

Coast North America (Trucking) LTD and Local 299, International Brotherhood of Teamsters, AFL-CIO, Petitioner and Chicago Truck Drivers, Helpers and Warehouse Workers Union.
Case 7-RC-21058

June 30, 1998

DECISION AND CERTIFICATION OF
REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 5, 1997,¹ and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 33 for the Petitioner and 29 for the Intervenor, with no challenged ballots and no ballots against both labor organizations.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations, and finds that a certification of representative should be issued.

The pertinent facts, more fully set out in the attached hearing officer's report, are briefly stated here. The Intervenor filed objections to the election alleging that five eligible employees were not given the opportunity to vote. The Employer joined in the Intervenor's objections and contended that it was the Petitioner's refusal to enter into a stipulation for a mail ballot election which caused the employees to miss the opportunity to vote. The hearing officer recommended that the objections be overruled, finding that only two employees were disenfranchised and that their votes could not have affected the outcome of the election.² In its exceptions, the Employer contends (1) that the hearing officer erred in failing to find that a determinative number of voters were deprived of an opportunity to vote and (2) that the Regional Director erred in failing to direct a mail ballot election. Contrary to our dissenting colleague, and for the reasons set forth below, we find no merit in the Employer's exceptions.

The election was conducted in two voting periods, from 4 to 7 a.m., and from 4-7 p.m. on June 5. Employee Michael Schiring was on vacation at the time of the election. Employees Edward Walinski and Darrel Wright were away from the polling place in the course of their normal duties for the Employer during the entire polling period. Drivers John Zanazaro and Richard Craig were off duty and in the area of the polling place during the first polling period from 4 to 7 a.m., but were away during the afternoon sessions.

¹ All dates are in 1997 unless otherwise noted.

² The hearing officer did not discuss the mail ballot issue.

Zanazaro and Craig arrived back at the terminal at about 10 and 11 p.m., respectively, the evening before the election and, because the Employer assigns runs on a "first in, first out" basis, they knew that evening that their start times were 8 and 9 a.m. the following morning. The Employer's policy is to require 10 hours' time between runs, i.e., 8 hours required by the Department of Transportation (DOT) regulation for over-the-road drivers and an additional 2 hours to accommodate drivers' travel time to and from the terminal. Drivers are routinely allowed to switch routes as long as the Employer's 10-hour rule is met and a replacement driver is available. On the day of the election, after the morning voting session, and a few minutes before their scheduled runs, Zanazaro and Craig advised Joseph Starmach, manager for the Employer's midwest operations, that they wanted to switch their runs so that they could vote in the 4 to 7 p.m. afternoon session. Starmach replied that he had no substitute drivers available. Zanazaro and Craig made their scheduled runs and returned to the terminal after the closing of the polls.

Where the conduct of a party to the election causes an employee to miss the opportunity to vote, the Board will set aside the election results if the employee's vote is determinative and the employee was disenfranchised through no fault of his own. *Sahuaro Petroleum & Asphalt Co.*, 306 NLRB 586 (1992); *Versail Mfg.*, 212 NLRB 592, 593 (1974). Analyzing each employee's situation under this precedent, the hearing officer found that employee Schiring, who was on vacation, was not prevented from voting by the action of any party and his inability to vote did not warrant setting aside the election. We agree with the hearing officer as to Schiring for the reasons stated in her report.

In addition, the hearing officer found that Zanazaro and Craig were off duty and in the area of the Chicago terminal and polling place throughout the 3-hour morning polling period. The hearing officer found that they could have voted in the morning session and were not prevented from voting by any action of a party. We agree.³

Zanazaro and Craig were both aware of the June 5 start time assigned to them on the evening before the election, and they both knew that their assigned runs would preclude them from voting in the afternoon session. They also knew that their ability to switch runs was not guaranteed, but was dependent on the availability of substitute drivers. Their one sure way of pre-

³ The hearing officer further found that, although employees Walinski and Wright were away from the polling place in the normal course of their duties, their inability to vote did not warrant setting aside the election in this case because, in light of her findings concerning Schiring, Zanazaro, and Craig, their two votes could not have affected the results. There are no exceptions regarding the hearing officer's findings as to Walinski and Wright.

