

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

STARBUCKS CORPORATION	)	
	)	
	)	
Employer	)	
and	)	Case No. 14-RC-289926
	)	
CHICAGO & MIDWEST REGIONAL	)	
JOINT BOARD – WORKERS	)	
UNITED/SEIU	)	
	)	
Petitioner	)	
	)	

**HEARING OFFICER’S REPORT AND RECOMMENDATIONS ON OBJECTIONS**

This report contains my findings and recommendations regarding the Employer’s objections to the election in the above referenced case. For the reasons contained herein, I recommend sustaining the Employer’s Objections Numbers 4, 5, 6, and 8. I recommend overruling the Employer’s Objections Numbers 1, 2, 3, and 10 through 15.

**Procedural History**

Upon a petition filed on February 2, 2022,<sup>1</sup> by Chicago & Midwest Regional Joint Board – Workers Union/SEIU, herein called the Petitioner, and pursuant to a Stipulated Election Agreement signed by Starbucks Corporation, herein called the Employer, the Petitioner, and approved by the Regional Director for Region 14 on February 25, an election by mail ballot was conducted on March 16, among the employees employed in the following unit:

All full-time and regular part-time hourly Baristas and Shift Supervisors employed at 10201 W 75th St, Overland Park, KS 66204 (Store 20346 - often referred to as “75th and I35”), but excluding all Store Managers, office clerical employees, professional employees, guards, and supervisors as defined by the Act, and all other employees.

The Revised Tally of Ballots,<sup>2</sup> which was made available to the parties pursuant to the Board’s Rules and Regulations, showed the following results:

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<sup>1</sup> All dates hereinafter are 2022 unless otherwise indicated.

<sup>2</sup> The initial Tally of Ballots, which was issued on April 8, showed six votes for the Petitioner, one vote against representation, and seven determinative challenges, all of which were made by the Employer. On May 20, the Petitioner agreed to sustain the Employer’s challenges for the purposes of Case No. 14-RC-289926. On May 27,

Approximate number of eligible voters	20
Number of void ballots	0
Number of ballots cast for Petitioner	6
Number of votes cast against participating labor organization	1
Number of valid votes counted	7
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	7

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted has been cast for the Petitioner.

The Employer filed timely objections to conduct affecting the results of the election. On April 27, the General Counsel transferred this case to Region 29. Pursuant to Section 102.69 of the Board’s Rules and Regulations, the Regional Director for Region 29 caused an investigation to be conducted. On June 10, she issued and served on the parties a Report on Objections and Notice of Hearing in which she directed that a hearing be held by a duly designated Hearing Officer regarding the Employer’s Objections Nos. 1 through 6, 8, and 10 through 15. The Regional Director overruled the remainder of the Employer’s objections.

A hearing was held before the undersigned on August 16, 17, 19, 24, and November 17 by Zoom video conference. The Petitioner, the Employer, and Counsel for the Regional Director of Region 14 appeared at this hearing. All parties were represented by counsel and afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues, present oral argument, and file post-hearing briefs.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Employer’s Objections.<sup>3</sup>

## **The Objections**

### **General Principles**

It is well-settled that the Board will not set aside a representation election lightly. *See In re Safeway, Inc.*, 338 NLRB 525, 525-26 (2002). There is a “strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of employees.” *Id.* at 525, quoting *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5<sup>th</sup> Cir. 1991). An objecting party has the burden of proving its allegations, and that burden is a heavy one. *See Mastec*

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in accordance with Section 11361.2 of the Board’s Casehandling Manual Part II, the Acting Regional Director for Region 29 issued a Revised Tally of Ballots reflecting that there were no determinative challenges.

<sup>3</sup> References to the transcript are identified as Tr. \_\_\_. References to the Board, Petitioner, and Employer’s exhibits will be cited as Bd. Ex. \_\_\_, Pet. Ex. \_\_\_, and Er. Ex. \_\_\_, respectively.

*North America, Inc. d/b/a Mastec Direct TV Employer*, 356 NLRB 809 (2011), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6<sup>th</sup> Cir. 1989).

The objections at issue in this case relate to conduct by Region 14. Regional conduct can be objectionable where “the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.” *Polymers Inc.*, 174 NLRB 282 (1969). The Board looks at the circumstances of each case: “It might well be that, in a given case, even literal compliance with all of the rules, regulations, and guidelines would not satisfy the Board that the integrity of the election was not compromised. Conversely, the failure to achieve absolute compliance with these rules does not necessarily require that a new election be ordered, although, of course, deviation from standards formulated by experts for the guidance of those conducting elections will be given appropriate weight in our determinations.” *Id.* at 282-83. “It is well settled that the Board, in conducting elections, must maintain and protect the integrity and neutrality of its procedures.” *Fessler and Bowman*, 341 NLRB 932, 933 (2004). Here, the Employer bears the burden of establishing that the Region’s conduct raised a reasonable doubt regarding the fairness and validity of the instant election.

