

May 1, 2020

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BY E-FILING

Roxanne L. Rothschild, Esq.
Executive Secretary
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1015 Half Street, SE
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Re: MHN Government Services, LLC
Case No. 19-RC-242915

Dear Ms. Rothschild:

As you know, we represent MHN Government Services, LLC (“MHNGS” or the “Employer”) in the matter identified above, which is currently pending before the Board on MHNGS’s April 6, 2020 Request for Review of the Regional Director’s March 9 Decision Affirming the Hearing Officer’s Report on Objections and Certification of Representative.

Pursuant to leave granted by your Office on April 27, this letter-brief is submitted in reply to Petitioner’s April 22 opposition to our motion for a stay of action on the Employer’s Request for Review while the Office of the Inspector General (“OIG”) considers and acts on our April 15 complaint concerning the Board agent’s testimony at the December 19, 2019 hearing on objections.¹

Inasmuch as the result of any OIG investigation that may be conducted on our complaint could affect the outcome in the underlying representation case, the Board should defer action on the Request for Review while the complaint is under consideration. The Board’s decision on review should await and be informed by the outcome of any OIG investigation. By imposing a stay, the Board would avoid any possible need to reopen the case after the Inspector General has acted. Absent a determination on the motion for a stay that there is no basis upon which the OIG could conclude that the Board agent testified falsely concerning the preparation of his “notes

¹ Board Agent Patrick Berzai was permitted to testify pursuant the Employer’s request, under Section 102.118 of the Board’s Rules and Regulations, to examine him at the December 19 objections hearing. The objections were based on Mr. Berzai’s statements and conduct at the election, the details of which are addressed in the Employer’s Request for Review.



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from election,” *i.e.*, Regional Director’s Representative Exh. 1 (“R-1”) – a determination that the Board is not, to our knowledge, presently in a position to make -- there is no reasoned basis upon which the requested stay could justifiably be denied.

Petitioner’s April 22 opposition to a stay also called into question counsel’s conduct in connection with the referral made to the OIG for good cause as well as the related request made to the Executive Secretary’s Office on April 17 for a stay while our complaint is processed. Inasmuch as that is a matter for consideration in the first instance by the Office of the General Counsel under Section 102.177 of the Board’s Rules and Regulations, we do not address it here, except to say that no action was taken in bad faith, to delay proceedings in this representation case or for any other improper purpose. On the contrary, and as we show below, there was and is a reasonable basis for pursuing an investigation concerning the Board agent’s testimony at the objections hearing, and the requested stay was simply incidental to that investigation. In sum, there is no basis for any finding of misconduct.

Viewed in their totality, the many suspicious circumstances surrounding the Board agent’s un contemporaneous record of the June 28 election, all discussed in our Request for Review, are more than sufficient to reasonably support the complaint as well as a finding by the Inspector General and the Board that there is reasonable cause to believe that R-1 was not written, as Berzai testified, within a week or so after learning that objections had been filed based on his misconduct during the closing minutes of the election. In fact, we believe it is the only way to make any sense at all of Berzai’s action/inaction between the election and the hearing.

Those circumstances include, based on Berzai’s own testimony, his equivocation over when R-1 was written (Tr. 36, 113-14); his failure to date the document (Tr. 35, 114); his misleading description of R-1 as “notes from election” (Tr. 34-35); that he had never before documented any election as in this case (Tr. 36-37); that Berzai never showed R-1 to anyone in the Regional Office after going to the trouble of hand-writing that eight page description of the election (Tr. 40-41); that he never spoke to his supervisor or anyone else about the election incident while the objections were under investigation, despite testifying that when there is a problem in an election that it was practice in the Regional Office to notify his supervisor or the Regional Attorney (Tr. 34, 36, 40-41); the fact that Berzai intentionally excluded R-1 from the case file, contrary to our understanding of Agency procedure, and hidden at home – another maneuver without precedent during his many years as an NLRB field attorney -- where the notes were concealed from all until he finally produced them at the Regional Director’s insistence 48 hours prior to the objections hearing (Tr. 44-45, 59-59); and, the fact that Berzai apparently was so concerned about preserving the secrecy of R-1 that he allowed the Director of NLRB Region 32 to misrepresent to the Employer, at the same time that she

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granted authorization for Berzai to testify, that there were no notes or other relevant documents to produce for inspection at the December 19 hearing because he never placed R-1 in the case file as he plainly should have done.²

