



NLRB MAIL BALLOT REPORT

Introduction

Conducting in-person, onsite, secret ballot elections to determine questions of union representation has long been the gold standard at the National Labor Relations Board (NLRB or Board). Secret ballot elections maximize voter participation, ensure workers' votes can be cast privately, and are the best way to prevent voter interference by unions, employers, or the Board itself. Historically, only under limited circumstances would the Board order a non-secret ballot election.

In November 2020, in response to the COVID-19 pandemic, the Board issued a decision in the *Aspirus Keweenaw* case, which expanded NLRB regional directors' authority to order an election by mail rather than manual ballot⁽¹⁾. This decision significantly increased the number of elections conducted by mail rather than through in-person, secret ballot elections. In September 2022, the Board updated the considerations that guide regional directors in determining whether an election should be conducted by mail ballot or in-person⁽²⁾.

During this time, the expanded use of mail ballots for representational elections predictably resulted in negative consequences. Voter participation decreased substantially while other problems with this election method were exposed, including inappropriate voter solicitation, increased lost or void ballots, and difficulties verifying signatures.

More problematic, in August 2022, information from an NLRB employee whistleblower exposed institutional issues at the Board, alleging that NLRB employees had interfered in representational elections involving Starbucks and Workers United⁽³⁾. After these allegations came to light, the Committee on Education and the Workforce (Committee) began investigating these claims and sought to determine the extent of misconduct and whether procedural irregularities and NLRB officials' misconduct in mail ballot elections occurred in elections involving other parties. Findings from the Committee's investigation identified widespread mismanagement, misconduct, and procedural irregularities in the NLRB's administration of mail ballot elections.

1.) 370 NLRB No. 45 (2020).

2.) Starbucks, 371 NLRB No. 154 (2022).

3.) Letter from Zarina Jenkins, Acting Exec. Vice President & Gen. Couns., Starbucks, & Kimberly J. Doud, Couns. for Starbucks, to Lauren M. McFerran, Chairman, NLRB, & Jennifer A. Abruzzo, Gen. Couns., NLRB (Aug. 15, 2022).

NLRB Whistleblower Documents

On March 22, 2023, the Committee issued a subpoena to a cooperative whistleblower who, as an NLRB employee, had raised concerns about NLRB officials engaging in misconduct and failing to conduct fair and impartial elections(4). The subpoena directed the whistleblower to produce documents related to NLRB officials regarding representation cases involving Starbucks in which NLRB employees failed to follow NLRB mail ballot rules and procedures(5). Between March 29 and March 31, 2023, the whistleblower provided the Committee with more than 500 pages of documents, including documents from 33 representation cases. These instances were not limited to a single officer or region; indeed, the misconduct was widespread, covering 15 NLRB regions.

The documents revealed numerous instances of NLRB staff misconduct through their failure to follow NLRB procedures or breaches of stipulated election agreements, which are signed by the regions and the parties to elections. This misconduct provided clear evidence that the NLRB is unable to conduct mail-ballot elections in a reliable manner. Below are several examples of NLRB officials' misconduct and questionable actions that the Committee found in its examination of the whistleblower's documents:

Case 1: Buffalo, NY

- A case in the Buffalo region where an NLRB Region 3 official said, "We do not have regular office hours open to the public at this time. If a voter chooses to hand-deliver a ballot to our office, there may not be any Regional staff available to receive the ballot. If that is the case, the voter can slide the ballot envelope under the interior door of our office as indicated by the sign on said door"(6). The Region 3 official said this in an email even though the voting instructions required mail ballots to be mailed to the region(7).
 - **Key Takeaway:** Board officials permitting employees to vote by delivering ballots to the NLRB office violates the election agreement and increases the likelihood that the ballot is lost or mishandled.

Case 2: Pittsburgh, PA

- A case in the Pittsburgh region where a Board agent asked whether a ballot could be delivered to a voter in person while the voter was working. The assistant to the regional director for Region 6 stated, "I think that would be okifi [sic] she can meet you outside during a break. It probably wouldn't be good to bring her a ballot inside while she is on the clock"(8). The Board agent then indicated she would deliver the ballot in person even though the notice of election stated, "The election will be by secret ballot carried out through the U.S. mail ..." (9).
 - **Key Takeaway:** Board officials permitting employees to vote in person violates the election agreement and increases the risk of Board officials having prohibited conversations with voters not in the presence of the parties to the election.

