

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

AARON MEDICAL TRANSPORTATION, INC.
Employer

and

Case No. 22-RC-70888

HUDSON COUNTY UNION LOCAL 1 AMALGAMATED
Petitioner

*Daniel Ritson, Esq., Archer & Greiner, P.C., Counsel for the Employer.
Wyatt Kraft, President and Patrick Desmond, Organizer, for the Petitioner.*

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This matter, initiated by a Report on Objections and Notice of Hearing dated April 29, 2013¹, was heard by me on May 15 in Newark, New Jersey. On March 22, a rerun secret ballot election was conducted among all full-time and regular part-time emergency medical technicians and coach drivers employed by the Employer at its Hasbrouck Heights, New Jersey facility during the payroll period ending Sunday, February 17, but excluding all office clerical employees, dispatchers, managers, guards and supervisors as defined in the Act, and all other employees. The Tally of ballots served upon the parties showed the following:

Approximate number of eligible voters	109
Void ballots	0
Votes cast for the Petitioner	26
Votes cast against participating labor organization	22
Valid votes counted	48
Challenged ballots	1
Valid votes counted plus challenged ballots	49

A majority of the valid votes counted plus challenged ballots has been cast for Hudson County Union Local One Amalgamated.

On March 29, the Employer filed timely objections to conduct affecting the results of the election, and on April 29 the Regional Director for Region 22 of the Board issued a Report on Objections and Notice of Hearing, wherein he found that Objection No. 1 raised substantial and material issues which could best be resolved by record testimony at a hearing, but that Objections 2, 3 and 4 did not, and recommended that these objections be overruled. The sole issue of this hearing therefore is whether there is merit to the Employer's Objection No. 1.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2013.

I. The Facts

The objection is as follows:

5 The Election Schedule: Prior to the Notice of Second Election being served by the Board, Aaron suggested that the election take place between 12:00 pm and 10:00 pm. The Union suggested that the election take place between 7:30 am and 10:30 am, with a second session between 3:00 pm and 5:00 pm. Ultimately, the Board advised via the Notice that the election would take place between 12:00 pm and 6:00 pm, with a second session between 10:00 pm and 12:00 am. That schedule resulted in at least 25 eligible voters being unable to vote as their shifts on March 22, 2013 were completed during the window in which the polls were closed. These employees were unable to vote and unable to wait hours to cast ballots.

15 The first election was conducted on January 27, 2012 from noon to 6:00 p.m. and from 10:00 p.m. to midnight in the same unit of eligible voters. The Tally of Ballots at that election showed the following:

20	Approximate number of eligible voters	104
	Number of void ballots	0
	Number of votes cast for Petitioner	33
	Votes cast against participating labor organization	56
	Number of valid votes counted	89

25 A majority of the votes has not been cast for the participating labor organization.

On February 3, 2012, the Petitioner filed timely objections to the conduct of this election and, after these objections were investigated, it was determined that several of the objections raised substantial and material issues that would best be resolved by record testimony at a hearing. Prior to that hearing, the parties agreed to set aside that election and to conduct a rerun election, and on November 16, 2012, the Regional Director for Region 22 approved a Stipulation and Waiver stating that in order to resolve the issues raised by the Petitioner's Objections to the conduct of the election conducted on January 27, 2012, the parties agreed to the following:

- 35 1. That the election conducted in this matter on January 27, 2012 be set aside and a second election be conducted on a date to be determined in accordance with the Notice of Second Election to be issued subsequently.
- 40 2. All remaining terms and conditions of the second election be the same as those set forth in the Stipulated Election Agreement executed by the parties and approved by the Acting Regional Director for Region 22 on December 27, 2011...

45 That Stipulated Election Agreement sets forth, *inter alia*, the appropriate unit, the date and time of the secret ballot election: from 12:00 noon to 6:00 p.m. and from 10 p.m. to 12:00 midnight.

At the hearing, nine employees of the Employer, each of whom were eligible voters and knew of the election, but did not vote, testified.

50 Stephen Kovalcik worked on March 22 from 5:45 a.m. to 6:18 p.m., and knew of the election, but when he returned from his shift, the polls were closed and were not rescheduled to reopen

until 10:00: “And I live about twenty minutes away and trying to make it back and forth there at 10:00 at night just wasn’t plausible for me.”

