

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

Savage Services Corporation

Employer,
and

Case No. 21-RD-264617

Nelson Medina

Petitioner,
and

**Wholesale Delivery Drivers, General
Truck Drivers, Chauffeurs, Sales, Industrial
and Allied Workers, Teamsters Local 848,
International Brotherhood of Teamsters**

Union.

**PETITIONER'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION
DISPOSING OF OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.69 of the National Labor Relations Board's ("Board") Rules and Regulations, Petitioner Nelson Medina ("Petitioner") submits this request for review of the Regional Director's Decision Disposing of Objections and Certification of Representative for the Board's consideration.

The Board should grant this request for review and order a new, in-person election for the employees working for Savage Services Corporation ("Employer" or "Savage"). The Regional Director improperly relied on the Board's October 1, 2020 decision to deny Petitioner's request for review of the Regional Director's Decision and Direction of Election and erroneously denied Petitioner and the Employer a hearing to prove the serious flaws in the mail balloting process raised by their objections.

RELEVANT BACKGROUND

Petitioner filed his decertification petition on August 13, 2020. The parties stipulated to the election save for the method, and submitted written position statements on that issue. Petitioner and the Employer strenuously argued for a manual election.

Petitioner argued that, given the “essential worker” status of bargaining unit members, and the fact that they have, through adequate safety protocols, been able to work, in-person throughout the pandemic, a manual election would be most appropriate. (Ex. A). Additionally, Petitioner committed to taking any action that would contribute to making a manual election work in these circumstances. *Id.*

The Employer’s position statement provided further detail into how it would commit to the safety of its employees and the Board agent during a manual election. It agreed to abide by the safety guidelines in General Counsel Memorandum 20-10 (July 6, 2020) and committed to additional safety precautions to further mitigate any risks from COVID-19. (Ex. B).

Notwithstanding the Board’s general preference for manual elections, *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998), and the extraordinary measures the Employer was willing to take to ensure the safety of a manual election, on September 18, 2020, the Regional Director issued his Decision and Direction of Election, ordering a mail ballot election. (Ex. C). On September 22, 2020, Petitioner filed a request for review of this decision with the Board. (Ex. D). The Board denied Petitioner’s request for review on October 1, 2020. Order, *Savage Servs. Corp.*, Case No. 21-RD-264617 (Oct. 1, 2020). In its decision, the Board held that the Regional Director did not abuse his discretion in ordering the mail ballot election. *Id.* However, in its denial, the Board specifically took under consideration Petitioner’s argument that a mail ballot election could result in voter disenfranchisement and stated that, while the request for review

was dismissed at this stage of the proceeding, “[a]ny party is free to present evidence of any actual disenfranchisement of voters, if applicable, in post-election objections.” Order at n.1.

Pursuant to the Decision and Direction of Election, the Region mailed out ballots on October 2, 2020, with a ballot count on October 27, 2020 at 10:00am. The voter list contained 126 eligible voters. At the ballot count several challenges were raised. Additionally, the Union attorney had immediate access to the tracking numbers for two of the ballots originally deemed untimely. After the Union’s attorney provided evidence via the tracking numbers that the ballots had been delivered to the Region, those ballots were ultimately counted.

After the resolution of challenges, the vote tally was 57 for Union representation, 49 ballots against. The Petitioner and the Employer filed timely objections. On May 28, 2021, The Regional Director issued his Supplemental Decision Disposing of Objections and Certification of Representative. In his decision, the Regional Director overruled all of Employer’s and Petitioner’s objections without a hearing.

ARGUMENT

The Regional Director erred by failing to consider the valid objections raising actual evidence of voter disenfranchisement resulting from the Regional Director’s decision to conduct a mail ballot election, as the Board specifically contemplated in its Order (Employer Objections 1, 2, 3, 4, 5, 6; Petitioner Objection 1, hereinafter “disenfranchisement objections”). Additionally, should the Board order a hearing held on some or all of these objections, it should also order a hearing on the issue of ballot solicitation, because, if some of the disenfranchisement objections are found to have merit, the ballots with potential evidence of ballot solicitation could be determinative (Employer Objection 12, Petitioner Objection 5, hereinafter “ballot solicitation objections”).

