JD(NY)–24–09
Bronx, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COLGATE SCAFFOLDING AND EQUIPMENT CORP.
Employer

and Case No. 2-RC-23327

DISTRICT COUNCIL FOR NEW YORK CITY AND
VICINITY, UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA
Petitioner

Denise Barton Ward, Esq., (Littler Mendelson, P.C.),
of Melville, NY, for the Respondent.
Nicholas S. Hanlon and Gary Rothman, Esqs.,
(O'Dwyer & Bernstein, LLP), New York, NY,
for the Petitioner.

RECOMMENDED DECISION ON OBJECTIONS

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to a Petition filed by District Council for New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, herein called Petitioner or the Union, the parties entered into a Stipulated Election Agreement, which was approved by the Director on October 24, 2008,[1] providing for an election to be conducted on November 25, in a unit of employees in various positions employed by Colgate Scaffolding and Equipment Corp., herein called the Employer at its facility in the Bronx, New York.

The election was conducted, and the initial tally of ballots revealed, 10 votes for Petitioner, 9 against, and 2 challenged ballots. Thus challenges were sufficient to affect the results of the election.[2]

On December 1, the Employer and Petitioner filed timely objections to conduct affecting the results of the election.

On January 16, 2009, the Director issued a Report, Recommendation and Notice of Hearing on challenged ballots. In that report, the Director concluded that the challenge to the ballot of Juan Villanueva be sustained, because he had been discharged on November 14, prior to the date of the election. The Director also concluded that the challenge to the ballot of Kevin Corno raised substantial and material factual issues which may best be resolved by a hearing.

Thereafter, the parties stipulated and agreed that Corno was not an eligible voter, and that the challenge to his ballot be sustained. This resulted in an Order Approving Stipulation on

[1] All dates hereinafter are in 2008, unless otherwise indicated.
[2] There were twenty one names on the *Excelsior* list.

Challenges, Approving Petitioner's Request to Withdraw Objections, and Revised Tally of Ballots, issued by the Acting Director on February 3, 2009. In that Order, the stipulation was approved, as well as Petitioner's request to withdraw its objections, and a revised tally of ballots was issued. This tally is as follows:

Approximate number of eligible voters	20
Number of void ballots	0
Number of votes cast for the Petitioner	10
Number of votes cast against participating labor organization	9
Number of valid votes counted	19
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	19

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted has been cast for Petitioner.

The order also indicated that the Employer's objections will continue to be processed. On February 19, 2009, the Acting Director issued a Notice of Hearing on Objections, after concluding that the Employers objections caused substantial and material factual issues which best may be resolved on the basis of record testimony.

Accordingly, a hearing was held before me in New York, New York on April 20, 2009. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses I issue the following:

FINDINGS OF FACT

I. THE OBJECTIONS

The Employers objections are set forth below:

> The bases of these Objections include, but are not limited to, the following:
>
> 1. The Board, through its agents, interfered with the fair operation of the election process and destroyed laboratory conditions by failing to follow Board procedures in regard to the conduct of the representation election.
>
> 2. The Board, through its agents, interfered with the fair operation of the election process and destroyed laboratory conditions by opening the polls twenty-two (22) minutes late for the second polling session.
>
> 3. By the foregoing and other unlawful misconduct, the Board and its agents destroyed the necessary laboratory conditions and interfered with the holding of a free and fair election among the employees on November 25, 2008 and such conduct substantially and materially affected the outcome of the election.

II. THE FACTS

The election on November 25, was scheduled for two sessions. The first session was set to start at 5:45 a.m. and to end at 7:15 a.m. The second session was scheduled to begin at 3:00 p.m. and to end at 5:30 p.m.

The *Excelsior* List submitter by the Employer, contained 21 names. Included on that list

were the names Juan Villanueva and Sergio Oseguera.

