

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MCI COMMUNICATIONS SERVICES,
INC.,

Employer,

and

COMMUNICATIONS WORKERS OF
AMERICA, DISTRICT 2-13,

Petitioner.

Case No. 04-RC-123386

EMPLOYER'S EXCEPTIONS TO REGIONAL DIRECTOR'S REPORT
AND RECOMMENDATION ON OBJECTIONS TO ELECTION

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. FACTUAL BACKGROUND 2

III. EXCEPTIONS TO THE REPORT AND RECOMMENDATION..... 7

IV. ARGUMENTS AND AUTHORITIES 8

 A. Under the Supreme Court’s Ruling in Noel Canning, the Regional Director in this Case Had No Statutory Authority to Determine the Appropriate Unit for Collective Bargaining and to Direct an Armour-Globe Election..... 8

 B. The Region Improperly Isolated the Facts Set Forth in the Objections Without Analyzing Whether the Circumstances Surrounding the Election as a Whole Undermined Employee Free Choice..... 11

 C. The Region Mischaracterized MCS’ Arguments Regarding the Sufficiency of the Ballot Utilized by the Region..... 16

 D. Contrary to the Board’s Rules and Regulations, the Region Failed to Conduct a Proper Investigation of MCS’ Second Objection Concerning the Scope of the Expanded Bargaining Unit..... 18

V. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Dakota Premium Foods,
335 NLRB 228 (2001)14

Heartland of Martinsburg,
313 NLRB 655 (1994)19, 21

Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.,
No. C13-5470-BHS, 2013 U.S. Dist. LEXIS 114320 (W.D. Wash. Aug. 13, 2013)10

Independence Residences, Inc.,
355 NLRB 724 (2010)11

Int'l Alliance of Theatrical Stage Employees.,
2013 NLRB LEXIS 53 (Jan. 28, 2013).....10

Jed-Wen of Everett, Inc.,
285 NLRB 118 (1987)11

Lab. Corp. of Am. Holdings,
2013 NLRB LEXIS 216 (Apr. 2, 2013).....10

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,
564 F.3d 469 (D.C. Cir. 2009)10

Midland National Life Insurance Co.,
263 NLRB 127 (1982)11

New Process Steel, LP v. NLRB,
130 S. Ct. 2635 (2010).....9

Nightingale Oil Co. v. NLRB,
905 F.2d 528 (1st Cir. 1990).....12

NLRB v. Lorimar Productions,
771 F.2d 1294 (9th Cir. 1985)15

NLRB v. New Vista Nursing & Rehab.,
719 F.3d 203 (3d Cir. 2013).....9

NLRB v. Noel Canning,
No. 12-1281, 2014 U.S. LEXIS 4500 (June 26, 2014).....7, 8, 9, 11

NLRB v. Parsons Sch. of Design,
793 F.2d 503 (2d Cir. 1986).....15

UMass Mem. Med. Ctr. & Int'l Ass'n of Emts, 349 NLRB 369, 369 (2007)17

STATUTES

29 U.S.C. § 153(a)9

29 U.S.C. § 153(b)9, 10, 11

29 U.S.C. § 159.....10

29 U.S.C. § 160(b)10

OTHER AUTHORITIES

20 Fed. Reg. 217510

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04-RC-123386

**EMPLOYER’S EXCEPTIONS TO
REPORT AND RECOMMENDATION ON OBJECTIONS TO ELECTION**

MCI Communications Services Inc. (“MCS” or “the Company”), pursuant to Rule 102.69(c) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), files these Exceptions to the Report and Recommendation on Objections to Election (“R&R”) dated June 20, 2014. For the reasons set forth below, the Board should reject the R&R and sustain MCS’ Objections, or in the alternative, remand the case for a hearing on these Exceptions pursuant to Rule 102.69(f).

I. INTRODUCTION

These Exceptions concern the conduct of an *Armour-Globe* election, in which unrepresented employees ultimately vote on whether they wish to be added to an existing bargaining unit. This case presents the Board with an opportunity to foster informed voting decisions and employee free choice in *Armour-Globe* elections by requiring that ballots make clear to voters the consequences of their votes—i.e., inclusion in an *existing* bargaining unit.

On June 20, 2014, the Acting Regional Director for Region 4 issued the R&R recommending that the Board overrule MCS’ Objections to the conduct of an *Armour-Globe* election that began on May 5, 2014 in Pittsburgh, Pennsylvania and concluded on May 8, 2014

in Philadelphia, Pennsylvania. The Objections submitted by MCS challenged the conduct of the election because the four unrepresented voters initially were subjected to confusing and conflicting statements regarding the bargaining unit with respect to which they were voting, and then were simply asked on the ballot whether they desired union representation generally. The ballot did not separately ask the eligible voters whether they wished to join an existing bargaining unit, CWA Local 13000. The election ultimately was decided by one vote.

