

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

FEDEX HOME DELIVERY, an operating division of
FEDEX GROUND PACKAGE SYSTEMS, INC.,

Employer

And

34-RC-2205

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 671

Petitioner

PETITIONER'S OPPOSITION TO AMENDED MOTION FOR RECONSIDERATION

The Petitioner, International Brotherhood of Teamsters, Local 671 ("Local 671" or "Petitioner"), hereby opposes the Amended Motion for Reconsideration filed by FedEx Home Delivery, a Separate Operating Division of FedEx Ground Package System, Inc. ("FedEx").¹

First, there is no provision under the Board's Rules and Regulations for the submission of an "Amended Motion for Reconsideration." As such, FedEx's filing must be viewed as a Motion for Reconsideration that was not filed with the Board within the time provided for under Section 102.65(e)(2).² Second, as set out below, FedEx's Amended Motion also fails on substantive grounds.

1. On April 11, 2007, then Regional Director for Region 34, Peter B. Hoffman, issued the DDE in this matter.

¹ To the extent that the Board does not consider FedEx's "Amended Motion" as supplanting FedEx's previously filed Motion for Reconsideration, Local 671 hereby incorporates by reference its previously filed Opposition to Motion for Reconsideration.

² While the United States Supreme Court decision in *New Process Steel v. NLRB* was not issued until June 17, 2010, FedEx was aware that the decision was pending and could have raised the 2-Member Board issue as part of its Motion for Reconsideration.

2. On May 22, 2007, the Board denied the Employer's Request for Review of the DDE. The Board's denial constituted an affirmance of the Regional Director's DDE in the instant matter. *See* Section 102.67(f) of the Board's Rules and Regulations.

3. On May 11, 2007, an election was held pursuant to the DDE as affirmed by the Board. Local 671 prevailed in that election.

4. FedEx, subsequently, filed its Objections to Election on June 8, 2007. The full text of those objections was as followed:

Objection 1. During the critical period before the representation election on May 11, 2007, Teamsters Union Local 671, Affiliated with IBT ("Union"), by and through its agents and others with whom it acted in concert, improperly conferred valuable benefits, including legal services, to eligible voters and caused two civil actions on their behalf to be commenced in the U.S. District Court for the District of Connecticut. The civil actions identify six (6) voters as named plaintiffs. The Union's conduct constitutes, among other things, an impermissible benefit that interfered with the laboratory conditions necessary to conduct a free and fair election.

Objection 2. At the election, the Company challenged the ballots cast by Paul Chiappa and Robert Dizinno, including for the reason that certain circumstances had changed since the time when the petition was filed. Before the Region counted the ballots, the Company notified the Board Agent that it maintained its challenge to the ballots of Chiappa and Dizinno for the reasons stated previously, and it objected to the Region opening and commingling their ballots without first (1) counting the unchallenged ballots to determine whether all challenged ballots were outcome determinative and (2) if so, giving the Company an opportunity to present evidence in support of its challenges, conducting an investigation, and then making a determination as to Chiappa's and Dizinno's eligibility. Over the Company's objection, the Board Agent opened and counted the challenged ballots of Chiappa and Dizinno; however, he did not open and count the other two challenged ballots (one by the Union and one by the Company). The count yielded 12 votes for the union and 9 votes for no union. The Board Agent's conduct in prematurely opening and counting challenged ballots was improper.

5. After two days of hearing, Administrative Law Judge Joel P. Biblowitz, on August 2, 2007, issued his Decision on Objections. In that decision, ALJ Biblowitz recommended that the "Employer's objections be overruled."

6. FedEx, subsequently, filed its Exceptions to the Decision and Recommended Order of the Administrative Law Judge. **Exhibit A.**

7. On September 29, 2008, the Board, acting with only two Members, issued its Decision and Order Remanding. **Exhibit B.** The Board, in its Decision and Order Remanding, in effect, ruled in favor of the position of FedEx, as stated in its Exceptions, in all respects. In addition, and more importantly, the remand order required that the record on both of FedEx's objections be reopened and that the ALJ make further findings.

