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Late Mail Delivery Turns Out to be Problem [Again] for Union Mail Ballot Election

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The ***NLRB*** has ruled that there is a significant difference between an employee's having the opportunity to vote in an NLRB mail ballot election and his or her vote being counted.

In ***Premier Utility Services, LLC*****,** 363 NLRB No. 159 (Apr. 5, 2016), 101 employees living and working in New York City's five boroughs were eligible to vote in a mail ballot election ending November 4, 2015, to determine whether Communications Workers of America, Local 1101 would represent the workers. By the November 5 tally date, the NLRB had received only four ballots, so the parties agreed to postpone the vote count until November 12. Still, by that date, the Board had received only 34 ballots, from just about a third of the eligible voters. Nevertheless, the ballot count occurred and the union received a majority of the votes, 20-14.

Sure enough, following the count, the NLRB Regional office received 48 ballots that were postmarked before November 4, the end of the voting period. However, the Regional Director refused to count them and certified the union as the exclusive bargaining representative for the 101 employees, despite having received the votes of scarcely one-fifth of the unit employees.

The employer filed "objections" to the Regional Director's decision not to count the

48 late-arriving ballots, as they could have affected the results, but the objections were overruled. The Board denied the employer's request for review and upheld the Regional Director's decision. The NLRB panel majority (Chairman Pearce and Member Hirozawa) expressed "concern about the United States Postal Service's late delivery of many, many ballots after the count," but noted that the Board "customarily does not permit mail ballots received after the count to be opened," citing *Classic Valet Parking*, 363 NLRB No. 23 (Oct. 23, 2015). In *Classic Valet*, the Board refused to count ballots that were timely mailed, but not received by the deadline because "adhering to [its] established practice" of counting votes by a fixed deadline was deemed more important than its purported "strong interest in effectuating employee choice" by counting all timely-mailed ballots, citing *Kerrville Bus. Co.*, 257 NLRB 176 (1981). In *Kerrville Bus*, however, the Board actually counted all ballots mailed at least three days before the deadline from a city within 100 miles because those "employees mailed their ballots at a time when they could reasonably anticipate timely receipt by the Board through the normal course of the mails. … As a matter of fundamental statutory policy, it behooves the Board 'to afford employees the broadest possible participation in the Board elections' as long as 'the election procedures are not unduly interfered with or hampered.'"

Member Miscimarra dissented in both *Premier Utility Services* and *Classic Valet*, voicing the concern the employers in those cases no doubt had with the Board's rigid adherence to rules that resulted in its refusing to count a determinative number of votes – that when the Board's regular procedures have been deficient, its "normal rules must be balanced against [the Board's] statutory responsibility to assure that employees have been reasonably permitted to freely exercise their rights under the Act."