

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

PROFESSIONAL)	
TRANSPORTATION, INC. (PTI))	
)	
and)	CASE NO. 32-RC-259368
)	
UNITED ELECTRICAL, RADIO,)	
AND MACHINE WORKERS OF AMERICA)	

**REQUEST FOR BOARD REVIEW OF
DECISION AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.67 of the National Labor Relation Board’s Rules and Regulations, employer Professional Transportation, Inc. (hereinafter “PTI”) requests that the National Labor Relations Board (hereinafter the “Board”) review and promptly reverse the July 9, 2020 Decision and Certification of Representative issued by the Regional Director of Region 32 in Case No. 32-RC-259368.

I. INTRODUCTION

This Request for Review follows a mail ballot election tainted by the misconduct of the United Electrical, Radio, and Machine Workers of America (hereinafter the “Union”). During the course of its election campaign, the Union, by its representatives and agents, improperly solicited and offered to collect mail ballots from several, if not many, PTI employees. The Union called PTI employees asking if they needed help completing their ballots and offered to collect and mail these ballots for the employees. In doing so, the Union interfered with PTI employees’ free choice in the election and cast doubt on the integrity of the election.

II. SUMMARY OF ARGUMENT

PTI requests review of the Regional Director’s Decision Overruling Objections and Certification of Representative on grounds set forth in Section 102.67(d) of the Board’s Rules

and Regulations. The Regional Director's decision and the Union's misconduct in a contested mail ballot election raise substantial questions of policy. (Rule 102.67(d)(1)). As set forth below, the Regional Director's decision denying PTI an evidentiary hearing and finding no objectionable conduct by the Union prejudices PTI and its employees. (Rule 102.67(d)(2)). The Regional Director's overruling of PTI's objections thus resulted in prejudicial error. (Rule 102.67(d)(3)). Finally, compelling reasons for reconsideration of the Board's mail ballot election rules and policies are present. (Rule 102.67(d)(4)).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. PTI's West Coast Expansion

PTI provides crew transportation services in the railroad, mining, and energy industries at locations across the United States. For example, PTI dispatches drivers to pick up crews at a railyard and transport that crew to a hotel for rest or deliver a rail crew from a location in the field to a railyard.

On or about March 5, 2020, PTI took over operations at railyards located in California and Nevada from Hallcon Corporation (hereinafter "Hallcon"), another railroad crew transportation company. These locations include, but are not limited to, Bakersfield, Dunsmuir, Fresno, Lathrop, Oakland, Portola, Roseville, San Jose, and Stockton, California, and Sparks and Winnemucca, Nevada (hereinafter collectively referred to as the "Locations").

Prior to PTI's expansion to the West Coast, Hallcon employees at the Locations were represented by the Union. Hallcon had previously entered into a national agreement with various UE Locals, including the Union. Although the Union represented Hallcon employees at the Locations, PTI had previously entered into its own collective bargaining agreement with United Professional & Service Employees Union Local 1222 (hereinafter "UPSEU"). However, to date, the UPSEU has not expressed a desire to represent employees at the Locations.

B. Stipulated Election Agreement Between PTI and the Union

On April 21, 2020, the Union filed a petition for election at the Locations, designated as Case No. 32-RC-259368. On April 28, 2020, PTI and the Union entered into a stipulated election agreement. Under the stipulated election agreement's terms, the election was to be held by mail ballot. Region 32 mailed ballots to PTI employees on May 15, 2020. PTI employees were then to complete and mail back their ballots to be received by the Region 32 offices by close of business on June 5, 2020. (See attached Exhibit 1, April 28, 2020 Stipulated Election Agreement).

