

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

**H2O LANDSCAPE DESIGN INC. D/B/A H2O UTILITY
CONTRACTORS**

Employer

and

Case No. 02-RC-116739

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1430, AFL-CIO**

Petitioner

**REPORT ON OBJECTIONS AND RECOMMENDATIONS
AND NOTICE OF HEARING ON OBJECTION**

Pursuant to a Stipulated Election Agreement, entered into by the above-named parties and approved on November 26, 2013¹, an election by secret ballot was conducted on December 17, in the following unit of employees:

All full-time and regular part-time junior technicians, technicians, senior technicians, and foremen employed by the Employer at its facility at 3931 Mulvey Ave., Bronx, NY, but excluding all other employees, office and clerical staff, salesmen, guards, and professional employees and supervisors as defined in the Act.

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.....	17
Void ballots.....	0
Votes cast for Petitioner.....	10
Votes cast against participating labor organization.....	2
Valid votes counted.....	12
Challenged ballots.....	5
Valid votes counted plus challenged ballots.....	17

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 Petitioner.

¹ All dates herein are in 2013.

On December 18, the Employer filed timely objections to the conduct of the election. The objections, verbatim, are as follows:

Objection 1

The Union and/or its agents during the course of the election promised the employees they could get the Union's health and welfare, pension and more holidays, sick leave vacation and more benefits and a contract one month after they voted for the Union 24 hours before the election. Said conduct adversely affected the results of the election.

Objection 2

During the course of the election, the Union and/or its agents made promises to the employees of the Company they could get higher wages and benefits, if they voted for the Union. Said conduct adversely affected the results of the election.

Objection 3

During the course of the election, the Union and/or its agents stated that if the employees did not vote for the Company the Employer would terminate the employees which interfered with the free atmosphere of the election.

Objection 4

During the course of the pre-election conference, the Union agent stated to the Company that the Employer threatened the employees that if an employee was an observer for the Union he would be terminated by the Company and the observer was fearful of retaliation by the Employer. Said contact interfered with the free atmosphere of the election.

Objection 5

During the course of the election, the Union and/or its agents had a meeting with the employees 24 hours prior to the election which violated the 24 hour rule of no group meetings with the employees prior to the election. Said conduct adversely affected the results of the election.

Objection 6

During the course of the election, the Union and/or its agents induced employees to sign union authorization cards by representing that if they signed an authorization card before the election, the Union would waive payment of initiation fee fees. Said conduct interfered with the results of the election.

Objection 7

During the course of the election, the Union and/or its agents misrepresented to the employees the type of wages and benefits it would receive under union conditions. Said conduct intetfered with the results of the election.

Objection 8

During the election, the Union yelled and screamed at the Employer at a job site that the employees would be terminated by the Company if they did not vote for the Company and the Employer did not care about its employees. Said conduct interfered with the results of the election

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.

OBJECTIONS 1, 2, AND 7

In support of objections 1, 2, and 7, the Employer's general manager, Desmond Shepherd, testified in a prepared affidavit that during the period between the filing of the petition and the election, multiple unit employees told him the Union would get a contract which would contain a health and welfare plan, a pension plan, and higher wages and benefits, including vacation, holidays, and sick leave. Shepherd further testified that he heard statements from employees that the Union would force the Company to make changes to current wages, benefits and working conditions. Shepherd stated that he was told by multiple employees that the Union would get a contract within one month, and that at the end of negotiations wages and benefits could only go up. The Employer cites *Wagner Electric Corp.*, 167 NLRB 532 (1967), *S&C Security Inc.*, 271 NLRB 1300 (1984), *Teletype Corp.*, 122 NLRB 1594 (1959), and *General Cable Corp.*, 170 NLRB 1682 (1968), in support of these objections. The Employer further contends that *Midland National Life Insurance Company*, 263 NLRB 127,133(1982), in which the Board held it would not probe into the truth or the falsity of the parties campaign statements, is inapplicable because employees were born in countries other than the United States and thus unfamiliar with U.S. labor law.

The Petitioner denies that its agents or representatives made any statements or promises which would be a basis to set aside the results of the election.

The cases cited by the Employer in support of these objections are inapplicable to the circumstances of this case. Thus, *Wagner Electric* involved a union-provided benefit; *S&C Security* involved the payment and/or expected payment of money to serve as an observer for a union during an election; *Teletype Corp.* involved cash payments to attend union campaign meetings; and *General Cable* the distribution of \$5.00 gift certificates. Accordingly, each case is inapposite. Rather, it is well settled that an election will not be set aside solely because of allegedly misleading campaign statements or misrepresentations of fact. *Midland National Life*

Insurance Company, 263 NLRB 127, 130 (1982). Although the Board will set aside an election when a party, through forgery or deception, uses propaganda that “no voter could recognize for what it is,” supra at 131, none of the statements that Shepherd relies on present such a situation. In this regard, Shepherd fails to identify a single agent or representative of the Petitioner that allegedly made the statements or promises described above. However, even assuming arguendo, that a representative of the Petitioner promised a contract within a month, or better pay and better benefits, under *Midland* those statements are insufficient to set aside an election, as there is no contention, or evidence to establish, that any forgery or deception was involved. Rather, it appears that the Employer is urging that the decision in *Midland* is inapplicable because its employees are “foreigners” who cannot understand the promises because they do not know federal labor law, and do not know which statements made by the Petitioner are true or false. Putting aside the Employer’s wholly unfounded implication that employees who are “foreigners” are somehow inherently less able to evaluate election campaign statements than native-born employees, the Employer provided no evidence in support of its “belief” that unit employees were incapable of evaluating election campaign material and statements for what they are, and/or understanding federal labor law. Nor did the Employer cite any legal authority in support of its contention that the Board decision in *Midland* is inapplicable to the instant matter. Based on the foregoing, the alleged misrepresentations and statements made by the Petitioner, as set forth in objections 1, 2 and 7, do not, in my opinion, constitute objectionable conduct under *Midland*. Accordingly, I find objections 1, 2, and 7 to be without merit, and I recommend that they be overruled.

