UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRONX LOBSTER PLACE, LLC
Employer

and Case 02-RC-191753

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 15
Union

DECISION AND ORDER REMANDING

Pursuant to a Stipulated Election Agreement, an election was held on February 24, 2017. The tally of ballots showed 14 votes for the Union and 12 against representation, with one challenged ballot. It is undisputed that at least four eligible voters did not vote. The Employer filed two timely objections, and the Regional Director directed a hearing on them.

In Objection 2, the Employer alleged that the election should be set aside because the Board agent conducting the election opened the polls several minutes after the second voting session was scheduled to commence, resulting in the potential disenfranchisement of a dispositive number of eligible voters. Testimony at the hearing established that the Board agent did in fact open the polls 7 minutes after the second voting session was scheduled to begin. As indicated, there is no dispute that four eligible employees did not vote, and the tally of ballots establishes this was a potentially dispositive number of voters. No testimony was adduced concerning the reasons these individuals did not vote, but two witnesses—the Employer's election observer and its Operations Manager—testified that they were present in the polling place during the 7-minute delay and that during this period no employees were present at the polls waiting to vote. In addition, no evidence was presented that any employees complained that they were prevented from voting due to the delay in opening the polls. Based on this testimony, the Hearing Officer recommended overruling Objection 2, and on October 20, 2017, the Regional Director adopted this recommendation, stating that the record "affirmatively and objectively demonstrates that no voters appeared at the polls during the minutes immediately prior to the actual opening of the polls." As the Regional Director also adopted the Hearing Officer's recommendation to overrule Objection 1, she issued a Certification of Representative.

Thereafter, in accordance with Section 102.69(c)(2) of the National Labor Relations Board's Rules and Regulations, as amended, the Employer filed this request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the reasons stated below, the Employer's Request for Review is granted as it raises a substantial issue warranting review with respect to Objection 2, and on review, we find that the election must be vacated and a second election directed.[1]

Contrary to the Regional Director and our dissenting colleague, we find that the late opening of the polls, combined with the possible disenfranchisement of potentially dispositive voters, warrants setting the election aside. In this regard, the case is squarely controlled by *Pea Ridge Iron Ore Co.*, 335 NLRB 161 (2001). In *Pea Ridge*, the polls opened 7 minutes late, and a determinative number of employees did not cast a ballot. Although the regional director found that the employees either elected not to vote or were unable to do so for reasons unrelated to the delay, the Board ordered a new election, holding that "[w]hen election polls are not opened at their scheduled times, the proper standard for determining whether a new election should be held is whether the number of employees possibly disenfranchised thereby is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised." Id. at 161.

Unlike our dissenting colleague, we find that *Arbors at New Castle*, 347 NLRB 544 (2006), relied on by the Regional Director, is readily distinguishable because in that case the parties stipulated that five eligible employees who did not vote had not appeared at the polls at any time during the scheduled polling hours. There is no such stipulation here. In addition to the stipulation, in *Arbors* the Board also relied on testimony and documentary evidence that established that of the five employees who did not vote, one was on long-term sick leave, one was not scheduled to (and did not) work on the day of the election, one called in sick and did not work that day, and the remaining two clocked in to work after the delayed opening of the polls. See id. at 544. Thus, in addition to the stipulation, there was clear objective evidence explaining why the employees did not vote. There is no comparable evidence here, and the parties' observers' testimony that they did not witness any voters waiting to vote during the 7-minute delay – essentially, an *absence* of evidence to explain why potentially determinative voters did not cast their ballots – is insufficient to distinguish this case from *Pea Ridge*.

Our dissenting colleague's position seems to be premised on the view that setting aside the election requires proof that a determinative number of eligible employees were actually prevented from voting because of the late opening of the polls. But our case law, as explained, rejects such an actual-disenfranchisement standard, in favor of a potential-disenfranchisement test. That test was satisfied here, given at least the possibility that a determinative number of potential voters were disenfranchised.[2]

Accordingly, we vacate the results of the election and remand this case to the Regional Director to conduct a second election.

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[1] Due to our findings regarding Objection 2, we find it unnecessary to pass on Objection 1, or whether the objections set for hearing "reasonably encompassed" additional evidence the Employer introduced at the hearing. The Board's decision to vacate the results of the election renders the Employer's December 18, 2017 Motion to Stay Certification moot.

[2] Member McFerran notes that no party has asked the Board to revisit its precedent in this area, which she would be open to reconsidering in an appropriate case.

LAUREN McFERRAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

Dated, Washington, D.C., February 2, 2018.

MEMBER PEARCE, dissenting:

It is well settled that there is a heavy burden of proof on the party seeking to set aside a Board-supervised election. See *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005). Consistent with this heavy burden, the Board will not set aside an election "based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed." See *Jobbers Meat Packing Co.*, 252 NLRB 41, 41 (1980). Rather, the Board requires that the party seeking to set aside the election demonstrate that a determinative number of employees were potentially disenfranchised by the delay. See *Pea Ridge Iron Ore Co.*, 335 NLRB 161, 161 (2001). Although actual proof of disenfranchisement is not required, the Board will not set aside the election where objective evidence demonstrates that a determinative number of employees could *not* have been disenfranchised by the late opening of the polls. See *Arbors at New Castle*, 347 NLRB 544, 545 (2006).

