Professional Transportation, Inc. *and* United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077. Case 32–RC–259368

June 9, 2021

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

Congress has entrusted the National Labor Relations Board with the responsibility to resolve questions concerning representation by conducting secret-ballot elections. Representation elections are the primary instrument chosen by Congress for effectuating the national labor policy of protecting the right of employees to designate "representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[1] It is well established that in conducting elections, the Board must maintain and protect the integrity and neutrality of its procedures. See *Fessler & Bowman, Inc.*, 341 NLRB 932, 933 (2004). Accordingly, the Board, throughout its history, has zealously safeguarded the integrity of its elections against irregularity and even the appearance of irregularity.

Board-conducted manual elections are supervised by a Board agent, who is charged with maintaining the integrity of the election. Among other things, the Board agent is responsible for ensuring that each ballot is touched only by the employee who casts it and the Board agent who counts it. Correspondingly, when an election is conducted by mail ballot, the Board has held that a party engages in objectionable conduct if it collects or otherwise handles mail ballots. *Fessler & Bowman, Inc.*, 341 NLRB at 932. In *Fessler & Bowman*, however, the Board did not resolve the related issue of whether a party engages in objectionable conduct if it *offers* to collect an employee's mail ballot—i.e., if it engages in mail-ballot solicitation.[2] We resolve that issue today. Consistent with our obligation to protect the integrity of Board-conducted elections, and for the reasons that follow, we hold that a party's solicitation of one or more mail ballots constitutes objectionable conduct that may warrant setting aside an election.

I. BACKGROUND

On April 21, 2020,[3] United Electrical, Radio, and Machine Workers of America (U.E.), Local 1077 (the Petitioner) filed a petition seeking to represent certain employees of the Employer at multiple railyards in California and Nevada. Pursuant to a stipulated election agreement, the election was conducted by mail, with ballots mailed to employees on May 15, to be returned by June 5 and counted on June 10. Of the 113 eligible voters, 42 voted for and 27 voted against representation by the Petitioner, with 5 nondeterminative challenged ballots.

On June 16, the Employer timely filed two objections alleging, among other things, that representatives of the Petitioner called eligible voters offering to collect and mail their ballots. In support of Objection One, the Employer submitted an offer of proof regarding alleged mail-ballot solicitation of two employees. The Employer's offer of proof stated that Employee One would testify that representatives of the Petitioner called her multiple times and texted her with an improper offer to help her with and collect her ballot. In support, the Employer provided the following transcript of a voicemail left by a purported agent of the Petitioner:

> . . . I'm from the Union. I talked to you in the yard a couple times and I just wanted to see if you got, if you guys got your ballot today. If you can give me a call back. . . . And if [you] need help filling it out, not filling it out, but if you need help on [sic] getting it sent back one way or the other, I can help you with that. Just because it's so complicated. But anyway . . . I hope to talk to you soon. Thank you. Have a good day hun [sic], bye bye.

The Employer's offer of proof further stated that Employee Two would testify that a representative of the Petitioner called him and offered to help complete his mail ballot and to collect and return the ballot for him. In support, the Employer provided an email between two purported managers in which one manager recounted that Employee Two told him that a representative of the Petitioner called Employee Two and told him "that the ballots are out and are confusing to fill out and [the representative] wanted [Employee Two] to call him when he gets it so they could walk him thru [sic] filling out the ballot."

On July 9, the Regional Director issued her Decision Overruling Objections and Certification of Representative, in which she overruled the Employer's objections without a hearing. Acknowledging the split Board decision in *Fessler & Bowman*, the Regional Director found

[1] National Labor Relations Act, Sec. 1.

[2] With Member Meisburg recused, *Fessler & Bowman* was decided by a four-member Board, which split 2-2 on the issue of whether mail-ballot solicitation constitutes objectionable conduct.

[3] All dates hereafter are in 2020 unless otherwise noted.

Objection One did not warrant a hearing as a matter of law because mail-ballot solicitation is not objectionable conduct under extant Board precedent. The Regional Director alternatively found the Employer's offer of proof in support of Objection One insufficient to make out a prima facie case of mail-ballot solicitation or other objectionable conduct and thus insufficient to warrant a hearing.

