

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

OMNI WASTE SERVICES, INC.,
Employer

and

Case No. 22-RD-1552

ANGEL PENA, An Individual
Petitioner

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL UNION 945
Intervenor

Nancy Slahetka, Esq., Newark NJ
for the Regional Director

Angelo R. Bisceglie, Jr. and Mark I. Silberblatt, Esqs.
(Bisceglie & DeMarco, LLC, West Patterson, NJ)
for the Employer

Michael A. McLaughlin, Esq.
(Cohen, Leder, Montalbano & Grossman, LLC, Kenilworth, NJ)
for the Intervenor

Angel Pena, pro se
for the Petitioner

DECISION ON CHALLENGED BALLOTS AND RECOMMENDATIONS

This case involves the resolution of six challenged ballots. The votes of five employees were challenged by the Board agent conducting the election because they arrived to vote after the stipulated and designated poll closing time. One ballot was challenged by the International Brotherhood of Teamsters, Local 945 (Intervenor or Union)¹ on the basis that the employee in question was no longer employed by Omni Waste Services, Inc. (the Employer). There are a total of approximately eight eligible voters in the below-described bargaining unit.

I. Statement of the Case

Based upon a petition filed on August 5, 2010, by Angel Pena, an individual, and pursuant to a stipulated election agreement approved by the Regional Director, Region 22 on December 8, 2010, an election was held on January 7, 2011² in the following unit:

¹ On September 1, 2009, the Union merged with Teamsters Local 125, International Brotherhood of Teamsters (Local 125) and Local 125 is the surviving local.

² All dates hereafter are in 2011 unless otherwise noted.

All full-time and regular part-time drivers, helpers, mechanics, welders, compactor repairmen, painters, and utility men employed by the Employer at its 507 East 35th Street, Paterson, New Jersey facility, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

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The tally of ballots showed that of approximately eight eligible voters, two votes were cast for the Intervenor, no votes were cast against the participating labor organization, two valid votes were counted and there were six challenged ballots, a number sufficient to affect the results of the election.

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On January 12, the Intervenor timely filed objections to the election and on March 2, the Regional Director issued a Report on Objections and Challenged Ballots and Notice of Hearing (the Report). Prior to the issuance of the Report, one objection had been withdrawn by the Intervenor and the Regional Director recommended overruling the remaining objection. The Regional Director further found that the determinative challenged ballots raise substantial and material issues which can best be resolved on the basis of record testimony at a hearing.³

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A hearing in this matter was conducted before me in Newark, New Jersey on March 25. Testifying for the Employer in this matter were: owner Kevin Juchniewicz, attorney Angelo R. Bisceglie, Jr., dispatcher Dan Blalik, Petitioner Pena, and employees Thomas J. Gallagher, Jr. and Stafford Patterson. The Intervenor called Local 125 business agent and former Local 945 president Steven Bottieri and Local 125 business agent and former Local 945 vice-president David Baumann. Neither the Petitioner nor the Regional Director called any witnesses⁴

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Based upon the record and my observation of the demeanor of the witnesses⁵ and the briefs submitted by the Employer (on behalf of both the Employer and Petitioner) and the Intervenor, I make the following recommended

II. Findings of Fact

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A. The Pre-Election Conference and Early Attempts to Vote

Pursuant to the Stipulated Election Agreement entered into by the parties, the election in this matter was scheduled to take place on January 7 between the hours of 7:00 a.m. and 7:30 a.m. The designated polling place was a conference room located in a trailer on the Employer's property. Also located within the trailer, next door to the polling place is the dispatcher's office. The two rooms are connected by a glass door. There is a separate door to the conference room

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³ In the absence of exceptions, on March 24, the Board issued a Decision and Order adopting the Regional Director's findings and recommendations as set forth in the Report.

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⁴ The Petitioner was advised of his right to question witnesses and otherwise participate in the hearing but, other than appearing as a witness called to testify by the Employer, declined to do so.

⁵ Where the record revealed substantial differences between witnesses as to determinative matters, I have specifically addressed them. As for other, less significant issues, at times I have simply noted the discrepancies in the testimony among witnesses. At other times I have credited the specific testimony cited, to the extent it supports my factual findings, and discredited any contrary testimony. In making my credibility findings, I considered not only the demeanor of the witnesses, but their apparent interests, if any, in the proceeding, and whether their testimony is corroborated or consistent with documentary or other evidence and/or the established or admitted facts. I have also considered "inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole.'" *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003) (unpub.), quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996).

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which is accessible from a deck located outside of the trailer, and this was the entrance designated to be used by voters to enter and exit the polling area. There is no dispute that the Board's Notice of Election was appropriately posed at the Employer's facility. It is also undisputed that all of the eligible voters were present at the Employer's facility during the time the polls were open.

When Board Agent arrived at the Employer's facility she determined that the glass door between the polling place and the dispatcher's office should be covered. Blanik, assisted by Gallagher, obtained some brown paper and covered the door prior to the commencement of the election.

The Board agent held a pre-election conference, but only Union representatives were present. These were Bottieri, Baumann, Union counsel Michael McLaughlin and Union observer and shop steward Brian Rice. Petitioner Pena testified that he had been advised of his right to attend the pre-election conference in a letter received from the Board as well as in a prior telephone conversation with a Board agent, but stated that he was waiting to be invited to the conference and did not take it upon himself to attend. Pena acknowledged that no one had informed him that the Board agent would come and find him for the pre-election conference, but also stated that due to the unfamiliarity of the situation he was waiting for someone to tell him what do.

