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Carson, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NYK LOGISTICS (AMERICAS), INC.

Employer

and

Case 21-RC-21083

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 63,  
OFFICE CLERICAL UNIT

Petitioner

DECISION AND DIRECTION OF SECOND  
ELECTION

The National Labor Relations Board has considered objections to an election held on November 12, 2008, and the Regional Director's and the hearing officer's reports recommending disposition of them.<sup>1</sup> The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 13 against the Petitioner, with 3 challenged ballots, an insufficient number to affect the results.

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<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. May 1, 2009), *petition for cert. filed* \_\_\_ U.S.L.W. \_\_\_ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *rehearing denied* No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. May 1, 2009), *petition for rehearing filed*, Nos. 08-1162, 08-1214 (May 27, 2009).

On December 5, 2008, the Regional Director issued a Report on Objections and Order Directing Hearing and Notice of Hearing. The Regional Director recommended, inter alia, that the Board overrule the Petitioner's Objection 4 without an evidentiary hearing, and the Petitioner timely excepted to this recommendation. As we have set aside the election on other grounds, we find it unnecessary to pass on these matters pertaining to the Petitioner's Objection 4.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's findings<sup>2</sup> and recommendations.<sup>3</sup> Accordingly, we sustain the Petitioner's Objection 1 based on Richard Crawford's objectionable statements of October 30, 2008, and we find that the election must be set aside and a new election held.

#### DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who

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<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility determinations. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>3</sup> In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to approve the withdrawal of the Petitioner's Objections 3 and 6 and the portion of the Petitioner's Objection 2 relating to the security cameras, and her recommendations to overrule the Petitioner's Objections 2 and 5. Regarding the Petitioner's Objection 1, we agree with the hearing officer that the Employer exceeded the bounds of permissible campaign statements based on the comments made by Richard Crawford, the Employer's vice president of warehouse operations, during the October 30, 2008 employee meeting. In doing so, we need not decide whether the Employer also engaged in objectionable conduct when Rodney Jensen, the Employer's planning manager, individually met with employee Nancy Gonzalez to discuss the Union.

In sustaining the Petitioner's Objection 1, Member Schaumber is of the view that the instant situation is distinguishable from *TNT Logistics of North America, Inc.*, 345 NLRB 290 (2005). In that case, the supervisor predicted that his employer's primary customer, Home Depot, might cancel its contract if the employer's employees voted to unionize. The Board majority in *TNT Logistics* found that the supervisor's statement conveyed his personal belief as to demonstrably probable consequences beyond the employer's control, "based on objective fact," which is permissible under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). According to the Board majority, the record contained unrefuted facts that Home Depot did not like using unionized carriers, it did not use any unionized carriers, and its contract with the employer was due to expire the following year. Here, in contrast, the record does not suggest that Target generally does not like doing business with unionized companies or that it has accounts only with non-unionized companies. Crawford also admitted that he never explained or attempted to justify his statements in terms of any provision of Target's contract with the Employer. Rather, based on Crawford's discredited testimony, the Employer took the position that such statements never occurred in the first place to warrant any explanation or justification by Crawford. In these circumstances, Member Schaumber agrees that the Employer failed to meet the established *Gissel* standard in that it provided no objectively-based rationale for Crawford's Target statements. See *DTR Industries, Inc.*, 350 NLRB 1132 (2007).

did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Longshore and Warehouse Union, Local 63, Office Clerical Unit.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C., June 15, 2009.

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Wilma B. Liebman, Chairman

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Peter C. Schaumber, Member

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NATIONAL LABOR RELATIONS BOARD