servicing their franchise was to vote during the morning session. Instead, they each chose to risk being disenfranchised by waiting until the morning voting session had ended to request a switch in runs.⁴

Contrary to our dissenting colleague's contention, the appearance of these employees at the facility during the morning session would not have violated Employer policies or DOT regulations. As the Employer recognizes in its brief, the DOT regulations (49 CFR § 395.3) "specify that no motor carrier may permit or require any driver to drive without at least 8 hours *off duty* between long runs." (Emphasis added.) The Employer adds 2 hours to this off-duty period to allow for the employees' commuting time. Neither the Employer nor the DOT prescribe what the employee does during off-duty time. As Starmach testified, the Employer does not regulate what its employees "do on their own time." Nor does the record reveal what these two employees in fact did during the off-duty period in question. Thus, it does not support our dissenting colleague's speculation that they were sleeping during the entire morning session or that, if they had voted during that session before making their scheduled runs, they would have violated the DOT regulation (49 CFR § 392.3) that generally prohibits operation of a commercial motor vehicle "while the driver's ability or alertness is so impaired . . . through fatigue . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle."

We do, however, certainly agree with our dissenting colleague that strict adherence to DOT regulations governing rest time for commercial motor vehicle drivers is absolutely critical. We deny, however, that our decision in this case endorses violations of rest time provisions or poses a threat to highway safety, as indicated by the record. Thus, the evidence shows that Zanazaro actually clocked in at 7:14 a.m. on June 5, only 14 minutes after the polls closed at 7 a.m. We differ with our dissenting colleague's speculation that Zanazaro's arrival at the polls just 15 minutes earlier would have endangered his safety or that of the traveling public. We similarly conclude that neither the Employer nor DOT regulations genuinely prevented Craig (whose morning run was to begin at 9 a.m.) from arriving in time to vote during the morning session.

As set forth above, the Board will set aside an election if an employee is disenfranchised due to the conduct of a party to the election and through no fault of his own, and if his vote is determinative. The application of that rule is clear here: Walinski and Wright, who were on scheduled runs during the voting ses-

sions, were disenfranchised due to the Employer's conduct. Zanazaro and Craig were not. They were off duty during the voting sessions. While we do not conclude that Zanazaro or Craig were disenfranchised through their own "fault," this is not a case where we can find that they were prevented from voting by their Employer's conduct. Accordingly, we agree with the hearing officer that Zanazaro and Craig had the opportunity to vote during the morning session and that their choosing not to vote does not warrant setting the election aside.

Therefore, only Wright and Walinski were prevented from voting by the conduct of the Employer. Because those two ballots are not determinative, the inability of Wright and Walinski to vote does not warrant setting aside the election. *Sahuarro Petroleum*, supra.

2. Nor do we agree with our dissenting colleague that, under current standards, the Regional Director's failure to conduct a mail ballot election constituted an abuse of discretion.⁵ The dissent states that NLRB Casehandling Manual (Part Two) Representation, Section 11336 "calls for a mail ballot in circumstances presented here 'where long distances are involved, or where eligible voters are scattered because of their duties.'" Contrary to our dissenting colleague, the Casehandling Manual does not "call for" a mail ballot election here.⁶ Section 11336 states only that the possibility of mail balloting should be "explored" in these circumstances. Here, the record shows that the Regional Director did in fact "explore" the possibility of mail balloting, but decided that it should not be employed in this case. The Regional Director apparently agreed with the assessment of the Petitioner that two manual voting sessions "would give everyone the absolute best chance to vote." We note that of the approximately 67 eligible voters, only 2 were deprived of an opportunity to vote, and their votes could not have affected the results.⁷

⁵ While Member Liebman agrees with Chairman Gould that this would have been an appropriate case for a mail ballot election, she does not agree that the Regional Director abused his discretion by not conducting one. *National Van Lines*, 120 NLRB 1343 (1958), *London's Farm Dairy*, 323 NLRB No. 186 (June 20, 1997), and *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1997), all cited by her dissenting colleague, actually reaffirm the broad discretion of the Regional Director and the Board's deference to the Regional Director's discretion—albeit in those cases, his discretion to order a mail ballot.