C. The Union's Unwelcome Solicitation and Attempted Collection of Ballots

After the Board mailed ballots on May 15, the Union began to improperly solicit and offer to collect mail ballots from several, if not many, PTI employees. (See attached Exhibit 2, PTI's Objections to Union Conduct Affecting Election, p. 1). For example, over the course of the election campaign, Lisa Madrid French (hereinafter "Madrid French"), a PTI driver at the Roseville, California, location, received multiple phone calls and voicemails from Union representatives. (See attached Exhibit 3, PTI's Written Offer of Proof Supporting Objections to Union Conduct Affecting Election, p. 1).

During the course of the election, Madrid French received a call and voicemail from an Anna Ridge with the Union asking if she had received her ballot yet and asking her to call her back. (See Exhibit A attached to Exhibit 3). Madrid French received another voicemail from a "Missy" [last name unknown] with the Union wanting to know if she had received her ballot and whether she needed any help filling it out or returning it to the Board. (See Exhibit B attached to Exhibit 3). Finally, Madrid French also received unsolicited text message from Union representative Anna Ridge asking if she still planned to vote for the Union. (See Exhibit C

attached to Exhibit 3).

Joseph Walling (hereinafter “Walling”), a PTI driver at the Sparks, Nevada location, also received calls from a Union representative requesting to help Walling complete his ballot and offering to collect and return the ballot for him. (See Exhibit 2, p. 1). This Union representative told Walling that the ballots were confusing to fill out and asked Walling to call him so he could walk him through filling out the ballot. (See Exhibit D attached to Exhibit 3). Walling reported this conduct to PTI branch manager Brian Mudd (hereinafter “Mudd”) who documented this conversation. (See Exhibit D attached to Exhibit 3). The scope of the Union’s solicitation and possible collection of ballots likely extended beyond these two employees who came forward to PTI to voice their concern with the Union’s conduct but could not be definitively confirmed, as there was no evidentiary hearing conducted on this issue.

D. The Vote Tally and PTI’s Objections

On June 10, 2020, the Region opened the mail ballots and tallied the votes via Facetime. Of the 113 eligible voters, the tally was 42 in favor of the Union and 27 against, with 5 challenged ballots. (See attached Exhibit 4, NLRB Tally of Ballots). On June 16, 2020, PTI timely filed its Objections to Union Conduct Affecting Election, which contained two objections alleging (1) improper solicitation and collection of ballots casting doubt on the integrity of the election process and (2) the Union engaging in coercive tactics to unduly influence employee votes in their election and impair their freedom of choice under the National Labor Relations Act (the “Act”). Simultaneously therewith, PTI filed its Written Offer of Proof Supporting Objections to Union Conduct Affecting Election on June 16, 2020.

On July 9, 2020, the Regional Director issued her Decision Overruling Objections and Certification of Representative. (See attached Exhibit 5, Regional Director’s Decision Overruling Objections and Certification of Representative). The Regional Director’s Decision overruled

both of PTI's objections without ordering an evidentiary hearing.

PTI now requests that the Board review and overturn the Region's Decision Overruling Objections and Certification of Election.¹

IV. SUMMARY OF EVIDENCE PRESENTED

Because the Regional Director denied an evidentiary hearing at which it anticipated taking additional direct testimony from employees regarding the Union's misconduct, PTI is limited to evidence included in its Objections and Written Offer of Proof. PTI provided with its Written Offer of Proof transcriptions of voicemails left with Roseville driver Madrid French from specifically named Union representatives. These transcriptions show that Union representatives solicited and attempted to collect Madrid French's ballot, including asking Madrid French if she needed "help filling it out" or "help getting it sent back one way or another." (See Exhibit 3, p.1 and Exhibits A and B attached to Exhibit 3). An additional text message conversation with Anna, a Union representative, asking Madrid French who she intended to vote for after Madrid French had asked her not to reach out to her anymore, was also provided as part of PTI's Written Offer of Proof. (See Exhibit C attached to Exhibit 3). Had an evidentiary hearing been ordered, Madrid French would have testified and provided additional context surrounding these messages. (See Exhibit 2, p.1).

