

Monte Vista Disposal Co. and Teamsters Automotive, Industrial & Allied Workers, Local 495, International Brotherhood of Teamsters, AFL-CIO,¹ Petitioner. Case 31-RC-6719

May 15, 1992

DECISION AND CERTIFICATION OF
RESULTS OF ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

The National Labor Relations Board has considered objections to, and determinative challenges in, an election held September 13, 1990, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 3 for and 4 against the Petitioner, with 2 determinative challenged ballots.

The Regional Director recommended that the challenges to the ballots and the Employer's objections to the election be overruled, and that the challenged ballots be opened and counted. The Board has reviewed the record in light of the Employer's exceptions and brief and has adopted the Regional Director's factual findings; but, contrary to the Regional Director's recommendation, it has decided to sustain the challenges and, as a consequence, to certify the results of the election.

I.

The election was held in the Employer's shop area from 3 to 4 p.m. The polling area provided a clear view of the street, which was 50 feet away. At about 3:58 p.m., a car containing employees Vasquez and Romero parked at the curb about 50 feet from the entrance to the polling area. The Petitioner's observer ran out of the polling area toward the car, shouting in Spanish and waving his arms. A car containing two Petitioner representatives pulled up, and the four men began walking to the polling area together. At this point, the Employer's observer asked the Board agent the time. The Board agent replied that it was 4 p.m. and that the polls were closed. The Employer's counsel witnessed the approach of the four men, who arrived at the polling area at 4:02 p.m. The Board agent allowed Vasquez and Romero to cast challenged ballots.

The Employer contended that the challenges to the ballots of Vasquez and Romero should be sustained because the polls were closed when they voted. The Employer also filed objections to the election based on the Petitioner's observer's shouting and waving at the two employees and based on the conversation between

the two employees and the Petitioner representatives while walking to the polling place.

The Regional Director, although recognizing that Vasquez and Romero had no legitimate excuse for appearing late, also observed that they were only a few minutes late and that the ballot box had not been opened. Citing *New England Oyster House*, 225 NLRB 682 (1976), the Regional Director stressed that the Board's policy is to rely on the reasonable and sound discretion of the Board agent and the Regional Director in determining whether late voters should be allowed to cast their ballots. Additionally, the Regional Director noted that the Board's policy is also to afford employees the broadest possible participation in elections. Accordingly, the Regional Director recommended that the challenges be overruled and that the ballots be opened and counted.²

In its exceptions, the Employer contends that the Regional Director failed to follow cases according finality to the hours specified for Board elections. The Employer argues that employees who arrive late at the polls because of their own negligence should not be permitted to vote.

We find merit in the Employer's exceptions. For the reasons discussed below, we have decided to overrule *New England Oyster House*, supra, to sustain the challenges to the employees' ballots, and to certify the results of the election. Before setting forth our new rule, we shall first examine existing Board precedent in this area.

II.

For many years, the case law appeared to center on the issue of whether the late-arriving employee had a reasonable excuse for his tardy appearance at the polls. Thus, where the employee had a valid reason for arriving late, the Board generally counted the employee's ballot. For example, in *Glauber Water Works*, 112 NLRB 1462, 1463-1464 (1955), the Board upheld a Board agent's reopening of the polls to permit the casting of ballots by six employees, five of whom worked part-time and were unable to leave their other jobs while the polls were open. One Board Member dissented, arguing that "departures from the scheduled voting time [should] be rigidly limited and permitted only under truly unusual circumstances." Id. at 1465. In *Hanford Sentinel*, 163 NLRB 1004 (1967), the Board held that a Board agent should not have refused to accept the ballots of two employees who appeared to vote immediately after the polls closed. The two employees, whom the Board agent had not permitted to vote just before the polling period began, worked during the brief 15-minute election and returned to the

¹ The name of the Petitioner has been changed to reflect the new official name of the International Union.

² The Regional Director also recommended that the Employer's objections be overruled. In light of our disposition of the challenged ballots, we find it unnecessary to pass on the Employer's objections.

polls shortly after the polls were declared closed. In *Westchester Plastics of Ohio*, 165 NLRB 219 (1967), enfd. 401 F.2d 903, 908-909 (6th Cir. 1968), the Board upheld a Board agent's acceptance of the ballot of a part-time employee who arrived to vote 1 minute after the polling period ended. The employee arrived late because he was working at his other job during the election, needed to provide a replacement for himself while he was out voting, and needed to obtain transportation to and from the polling place.

