

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14**

Beleaf Medical, LLC

Employer

and

Case 14-RC-325871

United Food & Commercial Workers Local 655

Petitioner

PARTIAL DECISION ON CHALLENGED BALLOTS

On September 15, 2023, United Food & Commercial Workers Local 655 (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit of employees employed by BeLeaf Medical, LLC (Employer). On October 6, 2023, a hearing was held before a Hearing Officer of the National Labor Relations Board (the Board or NLRB), with the sole issue litigated at hearing being whether certain petitioned-for job classifications are agricultural employees and exempt from the Board's jurisdiction. The parties were provided the opportunity to call, examine, and cross-examine witnesses; to introduce into the record evidence of the significant facts to support their contentions; and, to submit post-hearing briefs. Both parties timely submitted post-hearing briefs.

After carefully considering the entire record, the parties' briefs, and relevant Board law, I issued a Decision and Direction of Election (DDE) on January 25, 2024, that found that none of the petitioned-for job classifications were agricultural employees. I directed a manual election to be conducted on February 6, 2024, in the following unit¹:

INCLUDED: All full-time and regular part-time Order Fulfillment Specialists, Order Fulfillment Specialist Leads, Infusion Technicians, Infusion Leads, Post-Harvest Technicians, Post-Harvest Leads, Post-Harvest Trim Leads, and Post-Harvest METRC Specialists employed by the Employer at its 1315 Cherokee St., St. Louis, MO 63118, facility.

EXCLUDED: All office clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots prepared at the conclusion of the election shows that of approximately 16 eligible voters, 1 cast a ballot for Petitioner, and 3 cast ballots against representation. There were 11 challenged ballots, a number that is sufficient to affect the results of the election. On February 7, 2024, the Region sent a letter to the parties, notifying them of the various challenged ballots and the reasons for each challenge, and soliciting their positions on the challenges.

Under Section 102.69(c) of the Board's Rules and Regulations, a Regional Director is authorized to process challenges administratively or by a hearing. If a party has challenged a

¹ No Request for Review of my January 25, 2024, decision has been filed. Nor were any Objections filed to the election.

voter, the Regional Director should evaluate the challenge and the parties' positions and supporting evidence to determine if the evidence, "raises substantial and material factual issues." Board's Rules and Regulations, Section 102.69(c)(1)(i) and (ii). If the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of those determinative challenges. *NLRB Casehandling Manual (Part Two) Representation Proceedings*, Section 11361.1.

For the reasons set forth in this decision, I conclude that the evidence does not raise substantial and material factual issues with respect to the following determinative challenged ballots as it relates to their status as agricultural employees: nine Employer challenges to **Will Braddum, George Burgess, Sarah Bush, Gabriel Salazar, Ahmad (Jxggy) Haynes, Mikael McCants-Armstead, Peggy Luczak, Samuel Haddox, and Vincent Day**. Therefore, based on objective documentary evidence submitted by the Parties, I am disposing of these nine challenged ballots by ordering that they be opened and counted without a hearing.

With respect to the Employer challenge to the ballot of **Kailey Darden** based on her status as an agricultural employee, like the previous challenges, I find that Darden is not an agricultural employee, and am disposing of the challenge for this basis. However, in its February 13, 2024, response to the Region's letter seeking parties' positions on determinative challenges, the Employer raises for the first time its position that Darden's ballot should also be challenged based on her status as a Section 2(11) supervisor effective January 19, 2024. As will be more fully discussed below, I conclude that because the initial challenge to Darden's ballot based on her alleged status as an agricultural employee was not a valid challenge as this issue had already been decided, that the Employer is precluded from raising a post-election challenge based on her alleged supervisory status, of which it was fully aware prior to the election. Therefore, based on objective documentary evidence submitted by the Parties, I am disposing of the challenge to Darden's ballot by ordering that it be opened and counted without a hearing.

With respect to the Employer challenge to the ballot of **Todd Rick** based on his February 2, 2024, discharge, I conclude that the parties have raised substantial and material factual issues that must be resolved by a hearing. As discussed more fully below, Rick's discharge is the subject of the unfair labor practice charge filed in Case 14-CA-335087, which alleges the Employer violated Section 8(a)(1) and (3) of the Act by discharging Rick in retaliation for engaging in union activity. Therefore, if the remaining challenge to Rick's ballot challenged by the Employer is still determinative after the disposed challenged ballots have been opened and counted, it, along with Darden's challenged ballot, will be held in abeyance pending a decision in related Case 14-CA-335087.

I. THE CHALLENGED BALLOTS

Ten Employer Challenges – Agricultural Employees

The following voters were challenged by the Employer contending that they are agricultural workers over whom the NLRB does not have jurisdiction. The Employer's position is that despite the Regional Director's determination in the DDE, it challenged the voters in order to preserve the issue for presentation to the United States Court of Appeals for the 8th Circuit.

