

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

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**GOFFSTOWN TRUCK CENTER, INC.**

and

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 633**

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Case No. 1-RC-22272

March 30, 2009

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS  
TO HEARING OFFICER'S REPORT  
AND RECOMMENDATION ON OBJECTIONS**

**I. STATEMENT OF THE CASE**

This matter is before the National Labor Relations Board ("Board") as the result of Objections to the Conduct of the Election dated December 16, 2008 which were filed by Goffstown Truck Center, Inc. ("Goffstown"). On January 20, 2009 the Regional Director for Region One of the Board issued a Direction and Notice of Hearing since Goffstown's Objections raised substantial and material factual issues that would best be resolved on the basis of record testimony at a hearing. The hearing on these objections was held before the Hearing Officer, in Boston, Massachusetts on February 2 and 3, 2009. On March 6, 2009 the Hearing Officer issued her Report and Recommendation on Objections in which she recommended that Goffstown's objections be overruled and that a Certification of Representative be issued.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Goffstown files exceptions to the Hearing Officer's Report and Recommendation on Objections in the above referenced matter and submits this brief in support of its exceptions.

## II. THE FACTUAL BACKGROUND

A representation election in the above referenced case was scheduled for Friday, December 12, 2008 at the Employer's premises in Londonderry, New Hampshire. (Joint Exhibit #1)<sup>1</sup> On the day in question there was a severe ice storm, which actually had begun the previous day. (Tr. 18, 67)<sup>2</sup> There was a declared state of emergency in the immediate surrounding area of Londonderry, New Hampshire, as well as throughout the State of New Hampshire and much of New England, due to this widespread and destructive ice storm. (See, Employer Exhibits #2-11, which document the extent and magnitude of the ice storm)

The Employer's facility at 574 Mammoth Road, Londonderry, NH was equally impacted by the storm. On December 12<sup>th</sup> the Employer had no electricity, no heat and no telephone service at its terminal. Since the Londonderry schools were cancelled that day, work for the bus drivers was likewise cancelled. (Tr. 66) The main access roads to the terminal were blocked by downed power lines and trees. (Tr. 65) It was still sleeting on the morning of the election and the storm did not end until later in the day on December 12<sup>th</sup>. All around the Londonderry area (West, South and North) there was no electric power. (Tr. 67)

The Board Agent assigned to conduct the election arrived at the Employer's premises at approximately 7:45 a.m. The Employer's representative, Gerald Sirois ("Sirois"), informed the agent of the storm conditions and the lack of electricity, heat and telephones at the facility. Sirois questioned whether it was appropriate to hold the election under such severe circumstances. He stated that it did not make sense to have

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<sup>1</sup> Referenced exhibits (Joint, Employer, Petitioner and Region) refer to exhibits introduced during the February 2 and 3, 2009 hearing.

<sup>2</sup> Transcript references are to the reported proceedings of the February 2 and 3, 2009 hearing, volumes 1 and 2.

the vote. (Tr. 69-70, 106) The Union's observer, who was a witness at the hearing, Robert Giegerich ("Giegerich") corroborated Sirois' testimony and testified that Sirois asked the Board Agent, "should we really be doing this?" (Tr. 106) Giegerich further stated that the agent told Sirois that she had talked with Region One and "they said to go ahead with it." (Tr. 107) Sirois testified that he objected but he had no choice since the agent told him the Board was going forward. (Tr. 71) The agent never asked Sirois whether he agreed to proceed with the election. (Tr. 74)

Employees eligible to vote were unable to get to the polling place due to the severe weather conditions; the roads were blocked by fallen trees; there was a lack of electricity and telephone service throughout the entire region; and New Hampshire Governor John Lynch had advised the public to curtail all non-emergency travel. (Tr. 20, 35-37, 41-42, 115-116, 134-135; Employer Exhibit #2; Region Exhibits #2, 3, 6, 7)

The tally of the ballots from the election on December 12<sup>th</sup> reflects that 26 votes were cast for the Petitioner and 19 were cast for the Employer. There were 10 eligible voters who did not participate in the election voting. (Region Exhibit #5) Accordingly, there were a determinative number of eligible voters who were denied an adequate opportunity to vote due to the severe weather conditions that existed on December 12, 2008.

