

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

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Local 259, United Auto Workers, AFL-CIO,	:	
Petitioner,	:	Case No. 02-RC-082036
	:	
and	:	
	:	
S&H Associates, LLC,	:	
Employer.	:	
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**PETITIONER'S EXCEPTIONS TO REGIONAL DIRECTOR'S  
REPORT ON OBJECTIONS**

Pursuant to Section 102.69 of the Board's Rules and Regulations, Petitioner Local 259, United Auto Workers, AFL-CIO ("Local 259" or the "Petitioner") submits the following exceptions to the Regional Director's decision to recommend that the Board overrule Objections 1 through 3.

***STATEMENT OF THE FACTS***

On May 30, 2012, Local 259 initiated this matter when it filed a representation petition concerning a unit of employees at S&H Associates, LLC ("Employer"). Region 2 assigned the matter to Litigation Assistant Juniry Luna-Sanchez. On June 8, 2012, the parties entered into a Stipulated Election Agreement ("Stipulation") which scheduled a representation election for July 13, 2012. The Stipulation included at paragraph 8 the following standard language:

The Employer will post copies of the Notice of Election in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

A copy of the Stipulation is attached hereto as Exhibit A.

The Regional Office did not timely mail out the Notice of Election after the election stipulation was approved as required by the Stipulation. Nor did the Employer notify the Regional Office that it had not received copies of the Notice of Election at least five working days prior to the election date, as required by Section 103.20(c) of the Board's Rules and Regulations. As a result, the notice was not posted as of 12:01 a.m. on Tuesday, July 10, 2012. Later on July 10, 2012, Jeremy Meyer, Esquire, the Petitioner's counsel, received a telephone call from Ms. Luna-Sanchez to inform Local 259 that the Region had failed to mail the election notice to the Employer. Ms. Luna-Sanchez explained that under the circumstances, the July 13<sup>th</sup> election could not take place and asked whether the Petitioner would agree to waive any objections to the election based upon this election notice issue. After consulting with his client, Mr. Meyer called Ms. Luna-Sanchez back and informed her that Local 259 **would not** waive its right to object to the election. After a series of calls between Ms. Luna-Sanchez, Mr. Meyer, and the Employer's counsel, the parties eventually decided to reschedule the election to July 18<sup>th</sup>. Later that day, Mr. Meyer sent an email to Ms. Luna-Sanchez confirming that the Petitioner only agreed to that later election date because "we have been informed that it is no longer possible for the election to take place on July 13<sup>th</sup>, as provided in the Stipulated Election Agreement." A copy of the July 10, 2012 email is attached as Exhibit B.

The election was held on July 18, 2012, and resulted in a 15-15 tie with no challenged ballots. On July 23, 2012, the Petitioner filed timely objections to the election which listed seven bases for setting aside the July 18<sup>th</sup> election. Objection 1 faulted the Region for failing to send the election notice with sufficient time for it to be posted for three full working days prior to the July 13<sup>th</sup> election. Objection 2 faulted the Employer for failing to notify the Region that it did not

receive copies of the election notice prior to the fifth working day before the July 13<sup>th</sup> election, as required by Section 103.20(c) of the Board Rules. Objection 3 notes that because of the five day delay, at least one voter was unable to vote on the new date and it permitted the Employer to engage in objectionable conduct between July 13<sup>th</sup> and July 18<sup>th</sup> which is likely to have influenced the vote. Objections four through seven raised other objectionable conduct that did not directly relate to the failure to send the election notice and the rescheduling of the election. On October 3, 2012, the Regional Director issued a Report on Objections and Recommendations and Notice of Hearing on Objections which recommended the dismissal of Objections 1 through 3, and scheduled a hearing on Objections 4 through 7 on the allegations for other alleged irregularities.

These instant Exceptions are filed only with regard to the Regional Director's recommended dismissal of Objections 1 through 3.