The Petitioner takes the position that the voters should not have been allowed to be challenged because the Regional Director had already issued a pre-election DDE that determined these employees were eligible voters and not exempt agricultural employees, and that no allegation of changed circumstances was stated at the time the challenges were raised, citing to NLRB RCHM, §11338.7. These challenged voters are:

NAME	CHALLENGED BY	REASON
Will Braddum	Employer	Agricultural employee
George Burgess	Employer	Agricultural employee
Sarah Bush	Employer	Agricultural employee
Gabriel Salazar	Employer	Agricultural employee
Ahmad (Jxggy) Haynes	Employer	Agricultural employee
Mikael McCants-Armstead	Employer	Agricultural employee
Peggy Luczak	Employer	Agricultural employee
Kailey Darden ²	Employer	Agricultural employee
Samuel Haddox	Employer	Agricultural employee
Vincent Day	Employer	Agricultural employee

The Board has long held that a fully litigated issue may not be relitigated through the challenge procedure. *Amalgamated Clothing Workers of America*, 217 NLRB 98, 98 (1975); *D. H. Farms Co.*, 192 NLRB 53, 53 (1971) (“Respondent was attempting, through the challenge procedure, to relitigate the same issue fully litigated in the representation hearing and resolved by the Regional Director.”), enf. denied and remanded 465 F.2d 1230 (6th Cir., 1972), reaffid. 206 NLRB 111 (1973).

The *NLRB Casehandling Manual (Part Two) Representation Proceedings*, Section 11338.7 provides operational guidance intended to safeguard a free and fair election in this situation, in relevant part:

Person in job classifications specifically included by the Decision and Direction of Election should be given a ballot and permitted to vote without challenge based upon classification, unless a request for review has been filed within 10 business days after issuance of the Decision and Direction of Election regarding these job classifications and that request remains pending or has been granted at the time of the election, or there have been changed circumstances. Allegations of changed circumstances by the person seeking to challenge the employee should be reviewed by the Board agent. Unless

² As stated previously, the Employer initially challenged Darden along with the other nine employees as being an agricultural employee. Post-election, the Employer then raised Darden’s alleged supervisory status as a secondary basis for challenge. This basis will be more fully addressed below.

plausible reasons are given for the challenge, the person specifically included should be permitted to vote without casting a challenged vote.

See *Anheuser-Busch, LLC*, 365 NLRB No. 70 (2017) (challenge not allowed when employer failed to demonstrate changed circumstances); *Europa Auto Imports, Inc.*, 357 NLRB 650, 651, fn. 4 (2011) (same); *Cadmium & Nickel Plating Division of Great Lakes Industries, Inc.*, 124 NLRB 1386, 1387 (1959) (“mass challenge” of all voters not allowed because not for “good cause”). See also Sec. 102.65(e)(3) of the Board’s Rules and Regulations.

Here, the Employer’s challenges to the ballots of Will Braddum, George Burgess, Sarah Bush, Gabriel Salazar, Ahmad (Jxggy) Haynes, Mikael McCants-Armstead, Peggy Luczak, Kailey Darden, Samuel Haddox and Vincent Day are based on its argument that they are agricultural employees and are exempt from NLRB jurisdiction. This issue was fully litigated in the pre-election hearing, and I ruled on this issue in my DDE, finding that the job classifications that these employees work in are not agricultural in nature and should be included in the voting unit. Moreover, the Employer did not file a Request for Review of the DDE. The Employer’s position statement in support of its challenges does not describe newly discovered or previously unavailable evidence or changed circumstances that would warrant relitigating this issue. Therefore, I am overruling the Employer’s challenges to **Will Braddum, George Burgess, Sarah Bush, Gabriel Salazar, Ahmad (Jxggy) Haynes, Mikael McCants-Armstead, Peggy Luczak, Kailey Darden, Samuel Haddox and Vincent Day** on the basis they are agricultural employees and am directing that those ballots be opened and counted.

Employer Postelection Challenge to Purported Supervisor

In its February 13, 2024, response to the Region’s letter seeking parties’ positions on determinative challenges, the Employer raises for the first time its position that Kailey Darden’s ballot should also be challenged based on her status as a Section 2(11) supervisor effective January 19, 2024. In support of its position, the Employer provided a January 19, 2024, letter to Darden offering her the position of Post-Harvest Supervisor, which Darden accepted on January 23, 2024.

The Board in *Dickerson-Chapman, Inc.*, 313 NLRB 907, 908 (1994) found that based on factual assertions “certain incidents had taken place [after the preelection hearing] which allegedly tended to show that certain individuals whom the Regional Director had found to be employees were in fact supervisors”... “may be raised through the challenge procedure as changed circumstances” In that case, the finding was made prior to the election, and the party was able to challenge the eligibility status of the voter based on their alleged supervisory status. Unlike the situation in *Dickerson-Chapman*, the Employer in the instant matter did not challenge the ballot of Darden based on her alleged supervisory status. Rather, the Employer stated the sole basis for the challenge as her position being agricultural in nature. It was only after the election that the Employer raised for the first time Darden’s supervisory status, which it was aware of prior to the February 6, 2024, election. The Board “has long held that it will not entertain postelection challenges, or objections which are in the nature of postelection challenges.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 328-329 (1946); *Poplar Living Center*, 300 NLRB 888, 888 fn. 2 (1990).

