

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

WACO, INC.

Employer

and

Case 6-RC-12307

CONSTRUCTION & GENERAL  
LABORERS LOCAL #984 A/W  
LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA (LIUNA), AFL-CIO

Petitioner

**REPORT ON CHALLENGED BALLOTS AND OBJECTIONS**

By this report, I recommend that the Board sustain the challenges to 9 of the 22 challenged ballots which will result in the remaining 13 challenged ballots no longer being determinative to the results of the election. I also find no merit to any of the Employer's Objections and recommend that they be overruled and that the appropriate revised tally of ballots and certification of representative be issued.

Pursuant to a Stipulated Election Agreement approved by me on February 9, 2004, a mail ballot election commenced on March 1, 2004,<sup>1</sup> among employees in the unit heretofore found appropriate. The ballots were tallied on March 17 and the results of the election are set forth below:

1. Approximate number of eligible voters .....	107
2. Void ballots.....	13
3. Votes cast for Petitioner .....	27
4. Votes cast against participating labor organization.....	13
5. Valid votes counted.....	40
6. Challenged ballots.....	22

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<sup>1</sup> All dates referred to herein are in 2004 unless otherwise indicated.

- 7. Valid votes counted plus challenged ballots ..... 62
- 8. Challenges are sufficient in number to affect the results of the election.

On March 24, 2004, the Employer filed timely Objections to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. In accordance with Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the Challenged Ballots and Objections was made during which the parties were afforded an opportunity to submit evidence bearing on the issues. Having duly considered the results thereof, I hereby make the following report.<sup>2</sup>

**Background**

The Employer is a mechanical plant maintenance contractor engaged in the prevention of, and repair associated with, power outages. The Employer's headquarters is located in Richmond, Virginia. The sole jobsites involved in this proceeding are Dominion Power plants located in Mt. Storm and North Branch, West Virginia, where the Employer periodically performs preventative maintenance and repair work.

The parties agreed to the following appropriate collective bargaining unit:

All full-time and regular part-time construction employees, including iron workers, mechanics, boilermakers, shop machinists, brick masons, cement finishers, electricians, equipment operators, laborers, helpers/apprentices, tool room attendants, painters, first class welders, second class welders, pipefitters, millwrights and carpenters employed by Waco, Inc. at Dominion Power's Mt. Storm and North Branch facilities located in West Virginia; excluding all office clerical employees, timekeepers, safety specialists, safety inspectors, technical employees, senior planning engineers, planning engineers, the general superintendent, foremen, general foremen, project managers, managerial

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<sup>2</sup> Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC. Exceptions must be received by the Board in Washington, DC, by the close of business at 5:00 p.m. EST (EDT), on May 11, 2004. Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and which are not included in the Report, are not part of the record before the Board unless appended to the exceptions or 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 Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

employees and guards, professional employees and other supervisors as defined in the Act.

As set forth more fully herein, the parties disagreed as to whether the election should be conducted manually or by mail ballot and stipulated that I would decide this issue. After careful consideration of the facts and the arguments of both parties, I directed that the election would be conducted by mail ballot.

### **THE CHALLENGED BALLOTS**

At the count for the election held in the subject case on March 17, 2004, the Petitioner challenged the ballots of David Edward Clark, Jerry Robert Coffman, Gary Albion Hyde, Timothy Lee Leary, Jerry Wayne Long, Joshua D. Moore, Jonathan W. Rhea, Michael Lee Tasker and Craig S. Weimer on the grounds that they did not meet the formula for determining eligibility for the election. The Petitioner also challenged the ballots of Christopher Broadwater, Donald Ray Crites, Randall S. Minnick and Ronald Jacob Dyche as not being in the bargaining unit. The Board agent challenged the ballot of John Paugh, Jr. because his name was not on the eligibility list and the Employer challenged Paugh's ballot contending that he had improperly signed his ballot. The Petitioner also challenged the ballot of Nicholas R. Arnold on the grounds that he had not properly signed his mail ballot envelope. The Board agent challenged the ballots of Joyce Ruble, Rex A. Liller, Edward Landon, Carla Robinette, Brian Rhodes, Amy Paugh, and Billy Heckler because their names are not on the eligibility list. The challenged ballots are determinative of the results of the election.