## ***ARGUMENT***

### **A. The Region's Failure to Mail the Notice of Election with Sufficient Time to Be Posted Prior to the Original July 13<sup>th</sup> Date**

The Regional Director cites *Superior of Missouri, Inc.*, 338 NLRB 570 (2002), and *Malta Construction Co.*, 276 NLRB 1494 (1985), for the principle that "the rescheduling of an election by itself is not grounds for setting aside the results of the subsequently conducted election" even when "an administrative error by a Region caused [the original] election to be cancelled[.]" Both of those cases are distinguishable from the instant case.

In *Superior of Missouri*, a representation election was delayed for one week after the Board Agent failed to arrive at the election location by the time the polls were scheduled to open. 338 NLRB at 570. The Agent conferred with parties and they ultimately agreed to a new election

date. *Id.* In *Malta Construction Company*, the election was delayed for one week when the Field Examiner assigned to conduct the election became lost and never arrived at the election site to conduct the election. In neither case, however, is there any discussion of whether the objecting party expressly reserved its right to object to the election on the basis of the delay, as the Petitioner did here during the July 10<sup>th</sup> telephone conversation between counsel to Local 259 and the Board Agent.

Furthermore, in *Superior of Missouri*, the Board distinguished other cases in which elections were overturned because the polls opened late. The Board noted that in those other cases, the Board's conduct on the day of the election either (a) "rais[ed] the possibility that some employees had been disenfranchised," or (b) the delay "may have been affected by the irregularities that occurred during the election." 338 NLRB at 570. Likewise, in *Malta Construction*, the ALJ noted "there is no evidence in this record that eligible voters were disenfranchised by the delay of one week" because the number of votes cast equaled the number of eligible voters. 276 NLRB at 1510.

Local 259 has offered evidence that both of the distinguishing factors identified in *Superior of Missouri* and *Malta Construction* exist in this case. The election delay caused at least one individual, Ernest Guadarramas, to be disenfranchised because he was out of the country on July 18<sup>th</sup>. Because the election resulted in a 15 to 15 tie, this single missed vote would certainly have been determinative.

In addition, the Petitioner has alleged various incidents of pre-election misconduct that took place during the period that the election was delayed. See Objections 4-6. The Regional Director found sufficient merit to schedule a hearing on those allegations. As the Regional Director concluded, those objections "raise substantial and material factual issues" concerning

the validity of the July 18<sup>th</sup> election. It is critical to note that the incidents which are addressed by Objections 4-5 occurred on July 16<sup>th</sup> and 17<sup>th</sup>, and thus only occurred because the election was delayed from July 13<sup>th</sup> to 18<sup>th</sup>.<sup>1</sup>

Finally, the Regional Director's reliance on *Superior of Missouri* and *Malta Construction* is misplaced because, in the Regional Director's own words, "in each of those cases the Regional Director exercised reasonable discretion in concluding that, *due to factors beyond the control of any party*, the election could not be properly conducted on the scheduled date" (emphasis added). In this case, the delay was due to actions entirely within the control of one of the parties. As discussed below, the election here would not have been delayed had the Employer complied with its obligation under Section 103.20(c) of the Rules.

**B. The Employer's Failure to Notify the Regional Office as Required by Section 103.20(c) Caused the Delay in the Election**

Section 103.20(c) of the Board's Rules and Regulations states:

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to commencement of the election that it has not received copies of the election notice.

The Employer clearly and unmistakably failed to notify the Regional Office more than five working days prior to the date of the election as required that provision. While the Region's failure to mail the Notice of Election to the Employer may have simply been an oversight, had the Employer fulfilled its legal obligation under Rule 103.20(c), the problem could have been resolved in time to preserve the stipulated to July 13<sup>th</sup> election date.

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<sup>1</sup> The conduct alleged in Objection 6 occurred [t]hroughout the protected period preceding the election," which would also include the period between July 13<sup>th</sup> and 18<sup>th</sup>.

The Regional Director dismissed Objection 2 through an extremely narrow reading of Rule 103.20(c). Indeed, her analysis does not take into account any of the language of that provision after the first sentence. The Regional Director explained her recommendation regarding this objection as follows:

[S]ubparagraph (c) restricts a party that is deemed responsible for the non-posting of the Notice of Election from filing objections based on the Notice of election not having been posted for the requisite time period prior to the commencement of the election. There is no objection pending in this matter, filed by either party, regarding an allegedly inadequate election notice posting period.

