**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 1**

**ST. LUKE'S HOSPITAL**

**Employer**

**And** **Case 01-RD-267972**

**TARA CONDON**

**Petitioner**

**And**

**MASSACHUSETTS NURSES ASSOCIATION**

**Union**

# DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Upon a petition filed on October 21, 2020[1], by Tara Condon, the Petitioner, and pursuant to a Stipulated Election Agreement, an election was conducted via mail ballot in November and December among employees of St. Luke's Hospital, herein called the Employer, in the following unit:

> All full-time, regular part-time and per diem Registered Nurses, Attending Nurses, Resource Nurses, Cardiopulmonary Care Nurses, Case Coordinators, RDC Coordinators, Professional Practice Specialists, RN II, RN II – Enterostomal, Bed Placement Coordinators, Childbirth Educators, Clinical Nurse Experts, Educator I, Educator II, Imaging Services, Infection Control Specialists, Lactation Consultants, Psychiatric Coordinators, Substance Use Disorder Coordinators, Surgical Coordinators, and Wound Care RNs employed by the Employer at its St. Luke's Hospital site, but excluding all other employees, guards, managers, and supervisors as described in the Act.

The ballots were counted, and an initial Tally of Ballots issued, on December 15. A Revised Tally of Ballots (Counting of Challenged Ballots) issued on February 12, 2021, after the parties resolved multiple challenges. The Revised Tally of Ballots showed the following results:

Approximate number of eligible voters…….772
Number of void ballots……..3
Number of ballots cast for participating labor organization……..299
Number of votes cast against participating labor organization……..290
Number of valid votes counted……..589
Number of challenged ballots……1
Number of valid votes counted plus challenged ballots……590

[1] All dates are in 2020 unless otherwise indicated.

Number of sustained challenges (voters ineligible)……10

The remaining undetermined challenged ballot is not sufficient to affect the results of the election.

A majority of the valid votes counted plus challenged ballots has been cast for the Massachusetts Nurses Association.

On December 22, the Employer filed timely objections to conduct affecting the results of the election. The objections are as follows:

1. The telephone number for both the Regional Office and the national toll free line provided on the Notice of Election malfunctioned during the period in which employees who had not received a ballot were responsible for contacting the NLRB to request a new ballot and employees were not able to obtain ballots, resulting in a determinative number of voters being disenfranchised.

2. Several voters did not receive ballots in time to cast votes in the election resulting in a determinative number of voters being disenfranchised.

For the reasons set forth below, I am overruling the Employer's objections and issuing a Certification of Representative.

*The Ballot Mailing Process*

The ballots were mailed from Subregion 34 in Hartford, Connecticut, on November 18. Eligible voters were instructed to call the Region 1 office or the NLRB's national toll-free line if they did not receive a ballot by November 25.

On November 25, (the day before Thanksgiving), the Employer's attorneys notified the Board Agent handling the election by email that, due to a malfunctioning telephone system, eligible voters were unable to leave voicemails requesting new ballots. The Board Agent responded by email that, for that day only, voters needing duplicate ballots should contact her on her direct line.

Approximately one hour later, the Employer's Senior Vice President and Chief Nursing Officer emailed the potential voters, explaining the problem and providing them with the Board Agent's direct phone number. The email did not instruct employees to contact that number on only that day.

On November 30, the Petitioner's attorney contacted the Board Agent, by email with a copy to all parties, and advised her that the problems with the telephone system persisted.[2] The

[2] The Employer notes that a banner warning of possible telephone problems remained on the NLRB's website until at least late December.

Board Agent replied by email that she believed that the main phone line was functioning, and she had asked the parties to provide her contact information to eligible voters and that she had forwarded those voters' requests for ballots to the staff responsible for sending ballots out. In her November 30 response, the Agent also requested voters continue to initially contact the Regional office, or general number to request duplicates, but if they were unable to leave a message, they could contact her directly, and reiterated her telephone number.

On December 3, the Petitioner's attorney emailed the Board Agent with a copy to all parties that the voters were still encountering problems with the Region's telephone number. The Board Agent replied by email to all parties the same day, instructing them to advise voters who experienced problems contacting the Region by telephone to email her directly with their name, job title, current mailing address and phone number. The Employer shortly thereafter sent a second email to all potential voters providing them with the Board Agent's email address and advising them that if they needed a duplicate or had not received a ballot to email the Board agent with their name, job title, current mailing address and phone number.