The first session was opened on time and remained open until the scheduled conclusion. During that first session, all of the employees on the *Excelsior* list voted, except for Villanueva and Oseguera.[3] Kevin Corno, who was not on the list, voted during the first session, and as noted above his vote was challenged.[4]

Although the second session was scheduled to start at 3:00 p.m. it did not, because the Board Agent running the election, did not arrive at the employer's premises until 3:16 p.m. The polls opened at 3:22 p.m. The only employee who voted at the second session was Villanueva. As detailed above his vote was challenged by the Employer. That challenge was subsequently sustained, because Villanueva had been terminated prior to the election.

Thus the only eligible voter who did not vote was Oseguera. The only witness in this proceeding for the Employer was its attorney, Denise Barton Ward. She had no first hand knowledge of Oseguera's status at the time of the election. After the objections were filed, and subpoenas were issued by the Union for payroll records concerning Oseguera, Ward testified that she was told by Peter O'Farrell the Employer's president that Oseguera was on vacation during the election. According to Ward, O'Farrell told her that he did not know where Oseguera was on his vacation. Ward also testified that Oseguera never returned from his vacation (which was an unpaid vacation), and that after several letters were sent to him by the Employer, Oseguera was terminated by letter on January 7, 2009. The letter reads as follows:

> "Due to you exceeding your allowed vacation time and leaving your job we have elected to terminate your employment with our company."

Petitioner presented two witnesses, who testified concerning Oseguera's whereabouts on the day of the election. Miguel Rodriguez was an employee of the Employer, who was also a friend of Oseguera. Rodriquez was bilingual, and had translated for Oseguera in the past in his communications with the Employer. In early September, Oseguera asked Rodriguez to translate for him a request to Ali Hussein, a supervisor of the Employer. Rodriquez translated in Spanish, for Oseguera to Hussein that Oseguera was going to Mexico on November 2, and planned to return to work in February or March of 2009. Hussein responded, "all right." Hussein did not ask Oseguera for anything in writing. Rodriguez interpreted Hussein's comment as granting permission for Oseguera to leave for that period of time, and when he returns, Oseguera would get his job back. According to Rodriguez, it was common practice for employees of the Employer to leave at the end of the year to go to Mexico. They would ask Hussein for permission to go and he would routinely grant such permission. Rodriguez also testified that employees have in the past taken three or four months off to travel to Mexico and were able to return to their jobs, when they returned to this country. Rodriguez recalled an employee named Hector, who stayed in Mexico for six months, and when he returned to this country, he got "his job back." Hector, according to Rodriguez, left in December of 2007, and returned to work in May of 2008.

---

[3] Based upon the undenied and uncontradicted testimony of Petitioner's organizer, Andres Puerta, that after the close of the first polling session, Jesus Barajas the Petitioner's observer, and the Employer's observer, Juan, both stated that everyone had voted during the first session, with the exception of Villanueva. They did not mention Oseguera not having voted, according to Puerta, because "everyone" knew that Oseguera was in Mexico.

[4] As is also detailed above, the parties stipulated that Corno was not an eligible voter, and the challenge to his ballot was sustained.

Rodriguez also testified that he spoke to Oseguera on the phone, on a weekly basis from November 2, 2008 through April 14, 2009, from Mexico. Oseguera informed Rodriguez on the latter date that he was leaving Mexico on April 21, 2009, to return to the United States. Rodriguez spoke to Oseguera on Rodriguez's cell phone, which reflected Oseguera's phone number 394-534-2271, which according to Rodriguez is the number from Oseguera's hometown in Mexico.

Puerta testified that Oseguera informed him early in the organizing campaign, as well as after the election was scheduled, that he would be in Mexico from early November 2008 until the new year of 2009.

Hussein did not testify, and the Employer called no rebuttal witnesses to contradict or counteract the testimony of the Union's witnesses concerning Oseguera's absence from the country on the day of the election.

The record also establishes that Oseguera's name did not appear on the Employer's payroll, after November 2 of 2008.

