UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

PROGRESS TRANSIT INCORPORATED
Employer

and

LOCAL 1181-1061, AMALGAMATED
TRANSIT UNION, AFL-CIO — Case No. 29-RC-11388
Petitioner

and

LOCAL 270, RETAIL, WHOLESALE,
WAREHOUSE AND PRODUCTION EMPLOYEES
Intervenor

SUPPLEMENTAL DECISION ON OBJECTIONS AND NOTICE OF HEARING

Upon a petition filed on October 18, 2006, by Local 1181-1061, Amalgamated Transit Union, AFL-CIO (herein called "the Petitioner" or "Local 1181"), and pursuant to a Decision and Direction of Election ("DDE") issued by the undersigned Regional Director, on February 14, 2007,[1] an election by secret ballot was conducted on March 16 among the employees employed by Progress Transit Incorporated (herein called "the Employer" or "Progress Transit"), in the following unit:

> All full-time and regular part-time drivers employed by Progress Transit Incorporated, located at 6093 Strickland Avenue, Brooklyn, New York, but excluding all office clerical employees, guards and supervisors as defined in the Act.

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[1] All dates hereinafter are in 2007, unless otherwise indicated.

The Tally of Ballots immediately made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, as corrected by a Corrected Tally of Ballots issued on March 21, showed the following results:

Approximate Number of Eligible Voters	127
Number of Void Ballots.	1
Number of Votes Cast for Petitioner - Local 1181-1061, ATU, AFL-CIO	16
Number of Votes Cast for Intervenor - Local 270, RWWPE	74
Number of Votes Cast Against Participating Labor Organizations	1
Number of Valid Votes Counted	91
Number of Challenged Ballots	6
Number of Valid Votes Counted Plus Challenged Ballots.	97

Challenges are not sufficient in number to affect the results of the election.
A majority of the valid votes counted plus challenged ballots has been cast for Local 270, Retail, Wholesale, Warehouse and Production Employees.

Thereafter, on March 22, the Petitioner filed timely objections to conduct affecting the results of the election. The Petitioner's objections are attached hereto as Appendix A.[2]

Pursuant to Section 102.69 of the Board's Rules and Regulations - Series 8, as amended, the undersigned caused an investigation to be made of the objections, during which all parties were afforded full opportunity to submit evidence bearing upon the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

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[2] The Petitioner also filed an unfair labor practice charge in Case No. 29-CA-28226, mirroring the same allegations it made in the Objections. The unfair labor practice has been held in abeyance, pending the processing of the Objections.

The Employer, with its principal office and place of business located at 6093 Strickland Avenue, Brooklyn, New York, is engaged in the transportation of disabled passengers, pursuant to a contract with the New York State Metropolitan Transportation Authority ("MTA").

To place the objections in context, certain background information from the above-mentioned DDE will be summarized here. Joseph Juliano and various family members own and operate two companies that employ school-bus drivers, under contract with the New York City Department of Education. The school-bus drivers are represented by Local 270, Retail, Wholesale, Warehouse and Production Employees (herein called "the Intervenor" or "Local 270"). In 2006, Juliano started operating Progress Transit Incorporated (the Employer herein) for the purpose of driving disabled passengers, under contract with the MTA. Progress Transit recognized Local 270 as representative of para-transit drivers in June 2006, and executed a collective bargaining agreement with Local 270 in August 2006, before the Employer actually hired any para-transit drivers in September 2006. When Local 1181 filed its representation petition in October 2006, Local 270 intervened as the incumbent union. The DDE concluded, *inter alia*, that the petitioned-for unit of para-transit drivers employed by Progress Transit is an appropriate separate bargaining unit, and not an accretion to the school-bus drivers unit employed by the related companies. Citing General Extrusion Co., 121 NLRB 1165 (1958) and Dale's Super Valu, Inc., 181 NLRB 698 (1970), the DDE also rejected the Employer's contract bar and recognition bar claims, since the Employer had recognized Local 270 and executed a contract before hiring any drivers.

As additional background information, it should be noted that unfair labor practice charges were filed in Case Nos. 29-CA-28009 and 29-CB-13300, by an individual employee, alleging *inter alia* that the Employer unlawfully granted, and Local 270 unlawfully accepted, recognition as collective bargaining representative without majority support, and that those parties unlawfully executed a collective bargaining agreement. However, the relevant portions of those charges were withdrawn by the individual charging party on February 15, 2007, the day after the DDE issued, inasmuch as the parties (including the Petitioner) wanted to proceed to an election.

THE OBJECTIONS

Objection No. 1

In Objection No. 1, the Petitioner alleges that the Employer, "by its principals, officers, supervisors and agents," distributed hats to employees indicating their support for the Intervenor, thereby requiring employees to make a visible choice that would demonstrate their choice for or against the Petitioner. In its offer of proof in support of this objection, the Petitioner proffered the testimony of two employee-witnesses who would testify that the Employer distributed the Local 270 hats in late February or early March 2007. However, the Petitioner did not give a detailed description of the alleged facts, such as the name(s) of whoever distributed the hats, or exactly how they did so.