### **Objections Nos. 1 through 6: Mail Ballots and Voting in the Regional Office**

In its first objection, the Employer alleges that Region 14 engaged in misconduct by failing to mail out ballots to two eligible voters within the timing set forth in the Stipulated Election Agreement. In its second objection, the Employer alleges that Region 14 engaged in misconduct by failing to extend the time in which voters could return their ballots to the Regional office before the count. In its third objection, the Employer alleges that Region 14 engaged in misconduct by failing to follow the proper procedure for handling replacement ballots. In its fourth objection, the Employer alleges that Region 14 engaged in misconduct by making special arrangements with the Union to allow certain voters to vote in person rather than have a ballot mailed to them. In its fifth objection, the Employer alleges that Region 14 engaged in misconduct by misrepresenting to the Employer that it had mailed ballots to voters when the Region had allowed those voters to pick up their ballots in person. In its sixth objection, the Employer alleges that Region 14 engaged in misconduct by failing to explain to the Employer why the Region was not concerned about voter disenfranchisement and election integrity.

### **Facts**

The facts related to these objections are undisputed.

### **The Mail Ballots**

The parties signed a Stipulated Election Agreement, approved by the Regional Director for Region 14 on February 25, which provided for a mail ballot election. Er. Ex. 40.

On March 1, the Employer provided the Voter List to the Petitioner. Er. Ex. 41. On that day, Petitioner attorney Gabe Frumkin advised the Employer by email that there were two employees omitted from the Voter List and requested that the Employer furnish their contact information. Er. Ex. 70. On March 2, the Employer provided an Amended Voter List, which

included Alydia Claypool and Sage Quigley, whose names had been omitted from the initial list. Er. Ex. 42.

Ballots were mailed on March 16 and were due back to the Region by April 6. The Stipulated Election Agreement provided that the count would be held April 8 at 2 p.m. by Zoom. Er. Ex. 40.

On March 23, attorney Frumkin emailed Board Agent Amy Novara stating that seven employees had not received ballots and asking that duplicate ballots be sent to those employees. Novara replied that she sent the request to the election specialist who was handling duplicate ballots for the Region. Er. Exs. 64 and 65.

On April 1, at 12:15 pm, Board Agent Novara emailed Frumkin, stating: “Just to confirm with you, please have the individuals that have not yet received ballots call me directly . . . and I will assist them in scheduling a time to visit the Overland Park office to pick up a ballot.” On April 1, at 12:22 pm, Frumkin responded: “Thank you, Amy. I’ve passed the information onto the on-the-ground organizer.” Er. Ex. 63.

Also on April 1, at 4:41 p.m., Board Agent Melissa Nisly sent an email to the parties advising them that due to an “inadvertent fumble,” she had used the initial Voter List instead of the Amended Voter List when she sent out the mail ballots, and so she had not sent ballots to Claypool and Quigley. She explained that she had “corrected the error, sending out ballots to those voters who were added in the revised list. But, because I used the original numbering, the ‘new’ voters had to be added to the bottom of the original list and given numbers 19 and 20. I have attached a copy of this list with the addition, which will be used at the count. I apologize for any confusion this may have caused.” Er. Ex. 43.

Frumkin replied to this email on April 1, copying the attorneys for the Petitioner and Novara, but not the attorneys for the Employer. Frumkin stated that he had spoken to Novara about three employees who had not received ballots, including Claypool and Quigley: “[Novara] assured me that the workers could come into the subregional office next week to vote. Can one or both of you please advise me about how many voters have reached out to you, and where things stand regarding when they’ll be permitted to vote?” Er. Ex. 61. Later that day, Nisly replied only to Frumkin:

[Novara] is handling appointments for voters to come in and vote. I will be in the office on Monday and Friday. I have mailed either original or duplicate ballots to all three, and have prepared duplicate ballots of those for any voters who come into the office to vote. I believe [Novara] discussed having voters come in on either Monday or Wednesday (when [Supervisory Field Examiner] Carla Coffman will be in the office) if they make an appointment, either directly with her, or indirectly with her through you. This is my understanding. Hope it’s not too confusing.

Id. Petitioner attorney Frumkin did not recall creating appointments for any employees to visit the Regional Office to vote, although he testified that he had “a sense of the windows when [employees] could go in [to the Regional Office] or when [Board Agents] would be in the office.” Tr. at 129.