Walling, a driver at the Sparks location, also received calls and voicemails from a Union representative requesting that Walling call him back to discuss filing out the ballot and offering to collect and return the ballot for him. (See Exhibit 2, p.1). PTI branch manager Brian Mudd, who received Walling's complaint regarding the calls he had been receiving from Union representatives, drafted a summary of his conversation with Walling. (See Exhibit D attached to

¹ PTI is only contesting the Regional Director's decision to overrule its first objection regarding the Union's improper solicitation and collection of mail ballots.

Exhibit 3). Had an evidentiary hearing been ordered, Walling would have testified and provided additional information on the calls and messages from the Union. (See Exhibit 3, p.1).

V. ARGUMENT

The Region's decisions related to the mail ballot elections and the Union's misconduct provide a basis for Board review under Rule 102.67(d).

A. Regional Director's Failure to Order an Evidentiary Hearing is in Error and Prejudices PTI and its Employees

The Regional Director erred in declining to order a hearing on PTI's first objection regarding the solicitation and collection of mail ballots. The Regional Director's Decision contended that an evidentiary hearing is called for only when a party makes a prima facie showing "of substantial and material fact" that "must point to specific events and specific people." (See Exhibit 5, p.4 (citations omitted)).

However, PTI's Objections and Written Offer of Proof do, in fact, point to specific events and specific people showing substantial and material issues of fact that could warrant setting aside the election. PTI's Written Offer of Proof specifically identified two employees, Madrid French and Walling, who would have provided direct testimony of the Union's misconduct as alleged in PTI's first objection. Madrid French would have testified regarding the calls and text messages she received from Union representatives, including an Anna Ridge and a "Missy" [last name unknown], who asked if she needed help "filling it out" or "getting it sent back one way or another." (See Exhibit 3, p. 1, and Exhibits A, B, and C attached to Exhibit 3).

Walling would have testified regarding phone calls he received from the Union requesting he call them back so they could walk him through the ballot. (See Exhibit 3, p.1, and Exhibit D attached to Exhibit 3). The Regional Director failed to set an evidentiary hearing despite PTI pointing to specific witnesses who would discuss specific events and persons related

to the Union's misconduct regarding solicitation and potential collection of mail ballots, objectionable behavior that could potentially warrant setting aside the election.

Accordingly, failure to set an evidentiary hearing on PTI's objection was in error. The Board's rules do not require that an objecting party offer evidence that includes "signed witness statements or affidavits." *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994). The Board has previously found that an employer who "provided the names of two employee witnesses who . . . would substantiate the[] allegations" to be "critical" in the analysis of determining whether to order an evidentiary hearing. *The Holladay Corp.*, 266 NLRB 621, 622 (1983). On review, "[T]he question before the Board is not whether the objecting party can show that it will ultimately be able to prove its case." *Trimm Assocs. v. NLRB*, 351 F.3d 99, 106 (3rd Cir. 2003). The appropriate inquiry for ordering an evidentiary hearing instead is "only whether there has been a sufficient showing, given the inherent constraints on discovery, to raise a substantial and material issue of fact that, if resolved favorably to the objecting party, would warrant setting aside the election." *Id.*

Consistent with this standard, PTI's Written Offer of Proof specifically identified two witnesses, Madrid French and Walling, who would speak on the issue raised in PTI's first objection regarding contact from multiple Union representatives, including an Anna Ridge and "Missy," who solicited and offered to collect mail ballots from employees. Their testimony could directly raise an issue of substantial and material fact regarding the alleged solicitation and potential collection of mail ballots and could warrant setting aside the election. By denying PTI an evidentiary hearing on its first objection, the Regional Director prematurely determined that PTI would not ultimately be able to prove its case without first taking testimony from the individuals offered by PTI.

