JD-21-07
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PHILLY TRANSPORTATION, LLC
Employer
and

JOHNDELL GREDIC Case No. 4-RD-2100
Petitioner
and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 263
Union

Donna D. Brown, Esq., for the General Counsel.
Eric Faust, for the Employer.[1]
Lance Geren, Esq., for the Union.

ADMINISTRATIVE LAW JUDGE'S RULING ON OBJECTIONS

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to a Stipulated Election Agreement approved on December 14, 2006, by the Regional Director for Region 4 of the National Labor Relations Board (the Board), an election by secret ballot was conducted on January 12, 2007, among employees in the bargaining unit described in the Agreement.[2] The results of that election were as follows:

Approximate number of eligible voters	138
Void Ballots	0
Votes cast for Petitioner	38
Votes cast against participating labor organization	32
Valid votes counted	70
Challenged ballots	1
Valid votes counted plus challenged ballots	71

On January 15, 2007, the Employer, through Faust, timely filed an Objection to conduct which it contends adversely affected the results of the election. The objection, filed in letter

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[1] Eric Faust, who is not an attorney, is president of the Employer and served as its representative at the hearing.

[2] The bargaining unit consists of "All full-time and regular part-time escorts and drivers employed by the Employer at its 2905 Abbotsford Ave., Philadelphia, PA facility; but excluding all other employees, guards, and supervisors as defined in the Act." The decertification petition giving rise to the Stipulation Election Agreement and to the Board-conducted election was filed by Johndell Gredic, the Petitioner herein.

form, contains 12 "bullet-point" arguments explaining why the Employer believes the election was unfair and should be overturned. The arguments, enumerated 1-12 below, are as follows:

1. Our firm has approximately 140 eligible voters that *were and still are* eligible to exercise their statutory right to vote in the stipulated decertification election regarding union involvement in our firm.
2. The election times that were stipulated to did not allow at least 50% of our eligible voters to cast ballots.
3. Because it operates a 24-hour a day transportation business, the two-hour period allowed for voting did not cover all of its shifts, and 50% of its voters were turned away both before and after the 9 am to 11 am voting time frame.
4. On the date of the election, it operated 47 charters and had at least 47 employees either driving an extra shift or taking care of family or personal matters prior to or after the extra shift, resulting in 50% of the eligible voters being unable to vote during the stipulated two-hour polling period.
5. Because several schools scheduled early dismissal of students on the day of the election, "even more of our eligible voters" were out on the road and unable to vote.
6. Its transport of students in "Early Intervention" and "Head Start" programs directly conflicted with the 9 a.m. – 11:00 a.m. voting schedule.
7. "A very large number of eligible voters" who had trips to perform during the poll opening were turned away from voting when they reported to vote prior to 9:00 a.m.
8. The election was improperly held on a Friday, the busiest day of the week since it has more trips, charters, and sports trips on this day than any other week day, thus preventing "even more eligible voters from voting." The election should have been held on a Tuesday for a period of 6-8 hours to accommodate voters and the nature of its business.
9. A percentage of the eligible voters, 98% of whom are African-American, were on holiday because of the Martin Luther King holiday which fell on 1/15/07, the Monday following the Friday election date.
10. The two-hour voting window did not address the nature of our business.
11. A free and unprejudiced election was not achieved and a new election must be held that affords all eligible voters a reasonable timeframe to cast their vote.
12. All eligible voters "are part-time employees and cannot afford union dues, initiation fees, and so on" and must be afforded their right to choose.

A hearing on the Employer's objection was held in Philadelphia, PA on February 20, 2007, at which all parties to this proceeding were afforded an opportunity to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. Upon the record evidence in this proceeding, my observation of the demeanor of the witnesses, and briefs filed by the Employer and the Union, I make the following

Findings of Fact

The Employer is in the business of providing school bus transportation services from its Abbotsford Ave. facility in Philadelphia, PA. It began operations in April 2006, after taking over from Service Plus, its predecessor, which had, in turn, assumed operations from Metro Mobility. Local 623 had been the exclusive bargaining representative for the employees under Metro Mobility and Service Plus, and continued to serve as bargaining representative for those same unit employees when the Employer assumed operations in April 2006.