The parties agreed in the Stipulated Election Agreement that the payroll period for eligibility would be that which ended on February 8. The also agreed that the voter eligibility would be determined based on the Board's Daniel /Steiny formula as set forth below:

In accord with the Board's holdings in Daniel Construction Company, Inc., 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967), and Steiny and Company, Inc., 308 NLRB 1323 (1992), in addition to those employees eligible to vote under the standard criteria, unit employees are eligible to vote if they have been employed in the unit for either (1) a total of 30 days or more within the 12 months preceding the payroll period for eligibility or, (2) if they have had some employment in those 12 months and have been employed for a total of 45 days or more within the 24-month period immediately preceding the payroll period for

eligibility, and who have not quit or been discharged for cause prior to the payroll period for eligibility.

Thus, to be eligible to vote in the election, a voter must have met the Daniel/Steiny formula relative to work for the Employer at the Mt. Storm and/or North Branch, West Virginia jobsites or have been eligible to vote under the standard criteria.

The Petitioner, by letter dated April 16, has agreed that, for purposes of resolving the challenged ballot issues, Joyce Ruble, Rex A. Liller, Edward Landon, Carla Robinette, Brian Rhodes, Amy Paugh, Billy Heckler and John Paugh, Jr. are not eligible to vote. Neither party now contends that any of these eight individuals are eligible to vote.

As already noted, the Petitioner challenged the ballots of ten other voters, including Timothy Lee Leary on the basis that the voters did not meet the Daniel/Steiny formula for eligibility.

The Employer, in support of its contention that these individuals are eligible to vote under the terms of Daniel, provided documentation relating to their employment with the Employer at its Mt. Storm and North Branch, West Virginia, jobsites. A review of that documentation regarding Timothy Lee Leary reveals that Leary did not work a sufficient number of days to be eligible to vote. In its March 25 position statement, the Employer contends, regarding Leary, that he worked for more than 45 days at Mt. Storm during the period November 10, 2002, and January 3, 2003. However a review of the supporting documentation, attached as Exhibit N to the Employer's March 25 statement, and attached hereto as Exhibit 1, reveals that Leary worked a total of 37 days during the twenty four month period ending February 8, 2004, the payroll eligibility date. However, since January 3, 2003, Leary performed no work for the Employer in the unit and thus did not work during the 12-month period ending February 8. Therefore, even if Leary had worked 45 or more days during the 24-month eligibility period, he failed to meet the second prong of the test since he was not employed by the Employer in the unit at any time during the 12-month period preceding the eligibility date. Therefore Leary was ineligible to vote in the election.

Inasmuch as no party now contends that Joyce Ruble, Rex A. Liller, Edward Landon, Carla Robinette, Brian Rhodes, Amy Paugh, Billy Heckler and John Paugh, Jr. are eligible to vote, and the evidence provided by the Employer clearly establishes that Timothy Leary failed to meet the qualifications for eligibility, I find that Joyce Ruble, Rex A. Liller, Edward Landon, Carla Robinette, Brian Rhodes, Amy Paugh, Billy Heckler, John Paugh, Jr. and Timothy Leary are not eligible voters and I recommend that the challenges to their ballots be sustained

If my recommendation to sustain the challenges to the ballots of the nine voters set forth above is affirmed by the Board, the remaining 13 challenged ballots will no longer be determinative to the results of the election. Therefore, in order to conserve the limited resources of the Agency and those of the parties, I find it unnecessary to resolve the status of the remaining 13 challenged ballots. Accordingly, I recommend that the Board issue an appropriate revised tally of ballots consistent with these findings.

### **THE OBJECTIONS**

The Objections allege as follows:

The Employer believes there are seven grounds for objections to the election. These objections are both to conduct affecting the results of the election and to conduct of the election.

(Objection No. 1)

First, the Employer objects to the Region's decision to conduct a mail ballot election. It is longstanding Board policy that as a general rule, representation elections are conducted manually to avoid objectionable conduct and unmeritorious challenges. See, eg. San Diego Gas and Electric, 325 NLRB No. 218 (1998). This rule should only be departed from in extraordinary circumstances, which are not present in this matter. Id. Without any statement of analysis, the Regional Director issued a letter dated February 19, 2004 stating that the election would be conducted by mail ballot.

(Objection No. 2)

Second, the Regional Director's failure to articulate in writing, his finding to support the direction of a mail ballot election constitutes

evidence of the objectionable conduct and also a second separate objection to the election<sup>3</sup>.

