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LABORATORY CORPORATION OF
AMERICA HOLDINGS,

Employer,

And

DISTRICT 1199J, NUHHCE,
AFSCME, AFL-CIO,

Petitioner.

NATIONAL LABOR RELATIONS BOARD

CASE: 22-RC-096952

**STATEMENT IN OPPOSITION TO THE
EMPLOYER’S REQUEST FOR REVIEW**

District 1199J, NUHHCE, AFSCME, AFL-CIO (“District 1199J” or “Union”) files this statement in opposition to Laboratory Corporation of America Holdings’ (“Labcorp” or “Employer”) request for review of the Region 22 Regional Director’s February 26, 2013 Decision and Direction of Election. District 1199J respectfully submits that Labcorp’s request for review of the Regional Director’s decision to deny Labcorp’s motion to dismiss District 1199J’s representation petition must be denied because Labcorp cannot satisfy any of the compelling reasons for granting review under 29 C.F.R. § 102.67(c). Additionally, Labcorp’s request for “special permission” to appeal the Regional Director’s direction of a mail ballot election also must be denied.

Statement of Facts

District 1199J filed a RC Petition with Region 22 on January 24, 2013 seeking to represent certain job titles in the Employer’s Northern New Jersey region of operations. A

hearing was held on February 11, 2013 at Region 22 in Newark, New Jersey. At the hearing, the Union and Employer stipulated to an appropriate bargaining unit as follows:

Included: All full-time and regular part-time Patient Service Technicians in Patient Service Centers, Patient Service Technicians in individual offices, and Patient Center Site Coordinators employed by the Employer in multiple facilities in the counties of Bergen, Sussex, Passaic, Essex, Union, Morris, Hudson, and Upper Warren in New Jersey.

Excluded: All managerial employees, office clericals employees, Patient Service Technicians at the Phillipsburg, New Jersey Patient Service Center, supervisory Team Leads, professional employees, guards and supervisors as defined in the Act, and all other employees.

At the hearing, Labcorp made a motion to dismiss District 1199J's representation petition; the motion was denied. The sole remaining issue at the close of the hearing was whether to conduct a manual or mail ballot election. District 1199J sought a mail ballot election; Labcorp sought a manual ballot election. Both parties stated their positions on that issue on the record and submitted post-hearing briefs on February 19, 2013. The Regional Director issued a Decision and Direction of Election on February 26, 2013. On February 28, 2013, the Regional Director concluded that a mail ballot election was appropriate based on the impracticality of conducting a manual ballot election, the geographical scattering of employees, and the efficient use of the Region's resources. The Employer filed its request for review on March 12, 2013.

Legal Argument In Opposition To Labcorp's Request For Review

I. The Regional Director Correctly Denied Labcorp's Motion to Dismiss.

The Employer's request for review is premised on its argument that the Board as presently constituted lacks a quorum because the President's recess appointments are constitutionally invalid based on the decision of the U.S. Court of Appeals for the D.C. Circuit in Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). The Board has

recently made clear its position on this type of motion to dismiss, in Sub-Acute Rehabilitation Center at Kearny, LLC, 359 NLRB No. 77, FN. 1 (March 13, 2013) and Stamford Hospitality, LP, 359 NLRB No. 75, FN .1 (March 13, 2013), taking issue with the D.C. Circuit’s position in Noel Canning, and stating that the “question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.”

In taking that position and denying similar motions to dismiss and/or arguments that the Board lacks a properly constituted quorum, the Board noted that the interpretation of the Recess Appointments Clause of the U.S. Constitution, Article II, § 2, Clause 3, by the Noel Canning court is in direct contrast to long-standing decisions in three other courts of appeals interpreting the same clause. See Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); U.S. v. Woodley, 751 F.2d 1008 (9th Cir. 1985); and U.S. v. Allocco, 305 F.2d 704 (2d. Cir. 1962). Those decisions took into consideration “both the words of the Constitution and the history of the nation” in finding that the President had the authority to make the recess appointments at issue in those cases. Evans, 387 F.3d at 1222.

The Evans, Woodley, and Allocco courts also took a common sense approach and warned that an overly rigid interpretation of the Recess Appointments Clause, like the one taken in Noel Canning, would cause an absurd result where important government offices would remain unfilled for prolonged periods of time, stifling the purpose and operation of our government. Evans, 387 F.3d at 1224 (“We find that it was the intent of the Framers to keep important offices filled and government functioning”); Woodley, 751 F.2d at 1013 (“the former interpretation would lead to an absurd result that all offices

vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes”); Allocco, 305 F.2d at 712 (“We believe the Government’s interpretation of Article II is reasonable, while the petitioner’s would create Executive paralysis and do violence to the orderly functioning of our complex government.”)

It should also be noted that there shall be no prejudice to Labcorp should the Regional Director’s Decision and Direction of Election go forward as ordered. Rather, to accept the Employer’s request for review and its underlying argument that the NLRB must grind to a halt at present would in fact undermine the entire purpose of the Act in seeking to create stability in labor relations.