8. After an additional three days of testimony and the taking of other evidence, ALJ Biblowitz issued his Supplemental Decision on Objections. Local 671 and FedEx, respectively, filed exceptions to this Supplemental Decision.

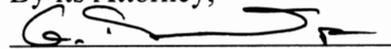
9. On May 27, 2010, a three-Member Board issued their Decision and Certification of Representative. **Exhibit C.** The Board's Decision was based on the record as a whole and resolved both of FedEx's Objections.

10. Even if *New Process Steel* is read expansively as applying to interim rulings by a two-Member Board, the result of the ruling was to reopen the record for additional evidence and for additional findings by the ALJ, which occurred. Thus, even if, as FedEx argues, the two-Member Decision and Order Remanding is considered "void," there is nothing in *New Process Steel* that suggests that a duly constituted 3-Member Board, subsequently, could not issue a final ruling on the objections based on the record. Indeed, where a record exists, it is improbable that a three-Member Board, in conformance with the instructions of *New Process Steel*, would require the creation of a new record. Rather, the Board, no doubt, will implement the holding of *New Process Steel* by issuing new three-Member Board Decisions and Orders based on the existing records. Further, nowhere in its Amended Motion does FedEx even argue that the final

Decision and Certification of Representative, in the instant case, was somehow tainted by the earlier “offending” Decision and Order Remanding. Indeed, FedEx could not and cannot make that argument because the Decision and Certification of Representation is based on the record and not on any principles of *res judicata*.

WHEREFORE, the Petitioner respectfully requests that this Honorable Board deny FedEx’s Amended Motion for Reconsideration.

Respectfully submitted,
Teamsters Local 671,
By its Attorney,



Gabriel O. Dumont, Jr.
Dumont, Morris & Burke, P.C.
14 Beacon Street, Suite 300
Boston, MA 02108
(617) 227-7272
Fax (617) 227-7025
gdumont@dmbpc.net

June 30, 2010

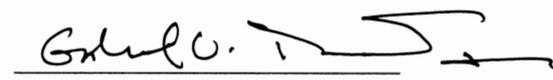
CERTIFICATE OF SERVICE

The undersigned attorney of record hereby certifies that copies of Petitioner’s Opposition to Motion for Reconsideration have been served via electronic mail on :

Charles I. Cohen, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ccohen@morganlewis.com

Jonathan Kreisberg, Regional Director
Rick Conception, Attorney
National Labor Relations Board, Region 34
280 Trumbull Street, 21st Floor
Hartford, CT 06103
jonathan.kreisberg@nrlb.gov
rick.concepcion@nrlb.gov

June 30, 2010


Gabriel O. Dumont, Jr.

3. The ALJ erred in concluding that the filing date of the Hartford lawsuits was determinative of the issue of whether the Teamsters' offer, promise and provision of free legal services to voters during the critical period destroyed the required laboratory conditions, thereby requiring that the election be set aside.

4. The ALJ erred in failing to find that the Teamsters, their agents, partners and surrogates collaborated to offer, promise and provide free legal services to voters during the critical period.

5. The ALJ erred by prohibiting the Company from compelling the production of testimony and documents from William Gardner, an admitted Teamster organizer who solicited potential class action plaintiffs for the self-styled "union law firm" of Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C. ("Liss-Riordan Firm").

6. The ALJ erred by prohibiting the Company from compelling the production of testimony and documents from the Liss-Riordan Firm.

7. The ALJ erred in failing to set aside the election due to the Board Agent's improper disregard for the Company's challenges to the ballots of voters Chiappa and Dizinno, which were based on changed circumstances.

8. The ALJ erred in finding that the Company failed to carry its burden of establishing that there was a change of circumstances where the Board Agent prevented the Company from presenting any evidence of changed circumstances when he improperly circumvented the mandatory challenged ballot clearing process, in violation of the Company's due process rights.