Under such uncontroverted factual circumstances, and based on prior Board decisions, the election held on December 12, 2008 should be set aside and a new election be conducted in accordance with the Board's procedures. See, ***Baker Victory Services, Inc***, 331 NLRB 1068 (2000); ***V.I.P. Limousine***, 274 NLRB 641 (1985). The employees, who were denied the opportunity to vote due to the severe weather

conditions, likewise have expressed the desire for a second election. (Tr.21, 37, 44; Employer Exhibit #12; Region Exhibits #2, 3, 7)

### III. THE ISSUES BEFORE THE BOARD

The first issue presented in this case is whether, despite the Hearing Officer's recommendation, the election should be set aside on the basis that the Board by holding the election under "such severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote." *Baker Victory Services*, 331 NLRB at 1068.

The further issue properly before the Board is whether by holding the election under those extreme conditions, and despite the Employer's objections to proceeding with the election, the Board prevented the Employer from its final opportunity to communicate with its employees prior to the election. The Hearing Officer denied the Employer the chance to present evidence in support of this issue on the basis of the Petitioner's objection at the hearing that it was outside the scope of the election objections filed by the Employer. (Tr. 80-81) The Employer was permitted to submit an offer of proof, which it did. (Tr. 81-83) The Employer submits that this second election objection should be considered by the Board since it falls within the scope of the Objections to the Conduct of the Election filed with the Board on December 17, 2008. Furthermore, the Employer specifically stated in its objections that "by these and other acts" the election results were prejudicially affected. (Pg. 2 of the Employer's Objections)

#### IV. ARGUMENT

The Employer has submitted uncontroverted evidence of the severe ice storm which prevailed in the Londonderry area prior to December 12<sup>th</sup> and on the election day. It can hardly be disputed that there were extraordinary weather conditions in effect, and that the ice storm created emergency conditions with the widespread loss of electricity, telephone service and heat, and the impassable roads due to downed trees and power lines. Based on this factual background and the evidentiary record, the Board must assess the Employer's election objections according to the Board's standard as stated in ***Baker Victory Services, Inc.***, supra:

“an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote.” (emphasis supplied)  
331 NLRB at 1068

Similarly, in ***V.I.P. Limousine***, supra, the Board stated:

“While the Board is not required to guarantee that every voter is able to get to the polls, when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted. If there is a reasonable possibility that this occurred and a determinative number of voters are called into question, to maintain the Board's high standards, the election must be set aside.” (emphasis supplied)  
274 NLRB at 641

Based on ***Baker Victory Services and V.I.P. Limousine*** the Board should set aside the election. First, the record is undisputed these weather conditions “reasonably” impacted the ability of the voters to come to the election to vote on December 12<sup>th</sup>. Second, the Tally of Ballots documents that a determinative number of voters (10) failed to show up and vote in the election on that day. The above cited Board decisions do not

require proof that the determinative number of voters expressly were prevented from voting because of the weather. Assuming, *arguendo*, that there must be a specific showing that the determinative number of voters were impacted by the weather and prevented from voting due to those conditions, for the reasons given below Goffstown submits that it has met such burden of proof in this case.

A. **Goffstown is Not Required to Demonstrate that a Determinative Number of Voters Were Expressly Prevented from Voting Because of the Storm Conditions.**

It is Goffstown's position that it has presented sufficient evidence for the Board to conclude that a second election should be directed based on the standard in *Baker Victory Services, Inc.* and *V.I.P. Limousine, Inc.* Clearly a "determinative number" of eligible voters did not vote on December 12<sup>th</sup>. The Tally of Ballots (Region Exhibit #5) is simple evidence of this fact, since the Petitioner's margin of victory was seven votes, and ten eligible voters failed to cast a ballot. The Employer is not obligated to prove that at least seven employees expressly were prevented from voting because of the ice storm conditions. It is sufficient under the Board's case law cited above for the Employer to prevail in its election objections by establishing, as it has, that (1) the weather conditions "reasonably" affected the eligible voters as a whole; and (2) a determinative number (in this case 10) actually did not vote.

