On March 3 and 4, voter Lisa Wratten called both numbers in order to request a duplicate ballot kit; when her phone calls were not answered, she did not leave a voicemail message. A Board agent attempted to contact Wratten by phone and, on March 10, the Board agent mailed Wratten a duplicate ballot kit and informed her by text message that it was in the mail. Wratten received the duplicate kit on March 15 and the Board agent texted her that day to confirm receipt. Wratten replied to the Board agent on March 16, confirming receipt and stating that she would mail her ballot that day, but did not in fact mail it until March 18.

On March 19, the Acting Regional Director approved the parties’ Stipulated Agreement to extend the voting period to March 29 and to hold the vote count on March 31 because of a concern that “not all mail ballots mailed [to] the Regional Office have been received. . . .” On March 22, the Board agent emailed the parties the following message:

Happy Monday! Wanted to let you both know that the 3 ballots I had been expecting plus a couple more came in to our office late Friday. So we’ve received ballots from all at least that have told me that they sent their ballots in. We are at about 20 received as of this past Friday. Thus, I’d expect we’ll be going forward with the count on 3/31.

On March 31, the Region conducted the ballot count (by videoconference) and the Tally of Ballots showed the Petitioner succeeding 11–10. After the count, the Employer’s representative emailed the Board agent and asked her to preserve any late-arriving ballot envelopes and to notify the parties. The Board agent responded:

...As you both know, as of Thursday 3/18 before the original count scheduled on 3/22, there were 3 voters that had separately informed me they mailed their ballot but we had not received them at my office. That led us to reschedule the count. Those 3 voters’ ballots were then received the following day, on Friday 3/19. Thus, we received a ballot from each voter that had contacted me. . . .

Wratten’s ballot arrived at the Region on April 1, and the next day the Board agent notified the parties via email that the ballot had been received, that it was postmarked on March 18, and that the duplicate kit had been sent at Wratten’s request on March 10. The Board agent stated that:

While she contacted me to request the duplicate, she did not request that I confirm we received her ballot, so she was not “on my radar” to contact upon receiving her ballot. In any event, I’d like to clarify my statement below [in the email chain], “we received a ballot from each voter that had contacted me,” such that we received a ballot from those that contacted me to ask that I confirm when their ballot has been received by my office. Of the remaining voters whose ballots we have not received (I believe there are 8), I did not receive any contact from them to request a duplicate ballot or otherwise concerning this election . . . .
The Employer’s Objection 2 alleges that: the Board agent on March 22 represented that the Region had received ballots from all voters who had told the Region that they had returned their ballots; that the Board agent failed to notify the parties that the Region was aware of at least one voter (i.e., Wratten) who had returned a ballot that had not been received as of the ballot count; and that this conduct resulted in “disenfranchisement that is outcome determinative.” In adopting the hearing officer’s recommendation to overrule this objection, the Acting Regional Director for Region 7 found that the Board agent’s “admittedly confusing statements” did not require setting aside the election because they did not raise a reasonable doubt as to the fairness and validity of the election.

The test for setting aside an election based on regional office conduct is whether the alleged irregularity raises “a reasonable doubt as to the fairness and validity of the election.” Guardsmark, LLC, 363 NLRB 931, 934 (2016) (quoting Polymers, Inc., 174 NLRB 282, 282 (1969), enf’d. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970)). To meet this standard, the objecting party must put forward evidence of actual prejudice, and this showing of prejudicial harm must be more than speculative to establish that a new election is required. Id. (citing Transportation Unlimited, 312 NLRB 1162 (1993)).

We agree with the Acting Regional Director’s decision to overrule this objection. Assuming, without deciding, that the Board Agent’s March 22 email misled the parties because it gave the incorrect impression that the Region had received all the outstanding ballots that had previously led the parties (and the Acting Regional Director) to agree to extend the voting period and the ballot count, this alleged misrepresentation does not raise a reasonable doubt as to the fairness and validity of the election. To the extent that the alleged misrepresentation deprived the Employer of the opportunity to seek a second extension of the ballot count, this circumstance is ultimately irrelevant to the question of whether the voting itself was valid, given that there is no showing that the statements at issue affected the ability of any employees to receive their ballots and cast their votes. No voters were aware of the Board agent’s communications, and Wratten’s ballot was already in the mail when the March 22 email was sent. Thus, nothing alleged in Objection 2 hindered the casting of any votes or otherwise undermined the integrity of the election process, as the dissent claims. Cf. Lemco Construction, Inc., 283 NLRB 459, 460 (1987) (low participation did not invalidate election where voters were given adequate notice, adequate opportunity to vote, and were not prevented from voting by party conduct or the scheduling of the election).