Employer attorney Bisceglie testified that, due to delays caused by a traffic accident and snow conditions, he arrived at the Employer's facility later than anticipated, at about 6:58 a.m. He proceeded directly to the dispatcher's office in the trailer, and knocked on the glass door which, by then, had been covered with paper and cracked it open. According to Bisceglie, he identified himself as the Employer's attorney, but the Board agent told him that he could not come into the room at the time.⁶ Bisceglie testified that he then sat down in the dispatcher's office. There were four or five drivers present and Bisceglie engaged in, as he described it, "chit-chat" with them. Bisceglie also testified that, "two or three of the drivers said that the Board agent had said that she wasn't ready for their vote. And said that – they were under the impression they were – she was going to let them know when she was ready. And so they were sitting there waiting to hear from the Board agent that the polls were open, which [she] never did." On cross-examination, Bisceglie admitted that he could not say with certainty that the polls were not open by 7:00 a.m. or that employees were denied entry to the polls after that time.

Dispatcher Blanik was present in his office during the time the drivers were waiting to vote. He stated that he was busy answering phones and did not pay close attention to what was transpiring, and did not have any direct conversations with employees about their efforts to vote.

⁶ In the Employer's post-hearing brief, it is asserted that: "Although Local 945 representatives were present in the conference room Board agent Bean told Mr. Bisceglie that he could not enter the conference room." The record fails to support this assertion. Bisceglie specifically testified that he "cracked" the door open and stated his name only to be told by the Board agent that he could not enter the poll site. He also stated that he did not see the Board agent at this time. Moreover, Bisceglie failed to testify as to the presence of any other individual in the room. It is improbable that Bisceglie could have discerned the presence of others simply from "cracking" the door, which at that time was fully covered with brown paper. Further, had Bisceglie, an admittedly well-experienced labor attorney, been aware of the presence of Union agents in the room at the time it is certainly more likely than not that he would have protested his exclusion from the pre-election conference and insisted on attending. Finally, there would have been no reason for the Board agent to have excluded the Employer's attorney from the pre-election conference had it been in progress at the time, especially since, as discussed below, she questioned whether the Employer would have an observer present for the election.

He did, however, overhear some of the drivers say that they were not letting people in yet and one driver state that the Union representative had told him that they weren't ready for them yet.

5 Pena testified that he attempted to vote on two occasions before he actually was allowed to cast his ballot. As he testified, Pena reported to work on January 7 at about 5:30 a.m. He saw the Board agent arrive at the facility at about 6:45. At about 6:55 he poked his head through the outside door to the trailer, and the Board agent advised him that she was conducting a meeting and he could not enter at that time. He observed several persons in the room including the Union representatives and the Union attorney. Nevertheless, it does not appear from Pena's
10 testimony that he stated his name, made reference to the pre-election conference or otherwise identified himself as the Petitioner.⁷

15 Pena went to shut the motors on two trucks that he had left running and then returned to the polling site. By this time, as Pena stated, it was already 7:00 a.m. He approached the trailer with two coworkers, Gallagher and Patterson. At this point in time, the Union representatives and their attorney were exiting the trailer. According to Pena, Bottieri told him that "they are not ready for you guys yet." The three men walked off the deck and waited outside.

20 Shortly thereafter, as Pena testified, he returned to the conference room but the Board agent stated that she was not ready and she would let him know when it was time to vote. At this time the only individuals present in the conference room were the Board agent and Rice. Pena then waited outside the door to the trailer for couple of minutes, but, as Pena testified, he went into the dispatcher's office, "[b]ecause it was snowing outside and she [the Board agent] said to wait outside until the time to come in." Pena stated that he was waiting for instructions
25 from the Board agent as to when he could cast his ballot: "But you know, actually I didn't bother again because I didn't want to interfere with anything, you know. I waited for her to call but we didn't hear the call because we were inside the dispatcher's office."

30 Although Pena testified that his second attempt to vote occurred at or after 7:00 a.m. he also testified that after he sought shelter in the dispatcher's office, he saw Bisceglie arrive at 7:00 a.m. "on the dot." I additionally note that during his cross-examination Pena was asked whether the Board agent's statement that she wasn't ready for the vote yet occurred prior to or after 7:00 a.m. and he replied, "it could have been two minutes to 7 if I'm not mistaken."

35 Thomas Gallagher testified that at about 7:00 a.m. he, together with Stafford Patterson walked around to the outside door of the trailer and went to vote. According to Gallagher, Bottieri stated that they were not ready for voters yet and he could not come in. The two men went back to the dispatcher's office where, as Gallagher testified, the clock read 7:00 a.m. The men told the other drivers who were waiting that they weren't ready for the vote yet. Then
40 Bisceglie arrived and tried to enter the polling area through the internal glass door. Upon being denied entry, he sat down with the drivers and waited. Gallagher further testified that the men were there for approximately 20-25 minutes "waiting for someone to say we could go in to vote."

45 ⁷ I note that Pena had provided the Region with a pre-trial statement in which he asserts: "There was never any pre-election meeting that I was aware of and if there was, Mr. Bisceglie and myself were not asked to participate." I do not credit this assertion. As an initial matter, Pena admitted that the letter in which this contention was made had been edited and put into final form by someone from Omni. Moreover, Pena's testimony at the hearing was clearly to the contrary: Pena stated that he had been
50 advised on two occasions of his right to attend a pre-election conference. Pena also testified on cross-examination that he did not in fact know whether Bisceglie had been asked to participate in a pre-election conference.