On April 4, Employer attorney Kimberly Doud replied to all on Nisly's April 1 email about her "inadvertent fumble," inquiring when Nisly had mailed ballots to Claypool and Quigley. On April 4, Nisly replied only to Doud and stated that she had mailed the ballots to these individuals on April 1. Er. Exs. 43 and 44.

On April 5, Doud replied to Nisly and copied the Union's attorneys as well as Novara. Doud noted that ballots were due back the next day, and that the count was set for April 8. Doud inquired whether this would allow enough time for Claypool and Quigley to cast ballots if their ballots were mailed on April 1, and suggested postponing the count to April 25 to allow these employees sufficient time to cast their ballots. Doud testified that the Employer was unaware of any arrangements for employees to vote at the Regional Office until after the count. Tr. at 241. The Union, aware that Claypool, Quigley, and other employees were visiting the Regional Office to cast their ballots, opposed postponing the count. Er. Ex. 62. On April 5, Carla Coffman, Supervisory Field Examiner in Region 14, emailed the parties to inform them that the Region declined to postpone the count, stating: "While we understand the concerns raised by the Employer, and noting the Union's opposition, we do not believe that there is any basis to postpone the count at this time." Er. Ex. 62.<sup>4</sup>

#### Employee Visits to the Regional Office

In the days leading up to April 6, when the mail ballots were due at the Regional Office, a number of employees visited the Regional Office in order to cast a ballot.

#### *Alydia Claypool*

Alydia Claypool, a member of the petitioned-for unit, did not receive a ballot in the mail. Tr. at 323. She spoke to co-workers to see if co-workers had received ballots. A co-worker who was a member of the organizing committee gave Claypool the number for the NLRB. Tr. at 325-26, 343. On or about April 4, Claypool called the NLRB number and made an appointment to visit the Regional Office that day. Tr. at 326, 333.

When Claypool got to the Regional Office, she spoke to a woman at the reception desk, who was separated from the reception area by a glass window. Tr. at 336. The woman gave Claypool a packet and directed Claypool to a private room located off the reception area. Claypool went into the private room and completed the ballot. Claypool sealed the ballot in an envelope and signed her name across the seal. Claypool then handed the envelope to the NLRB Agent. Tr. at 327-28, 342. Claypool was in this private room for the entire time it took her to complete her ballot. Tr. at 339. Claypool testified that the entire process took about three to five minutes. Tr. at 326.

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<sup>4</sup> Petitioner attorney Gabe Frumkin testified about his email exchanges with the Region. Frumkin did not have a clear independent recollection of the facts underlying those emails. The Petitioner does not dispute the accuracy of the emails.

*Sage Quigley*

Quigley, another unit member, did not receive a ballot in the mail. Tr. at 349. They spoke to other co-workers who had also not received ballots. Quigley testified that a group of employees were going to set up a time to go to the Regional Office together to vote,<sup>5</sup> but Quigley could not go at that time, so they set up their own appointment with the Regional Office. Id.

On April 4, Quigley texted Region 14 Board Agent Novara and scheduled an appointment for that same day. Tr. at 350-51. Quigley drove to the Regional Office. Upon arrival in the Region 14 reception area, they spoke to a Board Agent who was behind a glass partition. The Board Agent gave Quigley a ballot and envelopes.<sup>6</sup> Tr. at 363. Quigley went into a small, private office off the reception area, completed the ballot, sealed it in an envelope. Tr. at 353-55, 363-64. They were alone in the private room when they completed their ballot and sealed it in the envelope. Tr. at 363, 367. Quigley then slid the ballot back to the Board Agent through an opening in the glass partition. Tr. at 367. Quigley estimates that they were in the Regional Office for approximately five minutes. Tr. at 355.

*Michael Vestigo*

Michael Vestigo, another unit member, also did not receive a ballot in the mail. Tr. at 413. He heard that another round of ballots were mailed from the Regional Office, but he still did not receive a ballot. He also heard that if an employee did not receive a ballot, it was possible to go to the Regional Office to vote. Id. Vestigo could not recall from whom he had heard this information about ballots being mailed or visiting the Regional Office, but thought he had heard it from a co-worker. Tr. at 413-14.

On April 4, Vestigo contacted the Regional Office to schedule an appointment to go to vote at the Regional Office on April 6. Tr. at 444-46. Vestigo testified that when he got to the Regional Office on April 6, a Board Agent behind a glass partition gave him a ballot and envelopes and directed him to a room adjacent to the reception area.<sup>7</sup> Tr. at 418. Vestigo went into the adjacent room alone, completed his ballot, sealed it in the envelopes provided, and then gave it to Board Agent through an opening in the glass partition. Tr. at 418-19, 432. Vestigo estimates he was in the Regional Office for about five minutes. Tr. at 419.