Because PTI identified witnesses who would directly testify regarding the Union's

alleged misconduct, and named those individuals specifically, the Regional Director should have ordered an evidentiary hearing on PTI's first objection. The Regional Director's failure to do so has prejudiced PTI and its employees, as the denial to hear testimony regarding the scope of the Union's misconduct and its potential impact on the integrity of the mail ballot election calls into question the legitimacy of the election results. PTI respectfully requests that the Board grant PTI's request for review and order an evidentiary hearing in order to ensure that employees' rights to an election held under laboratory conditions are protected.

B. There Are Compelling Reasons for Reconsideration of Board Rules and Policy Regarding Solicitation of Mail Ballots Over Telephone

In addition to its assertion that the Regional Director erred in denying an evidentiary hearing, PTI also asserts that this case presents compelling reasons for the Board to reconsider its rules and policy regarding solicitation of mail ballots over telephone. As the Regional Director noted in her Decision Overruling Objections and Certification of Representative, the Board in its decision *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), split on the issue of whether solicitation of mail ballots by telephone alone is objectionable. (Exhibit 5, p. 7). The Regional Director's Decision explicitly noted that the Board may wish to revisit the issue of mail ballot solicitation by telephone. (Exhibit 5, p.7).

In light of the increased dependency on phones in American society and the ubiquitous use of videoconferencing software on personal phones since the Board issued its decision in *Fessler & Bowman* 16 years ago, as well as the urgent need to clarify mail ballot procedures due to the increased number of mail ballot elections ordered as a result of the ongoing COVID 19 pandemic, PTI believes a compelling reason exists for the Board to now revisit the issue of solicitation of mail ballots over the phone. PTI respectfully requests the Board consider policy issues regarding restrictions on party contact with voting employees after a Region has mailed

ballots and additional procedures to ensure employee confidence in conducting mail ballot elections, including solicitation, collection, and handling of envelopes, in order to restore faith in the integrity of mail ballot elections.

C. The Region’s Ruling and the Union’s Conduct Raise Substantial Policy Issues

Ensuring the integrity of elections is of critical importance in furthering the Act’s stated purpose of protecting “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” (29 U.S.C. § 151). The Act requires that employees be permitted to exercise their Section 7 rights to determine, if in an election held under laboratory conditions, whether they wish to be represented by a union. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

The Union’s solicitation and attempted collection of mail ballots risked the ability for PTI’s employees to freely exercise their rights under laboratory conditions provided under the Act. This conduct raises several important policy issues regarding mail ballot elections, including:

- (1) Whether Board procedure for mail ballot elections can sufficiently prevent misconduct and ensure employees’ rights to freely participate in an election;
- (2) Whether, and to what extent, the Board should allow representatives of either party to make unwelcome phone calls soliciting employees and attempting collection of ballots, or find such actions to constitute objectionable conduct;
- (3) Whether the Board should allow employees to complete their votes while being instructed by a party over the phone; and
- (4) Whether the Board and Regional Directors should disregard complaints from voting employees of Union misconduct.

Because these critical issues are implemented in this matter, PTI respectfully requests that the Board grant review of the Regional Director's decision so that these policies may be examined.

D. The Regional Director's Rulings Have Resulted in Prejudicial Error

PTI raised its objections upon learning of its employees' complaints about the Union's solicitation and attempts to collect mail ballots following the tally of ballots. However, the Regional Director denied PTI's objections without calling for an evidentiary hearing. By not ordering an evidentiary hearing and dismissing PTI's objections, the scope of the Union's misconduct is unknown and the legitimacy of the Union's certification cast in doubt. As a result, PTI and its employees have been prejudiced by the Regional Director's ultimate decision certifying the Union, despite PTI's Offer of Proof that the Union attempted to solicit and collect mail ballots.

VI. CONCLUSION

The grounds discussed above individually and collectively support Board review of this matter under Section 102.67(d) of the Board's Rules and Regulations. PTI respectfully requests that the Board review and overturn the Regional Director's Decision and Certification of Representative and order an evidentiary hearing on PTI's first objection.

