

Better Late Than Never? In Election Using Mailed-In Ballots, NLRB Says Postal Service Failure Is No Excuse For Late Ballots

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Recent posts have discussed in great detail the Board's new election rules and how they have already begun to impact employers, including [our post earlier this week](#) about voter eligibility lists. In a recent Board decision, however, the Board relied on its old precedent to uphold election results and deny an employer's request for review. In [Classic Valet Parking, Inc., No. 29-RC-148399](#) (N.L.R.B. Oct. 23, 2015), an employer sought review of a regional director's decision in a mail-ballot election case. The employer had previously objected to the decision to have a mail ballot in the first place, as it testified that eligible employees could be scheduled to work so that they would be able to vote on-site. As the election was conducted by mail, the employees were responsible for mailing in the ballots on time. The Board mailed employees the ballots on May 19 and set a hard deadline for completing and returning the ballots by June 2. The Board also scheduled the ballot tally just two days later on June 4. Ten ballots arrived late and were not counted. All 10 were actually postmarked before the June 2 deadline, but they were not received prior to the June 4 count. Thus, the ballots were potentially timely when mailed. In addition, there were only 16 total ballots counted, so the 10 unopened ballots had a strong chance of being election-determinative. Even further, six of the unopened ballots, enough to change the outcome, were postmarked **five days or more before the count**. Thus, considering the ballots likely did not arrive until a few days after the May 19 mailing date, the employees arguably completed the ballots within one week or sooner. In response to the employer's objection to the exclusion of the ten ballots, the union argued that "any potential mail slowdown is not grounds for opening and counting [late] ballots." The regional director relied on Board rules which leave all election mechanics to the discretion of the regional director. The Board followed its long-standing rule in this case to exclude late-received ballots that arrive after the scheduled ballot count. The Board said that its rule "effectuates the substantial policy considerations favoring finality of election results," while recognizing that reliance on the rule in this case **resulted in the exclusion of determinative ballots**. Board Member Miscimarra argued in his dissent that the normal practices should not be followed where the normal procedures fail to "assure to employees the fullest freedom in exercising the rights guaranteed by the Act." What's the lesson here? Employers facing union elections will encounter headaches from the very beginning. It's important to consult with labor

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professionals when faced with a potential union campaign, as the Board is not going to bend its rules, even when doing so results in impaired employee choice.