

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**McLaren Macomb,**

**Employer,**

**and**

**Case 07-RC-243228**

**Office and Professional Employees  
International Union, AFL-CIO, Local 40,**

**Petitioner.**

\_\_\_\_\_ /

**REQUEST FOR REVIEW**  
**OF**  
**DECISION AND CERTIFICATION OF REPRESENTATIVE**

**Table of Contents**

**I. Background ..... 1**

**II. Issues for Review ..... 4**

**A. The Circumstances Surrounding the Employer’s Challenged Ballots Mandate a New Election..... 5**

**B. The Evidence Establishes that the Ambiguity in the Official Notice of Election Mandates a New Election. .... 15**

**C. Improper promise of benefits by Petitioner mandates a new election. .... 18**

**D. Incorrect recording of Voters was another irregularity mandating a new election. .... 20**

**E. The Failure to Allow Inspection of Spoiled Ballots..... 21**

**F. Improper Electioneering by Petitioner’s Agent. .... 22**

**G. The presence of a recording devise in the voting area should be considered a per se violation..... 24**

**H. The cumulative effect of the conduct in the instant election warrant setting aside the election. .... 27**

**III. Conclusion ..... 28**

**REQUEST FOR REVIEW**  
**OF**  
**DECISION AND CERTIFICATION OF REPRESENTATIVE**

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, the Employer, McLaren Macomb, by and through its counsel, files the following Request for Review of the Regional Director's Decision and Certification of Representative which issued in the above-captioned matter on December 9, 2019. This request is based on the following compelling grounds for review: (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; and (2) there are compelling reasons for reconsideration of the Board's rule or policies regarding the future impact of prior decisions in representation cases.

**I. Background**

The Employer is an acute care hospital located in Mount Clemens, Michigan. Prior to the instant petition, the Employer already had several bargaining units of represented employees. For example, AFSCME Council 25 and its affiliated Local 2569, AFL-CIO, represents a prior non-conforming<sup>1</sup> bargaining unit comprised of approximately 328 of the Employer's full and regular part-time non-professional employees and around 13 skilled maintenance employees (for a total bargaining unit of approximately 341 employees). (E4<sup>2</sup> & E5). In addition to that prior non-conforming unit, the Employer also has a bargaining unit of guards represented by the Michigan Association of Police (E6 & E7) and a bargaining unit of registered nurses represented by the Petitioner (E8).

---

<sup>1</sup> The Employer's non-conforming AFSCME unit pre-dates the Board's Health Care Rule (i.e. 29 CFR 103.30).

<sup>2</sup> Parenthetical numbers preceded by the letter "T" refers to the transcript of the proceeding before Hearing Officer Zachary Armstrong at the National Labor Relations Board Region 07 offices located at 477 Michigan Avenue, Room 05-200, in Detroit Michigan beginning on September 25, 2019, 2019 at approximately 9:30 a.m. Parenthetical numbers preceded by the letters "Jt." Refers to the parties joint exhibits, "E" refers to the exhibits of the Employer, and "P" to exhibits of the Petitioner. Due to the record, number of exhibits, and limited time frame allowed for the submission of briefs, any failure to cite to a specific page in the transcript should be considered a reference to the record as a whole. Likewise, while references to the record are meant to assist the reader in locating evidence to support an assertion contained in the brief, those references should not be construed as reference to the only places in the record where evidence supporting any assertion can be found.

On or about June 12, 2019, the Petitioner submitted the instant petition. While not initially clear, it later confirmed that the Petitioner sought to represent a residual unit of the Employer's full-time and regular part-time non-professional employees. The Employer objected to the proposed unit on the grounds that it was not compliant with the Board's Health Care Rule. In particular, the Employer made the following objections to the proposed unit:

- (1) The Employer contended that, due to the existing AFSCME unit containing a major of the Employer's non-professional employees, only Michigan District No. 25 and its affiliated Local No. 2569, American Federation of State, County, and Municipal Employees Union, AFL-CIO was appropriate to represent the Employer's residual non-professional staff; and
- (2) Even if appropriate for representation by the Petitioner, the proposed bargaining unit does not comport with the Board's Health Care Rule (29 CFR 103.30(a)), setting forth the only appropriate bargaining units for acute care hospitals in that it seeks to include technical staff with nonprofessional staff and does not include all nonprofessional staff.

In the case of the later objection, the Employer asserted that several of the positions included in the proposed residual non-professional unit must be *excluded* as technical employees. The Employer also asserted that any residual unit of all non-professional staff outside the AFSCME unit must *include* the several classifications not included in the proposed residual unit.

After a nine-day hearing and the submission of briefs, the Regional Director for Region Seven issued the Decision and Direction of Election in this matter on August 8, 2019, which directed an election be held on August 28, 2019, for a bargaining unit determined to represent the Employer's residual non-professional staff. However, in doing so, the Decision and Direction of Election wholly dismissed AFSCME from any participation in the election, even failing to offer that union the opportunity to be included on the ballot without being required to demonstrate a showing of interest despite its undisputed status as the incumbent representative of the Employer's represented nonprofessional staff.

The Employer filed a Request for Review of the Decision and Direction of Election issued by Region Seven during the early morning hours of August 23, 2019, and, in doing so, requested the Board stay the election. No response from the Board has yet been received.<sup>3</sup>

On Wednesday August 28, 2018, an election was conducted by the National Labor Relations Board, Region Seven, in one of the classrooms located on the premises of the Employer's Hospital located at 1000 Harrington St, in Mt Clemens, Michigan. The election was conducted pursuant to a Decision and Direction of Election, which issued on or about August 8, 2019, and overseen by Region Seven of the National Labor Relations Board.

The election resulted in three hundred seventeen (317) ballots being cast (one hundred seventy-two (172) in support of the Petitioner, one hundred thirteen (113) cast against the Petitioner, and thirty-two (32) remaining challenged ballots). Approximately thirty-four (34) individuals did not vote out of the three hundred and fifty-one (351) individuals eligible to vote.

The Employer timely filed thirteen (13) objections to the election. These included allegations related to the conduct of the Petitioner and issues related to how the election was conducted, including objections related to the Region's opening of challenged ballots during the vote tally and the Official Notice of Election. Review of the Employer's objections was assigned to Region 16.

After close of business on August 13, 2019, the Regional Director for Region 16 issued the Decision on Objections 1 and 4 and Order Directing Hearing and Notice of Hearing on Objections 2, 3, and 5 through 13. The Employer filed a Request for Review of this decision on or about September 24, 2019. No response from the Board to this second Request for Review has yet occurred.<sup>4</sup>

---

<sup>3</sup> To the extent already before the Board, the Employer hereby incorporates the assertions contained in its August 23, 2019, Request for Review of the Decision and Direction of Election by reference.

<sup>4</sup> The Employer hereby incorporates the assertions contained in its September 24, 2019, Request for Review of the Decision on Objections 1 and 4 by reference.