On December 6, 2006, Gredic, as noted, filed a decertification petition seeking to have Local 623 removed as bargaining representative of the Employer's unit employees. Thereafter,

Faust met with Board agent Cara Fies-Keller to schedule a date, time, and place for an election to be held among unit employees. An agreement was apparently reached between the two on the specifics of the election which led to the Stipulated Election Agreement signed by the Employer, the Union, and the Petitioner on December 13, 2006, and approved, as noted, by the Regional Director the following day.

While not raised as part of its objection, the Employer at the hearing nevertheless claimed to have had no input regarding the date and time for the election.[3] Thus, Faust testified that the selection of Friday, January 12, 2007, for the election, and for the polling to take place between 9 a.m.-11 a.m., was proposed by Fies-Keller, and that he agreed to these arrangements because he did not know he could have suggested alternative dates and times for the election. He explained that had he been aware he could do so, he would have asked that the election be held on a Tuesday, rather than a Friday which is its busiest day, and that the polls be kept opened for at least 6 hours to accommodate its different shifts. While conceding that he "was probably negligent in working with the Board agent and educating her as to the demands of our business, [and as to] the different shifts that are conducted on our business," Faust claims that he "was not afforded" an opportunity "to ask for an expansion of the hours" for the polls to kept opened, and that, in his view, the two-hour time polling period was "mandated" and arbitrarily imposed on the Employer (Tr. 82-83).

Faust's above claim that the election schedule was mandated by the Board, and that he was denied an opportunity to propose a longer polling period, is simply not credible. Faust testified that, during his meeting with Fies-Keller to discuss, inter alia, the scheduling of the election, the latter asked about the Employer's pay periods, explaining to Faust that paydays are generally good days to hold elections because it increased the likelihood of a large employee turnout. His testimony in this regard thus suggests that Fies-Keller was not particularly familiar with the Employer's operations, or its employees' work schedules, making it highly unlikely, in my view, that Fies-Keller would have come up with the date and time for the election without input from Faust. Rather, I find it more likely that on being advised that paydays fell on Fridays, Fies-Keller "suggested" to Faust that the election be held on a payday Friday, and that the election date of Friday, January 12, 2007, a payday, was chosen by Faust, following consultation with Fies-Keller.

Nor do I believe, as claimed by Faust, that the 9 a.m.-11 a.m. polling time was "mandated" or arbitrarily chosen by agent Fies-Keller who, as noted, lacked familiarity with the Employer's operations. Rather, logic and common sense strongly suggest that, like the election date, the 9 a.m. – 11:00 a.m. polling schedule was arrived at following discussions and consultation with, and input from, Faust, the one person at the meeting most knowledgeable of the Employer's operations and employee schedules. An e-mail sent by Fies-Keller to Union representative James Merritt on December 12, the day before the Stipulated Election Agreement was signed, asking if the Union approved of the election arrangements that had been "proposed" by the Employer, contradicts Faust's claim that he had no input into when the election was to be held, and that the election schedule had been mandated or arbitrarily imposed on him by the Board. (See Union Exh. 2). Indeed, from my observation of his demeanor on the witness stand, and his *pro se* handling of the case for the Employer, which I find he did commendably, Faust did not strike me or come across as someone who would have

[3] Although not specifically raised in its objection, the Employer's argument in this regard is subsumed in the argument made in its objection that, given the nature of its business and the various shifts it operates, the date and time chosen for the election served to deprive many unit employees of their right to vote.

passively allowed the Board agent to dictate when and how the election at his facility and among his employees was to be conducted.

In sum, I find that the date, time, and place for the election was, as apparent by the Stipulated Consent Agreement, arrived at with the informed consent and approval of Faust for the Employer, and that it was Faust, not the Board agent, who, following discussions with Faust, first proposed the election schedule. There is no record evidence to suggest, nor does Faust in his testimony aver, that he, at any time during his meeting with Fies-Keller, expressed dissatisfaction with or opposition to the date, time, or place that was ultimately agreed upon for the election. Indeed, when asked by the Union's counsel if he expressed to Fies-Keller his belief that two hours might not be enough, Faust evasively replied that he "just agreed" to the time frame to be respectful, implicitly admitting thereby that he had not done so. (Tr. 127). The employer's claim, therefore, that the date and time for the election was foisted upon it by the Board is rejected as without merit. Having so found, I turn next to the merits of the Employer's objection.