⁶ Sec. 11336 states in pertinent part:

Mail Ballots: Voting may be conducted by mail, in whole or in part. Particularly where long distances are involved, or where eligible voters are scattered because of their duties, the possibility should be explored. The Regional Director should decide whether, or to what extent, mail voting should be employed.

⁷ Member Brame notes that under existing Board precedent and policy, the applicable presumption favors a manual election, not a mail ballot election. *Willamette Industries*, 322 NLRB 856 (1997). While Member Brame does not pass on the appropriateness of the

Continued

⁴ Starmach testified that Zanazaro, whose run was scheduled for 8 a.m., approached him about changing runs when Starmach came in at about "four to eight." Craig, who was scheduled for a 9 a.m. run, came to Starmach's office at about 8:40 or 8:45 a.m. to ask if he could switch runs.

For these reasons, we agree with the hearing officer that the objections should be overruled and the Petitioner be certified.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 299, International Brotherhood of Teamsters, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers, mechanics, dock, yard, and garage employees of the Employer at its Detroit, Michigan and Chicago, Illinois terminals; but excluding dispatchers, fleet maintenance managers, office clerical employees, trip control clerks, confidential employees, and guards and supervisors as defined in the Act.

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I would sustain the objections filed by the Employer and Intervenor and set aside the election on two grounds—(1) the Regional Director's refusal to conduct the election by mail, and (2) the hearing officer's failure to find that a determinative number of voters were deprived of an opportunity to vote in the manual election.

The Employer operates a long-haul trucking business. From terminals located in Chicago and Detroit, it makes deliveries to various points throughout the midwest. Due to the nature of this business which often causes drivers to be away from the terminals on long-distance assignments for extended periods, the Employer requested that the election among the drivers

mail ballot elections held in the cases cited by his dissenting colleague, he notes that they are markedly different from the present case. In *London's Farm Dairy*, 323 NLRB No. 186 (June 20, 1997), the over-the-road drivers worked out of four locations great distances apart and had such staggered schedules that manual balloting would have required two days for the election at each location, with the polls being open substantially all of both days. Additionally, two of the locations were substantial distances away from the Board's Regional Office that was conducting the election. In *National Van Lines*, 120 NLRB 1343 (1958), "because of the nature of their widespread over-the-road driving duties, the eligible voters had places of employment and residences which were scattered throughout the United States." *Id.* at 1344. In *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1997), the employees worked such varying shifts that it would have been necessary to conduct the election over 3 consecutive days at a location some distance away from the Board's Regional Office if a manual ballot election had been held. Unlike those cases, the manual ballot election here was readily held in a single day. The employees do not work at such scattered locations or work such varying schedules as to require the manual ballot election be held over an extended period. Moreover, the Employer's Chicago and Detroit terminals, from which the employees worked and at which the balloting was conducted, were not located remotely from the Board's Regional Offices. Accordingly, under all the circumstances and the existing Board precedent, Member Brame cannot agree with his dissenting colleague that the Regional Director erred in failing to conduct the election by mail ballot.

be conducted by mail ballot. All parties initially agreed to this arrangement, but after the Petitioner reconsidered and stated its preference for a manual election, the Regional Director directed a manual ballot at the Employer's terminals.

As it turned out, long-distance assignments did result in the disenfranchisement of four employees from the manual election which the Petitioner won by 4 votes, 33 to 29. The hearing officer concluded, however, that with respect to two of the drivers, John Zanazaro and Richard Craig, it was not their work assignments that prevented them from voting; rather, it was by personal choice that they failed to vote. Accordingly, because their disenfranchisement was not caused by the Employer and because the votes of the remaining two drivers who failed to cast ballots were not determinative, the hearing officer recommended overruling the objections and certifying the election results.¹

The hearing officer did not address the objection alleging error by the Regional Director in refusing to conduct the election by mail ballot. I would sustain this objection and find that it alone warrants setting aside the election.