In recommending that the Objections be overruled, the Region conducted only a threadbare analysis of MCS' arguments, improperly cherry-picking only certain facts identified by MCS, treating each of those select facts in isolation, and then analyzing whether any one fact alone could have caused voter confusion in the election. This approach fell far short of the Regional Director's obligation to examine the totality of the circumstances underlying the election and to determine, in light of all the facts, whether the manner in which the election was conducted protected employee free choice and enabled the eligible voters to cast fully informed votes. The Region also flatly mischaracterized MCS' claims concerning the sufficiency of the election ballot and failed to properly investigate additional arguments raised by MCS, resulting in an R&R that rests on false premises and flawed reasoning.

At bottom, the Region disregarded material facts that call into question whether the eligible voters understood the consequences of their votes in this case. For this reason, the Board should reject the R&R and sustain MCS' Objections to the election. In the alternative, the Board should remand the case for a hearing on these Exceptions.

II. FACTUAL BACKGROUND

On February 28, 2014, the Communications Workers of America, District 2-13 ("CWA" or "Petitioner") filed the Petition with Region 4, docketed at 04-RC-112386, in which it sought an *Armour-Globe* election to potentially add four building engineers employed in the job title of

Senior Facility Technician by MCS to the CWA Local 13000 bargaining unit, which the Petitioner conceded was limited to “the Commonwealth of Pennsylvania.” *See Tab 1, Petition, 04-RC-112386*. As the Region was well aware at the time the Petition was filed, the Petitioner had previously sought in September 2009 to organize the same Senior Facility Technicians as a stand-alone bargaining unit that would have been independent of Local 13000. *See Tab 2, Petition, 04-RC-21595*.

On March 13, 2014, the Region conducted a pre-election hearing, during which it received testimony and documents. In attendance during the hearing, because they were under subpoena by the Petitioner, were at least three of the four eligible voters, each of whom provided sworn testimony.¹ *See Tab 3, Hearing Transcript (“Tr.”) at 100:22-25 (Redding); 139:21-23 (Yezecko); and 151:2-6 (Comstock)*. During the hearing—and in the presence of the same eligible voters—the hearing officer made statements that led the voters to believe that they were voting to create their own stand-alone bargaining unit. For instance, the hearing officer stated that “the Petitioner is seeking *a unit* of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at its facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.” *Tr. at 9:17-22 (emphasis supplied)*. The eligible voters later heard the hearing officer ask counsel for the Petitioner whether “the total number of employees in the unit sought is four,” to which counsel for the Petitioner responded, “Yes.” *Tr. at 205:19-24*. The hearing officer also asked whether the unit sought “is just as it’s listed on the Petition ... with no changes,” to which the Petitioner responded “Correct.” *Tr. at 205:4-9*. As noted above, the Petition to which the hearing officer referred “listed” the unit sought as being “*a unit* of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at

¹ It is believed that the fourth voter, Kenneth Lipp, also was present, although he was not called to testify.

its facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.”

At the pre-election hearing, the Petitioner also represented that it would proceed to an election on any unit found to be appropriate. *Tr. at 205:11-14*. MCS represented that it would consent to an election relating only to the four-person, stand-alone unit. *Tr. at 205:15-18*.

As noted in the R&R, when eligible voters cast ballots on May 5, 2014 in Pittsburgh and on May 8, 2014 in Philadelphia, they were required to answer a single question: “Do you wish to be represented for purposes of collective bargaining by Communications Workers of America, District 2-13, AFL-CIO?” *R&R at p. 2*. The election was decided by one vote, with three voters checking the “yes” box, and one voter dissenting. *Id. at 1*. The ballot did not separately ask whether the eligible voters wished to join the existing CWA Local 13000 bargaining unit and, thus, it did not inform the voter that an affirmative vote would be interpreted as manifesting a desire to join that unit.

The purpose of the secret-ballot *Armour-Globe* election in this case was to determine whether the eligible voters wished to be represented for purposes of collective bargaining and, if so, added to an existing bargaining unit (CWA Local 13000). This came after the Regional Director (who, as the Supreme Court has now made clear, was acting under an invalid delegation of statutory authority by an unconstitutionally appointed Board) determined that the eligible voters, “if added to the existing [Local 13000 bargaining] unit, would constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.” *See Tab 4, Decision and Direction of Election (“DD&E”) at p. 10*. Accordingly, the range of eligible voters potentially included those who specifically desired to be represented by the CWA and become members of the “existing [Local 13000 bargaining] unit.” *Id.* However, it

also potentially included those who desired union representation, but limited to (as described by the Hearing Officer in the pre-election hearing, and as was previously sought by the Petitioner in 04-RC-21595) “a unit of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at its facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.” Finally, it also potentially included those who desired no union representation whatsoever. Yet despite these potentially divergent views, the ballot, as discussed, asked only a single, limited question: “Do you wish to be represented for purposes of collective bargaining by Communications Workers of America, District 2-13, AFL-CIO?” It did not ask the voters whether they wished to be added to the existing CWA Local 13000 bargaining unit.

