

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 27

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MHN GOVERNMENT SERVICES LLC,	:
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Employer,	:
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- and -	:
	Case No. 27-RC-237341
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INTERNATIONAL ASSOCIATION OF	:
MACHINISTS AND AEROSPACE WORKERS	:
AFL-CIO,	:
	:
Petitioner.	:
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EMPLOYER'S REQUEST FOR REVIEW OF THE  
REGIONAL DIRECTOR'S DECISION ON DETERMINATIVE  
CHALLENGED BALLOT AND OBJECTIONS AND  
CERTIFICATION OF REPRESENTATIVE

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**PRELIMINARY STATEMENT**

Pursuant to Section 102.69(c)(2) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or the “Board”), MHN Government Services LLC (“MHNGS” or the “Employer”) submits this Request for Review of the Regional Director’s “Decision on Determinative Challenged Ballot and Objections and Certification of Representative,” dated August 1, 2019.

As demonstrated below, compelling reasons exist in this case for the Board to grant review of the Regional Director’s Decision to overrule Objection No. 2, based on the late opening of the polls at the April 5, 2019 election, and the possible disenfranchisement of eligible

voters sufficient in number to have affected the outcome of that election, which was decided by just a single vote.

Substantial questions of law or policy are raised by the Employer's Request for Review because of the absence of and/or departure from precedent defining the "objective evidence" that the Board will rely on to resolve issues of possible disenfranchisement when the polls open after the time specified in the official Notice of Election.

In addition, the Regional Director's decision on a substantial factual issue -- *i.e.*, the absence of possible disenfranchisement of eligible voters -- is clearly erroneous and prejudicially affects not only the rights of the Employer, but also the Section 7 rights of the petitioned-for employees.

Finally, the Hearing Officer's ruling, over the Employer's objection, which allowed two of the three potentially disenfranchised voters to give after-the-fact subjective testimony regarding their reasons for not casting ballots in the April 5 election, was contrary to established Board law and resulted in prejudicial error.

## PROCEDURAL HISTORY

The petition herein was filed by International Association of Machinists and Aerospace Workers (“IAM” or the “Union”) on March 7, 2019, seeking a bargaining unit comprised of full-time and regular part-time “Special Professional Associates” (“SPAs,” a/k/a “Military and Family Life Counselors”) on assignment with MHNGS at the U.S. Air Force Academy and Fort Carson.

Pursuant to a Stipulated Election Agreement approved by the Regional Director on March 19, an election was conducted in Colorado Springs, CO on April 5. There were 12 eligible voters in the election, only nine of whom cast ballots. Five votes were cast for representation by IAM and four against.<sup>1</sup>

On April 12, MHNGS filed objections to conduct of the April 5 election based on (i) the inadequacy of the signage identifying the voting place and related issues with the Notice of Election; and (ii) the undisputed late opening of the polls at the morning session. (Review is sought solely with respect to the Employer’s late-opening objection.)

On April 22, the Regional Director issued a notice of hearing on the objections (and four determinative challenged ballots), finding that the evidence described in the Employer’s Offer of Proof in support of the objections “could be grounds for overturning the election if introduced at a hearing.” (Board Exh. 1)

A hearing was conducted before Hearing Officer Carmen Leon, a member of the legal staff of NLRB Region 20, on April 30 and May 1.<sup>2</sup> The Hearing Officer issued her Report on

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<sup>1</sup> An additional nine ballots were cast by individuals whose names were not on the voter list. None of those ballots is currently in dispute; IAM stipulated that five were ineligible and the other four were found to be ineligible by the Hearing Officer and Regional Director.

<sup>2</sup> Because the objections involved the conduct of the April 5 election by representatives of Region 27, the case was transferred to NLRB Region 20 for purposes of holding a hearing and issuing a report.

Challenged Ballots and Objections on June 12 (the “Report,” or “H.O. Rep.”), finding that there was no disenfranchisement of eligible voters as a result of the late opening of the polls.<sup>3</sup> Accordingly, she recommended that the objection be overruled and that a Certification of Representative be issued to IAM by the Regional Director.

On July 3, exceptions to the Hearing Officer’s Report, with a supporting brief, were filed with the Regional Director of NLRB Region 20. On August 1, the Regional Director issued her Decision overruling the Employer’s objections and certifying IAM as the exclusive representative of the petitioned-for employees (the “Decision,” or “R.D. Dec.”). As previously noted, this Request for Review is limited to the factual findings and legal conclusions that were the basis for the Regional Director’s Decision to (i) overrule Objection No. 2 based on the late opening of the polls, and (ii) certify Petitioner as exclusive representative of the unit employees, and related rulings by the Hearing Officer.

