

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

NORTH SHORE AMBULANCE AND
OXYGEN SERVICE, INC.

Employer

and

Case No. 29-RC-185400

LOCAL 726, INTERNATIONAL UNION
OF JOURNEYMEN AND ALLIED TRADES

Petitioner

DECISION ON OBJECTIONS AND CERTIFICATION OF REPRESENTATIVE

Upon a petition filed on October 3, 2016, by Local 726, International Union of Journeymen and Allied Trades, herein called the Petitioner or the Union, and pursuant to a Stipulated Election Agreement signed by the Petitioner and North Shore Ambulance and Oxygen Service, Inc., herein called the Employer, and approved by the undersigned on October 13, 2016, an election by secret ballot was conducted on October 28, 2016, among employees in the following unit:

All full-time and regular part-time ambulance drivers and helpers employed by the Employer at its College Point, New York facility, but excluding all other employees, including ambulance drivers, clerical, guards and supervisors as defined by the Act.

The tally of ballots prepared at the conclusion of the election shows that of the approximately **20** eligible voters, **11** votes were cast for the Petitioner, **6** votes were cast against the participating labor organization, with **2** challenged ballots, a number that is not sufficient to affect the results of the election.

Thereafter, on November 4, 2016, the Employer filed timely objections to conduct affecting the results of the election. The Employer's objections are attached hereto as Exhibit "A."

The Employer, a domestic corporation with its principal office and facility located at 112-09 14th Avenue, College Point, New York, is engaged in providing ambulance and ambulette transportation services for patients throughout New York City.

THE OBJECTIONS

As the objecting party, the Employer bears the burden of furnishing evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. *Park Chevrolet-Geo, Inc.*, 308 NLRB 1010, fn. 1 (1992); Section 102.69 of the Board's Rules and Regulations. Thus, in each case, whether an objecting party's evidence is sufficient depends upon the Board's substantive criteria for the relevant claim of election misconduct. *Durham School Services, LP v. NLRB*, 821 F.3d 52 (DC Cir. 2016), *enfg.* 360 NLRB No. 108 (2014).

Section 102.69(a) of the Board's Rules and Regulations provides that, when filing objections to an election, a party must also file a written offer of proof in the form described in Section 102.66(c) of the Board's Rules and Regulations. Section 102.66(c) specifies that offers of proof shall identify each witness and summarize the testimony of that witness. If the regional director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. With regard to processing objections and/or challenges, Section 102.69(c) (1) (i) of the Board's Rules and Regulations provides that if the regional director determines that the evidence described in the offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, the regional director

shall issue a decision disposing of the objections and a certification of the results of the election, including a certification of representative, where appropriate.

Accordingly, the Employer has the burden of providing evidence in support of its objections. A hearing should be held if the objecting party has established that it could produce at hearing evidence that, if credited, would warrant setting aside the election. NLRB Casehandling Manual (Part Two) Representation Proceedings Section 11395.1.

Objection 1:

In its first objection, the Employer contends that the Board Agent conducting the election permitted a business agent of the Petitioner, who is not an employee, to serve as the Petitioner's observer at the election. The Employer did not offer any evidence in support of this objection.

For the reasons described herein, I am overruling the Employer's first objection.

The Board will not find the use of a nonemployee observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer. *Embassy Suites Hotel, Inc.*, 313 NLRB 302 (1993); *San Francisco Bakery Employees Association*, 121 NLRB 1204, 1206 (1958). More specifically, it is well established that absent evidence of misconduct, service by a union official as an observer is not grounds to set aside a representation election. See e.g.; *Longwood Security Services, Inc.*, 364 NLRB No. 50 (2016); *Browning-Ferris Industries of California, Inc.*, 327 NLRB 704 (1999); *NLRB v. Black Bull Carting, Inc.* 29 F.3d 44, 46 (2nd Cir. 1994).¹ And, the Board has specifically found that it does not constitute a material breach of the Stipulated Election Agreement for a nonemployee union official to serve as an election observer. In this regard, the Board has held that a standard clause

¹ It is noted however, that nonemployee agents of an incumbent union are prohibited from serving as observers in a decertification election. *Butera Finer Foods, Inc.*, 334 NLRB 43 (2001).

in a Stipulated Election Agreement providing for “nonsupervisory-employee observers” is not intended to preclude nonemployees from serving as observers. *Longwood Security Services, Inc., supra*; *Browning-Ferris Industries of California, Inc., supra*.