On May 15, 2014, MCS filed two timely Objections to the conduct of the election. *See Tab 5, MCS Objections.* In its Objections, MCS first argued that, given the facts underlying the election (for instance, the hearing officer’s misleading and inaccurate statements in the presence of eligible voters), the ballot should have made clear what voters were deciding by additionally asking them whether they desired to be members of the CWA Local 13000 bargaining unit. *Id. at 1.* Because the ballot did not contain such clarity, and failed to make clear the consequences of an affirmative vote, the election as conducted undermined employee free choice and should be set aside. *Id.* In addition, as a separate ground for setting aside the election, the Company argued that the election resulted in the expansion of the Local 13000 bargaining unit into Delaware, involving work that is within the exclusive jurisdiction of a different bargaining unit. *Id. at 8.*

After filing its objections, the Company submitted a position statement in support of its Objections. *See Tab 6, MCS Position Statement.* In the position statement, the Company

provided additional evidence showing that, in numerous other *Armour-Globe* elections held across the country by NLRB Regional Offices, Regional Directors have fostered informed voting decisions and employee free choice by adding a few additional words to ballots in order to clearly specify the consequences of a “yes” vote. *See MCS Position Statement at pp. 4-5.* Additionally, MCS indicated that Verizon’s Director of Labor Relations, Maryanne Crompton, would be available to the Region for interview concerning MCS’ objection that the election was conducted in a manner that improperly expanded the scope of the existing bargaining unit, and it provided a detailed recitation of the testimony she would provide. *Id. p. 8.*

The R&R dated June 20, 2014 recommended that MCS’ Objections be overruled. *R&R at p. 5.* As noted, rather than collectively viewing the facts and analyzing their collective effect on the election, the R&R addressed each of the facts identified by MCS in its Objections separately, analyzing whether each individual fact alone could have undermined employee free choice in the election. For example, the R&R discounted the effect of the hearing officer’s conflicting statements in the presence of the eligible voters by concluding that any such remarks were “isolated,” without considering the broader context in which the statements were made, including the Union’s history of attempting to organize the same employees in a stand-alone unit, and the admission by the Union that it would represent the voters in any appropriate unit, including a separate stand-alone unit. *R&R at 3.* Indeed, the Region did not even acknowledge, let alone analyze, the Union’s prior organizing efforts or its assertion that it would represent the senior facilities technicians in *any* unit found to be appropriate. The Region also repeatedly mischaracterized and, in some respects, overstated MCS’ objection by contending, among other things, that MCS demanded that the ballot include “a complete explanation” of *Armour-Globe* procedures, even though MCS has never made any such argument. *Id. at 2-3.* Finally, the

Region conducted no investigation whatsoever into MCS' Objection that the election improperly enlarged the existing unit. Based on this flawed and incomplete analysis, the Acting Regional Director recommended that the Board overrule MCS' Objections. *Id. at 3.*

III. EXCEPTIONS TO THE REPORT AND RECOMMENDATION

Pursuant to Rule 102.69(c), MCS submits the following exceptions to the June 20, 2014

R&R:

Exception No. 1: As a threshold jurisdictional matter, the Regional Director has no statutory authority to take action in this case. As the Supreme Court's ruling in *NLRB v. Noel Canning*, No. 12-1281, 2014 U.S. LEXIS 4500, at *74 (June 26, 2014) makes clear, the Regional Director of Region Four has been acting under an invalid delegation of authority, granted by an unconstitutionally appointed Board. As a result, the Regional Director had no authority under the Act to (among other things) determine that Senior Facility Technicians employed by MCS, if added to the existing CWA Local 13000 bargaining unit, would constitute a unit appropriate for the purpose of collective bargaining and later direct that the *Armour-Globe* election be conducted in the objectionable manner that it was. The election must therefore be set aside.

Exception No. 2: The Acting Regional Director erred by reviewing in a vacuum individual facts set forth in MCS' Objections and analyzing whether any one fact alone could have caused voter confusion, instead of collectively analyzing the facts and determining whether, under the totality of the circumstances, the election was conducted (with a limited ballot question) in a manner that undermined employee free choice. *R&R at pp. 2-4.*

Exception No. 3: The Acting Regional Director improperly failed to address and analyze additional facts identified by MCS that likely contributed to voter confusion, including the Petitioner's prior attempt to organize the same eligible voters in a stand-alone unit and the Petitioner's representation at the pre-election hearing, in the presence of the eligible voters, that it would proceed to an election on any unit found to be appropriate.

Exception No. 4: The Acting Regional Director erred by concluding that the hearing officer made only "isolated statements" at the pre-election hearing that could have contributed to voter confusion during the election. *R&R at p. 3.* To the contrary, the hearing officer repeatedly made imprecise and conflicting statements regarding the scope of the bargaining unit at issue, which, in combination with the circumstances surrounding the election—including the Petitioner's prior attempt to organize the voters in a stand-alone unit and the Petitioner's representation that it would proceed to an election on any appropriate unit—led to voter confusion regarding the consequences of a "yes" vote.

Exception No. 5: The Acting Regional Director erroneously concluded, without explanation, that the hearing officer's imprecise and conflicting statements regarding the scope of the bargaining unit at issue were "superseded" by the DD&E. *R&R at p. 3.* That conclusion, more accurately described as an assumption, turns on whether eligible voters actually obtained a copy

of and read the DD&E, or read the election notice, and understood the consequences of a “yes” vote.

