

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION FIVE

COLLINGTON SERVICES, LLC  
Employer

and

Case 5-RC-15551

TEAMSTERS LOCAL UNION 639  
Petitioner

REPORT ON OBJECTIONS AND CHALLENGES

Pursuant to a Decision and Direction of Election<sup>1</sup> issued by the Regional Director on April 25, 2003,<sup>2</sup> a secret manual ballot election was conducted under the Regional Director's supervision on May 21. The tally of ballots showed 18 votes in favor of the Petitioner and 4 against. The Employer filed timely Objections to conduct affecting the election. On July 10, the Acting Regional Director approved a Stipulation between the Petitioner and Employer agreeing that a second election would be held on August 6. Accordingly, a secret manual ballot election was conducted under my supervision and a tally of ballots issued on August 6, with the following results:

Approximate number of eligible voters	15
Void ballots	0
Votes cast for Petitioner	7
Votes cast against participating labor organizations	6
Valid votes counted	13
Challenged ballots	2
Valid votes counted plus challenged ballots	15

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<sup>1</sup> The unit is: "All quality assurance auditors, including substitute lead auditors, employed by the Employer at its Upper Marlboro and Landover, Maryland, but excluding lead auditors, office clericals, guards, professional employees, and supervisors as defined by the Act." The eligibility period is the payroll period ending July 5, 2003.

<sup>2</sup> Unless otherwise noted, all dates are in 2003.

Challenges were sufficient in number to affect the result of the election. The Petitioner filed timely objections to conduct of the election and conduct affecting the results of the election on August 13.<sup>3</sup>

### THE OBJECTIONS

1. The Employer coerced employees and promised benefits (i.e. a promotion) to various bargaining unit employees during the critical period in order to influence employees in the exercise of their Section 7 rights.
2. The Employer manipulated the Excelsior list so that it was not accurate. Specifically, the Employer:
  - a. Included individuals on the Excelsior list that were not employed and/or working at the time of the eligibility dates and therefore are not eligible;
  - b. Included lead auditors and “substitute lead auditors,” who are outside the unit, on the Excelsior list;
  - c. Failed to list at least one bargaining unit employee on the Excelsior list.
3. The Employer stacked the unit by inserting lead and (substitute lead) auditors into the unit despite their exclusion from the unit.

In support of Objection 1 and in support of all the objections and challenges, Petitioner submitted the statement of Business Representative John Gibson. Gibson avers that during a pre-election conference held at the Employer’s Upper Marlboro, Maryland facility on May 21, he questioned the Employer’s designated observer, Larry Serious, as to whether he was a lead auditor.<sup>4</sup> According to Gibson, Serious answered that he was “not yet” a lead. Serious was then replaced as an observer. Gibson concludes that Serious had

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<sup>3</sup> The petition was filed on March 21. I will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. Goodyear Tire and Rubber Co., 138 NLRB 453 (1962).

<sup>4</sup> In the Decision and Direction of Election issued in the instant case, the Regional Director found lead auditors to be statutory supervisors, but substitute lead auditors to be employees in the unit.

been told that he would be made a lead after the election in return for voting against the Union. Gibson asserts that Serious has been paid as a lead since the date of the election and has functioned as a lead “the vast majority of the time.”

Gibson also asserts the Employer twice tried to include on the *Excelsior* list individuals who would vote against the Union, individuals it knew to be lead auditors and hence excluded from voting eligibility. However, Gibson provides no evidence to support this assertion.