While that is an accurate summary of the first sentence of Section 103.20(c), it completely ignores the second sentence of that provision. The first sentence does restrict the party responsible for non-posting from making that objection. However, the second sentence is not about what objections are available to parties. Instead, it imposes an affirmative duty on the Employer to notify the Regional Office more than five days prior to the election date. Indeed, the very purpose of imposing a duty on employers to notify the Regional Office appears to be designed to avoid precisely what has happened in this case. Furthermore, under Section 103.20(d), the Employer's failure to abide by its duty to notify to assure the Notice of Election was posted in time for the election are "grounds for setting aside the election[.]"

The Employer clearly violated that duty in this case. Had the Employer informed the Regional Office that it never received the Notice of Election before July 6<sup>th</sup> (the fifth working day preceding July 13<sup>th</sup>), the Region would have had sufficient time to provide the Employer with a Notice before July 10<sup>th</sup>, which would have saved the original election date. Thus, as a direct result of the Employer's failure to notify the Regional Office per the second sentence of

Section 103.20(c), the Region felt it had no choice but to delay the election notwithstanding the potential prejudice to the Petitioner.

If the Regional Director's interpretation were correct, there would be no consequence for an employer to ignore its obligation in Section 103.20(c) to notify the Regional Office. Indeed, if an employer does not receive a Notice of Election in the mail and wants additional time to campaign against a union, it has every incentive to delay notifying the Regional Office until it is less than three days prior to the election. In this case, the Employer managed to delay the election until the 49<sup>th</sup> day following the date the petition was filed, and enjoyed a longer campaign period than is normally permitted by the Board.

### ***CONCLUSION***

This is a case where both the Regional Office and Employer seriously erred. The Region failed to mail the Notice of Election to the Employer prior to the third working day preceding the election. The Employer failed to notify the Regional Office that it did not receive a Notice of Election in the mail more than five working days prior to the election date as required by Section 103.20(c). The only party that did not do anything wrong is Local 259. And yet, because of the actions of those other parties, it is likely that the outcome of the election was affected.

For the foregoing reasons, the Petitioner respectfully requests that the Board overturn the Regional Director's recommendation that Objections 1-3 be overruled, and that the Board order a new election be held in this matter. In the alternative, Petitioner submits that Objections 1-3 should be scheduled for a hearing, or consolidated with the hearing currently scheduled on Objections 4-7.

Respectfully submitted,

CLEARY, JOSEM & TRIGIANI LLP

By: /s/ Jeremy E. Meyer

Jeremy E. Meyer, Esquire  
One Liberty Place, 51<sup>st</sup> Floor  
1650 Market Street  
Philadelphia, PA 19103  
(215) 735-9099  
Attorney for Petitioner

Dated: October 16, 2012



## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the within Petitioner's Exceptions to Regional Director's Report on Objections was sent on the date set forth below by U.S. Mail and by email to the Employer's attorney and to the Regional Director of Region Two of the National Labor Relations Board as follows:

James McGrath, III, Esquire  
Putney, Twombly, Hall & Hirson LLP  
521 Fifth Avenue  
New York, NY 10175  
jmcgrath@putneylaw.com

Karen Fernback, Regional Director  
National Labor Relations Board  
Region Two  
26 Federal Plaza, Room 3614  
New York, NY 10278-0104  
karen.fernback@nrlrb.gov

/s/ Jeremy E. Meyer  
Jeremy E. Meyer, Esquire

Dated: October 16, 2012

# Exhibit A

Form NLRB-652

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**STIPULATED ELECTION AGREEMENT**

**S&H ASSOCIATES LLC****Case 02-RC-082036**

The parties **AGREE AS FOLLOWS:**

**1. PROCEDURAL MATTERS.** The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

**2. COMMERCE.** The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

S&H Associates LLC, the Employer herein, incorporated in the state of New Jersey, with a facility located at 32 Route 304, Nanuet, New York, is engaged in the business of selling and servicing automobiles. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$5,000 directly from suppliers located outside of the State of New York.

