

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

WASTE SERVICES OF NEW YORK, INC.,  
A WHOLLY-OWNED SUBSIDIARY OF ALLIED WASTE INDUSTRIES <sup>1</sup>

Employer

and

Case No. 29-RC-9791

LABORERS LOCAL UNION 108, LABORERS  
INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO

Petitioner

and

LOCAL 116, PRODUCTION AND MAINTENANCE  
EMPLOYEES UNION<sup>2</sup>

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Kevin Kitchen, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial

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<sup>1</sup> The record reflects the correct name of the Employer.

<sup>2</sup> The record reflects the correct name of the Intervenor. The motion to intervene was granted on the basis of a collective bargaining relationship between the Employer and the Intervenor .

error and hereby are affirmed,<sup>3</sup> except as discussed *infra* p. 6.

2. The record indicates that Waste Services of New York, Inc., herein called Waste Services or the Employer, a wholly-owned subsidiary of Allied Waste Industries, is a Delaware corporation, engaged in the business of waste handling and recycling, with facilities located at 72 Scott Avenue (“Scott Avenue facility”), 854 Shepard Avenue (“Shepard Avenue facility”), and 941 Stanley Avenue (“Stanley Avenue facility”), all in Brooklyn, New York, and an additional facility located on 132<sup>nd</sup> Street, Bronx, New York (“132<sup>nd</sup> Street facility”). During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, purchased and received at its Scott Avenue, Shepard Avenue, Stanley Avenue and 132<sup>nd</sup> Street facilities, machinery and equipment valued in excess of \$50,000, directly from entities located outside the State of New York.<sup>4</sup>

Based on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Based on the stipulations of the parties, and the record as a whole, I find that Laborers Local 108, Laborers International Union of North America, AFL-CIO, herein called the Petitioner, and Local 116, Production and Maintenance Employees Union, herein called the Intervenor, are organizations in which employees participate

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<sup>3</sup> The Hearing Officer properly excluded Employer’s Exhibit 2, a flyer allegedly drafted by an unnamed agent of the Petitioner on an unspecified date, inasmuch as no foundation was laid for the admission of this hearsay document. This rejected exhibit was erroneously attached to the Employer’s brief as “Exhibit A,” and relied upon in the Employer’s brief.

<sup>4</sup> The record further discloses an alternative basis for asserting jurisdiction: during the past year, Waste Services provided recycling services valued in excess of \$50,000 directly to the City of New York, which entity, in turn, is directly engaged in interstate commerce.

and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

The labor organizations involved herein claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner is seeking to represent a unit consisting of all employees, exclusive of guards, clerical employees and supervisors, employed by Waste Services at its Shepard Avenue and Stanley Avenue facilities. None of the parties is contending that the unit should include the Scott Avenue or 132<sup>nd</sup> Street facilities. At the hearing, the Intervenor acknowledged that the unit sought by the Petitioner is appropriate,<sup>5</sup> and the Employer conceded that at the present time, the unit is “technically” appropriate. However, the Employer asserts that because of the imminent sale of the Shepard Avenue operation, the Shepard Avenue facility should be treated as a separate, single-location unit, and the hearing in the instant case should have been adjourned for two weeks.<sup>6</sup>

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<sup>5</sup> The petition (Board Exhibit 1(a)) indicates that the Intervenor currently represents certain employees of the Employer, and that there is a collective bargaining agreement in effect, with an expiration date of April 30, 2002. The parties stipulated that the contract between the Intervenor and the Employer does not operate as a bar to the instant petition. The contract is not in evidence.

<sup>6</sup> The Employer argues that more time is needed for the “consummation” of the sale, and for the prospective purchasers (currently the managers of the Shepard Avenue facility) to be given notice and the opportunity to be heard at the hearing. However, the Employer cites no relevant legal authority in support of its position.

It is well-settled that if a major change in an employer's operations is "definite and imminent," the Board may conclude that "no useful purpose would be served by conducting an election." *Martin Marietta Aluminum, Inc.*, 214 NLRB 646 (1974); see *Davey McKee Corporation*, 308 NLRB 839 (1992); *Hughes Aircraft Company*, 308 NLRB 82 (1992). An executed purchase agreement with a firm date, demonstrating the imminence of a relocation or other major change in operations, may be sufficient to establish that processing a representation petition prior to the relocation or change would serve "no useful purpose." *Cooper International, Inc.*, 205 NLRB 1057,1058 (1973). However, evidence of "definiteness and imminence" may not be credited if offset by contrary evidence. *Gibson Electric, Inc.*, 226 NLRB 1063 (1976)(petitioner demonstrated that the employer's anticipated project completion date was more than six months away); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976)(evidence counter to corporate resolution directing cessation of operations). Moreover, the Board has held that "mere speculation as to the uncertainty of future operations is not sufficient to dismiss a petition or decline to hold an election." *Hazard Express, Inc.*, 324 NLRB 989 (1997); see also *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992).

In *Martin Marietta*, the Board dismissed a representation petition only after the employer established that it had issued permanent layoff notices to plant employees, terminated its contracts with utility companies and suppliers, and taken other definitive steps towards winding down operations at the petitioned-for location. *Martin Marietta*, 214 NLRB at 646-647. Similarly, in *Hughes Aircraft Company*, 308 NLRB 82 (1992), a petition to represent the employer's in-house guards was dismissed on a showing that the employer had contracted out their work, and had notified unit employees that they would

be permanently laid off less than two months after the hearing date. *Hughes*, 308 NLRB at 83, 83 n. 3. In *Davey McKee Corporation*, 308 NLRB 839 (1992), the Board dismissed a petition to represent construction workers employed within a particular geographical area, where the termination date on the relevant construction projects was 29 days after the hearing, and there were no pending bids within the geographical area. *McKee*, 308 NLRB at 839-840; *see also M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974).

In the instant case, the record evidence fails to establish that the sale of the Shepard facility is definite or imminent. The Employer's sole witness, and the sole witness to testify at the hearing, was the Employer's general manager, John Peters. Peters did not describe his job duties and responsibilities, and did not testify about the negotiations to sell the Shepard Avenue facility. He did not claim to have been involved in the negotiations or to be knowledgeable about them.

According to Peters, the Shepard Avenue facility employs approximately 90 workers, who process paper and cardboard for recycling. The Stanley Avenue facility is a municipal solid waste transfer station that employs about nine employees. Peters testified that very shortly, the Employer will sell its Shepard Avenue operation to Metropolitan Recycling, Inc., herein called Metropolitan. The record does not reveal whether Metropolitan is currently operational, or how long it has been in existence. The Employer's brief<sup>7</sup> reveals that its principals, referred to on the record as "the Biancos" or "the Bianco Brothers," are currently the managers of the Employer's Shepard Avenue facility.

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<sup>7</sup> The Employer's brief relies heavily on facts that were not included in exhibits or testified to by witnesses subject to cross-examination.

As its first exhibit, the Employer offered into evidence an incomplete document consisting of two pages: a letter referring to a multiple-page enclosure, and the first page of the enclosure. The Hearing Officer's agreement to receive this partial document into evidence was conditioned upon the subsequent production of the completed document. The Employer accepted this condition. Subsequently, however, a discussion ensued regarding the Employer's unwillingness to supply copies of the completed document to the Petitioner and Intervenor. Ultimately, the Employer refused to provide the full document<sup>8</sup> to the Board, despite the Hearing Officer's offer to examine it *in camera*, with redactions. In light thereof, the document should have been, and is now, rejected.

Moreover, even assuming, *arguendo*, that Employer's Exhibit 1 is admissible, the exhibit does not support the Employer's contention that the sale of the Shepard Avenue facility is definite and imminent. The first page of the exhibit is a letter dated February 19, 2002 (the day before the hearing), stating that it is enclosing "the application of Waste Services of New York, Inc., to sell its recycling business located at 854 Shepard Avenue, Brooklyn, New York to Metropolitan Recycling, Inc.," and that "As you are aware, the company is hoping to close this deal as soon as the Trade Waste Commission grants approval." Notably, the letter states that it is enclosing an application, not a contract, and that the Employer is merely "hoping" to close the sale. Moreover, the letter is hearsay. It purports to be from Illissa Rothschild, of the law firm of Reboul, MacMurray, Hewitt, Maynard & Kristol,<sup>9</sup> to Belina Anderson of the New York City

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<sup>8</sup> While the refusal of the Employer to produce the entire document calls into question the admissibility of secondary evidence, i.e., oral testimony, the testimony of Peters has been considered in reaching the decision herein.

<sup>9</sup> Milo Silberstein, Esq., who represented the Employer at the hearing, appears to be affiliated with an unrelated law firm.

Trade Waste Commission, herein called the Commission, with copies sent to Greg Bianco and John Persichilli. Neither Rothschild, Anderson, Bianco nor Persichilli testified at the hearing, and the record does not disclose their titles or positions. The Employer's witness did not claim that he had seen the letter before, or that he recognized Rothschild's signature.

The second page of Employer's Exhibit 1 is a single undated, unsigned page of an alleged "contract" between Waste Services and Metropolitan. This single page states that Waste Services agreed to sell and Metropolitan agreed to buy "the following described business," for the purchase price of \$1, and with a closing date of "the 15<sup>th</sup> day of December, 20\_\_":

"SEE RIDER FOR DESCRIPTION OF ASSETS BEING SOLD."