For the reasons set out fully below, the objections detailed by the Petitioner in Gibson’s statement, do not present a *prima facie* case of objectionable election conduct, and I recommend that they be overruled. First, Petitioner fails to provide any evidence in support of its assertion that Serious was promised a promotion in order to influence election results. Conclusionary allegations are not sufficient to support a finding of objectionable conduct. Specific evidence is required, and Gibson’s statement provides little more than speculation. The burden of the objecting party is heavy. *NLRB v. Claxton Mfg Co.*, 613 F.2d 1364, 166 (5<sup>th</sup> Cir. 1980), clarified 618 F.2d 26, 30 (5<sup>th</sup> Cir. 1980). A post-election hearing is granted to a losing party when the party “has supplied prima facie evidence raising substantial and material issues that would warrant setting the election aside.” *Gulf Coast Automotive Warehouse Co. v. NLRB*, 588 F.2<sup>nd</sup> 1096, 1100 (5<sup>th</sup> Cir. 1979). A party seeking to challenge an election may not rely upon “the Board staff to seek out evidence that would warrant setting aside the election.” *U.S. Rubber Co. v. NLRB*, 373 F.2<sup>nd</sup> 602, 606 (5<sup>th</sup> Cir. 1967)

(internal citation omitted). Rather, it is the responsibility of the party seeking to set aside election results to submit *prima facie* evidence “of a kind which would be admissible into evidence at a hearing and subjected to evaluation as to its weight and probative force.” Grants Furniture Plaza, Inc., 213 NLRB 410 (1974).

Second, with respect to the assertion that Serious was paid as a lead auditor, even if true, his wage rate alone would not indicate that he holds a position outside the bargaining unit. As the Regional Director determined in the Decision and Direction of Election, which issued April 25, the wage rate for lead auditors, a position the Regional Director placed outside the bargaining unit found appropriate, is \$1.00 per hour above the wage rate of auditors. Substitute lead auditors, who fall within the appropriate unit, are given a wage premium of \$1.00 per hour while actually functioning as lead auditors. Thus, the fact Serious has been paid the same wage rate as a lead auditor does not, by itself, indicate that he had been promoted to that position from the position of substitute lead auditor prior to the election, or that promises of his imminent promotion were made.

Little or no evidence was submitted in support of the contentions in Petitioner’s Objections 2 and 3. Objection 2(a) does not identify (and Gibson’s statement does not provide) information regarding the alleged attempts of unidentified, ineligible individuals to vote. Gibson does not explain whether the individuals at issue in Objection 2(b) are the same individuals whose inclusion in the Excelsior list is the subject of Objection 3.

Regarding to Objection 2(c) neither the objection nor Gibson's statement identifies the individual whose name it asserts was not included on the Excelsior list. In determining whether omissions from the Excelsior list are sufficient to warrant setting aside election results, the Board focuses not on the "degree of employer fault," but rather on whether the omissions involve a determinative number of voters and have prejudiced the ability of a union to communicate with potential voters. *Woodman's Food Market, Inc.*, 332 NLRB 503 (2000), quoting *Avon Products*, 262 NLRB 46, 48 (1982). The close election results in this case suggest that omissions could have involved determinative ballots. However, the Union has failed to provide any evidence, and indeed has failed to assert, that the alleged omission "may have compromised the union's ability to communicate with a determinative number of voters." *Woodman's* at 504. This being the case, Petitioner has failed to provide *prima facie* evidence raising substantial and material issues that would warrant setting the election aside.

Relative to Objection 3, while the Petitioner objects to the inclusion of "substitute lead auditors" on the Excelsior list, as noted above, this classification was included in the bargaining unit which the Regional Director found appropriate in the Decision and Direction of Election which issued on April 25. Lead auditors whose names were included on the Excelsior list are not named, but were subject to challenge at the Petitioner's option during the election.

In light of the foregoing, I recommend that Objections 1, 2, and 3 be overruled.

## THE CHALLENGES

Petitioner challenged the ballot of Larry Serious on the basis that he is a lead auditor, a classification excluded in the bargaining unit and challenged the ballot of Ronald Lindsay as not being employed during the election eligibility period.