4.) Letter from Virginia Foxx, Chairwoman, H. Comm. on Educ. & the Workforce, to Rebecca A. Dormon, Assistant to the Reg'l Dir., NLRB Region 15 (Mar. 22, 2023),

https://edworkforce.house.gov/uploadedfiles/letter_from_chairwoman_foxx_march_22_2023.pdf.

5.) *Id.*

6.) Starbucks Corp., Cases 03-RC-282115, 03-RC-282127, & 03-RC-282139, Email from Thomas A. Miller to Alan I. Model (Dec. 6, 2021).

7.) INSTRUCTIONS TO ELIGIBLE EMPLOYEES VOTING BY UNITED STATES MAIL, FORM NLRB-4175 (5-20).

8.) Starbucks Corp., Case 06-RC-292767, Emails between Stephanie J. Smith and Tara N. Yoest (May 16, 2020).

9.) Starbucks Corp., Case 06-RC-292767 (Apr. 29, 2022) (notice of election at 1).

Case 3: Seattle, WA

- A case in the Seattle region where a Board agent responded to questions about a particular voter and her ballot that were posed by an attorney representing the union. These answers followed the attorney's own admission that the NLRB should not be communicating with him about this matter: "I know I'm not supposed to coordinate with the Region directly on this ..." (10). The stipulated election agreement stated that eligible voters, not attorneys representing the parties, were to ask for ballots: "If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 19 office by no later than 4:45 p.m. on Friday, April 15, 2022 in order to arrange for another mail ballot kit to be sent to that employee" (11).
 - **Key Takeaway:** Board officials providing duplicate ballots to voters at the request of the union, and not at the request of the voters, violates the election agreement.

Case 4: San Francisco, CA

- A case in the San Francisco region where staff from NLRB Region 20 communicated with a union representative about needing two new ballots for co-workers. An NLRB field attorney provided confirmation that the election clerk would mail out new ballots if the requested contact information was provided. An NLRB field attorney said, in response to the union representative's question about pick-up and drop-off of the new ballots at the NLRB office, "I believe your co-workers can slide the ballots under our door if they don't want to mail them back in" (12). However, the stipulated election agreement stated, "The election will be conducted by United States mail.... If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 20 office by no later than 5:00 p.m. on May 23, 2022, in order to arrange for another mail ballot kit to be sent to that employee" (13). Despite the stipulated election agreement, the region allowed pick up and drop off ballots (14).
 - **Key Takeaway:** Board officials providing duplicate ballots to voters at the request of the union, and not at the request of the voters, violates the election agreement.

10.) Starbucks Corp., Case 19-RC-291290, Email from Benjamin Berger to Adam Morrison (Apr. 25, 2022).

11.) Starbucks Corp., Case 19-RC-291290 (Mar. 15, 2022) (stipulated election agreement at 1).

12.) Starbucks Corp., Case 20-RC-292521, Email from Jason Wong to Ella Clarke (May 24, 2022).

13.) Starbucks Corp., Case 20-RC-292521 (NLRB Apr. 5, 2022) (stipulated election agreement at 1).

14.) Starbucks Corp., Case 20-RC-292521, emails of May 24, May 26, & June 2, 2022.

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

On January 12, 2023, in one of her first acts as Chair of the Committee in the 118th Congress, Chairwoman Virginia Foxx resubmitted an October 20, 2022, inquiry to the NLRB regarding the increased use of mail ballot elections and allegations of NLRB misconduct⁽¹⁵⁾. On May 4, 2023, the Committee received an insufficient response from the NLRB. This prompted an additional letter, which the Committee sent on August 14, 2023⁽¹⁶⁾. On November 17, 2023, the NLRB eventually responded to the Committee's inquiry by producing documents related to NLRB mail ballot elections from March 2020 through October 2022.

As the Committee examined the NLRB's production, it noted irregularities that displayed procedural ineptitude rising to the level of misconduct in the NLRB's administration of mail ballot elections. Although the NLRB has significant procedural guidance, such as a case handling manual, and must follow either the Direction of Election or Stipulated Election Agreement for a particular election, NLRB regions across the country were woefully careless in ensuring that the proper procedures for mail ballot elections were followed.

Commonly, the NLRB communicated with union and employer representatives who requested duplicate ballots for employees. In these elections, employers and union representatives often requested information on the status of a ballot, to which the NLRB responded, and the NLRB sent ballots at the request of these non-employee parties. Election agreements in these cases provided that the employees were the only individuals authorized to request duplicate ballots. By responding to the inquiries of union and employer representatives, the NLRB compromised the anonymity of voters and potentially allowed unions or employers to attempt to manipulate elections.

