

United States of America
Before the National Labor Relations Board
Washington, D.C.

Keyport Auto Body Shop, Inc.
Employer,

and

International Brotherhood of
Teamsters, Local 966

PETITIONER

Case 22-RC-00949

VIA Facsimile
(202)-273-4270

Washington, D.C.

Employer's Motion for Extension of
Time to File Exceptions to Report
on Objections

Comes Now Employer, Keyport Auto Body Shop, Inc., and makes the Board for an extension of time to submit its exceptions to the Regional Director's Report on Objections in the above-styled matter. In support of its motion, Employer states the following:

- 1.) Pursuant to a Stipulated Election Agreement approved by the Regional Director on March 14, 2013, an election by secret ballot was conducted on April 19, 2013.
- 2.) The Tally of Ballots indicated that the Union won the election.
- 3.) Employer timely filed objections to conduct affecting the results of the election, which are attached as Exhibit A.

4.) The Director of Region 22 issued his Report on Objections, attached as Exhibit B, recommending that Employers Objections be overruled.

5.) On this day, May 29, 2013, the undersigned was in the process of completing Exceptions to the Regional Director's Report on Objections when the computer system used by the undersigned's firm went down.

6.) The undersigned has not been able to access said objections or to otherwise complete said exceptions because of these computer problems.

7.) Wherefore, based on the foregoing, Employer respectfully requests the Board issue an order granting the Employer up to and including Friday, May 31, 2013 to submit its exception.

Certificate of Service

The undersigned hereby certifies that it has copied the following by facsimile transmission this 29th day of May, 2013:

Edward J. Petersen
Acting Regional Director
20 Washington Pl. 5th Fl.
Newark, N.J. 07102
(973) 645-3852

James R. Anderson
President / Principal Officer
300 Knickerbocker Pk.
Crosskill, NJ
(201)-816-3493
(facsimile)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

In the Matter of:)

KEYPORT AUTO BODY SHOP, INC.,)

Employer,)

and,)

INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS, LOCAL 966,)

Petitioner.)

Case No: 22-RC-099498

**EMPLOYER'S OBJECTIONS TO THE CONDUCT
AFFECTING THE RESULT OF THE ELECTION**

COMES NOW Employer, Keyport Auto Body Shop, Inc., ("Employer" and/or "Company"), pursuant to §102.69 of the National Labor Relations Board, Rules and Regulations and Statements and Procedure and herewith files its Objections to the Conduct Affecting the Results of the Election in the above matter.

The Employer's reasons for objections are as follows:

A Board conducted Election was held at the Employer's facility in South Amboy, New Jersey on April 19, 2013, from 6:00 a.m. to 9:00 a.m. and 3:00 p.m. to 5:00 p.m. Upon the conclusion of the election, the Board determined that 67 votes were cast for the petitioning labor organization and 42 votes were cast against the petitioning labor organization. There were 7 challenged ballots.

2. First Objection. Prior to the election, certain individuals, which, upon information and belief included agents of the petitioning labor organization, by and through their conduct, engaged in a deliberate attempt to deceive and threaten eligible voters by informing

Appendix 1

Ex A

voting members of the unit that if they failed to vote in favor of the Union, they would be terminated by the Employer. These untruthful statements were not only widely disseminated, but apparently were also widely believed by members of the voting unit. This conduct interfered with the absolute right of eligible voters to make a free and untrammelled choice on the issue of unionization.

3. **Second Objection.** In light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Canning v. National Labor Relations Board, et al.*, No 12-1115 (January 25, 2012) that President Obama's recent appointments to the National Labor Relations Board are unconstitutional, it is Employer's position that Region 22 currently lacks authority under 29 U.S.C. § 159 to investigate or conduct a hearing on the pending petition in this matter because, absent a quorum, the Board has no authority investigate or conduct hearings which may be delegated to Region 15 under 29 U.S.C. § 153(b). Employer provides this notice and objection in order to preserve such argument for subsequent review, and its continued participation and cooperation in these proceedings does neither waive the foregoing nor acknowledges this Regional Office's authority to investigate or conduct a hearing on the current petition.