Here, the Employer did not provide any evidence in support of this objection and thus has not met its burden of furnishing evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election. I also note that there is no evidence of misconduct by the Union’s observer and there is no evidence of prejudice to the Employer by the choice of that observer. Inasmuch as it is not per se objectionable for a nonemployee union official to serve as an observer, I find that even if the Employer introduced evidence that a nonemployee union official served as an observer at a hearing and that evidence was credited, such evidence alone would not constitute grounds for setting aside the election. See e.g., *Longwood Security Services, Inc., supra*; see also, *Standby One Associates Center For Housing Partnership*, 274 NLRB 952 (1985). Thus, further consideration of this objection is unwarranted. Accordingly, I overrule the Employer’s first objection.

Objection 2:

In this objection, the Employer contends that within the twenty-four hour period preceding the election, the Union “continued to make coercive campaign speeches to assemblies of employees during work hours.” For the reasons described herein, I am overruling the Employer’s second objection.

In support of this objection, the Employer provided prepared statements from three employees. According to the first employee statement, on October 27, at 2:00 p.m.,² the

² The Stipulated Election Agreement shows that the election was scheduled to take place on October 28, 2016 from 12:30 p.m. to 3:30 p.m. and 6:00 p.m. to 8:00 p.m.

employee was approached by “someone from the Union” who asked if the employee would like to join the Union.³ A second employee states that on October 27, between about 1:30 p.m. to 2:00 p.m., s/he observed Union representative Nicolas approach the driver of a van in front of Queens Kidney Center. This employee indicates his/her belief that employees are not to be approached by Union representatives after 12:30 p.m. on the day before the election and that Union representative Nicolas did not follow this “protocol.” Further, in a statement dated November 1, 2016, a third employee states that s/he observed unnamed Union representatives at Elmhurst Hospital speaking to the drivers almost every day for the last few weeks, at times speaking to them for 15 to 20 minutes at a time. This employee witness states that s/he noticed a flyer or paper being passed to a driver. The employee states that unnamed Union representatives were still speaking to drivers up to the day before the election.⁴ In this regard, the employee states that one Union representative would speak to the driver while the second Union representative stood on the side as a “lookout.”⁵ The Employer contends that the employee statements show that employees did not consent to being approached by the Union. Thus, the Employer, citing *Great Atlantic & Pacific Tea Co.*, 111 NLRB 623, 624 (1955); *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953) and *Shirks Motor Express Corp.*, 113 NLRB 753, 755 (1995), concludes that the Union’s conduct unfairly and irreversibly tainted the election and is grounds for setting aside the election.

Discussion

In *Peerless Plywood Company*, 107 NLRB 427 (1953), the Board set forth a rule prohibiting employers and unions alike from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an

³ The employee states, “This letter is to inform you that I am denying to be a part of the Union.”

⁴ The time of day was not provided.

⁵ The employee indicates that s/he took pictures while they spoke. Pictures were not submitted.

election. The *Peerless Plywood* rule does not extend to letter campaigns, conversations with individual employees, campaign speeches for which attendance is voluntary and on the employees' own time, or mandatory speeches occurring more than 24 hours before an election. *Livingston Shirt Corporation*, 107 NLRB 400 (1953). Indeed, the Board has refused to find that a casual conversation/solicitation of three employees within 24 hours of an election could be characterized as a "speech" to a "massed assembly of employees" under the *Peerless Plywood* rule. See, *Business Aviation, Inc.*, 202 NLRB 1025 (1973).⁶ See also, *Electro Wire Products*, 242 NLRB 960 (1979).