On July 23, the Employer timely filed a request for review of the Regional Director's decision.[4] Citing Section 102.67(d) of the Board's Rules and Regulations, the Employer argues that this case raises a substantial question of policy, that the Regional Director's denial of an evidentiary hearing and finding of no objectionable conduct was clear error that prejudices the Employer, and that there are compelling reasons for reconsideration of the Board's policy regarding ballot solicitation in mail-ballot elections. The Petitioner timely filed an opposition to the Employer's request for review, primarily adopting the Regional Director's rationale in support of her decision.

On December 2, the Board granted the Employer's request for review with respect to the Board's policy regarding mail-ballot solicitation as addressed in *Fessler & Bowman* and invited briefs. Thereafter, the Employer and Petitioner filed briefs on review. In addition, the Board received a Brief Amicus Curiae from Nelson Medina.

II. ANALYSIS

In conducting elections, the Board must "maintain and protect the integrity and neutrality of its procedures." *Fessler & Bowman*, 341 NLRB at 933. The fulfillment of this duty is an aspect of the Board's larger objective of conducting elections "under conditions as nearly ideal as possible"—so-called laboratory conditions—in order to provide employees the opportunity to express their uninhibited desires regarding representation. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

To provide employees "a forum where [they] may freely express their representation choices via secret ballot," *Fessler & Bowman*, 341 NLRB at 933, the Board must first and foremost protect its election procedures from actual interference. But this is not enough. Even the appearance of irregularity in election procedures may cast doubt on the validity of an election and its results. Recognizing as much, the Board has set aside an election where, despite the absence of evidence that any party had actually touched a ballot, circumstances made it impossible to be certain that the parties had not done so.[5] The Board has also found objectionable conduct where actions in the course of the election conveyed the impression to voters that the Board was not in complete control of the election process.[6]

Under the standard procedures for manual-ballot elections set forth in the Casehandling Manual, the Board agent overseeing the election maintains personal custody of unmarked ballots at all times and ensures that no person handles a ballot before, during, or after the election other than the Board agent and the employee who marks and casts that ballot. See NLRB Casehandling Manual (Part Two) Representation Proceedings Sections 11306, 11322.[7] These procedures provide assurance to the employees and the parties that the ballots have not been tampered with and reflect the employees' choice concerning representation and that ballot secrecy has been preserved.

The Board has repeatedly acknowledged that "mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections, due to the absence of direct Board supervision over the employees' voting." *Mission Industries*, 283 NLRB 1027, 1027 (1987); see also *Thompson Roofing, Inc.*, 291 NLRB 743, 743 fn. 1 (1988) (citing the greater vulnerability of mail-ballot elections to the destruction of laboratory conditions as basis for requirement that voters sign and not print their name on the ballot envelope); *Brink's Armored Car*, 278

[4] The Employer did not seek review of the Regional Director's overruling of its Objection Two.

[5] *Tidelands Marine Services,* 116 NLRB 1222, 1224 (1956) (setting aside election where party representatives had access to unsealed ballot box because the irregularity raised doubts about the election's integrity and ballot secrecy).

[6] See, e.g., *Alco Iron & Metal Co.*, 269 NLRB 590, 591–592 (1984) (setting aside election where Board agent instructed petitioner's observer to translate voting procedure for Spanish-speaking employees because the "delegation of an important part of the election process to the [p]etitioner's observer conveyed the impression that the [p]etitioner, and not the Board, was responsible for running the election"); *Monroe Mfg. Co.*, 200 NLRB 62, 74 (1972) (setting aside election where employer's vice president told three employees waiting in line to vote that they were not eligible, in part because it could suggest to nearby voters that the employer "was acting in some manner for or in concert with the Board official in the conduct of the election").

[7] During the election, the Board agent hands each voter a ballot and watches as the voter proceeds to a voting booth (which the agent has inspected) alone, marks the ballot in private, and then deposits that ballot into the ballot box. Id. at Sec. 11322. The agent also ensures that only the voter places the ballot into the box and that no non-voters come within three feet of the box. Id. When the polls close, the agent seals the box in front of the parties' observers and maintains custody of the ballot box until it is opened in front of the parties. Id. at Sec. 11324. These procedures ensure that the Board agent is within monitoring proximity of every ballot at all times during a manual election, and that the only time the agent does not have custody of the ballots is for the brief time each voter steps into the voting booth alone to mark his or her ballot in private and then deposits the marked ballot in the ballot box.