Respectfully submitted,

KAHN, DEES, DONOVAN & KAHN, LLP

/s/ Jake R. Fulcher

Jake R. Fulcher

jfulcher@kddk.com

/s/ Nicholas J. Golding

Nicholas J. Golding

ngolding@kddk.com

CERTIFICATE OF SERVICE

The undersigned hereby states that on the 23rd day of July 2020, I served the above Request for Board Review of Decision and Certification of Representative and its Exhibits by the NLRB's E-Filing system on its website: <http://www.nlr.gov>. The same was also served the same day by electronic mail on the Regional Director of Region 32 Valerie Hardy-Mahoney at Valeri.Hardy-Mahoney@nlrb.gov, Nicholas Tsiliacos at Nicholas.Tsiliacos@nlrb.gov, and the United Electrical, Radio, and Machine Workers of America on attorney Michael Healey at mhealey@unionlawyers.net.

/s/ Jake R. Fulcher

EXHIBIT 1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
STIPULATED ELECTION AGREEMENT

Professional Transportation, Inc.

Case 32-RC-259368

The parties **AGREE AS FOLLOWS:**

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

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

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

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

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

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

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

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

Initials: _____

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

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

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

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

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

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

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

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

Initials: _____

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

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

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

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

PROFESSIONAL TRANSPORTATION, INC.

(Employer)

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

Print Name: _____

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

(Petitioner)

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

Print Name: _____

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

Date approved: 4/28/20

/s/ Valerie Hardy-Mahoney / hv
Regional Director, Region 32
National Labor Relations Board

EXHIBIT 2

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

PROFESSIONAL)	
TRANSPORTATION, INC. (PTI))	
)	
and)	CASE NO. 32-RC-259368
)	
UNITED ELECTRICAL, RADIO,)	
AND MACHINE WORKERS OF AMERICA)	

OBJECTIONS TO UNION CONDUCT AFFECTING ELECTION

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Professional Transportation, Inc. ("PTI"), by its counsel, files the following objections to conduct affecting the results of the mail ballot election held in the above-captioned matter from May 15 through June 5, 2020:

Objection 1: During the course of its election campaign, United Electrical, Radio, and Machine Workers of America (the "Union"), by its representatives and agents, improperly solicited and offered to collect mail ballots from several, if not many, PTI employees. The Union called PTI employees asking if they needed help completing their ballots and offered to collect and mail these ballots for the employees. Collection of mail ballots by a party "casts doubt on the integrity of the election process and undermines election secrecy." *Fessler & Bowman*, 341 NLRB 932, 934 (2004). The Board held in *Fessler* that "where a party collects or otherwise handles voters' mail ballots, that conduct is objectionable and may be a basis for setting aside the election." *Id.* The Board in *Fessler* further stated its disapproval of solicitation of mail ballots. *Id.*

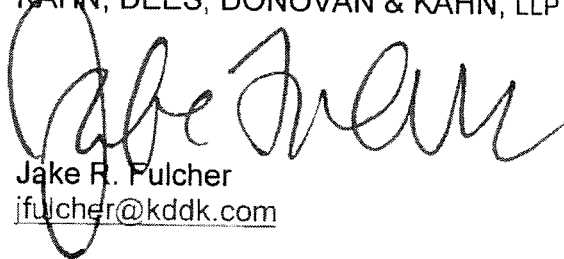
Objection 2: During the course of its election campaign, the Union, by its representatives and agents, engaged in coercive tactics and made numerous

misrepresentations to employees in an effort to unduly influence their votes in the election and impair their freedom of choice afforded to them by the National Labor Relations Act (the "Act").

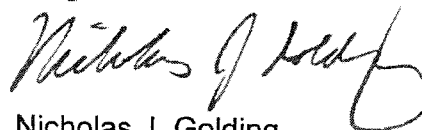
WHEREFORE, the Regional Director should set aside the results of the election and direct a new election to be held in which the eligible voters can decide, in an atmosphere free from improper conduct, whether they wish to be represented by the Union for purposes of collective bargaining.