He further testified that he waited inside rather than outside the trailer due to the fact that it was “freezing and snowing.”

5 On cross-examination Gallagher acknowledged that he was aware that he could vote at any time between 7:00 and 7:30 a.m. and that no one had told him that he had to wait to be told before he could cast his vote; however, he stated that he had assumed that someone would tell him.

10 Stafford Patterson testified that he tried to vote on two occasions. The first time he went with Gallagher, shortly prior to 7:00 a.m. Bottieri said they were not ready for the vote, so the two men left. Patterson further testified that he and Pena returned to the poll site shortly after 7:00 a.m. and the Board agent said she was not ready, and that she would let them know when she was. The men returned to the dispatcher’s office. Patterson further testified that on this
15 second occasion, Bottieri was present, as was the other Union representative. According to Patterson, he returned to the dispatch office and waited for the Board agent to let him know when it was time to vote. Patterson testified that he made such an announcement to the employees present. According to Patterson, he knew it was after 7:00 a.m. at the time he tried to cast his vote for the second time, because of the clock on the wall in the dispatch office.

20 On cross-examination Patterson acknowledged that the Board agent had blocked off the internal entrance to the polling area and he was aware that he would have to use the outside entrance to enter the polls.

25 Union business agent Bottieri testified that he has been present for numerous Board-conducted elections, and that this one was much like the others. He arrived at the Omni facility at about 6:30 a.m. together with Baumann, Local 125 Secretary/Treasurer Glen Thatcher, McLaughlin and Rice. Bottieri parked about a half-block from the facility and entered through the main gate. He passed the dispatch office, and saw a couple of men inside. He proceeded to the back entrance into the polling area. The Board agent was present and conducted the standard
30 pre-election conference. She inquired if the Employer was going to have an observer at the election, but the Union representatives were unable to answer that question. Shortly before 7:00 a.m. the Union representatives exited the polling area and left the facility. Only Rice and the Board agent remained in the polling site.⁸

35 As Bottieri testified, at one point during the pre-election conference someone tried to come through the door which led to the dispatch office. The Board agent said to whomever had made that attempt that he could not enter through that door, that the polls opened at 7:00 and that voters should come through the outside door. According to Bottieri a couple of voters did come to the correct door and attempt to vote prior to 7:00, and the Board Agent told them that
40 they could not vote yet, and that the polls would open at 7:00.

45 On cross-examination, Bottieri stated that he did not remember Bisceglie opening the glass door and introducing himself as the attorney for Omni. As Bottieri testified, the paper had not been fully put up at the time the door opened, when one individual tried to enter the office. He did not hear a voice on the other side.⁹ He also denied hearing the Board Agent tell prospective voters that she would let them know when it is time to vote. Bottieri maintained that the only thing he heard the Board agent say was that the polls were not open yet, that they

⁸ Rice did not testify in this proceeding.

50 ⁹ I conclude from the record as a whole that Bisceglie did not attempt to enter the room until the Union agents had left the pre-election conference.

would open at 7:00 and that voters had to come around the outside and through the other door. Bottieri denied telling any employee that the polls were not opened yet.

5 Baumann corroborated the basic facts relating to the timing and conduct of the pre-
election conference. He recalled that the Union officials checked the time on their cell phones
and exited the facility shortly prior to 7:00. After this, however, his recollection proved rather
faulty. He did not recall if anyone tried to come into the trailer during the pre-election
conference; he did not recall whether someone tried to enter through the door to the
10 dispatcher's office and did not recall whether any voters were turned away because the polls
were not yet open. When asked specifically whether he recalled Pena coming to the trailer and
asking to vote, Baumann stated that he did not recall.

B. Five Employees Arrive to Vote After the Polls Are Closed

15 As noted above, due to the inclement weather, the drivers waited inside the dispatcher's
office, and for the most part engaged in idle conversation among themselves and with Bisceglie.
The Union officers went for coffee and returned to the facility shortly before 7:30.

20 One driver, Mike Shurba, was outside at the facility and saw Bottieri as he returned.
Bottieri asked him if he had voted yet and Shurba replied that he had not. Bottieri told him he
better hurry up and do so, because the polls would shortly close. Shurba went in and voted and,
after he did so, went to the dispatcher's office where he saw his coworkers. He asked if they
had voted yet. At this time, both Shurba and Bisceglie urged the drivers to go and vote.

25 According to Bisceglie, at the time this took place, the clock on the wall of the
dispatcher's office read 7:23 or 7:24. It took just seconds for the drivers to exit and walk around
to the back of the trailer.

30 According to Pena, when the workers went to the polling site to cast their votes, Bottieri,
McLaughlin and Rice were in the room. As Bottieri testified, the Union agents entered the polling
site at 7:31 and had been there for only a minute when a group of employees arrived and
attempted to vote. The Board agent stated that the polls had closed. She then cleared the
room, stating she had to make a phone call, and subsequently called voters in one by one and
took their votes subject to challenge.