(Objection No. 3)

Third, the Regional Director engaged in objectionable conduct when he permitted the processing of the Union's petition with an inadequate showing of interest despite Waco's challenge to the showing of interest. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Section 11020, et sec. (1999); Purdue Farms, Inc., 328 NLRB No. 130 (1999).

(Objection No. 4)

Fourth, the Region's agent at the election, David Shepley, engaged in objectionable conduct when he challenged Nicholas Arnold's ballot on the basis that Mr. Arnold did not properly sign the ballot envelope. The Region's agent impermissibly substituted his interpretation to override the clear manifestations of a voters' intent. See National Labor Relations Board Casehandling Manual (Part Two) Representation Proceedings, Section 11340.7(a) (1999).

(Objection No. 5)

Fifth, the Union engaged in objectionable conduct when it challenged the ballots of 4 voters as supervisors due to the fact that as part of the negotiations of the Stipulated Election Agreement, the Union agreed to the names of properly excluded supervisors.

(Objection No. 6)

Sixth, the Union engaged in objectionable conduct when it attempted to "pack" the voting unit by insisting that the Region send ballots to 10 voters who were not eligible voters.

(Objection No. 7)

Seventh, the Region engaged in objectionable conduct when it did not timely submit election posters to Waco, Inc. so that the posters could be displayed at the job site on or before February 25, 2004. 29 C.F.R. Ch. 1 Section 103.20(d) provides that the failure to post an election notice at least 3 working days before an election "shall be grounds for setting aside the election whenever proper and

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<sup>3</sup> The Employer withdrew its second Objection by letter dated March 31, 2004.

timely objections are filed. ..." See Smith's Food & Drug, 295 NLRB 983 (1989); Terrace Garden Plaza, 313 NLRB 571 (1993).

### **Objection No. 1**

In its first objection, the Employer objects to the Region's decision to conduct a mail ballot election. Pursuant to a Stipulated Election Agreement entered into by the parties and approved by the undersigned on February 9, the parties voluntarily agreed that I would exercise my discretion in deciding whether to conduct a manual or a mail ballot election in this case. In this regard, the Stipulated Election Agreement stated:

The Regional Director will select from the below-described options the appropriate manner in which to conduct the election. The parties may submit position statements on this issue to the Regional Director, to be received in the Regional office no later than the close of business on Wednesday, February 11, 2004. The Regional Director will make his determination based upon his consideration of the parties' statements of position as well as information disclosed from the Regional Director's own administrative investigation. The parties retain only the right to appeal the Regional Director's determination in the post-election process by way of an objection that the Regional Director's decision was an abuse of his discretion.<sup>4</sup>

Prior to reaching a decision, I reviewed written submissions of both parties regarding this issue. The parties were informed of my decision to conduct a mail ballot election and the rationale for that determination by telephone on February 13, and by letter dated February 23, a copy of which is attached hereto as Exhibit 2.

The Board policy regarding whether to direct a mail ballot election was announced in San Diego Gas & Electric, supra, and has been incorporated into the Board's Casehandling Manual at Section 11301.2. Section 11301.2 states:

The Board's longstanding policy is that representation election should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the Regional Director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to

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<sup>4</sup> The proposed date for a manual election was Tuesday, March 9.

vote. The Regional Director should use his/her discretion in deciding which type of election to conduct, taking into consideration at least the following situations that normally suggest the propriety of using mail ballots:

- (a) where eligible voters are “scattered” because of their job duties over a wide geographic area;
- (b) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (c) where there is a strike, a lockout or picketing in progress.

The Board has held that a Regional Director may, in his or her discretion, order a mail ballot election “where a significant number of eligible voters are not scheduled to be at the election site at the times proposed for manual balloting –for such reasons as that they work part-time or on an on-call basis, or have duties that keep them in the field for substantial periods of time...” San Diego Gas, 325 NLRB at 1145. Moreover, the Board held that “[a] Regional Director should, and does, have discretion, utilizing the criteria we have outlined, to determine if a mail ballot election would be both more efficient and likely to enhance the opportunities for the maximum number of employees to vote.” Id. 325 NLRB at 1145, FN. 10.