9. The ALJ erred by creating and imposing a post-hoc, extra-procedural challenged ballot requirement on the Company.

WHEREFORE, for the reasons stated above and in the Company's accompanying Brief in Support of Its Exceptions to the Decision and Recommended Order, the Company respectfully

requests that the Board reject the Decision and Recommended Order of the Administrative Law Judge and ORDER that the election be set aside.

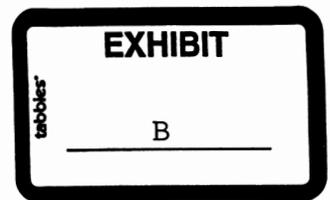
Respectfully submitted,

/s/ Doreen S. Davis
Doreen S. Davis

Of Counsel:

Doreen S. Davis
Richard J. DeFortuna
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5376/5270

DATED: August 16, 2007



NOT INCLUDED IN
BOUND VOLUMES

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Windsor, CT

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FEDEX HOME DELIVERY, AN OPERATING DIVISION OF
FEDEX GROUND PACKAGE SYSTEMS, INC.

Employer

and

Case 34-RC-2205

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 671

Petitioner

DECISION AND ORDER REMANDING

The National Labor Relations Board has considered the Employer's objections to an election held on May 11, 2007,¹ and Administrative Law Judge Joel P. Biblowitz's decision recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 12 for and 9 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to remand this proceeding to the judge to take further evidence and to make additional findings and recommendations consistent with this Decision and Order.²

¹ All dates hereafter are 2007 unless otherwise stated.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member

The election was held in a unit of the Employer's contract drivers employed at its Hartford, Connecticut terminal. The Employer filed two objections. The judge, sitting as a hearing officer, recommended overruling both objections. However, we find that the judge erred in failing to admit and consider additional evidence that is necessary and relevant to determining the merits of each objection.

OBJECTION 1

Objection 1 alleges that during the critical pre-election period the Petitioner conferred valuable legal benefits on unit employees and caused the initiation of two lawsuits against the Employer on behalf of those employees. It is undisputed that prior to the filing of the election petition in this case, the law firm of Pyle, Rome, Lichten, Ehrenberg, & Liss-Riordan, P.C., represented certain Massachusetts FedEx drivers in filing two lawsuits, against the Employer, seeking damages for the Employer's alleged misclassification of contract drivers as independent contractors rather than employees. William Gardner, a FedEx driver and one of the Massachusetts lawsuit plaintiffs, addressed Hartford unit employees on behalf of the Petitioner in pre-election campaign meetings. Gardner discussed the possibility of lawsuits with these employees, with Petitioner's President Lepore, and with the aforementioned law firm's representatives. Lepore also spoke with lead pro-union Hartford employee Robert Dizinno about this subject. In early April, 2007, Dizinno and five other unit employees signed agreements to be represented by the law firm on a contingent-fee basis, with no cost to the employees. On May 22, eleven days after the election was held, the law firm filed two

group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

lawsuits against the Employer in the United States District Court for the District of Connecticut. One was brought on behalf of five current or former unit drivers who were members of the bargaining unit; the other was a class action suit on behalf of all unit contract drivers. Both suits alleged wrongful misclassification of contract drivers as independent contractors rather than employees. It is undisputed that the Petitioner made no direct payments for the legal services in this litigation. At the time of the hearing in this proceeding, the two Connecticut cases were in the process of being transferred to the United States District Court for the Northern District of Indiana for inclusion in multi-district litigation (MDL), consolidating numerous cases filed nationwide against FedEx regarding the same misclassification issue.

The Employer contends that the Petitioner, through statements made by its agents and in collusion with the lawyers representing the employee plaintiffs, interfered with the conduct of the election by promoting the lawsuits and promising that bargaining unit employees would not be charged for the legal work associated with the suits. Specifically, the Employer contends that the Petitioner acted in concert with the civil plaintiffs' attorneys through: (a) interconnected websites; (b) interaction regarding the broader MDL litigation prior to the filing of the Connecticut lawsuits; and (c) the activities of Gardner and Dizinno in talking with employees about the lawsuits.

