

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**CHARTER COMMUNICATIONS (SUCCESSOR  
TO TIME WARNER CABLE OF NYC)**

**Employer**

**and**

**Case 02-RD-220036**

**BRUCE CARBERRY**

**Petitioner**

**and**

**LOCAL UNION NO. 3, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS**

**Union**

**Regional Director's Second Supplemental Decision on Challenged Ballots**

Pursuant to a Decision and Direction of Election that issued on June 18, 2018, and a Notice and Direction of Election that issued on January 10, 2019, an election by mail ballot was conducted in the following unit:

All field operations, network operations, and warehouse technician employees employed by Charter Communications, Inc., (the Employer), at its Bergen County, NJ, and Staten Island, Manhattan, Brooklyn, and Queens, NY facilities, including Tech 1's through Tech 5's, Crew Chiefs, Foremen and General Foremen; excluding all other employees, guards, and supervisors as defined in the National Labor Relations Act.

The ballots were mailed to the voters on January 25, 2019, and the ballot count occurred on February 25-26, 2019. On February 26, 2019, a tally of ballots was prepared and made available to the parties. The tally indicated that 62 ballots were void and the remaining 1601 ballots cast were challenged, an amount sufficient to affect the results of the election.<sup>1</sup>

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<sup>1</sup> Prior decisions and the tally of ballots indicated that the total number of challenged ballots was 1601. However, 2 additional ballots were deemed void by the Region and therefore not

The Union challenged 933 ballots on the basis that they were cast by temporary replacement employees. The Union also challenged 20 of those ballots on the additional basis that the voter printed, rather than signed their name. The Employer challenged 666 ballots on the basis that they were cast by permanently replaced strikers. The Employer also challenged 15 of those ballots on the additional basis that the voter printed rather than signed their name, 1 on the additional basis that the ballot was not signed at all, and 126 on the additional basis that they were cast by strikers that were not employed on the eligibility date.<sup>2</sup>

On April 17, 2019, I issued an Interim Report on Determinative Challenged Ballots and Order Directing Opening and Counting of Challenged Ballots (herein, Interim Report). I overruled a portion of the Union's challenged ballots, finding that they were not cast by temporary employees but by strikers who returned to work before the January 3, 2019 payroll eligibility date (herein, cross-overs). I ordered those ballots to be open and counted.<sup>3</sup>

On August 5, 2019, I issued a Supplemental Decision on Challenges and Objections (herein, Supplemental Decision) to administratively resolve the outstanding challenges. I sustained the Union's challenge to 20 ballots as void on the basis that they contained a printed

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counted on the final challenged ballot lists provided to the parties. See ER Exh. 23. The prior decisions correctly noted that the Union challenged 933 ballots and the Employer challenged 666 ballots (662 of which were also challenged by the Petitioner). Therefore, the final number of determinative challenged ballots is 1599.

<sup>2</sup> Both parties also challenged a number of ballots on the additional grounds that they arrived late. The ballots arrived at the Regional office after the return date in the Notice of Election but before the ballot count.

<sup>3</sup> The Interim Report inadvertently listed only 325 names due to a printing error. No party filed a request for review of the determination that 332 cross-overs were eligible to vote or to the Interim Report's failure to include the following 7 names:

1. Cadichon, Yonel
2. Eugene, Mario
3. Hudson, Darryl
4. Meighan, Enrico
5. Pena, Steven
6. Rothwell, David
7. Vukovic, Aleksander

The full list of 332 cross-overs that includes the above-named individuals is attached to this decision as Appendix A.

name rather than the required signature.<sup>4</sup> I found that the remaining employees challenged by the Union as temporary replacements were permanent replacements and eligible to vote. I ordered their ballots to be opened and counted.<sup>5</sup> I sustained the Employer's challenges to 15 ballots as void on the basis that they contained a printed name rather than the required signature. I sustained the Employer's remaining challenges on the grounds that they were cast by economic strikers who were permanently replaced. I also sustained the Employer's challenge to 117 of those ballots on the additional grounds that they were cast by employees that were not employed on the eligibility date.<sup>6</sup>

The Union filed a timely request for review of the Supplemental Decision with the Board. On March 19, 2020, the Board issued an order granting the Union's request for

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<sup>4</sup> Four employees listed as cross-overs in the Interim Report were subsequently deemed void in the Supplemental Decision, and their ballots should therefore not be opened and counted:

1. Fall, Mohamed
2. Gittens, Osmorn
3. Gonzalez, Richard
4. Guthrie, Rhoan

No party filed a request for review of that determination. In addition, the parties submitted a Stipulation accepted into the record as Joint Exhibit 1, in which the parties agreed that Pedro Diaz and Steve R. Bishop are also cross-over employees. Jt. Exh. 1, p. 4. I adopt the Hearing Officer's recommendation, to which no party excepted, that the Union's challenges to these two ballots are overruled and their ballots should be opened and counted. Therefore, I now find that the total number of ballots cast by cross-over employees to be opened and counted is 330. See Appendix B.

<sup>5</sup> The Supplemental Decision mistakenly provided that there were 581 rather than 585 remaining ballots challenged by the Union. 332 of the Union's 933 challenges were overruled in the Interim Report because they were cast by cross-overs (leaving 601 remaining challenges). While 20 ballots were deemed void in the Supplemental Decision, 4 of those ballots were cast by cross-overs and therefore do not affect the number of remaining challenges (585). With the two additional challenges resolved in Joint Exhibit 1, the Union's total number of remaining challenges is now 583.