A hearing over the Employer's remaining objections occurred before Hearing Officer Zachary Armstrong at the National Labor Relations Board Region Seven offices located at 477 Michigan Avenue, Room 05-200, in Detroit, Michigan, beginning on September 25, 2019, at approximately 9:30 a.m. Following that proceeding, the Hearing Officer's Report on Objections issued on October 8, 2019. The Employer filed Exceptions to that Report on October 28, 2019, and the Regional Director for Region 16 issued a Decision and Certification of Representative adopting those recommendations on December 9, 2019, which certified the Petitioner as the representative of the unit involved. An extension of time to file requests for review of that decision was granted, which extended the deadline to file requests for review until January 6, 2020. This Request for Review is submitted in accordance with that mandate.

## **II. Issues for Review**

As the Board confirmed in *New York Telephone Co.*, 109 NLRB 788, 790-91 (1954):

The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where . . . the irregularity concerns an essential condition of an election, and such irregularity exposes to question a sufficient number of ballots to affect the outcome of the election, in the interest of maintaining our standards there appears no alternative but to set this election aside and to direct a new election.

*See also Sonoma Health Care Center*, 342 NLRB 933 (2004) and *Polymers Inc.*, 174 NLRB 282 (1969).

However, in this instance, the Regional Director's Decision and Certification of representative ignores Region Seven's total disregard for the Board's election standards, as well as conduct long found to have an impact on employee choice. Any one of these issues likely require a new election in this instance, however, when taken as a whole there should be no doubt that another election must be held in this instance. Indeed, this is especially true considering the issues already submitted to the Board in the

Employer's first two requests for review. As such, it now incumbent upon the Board to grant the Employer's Request for Review and, at a minimum<sup>5</sup>, order a new election in this instance.

**A. The Circumstances Surrounding the Employer's Challenged Ballots Mandate a New Election.**

Under the Board's established rules and procedures, each party is entitled to make challenges for cause and those challenges are to be impounded until the challenges can be resolved. *See* 29 CFR §§102.69(a) and (c). There is no procedure or authority allowing a Board agent (or Regional Director) to unilaterally open a challenged ballot during the tally of ballots, especially over the objection of the party making objections. Rather, under the Board's established procedures, challenged ballots are to be reviewed via the same post-election procedures utilized for objections and not opened until such time as determined appropriate by a written decision of a region and/or following the request for review of such a decision. *See, e.g.*, Casehandling Manual § 11364.9. However, despite these established procedures, the Regional Director's Decision would overrule the Employer's objections despite the undisputed fact that these procedures were wholly ignored in the instant election. As such, it is now incumbent upon the Board to grant review of this matter, recognize the impact the treatment of the Employer's challenged ballots had on the instant election, and order that a new election occur.<sup>6</sup>

Specifically, in the case at hand, the undisputed evidence confirms that the Employer challenged the votes of certain voters during the morning voting period and that, following the initial objections of the Petitioner, the Region informed the Employer that it would open those challenged ballots and would not allow the Employer's observer to make similar challenges going forward. It is also not disputed that

---

<sup>5</sup> In accordance with its initial Request for Review filed on or about August 23, 2019, the Employer continues to assert that the Board should dismiss the instant petition as inconsistent with its Health Care Rule. However, to the extent that request is not found to be appropriate, the Employer alternatively requests that a new election be ordered for the reasons set forth in this Request for Review and the Employer's September 24, 2019, Request for Review.

<sup>6</sup> To the extent the Board orders a new election in this matter, the Employer requests that such an order include an order requiring the Region to impound the Employer's challenged ballots to ensure there is no repeat of the instant conduct.

the Employer objected to this news (See, e.g., Jt.-8<sup>7</sup>) or that, following the Employer's objection and request to appeal that decision, the Employer was allowed to continue to challenge voter's eligibility based on their status as technical employees and its asserted changed circumstances, resulting in seventy (70) challenged ballots. Unfortunately, it is also not disputed that the Board agent<sup>8</sup> later failed to impound these seventy (70) challenged ballots either. In this regard, the undisputed evidence confirms that, after the close of the voting periods and during the vote count, the Board agent opened the Employer's challenged ballots over the Employer's vehement objections, co-mingled them with the unchallenged ballots, and included them in the tally of ballots. However, despite these undisputed facts, the fact that they were wholly inconsistent with the Board's procedures, and the complete lack of authority for the Region's actions, the Regional Director's Decision and Certification of Representative essentially overrules the Employer's objections to the treatment of its challenge ballots based upon the assumption that the Employer's challenges were improper to begin with. In doing so, the Regional Director essentially states that the Employer should not have been allowed to make the challenges in the first place (despite its prior Request for Review (filed August 23, 2019) regarding the disputed technical classifications and the fact that it asserted changed circumstances justified the challenges). Thus, according to the Regional Director, the Region's actions were nothing more than the correction of an "earlier error of allowing Technical Group voters to be challenged" in the first place. RDD 5-9.

---

<sup>7</sup> Parenthetical numbers preceded by the letter "T" refers to the transcript of the proceeding before Hearing Officer Zachary Armstrong at the National Labor Relations Board Region Seven offices located at 477 Michigan Avenue, Room 05-200, in Detroit, Michigan, beginning on September 25, 2019, at approximately 9:30 a.m. Parenthetical numbers preceded by the letters "Jt." Refers to the parties joint exhibits, "E" refers to the exhibits of the Employer, and "P" to exhibits of the Petitioner. Parenthetical numbers preceded by "RDD" refer to the Regional Director's Decision and Certification of Representative that issued on December 9, 2019.

Due to the record, number of exhibits, and limited time frame allowed for the submission of briefs, any failure to cite to a specific page in the transcript should be considered a reference to the record as a whole. Likewise, while references to the record are meant to assist the reader in locating evidence to support an assertion contained in the brief, those references should not be construed as reference to the only places in the record where evidence supporting any assertion can be found.

<sup>8</sup> Based upon the representation of the Board agent, this action was based upon the instruction of the Regional Director for Region Seven.

However, the Regional Director's analysis of the circumstances surrounding the Employer's Challenged Ballots puts the cart before the horse so to speak. In doing so, the Regional Director incorrectly focuses on the validity of the Employer's challenged ballots as opposed to the impact of the undeniable procedural irregularity that occurred in this instance. Indeed, the Regional Director even goes so far as to hold that "[t]he Employer has not demonstrated that circumstances relating the to the Technical Group changed after the Decision and Direction of Election" as if the Employer's challenges had not already been improperly opened. However, this analysis is now moot and wholly improper in the case at hand. Rather, the time for resolving challenged ballots would only been included in these proceedings if the ballots had not already been opened and included in the vote tally. As such, it is improper for the Regional Director to consider the Employer's challenges as if the Employer had been given the requisite opportunity to defend its asserted challenged ballots now.