In other cases, the Committee noted deviations from election procedures regarding how voters cast their ballots. Frequently, the NLRB allowed employees to pick up, drop off, and cast mail ballots in person at regional offices instead of using the mail. Again, by going against the requirement that the election be conducted by U.S. Mail and allowing for in-person voting and hand delivery, the NLRB compromised the anonymity of voters and potentially disenfranchised voters who were unaware that voting in person was an option. The Committee also noted mismanagement where the NLRB engaged in questionable administrative practices, like altering the number on a ballot. Generally, the Committee found that a significant amount of NLRB staff lacks knowledge of the proper procedures to administer mail ballot elections.

15.) Letter from Virginia Foxx, Chairwoman, H. Comm. on Educ. & the Workforce, to Lauren McFerran, Chairman, NLRB (Jan 12, 2023), https://edworkforce.house.gov/uploadedfiles/01.12.23_follow_up_letter_-_nlrb_mcferran.pdf.

16.) Letter from Virginia Foxx, Chairwoman, H. Comm. on Educ. & the Workforce, to Lauren McFerran, Chairman, NLRB (Aug 14, 2023), https://edworkforce.house.gov/uploadedfiles/08.14.23_letter_to_nlr_re_nlr_personnel_misconduct.pdf.

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

The following provides a sample of cases reviewed by the Committee. These cases demonstrate that the problems of mail ballot elections occur across NLRB regions and across various employers and unions:

- **Joseph’s House and Shelter, Inc. (Service Employees International Union Local 200 United), Case 03-RC-297949:** On August 2, 2022, an NLRB field examiner emailed a union official stating, “As for the two voters who do not currently have mailing addresses, with a confirmed appointment, they may show up to our Albany office and cast a ballot there. Please reach out to the voters to see when this week between 8:00 a.m. and 3:30 p.m., they would like to stop by our Albany office. After we have confirmed appointments, I’ll let someone in that office to know to have an election kit prepared for them at the agreed-to time(s)”(17).

On August 4, 2022, an NLRB Region 3 Field Examiner emailed other regional officials to explain that an employee called Region 3 because he or she did not receive a ballot and requested to appear at the Albany office to receive one(18). The Field Examiner also inquired whether a duplicate ballot could be prepared and given to the employee at the NLRB Albany office(19). On August 5, 2022, the Assistant to the Regional Director responded to the Field Examiner to notify other regional officials that an employee appeared at the NLRB Albany office, was given a ballot, and voted at the NLRB office.

On August 9, 2022, an NLRB Field Examiner emailed other regional officials to inform them that an employee requested to appear in person at the NLRB Albany office to cast a ballot because the employee claimed to have never received a mail ballot. The Field Examiner also asked whether there was “any issue with granting this request”(20). On August 10, 2022, the NLRB Assistant to the Regional Director emailed the NLRB Field Examiner and Assistant to inform them that the employee “showed up and [name redacted] is voting now”(21). However, the Stipulated Election Agreement stated, “The election will be conducted by United States mail”(22).

- **Airway Cleaners (United Construction Trades & Industrial Employees Local 621) Case 04-RC-272199:** On March 19, 2021, internal emails show that the NLRB realized that there were two ballots with the same number with different names on them(23). Upon realization, one NLRB employee stated, “Ok. Let’s hope the parties don’t ask much in the way of questions”(24). Another NLRB employee asked if she should change the number on the ballot. Emails suggest the NLRB changed the number on the ballot to remedy this error(25). Such tampering with ballots is not authorized by the NLRB case handling manual or the Stipulated Election Agreement in this case.

17.) Email from Michael Dahlheimer to union official (Aug. 2, 2022).

18.) Email from Michael Dahlheimer to David Turner & Gregory Lehmann (Aug. 4, 2022).

19.) Email from David Turner to Michael Dahlheimer (Aug. 5, 2022).

20.) Email from Michael Dahlheimer to David Turner and Louis Porto (Aug. 9, 2022).

21.) Email from David Turner to Micheal Dahlheimer and Louis Porto (Aug. 10, 2022).

22.) Joseph’s House and Shelter Inc., Case 03-RC-297949 (July 15, 2022) (stipulated election agreement at 1).

23.) Email from Harold Maier to Edward Canavan (Mar. 19, 2021).

24.) Email from Harold Maier to Edward Canavan (Mar. 22, 2021).

25.) Email from Mary Leach to Harold Maier and Edward Canavan, NLRB Clerk (Mar. 22, 2021).

