

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

BANGS AMBULANCE, INC.

Employer

And

Case 03-RC-304534

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO**

Petitioner

**DECISION ON OBJECTION AND
CERTIFICATION OF REPRESENTATIVE**

For the reasons set forth in this decision, the Employer's Objection is overruled, and the Petitioner is certified as the collective bargaining representative of the employees in the unit.

PROCEDURAL HISTORY¹

Upon a petition filed on October 4, 2022², a manual election was conducted on November 9 to determine whether the following unit of employees of Bangs Ambulance, Inc. (Employer) wished to be represented for purposes of collective bargaining by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (Petitioner):

All full-time, regular part-time and per-diem³ emergency medical technician - basic (EMT-Bs), advanced emergency medical technician - intermediate (AEMT-Is), advanced emergency medical technician – critical care (AEMT-CCs), advanced emergency medical technician – paramedic (AEMT-Ps), senior paramedics, and emergency medical dispatchers employed by the Employer at its facilities located at 626 West State Street, Ithaca, New York and 205 West Green Street, Ithaca, New York, but excluding all administrative employees, office clerical employees, managers, guards and supervisors as defined by the Act.

At the conclusion of the election, a copy of the Tally of Ballots was made available to the parties. The Tally of Ballots shows that of the approximately 46 eligible voters, 22 cast ballots for Petitioner and 20 voters cast ballots against representation. There were no challenged ballots.

On November 16, the Employer timely filed an Objection to Election Results (Objection) and served the Objection on the Petitioner. That same day, the Employer filed its Offer of Proof in support of its Objection.

¹ On October 18, 2022, this case was transferred from Region 3 to Region 8 of the National Labor Relations Board (Board).

² All dates are in 2022 unless otherwise noted.

³ In order to be considered an eligible voter, a per diem employee must have worked an average of four (4) or more hours per week in the 13 weeks immediately preceding the eligibility date for the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations (Rules), an administrative investigation of the Employer's Objection was conducted. Having carefully considered the Objection, Offer of Proof, extant law, and all relevant evidence, I conclude that the Employer's Objection should be overruled. Accordingly, I am issuing a Certification of Representative.

STANDARD FOR SETTING ASIDE ELECTIONS AND BURDEN OF PROOF

It is well settled that the Board will not lightly set aside a representation election and "[t]here 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).

Section 102.69(a)(8) of the Rules 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 Rules. Section 102.66(c) specifies that offers of proof shall identify each witness and summarize the testimony of that witness. A party does not have an automatic right to a hearing on its objections. 29 C.F.R. § 102.69(c)(1). An evidentiary hearing is appropriate only "[w]hen an objecting party raises substantial and material issues of fact sufficient to support a prima facie showing of objectionable conduct." *Swing Staging, Inc. v. NLRB*, 994 F.2d 859, 862 (D.C. Cir. 1993); see also *Durham School Servs. v. NLRB*, 821 F. 3d 52, 58 (D.C. Cir. 2016). Section 102.69(c)(1)(i) of the Rules 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 the election, including a certification of representative, where appropriate.

The Board recognizes that 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 (February 22, 2017), citing *Transcare New York, Inc.*, 355 NLRB 326, 326 (2010). The objecting party cannot rely on bare assertions or conclusory statements to raise an issue requiring a hearing. See, e.g., *Affiliated Comput. Servs.*, 355 NLRB 899, 903 (2010); *The Daily Grind*, 337 NLRB 655 (2002). Rather, the objecting party must establish a prima facie case for setting aside the election. *Care Enterprises*, 306 NLRB 491 (1992). A hearing may not to be used as "a fishing expedition" to gather evidence in support of a party's objections. *Professional Transportation*, 370 NLRB No. 132, slip op. 9, fn. 25 (June 9, 2021).

THE OBJECTION AND ANALYSIS⁴

In its Objection, the Employer argues that COVID-19 and non-compliance with the COVID-19 protocols interfered with employees' free choice in the election. Specifically, the Employer maintains: (1) employees who contracted COVID-19 and were under isolation orders voted in the election; (2) at least one employee did not vote because s/he was experiencing COVID-19 symptoms.

⁴ A copy of the Objection is attached to this decision as Exhibit 1.

In support of its Objection, the Employer asserts that two employees would testify that they appeared at the polls to vote despite testing positive for COVID-19 and under isolation requirements. The Employer states a third employee would corroborate that the individuals in question appeared at the polls to vote. In addition, the Employer maintains that video footage would confirm that the two voters were at the Employer's facility on the date of the election. Finally, the Employer proffers testimony from an employee that s/he did not appear to vote because s/he was experiencing COVID-19 symptoms.