Moreover, as our dissenting colleague acknowledges, the effect of the Board Agent’s alleged misrepresentation is speculative. Even assuming that the Employer would have sought an extension had the March 22 email accounted for Wratten’s outstanding ballot, and that the Petitioner would have agreed to seek a second extension, the Acting Regional Director was under no obligation to grant a second extension (and it would not have been an abuse of discretion to deny a request for a second extension based on one possibly outstanding ballot the voter had purportedly placed in the mail 2 weeks before).

Under these circumstances, the Board Agent’s alleged misrepresentation did not raise a reasonable doubt as to the fairness and validity of the election. It did not hinder any voters from casting their ballots, and the harm the Employer alleges it caused is speculative. The alleged misrepresentation therefore does not require setting aside the election and directing a rerun election, and the Acting Regional Director properly overruled the Employer’s objection. Accordingly, we affirm the Acting Regional Director’s Decision and Certification of Representative.

5 As noted, the parties stipulated that the vote count would be held on March 31 and that any rescheduling of the count was within the regional director’s discretion. Additionally, the record reflects that the Board agent’s conduct did not prevent Wratten from receiving and casting her ballot. Accordingly, contrary to our dissenting colleague, we think it is entirely appropriate in these circumstances to recognize that it would not have been an abuse of discretion if the Acting Regional Director denied a request for a second extension and held the vote count pursuant to the parties’ stipulation. See generally Community Care Systems, 284 NLRB 1147, 1147 (1987) (“Where the election has gone ahead pursuant to the parties’ stipulation... and it does not appear that the election arrangements were such that employees were prevented from voting, we see no basis for permitting the unsuccessful party to attack the election on the basis of a condition to which it stipulated.”).

6 Contrary to the argument of the Employer, this case does not involve conduct that “tends to destroy confidence in the Board’s election process, or could reasonably be interpreted as impairing the election standards the Board seeks to maintain.” That test applies to conduct that, for example, may undermine the Board’s appearance of neutrality. See, e.g., Athbro Precision Engineering Corp., 166 NLRB 966 (1967). Nothing in the Board Agent’s communications here impugned the Board’s neutrality, nor would we find that an alleged misrepresentation concerning the status of a single outstanding ballot tends to destroy confidence in the overall election process.

7 Member Kaplan respectfully dissents. In his view, the Employer’s objections raise insurmountable concerns about the Region’s handling of this mail-ballot election, the outcome of which turned on a single vote. In Objection 2, the Employer raises a substantial issue regarding the effect of the Board agent’s failure to inform the parties about the status of Wratten’s ballot. The Region’s inconsistent handling of ballots—postponing the count out of concern for outstanding ballots, but then, by its misstatement, precluding any opportunity to request a second postponement where that concern still existed—undermined the integrity of the election process. As the majority acknowledges, no one
knows what steps might have been taken or what the outcome would have been had the Board agent accurately advised the parties about Wratten’s outstanding ballot. But even assuming that the Board agent had acted appropriately and that the Regional Director had thereafter declined to authorize a second postponement, the Employer would have had the opportunity to challenge that decision; for example, it could have sought extraordinary relief under Sec. 102.67(j) of the Board’s Rules and Regulations. And although his colleagues have prejudged that, if the Employer had been allowed to challenge the Region’s decision and that challenge had been presented to them, they would not have found the challenge to be successful, that does not change the fact that the Employer never had the opportunity to bring that challenge before a regular Board panel, the members of which may or may not have agreed with my colleagues. Taken with the other potential election irregularities raised by the Employer, Member Kaplan finds the collective effect on the election of all issues raised in the Request for Review require that the election results be set aside and a new election ordered.

The Acting Regional Director’s Decision and Certification of Representative is affirmed.

Dated, Washington, D.C. April 21, 2022

______________________________________
Marvin E. Kaplan,                              Member

________________________________________
Gwynne A. Wilcox,                            Member

________________________________________
David M. Prouty,                                Member

(SEAL)            NATIONAL LABOR RELATIONS BOARD