*Allyson McCoy*

Allyson McCoy was also a unit member. She did not receive a ballot in the mail. McCoy states that her co-workers knew that she was not a Union supporter. Tr. at 453-54. She states that no one from the store's organizing committee told her that she could contact the Regional Office and make an appointment to vote in person. Tr. at 457. McCoy asserts that she would have visited the Regional Office to cast a ballot had she known that was an option. Tr. at 457-58.

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<sup>5</sup> Quigley did not specify how many employees planned to go to the Regional Office together.

<sup>6</sup> Quigley did not receive a full mail ballot election kit at the Regional Office. Tr. at 363-64, 369.

<sup>7</sup> Vestigo did not receive a full mail ballot election kit at the Regional Office. Tr. at 429.

At the count on April 8, which was held by Zoom videoconference, the Employer challenged the ballots of Claypool, Quigley, and Vestigo because the envelopes containing their ballots did not have postmarks. Tr. at 263. Novara advised the parties that per Board protocol, special arrangements had been made to allow those voters to vote. Employer attorney Doud asked what the Board protocol was and what arrangements had been made, but none of the Board Agents present at the count provided details about how those voters had voted. Tr. at 264.

#### Relevant NLRB Casehandling Manual Provisions

The NLRB Casehandling Manual contains the following instructions for providing duplicate ballots:

#### **11336.4 Kit Not Received by Voter; Duplicate Kit**

Any contacts from prospective voters who report they have not received a kit should be given the action warranted. If the prospective voter, from the office records, has never been sent a mail kit, a duplicate should be sent immediately, the name inserted on a supplemental list, and one of a new series of “key” numbers given. If the caller has moved and it appears merely that the mail is delayed by the necessity for forwarding, advise a 2 day wait unless the deadline is imminent, in which case forward a new kit bearing the old number plus “(dupl)” and note the fact on the voter list.

If the caller has lost or spoiled the ballot or ballot envelope, the caller should also be sent a duplicate kit bearing the old number plus “(dupl).” In the event both the original and the duplicate envelopes are received from an employee to whom a duplicate was mailed, only the ballot in the envelope having the earlier postmark should be counted. In the event postmarks are not discernible, only the envelope bearing the earlier Regional Office date stamp should be counted. In the event two ballots are received in one envelope, the voter’s ballots should be challenged. If the parties agree, one of the ballots may be counted, providing secrecy can be maintained. Those duplicates not counted should not be entered in the tally as challenged or voided ballots, but preserved, unopened, for display to the parties as “duplicates.” The envelope bearing the earlier postmark or date stamp that contained the counted ballot should be attached to the envelope containing the duplicate that was not counted.

#### Credibility

Turning to credibility, I generally credit the testimony of Doud, Frumkin, Claypool, Quigley, and Vestigo. These witnesses testified clearly and without rebuttal. Although Frumkin’s recall of events was not complete, his testimony is supported by documentary evidence. Claypool, Quigley, and Vestigo’s testimony about the manner in which they voted was consistent.

## Discussion

### Objections 1, 2, and 3

The Employer's first three objections relate to the Region's mechanical handling of the election in this case. These objections allege that Region 14 engaged in misconduct by failing to mail out ballots to two eligible voters within the timing set forth in the Stipulated Election Agreement; by failing to extend the time in which voters could return their ballots to the Regional office before the count; and by failing to follow the proper procedure for handling replacement ballots. For the reasons below, I recommend overruling these objections.

It is undisputed that the Region failed to mail ballots to Claypool and Quigley on March 16 because the Board Agent mailing the ballots erroneously used a version of the Voter List that omitted those two voters. On April 1, approximately one week before the count of ballots was scheduled, the Board Agent discovered her error and mailed ballots to Claypool and Quigley. The record evidence shows that the Region followed the procedures set forth in Section 11336.4 of the Board's Casehandling Manual by mailing ballots to Claypool and Quigley with new key numbers.