35 As he was about to cast his vote Pena asked the Board agent, "Why didn't you tell us
that you were ready." As Pena testified, the Board agent replied, "I did. I opened the door and I
said we're ready." Pena then said, "Well, nobody's standing outside, we were in the office on the
40 other side so we couldn't hear." Pena acknowledged that the Board agent, "probably did open
the door to where you were supposed to enter but nobody's standing outside, everybody was
seeking shelter." I note there is no evidence that anyone advised the Board agent that they
would be waiting to vote in the dispatcher's office.¹⁰

45 Bisceglie testified that when he went to the voting area he was informed that the
employees had been denied the opportunity to vote because they were too late. Bisceglie told
the Board agent that the men had stated that she had told them that she would call them in
when it was time to vote. Counsel for the Regional Director asked Bisceglie whether it was the
case that the Board agent had in fact told him that it was not her duty to call people in to vote

50 ¹⁰ The Employer sought permission to call the Board agent to testify, but such permission was denied
by the Regional Director.

during an election. Bisceglie replied that he did not recall exactly what the Board agent had said but she did give him the impression that she did not take responsibility for that.

5 The ballots of the late-arriving voters taken subject to challenge by the Board agent were those of Pena, Gallagher, Patterson, John Ott and Frank Ippoliti. The Intervenor would not agree to open and count the votes of these employees.

10 After the voting and processing of the tally was complete, Bisceglie observed that there was a discrepancy between the clocks in the conference room and the dispatcher's office. He stated that the office clock was slow, by some 15 minutes. According to dispatcher Blanik, the clock in the dispatcher's office is battery-operated and when the batteries run down, the clock runs slow.¹¹ This occurs every three-to-four months and was not such a common occurrence that employees would know not to rely upon the clock. Bisceglie testified that he pointed out the discrepancy to the Board agent, and she acknowledged it.

15 I note that no employee witness who testified stated that they relied upon the time as displayed on the dispatcher's office clock as a reason for delaying the casting of their vote. In addition, the record establishes that these employees carry other timepieces, in particular, their cellular telephones.

20 C. Challenge to the Ballot of Luis Gonzalez

The Intervenor challenged the ballot of Luis Gonzales on the basis that he is no longer employed by the Employer. According to Omni owner Juchniewicz, Gonzales is a mechanic who, since the latter part of August, has been on medical leave due to knee surgery. He is expected to return to full-time work on or about April 10. Gonzalez was present at the facility on the day of the election, but did not punch in due to the fact that he was still on leave. Blanik corroborated that Gonzalez is out on medical leave. This was not the first time he had returned to the facility during his leave. As Blanik testified, Gonzales had visited just several days earlier, also during a snowstorm. The Intervenor offered no testimony to rebut the assertion that Gonzalez is on medical leave and is expected to return to work.

III. Analysis and Conclusions

35 A. The Challenges to the Ballots of the Late-Arriving Voters

1. The Board's criteria for determining the voting eligibility of late-arriving employees

40 For many years, the Board addressed the problem of late-arriving voters by focusing on whether the employees had a "reasonable excuse" for their late arrival at the polls. *New England Oyster House*, 225 NLRB 682, 682 (1976). Under that standard, Board election officials were authorized to exercise their own discretion regarding reasonableness. See, for example, *Wanzer Dairy*, 232 NLRB 631, 632 (1977). In some instances, late-arriving voters were found eligible to vote. *New England Oyster House*, supra (voter arrived 2-3 minutes late because he simply "lost track of the time"); *Johnson Co.*, 221 NLRB 542 (1975) (voter arrived 5 minutes late); *Westchester Plastics of Ohio*, 165 NLRB 219 (1967) enfd. 401 F.2d 903,906-909 (6th Cir. 1968). (voter 1 minute late because he worked another job during the election and had to provide a replacement before he could leave to vote, had to obtain transportation to and from

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¹¹ There is also a time-clock in the dispatcher's office which is hard-wired and accurate.

the polling place, and the voting period was only 15 minutes).

In other cases, late-arriving voters were deemed ineligible. See *Versail Manufacturing Inc.*, 212 NLRB 592, 593 (1974) (employee away from polling place on work assignment could have returned in time to vote, but chose not to); *Bancroft Mfg. Co.*, 210 NLRB 1007, 1012 (1974) enfd., 516 F.2d 436 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976) (Board agent refused to allow employees to vote who approached polling place after agent's announcement that polls were closed); *Dornback Furnace & Foundry Co.*, 115 NLRB 350, 352-353 (1956) (employee mistakenly believed he would be called to vote); *Bell Transport Co.*, 204 NLRB 96, 98 (1973), enfd. sub nom. *NLRB v. Groendyke Trans. Inc.*, 493 F.2d 17 (5th Cir. 1994), cert. denied 419 U.S. 1021 (1975) (employee serving as election observer sought to vote after ballots were counted).

In *Monte Vista Disposal Co.*, 307 NLRB 531, 533 (1992), the Board decided to end this state of affairs. It adopted something more akin to a “bright-line rule terminating the balloting at the conclusion of the voting period.” The Board determined that such a rule appropriately balanced the policy of affording employees the opportunity to vote with the need to bring a prompt and definite end to representation proceedings. See *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-332 (1946). Among other considerations, the Board observed that a bright-line rule would end confusion over the appropriate standard and thereby discourage litigation and delay. The Board also observed that the voting preference of a late-arriving voter can occasionally be surmised from the surrounding circumstances, and that a Board agent's exercise of discretion in such a situation raises the possibility of the appearance of partiality. Finally, the Board noted that the policy of affording employees an opportunity to participate is satisfied by the Board's pre-election procedures, which include the Board's pre-election notices which are required to be posted for at least three days immediately prior to the election and which give employees ample information regarding polling location and voting hours.

