

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

In the Matter of
NSTAR ELECTRIC & GAS CORPORATION
Employer-Petitioner
and
UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 12004, AFL-CIO, CLC
Union
and
UTILITY WORKERS UNION OF AMERICA,
LOCAL NO. 369, AFL-CIO
Union

CASE 1-RM-1263

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON CHALLENGED BALLOTS**

BEFORE: Eryn M. Doherty, Hearing Officer

APPEARANCES:

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I. OVERVIEW

This report contains my findings and recommendations concerning the eligibility of Philip Brienza, Stephen Doyle, Franklin Baley, Judith Kelly, and Mary Fostin to vote in the elections conducted on April 30, 2004.¹ In brief, I recommend that the challenges to Brienza, Doyle, Franklin, and Kelly be sustained and that the ballot of Fostin be opened and counted.

As discussed more fully below, pursuant to a Corrected Decision, Direction of Elections, and Order and a Supplemental Decision and Order Partially Vacating Direction of Elections, three elections were conducted on April 30 among the following group of employees employed by NSTAR Electric & Gas Corporation (NSTAR):² the employees in the gas meter shop in NSTAR's Southborough service center, Voting Group (a);³ the auto mechanics in the garage in Somerville, Voting Group (c);⁴ and the installation and gas sales clerks at the Summit Building in Westwood, Voting Group (e).⁵ Both NSTAR and the Utility Workers Union of America,

¹ All dates are in 2004, unless otherwise noted.

² In her Corrected Decision, Direction of Elections, and Order, the Regional Director ordered that elections be conducted concerning five separate voting units (a) through (e). In her Supplemental Decision and Order Partially Vacating Direction of Elections, however, the Regional Director vacated her order directing elections in Voting Groups (b) and (d).

³ There were no determinative challenges or objections filed in regard to Voting Group (a). The appropriate Voting Group (a) as set forth in the Corrected Decision, Direction of Elections, and Order is:

All full-time and regular part-time technicians employed by the Employer in the gas meter shop at its Southborough, Massachusetts facility, but excluding office clerical employees, guards, and supervisors as defined in the Act.

⁴ The Appropriate Voting Group (c), as set forth in the Corrected Decision, Direction of Elections, and Order is:

All full-time and regular part-time employees employed by the Employer in auto mechanic classifications at the garage at its Somerville, Massachusetts facility, excluding office clerical employees, guards, and supervisors as defined in the Act.

⁵ The Appropriate Voting Group (e), as set forth in the Corrected Decision, Direction of Elections, and Order is:

Local No. 369, AFL-CIO (Utility Workers Local 369) challenged the ballots of mechanics Brienza and Doyle in the election conducted for Voting Group (c). The Utility Workers Local 369 withdrew its challenges, without objection, to the voting eligibility of Brienza and Doyle at the start of the hearing. I recommend that these withdrawals be approved. NSTAR requested to withdraw its challenges to Brienza and Doyle, but not until the second day of hearing, after evidence was offered and admitted concerning their eligibility. As described below, I recommend that NSTAR's request to withdraw its challenges to the voting eligibility of Brienza and Doyle be denied and that the challenges to their voting eligibility be sustained because they transferred to non-bargaining unit positions after the payroll eligibility date, but prior to the election.

The Board agent conducting the election challenged the voting eligibility of mechanic Baley in the election conducted for Voting Group (c). I recommend that the challenge to the eligibility of Baley be sustained because he transferred to a bargaining unit position before the election, but after the payroll eligibility date.

The Utility Workers Local 369 also requested to withdraw its challenge to Fostin in Voting Group (e) at the start of the hearing. There were no objections to the Utility Workers Local 369's request to withdraw its challenge. No evidence was offered regarding Fostin's eligibility. Accordingly, there is a presumption that Fostin is an eligible voter and I recommend that the Utility Workers Local 369's withdrawal of its challenge to the eligibility of Fostin be approved, and that her ballot be opened and counted.