Section 11336.4 of the Casehandling Manual also states that "contacts from prospective voters who report they have not received a kit should be given the action warranted."<sup>8</sup> In addition to mailing ballots to these voters, the Regional Office provided Claypool and Quigley, as well as other employees who had not yet received ballots, an opportunity to visit the Regional Office, pick up a ballot, vote, and leave their ballot with a Board Agent. At least three voters visited the Regional Office to vote, including Claypool, Quigley, and Vestigo. These voters each made an appointment with a Board Agent to visit the Regional Office in early April. Claypool, Quigley, and Vestigo testified that upon arrival at the Regional Office, they identified themselves to a Board Agent in the Office. Each voter remained in the reception area and spoke to a Board Agent who was on the other side of a glass partition. A Board Agent provided each voter with a ballot and envelopes. Each voter completed their ballot alone in a private room located off the reception area, sealed the ballot in an envelope to protect the secrecy of the ballot, and gave the ballot to a Board Agent by sliding it through an opening in the glass partition separating the Board Agent from the reception area. These voters voted in the same manner as other mail ballot voters except that they completed their ballots at the Regional Office. I do not find that the procedures by which Claypool, Quigley, and Vestigo voted raise a question as to the validity or fairness of this election.

The Employer repeatedly asserted that these voters voted "in person." The Employer argues that Region 14 breached the Stipulated Election Agreement by conducting a mixed manual and mail ballot election. I find, though, that the procedures used in the present case are distinguishable from a manual or mixed election. As noted above, Claypool, Quigley, and Vestigo followed the same procedures as others voting by mail, including marking their ballots and sealing those ballots in secrecy envelopes. The envelopes were identical to the envelopes

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<sup>8</sup> The Board has noted that the Casehandling Manual is "not binding authority." The procedures outlined in the Casehandling Manual "demonstrate the efforts the agency undertakes to ensure that elections are free from, and from the appearance of, irregularities." *Professional Transportation, Inc.*, 370 NLRB No. 132, slip. of at 2 fn. 7 (June 9, 2021).



used by voters who returned their ballots by mail, except that these envelopes did not have a postal service postmark. There is no evidence that the Regional Office treated these “in person” ballots as it would treat ballots in a manual election. For example, the Region did not maintain a manual ballot box for ballots, but instead each voter used the secrecy envelopes employed in mail ballot elections. The Employer has not demonstrated that the manner in which these employees voted could have affected the outcome of the election or that these procedures could have impugned the fairness or validity of the election.

This case is distinguishable from *KCRA-TV*, 271 NLRB 1288 (1984), on which the Employer relies. In *KCRA-TV*, parties entered into a stipulated election agreement under which employees who worked at one location would vote in a manual election while employees that worked in a second location would vote by United States mail. The regional office provided two employees who worked at the first location mail ballots instead of requiring those employees to vote in the manual portion of the election. The Board found that the “Stipulated Election Agreement was materially breached when the Board agent sent mail ballots to two employees who were ineligible to receive them.” *Id.* at 1289. As explained above, in the instant case, employees who visited the Regional office received a duplicate ballot with mail ballot envelopes which were identical to what they would have received in the mail, voted according to mail ballot procedures, and gave a Board Agent a sealed mail ballot. These envelopes were identical to those the Region received in the mail except that they did not have a postmark. The Employer has not provided evidence that these procedures deviated from those provided for in the Stipulated Election Agreement.

With regard to the date of the count, the evidence show that the Employer requested that the count be postponed to a later date in order to give Claypool and Quigley an adequate amount of time to vote. The Union opposed the Employer’s request. The Region, aware that Claypool and Quigley, as well as other voters who did not receive ballots in the mail, had an opportunity to vote by the April 6 deadline, denied the Employer’s postponement request. The Board has found that the count must provide finality for an election, even if the Board were to receive a substantial, even determinative, number of ballots after the count. *See Classic Valet Parking*, 363 NLRB 249, 249 (2015); *see also Premier Utility Services, LLC*, 363 NLRB 1524 (2016). There is no evidence that the Region’s failure to move the date of the count, to which the parties had agreed in the Stipulated Election Agreement, affected the outcome of the election or called the validity of the election into question.

For these reasons, I recommend overruling the Employer’s Objections Nos. 1, 2, and 3.

#### Objections 4, 5, and 6

Objections 4, 5, and 6 relate to communications with the parties about the election and duplicate ballots. These objections allege that that Region 14 engaged in misconduct by making special arrangements with the Union to allow certain voters to vote in person rather than have a ballot mailed to them; by misrepresenting to the Employer that it had mailed ballots to voters when the Region had allowed those voters to pick up their ballots in person; and by failing to explain to the Employer why the Region was not concerned about voter disenfranchisement and election integrity. For the reasons stated below, I find that these objections have merit and recommend sustaining Objections 4, 5, and 6.

