

**Watkins Construction Company, Inc. and Pipeliners
Local Union 798, Petitioner.** Case 27–RC–8038

October 4, 2000

DECISION AND CERTIFICATION OF RESULTS
OF ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN
AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held by mail ballot between May 19, 2000 and June 2, 2000, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 12 against the Union, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings, but not his recommendation to sustain the Petitioner's Objections 1 and 2.¹

The mail ballot election began on May 19, 2000,² and ended on June 2 at 10 a.m. The ballots were counted on June 2 at 1 p.m. Immediately before the count began, the Union's observer, Randy Evans, challenged three ballots, including the ballot of Andres Flores. After the ballots were opened, only two challenged ballots remained because the Board agent had mistakenly opened Flores' ballot. The tally was 10 to 10 with 2 challenges.

The Board agent then asked Evans whether he was willing to withdraw the two remaining challenges. Evans, after calling the Union's attorney, voluntarily withdrew the two challenges. The final tally was 10 for and 12 against the Union. Unbeknownst to either party, one of the counted ballots had arrived at the regional office on June 2 at 10:19 a.m., after the 10 a.m. deadline. The parties did not learn of the ballot's tardiness until the hearing.

The Union filed several objections to the conduct of the election. The hearing officer, finding merit in the Union's Objections 1 and 2, agreed that the election should be set aside because of the Board agent's procedural errors. According to the hearing officer, the counting of Flores' ballot and the failure to give the Union the opportunity to challenge the tardy ballot³ caused reason-

able doubt as to the fairness and validity of the election. The hearing officer found that it was impossible to determine how these two ballots affected the election results. We disagree with the hearing officer's recommendation.

First, with respect to Flores' ballot, the parties litigated the Union's contention (raised in its Objection 4) that his ballot should not be counted because the Employer assisted him in completing his ballot. The hearing officer found that this objection lacked merit. The Union has not excepted to the hearing officer's recommendation that this objection be overruled. Therefore, the ballot cast by Flores was valid and should be counted.⁴

Second, with respect to the tardy ballot, we have held that even where the record does not disclose a reason for the late mailing of a ballot that is received after the deadline for receipt, such a ballot should be counted if it is received before the count begins. *American Driver Service*, 300 NLRB 754 (1990); *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981).⁵ It is uncontested that the tardy ballot at issue arrived 2 hours and 41 minutes before the count began.

Had Flores' ballot and the tardy ballot been properly segregated and the subject of a hearing to resolve challenges, it is clear that the challenges would have been overruled, and the ballots would have been counted, resulting in the 10–10 tie vote reflected in the initial tally. Because the remaining two challenged ballots have been opened and counted, we know that these ballots were cast against the Union. Thus, even assuming the Union had pursued all four possible challenges,⁶ there is no scenario under which the election results could have been favorable to the Union. In sum, the procedural errors that were committed, although regrettable, could not have affected the outcome of the election. Under these circumstances, we do not agree with the hearing officer that there are grounds for questioning the fairness of the election results. Accordingly, we find the evidence insufficient to warrant setting aside the election, and we shall certify the results of the election.

⁴ The Union argues in its answering brief that the hearing officer's overruling of Objection 4 does not resolve the issue of Flores' eligibility, which it claimed it raised by its challenge to his ballot. The Union, however, has at no time asserted any reason for challenging Flores' ballot other than the reason proffered in support of Objection 4. Consequently, we find no merit in the Union's contention that Flores' eligibility remains uncertain.

⁵ The NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11336.5(c), similarly provides that "[b]allots contained in envelopes received before the count should be counted, even if they are received after the close of business on the return date."

⁶ I.e., the three ballots it actually challenged and the tardy ballot it did not have an opportunity to challenge.

¹ In the absence of exceptions, the Board adopts, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objections 3 through 5.

² All dates refer to 2000, unless otherwise indicated.

³ Because the Union did not find out about the late ballot until the hearing, the late ballot was not the subject of an objection. The hearing officer treated the issue of the late ballot as newly discovered.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots
have not been cast for Pipeliners Local Union 798 and

that it is not the exclusive representative of these
bargaining unit employees.