The Board, however, did not adopt an inflexible rule. Rather, it held that “an employee who arrives at the polling place after the designated polling period ends shall not be entitled to have his or her vote counted, in the absence of extraordinary circumstances, unless the parties agree” *Monte Vista*, supra at 533-534 (footnotes omitted). The Board offered one example of what it would consider extraordinary circumstances; namely, a showing that one of the parties was responsible for the lateness of a voter. *Id.* at fn. 6. In *Pruner Health Services*, 307 NLRB 529 (1992) a case decided concurrently with *Monte Vista*, the Board found that a remand for hearing was appropriate because if the evidence established that the employer's facility had been locked thereby preventing an employee from voting, it would amount to extraordinary circumstances under this newly-enunciated test. Subsequently, in *Visiting Nurses Assn.*, 314 NLRB 404 (1994), the Board disagreed with the hearing officer who found that extraordinary circumstances warranted overruling a determinative challenge to a late ballot. In so finding, the Board noted that the employee's late arrival at the polls was not caused by her supervisor, but by a voluntary choice not to proceed directly to the polling area. On review in *Visiting Nurse Health System, Inc. v. NLRB*, 108 F.3d 1358 (D.C. Cir 1997), which involved a test of the Board's certification of the petitioning union, the court agreed with the Board's determination that the employee who voted late due to her own actions, rather than extraordinary circumstances, was not entitled to have her vote counted. In so doing, the court, reviewing the Board's decisions in *Monte Vista* and *The Glass Depot*, 318 NLRB 766 (1995) (discussed infra), observed that the Board's extraordinary circumstances doctrine, “contemplate[s] situations beyond one's control. . .”.

2. Summary of the Positions of the Parties

The Employer¹² acknowledges the applicability of the *Monte Vista* standard here and accordingly contends that several factors establish requisite extraordinary circumstances in this instance. As an initial matter, the Employer contends that the evidence shows that Pena, Gallagher and Patterson attempted to vote at approximately 7:00 a.m., according to the clock in the dispatcher’s office (which is alleged to have been about 15 minutes slow) and were told by Bottieri that they were not ready for their vote yet. Thus, the Employer asserts that extraordinary circumstances are the result of Bottieri’s, and thus the Union’s, direct refusal to allow the drivers to vote despite the fact that they were on time, made numerous attempts to vote and were ready, willing and able to do so.

The Employer further argues that extraordinary circumstances exist because, despite the drivers’ numerous attempts to vote, the Board agent advised these employees that she was not ready for them to vote yet. The Employer cites to testimony that employees were relying upon the Board agent to notify them when they would be allowed to vote. Thus, the Employer contends that the late voting was a direct result of the Board’s agent’s failure to take action to advise voters that the polls were open. In support of its contentions that the actions of the Board agent are sufficient to constitute extraordinary circumstances within the meaning of *Monte Vista*, the Employer relies upon *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 150 (1998) which, as the Employer argues, acknowledges that a finding of extraordinary circumstances may be based not only upon the conduct of an adversary, but on the conduct of the Board agent as well.

The Employer also contends that had the Board agent allowed Pena to attend the pre-election conference, it would have mitigated the confusion regarding the use of the appropriate timepiece to accurately establish the times for voting.

The Employer additionally argues that, inasmuch as the number of votes cast does not accurately represent the number of employees entitled to vote and therefore does not amount to a necessary representative complement, there are extraordinary circumstances here. The Employer further points to the fact that the winter storm on that day prompted the drivers to seek shelter within the dispatch office rather than wait outside the polling area.

The Intervenor, contrary to the Employer, asserts that no extraordinary circumstances exist which would warrant the counting of the ballots of the late voters. Indeed, the Intervenor has characterized the Employer’s contentions as any number of “red herrings.” These include the inclement weather and the discrepancy between the time clocks in the dispatcher’s office and the polling site. The Intervenor argues that all employees had sufficient notice of the election details and that the late-arriving voters disenfranchised themselves. The Intervenor further points out that three eligible voters who presented themselves during the time the polls were open were able to vote without any impediment, thereby offering some rebuttal to the three witnesses who testified that when they came to vote during the stipulated polling time they were prevented from doing so.

3. Application of the *Monte Vista* standards

As noted above, in *Monte Vista* the Board held that one extraordinary circumstance which would warrant the counting of the ballot of a late voter would be whether such lateness

¹² I note that the brief in which the below-described contentions were discussed was filed on behalf of Petitioner Pena as well. For ease of reference, however, I will refer to the positions stated therein as the Employer’s.

was attributable to the conduct of a party. The Board further stated that situations involving the responsibility of a party would continue to be governed by existing precedent. See *Glenn McClendon Trucking Co.*, 255 NLRB 1304 (1981) (election set aside where eligible voters were prevented from voting because of assignments performed in the normal course of their duties).
 5 Here, the Employer asserts that the conduct of both the Union and the Board agent were responsible for the fact that five eligible voters did not cast their ballots in a timely fashion.

In *Argus-Press Co.*, 311 NLRB 24 (1993), the Board stated as follows: “. . . given the ‘unusual circumstances’ test enunciated in *Monte Vista Disposal Co.* [citation omitted], a party
 10 who seeks to have a late-cast ballot counted has the obligation to establish the affirmative basis for disregarding the legitimate end of the voting period.” For the reasons discussed below, the evidence adduced by the Employer and as otherwise set forth in the record fails to support the Employer’s contention that the failure of five employees to cast their ballot in a timely fashion was attributable to the conduct of Union or Board agents.