Given the COVID-19 pandemic, the approved Stipulated Election Agreement (Agreement) contained certain safety protocols, consistent with General Counsel Memorandum 20-10, Suggested Manual Election Protocols ("GC Memo 20-10"). The protocols included: a spacious polling area, sufficient to accommodate six-foot distancing with markings on the floor to remind/enforce social distancing; a separate entrance and exit for voters, with markings to depict safe traffic flow throughout the polling area; separate tables for the observers and the Board Agent in the polling area, spaced six feet apart; use of multiple voter lists during the election to ensure social distancing between the observers and the Board Agent; sufficient disposable pencils without erasers for voters to mark their ballots; plexiglass barriers of sufficient size to separate observers and the Board Agent from voters and each other, along with pre-election conference and ballot count attendees; mask requirement for the Board Agent, voters, and observers during the entirety of the election process and for individuals attending the pre-election conference and ballot count; provision of hand sanitizer, gloves and disinfecting wipes, along with glue sticks or tape to seal challenge ballot envelopes. The Agreement also required a video inspection of the polling area by the Board Agent and parties the day before the election.

Pursuant to the Agreement, the Employer was required to submit to the Regional Office no earlier than 48 hours prior to the election a written certification, confirming that the polling area is consistently cleaned in conformity with CDC standards and identifying the number of individuals present in the facility who in the last 14 days:

- Have tested positive for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested;
- Are awaiting COVID-19 test results;
- Are exhibiting symptoms of COVID-19;⁵
- Have had contact with anyone who has tested positive for COVID-19 or is awaiting COVID-19 test results or has been directed by a medial professional to proceed as if s/he has tested positive for COVID-19, despite not being tested.

The Employer submitted its certification to the Region in accordance with the Agreement, indicating that there were no individuals at the facility within the preceding 14 days who had tested positive for COVID-19, were awaiting test results, were exhibiting symptoms or were otherwise exposed to COVID-19 as defined above.

In addition, the Agreement provided that each party representative and observer participating in the pre-election conference, election, and ballot count certify in writing that within the preceding 14 days they:

⁵ The certification defines the symptoms as a fever of 100.4 or higher, cough, or shortness of breath.

- Have not tested positive for COVID-19 or been directed by a medical professional to proceed as if they tested positive for COVID-19, despite not being tested;
- Are not awaiting COVID-19 test results;
- Are not exhibiting symptoms of COVID-19;
- Have not had direct contact with anyone who has tested positive for COVID-19 or is awaiting test results or has been directed by a medical professional to proceed as if s/he has tested positive, despite not being tested.

The parties and observers submitted the certifications described above in accordance with the Agreement.

The issues raised by the Employer's Objection do not warrant setting aside the election. As explained above, the Employer makes two arguments in support of its position that COVID-19 and non-compliance with COVID-19 protocols interfered with the employees' free choice in the election. First, it maintains that two employees appeared at the polls and voted despite being under isolation requirements after testing positive for COVID-19. When conduct at issue is engaged in by a non-party, an election will be set aside only if the conduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). The Board "accords less weight to such [third-party] conduct than to conduct of the parties." *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958). The Board recognizes that because unions and employers cannot control non-agents, "the equities militate against setting aside elections on the basis of conduct by third parties." *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003). See also, *Independence Residences*, 355 NLRB 724 (2010) (Board noted heightened standard for objections based on third-party conduct reflects a recognition of the unfairness of saddling parties with the consequences of conduct over which they had no control)

At the outset, I note that the parties signed an Agreement that provided for in-person voting, fully aware of the ongoing pandemic. To address the COVID-19 issues, the Agreement included safety protocols designed to protect voters, observers, the Board agent and others during the election, pre-election conference, and ballot count. The Employer has failed to present any evidence of non-compliance with the safety protocols outlined in the Agreement. Contrary to the Employer's assertions, the protocols did not explicitly bar employees who had tested positive for COVID-19 from voting. The voters, unlike the party representatives and observers, were not required to complete written COVID-19 certifications or to attest that they did not have COVID-19 or any COVID symptoms. Regardless of whether there was non-compliance with the safety protocols, there is no evidence that the conduct described by the Employer created an atmosphere of "fear and reprisal" rendering a free election impossible. The Employer stated in its Offer of Proof that it had reason to believe that other employees "may have" abstained from voting because they feared being infected due to violations of the isolation requirements. However, the Employer failed to identify witnesses who would provide testimony to support its contentions and has offered no evidence beyond its mere speculative assertions. An objecting party is required to identify each witness and summarize the testimony of that witness. 29 C.F.R. § 102.66(c). A hearing may not be used as "a fishing expedition" to gather evidence in support of a party's objections. *Professional Transportation*, 370 NLRB No. 132, slip op. at 9, fn. 25 (June 9, 2021). See also, *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980) ("Simply put, it is not enough for the objecting party's evidence merely to imply or suggest that some form of prohibited conduct has occurred"). Thus, I find that the Employer has failed to establish a prima

facie showing of objectionable conduct regarding its first argument concerning the presence of two COVID-positive employees at the polls.