In other cases, where the Board determined that an employee lacked a sufficient reason for appearing late, the Board generally sustained the challenge to the employee's ballot. Thus, in *Dornback Furnace & Foundry Co.*, 115 NLRB 350, 352-353 (1956), the Board upheld a Board agent's refusal to allow the casting of a late ballot where the employee's excuse was merely that he mistakenly believed he would be called to vote. In *Bell Transport Co.*, 204 NLRB 96, 98 (1973), enfd. sub nom. *Groendyke Transport*, 493 F.2d 17 (5th Cir. 1974), the Board refused to count the challenged ballot of the union's election observer who simply forgot to vote during the polling period and did not attempt to vote until the tallying of the ballots was completed. In *Bancroft Mfg. Co.*, 210 NLRB 1007, 1012 (1974), enfd. 516 F.2d 436 (5th Cir. 1975), the Board upheld a Board agent's refusal to allow several employees, who were approaching the polling area as he announced the polls were closed, to vote. The case reveals no legitimate excuse for their late arrival. In *Wanzer Dairy*, 232 NLRB 631 (1977), the Board upheld a Board agent's refusal to accept a ballot from an employee who was 1 hour and 20 minutes late to vote, finding that the bad weather which delayed the employee's arrival was "not at all unusual." *Id.* at 632.

This line of case law was summarized by an administrative law judge, with Board approval, in *Bell Transport*, supra. The judge stated that "[w]hether a voter may be permitted to cast a ballot after the polls have closed is left to the reasonable discretion of the Board and its agent conducting the election." 204 NLRB at 98. The judge explained that the Board examines four factors, and the first one the judge listed was "[t]he reason the employee was late." The other three were: (a) "how late the employee was"; (b) "how long the voting period was"; and (c) "whether the ballot box was opened or the tally commenced at the arrival of the employee." *Id.*

Shortly after *Bell Transport* was decided, however, a new line of case law began to develop. In *Howard Johnson Co.*, 221 NLRB 542 (1975), a panel majority adopted a Regional Director's report recommending the counting of a ballot cast by an employee who was 5 minutes late arriving at the polls "due to his own negligence." Chairman Murphy dissented, arguing that

the majority had departed from precedent requiring the late voter to have some reasonable excuse if his ballot is to be counted.

The rationale underlying *Howard Johnson* was explicated the following year in *New England Oyster House*, 225 NLRB 682 (1976). In that case, an employee arrived 2 or 3 minutes late at the polls because he "lost track of the time." The panel majority adopted the Regional Director's recommendation that the employee's ballot be counted. Citing *Bell Transport*, supra, and *Glauber Water Works*, supra, the Board explained that its practice is "to rely on the reasonable and sound discretion of the Board agent and the Regional Director as to whether a particular employee . . . should be permitted to cast a ballot . . ." The Board continued as follows:

Employees in these circumstances are usually permitted to vote if the polls are not closed and/or the ballot box has not been opened. This comports with a fundamental policy of the Act to afford employees the broadest possible participation in Board elections. Indeed a rule that requires an employee to sacrifice his franchise under Section 7 of the Act if he does not have reasonable excuse for being late is too procrustean for the Board to adopt in this time and at this date. 225 NLRB 682.

Chairman Murphy again dissented, reasserting her view that under Board precedent an employee's ballot should not be counted if the employee lacks a valid reason for arriving late at the polls.

Just 1 year later, a split Board held that an employee had indeed "sacrifice[d] his franchise" by arriving at the polls minutes after they had closed. *Atlantic International Corp.*, 228 NLRB 1308 (1977). In that case, an employee sought to vote 2 minutes after the Board agents had closed the polls and taped the ballot box. The panel majority upheld the agents' refusal to permit the employee to vote. There was no majority rationale. Member Fanning found that there was no abuse of discretion on the part of the Board agents because the taping of the ballot box "signaled the close of the election, and this fact was understood by all present . . ." *Ibid.* No reference was made to the discretion of the Regional Director whose decision the Board reversed. *New England Oyster House*, in which Member Fanning participated and on which the Regional Director relied, was distinguished on the ground that in that case the Board agent and the observers believed that the election process had not terminated when the late-arriving employee sought to vote.

Member Walther agreed with the result reached by Member Fanning. In a personal footnote reminiscent of the earlier dissents filed by Chairman Murphy, Mem-

ber Walther relied on the fact that the employee lacked a legitimate reason for his late arrival.

Member Penello dissented at length. He found *New England Oyster House*, in which he had joined Member Fanning in forming the majority, to be “substantially identical” and “dispositive of the issues raised” in *Atlantic International*. Id. at 1309. In Member Penello’s view, *New England Oyster House* stood for the proposition that absent extraordinary circumstances, late-arriving voters should be permitted to cast their ballots so long as the ballot box has not been opened.