There was a substantial disparity between the communications the Region shared with the Employer and the communications the Region shared with the Petitioner; this disparity casts doubt as to the fairness of the conduct of this election. Most significantly, the Region misrepresented to the Employer steps it was taking to provide Claypool and Quigly with ballots. On April 1, Nisly alerted the parties that she had inadvertently omitted Claypool and Quigley from the initial ballot mailing. She affirmatively informed the parties that she mailed ballots to those two voters and explained how she accounted for those ballots on the mail ballot list. At the time of Nisly's email, the Petitioner was in communication with the Region about employee visits to the Regional Office; the Employer did not know that employees were visiting the Regional Office to vote until after the count on April 8. Moreover, the Region offered the Petitioner the opportunity to schedule appointments for voters who needed ballots and provided the Petitioner with information about when the Region could schedule visits with employees. The Region never offered the same option or information to the Employer. As a result, the Petitioner had an opportunity to reach out to its supporters to advise them to contact the Regional Office about voting in that office. The Employer was not given that same opportunity.

Further, the Petitioner was better informed than the Employer regarding the timing of the count. The Petitioner, who opposed postponing the count, knew that Claypool and Quigley could visit the Region before April 6, when ballots were due back to the Regional Office. In its denial of the Employer's request to postpone the count, the Region cited the Petitioner's objection. Er. Ex. 62. Because the Region had been transparent with the Petitioner in a way that it had not been with the Employer, the Petitioner had greater insight into the timing of the count.

I find that the inequities resulting from the Region's communications with the parties cast doubt on validity on the fairness of this election. See *Hudson Aviation Services*, 288 NLRB 870 (1988) (in which the Board set aside an election where a Board Agent's argument with a representative of the employer impugned the neutrality of the election). Accordingly, I recommend sustaining the Employer's Objections Nos. 4, 5, and 6.

#### **Objection No. 8: Calvin Culey's Ballot**

In its eighth objection, the Employer alleges that Region 14 engaged in misconduct by losing custody of one of the ballots for an unspecified length of time prior to the ballot count.

#### **Facts**

Calvin Culey, a unit member, testified about the manner in which he voted in the election. Culey testified that he understood that this was a mail ballot election in which voters would receive a ballot in the mail and that voters would mail their ballots back to the NLRB or that voters could go vote in person. Tr. at 373. Culey testified that he thought he heard about voting in person from a Union agent named Mari, but he was not certain. Tr. at 373-74.

Culey received a ballot in the mail and completed the ballot. On April 5, Culey drove to the Regional Office to drop off his completed ballot. Tr. at 375, 377. Culey did not contact the Region to make an appointment before dropping his ballot off. Tr. at 377. Culey arrived at the Regional Office and saw a sign on the door to the Regional Office that read "Mailperson, just put mail on the desk inside." Tr. at 375. Culey went into the Region's reception area and placed his

ballot on the desk behind the glass partition. Tr. at 375. He did not see anyone present in the Regional Office. Id. In fact, the lights in the office were off. Tr. at 382.

During the count of ballots, there was no postmark on Culey's ballot. According to Employer attorney Doud, Board Agent Nisly, who conducted the count for Region 14, stated that the ballot had appeared in the Region that morning and she did not know how it got there. Tr. at 262. The Employer challenged Culey's ballot because it did not have a postmark. Pet. Ex. 9. The Union agreed to sustain the challenge to Culey's ballot, as well as the Employer's other challenges. Er. Ex. 79.

### Credibility

Turning to credibility, I generally credit Culey and Doud's testimony regarding Culey's ballot. Their testimony is consistent and unrebutted.

### Discussion

I find that the Employer's eighth objection has merit and recommend sustaining this objection. It is undisputed that Culey left his ballot in the Regional Office unattended on a desk and that this ballot was unsecured for an unknown period of time. There is no evidence as to when the ballot was found, by whom, or how or when it was secured by the Regional Office. Moreover, there is no evidence regarding who could have had access to the ballot between the time Culey left the ballot at the Regional Office and the time of the count. Culey's ballot was one of a number of determinative challenges in this case.<sup>9</sup> The Board has found that leaving determinative mail ballots unattended is grounds for setting aside an election, even absent evidence of tampering. *See New York Telephone Co.*, 109 NLRB 788, 790-791 (1954) (setting aside election where a determinative number of mail ballots were temporarily mislaid by the regional office, notwithstanding evidence that the ballots had at all times been in a locked room and there was no indication of tampering with the ballots); *see also Paprikas Fono*, 273 NLRB 1326, 1327 (1984) (setting aside election due to mishandling of determinative challenged ballots by regional personnel based on "the appearance of irregularity created by the procedures used and the impact of that appearance on the election's validity"). Based on these facts and the Board's precedent, I recommend sustaining the Employer's eighth objection.

