

**OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: JOHN PHILLIPENAS,)	Protest Decision 2011 ESD 201
)	Issued: April 4, 2011
Protestor.)	OES Case Nos. P-237-033011-GP
_____)	

John Phillipenas, member and secretary-treasurer of Local Union 631 and delegate candidate on the Empowerment slate, filed a post-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2010-2011 IBT International Union Delegate and Officer Election (“*Rules*”). The protest alleged that the *Rules* were violated with respect to the counting of ballots in the local union’s delegates and alternate delegates election.

Election Supervisor representative Jeffrey Ellison investigated this protest.

Findings of Fact

Local Union 631 conducted its tally of ballots on Monday, March 28, 2011. The local union contracted with Merriman River Group to administer the election. Merriman’s representative, Matt Fitch, attended and supervised the count. Also present were OES representatives Mary Ann Campbell and Bruce Boyens. Slates and candidates exercised their right to observe the count process, including the pickup of voted ballots from the post office.

The first issue the protest presented concerned the pickup of ballots. As this decision details, two pickups were made on count day. Protestor Phillipenas submits that the second pickup should not have been made nor the votes from that pickup added to the tally. The facts giving rise to his claim follow.

At about 9:45 a.m. on count day, a caravan of vehicles proceeded to the post office to pick up ballots. Among those making this trip were Fitch, Boyens, and observers for various slates competing in the election. Enroute to the post office, Fitch made three calls to post office personnel to advise that they were on their way to pick up the ballots. He called the post office box clerk, the business entry clerk, and the postage due clerk. He spoke with the first two and was assured they were ready for the caravan’s arrival. He left a voice-message for the postage due clerk.

Voting members mailed their voted ballots in ballot return envelopes with postage paid by business reply mail. Postage expense on business reply mail is incurred only on mail actually received; as such, business reply mail received at the post office is routed to the postage due clerk before being deposited in the post office box to which it is addressed. The postage due clerk tallies the business reply mail received and debits the business’ account before releasing it to the box holder. If the funds on deposit for business reply mail are insufficient to cover the postage due on it, the mail is held until sufficient funds are deposited. Fitch called the postage due clerk to learn whether the positive balance in the account as of the previous Friday was sufficient to pay any outstanding business reply postage expense.

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At the post office and in the presence of Boyens and the observers, Fitch asked for and received the mail for the ballot return post office box. After that mail was produced to him, he asked if he had received all the mail for that post office box. He was assured that he had. Fitch, Boyens and the observers then returned to their vehicles. Boyens and the observers traveled in the car with the ballots back to the union hall; Fitch returned by separate vehicle.

At the hall, Fitch instructed all observers and counters to turn their cell phone ringers off to eliminate interruptions and distractions they could cause; he did the same. Approximately 15 minutes later, at 11:06 a.m., the postage due clerk called Fitch's cell phone to respond to the voice-message he had left her earlier that morning. The clerk, identified as Joyce on the voice-message, stated that there were "a little over 150 pieces" still at the post office and that Fitch should "call and let me know what you want to do" about that mail.

Fitch, with his cell phone ringer off, did not discover Joyce's message until approximately 1:30 p.m., some two and one-half hours later. In the interim, the count proceeded with the ballots obtained that morning. The ballot return envelopes were counted and were scanned for the initial eligibility determination.¹ The envelopes that scanned as challenged were bundled together in groups according to the challenge code assigned them. The envelopes that scanned as eligible were opened and the secret ballot envelopes they contained were removed. The secret ballot envelopes were shuffled, then opened and the ballots removed. Each ballot was examined to insure that its markings could be read by the optical scanner machines used at the count. Those that could not were set aside for hand-counting.

By the time Fitch discovered the voice-message from the postal clerk, the counting process of the ballots picked up that morning that had scanned as eligible was nearly complete; challenged ballot resolution was yet to commence. Fitch discussed the message with OES's Campbell and Boyens. Campbell determined that the mail should be picked up and examined to verify that it was mail that had been at the post office at the time of the original pickup and was not mail that had been received that day, March 28, after the morning pickup. Protestor Phillipenas objected to this decision, stating that postal employees had said repeatedly at the time of the first visit that all the ballots had been produced. Any additional ballots, Phillipenas argued, were late returns that should not be counted. Campbell overruled the objection to making a second pickup. She reasoned that mail at the post office at the time of the pickup should be counted and mail received after the pickup should not be, but the decision as to which ballots to count, if any, could not be made without examining each piece.

¹ Eligibility to vote is determined in accordance with Article V of the *Rules*. Computerized scanning of bar codes on ballot return envelopes compares the voter's identity with an electronic Election Control Roster that incorporates the standards set forth in that article. Voters who do not scan as eligible at this stage of the process are automatically challenged and their ballots are grouped according to the type of challenge made. If the number of challenged ballots are sufficient to affect the outcome of the election, those ballots are resolved by examining all ballots in the successive groups of challenged ballots to ascertain that the data that formed the basis for the challenge is up-to-date; if it is not, current data is obtained and used to resolve the challenge. "Challenged ballots from each group resolved in favor of eligibility shall be counted until such time as the challenged ballots remaining no longer may affect the outcome of the election. When the remaining groups of challenged ballots may no longer affect the outcome of an election, the count shall cease and remaining challenges shall not be resolved." Article IV, Section 9.

