

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

TRANSCARE NEW YORK, INC., 911 DIV.  
Employer

and

Case No. 29-RC-072936

LOCAL 805, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS  
Petitioner

**REPORT ON CHALLENGES**

Upon a petition filed on January 23, 2012<sup>1</sup>, by Local 805 International Brotherhood of Teamsters, herein called the Petitioner or Local 805, and pursuant to a Stipulated Election Agreement signed by the Petitioner and Transcare, New York, Inc., 911 Div., herein called the Employer, and approved by an Acting Regional Director on February 8, an election by mixed manual/mail ballot was conducted. The mail ballot portion of the election was conducted on March 7 and the manual portion of the election was conducted on March 5 and March 6,<sup>2</sup> among the employees in the following unit:

All full-time, regular part-time and per diem Emergency Medical Technicians and Paramedics of the Employer's New York City 911/EMS Division, but excluding all Emergency Medical Technicians and Paramedics in the Employer's Ambulance Division, Special Operations Division, and Westchester County 911/EMS Division, dispatchers, ambulette drivers, guards, managers and supervisors as defined by the Act.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations showed the following results:

Approximate number of eligible voters . . . . . 285

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<sup>1</sup> All dates hereinafter are in 2012 unless otherwise indicated.

<sup>2</sup> The ballots were mailed by the Region on March 7 to the eligible per diem employees at their addresses on the eligibility list furnished by the Employer. To be counted, the ballots had to be received by the Region no later than close of business, March 21. The mail ballots were commingled with the manual ballots and counted on March 23.

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| Number of void ballots. . . . .  | 13  |
| Number of votes cast for Petitioner . . . . .                              | 99  |
| Number of votes cast against participating<br>labor organization . . . . . | 96  |
| Number of valid votes counted . . . . .                                    | 195 |
| Number of challenged ballots . . . . .                                     | 8   |
| Number of valid votes counted plus challenged ballots .                    | 203 |

Challenges are sufficient in number to affect the results of the election.

The ballot cast by Nancy Wallwork was challenged by the Petitioner on the ground that she is a statutory supervisor. The ballots cast by Josh Twito and Deborah Sartori were challenged by the Board Agent conducting the election on the ground that their names were not on the voter eligibility list provided by the Employer. The ballots cast by Alix Hyacinthe, Tracey Martin, William Medina, Corey Meyer and Johanny Ovalles were challenged by the Petitioner on the ground that they did not work sufficient hours with the Employer to be included in the bargaining unit.

Objections to conduct affecting the results of the elections were not filed by either party.

Pursuant to Section 102.69 of the Board's Rules and Regulations-Series 8, as amended, the undersigned caused an investigation to be conducted concerning the challenges. During the investigation all parties were afforded a full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

The Employer, a Delaware corporation, with its principal office located at 25 14<sup>th</sup> Street, Brooklyn, New York, is engaged in the business of providing medical transportation including critical care inter-facility transport, advanced life support transportation (“ALS”), basic life support transportation (“BLS”), 911 personnel, and ambulette and paratransit services in the New York City area.

## THE CHALLENGES

### Josh Twito and Deborah Sartori:

As noted above, the Board Agent conducting the election challenged the ballots of Twito and Sartori because their names were not on the voter eligibility list provided by the Employer. The Petitioner also challenged the eligibility of Sartori at the election, contending that she was not an employee. During the investigation of the challenges, the Petitioner and the Employer agreed in writing that Twito and Sartori are not eligible to vote and that the challenges to their ballots should be sustained. In their agreements, the parties waive any right under the Board's Rules and Regulations to a hearing on these two challenges or to a Board decision on these challenges. The parties also agree that upon approval of the agreements on the eligibility of Twito and Sartori, the undersigned may proceed to issue a revised Tally of Ballots and, when appropriate, a certification. In view of the stipulation of the parties and inasmuch as the investigation established no evidence contrary to the stipulation, I recommend that the challenges to the ballots of Josh Twito and Deborah Sartori be sustained.

### Nancy Wallwork, Alix Hyacinthe, Tracey Martin and Johanny Ovalles:

As noted above, the Petitioner challenged the ballot cast by Wallwork on the ground that she is a statutory supervisor. The Petitioner challenged the ballots cast by Hyacinthe, Martin and Ovalles on the ground that they did not work sufficient hours to be eligible employees of the Employer. The Employer contends that these four employees are eligible to vote. During the investigation of the challenged ballots, the Petitioner requested to withdraw its challenges to ballots of these four employees. The independent investigation did not establish any evidence contrary to finding these individuals eligible to vote. In these circumstances, I approve the

Petitioner's request to withdraw its challenges to the ballots of Nancy Wallwork, Alix Hyacinthe, Tracey Martin and Johnny Ovalles.