III. ANALYSIS AND CONCLUSIONS

It has been long held that representation elections are not lightly set aside. *NLRB v. Hood Furniture,* 941 F.2d 328 (5th Cir. 1941). There is a strong presumption that ballots cast under NLRB procedural safeguards reflect the true desires of the employees. *Lockheed Martin Corp.,* 331 NLRB 852-854 (2008). The burden of proof is on the party seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique Art.*, 339 NLRB 1119, 1122 (2003); *Lockheed Martin, supra, Chicago Metallic Co.,* 273 NLRB 1677, 1704 fn. 163 (1985).

The objections here relate solely to the fact that the polls for the second session were opened 22 minutes late. However, the facts that polls are opened late, closed early, or are closed for part of the scheduled time; do not automatically require that an election be set aside. *Midwest Canvas,* 326 NLRB 58 (1998); *Jobbers Meat Packing Co.,* 252 NLRB 41 (1980); *Jim Kraut Chevrolet Inc.,* 240 NLRB 460 (1974). Elections will be set aside, where one of three additional factors are present. (1) the votes of those possibly excluded could have been determinative. *Jobbers Meat Packing, supra; Midwest Canvas, supra.* In *Jim Kraut Chevrolet, supra* the Board phrased the test slightly differently. It stated that "in order to find such conduct objectionable, we require also that the late arrival of the Board agent, caused or may have caused eligible voters to be disenfranchised." Id. At 460.

I do not deem the difference between "may have caused," or "possibly" excluded to be significant, but since the more recent cases, use the "possibly" excluded or "possibly disenfranchised" standard, I shall do so as well. *Midwest Canvas, supra; Pea Ridge Iron Ore,* 335 NLRB 161 (2001).

Factor (2) which could result in an election being set aside, is where the record discloses "accompanying circumstances that suggested that the vote may have been affected by the Board agent's late opening or early closing of the polls." *Midwest Canvas, supra; Jobbers Meat, supra; Nyack Hospital,* 238 NLRB 257 (1978).

Finally the third factor cited by the Board in *Midwest Canvas, supra* is where "it is impossible to determine whether such irregularities affected the outcome of the election" Id. At

58; *Kerona Plastics Extrusion Co.,* 196 NLRB 1120 (1972). These principles have been reaffirmed by the Board in several cases. *Wolverine Dispatch*, 321 NLRB 746 (1996); *Celotex Corp.,* 266 NLRB 802, 803 (1983).

In applying these principles to the instant matter, factors 2 and 3 are clearly inapplicable, since there are no "accompanying circumstances" suggesting votes may have been affected by the late opening. Nor is it impossible to determine whether such irregularity affected the outcome of the election.

Factor number (1) is in issue however, and it must be determined here, "whether the number of employees possibly disenfranchised is sufficient to affect the results of the election." *Midwest Canvas, supra.*

Further, in assessing the crucial issue of whether employees have been "possibly disenfranchised" the Board uses an objective standard, and does not rely on after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election. *Pea Ridge Iron, supra; G.H.R. Foundry Div., Dayton Malleable Iron Co.,* 123 NLRB 1707, 1709 (1959); *Nyack Hospital, supra* at 259; *Whatcom Security* 258 NLRB 985 (1981).

Since the facts establish that Petitioner had only a one vote margin in the election, the burden is on the Employer to prove that at least one employee was "possibly disenfranchised" by the late opening of the polls. I conclude that the Employer has fallen far short of meeting its burden of proof in this regard.

The Employer argues initially that Petitioner failed to prove that Oseguera was the employee who did not vote in the election. It argues that Puerta's testimony that the two observers stated that only Villanueva had not voted, is hearsay and insufficient to establish that Oseguera had not voted. I disagree. As to the hearsay contentions, it is well settled that the Board admits and relies on "hearsay" testimony, where is it rationally probative in force and is corroborated by something more than the slightest amount of other evidence. *Midland Hilton Towers,* 324 NLRB 1141, fn. 1 (1997); *Dauman Pallet, Inc.,* 314 NLRB 185, 186 (1994). Here the "hearsay" testimony concerning who did not vote, is clearly probative, and is corroborated by the Employer's payroll records, which established that Oseguera was not on its payroll as of the date of the election, as well as by Rodriguez's testimony that he spoke to Oseguera weekly by phone from Mexico, from November of 2008 until April of 2009. Additionally, Puerta's testimony that Oseguera told him that he (Oseguera) would be in Mexico on the date of the election, as well as the Employer's discharge letter, terminating Oseguera for overstaying his leave, all corroborate and support Puerta's "hearsay" testimony that Oseguera did not vote.