In response to Objection No. 1, Local 270 contends that it distributed hats via bargaining-unit employees who supported Local 270, not via any supervisors or agents of the Employer. Similarly, the Employer contends that none of its supervisors or agents distributed Local 270 hats on the Employer's behalf. According to both the Intervenor and Employer, the individuals who distributed the hats were non-supervisory employees

who appeared on the voting list, and voted in the election without challenge by the Petitioner.

The Board has held that an employer may make campaign paraphernalia available to employees at a central location, unaccompanied by any coercive conduct (for example, simply leaving a pile of buttons in an employee break room, without monitoring which employees take or do not take the buttons). However, when a supervisor approaches individual employees and solicits them to wear campaign paraphernalia, they require employees to "make an observable choice" that would demonstrate their support or rejection of the employer's position -- essentially a form of objectionable interrogation. Barton Nelson, Inc., 318 NLRB 712 (1995); Kurz-Kasch, Inc., 239 NLRB 1044 (1978).

In this Objection, the Petitioner generally alleges that the Employer's representatives distributed Local 270 hats in a way that forced employees to make such a "visible choice," although it did not describe the circumstances in detail. Furthermore, the Petitioner did not name the alleged Employer representatives, whose supervisory status may be in dispute. Nevertheless, if the Petitioner witnesses' testimony could establish that supervisors put employees "on the spot" by asking them to accept or reject the Local 270 hats, this conduct could be grounds for setting aside the election.

Thus, whether the Employer distributed Local 270 hats in such a way to make employees indicate their support or lack of support, as a form of interrogation, raises substantial questions of fact and law, including issues of credibility, that can best be resolved by a hearing. I therefore direct that a hearing be held before a hearing officer concerning Objection No. 1.

Objection No. 2

In Objection No. 2, the Petitioner alleges that the Employer threatened employees that if they do not sign Local 270 cards, they could not work. The Petitioner's offer of proof proffers testimony from one employee-witness that, in late February or early March, a supervisor (unnamed) made such a threat.

In response, the Employer generally denied making any such threats to employees. Both the Employer and Intervenor pointed out that, without more specific information (i.e., name of supervisor, date of alleged threat), they could not provide a more specific response.

Although the Petitioner's Objection No. 2 contains the bare minimum, it does allege facts which, if true, could be grounds for setting aside the election. The issue of whether the Employer's supervisors or agents threatened employees that they could not work unless they signed Local 270 cards, raises substantial questions of fact and law, including issues of credibility, that can best be resolved by a hearing. I therefore direct that a hearing be held before a hearing officer concerning Objection No. 2.

Objection No. 3

In Objection No. 3, the Petitioner alleges that, in late February or early March, the Employer threatened employees that if they selected the Petitioner as their bargaining representatives, their salaries would be reduced. In its offer of proof, the Petitioner proffered the testimony of two employee-witnesses who would testify that supervisors made such a threat to them.

In response, the Employer generally denied that any of its agents or representatives threatened to reduce employee's wages if they voted for the Petitioner.

However, neither the Employer nor the Intervenor could give specific denials, since the Petitioner did not provide specific details in this Objection, such as the identity of the person(s) who allegedly made the threat.

Although the Petitioner's Objection No. 3 is equally minimal as Objection No. 2, it does allege facts which, if true, could be grounds for setting aside the election. The issue of whether the Employer's supervisors or agents threatened employees that their wages would be reduced if they selected the Petitioner as their bargaining representative, raises substantial questions of fact and law, including issues of credibility, that can best be resolved by a hearing. I therefore direct that a hearing be held before a hearing officer concerning Objection No. 3.

Objection No. 4

Objections 4 through 6 are based on a two-page document that the Employer's chairman, Joseph Juliano, distributed to employees in early March 2007. The document itself was attached to the objections, and is attached hereto as part of Appendix A.

Specifically, in Objection No. 4, the Petitioner alleges that the Employer's document "clearly states that its dealings with Local 270 would be more favorable than they would be with Local 1181. By such conduct the Employer threatened employees that it intended to bargain in a disparate manner as between the two unions."

In this regard, it appears the Petitioner is referring to the following sections of the Employer's memo:

> If Local 1181 should win the election, all it means is that we must bargain in good faith. We are not telling you that if Local 1181 wins we will deal with that Union any differently than we have dealt with Local 270. There will be no harsher treatment towards anyone or any [sic?] who supports Local 1181 or towards anyone who supports another Union. Our company can make demands

> and proposals and the Union can do the same. All of our present and existing benefits that [have] been obtained for you by Local 270 are as much a subject of negotiation as are any demands for additional benefits. Present benefits might even be traded for other ones that a Union might feel are more desirable for them.
>
> No one can predict what terms a Union contract will contain. No one can guarantee that with Local 1181 the employees will get everything that they now have plus more.

In response to this Objection, the Employer admits that it distributed the document to employees during the critical period, but disputes the Petitioner's interpretation of it, i.e., that the Employer promised to treat Local 270 more favorably in bargaining than it would treat Local 1181. The Intervenor characterizes the Employer's statement as simply an "accurate statement" that bargaining with Local 1181 could result in different terms of employment than the existing terms with Local 270.