The Casehandling Manual is not binding authority, and the procedures outlined therein are not reviewed or approved by the Board prior to publication by the General Counsel. As will be apparent, however, those procedures demonstrate the efforts the Agency undertakes to ensure that elections are free from, and from the appearance of, irregularities.

NLRB 141 (1986) (citing the same basis in finding it inappropriate for one employee to pick up mail-ballot package for another potential voter).[8] "For this reason, mail ballots are accompanied by election kits that clearly specify the precise procedure for casting and returning the ballot." *Fessler & Bowman*, 341 NLRB at 933. In addition to the ballot, these kits include two specialized envelopes—an inner envelope for the ballot itself and an outer envelope labeled specifically for each voter—plus instructions to fill out the ballot privately and regarding how to return the marked ballot to the Board's regional office. See NLRB Casehandling Manual (Part Two) Representation Proceedings Section 11336.[9] Because no Board agent is present, however, the Board cannot monitor what employees do with their ballots. Accordingly, to safeguard the integrity of mail-ballot elections, it is imperative that the Board adopt and apply rules to address irregularities in these elections when such are brought to the Board's attention.[10]

The Board took an important step in this direction in *Fessler & Bowman*, supra. There, the Board unanimously held that it is objectionable conduct for a party to collect or otherwise handle voters' mail ballots because doing so "casts doubt on the integrity of the election process and undermines election secrecy." 341 NLRB at 934. The Board then remanded the case for the purpose of determining whether the ballots that were collected in that case could have affected the election results.

The Board split, however, on whether the unsuccessful solicitation of employees' mail ballots is also objectionable. As a result of this split, the Board has not resolved the issue of whether mail-ballot solicitation constitutes objectionable conduct.[11] We resolve that issue now and find, for the following reasons, that it is objectionable for a party to engage in mail-ballot solicitation, but such solicitation will be a basis for setting aside the election only where the evidence shows that a determinative number of voters were affected.[12]

First, the solicitation of mail ballots casts doubt on the integrity of the election and the secrecy of employees' ballots. When a party offers to collect a voter's ballot, it asks the voter to disregard the voting instructions, which instruct the voter *not* to permit any party to handle or collect his or her ballot. Those instructions, as discussed above, maintain the integrity of mail-ballot elections by protecting the secrecy of each voter's ballot and reassuring employees and parties alike—to the extent possible without a Board agent on the scene—that the Board controls the election process. Permitting ballot solicitation thus undermines the Board's principal assurance to the voters and parties that it alone conducts the election and thus reasonably casts doubt on the election's integrity.

Solicitation also suggests to employees that the soliciting party is officially involved in running the election, which the Board has found "incompatible with [its] responsibility for assuring properly conducted elections." *Alco Iron & Metal Co.*, 269 NLRB at 591–592. The Board's mail-ballot instructions tell voters not to permit any party to handle, collect, or mail their ballots. If parties can still ask for voters' ballots, then voters may reasonably assume the solicitors have some official involvement in the election that places them above the rules. Indeed, if

[8] In Chairman McFerran's view, the Board should adopt rules, procedures, and practices necessary and appropriate to the type of election being conducted by the Board. She does not endorse the view that mail-ballot elections are inherently more vulnerable than manual-ballot elections to the destruction of laboratory conditions. In her view, each type of election presents its particular challenges to maintaining laboratory conditions.

[9] To enable parties to challenge specific voters' ballots while also preserving ballot secrecy, the election kit contains an inner blue envelope and an outer yellow envelope. The voter marks the ballot, places it in the blue envelope, and seals that envelope. The voter then inserts the blue envelope in the yellow envelope, which the voter seals and signs. This signed outer envelope enables the parties, at the vote count, to challenge particular voters' ballots. Then, after the challenged ballots are segregated, the rest of the yellow envelopes are opened and the blue envelopes are removed from them and thoroughly mixed. The blue envelopes are then opened and the ballots are extracted. The ballots are then mixed again before being counted. Id.; see also *Air 2, LLC*, 341 NLRB 176, 185–186 (2004), enfd. mem. 122 Fed. Appx. 987 (11th Cir. 2004).