Further, the Employer did not object to the testimony of Puerta concerning the statements of the observers. This failure to object to testimony, waives the Employer's right to object to the consideration of such evidence on hearsay grounds. *Livermore Joe's Inc.,* 285 NLRB 169; fn. 3 (1987); *Alvin J. Bart & Co.,* 236 NLRB 242, 243 (1978).

The Employer also argues that even considering Puerta's testimony, it does not establish that Oseguera was the one employee who did not vote, since Puerta was not told by either observer that Oseguera had not voted. Indeed, Puerta was told by the observers that "Villanueva" was the only employee who had not voted. However, I credit Puerta that it was common knowledge among the employees, including the observers, that Oseguera would not be voting because he was in Mexico. Thus the statement made to Puerta, by the observers

implicitly confirmed that Oseguera was the only eligible employee who had not voted.[5]

Further, as I have observed above, other record evidence supports the conclusion that Oseguera was the only eligible employees who did not vote. That evidence includes the Employer's records, the Employer's discharge letter, and the testimony of Rodriguez and Puerta. I therefore find that in fact Oseguera was the employee who did not vote in the election.

Moreover, I note that the Employer misperceives its burden of proof. As I have observed above, it is the burden of the Employer, as the objecting party to prove that objectionable conduct took place. *Lockheed Martin, supra. Lalique NA, supra, Chicago Metallic, supra.* Thus, it is the burden of the Employer to establish that the employee who did not vote was "possibly disenfranchised" by the polls opening late. Included in that burden, is proving who that employee was or was not. Thus since the Employer contends that the "one employee who did not vote could have been any other employee besides Oseguera," it is the Employer's burden to so prove. In that regard, the Employer faults Petitioner for not calling either of the observers as witnesses, to establish the Oseguera did not vote. However, since it is the Employer's burden to establish its objections, it should have called the observers to prove that Oseguera voted, or that some other employee was one who did not vote.

Apart from the issue of burden of proof, I find that the evidence, as detailed above is more than sufficient to conclude, which I do, that Oseguera was the one eligible voter, who did not vote in the election.

That brings me to the determinative issue of whether the Employer has proven that Oseguera "was possibly disenfranchised" by the late opening of the polls. I find that the Employer has failed to do so.

I conclude that as argued by Petitioner, that the evidence overwhelmingly demonstrates that Oseguera was in Mexico on the day of the election, and was not "possibly disenfranchised" by the late opening of the polls. The Employer argues, as it did with respect to the issue of whether Oseguera had not voted, that Petitioner has failed to prove that Oseguera was in Mexico on the day of the election. The Employer notes that no direct testimony was offered by Petitioner as to Oseguera's whereabouts on November 25, 2008. However, the testimony and evidence cited above, including Rodriguez's testimony that he spoke to Oseguera in Mexico, on the phone weekly from November of 2008 through April 2009, Puerta's testimony that Oseguera told him that he (Oseguera) would be in Mexico on the day for the election, plus the Employer's own payroll records and discharge letter, strongly suggest, and are more than sufficient for me to conclude, (particularly absent any contradictory evidence), that Oseguera was in Mexico on the day of the election.