The Hearing Officer practically concedes her argument with Goffstown's position on this issue:

"If there were no testimony or evidence from those individuals who did not vote, I may have ordered a new election, under the standard set forth in *Baker Victory Services* and *V.I.P. Limousine*, as a determinative number did not vote and the weather conditions were undeniably severe."  
Report at 13

The maintenance of the Board's "high" election standards requires more affirmative action in this case to address the very questionable judgment that was exercised by the Board's Regional office in proceeding with the election under such obviously severe weather conditions, and in the face of the objections raised by Sirois, Goffstown's manager in Londonderry, on the morning of the election.

This election, furthermore, should be aside due to the irregularities (discussed in greater detail further in this brief) in the Region's administration of the election, whereby the Regional office lost the *Excelsior* list that was used during the election. As one of the consequences of that mistake, there is disagreement over the exact number of voters who were eligible to vote in the December 12<sup>th</sup> election. The Tally of Ballots lists 55 eligible voters, and the original list of voters submitted by Goffstown in November 2008 to the Board's Regional Office reflected 54 names (Region Exhibit \$4).<sup>3</sup> The Hearing Officer improperly resolved this discrepancy against Goffstown in its Objections. Given the statutory importance of the representation election process and ensuring that all voters are given the opportunity to vote, the Board should set aside this election where there is evidence that its own agency bore responsibility for election irregularities.

In addition, based on the recently discovered email correspondence (proposed Employer Exhibits #13 and 14, attached to the Employer's Motion to Reopen the Record) between Michael Kennedy, Goffstown's Chief Operating Officer, and Patricia Umile, the Board's Agent, who conducted the December 12, 2008 election, it is now undisputed that the revised *Excelsior* list provided to the Board agent, and presumably used by her at the election contained 55 names, not 54 as found by the Hearing Officer. Consequently, the Board should reject the Hearing Officer's recommendations and

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<sup>3</sup> This discrepancy would be conclusively resolved by granting the Employer's Motion to Reopen the Record.

conclusions which are based on her reliance upon the 54 person *Excelsior* list. The Board should adopt Goffstown's position using the 55 person *Excelsior* list, and this will inescapably lead to the conclusion that the election should be set aside for the reasons set forth by Goffstown.<sup>4</sup>

**B. Goffstown Has Presented Sufficient Evidence that a Determinative Number of its Employees Were Prevented from Voting by the Severe Weather Conditions that Existed on December 12, 2008.**

Goffstown submits that the record contains evidence that the following six employees were specifically prevented from voting because of the ice storm: Michael Roberts, Tammy Jacobs, Cheryl Cashin, Cassie Grant, Joseph LaFrance, and Tanya Fortin. The parties stipulated that Kristy Leach did not vote because she was in Florida on December 12<sup>th</sup>. (Tr. 63) Two employees, Shannon Rodham and Lisa Ciano ("Ciano") testified at the hearing that they did not vote, and that their decision was not prompted by the weather on election day. For reasons provided later in this memorandum of law, it is Goffstown's position that Ciano's testimony and stated reason for not voting should not be credited, and she should be included among the above group of six.

There is a remaining, tenth eligible voter, who did not vote and who has not been identified.<sup>5</sup> This individual, likewise, should be added to the other six eligible voters since the newly discovered evidence (proposed Employer Exhibits #13 and 14) prove that there were 55 eligible voters on the revised *Excelsior* list.

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<sup>4</sup> In the alternative, Goffstown submits that there should be a re-hearing to have this proposed evidence presented together with testimony over the circumstances of the communications between Kennedy and Umile regarding the revisions to the *Excelsior* list.