OBJECTIONS 3, 4, AND 8

In these objections the Employer has alleged that representatives of the Petitioner threatened employees with retaliation, including termination, if they supported the Union. In support of Objection 3, Shepherd states that he was told by multiple unit employees that if they did not vote for the Company, the Company would terminate their jobs. With respect to Objection 4, the Employer relies on an alleged statement made by Petitioner’s representative Samuel Gonzalez to Shepherd during the pre-election conference. Specifically, Shepherd testified that Gonzalez told him, in the presence of the Petitioner’s observer Jose Mantalban, that Mantalban would be terminated if he was the Petitioner’s observer. Shepherd further alleges that Mantalban intimidated and coerced other employees to vote in favor of the Petitioner. Other than what has already been described in connection with Objections 3 and 4, the Employer provided no other specific evidence in support of Objection 8. The Employer cites

Based on the above, I find objections 3, 4, and 8 to be without merit and recommend that they be overruled.

OBJECTION 5

In support of this objection, Shepherd asserts that he was told by an employee that representatives of the Petitioner met with all the employees the night prior to the election on December 16, 2013, and that during the meeting the Petitioner and its agents told all the employees at the meeting to vote "Yes" for the Union as a group.

The Petitioner denies conducting a meeting with employees within the 24 hour period immediately prior to the election.

In general, the Board has held that employers and unions are prohibited from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427 (1953). The Board has held, however, that this 24-hour rule "was not intended to . . . prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). The Board has, as a result, explained that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period, if employee attendance is voluntary and on their own time. *Foxwoods Resort Casino*, 352 NLRB 771, 771, 780-781 (2008). In the instant matter, there is no contention, or evidence to establish, that the Petitioner conducted a meeting on the Employer's premises during working hours, and/or that attendance at such a meeting was mandatory. Accordingly, the evidence is insufficient under *Peerless* to establish grounds for setting aside the election.

Based on the foregoing, I find Objection 5 to be without merit and recommend that it be overruled.

OBJECTION 6

In support of this objection, Shepherd testified that several employees informed him that they had been told the Petitioner "would waive payment of initiation fees and dues if they signed union cards before the election, and that if they did not sign union authorization cards after the petition was filed, they would have to pay union dues and initiation fees".

The Petitioner specifically denies engaging in this conduct.

After duly considering the results of the administrative investigation of the objection and the statements and positions of the parties with respect thereto, I have concluded that Employer's objection 6 raises substantial and material factual issues which best may be resolved on the basis of record testimony. Accordingly,

IT IS HEREBY ORDERED that a hearing be held before a Hearing Officer designated by the undersigned for the purposes of receiving testimony with respect to the issues raised by Objection 6.

IT IS FURTHER ORDERED that the Hearing Officer, duly designated for the purposes of conducting such hearing, shall initially prepare and cause to be served upon the parties a report containing findings of fact, including resolutions of credibility and recommendations to the Board concerning the dispositions of the issues raised by Objection 6. Within 14 days of the issuance of such report, any party may file exceptions thereto with the Board. Immediately upon the filing of such exceptions or answering briefs to the exceptions, the party filing the same shall serve a copy upon me. If no exceptions are filed, the Board may decide the matter forthwith upon the record or may make other disposition of the case.

YOU ARE HEREBY NOTIFIED that pursuant to Section 102.62 and 102.69 of the Board's Rules and Regulations, a hearing shall be conducted on Objection 6 at 26 Federal Plaza, Room 3614, New York, New York, before a Hearing Officer of the National Labor Relations Board, at which time and place the parties will have the right to appear in person or otherwise and give testimony.² The scheduling of the hearing shall await the final disposition of Objections 1, 2, 3, 4, 5, 7, and 8.

² Pursuant to the provisions of Sections 102.69 and 102.65(c) of the Board's Rules and Regulations, any party may request from the Board special permission to appeal the direction of a hearing on Objection 6. Such request shall be filed promptly, in writing, and shall briefly state the grounds relied upon.

CONCLUSIONS AND RECOMMENDATIONS

Having found Objections 1, 2, 3, 4, 5, 7, and 8 to be without merit,³ it is hereby recommended that they be overruled.⁴

Signed at New York, New York
January 30, 2014



Karen P. Fernbach
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0104

³ No hearing is warranted with respect to Objections 1, 2, 3, 4, 5, 7, and 8 since no substantial or material factual issues have been raised thereby. Further, even assuming the evidence proffered by the Employer in support of its objections were deemed to be true, no hearing is warranted and the election will not be set aside based thereupon. See *Whitney Museum of American Art*, 247 NLRB 573 (1980), enf'd 105 LRRM 3239 (2d Cir. 1980).

⁴ Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, exceptions to this Report may be filed 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 that evidence in any subsequent related unfair labor practice proceeding.

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 **February 13, 2014, 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 on 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.