**3. LABOR ORGANIZATION.** The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

**4. ELECTION.** A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

**DATE:** July 13, 2012

**HOURS:** 8:00 a.m. to 9:00 a.m.

**PLACE:** In the technicians' locker room located on the main floor of the Employer's facility located at 32 Route 304, Nanuet, New York

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

**5. UNIT AND ELIGIBLE VOTERS.** The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All full-time and regular part-time prep persons, lot persons, body men, combo technicians, facilities persons (maintenance), parts counter personnel, parts drivers, parts clerks, technicians, porters and cashiers employed by the Employer at 32 Route 304, Nanuet, New York.

**Excluded:** All other employees, including service writers, office clerical employees, new and used car salespersons, and watchmen, and guards, professional employees and supervisors as defined in the Act

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending June 5, 2012**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

**6. ELECTION ELIGIBILITY LIST.** Within seven (7) days after the Regional Director has approved this Agreement, the Employer shall provide to the Regional Director an election eligibility list containing the full names and addresses of all eligible voters. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB 359 (1994).

**7. THE BALLOT.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of any voters or potential voters who only read a language other than English.

The question on the ballot will be "Do you wish to be represented for purposes of collective-bargaining by LOCAL 259 UNITED AUTO WORKERS, AFL-CIO? The choices on the ballot will be "Yes" or "No".

**8. NOTICE OF ELECTION.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer will post copies of the Notice of Election in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

**9. ACCOMMODATIONS REQUIRED.** All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

**10. OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

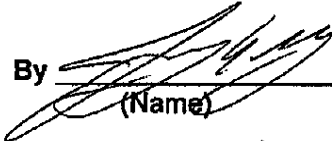
**11. TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

**12. POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

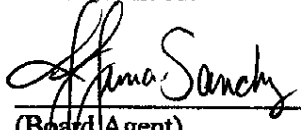
**S&H ASSOCIATES LLC**  
(Employer)

By \_\_\_\_\_  
(Name) (Date)

**LOCAL 259 UNITED AUTO WORKERS,  
AFL-CIO**  
(Petitioner)

By  6/8/12  
(Name) (Date)

Recommended:

 6/8/12  
(Board Agent) (Date)  
Juniry Luna-Sanchez, Board Agent

Date Approved: 6/8/12

BY:   
ELBERT F. TELLEM, ACTING Regional Director  
National Labor Relations Board

**12. POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

**S&H ASSOCIATES LLC**

(Employer)

**LOCAL 259 UNITED AUTO WORKERS,**

**AFL-CIO**

(Petitioner)

By

(Name)

(Date)

By

(Name)

(Date)

Recommended:

Date Approved:

Juan Sanchez 6/8/12  
(Board Agent) (Date)

Juan Luna-Sanchez, Board Agent

BY:

Elbert F. Tellez  
Elbert F. TELLEZ, Acting Regional Director  
National Labor Relations Board

# Exhibit B

**From:** Jeremy E. Meyer  
**To:** ["Luna-Sanchez, Juniry"](#)  
**Cc:** [Brian Schneck](#)  
**Subject:** 02-RC-082036/S&H Associates LLC  
**Date:** Tuesday, July 10, 2012 1:48:00 PM

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This is to confirm our telephone conversation this afternoon in which I stated that the Union agrees to hold the representation election on Wednesday, July 18, 2012 in light of the Employer's refusal to agree to an earlier date.

We note that this delay is not due to any action by the Union, but rather because the Region failed to mail out the election notice, and because the Employer apparently failed to notify the Region when it did not receive the notice more than five days prior to the election, as it is required to do. While it is my understanding that the election can no longer be held any date earlier than July 18<sup>th</sup>, I would nevertheless like to reiterate that the Union is only agreeing to this change because we have been informed that it is no longer possible for the election to take place on July 13<sup>th</sup>, as provided in the Stipulated Election Agreement.

Jeremy E. Meyer, Esquire  
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Also a member of Schwarz, Cleary, Josem & Schwarz LLC, a partnership  
of the law firms of Cleary & Josem LLP and Schwarz & Schwarz P.C.

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