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At this, Fitch led a second caravan to the post office to retrieve the additional mail. Boyens and the observers returned to the hall in the car with the ballots. Campbell examined the postmarks on the 152 pieces contained in the second pickup: 32 had no discernible or legible postmark; of the remaining 120 pieces, the postmarks ranged in date from March 18 to March 26.² None carried a postmark date of March 28, the date of the count. Accordingly, Campbell concluded that all of the ballot return envelopes from the second pickup had been at the post office when the first pickup occurred and simply had not been produced to Fitch. Therefore, she determined that they should be counted.

Subsequent investigation showed that the ballot return envelopes produced in the second pickup had been in the work area of the postage due clerk at the time of the initial pickup; the clerk had completed her work tallying the postage expense but had not sent the ballots to the post office box area for inclusion with the other ballots. Pete Seriano, postal service distribution operations supervisor, told Fitch and Campbell on March 29 that postmarks are applied when mail arrives at his facility; therefore, the postmark dates on the ballots produced at the second pickup indicated the dates those envelopes arrived there.

To preserve the issue for review, Campbell directed that a separate tally be made of the ballots in the second pickup. This was done.

When the tally of the ballots that scanned as eligible was completed, the number of challenged ballots was sufficient to affect the outcome of the election. Accordingly, Campbell and the local union's TITAN operator worked to resolve the challenges to the eligibility of those voters. All but two were resolved on March 28 and the ballots of the voters determined to be eligible were counted that day. The results of the election to that point were still such that the eligibility determination on the remaining two challenged ballots could affect the outcome of the election. Determination of eligibility of those two ballots required access to employer records to verify the identity of one of the members³ and the employment status of the other. Given the lateness of the hour, however, contact with the employers was unsuccessful.

The inability to access the employers' records on March 28 gave rise to the second allegation of Phillipenas' protest. He contended that the count should have concluded on March 28 under these circumstances. The impact of his position is that any ballots for which eligibility could not be determined as of the end of the day on March 28 should not be counted, and the tally as it stood at that time deemed final.

Campbell concluded, contrary to Phillipenas' position, that the effort to resolve the final challenges should continue and that the employers should be contacted. Accordingly, she

² Twelve envelopes were postmarked March 18; seven, March 19; twenty-three, March 21; eighteen, March 22; twelve, March 23; twenty-two, March 24; seventeen, March 25; and nine, March 26.

³ This member was listed in TITAN records by her birth name. Following her marriage, she adopted her husband's last name and moved her residence. When she did not receive a ballot, she phoned to request a ballot package. In her voice-message, which had been retained and was reviewed by Campbell during the counting process, she listed her new surname and address; she also listed the last 4 digits of her Social Security number, which was not affected by her marriage. Correlating this information with information obtained from other records on March 29, Campbell verified the member's identity, and her TITAN records showed she was eligible to vote.

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announced that the count would continue the next morning, March 29. No one, including the observer for Phillipenas' slate, objected to this decision.

The first of the following tables shows the tally of ballots in the delegates portion of the election after counting of the ballots that scanned as eligible from the first pickup; the second table is the cumulative total at the end of the day on March 28, after resolution of all but the final two challenged ballots.

Tally of ballots from 1st pickup

Place	Candidate	Slate ⁴	Tally
1	Cheryl Schmit	RTP	269
2	Laura Sims	RTP	264
3	Tommy Blitsch	RTP	259
4	Rhonda Link	RTP	246
5 ⁵	John Phillipenas	Emp	243
5	Julian Campos	RTP	243
7 ⁶	Don Weimer	Emp	242
7	Wayne Dey	Emp	242
9	Shirayne Waite	RTP	237
10	Johnny Gonzalez	Emp	235
11	Kermit Williams	Emp	234
12	Todd Clapper	Emp	231
13	Javon Jefferson	RTP	230
14	Tom Geraci	RTP	226
15	Joseph Rivas	Emp	225
16	Delbert King	Emp	224
17	Harold Klein	Hoffa	119
18	Kevin Hardison	Hoffa	114
19	Brian Nilson	Hoffa	110
20	Eric Kaplan	Hoffa	104
21	Peter Andrade	Hoffa	99
22	Fred Spears	Hoffa	94
23	Don McNamee	Ind	62
24	William Brown	T & R	53
25	Jany Treadwell	Truth	50
26	Willie Gary	Truth	43
27	John Hicks	T & R	37

⁴ RTP = Restore the Pride; Emp = Empowerment; Hoffa = Hoffa/631; T&R = Truth & Respect; Truth = Truth

⁵ Phillipenas and Campos were tied for 5th delegate position.

⁶ Weimer and Dey were tied for 7th delegate position.

