

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

GLEN COVE PROPERTY, LLC.)	
d/b/a GLEN COVE MANSION HOTEL &)	
CONFERENCE CENTER)	
)	
Employer)	
and)	Case No. 29-RC-078447
)	
)	
LOCAL 811, WAREHOUSE)	
PRODUCTION SALES & ALLIED SERVICE)	
EMPLOYEES UNION)	
)	
Petitioner)	
)	
)	

REPORT ON OBJECTION

On April 9, 2012,¹ Local 811. Warehouse Production Sales & Allied Service Employees Union, herein called the Petitioner or Local 811, filed a petition in this matter seeking to represent certain employees employed by Glen Cove Property, LLC. d/b/a Glen Cove Mansion Hotel and Conference Center, herein called the Employer. Pursuant to a Stipulated Election Agreement signed by the Petitioner and the Employer, and approved by the undersigned on April 19, an election by secret ballot was conducted on May 18 among the employees in the following unit:

All full-time and regular part-time front desk personnel, bus persons. laundry attendants, conference center preparation staff, fitness & recreation staff, housekeeping, audio-visual staff, food & beverage, and maintenance employees employed by the Employer at its facility located at 200 Dosoris Lane, Glen Cove, New York, but excluding all temp agency employees, special event staff, department heads, sales personnel, executives, clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

¹ All dates hereinafter are in 2012 unless otherwise indicated

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	69
Number of void ballots	0
Number of ballots cast for the Petitioner	34
Number of votes cast against participating labor organization	15
Number of valid votes counted	49
Number of challenged ballots	5
Number of valid votes counted plus challenged ballots	54

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has been cast for the Petitioner.

The Employer filed a timely objection to conduct affecting the results of the election. The Employer's objection is attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned Petitioner's objection, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

The Employer, at its Glen Cove, New York facility, has been engaged in providing lodging and other hospitality services.

The Objection

In its objection, the Employer alleges that the Board Agent conducting the election opened the polls late and that this late opening of the polls affected the results of the election. The Petitioner asserts that this objection is without merit.

The election was scheduled to be held from 3:00 p.m. to 5:00 p.m. in the employee cafeteria at the Employer's facility.

In its offer of proof, the Employer states that the Board Agent conducting the election did not arrive at the Employer's facility until 3 p.m. on the day of the election, the time at which the polls were scheduled to open. According to the Employer, the polls did not open for voting until 3:20 p.m. The Employer further states that a named employee will testify that there were a number of employees on the Excelsior² list who were at work on the day of the election, but who did not vote during the "truncated" voting period. The Employer asserts that there were employees who were, or who may have been, disenfranchised.

The independent investigation established that 54 people voted. There were 34 votes for the Petitioner and 15 votes against the Petitioner. Thus, the Petitioner leads by 19 votes. Fifteen individuals whose names appeared on the Excelsior list did not vote. In addition, there are 5 challenged ballots, two of which were challenged as not being listed on the Excelsior list.³

The independent investigation also revealed that the election observers for both the Employer and the Petitioner signed a statement confirming that the polls opened late at 3:10 p.m. Both observers also affirmed that they did not observe any employee who came to vote but who left because of the late opening of the polls. Both observers added, however, that a named employee was waiting to vote at the time the polls were scheduled to open but the named employee did not vote. An independent examination of the Excelsior list used at the election confirmed that the named employee did not vote. In the statement, both observers stated; "it is unknown if the late opening of the polls prevented [that named employee] from casting a ballot."

Discussion

It is undisputed that the polls did not open at 3 p.m., as scheduled, in the instant case. It is well settled that the Board will not set aside an election based only on a showing that the polls did not open on time or were not opened for the entire voting session as scheduled. An election may be

² Excelsior Underwear Inc., 156 NLRB 1236 (1966).

overturned, however, if the polls open late and one of three additional factors is present: (1) where the votes of those employees “possibly excluded” by the defect could have been determinative; (2) where there are “accompanying circumstances that suggested that the vote may have been affected”; or (3) where “it was impossible to determine whether such irregularity affected the outcome of the election.” Midwest Canvas Corp., 326 NLRB 58 (1998); see also Celotex Corp., 266 NLRB 802, 803 (1983); Jobbers Meat Packaging Co., 252 NLRB 41 (1980). In this case, the first two factors have been met.