All full-time and regular part-time gas sales clerks and installation clerks employed by the Employer in the Gas Sales and Marketing department at the Summit Building in Westwood, Massachusetts, but excluding all other clerical employees, guards, and supervisors as defined in the Act.

Lastly, United Steelworkers of America, Local No. 12004, AFL-CIO, CLC (Steelworkers Local 12004) challenged the ballot of Kelly in the election conducted for Voting Group (e). As described below, I recommend that the challenge to the eligibility of Kelly be sustained because even though she was employed in the Voting Group (e) unit on both the payroll eligibility date and election date, she held a temporary position and, therefore, she is ineligible to vote in the election.

In sum, because Brienza, Doyle, and Baley were not employed in Voting Group (c) on both the payroll eligibility date and the election date, I find that they are not eligible voters. Although Kelly, on the other hand, was employed in the Voting Group (e) unit on both the payroll eligibility and election dates, her employment in that unit position was temporary. Accordingly, I find that she too is an ineligible voter. Finally, the challenge to Fostin's eligibility having been withdrawn, I recommend that her ballot be opened and counted in the election conducted for Voting Group (e).

II. PROCEDURAL HISTORY

For many years, Utility Workers Local 369 or its predecessor locals⁶ and Steelworkers Local 12004 have represented employees employed by NSTAR or its predecessors⁷ in two separate bargaining units. NSTAR, the Employer-Petitioner in this matter, asserted at the pre-

⁶ Utility Workers Local 369 did not assume its present form until December 2000. Prior to this time, the bargaining unit was actually composed of eight separate bargaining units represented by six separate locals – three Utility Workers Union of America (UWUA) locals, one of which was Utility Workers Local 369, and three Brotherhood of Utility Workers (BUW) locals. In February 2000, the UWUA and the BUW merged at the national level. Near the end of 2000, a series of mergers between the six separate UWUA and BUW locals took place, resulting in a much larger Utility Workers Local 369 that now includes a wide variety of employees, both gas and electric, working in physical, clerical, professional, and technical jobs.

⁷ In 1999, BEC Energy and Commonwealth Energy System (COM/Energy) merged to form NSTAR, a holding company. NSTAR Gas & Electric Corporation, a subsidiary of the parent company, NSTAR, was formed on May 31, 2001. NSTAR Electric & Gas Corporation is the employer of the employees at issue in this case.

election hearing that, because of the consolidation of certain of its facilities and operations, the two units as they existed no longer had a separate community of interest, and that the smaller unit currently represented by Steelworkers Local 12004 should be accreted into the larger unit represented by Utility Workers Local 369. Conversely, Steelworkers Local 12004 and Utility Workers Local 369 asserted that there had been no changes that warranted disturbing Steelworkers Local 12004's representation of NSTAR employees, and that their contracts with NSTAR served as a bar to any election.

The Regional Director found that the consolidation of certain of NSTAR's facilities and operations did not warrant a system-wide accretion of the Steelworkers Local 12004 unit into the Utility Workers Local 369 unit, nor an election in a system-wide unit, nor an accretion or election among all of the employees at the three combined service centers, whether considered separately or as a group. The Regional Director found, however, that some of the changes did create a new operation for certain groups of employees, and permitted those employees to vote whether they wished to be included in the Utility Workers Local 369 or the Steelworkers Local 12004 unit. Specifically, separate voting groups composed of the employees in the gas meter shop in Southborough (Voting Group (a)), the auto mechanics in the garage in Somerville (Voting Group (c)), and the installation and gas sales clerks at the Summit Building in Westwood (Voting Group (e)) were afforded the opportunity to vote for their chosen representative.