Exception No. 6: The Acting Regional Director repeatedly mischaracterized MCS’ arguments regarding the sufficiency of the election ballot by stating that MCS demanded that the ballot include “a complete explanation of the *Armour-Globe* election procedures.” *R&R at pp. 2-3.* MCS never made any such demand. To the contrary, MCS argued simply that, under the circumstances, the ballot should have asked eligible voters whether they wished to be represented for purposes of collective bargaining by the Communications Workers of America, AFL-CIO and, if yes, whether they desired to be members of the existing CWA Local 13000 bargaining unit. By adding *only 15 more words*, consistent with the approach taken in *Armour-Globe* cases by other NLRB regions, the Region would have better equipped eligible voters to decide, secretly and in informed fashion, whether they desired union representation, and if yes, whether they wanted to become members of the existing CWA Local 13000 bargaining unit.

Exception No. 7: The Acting Regional Director erroneously characterized the ballot in this case as being “customary for any representation election.” *R&R at p. 2.* As the Acting Regional Director himself acknowledged, however, the election here was not “any representation election,” but an *Armour-Globe* election, the purpose of which was to determine whether the eligible voters wished to be represented for purposes of collective bargaining *and*, if so, added to an existing bargaining unit (CWA Local 13000). Further, other Regions that have conducted *Armour-Globe* elections have utilized more detailed ballots, indicating that the ballot used by Region Four was *not* customary for an *Armour-Globe* election.

Exception No. 8: The Acting Regional Director erred by concluding, paradoxically, that a representation election cannot be overturned on the basis of “speculative harm” while speculating himself that a “ballot with the full *Armour-Globe* language” would have confused voters. *R&R at p. 3.* That unfounded assumption again misstates MCS’ Objection and overlooks the fact that numerous other Regions conducting *Armour-Globe* elections have added a few extra words to the ballot asking voters whether they wished to become part of the existing unit.

Exception No. 9: The Acting Regional Director, in violation of the Board’s Rules and Regulations, improperly failed to investigate MCS’ Objection that manner in which the *Armour-Globe* election was conducted resulted in the expansion of the Local 13000 bargaining unit, such that the eligible voters would be performing work within the exclusive jurisdiction of another unit.

IV. ARGUMENTS AND AUTHORITIES

- A. Under the Supreme Court’s Ruling in *Noel Canning*, the Regional Director in this case had no statutory authority to determine the appropriate unit for collective bargaining and to direct an *Armour-Globe* election.**

As the Supreme Court’s decision in *NLRB v. Noel Canning*, No. 12-1281, 2014 U.S.

LEXIS 4500, at *74 (June 26, 2014) has now made clear, the Regional Director in this case has

been acting pursuant to an invalid delegation of authority, granted by an unconstitutionally appointed Board. As a result, the Regional Director had no authority under 29 U.S.C. § 153(b) to (among other things) determine that the Senior Facility Technicians employed by MCS, if added to the existing CWA Local 13000 bargaining unit, constituted an appropriate unit and/or to direct the *Armour-Globe* election that occurred on May 5 and May 8, 2014. The election must therefore be overturned.

In *NLRB v. Noel Canning*, No. 12-1281, 2014 U.S. LEXIS 4500, at *74 (June 26, 2014), the Supreme Court held that President Obama’s three January 2012 recess appointments to the NLRB—Terence Flynn, Shannon Block and Richard Griffin, Jr.—were unconstitutional under the Recess Appointments Clause of the U.S. Constitution. Consequently, the Board lacked a statutorily-mandated quorum in the period between January 4, 2012—the date the three recess appointments were made—and July 30, 2013—the date the Senate voted to confirm a full five-member Board. See 29 U. S. C. § 153(a) (providing for a 5-member Board); *id.* § 153(b) (providing for a 3-member quorum to exercise the powers of the full Board). And, under controlling precedent, unless the National Labor Relations Board has a quorum of three lawfully appointed Members, the Board cannot exercise any authority under the National Labor Relations Act, nor may agents of the Board exercise nonexistent authority that the quorum-less Board has purported to delegate to them. See *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635, 2640, 2644-45 (2010); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 244 (3d Cir. 2013); see also *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-76 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3498 (2010). Because “the NLRA’s three-member-composition requirement is jurisdictional,” it may be raised by a party at any point in the litigation as a jurisdictional defect, as MCS does here. *New Vista Nursing & Rehab.*, 719 F.3d at 213.

In the absence of *any* authority under the Act, the quorum-less Board, with respect to this case, was not empowered to appoint Regional Director Walsh to serve as the Regional Director for Region 4 or to delegate to him the Board's powers with respect to "Representatives and Elections" under 29 U.S.C. § 159. *See* 20 Fed. Reg. 2175 (requiring Board approval for the appointment of any Regional Director); 29 U.S.C. § 153(b) (authorizing the Board to delegate to Regional Directors its powers under 29 U.S.C. § 159); *see also Laurel Baye Healthcare of Lake Lanier, Inc.*, 564 F.3d at 473 ("[A]n agent's delegated authority terminates when the powers belonging to the entity that bestowed that authority are suspended"); *Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, No. C13-5470-BHS, 2013 U.S. Dist. LEXIS 114320, at *3-4 (W.D. Wash. Aug. 13, 2013) (holding that Regional Director lacked authority to issue complaint under 29 U.S.C. § 160(b) because appointing Board lacked a valid quorum).