As regards any alleged interference with the voting process on the part of the Union, I find that the employer has failed to establish a sufficient basis to support its contention that the Union generally or Bottieri in particular prevented or discouraged any voter from voting during the period when the polls were open. As an initial matter, there is insufficient probative evidence
 20 that any Union agent, other than the election observer, remained behind during designated polling hours. Bottieri, corroborated in this regard by Baumann, testified that they attended the pre-election conference and left shortly prior to the opening of the polls. Moreover, as Pena testified, the Union officials were exiting the polling site when Bottieri told the employees who were present that they were “not ready for you guys yet.”¹³ Pena further testified that after
 25 Bottieri made these comments he attempted to enter the polling site and was told by the Board agent that she was not ready to receive voters at that time. I further note that, in a similar vein, Patterson testified that when he initially tried to vote, at a time prior to 7:00, Bottieri stated that “they weren’t ready.” Thus, at the time Bottieri made these comments to employees they were accurate in that the polls had not yet opened.¹⁴

The Employer also appears to argue that Bottieri made comments of a similar nature to employees at some point well into the election period, thereby impeding their efforts to vote. In so doing, the Employer attempts to bootstrap witness testimony that it was approximately 7:00
 35 a.m. when they entered the dispatcher’s office, after their initial attempts to vote, to the contention that the clock in the dispatcher’s office was some 15 minutes slow. Thus, Employer seemingly contends that Bottieri interfered with employees’ attempts to vote well into the polling period. However, there is insufficient evidence of any such procedural irregularity. As has been noted above, both Pena and Patterson testified that it was before 7:00 a.m. when Bottieri made the comments attributed to him. Moreover, there is no credible evidence that Bottieri remained
 40 behind at the Employer’s facility after the polls opened. Further, I find it inherently improbable that Bottieri, an experienced Union agent, who surely would have been aware of the

¹³ The Employer has argued that Bottieri told Pena to leave the polling site during the pre-election conference. Such an assertion is unsupported by the record. Pena testified that it was the Board agent, apparently unaware of Pena’s status as Petitioner, who told him that she was conducting a meeting and he could not enter the conference room.

¹⁴ Bottieri denied making such comments to employees; however I do not credit this testimony. I note from his conduct at the hearing that Bottieri has a tendency to speak out of turn and take it upon himself to make comments which he might not otherwise be authorized to make. In this regard, on my own
 50 motion, I amend the transcript at page 57, lines 12 to 19 to reflect that it was Bottieri, and not Pena, who made the comments at issue there.

consequences of his actions, would seek to interfere with the voting process during the election period.¹⁵ I further note, as the Intervenor points out, that several other employees who presented themselves at the polling site during the designated polling period voted without incident.

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Thus, based upon the foregoing I conclude that Bottieri did not make any statements to employees during the election period which would have dissuaded them from voting at an appropriate time. Moreover, I find that Bottieri's comments to employees, issued at the time the Union agents were exiting from the pre-election conference, did not constitute conduct which could fairly be said to have been responsible for their failure to vote in a timely fashion. As noted above, Pena, Patterson and Gallagher all testified that Bottieri said words to the effect that the Board agent was not ready for them to vote "yet." This particular statement cannot be found to have a preclusive effect for the entire voting period. Moreover, none of the employees who testified attributed their failure to vote during the stipulated election period to anything in particular that Bottieri may have said to them. To the contrary, both Pena and Patterson made subsequent attempts to vote after they saw Bottieri that morning.

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Accordingly, I conclude that the evidence fails to meet the Employer's affirmative obligation to show that the Union's conduct constituted extraordinary circumstances which would warrant the counting of the ballots of the late-arriving voters.

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This brings me to the Employer's contention that the conduct of the Board agent constituted extraordinary circumstances which would warrant the counting of the ballots of the late voters. In this regard, the Employer argues that despite drivers' numerous attempts to vote, and the Board agent statements to employees that she was not ready for them to vote yet and would let them know when she was, the Board agent never advised employees that the polls were open and that they could come and cast their votes. In support of its contention that Board agent conduct may be considered tantamount to the conduct of a party, the Employer relies upon *Waste Management of Northwest Louisiana, Inc.*, 326 NLRB 150 (1998). While this objections case does not deal with the issue of Board agent action, conduct or misconduct,¹⁶ the Employer apparently relies upon the following observation: "When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to vote is not a basis for setting aside the election" (footnote and citation omitted). The Employer is apparently suggesting that I conclude the converse: that because the Board agent could have (and as the Employer argues, should have) ensured that the voters arrived at the polls in a timely fashion, her failure to do so is sufficient to warrant the counting of the late ballots.

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Here, assuming for purposes of the instant analysis that Board agent action, inaction or misconduct might under certain circumstances be tantamount to extraordinary circumstances within the meaning of *Monte Vista*, supra,¹⁷ in this case the evidence fails to establish any such

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¹⁵ In this regard, I give no weight to Patterson's testimony that he saw Bottieri in the polling area after 7:00 a.m. I conclude that he was confused on this issue. Such testimony was not corroborated by any other witness and moreover I find it, frankly, incredible that Bottieri would have been allowed to do so.

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¹⁶ In this case the election was scheduled to end at 7:30 a.m. The employee in question was not scheduled to report to work until 8:00 a.m., and arrived at the facility after the polls had closed. The Board found that the directive to report at 8:00 a.m. did not prevent the employee from arriving earlier to cast his ballot.

