
ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

NATIONAL HOT ROD ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

**INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES,
ITS TERRITORIES AND CANADA, AFL-CIO, CLC,**

Intervenor for Respondent.

**PETITION FOR REVIEW FROM
THE NATIONAL LABOR RELATIONS BOARD
IN CASE NOS. NLRB-29CA254128 AND NLRB-22RC18662.**

REPLY BRIEF OF PETITIONER

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PERTINENT STATUTES

The Pertinent Statutes are set out in the addendum of the Appellant’s Opening Brief.

INTRODUCTION

Should this Court allow a representation election decided by a single vote to stand when there is clear evidence that a determinative number of voters were disenfranchised? That is the core issue here: whether the National Labor Relations Board (Board) properly overruled objections filed by National Hot Rod Association (NHRA or Company) to a mail-ballot representation election conducted by the Board, which was decided by a single vote. On August 28, 2020, NHRA filed its Opening Brief. The Board filed its Brief on October 28, 2020, and the Intervenor Union filed its Brief on November 4, 2020. NHRA now files its Reply Brief.¹

SUMMARY OF ARGUMENT

The core facts are not disputed. The parties stipulated to a mail ballot election in which the Board's Regional Office in Newark, New Jersey, would mail out voter kits on November 15, 2016. These kits were sent to voters throughout the country. Under the agreement, the ballots would be counted on December 2. The Notice of Election further provided that if a voter did not receive a voter kit by November 22, he/she should contact the Board at a number provided for the Regional Office or a national toll-free number for the Board in order to obtain a duplicate ballot. On

¹ For the most part, the contentions of the Board and Union are fully addressed in the Company's Opening Brief. Only those points or contentions that warrant further elaboration or clarification are addressed herein.

November 23,² at 11:55 a.m., employee Robert Logan, who resided in Michigan, called the Regional Office number and left a voice mail identifying himself and requesting a duplicate ballot. That same day, the Regional Office mailed duplicate ballots to three other employees, but not to Logan. On Friday, November 25, at 3:21 p.m. not having received any call back from the Regional Office, Logan left a second voice mail at the Regional Office number provided. Earlier that day, at 11:32 a.m., employee Paul Kent, who also resided in Michigan, called the Regional Office number and left a voice mail requesting a duplicate ballot. Kent had previously (before Thanksgiving) sent one of the supervising Board agents an email requesting a duplicate ballot, but had received no response. Neither Kent nor Logan received a response, and no duplicate ballots were sent on November 25. Over the weekend (November 26 and 27), Logan reached out to representatives for both the Company and the Union to explain his predicament and to request help in contacting the Regional Office. The Company representative provided email addresses for the two Board agents and the Union representative provided a personal cell phone number for one of the Board agents. On Monday, November 28, Logan called that Board agent on his cell phone and was able to reach him. According to Logan, the Board agent stated that the Regional Office number listed on the Notice of Election was

² This was the day before Thanksgiving.

incorrect and not monitored. Later that day, on November 28, the Regional Office sent Logan a duplicate voter kit. The following day, November 29, the Regional Office sent Kent a duplicate voter kit. Neither kit arrived at the employee's residence before December 2. Logan, knowing that the election was over by the time he received his kit, did not return a ballot. Kent returned his ballot, but it was never opened.

While NHRA raised a question in its Opening Brief, based on the Board's cryptic assertion that the Company had failed to establish Board agent "misconduct," as to whether the Board had applied a separate line of cases where Board agent neutrality was challenged, the Board asserts in its Brief that the Board merely used the term "misconduct" as the equivalent of an election "irregularity." (Board Brief at 36-39). As NHRA acknowledged in its Opening Brief, it too used the terms interchangeably in its briefs to the Board. The Company accepts the Board's explanation, and with that explanation, it now is apparent that there is no disagreement between the Board and the Company regarding the applicable legal standard in this voter disenfranchisement case. The Board "applies an objective standard to potential disenfranchisement cases in order to maintain the integrity of its election proceedings." *Garda World Security Corp.*, 356 NLRB 594, 594 (2011). Under that standard, "an election will be set aside if the objecting party shows that the number of voters *possibly* disenfranchised by an election irregularity is sufficient

to affect the election outcome.” *Id.*, citing *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796-797 (1996) (emphasis added). It thus is undisputed that there are two essential elements for establishing a valid case of voter disenfranchisement. First, an “irregularity” in the “election mechanics” that can be attributed either to the Board or a party must have occurred. Second, there must be a “possibility” that as a result of this irregularity, a determinative number of voters were denied a reasonable opportunity to cast valid ballots.