<sup>6</sup> I also overruled both parties' challenges to ballots that arrived late as they were received by the Regional office before the ballot count. See *Kerrville Bus Co.*, 257 NLRB 176 (1981); *Premiere Utility Services, LLC*, 363 NLRB No. 169 (2016). Regarding the objections, I overruled Union Objections 6-8 and directed a hearing on Union Objections 1-5 if the Union does not obtain a majority of the valid votes cast. If Objections 1-5 are ultimately overruled, I held that I would consolidate Objections 9 and 10 with the Complaint in Case Nos. 02-CA-220539 and 02-CA-223159.

review.<sup>7</sup> The Board remanded certain matters for further proceedings, including a hearing if warranted. First, the Board ordered me to consider evidence on and analyze whether the replacement employees challenged by the Union were temporary or permanent under *O.E. Butterfield, Inc.*, including whether all the strikers had been permanently replaced. 319 NLRB 1004 (1995). Second, the Board ordered me to consider whether the Employer established that it permanently eliminated approximately 300 positions for reasons not predicated wholly on considerations following from the strike itself. See *Lamb-Grays Harbor Co.*, 295 NLRB 355, 357 (1989). And, if the positions have not been permanently eliminated, whether any of the challenged strikers held these now-vacant positions when the strike commenced and thereby retain their eligibility to vote. Third, the Board ordered me to consider whether the Employer met its burden of proving, through objective evidence, that any of the strikers voluntarily separated from their employment and are therefore ineligible to vote. See *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359 (1962).<sup>8</sup>

Thereafter, I issued an Order Directing Hearing on Remand and Notice of Hearing. Bd Exh. 1(c). Pursuant to that order, a hearing was held before a Hearing Officer on September 21-24, 2020. On October 19, 2020, the Hearing Officer issued a report (herein Hearing Officer's Report) in which she recommended the majority of the Union's challenges be overruled because the Employer met its burden of proving that these ballots were cast by permanent replacements. She recommended the remaining Union challenges be sustained. Further, she found that three positions were permanently eliminated and recommended that I sustain the Employer's challenges to these ballots. She recommended that the remaining Employer challenges to ballots cast by striking employees be overruled. Finally, she approved a joint stipulation and recommended resolution of certain challenged ballots based on that agreement between the parties. Joint Exh. 1.

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<sup>7</sup> No party requested review of my ruling regarding the ballots deemed void because they either lacked a signature or the voter printed, rather than signed their name. No party requested review of my ruling that ballots arriving after the cutoff date in the Notice of Election but before the ballot count are not void on that basis.

<sup>8</sup> The Board also reinstated Objection 6 and directed me to hold it in abeyance pending resolution of the challenges and if necessary, to consider it with Objections 1-5.

The Employer filed timely exceptions to the Hearing Officer's findings and recommendations. The Union filed an answering brief urging me to adopt the Hearing Officer's Report in its entirety.

I have carefully reviewed the Hearing Officer's rulings. I find that they are free from prejudicial error, and are hereby affirmed. I also adopt her recommendations, except as modified below.<sup>9</sup> In considering the Employer's exceptions and the parties' briefs, I rely on the Hearing Officer's finding of fact and recommendations for the reasons discussed below.

### **Voluntary Separations**

Economic strikers may be ineligible to vote if, prior to the election, the employee obtains permanent employment elsewhere. *Lamb-Grays*, 295 NLRB at 357. The Employer challenged 126 ballots on the basis that they were not employed on the eligibility date because they voluntarily separated from employment.<sup>10</sup> The parties submitted a stipulation, accepted into the record as Joint Exhibit 1, intended to resolve this issue. See Jt. Exh. 1.

First, the parties agreed to sustain the Employer and Petitioner's challenges to the ballots of the 101 individuals listed in Employer Exhibit 7 and Christopher Williamson. Jt. Exh. 1, p. 1. I therefore partially adopt the hearing officer's recommendation and sustain the Employer's challenges to the ballots cast by the voters listed in Appendix C.<sup>11</sup> These ballots will not be opened and counted.<sup>12</sup>

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<sup>9</sup> I find merit or partial merit to Employer Exceptions 1, 28, 41, 43-51 and 53-54, as discussed below.

<sup>10</sup> While prior decisions refer to 117 ballots, the original list of Employer challenges contains 117 typed challenges and an additional 9 handwritten challenges, for a total of 126 ballots challenged by the Employer as having been cast by strikers no longer employed on the eligibility date. See ER Exh. 23.

<sup>11</sup> The parties and the Hearing Officer agreed to sustain the Employer's challenge to the ballot of Fitzgerald Boyce, but there is no corresponding ballot challenged by any party. See ER Exh. 7 and 23; Joint Stipulation; Hearing Officer's Report. However, if this is a clerical error and a ballot was cast by Boyce, in view of the parties' agreement, I will sustain the challenge to his ballot, and, if cast, his ballot will not be opened and counted.

<sup>12</sup> Three individuals listed in Employer Exhibit 7 cast ballots previously deemed to be void in the Supplemental Decision and their ballots should not be opened and counted on that basis as well:

1. Cooper, Michael
2. Marin, Jorge

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