The Objection

Paragraphs 1, 2, 3, 4, and 6

When read together, the essence of the Employer's argument in these paragraphs is that "at least 50% of [its] eligible voters" were effectively denied the right to vote by virtue of the fact that they were given only two hours, e.g., from 9 a.m. – 11 a.m., in which to cast their ballots. It contends that the two-hour polling period was too limited and did not allow employees sufficient time to get to the polling place, citing, by way of example, that the 9 a.m.-11 a.m. time frame conflicted with the transport by its employees of students involved in school Early Intervention and Head Start programs. It further argues, implicitly, that because it runs several shifts, the two-hour polling period failed to accommodate employees working on different shifts, thereby denying them the right to vote. Finally, it argues, in paragraph 4, that on the day of the election, it had at least 47 employees "either driving an extra shift or taking care of family or personal business prior to or after the extra shift," which, it contends, resulted in "50% of eligible voters not being able to vote during the 9-11 a.m. polling period. Finally, while not specifically raised as an argument in its objection, the Employer, at the hearing and on brief, claims that a majority (e.g., 15-20) of the unit employees assigned to its Temple University Division did not work on the day of the election because the Temple Division was closed for the holiday period from December 15, 2006 to January 15, 2007, and that these employees, consequently, "were never able to find out about or participate in the election." (Tr. 56, Employer's brief, p. 1). I find its argument to be without merit.

It is patently clear from the above-described election results that of the 138 unit employees who were eligible to vote,[4] only 70, or slightly more than half, actually cast ballots. From this statistical fact, and citing certain documentary evidence produced at the hearing, the Employer argues, and would have me infer, that those employees who did not vote failed to do so because they could not get to the polls in time given their work schedules on January 12, 2007, and the limited amount of time provided, e.g., two hours, in which to cast their ballots. The Employer's argument is based on nothing more than speculation and conjecture and does not support any such inference.

In support of its position that numerous employees who worked on election day were not

[4] The list of eligible voters, e.g., the "Excelsior" list, is in evidence as Board Exhibit 2.

able to vote, the Employer produced a document, received into evidence as Employer Exhibit 1,[5] containing the names of employees who were scheduled to run charter trips on the date of the election, and the times when said employees were scheduled to pick up students and return from such trips. It identified nine employees listed therein, e.g., Ed Sommers , Milton Carden, Dwayne Glover, Shawn Jenkins, W. Wright, Ronald Adams, Joseph Sado, Aleasa Moore, and W. Williams, as among those who "were not able to vote because they were performing charter-work during the time of the election."

However, of the nine employees the Employer contends were unable to vote, only Ed Sommers appears to have had a charter route on January 12, that fell within the entire polling period. The other eight employees each had a window of opportunity during which they could cast ballots. For example, Employer Exhibit 1 shows Milton Carden was scheduled to begin a charter route at 9:15 a.m. and to return at 12:00 p.m. Carden, therefore, could have voted between 9:00 a.m.-9:15 a.m., if he chose to do so, and no evidence was produced by the Employer to show that his failure to do so was in any way related to his work schedule that day. That exhibit also shows employee Dwayne Glover scheduled to begin a charter route at 10:00 a.m., giving him one hour – between 9-10 a.m. – in which to cast a ballot. Employee Shawn Jenkins is shown on Employer Exhibit 1 as having a charter route on election day that was to begin at 8:45 a.m.. The Exhibit, however, does not show a return time for Jenkins, and no evidence was produced by the Employer to show if Jenkins was due to return before or after the 11:00 a.m. poll closing time. The Employer, therefore, has not demonstrated that Jenkins' work schedule on election day was such as to have denied him an opportunity to vote in the election. Employees W. Wright, Joseph Sado, and W. Williams were, according to Employer Exhibit 1, all scheduled to begin their charter routes at 2:00 p.m., some three hours after the election polls closed, making it patently clear that their work schedule did not interfere with their right or opportunity to vote. Employer Exhibit 1 also shows that Ronald Adams, whose charter route was not scheduled to begin until 10:45 a.m., and Aleasa Moore, who was scheduled to begin her route at 10:00 a.m., likewise had ample time, e.g., at least one hour, in which to cast ballots.