A. The Regional Director erred in his decision to overrule the voter disenfranchisement objections without a hearing.

The voter disenfranchisement objections highlight significant issues with the mail ballot procedure in this case and the Regional Director erred by overruling these objections without a hearing. The Regional Director should have been particularly attuned to this evidence given the Petitioner's concerns in his position statement and Request for Review, as well as the Board's Order denying his request for review leaving open the ability of parties to object to the mail ballot election should they have actual evidence of voter disenfranchisement. Petitioner made it clear that he was concerned the timing of the mail ballot election—given the unprecedented numbers of U.S. Presidential Election mail ballots as well as the effect of the Covid-19 pandemic on the U.S. Postal Service—would result employees' votes being unduly delayed or lost in the mail, and therefore not counted.¹

Here, the Employer provided affidavits from twelve employees whose votes were not counted because of delays and failures of the post office and/or the Region. These employees—individuals who voted or intended to vote (not merely individuals who did not vote)—constitute nearly ten percent of the unit. *See* Employer Offer of Proof with Exhibits (Ex. E). Specifically, three employees never received a ballot from the Region (Ex. E at p. 3, Exs. 1–3); five employees averred they timely mailed their ballot but it was either received late by the Region or never received at all (Ex. E at p.3, Exs. 4–8); and five voters had voided ballots and did not have a meaningful opportunity to perfect their vote (Ex. E at p.3, Exs. 9–11). All of these employees intended to have their votes counted in the election and many took affirmative steps in an attempt to have their votes counted.

¹ This mail ballot election took place at the same time as California counties mailed out their U.S. Presidential election ballots and citizens were returning them. *See* General Election November 3, 2020, Cal. Sec. of State, <https://voterguide.sos.ca.gov/voter-info/vote-by-mail.htm>.

As Member Miscimarra succinctly stated in *Premier Utility Services*, 363 NLRB No. 159

(Apr. 5, 2016):

In my view, the Board's normal mail-balloting procedures suffered an unacceptable breakdown here in spite of everyone's reasonable efforts. Under our statute, questions concerning union representation are to be resolved based on the principle of majority support. I recognize that the Board has no responsibility to ensure votes are cast by each and every eligible voter. However, in the present circumstances, the rule favoring finality should give way in favor of allowing employees who reasonably attempted to exercise their rights under the Act to have a say in their representation.

Id. (Miscimarra, Member, dissenting). Here, the evidence will show that the timing of the mail ballot election during the pandemic and the U.S. Presidential election actually resulted in significant voter disenfranchisement. As Member Miscimarra stated, the Board should consider the present circumstances and allow employees who reasonably attempted to exercise their rights to have a say in their union representation.

Compounding all of these failures is the fact that, two weeks after the vote count, in *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board identified a standard for evaluating whether a mail ballot election is warranted due to COVID-19. In that case, the Board outlined six factors, stating if more than one is present, a mail ballot election could be appropriate. The six factors are: (1) the region is operating under mandatory telework status; (2) the 14-day trend in new confirmed cases is increasing or the 14-day positivity rate in the county is at least five percent; (3) the proposed manual election site cannot be established in such a manner to avoid violating applicable health orders relating to maximum gathering size; (4) the employer fails or refuses to commit to the standards in GC Memorandum 20-10; (5) there is a

current COVID-19 outbreak at the facility or the employer refuses to disclose its status; and (6) other similarly compelling considerations. *Id.*²

Applied here to the circumstances surrounding the October election would suggest the Regional Director erred in his direction of a mail ballot election: (1) at the time the Regional Director directed the election, all regional offices were operating on permissive, rather than mandatory telework status, *Aspirus Keweenaw*, 370 NLRB No. 45, at *7; (2) on September 10, 2020, the 14-day positivity rate was on the decline and was at four percent³; (3) in its position statement the Employer agreed to abide by all state and local health orders, *see* Ex. B; (4) the Employer similarly agreed to commit to, and exceed, the standards in GC Memorandum 20-10, *id.*; (5) the Employer agreed to commit to certification, *id.*; and (6) the Regional Director did not indicate any compelling circumstances that would require a mail ballot election, *see* Ex. C. Not a single one of the *Aspirus Keweenaw* factors was present at the time the Region ordered the election. Thus, had the test been applied to this case, a manual election would surely have been held.