As noted above, prior to the election the Employer requested the Region to conduct a mail ballot because of concerns that long-distance assignments might disable unit drivers from casting a ballot in a manual election. This prospect of disenfranchisement has long been a recognized concern of the Board with respect to employees engaged in long-distance truckdriving and was the prime basis for the recent provision of a mail ballot for over-the-road drivers in *London's Farm Dairy*, 323 NLRB No. 186 (June 20, 1997). See also *National Van Lines*, 120 NLRB 1343 (1958). Indeed, even our Casehandling Manual calls for a mail ballot in circumstances presented here "where long distances are involved, or where eligible voters are scattered because of their duties." See NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11336. The only apparent reason for the Region's refusal to conduct one here was the Petitioner's backing out of an all-party agreement to hold the election by mail. Mail balloting, however, is not conditioned on unanimous agreement of the parties, see *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1998) (mail ballot election directed, notwithstanding the employer's opposition), and the Region's acquiescence to the Petitioner's change of position not to hold one reasonably tended to have the objectionable effect of causing employees to "resent the change as something effectively forced on them by those who initiated

¹ The hearing officer found that the other two drivers who failed to vote, Edward Walinski and Darrell Wright, were prevented from doing so because of their driving assignments. Another employee, Michael Schiring, failed to vote because he was on vacation.

and supported the organizing campaign'' *London's Farm Dairy*, supra, 323 NLRB No. 186 slip op. at 1 (discussing effect on employees if Region had rejected petitioner's request for mail ballot and accepted instead employer's offer to change employee work schedules to accommodate manual balloting). In short, I find the Regional Director's refusal to direct a mail ballot was an abuse of discretion.

This error led directly to what I find constitutes the second basis for overturning the election results—the hearing officer's erroneous conclusion that drivers Zanazaro and Craig were not prevented from voting in the manual election by the work assignments made by the Employer.

When employees are unable to vote because they are away from the polling place in the normal course of their duties for their employer, the Board will set the election aside if the employees' votes are determinative.² Applying this precedent here, I find that the election clearly must be set aside. On the day before the election, Zanazaro and Craig were assigned long-distance runs from which they did not return until late that night. After completing necessary paperwork, Zanazaro left for home at 10 p.m. and Craig went home at 11 p.m. Zanazaro's departure time for his next day's assignment was 8 a.m. and Craig's was 9 a.m. Both departure times were dictated by Federal law and the Employer's past practice which together mandated a 10-hour layoff between driving assignments—8 hours to rest as required by Department of Transportation (DOT) safety regulations and an additional 2 hours of commuting time between the terminal and drivers' homes which the Employer allows to ensure that drivers obtain the federally mandated rest between runs. In accordance with these provisions, both drivers did not arrive for work on election day until after the close of the 4 - 7 a.m. polling period and neither returned from their runs that day until after the close of the 4 - 7 p.m. polling period.

On these facts, my colleagues affirm the hearing officer's conclusion that because Zanazaro and Craig were off duty and in the vicinity of the polling place during the 3-hour morning polling session, their work assignments did not prevent them from voting and, hence, their failure to do so was not objectionable.³ This is absurd. Yes, Zanazaro and Craig were off duty and in the vicinity of the polling place—they were home sleeping where they should have been pursuant to Employer's 2-hour commuting policy and the mandatory 8-hour rest period set forth in DOT's regulations covering drivers employed by commercial motor

carriers like the Employer! See 49 CFR § 395.3. The obvious purpose of this 8-hour rest period is to ensure that:

No driver shall operate a commercial motor vehicle . . . while the driver's ability or alertness is so impaired, through fatigue . . . as the make it unsafe for him to begin or continue to operate the commercial motor vehicle. 49 CFR § 392.3.

Had Zanazaro and Craig arrived at the terminal by 7 a.m. to vote, as the hearing officer required, they would have violated the Employer's commuting policy and the federal regulatory layoff requirements, thereby endangering not only their own safety but that of the traveling public as well. I cannot endorse the potential for such a result and neither should any Board member. By staying home to rest rather than getting up early to vote, Zanazaro and Craig simply followed the layoff rules applicable to them—rules which comprised as valid a part of their overall employment obligations as driving a truck. Their inability to cast ballots, therefore, was not their fault and as their votes, combined with those of Wright and Walinski who were disenfranchised because of their driving assignments, were determinative of the election results, the election must be set aside.