On April 30, Region One conducted separate elections among the employees employed in Voting Groups (a), (c), and (e). The ballots were impounded due to the filing of a Request for Review of the Regional Director's Corrected Decision, Direction of Elections, and Order by both NSTAR and Utility Workers Local 369. Upon the Board's denial of the requests for review dated May 25, the ballots were opened and counted on June 3. The tally of ballots for the

election in Voting Group (c), the auto mechanics in the garage in Somerville, shows that, of the 4 eligible voters, 2 votes were cast for Steelworkers Local 12004, 0 votes were cast for Utility Workers Local 369, and 0 votes were cast by voters who did not wish to be represented by either Union. There were no void ballots, but there were three determinative challenges. NSTAR and Utility Workers Local 369 challenged the ballots of Brienza and Doyle on the ground that they were not employed in the Voting Group (c) Unit. The Board agent conducting the election challenged the ballot cast by Baley on the ground that his name did not appear on the eligibility list.

In Voting Group (e), the installation and gas sales clerks at the Summit Building in Westwood, the tally of ballots for the election shows that, of the 3 eligible voters, 0 were cast for Steelworkers Local 12004, 1 was cast for Utility Workers Local 369, and 0 votes were cast by voters who wished to be represented by neither of the Unions. There were no void ballots, but there were two determinative challenges. Steelworkers Local 12004 challenged the ballot cast by Kelly, and Utility Workers Local 369 challenged the ballot by Fostin, on the ground that their job classifications were not included in the voting group.

Following preliminary investigation of the issues raised by the challenged ballots, the Regional Director issued a Direction and Notice of Hearing on July 1. The Regional Director concluded that the challenged ballots were attended by 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 credibility of witnesses, findings of fact, conclusions of law, and recommendations to the Board concerning the disposition of the issues involved here. Pursuant to the Regional Director's July 1 Direction and Notice of Hearing, I

conducted a hearing on July 15 and 20 in Boston, Massachusetts for the purpose of resolving issues of fact and credibility raised by the determinative challenges. All three parties appeared at the hearing through either counsel or by representatives, and each was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence in relation to the issues involved.⁸ None of the parties elected to file post-hearing briefs. In making my determinations, I am mindful that the party seeking to exclude an employee from voting has the burden of establishing that the employee is, in fact, ineligible to vote. *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1988), quoting *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). 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 the witness.⁹

III. VOTING GROUP (c) AND THE CHALLENGES TO THE ELIGIBILITY OF BRIENZA, DOYLE, AND BALEY

A. FINDINGS OF FACT

About 60 auto mechanics are employed by NSTAR in its transportation department¹⁰ where it maintains and repairs its fleet of gas and electric vehicles.¹¹ Those represented by Utility Workers Local 369 are classified as auto mechanics, while those represented by Steelworkers Local 12004 are called garage mechanics or garage attendants. The garages at Massachusetts Avenue (Boston), Hyde Park, Waltham, Framingham, Walpole, Wareham, New Bedford, Plymouth, and Yarmouth employ only mechanics represented by Utility Workers Local

⁸ Peter Beaumont, NSTAR senior labor relations consultant, was the only witness to testify at the hearing.

⁹ Accordingly, any failure to completely detail all conflicts in evidence does not mean conflicting evidence was not considered. *Bishop & Malco, Inc.*, 159 NLRB 1159 (1966).

¹⁰ James Elliot is the manager of the Transportation group, and five supervisors report to him

¹¹ All company vehicles are designated as either gas or electric.

369. The garages in Worcester and Southborough employ only mechanics represented by Steelworkers Local 12004. Beaumont testified during the pre-election hearing that NSTAR intends to close its Framingham service center and merge it with its Southborough one and, as a result, three Utility Workers Local 369 mechanics will transfer to Southborough and work side by side with six mechanics represented by Steelworkers Local 12004. NSTAR closed its Dedham service center in November 2003, and transferred its Steelworkers Local 12004 mechanic to the Somerville garage where he works side-by-side with Utility Workers Local 369 auto mechanics.¹²

NSTAR implemented a “hub and satellite” system in December 2003 whereby three of its garages, Massachusetts Avenue, Wareham, and Southborough, became hubs to which vehicles are brought for major repairs. Each hub has satellites, garages that perform minor repairs. As a result of this change, the garage at Massachusetts Avenue, which had previously handled repairs only for electric vehicles, and the garage at Southborough, which had previously handled repairs only for gas vehicles, now repair both gas and electric vehicles. The garage in Wareham has always repaired both gas and electric vehicles.

