

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NORTH SHORE AMBULANCE AND OXYGEN SERVICE, INC.)	
)	
Employer)	
and)	Case No. 29-RC-96814
)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 805)	
)	
Petitioner)	
)	

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON OBJECTIONS**

This report contains my findings and recommendations regarding the Petitioner's objections to the election in the above referenced case. For the reasons contained herein, I recommend overruling the Petitioner's objections.

Procedural History

Upon a petition filed on January 23, 2013,¹ by International Brotherhood of Teamsters, Local 805, herein called the Petitioner or the Union, and pursuant to a Stipulated Election Agreement signed by the Petitioner, and North Shore Ambulance and Oxygen Service, Inc., herein called the Employer, and approved by the Regional Director on February 1, an election by secret ballot was conducted on February 22 among the employees in the following unit:

All full-time and regular part-time ambulance drivers and helpers employed by the Employer at its facility located at 112-09 14th Avenue, College Point, New York, but excluding ambulance EMTs, medics, office clerical

¹ All dates hereinafter are in 2013 unless otherwise indicated.

employees, dispatchers, washers, cleaners, guards and supervisors as defined in Section 2(11) of the Act.

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

Approximate number of eligible voters	23
Number of void ballots	0
Number of ballots cast for the Petitioner	11
Number of votes cast against participating labor organization	12
Number of valid votes counted	23
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	23

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has not been cast for the Petitioner.

The Petitioner filed timely objections to conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be conducted and on May 31, issued and served on the parties a Report on Objections and Notice of Hearing, in which he directed that a hearing be held by a duly designated Hearing Officer regarding the Petitioner's fifth objection alleging that the Employer threatened to cut employees' hours if they supported the Petitioner and also an allegation that the Employer resorted to racial appeals to discourage support for the Union.² No exceptions to the Regional Director's Report were filed.

² This allegation was not specifically alleged as an objection. However, during a contemporaneous investigation of a related unfair labor practice charge, the Petitioner presented evidence that the Employer made racial appeals to discourage support for the Union. The Regional Director directed that a hearing be held regarding this allegation citing White Plains Lincoln Mercury, Inc., 288 NLRB 1133, 1139 (1988) (holding that "evidence is uncovered during the course of the investigation that warrants a finding of election interference – regardless of whether such misconduct was alleged in the objections – that evidence will support setting aside the election.").

A hearing was held before the undersigned on June 18, 2013, in Brooklyn, New York. The Petitioner and the Employer appeared at this hearing.

At the hearing, all parties were represented by counsel and afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues and present oral argument.

In support of its objections, the Petitioner called two witnesses, Lance Pelt and Enrique Martinez. The Employer called Anthony Tufaro.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Petitioner's objections.³

THE EVIDENCE

The Petitioner's Evidence

Lance Pelt was employed by the Employer as an ambulance driver from 2009 until March 2013. His duties included transporting patients to and from medical appointments and dialysis. Tr. at 8.

Pelt testified that on a Friday before the election, when he went to pick up his paycheck, he was called into Anthony Tufaro's office along with three other employees, Alex, Will, and Fernando. Pelt did not indicate last names for these employees. Tr. at 17-18, 20. Pelt did not recall the exact date on which this occurred. Tr. at 18-19. After being asked on direct examination "about conversations you had with [Anthony Tufaro, the Employer's owner] that dealt with hours, or pay or reduction thereof," Tr. at 17, Pelt testified that Tufaro told the

³ References to the transcript are identified as Tr. ___. References to the Board and Petitioner's exhibits will be cited as Bd. Ex. ___ and Pet. Ex. ___, respectively.

employees that if the Union came in, “he wouldn’t be able to afford to keep paying [the employees] whatever he was paying [them], and that . . . hours would have to get cut.” Pelt said that in the same conversation, Tufaro said that he would have to hire more workers. When asked if Tufaro explained why he would have to reduce employees’ hours if the Union came in, Pelt said, “I guess we was going to try to get our salary . . . raised. And he said he couldn’t afford to do that. So in order to do it he would have to fire a couple of workers and then he would have to cut the hours . . . in order to pay us.” Tr. at 18.

Pelt was also asked on direct examination, “was there any discussion about the makeup of the Union?” Tr. at 19. Pelt replied, “Oh, about the Hispanics? Yeah.” Tr. at 19. Pelt testified that Tufaro told the employees that the Hispanics were trying to take over his company. *Id.* Pelt explained that Tufaro said that the Employer’s Hispanic workers were working with the Spanish workers of the Union to take over his company. Pelt further testified that Tufaro pulled up the Union’s website and showed the employees the website on his computer screen. Tr. at 19, 33-34. Pointing to the names on the website, Tufaro told the employees that all the people working for the Union were Spanish. Tr. at 19. According to Pelt, Tufaro told the employees how much money the Union officials were making and that the employees’ money was going to pay their salaries. Tr. at 19, 33-34. Pelt testified that this was the only time Tufaro mentioned the race of the Union officials to the employees. Tr. at 37.

