

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AARON MEDICAL
TRANSPORTATION, INC.
Employer

and

CASE 22-RC-070888

HUDSON COUNTY UNION
LOCAL 1 AMALGAMATED
Petitioner

**EMPLOYER'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE DATED JUNE 12, 2013**

The Employer, Aaron Medical Transportation, Inc. ("Aaron"), respectfully takes exception to the portions of the June 12, 2013 Decision of the Hon. Joel P. Biblowitz, A.L.J (the "Decision") referenced below, for the reasons provided.

a. Page 2, lines 5-6: Aaron takes exception to the Decision's failure to mention that Aaron **twice** suggested to the National Labor Relations Board (the "Board") more inclusive election times than those times that actually were used. Aaron first suggested that the March 22, 2013 rerun election take place from 12:00 pm through 8:00 pm, and later, for further inclusiveness, suggested that the election take place between 1:00 pm and 10:00 pm.

b. Page 2, lines 10-12: Aaron takes exception to the Decision's failure to mention that the employees who were disenfranchised not only completed their work shifts at times during which the polls were closed, but also **began** their work shifts during times when the polls were closed.

c. Page 2, lines 15-16: Although, as the Decision indicates, the January, 27, 2012 election took place “in the same unit of eligible voters” as the March 22, 2013 rerun election, Aaron takes exception to the Decision’s failure to note that the particular individuals comprising the unit, and their work shifts, were different. In that regard, employee Brian Smith testified that his hours had changed since the January 27, 2012 election. See Transcript of May 15, 2013 hearing (“Transcript”) at 20:22-24; 21:1-8. Ivan Sepulveda testified that he was hired subsequent to the January 27, 2012 election. Id. at 44:6-16. Kandis Devita also testified that her hours had changed since the January 27, 2012 election. Id. at 71:16-19.

d. Page 2, line 25: Aaron takes exception to the Decision’s somewhat unclear statement of the result of the January 27, 2012 election. A majority of the votes were not cast for Hudson County Union Local 1 Amalgamated (the “Union”) in the January 27, 2012 election.

e. Page 2, lines 40-42: Although the terms and conditions of the rerun election were to be the same as those set forth in the Stipulated Election Agreement, Aaron reasonably assumed that such “terms and conditions” relating to elements such as the times of the rerun election would be revisited as necessary. That assumption was confirmed when representative of the National Labor Relations Board (the “Board”) sought dates and times from counsel to Aaron.

f. Page 3, lines 4-5: Contrary to the statement in the Decision that employee Marisa Mucka did not vote because she had to attend a baby shower on the evening of March 22, 2013, Ms. Mucka testified that attending the baby shower caused her to punch out earlier than the usual end of her shift. (Ms. Mucka punched out at 7:42 pm, as opposed to 8:00 pm.) Id. at 12:21-23; 13:14-18. Accordingly, the polls were closed at the time Ms. Mucka’s work shift ended. As such, the only demonstrable effect of Ms. Mucka attending a baby shower later that evening was that she was

precluded from making a “special trip” to vote when the polls reopened at 10:00 pm. Pursuant to NLRB Casehandling Manual Section 11302.3, “[t]he voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, **without making a special trip to vote[.]**” (emphasis added) Ms. Mucka was unable to vote on employer time due to her work duties. Transcript at 15:9-19.

g. Page 3, lines 11-12: Contrary to the paraphrasing in the Decision, employee Brian Smith’s full testimony was: “I was unable to come in. When I punched out, the election ballots were closed. And with my work schedule during the week, I don’t have time to help out around the house, so I have to help out and do everything at home when I do have time on the weekends.” Id. at 19:17-21. (March 22, 2013 was a Friday.)

h. Page 3, lines 16-18: Contrary to the paraphrasing in the Decision, employee Aja Aponte’s full testimony as to why she could not have made a “special trip” to return to the Aaron facility when the polls reopened at 10:00 pm was as follows: “I am a single mother and I have a 5 year old, and I am not going to bring my 5 year old at 10:00 pm to go to vote.” Id. at 32:9-14.