In sum, there are two independent grounds which I find warrant setting aside the election—the failure to conduct the election by mail and the disenfranchisement of four eligible voters whose votes in the manual election were determinative. Accordingly, I dissent from my colleagues' refusal to sustain the objections and set aside the election.

APPENDIX

Hearing Officer's Report on Objections to Conduct Affecting the Results of the Election with Findings and Recommendations

Pursuant to a petition filed by Local 299, International Brotherhood of Teamsters, AFL-CIO (Petitioner) on April 1, 1997, and pursuant to a Decision and Direction of Election issued by the Regional Director for Region 7 of the National Labor Relations Board on May 8, 1997, an election by secret ballot was conducted on June 5, 1997, under the direction and supervision of the Regional Director in the following unit of employees:

All full-time and regular part-time drivers, mechanics, dock, yard and garage employees of the Employer at its Detroit, Michigan and Chicago, Illinois terminals; but excluding dispatchers, fleet maintenance managers, office clerical employees, trip control clerks, confidential employees, and guards and supervisors as defined in the Act.

² *Glenn McClendon Trucking*, 255 NLRB 1304 (1981); *Cal Gas Redding, Inc.*, 241 NLRB 290 (1979).

³ The hearing officer found that Zanazaro's and Craig's driving assignments did prevent them from voting in the afternoon voting session.

The results of the election were as follows:

Approximate number of eligible voters	68
Void ballots	0
Votes Cast for the Petitioner	33
Votes Cast for the Intervenor	29
Votes cast for neither Intervenor nor Petitioner	0
Valid votes counted	62
Challenged ballots	0
Valid ballots counted plus challenged ballots	62

On June 16, 1997, the Intervenor timely filed objections to conduct affecting the results of the election, a copy of which was served upon the Petitioner and the Employer.

Following investigation of the issues raised by the objections, the Acting Regional Director for Region 7 issued a Report on Objections and notice of hearing on June 27, 1997. The Acting Regional Director concluded therein that the objections involved substantial questions of fact and credibility which could best be resolved on the basis of evidence developed at hearing. The notice of hearing further provided that the hearing officer prepare and cause to be served on the parties a report containing resolutions of witness credibility, findings of fact, conclusions of law, and recommendations to the Board concerning the disposition of the issues involved herein. A hearing was held before me on July 9, 1997, in Chicago, Illinois. The Employer, Intervenor, and Petitioner were represented and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded to all parties. The findings of fact and credibility resolutions contained herein are based upon my consideration of the entire record and upon my observations of the testimony and demeanor of witnesses. All testimony has been reviewed and evaluated in light of the demeanor of witnesses, the logical probability of testimony, and the record as a whole. Where any witness has testified in contradiction to the findings herein, his testimony has been discredited as being either in and of itself not worth credence or because it conflicted with the weight of other credible evidence.¹

The Objections

As provided in the notice of hearing on objections herein, the objections filed by the Intervenor² raised two related objections. The Intervenor objects to the election on the grounds that five eligible employees were not given the opportunity to vote in the election, a number sufficient to affect the results of the election; and in regard to at least four of the employees, the Employer caused those employees to miss the opportunity to vote. Testimony and documents were pre-

¹ Accordingly, any failure to completely detail all conflicts in evidence does not mean conflicting evidence was not considered. *Walker's*, 159 NLRB 1159 (1966).

² The Employer, by letter dated June 16, 1997, advised Region 7 that it joined in the objections filed by the Intervenor.

sented relating to the alleged disenfranchisement of the eligible voters and to the Employer's actions which ostensibly led to such disenfranchisement. None of the unit employees were presented for testimony.