As to Ed Sommers, on election day, his charter route, according to Employer Exhibit 1, called for him to pick up his student passengers at 8:45 a.m., and to begin his return trip at 11:20 a.m. While the two hour polling period coincided with Sommers' scheduled pickup and return times, it does not necessarily follow from this that Sommers, or for that matter any other employee shown in Employer Exhibit 1 as having had a similar work schedule, was somehow prevented from voting based on this alleged conflict between their described work schedules and the polling time.[6] In fact, the record shows that most of the employees identified in

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[5] Along with a two-page posthearing brief, the Employer submitted a copy of Employer Exhibit 1. However, this latter copy contains a notation, not found on the original Employer Exhibit 1, stating that the exhibit shows employees who "were performing charter work during the [1-12-2007, 9-11 am] election." The notation is not entirely accurate, for the exhibit shows that numerous employees handled routes that began in the afternoon, after the polls had closed. For example, employees Phanes Supre, Jamillal Knight, W. Wright, Doris Downing, and Angelio Procter began their charter routes at 1:45 p.m.; employees Joseph Sado, and W. Williams started at 2:00 p.m.; employee Will Williams at 3:45 p.m.; Rafael Neris at 4:00 p.m.; Robert Carey at 4:30 p.m.; Regina Vassell at 5:30 p.m.; and Ronald Braxton at 7:00 p.m.

[6] It would appear that employees engaged in such charter trips were not necessarily required to remain at the destination site until their scheduled return time. Thus, Faust testified that the decision as to whether an employee had to remain at the site was up to the customer. No evidence was produced by the Employer to show that during his charter trip on January 12, Sommers had been required by Bishop McDevitt High School, the customer, to remain at his

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Employer Exhibit 1 who had work schedules similar to Sommers that day did indeed vote. Thus, employees Larae Deas, William English, Ana Placencia, Rosa Serrano, Sterling Mercier, and Joanne Hamlet all were assigned charter routes that day with scheduled pickup times beginning on or before 9:00 a.m. and a return time on or after 11:00 a.m. According to Board exhibit 2, all of these employees voted in the election.[7]

No explanation or evidence was proffered by the Employer as to why employees Deas, English, Placencia, Serrano, Mercier, and Hamlet were able to vote, while Sommers did not, despite having similar work schedules on January 12. Having failed to produce any evidence to show why Sommers, or any of the other eight employees with charter trips on January 12, did not vote, the Employer's claim that their failure to do so was somehow related to an alleged conflict between their work schedules and the two-hour polling period, is rejected as without merit.[8]

Nor, in any event, is the Employer in a position to question the validity of the election based on what it contends was the insufficient amount of time employees had in which to cast ballots, for, as previously discussed and found, it was the Employer who proposed the date and time for the election which all parties agreed to in the Stipulated Election Agreement. As noted, there is no record evidence to show, and Faust readily conceded, that at no time during his pre-election scheduling discussions with Fies-Keller did he express any concern as to the sufficiency or insufficiency of the two-hour polling period.

The Employer has likewise presented no evidence to support its claim that a number of unit employees assigned to its Temple Division were unaware of, and consequently did not vote in, the January 12, election. Again, its argument in this regard is based on nothing more than speculation and conjecture. The Employer, for example, would have me assume that because the facility in question, Temple University, was purportedly closed between semesters, from 12/15/06 to 01/15/07, the employees assigned to that division during the period were not working and never learned that an election was to be held on January 12, 2007. Gredic did testify that "some" of the employees assigned to the Temple Division did not work during the Christmas recess, inferentially suggesting thereby that others did report for work during that period. The Employer, however, never identified which employees had been assigned to the Temple Division, and which of them may or may not have worked during the period in question. Nor was any evidence produced to show that these unnamed employees had no knowledge that a Board election among all unit employees had been scheduled for January 12, 2007. Not a single employee who worked for the Temple Division was called by the Employer to substantiate its claim in this regard. Accordingly, its claim that some 15-20 unnamed

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destination site, "125 Royal Ave, Glenside, PA", until his return time.

[7] Board Exhibit 2 was used by the Board agent during the election to check off the names of employees who appeared and voted in the election. A check mark next to an individual's name reflects that that employee showed up and voted.