Having so found, I conclude in agreement with the Petitioner, that Oseguera was not "possibly" disenfranchised by the late opening of the polls, since he was in Mexico as the day of the election, and could not and would not have appeared to vote on that day. Thus, he would not have voted, even if the polls had been opened on time, and he was not "possibly disenfranchised" by the late opening. *Getronics USA, Inc.,* JD(NY)-47-08, Case No. 22-RC-12925, (December 30, 2008), adopted by the Board, on April 27, 2009 (not to be included in Bound Volumes). (Employee on vacation, in the Dominican Republic on the date of the election); *The Smith Company*, 192 NLRB 1098, 1102 (1971) (one employee who did not vote

[5] Villanuera, as noted, had not voted and did vote in the second session, under challenge. The parties subsequently agreed that the challenge to his ballot be sustained.

on leave of absence, and the other was absent because of illness).

The Employer argues however that it is inappropriate for the Board to inquire into the seasons why Oseguera did not vote and that as a matter of law, the election must be aside, where as here a determinative number of ballots were not cast. *New York Telephone Co.,* 109 NLRB 788, 740 (1959); *Wolverine Dispatch Inc.,* 321 NLRB 746, 747 (1996); *Whatcom Security Agency,* 258 NLRB 485 (1981); *Nyack Hospital*, 238 NLRB 257 (1978), *Pea Ridge, supra.*

The Employer's contention essentially is, that it is *per se* objectionable, and the election is automatically set aside, where, as here, the polls open late (or close early), and a determinative number of voters do not vote. I do not agree with the Employer's contentions in this regard, and in my view, such a rigid position is contrary to the precedent that I have cited above, where the standard is whether the determinative voters who did not vote, were "possibly disenfranchised" by the late opening.

I also do not find that the cases cited by the Employer support such a position. Rather these cases are consistent with the "possibly disenfranchised" standard and do not establish an automatic setting aside of the election, based solely on the fact that a determinative number of ballots were not cast, as the Employer contends.

The Employer cites the following language from *New York Telephone Co.,* 109 NLRB 788 (1959), which has also cited approvingly in *Whatcom Security, supra*, and *Nyack Hospital, supra.*

> The Board is responsible for assuring properly conducted elections and its role in the conduct of elections must not be open to question. Where as here, 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 the election aside and direct a new election. Id. At 740-791. *Whatcom Security, supra* at 445; *Nyack Hospital, supra* at 259.

The Employer argues further that the "irregularity" concerning the election, includes the opening of a poll on time, and that the election as in these cases, must be set aside. However, I note that the key portion of that quote that the irregularity "exposes to question a sufficient number of ballots to affect the outcome of the election," is quite similar to the "possibly disenfranchised" standard. Whether the irregularity "exposes to question" the ballot or "possibly disenfranchised" the voter, it is not a "per se" finding, but requires some assessment of the "possible" affect of the irregularity on the vote or the voter.

New York Telephone Co., supra, involved "possible" tampering with missing ballots, and the Board concluded that such irregularity exposed to question a sufficient number of ballots to affect the outcome. Clearly that finding cannot be made here.

Whatcom Security involved an election, where the doors to the polling place were locked for 50 minutes, prior to the end of the polling period. Fourteen eligible voters did not vote. The Acting Director interviewed all fourteen, inquired as to why they had not voted, and concluded that only two had not voted, due to the locked doors. Thus since these two votes would not have affected the outcome, he concluded that the outcome of the election could not have been affected. The Board reversed the Acting Director. The Board criticized the Acting Director's reliance on the "impressions of the employees in question obtained at various times and under varying circumstances after the election," as inconsistent with Board precedent, which forbids

consideration of post election statements by voters regarding subjective reasons as to why they did not vote. *G.H.R. Foundry*, 123 NLRB 1702 (1954). *Litton Dental Products*, 221 NLRB 700, 708 (1995). The Board then went on to quote *New York Telephone, supra* as detailed above, and added "particularly since the large number of nonvoters could have affected the election results," the election must be set aside. Thus *Whatcom* is clearly not supportive of the Employer's position and is clearly distinguishable from the instant matter. The Board there was primarily concerned with the error of the Region of relying on subjective statements of voters to assess why they did not vote. Once these improper findings were excluded, the election was set aside. Here, to the contrary, I have not relied on any post election or subjective statements of employees to assess why Oseguera did not vote. Rather, it was based on the objective fact that he was in Mexico, on vacation, on the day of the election.