William Medina and Corey Meyer:

As noted above, the Petitioner challenged the ballots cast by Medina and Meyer on the ground that they did not work sufficient hours to be eligible employees of the Employer. The Employer contends that Medina and Meyer are eligible to vote. For the reasons noted herein, I find that Medina and Meyer are eligible to vote and I recommend that the challenges to their ballots be overruled.

The independent investigation revealed that the Petitioner initially sought a unit of all full-time and per diem EMTs and paramedics of Transcare NY Inc. 911 Division, excluding all other Transcare NY Inc. employees and guards and supervisors as defined by the Act. The bargaining unit set forth in the Stipulated Election Agreement includes all full-time, regular part-time and per diem Emergency Medical Technicians and Paramedics of the Employer's New York City 911/EMS Division, and excludes all Emergency Medical Technicians and Paramedics in the Employer's Ambulance Division, Special Operations Division, and Westchester County 911/EMS Division, dispatchers, ambulance drivers, guards, managers and supervisors as defined by the Act. The election agreement does not contain an agreement of the parties concerning an eligibility formula for part-time employees or per diem employees.

During the independent investigation, the Petitioner provided a document dated April 1, 2011 and entitled "Transcare New York EMS Policy and Procedure....Per diem Requirements," wherein the Employer defined requirements for employees "hired as per diem or part time." The document defines per diem employees as employees who are not permanently scheduled for

shifts and part time employees as employees who are permanently scheduled for shifts but not for more than 30 hours in a given week. The aforementioned document also states that per diem and part time employees are required to work three shifts or 36 hours per month. In this regard, a footnote states that per diem employees who fail to work 36 hours in a month will be in violation of the policy and will be restricted pending review of their per diem history for the first offense. The second offense will result in termination for job abandonment.<sup>3</sup>

The Petitioner contends that Medina and Meyer do not meet the company definition of a per diem or part time employee based on the Employer's policy that such employees must work three shifts per month. The Petitioner does not dispute the Employer's evidence that these employees worked on the dates set forth below in footnote 4. Nor does the Petitioner contend that they do not perform bargaining unit work.

The Employer contends that Medina and Meyer are eligible to vote and that the challenges to their ballots should be overturned. More specifically, the Employer contends that William Medina and Corey Meyer are employed as per diem Emergency Medical Technicians. Medina was hired in December 2007 and Meyer was hired in August 2011. The Employer provided payroll records indicating that during the 13 weeks prior to the January 28, 2012 eligibility date, Medina worked an average of 7.46 hours per week and Meyer worked an average

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<sup>3</sup> I note that the Employer included Medina and Meyer on the *Excelsior* list and neither party is asserting that they were terminated for failure to comply with this three shift/36 hour per month requirement.

of 5.67 hours per week.<sup>4</sup>

The Board has adopted a three-prong approach, set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), when resolving whether a challenged voter is properly included in the stipulated unit. Under this three prong test, "the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community of interest test." *Id.* at 1097. To determine whether the stipulation is clear or ambiguous, the Board compares the express language of the stipulated bargaining unit with the disputed classification. *Northwest Community Hospital*, 331 NLRB 307 (2000); *Bell Convalescent Hospital*, 337 NLRB 191 (2002). "The Board will find that the parties have 'a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.'" *Los Angeles Water & Power Employees Association*, 340 NLRB 1232, 1235 (2003).<sup>5</sup> Here, the stipulation negotiated by the

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<sup>4</sup> According to the payroll records submitted by the Employer, Medina worked 12.40 hours on January 23, 2012, 12.62 hours on January 16, 2012; 12 hours on January 9, 2012; 12.80 hours on January 12, 2012, 5.58 hours on January 3, 2012; 12.45 hours on December 11, 2011; 12.80 hours on November 14, 2011; 4 hours week ending November 12, 2011, and 12.37 hours on November 1, 2011. The Employer's payroll records show Meyer worked 12.95 hours on January 26, 2012; 12 hours on December 14, 2011; 11.75 hours on December 3, 2011; 12 hours on November 26, 2011; 13 hours on November 5, 2011 and 12 hours on November 4, 2011. Further, with regard to dates worked after the payroll period for eligibility, the Employer contends that Medina also worked four 12-hour shifts in February (Feb 12, 13, 20, and 21) and three 12-hour shifts in March (March 11, 12 and 25). With regard to dates worked by Meyer after the payroll eligibility date, the Employer contends that Meyer worked a 12-hour shift on January 30, 2012, two 12-hour shifts in February 2012 (Feb 9 and 16) and one 12-hour shift in March 2012 (March 1).