Pelt testified that when he left Tufaro’s office, other employees were waiting to speak to Tufaro. Tr. at 33. Pelt did not offer any additional details about this conversation.

The Employer’s Evidence

Anthony Tufaro owns and operates the Employer’s business. Tufaro testified that he met with employees in small groups in his office before the election. Tufaro could not specify when these conversations took place. Tr. at 42. Tufaro did not speak to employees one on one

because he believed that was not legal. Tr. at 42, 49. According to Tufaro, he told employees that there was a Union drive and that the employees had to decide what they wanted. Tr. at 43. He stated that he did not tell the employees not to vote for the Union, but rather only stated that the Union could not guarantee the employees anything. Tr. at 49-50. Tufaro specifically denied telling employees that their hours would be cut if the Union won the election. Tr. at 42.

Tufaro further testified that he visited the Union's website while employees were in his office. Tr. at 43. According to Tufaro, he did not allow the employees to view his computer screen, but he read them what was on the Union's website. Tr. at 51. He stated that he told the employees that the Union did not have experience with ambulance drivers and what the Union officials' salaries were. Tr. at 43. Tufaro specifically denied that he mentioned the race of any of the Union officials. Tr. at 43.

In rebuttal, Enrique Martinez, a business agent employed by the Petitioner, testified that the Union does not post official's salaries on its website, but he also stated that those salaries are available on other websites. Tr. at 55.

DISCUSSION

This case turns on the credibility of two witnesses, Pelt and Tufaro, who offered differing accounts of the same conversation. It is undisputed that Anthony Tufaro, the Employer's owner and operator, spoke to small groups of employees in his office about the Union during the critical period, although neither witness could state precisely when this occurred. Pelt was called into Tufaro's office with three other employees, Will, Alex, and Fernando. It is this conversation which serves as the basis for the Petitioner's objections.

According to Pelt, Tufaro told the employees that if the Union came in, "he wouldn't be able to afford to keep paying [the employees] whatever he was paying [them], and that . . . hours

would have to get cut.” Pelt also testified that Tufaro said that he would have to hire more workers. When asked if Tufaro explained why he would have to reduce employees’ hours if the Union came in, Pelt said, “I guess we was going to try to get our salary . . . raised. And he said he couldn’t afford to do that. So in order to do it he would have to fire a couple of workers and then he would have to cut the hours . . . in order to pay us.” Tr. at 18.

Pelt further testified that Tufaro visited the Union’s website and pointed out that the Union officials were all Spanish, telling employees that the Hispanics were trying to take over his company. According to Pelt, Tufaro told the employees how much money the Union officials were making and that the employees’ money was going to pay their salaries. Pelt testified that this was the only time Tufaro mentioned the race of the Union officials to the employees.

Tufaro specifically denied telling employees that their hours would be cut if the Union won the election. According to Tufaro, he merely told the employees that there was a Union drive and that the employees had to decide what they wanted. He stated that he did not tell the employees not to vote for the Union, but rather only stated that the Union could not guarantee the employees anything. Tufaro admitted that he went to the Union’s website, but stated that he only told employees that the Union did not have experience with ambulette drivers and what the Union official’s salaries were. Tufaro specifically denied that he mentioned the race of any Union officials.

I find Tufaro’s testimony to be more credible than Pelt’s testimony. Tufaro testified in a clear, straightforward, and consistent manner. In contrast, Pelt’s answers were not clear or consistent and lacked specificity. Pelt first testified that Tufaro told the employees that he could not pay the employees what they were being paid and that he would have to cut hours and hire more workers. When asked if Tufaro explained why he would reduce employee hours, Pelt

testified that Tufaro could not afford to give the employees raises, and that he would fire workers and cut hours. The inconsistencies in this testimony undermine its credibility. Pelt's testimony varied regarding whether Tufaro said he would hire or fire workers and whether the Employer could afford to pay employees the wages they were currently being paid or to give employees a raise. The Board has found testimony containing internal inconsistency not reliable. See Lone Star Institutional Grocers, 282 NLRB 984, 984 fn. 1 (1987). Moreover, despite Pelt's testimony that three other employees were present for this conversation and Tufaro's testimony that he spoke with all the employees, the Petitioner failed to call any corroborating witnesses to confirm Pelt's version of the conversation. While not dispositive, failure to call corroborating witnesses is a factor weighed in making credibility determinations. See Noral Color Corp., 276 NLRB 567, 576 (1985) ("failure to corroborate must be deemed significant in a close question of credibility."); see also West Irving Die Casting of Kentucky, Inc., 346 NLRB 349, 352 (2006) (finding the failure to call a corroborating witness as a factor in making credibility determinations); C&S Distributors, Inc., 321 NLRB 404, 404 fn. 2 (1996) (stating that failure to call an identified, potentially corroborating witness is a factor in determining whether a party has established by a preponderance of the evidence that a violation of the Act has occurred). In addition, I note that Pelt was asked leading questions on direct examination, specifically to recount conversations with Tufaro "that dealt with hours, or pay or reduction thereof" and if Tufaro said anything "about the makeup of the Union." As with failure to call a corroborating witness, the leading nature of questions on direct examination is not dispositive with regard to credibility, but is a factor to be considered. See Neptco Inc., 346 NLRB 18, 26 fn. 5 (2005) (stating that it is significant if important testimony is elicited through leading questions when determining credibility). While not individually dispositive, taken together, the inconsistencies