Coupled with the implementation of this plan, NSTAR’s Massachusetts Avenue garage experienced personnel shortages because it is a 24-hour, seven-days a week operation. Only Utility Workers Local 369 auto mechanics were affected by these changes, and, therefore, NSTAR and Utility Workers Local 369 bargained over them. Negotiations regarding these changes began about October or November 2003, and culminated with a Garage Committee Agreement dated February 27. NSTAR and Utility Workers Local 369 agreed to transfer one

¹² In her Supplemental Decision and Direction of Election, the Regional Director found this merger created a new operation and, therefore, she ordered a direction be conducted among the mechanics in Somerville.

auto mechanic from the North suburban garages to the Massachusetts Avenue garage in order to alleviate the personnel shortages. As a result, only one Utility Workers Local 369 auto mechanic, as opposed to two, and one lead mechanic would staff the Somerville garage along with the Steelworkers Local 12004 mechanic. Coinciding with this arrangement was NSTAR's decision to permanently assign an auto mechanic to its Hyde Park garage, as opposed to temporarily staffing that position as it had been doing.¹³

The Garage Committee Agreement did not specify a date when the auto mechanics positions would transfer from the North suburban garages to the Massachusetts Avenue garage. Beaumont, NSTAR's representative during the negotiations, testified that NSTAR proposed to implement the changes with the next watch schedule beginning on March 14.¹⁴ Beaumont further testified that Utility Workers Local 369's Business Agent Phil Trembly requested that NSTAR wait to implement the changes until the April 11 watch schedule in order to provide the affected employees with sufficient notice, and that NSTAR agreed to this request.

The Garage Committee Agreement grandfathered in a number of the senior auto mechanics on Utility Workers Local 369's Auto Mechanics North Roster to work at the Massachusetts Avenue garage if they chose to do so.¹⁵ The procedures used to fill vacancies within a department among employees who hold the same classification are similar to those employed for temporary transfers. Pursuant to the applicable collective-bargaining agreement, such restructuring or movement of employees does not involve a requisition order or a posting.

¹³ The Hyde Park facility opened in November of 2003.

¹⁴ A watch schedule is the Utility Workers Local 369's auto mechanics 28-day work schedule. A draft watch schedule is posted 10 days prior to its effective date and the final schedule is posted the Wednesday before its effective date.

¹⁵ These auto mechanics had been grandfathered in a previous agreement between the two parties. The individuals identified in the Garage Committee Agreement are those employees who remain employed by NSTAR.

Accordingly, to fill the remaining vacancies at the Massachusetts Avenue garage, as well as to fill any vacancies created by the transfer of auto mechanics to that site, the department manager polled the auto mechanics based on their seniority on this roster to determine their desire to fill the vacancies. If vacancies were not voluntarily filled, then auto mechanics were assigned to them. This polling was done informally, and, therefore, no records exist as to when it actually occurred.¹⁶ At the hearing, Beaumont generally testified that the polling occurred between February 27, the signing of the Garage Committee Agreement, and the posting of the draft April 11 watch schedule, which was on or about April 1. The polling of the auto mechanics and their subsequent transfers were done according to the Garage Committee Agreement and the collective-bargaining agreement. Utility Workers Local 369 did not file any grievances over the manner in which the personnel changes occurred or the procedure for selecting the auto mechanics to fill the openings created by changes in staffing levels.