However, the Board has made exceptions where there are already timely challenges in place. See, *CHS, Inc.*, 357 NLRB 514 (2011), where the Board reversed the hearing officer's determination that the employer's post-election challenge to a ballot was untimely given that a timely initial challenge had been filed and the ballot had been segregated. In that decision, the Board stated that, "...the Board has held that a party may raise and litigate at a hearing an alternative ground for a properly challenged ballot, even if that alternative ground was not raised in a timely challenge." Citing, *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936 (1978). However, unlike the facts in *CHS, Inc.*, there was not a properly challenged ballot in the instant matter. Rather, the challenge to Darden's ballot was based on an already decided issue and should not have been allowed. Thus, the challenge was not valid, and the Employer is precluded from raising a secondary basis post-election. Particularly where the Employer was already in possession of the knowledge that Darden had been promoted out of the unit prior to the election and failed to challenge Darden's ballot on this basis during the election or prior to the counting of the ballots and issuance of a Tally of Ballots.

Therefore, because the Employer is precluded from raising a post-election challenge to the ballot of Kailey Darden, and as set forth previously, Darden's ballot should be opened and counted with the other ballots that were found to be improperly challenged as agricultural employees.

One Employer Challenge to Discharged Employee

The Employer challenged the ballot of one additional voter, Todd Rick, as being ineligible to vote as Rick had been terminated for cause prior to the date of the election. The Petitioner argues that Rick was eligible to vote as he was unlawfully discharged during the critical period in retaliation for union activities and is the subject of an on-going unfair labor practice charge investigation in Case 14-CA-335087.

NAME	CHALLENGED BY	REASON
Todd Rick	Employer	Terminated

In its position statement in response to the Region's challenges letter, the Employer states that it challenged each of the voters, including Todd Rick, as being agricultural workers over whom the NLRB lacks jurisdiction. That by doing so, it was preserving the issue for presentation to the United States Court of Appeals for the 8th Circuit. It then referenced its October 27, 2023, Post-Hearing Brief as evidence of further support for its position. As set forth previously, because I have already ruled on this issue in the DDE and found the employees to not be agricultural workers, the Employer's challenge to Rick's ballot on this basis is overruled.

On February 5, 2024, the Petitioner filed unfair labor practice charge 14-CA-355087, alleging that the Employer violated Section 8(a)(1) and (3) of the Act by terminating Todd Rick in retaliation for engaging in union activity and during the critical period of the petition herein. The Petitioner contends that Rick, who was on the voter list, was unlawfully discharged and is therefore eligible to vote in the election. The Employer contends that Rick was terminated for cause on February 2, 2024, for conduct occurring on January 26, 2024.

Alleged discriminatees who no longer work for an employer are nevertheless permitted to vote under challenge. *Grand Lodge Int'l Association of Machinists*, 159 NLRB 137, 143 (1966); *Tetrad Co.*, 122 NLRB 203 (1959). The parties' positions demonstrate that a determination on this challenge is closely connected to the outcome of the unfair labor practice allegation. If the alleged discriminatee is ultimately found to have been unlawfully discharged, they may be eligible to vote. On the other hand, if their separation from the Employer is found to be lawful, they would not be eligible to vote if they are no longer employed on the eligibility date or when they cast their ballot. In such cases, where determinative challenged voters are also involved in related unfair labor practice allegations or are the subject of unfair labor practice allegations, and where the Region's investigation into the unfair labor practice charges result in the authorization to issue a complaint, it is appropriate to consolidate the challenges with a complaint for hearing before an Administrative Law Judge. See *NLRB Casehandling Manual, Part Two, Representation Proceedings*, Section 11420.1. Accordingly, I am deferring a determination with respect to the challenged ballot of **Todd Rick**, pending the outcome of the Region's investigation into the unfair labor practice charge filed by the Petitioner.

II. CONCLUSION AND ORDER

Based on my administrative investigation and for the foregoing reasons, I have determined that certain determinative challenges will be opened and counted and that if the single remaining challenged ballot is still determinative, it will be held in abeyance pending the outcome of related unfair labor practice charges. Accordingly,

IT IS ORDERED that the Employer's challenges to the ballots of **Will Braddum, George Burgess, Sarah Bush, Gabriel Salazar, Ahmad (Jxggy) Haynes, Mikael McCants-Armstead, Peggy Luczak, Kailey Darden, Samuel Haddox and Vincent Day** are overruled, and their ballots shall be opened and counted.

The aforementioned ballots will be opened and counted by a Board Agent of Region 14 on a date and time to be determined by me, after consultation with the parties. A revised tally of ballots will be provided to the parties upon completion of the ballot count.

If the remaining challenged ballot of **Todd Rick** is determinative after the issuance of the revised tally of ballots, I am deferring any determination with respect to Rick's employee status, pending the outcome of related unfair labor practice charges being investigated by the Region.

III. REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington within 10 business days after a final disposition of this proceedings by the Regional Director.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents,

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enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Date: March 15, 2024

/s/ Andrea J. Wilkes

Andrea J. Wilkes, Regional Director
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