The Law

It is the Board's responsibility to establish the proper procedure for the conduct of its elections, which procedure requires that all eligible employees be given an opportunity to vote. *Alterman-Big Apple, Inc.*, 116 NLRB 1078, 1080 (1956). Where the conduct of a party to the election causes an employee to miss the opportunity to vote, the Board will find that to be objectionable if the employee's vote is determinative and the employee was disenfranchised through no fault of his or her own. *Sahuaro Petroleum*, 306 NLRB 586 (1992); *Versail Mfg.*, 212 NLRB 592, 593 (1974). When an employee is prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of a party or the Board, the inability to vote is not a basis for setting aside the election. *Id.* The burden is on the objecting party, in this case the Employer and the Intervenor, to come forward with evidence in support of its objection. *Campbell Products Dept.*, 260 NLRB 1247 (1982). It is well established that where employees are prevented from casting determinative ballots in an election because they are away from the polling place in the normal course of their duties for the employer, thereby having no opportunity to cast their ballots through no fault of their own, it is proper to set the election aside. *Yerges Van Lines*, 162 NLRB 1259 (1967); *Alterman-Big Apple, Inc.*, 116 NLRB 1078 (1956). In *Yerges*, the Board found that the employee driver at issue had been assigned a route far away from the polling place at the time of the election. The driver was away from the polling place in the normal course of his duties for the Employer through no fault of his own. As his vote could have affected the election results in the unit of only two eligible voters, the Board set aside the election. In *Versail Mfg.*, 212 NLRB 592 (1974), however, the absence of an eligible over the road driver was held to be insufficient reason to set aside the election. This driver was assigned a route which kept him away from the Employer's facility for 2 or 3 days. The driver visited friends during his route, leaving his trailer unattended. When the driver returned to the location at which he had left the trailer, in what he thought was time enough for the return trip and voting, the trailer was missing. It took the driver an extra day to enlist the aid of the state police in an attempt to locate the missing trailer. Stating that the driver's inability to vote was caused by the personal frolic outside the normal course of his duties, rather than the fault of any party or any unfairness in scheduling or the mechanics of the election, the Board did not set aside the election. *Id.* at 593.

Facts

At hearing, only one witness, Joseph Starmach, Chicago terminal manager, was presented. Through his testimony and certain documents identified by Mr. Starmach, the following facts were established. Starmach is in charge of the daily operations of the Chicago terminal. The drivers at the Chicago terminal are assigned work on a "first in, first out" basis without regard to seniority. (Tr. 9-10.) A driver's route is determined by the order in which the drivers return to the

terminal on the preceding run. Those first to punch out after their route on one day, receive the first routes assigned for the next day. The driver will pick up the following day's work assignment when they punch out for the day. (Tr. 10.) This method of assigning work accommodates the Department of Transportation regulation requiring that over-the-road drivers receive at least an 8-hour break between runs. (Tr. 11.) The Employer has implemented a policy of requiring 10 hours between runs due to the distance most drivers live from the terminal. (Tr. 11.) The additional 2 hours are adjustments for the drivers' travel time to and from the terminal. (Tr. 12.) Thus if a driver punches out at 10 p.m., he may not perform another run until at least 8 a.m. the following day.

Drivers are routinely allowed to switch routes with each other or take time off upon request as long as the Employer's 10-hour rule is met and a replacement driver is available. (Tr. 10-11.) The Employer uses casual drivers to supplement its regular work force in case of illness or to accommodate time off requests by the drivers. (Tr. 32.) At the time of the election and for 2 to 3 weeks preceding the election, the Employer had no casual drivers in its employ. (Tr. 32-34, 77.) On the day of the election, two drivers called in sick and another was on vacation. The election was held on June 5, 1997, from 4 to 7 a.m. and from 4 to 7 p.m. (Tr. 13.)

One of the five drivers identified by the Intervenor's objections, Michael Schiring, was on a hunting trip during the week of the election. (Tr. 13-14.) This trip was prepaid prior to the direction of election, and Schiring did not vote in the election. (Tr. 28.) According to Starmach, Schiring expressed an interest in obtaining an absentee ballot, however, there was no provision for an absentee or mail ballot in this election. (Tr. 27.)

Testifying from Petitioner's exhibits 1 through 11 and Intervenor's exhibit 1, Starnach reviewed the runs assigned to the remaining four drivers whose opportunity to vote is at issue. According to the testimony and the documentary evidence, Edward Walinski left the Chicago terminal on June 2, 1997, and had an unplanned delivery delay in Detroit. Walinski unloaded at 9 a.m. and was also late in his second delivery which was made on June 5 at 6 a.m. Walinski's June 5 delivery was in Fargo, 630 miles away from the Chicago terminal. Thus, leaving the Fargo terminal at 7 a.m. and driving straight to the Chicago terminal, Walinski would have missed the polling period. Walinski was assigned another run from Fargo and arrived back in Chicago on June 6, 1997. (Tr. 18; P. Exh. 4.) Therefore he was away from the terminal, performing his normal work assignments for the Employer during the entire polling period and beyond. Walinski requested a trade in assignments, but due to a lack of casual drivers and the vacationing and sick drivers, there was no one to take Walinski's assignment.