As a result of these personnel changes, in addition to various other mechanics who transferred from one location to another, Brienza and Doyle were transferred from the Somerville garage (Voting Group (c)) to the Massachusetts Avenue garage, a location not included in Voting Group (c).¹⁷ Baley was transferred from the Waltham garage, a non-Voting group (c) location, to the Somerville garage, within Voting Group (c), in order to fill the vacancy created by Brienza and Doyle's departure. The exact timing of the transfers is somewhat difficult to pinpoint from the record evidence, the evidence establishes that Brienza, Doyle, and

¹⁶ Beaumont testified that transfer records had not been completed by Somerville's manager at the time Brienza, Doyle, and Baley transferred.

¹⁷ Although Brienza was employed at the Somerville garage at that time, he had previously been grandfathered to work at the Massachusetts Avenue garage, if he so chose.

Baley had been transferred to their new locations and had begun working at their new locations as of the April 11 watch schedule.

B. LEGAL ANALYSIS

1. NSTAR's Request to Withdraw Its Challenges to Brienza and Doyle

Contrary to NSTAR's stated position, on the record, at the start of the hearing, that Brienza and Doyle should be found ineligible to vote because they were not employed in Somerville on the date of the election, on the second day of hearing, NSTAR requested to withdraw its challenges to Brienza and Doyle. Keith McCown, NSTAR's counsel, stated that NSTAR, by letter dated June 10, submitted a request to the Regional office to withdraw these challenges.¹⁸ At the hearing, McCown further stated that it was NSTAR's position that the "mechanics' challenged ballots should be opened and counted on the basis that "the Board's traditional rules about voting eligibility dates unfairly affect the unique voting scenario that the Region created here." Contrary to this position, NSTAR submitted evidence to the Regional office on July 13 and at the hearing that establishes that Brienza, Doyle, and Baley were not employed in the Voting Group (c) unit on both the payroll eligibility date, March 27, and the election date, April 30. More particularly, NSTAR offered, and I received into evidence, the work schedules of these employees, for the periods March 13 through April 10 and April 11 through May 9.¹⁹ Further, Beaumont testified that the schedules confirm that Brienza, Doyle, and Baley were not employed in the unit on the operative dates for eligibility. Based on the introduction of such evidence at the hearing, I reserved ruling on NSTAR's request on the

¹⁸ NSTAR was represented by counsel on the first day of the hearing, but McCown was not the individual who made an appearance on NSTAR's behalf. McCown first made an appearance at the hearing on the second day of hearing.

¹⁹ After McCown stated NSTAR's position, NSTAR offered, and I received into evidence the work schedules of these employees from December 21, 2003 until July 4. These records further confirm that Brienza and Doyle were working at the Somerville location until April 11 and that Daley worked at the Waltham location until April 11.

second day of hearing to withdraw the challenges to the voting eligibility of these employees, as the request appeared inconsistent with the record testimony at that time and, therefore, the issue of the eligibility of these voters required appropriate resolution. *J. Weingarten, Inc.*, 172 NLRB 2020 (1968). Based on the evidence that establishes that these voters are ineligible to vote, I see no reason to grant NSTAR's request to withdraw these challenges.

2. Recommendation to Sustain the Challenges to the Voting Eligibility of Brienza, Doyle, and Baley

In order to be eligible to vote in an election employees must be employed both during the payroll eligibility period and on the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973); *Apex Paper Box Co.*, 302 NLRB 67, fn. 4 (1991). Here, the payroll eligibility date was March 27, and the election was conducted on April 30.²⁰ Brienza and Doyle were each employed in Voting Group (c), in the position of auto mechanic at NSTAR's Somerville garage, on the payroll eligibility date. However, they were transferred from the Somerville garage to the Massachusetts Avenue garage, positions outside the voting unit, by April 11, before the April 30 election. As such, I find that they are not eligible voters.

