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LITIGATION SERVICES  
WASH., D.C.

May 15, 2015

**VIA FEDERAL EXPRESS**

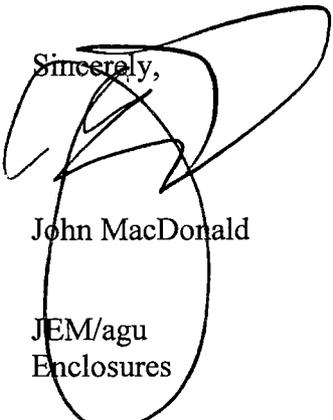
Henry R. Protas  
Attorney  
National Labor Relations Board  
Region 4  
615 Chestnut Street, Suite 710  
Philadelphia, PA 19106-4413

**Re: Advanced Disposal Services East, Inc. - Petition for Review  
NLRB Case No. 04-CA-145936**

Dear Mr. Protas:

Enclosed please find Advanced Disposal Service East, Inc.'s file-stamped Petition for Review filed today in the United States Court of Appeals for the Third Circuit.

Sincerely,

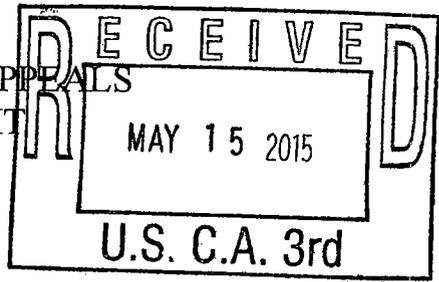


John MacDonald

JEM/agu  
Enclosures

cc: Linda J. Dreeben (with enclosures) ✓  
Gary Shinnors (with enclosures)  
Mark Featherman (with enclosures)

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT



ADVANCED DISPOSAL SERVICES )  
EAST, INC. )  
 )  
Petitioner )  
 )  
v. )  
 )  
NATIONAL LABOR RELATIONS )  
BOARD, )  
Respondent )  
 )

PETITION FOR REVIEW

Advanced Disposal Services East, Inc., Petitioner herein, hereby petitions the Court for review of the Order of the National Labor Relations Board (Board) in NLRB Case No. 04-CA-145936 finding that Petitioner violated Sections 8(a)(5) and (1) of the National Labor Relations Act as amended (Act), 29 U.S.C. §§ 158(a)(5), (1) and the underlying certification of Representative in Case No. 04-RC-123739. The Board's order was entered on May 8, 2015 and is reported at 362 NLRB No. 89. The Board's Decision and Certification of Representative was issued on December 16, 2014, and was not issued as a reported, published opinion. The Board's decisions are attached hereto as Exhibits A and B. A Certificate of Parties and Amici and List of Parties Served is attached as Exhibit C. This petition is filed pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f).

WHEREFORE, Petitioner hereby requests that the Court grant the petition for review and set aside the order of the NLRB finding that Petitioner violated Sections 8(a)(5) and (1) of the Act and ordering Petitioner to comply with the NLRB's remedial order.

Respectfully submitted this 15<sup>th</sup> day of MAY, 2015.



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*Attorneys for Advanced Disposal Services East, Inc.*

# Exhibit A

*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**Advanced Disposal Services East, Inc. and Teamsters  
Local Union No. 384 a/w the International  
Brotherhood of Teamsters. Case 04-CA-145936**

May 8, 2015

**DECISION AND ORDER**

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Teamsters Local Union No. 384 a/w the International Brotherhood of Teamsters (the Union) on February 6, 2015, the General Counsel issued the complaint on February 19, 2015, alleging that Advanced Disposal Services East, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 04-RC-123739. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On March 13, 2015, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On March 17, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding. Further, relying on *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Respondent contends that because the Board lacked a quorum, its appointment of the Regional Director for Region 4 is void; the Regional Director had no authority to conduct the election; and the Board's subsequent certification of the Union cannot stand. On these bases, the Respondent argues that the Board must set aside the election and remand the representation case to

the Regional Director with directions to conduct a new election.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.<sup>1</sup>

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a Delaware corporation with facilities at 2955 Felton Road, Norristown, Pennsylvania, 455 Poplar Neck Road, Birdsboro, Pennsylvania, and 565 Trestle Park, Downingtown, Pennsylvania, has been engaged in residential and commercial waste hauling services.

