

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

S&H ASSOCIATES, INC.
Employer

and

Case No. 02-RC-082036

LOCAL 259 UNITED AUTO WORKERS
Petitioner

REPORT ON OBJECTIONS AND RECOMMENDATIONS

This report contains the Acting Regional Director's findings and recommendations regarding the Employer's objection to the election. The Employer's sole objection alleges that the Petitioner, by its supporter and agent, Douglas Burd, engaged in electioneering within the designated no-electioneering area during the polling period, and thereby compromised the employees' ability to exercise free choice in the election. As described below, I recommend overruling the objection. The evidence is insufficient to establish that the Petitioner, or its any of its agents, engaged in any conduct which warrants setting aside the results of the election.

PROCEDURAL BACKGROUND

Pursuant to a Decision and Direction of Second Election issued by the Board on May 29, 2013, a second election was conducted on July 12, 2013, from 11:00 a.m. to 12:00 p.m., at the technicians' locker room located on the main floor of the Employer's facility located at 32 Route 304, Nanuet, NY.

The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters.....	39
Number of void ballots.....	0
Number of votes cast for Petitioner.....	20
Number of votes cast against Petitioner.....	17
Number of valid votes counted.....	37
Number of challenged ballots.....	0
Number of valid votes counted plus challenged ballots.....	37

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

On July 19, the Employer filed a timely objection to the election.¹

Pursuant to Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the objections was conducted. During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issue. The results of the investigation are described below.

THE OBJECTION

In support of its objection, the Employer asserts that shortly before the election, the Board Agent conducting the election informed the parties that the polling area, including the technicians' locker room and the area immediately outside the locker room, was to be free from electioneering and campaigning. The Employer provided a sworn affidavit of a bargaining unit employee in support of the objection. According to the testimony of this witness, as the witness and other employees were waiting in line to vote between 11:00 a.m. and 12:00 noon on the day of the election, another employee, Douglas Burd, loudly said "Vote YES! Vote YES!" in the polling area for the election. The witness further testified that other employees waiting in line replied by saying "SAY YES!." The witness did not specify how many employees were waiting in line and in the area at the time of this exchange. No evidence was submitted by the Employer in support of its contention that Burd was an agent of the Petitioner at the time of this alleged objectionable conduct.

Petitioner denies the Employer's claim that Burd was an agent of Petitioner, or acting on its behalf. In this regard, Petitioner notes that Burd was not designated as an observer for the Petitioner, and not employed in any capacity by the Petitioner. Rather, Burd's status was limited to being an employee employed by the Employer and an eligible voter.

A threshold issue is the alleged agency status of Douglas Burd. The Board, with appellate court approval, has long held that pro-union employees do not constitute union agents merely because of their "vocal and active union support[]." *United Builders Supply Co., Inc.*, 287 NLRB 1364, 1364 (1988). *Accord Tuf-Flex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983). Rather, the conduct of prounion employees will only be attributed to a union where it has

¹ Copy attached.

“instigated, authorized, solicited, ratified, condoned, or adopted” the conduct at issue. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808-09 (6th Cir. 1989); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). Common law principles apply in determining agency status. *Poly-America, Inc. v. NLRB*, 260 F.3d 465 (5th Cir. 2001); *Pan-Olston*, 336 NLRB at 305-06. The burden of proving an agency relationship is on the party asserting its existence. *Poly-America*, 260 F.3d at 480; *Cornell Forge Co.*, 339 NLRB No. 85 (2003).

In the instant matter, no evidence was presented to support the Employer’s contention that Burd was an agent of the Petitioner. No specific or otherwise probative evidence was submitted or adduced in the administrative investigation of this objection to show that Burd acted on behalf of the Petitioner with actual or apparent authority. Rather, the evidence fails to establish that the Petitioner placed Burd in the position of acting, or appearing to act, as its agent. Moreover, there is no evidence that the Petitioner knew about or endorsed Burd’s alleged statements, or that the Petitioner authorized, ratified or condoned any of the conduct alleged to be objectionable. Based upon the foregoing, the evidence submitted by the Employer and otherwise adduced by the investigation fails to establish that Burd acted with either actual or apparent authority on behalf of the Petitioner when he made the alleged statements to employees. Accordingly, the Board’s decision in *Brinks Inc.*, cited by the Employer and involving electioneering conduct by a union observer in the polling area, is inapplicable to the instant case.