Here, Regional Director Walsh was appointed by the Board on January 29, 2013 and was formally installed on April 2, 2013. *See* NLRB Office of Public Affairs, *Dennis Walsh Named Regional Director in Philadelphia* (Jan. 29, 2013), available at <http://www.nlr.gov/news-outreach/news-story/dennis-walsh-named-regional-director-philadelphia>. On both dates, the Board was comprised of the invalidly appointed recess appointees, and was therefore acting in the absence of a valid quorum. *Int'l Alliance of Theatrical Stage Employees.*, 2013 NLRB LEXIS 53 (Jan. 28, 2013) (opinion by members Pearce, Griffin, and Block); *Lab. Corp. of Am. Holdings*, 2013 NLRB LEXIS 216 (Apr. 2, 2013) (opinion by members Pearce, Griffin, and Block). As a result, the Board had no legal authority to appoint Regional Director Walsh, and Regional Director Walsh, in turn, had no authority in April 2014 to exercise nonexistent powers purportedly delegated to him by the invalidly constituted Board pursuant to 29 U.S.C. § 153(b). Those powers, as specifically enumerated in the Act, include the authority to: (1) determine the

unit appropriate for the purpose of collective bargaining; (2) investigate and provide for hearings, and determine whether a question of representation exists; (3) and direct an election or take a secret ballot under the Act and certify the results thereof. 29 U.S.C. § 153(b).

Simply put, Regional Director Walsh had no authority in this case to determine that the Senior Facility Technicians employed by MCS, if added to the existing CWA Local 13000 bargaining unit, would constitute a unit appropriate for the purpose of collective bargaining and to direct the *Armour-Globe* election that occurred on May 5 and May 8, 2014 with the deficient ballot. *See DD&E at pp. 10-11.* Accordingly, the election must be overturned, as it was conducted under an invalid grant of authority by an unlawfully constituted Board.

B. The Region improperly isolated the facts set forth in the Objections without analyzing whether the circumstances surrounding the election as a whole undermined employee free choice.

Notwithstanding the impact of the *Noel Canning* decision on this case, the R&R was clearly erroneous because the Region cherry-picked only select facts identified by MCS in its Objections, treating each of those select facts in isolation, and then analyzing in a vacuum whether any one fact alone could have caused voter confusion. By proceeding in this way, the Region overlooked the aggregate impact of the circumstances leading up to the election and ignored the context in which the election occurred.

The Board has long held that the primary goal in any secret-ballot election is to protect employee free choice. *Independence Residences, Inc.*, 355 NLRB 724, 732 (2010) (explaining that the “purpose of [the Board’s] election objections jurisprudence” is to protect employees’ free choice); *Jed-Wen of Everett, Inc.*, 285 NLRB 118, 121 (1987) (“Board's general goal . . . is to conduct elections under conditions as nearly ideal as possible to determine the uninhibited desires of employees”); *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982) (recognizing the “fundamental statutory purpose of assuring employee free choice”). In

determining whether employees have been provided with such a right, the Board must assess the totality of the circumstances and determine whether, on the facts as a whole, “the manner in which the election was held raises a reasonable doubt as to its validity.” *Nightingale Oil Co. v. NLRB*, 905 F.2d 528, 531 (1st Cir. 1990) (citing *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 68 (3d Cir. 1983)).

The totality of the circumstances here demonstrate that the eligible voters were deprived of the opportunity to make a fully informed decision on whether they wanted to join the existing Local 13000 bargaining unit. First, as a historical matter, the Petitioner previously attempted to organize these same employees in a stand-alone unit, not as additions to the Local 13000 bargaining unit. *See Petition, 04-RC-112386*. Second, at the pre-election hearing, in the presence of a majority of the eligible voters, the hearing officer repeatedly made ambiguous and ultimately conflicting statements regarding the unit at issue. The hearing officer initially stated that “the Petitioner is seeking a unit of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at its facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.” *Tr. at 9:17-22*. Later, the hearing officer indicated that a four-person unit was sought. *Tr. at 205:11-24*. Then, the eligible voters heard the hearing officer ask counsel for the Petitioner whether “the total number of employees in the unit sought is four,” to which counsel for the Petitioner responded, “Yes.” *Tr. at 205:19-24*. The hearing officer also asked whether the unit sought “is just as it’s listed on the Petition ... with no changes,” to which the Petitioner responded “Correct.” *Tr. at 205:4-9*. As noted above, the Petition to which the hearing officer referred described the unit sought as being “a unit of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at its

facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.”

Third, the Union represented at the pre-election hearing—also in the presence of the eligible voters—that it would proceed to an election on any appropriate unit. *See DD&E at p.10, fn.12.* Finally, the ballot itself lacked adequate precision, asking the voters whether they “wish[ed] to be represented for purposes of collective bargaining by [CWA] District 2-13, AFL-CIO,” which is not a party to the collective bargaining agreement that covers Local 13000.