At the hearing, the judge limited the Employer's presentation of evidence in support of its objection to proof that the Petitioner paid for the unit employee plaintiffs' legal services. As previously stated, the Petitioner made no such payments. The judge ruled that the Employer could not introduce evidence as to whether the Petitioner supported the litigation in any fashion other than direct financial payment or about what

its representatives communicated to employees on this subject. He also quashed subpoenas duces tecum issued, inter alia, to Gardner, to Shannon Liss-Riordan, an attorney in the law firm representing unit employees in the Connecticut lawsuits, and to the firm itself.

In its exceptions, the Employer contests the above-described limitation imposed by the judge, contending that evidence regarding the arrangements made for the provision of legal services to unit employees during the pre-election critical period and representations made to unit employees about those services were relevant to a determination of whether the Petitioner engaged in objectionable conduct, irrespective of whether it actually paid anything to the law firm. As discussed below, we find merit in the exceptions.³

In *Novotel New York*, 321 NLRB 624 (1996), the Board held that a union's pre-election financing of a lawsuit under the Fair Labor Standards Act (FLSA) to recover overtime and other wages for all unit employees was not objectionable conduct. Accord: *BHY Concrete Finishing, Inc.*, 323 NLRB 505 (1997), and *Superior Truss & Panel, Inc.*, 334 NLRB 916 (2001). In *Novotel*, however, the Board observed that the union in question had not "conditioned the continued receipt of legal representation on a favorable result in the election." 321 NLRB at 635 fn. 57.⁴

By limiting the evidence here solely to the question of whether the Union directly financed the Connecticut lawsuits, the judge failed to develop a complete record on the

³ We affirm the judge's finding that the Petitioner's maintenance of two internet websites did not prove objectionable conduct.

⁴ Chairman Schaumber did not participate in *Novotel* and does not pass on whether that case was correctly decided.

objectionable benefits issue, i.e., did the Petitioner arrange or take credit for the provision of free legal services for unit employees contingent on a favorable outcome for the Petitioner in the election or, for that matter, on individual plaintiffs' votes for the Petitioner? In the circumstances present here, it was error for the judge to exclude witness testimony and to revoke subpoenas solely on the grounds that the evidence sought to be introduced had no bearing on whether the Petitioner actually paid for legal services in connection with the Connecticut lawsuits.

Accordingly, we remand this objection to the judge with directions to reopen the record to admit additional evidence and make appropriate findings concerning the Petitioner's involvement in the arrangement of legal services and what its agents said to unit employees about those services.

OBJECTION 2

Objection 2 alleges that the Board's agent improperly commingled the challenged ballots of Paul Chiappa and Robert Dizinno with unchallenged ballots, and thereafter opened and counted all of these ballots, without affording the Employer an opportunity to present evidence in support of a new argument why the challenges should be sustained. The Regional Director's Decision and Direction of Election rejected the Employer's contention that contract driver Chiappa should be excluded from the unit as a supervisor within the meaning Section 2(11) of the Act and that Dizinno lacked a sufficient community of interests with the contract drivers to warrant his inclusion in the unit. The Employer filed a request for review of the Regional Director's decision with the Board. The request for review was still pending on election day. At the pre-election conference, the Employer's attorney Robert Hodovance told Board agent Nestor Diaz

that the Employer intended to challenge Chiappa and Dizinno's ballots. Hodovance told Diaz that, in addition to the grounds previously urged, by the Employer, the challenges were based on changed circumstances involving Chiappa and Dizinno during the period between the pre-election hearing and the election. Agent Diaz indicated that he would accept these challenges, and he did so when the Employer's observer challenged each voter during the election.