Conversely, Baley was employed at the Waltham garage, a non-Voting Group (c) location, as of March 27, the payroll eligibility date, but was transferred to the Somerville garage, a position within the voting unit, by April 11, prior to the election. Because Baley was not employed in the unit on the payroll eligibility date, I find that he, too, is an ineligible voter.

²⁰ According to the Corrected Decision, Direction of Elections and Order, the eligibility date was the payroll period ending immediately preceding its date of issuance. NSTAR's payroll period is Saturday to Saturday, therefore, the eligibility date is March 27.

IV. VOTING GROUP (e) AND THE CHALLENGES TO THE ELIGIBILITY OF FOSTIN AND KELLY

A. FINDINGS OF FACT

Around late 2003, the Utility Workers Local 369 gas clerk employed at NSTAR's corporate headquarters in Westwood, MA (the Summit), left her employment with NSTAR, thereby creating a vacancy. As a result, pursuant to NSTAR's collective-bargaining agreement with Utility Workers Local 369, on January 27, Thomas McCarthy, department manager, completed a requisition order to fill the position of gas clerk. The requisition was approved by Human Resources Manager Joanne Cullanen on March 2. Thereafter, on March 8, NSTAR posted a Notice of Vacancy to fill the gas clerk position. This posting, as required by NSTAR's collective-bargaining agreement with Utility Workers Local 369, was posted for 10 days. Employees replying to the Notice were required to do so by March 19. The vacancy announcement was also distributed to employees via a paycheck insert. Employee Cheryl Farina accepted the gas clerk position on May 6.²¹

In the interim, due to the work load, NSTAR needed to fill the gas clerk position on a temporary basis. According to NSTAR's collective-bargaining agreement with Utility Workers Local 369, open positions may be filled temporarily for any length of period up to one year. In order to temporarily fill an open position, NSTAR's manager for the department involved will poll employees on respective Utility Workers Local 369 rosters, here it was the administrative coordinator and office assistant rosters, to determine if there are any volunteers to fill the position. If there are no volunteers, management will assign employees to temporarily fill the position. The transfer, either voluntary or assigned, is only temporary, because a permanent

²¹ It is unclear from the record exactly when Farina began working in the gas clerk position, as her release date had to be negotiated with her former department, Billing Operations.

position must be posted and bid on by employees according to the collective-bargaining agreement. If a temporary employee desires to remain in the position on a permanent basis then he or she is required to apply for it. When an employee permanently fills a position, he or she will assume the title, grade, and pay rate of the position, even if his or her previous position was a higher grade and/or pay rate.

Kelly, an administrative coordinator in Station Operations who is represented by Utility Workers Local 369, transferred to the vacant gas clerk position on February 23.²² Although the gas clerk position is a lower grade position, Kelly retained her title as administrative coordinator, as well as her higher grade and pay rate while she performed the gas clerk position.²³ Kelly remained in this position until May 17, when she accepted a position with the Credit, Collection and Revenue Protection Department, which Beaumont testified was a permanent transfer for her.²⁴

B. LEGAL ANALYSIS

1. Recommendation to Approve Utility Workers Local 369's Request to Withdraw its Challenge to Fostin and to Open and Count Her Ballot

Utility Workers Local 369 requested to withdraw its challenge to Fostin's eligibility at the start of the hearing. No party offered evidence regarding her eligibility. Accordingly, since there is a presumption that Fostin is an eligible voter, I recommend that Utility Workers Local

²² Beaumont testified that because he was not involved with Kelly's transfer he did not know whether she volunteered for the position or was assigned it.

²³ The gas clerk position is classified as Office Assistant Grade 8. The administrative coordinator position is a higher grade.

²⁴ The Job Summary for Kelly lists her effective date of transfer as May 24, but, Beaumont testified that this was incorrect and her actual date of transfer was May 17.

369's request to withdraw its challenge to Fostin be approved, that she be found an eligible voter, and that her ballot be opened and counted.