Between November 23 and December 7, Region 1's records reveal that it received and responded to 37 requests for ballots or duplicate ballots as set forth below:

- Ten voters called the Region 1 information officer[3] on November 23, to request duplicate ballots. Duplicate ballots were sent to all ten voters on November 24.

- Two employees not on the voting list called the Region 1 information officer on November 23, to request ballots. Ballots were sent to these voters on November 24.

- Two employees not on the voting list called the Region 1 information officer on November 24, to request ballots. Ballots were mailed to the two voters that same day.

- Four voters called the Region 1 information officer on November 24, to request duplicate ballots. Duplicate ballots were mailed to these four voters that same day.

- One voter called the Board Agent handling the election on November 25, (the day before Thanksgiving) to request a duplicate ballot. A duplicate ballot was mailed to that voter that same day.

- Two employees not on the voting list called the Region 1 information officer on approximately November 24, to request ballots. Ballots were mailed to these voters on November 25.

- Four voters called the Region 1 information officer on November 27 (the day after Thanksgiving). Duplicate ballots were sent to these four voters on November 30.

[3] All the calls identified as being received by Region 1's information officer would have been routed through the Region 1 telephone number employees were instructed to call that the Employer asserts was malfunctioning for parts of the voting period.

- Three voters contacted the Board Agent assigned to the election on approximately November 30, and requested duplicate ballots. Duplicate ballots were mailed to these three voters on December 1.

- A voter contacted the Board Agent assigned to the election on approximately December 1, and requested a duplicate ballot. A duplicate ballot was mailed to this voter on December 2.

- An employee not on the voter list emailed the Board Agent assigned to the election at 10:13 p.m. on December 3, to request a ballot. A ballot was mailed to this voter on December 4.

- Two voters not on the voter list emailed the Board Agent assigned to the election on December 4, to request a ballot. Ballots were mailed to those two voters that same day.

- Three voters emailed the Board Agent assigned to the election on December 4, to request duplicate ballots. Duplicate ballots were mailed to these three voters that same day.

- An employee not on the voting list called the Region 1 information officer on December 4, to request a ballot. A ballot was mailed to this voter that same day.

- A voter emailed the Board Agent assigned to the election late in the day on December 7, to request a duplicate ballot. A duplicate ballot was mailed to this voter on December 8.

Thirty-one of the thirty-six voters[4] who contacted the Region during the voting period to request original or duplicate ballots returned their ballots prior to the count on December 15.

*Employer's Objection 1*

The Employer has provided an offer of proof to support its contention that a determinative number of voters were unable to request ballots due to the malfunctioning NLRB telephone system.

The Employer states that a potential voter, Voter A, would testify that he never received a ballot and that when he attempted to call the Region, he was unable to reach anyone from whom to request a new ballot or to leave a message. The Region has no record of Voter A attempting to request a new ballot.

In addition, the Employer states that a potential voter, Voter B, would testify that she did not receive a ballot but that when she called the Region on multiple occasions she was unable to reach a Board agent or to leave a message. As with Voter A, the Region has no record of Voter B attempting to contact the information officer or the Board Agent assigned to the election.

[4] One voter contacted Regional Staff twice to request a duplicate ballot.

*Employer's Objection 2*

The Employer has further provided an offer of proof to support its contention that several voters did not receive ballots in time to cast votes in the election.

The Employer maintains that a potential voter, Voter C, would testify that she did not receive her ballot although her address was correct on the voter list. It asserts that she would testify that she called the Board three times to request a duplicate ballot, but never received one. The Region's records reveal that Voter C's ballot kit was returned on December 4, and marked as "undeliverable." These same records reveal that on December 4 and December 7, the information officer left voicemails for Voter C in an attempt to confirm Voter C's address. Voter C did not return the information officer's calls and there is no record that she attempted to contact the Board Agent assigned to the election or the Region at any time.

The Employer also claims that a potential voter, Voter D, would testify that he called the Region to request a new ballot and spoke to someone who asked him to verify his address. However, he never received a duplicate ballot. The Region has no record of Voter D requesting a duplicate ballot, and it appears that no duplicate ballot was ever sent to him.

