

STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

PYRAMIC ACQUISITION II MANAGEMENT, LLC,  
d/b/a THE FAIRFAX AT EMBASSY ROW  
Employer

and

Case 05-RC-095207

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 99  
Petitioner

**SUPPLEMENTAL DECISION ON OBJECTIONS**  
**AND**  
**CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Decision and Direction of Election<sup>1</sup> issued on January 18, 2013,<sup>2</sup> an election by secret ballot election was conducted on February 8, 2013 under my supervision. Upon conclusion of the polling, the ballots were impounded due to the pendency of the Employer's Request for Review of the Decision of the Regional Director, submitted on February 6. On February 20, the Board denied the Employer's Request for Review. Accordingly, the ballots were tallied on February 27, with the following results:

Approximate number of eligible voters.....	6
Void Ballots.....	0
Votes cast for Petitioner.....	4
Votes cast against participating labor organization.....	1
Valid votes counted.....	5
Challenged ballots.....	1
Valid votes counted plus challenged ballots.....	6

The Challenged ballots are not sufficient in number to affect the outcome of the election.

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<sup>1</sup> The appropriate unit as set forth in the Decision and Direction of Election is: "All full-time and regular part-time Engineering Department employees employed by the Employer at The Fairfax at Embassy Row in Washington, D.C., including engineers and painters, but excluding all office clerical employees, managerial employees, guards, and supervisors as defined in the Act."

<sup>2</sup> All dates are in the year 2013 unless noted otherwise.

On March 5, the Employer timely filed objections to conduct of the election and conduct affecting the results of the election,<sup>3</sup> a copy of which is attached as Exhibit A.

**Objection No. 1:**

An employee who is a supervisor under Section 2(11) of the Act was allowed to vote under challenge. The disputed supervisor's ability to vote rendered the conduct of a free and uncoerced election impossible.

In support of Objection No. 1, the Employer attached the transcript from the pre-election hearing. No other evidence was submitted. The Employer additionally stated that Carrasco "can also testify that he attended Union organization meetings alongside members of the voting unit, and vocally supported the Petitioner in his conversations with members of the voting unit that he supervised."

In the Decision and Direction of Election, I found that the record was unclear as to Carrasco's supervisory status and ordered that he be allowed to vote under challenge. The Board denied the Employer's request for review, which specifically included this issue. Therefore, no final determination has been made as to Carrasco's supervisory status.

Assuming, *arguendo*, that Carrasco is a supervisor as defined in Section 2(11) of the Act, the Region must consider whether his alleged prounion activity and his presence in the polling area for the purpose of voting under challenge would constitute objectionable conduct, such that a new election is warranted. This inquiry includes: (1) whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election; and (2) whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), *remanded* 230 F.3d 206 (6<sup>th</sup> Cir. 2013). In examining whether a supervisor's

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<sup>3</sup> The petition was filed on December 19, 2012. I will consider on its merits only the alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962).

prounion conduct reasonably tended to coerce or interfere, the Board looks at the nature and degree of supervisory authority, as well as the nature, extent and context of the conduct in question. *Id.* at 908. Here, no evidence has been adduced, presented, or its existence suggested by any party that Carrasco engaged in any electioneering or other conduct at the election itself. In *Harborside*, the supervisor was alleged to have made several threats to employees regarding job loss if they voted against the union, and had solicited union authorization cards from employees. In the instant case, the Employer has failed to provide any detail whatsoever regarding the number of instances and/or the circumstances in which Carrasco allegedly expressed prounion views, the nature of any statements attributed to Carrasco, or the number of employees to whom he may have communicated his views. Importantly, the Employer does not contend that Carrasco solicited authorization cards from any employee, which conduct the Board found in *Harborside* and its progeny to have an inherent coercive tendency absent mitigating circumstances. See, e.g., *SNE Enterprises, Inc.*, 328 NLRB 1041 (2006); *Madison Square Garden*, 350 NLRB 117 (2007). Rather, the Employer states only, without any supporting detail whatsoever, that Carrasco “can testify” that he attended Union meetings and vocally supported the Union in conversations with unit employees.

The Employer further argues that Carrasco’s mere presence at the election destroyed the laboratory conditions necessary for a free election. In *Hawaiian Flour Mill, Inc.*, 274 NLRB 1108 (1985), *enfd.* 792 F.2d 1459 (9<sup>th</sup> Cir. 1986), the Board overruled objections to an election, rejecting the employer’s argument that two statutory supervisors participated in a union campaign, and subsequently, one of them voted under challenge at the election. There, the Court explained that the proper inquiry is whether supervisory prounion conduct reasonably tends to have a coercive effect on, or is likely to impair employee choice. In *Madison Square Gardens*, the Board set aside an election where supervisors solicited union cards and engaged in other prounion conduct including campaigning for the union at meetings held away from the

workplace and speaking to employees in the employer's break room about the benefits received by unionized employees. One supervisor was observed tearing down a poster describing the Employer's views while calling it a "piece of shit." Notwithstanding the supervisors' other prounion conduct, the Board identified only the solicitation of cards by the supervisors as the basis for its decision to set aside the election.