Here, I agree with the Regional Director's finding that the testimony of the Employer's witnesses affirmatively establishes that employees could not have been disenfranchised by the late opening of the polls.[3] In holding otherwise, my colleagues fail to appreciate the significance of this *objective* evidence and err by finding this case governed by *Pea Ridge*, supra, a case holding that the after-the-fact *subjective testimony of nonvoting employees* as to their reasons for not voting will not be relied on when assessing whether the late opening of the polls potentially disenfranchised a determinative number of voters.

The facts in this case are not in dispute. In a unit of 31 potential voters, the ballot count was 14 for the Petitioner, 12 against representation, and 1 challenged ballot. The hearing officer determined that the Board agent opened the second polling session 7 minutes late. The hearing officer credited the uncontested testimony of the only two witnesses at the hearing -- Employer observer Jose Palacios and Employer Operations Manager Christian Quintana -- that they were continuously present in the polling area throughout this delay, and that no employees appeared at the polls or were observed in its vicinity.[4] The hearing officer further noted that there was no evidence that any employee reported being unable to vote due to the delayed opening of the

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[3] I also agree with the Regional Director that there is no merit to the Employer's objection regarding defaced sample ballots on the Notices of Election and that the Employer's additional allegations regarding the Union's observer are not reasonably encompassed in its objections.

[4] Quintana and Palacios testified that the Petitioner's election observer, Franklyn Perez, was also present from the scheduled start of the afternoon polling session until the Board agent arrived. Perez did not testify.

polls. Citing *Arbors at New Castle*, supra, the hearing officer recommended overruling the objection, finding that "objectively, the instant evidence shows that the late opening of the polls did not prevent any employees from exercising their right to vote."

Affirming the hearing officer's finding that the objection lacked merit, the Regional Director found that as in *Arbors at New Castle*, "the record evidence affirmatively and objectively demonstrates that no voters appeared at the polls during the minutes immediately prior to the actual opening of the polls."

I agree with the Regional Director and hearing officer that this case is analogous to *Arbors at New Castle.* In *Arbors*, the Board declined to set aside the election where the opening of the polls was delayed by 16 minutes because the parties stipulated that the nonvoting employees did not appear at the polls at any time during the scheduled polling hours. See 347 NLRB at 545. Here, the credited and uncontroverted testimony of the objecting Employer's own witnesses and agents, including its Operations Manager, establishes that no employees appeared at the polls or attempted to vote during the delay. This testimony constitutes an admission by the Employer and is equivalent to the employer's stipulation in *Arbors*. See, e.g., *Sierra Academy of Aeronautics*, 182 NLRB 546, 548 (1970) (testimony constitutes binding admission). As in *Arbors*, this objective evidence demonstrates that a determinative number of employees could not have been disenfranchised by the delay, and thus, the election should not be set aside.[5]

Contrary to the majority's contention, this case is not "squarely controlled" by *Pea Ridge*. There, the Board found that the regional director improperly relied on an employee's testimony that he had appeared at the polls but decided not to vote in the election. The Board explained that an objective standard is applied in order to safeguard the integrity of the election process and that an employee's subjective reason for failing to vote will not be considered. See 335 NLRB at 161. Here, by contrast, the Regional Director did not rely on after-the-fact statements from the nonvoting employees. Rather, like the stipulation in *Arbors*, the Regional Director's decision is grounded in the credited and uncontroverted testimony of the Employer's own witnesses and agents who were actually present at the polling site throughout the delay and admitted that no employee appeared or attempted to vote. These admissions are at least as objective and binding as the stipulation in *Arbor*. And they significantly differ from *Pea Ridge* where there was no stipulation or admission that no employees appeared at the polls during the delay or even any evidence as to what happened at the polls during the delay. See, e.g., *Wolverine Dispatch, Inc.*,

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[5] The majority wrongly claims that additional evidence regarding the nonvoting employees is required, such as their work schedules on the day of the election. The majority fails to recognize that the burden of proof is on the Employer. Here, the only evidence introduced by the Employer was its witnesses' testimony that no employees attempted to vote during the delay.

Further, contrary to my colleagues' assertion, my position is not "premised on the view that setting aside the election requires proof that a determinative number of eligible employees were *actually* prevented from voting because of the late opening of the polls." (emphasis added.) As the above discussion demonstrates, I recognize that the Board applies a potential-disenfranchisement standard. Here, the objective evidence simply establishes that a determinative number of voters *could not* have been disenfranchised by the delay because no employees appeared at the polls during the delay.

321 NLRB 796, 796-97 (1996) (setting aside election where no one was present at the polls during its unscheduled closing and a potentially determinative number of employees did not vote).

In sum, I agree with the Regional Director that the instant case is governed by *Arbors at New Castle*, and I would deny the Employer's request for review.

Accordingly, I dissent.

MARK GASTON PEARCE, MEMBER