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

- **JDRC Managed Services, LLC (Local 881, United Food and Commercial Workers), Case 13-RC-258758:** In this election, a law firm representing the union emailed a region employee stating that an employee informed the union yesterday that he or she did not receive an election ballot and requested a duplicate ballot. A region official responded, “Will do”(26). However, the direction of election stated voters must ask the NLRB directly for ballots: “Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by Thursday, May 7, 2020, should communicate immediately with the [NLRB]”(27).
- **The Second City, Inc., and Second City Works, Inc., A Single Employer (Illinois Federation of Teachers, AFT, AFL-CIO), Case 13-RC-272783:** The Stipulated Election Agreement stated, “The election will be conducted by United States mail.... If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 13 office by no later than office closing time at 5 p.m. on March 18, 2021 in order to arrange for another mail ballot kit to be sent to that employee”(28). However, internal emails show that the region permitted a voter to drop off his or her ballot at the regional office(29) despite an NLRB Field Examiner Supervisor stating in an email, “I don’t believe that we are allowing people to come into the office to cast their ballots”(30).
- **Westmont Manor HRC, LLC d/b/a Westmont Manor Health & Rehab Center (SEIU Health Care Illinois, Indiana, Missouri and Kansas), Case 13-RC-285742:** The Stipulated Election Agreement stated, “The election will be conducted by United States mail.... If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 13 office by no later than 5:00 p.m. on November 30, 2021 in order to arrange for another mail ballot kit to be sent to that employee”(31).

However, an email from a Region 13 official to the union and employer states, “We can mail duplicates and employees can hand deliver the completed ballot envelope to our office. We have also made arrangements for employees to pick up their mail ballot kit at our office and cast their vote in person, but our office will need to know who will be coming so we have the correct kit prepared”(32). Another email from the Region 13 Field Examiner to the union says that a voter is “welcome to let me know if” he or she “prefers to come to our office when we’re open”(33).

In addition, an internal email from a Region 13 Field examiner states: “The Union claims the below individuals did not receive their ballot kits yet for the above case. Let’s mail them duplicates tomorrow (Wednesday)”(34). The Region 13 field examiner’s contact log also states that the region mailed a ballot to a voter based on the union’s request, not the voter’s request(35).

26.) Email from Christina Mols to union attorney (Mar. 1, 2021).

27.) JDRC Managed Serv., LLC (Local 881, United Food & Com. Workers), Case 13-RC-258758 (NLRB Apr. 24, 2020) (decision and direction of election at 2), <https://www.nlr.gov/case/13-RC-258758>.

28.) The Second City, Inc. and Second City Works, Inc., Case 13-RC-272783 (NLRB June 12, 2020) (stipulated election agreement).

29.) Email from Lisa Friedheim-Weis to Lori Brown and Loretta Thompson (Mar. 30, 2021).

30.) Email from Lisa Friedheim-Weis to Lori Brown and Loretta Thompson (Mar. 30, 2021).

31.) Westmont Manor Health & Rehab Center, Case 13-RC-285742 (NLRB Nov. 8, 2021) (stipulated election agreement at 1) (November 8, 2021).

32.) Email from Region 13 to employer and union (Jan. 13, 2022).

33.) Email from Region 13 to union (Jan. 11, 2022).

34.) Region 13 internal email (Nov. 30, 2021).

35.) Region 13 Field Examiner J. Prokop’s contact log (Nov. 30, 2021).

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

- **South Holland Manor Health and Rehab Center (SEIU HC Illinois, Indiana, Missouri, and Kansas), Case 13-RC-285779:** The Stipulated Election Agreement stated that the election would be conducted by U.S. mail and that voters should contact the region directly if they require a duplicate ballot(36). NLRB emails state that NLRB employees made arrangements at the request of the union and not at the request of voters to send duplicate mail ballots(37). For example, the Region 13 Field Examiner emailed the union, “I put in the request to send duplicates to the below two individuals”(38). Further, a Region 13 internal email from the Field Examiner states, “Please send duplicates today to the below highlighted individuals per the Union’s request”(39). Additionally, the Field Examiner’s contact log said, “we will nonetheless mail a duplicate per U request”(40).
- **Howard Brown Health (Illinois Nurses Association), Case 13-RC-297047:** The Stipulated Election Agreement stated that the election would be conducted by U.S. mail and that voters should reach out directly to the region if they require a duplicate ballot(41). However, an NLRB email from the Field Examiner to the union’s attorney explained that “if an employee has requested a duplicate, has not received one, and is concerned about not getting a ballot, please let your client know that the employees can also make arrangements to come to our office and we can give them a ballot in person”(42).