[10] For the reasons set forth in her separate opinion in *Aspirus Keweenaw*, 370 NLRB No. 45, slip op. at 8–11 (2020), Chairman McFerran believes that it is time for the Board to reevaluate its historic preference for manual elections and to consider expanding and normalizing other ways to conduct elections on a permanent basis, including mail, telephone, and electronic voting. If this goal is to be realized, Chairman McFerran recognizes that the Board must be vigilant in protecting the integrity of its election processes, whatever form they take.

[11] We disagree with any suggestion in the Regional Director's Decision in this case that the Board subsequently resolved this issue in *Grill Concepts Services, Inc.*, Case 31–RC–201589 (June 28, 2019) (unpublished order). In addition to that decision being unpublished and thus not precedential, the Board there affirmed the Regional Director's finding of no objectionable conduct on the ground that the evidence did not establish that any solicitation of mail ballots occurred. In so finding, the Board stated that

> [i]t is therefore unnecessary to address the question of whether mere solicitation of mail ballots constitutes objectionable conduct, as urged by the partial dissent in *Fessler & Bowman*, supra at 935–936. Accordingly, we do not rely on any statements by the Hearing Officer or Regional Director that even if the Petitioner had solicited mail ballots from the employees, such conduct would not be objectionable.

Id., slip op. at 2 fn. 3.

[12] In *Fessler & Bowman,* Members Liebman and Walsh would have found that mail-ballot solicitation does not constitute objectionable conduct. Id. at 934–935. Chairman McFerran respectfully departs from their position primarily because, as explained above at fn. 10, she believes the Board should modernize its election methods and thus she believes that it is critically important for the Board to safeguard the integrity of its election procedures in service of that goal.

mail-ballot solicitation were not objectionable conduct, a party could even tell employees, truthfully, that it is permissible to ask for ballots, thus conveying the impression that the party plays a role in the election sanctioned by the Board itself.[13]

We acknowledge that mail-ballot solicitation does not fit neatly within the Board's usual framework for determining whether elections must be set aside. This is so because it is conduct by a party, and objectionable conduct by a party generally warrants setting aside an election only if it reasonably tends to interfere with employee free choice in the election—and determining if it does involves a multi-factor inquiry that takes into account, among other things, the severity of the conduct and whether it was likely to cause fear among the employees.[14] But the relevant question for ballot solicitation is not whether it causes fear among employees and interferes with free choice, but whether it impugns the integrity of the election and casts doubt on the secrecy of the employees' ballots. Cases presenting those issues typically involve Board agent misconduct rather than party misconduct, as here, because in a manual election the parties have virtually no ability to interfere with the ballots when proper procedures are followed.

Accordingly, even though mail-ballot solicitation involves party conduct, the crucial question is one typically reserved for Board agent conduct: whether it undermines the integrity of a Board-conducted election. For the reasons stated above, we find that it does. This is so even though unsuccessful ballot solicitation does not result in actual ballot tampering or loss of ballot secrecy. The Board will set aside elections based on Board agent conduct that impugns the integrity of an election even though no actual ballot tampering is shown. See, e.g., *Paprikas Fono,* 273 NLRB 1326 (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"); *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 they had been tampered with). There is no valid reason for disregarding conduct that "exposes [ballots] to question" and creates "an appearance of irregularity" simply because the person responsible is a party agent rather than a Board agent. Cf. *Goffstown Truck Center*, 356 NLRB 157 (2010) (setting aside election where party asserted that it was acting "on behalf of the NLRB" when inquiring into how employees intended to vote because the conduct implied a lack of neutrality by the Board); *Whatcom Security Agency, Inc.*, 258 NLRB 985 (1981) (setting aside election where third party inadvertently locked doors to polling area for 50 minutes during election and a determinative number of employees did not vote because "the irregularity concern[ed] an essential condition of an election" and may have disenfranchised an outcome-determinative number of voters). Accordingly, we hold that the solicitation of ballots by a party is objectionable conduct that may warrant setting aside an election. Where such conduct is shown, we will set aside the election if the evidence shows that a determinative number of voters were affected thereby.[15]

Whether objectionable conduct affected a determinative number of voters is a relevant consideration in party