The Employer, in support of its position that the Regional Office should conduct a manual election, contends that the average commute for all of the eligible voters, who live in West Virginia and Maryland, is less than one hour to the Mt. Storm jobsite. Even assuming that the Employer’s estimation of driving times is accurate, it is noted that the proposed manual election would have been conducted in March, a month when weather is very unpredictable in the Mt. Storm area. Mt. Storm is a rural area whose elevation is one of the highest in West Virginia, thus increasing the odds of inclement weather, which could interfere with the ability of the eligible voters as well as the Board agent to get to and from the voting site. This has the potential not only to depress voter turnout, but also creates the possibility of objections in the event of severe weather. In fact, as discussed infra regarding Objection 7, the weather was so inclement during the days preceding the mailing of the ballots, that the Employer’s Vice President/Operations Manager Ronald Rost, determined not to drive to Mt. Storm to post

Notices of Election at the jobsite due to the bad weather. Rost stated in his affidavit, submitted in support of Objection 7, "I considered the risk of driving up to the jobsite in the bad weather and decided that it was a safety hazard and did not want to risk the trip." The Employer also cited the severe weather condition as the reason the local manager would not meet a Board agent in West Virginia to pick up the Notices of Election that day.

As already noted, the petitioned-for unit involves employees employed in the construction industry and the parties agreed to the use of the Daniel/Steiny eligibility formula. At the time of the election the Employer had only three employees who were working at the Mt. Storm location, out of approximately 97 employees<sup>5</sup> who would be eligible to vote pursuant to the parameters of Daniel/Steiny. Thus, less than 5 percent of the eligible voters were employed by the Employer at the Mt. Storm location at the time that a manual ballot election would have taken place.

In addition, it was not known how many, if any, of the remaining eligible voters were working elsewhere and, if so, where they were working. In the absence of any evidence on this issue, to conduct a manual, rather than a mail ballot, election would unnecessarily place a potentially significant burden on the voters in terms of lost wages, travel time and expenses. Moreover, it would be extremely difficult to fashion voting times such that they would enfranchise the largest number of eligible voters since there was no way of knowing the schedules that those eligible voters might have been working.

In summary, given the lengthy round trip commute for many of the voters from their homes to the facility; the isolated location of the facility and the potential for severe weather; the fact that less than five percent of the eligible voters were actually working at the facility; and the absence of evidence that the voters were available in the area to vote, it must be concluded that

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<sup>5</sup> In addition to the 97 names included on the Excelsior list submitted by the Employer, at the Petitioners request ballots were sent to ten additional former employees of Waco whom the Petitioner believed to be eligible voters.

my decision to conduct the election by mail ballot enhanced the opportunities for a maximum number of employees to vote and was clearly not an abuse of discretion.<sup>6</sup> Accordingly, I recommend that Employer Objection No. 1 be overruled.

### **Objection No. 2**

As already noted, the Employer has withdrawn Objection No. 2.

### **Objection No. 3**

In its third objection, the Employer contends that the Regional Office engaged in objectionable conduct by the processing of the Petitioner's petition with an inadequate showing of interest despite the Employer's challenge to that showing of interest.

The Employer's counsel raised a question as to the adequacy of the Petitioner's showing of interest shortly after the Petition was filed and was informed that the showing was sufficient. Thereafter, the parties executed the Stipulated Election Agreement which was approved by me on February 9. The Employer did not again raise the issue until its counsel's letter of February 16, which was responded to by the Regional Office, by letter of February 20. Those letters without attachments, are attached as Exhibits 3 and 4, respectively. A review of those letters demonstrates that the Region gave careful consideration to the Employer's concerns, albeit raised untimely, and found the showing of interest to be adequate. In this regard, it should be noted that all the allegations raised in the Employer's February 16 letter are based completely on supposition and speculation and were unaccompanied with any direct evidence of fraud.

The showing of interest in a representation proceeding is a matter for administrative determination and is not litigable. Moreover, after an election has been held, the adequacy of the showing of interest is irrelevant and challenges to the adequacy of the showing of interest

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<sup>6</sup> The abuse of discretion standard for challenging election methods chosen by a Regional Director is consistent with longstanding Board policy. National Van Lines, 120 NLRB 1343, 1346 (1958); and San Diego Gas & Electric, supra.

may not be raised absent newly discovered evidence of fraud.<sup>7</sup> Gaylord Bag Co., 313 NLRB 306 (1993).

As set forth in the Region's February 26 letter, review of the showing of interest conducted in response to the Employer's request revealed that the Petitioner had an adequate showing of interest among the four active employees at the time that the petition was filed.<sup>8</sup> The parties later stipulated that one of the four employees employed at the time the petition was filed was a supervisor. A further administrative review during the course of this investigation revealed that the Petitioner continued to possess an adequate showing of interest among the three remaining employees as well as in the larger unit.