Moreover, an email from the Region 13 Acting Regional Director to the Field Examiner states, “A mail ballot can be dropped off by an individual voter. We do not want one person to drop off multiple ballots”(43). Further, an email from the Field Examiner to the Acting Regional Director and other regional officers stated, “Two voters in this election stopped by the office today without any advance to [sic] notice to get a ballot for the Howard Brown Health election. I told the organizer that, in the future, they need to contact us first so that we can make arrangements to prepare the ballots for them. In any event, could you please have duplicate ballots prepared for the following employees to pick up at the office? ... Also, if you could please let me know when the ballots are ready, I will then communicate with the Union”(44).

Later, a union organizer emailed the Field Examiner, “I’ll be bringing two HBH workers, [redacted] again and [redacted] from the Election Case 13-RC-297047 to the NLRB Region 13 office at noon tomorrow (Wednesday) to fill out a ballot. We’ll be doing this on their lunch break and will have to move quick so we’ll need to have them prepped in advance for them.” The Field Examiner replied, “OK, thanks for the notice, Tristan. We will have the ballots ready for them”(45).

36.) South Holland Manor Health & Rehab Center, Case 13-RC-285779 (NLRB Nov. 8, 2021) (stipulated election agreement).

37.) Email from union attorney to Jana Prokop (Dec. 2, 2021); Email from Jana Prokop to union attorney (Dec. 2, 2021).

38.) Email from Jana Prokop to Drew Schendt (Dec. 2, 2021).

39.) Email from Jana Prokop to Lori Brown et al. (Dec. 6, 2021).

40.) Field Examiner J. Prokop’s contact log (Dec. 2, 2021).

41.) Howard Brown Health, Case 13-RC-297047 (NLRB June 24, 2022) (stipulated election agreement).

42.) Email from Jay Greenhill to union attorney (July 20, 2022).

43.) Email from Daniel N. Nelson to Jay B. Greenhill (July 28, 2022).

44.) Email from Jay B. Greenhill to Catherine Jones et al. (July 28, 2022).

45.) Emails between Jay B. Greenhill and Tristan Bock-Hughes (Aug. 2, 2022).

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

Subsequently, the Field examiner emailed a union organizer, “I just want to let you know that I contacted the acting Assistant Regional Director and passed along your message. She has communicated with our information officers and support staff who are at the front desk to let them know that they should be accepting ballots from voters who want to remit them in person at the office.” A second email from the Field Examiner to the union organizer stated, “I will make sure that a voter kit is ready for [redacted] tomorrow and that the staff will be informed that they should accept a completed ballot from [redacted] if [redacted] chooses to fill out at the office.” An email from the union organizer indicates the voters voted in person at the regional office(46). Emails a day later show a voter voted in person at the regional office(47).

- **Steiner Electric Company (International Union of Operating Engineers, Local 150, AFL-CIO), Case 13-RM-248104:** An NLRB employee expressed the following in an email: “I personally don’t think it’s a problem or infringing on any employee’s rights for us to send duplicate ballots to anyone, especially when a party tells us that they’d been told more employees mailed their ballots than we received, same as the Union claimed in TZ Chicago. We frequently take requests from the parties to mail duplicates, although typically when someone has a different address, or was omitted from the voter list”(48). However, the Stipulated Election Agreement stated, “[A]ny person who has not received a ballot by April 22, 2020 or otherwise requires a duplicate mail ballot kit should contact the Region 13 office in order to arrange for another mail ballot kit to be sent to that employee”(49).
- **Twin City Foods, Inc., United Food and Commercial Workers Union, Local 1439, Chartered by United Food and Commercial Workers Union, AFL-CIO), Case 19-RC-265696:** The direction of election stated that employees should communicate with the NLRB if they did not receive a mail ballot by a specific date(50). Twice on December 7, 2020, the union informed Region 19 that an employee had not received a ballot. A Region 19 official replied that a duplicate ballot would be sent that day(51). On December 8, 2020, the union informed Region 19 that an employee had not received a ballot. In an internal email, a Region 19 official directed that a duplicate ballot be sent to the voter(52).

46.) Emails between Jay B. Greenhill and Tristan Bock-Hughes (Aug. 4, 2022).

47.) Emails between Jay B. Greenhill and Tristan Bock-Hughes (Aug. 5, 2022).

48.) Email from Jana Prokop to Daniel Nelson (May 7, 2020).