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<sup>3</sup> The Hearing Officer also overruled the Employer’s other objection based on the inadequacy of the “Voting Place” signage and defects in the Notice of Election.

## ARGUMENT

### The Board Should Grant Review of the Regional Director's Decision Overruling the Employer's Late-Opening Objection Because of Her Misapplication of the Law and Erroneous Conclusion That No Eligible Voters Were Potentially Disenfranchised by the Delay

The evidence is uncontroverted that the polls did not open until 10:32 AM on April 5, two minutes after the scheduled start of the first voting period. (H.O. Rep. at 9, 15 n.36) There is no dispute here about the late opening, only whether there may have been possible disenfranchisement of eligible voters warranting a second election. As we demonstrate below, there plainly was.

The applicable legal standard is straightforward: “When polls are not opened at their scheduled times, the Board will set the election aside if ‘the number of employees possibly disenfranchised thereby is sufficient to effect [sic] the election,’ whether or not those voters or any voters at all were actually disenfranchised.” (H.O. Rep. at 14 (quoting *Pea Ridge Iron Ore Co.*, 335 NLRB 161, 161 (2001))) Both the Hearing Officer and Regional Director recognized this and, in addition that, “the Board has consistently adhered to an *objective standard* that does not rely on after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election.” (*Id.* (emphasis added) (quoting *Pea Ridge Iron Ore Co.*, 335 NLRB 161, 161 (2001)); R.D. Dec. at 3)

However, both the Hearing Officer and Regional Director erred in the application of these principles. The Regional Director concluded that there was no possible disenfranchisement in the April 5 election, based solely on testimony of the nonvoters to the effect that they “were off-site during the election.” (R.D. Dec. at 3)<sup>4</sup> Contrary to the Regional Director’s Decision,

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<sup>4</sup> Similarly, the Hearing Officer found that the nonvoters “were absent from the polling place at the time the polls were opened late . . . .” (H.O. Rep. at 15)

which adopted the Hearing Officer's Report on this issue, that evidence falls short of the "objective standard" required by *Pea Ridge* and later cases including *Bronx Lobster Place, LLC*, Case No. 02-RC-191753, 2018 WL 721396 (NLRB Feb. 2, 2018), decided just last year.

While the Hearing Officer's Report states that "[a] review of the objective evidence establishes that none of the three nonvoting employees were physically present at the polling site" (H.O. Rep. at 15), nowhere does it identify any such "objective evidence." Neither does the Regional Director's Decision "agree[ing] with the hearing officer that all of the Employer's objections should be overruled." (R.D. Dec. at 2)

In fact, no "objective evidence" was introduced by Petitioner at the hearing, with the possible exception of the boarding pass and other airline documents that were produced during the Employer's cross-examination of Josh Aevum, one of the three eligible voters who failed to cast a ballot in the election. In the absence of such evidence, the Regional Director's conclusion "that the late opening of the polls in this case could not possibly have prevented the three determinative nonvoters from voting," cannot be allowed to stand. (R.D. Dec. at 3) The Board should grant review and reverse at least with respect to the Regional Director's findings and conclusions regarding possible disenfranchisement of Taylor Ferguson and Hillary Goulding, the two other nonvoters.<sup>5</sup>

The Hearing Officer mistakenly relied on *Arbors at New Castle*, 347 NLRB 544 (2006). The Regional Director also misinterpreted that case. Contrary to the Hearing Officer's Report, "this case is **[not]** akin to *Arbors* . . . ." (H.O. Rep. at 15) Indeed, it is not even close, and

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<sup>5</sup> In her Report, the Hearing Officer states that she did "not rely on Ferguson's statement that she 'was not planning to vote' or Goulding's statement that she 'did not wish to participate in the vote'" in reaching her conclusion that there was no disenfranchisement as a result of the late opening. (H.O. Rep. at 15) But, as noted above, the Report is silent regarding the "objective evidence" supporting that conclusion.

reliance on the Board's decision in that case is plainly misplaced. Moreover, the Hearing Officer applied the wrong standard when, in making her faulty comparison of the instant case to *Arbors*, she stated that there was "credible testimony" that the three nonvoters in the April 5 election "were not present at the polling site." (H.O. Rep. at 15) The Regional Director's Decision repeats those same errors. (R.D. Dec. at 4-5) The standard is not "credible testimony;" rather, the case law requires a showing by "objective evidence," and no such showing has been made here.