Darrel Wright was also away from the Chicago terminal during the polling periods held on June 5, 1997. Wright arrived at the terminal at 5 p.m. on June 3 and punched out. He was assigned a 2:30 a.m. start for June 4 and returned to the terminal at 3:30 p.m. the same day. (P. Exh. 10. Tr. 24, 72.) On June 5, Wright began his run at 2 a.m. to make a delivery in Minnesota by noon. Wright arrived at his destination at 11:50 a.m. on June 5 and left the stop at 1:15 p.m. Wright was 457 miles from the Chicago terminal and could not have returned in time for the afternoon polling period.

(Tr. 25; P. Exh. 11.) Wright then took his layover and continued on a run to Oregon. Wright was also away from the polling place in the course of his normal duties for the Employer, through no fault of his own.

Richard Craig ended his shift on June 4 at 10:58 p.m. (P. Exh. 6; Tr. 22, 66. Craig picked up his paperwork showing his June 5 start time of 9 a.m. (P. Exh. 7. Craig returned to the terminal on June 5, after the morning polling session was over and requested a trade of his run so that he would be able to vote in the afternoon session. (Tr. 23.) No trade was available, so Craig made his run and returned to the Chicago terminal the day after the election.

John Zanazaro ended his run on June 4 at 9:40 p.m. and picked up his papers with a start time for 8 a.m. the following day. (Tr. 19; P. Exh. 2. On the morning of June 5, Zanazaro made a request to trade runs so that he could vote in the afternoon polling period, but no trade was available. (Tr. 20-21.) Craig made his run to Iowa and Oregon and returned to the terminal at 9 p.m. on June 5. (Tr. 21, 46; P. Exh. 3.)

Analysis

In the case of both John Zanazaro and Richard Craig, these drivers were in the area of the Chicago terminal and polling place throughout the 3-hour morning polling period. Craig returned to the terminal at about 11 p.m. the evening before the election and knew that he had an 9 o'clock start time the following morning. Zanazaro arrived at the terminal before 11 p.m. the evening before the election and knew his start time was 9 a.m. the following morning. (Tr. 30.) So for the first polling period from 4 to 7 a.m. on June 5, both Zanazaro and Craig were off duty and in the area of the polling place. (Tr. 46.)

In *Versail Mfg.*, 212 NLRB 592 (1974), the Board declined to set aside the election because the employee was prevented from voting by personal activities away from the polling place which were outside the nominal scope of his employment. See also *Berryfast, Inc.*, 265 NLRB 82 (1982) (eligible employee's own conduct was instrumental in her not voting). Such is the case here. Michael Schiring, who was on vacation at the time of the election, was clearly not prevented from voting by the action of any party. Although work assignments did keep Zanazaro and Craig away from the polling place for the afternoon sessions, they both could have voted in the morning sessions. They were both aware of the start time assigned to them the evening before the election and could have chosen to vote in the 4 to 7 a.m. session. Both drivers had at least 10 hours' notice that they were assigned runs which would keep them away from the polling place during the afternoon session. Even assuming that the drivers were accustomed to easily trading runs to accommodate their personal schedules, neither had the foresight to eliminate any risk of missing the election and come to the morning polling period. Instead, each chose to risk not being able to switch runs and consequently were unable to vote.

Since only employees Wright and Walinski were away from the polling place in At, the course of their employment for both the morning and afternoon sessions, through no fault of their own, and their two votes could not make a difference in the outcome of this election, I shall recommend that the Petitioner's and Employer's objections be overruled.

Conclusion and Recommendation

Based on the foregoing, I recommend that the Employer and Intervenor's objection regarding the disenfranchisement

of eligible voters be overruled and a certification of representative issue.³

³Exception must be received by the Board in Washington, D.C., by October 22, 1997.