¹⁷ See, for example, *Versail Mfg.*, supra at 593, distinguishing *Yerges Van Lines, Inc.*, 162 NLRB 1259 (1967) : "In our opinion, the fact that required the *Yerges* election to be set aside was that the employee was caused to miss the election by the Employer, a party to the proceeding. The same protective policy would be applicable if the petitioning union, or the Board itself, prevented an eligible

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conduct on the part of the Board agent prevented voters from casting a timely ballot.

As an initial matter, I note that there is no specific allegation or evidence that the polls did not open on time. In this regard, Bisceglie acknowledged that he could not state that the polls did not open in a timely fashion or that employees were denied access to the polls after 7:00 a.m. As discussed above, there is witness testimony that certain employees attempted to cast their vote after 7:00 a.m. and were told that the Board agent was not ready for them yet. However, other testimony, in particular Pena's, is equivocal on that issue. I additionally note that Bisceglie stated that when he arrived at the Employer's facility, just prior to 7:00 a.m.,¹⁸ employees in the dispatcher's office stated that they had previously been told by the Board agent that she was not ready for their vote, thus indicating that their unsuccessful attempts to do so had occurred prior to that time. Further, both Pena and Gallagher unambiguously testified that Bisceglie arrived after they attempted to vote. Moreover, there is no evidence that any employee who spent the next half hour or so waiting in the dispatcher's office with Bisceglie, including Pena, Gallagher and Patterson, left the office to attempt to vote at any time prior to the group exit after the end of the polling period. Thus, it is reasonable to conclude and I find that Pena, Gallagher and Patterson had all made their initial attempts to vote prior to Bisceglie's arrival and the official opening time of the polls.¹⁹

Further, Pena testified that although the Board agent told him to wait outside until it was time to come in to vote, he and (as the record reflects) other employees decided on their own initiative to situate themselves in the dispatcher's office due to adverse weather conditions. There is no evidence that the Board agent was notified that the employees would not be waiting outside, as she had instructed.

Moreover, as Pena acknowledged, the Board agent subsequently advised him that she had, in fact, opened the door to the polling site and announced that the polls were open. As it happened, no one was present to hear such announcement. The Employer has provided no authority to support its apparent contention that the Board agent was under an affirmative obligation to leave the polling site and go to seek out voters.

Additionally, as Gallagher admitted, employees were not told that they would have to wait to be called prior to going to vote. It is apparent that any conclusion to the contrary was a result of unfortunate assumptions regarding the duties and responsibilities of the Board agent on the part of one or more of the voters, which then became adopted by the group at large. In this regard I note that well before the adoption of *Monte Vista's*, "bright line" rule, the Board concluded that the agent conducting an election did not commit objectionable conduct when he refused to allow a late arrival to vote where that employee mistakenly believed that he would be called to do so. *Dornback Furnace & Foundry Co.*, supra.

Regarding Pena's failure to attend the pre-election conference, I note that he acknowledged having received a letter from the Board and subsequently participated in a

employee from voting. . ."

¹⁸ In this regard, I find that Bisceglie, as the attorney for the Employer who was delayed in arriving at the election, would have been acutely aware of the time.

¹⁹ Whether or not these employees were under the impression that certain of their attempts to vote took place after 7:00 a.m., the Board has made clear that it is established Board policy that the Board agent conducting the election selects the official timepiece by which the polls are opened and closed. *Visiting Nurses Assn.*, supra at fn. 3; *Consumers Energy Company*, 337 NLRB 752 (2002) (Board agent's watch was the recognized official timepiece, even if he failed to formally designate it as such).

telephone conversation with a Board agent in which he was notified of his right to attend the pre-election conference. He further stated that that he was present at the facility and saw the Board agent arrive at the polling place. The Employer argues that Pena's attendance at the pre-election conference would have mitigated any confusion regarding the use of the appropriate timepiece to accurately establish the times for voting. There is insufficient evidence, however, to show that the failure of any employee to vote during the polling period stemmed from reliance upon a faulty timepiece. Moreover, it is clear from Pena's testimony that there was no impediment to his having attending the pre-election conference. In fact, Pena did present himself at the poll site prior to the start of the election but, apparently, failed to identify himself as the Petitioner or otherwise state that he wished to join the meeting which was underway.²⁰ Under these conditions, I do not find that Pena's apparent reticence to attend the pre-election conference constitutes extraordinary circumstances attributable to any party or to events otherwise beyond Pena's control which would militate in favor of abandoning the Board's *Monte Vista* rule.

Accordingly, it cannot be said that any action, inaction or alleged misrepresentation on the part of the Board agent precluded or even dissuaded employees from voting at an appropriate time.

The Employer further argues that extraordinary circumstances are shown by the fact that so few votes were cast. In support of this contention, the Employer relies upon *Glass Depot*, supra, a case which involved a severe snow storm which prevented 4 out of 19 voters from casting ballots. The Board found that it was not required to determine whether that storm was an extraordinary circumstance because a representative complement of the employees attended the vote. However, the Board did observe that had a representative complement of employees not voted, the snow storm "may well have been" such an extraordinary circumstance. 318 NLRB at 767. Nevertheless, while it is not disputed that it was snowing on the day of the election in this matter and only three of eight eligible voters cast ballots, the Employer's reliance upon *Glass Depot* is generally misplaced.²¹

In *Lemco Construction*, 283 NLRB 459 (1987), the Board announced that it was abandoning any analysis which was "dependent on a numerical test to determine the validity of a representation election."²² In doing so, the Board overruled prior precedent which considered whether the number of voters actually voting in the election was a representative group. Subsequently, in *Glass Depot*, a Board plurality distinguished *Lemco*, and indicated that a different result might obtain if a lack of a representative complement was caused by an

²⁰ Contrary to the suggestion that Pena was inappropriately excluded, I infer that had Pena entered the polling site and identified himself as the Petitioner during the period of time the pre-election conference in progress, he would have been invited to attend.