### Objections Nos. 10 through 15: The Count

In its tenth objection, the Employer alleges that Region 14 engaged in misconduct by using a cardboard "ULTA" box to mix up the ballots during the count, causing one of the ballots to get lost for several minutes underneath one of its flaps. In its eleventh objection, the Employer alleges that Region 14 engaged in misconduct by losing one of the ballots during the ballot count. In its twelfth objection, the Employer alleges that the Board Agent conducting the count engaged in misconduct by counting a ballot that had been outside the presence of the parties for several minutes. In its thirteenth objection, the Employer alleges that Region 14 personnel engaged in election misconduct by leaving the room during the ballot count with all seven unsecured determinative challenged ballots for twenty minutes. In its fourteenth objection,

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<sup>9</sup> The Petitioner agreed to sustain the Employer's challenges. Region 29 issued a revised, final tally of ballots. Er. Ex. 79. The challenges were not resolved on their merits.

the Employer alleges that Region 14 personnel failed to handle determinative challenged ballots in accordance with election procedures set forth in Section 11344 of the Manual. In its fifteenth objection, the Employer alleges that Region 14 failed to maintain proper procedures for ballots during the count.

### **Facts**

The facts related to the conduct of the count are undisputed. Employer attorney Doud testified about the conduct of the count without rebuttal.

The count was conducted on April 8 by Zoom videoconference. Board Agent Nisly conducted the count. Board Agents Novara, Susan Wade Wilhoit, and Supervisory Examiner Carla Coffman attended the count via Zoom videoconference. Tr. at 256-57. Approximately seventy people watched the count. Initially, the parties and the Board Agents went into a Zoom breakout room to view the mail ballot envelopes. Tr. at 259. The Employer objected to conducting the count at that time on the grounds that certain voters had not had an adequate opportunity to vote because their ballots had been mailed late. Board Agent Novara noted the Employer's objection, but the parties proceeded with the count. Tr. at 259-60. There were fourteen returned ballots; the Employer challenged seven ballots. Tr. at 266. With regard to the seven unchallenged ballots, Nisly opened the outer, signed envelopes and put the seven ballots inside the unsigned envelopes to be counted in a cardboard box. Nisly set the seven challenges aside. The Board Agents and the parties then moved back to the main Zoom room. Id.

Once the parties returned to the main Zoom room, Nisly began to count the ballots in the cardboard box. Nisly took the ballots out of the cardboard box, put the box on the floor out of the view of the Zoom camera, and counted the ballots. Nisly initially only counted six ballots. She then found the seventh ballot under a flap of the cardboard box and counted that ballot. Tr. at 266-67.

Nisly then made a list of the challenged ballots. She took the challenged ballots out of the room for approximately fifteen to twenty minutes to make copies of the challenged ballot envelopes. Tr. at 267, 273. The list of names of the challenged voters was visible on the Zoom screen during this time. Nisly returned to the room, finished processing the challenges, and completed the tally of ballots. Tr. at 267.

### **Relevant Casehandling Manual Provisions**

Section 11344 of the Casehandling Manual, which governs storage of determinative challenge ballots, states:

A photocopy of the face of the envelope(s) and a memorandum stating where the ballots have been stored should be placed in the electronic case file. The envelope(s) must then be stored in the office safe.

The regional director, officer-in-charge, or resident officer is the custodian of the safe. The regional director may designate others as agents for this purpose, but the ultimate responsibility remains with the regional director, officer-in-charge, or resident officer.

A log should be maintained by the regional director, officer-in-charge, resident officer or the duly designated agent concerning the challenged ballots that are stored in the safe. If a designated agent is appointed, the regional director should set forth the name of the designated agent in this log and this designation should be signed by the regional director.

When the large envelope(s) containing ballots is to be removed from the safe, the following procedure must be followed. The parties should be advised and provided an opportunity to be present at the opening of the large envelope(s). *Paprikas Fono*, 273 NLRB 1326 (1984). The regional director, officer-in-charge, resident officer, or designated agent will make an entry in the log showing the removal from the safe and this removal entry will be signed by one of the aforementioned persons. The log should indicate the reason for the removal, the date of the removal, the Board agent to whom the envelope is released, and the nature of the contents authorized to be removed (e.g., all determinative challenged ballots or the identity, as shown on the large envelope, of the challenged ballots that are authorized to be removed).

As indicated above, the large envelope(s) should not be opened unless the parties have been allowed the opportunity to be present. In addition, when some, but not all, of the challenged ballots are removed from the large envelope for the purpose of counting, such removal shall be done at the count in the presence of the parties' representatives who choose to be present.