4. The Employer continues to investigate all allegations of reported misconduct which affected the results of the election and pursuant to Section 102.69 of the National Labor Relations Board, Rules and Regulations and Statements and Procedure, the Employer will submit further detailed evidence verifying and substantiating its reasons for its objections to the election conducted on April 19, 2013.

5. By the above and other conduct, the election conducted on April 19, 2013, was held; (1) under conditions which rendered impossible a rational, uncoerced and free expression

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of choice in the election' (2) in a manner that raises a reasonable doubt as to the fairness and validity of the elections; and, (3) was conducted without statutory authority under the National Labor Relations Act.

WHEREFORE, the Employer respectfully requests the election conducted by the Region on April 19, 2013, be set aside and that a second election be directed; and, if necessary, the Employer requests a full hearing on its objections, to be conducted on the record, before a Hearing Officer pursuant to Section 102.69(e) of the NLRB, Rules and Regulations and Statements and Procedure.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ Geoffrey M. Gilbert

Geoffrey M. Gilbert

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Attorneys for Employer.

Respectfully,

McMAHON

Geoffrey

Rex Fennessey

2730 North

St. Louis

Telephone

Facsimile

Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of April, 2013, a true and correct copy of the foregoing was served upon the following by depositing same via Regular U.S. Mail and addressed as follows:

**J. Michael Lightner
Regional Director
National Labor Relations Board
Region 22
20 Washington Pl., Floor 5
Newark, NJ 01702-3127**

**James R. Anderson, President
International Brotherhood of Teamsters, Local 966
300 Knickerbocker Road
Cresskill, NJ 07626-1350**

/s/ Geoffrey M. Gilbert

UNITED STATES
OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 22

KEYPORT AUTO BODY SHOP, INC.
Employer

and

Case 22-RC-099498

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 966
Petitioner

REPORT ON OBJECTIONS

Pursuant to a Stipulated Election Agreement approved by the Regional Director on March 14, 2013, an election by secret ballot was conducted on April 19, 2013, among all full time and regular part time bus drivers and aides employed by the Employer at its 7061 Route 35 South, South Amboy, New Jersey facility during the payroll period ending Tuesday, March 12, 2013, but excluding all office clerical employees, dispatchers, safety trainers, professional employees, temporary employees, casual employees, maintenance employees, yard men/women, guards and supervisors as defined in the Act, and all other employees. Thereafter, a Tally of Ballots was duly served upon the parties which showed the following:

Approximate number of eligible voters	120
Void ballots	0
Votes cast for the Petitioner	67
Votes cast against participating labor organization	42
Valid votes counted	109
Challenged ballots	7
Valid votes counted plus challenged ballots	116

Challenges are not sufficient in number to affect the results of the election.

Ex B

A majority of the valid votes counted plus challenged ballots has been cast for International Brotherhood of Teamsters, Local 966.

On April 26, 2013,¹ the Employer timely filed objections to conduct affecting the results of the election, which are attached hereto as Appendix 1.²

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned Regional Director caused a preliminary investigation to be made of the Employer's objections, during which all parties were afforded full opportunity to submit evidence on the issues involved. The investigation disclosed and the undersigned finds and reports as follows:

THE OBJECTIONS

Objection No. 1

In Objection No. 1, the Employer contends that during the critical period, the Petitioner, by its agents, interfered with the conduct of the election by engaging in a deliberate attempt to deceive and threaten eligible voters by informing them that if they failed to vote in favor of the Petitioner, the Employer would terminate them. Thus, the Employer requests that the April 19 election be set aside and that a rerun election be conducted. The Petitioner denies that it engaged in objectionable conduct as alleged.

In support of this objection, the Employer provided statements from three eligible bargaining unit members. Employee #1 contends in a statement that on April 16, she 'heard' a rumor from several individuals whom Employee #1 believed were Union supporters, that if the Petitioner did not prevail in the April 19 election, the Employer would terminate all the

¹ All dates hereafter are 2013 unless otherwise specified.