49.) Steiner Electric Co., Case 13-RM-248104 (NLRB Apr. 8, 2020) (stipulated election agreement at 1).

50.) Twin City Foods, Inc. (United Food & Com. Workers Union, Local 1439, Affiliated with the United Food & Com. Workers Int’l Union), Case 19-RC-265696 (NLRB Nov. 3, 2020) (decision and direction of election at 26), <https://www.nlr.gov/case/19-RC-265696>.

51.) Email from union organizer to Dennis Snook and Winnie Willmore (Dec. 7, 2020); Email from Dennis Snook to union organizer (Dec. 7, 2020); Email from union organizer to Dennis Snook and Winnie Willmore (Dec. 7, 2020); Email from Dennis Snook to union organizer (Dec. 7, 2020).

52.) Email from Winnie Willmore to Dennis Snook (Dec. 8, 2020).

Widespread NLRB Mail Ballot Election Misconduct and Procedural Irregularities

- **Border Recapping, LLC d/b/a Border Tire (Teamsters Automotive, Industrial, Theme Park, Service Sector and Allied Workers Local No. 495), Case 21-RC-261206:** In an internal email, a Region 21 field attorney noted to staff that a voter contacted her to see if he or she could pick up and drop off his or her ballot at the regional office(53). The field attorney relayed to the voter that she did not think the NLRB was allowed to do either but sought further guidance from the assistant regional director. Region 21 staff separately told two voters who were concerned about having their ballots counted in time that they could return their ballot by regular mail, return it by delivery service, or attempt to hand deliver to the NLRB office(54). However, the Stipulated Election Agreement stated, “The election will be conducted by United States mail”(55).
- **CR&R Incorporated (Package and General Utility Drivers, Teamsters Local Union No. 396), Case 21-RC-262469:** On August 27, 2020, the union’s attorney sent an email to Region 21 officials and the employer’s attorney saying that an employee (who the employer mistakenly believed was left of the voter list) called the regional office about not having received a ballot. Region 21 staff told the employee that he or she would not be mailed a ballot because he or she was not on the voter list, contrary to what the Region 21 staff had previously stated(56). In a follow-up email, the union’s attorney said, “That makes no sense ... this is another reason why mail ballots are so problematic”(57). The Assistant Regional Director confirmed that the employee was sent a ballot even though the employee was not on the list(58).

53.) Email from Cecelia Valentine to Nathan Seidman and Judith Saenz (July 6, 2020).

54.) Emails from Nathan Seidman to voter (July 8, 2020).

55.) Border Recapping, LLC, Case 21-RC-261206 (NLRB June 12, 2020) (stipulated election agreement).

56.) Email from Amanda Lively to Nathan Seidman, Liz Valtierra, and Jeffrey Berman (Aug. 27, 2020)

57.) Email from Amanda Lively to Nathan Seidman, Liz Valtierra, and Jeffrey Berman (Aug. 27, 2020).

58.) Email from Nathan Seidman to Jeffrey Berman, Amanda Lively, and Liz Valtierra (Aug. 27, 2020).

NLRB Inspector General Finds Gross Mismanagement in Mail Ballot Elections

On July 8, 2023, the NLRB's Office of the Inspector General (OIG) issued an investigative report⁽⁵⁹⁾ involving a union mail ballot election at a Starbucks store, which was conducted by NLRB Region 14 in 2022 (Case 14-RC-289926)⁽⁶⁰⁾. The OIG found what it termed "gross mismanagement" by the NLRB employees who conducted the election, a lack of candor from the NLRB Region 14 Director in responding to the investigation, and deficient record keeping in the election's case file.

On September 13, 2023, the Region 29 Regional Director set aside the election results in this case and ordered a rerun of the election. Central to the decision to rerun the election was misconduct that "undermines the Region's appearance of neutrality"⁽⁶¹⁾. Specifically, Region 14 employees had communicated with Workers United concerning workers who did not receive ballots, but Region 14 failed to keep Starbucks apprised of the same information⁽⁶²⁾.

Gross Mismanagement

The OIG's report bolsters the Committee's findings about Case 14-RC-2589926 and shows that this election was mismanaged from the moment the Stipulated Election Agreement was signed. The OIG noted several instances of mismanagement, summarizing his findings:

Given all the information available to the Region and the provisions of the Casehandling Manual, the failure by the Region to recognize and timely remedy the problem involving the ballots was mismanagement. That Regional personnel worked closely with [Workers United] to remedy the situation, while withholding information from [Starbucks], further exasperated the issues in the election and reasonably called into question the Region's neutrality in the process⁽⁶³⁾.

