

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

**BERGEN FUNERAL SERVICE**  
Employer

and

**Case No. 22-RC-12826**

**LOCAL UNION 813, INTERNATIONAL  
BROTHERHOD OF TEAMSTERS**  
Petitioner

*David Glanstein, Esq.*, Counsel for the  
Petitioner

*Chris Capone, Esq.*, Counsel for the  
Employer

**DECISION ON OBJECTIONS AND CHALLENGES**

RAYMOND P. GREEN, Administrative Law Judge. I heard these cases on October 23 2007. The Petition in this case was filed on July 24, 2007 and pursuant to a Decision and Direction of Election issued on August 21, 2007, an election was held on September 20, 2007 in the following unit:

All full-time and regular part-time licensed funeral directors and embalmers employed by the Employer at its Hasbrouck Heights, New Jersey facility during the payroll period ending Friday, August 17, 2007, but excluding all office clerical employees, professional employees, apprentice/trainees, managerial employees, guards and supervisors as defined in the Act.

The Tally of Ballots showed that out of approximately 14 eligible voters, 6 cast votes for the Petitioner and 7 cast votes against union representation. There were not challenged ballots.

On September 26, 2007, the Petitioner filed objections to the election and on October 11, 2007, the Regional Director issued a Report on Objections and Notice of Hearing. In the Report, the Director approved the Petitioner's withdrawal of its Objections Nos. 1, 5, 6 and 7. He further ordered that a hearing be held on the Petitioner's Objections Nos. 2, 3 and 4.<sup>1</sup>

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<sup>1</sup> At the hearing, the Employer, citing *Star Video Entertainment Inc.*, 290 NLRB 1010 (1998), moved to have the Objections be dismissed because the Petitioner had not submitted affidavits to the Board in support of its Objections. While the Regional Director will require, pursuant to Section 102.69(a) of the Board's Rules and Regulations, an objecting party to provide some evidence in support of its Objections, the form of that evidence is a matter of discretion for the Regional Director. There is nothing in the Board's rules and regulations that requires an objecting party to provide affidavits in order for the Director to issue a Notice of Hearing so that evidence may be presented, challenged and evaluated in the context of a hearing.

Objection No. 2 alleges that on or about August 29, 2007, the Employer by its owner, Scott Nimmo, threatened to make employees so uncomfortable that they would quit their employment.

5           Objection No. 3 alleges that on or about August 29, 2007, the Employer issued a written notice of discipline to a unit employee for lateness and gave the employee a final warning, contrary to its past practice.

10           Objection No. 4 alleges that on or about two weeks before the election, the Employer changed its overtime policy and announced that employees would be switched from hourly to salaried and therefore would no longer be entitled to overtime pay.

## **Objection 2**

15           Tod Catalano testified that on August 29, 2007, Scott Nimmo, the Employer's President, said that he understood that Catalano wanted to be in charge of everything. He testified that at the moment, he didn't respond and went downstairs to do his work. Catalano testified that when he finished he went back upstairs and asked Nimmo what he meant by the remark. According to Catalano, Nimmo indicated that he was aware that Catalano and Randy were in charge of the Union. (Referring to Randal Occhipinti). He testified that Nimmo said that this wasn't Catalano's home anymore; that he didn't want him around; and he would make him so uncomfortable that he would quit his employment. Catalano testified that Catalano said that the sides were drawn. According to Catalano, Nimmo, after some more conversation said that Catalano had cost him \$10,000 and when asked what for, he responded by saying; "do you think lawyers are for free?"  
20           Catalano testified that at or near the end of the conversation, Nimmo repeated that he was going to make you so comfortable that you will quit before the election and "your buddy" won't last a week.

25           Catalano testified that this conversation with Nimmo took place without any other persons being immediately present. Nevertheless, he testified that later on the same day and on subsequent occasions before the election was held, he disseminated this conversation to other employees.

30           Scott Nimmo essentially testified that although he recalled having a conversation with Catalano on or about August 29, 2007 as he was leaving the facility, he did not make any of the statements attributed to him by Catalano.

35           Neither party presented any witnesses to corroborate or refute their respective versions of this event. Thus, despite the fact that Catalano testified that he told other specifically named employees of this conversation shortly after it occurred, neither side chose to call or ask any witnesses whether this was so.

40           This therefore, can only be decided based on my credibility finding. And in this respect, I can't say that there is certainty in my mind regarding the testimony of Catalano versus Nimmo. Nevertheless, as I am only required to determine whether I credit one version over the other by a preponderance of the evidence, I am going to credit the account of Catalano. I thought that Catalano's testimony was given in a straight forward and direct manner. I thought that his testimony was consistent in response to questioning by the Petitioner's counsel, by the Employer's counsel and by me. In my opinion, he was appropriately nervous for a lay person who was subpoenaed to testify and his demeanor made a good impression on me.  
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I therefore conclude that Scott Nimmo, the Employer’s agent, threatened Catalano with reprisals because he believed that Catalano was a supporter of the Union. Because the evidence is that Catalano related this to other eligible voters and because the outcome of the election was so close, I find that Objection No. 2 has merit. Accordingly, I recommend that the election be set aside and that a new election be conducted.<sup>2</sup>

Based on the above, I hereby make the following

**Conclusions of Law**

That the Petitioner’s Objection No. 2 is found to have merit. In this regard, the credited evidence shows that the Employer threatened an employee with reprisals because of his perceived union activity and that the threat was disseminated to other employees during the critical period before the election.

**ORDER**

Based on the above, this case should be remanded to the Regional Director of Region 22 for action consistent with these findings.<sup>3</sup>

Dated at Washington D.C. November 9, 2007

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Raymond P. Green  
Administrative Law Judge

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<sup>2</sup> Inasmuch as I have found merit to Objection No. 2, there is no need to resolve the allegations of Objections Nos. 3 and 4. Nevertheless, I note that the testimony in support of those objections was offered to prove that the Employer took adverse actions against employee Randal Occhipinti because of his support for the Union. In this regard, I view the evidence essentially as alleging that the Employer engaged in conduct which, if proven, would constitute violations of Section 8(a)(3) of the Act. (Issuing a final warning and changing his method of pay to preclude him from earning overtime). Since there is no unfair labor practice complaint consolidated with these objections that alleges violations of Section 8(a)(3), the Board has for a long time, taken the position that it will not consider certain unfair labor practices, especially those involving Section 8(a)(3) in objections or challenge cases. See *Texas Meat Packers*, 130 NLRB 279 (1961) and *McLean Roofing Co.*, 276 NLRB 840 fin. 1 (1985).

<sup>3</sup> Under the provisions of Section 102.69 of the Board’s Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of the issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by November 23, 2007.