### Larry Serious

Lead auditors were excluded from voter eligibility because they are supervisors within the meaning of Section 2(11) of the Act. While the Petitioner has not specifically alleged that Serious exercised supervisory authority, Gibson asserts that Serious has been paid as a lead auditor since the date of the election and has functioned as a lead most of the time. As discussed above, substitute lead auditors are paid the same hourly wage as lead auditors when performing lead auditor duties. Serious's receipt of the lead auditor wage rate is not dispositive of his status as a lead auditor. The Petitioner offers no other basis for its conclusion that Serious is a lead auditor or possesses supervisory authority.

In support of its position that Serious is an eligible employee, the Employer submitted statements from Larry Serious, Director of Loss Possession and Quality Assurance Lemuel Moore, and Auditor Ronald "Rodney" Lindsay. According to Serious, he is employed as an auditor and substitute lead auditor. Since the departure of Lead Auditor Jacqueline Hall shortly before the first election in this matter, Serious has acted as a substitute lead auditor approximately three or four days per week. As substitute lead auditor, his

primary tasks are to audit one load per day that is sent to the Upper Marlboro facility by the Variety Warehouse and to complete certain paperwork relative to that audit. The paperwork takes approximately 15 to 20 minutes to complete. The remainder of his time Serious spends auditing either alone or with other auditors. When not serving as a substitute lead auditor, he works in a different auditing area and reports to a lead auditor. Serious asserts that he has not, nor has he ever been vested with the authority to hire employees, assign work, transfer, suspend, lay off, reward, or adjust grievances of employees or to recommend that these actions be taken.

Lemuel Moore, who directly supervises the auditing group, maintains that he has not conferred upon Serious any of the authorities listed above. Ronald Lindsay, who has worked with Serious as an auditor on the Variety Load Team since about July 3, 2003, testifies that he has never observed Serious exercising any of the listed supervisory functions.

In view of the foregoing, and in the absence of any contrary evidence supplied by the Petitioner, I conclude that Serious is not lead auditor and a supervisor within the meaning of Section 2(11) of the Act. Rather, he performs the work of auditor and substitute lead auditor, classifications I have found appropriately included in the bargaining unit. Accordingly, I recommend that the challenge to his ballot be overruled.

#### Ronald Lindsay

It is Petitioner's claim Lindsay is ineligible to vote because he was not employed prior to the eligibility date of the payroll week ending July 5, 2003,

established by the Stipulation for a second election approved by the Acting Regional Director on July 10. However, the Petitioner supplied no evidence in support of its assertion, nor even suggested any witness who might have such evidence.

The Employer tendered the sworn statement of Ronald Lindsay in which he attests that he was hired by the Employer as an auditor on July 2, and has worked in that capacity since July 3. Lindsay's testimony is supported by payroll service records and a time sheet for the payroll period ending July 5, submitted by the Employer which show that Lindsay was paid for 38.63 hours, including 6.63 overtime hours and 8 holiday hours for that pay period. The Employer submitted other documents including timesheet records and a punch detail report covering the period July 3 through the election date of August 6, which show that Lindsay continued to work for the Employer through the date of the election.

In light of the probative evidence submitted by the Employer and in the absence of contrary evidence, it must be concluded that Lindsay was employed during the payroll period for eligibility and continued to be employed by the Employer through the election date. Accordingly, since Lindsay satisfies the requirements for eligibility I recommend that the challenge to Lindsay's ballot be overruled and his ballot counted. See, for example, Greenspan Engraving Corp., 137 NLRB 1308, 1309 (1962).

#### SUMMARY

I recommend that the Objections 1, 2, and 3 be overruled. I further recommend that the challenges to the ballots of Larry Serious and Robert

Lindsay be overruled and their ballots be opened and counted and the result reflected in a Revised Tally of Ballots.

Dated at Baltimore, Maryland this 12th day of September 2003.

(SEAL)

ALBERT W. PALEWICZ

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Albert W. Palewicz, Acting Regional Director  
National Labor Relations Board, Region 5  
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Baltimore, Maryland 21202

Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision, if filed, must be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of objections and which are not included in the Supplemental Decision, are not a part of the record before the Board unless appended to the request for review of opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. The request for review must be received by the Board in Washington by September 26, 2003.