i. Page 3, lines 22-23: To clarify the text of the Decision, on the day of the March 22, 2013 election, employee Landi Lopez worked in Jersey City, New Jersey. As Mr. Lopez testified that location is approximately 45 minutes from the Aaron facility where the election took place, which facility is located in Hackensack, New Jersey. Id. at 38:8-13.

j. Page 3, lines 23-24: Aaron takes exception to the Decision’s failure to mention that Mr. Lopez additionally testified that his job duties precluded him from returning to Hackensack from Jersey City to vote during the workday. Id. at 38:8-20.

k. Page 3, lines 35-37: While the Decision correctly notes that Employee Mohammed Azeez testified that he could not return to the Aaron facility to vote at 10:00 pm due to his having to take care of his mother, it should be noted that Mr. Azeez further testified that his mother's aide leaves at 6:00 pm. It reasonably can be presumed from such testimony that Mr. Azeez' mother is unable to care for herself and is reliant on Mr. Azeez.

l. Page 3, line 44: Aaron takes exception to the Decision's characterization of Kandis Devita's testimony, that she did not vote because she was not "allowed" to do so. Aaron takes exception to the implication that Aaron did not permit Ms. Devita to vote. To the contrary, Ms. Devita testified that she did not "have time to come back this election to vote", and that her work duties are "usually far" from the Aaron facility. Id. 71:2-4; 16-20.

m. Page 3, lines 50-52: Aaron takes exception to the statement that a Board priority is to bind parties to their agreements, when in this case the "agreement" pertains to election times that disenfranchised a significant number of employees and that both parties to the election subsequently agreed were inadequate. (The Union suggested that the rerun election take place between 7:30 and 10:30 am, with a second session between 3:00 pm and 5:00 pm.)

n. Page 4, lines 5-9: Aaron takes exception to the Decision's mention of only one communication between counsel to Aaron and the Board regarding the timing of election. As previously referenced herein, counsel twice communicated more inclusive election times to the Board.

o. Aaron takes exception to the Decision's citation to Community Care Systems, Inc., 284 NLRB 1147 (1987), in overruling Aaron's objection to the March 22, 2013 election based on the disenfranchisement of voters. In that case, the Board upheld an election result where there was no evidence that the election date prevented employees from voting. In the present case, however, the timing of the election **did** prevent employees from voting within the strictures of NLRB Casehandling Manual Section 11302.3. Again, that section provides: "The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, **without making a special trip to vote**[" (emphasis added) As detailed in Aaron's post-hearing submission following the May 15, 2013 hearing, the witness employees in this case testified to being unable to vote on employer time due to their job duties, and unable to make a "special trip" (which they should not have been required to make) due to various compelling circumstances. Accordingly, Chairman Dotson's dissenting opinion in Community Care Systems, Inc., is far more relevant and instructive than the majority opinion.

As Chairman Dotson wrote:

Notwithstanding that the parties ultimately stipulated to the scheduling of the instant election, it is well settled that it is the Board's responsibility, **not that of the parties**, to establish the proper procedure for the conduct of elections and that an important part of the procedures established by the Board is that all eligible employees should be given an opportunity to vote.

Id. at 1150 (emphasis added).

In the present case, Aaron could not have made it easier for the Board to set more proper election times, by **twice** proposing such times. Notwithstanding those requests, the election went forward at times that disenfranchised a significant portion of the eligible voters, for no conceivable reason.

o. Page 4, lines 16-31: Aaron takes exception to the Decision's citation to Versail Manufacturing, Inc., 212 NLRB 592 (1974), in overruling Aaron's objection to the March 22,

2013 election based on the disenfranchisement of voters. As the Decision notes, in that case the Board ruled on an objection concerning a truck driver employee who was unable to return to the employer's facility to vote because he made a voluntary side trip to visit friends. As such, the case has nothing in common with the present matter, in which the disenfranchised employees' testimony indicated that were kept from their employer's facility during the polling times "in the normal course of their duties" for Aaron. Yerges Van Liners, Inc., 162 NLRB 1259 (1967).

