

# D.C. Circuit Strikes Down Board's Mail Election Ruling for Lack of Justification

**Labor Relations Update** on July 15, 2024

On July 9, 2024, D.C. Circuit Court of Appeals remanded a National Labor Relations Board (“Board”) decision for further clarification. In [GHG Management LLC v. NLRB, Case No. 22-1312 \(D.C. Cir. July 9, 2024\)](#), the D.C. Circuit Panel denied the Board’s motion for enforcement of its order certifying election rules, in a case involving a narrow union victory in a mail-ballot election, and remanded the case for the Board to explain why the legal standard they applied was proper under those circumstances.

## **Background**

After reaching a tentative agreement to hold an election, the union and the employer, a Chicago cannabis company, GHG Management, agreed to a mail-ballot election on union representation in 2021. The deadline for collecting and counting ballots was delayed due to outstanding votes that had been mailed but not received by the Board agent who oversaw the election.

When the new deadline approached, the agent informed the parties that all ballots had been received and they were moving forward with counting. However, one employee’s vote, to whom the Board agent had mailed a replacement ballot, was not received until the day **after** votes were announced and was not counted. The union won the election by a single vote.

Upon learning of this uncounted ballot, GHG Management objected to the results of the election believing that the Board agent’s communication about the outstanding ballot and the failure to count it was improper. GHG Management argued that the agent’s actions misled the parties and potentially affected the election outcome. The Board rejected the objection and upheld the election results; reasoning that GHG Management could not show actual prejudice as required by the standard that the Board applied. The Company sought review of the Board’s decision before the D.C. Circuit.

## **Conflicting Legal Standards**

The dispute centers around the proper legal standard the Board should have applied when evaluating the objections.

1. **Reasonable Doubt Standard:** This standard requires setting aside an election if there is reasonable doubt about its fairness and validity. It necessitates showing actual prejudice, meaning that the objecting party must demonstrate more than speculative harm. This is the standard the Board applied against the relevant objections.
2. **Possible Disenfranchisement Standard:** Under this standard, an election can be set aside if there is possible outcome-determinative disenfranchisement, even if actual prejudice is not conclusively shown. GHG Management believes this lower burden should have been applied.

To justify the application of the reasonable doubt test, the Board's General Counsel argued that the Board's decision relied on whether the case related to Board "misconduct." The General Counsel argued that the possible disenfranchisement standard only applies when the allegations entail employees being "prevented from voting by the conduct of the party or by unfairness in the scheduling or mechanics of the election," but that is not the governing-standard for agent-misconduct cases. The General Counsel acknowledged that, had the "possible disenfranchisement" standard applied, GHG Management's objections would likely have been sustained.

Additionally, the General Counsel argued that the "fact that a misconduct-based objection *also* [brings about] claims resulting [in] voter disenfranchisement does not render inapplicable the reasonable-doubt test or the necessity of proving non-speculative prejudice." The General Counsel argued that the reasonable doubt test is proper in all cases of alleged Board misconduct, even if that misconduct may have cause outcome-determinative disenfranchisement.

In response, GHG Management highlighted cases where the Board applied the possible disenfranchisement test, even though the case involved improper conduct from Board agents. The General Counsel replied that those cases did not involve misconduct, but instead involved Board agents failing to timely send ballots or not keeping polls opened when they were scheduled.

### ***D.C. Circuit Analysis***

The D.C. Circuit Panel held that the Board failed to justify applying the reasonable doubt standard. Based on Board precedent, the Panel concluded that it was not clear if alleging Board misconduct was a controlling factor in determining whether to apply the “reasonable doubt” or “possible disenfranchisement” standards, and the Panel was not clear on precisely how the Board defined “misconduct.”

The Panel concluded that prior Board decisions conflicted with the General Counsel’s theory of the case here. In those cases, the Board’s alleged actions *could* have constituted misconduct, but the Board nevertheless applied the possible disenfranchisement test. Additionally, the Panel found that the General Counsel, nor the Board in its initial ruling, offered any precedent that supported the notion that where there is misconduct, then the reasonable doubt test must be applied, despite those cases also alleging outcome-determinative disenfranchisement.

With the above in mind, the Panel believed that they could not properly review the Board’s decision on the individual objection without the Board properly justifying why it opted for the stricter standard. The D.C. Circuit remanded the case, providing the Board with an opportunity to further explain why the reasonable doubt test is proper and why the conduct alleged here must be evaluated under one test or another, or reconsider its application.

## **Takeaways**

Mail-ballot elections had become commonplace in the midst of the COVID-19 pandemic, and their use has continued in many Regions thereafter. There are typically obstacles, however, to conducting mail-ballot elections, including the possibility that ballots never reach the employees, and the timing that results from delay and mail issues.

The D.C. Circuit’s decision reflects a harsh rebuke of the Board’s reasoning (or lack thereof) in its review of objections related to a mail-ballot election, with unique facts, where a single ballot was potentially outcome-determinative. By remanding the case, the Panel reigned in the Board’s authority to act without providing sufficient justification for its decisions, and continues a long line of recent decisions by circuit courts reversing or remanding NLRB decisions.

We will continue to follow this case, and how the Board revisits its decision on remand, as well as the impact on other pending cases before the Board.

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