Rather, the only question at issue in this proceeding should have been whether the inconsistent instructions given regarding the Employer's ability to make challenges and/or the Board agent's later opening and co-mingling of the Employer's challenged ballots requires a new election due to the undisputable deviation from the Board's rules regarding the handling of challenged ballots and the reasonable doubt it created as to the fairness and validity of the election. While a fellow Regional Director may not understand the doubt created by such an action, this Board must recognize the perception created when a Region wholly ignores its established challenged ballot procedures in this regard. In doing so, the Board must set aside the instant election and order that a new election be held.

The Board has confirmed that it will set aside an election based on Board agent misconduct and/or Regional office procedural irregularities, where the objecting party demonstrates evidence that "raises a reasonable doubt as to the fairness and validity of the election." *Durham School Services, LP*, 360 NLRB No. 108, slip op. at 4 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enf. 414

F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970); see also *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42, slip op. at 1 (2012), enfd. 477 Fed. Appx 743 (D.C. Cir. 2012). In doing so, “the Board does not require proof that irregularities in the handling of ballots necessarily affected the election results before an election will be set aside.” *Fresenius USA Mfg.*, 352 NLRB 679, 680 n. 6 (2008). This includes ensuring both parties are ensured the opportunity to monitor the conduct of the election, ballot count, and *determinative challenge procedure*.” *Id.* At 680 (emphasis added). Indeed, “the Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election.” *Jakel, Inc.*, 293 NLRB 615, 616 (1989) (citing *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)). Accordingly, “the Board will set aside an election . . . if the irregularity is sufficient to raise ‘a reasonable doubt as to the fairness and validity of the election.’” *Fresenius USA Mfg.*, *supra* at 680 (quoting *Polymers*, 174 NLRB at 282).

In this instance, although the Regional Director’s Decision portrays Region Seven’s actions regarding the Employer’s challenged ballots as the harmless correction of a prior error, there can be no dispute that significant procedural irregularities occurred with regard to the circumstances surrounding the Employer’s challenged ballots. Undisputed evidence confirms that the Employer’s challenged ballots were not impounded and/or addressed via the Board’s post-tally procedures for resolving challenged ballots. To make matters worse, this occurred despite the fact that the Employer was instructed that it would be allowed to continue to make challenges and assured that the Board’s process for challenged ballots would be followed after the Region reversed its initial indication that these challenges would not be allowed. Instead, the Region granted the Petitioner’s request to open the challenged ballots without providing the Employer the opportunity to provide evidence and/or an explanation and authority to explain why its challenges were appropriate. Indeed, this occurred during a circus like presentation at

the vote tally to the cheers of the large group of the Petitioner's supporters. Nevertheless, despite these facts, neither the Hearing Officer nor Regional Director's analysis considered whether the Region's actions created reasonable doubt as to the fairness and validity of the instant election. As such, the Board's efforts to ensure that its elections are not subject to question were wholly ignored in this instance and it is up to the Board to address them now.

In doing so, it cannot be lost that the Hearing Officer and Regional Director's reliance upon Section 11338.7 of the Board's Casehandling Manual and *Anheuser-Busch, LLC*, 365 NLRB No. 70 (2017) was wholly misplaced. Indeed, neither the Board's Casehandling Manual nor the Board's decision in *Anheuser-Busch, LLC* provide authority for the opening of challenged ballots during the tally of ballots, as occurred in this instance. Rather, any review of the relevant sections of the Casehandling Manual actually confirms that the Board agent failed to follow the procedures for handling challenged ballots in this instance and the Board's Rules actually expressly required that "[t]he ballots of challenged persons shall be impounded." See § 102.69(a). At a minimum, those challenged ballots should not have been opened until the Board's procedures for considering challenged ballots could be considered. Accordingly, there should be no dispute that the Board agent's failure to impound the Employer's seventy (70) challenged ballots was a clear violation of the Board's rules, as well as the procedures established for resolving challenged ballots.

There simply is no authority for the assertion that a Board agent can unilaterally clear a challenged ballot as occurred in this instance. In fact, even the portion of the Casehandling Manual related to "Clearing Challenges" does not provide for the Region or Board agent to make determinations on challenged ballots during the vote count. Rather, Section 11340.3 of the Board's Casehandling Manual only allows challenged ballots to be resolved during a vote count by consent of the parties or withdrawal. As such, the provisions of the Casehandling Manual provide far greater support for the

assertion that the Region's opening and co-mingling of the Employer's challenged ballots was objectionable than it provides authority to support the assertions of the Hearing Officer that the Board agent could somehow unilaterally rule upon the Employer's challenges during the vote count in this instance.

Similarly, in *Anheuser-Busch, LLC*, supra, the Board never held that challenged ballots could be opened during the vote tally or after they were challenged, placed in envelopes and placed in the ballot box. Indeed, that decision never addressed the undisputed requirement that challenged ballots be impounded contained in the Board's rules. Rather, *Anheuser-Busch, LLC* merely confirmed that it was not objectionable for a Board agent to refuse to permit a challenge under the circumstances involved in that instance. *Id.* In fact, the circumstances present in *Anheuser-Busch, LLC* are not at all present in the case at hand. Here, the Region never intervened in the Employer's efforts to challenge voters, a fact confirmed by the Hearing Officer ("The Board agent did not preclude the Employer's observers, during any voting period, from challenging any voter, for any reason." (Report at 6)). As such, any decision confirming the ability of a Board agent to limit a party from making challenges is simply not relevant to the Employer's objection to the opening and co-mingling of its challenged ballots in this instance.<sup>9</sup>

In this regard, the Hearing Officer and Regional Director's analysis regarding the Employer's objections related to its challenged ballots wholly misses the mark with regard to the issue raised in the

---

<sup>9</sup> Similarly, any attempted reliance on *Europa Auto Imports*, 357 NLRB 650 (2011) is also misplaced. While the Petitioner and Regional Director for Region Seven appear to have relied upon that decision to support the opening of the Employer's challenged ballots in this instance, any attempt to do so is not supported by any reading of that decision. Rather, in *Europa Auto Imports*, the Employer never alleged any changed circumstances to the attention of the Region and, in fact, failed to even raise the issue until its post-election objections. *Id.* That decision did not even involve challenged ballots made prior to ballots being cast, much less challenges made under the assertion of changed circumstances as occurred in this instance. Rather, in *Europa Auto Imports*, the Board held that the employer could not raise an eligibility issue under the guise of a post-election objection, which did not occur in this instance. *Id.* at 651.

Moreover, it should not be lost that the employer in *Europa Auto Imports* was given the opportunity to present evidence at a hearing concerning "possible changed circumstances" in the Regional Director's supplemental decision ordering a hearing on the challenged ballots. *Id.* at 650. Needless to say, no such opportunity was afforded to the Employer in this instance. Rather, in this instance, the Region disposed of the Employer's challenged ballots without an opportunity to present evidence and despite the undisputed allegation of changed circumstances. Indeed, this occurred despite the Casehandling Manual's dictate that such an opportunity to be provided. *See, e.g.* § 11364.1.