Respectfully submitted,

KAHN, DEES, DONOVAN & KAHN, LLP



Jake R. Fulcher
jfulcher@kddk.com



Nicholas J. Golding
ngolding@kddk.com

#471190

CERTIFICATE OF SERVICE

The undersigned hereby states that on the 16th day of June 2020, I served the above Objections to Union Conduct Affecting Election upon the Regional Director, National Labor Relations Board – Region 32, by the NLRB E-Filing system. The same was also served the same day by electronic mail to United Electrical, Radio, and Machine Workers of America on attorney Michael Healey at mhealey@unionlawyers.net.

/s/ Jake R. Fulcher

EXHIBIT 3

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

PROFESSIONAL)
TRANSPORTATION, INC. (PTI))
)
and) CASE NO. 32-RC-259368
)
UNITED ELECTRICAL, RADIO,)
AND MACHINE WORKERS OF AMERICA)

**WRITTEN OFFER OF PROOF SUPPORTING OBJECTIONS TO UNION CONDUCT
AFFECTING ELECTION**

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Professional Transportation, Inc. ("PTI") files the following written offer of proof in support of its objections to conduct affecting the results of the mail ballot election held in the above-captioned matter from May 15 through June 5, 2020:

Objection 1 Witnesses

1. Lisa Madrid French ("Madrid French"), PTI driver at Roseville, California location. Madrid French will testify about multiple calls and voicemails she received from United Electrical, Radio, and Machine Workers of America (the "Union") representatives offering to help her complete her mail ballot and soliciting the collection of her ballot, asking if she needed "help filling it out" or "help getting it sent back one way or the other." Transcriptions of two Union voicemails are attached hereto as Exhibits A and B. Text messages sent by the Union asking if Madrid French intended to vote for the Union are attached hereto as Exhibit C.

2. Joseph Walling ("Walling"), PTI driver at Sparks, Nevada location. Walling will testify about calls he received from a Union representative requesting to help Walling complete his mail ballot and offering to collect and return the ballot for him.

3. Brian Mudd ("Mudd"), PTI branch manager. Mudd received Walling's complaint that the Union had contacted him to solicit and collect his mail ballot. Mudd will testify to his conversation with Walling and the Union's activity. A copy of Mudd's notes regarding his conversation with Walling is attached hereto as Exhibit D.

Objection 2 Witnesses

1. Brian Mudd. Mudd will testify that during the election campaign he received complaints from a PTI driver who was mailed a stack of flyers to distribute to other drivers from Union representatives. These flyers contained misrepresentations to employees that the Union can guarantee yearly wage increases if elected. These misrepresentations were made in an effort to unduly influence their votes in the election and impair their freedom of choice afforded to them by the National Labor Relations Act (the "Act"). Copies of this flyer are attached hereto as Exhibit E.

2. Stephen Kessler ("Kessler"), PTI Chief Operating Officer. Kessler will testify regarding the complaints he received from PTI employees regarding the Union's propaganda and misrepresentations.

WHEREFORE, the Regional Director should find the written offer of proof sufficient to set aside the results of the election and direct a new election to be held in which the eligible voters can decide, in an atmosphere free from improper conduct, whether they wish to be represented by the Union for purposes of collective bargaining.

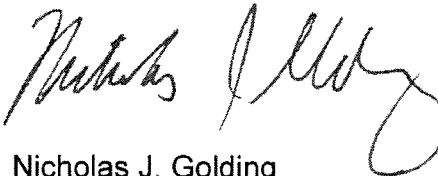
Respectfully submitted,

KAHN, DEES, DONOVAN & KAHN, LLP



Jake R. Fulcher

jfulcher@kddk.com



Nicholas J. Golding

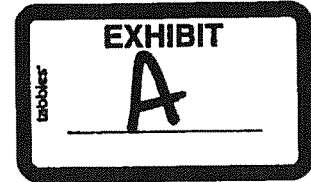
ngolding@kddk.com

CERTIFICATE OF SERVICE

The undersigned hereby states that on the 16th day of June 2020, I served the above Written Offer of Proof upon the Regional Director, National Labor Relations Board – Region 32, by the NLRB E-Filing system.