[13] Member Ring also observes, as did Chairman Battista and Member Schaumber in *Fessler & Bowman*, that holding ballot solicitation objectionable makes it more likely that elections in which ballots are collected will be set aside, and conversely, not holding ballot solicitation objectionable makes it more likely that elections will be upheld despite actual ballot collection. Employees who trust a soliciting party sufficiently to hand over their ballots likely view that party favorably and are thus unlikely to reveal that their ballots were collected, whereas employees who refuse to hand over their ballots are more likely to complain that they were solicited to do so. See *Fessler & Bowman*, 341 NLRB at 936. If ballot collection alone is objectionable, and in a given case successful attempts go undetected and only unsuccessful attempts are revealed, the election will be upheld. If ballot collection and solicitation are objectionable, the election may be set aside even if successful attempts remain hidden. Of course, if all solicited voters hand over their ballots and say nothing, the election will be upheld even if solicitation and collection are both objectionable. Nevertheless, ballot collection is undisputedly objectionable, and making ballot solicitation objectionable as well increases the odds that elections in which undetected ballot collection takes place will be set aside.

See *Fessler & Bowman*, 341 NLRB at 936.

[14] See, e.g., *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004); *Taylor Wharton Division Harsco Corp.*, 336 NLRB 157, 158 (2001). The standard is objective and involves the following factors:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Taylor Wharton Division Harsco Corp., 336 NLRB at 158.

[15] This case, like *Fessler & Bowman,* involves alleged mail-ballot solicitation by union agents. While our holding that mail-ballot solicitation is objectionable conduct applies equally to other parties to an election, including employers, we do not reach the issue of whether such solicitations by an employer could also be considered objectionable on grounds other than those discussed here.

misconduct cases[16] and may be a relevant consideration in cases where the conduct of a Board agent allegedly raises a reasonable doubt as to the fairness and validity of the election.[17] Although this factor is sometimes not considered where Board agent misconduct is at issue, we believe that it is appropriate to require evidence that a determinative number of employees were affected in the case of mail-ballot solicitation by a party to the election. The stricter standard applied in some cases involving Board agent misconduct appropriately reflects that Board agents are trained in election procedures and act under the supervision of the Board, and their conduct can affect the perception of the Board's impartiality in ways that party conduct cannot. Mail-ballot solicitation by a party does not implicate the former considerations at all or the latter consideration to the same extent. For these reasons, in determining whether mail-ballot solicitation warrants setting aside an election, we find it appropriate to consider evidence of both the number of unit employees whose ballots were solicited and the number of unit employees who were aware of ballot solicitation,[18] as well as evidence demonstrating that a party engaged in a pattern or practice of solicitation (for example, by using a common script to solicit ballots), thus reasonably suggesting that other employees, in addition to those for whom direct proof of solicitation is available, were in fact solicited.[19]

III. APPLICATION

In representation cases, new rules are presumed to apply retroactively unless doing so would be manifestly unjust. *Providence Health & Services–Oregon d/b/a Providence Portland Medical Center*, 369 NLRB No. 78, slip op. at 5 (2020) (citation omitted). To determine whether retroactive application would be manifestly unjust, the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application." Id. (citation omitted). Here, the Board had no precedent permitting mail-ballot solicitation on which the parties could have relied, and the Board *did* have clear precedent putting all parties on notice that ballot collection is forbidden, and therefore ballot solicitation was, at best, pointless. Retroactive application cannot visit any particular injustice on either party in the instant case because, as explained below, it does not affect the outcome of this case.[20] Further, it is necessary to bring immediate clarity and consistency to the Board's rules regarding the solicitation and collection of mail ballots due to the recent increase in mail-ballot elections during the Coronavirus Disease 2019 (COVID-19) pandemic. Finally, we note that retroactive application here is consistent with the Board's approach to related misconduct. See *Fessler & Bowman*, 341 NLRB at 935 (applying retroactively new rule holding ballot collection objectionable). Accordingly, we apply

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[16] See, e.g., *Flamingo Las Vegas Operating Co., LLC*, 360 NLRB 243, 246 (2014) (employer threats to be less lenient with discipline if union won and accusation of disloyalty for supporting union did not warrant setting aside election where the statements were disseminated to significantly fewer employees than the 18-vote margin in the election); *Coast North America (Trucking) LTD*, 325 NLRB 980, 981 (1998) (declining to set aside election because employer's conduct prevented only a nondeterminative number of employees from voting).