During the year preceding issuance of the complaint, the Respondent received goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following the representation election held on April 16 and 17, 2014, the Union was certified on December 16, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers, helpers and mechanics employed by the Respondent at its Birdsboro, Pennsylvania; Norristown, Pennsylvania and Downingtown, Pennsylvania locations; but excluding all other employees, guard and supervisors as defined in the Act.

<sup>1</sup> The Respondent's requests that the complaint be dismissed and a new election be directed are therefore denied.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### B. Refusal to Bargain

By letter dated January 22, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated February 4, 2015, the Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since February 4, 2015, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, Advanced Disposal Services East, Inc., Norristown, Birdsboro, and Downingtown, Pennsylvania, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Teamsters Local Union No. 384 a/w the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers, helpers and mechanics employed by the Respondent at its Birdsboro, Pennsylvania; Norristown, Pennsylvania and Downingtown, Pennsylvania locations; but excluding all other employees, guard and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Norristown, Birdsboro, and Downingtown, Pennsylvania, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 4, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2015

\_\_\_\_\_  
Phillip A. Miscimarra, Member

\_\_\_\_\_  
Kent Y. Hirozawa, Member

\_\_\_\_\_  
Lauren McFerran, Member

WE WILL NOT fail and refuse to recognize and bargain with Teamsters Local Union No. 384 a/w International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time drivers, helpers and mechanics employed by us at our Birdsboro, Pennsylvania; Norristown, Pennsylvania and Downingtown, Pennsylvania locations; but excluding all other employees, guard and supervisors as defined in the Act.

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

ADVANCED DISPOSAL SERVICES EAST, INC.

The Board's decision can be found at [www.nlr.gov/case/04-CA-145936](http://www.nlr.gov/case/04-CA-145936) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



# Exhibit B

MHS  
Norristown, PA

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADVANCED DISPOSAL SERVICES  
EAST, INC.

Employer

and

Case 04-RC-123739

INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 384

Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 16 and 17, 2014 and the Hearing Officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 60 for and 58 against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions<sup>1</sup> and briefs, has adopted the Hearing Officer's findings<sup>2</sup> and recommendations, and finds that a certification of representative should be issued.

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<sup>1</sup> The Employer argues for the first time in its exceptions that Regional Director Dennis Walsh was without authority to issue his decision because the Board could not appoint him to his position on January 29, 2013 due to the invalidity of the recess appointments of two of the Board's three members and the consequent absence of a quorum. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Assuming that this issue is properly before the Board, we find no merit to the Employer's contention. We find that the General Counsel was authorized to appoint Walsh as the Regional Director pursuant to the Board's order contingently delegating certain authorities to other NLRB officials. See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011). Further, the Board on July 18, 2014, in an abundance of caution and with a full complement of five Members ratified nunc pro tunc and expressly authorized the selection of Mr. Walsh.

1. We agree with the hearing officer's recommendation to overrule the Employer's objection related to the police presence on the morning of the election. In doing so, we note that, on the facts of this case, it does not matter who was responsible for calling the police to the Norristown facility because the officers' conduct did not interfere with the election. See *Vita Food Products*, 116 NLRB 1215, 1219 (1956).

2. We also agree with the hearing officer's recommendations to overrule the Employer's objections based on the conduct of Union business agent Chris O'Donnell and employee Christopher Lyons. The hearing officer correctly found that O'Donnell's statements and conduct, as well as some of Lyons', was not objectionable because there was no evidence that any employees witnessed that conduct or that it was disseminated to other employees. The lack of dissemination or evidence of employee witnesses supports a finding that, whether engaged in by an agent of the Union or by third-party employees, the conduct was not objectionable. See *Lockheed Martin Corp.*, 331 NLRB 852, 854-855 (2000) (party conduct); and *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092-1093 (1999) (third-party conduct).

3. The hearing officer correctly found that Lyons' argument with a fellow employee on the morning of the election does not warrant setting aside the election.

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Finally, Regional Director Walsh on July 30, 2014 affirmed and ratified any and all actions taken by him or on his behalf from March 10, 2013 to July 18, 2014. See *Durham School Services*, 361 NLRB No. 66 (2014); *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1-2 (2014); *ManorCare of Kingston, PA*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014). Accordingly, we reject the Employer's contention regarding the validity of Regional Director Walsh's appointment.