Employer's objections. The question in the case at hand is not whether the Region arguably could have stopped the Employer from making its challenges to the ballots of certain employees based on changed circumstances and/or their technical status. That issue was resolved during the first voting period (when the Board agent never once intervened when the Employer's observer made challenges based upon the technical status of certain employees) and, again, following discussions between the Employer's counsel and the Board agent and Region between the first two voting periods (when the Region and Board agent allowed the Employer to continue to challenge the eligibility of voters based upon their status as technical employees).<sup>10</sup> As such, it was not proper for the Hearing Officer to analyze the Employer's objection as if the Board agent and/or Region had actually intervened to stop the Employer from challenging the ballot of any specific voter(s).

Similarly, it was not proper for the Regional Director to review the Employer's objections as if this was a proceeding whereby the Employer was obligated to present evidence that demonstrated that circumstances related to the Technical Group changed after the Decision and Direction of Election. The Region's decision to open the Employer's challenged ballots made that issue moot as the Employer was denied the opportunity to process its challenges in accordance with the Board's procedures. Indeed, the Casehandling Manual actually confirms that "[i]f a party has challenged a voter, the regional director should *later* evaluate the challenge and the parties' positions and supporting evidence to determine if the evidence 'raises substantial and material factual issues.'" § 11361.1 (Citing Sec. 102.69(c)(1)(i) and (ii) of the Board's Rules) (emphasis added). However, this occurs during an administrative review following the tally of ballots and results in a written decision addressing the challenged ballot(s) at issue. This decision is then subject to a request for review with the Board. *See* Sec. 102.69(2). However, the Region's handling of the Employer's challenged ballots wholly denied the Employer this opportunity.

---

<sup>10</sup> These decisions likely can be explained by the undisputed witness testimony that the Employer informed the Region that the Employer "believed there were changed circumstances that justified"<sup>10</sup> the Employer's challenges. (T-257).

Thus, it was wholly improper for the Regional Director to assume that this burden could not have been met had the Employer been provided the opportunity to process its challenges in accordance with the Board's procedures, much less decide an issue that was not included in the notice of hearing issued for the instant proceeding<sup>11</sup>.

However, in reviewing the Employer's objections to the circumstances surrounding its challenged ballots, the Regional Director spent significantly more time considering the propriety of the Employer's challenges than he did considering the impact the Region's decisions had on the ability of the parties to trust the Board's determinative challenge procedure. Needless to say, in considering whether the Region's wholesale failure to follow the Board's established challenged ballot procedures created reasonable doubt as to the fairness and validity of the instant election, the Regional Director likely should have assumed that this burden would have been met. However, the Regional Director's Decision does not even consider the perception created by the Region's denying the Employer this opportunity.

Needless to say, in the case at hand, the question that must be answered is whether it was objectionable for a Board agent to allow an Employer to challenge seventy (70) ballots only to open and co-mingle those challenged ballots and include them with the tally of ballots despite the Employer's vehement objections and the requirement that "[t]he ballots of such challenged persons shall be impounded." See Sec. 102.69(a). In doing so, it must be also recognized that this occurred without providing the Employer with an opportunity to provide a detailed explanation and evidence in support of its challenges or a written decision addressing the rationale for such a decision. Unfortunately, there can be little doubt that these actions are wholly inconsistent with the required handling of challenged ballots included in Section 102.69(a) of the Board's Rules or the procedures set forth within the Casehandling

---

<sup>11</sup> While the Notice of Hearing issued following the Employer's objections, it never indicated that the propriety of the Employer's challenged ballots was amongst the issues to be litigated in this proceeding.

Manual. Indeed, under these circumstances, any party subject to this type of conduct would question the fairness of the process. Accordingly, it should also not be disputed that the circumstances surrounding the Employer's challenged ballots amounted to an irregularity in the handling of the ballots that established reasonable doubt as to the election's fairness and validity. Indeed, this is especially true given the circus like environment occurring at the time.<sup>12</sup>

It should also not be lost that, while the Board's revised Rules eliminated the automatic impounding of ballots following a request for review, even the so called "quickie election" rules did not eliminate the Employer's ability to make challenges for cause. §102.69(a). In this regard, the Employer's prior request for review alone should have provided sufficient cause to justify the Employer's challenges. However, the assertion that there was a change in circumstances should also have been sufficient to justify its challenges. Nevertheless, despite these facts, the Region took it upon itself to clear the Employer's challenges during the vote tally. As such, a procedural irregularity should not be in doubt.

In doing so, the Board's rules regarding the handling of challenged ballots are very clear . . . **"The ballots of challenged persons shall be impounded."** *Id.* (emphasis added). There is no exception to this requirement absent the consent of the parties or the withdrawal of the party challenging the ballot at issue<sup>13</sup>. *See Casehandling Manual*, § 11340. Rather, under the Board's rules and established procedures, issues related to challenged ballots are supposed to be resolved via the same post-election procedures governing objections generally. § 102.69(c)(1). In fact, according to the Casehandling Manual, "[t]o help protect voter secrecy, ***the region should not open and count challenged ballots until the time for filing the request for review has passed and no request was filed or the Board has ruled***

---

<sup>12</sup> Undisputed testimony confirmed that the Petitioner publicly demanded the Region open the Employer's Challenged ballots and the fact that this eventually occurred in front of a large group of the Petitioner's supporters over the Employer's vehement objections.

<sup>13</sup> Even then, where a withdrawal occurs, the other parties are supposed to be given an opportunity to challenge the same voter involved in the challenge to be withdrawn. *Id.* at 11340.3.

*on the request for review.* § 11364.9 (emphasis added). Yet, these mandates were clearly not headed in this instance. Instead, the Employer's challenged ballots were opened without a record, administrative review, or the issuance of a decision and without an opportunity for review by this Board. Given this blatant deviation from the Board's established procedures regarding the handling of challenged ballots, the decision to open and co-mingle the challenged ballots in this instance called into question the fairness of the election to say the least.

In this regard, the circumstances surrounding the decision to open the Employer's challenges cannot be forgotten in considering the impact of the Region's actions in this election. Specifically, the Employer was undisputedly allowed to make its challenges without objection by the Board agent or Petitioner's observer throughout the entire initial voting period. It was not until the Petitioner's representative publicly challenged the Employer's ability to make those challenges after the initial voting period that the Employer's actions were even questioned. Thereafter, the Board agent's public decision to later open the Employer's challenged ballots during the vote count (despite previous indications to the contrary) created the reasonable perception to those in attendance that the Board agent and Regional Director for Region Seven favored the Petitioner and that they were going to push forward to certify the instant election despite the Employer's challenges and regardless of due process. Indeed, the Board agent essentially told the large crowd in attendance that the Board will ignore its procedures and act outside its rules to obtain a desired result. Needless to say, this resulted in substantial questions regarding the Board's actions in this election and is exactly the type of conduct the Board has sought to avoid.