Here, the Employer's evidence shows that on the day before the election, within twenty-four hours of the election, Union representative(s) approached and spoke to employees individually.⁷ During one such conversation, a Union representative asked an employee if the employee would like to join the Union.⁸ In these circumstances, I find there is insufficient evidence to establish that the Union's conduct constituted speech to massed assemblies of employees in violation the *Peerless Plywood* rule. See e.g., *Business Aviation, Inc.*, 202 NLRB 1025 (1973) (casual solicitation of three employees on the night before the election by a union agent was not prohibited by the *Peerless Plywood* rule). See also, *Comcast Cablevision of New Haven, Inc.*, 325 NLRB 833 (1998) (where the Board upheld a hearing officer's finding that the *Peerless Plywood* rule was not applicable to a union's brief urging of employees to vote for the union as they entered and left the employer's facility on the day of the election); *Mediplex of Milford*, 319 NLRB 281 (1995) (where the Board found that the conduct of a union

⁶ In *Business Aviation, Inc.*, *supra*, the Board found that the *Peerless Plywood* rule does not prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election.

⁷ I note that the third employee statement set forth above did not indicate the time of day on the day before the election that Union representatives were observed speaking to employees; thus it is unclear whether such conversations were within 24 hours prior to the election.

⁸ The specific content of any other discussions was not submitted.

representative, i.e., shouting to employees in the lobby leading to the polling area about a “victory party” to be held after the election, did not constitute a speech to massed assemblies of employees as proscribed by the *Peerless Plywood* rule); *Associated Milk Producers*, 237 NLRB 879 (1978) (where the employer’s plant manager’s election day conversation with three laboratory employees was not objectionable within the meaning of the *Peerless Plywood* rule); *M & B Asphalt Co., Inc.*, Case No. 08-RC-127048, 2014 WL 7149607 fn. 1 (2014) (where the record indicated that the union representatives “made their rounds” among individual employees; the Board agreed to certify the results of an election, noting there was insufficient evidence that employees were assembled so as to invoke the *Peerless Plywood* rule).⁹

In my view, the Employer has not alleged sufficient facts that, if established at hearing, would distinguish the Union representatives here approaching employees and speaking to them from the Union representative speaking with employees in *Business Aviation, supra*, to warrant setting aside the election. Nor would the October 27 conduct of a Union representative asking an employee if s/he wanted to join the Union be improper electioneering sufficient to warrant setting aside the election.¹⁰ I find that even if the Employer introduced the proffered evidence at a hearing and it was credited, it would not constitute grounds for setting aside the election. Accordingly, I am overruling this objection.

Objection 3:

In this objection, the Employer contends that before the election, the Union coerced and intimidated employees to vote for the Union by a) creating the impression that the employees

⁹ In *M & B Asphalt Co., Inc., supra*, the Board notes that even in cases such as *Great Atlantic & Pacific Tea Co.*, 111 NLRB 623, 624 (1955) and *Shirks Motor Express Corp.*, 113 NLRB 753, 755 (1955), cases cited by the Employer herein, an assembly of employees is required to invoke the *Peerless Plywood* rule.

¹⁰ See e.g., *Springfield Discount Inc., d/b/a J.C. Penney Food Department*, 195 NLRB 921 (1972) (noncoercive polling by union not objectionable.)

would be retaliated against if they did not vote for the Union; b) creating the impression that employees would be favored if they voted for the Union; and c) threatening one or more employees with physical and mental abuse, harassment and isolation if they did not vote for the Union.

The Employer did not offer any evidence in support of its third objection. A party raising objections cannot rely on its bare allegations to warrant further investigation/a hearing. *Lange and Perkins, LLC d/b/a The Daily Grind*, 337 NLRB 655, 656 (2002) (unsupported allegations are insufficient to trigger administrative investigations). A party must at least identify its witnesses and provide a description of the relevant information the named witnesses could provide. *See Id.* See also Section 102.69(a) and Section 102.66(c) of the Board's Rules and Regulations. Accordingly, inasmuch as I find that the Employer has not provided sufficient evidence or a description of evidence that, if credited at hearing, would warrant setting aside the election, I am overruling the third objection.

Additional, Unnumbered Objection

In this objection, the Employer contends that the Union, by the conduct alleged in its Objections 1 through 3 and by other acts, destroyed the laboratory conditions necessary for the fair conduct of the election.

The Employer did not present any evidence in support of this objection that was not previously considered in connection with the above-mentioned objections. Accordingly, I overrule this unnumbered omnibus objection.

CONCLUSION

In summary, I am overruling the Employer's objections in their entirety. Accordingly, I hereby issue the following Certification of Representative:

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots has been cast for Local 726, International Union of Journeymen and Allied Trades, and that it is the exclusive bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time ambulance drivers and helpers employed by the Employer at its College Point, New York facility, but excluding all other employees, including ambulance drivers, clericals¹¹, guards and supervisors as defined by the Act.