<sup>5</sup> The Employer submits that it was prevented from presenting record evidence concerning the remaining, unidentified eligible voter due to the missing *Excelsior* list which Region One has been unable to find. Based on such circumstances, it should be presumed that this individual was prevented from voting due to the weather, since the majority of the other eligible voters were clearly affected by the ice storm.

The Hearing Officer erroneously rejected Goffstown's argument that there was an unidentified employee who failed to vote on the day of the election (Report at 5). She made this finding by concluding that there were only 54 eligible voters, and not the 55 listed on the Tally of Ballots from the December 12<sup>th</sup> election (Report at 6). She relied on the list of voters submitted by Goffstown approximately one month prior to the election (Region Exhibit #4), which had 54 as the total number of employees. Her report states the following:

"While the original *Excelsior* list used at the election on December 12 is missing from the Regional Office file, and the Tally lists approximately 55 eligible voters, I find there is enough record evidence to reconcile the discrepancy."  
Report at 5-6

Based on the recently discovered evidence related to the revised *Excelsior* list submitted by Kennedy to Umile (proposed Employer Exhibits #13 and 14), it is undisputed now that there were in fact 55 eligible voters and one unidentified employee who failed to vote on the election day.

Given the irregular circumstances of the missing *Excelsior* list, it would be a further "irregularity" for the Board to adopt the Hearing Officer's finding that there were only 54 eligible voters. The maintenance of the Board's "high" election standards requires that the benefit of the doubt in this case be given to the evidence presented by Goffstown.

**C. Michael Roberts was Prevented by the Severe Weather from Voting in the December 12<sup>th</sup> Election.**

The Hearing Officer found that Michael Roberts was not precluded from voting in the election on December 12, 2008 because of the weather. She wrongfully concluded

that his employment and responsibilities as a firefighter for the Town of Londonderry, New Hampshire interfered with his ability to come to vote that day (Report at 13-14).

Roberts has worked for the Employer as a bus driver since October 2005.<sup>6</sup> He was eligible to vote in the election, but he was prevented from doing so because of the ice storm. (Tr. 15) As a member of the Londonderry Fire Department, he was called in, off-duty, on December 12<sup>th</sup> to assist in the declared state of emergency. He was obligated to respond to the Fire Department's call that Friday morning, and he was not released until the following day. (Tr. 16-17, 24; Employer Exhibit #1) Roberts received the call between 6:00-7:00 a.m. (Tr. 16) He reported to the Fire Station at approximately 11:00 a.m. since first he had to ensure the safety of his family at home and to make sure they had sufficient water supplies at home. (Tr. 24, 26) But for the emergency call-in by the Londonderry Fire Department, Roberts was planning to vote that day. (Tr. 17)

The Hearing Officer rationalized her finding with respect to Roberts on the following:

"While there is certainly a relationship between the ice storm and Roberts being called in to work for emergency assistance, he is a full-time firefighter and could have been called in for any other emergency unrelated to the weather and would have had the same obligation to report."

Report at 14

Her reasoning is speculative and also simply incorrect. There was a declared state of emergency specifically prompted by the severe ice storm; and it was not just a matter of "emergency assistance" that day. Also, Roberts was ordered to report for duty, together

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<sup>6</sup> The Petitioner attempted to challenge Roberts' voting eligibility in the course of the election objections hearing. Such an issue is legally improper and irrelevant since this proceeding is not the proper forum for this argument to be raised. Roberts' eligibility was never challenged at the voting place; and there are insufficient facts in the case to establish whether or not Roberts' employment status is irregular or otherwise not in community with the remainder of the defined voting unit. The Board should ignore the Hearing Officer's gratuitous statement that "the evidence provided to me at the hearing seems to indicate that Michael Roberts was not eligible to vote in the election," since this issue was not properly before her.

with all of the off duty personnel of the fire department (Employer Exhibit #1). Finally, because of the severity of the storm conditions he was not permitted to take a break from his duties until 24 hours later. (Tr. 25) Under these unique and unusual factual circumstances, the Hearing Officer erred when she found that the weather had not precluded Roberts from voting in the December 12<sup>th</sup> election.