The Employer states that a potential voter, Voter E, would testify that she contacted the Board Agent assigned to oversee the election to request a ballot but did not receive the ballot until the deadline for returning ballots had passed.[5] No ballot was mailed to Voter E on November 18 because Voter E was not on the voter list. Voter E was not on the voter list because all parties agreed that she was not eligible to vote. Voter E requested a ballot at 10:13 p.m. on December 3; a ballot was mailed to her on December 4, twelve days before the ballots were to be counted on December 15.

Finally, the Employer states that a potential voter hereinafter referred to as Voter F would testify that she never received a ballot. It does not assert that she made any attempt to contact the Region to request a duplicate and the Region has no record of Voter F requesting a duplicate ballot.

*Analysis*

It is well settled that "representation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees," *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "the burden of proof on parties seeking to have a Board supervised election set aside is a heavy one," *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

[5] "Voter E" is the employee identified above who was not on the list and emailed the Board Agent conducting the election the evening of December 3 and was sent a ballot the next day.

Section 102.69(a) of the Board's Rules and Regulations provides that when filing objections to an election, a party must also file a written offer of proof in the form described in Section 102.66(c) of the Board's Rules and Regulations. Section 102.66(c) specifies that offers of proof shall identify **each** (emphasis added) witness and summarize the testimony of that witness. With regard to processing objections and/or challenges, Section 102.69(c)(1)(i) of the Board's Rules and Regulations provides that, if the Regional Director determines that the evidence described in the offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, the Regional Director shall issue a decision disposing of the objections and certifying the results of election, including a certification of representative where appropriate. The objecting party bears the burden of furnishing evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election, *Jacmar Food Service Distribution*, 365 NLRB No. 35, slip. Op. 1, fn. 2 (2017), citing *Transcare New York, Inc.*, 355 NLRB 326 (2010).

In the instant case, the Employer asserts that eligible voters were denied the opportunity to vote and be counted in the election. The proper test for evaluating whether election results should be certified based on eligible voters having an adequate opportunity to participate in an election, notwithstanding low participation, is an objective one. In *Lemco Construction, Inc.*, 283 NLRB 459 (1987), the Board determined that election results should be certified where all eligible voters have an adequate opportunity to participate in the election, notwithstanding low voter participation. The Board declared it will not apply a test based on the percentage of eligible voters who voted to determine the validity of an election, rather, it will find an election to be valid if: (1) all employees have received adequate notice of the election; (2) all employees were given adequate opportunity to vote; and (3) employees were not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. *Ibid.* See also, *Northern Star Realty Co.*, 283 NLRB 1159 (1987); *Community Care System*, 284 NLRB 1147 (1987). In *Lemco*, only 1 out of 8 eligible voters cast a ballot because some employees were absent, and a group of employees arrived at the polling place after the polls closed. Despite the low voter participation, the Board dismissed the objection to the election and determined that election results should be certified where all eligible voters had adequate notice and opportunity to participate in the election.

The *Lemco* standard was applied in *Sitka Sound Seafoods*, 325 NLRB 685 (1998) where the Board upheld a mixed mail manual election in which only 64 of the 92 employees on the voter list voted. In *Antelope Valley Bus Co., Inc. v. NLRB*, 275 F.3d 1089 (D.C. Cir. 2002), the Court upheld a mail ballot election where a determinative number of voters testified that they did not receive mail ballots. In *Northern Star Realty Co.,* supra, the election was upheld where only 1 of 2 employees voted because the employee was provided adequate notice and opportunity and was not prevented from voting by any party.

Accordingly, I shall apply the *Lemco* standard here. The first *Lemco* factor requires that all employees receive adequate notice of the election; it is undisputed that this requirement has been met. Likewise, there is no allegation, and no evidence suggests, that any party prevented any eligible voter from casting a ballot. The sole question is whether all employees were given

an opportunity to vote; or, alternatively, whether the malfunctioning NLRB telephone system prevented voters from casting ballots.