Given the Board's stated objective to ensure that its elections are not subject to question, there should be no doubt that the current election must be set aside, and a new election ordered. Not only is there an undisputed irregularity impacting an essential condition of the election (i.e. the Board's

challenged ballot process) but that irregularity involved a number of ballots more than significant to affect the outcome of the instant election<sup>14</sup>. Indeed, this is especially true given the evidence of other irregularities and objectionable conduct present in this instance. Accordingly, given the totality of the circumstances present in this election, the Board must recognize that the only way to maintaining the Board's standards in this instance is to grant the Employer's Request for Review and "set this election aside and to direct a new election."

**B. The Evidence Establishes that the Ambiguity in the Official Notice of Election Mandates a New Election.**

In addition to the irregularities related to the opening of the Employer's challenged ballots and contrary instructions given regarding the Employer's ability to make challenges, the instant record confirms that the Official Notice of Election failed to state the specific election in which the election would be held as is required by the Board's rules. (See Jt. 2). Indeed, this occurred despite discussions between the Board agent and Employer's Counsel regarding how they would proceed with regard to communicating the specific location of the election (T-254-55) and the Employer's later e-mail providing the actual room where the election would be held to ensure that the notice could be updated (Jt. 4). This evidence should confirm, at a minimum, the Employer's reasonable belief that the Official Notice of Election would be updated and that, despite the Employer's discussions with the Region, it was not. Needless to say, based upon this belief, there should have been no need for the Employer to request that the Notice be updated until it was too late.

The Board's Casehandling Manual makes it very clear that "[t]he responsibility for the accuracy of the finished Notice of Election is the Board agent's." § 11314. In this regard, the instant circumstances are very different than those that occur when a party is responsible for distribution/posting of a notice and fails to do so as was relied upon by the Hearing Officer. Indeed,

---

<sup>14</sup> While it should go without saying, the instant election involved a fifty-nine (59) vote margin of victory that undisputedly would have been impacted by the seventy (70) challenged ballots involved in this instance.

under those circumstances, the Board's Rules specifically estop a party from objecting to the nonposting of a notice if it was responsible for such a posting. § 102.67(k)<sup>15</sup>. However, the Board's Rules do not impose such a prohibition regarding the contents of the notice.

Rather, the Board has confirmed that "[t]he Board is responsible for assuring properly conducted elections." *New York Telephone, supra*. Given this distinction, even though the Regional Director did not ultimately rely upon this analysis, there was no basis for the Hearing Officer's assertion that the Employer is estopped from objecting to the Official Notice of Election following the election in this instance. In fact, the Employer more than satisfied any obligation to object to the lack of the specific room location included in the Official Notice of Election through the conversations with the Board agent preceding the issuance of the original Notice (T-254-55) and the later e-mail providing the specific classroom in which the election would be held (Jt. 4). However, the Hearing Officer's assertion to the contrary confirms why the absence of Board precedent in this area provides compelling grounds for review in this instance.

Notably, neither the Hearing Officer nor Regional Director dispute that the Official Notice of Election did not identify the specific classroom location in accordance with the mandates of the Board's rules. See § 167(k). However, despite this fact, the approximately thirty-four (34) individuals who did not vote, and the evidence confirming potential confusion over the location of the election (T-43 to 44) the Regional Director asserts that "[t]he record supports the Hearing Officer's decision to overrule the Employer's objection." (RDD p. 11). Indeed, this occurred despite the Regional Director's acknowledgement that the authority cited by the Hearing Officer was likely not applicable. As such, it is now incumbent upon the Board to acknowledge that the Board agent's failure to update the Official

---

<sup>15</sup> Although the provisions are relatively similar, the Hearing Officer incorrectly cites Section 102.62(e) of the Board's rules in relation to the Board's Notice requirements. However, that Rule only applies to Notice's issued following an election agreement. Section 102.67(k) governs notices issued following a Regional Director's order directing an election, which is what occurred in this instance.

Notice of Election after being provided the specific classroom by the Employer requires a new election in this instance.

In this regard, the Regional Director essentially acknowledges that the Hearing officer was not correct in relying on the Board's decision in *Bokum Resources*, 245 NLRB 681 (1979)(where the notice of election was corrected prior to the election). However, the Regional Director asserts that this fact was "undercut" by *Affiliated Midwest Hospital*, 266 NLRB 1198 (1983). RDD p. 11. In doing so, the Regional Director claims that *Affiliated Midwest Hospital* involved an election notice that was not corrected and, thus, the Hearing Officer's recommendations still remained applicable because the decision was cited in the Appendix<sup>16</sup> to *Transportation Unlimited*, 312 NLRB 1162 (1993). However, the problem with that assertion is that the Board in *Affiliate Midwest Hospital* never really considered the errors surrounding the election notice. Rather, that decision involved an unfair labor practice whereby the Board declined to review the Employer's asserted challenge to the election notice because the respondent in that case was "attempting to raise herein issues which were raised and determined in the underlying representation case," in which the election had already been set aside for other reasons. *Affiliated Midwest Hospital*, supra at 1199. As such, the Regional Director's reliance on that decision was just as erroneous as the Hearing Officer was to rely upon *Bokum Resources*. There was simply no election in this instance where a corrected election notice was involved.

Needless to say, the posting of an accurate and specific Official Notice of Election is a significantly important aspect to any Board election. Given this fact, the error in this instance cannot be described as minor given the number of classrooms and size of the area of the Hospital in which the election was held. Indeed, in this instance the evidence confirms that the Notice could likely have had an impact on the election, which is a fact not present in any of the cases cited by the Hearing Officer or

---

<sup>16</sup> The Appendix was the Supplemental Decision and Certification of Representative that was issued by the Regional Director for Region Twenty-Six.

Regional Director. Not only was there testimony confirming confusion by at least one person over the location of the polling place (T-43-44) but there should be no dispute that approximately thirty-four (34) individuals did not vote. As such, the instant record establishes more than mere speculation regarding the likely impact of the erroneous Official Notice of Election had on these proceedings and it is incumbent upon the Board to correct this error by setting aside the instant election and directing a new election to ensure the election in this instance cannot be subject to question. At a minimum, the lack of specificity in the election notice was an irregularity that, when considered in combination with the other irregularities that occurred in this instance, calls into question the fairness and validity of the instant election and, therefore, requires a new election be ordered.