In view of the pending request for review, all ballots were impounded at the conclusion of the election. On May 22, the Board denied the request for review. A ballot count was scheduled for June 1. Two days before the ballot count, Diaz called Hodovance and stated that the ballots of Chiappa and Dizinno would be counted pursuant to what Diaz perceived as his "instructions" arising from the Board's denial of the Request for Review. Hodovance questioned this procedure in light of the unresolved allegation that unspecified changed circumstances affected the eligibility of these two employees. At the ballot count on June 1, Diaz opened and commingled the two ballots with the other unchallenged ballots prior to the final ballot count. Hodovance objected, to this handling of Chiappa's and Dizinno's ballots but he did not expressly refer again to the allegation of changed circumstances affecting them.

At the hearing, the judge did not allow the parties to litigate the issue of whether there had been a change in circumstances affecting the voter eligibility of Dizinno and Chiappa. In his decision, the judge concluded that the Employer failed to satisfy its burden of proving that Chiappa or Dizinno were ineligible to vote, finding that the Employer had to do more than simply repeat that there were unspecified "changed circumstances." He therefore recommended overruling Objection 2.

We find that the Board agent erred by commingling and counting the ballots cast by Dizinno and Chiappa prior to any consideration of the merits of the Employer's claim that changed circumstances justified the challenges to those ballots. In this respect, Diaz erroneously believed that the Board's denial of the Employer's request for review of the Regional Director's decision was conclusive. However, this error did not necessarily affect the outcome of the election. As recently stated, "[t]here is not a 'per se rule that . . . elections must be set aside following any procedural irregularity' ... the Board 'requires more than mere speculative harm to overturn an election.'" *Fresenius USA Mfg. , Inc.*, 352 NLRB No. 86, slip op. at 2 (2008) (internal citations omitted).

Absent evidence about the alleged pre-election change in the job circumstances for Chiappa and Dizinno, we cannot determine whether the opening of their ballots improperly affected the election results. Cf. *Watkins Construction Co.*, 332 NLRB 828 (2000) (overruling objection where even if the challenged ballots had been kept segregated, post-election litigation showed challenges would have been overruled and election results would not change). Although the judge correctly stated that the party seeking to exclude an employee from the unit , in this case the Employer, bears the burden of proof, it was error for the judge to preclude litigation of this changed-circumstances issue and then to find that the Employer failed to meet its burden. Accordingly, we remand the Employer's Objection 2 to the judge to take evidence and make appropriate findings as to whether the challenges to the ballots of Chiappa and Dizinno would have been sustained based on changed job circumstances, and if so, whether the Board agent's error affected the election.

ORDER

It is ordered that this proceeding is remanded to the administrative law judge for appropriate action as described above.⁵

It is further ordered that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and recommendations for disposition of the Employer's objections, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.69 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. , **September 29, 2008.**

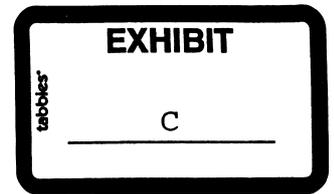
Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁵ All parties of record shall have the right to present evidence, to cross-examine witnesses, and to present rebuttal evidence with respect to the issues on remand. They also retain the right to object to the enforcement of subpoenas and the presentation of evidence on grounds that do not conflict with this Decision and Order. If an objection to the introduction of evidence is sustained by the judge, the party adversely affected by the judge's ruling should make an offer of proof to preserve its position before the Board.



NOT INCLUDED
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INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 671
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered objections to an election held on May 11, 2007, and the judge's supplemental decision recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election issued on April 11, 2007. The tally of ballots shows 12 for and 9 against the Petitioner, with 2 challenged ballots, a number insufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's findings and recommendations only to the extent consistent with this decision, and finds that a certification of representative should be issued.

The Employer filed two objections to the election. We adopt the judge's recommendation to overrule Objection 1, for the reasons set forth in the judge's

supplemental decision.¹ Contrary to the judge, however, we also overrule Objection 2, and we therefore certify the Petitioner as the collective-bargaining representative of the Employer's employees in the bargaining unit.