III.

As the survey of precedent reveals, the current state of Board law governing the treatment of prospective voters who arrive after the polls have closed is at best confusing. The main factor on which the Board had focused for many years, i.e., whether the late-arriving voter had a reasonable excuse, was seemingly abandoned in *Howard Johnson* and *New England Oyster House* only to be revived by one of the two Board Members who comprised the majority in *Atlantic International*. The two Board Members who comprised the majority in *New England Oyster House* (Members Fanning and Penello) disagreed as to its meaning when a similar case arose just 1 year later. Although the cases frequently speak of the Board’s reliance on the discretion of regional personnel, at the present time the Board agent conducting the election has no discretion to exercise. The current NLRB Casehandling Manual (Part Two), Representation Proceedings Section 11324, directs that if a voter arrives after the polls have closed and there is no agreement by the parties on whether the voter should be allowed to cast a ballot, “the Board agent should permit the voter to cast a ballot, which the Board agent will then challenge.” This instruction strips the Board election agent of any discretion in the matter.

In sum, the time has come to reexamine and clarify this area of the law. We shall begin by setting forth what we believe to be the controlling considerations.

“Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). In exercising that discretion, the Board must take into account a number of policies, such as preserving “the secrecy of the ballot,” ensuring “the finality of the election result,” and minimizing “unwarranted and dilatory claims.” Id. at 331.

Specifically with regard to late-arriving voters, the Board is presented with conflicting policy considerations. On the one hand, the Board seeks “to afford employees the broadest possible participation in Board elections.” *New England Oyster House*, 225 NLRB at

682. On the other hand, the Board “favor[s] prompt completion of representation proceedings.” *Lemco Construction*, 283 NLRB 459, 460 (1987), quoting *Versail Mfg.*, 212 NLRB 592, 593 (1974).

We do not find reliance on the exercise of an essentially standardless discretion by Regional Office personnel to be a satisfactory procedure for determining whether late-arriving employees should be allowed to vote in a Board election. Often the voting preference of the late-arriving voter arguably can be surmised from the attendant circumstances.³ Although the Board agent or Regional Director will not in fact be influenced by this factor, we believe a rule that protects Board personnel from even the appearance of partiality is preferable.

We also reject the Board’s past practice of inquiring into the reasonableness of the late-appearing voter’s explanation for his or her tardiness. The Board’s rules provide that employees have ample notice of the date and time period of the election.⁴ An approach which allows for a broad inquiry into the good faith or acceptability of each individual employee’s excuse simply encourages litigation and results in unwarranted delays in the completion of representation proceedings.

After duly considering the Board’s prior approaches in this area and the relevant policy considerations, we have decided that something closer to a bright-line rule terminating the balloting at the conclusion of the voting period will best serve the Board’s mandate “to insure the fair and free choice of bargaining representatives.” *A. J. Tower*, 329 U.S. at 330. A clear rule that can be readily understood and easily applied will reduce litigation and advance the interest in promptly concluding representation proceedings. The interest in maximizing employee participation in NLRB elections is adequately protected by Board procedures affording all employees notice of the election and the opportunity to vote during the scheduled election period. Therefore, we hold that an employee who arrives at the polling place after the designated polling period ends shall not be entitled to have his or her vote counted,⁵ in the absence of extraordinary circumstances,⁶

³ In this case, the employees walked to the polling area with two Petitioner representatives.

⁴ Board’s Rules and Regulations Sec. 103.20.

⁵ Late-arriving employees should be permitted to cast challenged ballots to preserve their votes in the event they fall within one of the narrow exceptions to this rule.

Therefore we do not disagree with our dissenting colleague about the appropriateness of the agent’s following Sec. 11324 of the Casehandling Manual, discussed above, which directs Board agents to challenge the ballot of a late-arriving voter, in the absence of agreement by the parties. If the challenged ballot is determinative, the Regional Director will readily be able to dispose of it under the clear rule we announce today.

⁶ See, e.g., *Pruner Health Services*, 307 NLRB 529, issued today. Extraordinary circumstances shall include a showing that one of the parties was responsible for the tardiness of the late-arriving voter or

unless the parties agree not to challenge the ballot. Accordingly, we overrule *New England Oyster House*, *Howard Johnson*, *Westchester Plastics*, *Hanford Sentinel*, *Glauber Water Works*, and similar cases to the extent they are inconsistent with the new rule we announce today.