Lack of Candor from the Regional Director

The OIG's report details how the Region 14 Director exhibited a lack of candor with regard to the OIG's interview process:

The Regional Director lacked the appropriate candor during the interview process. The Regional Director had a regulatory requirement to cooperate with the OIG investigation.... Given the recall of the facts by the Regional Director in her lengthy statement at the beginning of the second interview, her inability to recall information until provided documentation is not credible. Unfortunately, to determine the Regional Director's actions in the election we had to rely on the candor of her subordinates and the ability to retrieve documentary evidence from the Agency's systems. As such, the Regional Director's candor was far below that expected of a senior Federal executive and calls into question her character for truthfulness⁽⁶⁴⁾.

59.) Memorandum from David Berry, Inspector Gen., NLRB, to Jennifer Abruzzo, Gen. Couns., NLRB (July 8, 2023), https://edworkforce.house.gov/uploadedfiles/second_corrected_oig_i_569_report.pdf.

60.) Starbucks Corp. (Chicago & Midwest Reg'l Joint Bd., Workers United/SEIU), Case No. 14-RC-289926 (NLRB Sept. 13, 2023) (decision and direction of second election), <https://apps.nlr.gov/link/document.aspx/09031d4583b4a845>.

61.) *Id.* at 21.

62.) *Id.* at 22.

63.) Memorandum from David Berry, *supra* note 59, at 15.

64.) *Id.* at 16.

NLRB Inspector General Finds Gross Mismanagement in Mail Ballot Elections

Improperly Maintained Case File

Regarding the case file for this election, the OIG explained that it was not maintained in a manner that would permit supervisory review on an ongoing basis:

It is difficult to understand the Regional Director's position with regard to the completeness of the case file. The Regional Director has taken no action to ensure that the case files in her Region are properly maintained. Her method of only relying on subordinate staff is not an effective management process(65).

65.) *Id.* at 17.

Mail Ballot Elections are Inferior to In-Person Secret Ballot Elections.

In-person, secret ballot elections encourage high voter participation, are observed by the NLRB, employer, and union representatives, and guarantee voter privacy. The Board's expansion of mail ballot elections during the pandemic exposed shortcomings in this alternative election method. Mail ballot elections greatly reduced voter participation and jeopardized workers' rights to choose freely and fairly whether to be represented by a union.

Then-Board Member Lauren McFerran insisted in 2020 that voter participation rates in mail ballot elections would "improve... as they become normalized and the Board gains more experience administering mail-ballot elections"(66). However, in KMS Commercial Painting, over a year after the NLRB expanded the use of mail ballot elections, Board Member John Ring disclosed data highlighting the seismic shift in how the NLRB conducts representation elections and its impact on voter turnout. He revealed that "as of January 29, 2022, 304 of the 378 elections conducted by the Board in Fiscal Year 2022 were held by mail ballot"(67). Member Ring then discussed the large discrepancy in voter participation between mail ballot and in-person elections:

Internal agency statistics show that, as of January 29, 2022, the mail ballot participation rate for Fiscal Year 2022 mail ballot elections was 67.8 percent, while the manual ballot participation rate was 85.9 percent. During the same period, 3 percent of the ballots cast in mail ballot elections were voided, while the void rate was only one percent for manual elections(68).

A U.S. Chamber of Commerce report analyzing mail ballot election data produced similar findings. From January 3, 2022, to February 3, 2023, mail ballot elections had "a mean participation rate of 67%, compared to a mean participation rate of 83.8% for in-person elections"(69). The same report also found that mail ballot elections resulted in more void ballots being cast. From "January 1, 2022, through September 13, 2022, the percentage of void ballots in mail-ballot elections was 2.8%, compared to .4% for in-person elections"(70). The number of voided ballots was 700 percent larger in mail ballot elections compared to in-person elections during this timeframe.

Mail ballot elections presented other problems, including difficulties verifying signatures on mail ballot envelopes. For example, in the College Bound Dorchester, Inc. case, the NLRB held a mail ballot election to determine whether SEIU Local 888 would serve as the bargaining representative for the employees(71). Of approximately 24 eligible voters, six voted for the SEIU, and six voted against it, with an additional seven ballots challenged. Of the challenged ballots, the acting regional director sustained the challenges to six of the ballots, with neither party requesting review of those determinations. The remaining and determinative ballot of one employee was challenged by the employer on the grounds that the signature on the ballot envelope was illegible and did not match examples of the employee's signature submitted by the employer.