in Pelt's testimony, the failure to call identified corroborating witnesses, and the leading nature of Pelt's direct examination render his testimony less credible than Tufaro's.

With regard to the allegation that the Employer threatened to reduce employees' hours if they supported the Union, given that I have credited Tufaro's testimony regarding this conversation over Pelt's account of the conversation, I find that the record evidence does not establish that the Employer threatened to reduce employees' hours during the critical period prior to the election. Accordingly, I recommend overruling the Petitioner's fifth objection.

With regard to the allegation that the Employer resorted to racial appeals to discourage support for the Union, I find that the Petitioner has not established that the Employer engaged in objectionable conduct. As stated above, Tufaro's account of the conversation and his straightforward and clear denial that he cited the Union officials' race was more credible than Pelt's testimony.⁴

Moreover, even crediting Pelt's version of events, such conduct would not provide grounds for setting aside the election. According to Pelt, Tufaro told the employees that Hispanics were trying to take over his company and that the Union officials were Spanish. Pelt stated that this was the only occasion on which the Employer raised the issue of race. Such comments, if true, do not rise to the level of objectionable conduct. In Sewell Manufacturing Co., 138 NLRB 66 (1962), the Board found that "a deliberate, sustained appeal to racial prejudice" may destroy the requisite laboratory conditions for an election. In that case, the employer made several racial appeals during the course of a union campaign, including a letter to employees from the employer's president stating that the president would not want to pay dues to

⁴ The Petitioner sought to impeach Tufaro's credibility. Tufaro testified that he visited the Union's website and reported Union officials' salaries to employees. Enrique Martinez, a business agent for the Petitioner, testified that the Union's website does not contain salaries. However, I note that Pelt also stated that Tufaro had showed the employees the officials' salaries on the Union's website. Thus, the Petitioner impeached its own witness on this point as well.

the Union because he “would object to paying assessments so the union can promote its political objectives such as the National Association for the Advancement of Colored People, and the Congress for Racial Equality.” Sewell, 138 NLRB at 67. In addition, the employer distributed a newsletter which stated, in part, “[i]t isn’t in the interest of our wage earners to ties themselves to organizations that demand racial integration, socialistic legislation, and free range of communist conspirators.” Sewell, 138 NLRB at 68.

In contrast, the Board has held that isolated racial comments will not serve as a basis for setting aside an election when they do not rise to the level of a sustained appeal to racial prejudice. See HCF Inc., 321 NLRB 1320, 1320-21 (1996) (in which the Board found that a statement that black employees were treated worse than white employees did not rise to the level of objectionable conduct under Sewell); Englewood Hospital, 318 NLRB 806 (1995) (in which the Board found that the employer’s circulation to employees of a letter containing a swastika during the critical period did not rise to the level of a sustained racial appeal prohibited under Sewell). Thus, even crediting Pelt’s version of his conversation with Tufaro, I do not find that Tufaro’s alleged comments that Hispanics were trying to take over his company and that the Union officials were Spanish rise to the level of a sustained racial appeal objectionable under Sewell.

For the reasons explained above, I recommend overruling the Petitioner’s allegation that the Employer resorted to racial appeals to discourage support for the Union.

RECOMMENDATION

I have recommended overruling the Petitioner’s objections. Accordingly, I further recommend that a certification of results issue.

RIGHT TO FILE EXCEPTIONS

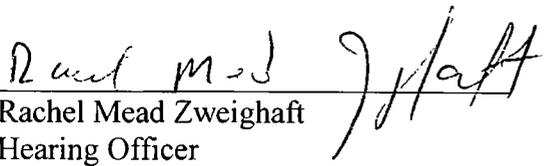
Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 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 July 17, 2013, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If 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 Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. 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 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 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.

Dated at Brooklyn, New York, on this July 3, 2013.


Rachel Mead Zweighaft
Hearing Officer
National Labor Relations Board, Region 29
Two MetroTech Center
Brooklyn, New York 11201