At a hearing, Voter A and Voter B would testify that they were unable to reach a Board Agent or a voicemail box in order to request ballots. Meanwhile, no fewer than 36 voters were able to request ballots by leaving voicemails in the NLRB's voicemail box, speaking directly to various NLRB agents performing information officer duties, leaving voicemails for the Board Agent assigned to handle the election, speaking directly to the Board Agent handling the election, or emailing the Board Agent handling the election. When the NLRB's phone system experienced problems on November 25, the Employer, with authorization, immediately provided all employees with alternate contact information for the Board Agent handling the election; and sent this information a second time on December 3. While some employees took advantage of the opportunity to contact the Board Agent directly, a steady stream of employees also continued to navigate the NLRB's phone system successfully and request ballots in the usual manner, from the information officer on duty. The experiences described by Voter A and Voter B through the Employer's offer of proof do not suggest a bar to employee enfranchisement worthy of setting aside an election in which almost six hundred eligible voters cast their ballots.

Voter C would testify that she never received her ballot although her address was correct on the voter list. As noted before, however, her ballot was returned as "undeliverable;" and attempts by the Region to reach her and confirm her address were unsuccessful. These unfortunate circumstances do not warrant setting aside an election on the ground that a single employee did not have the opportunity to vote.

Voter D and Voter F would testify that they never received ballots. The Region has no record of either voter requesting a duplicate and, more importantly, the Employer's offer of proof provides no basis for concluding that Voter F ever requested one.

Finally, Voter E would testify that she did not receive a ballot until the deadline for returning ballots had passed. Voter E was among a group of employees that the parties eventually agreed were ineligible to vote and stipulated that the challenges to similarly situated employees should be sustained. In any event, a ballot was sent to her on the business day immediately following her request for one.

Even crediting the proposed testimony of all six voters, at most, the Employer's evidence shows that four eligible voters, Voters A, B, C, and D requested or attempted to request duplicate ballots and never received them. The ballots that would have been cast by these four voters would not have been determinative of the final results. There exists no scenario under which the allegedly disenfranchised employees' votes could alter the results of the election. As the Tally of Ballots presently stands, there are nine more "yes" votes than "no" votes; one challenged ballot remains unresolved and uncounted. If Voters A, B, C, and D had been able to vote, and they and the voter whose ballot remains challenged voted against representation, the results of the election would remain unchanged. Absent evidence that a potentially determinative number of eligible

voters were deprived of the opportunity to cast a ballot because the Region could not or did not respond to their requests for duplicate ballots, there is insufficient basis to set aside the election. [6]

Thus, the Employer has failed to produce sufficient evidence of a *prima facie* showing that substantial and material issues of fact exist that would warrant setting aside the election based on Objections 1 and 2. Accordingly, I am overruling these objections.

## CONCLUSION

Based on the foregoing, I am overruling the Employer's objections in their entirety. As the tally of ballots now shows that a majority of the valid votes counted has been cast in favor of the Petitioner, I hereby issue the following Certification of Representative:

## CERTIFICATION OF REPRESENTATIVE

**IT IS CERTIFIED** that a majority of the valid ballots has been cast for the Massachusetts Nurses Association, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time and per diem Registered Nurses, Attending Nurses, Resource Nurses, Cardiopulmonary Care Nurses, Case Coordinators, RDC Coordinators, Professional Practice Specialists, RN II, RN II – Enterostomal, Bed Placement Coordinators, Childbirth Educators, Clinical Nurse Experts, Educator I, Educator II, Imaging Services, Infection Control Specialists, Lactation Consultants, Psychiatric Coordinators, Substance Use Disorder Coordinators, Surgical Coordinators, and Wound Care RNs employed by the Employer at its St. Luke's Hospital site, but excluding all other employees, guards, managers, and supervisors as described in the Act.

## RIGHT TO REQUEST REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for

[6] This conclusion is based on an assumption, but not a finding, that functionality problems of unknown duration with the Region's telephone line during parts of the voting period deprived these four voters of the opportunity to vote. It is not apparent that such a finding would be warranted. Almost four weeks elapsed between the date that the ballots were mailed and the count. During that period, a significant number of employees successfully contacted the Region to request original or duplicate ballot, before and after the reported telephone issues. In addition, Regional personnel responded proactively when they learned of possible problems and promptly provided alternative means for employees to request ballots. All employees received notice of this alternative method, not once, but twice, and, as set forth above, many employees relied on it to request ballots.

review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **March 18, 2021**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: March 4, 2021

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