The Region does not deny the existence of these facts, but chooses instead to focus on only a select few, and even then, analyzes those facts in a vacuum, addressing each separately and individually without recognizing the collective influence of all the facts on the eligible voters. Additionally, the Region ignores certain facts, omitting any discussion of the Union’s previous attempt to organize the eligible voters in a stand-alone unit and the Union’s representation at the pre-election hearing that it would proceed on *any* unit found appropriate. By failing to collectively analyze the facts leading up to the election, the Region creates a vacuum in which its remaining conclusions are wholly devoid of context. For example, the Region attempts to downplay the effect of the hearing officer’s conflicting statements by concluding that any such statements were “isolated” and, in all events, cured by the subsequent DD&E. *R&R at p. 3.* But that conclusion removes the hearing officer’s ambiguous and contradictory statements from the context of both the Union’s history of stand-alone organizing efforts (which preceded the current petition) and the assertion by the Union (in conjunction with the hearing officer’s remarks) that it would represent the voters in any unit (including a separate stand-alone unit) and that the unit as described in the Petition was “correct.” Considered

together, these circumstances collectively led to voter confusion over the scope of the bargaining unit on which they voted.

In addition, the Region incorrectly suggests that the hearing officer's remarks were harmless because they were remedied by the subsequent DD&E. *R&R at p. 3*. To the contrary, as the facts described above demonstrate, the hearing officer made at least three conflicting statements throughout the course of the pre-election hearing, and in the presence of the eligible voters, specifically concerning the scope of the bargaining unit at issue. Acknowledging the likely confusing effect of these contradictory remarks, the Region attempts to argue that the hearing officer's statements were "superseded" by the DD&E. *Id.* This reliance on the DD&E is misplaced, however. First, as discussed, the Regional Director lacked authority to even issue the DD&E because he was acting under an invalid delegation of authority, granted by an unconstitutionally appointed Board. Second, it assumes without any foundation or explanation from the Region that eligible voters did not hear the hearing officer's conflicting and confusing unit descriptions, and then actually took time to read the DD&E and/or election notice and understood the consequences of a "yes" vote. While wishful thinking, it is highly unlikely. *See Dakota Premium Foods*, 335 NLRB 228, 229 (2001) (Hurtgen, dissenting) ("[e]mployees are far more likely to see the ... ballot handed to them than they are to read the fine print on a notice placed on a wall.").

The Region also erroneously addresses in isolation MCS' argument that voters were likely confused about the identity of the Union they were voting to join. Specifically, the eligible voters were not likely to understand that by voting in favor of being "represented for purposes of collective bargaining by Communications Workers of America, District 2-13, AFL-CIO," they actually were voting to become part of CWA Local 13000, since CWA District 2-13 is nothing

more than an international district that is not a party to the collective bargaining agreement that covers members of Local 13000. *Objections at p. 6.* In response, the Region sidesteps the issue by noting only that the “District signed the collective-bargaining agreement for the International Union and is a duly authorized representative for the existing unit of employees.” This bare observation does not even purport to address how the ballot language—cryptically identifying the Union as Communications Workers of America, District 2-13, AFL-CIO—operated in combination with the hearing officer’s remarks and the Petitioner’s representations at the pre-election hearing to confuse the eligible voters in the election.

For example, some eligible voters may have voted “yes” under the assumption that a vote in the affirmative reflected only their desire to be represented by CWA District 2-13 for purposes of collective bargaining, but not as part of the existing Local 13000 bargaining unit. Others may have believed, in light of the hearing officer’s statements, that they specifically were voting on whether they wished to be represented for purposes of collective bargaining by the Petitioner in a stand-alone, four-person “unit of full-time and regular part-time senior facility technicians employed by the Employer in the Commonwealth of Pennsylvania at its facilities currently located at 630 Clark Avenue, King of Prussia, Pennsylvania, and Liberty Avenue, Pittsburgh, Pa.” In other words, the eligible voters very likely believed that they were voting on a particular bargaining unit, when in fact they were voting on something else entirely. Such voting conditions lead to confused and/or misinformed decisions, thereby undermining employee free choice in an election. *See NLRB v. Parsons Sch. of Design*, 793 F.2d 503, 506-08 (2d Cir. 1986); *NLRB v. Lorimar Productions*, 771 F.2d 1294, 1301 (9th Cir. 1985).

At bottom, the conclusions reached in the R&R derive from a faulty premise—that the individual circumstances leading up to a representation election should be divided into their

component parts and analyzed separately. This is contrary to law, and when the facts leading up to the election are properly examined *as a whole*, it becomes apparent that the eligible voters did not understand the consequences of their vote and were confused about both the scope of the bargaining unit at issue and the identity of the bargaining representative. For this reason, the Board should reject the R&R and sustain MCS' Objections.