[8] Faust, it should be noted, testified that employees assigned these charter trips are not necessarily required to remain at the destination site until the return trip, explaining that the decision on whether a driver should remain at the site is up to the client being serviced. (Tr. 94). It is not known if the client being serviced by Sommers on election day, Bishop McDevitt High School, asked him to stay at the site until his return trip. If not, there would have been no obstacle to Sommers returning to the Employer's premise to cast his ballot. As the party seeking to have the election set aside, the Employer bore the burden of establishing why Sommers failed to vote. The Employer failed to meet that burden here.

employees in its Temple Division were unaware of the election and, consequently, did not vote, lacks evidentiary support and is found to be without merit.

The Employer in paragraph 6 also argues, inferentially, that those employees who were responsible for transporting students enrolled in Early Intervention and Headstart programs may not have voted because the schedule for said programs directly conflicted with the 9:00 a.m.-11:00 a.m. polling period. It has, however, presented no evidence whatsoever to support that assertion. The schedules for the Early Intervention and Headstart programs, for example, were not produced to compare with the voting schedule used during the election, leaving the Employer's claim in this regard uncorroborated. Nor did the Employer identify which employees were responsible for these bus routes, and which of them may or may not have voted. In sum, the Employer's claim in paragraph 6 is based on nothing more than supposition and conjecture. Accordingly, its argument that employees involved in the transportation of students enrolled in the Early Intervention and Headstart program were not able to vote is without merit.

Finally, while it is true that almost 50% of the eligible voters did not cast ballots, no evidence was presented by the Employer to show that this failure to vote was in any way related to, or influenced by, the election schedule. Indeed, the only evidence of what may have motivated employees not to vote came from Petitioner Gredic, who testified that "a lot of people didn't want to vote" because they did not see any purpose in doing so. She expressed the view that "those who wanted to vote, voted." (Tr. 27). Thus, it is quite possible that, as claimed by Gredic, employees who chose not to vote did so voluntarily, and not because of something the Board or the Union may have done. Absent evidence showing that the employees' failure to vote was somehow linked to conduct attributable to the Union or the Board, the mere showing of a mathematical possibility that the number of nonvoting employees could affect the outcome of the election, as inferentially argued by the Employer here, does not suffice to set an election aside. *Acme Bus Corp.*, 316 NLRB 274 (1995). Accordingly, any such suggestion by the Employer is hereby rejected as without merit.

Paragraph 5

In paragraph 5 of its objection, the Employer argues that several schools for which it provides transportation services had an early dismissal schedule on January 12, which, consequently, "placed even more of our eligible voters on the street and unable to vote." In support of its claim, the Employer introduced into evidence, as Employer Exhibit 2, a list of the schools it purportedly services showing that several of them were indeed closed or closed early on January 12. A review of Employer Exhibit 2, however, does not support the Employer's claim that employees who purportedly serviced the schools that closed early on election day were denied an opportunity to vote. For example, while Employer Exhibit 2 shows that approximately 20 schools closed early on January 12, all of the closings occurred either at 11:30 a.m. or 12:00 p.m., long after the polls closed. Consequently, employees handling those routes could easily have cast ballots at any time during the 9:00 a.m.-11:00 a.m. polling period without affecting their ability to handle the schools' early dismissals. The Employer produced no evidence to show that any of these employees in fact did not vote in the election.[9] Accordingly,

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[9] The Union in its brief contends that a comparison of Employer Exhibit 2 with the Excelsior List (Board Exhibit 2) shows that "all of the employees covering the early dismissals voted in the election." (Union brief, p. 6). I am, however, unable to draw any such inference from a comparison of these two exhibits, for while Board Exhibit 2 contains the names of each unit employee and identifies with a check mark which employee voted in the election, Employer Exhibit 2 identifies the schools that had early closings or were closed on January 12, but does

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the Employer's claim that employees who handled the early school dismissals on January 12, 2007, were unable to vote because of an alleged conflict between their work schedule and the polling period is devoid of evidentiary support, and, I find, based on nothing more than speculation and conjecture. Its claim in this regard is therefore rejected as without merit.