Based on the above, the reasons set forth in the Region's February 20 letter and the Board's policy that an attack of the showing of interest following an election is untimely, I find that Objection No. 3 is without merit and recommend that it be dismissed.

#### **Objection No. 4**

In its fourth objection, the Employer contends that the Board Agent conducting the election committed objectionable conduct when he challenged employee Nicholas Arnold's ballot on the basis that Arnold did not properly sign the mail ballot envelope.

Inasmuch as the election was conducted by mail ballot, the actual ballot count took place in the Pittsburgh Regional Office. Representatives of both the Employer and the Petitioner were present for, and participated in, the counting process but no eligible voters attended the event. A review of the case records indicates that the Board agent observed that the name in the signature block of the disputed mail ballot envelope was printed rather than signed in cursive. He informed the parties in attendance at the ballot count that it was the position of the Regional Office that the ballot was void because the voter had printed rather than signed his name. The

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<sup>7</sup> Perdue Farms, Inc., 328 NLRB 909 (1999), relied upon by the Employer is inapposite in that it involved allegations of fraud discovered only after the election had been conducted.

<sup>8</sup> In fact, the Petitioner had an adequate showing of interest among all eligible voters.

Employer's representative said that he did not agree with the Board agent's assessment and said that the ballot should be counted because printing could be the way the employee signs documents. The Petitioner's representative disagreed with the Employer. The Board agent informed the parties that the ballot would be set aside as a challenged ballot due to the disagreement between the parties.

In the present case the Employer contends that Arnold's intent was clear when he printed his name on the envelope. In support of this contention the Employer provided a statement from Arnold, in which Arnold stated that he prefers to sign by printing his name. However, that statement further reveals that Arnold can sign his name in cursive. The Employer also provided additional documents, which reveal that Arnold sometimes prints his name and sometimes signs his name in cursive. Particularly instructive is a copy of Employment Eligibility Verification from the U.S Department of Justice, upon which Arnold signed his name in cursive, thus showing that Arnold has signed his name in cursive when so instructed.

Section 11336.5(c) of the Board's Casehandling Manual states in pertinent part; "Ballots that are returned in envelopes with no signatures or with names printed rather than signed should be voided. Thompson Roofing, Inc., 291 NLRB 743 (1988)." In Thompson, a voter, like Arnold, printed his name on his ballot envelope. The Board acknowledged that there was no evidence of fraud and no doubt that the ballot was that of the voter. It ruled however that even in such circumstances, if the voter failed to follow instructions his ballot is void.

Of course, the question raised by this Objection is not whether ultimately the disputed ballot should be counted but whether the Board agent engaged in objectionable conduct by designating it as a challenged ballot. The Board agent's initial action in declaring the mail ballot void because it was not signed was correct.<sup>9</sup> The Board agent, however, acted prudently when he segregated the disputed ballot in response to the Employer's assertion that the printed name

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<sup>9</sup> The Employer's reliance on Section 11340.7 of the Casehandling Manual is misplaced since that section relates only to the interpretation of the intent of a voter as displayed by the ballot itself and not the compliance with the mail ballot procedures.

on the envelope was in fact a signature. Thus, the Board agent preserved the disputed mail ballot envelope for further consideration and disposition. Moreover, the Employer fails to articulate how this cautious action taken by the Board agent during the mail ballot count at which no employees were even present could have affected the election.

Based on the foregoing, I find that Employer's Objection No. 4 is frivolous and recommend that it be overruled.

#### **Objection No. 5**

In its fifth objection, the Employer contends that the Petitioner engaged in objectionable conduct when it challenged the ballots of four voters as supervisors since the parties had earlier, during negotiations held to obtain a Stipulated Election Agreement, agreed to the names of properly excluded supervisors.

In support of this contention, in its position statement dated March 31, the Employer contends that prior to the election the parties agreed as to the supervisory status of 15 individuals who had been employed by the Employer as supervisors on the Mt. Storm jobsite. At the time of the vote count, the Petitioner challenged four individuals as supervisors. The Petitioner had not earlier contended that these individuals were supervisors. The Employer now claims that these challenges are specious and thus objectionable, since these individuals, according to the Employer, were not employed as supervisors at the time they were laid off from the Mt. Storm jobsite.<sup>10</sup> The Employer does, however, concede that one of the employees, Ronald S. Minnick, had been earlier employed at Mt. Storm as a supervisor. There is no indication as to the prior supervisory status of the other employees at issue.