In this case, the uncontested factual findings establish that Vasquez and Romero arrived at the polling place after the end of the polling period. There is no contention that extraordinary circumstances accounted for their tardiness. Nor was there an agreement to permit their votes. Finally, there is no suggestion that either party was responsible for their late arrival. Accordingly, we sustain the challenges to their ballots, and we shall certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Teamsters Automotive, Industrial & Allied Workers, Local 495, International Brotherhood of Teamsters, AFL-CIO and that it is not the exclusive representative of these bargaining unit employees.

MEMBER DEVANEY, dissenting.

As a matter of fundamental statutory policy, the National Labor Relations Board is tasked with affording employees the broadest possible participation in Board elections.¹ Rejecting 37 years of precedent, my colleagues abandon this principle today. For the sake of what amounts to no more than administrative convenience, they adopt instead a rigid rule preventing late-arriving voters from having their votes counted, except in “extraordinary circumstances.” They apply the rule mechanistically, even in circumstances as here, where the voters arrive only 2 or 3 minutes after the polls close and the ballot box has not been opened or the tally of ballots begun. I decline to join this ill-considered abandonment of carefully thought out Board precedent.

My colleagues advance several justifications for their decision, none of which, in my view, withstands scrutiny.

My colleagues argue that Board precedent concerning late-arriving voters is “at best confusing.” Contrary to their characterization, cases dating from the Board’s 1955 decision in *Glauber Water Works*² to its 1977 decision in *Wanzer Dairy*³ and through its

voters. Situations involving the responsibility of a party will thus continue to be governed by existing precedent. See, e.g., *Glenn McClendon Trucking Co.*, 255 NLRB 1304 (1981).

¹ *Kerrville Bus Co.*, 257 NLRB 176, 177 (1981), quoting *New England Oyster House*, 225 NLRB 682 (1976).

² 112 NLRB 1462 (1955).

³ 232 NLRB 631 (1977).

1981 decision in *Kerrville Bus Co.*,⁴ reveal a continuing evolution of reasonably consistent decisions concerning late-arriving voters.

In these cases, the Board has found that employees arriving to vote within a few minutes after the polls closed and before the ballot box was opened should have their votes counted.⁵ Conversely, these decisions have upheld the refusal to allow would-be voters to vote later, and at a point when the ballots had been tallied.⁶ The only exception to this line of cases is *Atlantic International Corp.*,⁷ an aberrant case in which each member of the divided panel expressed a separate rationale.⁸

Further, contrary to my colleagues, the question whether a late-arriving voter has a reasonable excuse for his tardiness has never been the determinative criterion under Board precedent, but merely one of four factors, first articulated in *Bell Transport*. Another, and perhaps more important, factor was whether the ballot box was opened or the tally had commenced at the time of the employee’s arrival. As the case law evolved, the Board indicated in *Howard Johnson* that the question whether the late-arriving voter had a reasonable excuse was not necessarily determinative of whether his vote would be counted. The Board further explicated this point in *New England Oyster House*. Any doubt about the continuing vitality of *Howard*

⁴ 257 NLRB 176 (1981); see also *American Driver Service*, 300 NLRB 754 (1990). Although *Kerrville Bus Co.* and *American Driver Service* involved mail ballot elections, the Board in analyzing these cases used the principles applied to late-arriving voters in manual elections.

⁵ See *Kerrville Bus Co.* (mail ballots arriving late but before ballots were tallied); *New England Oyster House*, 225 NLRB 682 (1976) (voter arrived 2–3 minutes late and before ballot box was opened); *Howard Johnson Co.*, 221 NLRB 542 (1975) (voter arrived 5 minutes late and before ballot box was opened); *Westchester Plastics of Ohio*, 165 NLRB 219 (1967), enfd. 401 F.2d 903, 908–909 (6th Cir. 1968) (voter arrived 1 minute late and before ballot box was opened); *Hanford Sentinel*, 163 NLRB 1004 (1967) (2 voters arrived “only minutes” late and before ballot box was opened); cf. *Glauber Water Works* (during voting, Board agent announced a second voting session to be held 2-1/2 hours later; employees who voted during second session voted at a time when the polls were open; Board upheld discretion of agent in reopening the polls).

⁶ *Wanzer Dairy* (employee arrived 80 minutes after polls closed; ballots had been tallied); *Bell Transport Co.*, 204 NLRB 96, 98 (1973), enfd. sub nom. *Groendyke Transport*, 493 F.2d 17 (5th Cir. 1974) (election observer did not try to vote until tally of ballots was completed).

⁷ 228 NLRB 1308 (1977).