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. 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 have carefully examined the record and find no basis for reversing the findings. In addition, some of the Employer's exceptions allege that the hearing officer's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's decision and the entire record, we are satisfied that the Employer's contentions are without merit.

The argument between Lyons and his coworker, Benjamin Shackelford—who the credited evidence establishes had been friends for 20 years—would have reasonably been viewed by employees as a personal disagreement and not a threat of violence against employees who failed to support the Union. See *Bell Trans*, 297 NLRB 280, 280-281 (1989). Moreover, although there was evidence that a handful of individuals in the 120-employee unit heard about and discussed the incident, the Employer has not shown that it was widely disseminated. See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (to be objectionable, third-party conduct must “create a general atmosphere of fear and reprisal rendering a free election impossible”). Finally, to the extent there is evidence that the argument was characterized as a “fight” when discussed among other employees, this evidence is insufficient to sustain the objection because the argument was conveyed erroneously and out of context by employees not involved in or witness to the actual incident. See *ManorCare of Kingston PA, LLC*, 360 NLRB No. 93, slip op. at 1-2 (2014).<sup>3</sup>

4. Finally, the Employer argues that the conduct of O'Donnell, Lyons, and unnamed actors, considered cumulatively, warrants setting aside the election. We find this exception without merit. Whether considered individually or cumulatively, the

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<sup>3</sup> Member Miscimarra agrees that employees would not have reasonably viewed Lyons' conduct during his argument with Shackelford as a threat of violence against employees who did not support the Union. On this basis, he concurs in finding that Lyons' confrontation with Shackelford does not warrant a new election. Although Member Miscimarra agrees with the multifactor standard set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), for determining whether third-party threats warrant setting aside an election, he would abandon the phrase “general atmosphere of fear and reprisal” because it improperly suggests that an election cannot be set aside unless third-party threats affected nearly all eligible voters, no matter how close the tally and how serious the misconduct. See *Mastec Direct TV*, 356 NLRB No. 110, slip op. at 5-7 (2011) (Member Hayes, dissenting) (criticizing *Westwood Horizons Hotel* on this point). Contrary to the implication of the phrase, the Board has in fact properly set aside elections based on serious third-party misconduct affecting only a few determinative voters. See *Robert-Orr Sysco Food Services*, 338 NLRB 614 (2002); *Smithers Tire*, 308 NLRB 72 (1992); *Buedel Food Co.*, 300 NLRB 638 (1990); *Steak House Meat Co.*, 206 NLRB 29 (1973).

Employer's objections do not warrant setting aside the election. See, e.g., *Thiele Industries*, 325 NLRB 1122, 1122 fn. 2 (1998); and *Windsor House C & D*, 309 NLRB 693, 696 (1992).

**CERTIFICATION OF REPRESENTATIVE**

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Brotherhood of Teamsters, Local 384, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part-time drivers, helpers and mechanics employed by the Employer at its Birdsboro, Pennsylvania, Norristown, Pennsylvania, and Downingtown, Pennsylvania locations, but excluding all other employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., December 16, 2014.

\_\_\_\_\_  
Philip A. Miscimarra, Member

\_\_\_\_\_  
Kent Y. Hirozawa, Member

\_\_\_\_\_  
Nancy Schiffer, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

# Exhibit C

**Certificate of Parties and Amici**  
**And List of Parties Served**

The following parties and amici participated in the proceeding before the National Labor Relations Board for which Advanced Disposal Services East, Inc. now files its Petition for Review:

Counsel for the NLRB General Counsel:  
Henry R. Protas  
Attorney  
National Labor Relations Board  
Region 4  
615 Chestnut Street, Suite 710  
Philadelphia, PA 19106-4413

Counsel for Teamsters Local 384:  
Mark Featherman, Esq.  
1845 Walnut Street, 24th floor  
Philadelphia, PA 19103

Accordingly, Petitioner, on this date, May 15<sup>th</sup>, 2015, has served a file-stamped copy of its Petition for Review on the persons identified above, as well as on the following individuals, by overnight delivery.

Linda J. Dreeben  
Deputy Associate General Counsel Appellate and Supreme Court  
Litigation Branch  
National Labor Relations Board  
1099 14th Street, NW  
Washington, D.C. 20570

Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, D.C. 20570

Respectfully submitted this 15<sup>th</sup> day of MAY, 2015.



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*Attorneys for Advanced Disposal Services East, Inc.*