/s/ Jake R. Fulcher

Hi Lisa, it's Ana Ridge from the Union. I'm just calling to see if you have received your ballot yet from the labor board. They should be coming today or tomorrow. So, give me a call back and let me know if you have. I hope you're doing well and talk to you soon.



Hi Lisa, this is Missy. I'm from the – I'm from the Union. I talked to you in the yard a couple times and I just wanted to see if you got, if you guys got your ballot today. If you can give me a call back. My number is 916-613-5991. And if need help filling it out, not filling it out, but if you need help on getting it sent back one way or the other, I can help you with that. Just because it's so complicated. But anyway, again this is Missy and I hope to talk to you soon. Thank you. Have a good day hun, bye bye.



5:16 Sprint

VOLTE 87%

< +1802377...



Add to conta...

Block number

Wednesday, May 20, 2020

9:56 PM

Got my ballot today. No need to respond. Just an fyi.



Great! Glad you got it. Are you still planning to vote for the union?

10:14 PM

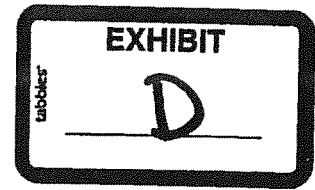
Thursday, May 21, 2020

1:00 PM

Hi Anna. All the calls has resulted in I am being forced to be rude and blunt, which is not my usual MO. Dont contact me until the union has a contract with PTI. Next I will be forced to block your number. Have a nice day and good luck to you.



From: Sparks.nv <Sparks.nv@unitedevv.com>
Sent: Wednesday, May 20, 2020 6:52 PM
To: Steve Kessler <Steve.Kessler@unitedevv.com>
Cc: Sam Ray <sam.ray@unitedevv.com>
Subject: Union



Steve,

I don't know that I have Jake's email so could you please forward this to him.

Driver Joseph Walling called me today asking about the vote. He asked me if it was secret ballot. I advised him yes it is and that he doesn't have to tell anyone if and or how he voted. He said he got a call for a guy from the union telling him that the ballots are out and are confusing to fill out and wanted Joseph to call him when he gets it so they could walk him thru filling out the ballot. I inform Joseph that No one can fill out the form for him. No one can tell him how to do it and that no one else can pick it up and or mail it for him. I told him that the instruction for filling it out are in the letter from the NLRB and in the email that Steve sent out. He told me that is what he thought and he is a little upset at the union for this tactic. He said he was thinking about calling the NLRB. I told him that he certainly can do this if he chooses.

I do not know if he did but if he does and shares it with me ill let you guys know.

Also I just 5 minutes ago received another call from a different driver names Jerry Galloway. He stated that the union rep promised him that they will get a crew portal board for the drivers to view since they can't see it now. I again explained to him that they can't guarantee any of this to him and that all PTI has to do is to sit down in good faith and talk to them. He said he knows that and that the union rep wouldn't give him anything in writing and kept telling him that it will be in the contract.

If I hear more I will keep you guys informed.

Thanks.

Brian Mudd
Branch Manager

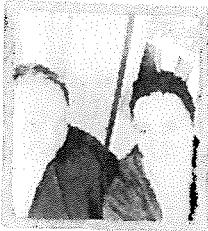
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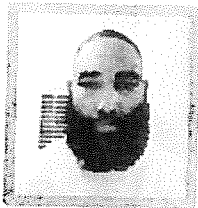


PTI Drivers Speak Out: We're Voting UE Yes!



Drivers Debbie Hight and Wanda Green
I voted for UE because I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one.

Debbie Hight and Wanda Green, Drivers, Roseville, CA



Rodolfo W. Driver
I voted for UE because I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one.

