

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SANITATION SALVAGE CORP.

Employer,

And

Case No. 02-RC-070804

WASTE MATERIAL, RECYCLING
AND GENERAL INDUSTRIAL LABORERS
LOCAL 108

Petitioner,

And

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

Intervener.

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO
EMPLOYER'S EXCEPTION TO THE HEARING OFFICER'S REPORT

Haluk Savci, Esq.
Associate General Counsel
Mason Tenders District Council
Of Greater NY and Long Island
520 8th Avenue, Suite 650
New York, NY 10018
(212) 453-9407

CASES CITED

Adam Wholesalers, 322 NLRB 313 (1996)

Allied Mechanical, 343 NLRB 631, 631-32 (2004)

Cambridge Tool Mfg. 316 NLRB 716 (1995)

Double J. Services, 347 NLRB No. 58 (2006)

Fieldcrest Cannon, 318 NLRB 1 (1995)

Harborside Healthcare, 343 NLRB 906, 907 (2004)

Interstate Truck Parts, 312 NLRB 661, 663(1993) *enf. mem* 52 F.3d 316 (3rd Cir. 1995)

Mid-South Drywall, 339 NLRB 480 (2003)

Milium Textile Services, 357 NLRB 169 (2011)

Newburg Eggs, 357 NLRB No. 171 (2011)

Reliant Energy, 357 NLRB No. 172 (2011)

Smithfield Foods, 347 NLRB 1225, 1235 fn. 29 (2006)

Stabilus, Inc. 355 NLRB 79(2010)

Standard Dry Wall Products, 91 NLRB 544 (1950)

Super Thrift Markets, Inc. t/a Enola Super Thrift, 233 NLRB 409(1977)

Truss-Span Co. 236 NLRB 50 (1978) *enfd.* In relevant part 606 F.2d 266 (9th Cir. 1979)

PRELIMINARY STATEMENT

Waste Material, Recycling and General Industrial Local 108, LIUNA (“Local 108” or the “Petitioner”) submits this memorandum of law in opposition to the exceptions filed by the Employer Sanitation Salvage Corp. (“Sanitation Salvage” or the “Employer”) to Hearing Officer Greg Davis’ December 6, 2012 Report on Objections (“Report”) recommending that the results of the October 18, 2012 representation election be set aside. The Hearing Officer recommended overturning the election after sustaining Petitioner’s timely filed Objections 2 and 4 and finding the Employer’s conduct had a reasonable tendency to interfere and coerce employees in the election.

As explained below, the Employer’s principal purported grounds for filing the present exceptions is to dispute the factual findings of the Hearing Officer, all of which were more than adequately supported by the hearing record, and arguing the Hearing Officer erred in recommending a new election. The Hearing Officer made entirely reasonable factual findings. His recommendations to overturn the results of the election are fully supported by precedent and should be adopted by the Board.

PROCEDURAL BACKGROUND

On August 16, 2012, pursuant to a Notice of Second Election, Region 2 conducted a secret ballot election for a unit of employees at the Employer’s 421 Manida Street, Bronx New York facility.¹ Intervener Local 124, Recycling, Airport, Industrial and Service Employees Union (“Local 124” or “Intervener”) received 32 votes while Petitioner received 10 votes. On August 23, 2012, Petitioner filed 6 timely objections. On October 5, 2012, the Regional Director scheduled a hearing on 4 of the 6 objections. The

¹ By stipulated election agreement a first election was held on January 25, 2012 after which Petitioner filed election objections.

Region convened a hearing on October 18, 2012. On December 5, 2012 the Hearing Officer issued a Report on Objections sustaining Objections 2 and 4² and recommended overturning the election finding specifically 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 employees’ activities on behalf of Local 108 were under surveillance; (4) the Employer, by Danny Lally, threatened to discharge employees because of their support for Local 108; the Employer, by Danny Lally, conveyed the impression to employees that voting for Local 108 would be futile; and (5) that the foregoing actions of the Employer all took place within the critical period.” . Hearing Officer Report (“HOR”) at 17.

On December 19, 2012, the Employer filed exceptions to the Hearing Officer’s findings arguing that the hearing record did not support the findings, the objections should not have been sustained and the Hearing Officer erred in recommending a new election. On December 20, 2012, the Board granted Petitioner’s Request to extend time to answer to January 7, 2013.

² Objections No. 2 and 4 read as follows:

Objection No. 2: The Employer, through its supervisors and/or agents, including but no limited to Danny Lally, Chirs Mahr, Ethan Perez and Chris McGraff campaigned on behalf of Local 124, including but not limited to, by wearing Local 124 tee shirts and actively lobbying employees to vote for Local 124 representation and/or against Local 108.

Objection No. 4 The Employer unlawfully threatened and coerced employees to vote against Local 108 representation, including but not limited to, by threatening that the Employer would respond to Local 108 representation by diminishing employees’ terms and conditions of employment and refusing to sign a contract with Local 108; the Employer similarly threateningly identified employees it understood to be Local 108 supporters, such as by referring to them as “Mr. Local 108”.

The Hearing Officer reasonably found Charles Mahr was an agent of the Employer reasonably crediting testimony that employees took direction from Mahr, Mahr identified himself as a supervisor and was viewed as a supervisor by employees, and Mahr disciplined employees and communicated termination notices to employees.

The Employer in disputing the Hearing Officer's conclusion that Charles Mahr was an agent of the Employer argues that the Hearing Officer incorrectly "extrapolates" that Mahr acted as a conduit to convey work-related messages to drivers, and that Mahr was instead merely the senior man on the night shift who at most was called upon to troubleshoot minor issues. In making this argument, the Employer simply chooses to ignore the hearing evidence reasonably credited by the Hearing Officer that Mahr acted as an agent for the Employer and offers not one factor as to why these credibility determinations should be overtuned.

The Hearing Officer credited testimony from employees Tarrell Sumlin and Hiram Arrocho who both identified Mahr as a night supervisor during the week and on Sundays, times when stipulated Supervisor Danny Lally was not present. Hearing Transcript at 48,66. Arrocho, a current employee of the Company, specifically testified that Mahr told him he was a supervisor and that Arrocho needed to report to him. *Id.* at 66-68. Arrocho testified he witnessed Mahr hire and discipline employees specifically recalling that Mahr terminated employee, Jose ("Lulu") Bonilla. *Id.* at 77,84-86. Kajeem Hill, another former employee, testified that it was Mahr on behalf of the Employer who notified him that he had been terminated, a fact admitted by Mahr. *Id.* at 142-145.

The Hearing Officer credited the testimony of Messrs. Arrocho, Summelin and Hill concluding that there was "no question" Mahr acted as agent of the employer finding that 1) "Employees took directions from Mahr and no one else for a significant

portion of each weekday and during his full shift in place of the admitted supervisor, Lally, on Sundays”; 2) Mahr “identified himself as a supervisor to employees and the record shows that the employees regarded him as such” and 3) the Employer used Mahr to inform an employee, Hill, that he had been terminated even though the owner of the Company could have easily accomplished the task by phone instead of relying on Mahr. Report at 6-11.

The Hearing Officer correctly applied Board precedent in *Mid-South Drywall*, 339 NLRB 480 (2003) to his findings to conclude that Mahr was an agent of the Employer. In *Mid-South Drywall*, the Board held “[i]t is well established that where an employer places a rank-and-file employee in a position which employees would reasonably believe that the employee speaks on behalf of management, the employer has vested that employee with apparent authority to act as the employer’s agent, and the employee’s actions are attributable to the employer. See *Mid-South Drywall Inc.*, 339 NLRB 480 (2003) citing *Pan-Oston Co.*, 336 NLRB No. 23 slip op. at 1-2(2001). The Board in *Mid-South Drywall* found that the lead man in was an agent of the employer citing he (1) was often the highest-ranking employee on the job site; (2) directed the daily job activities of the employees; (3) regularly answered their questions concerning their work duties; (4) regularly answered their questions concerning their work duties; (4) communicated management decisions to employees; and (5) was perceived by employees to be a supervisor. *Id.* Each of these criteria cited in *Mid-South Drywall* apply to Mahr. Oddly, the Employer now seeks to discredit the Arrocho’s testimony concerning Mahr even though at the hearing the Employer did not question Mahr about Arrocho’s alleged statements concerning Mahr. It is the Board’s established policy not to overrule an

administrative law judge or hearing officer's "credibility resolutions unless the clear preponderance of all relevant evidence convinces [it] that they are incurred." *Standard Dry Wall Products*, 91 NLRB 544 (1950). Here the factual finding of the Hearing Officer were eminently well supported and corroborated by multiple witnesses including most tellingly the unrefuted testimony of a current Sanitation Salvage employee. The Employer's refutations do not come remotely close to satisfying the high standard for overruling such factual determinations. The Hearing Officer's finding that Mahr is as an agent of the Employer should be adopted by the Board.

The Hearing Officer reasonably found that Mahr's Conduct in telling employees to "do the right thing" and vote against Local 108 and warning of the adverse consequences of losing overtime if Local 108 prevailed in the election had the tendency to interfere with the employee freedom of choice in choosing a bargaining representative.

The Employer apparently does not dispute Mahr's conduct as alleged but argues that, if Mahr is viewed as agent of the Employer(which the Hearing Officer correctly found him to be), it "defies logic" to conclude that the election results would have turned out differently given the margin of victory. This argument both ignores the evidentiary record and fails to address the relevant standard of review under Board precedent.

The test to determine whether Mahr's actions warrant setting aside the election is whether the conduct has "the tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.* 316 NLRB 716 (1995). Objectionable conduct which interferes with the laboratory conditions for an election need not amount to conduct commonly that violates Section 8(a)(1). *Stabilus, Inc.* 355 NLRB 79(2010). And, despite the Employer's protestation, there exists no magical voting margin that causes the Board to ignore misconduct in the critical period in an election. See *Newburg Eggs*, 357 NLRB

No. 171 2011(Board upheld invalidating results of election even though the voting margins in previous elections were substantial since the Employer’s conduct created an atmosphere which made the exercise of free choice improbable); *Reliant Energy*, 357 NLRB No. 172 (2011). Rather, the standard the Board applies in deciding whether to *not* overturn the results of an election involving proscribed conduct during the critical period is whether the violations are such “that it is virtually impossible to conclude that they could have affected the results of the election.” *Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409(1977). Here, the Hearing Officer correctly concluded that the conduct attributed to the Employer by not just Mahr, but also Lally, in the context of a margin of victory of only eleven votes warranted overturning the election results. During the critical period Mahr told Arrocho to do the “right thing” and support Local 124 threatening the consequence that employees of the company would lose their overtime if Local 108 prevailed in the election. As the Hearing Officer noted, election campaign statements by supervisors or company agents which reasonably cause prounion employees to fear reprisal if they exercise Section 7 rights will ordinarily be attributed to the Employer and found objectionable. *Harborside Healthcare*, 343 NLRB 906, 907 (2004). As well, threats to reduce wages or hours (or in this instant overtime) are considered flagrant interference with Section 7 rights which are “more likely to destroy election conditions for a longer period of time than are other unfair labor practices.” *Milium Textile Services*, 357 NLRB 169 (2011); *Interstate Truck Parts*, 312 NLRB 661, 663(1993) *enf.*. Mem 52 F.3d 316 (3rd Cir. 1995); *Truss-Span Co.* 236 NLRB 50 (1978) *enfd.* In relevant part 606 F.2d 266 (9th Cir. 1979) (Threat to eliminate pension and profit sharing plans interfered with the conduct of the election) That the margin of victory was

22 votes in no way vitiates the effects of the proscribed conduct attributable to the employer. *See Super Thrift Markets, Inc. t/a Enola Super Thrift*, 233 NLRB 409(1977) (Board upheld setting aside election results where coercive statements were directed to two employees in a unit of 24 employees reiterating that the Board has long held statements made during election campaigns can reasonably be expected to have been disseminated and discussed by employees).

The Hearing Officer reasonably concluded that Mahr's statements to employees as an agent of the Employer tended to interfere with employees free choice of bargaining representative. The Employer offers no credible rationale as to why this finding should be disturbed.

The Hearing Officer reasonably credited the testimony of Summelin and Arrocho that Danny Lally through his coercive actions on commenting about their conversations with Local 108 organizers, threatening to discharge employees and communicating the futility of supporting Local 108 adversely affected their freedom to choose their elected representative.

The Employer's contention that the hearing record is devoid of any evidence that supervisor Lally coerced employees again simply ignores the Hearing Officer's extensive and entirely reasonable explanation based on the hearing record as to why he credited Summelin and Arrocho's testimony concerning Lally's actions.

Both Arrocho and Summelin testified extensively concerning Lally's statements to them during the critical period. Arrocho, a current employee of the Employer who had not been disciplined by the Employer, testified that Lally disparaged Local 108 to him after he observed Arrocho speaking with Hill who at the time worked for the Union as an organizer. Hearing Transcript at 72-73. He further testified that Lally later told him "to do the right thing" before the election and on the day of the vote. *Id.* at 70-73;74-75; 82-83..

Sumlin testified that Lally criticized him after he observed him speaking with Hill stating “I don’t know why you were around Mr. Q and the other 108 people because you going to end up like Q with no job.” *Id.* at 51-52. Sumlin also detailed that Lally categorically testified that voting for Local 108 would be futile because the Employer had no intention of bargaining with Local 108 stating that “we’re not going to sign any paperwork like nothing, you’re going to get nothing for at least like two or three years.” *Id.* at 54.

The Hearing Officer reasonably credited the testimonies of Arrocho and Summelin finding their testimony concerning their conversations with Lally were consistent and, unlike Lally’s testimony, were straightforward and not evasive. Both men readily admitted to problems they had on the job. And, most tellingly, the Hearing Officer highlighted that Arrocho, a current employee, testified against his direct supervisor, Lally, against his own self-interest. In contrast, the Hearing Officer noted the evasive and inconsistent testimony of Lally whose prevarication on the relatively minor point of whether he remembered seeing a Local 124 grill on company property cast a larger cloud on the credibility of his testimony in general. In answering the Hearing Officer’s direct and simple question of whether he had conversations with employees about the election could only answer- “Anything is possible.” Report at 14. Given the deference afforded to the hearing officer in making credibility determinations and in light of the extensive, eminently reasonable explanation as to why he credited the testimonies of Summelin and Arrocho over Lally, the Employer utterly fails to support their exception to overturn the findings. *Standard Dry Wall Products*, 91 NLRB 544 (1950).

Lally’s actions alone are themselves support overturning the results of the election. By creating the impression that employees’ activities on behalf of Local 108

were under surveillance, Lally coerced and adversely affected their freedom of choice in the election. *Double J. Services*, 347 NLRB No. 58 2006, slip op. (creation of an impression of surveillance, and interrogation is objectionable conduct). By threatened to discharge employees because of their support for Local 108 as the Hearing Officer found Lally did in his remarks to Summein, Lally again coerced employees and violated their Section 7 rights. *See Allied Mechanical*, 343 NLRB 631, 631-32 (2004) By communicating to employees that it would be futile to support Local 108, the Employer through Lally coerced employee rights to freely choose their representative in the election. *Smithfield Foods*, 347 NLRB 1225, 1235 fn. 29 (2006); *Adam Wholesalers*, 322 NLRB 313 (1996); *Fieldcrest Cannon*, 318 NLRB 1 (1995).

The Employer continually ignores the credited evidence in the hearing supporting coercive and violative conduct by its supervisors and agents. As argued above, the Employer offers no concrete reasons for why the Board should overturn any of the credibility determinations made by the Hearing Officer concerning Mahr and Lally and their violative behavior. Instead, the gravamen of their argument is a perversely reasoned rationale that Mahr and Lally's behavior should in effect be ignored because "two elections have already been conducted .. and during each election, an overwhelming number of Sanitation Salvage's employees voted to retain Local 124". This is not a reason to ignore the Employer's proscribed conduct here. As the Board held in *Newburg Eggs*, ignoring proscribed employer conduct during the second election merely because it would result in a third election (as the Employer argues here) would perversely reward the Employer for its ongoing pattern of illegal conduct. *Newburg Eggs*, 357 NLRB No. 171 (2011). Moreover, it is the Board's long standing policy to direct a new election

whenever conduct violative of Section 8(a)(1) (which the conduct here arguable is) occurs during the critical period unless it is virtually impossible to conclude that the conduct could have affected the results of the election. *Super Thrift Markets* 233 NLRB 409 at 410. The reasonableness of the decision to overturn the election can be derived from Lally's words alone who admitted in his testimony that the election was all that employees were talking about. Report at 15. Given the nature of the Lally and Mahr's conduct coupled with the size of the unit and the election margin and the heightened awareness of the election in the shop, a trier of fact cannot reasonably conclude it is "virtually impossible" that the Employer-attributed conduct did not affect the results of the election.

CONCLUSION

As argued above, the Employer fails to provide any rational basis to overturn the Hearing Officer's findings and his recommendation to overturn the results of the election. Accordingly, the Board should affirm his findings and recommendation and order a new election.

January 7, 2013

Respectfully submitted,



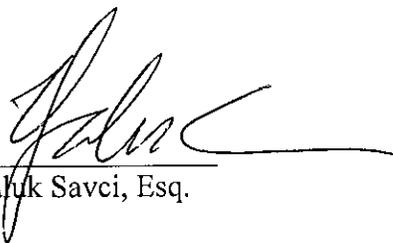
Haluk Savci
Associate General Counsel
Mason Tenders District Council
Of Greater NY and LI
520 8th Avenue, Suite 650
New York, NY 10018

Attorney for Petitioner Local 108

CERTIFICATE OF SERVICE

I do hereby certify that I did cause on this Seventh day of January, 2013, this Memorandum of Law in Opposition to the Employer's Exceptions to the Hearing Officer's Report on Objections to be served by electronic mail on the following parties:

Gregory Davis, Esq. greg.davis@nlrb.gov
Denise Forte, Esq. denise@tfslip.com
Steve Kern, Esq. skern@bislawfirm.com
Scott Trivella, Esq. scott@tfslip.com


Haluk Savci, Esq.