As suspicious as all those circumstances are, nothing stands out quite like Berzai's decision to write his "notes from election" in longhand. With a computer and keyboard readily available to him, not only in the office but also presumably at home, the question naturally arises why Berzai would hand write an eight page, single-spaced document on a legal pad, particularly when the NLRB has become a paperless agency, where virtually all communication has become electronic and all documents must be e-filed by directive of the General Counsel.³

Surely Berzai regularly utilizes a computer in his work to take affidavits, write final investigative reports, draft complaints and dismissal letters, generate case-related correspondence, and perform myriad other official functions as an NLRB field attorney. There had to have been a reason why he put his recollections on paper in this manner, rather than using his computer, on which he could easily correct errors as well as make additions and deletions to the document as he went along. R-1 was not some simple note to himself about an issue of no consequence. On the contrary, it was a 1700+ word document that effectively became the central witness at a hearing concerning his admitted failure to maintain the "laboratory conditions" at a representation election conducted under his supervision.⁴

If Berzai did in fact create R-1 at a much later date than he represented at the objections hearing, as we genuinely believe to be the case, the only way that he could have done that without the possibility of detection would be to write it out by hand. Had he instead typed his notes on a computer, the metadata associated with the resulting electronic document could have given him away. It would reveal the date that the document was created as well as when it was subsequently modified. That would not have been good. And, even if Berzai had an innocent explanation for handwriting his so-called "notes from election," they still should have been scanned and uploaded to the

² References are to the transcript of the hearing on objections held at the Seattle Regional Office on December 19, 2019.

³ It is our understanding that Board agents are required to enter their case notes into the NLRB's secure "Next Generation Case Management System," where they are accessible to other Agency personnel. That Berzai wrote R-1 by hand is not simply odd, it also appears to be contrary to Agency policy and procedure.

⁴ Berzai testified that he wrote R-1 all in one sitting; that he did not work from any notes and that there were no drafts. That itself seems highly unlikely given that there is not a single word crossed out anywhere in the entire eight page document.

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electronic case file once they were written. The fact that he did not do so is highly suspect.

Inadvertently, Petitioner gives credence to the metadata point in its opposition to the Employer's Request for Review where, in arguing against the possibility of a finding that R-1 was created some time after the December 3 remand by the Board, IAM states that "[t]here was no metadata on the document . . . to suggest that . . . [it] was created after the December 3 remand, instead of 7-10 days after the Objections were filed." (Petitioner's Statement in Opposition at p. 18.)⁵ Of course not, and that is exactly our point. There is no metadata because Berzai intentionally hand-wrote the document to avoid the creation of any metadata that would reveal its long-delayed preparation.

These facts may not have aroused Petitioner's suspicions concerning Berzai's testimony, but they certainly aroused ours, and enough so to have given us good reason to bring the matter to the attention of the OIG, which we did formally on April 15, after first walking through the facts on the telephone with the Assistant Inspector General for Investigations. If Berzai did indeed write R-1 long after the election as the circumstances strongly suggest, not around a week after learning of the Employer's election objections, that is no small thing. Indeed, Petitioner recognized this as well in its April 22 opposition to the stay motion, when counsel acknowledged that it would matter when the so-called "notes from election" were created by Berzai because if in early July, as he testified, it would "give the appearance that they were created back when his memory was clearer." (Petitioner's Opposition at p. 4.)

To be sure, if R-1 was not created until after the Board remanded the case for a hearing on the objections, it would have no corroborative value whatsoever, and could not have been properly relied on to credit Berzai. Indeed, the belated creation of that documentary evidence would raise the serious issues concerning the Board agent's credibility that we called out in our January 3 post-hearing brief to the Hearing Officer, in our February 18 brief to the Regional Director in support of exceptions to the Report on Objections, and, most recently in our April 6 Request for Review of the Regional Director's Decision Affirming the Hearing Officer's Report. Although the Hearing Officer and the Regional Director avoided the credibility issue, in neither his Report nor her Decision is there any suggestion that the arguments advanced concerning Berzai's credibility were considered baseless or frivolous, the labels attached by Petitioner in its

⁵ Although we argued in our briefs to the Hearing Officer, the Regional Director and most recently to the Board in our Request for Review, that the suspect circumstances surrounding the drafting and subsequent concealment of R-1 require that Berzai's testimony be discredited, our argument did not include this particular point. However, it was made in our April 15 letter to the OIG requesting an investigation into Berzai's testimony regarding the date when he prepared R-1.