The facts in *Arbors* are readily distinguishable. As the Hearing Officer and Regional Director both acknowledged, in *Arbors* the parties entered into a binding stipulation that *none* of the five eligible voters who failed to cast a ballot appeared at the polls at any time during the scheduled hours of the election. (H.O. Rep. at 14 (citing *Arbors at New Castle*, 347 NLRB 544, 544 (2006)); R.D. Dec. at 4 (citing *Arbors at New Castle*, 347 NLRB 544, 544 (2006))) Here, as in *Bronx Lobster*, there is no such stipulation, except possibly as to Mr. Aevum. Nor is there the combination of documentary evidence and testimony from employer witnesses that was present in *Arbors* -- but absent in *Bronx Lobster* -- confirming that of the five nonvoters in *Arbors*, (i) one was on long-term sick leave at the time of the election; (ii) one was not scheduled to work on the election date and did not do so; (iii) one called in sick; and, (iv) two clocked-in after the delayed opening of the polls. *Arbors at New Castle*, 347 NLRB 544, 544 (2006). Thus, as the Board observed years later in *Bronx Lobster*, "in addition to the stipulation, there was clear objective evidence [in *Arbors*] explaining why the employees did not vote." 2018 WL 721396, at \*2 (NLRB Feb. 2, 2018).<sup>6</sup>

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<sup>6</sup> *Colgate Scaffolding and Equipment Corp.*, 354 NLRB 544 (2009), also relied on by the Hearing Officer and Regional Director, is equally distinguishable. In that case, where there was a 22-minute delayed opening of the polls, all but one of the eligible voters cast ballots in the election. The record established that at the time of the election the one nonvoter had been in Mexico on a long term basis as demonstrated by, among other things,

The evidence here is quite unlike what was before the Board in *Arbors*. Of the testimony offered by the three nonvoters in this case, only Josh Aevum's could reasonably be described as "objective evidence" of his reasons for not voting in the election. Mr. Aevum had been abroad and, with the aid of airline records accessed on his smartphone, he testified that he was out of the country for most of the day on which the election was held, having departed Paris at 4:20 PM on April 5 on a ten-hour flight that landed in Denver at 6:15 PM local time, more than an hour after the polls had closed. (Tr. 152; H.O. Rep. at 10) Arguably, Aevum's testimony, and the records on which it was based, objectively established that the late opening of the polls had no impact on his voting in the election. Indeed, one can go so far as to say that he could not physically have voted.

Plainly, the same cannot be said of Taylor Ferguson and Hilary Goulding, the two other nonvoters. Unlike Aevum, their testimony does not establish that they could not have cast ballots in the election. Ms. Ferguson testified without corroboration, documentary or otherwise, that she did not go to the polling place at any time on April 5; that she did not try to vote; and, that she was "not planning to vote." (Tr. 138-40; H.O. Rep. at 10, 15) Ms. Goulding testified, also without corroboration, that she was at work on April 5 and then went home, where she said she remained until after the polls closed. She did not cast a ballot, explaining that she "did not wish to participate in the vote." (Tr. 222; H.O. Rep. at 10, 15; R.D. Dec. at 3, n.3)

The testimony of those two nonvoters cannot fairly be described as the kind of *objective evidence* that the Board has held would be admissible to demonstrate that the delayed start of an election did not result in voter disenfranchisement, as in *Arbors*. Rather, it is *subjective* in

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objective testimony from other individuals that the missing voter was out of the country, *corroborated by employer payroll records and other documents*. Those facts are quite different from what we have here, with the possible exception of Mr. Aevum, as noted above. There is no documentary evidence corroborating the testimony of either Ms. Ferguson or Ms. Goulding.

nature, and should not have been allowed by the Hearing Officer.<sup>7</sup> As it is not possible to parse Ferguson's and Goulding's *after-the-fact subjective testimony* regarding their reasons for not voting from the testimony concerning their whereabouts on the day of the election, it was error for the Hearing Officer to allow any of it into the record over the Employer's objection.

Contrary to the Hearing Officer's Report and the Regional Director's Decision, *Bronx Lobster* and *Pea Ridge* are controlling here. In *Bronx Lobster*, there was a seven minute delay in opening the polls in an election where 14 votes were cast for the union and 12 against representation. At least four eligible voters did not cast ballots, a potentially dispositive number of votes. There were no complaints that any employees had been prevented from voting because of the delay, and the employer's election observer and operations manager testified that no employees were at the poll waiting to vote during the short delay. *Bronx Lobster*, 2018 WL 721396, at \*1 (NLRB Feb. 2, 2018). Notwithstanding that uncontroverted testimony demonstrating the absence of any causal connection between the delayed opening and the failure of the four voters to cast ballots in the election, the Board held that the case was controlled by *Pea Ridge*, where a second election had been directed on similar facts. *Id.* Based on its prior holding in *Pea Ridge*, the Board sustained the objection in *Bronx Lobster* and directed a second election, distinguishing *Arbors* on its facts. *Id.* at \*1-2.