² The critical period for considering objectionable conduct in this matter extends from March 1, 2013, the filing date of the petition, until April 19, 2013, the date of the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453 (1962).

employees. Employee #2 contends in a statement that during the weeks leading up to the April 19 election, she heard rumors of, and was informed by an unnamed person the witness believed to be a Union supporter, that if Employee #2 did not vote in favor of the Petitioner, she would lose her job. Employee #3 contends in a statement that on April 17, she was told by someone she believed to be a Union supporter that if she did not vote in favor of the Petitioner, she would be fired or could lose her job.

The threshold issue regarding this objection is whether the unidentified individual(s) alleged to have engaged in the objectionable conduct were agents of Petitioner within the meaning of the Act. Whether someone acts as an agent under the Act must be determined by common law principles of agency which incorporate principles of implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question.³ From the submitted statements, it appears that the individual(s) alleged to have engaged in objectionable conduct are employees of the Employer whose name appeared on the *Excelsior* list and who were eligible to vote in the April 19 election. In the instant case, the Employer did not present nor did the investigation otherwise reveal evidence that Petitioner imparted any actual or implied authority to these individuals which would support a finding that they are the Petitioner's agents within the meaning of Section 2(13) of the Act. I note that there is no contention whatsoever that these unidentified individuals ever received any compensation from the Petitioner in exchange for any services or support, nor that they organized any events or meetings on behalf of the Petitioner. Moreover, the Employer has not contended that those individuals alleged to have engaged in objectionable

³ *Shen Automotive Dealership Group*, 321 NLRB 586 (1996).

conduct were imbued with any authority to act on the Petitioner's behalf. The mere fact that the employee(s) in question may have supported the Petitioner's organizing efforts and engaged in various other protected, concerted activities is wholly insufficient to support the Employer's contention that they should be found to be agents of the Petitioner. Accordingly, I find that the unnamed, unidentified alleged perpetrators of the conduct raised in Objection No. 1 were not at any material time agents of the Petitioner within the meaning of Section 2(13) of the Act.⁴ Having determined that these individuals did not act as agents of the Petitioner at any material time, none of their alleged statements or actions may be attributable to Petitioner.

The standard to be applied in determining whether third-party conduct warrants setting aside an election requires that the objecting party establish that the conduct during the campaign was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.⁵ In determining the seriousness of a third-party statement, the Board evaluates, *inter alia*, not only the nature of the statement itself, but also whether the statement encompassed the entire bargaining unit; whether the person making the statement was capable of carrying out the promise or threat; and whether it is likely that employees acted in fear of that person's capability.⁶

I find that the offer of proof and evidence presented by the Employer in support of this objection fails to rise to the level of "aggravated" third party conduct which would tend to create a general atmosphere of fear and reprisal rendering a free election impossible. Here, the asserted objectionable conduct consisted of only a limited number of conversations involving three voting unit employees and unidentified pro-Union bargaining unit members who allegedly

⁴ See *Advance Products Corp.*, 304 NLRB 436 (1991); *United Builders Supply Co.*, 287 NLRB 1364 (1988).

⁵ See *Sub-Zero Freezer Co.*, 265 NLRB 1521 (1982); *Q.B. Rebuilders, Inc.*, 312 NLRB No. 181 (1994), and cases cited therein.

⁶ *Id.*

stated that employees could lose their jobs if the employees failed to select the Petitioner as their bargaining representative. It is noted that the Board has long held that predictions such as those raised by the Employer in its objection and offer of proof do not amount to objectionable conduct necessitating the setting aside of a Board-conducted election.⁷

Alternatively, assuming *arguendo* that the unnamed Union supporters were found to be agents of the Petitioner and, thus, their conduct could be attributed to the Petitioner, the Board applies an objective test in evaluating party conduct during an election's critical period, i.e. whether the conduct has the "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election."⁸ The critical issue herein is whether the alleged coercive conduct is sufficient to affect the results of the election. The essential question in the instant case is whether the unnamed employees' statements to colleagues that they would lose their jobs if they voted against union representation constituted a threat which could have coerced employees to vote for Petitioner. In *Underwriters Laboratories, Inc.*, 323 NLRB 300 (1997), the Board adopted the Administrative Law Judge's recommendation that such conduct is not objectionable. Citing *Janler Plastic Mold Corporation*, 186 NLRB 540 (1970), it was held that:

"(A) statement that the Company would fire employees if the Union lost the election was found to be illogical and unreasonable, and thus not coercive, since that result was what the Company wanted."