**D. Lisa Ciano's Stated Reason for Not Voting in the Election Should Not be Credited.**

The Hearing Officer credited Lisa Ciano's testimony that her decision to not vote on December 12<sup>th</sup> was unrelated to the weather conditions that existed that day. As stated previously above, the testimony by Ciano should be discredited and she should be included together with the other eligible voters who were precluded from voting because of the storm. In her direct testimony she stated that she did not vote in the election and that the weather conditions on December 12<sup>th</sup> had no bearing on her decision. (Tr. 55-56) During her cross-examination she first denied that prior to testifying on February 2<sup>nd</sup> she had been contacted by anyone from the Petitioner. She also stated that prior to the hearing she had not spoken with Roger Travers from the Petitioner about whether or not she had voted on December 12<sup>th</sup>. (Tr. 56-57) Upon further cross examination she revealed that, in fact, she had met with Travers sometime in early January 2009; that he had asked her if she had voted in the election; and that then he requested she provide a written statement to the effect the weather had not been an issue in her not voting. (Tr. 56-59) These contradictions in Ciano's testimony under oath severely impact on her credibility. Her statement regarding her decision not to vote should be discredited. Clearly, she had been influenced by the Petitioner's representative, and also by the role that the Petitioner could have in providing free legal

counsel for her on a personal matter-- suspension of her school bus operator's certificate following a serious school bus accident on November 20, 2008 in which a student was struck and injured by the bus driven by Ms. Ciano. (Tr. 57, 59-61). Ms. Ciano apparently thought she might receive assistance from the union as she faces possible license revocation, and civil liability in connection with the accident.

**E. When Region One Proceeded to Conduct the Election in Spite of Goffstown's Objections, It Thereby Prevented the Employer from a Final Opportunity to Communicate with its Employees Prior to an Election.**

The overall credible evidence in this case shows that Sirois, the Employer's representative on the morning of the election, objected to proceeding with the election because of the severe ice storm. Both he and the Union's observer, Giegerich, testified that Sirois directly questioned if the election should go forward, and he was told by the Board agent that "they [Region 1] said to go ahead with it." (Tr.69-71, 106-107) Sirois did not state to the agent that he agreed to proceed. (Tr. 74) The Petitioner's witness, Roger Travers testified that Sirois "agreed" to hold the election that day. However, his testimony is not credible. Repeatedly under cross examination he was unable to recall the alleged words Sirois used in "agreeing" to the election, in contrast to the high level of detail Travers offered in his testimony concerning other related aspects of the morning of the election. (Tr. 99)

By proceeding with the election under the severe weather conditions existing on December 12<sup>th</sup> and over the objections by Sirois, the Regional Office of the Board prevented Goffstown from an opportunity to communicate with its employees one final time before the voting began. The Hearing Officer rejected Goffstown's attempt to introduce evidence on this objection and, as stated previously, the Employer was

merely permitted to submit an offer of proof. (Tr. 81-83) The Hearing Officer in her report erroneously affirms the rejection of Goffstown's supplemental objection on this issue. She incorrectly concludes that this objection is outside of the Objections filed on December 17, 2008.

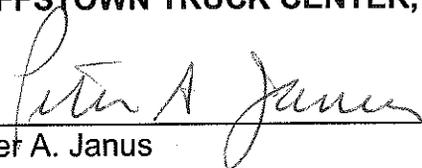
**V. CONCLUSION**

Goffstown submits that the evidence in this case warrants the Board's decision to overrule the Hearing Officer's recommendation that a Certification of Representative be issued. Based on the Board's standard in *Baker Victory Services, Inc.* and *V.I.P. Limousine, Inc.* the election results from December 12, 2008 should be set aside and a new election should be scheduled.

Respectfully submitted,

**GOFFSTOWN TRUCK CENTER, INC.**

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Employer's Brief in Support of Exceptions to Hearing Officer's Report and Recommendation on Objections has been electronically delivered this 30<sup>th</sup> day of March, 2009, to the following:

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