C. The Region mischaracterized MCS' arguments regarding the sufficiency of the ballot utilized by the Region.

Because of the voter confusion arising from the circumstances leading up to the election, MCS argued in its Objections that the ballot should have asked the eligible voters specifically whether (1) they wished to be represented for purposes of collective bargaining by the Communications Workers of America, AFL-CIO *and*, if yes, (2) whether they desired to become part of the existing Local 13000 bargaining unit. *Objections at pp. 7-8*. This approach, adding roughly 15 additional words to the ballot, has two distinct advantages. First, it tailors the ballot to the very purpose of an *Armour-Globe* election, which is to determine whether the eligible voters wish to become members of an existing bargaining unit. *See DD&E at p. 10*. Second, it clarifies the consequences of a "yes" vote, which fosters informed voting and employee free choice. Such an approach has been used in *Armour-Globe* elections throughout the country. *See MCS Position Statement at pp. 4-5*.

The Region does not dispute that these noted advantages would serve to foster informed voting and employee free choice; instead, it attempts to discredit MCS' Objections by mischaracterizing the Company's arguments regarding the sufficiency of the ballot that was actually used. Specifically, the Region assumes a defensive posture by repeatedly and incorrectly asserting that MCS demanded "a complete explanation of *Armour-Globe* election procedures on the ballot . . ." *R&R at p. 2; see also id. at p. 3* ("There is no requirement that the

Region fully expound on the Armour-Globe ramifications on the ballot.”). MCS never made any such demand. Instead, MCS argued only that, under the circumstances leading up to the election (as described above), the ballot could have included roughly 15 additional words that additionally asked whether voters desired to be members of the existing CWA Local 13000 bargaining unit. *Objections at pp. 7-8*. This simple, additional question would have enabled eligible voters to decide secretly, and in informed fashion, whether they desired union representation, and if yes, whether they wanted union representation as members of the CWA Local 13000 bargaining unit.² By contrast, MCS has *never* claimed that the ballot should contain “a complete explanation” of *Armour-Globe* procedures. *R&R at p. 2*. The Region’s claim to the contrary is flatly inaccurate.

Next, the Region erroneously characterized the ballot used in this case as being “customary for any representation election.” *R&R at p. 2*. But the election here was not just “any representation election;” rather, it was an *Armour-Globe* election, in which employees vote on whether they wish to be added to an existing bargaining unit. *See UMass Mem. Med. Ctr. & Int’l Ass’n of Emts*, 349 NLRB 369, 369 (2007). It is self-evident that if employees wish to make an informed choice in such an election, they must be aware of the consequences of a “yes” vote—i.e. inclusion in the existing unit. *See Hamilton Test Sys.*, 743 F.2d at 140-42 (where employees believe they are voting on a particular bargaining unit, but it turns out to be something else, the employees have been denied the right to make an informed choice). Indeed, other Regions that have convened *Armour-Globe* elections have used more detailed ballots to better equip voters to make informed decisions in *Armour-Globe* elections.³ *See Objections at*

² For its part, the NLRB’s Casehandling Manual provides no guidance whatsoever on the language to be used on a ballot in a contested *Armour-Globe* election.

³ The Region inexplicably claims that the ballots used by other Regions are “irrelevant,” even though such evidence bears directly on his conclusion that the ballot in this case was “customary.”

pp. 4-5 (listing examples of ballots used in other Regions). The fact that other Regions choose to clarify the consequences of an affirmative vote on an *Armour-Globe* ballot dispels the notion suggested by the Region in the R&R that “the full *Armour-Globe* language may have presented more of a challenge for voters” than the ballot used in this case. *R&R at p. 3*. In all events, and as MCS has consistently explained, the Company has never demanded that the ballot contain the “full *Armour-Globe* language.”

At end, the circumstances leading up to the election demonstrate that the Region should have added roughly 15 additional words to the ballot that additionally asked voters whether they wished to join the existing bargaining unit. Accordingly, the Board should reject the R&R and sustain MCS’ Objections.

D. Contrary to the Board’s Rules and Regulations, the Region failed to conduct a proper investigation of MCS’ second Objection concerning the scope of the expanded bargaining unit.

MCS also excepts to the R&R because the Region failed to conduct any meaningful investigation into the Company’s second Objection. Specifically, MCS produced evidence, in the form of documents and a proffer of expected testimony from a readily available witness (whose office is only several blocks from the Region Four office), demonstrating that the manner in which the *Armour-Globe* election was convened in this case results in the expansion of the bargaining unit into Delaware, such that the eligible voters would be performing work within the exclusive jurisdiction of another union local. The Region, however, summarily dismissed this Objection without any further investigation or analysis, in derogation of his duties under the Board’s Rules and Regulations.

The NLRB’s Rules and Regulations clearly require the Regional Director to conduct an investigation of a party’s election objections. In particular, Rule 102.69(c)(1) provides that:

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, or if the challenged ballots are sufficient in number to affect the results of the election, the Regional Director *shall*, consistent with the provisions of section 102.69(d), initiate an investigation, as required, of such objections or challenges.

Section 102.69(d), in turn, provides that:

In issuing a report on objections or on challenged ballots, or on both, following proceedings under section 102.62(b) or 102.67 . . . the Regional Director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the Regional Director concludes raise substantial and material factual issues.