5 Marissa Mucka worked on March 22 from 8:00 a.m. to 7:42 p.m. Although she knew of the election, she did not vote because she had to attend a baby shower that evening. Most of the calls that she makes during the day are in Teaneck, New Jersey, about fifteen to twenty minutes from where the election was conducted, and she only had one ten minute break during that day.

10 Brian Smith worked that day from 5:45 a.m. to 6:18 p.m. in the Kearney, New Jersey area, about twenty to twenty five minutes from the facility. He knew of the election, but the polls were closed when he returned to the facility. He did not return for the late balloting because he had to help around his house. He did vote in the January 2012 election, but his hours had been changed since then.

15 Aja Aponte worked from 7:56 a.m. to 6:41 p.m. on the day of the election. She “glanced at” the election notice at the facility, but was not aware that the polls reopened at 10:00 p.m. She testified that even if she had known of the late reopening of the polls, she would not have returned to vote because she is a single mother to a five year old child. In the January 2012 election she was notified over the radio “to come back to base so that we may pick up our
20 checks and vote” and, after doing so, they immediately returned to work.

Landi Lopez worked from 8:10 a.m. to 8:02 p.m. on the day of the election in Jersey City, New Jersey, about forty five minutes from the facility. He was not given any time by the Employer to return to the facility to vote, and he did not stay for the reopening of the polls, or return at 10:00
25 because he had to return home to assist his wife who is pregnant and his four year old child.

Ivan Sepulveda worked from 8:00 a.m. to 8:11 p.m. on the day of the election. He didn’t have any down time to return the facility to vote and, after finishing work, he went home to be with his wife and children.
30

Jlhane Boutaib worked from 11:51 a.m. to 7:47 p.m. on the day of the election. She was aware of the 10:00 reopening of the polls, but she did not remain at the facility, or return at 10:00, because she is a single mother and had to pick up her child from the babysitter.

35 Mohammed Azeez worked from 8:53 a.m. to 6:15 p.m. on the day of the election. He did not remain at the facility or return to vote for the 10:00 reopening of the polls because he had to return home to care for his Mother. He voted in the prior election, but does not recollect the circumstances of when he voted.

40 Kandis Devita worked from 9:00 a.m. to 8:05 p.m. on the day of the election. She did not vote because she takes the ambulance home and takes calls from midnight to 8 a.m. With only about three hours at home she did not have time to return to vote at the 10:00 reopening of the polls. She testified that she voted in the January 2012 election because her shift ended before the polls closed. If she had been allowed to return for this election, she would have voted.
45

II. Analysis

50 There are two competing Board priorities present in this case. The first is to schedule elections so that the largest number of employees can vote and participate in the question of whether they wish to have a union represent them. The other priority is that the parties to an election are bound to their agreements, whether it is a description of the agreed-upon bargaining unit or the time and place of the election. Unfortunately, these two priorities conflict in

5 this case. In the Stipulation and Waiver approved by the region the parties agreed that the rerun election would have the same “terms and conditions” as the first election in January 2012, with the exception, obviously, of the date of the election; however at this rerun election only 49 out of approximately 109 eligible voters voted, while in the earlier election, with identical polling
 10 periods, 89 out of approximately 104 eligible voters voted. Counsel for the Employer, in its brief responds to the allegation that it had agreed that the rerun election would be conducted under the same terms and conditions as set forth in the Stipulated Election Agreement, including the polling periods of 12:00 to 6:00 and 10:00 to 12:00 midnight, by attaching an email to the region requesting “a duration of 1 p.m. through 10:00 p.m.” for the polls to be open.

15 In *Community Care Systems, Inc.*, 284 NLRB 1147 (1987), the employer filed an objection regarding the election date, even though it had been agreed to by all the parties. The Board stated: “But where the election has gone ahead pursuant to the party’s stipulation, however reluctant, and it does not appear that the election arrangements were such that
 20 employees were prevented from voting, we see no basis for permitting the unsuccessful party to attack the election on the basis of a condition to which it stipulated.” In *Versail Manufacturing, Inc.*, 212 NLRB 592, 593 (1974), the Board ruled upon an objection relating to an employee who was unable to return to the facility to vote because he made a side trip to visit some friends:

25 ...we want to make it clear that to the extent that the eligible voter’s “fault” is involved, it is not “fault” in the pejorative sense. In our opinion, the fact that requires the *Yerges*² election to be set aside was that the employee was caused to miss the election by the Employer, a party to the proceeding. The same protective policy would be applicable if the participating union, or the Board itself, prevented an eligible employee from voting. It would be inapplicable, of course, if the crucial employee was prevented from voting by reason of sickness or some other unplanned occurrence beyond the control of the parties, the Board or the employee...But once the election has been held there is no more reason to negate the results at the behest of the dissatisfied party, because of
 30 personal matters affecting the opportunity of individual employees to vote than there would be in the case of a political election. There must be some degree of finality to the results of an election...

35 In *Jowa Security Services, Inc.*, 269 NLRB 297, 298 (1984), of three hundred fourteen eligible voters in the unit, only sixty four valid ballots were counted. The Board overruled the objections, stating:

40 ...other than the naked assertion that the low turnout was a fortiori attributable to inadequate notice, there is no basis for drawing an inference that lack of notice was the reason for the low turnout. Where employees fail to vote because of hospitalization, vacation, apathy, or any other normal conditions of life, we see no useful purpose in speculating as to the state of mind of employees who do not vote. In the absence of evidence that any employee eligible to vote was denied the right to cast a ballot, the reasons for an employee’s failure to vote are irrelevant.

45 In *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987), of approximately eight eligible voters, only one voted and the petitioner filed objections alleging that this was not representative of the unit and that the election should be rerun. The Board decided to abandon its numerical test to determine the validity of elections, and to issue a certification where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of a party
 50

² *Yerges Van Liners, Inc.*, 162 NLRB 1259 (1967).

or by unfairness in the scheduling or mechanics of the election and stated:

5 ...election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The fundamental purpose of a Board election is to provide employees with a meaningful opportunity to express their sentiments concerning representation for the purpose of collective bargaining. The law does not compel any employee to vote, and the law should not permit that right, to refrain from voting, to defeat an otherwise valid election.

10 Based upon the above, I would overrule the Employer's objection herein and certify the results of the election. Even though the Employer proposed, by email dated February 9, that the election be conducted from 1:00 p.m. to 10:00 p.m., it had agreed earlier in the Stipulation and Waiver that all the terms and conditions of the second election would be the same as those set forth in the earlier Stipulated Election Agreement, which included the hours of 12:00 to 6:00 p.m. and 10:00 p.m. to 12:00 midnight. Although in hindsight it would have been preferable if the voting hours were 12 noon to 12 midnight, that was not the case and the parties had agreed on the voting hours. In addition to the fact that the Employer initially agreed to the polling hours, the Board has held that "...the Regional Director has broad discretion in making electoral arrangements and in the absence of objective evidence that this discretion has been abused, the election is upheld." *Milham Products*, 114 NLRB 1544 (1955).

25 It is of course troubling when only a minority of the eligible voters vote in a Board conducted election, especially when only four votes separate the parties but, as stated above, that is not a basis, in and of itself, of overturning an otherwise valid election. Each of the employees who testified told of their reasons for not voting and while these reasons were personal to them, and not to be demeaned by me, it was not due to the lack of knowledge of the election, nor were any of them denied an opportunity to participate in the election and vote. Although it may have been inconvenient for them to return for the 10:00 to 12:00 midnight voting period, that is not a valid reason for overturning an otherwise valid election. Finally, the employees testified that they did not have an opportunity to vote during the 12:00 p.m. to the 6:00 p.m. voting period because they were too busy working. There was also some testimony that at the January 2012 election, the Employer allowed some of the employees to return to the facility to vote. Apparently, if the Employer had allowed employees some time off on the day of the election, there would have been a larger number of votes cast.

35 **Conclusions**

40 Based upon the above, I recommend that the Employer's Object 1 be overruled and that Region 22 issue an appropriate certification certifying the Petitioner as the collective bargaining representative of the Employer's employees in the appropriate unit herein³, and the hearing conducted on May 15, 2013, is closed.

Dated, Washington, D.C. June 12, 2013

45 _____
Joel P. Biblowitz
Administrative Law Judge

50 ³ Under of the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C. within 14 days from the date of this Decision. Exceptions must be received by the Board in Washington, D.C. by June 26, 2013.