[17] See, e.g., *New York Telephone*, supra (setting aside election where determinative number of mail ballots were mislaid by regional office).

[18] Consistent with Board precedent, we will consider all unit employees aware of ballot solicitation without regard to the identity of the party or individual that disseminates the news of the solicitation. See *S.T.A.R., Inc.*, 347 NLRB 82, 84 (2006).

Chairman McFerran observes that parties could easily manipulate dissemination in order to set aside an election where there is otherwise limited evidence of ballot solicitation. To avoid these concerns, Chairman McFerran would only consider the number of unit employees who were made aware of ballot solicitation *by a solicited employee*. Contrary to her colleagues, then, Chairman McFerran would not follow *S.T.A.R.* here because that case involved coercive conduct (not election-integrity issues) and because she agrees with Member Liebman's dissenting view there. See id. at 85–86 (Member Liebman, dissenting).

[19] Member Emanuel agrees with his colleagues that the solicitation of ballots is objectionable; however, he would establish a bright-line rule that elections should be set aside, upon the filing of timely objections, whenever a party is shown to have collected or solicited mail ballots, irrespective of the number of such incidents or the number of voters affected. As the dissenting Members in the Board's decision in *Fessler & Bowman, Inc.*, pointed out:

> Every effort is made to assure that a mail-ballot election conforms as closely as possible to a manual election. More particularly, that is why Form NLRB-4175 tells the employee to "mail [his ballot] immediately" after marking it.
>
> All of these rules are designed to make it clear that *the Board* controls the election process. There is to be no party intrusion between the voter and the Board. Any party who seeks to come between the voter and the Board undermines that vital principle.
>
> The most sacred hallmark of a Board election is that employees are guaranteed the secrecy of their ballot. Thus, employees are entitled to an absolute assurance that their ballots will not be seen by any party. (Emphasis in original.)

341 NLRB 932, 935 (2004).

In Member Emanuel's view, merely deeming solicitation of mail ballots objectionable is insufficient. The integrity of mail ballot elections is simply too important and voter confidence and privacy cannot be protected unless the Board establishes more definitive consequences for engaging in such conduct. Setting aside the election will establish a clear line for the parties and employees and restore the integrity of the electoral process without disenfranchising voters.

[20] We would reach the same conclusion in any pending case in which applying today's decision *would* affect the outcome. No party can reasonably claim it has suffered injustice by being deprived of the fruits of an election in which it extended offers that, if accepted, would result in conduct clearly prohibited under Board precedent on the books since 2004.

our decision today retroactively to this case and to all pending cases in whatever stage.

We find the Employer's offer of proof regarding Objection One, if credited at a hearing, sufficient to show that the Petitioner solicited the ballot of Employee One. The Employer supported its offer of proof regarding Employee One by providing a transcription of a voicemail she received from a purported Petitioner agent in which the caller brought up Employee One's mail ballot and then said, "[I]f you need help on getting it sent back one way or the other, I can help you with that." The offer could be reasonably interpreted as an offer to collect and mail Employee One's ballot.[21]

The Regional Director found the statement too ambiguous to be reasonably construed as ballot solicitation, noting the caller referred to a "complicated" process, which the Regional Director found could not be reasonably interpreted to refer to the uncomplicated process of mailing a ballot. We agree that the appropriate standard is whether a statement could be reasonably interpreted as a ballot solicitation (an offer to collect the ballot), but we disagree with the Regional Director's finding that the statement allegedly made to Employee One could not be so interpreted. We emphasize that the applicable test is an objective one: not whether the particular employee interpreted the party's statement as a ballot solicitation, but instead whether the statement could reasonably be interpreted as such. Here, the evidence of solicitation is clear: the offer was to help get the ballot "sent back," which is reasonably understood as an offer to collect the ballot in order to mail it.[22] Accordingly, the offer of proof regarding Employee One is sufficiently specific to establish a prima facie case of solicitation if credited at a hearing.