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<sup>10</sup> While the Employer contends in its Objections that all four of these individuals were challenged as supervisors, it concedes in its March 25 position statement regarding the challenged ballots that one of the four, Ronald J. Dyche, was challenged for multiple reasons. In his affidavit, the Employer's attorney, David Burton, concedes that the Petitioner questioned Dyche's eligibility throughout the pre-election process and that Burton had suggested to the Board agent that the Petitioner could let Dyche vote subject to challenge.

Again, the issue raised by the Objection is not whether the four voters were supervisors but whether the act of challenging their ballots at the mail ballot count constituted objectionable conduct.

Although it is undisputed that the parties had agreed to exclude 15 individuals as supervisors, the Employer does not assert that the Petitioner waived its right to challenge any other voter as supervisors nor did the parties sign a Norris-Thermador<sup>11</sup> agreement to specifically resolve all eligibility issues. Section 11336.6(b) of the Casehandling Manual provides that during the count of mail ballots, “the observers may, if they wish, challenge ballots.” Thus, I find that Petitioner had not surrendered its right to challenge the four voters and properly followed the procedure to do so.

Although the Employer contends that the challenges were specious, it offered no evidence other than its understanding that all supervisory issues has been previously resolved. The Board’s comments in its decision in The Pike Company, 314 NLRB 691 (1994), which addresses the showing of interest, reflect its recognition of the difficulties facing petitioners in the construction industry in determining voter eligibility under the Daniel/Steiny formula. There, the Board stated:

The Regional Director correctly found that to base the showing-of-interest requirement on the number of all employees eligible under the Steiny/Daniel formula would place an almost impossible burden on petitioners in the construction industry [footnote omitted], as the petitioners would have to track down individuals who may have worked for a construction industry employer within the prior 2 years to determine if the employees worked for a sufficient period of time to be eligible to vote under the formula, and then to procure authorization cards from such employees. These individuals most likely would be unknown to the petitioner, or to current employees, and may have moved to distant locales. We agree with the Regional Director that given the unique nature of the construction industry, tracking down such individuals would be a difficult and burdensome task. As we have stated previously, the construction industry is characterized by intermittent employment of an

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<sup>11</sup> Norris-Thermador Corp., 119 NLRB 1301 (1958).

unpredictable duration and often involving several employers [footnote omitted].

Of course, the same impediments restrain a petitioner in gathering information to make judgments on the supervisory status of voters. It was particularly difficult in the instant case since less than 5 percent of the eligible voters were working at the time of the election campaign. Under these circumstances, absence affirmative evidence to support the Employer's assertions, I cannot conclude that the Petitioner made its challenges to the four voters in bad faith. Moreover, I note that the Employer again fails to articulate how challenges made to mail ballots outside the presence of any voters could constitute objectionable conduct.

Based on the foregoing, I find that Employer Objection No. 5 is frivolous and recommend that it be overruled.

#### **Objection No. 6**

In its sixth objection the Employer contends that the Petitioner attempted to "pack the unit" by requesting that ballots be sent to ten individuals who had been employed by the Employer. The Employer contends that these ten individuals, all of whom had worked for the Employer, were not eligible to vote because they quit, were terminated for cause, or did not work sufficient hours to qualify to vote under Daniel/Steiny.

A review of the evidence provided by the Employer reveals that each of the individuals named<sup>12</sup> had been employed by the Employer at its Mt. Storm jobsite at various times during the years 2001 through 2003. The evidence relied upon by the Employer includes time records, separation forms and unemployment compensation records. All of these documents were in the possession of the Employer. None were in the possession of the Petitioner. That some of these employees may have quit or been terminated for cause could not have easily been confirmed by the Petitioner. It is clear from the evidence provided by the Employer that the Employer at its Mt. Storm jobsite had employed these individuals at some point.

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<sup>12</sup> The ten named individuals are Shawn Adamy, Billy Heckler, Amy Paugh, John Paugh, Jr., Ethan Alt, Brian Rhodes, Carla Robinette, Edward Landon, Rex Liller and Joyce Ruble.

Once again the Employer failed to posit a theory on how providing ballots to ten former employees impacted the election itself.

Under these circumstances, particularly in the context of the construction industry as discussed in Objection No. 5, it cannot be concluded that, the Petitioner was aware that these individuals clearly were not eligible to vote, or that it engaged in objectionable conduct by seeking to have ballots sent to individuals who had been employed by the Employer at Mt. Storm. Accordingly, I find that Objection No. 6 is without merit and recommend that it be overruled.