**C. Improper promise of benefits by Petitioner mandates a new election.**

According to the Regional Director's decision, the economic benefits included in the AFL-CIO Union Plus program are nothing more than benefits incidental to membership and thereby not objectionable. However, in doing so, the Regional Director's decision confirms why the Board must grant review of the instant case. That is, at a minimum, review should be granted in this instance to better define the difference between an offer of economic benefits and those benefits that would be allowed as merely an benefit incident to membership. In this regard, the Board has confirmed that a union promise may be objectionable if the benefit promised is within the union's power to effectuate it. *See, e.g., Alyeska Pipeline Service Co.*, 261 NLRB 125, 126 (1982) (union controlled all access to construction jobs in Alaska for employees participating in election, and thus union's suggesting only way to get union card was by voting for union in upcoming election was objectionable as union was clearly promising to grant members advantage over nonmembers and had power to do that). While the Board in *Dart Container*, 277 NLRB 1369 (1985) (involving an offer of free legal advice from union attorneys and access to a union strike fund) held that a union does not interfere with an election when it

promises to extend an existing incident of union membership to new members, the benefits offered in this instance were far different than the benefits involved in that decision. Rather, the benefits in *Dart Container* were directly related to that union's representational activities and, therefore, considered benefits "incident to membership." *Id.* However, in this instance, the Petitioner's website offered a variety of economic benefits through the AFL-CIO Union Plus program and elsewhere that included death benefits, identity protection, access to scholarships, towing services, food and drink discounts, shopping discounts, and a litany of other economic incentives unrelated to the type of Section 7 activities that might be considered "incident to membership." (*See* E3 & E4). As such, it was not proper for the Regional Director to overrule the Employer's objection in this instance since the benefits offered are far more akin to those present in *Crestwood Manor*, 234 NLRB 1097 (1978), where the Board found that the Union engaged in objectionable conduct when it made an offer of financial benefits to employees contingent on its success in the election. *See also Mailing Services*, 293 NLRB 565 (1989) (offer of free medical screenings) and *Wagner Electric Corp*, 167 NLRB 532 (1967) (offer of free life insurance coverage).

Any doubt regarding the objectionable nature of the promise of benefits in this instance should be easily resolved by simply considering how the Board would proceed had the Employer made a similar offer (i.e. offered employees certain benefits and access to scholarships and discounts if they agreed to refrain from membership in a collective bargaining unit or offered to provide similar benefits if employees rejected the Petitioner). Needless to say, any similar offer by an employer would undisputedly be found objectionable. Accordingly, the Board must acknowledge that the same reasoning likely applies to benefits offered by the Petitioner and the AFL-CIO Union Plus Program when those benefits are conditioned upon membership in a bargaining unit. In doing so, the Regional Director simply ignored that the offer of economic benefits advertised through the Petitioner's website (and sites

linked to the Petitioner's site) was conditioned upon individuals becoming members of a bargaining unit represented by the Petitioner and, therefore, was objectionable in this instance.

Contrary to the assertions of the Regional Director, the evidence confirms that employees would be encouraged to vote for Petitioner if they wanted to obtain these benefits as they could not obtain these benefits unless the proposed bargaining unit was certified. In fact, the Petitioner's Constitutional and By-Laws confirms that only "persons employed as licensed nurses, or who are otherwise within the scope of a bargaining unit represented by Local 40 and who are not supervisors as defined by Section 2(11) of the National Labor Relations Act" are eligible for membership with the Petitioner. (E5, p. 2). Needless to say, this confirms that only way for the individuals in the proposed bargaining unit to obtain the benefits advertised on the Petitioner's website was for them to elect the Petitioner their representative. Accordingly, the Petitioner committed objectionable conduct by maintaining the offer of economic benefits involved here on its website during the critical period and prior.

**D. Incorrect recording of Voters was another irregularity mandating a new election.**

It is undisputed that eligible employee Jennifer Baker attempted to vote but was denied the ability to vote without challenge as the Union's observer had incorrectly recorded her as having already voting. However, although the facts surrounding the incident with Ms. Baker's efforts to vote are not in dispute, neither the Hearing Officer or Regional Director adequately considered the impact of this irregularity on the perceived fairness and validity of the instant election. In particular, neither sufficiently considered the impact this incident had on perceptions regarding the handling of the voter list and the process by which voters were checked off given the role the Petitioner's Observer played in in the processing of voters and her maintaining sole possession of the voter list. In doing so, the undisputed testimony confirmed that the Petitioner's Observer maintained control over the voter list during every voting session and regularly directed the Employer's observers as to where they should

sign off on voters who had voted. (T-50, 56-58, 78, 101, 103, 108, 110, 140-41, 157-60, 162, and 173). As such, the actions of the Petitioner's Observer in this instance likely resulted in the error that required Ms. Baker to vote under challenge in this instance and likely allowed an individual to vote who should not have. Even one occurrence like this reasonably leads participants to the election to question whether other instances occurred that were not uncovered and results in questions regarding the validity of the instant election.

In this regard, the circumstances surrounding Ms. Baker's having been recorded as having voted despite her not having done so establish yet another irregularity in the handling of this election that call into question the fairness and validity of the election. While the Regional Director does not believe the ballots impacted by this irregularity were sufficient to impact the outcome of the instant election, his analysis assumed that the vote tally was otherwise accurate despite the inclusion of the Employer's seventy (70) challenged ballots therein. However, if those challenged ballots were not included, the two ballots at issue in this instance become far more likely to have impacted the outcome in this instance. As such, the Board must recognize the likely impact this irregularity had on the instant election and order a new election. Indeed, given the number of irregularities involved in this instance, it is the only way to ensure an election that is perceived as both valid and fair.

**E. The Failure to Allow Inspection of Spoiled Ballots.**

While the Hearing Officer recognized that spoiled ballots should be shown to a parties observer and admits that the Employer's representative asked that the Employer be allowed to inspect the spoiled ballots, he and the Regional Director somehow asserts that the Board agents refusal to provide the Employer's observer the opportunity to inspect the spoiled ballots was not objectionable because the observer was not the person to make the request. However, this defies logic and is inconsistent with the directive in the Casehandling Manual that parties (through their observers) should be given the

opportunity to inspect spoiled ballots. § 1132.33. Indeed, the undisputed testimony confirmed that Kahn-Monroe was acting on behalf of the Employer when she made the request to review the spoiled ballots. (T-333). As such, even if she were not allowed to inspect the spoiled ballots herself, the Employer's observer should have been provided the opportunity to inspect the spoiled ballots following Kahn-Monroe's request. However, such an opportunity was never offered despite the procedures set forth in the Casehandling Manual. (T-174 and 318). See also Casehandling Manual §1132.33.

Needless to say, the failure to allow the Employer's observer the opportunity to inspect the spoiled ballots amounts to yet another irregularity in the handling of the election in this instance and contributes to the perceptions and reasonable doubt as to the fairness and validity of the instant election and only further opened this election to question. Indeed, this action is similar to the failure to ensure all parties had an opportunity to monitor the ballot count that occurred in *Fresenius USA Mfg*, 352 NLRB at 680-81, where the Board ordered a new election where the Employer was denied a request to examine ballots immediately following the vote count.<sup>17</sup>

While the issue may have only involved two ballots, these ballots may have had a significant impact on the election. Indeed, this is especially true considering the fact that seventy (70) challenged ballots were included in the vote tally instead of being impounded. As such, given the number of irregularities in the instant election, the Board's interest in maintaining elections that are not open to question requires that the instant election be set aside and a new election be directed.