⁸ *Bancroft Mfg. Co.*, 210 NLRB 1007, 1012 (1974), enfd. 516 F.2d 436 (5th Cir. 1975), and *Dornback Furnace & Foundry Co.*, 115 NLRB 350, 352–353 (1956), cited by my colleagues as cases in which late-arriving voters were held not entitled to vote because they lacked a sufficient reason for appearing late, are inapposite. These are not challenged ballot cases. Rather, they are cases in which Board agents’ refusal to allow late-arriving employees to vote was alleged to be objectionable conduct, and the votes of the late arrivals would not have been sufficient in number to affect the election result. In these circumstances, the Board declined to set aside the elections.

Johnson and *New England Oyster House* possibly engendered by the Board's subsequent splintered decision in *Atlantic International* was dispelled by *Kerrville Bus Co.*, and later, *American Driver Service*. In the latter two cases, the Board reaffirmed that the absence of a reasonable excuse did not necessarily preclude counting a late ballot. Indeed, the dissent in *Howard Johnson* argued that reasonable excuse "should be a *sine qua non* to counting a late voter's ballot,"⁹ but this position was never adopted by the Board. Thus, while the law has not remained static, it is hardly, in such disarray as to warrant discarding it wholesale.

My colleagues erroneously maintain that the NLRB Casehandling Manual presently provides the Board agent conducting the election no discretion, and that to the extent such discretion exists, it is "standardless."

The Manual currently states that, if a voter arrives after the polls have closed but before the ballot box has been opened and the parties do not agree on whether the voter should be allowed to cast a ballot, the Board agent should permit the voter to cast a challenged ballot.¹⁰ This provision does not determine whether the vote will be counted. Rather, if the challenged ballot is determinative, it preserves the issue for ruling by the Regional Director. In deciding whether the ballot should be counted, the Regional Director (or, in some instances, a hearing officer or administrative law judge) then applies the four-factor test set out in *Bell Transport*. As interpreted by the Board's decisions, the test supplies the standard for measuring the decisionmaker's exercise of discretion.¹¹

My colleagues cite to no case other than the instant one to support their contention that the voting preference of late-arriving voters often can be anticipated from the attendant circumstances and that reliance on the Board agent's discretion in allowing them to vote may give an appearance of partiality to the agent's decision. Even if such cases were abundant, a Board agent's permitting late-arriving voters to cast *challenged* ballots prior to the opening of the ballot box, as provided in the Casehandling Manual, does not reasonably give rise to an appearance of partiality.

There is similarly little support for my colleagues' argument that an inquiry into the reasonableness of a late-appearing voter's tardiness results in an unwarranted delay in representation proceedings. First, under

Board precedent, the importance of the employee's explanation for his tardiness has diminished. Depending on other factors, he may be entitled to have his vote counted regardless of the reason for his late arrival; the Board is not likely to require extensive inquiry into the reasonableness of a late voter's tardiness. Second, permitting voters who arrive minutes late to cast challenged ballots usually results in no substantial delay in tallying the ballots. Third, ballot challenges are routinely made in Board elections for numerous reasons, of which late-arriving voters are a very small proportion. Even totally eliminating all ballot challenges concerning late-arriving voters would negligibly affect the overall length of time representation cases take. Finally, since my colleagues permit counting of late voters' ballots only under "extraordinary circumstances," such as when a party is responsible for a voter's tardiness, their rule requires a more extensive factual inquiry and is therefore likely to cause much greater delay than that necessitated by the precedent they are reversing. For example, in *Pruner Health Services*, 307 NLRB 529, issued today, they reject a Regional Director's recommendation to count the ballot of an arguably late voter who arrived at the polling area before the ballot box was opened. Instead, my colleagues are remanding the case for an evidentiary hearing to resolve conflicting accounts of the reasons for the voter's tardy arrival at the polling area—an issue that was unnecessary to resolve to decide the case under prior precedent.

In adopting "something closer to a bright-line rule terminating the balloting at the conclusion of the voting period," my colleagues purport to strike a balance between two conflicting policy goals: prompt completion of representation proceedings; and affording employees the broadest possible participation in Board elections. However, my colleagues' new rule will not have a significant impact on the duration of representation proceedings. It will accomplish little other than depriving slightly late voters—those who arrive after the time set for the polls to close but before the ballot box has been opened—the opportunity to have their votes counted. This result clearly impedes the goal of affording employees the broadest possible participation in Board elections.

My colleagues' inflexible new rule promotes mechanical adherence to form without sufficient consideration of the underlying substance. Accordingly, I dissent and would adopt the Regional Director's recommendation to count the challenged ballots.

⁹ 221 NLRB at 543 (emphasis added).

¹⁰ NLRB Casehandling Manual (Part Two), Representation Proceedings, Sec. 11324.

¹¹ See, e.g., *Kerrville Bus Co.*; *Bell Transport Co.*, 204 NLRB at 98.