p. Page 4, lines 33-43: Aaron takes exception to the Decision's citation to Iowa Security Services, Inc., 269 NLRB 297 (1984), in overruling Aaron's objection to the March 22, 2013 election based on the disenfranchisement of voters. In that case, the Board refused to overturn an election where it was alleged that employees had inadequate notice of the election. The Board found that, "There is no evidence of any irregularity in the posting of election notices in this case." Accordingly, the case again has nothing in common with the present matter, in which there is substantial testimony that inadequate voting times prevented employees from voting within the strictures of NLRB Casehandling Manual Section 11302.3.

q. Page 4, line 45 – page 5, line 9. Aaron takes exception to the Decision's citation to Lemco Construction, Inc., 23 NLRB 459 (1987), in overruling Aaron's objection to the March 22, 2013 election based on the disenfranchisement of voters. To quote the Decision, in that case, "The Board decided to abandon its numerical test to determine the validity of elections, and to issue certification where there is adequate notice and opportunity to vote **and employees are not prevented from voting by the conduct of a party or by unfairness in the scheduling or mechanics of the election[.]**" Id. at 460 (emphasis added). As the emphasized portion of the preceding quotation indicates, Lemco Construction, Inc. could not be more different from the

present matter, in which the scheduling of the election did in fact prevent employees from voting pursuant to NLRB Casehandling Manual Section 11302.3.

r. Page 5, lines 11-17: Aaron takes exception to the Decision's rationale for overruling Aaron's objection to the March 22, 2013 election based on disenfranchisement of voters, which rationale relies on the fact that Aaron had agreed to the polling times before **twice** suggesting more inclusive times. Despite conceding that Aaron's proposed times "would have been preferable", the Decision ignores the principle that "it is the Board's responsibility, **not that of the parties**, to establish the proper procedure for the conduct of elections and that an important part of the procedures established by the Board is that all eligible employees should be given an opportunity to vote." Community Care Systems, Inc., 284 NLRB at 1150, Chairman Dotson, dissenting (emphasis added).

s. Page 5, lines 17-20: Aaron takes exception to the Decision's citation to Milham Products Co., Inc., 114 NLRB 1544 (1955), for the proposition 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." No such quotation appears in that case. Rather the case provides only that "the Regional Director has broad discretion in making electoral arrangements." Id. at 1546. Such discretion, however, should not permit the Board to ignore its own rule that:

The hours of an election depend on the circumstances of each case. **The voting period(s) should be adequate to permit all voters, at their option, to cast votes either on employer time or on their own time, without making a special trip to vote...** It is better to err on the side of allowing too much time than too little.

NLRB Casehandling Manual Section 11302.3.

t. Page 5, lines 22-24: Aaron takes exception to the Decision's language, despite conceding that it is "troubling" when only a minority of eligible voters come to the polls, that such fact is "not a basis, in and of itself, of overturning an otherwise valid election." Aaron has never made any such argument. Rather, it is Aaron's contention that only a minority of eligible voters came to the polls because a significant number of voters were disenfranchised by an unfair election schedule that remained unchanged despite multiple requests, and for no conceivable reason.

u. Page 5, lines 24-29: Aaron takes exception to the Decision's dismissal of the testifying employees' inability to vote late at night, several hours after their work shifts ended, because "they were not denied an opportunity to participate in the election and vote." To the contrary, the employees were denied the opportunity to vote during employer time due to the unfair election schedule and would have to have made "special trips" back to work, late at night, in order to do so. The Board's own rule, NLRB Casehandling Manual Section 11302.3, makes clear that employees cannot be forced to do so.

v. Page 5, lines 29-34: Aaron takes exception to the Decision's dismissal of the fact that employees could not vote on working time because they were busy performing their job duties, and the Decision's implication (without citation to authority) that Aaron should have "allowed employees some time off on the day of the election." Such statements in the decision are directly contrary to Yerges Van Liners, Inc., supra., in which an election was set aside where a moving company employee was kept from voting by his having to make a delivery. There is no suggestion in the case that the employer had any obligation to ensure that there would be some working time during which the employee could vote.

Based on all of the foregoing exceptions, Aaron respectfully requests that the Board reverse the Decision and set aside the March 22, 2013 rerun election.

Respectfully submitted,
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Attorneys for the Employer

By: 
Daniel C. Ritson

Dated: June 26, 2013