As there is no disagreement between the parties regarding the applicable legal standards, the Board’s singular argument in its Brief is very simple: No election “irregularity” attributable to the Board occurred, and while some employees encountered “difficulties” in casting ballots, they failed to fully avail themselves of all of the available avenues for casting a timely ballot. What is most striking about the Board’s argument is that Counsel represents to this Court that despite what Board agent Flores told Logan, *the Regional Office did in fact monitor the phone number provided on the Notice of Election.* (Board Brief at p. 28). Because the Board was not a party to the objections part of the case before the ALJ, and because the Board’s General Counsel refused to permit any Board agent testimony, (JA 115-117), this is the first time in this proceeding that the Board has taken any official position on whether or not the phone number provided to employees was in fact regularly monitored.

What is most astonishing about the Board's representation to this Court is that it leads inevitably to the conclusion that the Regional Office knew on November 23 and 25 that employee Logan had requested a duplicate ballot, but waited until November 28 to send him a duplicate kit. Similarly, it knew at least by November 25 (and perhaps earlier through email) that employee Kent had requested a duplicate ballot, but waited until November 29 to honor his request. *Nowhere in its brief does the Board offer any explanation or justification for why it chose to sit on the requests by Logan and Kent until it was too late for them to receive and return their ballots.*

Thus, while the Board carefully avoids discussing the issue in its brief, it apparently (as there is no other alternative interpretation) is its position that deliberately waiting four and five days to honor voter requests for duplicate ballots does not constitute an election "irregularity." That is a contention for which there is no legal support, and one that cannot be taken seriously. Further, it is beyond question that employees Logan and Kent were, at a minimum, *possibly* disenfranchised as a result of this irregularity. Had the Regional Office responded to their requests in a timely fashion, it is highly likely that they could have received and returned their ballots in time to be counted on December 2. Inasmuch as the election was decided by a single vote, the disenfranchisement of either Logan or Kent requires that the election be set aside and that the Board's order be denied enforcement.

ARGUMENT

A. NHRA Established Clear Election Irregularities Attributable to the Regional Office.

NHRA offered specific testimony and documentary evidence to establish an election irregularity attributable to the Board. Employee Robert Logan testified, and his cell phone records confirm, that he contacted the Regional Office at the number provided in the Notice of Election at 11:55 a.m. on Wednesday, November 23, and at 3:21 p.m. on Friday, November 25, and left voice mail messages requesting a duplicate ballot. He received no response. (JA 47, 64, 85-86, 143-144). Thereafter, he obtained (through the Union Representative) the direct telephone number for Board Agent Frank Flores. The ALJ found that Logan called Flores on November 28. (JA 173, n. 17). During their conversation, Flores told Logan that the Regional Office number listed on the Notice of Election was not the correct number and was not monitored by the Region. (JA 64, 87). The Board's records reflect that the Regional Office mailed Logan a duplicate voter kit on Monday, November 28. Logan eventually received his initial ballot, which was postmarked November 15, on December 5. He received his duplicate ballot on December 7. (JA 48). As noted, the ballots were counted on December 2.

Employee Paul Kent testified that prior to Thanksgiving (which was on November 24), he sent an email to Board Agent Eric Pomianowski, identifying himself and stating that he had not received a mail ballot. Kent expressed concern

that he was leaving on a road trip on the Friday following Thanksgiving and that he hoped to receive the ballot before Thanksgiving. (JA 71-72). On Friday, November 25 at 11:32 a.m., not having received a mail ballot or a response to his email, Kent called the Regional Office and left the following voice mail:

Hey Eric my name is Paul Kent and, ah, I did not receive a ballot of the NHRA union. I was hoping you could overnight me one [TEXT REDACTED IN ORIGINAL] so again my name is Paul Kent. I'm sure you have all the information but I did not receive my ballot for the NHRA union vote so I need one hopefully in the mail today and I can either get it tomorrow or Monday and sent it right back out Monday, so my phone is [TEXT REDACTED IN ORIGINAL].
Thank you.