Paragraph 7

In paragraph 7 of its objection, the Employer asserts that a large number of eligible voters who had charter trips to perform during the 2-hour polling period "were turned away when they reported to vote prior to 9:00 a.m." and, consequently, "were not afforded their right to vote." In essence, the Employer's argument is that said employees should have been allowed to cast ballots before the 9:00 a.m. election start time agreed to by the parties in the Stipulated Election Agreement. I find its argument to be without merit.

First, the Employer produced no evidence to show that employees whose charter trip on January 12, purportedly conflicted with 2-hour polling period had attempted to vote before the 9:00 a.m. election start time but were turned away. In fact, Gredic, who was called as a witness by the Employer to buttress its claim, denied having any such knowledge. Gredic did recall that one employee, whose name she did not remember, showed up to vote somewhere between 11:05-11:10 a.m., after the 11:00 a.m. closing time, but was turned away. However, to her knowledge, no one else "was turned away from voting because it was too early…." (Tr. 32).

Second, even if employees had shown up at the polls and attempted to vote before the 9:00 a.m. start time, it would not have been improper for the Board agent to refuse to allow them to cast ballots, for it is the Board's policy and practice that early arriving voters should not be permitted to vote prior to the scheduled polling time.[10] As noted, there is, in any event, no evidence to indicate that this in fact occurred here. Accordingly, the Employer's assertion in paragraph 7 of its objection, that employees were turned away from voting before the scheduled election start time, is rejected as lacking evidentiary support and wholly without merit.

Paragraph 8

The Employer argues in paragraph 8 of its Objection that, because it has more trips, charters, and sports trips on Fridays than on any other day of the week, the holding of the election on Friday, January 12, effectively "prevented even more eligible voters" from voting. Consequently, it further argues, the election should be set aside and a new one conducted during a longer polling period, e.g., between 6-8 hours, and on different weekday, preferably a Tuesday, so as to allow maximum employee participation. Its argument is without merit.

As previously discussed and found, it was the Employer who proposed the date and time for the election, and who, without any stated reservation or objection, entered into the Stipulated Consent Agreement agreeing to hold the election on Friday, January 12, 2007, between the hours of 9:00 a.m. and 11:00 a.m. The Employer, as noted, readily admitted to being negligent in not expressing its alleged concern regarding the selection of Friday for the holding of the election, or to limiting the polling time to two hours. In these circumstances, the Employer cannot be heard to complain as to the propriety or appropriateness of the election schedule as it

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not identify, either by name or employee number, the employees who were assigned to service those particular schools that day.

[10] See the Board's Case handling Manual (Part Two) Representation Proceedings, sec. 11318.5. Also, *Topside Construction, Inc.*, 329 NLRB 886, 899 (1999)

clearly was the product of its own choosing.

The Employer, in any event, produced no evidence to substantiate its claim that employees assigned charter trips, or some other work, on election day were unable to, or prevented from, voting due to a purportedly busy Friday work schedule. In fact, as to the employees assigned charter trips on the day of the election and reflected in Employer Exhibit 1, the record shows that, with exception of the nine employees discussed above in connection with paragraphs 1, 2, 3, 4 and 6 of the Employer's objection, all were able to, and did, in fact, vote, as shown in Board Exhibit 2, and, consequently were not, as claimed by the Employer, hindered in any way by their work schedule that day. As previously discussed, of the nine employees who did not vote, eight had sufficient time in their work schedule on election day in which to cast ballots if they so chose. Although the work schedule of the remaining employee, Sommers, did coincide with the 2-hour polling period, other employees with similar or identical work schedules as Sommers were, in fact, able to vote, raising the question, not answered here by the Employer, of why Sommers failed to vote. The one person who could have answered the question, Sommers, was not called to testify. In sum, the Employer has produced no evidence to show that the holding of the election on a Friday, allegedly its busiest work day, somehow deprived employees of their opportunity to vote in, or otherwise adversely affected the results of, the election.[11] Accordingly, the assertions contained in paragraph 8 of the Employer's objection is found to be without.

Paragraph 9

In paragraph 9 of its objection, the Employer implicitly asserts, but offered no evidence at the hearing to show, that many eligible voters failed to vote in the January 12, election because they purportedly were "on holiday" observing Martin Luther King Day, which fell on the following Monday, January 15, 2007. Consequently, it further suggests implicitly, that the alleged failure of these absentee employees to vote requires that a new election be held so as to enable them to vote. I disagree.