### **Objection No. 7**

The Employer contends that the Region engaged in objectionable conduct by failing to timely submit Notices of Election to the Employer so that they could be posted in a timely fashion.

The Stipulated Election Agreement provides that mail ballots were mailed to voters on Monday, March 1. Pursuant to Rule 103.20 of the Board's Rules and Regulations, the Employer was required to post the Notices at the Mt. Storm jobsite on or before Wednesday, February 25, at 12:01 a.m., three full working days prior to the mailing of the ballots to voters. The Notices were mailed from the Regional Office in Pittsburgh, Pennsylvania, to the Employer's headquarters on February 18, one week prior to the required posting date. However, according to the Employer, it did not receive the Notices at its Richmond, Virginia office until about 10:00 a.m. on February 24.

In his affidavit, Ronald Rost testified that upon receipt of the notices he determined that he could not deliver the notices to Mt. Storm in time for them to be timely posted. His reason for this was that Mt. Storm was a five-hour drive from his office in Richmond, there was a snowstorm that would delay the trip further, and he believed that a drive to Mt. Storm was a safety hazard that he did not want to risk. Thus, he faxed a copy of the notice to his attorney.

Upon receipt of the fax, the Employer's attorney contacted the Regional Office at which time several options were discussed with Regional Office representatives. The Employer

rejected a suggestion that an Employer representative meet a Board agent half way between Mt. Storm and the Regional Office so that a Board agent could hand deliver the Notices to the Employer representative who could then take them to Mt. Storm in time to be posted on or before 12:01 a.m. on February 25. Instead, The Employer's attorney advised that the Employer would post a faxed copy of the Notice at Mt. Storm prior to 12:01 a.m. on February 25. The Region's representative responded that the posting of a fax copy of the Notice may not satisfy the requirements of Rule 103.20 and could lead to objections being filed by the Petitioner if it lost the election. Thereafter, Rost faxed the printed Notice of Election to Mt. Storm where the faxed copy was posted on February 24, and forwarded the printed copy of the Notice by Federal Express to Mt. Storm where it was received and posted on February 25.

The Employer contends that the Notices were posted in an untimely manner because the Regional Office sent the notices to the Employer's headquarters rather than to its jobsite. However, the Employer concedes that it at no time directed the Regional Office to mail the notices to the Mt. Storm jobsite, provided the Regional Office with a mailing address for the jobsite, or gave the Regional Office the name of any Employer representative at the jobsite to whom to direct the notices.

The Board requirements in this regard are set forth in Section 103.20 of the Board's Rules and Regulations states in pertinent part:

- Posting of election notices.* – (a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.
- (b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.
- (c) A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional office at least 5 working

days prior to the commencement of the election that it has not received copies of the election notice.<sup>13</sup>

The Regional Office provided the Employer a copy of the above-described rule by letter dated January 26, when the Petition was served and again on February 9, in its letter notifying the parties and the Employer's counsel that the Stipulated Election Agreement had been approved.

The Employer concedes that it did not inform this office until February 24, of the delay in the Employer's receipt of the election notices. Since the Employer failed to inform this office of the delay in the receipt of the Notices in a timely manner, specifically prior to 12:01 a.m. on Monday February 23, the Employer is, pursuant to Rule 103.20 "conclusively deemed to have received copies for posting" and is thus estopped from objecting to the nonposting. Accordingly I find that Objection No. 7 is without merit and recommend that it be overruled.

#### **SUMMARY**

Based on the foregoing and accepting the facts in the light most favorable to the Employer's position, I must conclude that, taken individually or collectively, the disputed conduct alleged in Objections Nos. 1 and 3-7 did not interfere with employee rights under the Act or with the election. Accordingly, I recommend to the Board for all the reasons set forth above that the Employers Objections be overruled in their entirety.

Dated at Pittsburgh, Pennsylvania, this 27th day of April 2004.

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Gerald Kobell  
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD  
1000 Liberty Avenue, Room 1501  
Pittsburgh, Pennsylvania 15222

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<sup>13</sup> Pursuant to Rule 103.20, the Employer was obligated to inform the Regional Office of the delay in receipt of the Notices of Election no later than 12:01 a.m. on Monday, February 23, 2004. Club Demonstration Service, 317 NLRB 349 (1995).