Similarly, *Wolverine Dispatch, supra* and *Pea Ridge, supra,* are of no help to the Employer. *Wolverine Dispatch* involved a Board Agent closing the polls in the middle of the election, for a period of five minutes. Four eligible voters did not vote, and the election was decided by four votes. The hearing officer found no objectionable conduct, since the evidence did not affirmatively demonstrate that any employees were disenfranchised. The Board reversed this conclusion, applying the proper standard (which I have applied, as detailed above) of "whether the number of employees possibly disenfranchised is sufficient to affect the election outcome" It concluded that since it was "possible" that four eligible voters arrived at the polls when it was closed, and left without voting the election should be set aside. Clearly this case differs substantially from ours, as I have discussed above. *Pea Ridge, supra* reversed a Director who, as did the Acting Director in *Whatcom* violated Board precedent by relying on subjective post election statements of a voter that he appeared at the polls and "decided not to vote." Since that one vote could have been determinative, the Board set aside the election applying the "possibly disenfranchised" standard, and concluded that the employee could possibly had been prevented from voting by the late opening of the polls.

Interestingly, the Director also had obtained statements from four other nonvoters to the effect that three of them were out of town on vacation and one was unavailable because of a medical emergency. The Board stated as follows, concerning the Director's reliance on these statements. "The Regional Director's reliance on the statements from the other four employees who did not vote raises a closer issue. However, since the fifth employee's situation was determinative, we need not reach this issue." Thus the Board did not decide in *Pea Ridge*, 335 NLRB at 161, fn 1, the issue here, of whether an employee on vacation and out of the country or otherwise out of town, can be found to have been "possibly disenfranchised," by the late opening of the polls. Clearly *Pea Ridge* did not rule out as the Employer asserts, any inquiry as to why a nonvoter did not vote, as long as such an inquiry, is based on objective rather than subjective evidence.

Finally the Employer relies on *Nyack Hospital, supra* where the Board affirmed the Director's decision to set aside an election, based upon the late opening of the polls, coupled with a finding that the number of voters who did not vote was determinative. The Employer emphasizes that the Employer in *Nyack Hospital* had requested that the Director ascertain through an investigation the reasons for each eligible employee's failure to vote, or in the alternative, be supplied with the Excelsior list, used by the observers, so it could conduct its own investigation. The Director rejected these requests, based primarily on his view, that such investigations would involve the ascertaining of subjective reasons of eligible employees as to why they did not vote, which is prohibited by Board *G.H.R., supra* precedent.

> Such an investigation, whether conducted by the Board or by the Employer, would, for the most part, merely adduce the subjective reasons for eligible employees as to why

they did not vote. It was precisely this type of investigation, consisting of postelection subjective statements that the Board rejected in *G.H.R., supra.* The Board stated that it was precluded "from accepting from eligible voters subjective reasons as to why they did not vote. Such postelection subjective statements are therefore not relevant to the effect of the late opening of the polls upon the instant election." Id. at 259 (footnote omitted).

However, this case does not hold as the Employer contends that it is not appropriate, under any circumstances, to inquire into the reasons for why an employee did not vote. Rather, a careful reading of the Director's decision, set forth above, reveals only that in the circumstances of that case, he would not make such an inquiry. He concluded, as detailed above, that such an investigation (of the reasons for why voters didn't vote), would, <u>for the most part</u> (emphasis supplied) adduced subjective reasons of eligible employees as to why they did not vote. This statement recognizes the possibility that such an investigation could also establish reasons for not voting, based on objective factors, which could be considered. However, in view of the fact that the case involved three separate units, and 169 employees who did not vote, the Director reasonably concluded that it made no practical sense to conduct such an investigation, which would more than likely be unsuccessful in ascertaining reasons for not voting by objective evidence, from a sufficient number of employees, to assist him in his decision. He therefore considered, that in those particular circumstances, that the "irregularity exposed a sufficient number of ballots to affect the outcome of the election," and recommended that the election be set aside.