The NLRB's case handling manual makes clear, “[a]ll objections ordinarily should be investigated” and “[w]itnesses should be interviewed, and, if applicable, records should be examined.” *NLRB Casehandling Manual*, § 11394.1; see also *Heartland of Martinsburg*, 313 NLRB 655, 655 (1994) (citing *Holladay Corp.*, 266 NLRB 621 (1983)) (noting that the Board's Rules do not define the nature of the evidence that an objecting party must submit to initiate an investigation but that “the critical prerequisite to a full investigation of specific allegations in objections is the submission of names of witnesses who can provide direct relevant testimony.”)

Here, the Region conducted no investigation—whatsoever—with respect to MCS' second Objection, which argued that the election improperly expanded the scope of the Local 13000 bargaining unit. As previously noted, on May 22, 2014, the Company submitted a statement of position in support of its Objections in which it provided additional documentary evidence demonstrating that the election in this case resulted in the expansion of the Local 13000 bargaining unit into Delaware, involving work that is within the exclusive jurisdiction of a different bargaining unit. See *MCS Position Statement at pp. 8-9*. MCS also indicated to the Region that it would make Verizon's Director of Labor Relations, Maryanne Crompton, available for interview to further substantiate the Company's arguments. *Id. p. 8*. MCS even

made a proffer of Ms. Crompton's expected testimony—that Verizon and the CWA historically have rigidly observed state lines; that bargaining unit jurisdictions are framed by state lines; that the CWA locals historically have opposed its members employed in one state being assigned to perform work in another state; and that any exceptions have been isolated and limited to service emergencies or have resulted from bargaining between the parties. *Id.*

The documents and testimony that MCS provided to the Region in its position statement corroborated other evidence gathered by the Region during the pre-election hearing. That evidence showed that three of the four eligible voters routinely perform work in Delaware, unlike members of the bargaining unit they were voting to join. For example, the President of Local 13000 admitted that members of CWA Local 13000 “do not cross into Delaware, across the Delaware state line, simply because [Verizon employees who perform work in Delaware are] represented by a completely separate bargaining unit ... by Local 13101.” *Tr. at 191:21-192:1; see also Tr. at 192:7-9* (Local 13000 President admitting, “Yeah, there’s a, I guess, geographical jurisdictions for Pennsylvania as well as Delaware has th[eir], you know, contract that covers the employees in the State of Delaware.”). By contrast, the eligible voters confirmed that they regularly perform work in Delaware. For instance, the senior facilities technicians travel into Delaware for the purpose of performing required preventive maintenance. *Tr. at 92:21-93:17; Tr. at 95:20-96:6 and 129:11-130:15.* Further, in the event of a problem at any of the four Delaware facilities, they travel into Delaware to examine the problem and take remedial action. *Tr. at 94:24-95:4; 95:5-8; 98:10-16; 99:4-16; 130:18-132:24.* Finally, for 26 weeks out of the calendar year, the eligible voters have individual on-call responsibilities for the Delaware facilities, meaning if there is an after-hours or weekend problem at any of those buildings, they must drop everything and travel to Delaware. *Tr. at 148:11-150:8.*

In addition, as MCS has consistently explained to the Region, while the collective bargaining agreement covering Local 13000 allows for its members to be assigned work in other states, such assignments are the exception to the rule. As the Local 13000 President admitted, out-of-state assignments are limited to “an emergency situation or damage, like say to a catastrophe, a storm or whatnot,” and come into play only “on occasion,” requiring the Company to solicit volunteers. *Tr. at 191:14-24; 195:16-196:4*. Additionally, while certain former MCS installation and maintenance technicians who became CWA-represented employees as a result of a 2008 settlement agreement may be assigned to “work in several states along the mid-Atlantic corridor,” *DDE at p. 8*, the President of Local 13000 clarified and/or confirmed that such provisions do not apply to any other CWA Local 13000 members. *Tr. at 196:24-197:6*.

Despite the foregoing evidence, the Region failed to conduct any investigation into MCS’ second Objection. Indeed, the Region did not even attempt to interview Ms. Crompton, did not mention any of the foregoing evidence or cite MCS’ position statement in his R&R, and did not address or analyze the merits of MCS’ argument. This dismissive response to MCS’ Objection stands in stark contrast to the plain import of Section 102.69(c), which requires, without exception, that the Region “initiate an investigation” of a party’s objections. The Region’s failure to do so here is grounds for setting aside the election, or at the very least, remanding this proceeding for a full investigation by the Region. *Heartland of Martinsburg*, 313 NLRB at 655.

V. CONCLUSION

For the reasons set forth above, the Regional Director had no statutory authority in this case to exercise any powers under the Act related to the Union's representation petition. On this ground alone, the election that he directed should be overturned. Notwithstanding this jurisdictional defect, the Report and Recommendation is fundamentally flawed as a matter of both fact and law. Accordingly, the Board should reject the R&R and sustain MCS' Objections to the election. In the alternative, the Board should remand the case for a hearing on MCS' Exceptions.

Dated: July 11, 2014

Respectfully submitted,



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