

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 19**

BARRIER WEST, INC.

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO, WOODWORKERS  
DISTRICT LODGE W1, affiliated with  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO

CASE NO. 19-CA-32892

RESPONDENT BARRIER WEST, INC.'S  
OPPOSITION TO SUMMARY  
JUDGMENT

**I. INTRODUCTION AND RELIEF REQUESTED**

This case provides the National Labor Relations Board (the "Board") with the opportunity to revisit and correct an out-dated practice of refusing to make arrangements to allow an employee with a disability to vote in a manual election. The practice, noted in Section 11302.4 of the Board's Representation Casehandling Manual, whatever its historical validity, can no longer be squared with the Congressional policy designed to ensure that, "physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society." ADA Amendments Act of 2008, PL 110-325. In light of the public's and Congress' strong and unwavering commitment to inclusion for persons with disabilities, it is no longer acceptable to lump persons with disabilities—who desperately want to participate in an election, but are physically unable to travel to the election site—into the same category as persons taking voluntary vacations to Mexico.<sup>1</sup> Refusal to accommodate a disability is

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<sup>1</sup> See NLRB v. Cedar Tree Press, Inc., 169 F.3d 794 (3d Cir. 1999).

factually and legally distinct from refusal to accommodate an individual's vacation. Whether resolved correctly before this agency or the courts, the plain fact is that under the current legal standards, the Board simply *cannot* continue to deny an eligible individual the right to participate in an election when the only thing preventing him from doing so is his physical disability.

Thus, denying Daniel Alderman an opportunity to participate in the election was objectionable conduct affecting the result of the election. As the Union was not properly certified, Barrier West has no obligation to bargain with it or provide it with the information requested. For these reasons, and the reasons set forth below, Barrier West respectfully requests the Board deny the Acting General Counsel's motion for summary judgment and enter an order directing a new election.

## II. FACTUAL BACKGROUND

The facts underlying the present motion are largely undisputed and set forth in detail in Employer's Brief in Support of Exceptions to Regional Director's Report and Recommendation on Objection, attached as Exhibit L to Counsel's Motions to Transfer Case to the Board and for Summary Judgment.

## III. ARGUMENT

### **Barrier West is Not Required to Recognize and Bargain with the Union because the Union is not Properly Certified as the Exclusive Collective Bargaining Representative of the Unit**

The Board's refusal to accommodate Mr. Alderman's disability and provide him with an opportunity to participate in the election constituted objectionable conduct warranting a new election. Mr. Alderman was eligible to vote, but physically incapable of doing so without accommodation based on a substantial physical impairment. He requested an accommodation as soon as practicable and, relying on Section 11302.4, the Board responded that its policy was

to not allow any exception to in-person voting and refused to provide him with the assistance he required to participate in the election. As set forth in Barrier West's Brief in Support of Exceptions to Regional Director's Report and Recommendation on Objection, the Board's action—or lack thereof—is inconsistent with federal statutes and regulations, and with the Board's affirmative obligations to accommodate individuals with disabilities under its own policies.

The Board's continued reliance on Section 11302.4 also completely ignores the indisputable and growing public policy in favor of accommodation and inclusion for persons with disabilities. Congress recently re-doubled its efforts in this area, recognizing that "physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities *are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.*" ADA Amendments Act of 2008, Section 2(a)(2) (emphasis added). As demonstrated by Mr. Alderman's situation, Section 11302.4—as applied by the Board—is a significant, in fact, insurmountable, "institutional barrier" to individuals with disabilities that desire to participate in manual elections, but are unable to do so without accommodation. Section 11302.4, as applied, is a discriminatory policy that resulted in objectionable conduct warranting a new election. The Union is not properly certified as the exclusive collective bargaining representative for Unit employees.

#### IV. CONCLUSION

For the reasons stated above, Barrier West respectfully requests the Board deny the Acting General Counsel's motion for summary judgment and enter an order directing a new election.

DATED: March 9, 2011



Michael T. Reynyan  
Bruce Michael Cross  
Maralee M. Downey  
**Perkins Coie LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Barrier West, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer in the above-captioned matter has been served upon the persons shown below by depositing a copy thereof in the United States Mail on March 9, 2011, with proper postage affixed for first class mail to:

Machinists District Lodge W1  
Attn: Claudio R. Figuero, Grand Lodge Rep.  
620 Coolidge Dr., Suite 130  
Folsom, CA 95630-3182

Machinists District Lodge W1  
Attn: Wayne Thompson, Business Representative  
25 Cornell Ave.  
Gladstone, OR 97027-2547

DATED: March 9, 2011.

  
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Janet Davenport  
Legal Secretary