Rodolfo W. Driver, Driver, Oakland, CA



Diana Chambliss
I voted for UE because I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one.

Diana Chambliss, Driver, Roseville, CA



Bill Koon
I voted for UE because I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one.

Bill Koon, Driver, Roseville, CA



Ed Stephenson
I voted for UE because I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one. I have been a PTI driver for 10 years and I know the company is a good one.

Ed Stephenson, Driver, Sparks, NV



• ueunion.org • 800-377-9375 • pt@ueunion.org •

Apr 20 10:00



It's Your Right To Organize... It's the Law!

It's Your Right to:

- **Participate**
in meetings to discuss joining the union
- **Distribute,**
hand and discuss union literature in your
work areas during breaks and non-duty time
- **Wear**
union insignia such as buttons or hats to
show support for the union
- **Circulate**
and sign petitions or join together in other
activities to protest unfair treatment or
demand improvements in wages, hours and
working conditions
- **Organize**
other employees to support the union, sign
union cards, file grievances or speak up for
union recognition
- **Sign**
a union membership card and vote for the
union

It's Against the Law for Your Employer to:

- **Ask**
your opinion of the union
- **Fine**
or threaten to fine employees
because they support the union
- **Promise**
employees a pay raise, promotion,
benefit or special treatment if they oppose the union
- **Favor**
any employees who don't support the union over
those that do in promotions, transfers, enforce-
ment of rules or any other company action
- **Close**
or threaten to close your place of
employment or take away your rights or
privileges in order to discourage union
activity

The National Labor Relations Act Says:

"Employees shall have the right to self-organization, to join or to join together for the purpose of representing their interests in collective bargaining through representatives of their own choosing." - Section 7

"It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." - Section 8(a)

Your best protection against violations of these rights is unity with your co-workers.

If you think that your rights have been violated,
contact the organizing committee immediately.

EXHIBIT 4

FORM NLRB-760
(7-10)

UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

Date Filed

04/21/2020

Case No. 32-RC-259368

Date Issued 06/10/2020

City Oakland

State CA

Type of Election:
(Check one:)

☒ Stipulation

☐ Board Direction

☐ Consent Agreement

☐ RD Direction
Incumbent Union (Code)

(If applicable check
either or both:)

☐ 8(b) (7)

☒ Mail Ballot

PROFESSIONAL TRANSPORTATION, INC.

Employer

and

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

Petitioner

TALLY OF BALLOTS

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

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

For the Regional Director

[Signature]

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

For Professional Transportation, Inc.

Steve Kessler, COO verbal authorization via FaceTime

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

Isi Sean Fulkerson verbal authorization via FaceTime

For

EXHIBIT 5

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

PROFESSIONAL TRANSPORTATION, INC.

Employer

and

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

Petitioner

Case 32-RC-259368

REGIONAL DIRECTOR'S DECISION OVERRULING OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Based on a petition filed on April 21, 2020¹ and pursuant to the parties' Stipulated Election Agreement, an election was conducted by mail from May 15 to June 5 to determine whether a unit of driver employees of Professional Transportation, Inc. (the Employer) wish to be represented for purposes of collective bargaining by United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077 (Petitioner). That voting unit consists of:

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

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

THE EMPLOYER'S OBJECTIONS

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

¹ All dates refer to calendar year 2020.

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

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

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

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

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

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

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

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

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

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

Objection 1:

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

Offer of Proof:

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

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

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

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

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

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

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

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

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

Regional Director's Decision Overruling Objections and
Certification of Representative

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

Analysis:

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

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

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

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

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

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

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

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

Objection 2:

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

Analysis:

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

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

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

Based on the above, I overrule Objection 2.

CONCLUSION AND ORDER

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

CERTIFICATION OF REPRESENTATIVE

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

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

RIGHT TO REQUEST REVIEW

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

Regional Director's Decision Overruling Objections and
Certification of Representative

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

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

Dated: July 9, 2020



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