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effort to persuade the Board that there are no grounds here to stay action on review of the Decision.

Petitioner attempts to make much of the fact that we did not reach out to the Inspector General sooner, and suggests that allowing four months to pass before making our complaint to OIG demonstrates a lack of merit. We strongly disagree. The fact is, as already stated, we have made much the same argument concerning Berzai's testimony to the Hearing Officer, Regional Director and the Board. We had hoped for the Hearing Officer and Regional Director to take a critical look at Berzai's testimony and find that it lacked credibility based on the suspect creation and handling of his "notes from election." Regrettably, we were unable to get either of them to go that far. Neither was willing to discredit Berzai. In fact, they each relied on R-1, to varying degree, to support Berzai's testimony. We remain hopeful that on review the Board will correct the errors below.

It was not until we were briefing the issues in our Request for Review that we took the argument one step further, and urged that the record of the December 19 hearing supported a finding that R-1 was not written when Berzai said, but rather at a considerably later point in time. It was the only reasonable way to explain Berzai's testimony that he both failed to share his side of the story with anyone in the Regional Office after going to great trouble of reducing it to writing, and then purposely kept it out of the case file and secreted at his home, something he had never done before with any other work record and that, too, appears to have been contrary to Agency policy and procedure.

Soon thereafter our focus became the oddity that Berzai wrote his eight-page "notes from election" by hand and the belief that he had done so to conceal the fact that R-1 was created long after the June 28 election. It was then that contact was made with the OIG. Our suspicion about Berzai's reason for handwriting his notes was heightened by Petitioner's argument in its April 13 Statement in Opposition to our Request for Review that there was no metadata from which the date of the document's creation could be determined. In short, there is no basis for Petitioner's suggestion that the Employer's complaint is not deserving of investigation by the Inspector General because it was not brought to his attention until mid-April. A referral such as the one we made here is indisputably a serious matter that should not be initiated hastily or without good reason, and this one was decidedly unhurried for that reason.



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In sum, and contrary to Petitioner's opposition to a stay, we respectfully submit that it would be inappropriate for the Board to take any final action on the Employer's Request for Review – other than to grant it and direct that a second election be held -- while issues surrounding the authenticity of R-1 are under consideration by the Inspector General. Section 102.67(j)(1)(ii) of the NLRB's Rules and Regulations provides that the Board may issue "a stay of some or all of the proceedings" on a representation petition "upon a clear showing that it is necessary under the particular circumstances of the case." Plainly, that showing has been made here.

If the OIG concludes that there is reasonable cause to believe, contrary to Berzai's testimony on December 19, that his so-called "notes from election" were written after the Board's December 3 remand to the Regional Director for a hearing on the Employer's election objections, not within a week or so after those objections were filed, then fundamental fairness would dictate that his testimony would have to be stricken in its entirety and the results of the election set aside because the process would have been corrupted to the point of invalidity. No Certification of Representative could properly be issued under such circumstances.

Accordingly, the relief requested should be granted, holding Board action in abeyance while the Inspector General completes his work. To deny a stay would create the prospect of a need to reopen the representation case if there is a later determination of official misconduct affecting the proceedings in this matter. That would not be in the interest of the Board, either of the parties, the employees in the petitioned-for unit, or the public.

Finally, and as stated at the outset of this letter-brief, there is no basis for Petitioner's assertion that the General Counsel should initiate an investigation of the referral to the OIG pursuant to Section 102.177 of the Board's Rules. As that does not appear to be an issue properly addressed to the Board in a letter-brief replying to Petitioner's opposition to a stay, we do not do so here and will instead reserve our right to address the issue if and when we are asked to do so by the General Counsel. That said, we believe that everything we have put before you in this letter-brief, a copy of which will go to the General Counsel since Petitioner's counsel included him and others in the General Counsel's Office on his April 22 letter, demonstrates that no action has been taken that warrants any investigation let alone disciplinary action.



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Thank you once again for the leave granted to file this reply letter-brief.

Respectfully submitted,

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

MHN GOVERNMENT SERVICES, LLC

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, LOCAL LODGE 47**

Case No. 19-RC-242915

Date of Electronic Mailing: May 1, 2020

CERTIFICATION OF SERVICE OF: Letter-Brief in Reply to Petitioner's Opposition to Motion for a Stay

I hereby certify that on the 1st day of May 2020, I caused the above-entitled document to be served by electronic mail upon the following parties:

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