, the Board concluded that the conflicting and ambiguous

Regional Director's Decision Overruling Objections and  
Certification of Representative

testimony failed to establish “that the Petitioner’s representatives sought to *physically* assist voters in filling out the ballot, sought to have the voters record their votes *in the representatives’ presence*, or engaged in any other conduct that could reasonably be viewed as coercive or imperiling the integrity of the mail ballots in this election.” *Emphasis added*. The same fact pattern is present here. There is no allegation or offer of proof suggesting that Petitioner agents sought to provide in-person assistance. Rather, all of the correspondence refers to alleged Petitioner agents seeking a return call for their assistance.

To be sure, 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. As noted above, the Board in *Fessler & Bowman* split on the issue of whether mere solicitation by telephone was objectionable, and as a result, did not find it to be. *The Daily Grill* Board, whether it intended to or not, seemed to suggest that mere ballot solicitation would be objectionable if it occurred in person. Whatever its intent, it did not resolve the legal question, and I am constrained to apply extant law. Thus, even accepting the Employer’s offer of proof at face value, Board precedent compels the overruling of Objection 1, irrespective of its value. However, should the Board review this Decision and wish to consider the issue of mere mail-ballot solicitation by telephone, I would overrule Objection 1 on the additional basis that the offer of proof is insufficient to raise material and substantial issues of fact that would warrant a hearing, much less make a *prima facie* showing that mail ballot solicitation occurred.

Beginning with Witness #1, that voter would testify to receiving the above voicemail messages from two alleged Petitioner agents in which one offered to help with “not filling it out...but getting it back one way or the other...because it’s so complicated.” I find this telephonic offer to assist to be too ambiguous to constitute ballot solicitation of any kind, and far too ambiguous to be considered coercive. Depositing an envelope in the mail is not complicated, suggesting to the listener that the complication might lie elsewhere; peradventure the voting instructions. Whatever the intended meaning of the offer, it is well established that “the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct.” *Picoma Industries, Inc.*, 296 NLRB 498, 499 (1989), quoting *Beaird-Poulan Division*, 247 NLRB 1365, 1370 (1980), *enfd.* 649 F.2d 589 (8th Cir. 1981). “Rather, the test is based on an objective standard.” *Id.* See also *Teamsters Local 299*

Regional Director's Decision Overruling Objections and  
Certification of Representative

(*Overnite Transportation Co.*), 328 NLRB 1231 fn. 2 (1999). Thus, even assuming for the sake of analysis that Witness #1 subjectively construed the offer to assist as coercive; when viewed objectively and in context, it was too ambiguous to reasonably be construed as a solicitation of the voter's ballot or as otherwise coercive.

Turning to Witness #2, no specific testimony was offered. Rather, the Employer offered a conclusory summary of his testimony; i.e. that an unidentified Petitioner agent called and offered to assist him in filling out his ballot and to collect and return his ballot for him. Missing are the "factual specifics about who said or did what to whom that, if credited by a factfinder, could support a determination that the conduct was coercive." *XPO Logistics Freight, Inc. v. NLRB*, supra. The offer of proof with respect to Witness #2 is therefore deficient. It does not contain the specifics necessary to warrant a hearing, much less set aside the election results. The only details offered in this regard came through the manager witness's e-mail to another manager, reporting what Witness #2 told the manager witness. In that e-mail, the manager witness explained that Witness #2 told him that an unidentified Petitioner agent called him and asked for a return call so he could "walk him through filling out the ballot" because they are "confusing to fill out." There is nothing more regarding the hearsay exchange between Witness #2 and the alleged, unidentified Petitioner agent in this email. Indeed, the only mention or notion of someone else "filling out the form" and "picking up or mailing" the ballot for Witness #2 came from the manager witness himself. According to the e-mail, Witness #2 made no mention of such solicitations, and as discussed above, the offer of proof regarding Witness #2 lacks the requisite specificity to warrant a hearing. Taken together, the alleged "facts" offered in support of Objection 1 fall far short of making a *prima facie* showing of objectionable conduct. Accordingly, a hearing is not warranted, and I am overruling Objection 1.

**Objection 2:**

Employer's Objection 2 alleges that the Petitioner spread false and misleading propaganda to employees in order to influence their votes, including guarantees of annual wage increases. One employee complained about receiving a stack of fliers bearing such alleged misrepresentations. The offer of proof included one such Petitioner flier.

**Analysis:**

This offer of proof likewise fails to raise substantial and material factual issues that would warrant a hearing. In cases of alleged campaign misrepresentations, the Board applies the

Regional Director's Decision Overruling Objections and  
Certification of Representative

longstanding *Midland* standard under which it will not probe into the truth or falsity of the parties' campaign statements and will not set aside an election on the basis of misleading statements unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). The *Midland* standard is premised on a "view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." *Id.* at 132, quoting *Shopping Kart Food Market, Inc.*, 228 NLRB 1311, 1313 (1977).

Here, the Employer does not assert, nor offer any proof, that Petitioner forged any documents that would render the voters unable to recognize propaganda for what it was. The alleged guarantee of yearly wage increases is precisely the type of message that the Board will not scrutinize. See the Board's recent affirmation of *Midland* in *Didlake, Inc.*, 367 NLRB No.125 (2019)(employer misstatements of the law are also not objectionable).

Based on the above, I overrule Objection 2.

**CONCLUSION AND ORDER**

I have overruled the Employer's Objections in their entirety for the reasons set forth above and in accordance with Section 102.69(c)(1)(i) of the Board's Rules and Regulations and Section 11395.1 of NLRB Casehandling Manual, Part Two- Representation Proceedings. Accordingly, I HEREBY issue the following:

**CERTIFICATION OF REPRESENTATIVE**

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots have been cast for United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077, and that it is the exclusive collective-bargaining representative of all the employees in the following appropriate bargaining unit:

All full-time and regular part-time road drivers and yard drivers employed by the Employer at or out of the Union Pacific rail yards located in Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California and Sparks and Winnemucca, Nevada; excluding confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

**RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor

Regional Director's Decision Overruling Objections and  
Certification of Representative

Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by July 23, 2020.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: July 9, 2020



---

Valerie Hardy-Mahoney  
Regional Director  
National Labor Relations Board  
Region 32

## CERTIFICATE OF SERVICE

The undersigned hereby states that on the 16<sup>th</sup> day of December, 2020, the foregoing Brief was filed on the NLRB's E-Filing system on its website: <http://www.nlbr.gov>. The same was also served the same day by electronic mail on the (1) Regional Director of Region 32, Valerie Hardy-Mahoney at [Valerie.Hardy-Mahoney@nlrb.gov](mailto:Valerie.Hardy-Mahoney@nlrb.gov); (2) Nicholas Tsiliacos at [Nicholas.Tsiliacos@nlrb.gov](mailto:Nicholas.Tsiliacos@nlrb.gov), and (3) the attorneys for Employer, Jake Fulcher at [jfulcher@kddk.com](mailto:jfulcher@kddk.com); Nicholas Golding at [ngolding@kddk.com](mailto:ngolding@kddk.com).

/s/ Michael J. Healey  
mike@unionlawyers.net