In light of all of the circumstances, including actual evidence of significant disenfranchisement, the unprecedented burdens on the Postal Service in October 2020, and the fact that under *Aspirus Keweenaw* a manual election would have been appropriate, the Board should order a hearing on the voter disenfranchisement objections so Petitioner and the Employer can present evidence and cross-examine the evidence relied upon by the Regional Director to initially overrule the objections.

² If the Board determines a hearing is necessary, it should direct the Region to apply the *Aspirus Keweenaw* test to any new election it orders.

³ California death toll tops 14,000, but new coronavirus cases continue to decline, L.A. Times (Sept. 10, 2020), <https://www.latimes.com/california/story/2020-09-10/coronavirus-deaths-california>.

B. If the Board orders a hearing on the voter disenfranchisement objections, it should also allow parties to present evidence of ballot solicitation because that issue, combined with the disenfranchisement objections, could be outcome-determinative.

If the Board overturns the Regional Director's decision with respect to some or all of the voter disenfranchisement objections and orders a hearing, the Board should also overrule the Regional Director's decision on the ballot solicitation objections and allow the parties to present evidence surrounding those objections. "The solicitation of mail ballots casts doubt on the integrity of the election and the secrecy of employees' ballots." *Prof. Transp. Inc.*, 370 NLRB No. 132, slip op. at 3 (June 9, 2021).

At the ballot count, the Union's attorney had, on hand, the UPS tracking numbers of two ballots. This circumstance is highly suspect and creates an inference that the Union was involved in or assisted with the mailing of those two ballots. The Regional Director summarily dismissed these concerns without a hearing, stating that the UPS delivery envelope indicated that the ballots were sent by the employees. Without a chance to see the envelope or examine the employees involved, it is impossible to determine whether this statement by the Region is accurate. Petitioner and the Employer should have the chance to prove their objection at a hearing.

In *Professional Transportation*, the Board held that mail ballot solicitation is objectionable conduct, but "such solicitation will be a basis for setting aside the election only where the evidence shows that a determinative number of voters were affected." *Id.* In this election, if the Board orders a hearing on the voter disenfranchisement objections and the Region ultimately finds merit to some, but not all of these objections, there is a chance that the ballot solicitation objections could be determinative. For this reason, if the Board orders a hearing, it

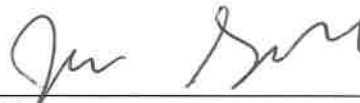
overturn the Regional Director's decision on the solicitation objections and should allow the parties to present evidence on those objections at the hearing.

CONCLUSION

As the Board stated in, *Fresenius USA*, 352 NLRB 679, 681 (2008), "the cumulative effect of these irregularities . . . raises a reasonable doubt as to the fairness and validity of the election. This is especially so considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome." So also in this case, the cumulative effect of lost and delayed ballots and potential union solicitation of ballots raises doubt as to the fairness and validity of this election. The Regional Director erred by overruling these objections without a hearing. The Board should overturn the Regional Director's Supplemental Decision as it relates to the voter disenfranchisement and vote harvesting objections and order a hearing on these objections. Further, it should direct the Region to consider a rerun election under the *Aspirus Keweenaw* standard.

June 29, 2021

Respectfully submitted,



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Certificate of Service

I served the Petitioner's Request for Review in Case No. 21-RD-264417 on June 29, 2021 by e-filing to Region 21 and by email to the following

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