(Resp. Exh. 10, p. 7). Neither Kent's email nor his voice mail were returned. (JA 81-82). The Regional Office's records reflect that on November 29, it mailed Kent a duplicate ballot. (JA 119). Kent ultimately received a ballot on or after December 6,³ which he completed and mailed in on December 10. (JA 73). The ballot was received by the Regional Office on an unknown date. (JA 115). It has never been opened.

Based on Logan's testimony regarding his conversation with Board agent Flores, which was not rebutted by Flores or the Board, NHRA contended that the Regional Office provided an incorrect phone number on the Notice of Election that was not monitored for at least a critical five-day period between November 23 and

³ Kent was away from home from December 6 until December 9. The ballot was waiting for him when he arrived home. (JA 73).

November 28. This appeared to be the more charitable explanation for the Regional Office's failure to send Logan a duplicate kit until November 28 and its failure to send Kent a duplicate kit until November 29. In its Opening Brief to this Court, NHRA observed that the alternative explanation, i.e., the Regional Office provided a correct number which was regularly monitored, but chose to wait four and five days to send out duplicate kits was more sinister. The Company noted its assumption that the Regional Office did not act intentionally. (Opening Brief at p. 35). Surprisingly, in its Brief to this Court, the Board resists the more charitable explanation in favor of the more damning explanation. Thus, it argues that the Regional Office actually monitored the phone number listed on the Notice of Election, that Logan's testimony regarding his conversation with Board agent Flores was "hearsay,"⁴ that other employees were able to contact the Regional Office on the listed phone number, and that it promptly sent out multiple duplicate ballots upon request. (Board Brief at p. 28). But if, as Board Counsel represents to this Court, the Regional Office did monitor the phone number provided in the Notice of Election, the Board's position is reduced to this:

We regularly monitored the Regional Office phone number provided on the Notice of Election. On the morning of November 23, we received a voice mail from employee Logan requesting a duplicate ballot. We

⁴ Logan's conversation with Board agent Flores was admitted by the ALJ because he deemed the Board to be the equivalent of a "party" inasmuch as the Regional Office's conduct was the subject of the objections. (JA 87). Notably, neither Board agent Flores, nor Board Agent Pomianowski, testified.

ignored that request, even though we sent out duplicate ballots to three other employees that same day. On the afternoon of November 25, we received another voice mail from employee Logan again requesting a duplicate ballot. Earlier that same day, November 25, we also received a voice mail from employee Kent requesting a duplicate ballot. We ignored both of those requests too. On November 28, after employee Logan, through his own independent efforts, succeeded in reaching our Board agent on his cell phone number, we finally mailed him a duplicate ballot. But we chose to wait until November 29 to mail employee Kent a duplicate ballot. Alas, neither duplicate ballot arrived in time for either employee to return a timely ballot. That is a shame, but we can't be held responsible.

The Board's position that it properly fulfilled its obligation to supervise this mail ballot election when it waited five (5) days to mail a duplicate kit to Logan and waited four (4) days to mail Kent a duplicate kit strains credulity. The Board states in its brief somewhat disingenuously that it mailed a duplicate kit to Logan two (2) *business* days after his first request, as if this somehow constitutes a timely response. (Board Brief at p. 25). Logan's first request was made at 11:55 a.m. on the day before Thanksgiving. The Regional Office had plenty of time left on that Wednesday to send Logan a duplicate kit. Indeed, it sent kits out that same day to three other employees. Why it failed to send one to Logan has never been explained. But if for some unknown reason, it was unable to do so on that day, it had to know how critical it was to mail out Logan's ballot on Friday, November 25. The upcoming weekend made it even more important to do so. Again, the Board proffers no explanation for failing to mail a duplicate kit on Friday, November 25. In these circumstances, the fact that it finally sent Logan a duplicate kit on Monday, November 28, and only

after he was able to reach a Board agent on his cell phone, does not make the Regional Office's conduct reasonable. The same is true with respect to Kent. His voice mail was left at 11:32 a.m. on Friday, November 25. There was plenty of time remaining that day to send out a duplicate kit. Again, there is no explanation as to why that was not done. And even though the Regional Office sent out a duplicate kit to Logan on Monday, November 28, it inexplicably waited until Tuesday, November 29 to send a kit to Kent. What this Court is left with is a conscious refusal by the Regional Office to respond to voter requests for duplicate ballots for four (4) and (5) days during a very critical time period. Given that the agreed-upon election mechanics included a specified procedure for voters to obtain duplicate kits, which both Logan and Kent followed, the Regional Office's conduct cannot be characterized as anything other than an election "irregularity." The Board's finding that NHRA failed to establish an election irregularity attributable to the Board lacks any substantial evidence in the record.