Objection One also alleges that the Petitioner solicited the ballot of Employee Two and that Employee Two would testify "about calls he received from a Union representative requesting to help [Employee Two] complete his mail ballot and offering to collect and return the ballot for him." In support, the Employer provided an email between two managers recounting Employee Two's alleged complaint that a representative of the Petitioner offered to "walk [Employee Two] thru [sic] filling out the ballot." The Regional Director concluded that the offer of proof regarding Employee Two was insufficient to warrant a hearing, finding the description of Employee Two's testimony to be conclusory and that the email provided in support of that testimony failed to describe any solicitation of his ballot.

We need not resolve whether the Employer's offer of proof for Employee Two is sufficient to establish a prima facie case of solicitation if credited at a hearing because even if it were, Objection One fails to allege sufficient misconduct to set aside the election.[23] An objecting party has the duty to furnish evidence or a description of evidence that, if credited at a hearing, would warrant setting aside the election. *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010). Here, however, the evidence described in the Employer's offer of proof in support of Objection One, if credited, could establish at most that the Petitioner's mail-ballot solicitations affected two voters. The offer of proof does not identify evidence that other voters were solicited, that the alleged solicitations of Employees One and Two's ballots were disseminated to other unit employees,[24] or that the Petitioner engaged in a pattern or practice of solicitation.[25] The misconduct is thus limited to, at most, two voters, which could not have affected the outcome of the election, in which the Petitioner prevailed by a minimum of ten votes.[26] See *Regency Hyatt House*, 180 NLRB 489, 490 (1969) (adopting overruling of objection that union observer translated ballot for single voter in part because it did not affect outcome of the election). We therefore find the Employer's offer of proof fails to

[21] We recognize that most instances of mail-ballot solicitation or collection will likely occur during in-person conversations between voters and party agents. However, the reasons stated above in support of finding solicitation to constitute objectionable conduct do not apply any less where solicitation takes place indirectly, such as by voicemail or text message.

[22] By contrast, simply asking if employees have received their ballots or offering to assist them with understanding the election instructions could not reasonably be interpreted as ballot solicitation. The Board's election instructions (Form NLRB-4175) state that parties are not permitted to handle, collect, or mail ballots, but do not prohibit parties from offering to help employees understand the election process.

[23] Chairman McFerran would find that the Employer's offer of proof for Employee Two clearly does not rise to the level of solicitation.

[24] As explained above in fn. 18, Chairman McFerran would only consider evidence of dissemination by solicited employees. Here, there is no such evidence.

[25] Acknowledging this shortcoming, the Employer argues that a hearing is necessary to investigate whether there were other instances of solicitation it did not allege, but hearings are not to be used as fishing expeditions. Instead, where a party files objections to conduct affecting the results of an election, and "the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing . . . the Regional Director shall issue a decision disposing of the objections." Sec. 102.69(c) of the Board's Rules and Regulations; see also *Frontier Hotel*, 265 NLRB 343, 344 (1982) ("[A] regional director's determination that a hearing is unnecessary is a finding that there are no substantial and material issues presented, and our adoption or rejection of this determination rests solely on whether the objecting party *has identified evidence to the contrary*.") (emphasis added).

[26] Of the 113 eligible voters, 42 voted for representation by the Petitioner and 27 voted against representation, with five challenged ballots. If all five challenged ballots were cast against representation, then the final tally would be 42 votes for representation by the Petitioner and 32 against.

provide a description of evidence that, if credited at a hearing, would warrant setting aside the election.[27]

IV. CONCLUSION

Having carefully considered the entire record in this proceeding, including the briefs on review, we find that solicitation of mail ballots constitutes objectionable conduct that may warrant setting aside an election, but we affirm the Regional Director's Decision Overruling Objections and Certification of Representative for the reasons stated above.

ORDER

The Regional Director's Decision Overruling Objections and Certification of Representative is affirmed.

Dated, Washington, D.C. June 9, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOA

[27] As explained above in fn. 19, Member Emanuel would establish a bright-line rule that elections should be set aside, upon the filing of timely objections, whenever a party has collected or solicited mail ballots. He agrees with his colleagues that the proffered evidence here, if credited, is sufficient to establish solicitation of Employee One. Accordingly, he would remand to the Regional Director for a hearing on Objection One.