Accordingly, as the Board had already determined that “[t]he question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act,” the Regional Director’s denial of the Employer’s motion to dismiss is correct and Labcorp presents no valid grounds that warrant review under 29 C.F.R. § 102.67(c). Sub-Acute Rehabilitation Center at Kearny, 359 NLRB No. 77, FN. 1.

II. The Employer’s Request for “Special Permission” to Appeal the Regional Director’s Direction of a Mail Ballot Election is Without Merit and Must be Denied.

The Employer also seeks “Special Permission” to appeal the Regional Director’s direction of a mail ballot election. Because the Regional Director’s decision is supported by the record and is not an abuse of discretion, the Employer’s request must be denied. The Regional Director is given the discretion to “reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.” NLRB Casehandling Manual (“CHM”), Part Two,

Representation Proceedings, §11301.2. An examination of the record in this case demonstrates that the direction of a mail ballot election by the Regional Director was not an abuse of discretion.

The Board has recognized that the presence of any one of the following three situations normally suggests the propriety of using a mail ballot:

- (a) where eligible voters are “scattered” because of their job duties over a wide geographic area
- (b) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (c) where there is a strike, a lockout or picketing in progress. Id.

The Regional Director must also consider the desires of the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what constitutes efficient use of Board resources in making the determination. Id.; see also San Diego Gas and Electric, 325 NLRB 1143 (1998). Employees are considered to be “scattered” where they work in different geographic areas, work in the same area but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. CHM, Sec. 11301.2. The factors in favor of a mail ballot election are more fully discussed in the Union’s post-hearing brief, attached to this statement in opposition as Exhibit A (See Pages 3-4).

Based on the fact that there the stipulated unit consists of approximately 276 eligible voters spread across 35 Patient Services Centers and eight medical offices in seven counties in Northern New Jersey, the Regional Director found that the voters were geographically scattered and that therefore a manual election was impractical. In this case, the Regional Director considered all the relevant factors and followed all applicable procedures in properly finding that a mail ballot election was warranted under the circumstances.

The Regional Director's decision is entitled to great deference, and the Board in the past has refused to tamper with the direction of a mail ballot election unless there was an abuse of discretion. See Nouveau Elevator Industries, 326 NLRB 470 at 471 (1998) (“[H]ad the decision been ours as an initial matter, we would have determined to conduct some or all of the election by mail . . . [n]evertheless, under the circumstances of this case, and given the broad discretion that the Board has invested in the Regional Director, we find that the Regional Director did not abuse his discretion by ordering a manual election”).

In this case, the Regional Director properly found that the circumstances warranted a mail ballot election. As the Regional Director's decision is supported by the record and is clearly not an abuse of discretion, the Employer's Request for permission to appeal the direction of a mail ballot election must be denied.

Conclusion

For the foregoing reasons, the Employer's request for review should be denied in its entirety.

Respectfully Submitted,

s/ William P. Hannan
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Dated: March 19, 2013

Counsel for District 1199J,
NUHHCE, AFSCME, AFL-CIO

CERTIFICATION OF SERVICE

I hereby certify that the foregoing statement in opposition to the Employer's request for review was electronically filed with the National Labor Relations Board and with the Regional Director and served on Doreen S. Davis, Esq., counsel for the Respondent, via electronic mail (ddavis@jonesday.com) and regular mail on the below date.

s/ William P. Hannan
William P. Hannan, Esq.

Date: March 19, 2013

EXHIBIT A

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PLEASE REPLY TO NEWARK

February 19, 2013

Via Electronic Filing

J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, NJ 07102

**Re: Laboratory Corporation of America Holdings and District 1199J, NUHHCE,
AFSCME, AFL-CIO
Case No.: 22-RC-096952**

Dear Mr. Lightner:

Please accept this letter brief in lieu of a more formal statement as the post-hearing brief on behalf of the Petitioner/Union District 1199J, NUHHCE, AFSCME, AFL-CIO ("District 1199J") in the above matter. A hearing took place on February 11, 2013 at the Region 22 office in Newark, New Jersey.

At the hearing, the parties stipulated to an appropriate bargaining unit as follows:

Included: All full-time and regular part-time Patient Service Technicians in Patient Service Centers, Patient Service Technicians in individual offices, and Patient Center Site Coordinators employed by the Employer in multiple facilities in the counties of Bergen, Sussex, Passaic, Essex, Union, Morris, Hudson, and Upper Warren in New Jersey.

Excluded: All managerial employees, office clericals employees, Patient Service Technicians at the Phillipsburg, New Jersey Patient Service Center, supervisory Team Leads, professional employees, guards and supervisors as defined in the Act, and all other employees.