Next, the Employer argues that the election should be set aside because an employee was denied the opportunity to vote. Specifically, the Employer asserts that an employee did not appear at the polls because s/he was experiencing COVID-19 symptoms. The Board is responsible for establishing the proper procedure for the conduct of its elections. *Yerges Van Liners*, 162 NLRB 1259, 1260 (1967) While a primary concern of the Board is whether employees are given a sufficient opportunity to vote, the Board is not required to guarantee that every eligible voter is able to get to the polls. *V.I.P. Limousine*, 274 NLRB 641, 641 (1985). However, when a party's conduct causes an employee to miss the opportunity to vote, the Board will set the election aside if the employee's vote is determinative and the employee was disenfranchised through no fault of his or her own. *Sahuaro Petroleum & Asphalt Co.*, 306 NLRB 586, 586-587 (1992), citing *Versail Mfg.*, 212 NLRB 592, 593 (1974). For example, in *Glenn McClendon Trucking Co., Inc.*, 255 NLRB 1304 (1981), the Board set aside the election because employees' work assignments made by the employer prevented them from voting. However, if an employee cannot vote due to sickness or some other unplanned occurrence beyond the control of the parties or the Board, the inability to vote is not a basis for setting aside the election. *Versail Mfg.*, 212 NLRB at 593; *Sahuaro Petroleum and Asphalt Company*, at 586-587, citing *Versail Mfg.*

Here, I find that even if the Employer introduced the proffered evidence at a hearing and it was credited, it would not constitute grounds for setting aside the election. The voter was not prevented from voting by the conduct of a party, and the illness was beyond the control of the Employer, the Petitioner, and the Board. See *Versail Mfg* at 593. The Board has held that where election arrangements have been made for a manual election at a specified time and no timely request has been made for other arrangements, the Board will not set aside an election where sick or hospitalized employees have not voted. *Franklin's Stores Corp. of Daly City* , 117 NLRB. 793 (1957); *Red Owl Stores, Inc.*, 114 NLRB. 176 (1955); *Mcfarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384 (1959) Simply put, inability to vote because of illness, which could include myriad issues, is not a basis to set aside an election. Moreover, even assuming the Employer's evidence established a sufficient basis to find disenfranchisement, it would not merit setting aside the election because the employee's vote is not determinative.⁶

For the reasons explained above, I find that the evidence described in the Employer's Offer of Proof would not constitute grounds for setting aside the election if introduced at a hearing. Accordingly, I overrule the Objection in its entirety.

FINDINGS AND CONCLUSION AND CERTIFICATION OF REPRESENTATIVE

For the reasons discussed above, the Employer's Objection does not allege conduct that would constitute grounds for setting aside the election if introduced at a hearing. Accordingly, I overrule the Employer's Objection and issue the following certification:

⁶ The Employer stated in its Offer of Proof that it had reason to believe that other employees "may have" abstained from voting because they were experiencing COVID-19 symptoms. However, the Employer failed to identify witnesses who would provide testimony to support this contention. Moreover, as explained above, even assuming the Employer provided evidence to support this assertion, the inability to vote because of illness is not a basis to set aside an election. *Versail Mfg.*, 212 NLRB at 593.

IT IS HEREBY CERTIFIED that a majority of the valid ballots have been cast for Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and that it is the exclusive representative of all the employees in the following bargaining unit:

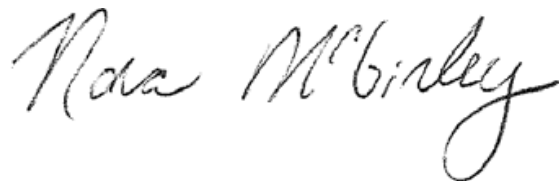
All full-time, regular part-time and per-diem emergency medical technician - basic (EMT-Bs), advanced emergency medical technician - intermediate (AEMT-Is), advanced emergency medical technician – critical care (AEMT-CCs), advanced emergency medical technician – paramedic (AEMT-Ps), senior paramedics, and emergency medical dispatchers employed by the Employer at its facilities located at 626 West State Street, Ithaca, New York and 205 West Green Street, Ithaca, New York, but excluding all administrative employees, office clerical employees, managers, guards and supervisors as defined by 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 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 28, 2023**. 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.nlr.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 at Cleveland, Ohio this 14th day of March 2023.



Nora McGinley, Acting Regional Director
National Labor Relations Board, Region 8
1240 East Ninth Street, Room 1695
Cleveland, Ohio 44199

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

BANGS AMBULANCE, INC.,

Employer,

and

Case: 03-RC-304534

CSEA, LOCAL 1000,

Petitioner.

OBJECTION TO ELECTION RESULTS

I, Roy R. Galewski, am one of the attorneys representing the Employer in this action. This objection to the election results is submitted on behalf of the Employer pursuant to the National Labor Relations Board regulations (29 C.F.R. § 102.69) .

The Employer has learned that at least one employee did not vote in the election because they were experiencing symptoms of COVID-19 on the date of the election. In addition, the Employer has reason to believe that employees voted on the date of the election even though they were subject to isolation orders after contracting COVID-19.

Given how narrow the election results were, there is reason to believe that COVID-19 and non-compliance with COVID-19 protocols have impacted the results of the election in a way that interfered with the employees' exercise of a free and reasoned choice in the election. Accordingly, based on the foregoing, and the accompanying Written Offer of Proof, the Employer respectfully requests that the election results be set aside, and that a rerun election be scheduled for an appropriate time when the circumstances permit the free choice of a bargaining representative.

Dated: November 16, 2022



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