²¹ *Glass Depot* was an objections case; however I note that the Board did cite and rely upon *Monte Vista* in that context.

²² In *Lemco*, the Board considered objections to an election where there were approximately eight eligible voters. During the half-hour election one employee voted and five did not although they were present during the time the polls were open. These five employees chose to wait until the final minutes prior to the close of the polls so as to vote together as a group. When these employees went to vote they learned that the timepiece they relied upon differed from the official timepiece used for the election and the polls were closed. The Board found that, notwithstanding low voter participation, the election results should be certified where there was notice, an adequate opportunity to participate in the election and where employees were not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election.

5 extraordinary event such as severe weather; however, this discussion was dicta as applied to the facts of that case. Subsequently, in *Baker Victory Services*, 331 NLRB 1068 (2000), the Board rejected the “representative complement” standard set forth in the plurality opinion in *Glass Depot*, as relating to severe weather conditions on the day of the election, and held that an election should be set aside where “severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote” (citing *V.I.P. Limousine*, 274 NLRB 641 (1985)).

10 Here, however, there is no question but that the weather conditions on the day of the election did not prevent any employee from arriving at the Employer’s facility in adequate time to cast his vote during the polling hours. Rather, the Employer contends extraordinary circumstances have stemmed from the fact that the cold and snow conditions forced employees to seek shelter indoors.

15 It is undisputed that employees were aware that they were obliged to enter the polling site through the outside door, and the conduct of several of the employees, in particular those who testified herein, makes it apparent that they knew this to be the case. As the Employer has noted, the trip from the dispatcher’s office took mere seconds. The brief moments of discomfort these employees might have experienced cannot reasonably be considered to constitute any
20 sort of hardship which would excuse their apparent lassitude when it came to the timely casting of their ballots. Thus, I cannot conclude that the snow storm on the day of the election prevented any employee from timely voting in the election. See *Laidlaw Transit, Inc.*, 327 NLRB 293 (1998) (Board agent improperly allowed a late voter to cast a ballot which was opened and counted and could have affected the results of the election where there was no evidence that
25 the voter was prevented by voting either by the weather or conduct of a party.)

In reaching the conclusion that the ballots of the late-arriving voters should not be opened and counted I am mindful of the fact that this is not a circumstance where employees failed to vote because of preference or abject indifference. To the contrary, all employees in the
30 unit attempted to vote and at least two tried to do so on more than one occasion. Here, however, the evidence establishes that all eligible voters had adequate notice and an opportunity to participate in the election. In particular, as discussed above, I have found that employees were not prevented from voting by the conduct of a party or the Board. Moreover, there has otherwise been no credible evidence of unfairness in the scheduling or mechanics of
35 the election.

40 Thus, to paraphrase the Board in *Lemco*,²³ I am obliged to conclude that the instant case presents unfortunate circumstances, rather than extraordinary ones. Under *Monte Vista*, this is not sufficient to warrant the opening and counting of the ballots of the voters who arrived after the close of the polls. I therefore recommend that the challenges to the ballots of Thomas Gallagher, Jr., Frank Ippolito, John Ott, Stafford Patterson and Angel Pena be sustained.

45 B. The Challenge to the Ballot of Luis Gonzalez

Both Juchniewicz and Blanik testified that Gonzalez was on sick leave on the date of the election, and was expected to return to work. This testimony was un rebutted. It is well settled that an employee who at the time of the election has the status of an employee on sick leave is regarded as sharing and retaining a substantial interest in the terms and conditions of
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²³ 263 NLRB at 461 fn. 11

employment. See *Delta Pine Plywood Co.*, 192 NLRB 1272 fn. 1 (1971). Employees on sick leave are presumed to remain in that status until recovery and a party seeking to overcome that presumption must make an affirmative showing that the employee has resigned or been discharged. *Edward Waters College*, 307 NLRB 1321 (1992); *Atlantic Dairies Cooperative*, 283 NLRB 327 (1978); *Red Arrow Freight Lines*, 278 NLRB 965 (1986). Here, the Intervenor has presented no evidence to rebut the Employer's evidence that Gonzales was on sick leave, that he was expected to return to work or that he had performed bargaining unit work prior to going on sick leave. See *A & J Cartage*, 309 NLRB 263 (1992).

Accordingly, I conclude that Gonzalez is an eligible voter herein and recommend that the challenge to Gonzalez's ballot be overruled.

IV. Conclusion and Recommendations²⁴

Based upon the foregoing, I recommend that the challenges to the ballots of Thomas Gallagher, Frank Ippoliti, John Ott, Stafford Patterson and Angel Pena be sustained, and that the challenge to the ballot of Luis Gonzalez be overruled. Inasmuch as Gonzalez's ballot is not determinative of the election results, I further recommend that it not be opened and counted. *Reliable Trucking*, 349 NLRB 812 (2007). I further recommend that a Certification of Representative be issued by the Regional Director, Region 22.²⁵

Dated, Washington, D.C. June 10, 2011

Mindy E. Landow
Administrative Law Judge

²⁴ Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days of the issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by June 24, 2011.

²⁵ I further recommend that the Regional Director determine whether it is appropriate to have the certification reflect the named Intervenor's merger with Local 125, International Brotherhood of Teamsters.