With regard to the first factor, according to the Tally of Ballots there are presently 34 votes cast for and 15 against the Petitioner. Thus, the Petitioner is ahead by 19. There were 15 individuals on the Excelsior list who did not vote and 5 challenged ballots. Because the number of individuals on the Excelsior list who did not vote plus the number of challenged ballots (20) exceeds the margin of votes enjoyed by the Petitioner (19 votes), the employees possibly excluded by the late opening of the polls could be determinative. See Midwest Canvas, 326 NLRB at 58-59 (in which the Board calculated the number of potential voters who did not vote plus the challenged ballots in determining whether those potential votes were determinative); see also Wolverine Dispatch, Inc., 321 NLRB 796, 797 (1996) (finding that the standard is “whether the number of employees possibly disenfranchised [by late opening of the polls or a cessation in voting] is sufficient to affect the election outcome, not whether the number of voters, or any voters at all, were actually disenfranchised.”). Given that a determinative number of employees did not vote in this case, the Tally of Ballots illustrates that the late opening of the polls may have affected the outcome of the election.⁴

³ These two challenges are included among the 69 eligible voters shown on the Tally of Ballots.

⁴ The Petitioner suggests that the Region hold a hearing on the five challenges because the resolution of two challenges would render the nonvoters nondeterminative. This is similar to the approach the Board followed in Midwest Canvas in which it directed that a hearing be held to determine the number of eligible voters in order to ascertain if the number of individuals not voting was determinative. See Midwest Canvas, 326 NLRB at 58-59. In this

With regard to the second factor, whether there were circumstances accompanying the late opening of the polls which may have affected the election, there is evidence that a voter who was waiting for the polls to open left and did not cast a ballot. This evidence suggests that the voter may have been affected by the late opening of the polls. The Board has found that when there is such evidence that late opening of the polls may have affected the election, the election should be set aside. For example, in B & B Better Baked Foods, Inc., 208 NLRB 493 (1974), the polls were scheduled to open at 7 a.m., however the Board Agent conducting the election arrived late and the polls did not open until after 7:40 a.m. There were two employees whose shift ended at 7 a.m. The Board set the election aside, noting “it is frequently impossible to determine to what extent a substantial departure by the Board Agent from scheduled election voting hours has affected the outcome of the ensuing election. In this case, the votes of those possibly excluded from voting could have been determinative. Moreover, the ensuing votes may have been affected by the conduct of the Board Agent. To preclude such occurrences as this, which cast doubt on the results of elections which we are responsible for certifying, and to carry out our responsibility for assuring properly conducted elections and maintaining our own standards, we see no alternative but to set aside this election and direct a second election.” B & B Better Baked Foods. 208 NLRB at 493. Similarly, in Kerona Plastics Extrusion Co., 196 NLRB 1120 (1972), the Board Agent conducting the election mistakenly closed the polls twenty minutes early. The Employer alleged that due to this mistake, rumors circulated that the Board Agent favored the employer. In that case, the Board held that, while it was impossible to determine whether the early closing of the polls had affected the election, the laboratory conditions for the election were disturbed so seriously that a new election was warranted.

case, however, because there were additional circumstances warranting setting aside the election, as discussed below, a hearing on the challenges would not resolve the matter.

In the instant case, the evidence reveals that at least one voter came to the polling place at the time the polls were scheduled to open but the employee did not vote. While it is unknown why this individual did not vote, the possibility that the late opening of the polls may have affected his or her casting a ballot is serious enough, in my opinion, to warrant setting aside the election. As the Board cases make clear, it is not possible in these cases to determine whether or to what extent the late opening of the polls actually affected the vote. The potential that the late opening may have affected the election is sufficient to set aside this election.

Because the evidence illustrates that this election may have been affected by the late opening of the polls, I recommend sustaining the Employer's objection and recommend that the election be set aside and a new election held.

Summary and Recommendations

I have recommended sustaining the Employer's objection. Accordingly, I recommend that the election conducted on May 18, 2012, be set aside and declared a nullity and that a new, second election be conducted on a date to be determined by me.

Right to File Exceptions

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional

Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions

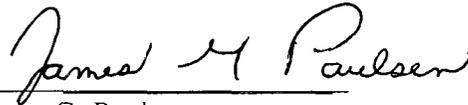
Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on June 28, 2012, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board

will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on this 14th day of June, 2012.

A handwritten signature in cursive script that reads "James G. Paulsen". The signature is written in black ink and is positioned above a horizontal line.

James G. Paulsen
Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201