The Employer's Objection 2 alleges that the Board's agent improperly commingled the challenged ballots of Paul Chiappa and Robert Dizinno with unchallenged ballots, and thereafter opened and counted all of these ballots, without affording the Employer an opportunity to present evidence in support of a new argument that the challenges should be sustained based on alleged pre-election changes in Chiappa's and Dizinno's job circumstances. In our prior Decision and Order Remanding, issued on September 29, 2008, we found that the Board agent erred by commingling and counting the ballots of Chiappa and Dizinno, but that this error did not necessarily affect the election outcome. We therefore remanded this proceeding to the judge with directions to take evidence and make appropriate findings as to whether the challenges to the ballots of Chiappa and Dizinno would have been sustained based on changed job circumstances, and if so, whether the Board agent's error affected the election.

In his supplemental decision, the judge found that the Employer failed to prove that the challenge to Chiappa's ballot would have been sustained, but met this burden with respect to Dizinno's ballot. The judge therefore concluded that the Board agent erred in commingling Dizzino's ballot with other ballots, despite the Employer's

¹ Member Schaumber agrees that under extant Board precedent, which he applies for institutional reasons, the Petitioner's conduct relating to Objection 1, as found by the judge, does not constitute objectionable conduct warranting a new election.

continuing challenge to the ballot. We disagree with the judge's conclusion in this regard.

In the underlying Decision and Direction of Election, the Regional Director found that Dizinno was an eligible voter based on several factors showing he shared a sufficient community of interest with other unit contract drivers.² In separately rejecting the Employer's argument that Chiappa was Dizinno's supervisor and thus excluded from the unit under Section 2(11) of the Act, the Regional Director noted that the Employer discussed issues relating to Dizinno's route directly with him, rather than with Chiappa, and that, until the second day of the pre-election hearings, the Employer maintained a separate contract driver's mailbox for Dizinno.

In his supplemental decision, the judge relied on the Regional Director's findings above to conclude that Dizinno's job circumstances changed prior to the election when the Employer eliminated his mailbox at its terminal facility and conducted business discussions about Dizinno's route through Chiappa, rather than directly with Dizinno. As noted above, neither of these aspects of Dizinno's employment were cited by the Regional Director in support of finding that Dizinno shared a community of interest with other contract drivers. Instead, the Regional Director discussed this evidence in determining whether Chiappa was a supervisor under the Act. In addition, in asserting

² "Here, the record unequivocally establishes that Dizinno works out of the same Hartford terminal as do all other contract drivers, performing the same function for the Employer. Dizinno reports to the same terminal management, begins his work day at that terminal at the same approximate start time as other contract drivers, and is subject to the same policies and practices as all other contract drivers, including customer service rides and driver release audits. Dizinno also undergoes the same training and periodic DOT testing as other contract drivers, and, similar to other contract drivers, receives the full settlement amount for the Manchester route that he solely operates." Regional Director's Decision and Direction of Election at 31-32.

changed circumstances, the Employer presented no evidence of changes in the material community of interest factors relied on by the Regional Director to find that Dizinno was properly included in the driver unit. Moreover, neither the judge nor the Employer has explained why the lack of a mailbox or direct route discussions with Dizinno are so substantial as to outweigh the material factors in our community of interest analysis. We therefore find that the Employer has failed to meet its burden of proving sufficient changed job circumstances that would warrant removal of Dizinno from the unit. Thus, Dizinno, like Chiappa, was an eligible voter on the election date. Inasmuch as their ballots are properly included in the ballot count, the Board agent's error in commingling them with other ballots prior to final resolution of the Employer's challenges did not adversely affect the conduct of the election. We therefore overrule the Employer's Objection 2 and will certify the Petitioner as the exclusive representative of the bargaining unit employees.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Brotherhood of Teamsters, Local 671, and that it is the exclusive

collective-bargaining representative of the employees in the following appropriate unit:

All contract drivers employed by the Employer at its Hartford Terminal; but excluding drivers and helpers hired by contract drivers, temporary drivers, supplemental drivers, multiple-route contract drivers, package handlers, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

Dated, Washington, DC . , May 27, 2010 .

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Mark Gaston Pearce, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD