

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

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In the Matter of:

SANITATION SALVAGE CORP.

Employer,

And

Case No. 02-RC-070804

LOCAL 108, WASTE MATERIAL RECYCLING
INDUSTRIAL LABORERS

Petitioner

And

LOCAL 124, RECYCLING, AIRPORT, AND
INDUSTRIAL SERVICE EMPLOYEES UNION

Intervener

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**EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
HEARING OFFICER'S REPORT ON OBJECTIONS**

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PRELIMINARY STATEMENT

Sanitation Salvage Corp. ("Sanitation Salvage") respectfully submits this brief in support of its exceptions to the Report on Objections (the "Report"). As set forth herein, Sanitation Salvage respectfully submits that the Hearing Officer erred in overturning the results of the election held on August 16, 2012 and ordering that a new election be conducted.

It must be noted that as a result of the Hearing Officer's December 5, 2012 Report that a **third** election is being directed by Region 2. By way of background, a Stipulated Election was originally held on January 25, 2012 at which time Sanitation Salvage's employees, by way of a 22 to 5 margin, voted to have Local 124, Recycling, Airport, and Industrial Service Employees Union ("Local 124") continue to act as their exclusive bargaining representative. Objections were filed with Region 2 ("Region") by Local 108, Waste Material Recycling Industrial Laborers (Local 108") alleging, *inter alia*, that the conduct of Sanitation Salvage's "supervisors" Charles Mahr and Chris Margraff "campaigned" for Sanitation Salvage "through their conduct." Sanitation Salvage submitted its appropriate response to Local 108's objections, denying that Mr. Mahr and Mr. Margraff were supervisors. After some discussion, it was agreed amongst Local 108, Local 124 and Sanitation Salvage that the January 25, 2012 election results would be set aside and a second election would be conducted on August 16, 2012.

A second election was conducted on August 16, 2012. By a 32 to 10 vote, Sanitation Salvage's employees voted once again to have Local 124 remain as their exclusive bargaining representative. On August 23, 2012 Local 108 submitted six objections seeking to once again set aside the results of the Stipulated Election held on August 16, 2012. By Order of the Regional Director dated October 5, 2012, Region 2 scheduled a hearing on four of the six objections.

On October 18, 2012 a hearing was held before Gregory B. Davis (the "Hearing Officer") on four of the objections filed by Local 108. On December 5, 2012 the Hearing Officer issued his Report sustaining two of the four objections. Specifically the Hearing Officer concluded that "(1) Chris Mahr is an agent of the Employer; (2) the Employer by Mahr, threatened employees with a reduction in overtime if Local 108 won the election; (3) the Employer, by Danny Lally, created the impression that employees' activities on behalf of Local 108 were under surveillance; (4) the Employer, by Danny Lally, conveyed the impression to employees that voting for Local 108 would be futile"

As set forth herein the objections filed by Local 108 were not supported by the record evidence and the Hearing Officer should not have sustained any of the objections. Accordingly, Sanitation Salvage respectfully submits that the National Labor Relations Board (the "Board") should reverse the Hearing Officer's recommendations and direct Region 2 to certify the results of the August 16, 2012 Stipulated Election.

ISSUES PRESENTED

1. Whether the Hearing Officer erred in finding that Charles Mahr was an agent of the Employer.
2. Whether the Hearing Officer erred in finding that Mr. Mahr's conduct had the tendency to interfere with the employees' freedom of choice.
3. Whether the Hearing Officer erred in concluding that the Employer through Danny Lally coerced employees to vote Against Local 108.
4. Whether the Hearing Officer erred in recommending that the election be set aside and a new election conducted.

LEGAL ARGUMENTS

I. THE HEARING OFFICER ERRED IN CONCLUDING THAT CHARLES MAHR WAS AN AGENT OF THE EMPLOYER (EXCEPTION NOS. 1 -4)

In sustaining Objection No. 2 raised by Local 108 the Hearing Officer first concluded that Charles Mahr was an agent of the Employer as that term is defined under Section 2(13) of the Act. As set forth herein, this conclusion was in error and should be reversed.

It is well settled that the Board may find that an employee was acting as an “agent” as that term is defined by Section 2(13) of the Act for the employer if under all the circumstances, other employees would reasonably believe that the “agent” was reflecting company policy and acting for management. *Zimmerman Painting & Heating*, 325 NLRB 106 (1997). Critically, the Board will look to whether management placed the “agent” in a position whereby he transmitted management directives and therefore it would be reasonable for the employees to believe this person speaks for management. *Id.*

In support of his conclusion that Mr. Mahr is an agent of the Employer the Hearing Officer relies upon the testimony of two employees, Tarrell Sumlin and Hiram Arocho that Mr. Mahr is the most senior person on duty during the night shift; that he informed Kajeem Hill that he was terminated, and that employees were instructed to call Mr. Mahr after midnight if they encountered problems completing their routes. (Report at p. 7). From these basic facts the Hearing Officer extrapolates that Mahr “was regularly used as a conduit by management to convey work-related messages of importance to drivers and helpers during their shift.” (Report at p. 9). Such extrapolation is unsupported by the record. Indeed Mr. Sumlin merely testified that on one occasion his truck broke down and he called Mr. Mahr to obtain a new truck. (Tr. p. 49 ll. 1-25, p. 50 ll. 1-9). Mr. Arocho testified that Danny Lally, not Mr. Mahr was his supervisor, that he reported to Mr. Lally and that Mr. Lally was responsible for giving him his

assignments. (Tr. p. 65, ll. 1-25, p. 66, ll. 1-2). Mr. Arocho merely testified that if he encountered problems with a truck or the route after midnight that he would call Mr. Mahr. (Tr. p. 67 ll. 6-15). Mr. Mahr credibly testified without contradiction that he does not have the authority to hire (Tr. p. 131, ll. 20-21); fire (tr. p. 132, ll. 11-12); suspend (Tr. p. 133, ll. 13-14); promote employees (Tr. p. 134, ll. 20-21); give raises (Tr. p. 134, ll. 18-19); and order supplies (Tr. p. 133-134, ll. 25-1). Mr. Mahr also testified that he does not have the authority to schedule sick days, approve vacation requests or to otherwise set the schedule of any other driver. (Tr. p. 134, ll. 3- 17).

Furthermore, the cases relied upon by the hearing officer—*J.J. Cassone Bakery*, 350 NLRB 86, 95 (2007); *Poly-America, Inc.*, 328 NLRB 667 (1999); and *Spirit Construction Services*, 351 NLRB 1043 (2007)— support a finding that Mr. Mahr is NOT an agent of Sanitation Salvage. In *J.J. Cassone Bakery, Inc.*, the employee deemed to be an agent of the employer was responsible for quality control, routinely assigning tasks to another employee, disciplining employees and “report[ed] production and employee problems, absences and vacation requests to the supervisor, and receive[d] complaints from employees on their line about other workers.” The record here is woefully devoid of any evidence that Mr. Mahr had such authority, which would be indicative of a 2(13) agent. It is respectfully submitted that there is no record evidence, which would support such a finding in the instant case.

In *Poly-America, Inc*, the Board found the lead man to be an agent because he was “the authoritative communicator of information on behalf of management regarding safety, housekeeping, quality control, and production matters.” Here the record is devoid of any evidence that Mr. Mahr was involved in such issues as safety, quality control or production matters. Likewise, in *Spirit Construction Services*, the employer admitted that it used the

purported agent as “a conduit of information from the office to the field and from the field to the office” and was responsible for instructing employees on which tasks to complete. In the instant case, there was not one shred of evidence that Mr. Mahr played any role in instructing employees with respect to the completion of their job duties.

In sum, the fact that Mr. Mahr may be the most senior person on duty after midnight and was called upon to troubleshoot minor issues does not make him a Section 2(13) agent of the Employer. For this reason alone Objection No. 2 should be dismissed.

II. THE HEARING OFFICER ERRED IN CONCLUDING THAT CHARLES MAHR’S CONDUCT HAD THE TENDENCY TO INTERFERE WITH THE EMPLOYEES FREEDOM OF CHOICE (EXCEPTION NOS. 5-7, 12)

Even if the Hearing Officer was correct in concluding that Mr. Mahr was an agent of Sanitation Salvage, and to be clear he was not, the Hearing Officer incorrectly concluded that Mr. Mahr’s conduct had “the tendency to interfere with the employees’ freedom of choice.” (Report pp. 10, 12). It is well settled that the burden to set aside election results is a “heavy” one; even heavier where the vote margin is large. *See The Permanente Medical Group, Inc. et al. and Nat’l Union of Healthcare Wkrs., et al.*, 2012 WL 3059602 at *7 (NLRB July 25, 2012)(citing, *Trump Plaza Assoc. and Int’l Union, et al.*, 352 NLRB 628, 629 (2008)). Here, the Hearing Officer acknowledges that the purported objectionable conduct was directed towards two employees and that Local 124 won the election by twenty-two votes, yet the Hearing Officer nonetheless incredulously concluded that he found “it conceivable that the election might have turned out differently absent Employer misconduct.” (Report at pp. 11-12). This legal finding is fatally flawed inasmuch as there is no evidence in the record to support such a finding. Indeed, given that Mr. Mahr’s statements were directed towards two isolated co-employees and Local 108 lost the election by twenty two votes, it defies logic and reason to conclude that the election

results would have turned out differently. As such, Objection No. 2 should not have been sustained.