<sup>5</sup> Where a stipulation neither includes nor excludes a disputed classification, the Board will find that the parties' intent with respect to that classification is not clear. *Los Angeles Water & Power*, supra at 1235 (2003). "The Board bases this approach on the expectation that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles." *Halsted Communications*, 347 NLRB 225 (2006).

parties identified the classifications included in the unit and specifically included “all full-time, regular part-time and per diem emergency medical technicians and paramedics...” Further, the parties included regular part-time emergency medical technicians in their stipulated unit, which was not included in the petitioned-for unit. Thus, in my view, the clear and unambiguous intent of the parties was to include all full-time, regular part-time and per diem emergency medical technicians. Compare *Regional Emergency Medical Services, Inc.*, 354 NLRB 224 (2009) (where contingent EMTs were specifically included in the union’s petition but not mentioned in the parties’ unit stipulation, which expressly included only full-time and part-time EMTs, the Board found the parties’ clear and unambiguous intent to include only full-time and part-time EMTs and not contingent EMTs.)

In determining the voting eligibility of Medina and Meyer, i.e., whether they fall into the unambiguously included classifications, inasmuch as Medina and Meyer are emergency medical technicians and there is no dispute they perform bargaining unit work, the sole issue to be resolved is whether they are ineligible, as contended by the Petitioner, because they do not meet the Employer’s minimum shift/hours of work requirement under its per diem or part-time policy. I note, however, that there is no express agreement of the parties on a formula to be used in determining per diem or part-time voting eligibility. In this regard, the Board's longstanding and most widely used formula to determine voting eligibility for part-time or on-call employees is the *Davison-Paxon*<sup>6</sup> formula, under which an employee is considered to have a sufficient regularity of employment to demonstrate a community of interest with unit employees if that employee regularly averages four or more hours of work per week for the last quarter prior to the election eligibility date. The Board has explicitly held that the “last quarter prior to the election

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<sup>6</sup> *Davison-Paxon Company*, 185 NLRB 21 (1970).

eligibility date” refers to the thirteen week period immediately before the eligibility date. *Woodward Detroit CVS, LLC*, 355 NLRB No. 181 (2011); *Hardy Herpolsheimer's- A Division of Allied Stores of Michigan, Inc.*, 227 NLRB 652 (1976). The Board has made it clear that the *Davison-Paxon* formula should be used absent a showing of special circumstances. *Columbus Symphony Orchestra, Inc.*, 350 NLRB 523 (2007). Similarly, in connection with the health care industry, in *Sisters of Mercy Health Corporation*, 298 NLRB 483 (1990), the Board overruled the challenges to the ballots of two on-call nurses who regularly averaged four or more hours per week for the quarter prior to the eligibility date utilizing the eligibility formula set forth in *Davison-Paxon Co., supra*.<sup>7</sup> Thus, in the absence of an express agreement or an undisputed oral agreement by the parties to invoke a different formula, I find the *Davison-Paxon* formula appropriate to determine the eligibility of William Medina and Corey Meyer. See e.g., *In Re Women and Infants' Hospital of Rhode Island*, 333 NLRB 479 (2001); *Banner Bedding, Inc.*, 214 NLRB 1013 (1974).

Accordingly, inasmuch as it is undisputed that during the 13 weeks prior to the January 28, 2012 eligibility date, Medina worked an average of 7.46 hours per week and Meyer worked an average of 5.67 hours per week, i.e., that they each averaged 4 or more hours of work per week during the thirteen week period immediately before the eligibility date, I find them eligible to vote and recommend that the challenges to their ballots be overruled. *Davison-Paxon, supra*; *Sisters of Mercy Health Corporation, supra*.

### **SUMMARY AND RECOMMENDATIONS**

In summary, I have recommended that the challenges to the ballots of Josh Twito and

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<sup>7</sup> In *Sisters of Mercy*, the Board distinguished *Marquette General Hospital*, 218 NLRB 713 (1975) inasmuch as there was an absence of evidence of a wide disparity in the hours of the on-call/part-time nurses.

Deborah Sartori be sustained. Further, I have recommended that the challenges to the ballots of William Medina and Corey Meyer be overruled and that their ballots be opened and counted on a date to be determined subsequently. Finally, I have approved the Petitioner's request to withdraw the challenges to the ballots of Nancy Wallwork, Alix Hyacinthe, Tracey Martin and Johnny Ovalles.

### **RIGHT TO FILE EXCEPTIONS**

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Request must be received by the Board in Washington, D.C., by 5 p.m., EST on May 7, 2012.<sup>8</sup> The request may **not** be filed by facsimile.

The parties are advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described exceptions electronically, please refer to the guidance which can be found

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<sup>8</sup> Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Regional Director's Report are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

under "E-Gov" on the National Labor Relations Board website: [www.nlr.gov](http://www.nlr.gov).

Signed at Brooklyn, New York, on this 23<sup>rd</sup> day of April, 2012.

A handwritten signature in cursive script, reading "James G. Paulsen", written in black ink. The signature is positioned above a horizontal line.

James G. Paulsen  
Regional Director  
Region 29  
National Labor Relations Board  
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