Additionally, the Respondent Laboratory Corporation of America Holdings (“LabCorp”) made a motion to dismiss the Union’s representation petition; the motion was denied. At the close of the hearing, the only contested issue to be decided by the Regional Director was whether to order a manual or mail ballot election. District 1199J seeks a mail ballot election; LabCorp seeks a manual ballot election. Both parties stated their positions on the record during the hearing and were given the option to address the issue further in post-hearing briefs.

STATEMENT OF POSITION

The Regional Director has a wide degree of discretion, within the constraints of certain guidelines, to order a mail ballot election rather the standard manual election. San Diego Gas and Electric, 325 NLRB 1143, 1144 (1998); see also Nouveau Elevator Industries, 326 NLRB 470 (1998). The current guidelines the Regional Director must consider when determining whether to order a mail or manual ballot election are contained in Part Two of the NLRB Casehandling Manual, Representation Proceedings (“Manual”), and are largely derived from the Board decision in San Diego Gas and Electric. Manual, Sec. 11301.2.

In situations “where circumstances tend to make it difficult for eligible voters to vote in a manual election or where a manual election, though possible, is impractical or not easily done,” the Regional Director may conclude that a mail ballot will “enhance the opportunity for all to vote.” Id. The Board has recognized that the presence of any one of the following three situations normally suggests the propriety of using a mail ballot:

- (d) where eligible voters are “scattered” because of their job duties over a wide geographic area
- (e) where eligible voters are “scattered” in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and
- (f) where there is a strike, a lockout or picketing in progress. Id.

The Regional Director should also consider the desires of the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and what

constitutes efficient use of Board resources in making the determination. Id.; see also San Diego Gas and Electric, 325 NLRB at 1145. Employees are considered to be “scattered” where they work in different geographic areas, work in the same area but travel on the road, work different shifts, or work combinations of full-time and part-time schedules. Manual, Sec. 11301.2.

In this case, every factor calls for the Regional Director to exercise his discretion and order a mail ballot election. Very clearly, the first situation demonstrating the propriety of using a mail ballot is present. The stipulated unit consists of approximately 276 eligible employees scattered across 35 patient services centers (“PSC”) and many other individual offices in 8 counties throughout the Employer’s Northern New Jersey region of operations. About half the unit is composed of Patient Service Technicians (“PST”) who work in the employer’s 35 PSCs across the region. The other half of the unit consists of PSTs who are further scattered at additional locations in individual doctors’ offices across the Northern New Jersey region. Each PSC may have as few as one or up to several employees present at a location. Accordingly, there is no “central” location where large numbers of employees can conveniently convene to vote to ensure reasonable access to voting. Some of the PSCs are over 50 miles apart from other PSCs, not to mention individual office locations where other PSTs are based. A manual election would require, at a minimum, perhaps more than a dozen voting locations open for a large number of hours to ensure reasonable access to the polls. Even then, the scattering of a large number of employees over a large number of locations would not provide reasonable access to voting locations and would make it difficult and impractical for most of the eligible employees to vote.

The Respondent proposed a manual voting plan on the record at the hearing. Under that plan, where there would be four voting locations open under very restrictive hours, the drive times could be up to fifty minutes (presumably without traffic) from a work site to a designated voting location. Additionally, the geographic region is not conducive to allow easy access to locations via public transportation, and the winter climate may further prevent eligible voters to

travel significant distances to polling stations. Although generally open standard business hours, hours can vary between PSCs.

The other factors listed in the Manual and in San Diego Gas and Electric greatly favor a mail ballot election as well. Based on the duties exercised by the eligible employees in the stipulated unit, which include a variety of medical and office tasks, there is no issue regarding the likely ability of voters to read and understand mail ballots. Additionally, as a large corporate entity, there is no issue regarding the availability of employee addresses. Lastly, the efficient use of the Region's financial resources also strongly favors a mail ballot election. A mail ballot election would be a far more efficient use of agency resources than sending agents to many locations over long hours (and even that would be no guarantee for reasonable access to voting based on the large geographic region of the unit).

In this case, the eligible voters are scattered over a wide geographic area across the Respondent's Northern New Jersey region. A manual election, in virtually any form, would make it extremely difficult for eligible employees to vote and is impractical and not easily done. Simply stated, the vast majority employees are never present at the same location (or even anywhere near each other) at common times. The only way to enhance the opportunity for all eligible employees in the stipulated unit to vote is to hold a mail ballot election. For the foregoing reasons, the Petitioner District 1199J respectfully requests that the Regional Director order a mail ballot election.

Respectfully Submitted,
OXFELD COHEN, P.C.
Attorneys for Petitioner, District 1199J

s/ William P. Hannan
William P. Hannan, Esq.

cc: Doreen S. Davis, Esq. (via email)
Sonia Martinez, District 1199J
Susan Cleary, President, District 1199J

CERTIFICATION OF SERVICE

I hereby certify that the foregoing letter brief was served on Doreen S. Davis, Esq., counsel for the Respondent, via electronic mail (ddavis@jonesday.com) on the below date.

s/ William P. Hannan
William P. Hannan, Esq.

Date: February 19, 2013