As with the February 19 letter, Peters did not claim to have seen this hearsay document before the hearing. There is no evidence as to whether this one-page document, or the alleged contract it is a part of, was ever executed, and if so, when and by whom. The document does not identify the assets being sold. The record does not divulge why the document sets forth a "purchase price" of \$1, whether there is a familial relationship between the owners of the Employer and Metropolitan, or whether the sale is an arm's length transaction. Given that the "purchasers" (for the price of \$1) are currently the managers of the Shepard Avenue facility, it is not evident from the record whether the sale, if it takes place, would constitute a change in the Employer's operations. Moreover, since the closing date indicated on the document is "the 15<sup>th</sup> day of December 20\_\_," it appears either that the proposed sale is not "imminent," in that it will occur more than nine months from the date of this decision, or that the closing date has already passed. In

fact, it is not discernible from this document when, if ever, this sale will close.

Accordingly, Employer's Exhibit 1, even if admitted, would not demonstrate that a contract has been negotiated or that the sale of the Employer's Shepard Avenue facility is definite or imminent.

Furthermore, on this record, it is uncertain whether the Trade Waste Commission will approve the proposed sale, and if so, when. In its brief, the Employer asserts that it is "optimistic that the proposed sale will be approved by the Trade Waste Commission in the near future, possibly within the next one (1) to two (2) weeks." *Brief of Employer* at 3. However, this assertion clearly falls short of the degree of certainty required by the *Martin Marietta* line of cases, and the Employer presented no evidence upon which it bases its "optimism." Waste Services' brief relies on the following testimony by Peters:

**Hearing Officer:** You had previously testified about your understanding about the sale of part of the business to Metropolitan. Do you know how long the process of review at the Trade Waste Commission takes before they approve a sale?

**The Witness:** The process is not a longstanding process. They've had some of the paperwork which does not pertain to the sale, but pertains to the background checks of the potential buyers, has been submitted for some time; so I believe this would not take longer than two weeks; and that is what's been stated to the Company.

**Hearing Officer:** The Commission has stated to the Company that it's probably going to be approved within two weeks; is that what you're saying?

**The Witness:** Yes, an answer would be delivered within two weeks.

Brief of Employer at 10 (quoting transcript p. 32 line 10 – p. 33 line 2).

The testimony continued as follows:

**Hearing Officer:** O.K. An answer?

**The Witness:** Yes.

**Hearing Officer:** Not necessarily an approval?

**The Witness:** Correct.

Transcript p. 33 lines 3-6. Petitioner's attorney objected to this hearsay testimony. Significantly, Peters did not claim to have participated in or overheard this alleged conversation between unnamed agent(s) of the Commission and unnamed agent(s) of the Employer, nor did he indicate whether anyone had told him about this alleged conversation. Clearly this testimony does not even rise to the level of hearsay, but rather is pure speculation. Furthermore, as the Hearing Officer's questioning made clear, there is no evidence that anyone at the Commission promised that the Employer's application, submitted to the Commission the day before the hearing and twelve days after the petition was filed, would be approved. Initially, as set forth above, Peters appeared to indicate that the basis for his "belief" that the Commission's review "would not take longer than two weeks" was that the Commission has had paperwork pertaining to the background checks of the potential buyers "for some time." However, this latter fact is equally consistent with the possibility that the evaluation of the Employer's sale application will also take the Commission "some time." In this regard, Peters did not contend that the potential buyers have passed their background checks, or that the background checks have been completed. He did not maintain that he was in any way involved with the application process, that he is familiar with the Commission's application procedures or what has to be included in an application, or that he had ever communicated with anyone from the Commission.

Review of the entire record reveals little, if any, probative evidence that the alleged sale of the Shepard Avenue facility is definite and imminent. Accordingly, I find that the continued processing of the petition is warranted. In view of the record herein, I find the following to be an appropriate unit for the purposes of collective bargaining:

All full-time and regular part-time employees employed by the Employer at its 854 Shepard Avenue and 941 Stanley Avenue, Brooklyn, New York, facilities, but excluding all guards, clerical employees and supervisors as defined in Section 2(11) of the Act.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are (a) employees in the unit who were employed for at least 30 days in the 12-month period preceding the eligibility date for the election, and (b) employees in the unit who had some employment during that 12-month period and were employed for at least 45 days within the 24 months immediately preceding the eligibility date for the election. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those

eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Laborers Local Union 108, Laborers International Union of North America, AFL-CIO, Local 116, Production and Maintenance Employees Union, or no labor organization.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the 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, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before March 11, 2002. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by March 18, 2002.

Dated at Brooklyn, New York, March 4, 2002.

/s/ Alvin P. Blyer  
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Regional Director, Region 29  
National Labor Relations Board  
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