**F. Improper Electioneering by Petitioner's Agent.**

The undisputed evidence presented confirmed that, prior to the first voting session, Petitioner's President Jeff Morawski approached an individual waiting to vote that was in the corridor immediately outside the polling area and engaged in a prolonged discussion with him. (T-221, 223, & 237-38).

---

<sup>17</sup> Interestingly, the record confirms that the Board agent in this instance verbally announced how ballots were cast but failed to display the ballots to the observers. This is the precise conduct that resulted in the new election in *Fresenius USA Mfg*.

Indeed, although Morawski was in attendance at the hearing, he never testified to deny the discussion or testimony confirming that the discussion was more than mere pleasantries and lasted more than a couple of seconds. (T-223). At a minimum, his failure to testify should create a strong inference as to the prolonged nature of this discussion and confirm that prior testimony regarding this incident was more than accurate and the Board should address the Regional Director's failure to make such an inference. However, even without that inference, the Board must recognize that the evidence was sufficient to establish a violation of the Board's *Milchem* rule in this instance and grant review to correct the Regional Director's decision to the contrary.

Under that rule, the Board prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." *Milchem, Inc*, 170 NLRB 362 (1968). In doing so, the Board does not inquire into the nature of the conversation under this rule. *Id.* at 362. Rather, under this rule discussions that are more than a "chance, isolated, innocuous comment or inquiry" may be grounds to set aside an election. *Id.* at 363. Thus, although his remarks were not shown to be actual electioneering, the Board set aside an election where the petitioner's observer engaged in conversations "beyond a mere hello." *Modern Hard Chrome Service Co.*, 187 NLRB 82, 83 (1970).

In the instant case, the evidence confirms that Morawski (an agent of the Petitioner) approached an eligible voter waiting to vote in the corridor outside the polling area mere moments before polling was to begin. The evidence also confirms that the discussion was more than mere pleasantries. As such, regardless of the content involved in that discussion, the evidence establishes a violation of the *Milchem* rule in this instance.

Despite the assertions of the Hearing Officer, *J.P. Mascaro & Sons*, 345 NLRB 637, 638-39 (2005) does not stand for the proposition that discussions must transpire when the polls are open to establish a violation of the *Milchem* rule. Rather, that decision focused on the proximity of the individual

involved to a designated no-electioneering zone and the Employer is unaware of any authority for the Board having limited the application of the application of its *Milchem* rule to when the polls were open. *Id.* Rather, the *Milchem* rule applies to discussions with “voters waiting to cast ballots” without regard to whether the polls have yet opened. *J.P. Mascaro & Sons* at 639 (citing *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 197 (2004)). As such, the Hearing Officer’s insinuation that the discussion at issue in this instance is somehow excusable since it occurred immediately prior to the polls opening is simply not supported by the authority cited, much less any established precedent. While this reasoning was not included in the Regional Director’s analysis, it does demonstrate that more clarification on this issue may be needed and demonstrates why the Employer’s request for review should be granted in this instance.

In this regard, although the discussion in this instance only involved a single potential voter, that voter may likely have been sufficient to impact the outcome of the current election. Indeed, this is especially true if the seventy (70) employer challenges are taken into account. However, instead of acknowledging this fact, the Regional Director simply dismissed the incident as insufficient to impact the instant election. As such, the Board must now intervene and confirm the likely impact this discussion had on the instant election by confirming the objectionable conduct involved.

**G. The presence of a recording device in the voting area should be considered a per se violation.**

The Board has confirmed that photographing employees engaging in protected concerted activity violates Section 8(a)(1) of the Act. *F. W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993); *Saia Motor Freight Line*, 333 NLRB 784, 784–785 (2001). Photographing employees engaged in Section 7 activity also constitutes objectionable conduct whether engaged in by a union or an employer.” *Randell Warehouse of Arizona*, 347 NLRB 591 (2006). *See also* *Mercy General Hospital*, 334 NLRB 100, 104–105 (2001). Thus, in *Pepsi-Cola Bottling Co.*, 289 NLRB 736, 736–767 (1988), the Board set aside an

election based on the union's apparent videotaping of at least two employees as they exited the employer's premises and were handed union leaflets, given that the union offered "[n]o legitimate explanation" for the videotaping. The Board similarly set an election aside where a union agent photographed employees, provided no explanation when doing so "to assuage [employee] fears that the pictures would be the basis for future reprisals" and did not offer a valid explanation of the photographing. *Mike Yurosek & Son*, 292 NLRB 1074 (1989).

Despite this precedent, the Hearing Officer and Regional Director assert that the undisputed evidence of photography in this instance was not objectionable "[a]bsent any coercive statements or other contemporaneous misconduct." (Report at 13). However, this assertion was made without reference to any authority for his conclusion. Needless to say, that is because there is none. Rather, the aforementioned precedent confirms that the Petitioner's photography in this instance was likely objectionable given the complete failure of the Petitioner to offer any explanation for its photography around the polling area and during the vote count on the day of the election.

Moreover, while the Employer was not able to find authority regarding the use of cameras in the polling place and during a polling period, there should be little doubt that such conduct would be objectionable even when done by a member of the proposed bargaining unit. The absence of authority addressing this issue only confirms why it is important for the Board to grant the Employer's request for review in this instance. Rather, contrary to the findings of the Regional Director, the presence of a camera in the voting area alone should be considered a per se violation and grounds for setting aside an election.

In this regard, the fact that an individual had their camera phone out in the voting area is not disputed (T-80-81 and 107-08), however, the only witness to testify could not confirm whether a picture was actually taken (T-108). Nevertheless, the potential impact of this conduct on the instant election

should not be lost. Indeed, conduct occurring close to or within the voting area is often subject to the strictest scrutiny when considered by the Board. *See, e.g. Milchem, Inc.*, 170 NLRB 362 (1968) (“The final minutes before an employee casts his vote should be his own, as free from interference as possible.”). As such, there should be no doubt that the presence of a camera (or other recording device) inside the polling place is sufficient to taint the laboratory conditions required for the election in this instance and should confirm why such conduct should be considered a per se violation.

Contrary to the assertions of the Hearing Officer, there is no testimony establishing that no voters witnessed the incident. In fact, the Employer’s observer testified that when this incident occurred she “was looking down, waiting for the next person.” (T-80). Thus, while the observer confirmed no one was behind the individual taking a picture (T-107), her prior testimony would indicate that other voters were present.

