

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

BRONXWOOD HOME FOR THE AGED, INC.

Employer

and

Case No. 02-RC-116747

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

Petitioner

**SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE**

This supplemental decision contains my findings regarding the Employer's objections to the election. The Employer objected to the Decision and Direction of Election, issued by the undersigned on December 19, 2013,^[1] the January 14, 2014 decision directing a mail ballot instead of a manual ballot, and the February 10, 2014, certification of the tally of ballots, by an agent of the undersigned, issued on February 10, 2014. The Employer's basis for these objections rest on the alleged fact that the National Labor Relations Board (the Board) never properly delegated its authority and powers to the undersigned. The Employer appears to further contend that my decision to conduct the election by mail ballot, rather than manually as proposed by the Employer, was improper and grounds for setting aside the election.

PROCEDURAL BACKGROUND

Pursuant to a Decision and Direction of Election, issued on December 19, 2013, an election in this matter was directed in the following unit of employees:

Included: All full-time and regular part-time Home Health Aides and Personal Care Aides employed by the

^[1] No request for review of the Decision and Direction of Election was filed by the Employer.

Employer at 1468 Williamsbridge Road, Bronx, NY
10461.

Excluded: All other employees, including but not limited to Finance Coordinator, HR Coordinator, Service Coordinator, Office Manager, Director of Patient Service, Program Director, Director, Business Development Receptionist, Registered Nurse, guards, and professional employees and supervisors as defined by the Act.

By letter dated January 14, 2014, the undersigned directed the election to be conducted via a mail ballot election. The ballots in this matter were mailed to eligible voters on January 24, 2014. The ballots were counted on February 10, 2014, at the Regional Office.

The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters.....	224
Void ballots.....	11
Votes cast for Petitioner.....	141
Votes cast against participating labor organization.....	2
Valid votes counted.....	143
Challenged ballots.....	17
Valid votes counted plus challenged ballots.....	160
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 Petitioner.	

On February 13, 2014, the Employer filed timely objections to the election. The objections verbatim, are as follows:

Our objections include but are not limited to your Decision and Direction of Election dated December 19, 2013 determining the appropriate bargaining unit and ordering the holding of the election; your letter dated January 14, 2014 directing that the election would be held by mail-ballot instead of manual ballot; the Tally of Ballots dated February 10, 2014 certifying the election results by an agent on your behalf; and any future decisions you issue in Case No. 02-RC-116747.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the objections was conducted. During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues. The results of the investigation are discussed below.

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (Jun. 24, 2013) (oral argument held Jan. 13, 2014), Respondent filed one objection to the election, arguing that I was appointed on January 6, 2012,^[2] that the Board lacked a quorum on that date, and that, as a result, the Board "never properly delegated its authority" to me. Thus, Respondent objects to all decisions made by me in this matter. Respondent's objection fails.

As an initial matter, my handling of the representation case is unaffected by any issue concerning the composition of the Board. In the absence of a Board quorum, the undersigned had the authority to conduct representation proceedings under the Board's 1961 delegation of its decisional authority in representation cases. *STG Int'l, Inc.*, 2013 WL 1786666 at *1, n.1. Furthermore, Respondent's assertion that delegees may not exercise delegated authority fails to account for the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit's *Laurel Baye*^[3] decision, stated that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to non-group members, such as the regional directors or the general counsel." 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, four Courts of Appeals have held that valid prior delegations of Board authority survive a loss of Board quorum. See *Kreisberg v. Healthbridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011).

To the extent that Respondent is also claiming that my appointment is invalid, the Board has already addressed this issue. In *Universal Lubricants, LLC*, the Board rejected an argument

^[2] Respondent is incorrect. I was appointed Regional Director on December 28, 2011, by a Board consisting of Chairman Pearce and Members Becker and Hayes.

^[3] *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

attacking the appointments of Regional Directors, noting that the “question [of the validity of the recess appointments] remains in litigation,” and until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.” 359 NLRB No. 157 (July 16, 2013), slip op. 1 n.1.

Further, Respondent’s assertion that it would object to a certification in this case ignores the simple fact that any certification would be issued under the auspices of a Board with five fully confirmed members. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). All five members were sworn in as of August 12, 2013.

Nor do I find persuasive the Employer’s contention that conduct of the election by mail ballot was inappropriate. Rather, as all of the eligible voters in this election were assigned to work in the homes of clients throughout the greater New York City area, on varying work schedules, and rarely, if ever, all together in a central location at the same time, the decision to conduct the election by mail ballot was reasonable and well within the parameters set forth by the Board in evaluating if conduct of an election by mail rather than manually was appropriate. *See San Diego Gas & Elec.*, 325 NLRB 1143, 1145 (1998) (Regional Director should take into consideration at least the following situations that normally suggest the propriety of using mail ballots: (1) where eligible voters are “scattered” because of their job duties over a wide geographic area; (2) 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 (3) where there is a strike, a lockout or picketing in progress. If any of the foregoing situations exist, the Regional Director, in the exercise of discretion, should also consider the desires of all the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and finally, what constitutes the efficient use of Board resources, because efficient and economic use of Board agents is reasonably a concern).

CONCLUSION

Having found the Employer’s objection to be without merit, it is hereby overruled.^[4]

^[4] No hearing is warranted with respect to the objections, inasmuch as no substantial or material factual issues have been raised thereby. Further, even assuming the evidence proffered by the Employer in support of its objections to be true, no hearing is warranted, in my opinion, and the election will not be set aside based thereupon.

WHEREFORE, IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for the Petitioner in the unit of employees described above.^[5]

Signed at New York, New York
March 11, 2014



Karen P. Fernbach, Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

^[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, DC, by close of business (**5 p.m. Eastern Time**) on **March 25, 2014**, unless filed electronically. If filed electronically, it 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. If submitted by mail or sent by a delivery service, it must be received by the close of business at 5:00 p.m. Eastern Time on the due date, or be postmarked or given to the delivery service no later than **March 24, 2014**. **Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically.** Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review 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.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. 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.

NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.