The party seeking to set aside election results must submit *prima facie* evidence "of a kind which would be admissible into evidence at a hearing and subjected to evaluation as to its weight and probative force." *Grants Furniture Plaza, Inc.*, 213 NLRB 410 (1974). Thus, the objecting party's burden is heavy because conclusory allegations are insufficient. *NLRB v. Claxton Mfg. Co.*, 613 F.2d 1364, 1366 (5th Cir. 1980). Specific evidence is required. *Id.* Here, the Employer failed to provide any specific evidence whatsoever to show that Carrasco's mere presence at the election and/or at union meetings, or his alleged support of the union in conversations with unit employees rose to the level of objectionable conduct.

In sum, I find that the Employer has failed to establish that substantial or material issues exist and has not made out a *prima facie* showing that would warrant setting aside the election results. Accordingly, Objection 1 is overruled.

**Objection No. 2:**

Prior to the election, the Hotel was denied its administrative due process in presenting evidence during the representation certification hearing regarding the supervisory status of the employee described in Objection No. 1.

The Employer asserts that the transcript from the pre-election hearing reveals the Hearing Officer's precluded questioning regarding Carrasco's ability to independently award overtime, thus resulting in the denial of due process that irreparably damaged the integrity of the election.

The Decision and Direction of Election that issued herein found that the Hearing Officer's rulings were free from prejudicial error, and affirmed those rulings. The Employer filed a Request for Review of the Decision and Direction of Election, which the Board denied;

however, the Employer did not assert that any of the Hearing Officer's evidentiary rulings were erroneous. Accordingly, the Employer's argument is untimely raised and is not properly considered as an objection.

Based on the foregoing, Objection No. 2 is overruled.

**Objection No. 3:**

In light of *Noel Canning v. NLRB*, ---F.3d ---, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), the Board's February 20, 2013 Order, attached hereto as Exhibit 1, denying the Employer's Request for Review of the Regional Director's Decision and Direction of Election was invalid. As such, the tallying of the ballots deprived the Hotel of its due process rights.

The Employer contends that the certifying of the election results is barred because the National Labor Relations Board lacks a quorum consisting of at least three legitimately appointed members. It contends that the unconstitutional appointments deprive the Board of the statutorily mandated quorum necessary to act, and therefore, the Board cannot rule on any appeal of a Regional Director's Decision. Thus, the Board agents and the Regional Director lack authority to act on behalf of the Board. The Employer cites *Noel Canning v. NLRB*, ---F.3d ---, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) and *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473-75 (D.C. Cir. 2009), *aff'd sub nom, New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010).

The Employer correctly pointed out that the D.C. Circuit held that the President's appointments to the Board were not valid; however, the Board disagrees with that decision. In this regard, in *Noel Canning*, the D.C. Circuit acknowledges that its conclusions conflict with rulings of at least three other courts of appeals. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at 14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11<sup>th</sup> Cir. 2004 (en banc)); *United States v. Woodley*, 751 F.2d 1008, 1012-13

(9<sup>th</sup> Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). See also *Belgrove Post Acute Care Center*, 359 NLRB No. 77, fn1 (2013).

Even in the absence of a circuit conflict, it has been the Board's longstanding practice not to acquiesce in adverse decisions by courts of appeals in subsequent proceedings involving different parties. See Letter of Acting Solicitor, National Labor Relations Board, *Industrial Turnaround Corp. v. NLRB*, 118 F.3d 248 (4<sup>th</sup> Cir. 1997) (Nos. 96-1783 & 96-1926) (explaining that "the Board, for more than 50 years, has taken the position that it is not obligated to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties," and discussing the grounds for that position). Chairman Mark Gaston Pearce issued the following statement:

The Board respectfully disagrees with today's decision and believes that the President's position in the matter will ultimately be upheld. It should be noted that this order applies to only one specific case, Noel Canning, and that similar questions have been raised in more than a dozen cases pending in other courts of appeals.

In the meantime, the Board has important work to do. The parties who come to us seek and expect careful consideration and resolution of their cases, and for that reason, we will continue to perform our statutory duties and issue decisions.

News Release, Statement by Chairman Pearce on Recess Appointment Ruling,

<http://www.nlr.gov/news/statement-chairman-pearce-recess-appointment-ruling> (Jan. 25, 2013).

In light of the above, and given the strong public interest in promptly addressing representation disputes that are of concern to employees and employers alike, I must reject the Employer's assertions that none of the agency's employees have legal authority to continue processing cases on behalf of the Board, and that the election should be set aside. Most representation disputes have long been resolved, administratively, without the necessity of court litigation. And even where, as here, there is a challenge to the authority of the Board to act, our experience in continuing to process cases during the analogous dispute leading to *New Process*

*Steel, L.P. v NLRB*, 130 S. Ct. 2635, 2638 (2010), was that most of the cases decided during that time helped finally resolve labor disputes because the parties either accepted the Board's decision or settled the dispute.

Accordingly, the Objection No. 3 is overruled.

### **SUMMARY**

In summary, I overrule the objections in their entirety and issue the following:

### **CERTIFICATION OF REPRESENTATIVE**

It is hereby certified that a majority of valid votes has been cast for **INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 99**, and that said Union is the exclusive representative of the employees in the unit involved herein, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Date at Baltimore, Maryland this 28<sup>th</sup> day of March 2013.

(SEAL)

/s/ WAYNE R. GOLD

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Wayne R. Gold, Regional Director  
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Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report, if filed, must be filed with the Board in Washington, D.C. 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 objections and which are not included in the Report, are not a part of the record before the Board unless appended to the exceptions or opposition thereto which 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 upon that evidence in any subsequent related unfair labor practice proceeding. Exceptions must be received by the Board in Washington by **April 11, 2013**.