Douglas Burd was a voting employee and not an agent of the Petitioner. As such, Burd was not prohibited from carrying on conversations in the polling area. The conduct of non-agent, pro-union employees is objectionable only if it is so disruptive as to require setting aside the election. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *Boston Insulated Wire & Cable Co.*, 259 NLRB at 1119 n. 11. Here, because there was no evidence of the involvement of the Petitioner in this conduct, the appropriate test is whether the “misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” This case does not involve and the facts do not support a conclusion that any significant disruption took place during the representation election. Nor does the record reflect any misconduct so aggravated as to create an atmosphere in which a free election was an impossibility. In cases involving electioneering by non-parties at or near the polls, the Board considers the circumstances peculiar to the situation and determines whether the conduct at issue so substantially impaired the employees’ exercise of free choice as to require that the election be set

aside. *Glacier Packing Co., Inc.*, 210 NLRB 571 (1974). In *Boston Insulated Wire*, the Board identified the factors to be considered in determining whether specific conduct is objectionable. Thus, the Board determines whether the conduct, under the circumstances, “is sufficient to warrant an inference that it interfered with the free choice of the voters.” This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on whether the electioneering is conducted within a designated “no electioneering” area or contrary to the instructions of the Board Agent. With respect to the extent and nature of the alleged electioneering, a loud outburst in the polling area by a non-agent, even involving a partisan message, does not rise to the level of objectionable third-party conduct. See e.g., *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 329 (5th Cir. 1991) (election results upheld even though union won by only single vote and one of employer's objections based on presence of two terminated employees in polling area who were cutting up and laughing and told an employee, “You know damn well the way you are supposed to vote,” and told another employee the same and that they should “stick together”) *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 807 (6th Cir. 1989) (employee in the polling area yelled two or three times that it was employees' last chance to change their minds and vote for the union).

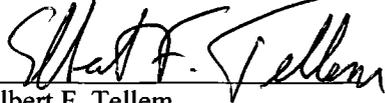
Application of the criteria set forth in *Boston Insulated Wire*, *Hood Furniture*, and *Kux Mfg.*, to the instant matter supports the conclusion that the evidence provided in support of the objection fails to establish conduct “‘so disruptive’ as to require setting aside the election.” Thus, in addition to being third party conduct, no evidence was provided or adduced to establish that the conduct engaged in was contrary to the instructions of the Board Agent conducting the election. Nor does the extent and nature of the alleged objectionable conduct in the instant matter warrant setting aside the election. Rather, the conduct at issue was limited to a single outburst and is analogous to the conduct not found objectionable in *Hood Furniture*, and *Kux Mfg.*

Accordingly, I find the Employer’s objection to be without merit, and I recommend that it be overruled.

CONCLUSIONS AND RECOMMENDATIONS

Having found the Employer's objection to be without merit, it hereby is recommended that it be overruled.² It is further recommended that a Certification of Representative be issued to the Petitioner.³

Signed at New York, New York
August 15, 2013


Elbert F. Tellem
Acting Regional Director, Region 2
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

² No hearing is warranted with respect to the objection, inasmuch as no substantial and material factual issues have been raised thereby. Further, even assuming that the evidence proffered by the Employer were to be deemed to be true, no hearing is warranted and the election will not be set aside based there upon. See Whitney Museum of American Art, 247 NLRB 573 (1980); enff 105 LRRM 3239 (2nd Cir. 1980).

³ Pursuant to Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. Under the provisions of Sec. 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 or challenges 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. Exceptions must be received by the Board in Washington, D.C. by August 29, 2013, at 5:00 p.m. Eastern Time, unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, it 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. If submitted by mail or sent by a delivery service, it must be received by the close of business at 5:00 p.m. Eastern Time on the due date, or be postmarked or given to the delivery service no later than August 28, 2013.

NATIONAL LABOR RELATIONS BOARD

In The Matter Of

S&H ASSOCIATES, LLC,

Employer,

- and -

**LOCAL 259 UNITED AUTO WORKERS,
AFL-CIO,**

Petitioner.

Case No. 02-RC-082036

**EMPLOYER'S OBJECTION
TO CONDUCT AFFECTING
THE ELECTION RESULTS**

Pursuant to Rule 102.69 of the Rules and Regulations of the National Labor Relations Board, the Employer, S&H Associates, LLC, hereby submits the following post-election objection affecting the results of the election held on Friday, July 12, 2013 in the technicians' locker room located on the main floor of the Employer's facility located at 32 Route 304, Nanuet, New York:

1. On July 12, 2013, at some time between 11:00AM and 12:00PM, Douglas Burd, a supporter and agent of Petitioner, Local 259 United Auto Workers, AFL-CIO (the "Union") loudly said, "Vote YES! Vote YES!" in the polling area, prompting other unit members in line to vote to respond "Say YES!" Such conduct, took place during the polling period in an area that Maria Belonis, Board Agent, had previously indicated was to be free from electioneering and campaigning.

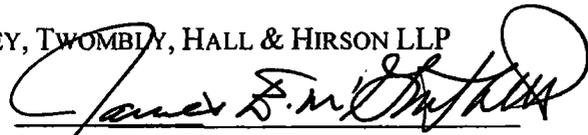
The Union's conduct compromised the employees' ability to exercise free choice in the election. Accordingly, the Employer respectfully requests that the Board sets aside the election results and promptly directs a new election.

Dated: New York, New York
July 19, 2013

Respectfully submitted,

PUTNEY, TWOMBLY, HALL & HIRSON LLP

By:



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