B. Employees Logan And Kent Were Disenfranchised.

Once an election irregularity attributable to the Board is established, the only remaining question is whether that irregularity caused a sufficient number of employees to be *possibly* disenfranchised. Given that this election was decided by a single vote, if either Logan or Kent was possibly disenfranchised as a result of the

Regional Office's apparently conscious failure to respond in a timely fashion to their requests for duplicate ballots, the Board's order must be denied enforcement.

There is no question that Logan and Kent did not receive duplicate voter kits prior to the counting of the ballots on December 2. In that sense, they were clearly disenfranchised. The only issue is whether this disenfranchisement can be attributed to the Regional Office's conduct, or instead, whether it is attributable to a lack of reasonable diligence on the part of the two employees. The Board argues that it is the latter, but this contention cannot be squared with either the facts or the law.

The Board argues at various points in its Brief that Logan and Kent were obligated to contact the Board on or before November 22 if they did not receive their initial ballot. (Board Brief at pp. 6, 21-22, 29).⁵ This argument is based on a provision in the Stipulated Election Agreement that employees who did not receive a ballot should contact the Regional Office "no later than" Tuesday, November 22. There are two problems with this argument. First, neither the Board nor the ALJ found that the November 22 date was binding or had any significance. Nor did the Board or ALJ mention or rely upon this rationale for finding that there was no election "irregularity." It is well settled that post-hoc rationalizations of the Board's appellate counsel cannot supply possible justifications for the Board's decision that

⁵ The Union makes the same argument. (Union Brief at p. 11).

the Board itself did not rely upon. *Johnson v. Copyright Royalty Board*, 969 F.3d 363, 390 (D.C. Cir. 2020). Second, the Stipulated Election Agreement is not disseminated to eligible voters, and it is the Notice of Election that advises employees of their obligations.⁶ The Notice of Election advised employees:

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by 5:00 p.m., on Wednesday, November 30, 2016.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Tuesday, November 22, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (973) 645-2100 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

(JA 97).

Thus, employees were not notified of any obligation to contact the Regional Office *no later than November 22*. Rather, they were informed that if *by November 22*, they had not received a ballot, they should contact the Regional Office immediately. Obviously, employees could not know until November 22 that there might be a problem that required follow-up. As noted, neither the Board nor the ALJ found any obligation to call the Regional Office no later than November 22. Nor did the Board or ALJ find that Logan and Kent waited too late to request duplicate

⁶ The Board cites to a November 7 email from an NHRA representative to employees stating that if employees did not receive a ballot, they should contact the Regional Office by November 22. (Board Brief at pp. 8-9). But that email was not part of the official Board communications to employees, and employees cannot be faulted for relying upon the official Notice of Election.

ballots. The ALJ's finding, adopted by the Board, was that Logan and Kent should have done more to obtain a ballot, not that they should have acted earlier. (JA 182).⁷

The Board's arguments in support of the ALJ's conclusion that Logan and Kent were required to do more than what they did in order to obtain a duplicate ballot are unconvincing and not supported by the record. Regarding Logan, the Board argues that he did not call the national toll-free number provided on the Notice of Election (Board Brief at p. 9),⁸ and did not send emails to the two Board agents (Flores and Pomianowski) (Board Brief at pp. 9-10). Given the Board's representation in its Brief to this Court that the Regional Office did in fact monitor the Regional Office phone number called by Logan and Kent, its argument that they should have done more is nothing more than a Trojan horse. Thus, the Regional Office was in fact aware of the requests by Logan on November 23 and 25 and by Kent on November 25. *Making additional efforts to contact the Board agents would have been superfluous as they already knew, by virtue of monitoring the Regional Office telephone number that Logan and Kent had requested duplicate ballots, but for reasons that have never been revealed, the Regional Office chose not to respond in a timely fashion.*

⁷ Logically, as the date for counting the ballots drew closer, the Board should have responded with greater urgency to requests for duplicate ballots.