The Board agent should put a memorandum in the case file recording the number of ballots removed, their identity, their disposition, and the number of ballots remaining in the large envelope. A copy of the memorandum is to be placed in the large envelope, which should again be secured in the manner described above by the Board agent and the parties' representatives at the count and placed in the safe.

### Credibility

I credit Doud's testimony regarding the conduct of the count. As noted, Doud's testimony is un rebutted.

### Discussion

#### Objections 10, 11, and 12: The Count

In these objections, the Employer alleges that the Board Agent conducting the count engaged in misconduct by using a cardboard "ULTA" box to mix up the ballots during the count and causing one of the ballots to get lost for several minutes underneath one of the flaps of the box; by losing one of the ballots during the ballot count; and by counting a ballot that had been outside the presence of the parties for several minutes.

The evidence shows that Nisly deposited all seven unchallenged ballots in a cardboard box, although Nisly used a box from a department store instead of an NLRB ballot box. There is

no evidence that the cardboard box used was deficient for holding the seven ballots or how the box differed from an NLRB ballot box other than the labelling.

The parties were present in the Zoom breakout room when Nisly deposited the ballots in the box. The parties then went into the main Zoom room with other individuals who were watching the count. Nisly took the ballots out of the cardboard box, put the box on the floor out of the view of the Zoom camera, and counted the ballots, but only had six ballots instead of seven. Nisly found the seventh ballot under a flap of the cardboard box. Although the Employer alleges that the ballot was outside the presence of the parties for several minutes, this allegation is not plausible. The evidence shows that Nisly simply left one ballot in the ballot box while she counted the other ballots, and then immediately retrieved the last ballot to finish the count. Given that there were only seven ballots to count, the last ballot could not have been in the ballot box for more than a few moments. I do not find that the Employer has demonstrated that the use of the cardboard box was objectionable. Moreover, the evidence does not support a finding that Nisly lost a ballot or that the seventh ballot was outside the presence of the parties. Accordingly, I recommend overruling the Employer's Objections Nos. 10, 11, and 12.

#### Objections 13, 14, and 15: The Challenges

In these objections, the Employer alleges that the Board Agent conducting the count mishandled the determinative challenges by leaving the room during the ballot count with all seven unsecured determinative challenged ballots for twenty minutes; by failing to handle determinative challenged ballots in accordance with election procedures set forth in Section 11344 of the Casehandling Manual; and by failing to maintain proper procedures for ballots during the count.

The Employer's evidence demonstrates that Nisly followed the proper procedures for documenting the determinative challenged ballots. The Casehandling Manual provides that the Board Agent should make a photocopy of the face of the envelopes. The Employer concedes that this is precisely what Nisly did. Making photocopies required Nisly to leave the room where the count was conducted. There is no evidence that Nisly failed to safeguard the challenged ballots while she made photocopies or that she failed to secure the ballots properly. The Employer has not met its burden that Nisly's processing of the challenges was objectionable. *Compare Paprikas Fono*, 273 NLRB 1326, *supra* (in which the Board set aside an election where there was evidence of extensive handling of challenged ballots by Regional staff, including opening the impounded ballot envelope and inspecting the challenged ballot envelopes, outside the presence of the parties). Accordingly, I recommend overruling the Employer's Objections Nos. 13, 14, and 15.

### **RECOMMENDATION**

I recommend sustaining the Employer's Objections Numbers 4, 5, 6, and 8; I recommend overruling the Employer's Objections Numbers 1, 2, 3, and 10 through 15. Accordingly, I

further recommend that the election held on March 16, 2022 be set aside and a new election held or whatever remedy the Regional Director or Board find appropriate in this case.<sup>10</sup>

### **Appeal Procedure**

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 29 by March 10, 2023. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions must 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](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Pursuant to Sections 102.111-102.114 of the Board's Rules, exceptions and any supporting brief must be received by no later than 11:59 p.m. Eastern Time on the due date.

Within five (5) business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated at Brooklyn, New York, on February 24, 2023

/s/ Rachel Zweighaft

Rachel Zweighaft  
Hearing Officer  
National Labor Relations Board, Region 29  
Two MetroTech Center  
Brooklyn, NY 11201

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<sup>10</sup> On October 12, 2022, Administrative Law Judge Arthur J. Amchan issued a Decision in Case No. 14-RC-290968 et al. Judge Amchan recommended that the Employer "be ordered to recognize and on request bargain with the Union as the exclusive collective-bargaining representative of [the Employer's] bargaining unit employees at the 75th street store for a period of not less than 1 year." Administrative Law Judge Decision at 38-39.