Here, in contrast, none of the factors as detailed above in *Nyack Hospital*, *supra* are present. Rather, there is only one employee (Oseguera), who did not vote, and it is possible to determine by objective evidence and not subjective post election statements of the employee, why he did not vote.

Midwest Canvas, *supra*, supports my conclusion in this regard, and refutes the Employer's contention that it is never appropriate to inquire into the reasons why employees did not vote, where polls were opened late. There, the polls were opened 20 minutes late, and the Director recommended that the election be set aside, citing *Whatcom, supra* and *Nyack Hospital.* The Board reversed, and ordered a hearing to determine whether as Petitioner contended, 14 employees who were in the *Excelsior* list were ineligible to vote. The Board agreed with Petitioner, that if after the hearing it was determined that these employees were not eligible voters, then the calculations could reveal that the number of "possibly disenfranchised" voters would not be determinative, and there would be no reason to set aside the election.

The Board majority, in response to the dissent's argument that the remand would result in an unwarranted expenditure of Board resources, observed as follows: "To the contrary, we believe that our approach can conserve the Board's resources. The eligibility of the 14 employees in question likely can easily be ascertained, at minimal agency expense." 326 NLRB at 59.

It is thus clear that the Board in *Midwest Canvas* permitted and in fact required, inquiry into voter's status, *vis a vis*, its affect on an election where the polls closed early, since it was likely that a determination could be made concerning eligibility based on objective evidence. The Board's further observation in *Midwest Canvas* is particularly pertinent to the instant matter. "But, where the late opening could not have disenfranchised enough eligible voters to affect the election results, we see no reason to set aside the election." *Id*

Similarly, here I conclude that inasmuch as Oseguera was in Mexico on the day of the election, "the late opening could not have disenfranchised enough eligible voters to affect the

election results."

The Employer also argues that an inquiry into the whereabouts of an employee on the day of the election is "inherently subjective," and contrary to Board precedent, prohibiting subjective inquiries as to why an employee did not vote. In this regard, the Employer asserts "if the Board were to accept this argument, then the Board would be placed in a role of subjectively determining how far out of town is too far to reach the polls. Would Brooklyn be too far? Connecticut? Is the Board going to determine the exact mileage that would be too far out-of-town to vote? Such a result would be absurd. The subjectivity of such an analysis is precisely why the Board has refused in every previous case to look into the reasons why an employee did not vote when polls were not open for the full polling period."[6]

However, the Employer's arguments should be left for another case or another day. It is true as the Employer asserts, that if an employee is on vacation, but in Brooklyn or Connecticut, it would present difficult issues for the Board to determine, as to whether that employee was "possibly disenfranchised" by the late opening of the polls. But that is not the case here. No subjectivity is involved. Oseguera was in Mexico on the date of the election. It is "absurd" and virtually impossible to conclude that he would come from Mexico to try to vote and then return to Mexico.

I have no hesitation in concluding as I do, that not only has the Employer not proven that he was "possibly disenfranchised," by the late opening of the polls, but in fact Oseguera was not disenfranchised by the late opening. I find that he was in Mexico on the date of the election and had no intention of attempting to vote.

Accordingly, based on the above analysis and authorities I recommend that the Employer's objections be dismissed and the appropriate certification be issued.[7]

ORDER[8]

A Certification of Representation should be issued to the Petitioner.

Dated, Washington, D.C. June 9, 2009

_____
Steven Fish
Administrative Law Judge

---

[6] The Employer is of course incorrect in its assertion that the Board has "in every previous case," refused to look into reasons why an employee did not vote in these circumstances. See *Getronic*s, *supra*; *The Smith, supra*.

[7] *Midwest Canvas, supra; Getronics, supra; The Smith, supra, Jobbers Meat Packing, supra; Jim Kraut, supra.*

[8] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, D. C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by June 23, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director of Region 2. If no exceptions are filed thereto, the Board may adopt this recommended decision.