III. THE HEARING OFFICER ERRED IN CONCLUDING THAT THE EMPLOYER THROUGH DANNY LALLY COERCED EMPLOYEES TO VOTE AGAINST LOCAL 108 (Exception Nos. 8 – 12)

Contrary to the Hearing Officer's Report, the record is devoid of any evidence that Danny Lally coerced employees to vote against Local 108. Indeed, Mr. Lally credibly testified that he did not care about the outcome of the election as it did not affect him. (Tr. p. 158, ll 23-25, p. 159 ll. 11-14). To the extent that the Hearing Officer found inconsistencies in Mr. Lally's testimony, it is respectfully submitted that such inconsistencies were minor and did not detract from his forthright denials of the alleged objectionable conduct. Moreover, the Hearing Officer completely ignored the fact that the Messers. Arrocho and Sumlin who testified on behalf Local 108 were biased against the Employer. Indeed, as to Mr. Sumlin the Hearing Officer appears to credit his testimony because he admitted on direct examination that he was recently terminated by Sanitation Salvage for fighting with another employee. (Report at p. 15). That Mr. Sumlin was terminated for fighting with another employee does not make Mr. Sumlin credible, to the contrary, it supports a finding that his testimony should be disregarded in its entirety.

In sum, the credible evidence clearly established that Mr. Lally did not coerce employees into voting against Local 108. As such, the Hearing Officer erred in sustaining Objection No. 4.

IV. THE HEARING OFFICER ERRED IN OVERTURNING THE ELECTION CONDUCTED ON AUGUST 16, 2012 (Exception Nos. 12-13)

Even assuming that the Hearing Officer was correct that the purported conduct took place, and to be clear he was not, the Hearing Officer nonetheless erred in setting aside the election. It is well established that the Board does not lightly set aside representation elections.

Quest Int'l, 338 NLRB 856 (2003); *see also, In re Safeway, Inc.*, 338 NLRB 525 (2002). “There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (1991). As noted, the burden to set aside the election results is a “heavy” one; even heavier where the vote margin is large. *The Permanente Medical Group, Inc. et al. and Nat’l Union of Healthcare Wkrs., et al.*, 2012 WL 3059602 at *7 (NLRB July 25, 2012)(citing, *Trump Plaza Assoc. and Int’l Union, et al.*, 352 NLRB 628, 629 (2008)). In the instant case, clearly the margin of votes was large and this was the second election.

Where pre-election conduct is alleged to have invalidated a representation election, the challenging party must prove by “specific evidence” not only that campaign improprieties did occur but also that such improprieties prevented a fair election. *NLRB v. Hydrotherm, Inc.*, 824 F.2d 332, 334 (4th Cir.1987); *see also, Avante at Boca Raton, Inc. and 1115 Nursing Home*, 323 NLRB 555, (1997). In this matter, Local 108 had the burden of showing that there was specific unlawful interference with the Stipulated Election held on August 16, 2012. Specifically, Local 108 had to show that the conduct in question had a reasonable tendency to interfere with the employees’ freedom of choice in the election to such an extent that it materially affected the results. *See, Jensen Enterprises, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 631, et al.*, 290 NLRB 547 (1988).

Here, it cannot be forgotten that two elections have already been conducted regarding this matter and during each election, an overwhelming number of Sanitation Salvage’s employees voted to retain Local 124 as their bargaining representative. Local 108 failed to present any evidence from any employee that was actually affected by the purported conduct. To the contrary, Local 108 presented the evidence of three biased individuals who supported Local 108

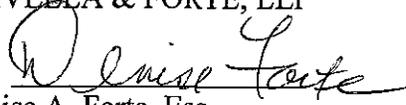
and who arguably, to the extent they were eligible to vote, voted in favor of Local 108. Strikingly absent from the record is the testimony of a single employee who supported Local 108, but was coerced into voting for Local 124. Moreover, it bears repeating that all of the purported objectionable conduct was directed at **two** eligible voters. In an election where Local 124 won by over twenty two votes, such conduct is clearly insignificant. *The Permanente Medical Group, Inc. et al. and Nat'l Union of Healthcare Wkrs., et al.*, 2012 WL 3059602 at *7.

In sum, the time has come for Local 108 to admit that Sanitation Salvage's employees are happy with being represented by Local 124 and that a third election will not result in a different outcome. Further, the Board should not permit Local 108 to continue to hold the Employer hostage and cause it to incur significant expenses, including defending against numerous baseless objections. Accordingly, the Board should sustain Sanitation Salvage's exceptions to the Report and direct the Region to certify the election results.

CONCLUSION

For the above-stated reasons, the Employer respectfully requests that its exceptions to the Hearing Officer's Report be sustained and that the Board direct the Region to dismiss the objections filed by Local 108 in their entirety and further direct the Region to certify the results of the election conducted on August 16, 2012.

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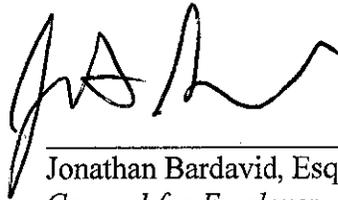
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2012, I caused the foregoing EMPLOYER'S BRIEF
IN SUPPORT OF ITS EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON
OBJECTIONS to be served by electronic mail as follows:

Gregory B. Davis, Hearing Officer (Greg.Davis@nlrb.gov)
Steven Kern, Counsel for Local 124 (skern@bislawfirm.com)
Tamir Rosenblum, Counsel for Local 108 (trosenblum@masontenders.org)

A handwritten signature in black ink, appearing to read 'JB', is written above a horizontal line.

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Counsel for Employer