66.) See *Aspirus Keweenaw*, 370 NLRB No. 45 (2020).

67.) *KMS Com. Painting, LLC*, 371 NLRB No. 69, at 1 n.3 (2022) (Ring, Member, concurring).

68.) *Id.* at 2 n.7.

69.) U.S. CHAMBER OF COM., *MALIGNED MAIL BALLOTS AND WHISTLEBLOWERS: THE NLRB'S CREDIBILITY COMES INTO QUESTION* (2023), https://www.uschamber.com/assets/images/NLRB_White_Paper.pdf.

70.) *Id.*

71.) *College Bound Dorchester, Inc.*, Case 01-RC-261667 (NLRB 2021) (decision on review and order remanding).

Mail Ballot Elections are Inferior to In-Person Secret Ballot Elections.

Initially, the Acting Regional Director overruled the employer’s challenge without a hearing and determined that there was no significant difference between the signature on the ballot envelope and other examples of the employee’s signature. However, the full Board reviewed the case and determined that the Acting Regional Director’s finding that “there was no significant discrepancy between the signature on the ballot envelope and multiple, consistent exemplars of the eligible employee’s signature was clearly erroneous”(72). The case was remanded to the NLRB region for further proceedings, and the union ultimately withdrew the election petition(73).

Inappropriate voter solicitation was another issue the Board encountered when it expanded the use of mail-ballot elections. In Professional Transportation, the employer offered evidence that union representatives called employees offering to help fill out, collect, and mail their ballots(74). In the decision, the Board noted the importance of protecting the integrity of representation elections and held that the solicitation of mail ballots constitutes objectionable conduct that can result in setting aside an election(75).

Other problems that arose from the expanded use of mail ballot elections include technical difficulties with the video count of mail ballots,(76) voter eligibility issues,(77) and postal delays causing mail ballots to arrive late, disenfranchising voters(78). The myriad difficulties in conducting mail ballot elections provides further evidence as to why the Board has long maintained that questions of representation are best determined by conducting in-person, secret ballot elections.

72.) *Id.* at 3.

73.) College Bound Dorchester, Inc., Case No. 01-RC-261667, <https://www.nlr.gov/case/01-RC-261667>.

74.) Professional Transp., Inc., 370 NLRB No. 132 (2021).

75.) *Id.*

76.) Stericycle, Inc., Case 04-RC-260851 (NLRB Feb. 22, 2021) (order) (Member Ring noting challenges with ballot count conducted using video technology).

77.) NRT Bus, Inc., 371 NLRB No. 136 (2022).

78.) Promowest Productions, Inc., Case 09-RC-261089 (NLRB Nov. 25, 2020) (order) (Members Ring and Kaplan noting that “the facts of this case—namely, the possibility that some ballots may be lost or delayed in the mail—illustrate one reason why manual elections are, and should be, preferred”); Daniel Wiessner, U.S. labor board won’t revisit mail-in union election despite postal delays, REUTERS, Apr. 29, 2022, <https://www.reuters.com/legal/litigation/us-labor-board-wont-revisit-mail-in-union-election-despite-postal-delays-2022-04-29/>.

Conclusion

The NLRB has an obligation to workers, employers, and unions to ensure that elections follow established rules and procedures and that the outcomes of these elections are the result of a fair process. Unfortunately, the documents from the NLRB whistleblower, the Board, and the NLRB Inspector General demonstrate this has not been the case in numerous mail ballot elections.

Further undermining the NLRB's credibility, the Board and the General Counsel have failed to take these findings of misconduct and procedural irregularities seriously. To the Committee's knowledge, the Board has yet to develop or implement safeguards to prevent such misconduct from occurring in future mail ballot elections or take accountability for the NLRB's failings.

Instead, the Board signaled early in the Biden administration that it sought to reduce the use of in-person secret ballot elections. In June 2021, the Board issued a decision in which the Chairman wrote she was interested in "reevaluat[ing the Board's] 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"(79).

The American public and workers must have full confidence in the integrity of the NLRB to administer elections in a neutral and fair manner. To meet this high standard, the Board should recommit to conducting union elections by secret ballot. Arguably the Board's most important statutory charge is to ensure that elections are free and fair. It is well-documented that conducting NLRB-supervised secret ballot elections is the best way to fulfill this duty.

79.) Professional Transp., Inc., 370 NLRB No. 132, at 3 n.10 (2021) (views of Chairman McFerran).