Tally before resolution of last 2 challenges

Place	Candidate	Slate	Tally
1	Cheryl Schmit	RTP	326
2	Laura Sims	RTP	323
3	Tommy Blitsch	RTP	313
4 ⁷	Rhonda Link	RTP	298
4	Julian Campos	RTP	298
6	Don Weimer	Emp	291
7	John Phillipenas	Emp	286
8 ⁸	Wayne Dey	Emp	284
8	Shirayne Waite	RTP	284
10	Javon Jefferson	RTP	281
11	Johnny Gonzalez	Emp	278
11	Kermit Williams	Emp	278
13	Todd Clapper	Emp	276
14	Tom Geraci	RTP	275
15	Delbert King	Emp	267
16	Joseph Rivas	Emp	264
17	Harold Klein	Hoffa	154
18	Kevin Hardison	Hoffa	151
19	Brian Nilson	Hoffa	142
20	Eric Kaplan	Hoffa	132
21	Peter Andrade	Hoffa	124
22	Fred Spears	Hoffa	122
23	Don McNamee	Ind	76
24	William Brown	T & R	66
25	Jany Treadwell	Truth	62
26	Willie Gary	Truth	49
27	John Hicks	T & R	43

⁷ Link and Campos were tied for 4th delegate position.

⁸ Dey and Waite were tied for 8th delegate position.

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On March 29, Campbell resolved the challenged ballots in favor of eligibility after gaining access to records that were unavailable the previous evening; both voters were determined to be eligible. Both ballots were slate votes for the RTP slate. The addition of these votes to reach the final tally changed the finishing order for the seventh, eighth and ninth positions. The following tables show those positions before and after the addition of the final two votes:

Tally before resolution of final 2 challenges

Place	Candidate	Slate	Tally
7	John Phillipenas	Emp	286
8	Wayne Dey	Emp	284
8	Shirayne Waite	RTP	284

Tally after resolution of final 2 challenges

Place	Candidate	Slate	Tally
7	Shirayne Waite	RTP	286
8	John Phillipenas	Emp	286
9	Wayne Dey	Emp	284

After the final tally showed a tie for seventh position between Waite and Phillipenas (each with 286 votes), Campbell supervised a coin toss to break the tie. Phillipenas called “heads;” the coin showed “tails.” Accordingly, Waite was awarded seventh position and Phillipenas the eighth and final delegate seat.

Analysis

The protest first contends that the second pickup of ballots on count day violated the *Rules*. Article II, Section 11(b) states that “[t]he ballots shall be transported from the post office to a suitable location for counting.” Phillipenas argues implicitly that this provision means one and only one pickup may be made from the post office on count day.

Under normal circumstances, only one pickup of ballots is made on count day. The notice of election and ballot instructions advise the voter that the ballot must be mailed so that it is received by 9 a.m. on the date designated for counting of ballots. The time between mailing and counting of ballots is at least 21 days⁹ (Article II, Section 7(d)) to give members sufficient time to receive, review, mark, and mail their ballots. Ballots received after the date and time set for the count arrive too late to be included.

The question this protest presents is whether ballots received by the post office before the deadline for return but not delivered to count officials in the initial pickup because of the postal service’s error should nonetheless be counted. We conclude that they should. First, postal officials stated that the ballots were at the post office at the time of the initial pickup and, indeed, had been processed. When the postal service official told Fitch that all mail received for the ballot return post office box had been produced, that was error. Had the correct response been given, Fitch and the observers would have waited and retrieved the rest of the returned mail on the initial run. Second, the postmark evidence here confirms that ballots in the second pickup

⁹ For Local Union 631, ballots were mailed March 1 and the count was conducted March 28, giving members a 27-day window for voting and returning ballots.

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had arrived before count day.¹⁰ The members who voted those ballots complied with the requirements in the notice of election and mailed their ballots in sufficient time that they were received by the post office prior to the count. We decline to hold that those members' ballots should not be counted as late returns. The decision to return for the second pickup of ballots here was correct. Accordingly, we DENY this aspect of the protest.

Phillipenas' second claim is that the final two challenged ballots should not have been counted because the challenges to them were not resolved on March 28. We DENY this claim as well. At the end of the day on March 28, the tallies of Phillipenas, Dey and Waite were within two votes. As such, the *Rules* required that the challenges be resolved, if possible. Article IV, Section 9 makes this plain:

Challenged ballots ... resolved in favor of eligibility shall be counted until such time as the challenged ballots remaining no longer may affect the outcome of the election. When the remaining ... challenged ballots may no longer affect the outcome of an election, the count shall cease and remaining challenges shall not be resolved.

The time limit for completing the count is not expressed in terms of a date, *i.e.*, count day, as the protest argues. Instead, resolution of challenges shall continue "until such time" as they no longer may affect the outcome and "shall cease" only when the outcome may no longer be affected. In this case, resolution properly carried over to March 29 because access to necessary records could not be obtained on March 28.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal, and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, 1801 K Street, N.W., Suite 421 L, Washington, D.C. 20006, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

¹⁰ We acknowledge that 32 of the ballot return envelopes in the second pickup had no legible postmark or no postmark at all. However, given that none of the 120 ballots that had legible postmarks were dated later than March 26, two days before the count, we conclude that the remaining 32 were received no later than March 26 as well.

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Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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