The similarities between the *Pea Ridge/Bronx Lobster* facts and the record here, as well as the significant distinctions between this case and *Arbors*, are readily apparent from the face of the Hearing Officer's Report and the Regional Director's Decision. No serious attempt is made in either to reasonably distinguish *Pea Ridge* and *Bronx Lobster*, or to explain why they are

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<sup>7</sup> Indeed, these are precisely the type of "subjective . . . personal reasons" for not voting that the Board has long refused to consider in determining whether an election should be set aside based on late opening of the polls. *G.H.R. Foundry Div., Dayton Malleable Iron Co.*, 123 NLRB 1707, 1709 (1959).

deemed inapposite in this case. For that matter, neither the Hearing Officer nor the Regional Director justify the controlling effect given to *Arbors*. No meaningful difference exists between the employee's statement in *Pea Ridge* that he "decided not to vote," and the testimony here by Ferguson and Goulding. Their testimony was insufficient to eliminate the possibility of disenfranchisement.

It is unfortunate that the Board has failed to clearly indicate, in any of its decisions in late-opening objections cases, where the line is drawn between *objective* and *subjective* evidence regarding the reasons why an eligible voter did not cast a ballot. Even the Regional Director seems to make that observation in the Decision where she states that *Pea Ridge*, the lead case on the issue, is only "*somewhat instructive, as it gives [merely] a glimpse of the Board's view of objective versus subjective evidence, which informed subsequent decisions . . .*" (R.D. Dec. at 3; emphasis added) The fact is that there is little useful guidance to be found in any of the relevant cases as to what evidence is objective and admissible concerning a nonvoter's whereabouts on the date of an election, and what is inadmissible subjective after-the-fact voter testimony.

We submit that the Board should grant review in this case, provide the necessary guidance on "objective" vs. "subjective" evidence, and find that the testimony on May 1 by Ms. Goulding and Ms. Ferguson, relied on by both the Hearing Officer and Regional Director, was inadmissible to show that they could not have been disenfranchised by the Board agent's failure to open the polls on time at 10:30 AM on April 5.

In sum, at least two voters -- Ms. Ferguson and Ms. Goulding -- were possibly disenfranchised by the delayed opening of the polls on April 5. Because the election was decided by just a single ballot, those two votes could have been determinative of the outcome.

Accordingly, Objection No. 2 should have been sustained. As the Board stated in *Nyack Hospital*, 238 NLRB 257, 259 (1978), “where there is some irregularity in the conduct of an election which ‘irregularity exposes to question a sufficient number of ballots to affect the outcome of the election,’ there is no alternative but to set the election aside and direct a new election in the interest of maintaining the Board’s strict standards for the conduct of elections.” The Board should be guided by that observation here, especially considering that the election was decided by a single vote. As noted in *Hopkins Nursing Care Center*, “[t]he Board gives great weight to the closeness of the election in deciding whether conduct is objectionable.” 309 NLRB 958, 959 n.8 (1992) (citations omitted); *see also Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995).

**CONCLUSION**

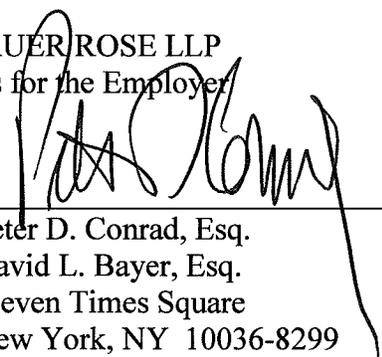
For all the foregoing reasons, the Board should grant Respondent's Request for Review; reverse the Regional Director's August 1, 2019 Decision overruling Objection No. 2; revoke the Certification of Representative issued to IAM; and, direct that a second election be held to fairly determine the "question concerning representation" in this case.

Dated: August 15, 2019  
New York, New York

Respectfully submitted,

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**Date of Electronic Mailing:** August 15, 2019

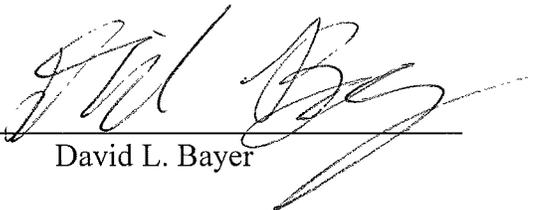
**CERTIFICATION OF SERVICE OF:** Employer's Request for Review of the Regional Director's Decision on Determinative Challenged Ballot and Objections and Certification of Representative

I hereby certify that on the 15th day of August 2019, I caused the above-entitled document to be served by electronic mail upon the following parties:

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