RIGHT TO REQUEST REVIEW

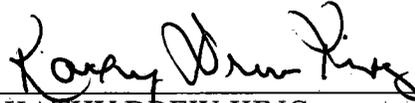
Pursuant to Section 102.69 (c) (2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i) (1) of the Board's Rules and must be received by the Board in Washington by **December 2, 2016**. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A

¹¹ The stipulated election agreement inadvertently left off the "s" at the end of the excluded title "clerical." I am herein correcting this error.

certificate of service must be filed with the Board together with the request for review.

Dated: November 18, 2016

A handwritten signature in black ink, appearing to read "Kathy Drew-King", written over a horizontal line.

KATHY DREW-KING
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 29
Two Metro Tech Center
Suite 5100
Brooklyn, NY 11201-3838

November 4, 2016

VIA E-FILING
FACSIMILE (718) 330-7579
AND FEDERAL EXPRESS

Mr. James G. Paulsen
Regional Director
National Labor Relations Board, Region 29
Two MetroTech Center North, 5th Floor
Brooklyn, New York 11201

Re: North Shore Ambulance and Oxygen Service, Inc.
Case No. 29-RC-185400

Dear Mr. Paulsen:

This firm represents the Employer, North Shore Ambulance and Oxygen Service, Inc. (“North Shore” or the “Employer”) in connection with Case No. 29-RC-185400. Pursuant to Section 102.69 of the National Labor Relations Board’s Rules and Regulations, Series 8, as amended, North Shore hereby objects to the conduct of the October 28, 2016 election (the “Election”), and to conduct affecting the results of the election, as follows:

1. At the Election, the NLRB Board Agent permitted a Business Agent of Local 726, IUJAT (the “Union”), who is not an employee of North Shore to serve as the Union’s observer. Employer respectfully submits that permitting a non-employee Union representative to serve as an observer unfairly influenced and irreversibly tainted the conduct of the Election.
2. Within the twenty-four (24) hour period preceding the Election¹, the Union continued to make coercive campaign speeches to assemblies of employees during work hours. As the annexed statements show, employees did not consent to being approached by the Union. The Union’s conduct in this regard unfairly and irreversibly tainted the Election and is grounds for setting aside the results of same. *See, e.g. Great Atlantic & Pacific Tea Co.*, 111 NLRB 623, 624 (1955); *Peerless Plywood Co.*, 107 N. L. R. B. 427, 429 (1953); *Shirks Motor Express Corp.*, 113 NLRB 753, 755 (1955). *See* Employee Statements annexed hereto as Exhibit A.

¹ The Election was scheduled to commence at 12:30 p.m. on October 28, 2016.

3. Prior to the Election, Union, its representatives and agents subjected the employees of North Shore to a reign of fear and intimidation which continued unabated throughout the voting period. Representatives of the Union, verbally assaulted, harassed and threatened employees of North Shore, thereby coercing and intimidating North Shore's employees to vote for the Union. The Unions actions in this regard, irreversibly tainted the conduct of the instant election. Specifically, the Union:
 - a. Created the impression that the employees would be retaliated against if they did not vote for the Union;
 - b. Created the impression that the employees would be favored if they voted for the Union; and
 - c. Actually threatened one or more employees with physical and mental abuse, harassment and isolation if they did not vote for the Union.

By these and other acts, the Union, by its agents and representatives, interfered with the right of employees to engage in protected activities, interfered with employees' free and untrammled choice in the election, and thereby destroyed the laboratory conditions necessary for the fair conduct of the election. Laboratory conditions necessary for the fair conduct of the election were also otherwise destroyed.

These objections are being filed on this date pursuant to Section 102.114(f) of the Board's Rules and Regulations.

WHEREFORE, the Employer requests that the election be set aside and a new election ordered as soon as the Regional Director deems the circumstances permit, and such other relief be granted as is appropriate.

Dated: Woodbury, New York
November 4, 2016

Respectfully submitted,



Jeffery A. Meyer
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cc: North Shore Ambulance and Oxygen Service, Inc.
Local 726, IUJAT
Gary Rothman, Esq.