2. Recommendation to Sustain the Challenge to the Voting Eligibility of Kelly.

Kelly worked as the gas clerk, a bargaining unit position in Voting Group (e), on both the payroll eligibility date and election date and voted in the election. Generally, an employee who is employed and working in the unit on both the payroll eligibility date and election date is eligible to vote. An exception to this general rule is made for temporary employees whom the Board considers to be ineligible employees unless their tenure of employment remains uncertain. *Marian Medical Center*, 339 NLRB No. 23, slip op. at 1 (2003) (citations omitted). To determine whether a temporary employee is eligible to vote, the Board examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created. *Id.* at 2., citing *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129(1979) (students hired for one summer without expectancy of continued employment); *Kaiser Cement & Gypsum*, 158 NLRB 1740, 1744 (1966) (employees included in one unit who were temporarily transferred to work at location of a separate unit); *FWD Corp.*, 138 NLRB 386, 390 (1962) (employee on 6-month temporary training assignment to unit location); *Irwin & Lyons*, 51 NLRB 1370, 1373 (1943) (employees transferred from one logging camp to another during temporary shutdown).

Here, the evidence supports the conclusion that Kelly's transfer was temporary in nature. In this regard, she moved into the gas clerk position after NSTAR initiated the contractually required procedures for permanently filling a position, but before NSTAR had posted the position and completed the required procedures for filling the position. Further, unlike

permanent transfers, Kelly retained her higher grade and pay when she moved into the gas clerk position. Accordingly, the duration of Kelly's tenure in the gas clerk position was contingent on NSTAR completing its posting requirements and permanently filling the position, a sufficiently ascertainable event. In this regard, the condition for which Kelly had assumed the gas sales clerk position was satisfied when Cheryl Farina was awarded the permanent position on May 6 and on May 17 Kelly ended her temporary position as the gas clerk. On these facts, I conclude that Kelly was ineligible to vote because she was temporarily employed in the Voting Group (e) unit, and, therefore, I recommend that the challenge to her ballot be sustained.

V. CONCLUSION

A. Voting Group (c)

Based on the foregoing, I recommend that NSTAR's request to withdraw its challenges to Brienza and Doyle be denied and that the challenges to the eligibility of these voters be sustained, as they were transferred to non-bargaining unit positions prior to the date of the election and, therefore, were ineligible to vote. I recommend that the challenge to Baley's eligibility to vote be sustained because he was transferred to a unit position after the payroll eligibility date, but prior to the election. As such, he, too, was, ineligible to vote, as he was not employed in the bargaining unit as of the payroll eligibility date. Accordingly, I recommend that a revised tally of ballots be issued for Voting Group (c), and that the United Steelworkers of America, Local No. 12004, AFL-CIO, CLC be certified as the collective-bargaining representative of the directed unit.

B. Voting Group (e)

I recommend that Utility Workers Local 369's withdrawal of its challenge to Fostin be approved and that she be found to be an eligible voter. I further recommend that the challenge to

the voting eligibility of Kelly be sustained, as she held the gas clerk position on a temporary basis and, therefore, was ineligible to vote. Consequently, I recommend that Fostin's ballot be opened and counted, a revised tally of ballots be issued, and, depending upon the results of the revised tally of ballots, a certification of the results of the election, including a certification of representative, if appropriate, be issued or that such other election that may be appropriate be conducted.²⁵

/s/ Eryn M. Doherty
Eryn M. Doherty, Hearing Officer
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Region One
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Dated at Boston, Massachusetts
this 19th day of August, 2004

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²⁵ Pursuant to Section 102.69 of the Board's Rules and Regulations, any party may, within 14 days of the issuance of this report, file exceptions with the Board in Washington, D.C. Immediately upon filing such exceptions, the party filing the same shall serve a copy thereof on all parties and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the Hearing Officer's recommendations. For a full description of the post-hearing procedures, see Section 102.69.