Initially, the Employer presented no documentary or other evidence to show how many, or which, of the unit employees took January 12, 2007, off in honor of Martin Luther King Day. Not a single employee witness was called by the Employer in support of this claim. Nor were any employee time sheets, cards, or other records produced to show which employees took off that day in anticipation of the holiday. Accordingly, the Employer's claim in this regard is based on nothing more than speculation and conjecture.

More importantly, assuming, arguendo, the truth of the Employer's assertion, to wit, that many eligible voters took off work on January 12, election day in honor of the upcoming Martin Luther King Day, a fact which, as noted, has not been established here, their decision to do so was purely a voluntary one, and not the result of anything the Board or the Union may have done. When, as here, employees do not vote for reasons that are beyond the control of a party or the Board, the failure to vote is not a basis for setting aside the election. *Waste Management*

[11] The Employer, it should be noted, produced no evidence to show that its Friday work schedule is busier or heavier than that of any other day of the week. Thus, while it did produce Employer Exhibit 1 showing the number of charter trips it had scheduled for Friday, January 12, 2007, election day, similar documents representing work schedules for other days of the week, including Tuesdays, its preferred day, which might have substantiated the Employer's claim, were not produced. Faust's unsubstantiated assertion at the hearing that Friday is the Employer's busiest work day is, I find, insufficient to support that claim.

of Northwest Louisiana, Inc., 326 NLRB 1389 (1998); *Coast North America (Trucking) LTD*, 325 NLRB 980 (1998); also, *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1094 (DC Cir. 2002). Accordingly, the Employer's implicit assertion that the election should be set aside because many of its eligible voters voluntarily absented themselves on election day to commemorate the Martin Luther King Holiday which fell on Monday, three days later, is rejected as without merit.

Paragraph 10

In paragraph 10, the Employer contends that the 2-hour voting period "did not address the nature of [its] business." Except for the previously raised and rejected arguments on how the 2-hour polling period denied its charter trip drivers an opportunity to vote, and why Friday was purportedly the wrong day on which to conduct the election, the Employer did not explain, much less produce evidence to show, how or why the election schedule failed to address the nature of its business. In short, the Employer has not shown that there was anything so particularly unique about its business operations so as to have somehow rendered it difficult for employees to cast ballots during the 2-hour voting period. As already discussed, most of the employees assigned charter trips on election day were able to vote during the 2-hour period and, as to those who didn't, no evidence was produced to show that their failure to vote was in any way linked to the 2-hour polling period chosen by the Employer itself presumably as the most opportune time for employees to vote. Accordingly, the Employer's vague and unsubstantiated claim in paragraph 10 that the 2-hour voting period "did not address the nature of [its] business" is rejected as without merit.

Paragraphs 11 and 12

The assertions made by the Employer in Paragraphs 11 and 12 of its Objection are nothing more than statements of opinion, e.g., "A free unprejudiced election was not in any achieved…(paragraph 11), and the "eligible voters are part-time employees" who "cannot afford union dues, initiation fees, and so on" (paragraph 12), and do not refer to, identify, or describe any specific conduct or action engaged in by the Union or undertaken by the Board that might warrant setting aside the election. The Employer in these paragraphs, and, as previously discussed and found, in the arguments made in paragraphs 1-10 of its Objection, has presented no evidence to show that the election held on January 12, 2007, was in any biased or unfair, or that the scheduling of the election had somehow deprived any unit employee of their right or opportunity to vote. Further, whether or not unit employees could afford to pay union fees or dues should the Union prevail in the election, a fact which incidentally has not been established here, has no bearing on how the election was conducted or render the election improper. Accordingly, the assertions made by the Employer in paragraphs 11 and 12 of its Objection are rejected without merit.

Conclusion

The arguments and assertions made by the Employer in its objection to the election held on January 12, 2007 are without merit.

Recommendation

Based on the above findings and conclusion, I recommend that the Employer's objection to the election held on January 12, 2007, be overruled in its entirety, and that a certification of representative be issued.[12]

Dated, Washington, D.C., April 18, 2007

George Alemán
Administrative Law Judge

[12] Any party may, within fourteen (14) days from the date of issuance of this recommended Decision, file with the Board in Washington, DC, and original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 4. If no exceptions are filed, the Board will adopt the recommendations set forth herein.