In *Janler*, the Board specifically held the following:

"(W)e are satisfied that the employees could reasonably be expected to evaluate these remarks as noncoercive and not as threats. Nor do we consider that a particular employee's subjective "understanding" of these remarks is competent evidence to prove a coercive or objectionable effect, since in our

⁷ *Springfield Hospital*, 281 NLRB 643 (1986).

⁸ *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

opinion the remarks do not reasonably have that tendency. In the first place, the vote was to be by secret ballot, under conditions safeguarded by the Board; and no evidence was offered to show that any employee had reason to believe that Petitioner could ascertain how he voted. In the second place, no evidence was offered to show that any employee had reason to believe that the Employer favored the Petitioner and on request was disposed to discharge any employees for voting *against* Petitioner. Accordingly, we find no merit in this exception."

Based on the foregoing, and noting that the Board has long held that predictions such as those raised by the Employer in its objection and offer of proof do not amount to objectionable conduct necessitating the setting aside of a Board-conducted election,⁹ I find that the Employer's Objection No. 1 does not raise substantial and material issues with respect to conduct affecting the results of the election. Accordingly, the undersigned recommends that the Employer's Objection No. 1 be overruled.

Objection No. 2

In Objection No. 2, the Employer objects to the election based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), arguing that under that decision, the President's January 4, 2012 recess appointments to the Board were invalid and consequently that Region 22 lacks authority to investigate or conduct a hearing on the pending petition. I recommend that the objection be overruled for the reasons below.

In *STG International, Inc.*, Case 21-RC-097525 (April 25, 2013), the Board rejected a similar challenge, noting that in *Noel Canning* (petition for certiorari in the United States Supreme Court filed April 25, 2013), the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues (citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013) (citation omitted)). Thus, the Board concluded that "[t]his question

⁹ *Springfield Hospital*, 281 NLRB 643 (1986).

remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." Moreover, the Board also held in *STG* that, in any event, the Board's delegation of decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. *STG*, Case 21-RC-097525 (April 25, 2013). Therefore, the Board concluded that Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. (*Id.*)

Accordingly, I recommend that the Employer's Objection No. 2 be overruled.

CONCLUSIONS AND RECOMMENDATIONS

For the reasons noted above, I find that the Employer's Objections No. 1 and 2 do not raise substantial and material issues with respect to conduct affecting the results of the election and therefore, I recommend that the Board overrule the Employer's Objections No. 1 and 2.

Having recommended that the Employer's Objections be overruled in their entirety, it is further recommended that the Board issue an appropriate Certification of Representative, certifying that a majority of the valid votes counted plus challenged ballots has been cast in favor of International Brotherhood of Teamsters, Local 966.

RIGHT TO FILE EXCEPTIONS

Pursuant to the provisions 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. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and that are not included in the Report, is not part of the record before the Board unless appended to the Exceptions or opposition thereto that 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 Report shall preclude a party from relying on the evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Section 102.111-102.114, concerning the Service and Filing of Papers, Exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on May 29, 2013, at 5:00 p.m. (EST), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file Exceptions electronically.** If the Exceptions are filed electronically, the Exceptions will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Standard Time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of the Exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.¹⁰ A copy of the Exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing the Exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the Exceptions rests exclusively with the sender. A failure to

¹⁰ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

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(314) 567-7350

timely file the Exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Issued at Newark, New Jersey this 15th day of May, 2013.

Edward J. Peterson

Edward J. Peterson, Acting Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

file
had
determination
Newark, New Jersey, this 15th day of May, 2013.

Edward J. Peterson
Edward J. Peterson
National Labor R.
20 Washington Pl
Newark, New Jersey