Either way, there should be no doubt as to the impropriety of a camera or other recording device in the voting area. Such a device can not only be used to record who was or was not casting ballots but also potentially could record the manner in which voters cast their ballots. However, despite these risks, there is no evidence that the Board agent or Region took any steps to confirm that such devices were prohibited from the voting area and, as a result, the individual involved in this instance proceeded to attempt her selfie as if it were no big deal. Indeed, testimony confirmed that individual attempting the selfie in this instance was offended when the Board agent attempted to intervene. (T-80). Such a response would not have occurred had the Board agent or Region taken steps to ensure recording devices were not brought into the polling area. As such, while the Board agent undisputedly attempted to intervene, the fact remains that no actions were taken to prohibit the recording device in the voting area to begin with and one can only assume that if this voter did not appreciate the impropriety of doing so, others did not understand it either.

It is the Board's responsibility to ensure that events like this do not occur. In doing so, the Board must acknowledge that the failure to provide potential voters that conduct like this will not occur may impact whether individuals participate in these types of elections, since they have not received assurances regarding the privacy of their actions. In an election where thirty-four (34) individuals failed to vote, this type of incident is particularly troubling. Accordingly, the Board must recognize the likely impact this type of conduct may have on future elections and confirm that the presence of a recording device in the voting area is a per se violation that mandates a new election.

**H. The cumulative effect of the conduct in the instant election warrant setting aside the election.**

In *Frensenius USA Mfg., supra* at 681, the Board acknowledged that it is sometimes “unnecessary to pass on whether the irregularities involved in [an election], considered separately or in various combinations, would warrant setting aside” an election. Rather, “the cumulative effect of” irregularities can be sufficient to raise “reasonable doubt as to the fairness and validity of” an election. *Id.* As such, there should be little doubt that an election replete with the irregularities that occurred in this instance should be more than sufficient to mandate a new election.

In this regard, the undisputed facts involved in the present proceedings confirm that the instant election involved an erroneous Official Election Notice, the complete disregard of the Board's established procedures for the handling of challenged ballots, an undisputed failure to allow the Employer's observer to inspect ballots, a likely *Milchem* violation, a recording device in the voting area, and an offer of economic benefits by the Petitioner during the critical period. This is in addition to the issues raised in the Employer's prior requests for review, which include issues related to the Board's Healthcare Rule, the composition of the proposed unit and the fact that the Decision and Direction of election failed to offer AFSCME a place on the ballot without requiring a formal request for intervention or demonstration of any showing of interest, despite precedent requiring this occur. *See, e.g. St. Mary's*

*Duluth Clinic Health Systems*, 322 NLRB 1419, 1422 (2000) and *Kaiser Foundation Health Plan of Colorado*, 333 NLRB 557, 558 (2001). As such, the cumulative effect of the irregularities in this instance appear more than sufficient to establish reasonable doubt as to the fairness and validity of the election and the Employer's objections to the instant election must be sustained.

### **III. Conclusion**

History confirms that the Board can normally be counted on to hold a fair and valid election. However, in this instant election, the undisputed evidence confirms that there was a litany of irregularities that wholly undermine the perception of fairness and validity of the election. Indeed, even if each of these irregularities alone would not be considered objectionable grounds to set aside the election, together they more than present a reasonable basis for questioning the fairness and validity of the election in this instance. This is especially true given the other evidence of objectionable conduct on the part of the Petitioner. As such, it is up to the Board to grant review and acknowledge what the Regional Director and Hearing Officer failed to recognize . . . the instant election simply cannot be allowed to stand without damaging the Board's efforts to ensure its elections are without question.

WHEREFORE, for the foregoing reasons and as set forth in its requests for review, the Employer hereby requests the Board grant this request for review and either dismiss the Petitioner's petition or, in the alternative, sustain the Employer's objections and order that a new election be held.

  
\_\_\_\_\_  
Grant T. Pecor, Attorney for Employer  
Clark Hill PLC  
200 Ottawa Ave NW, Ste. 500  
Grand Rapids, MI 49503  
(616) 608-1100  
gpecor@clarkhill.com

Dated: January 6, 2020

## TABLE OF AUTHORITIES

### Cases

<i>Affiliated Midwest Hospital</i> , 266 NLRB 1198 (1983).....	18, 19
<i>Alyeska Pipeline Service Co.</i> , 261 NLRB 125, 126 (1982).....	20
<i>Anheuser-Busch, LLC</i> , 365 NLRB No. 70 (2017).....	9, 10, 11
<i>Bokum Resources</i> , 245 NLRB 681 (1979).....	18, 19
<i>Crestwood Manor</i> , 234 NLRB 1097 (1978).....	20
<i>Dart Container</i> , 277 NLRB 1369 (1985).....	20
<i>Durham School Services, LP</i> , 360 NLRB No. 108 (2014).....	8
<i>Europa Auto Imports</i> , 357 NLRB 650 (2011).....	11
<i>F. W. Woolworth Co.</i> , 310 NLRB 1197 (1993).....	26
<i>Fresenius USA Mfg.</i> , 352 NLRB 679 (2008).....	8, 9, 24, 29
<i>J.P. Mascaro &amp; Sons</i> , 345 NLRB 637 (2005).....	25
<i>Jakel, Inc.</i> , 293 NLRB 615 (1989).....	8
<i>Kaiser Foundation Health Plan of Colorado</i> , 333 NLRB 557 (2001).....	30
<i>Mailing Services</i> , 293 NLRB 565 (1989).....	21
<i>Mercy General Hospital</i> , 334 NLRB 100 (2001).....	27
<i>Mike Yurosek &amp; Son</i> , 292 NLRB 1074 (1989).....	27
<i>Milchem, Inc.</i> , 170 NLRB 362 (1968).....	25, 26, 28, 30
<i>Modern Hard Chrome Service Co.</i> , 187 NLRB 82 (1970).....	25
<i>New York Telephone Co.</i> , 109 NLRB 788 (1954):.....	4, 17
<i>Pepsi-Cola Bottling Co.</i> , 289 NLRB 736 (1988).....	27
<i>Physicians &amp; Surgeons Ambulance Service</i> , 356 NLRB No. 42 (2012).....	8
<i>Polymers Inc.</i> , 174 NLRB 282 (1969).....	4, 8, 9
<i>Randell Warehouse of Arizona</i> , 347 NLRB 591 (2006).....	27
<i>Saia Motor Freight Line</i> , 333 NLRB 784, 784 (2001).....	26
<i>Sonoma Health Care Center</i> , 342 NLRB 933 (2004).....	4
<i>St. Mary's Duluth Clinic Health Systems</i> , 322 NLRB 1419 (2000).....	30
<i>Transportation Unlimited</i> , 312 NLRB 1162 (1993).....	18
<i>Wagner Electric Corp.</i> , 167 NLRB 532 (1967).....	21

### Other

NLRB Casehandling Manual.....	5, 9, 10, 11, 12, 14, 15, 16, 23
-------------------------------	----------------------------------

### Rules

NLRB Health Care Rules.....	1, 2, 5
NLRB Rules and Regulations.....	1, 10, 12, 13, 14, 17