⁸ The Notice of Election gave employees a choice of numbers to call. It did not instruct employees to call both numbers.

Also, why Logan and Kent would have felt it necessary to call a national automated number when they were able to leave detailed voice mails on the Regional Office phone number provided on the Notice of Election is not explained. The Regional Office was specifically supervising the election, and Logan had no reason to believe that his voice mails would not be acted upon, at least until the second voice mail was not returned. And at that point, Logan did make further efforts to contact the Board, obtaining a personal cell phone number for Board agent Flores from the union representative, and then calling him on Monday, November 28. Importantly, the Notice of Election informed employees to call “the Region 22 Office at (973) 645-2100 *or* our national toll-free line at 1-866-667-NLRB (1-866-667-6572).” (Emphasis added). The employee was given a choice. He could call either number. Nowhere was he told that he should call both numbers.

Having received no response to either of his voice mails, Logan could conceivably have chosen to email the two Board agents in lieu of calling them directly, but he did not receive their email addresses until Saturday, November 26, and inasmuch as he actually reached Flores on Monday, November 28, the next business day, emailing would not have resulted in a duplicate kit being sent any earlier. The Board has never required that employees exhaust every conceivable option for voting. What it requires is reasonable diligence. Logan more than satisfied his obligations as a voter. The problem was not a lack of effort on his part. Instead,

the problem was the Regional Office consciously ignoring his November 23 and 25 voice mails requesting a duplicate ballot. We know from the record that had the Regional Office sent Logan a duplicate kit on November 23, it was highly likely that he would have received it in time to return it by December 2. Thus, employees David Hamberg (residing in Missouri) and Suzanne Michaels (residing in Nevada) were mailed duplicate ballots on November 23 and were able to return timely ballots. (JA 118, 128, 131-132). Logan's voice mail was left at 11:56 a.m. on November 23, which left plenty of time for the Regional Office to send him a duplicate ballot that same day. Even if the Region had waited until Friday November 25 to send a duplicate mail ballot, it is by no means impossible, or even unlikely, that Logan could have received it in time to return it before December 2.⁹

With respect to Kent, the Board acknowledges that it received his voice mail on November 25, but offers no explanation for why it waited until November 29 to send him a duplicate voter kit, thereby effectively ensuring that he would not receive

⁹ The Board's contention in a footnote that Logan *would have voted for the Union* is legally immaterial, not to mention completely speculative. The Board does not assess how an employee might have voted. The standard is an objective one, and an employee's statement *after the fact* as to how he would have voted if he had received a ballot in time to return it is wholly immaterial. Indeed, given that Logan made this statement in an email to the Union's representative, it is highly unlikely that he would have stated otherwise. In fact, as the Board acknowledges, the Company's representative was under the impression that Logan intended to vote for the Company. (Board Brief at p. 9). Actual votes are determinative, not statements to interested parties regarding voting intentions.

it in a timely fashion. The Board instead argues that because of personal circumstances, Kent would not have been able to return a timely ballot even if a duplicate kit had been sent to him on November 25. (Board Brief at 11). But, as discussed in NHRA's Opening Brief, this argument is belied by the actual voice mail left by Kent: "I need one hopefully in the mail today and I can either get it tomorrow or Monday and sent[sic] it right back out Monday." Kent was close enough to his home to return and was sufficiently motivated to make the effort necessary to pick up and return a timely ballot. The Regional Office's unexplained delay in mailing Kent a duplicate ballot denied him that reasonable opportunity. It is the possibility, not certainty, of disenfranchisement that is determinative. Like Logan, Kent was disenfranchised by the Regional Office's inaction, and his vote was determinative. Insofar as the Board concluded otherwise, its decision is not supported by substantial evidence.

CONCLUSION

For the reasons set forth in NHRA's Opening Brief and in this Reply Brief, the Company respectfully requests that the Board's order be denied enforcement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: November 17, 2020

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of November, 2020, I caused this Reply Brief of Petitioner to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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