Section 8(c) of the Act provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, <u>if such expression contains no threat of reprisal or force or promise of benefit</u> (emphasis added).

In evaluating an employer's prediction of the consequences of unionization under Section 8(c), as interpreted by the U.S. Supreme Court in <u>NLRB v. Gissel Packing Co.</u>, 395 U.S. 575, 71 LRRM 2481 (1969), the Board makes an important distinction between an accurate description of what *could* happen in the collective bargaining process, versus an employer's express or implied threat to *cause* a negative consequence. For example, in evaluating a prediction regarding a possible loss of benefits, the Board differentiates between truthful, non-coercive statements that employees may lose certain benefits in the give-and-take of bargaining, <u>Histacount Corp.</u>, 278 NLRB 681 (1986), and coercive

threats to eliminate benefits via the employer's own unilateral change or bad-faith bargaining, Aluf Plastics, a Division of API Industries, Inc., 314 NLRB 706 (1994).

Similarly, the Board has held that an employer may express a preference between two competing unions, as long as such expression is not accompanied by promises of benefit if the favored union wins the election or, conversely, threats to cause negative consequences if the disfavored union wins. Plymouth Shoe Co., 182 NLRB 1, 3 (1970).

Based on the foregoing, I find that the Employer's document is, at most, a permissible statement that employees *may* lose certain benefits in the give-and-take of bargaining. It contains no threat, express or implied, that the Employer would deal with Local 270 more favorably than Local 1181. In fact, the Employer expressly reassures employees that "we must bargain in good faith" and that "we are *not* telling you that if Local 1181 wins we will deal with that Union any differently than we have dealt with Local 270" (emphasis added). Under these circumstances, the statement cannot be read as coercive.

In sum, although there is no factual dispute that the Employer distributed the two-page document to employees, the statements therein regarding the possible consequences of bargaining do not constitute objectionable conduct. I therefore find no merit to Objection No. 4, and direct that it be overruled.

Objection No. 5

This Objection involves the same two-page document described above. The Petitioner specifically alleges in Objection No. 5 that the Employer's document "disparages and vilifies" Local 1181. The Petitioner refers to these excerpts of the

document which, in turn, refer to two newspaper articles regarding recent scandals at Local 1181:

> Over the course of the last few years, dues to Local 1181 have gone to line the pockets of the corrupt members of this Union…. Take a look at the attached New York Times articles that came out less than a month [after the petition was filed]… These are the same people who ran the Union when they collected cards from you. More importantly, it shows how corrupt this Union is, from top to bottom and how they are interested in just one thing … getting your money … no matter how it is done, legally or illegally (emphasis in original).

The attached newspaper articles reported, *inter alia*, that the president of Local 1181 was indicted with charges of racketeering, extortion and bribery; that the president and other officers had previously been charged regarding alleged Mafia ties, racketeering and other federal crimes; and that the parent union placed Local 1181 into temporary trusteeship.

In response to this Objection, both the Employer and Intervenor stated that the document "speaks for itself." The Employer generally denied that the statements were objectionable. The Intervenor argues that the statement was "limited to truthful comment" regarding the criminal prosecutions.

It is well settled that an employer may state its negative views of a union, or even "disparage" the union, as long as the statement contains no threats or promises. Poly-America, Inc., 328 NLRB 667 (1999), citing Gissel Packing, *supra*. The Petitioner has cited no case law to the contrary. In the instant case, the Employer's document brought negative information to employees' attention, i.e., that Local 1181 officers had been indicted for various crimes. However, it contains no threats or promises.

Furthermore, the Employer's statement that Local 1181 is "corrupt" is, at most, a misrepresentation. The Board does not generally probe into the truth or falsity of parties'

campaign statements. False statements or misrepresentations, although not condoned, will not cause an election to be set aside. Midland National Life Insurance Co., 263 NLRB 127 (1982)[3]; AWB Metal, Inc., 306 NLRB 109 (1992), *enf'd* 4 F.3d 993 (1993).

In sum, although there is no factual dispute that the Employer distributed the two-page document to employees, the "disparaging" statements therein do not constitute objectionable conduct under the law. I therefore find no merit to Objection No. 5, and direct that it be overruled.

Objection No. 6

The Petitioner alleges in Objection No. 6 that the Employer's campaign document "falsely claims that it [the Employer] has a valid contract with Local 270." The Petitioner's offer of proof did not specifically address this Objection.

The Petitioner apparently refers to such statements in the Employer's document as "[G]ive our contract with Local 270 a vote of confidence" and "All I can ask is a chance to prove to you that any agreement that we got with Local 270 can work" (emphasis added). The Petitioner calls the Employer's claim that it has a contract with Local 270 "false," since this Agency's Decision and Direction of Election found that the contract was (in the Petitioner's words) "not lawful."

As described above, there is no dispute that the Employer and Local 270 signed a collective bargaining agreement before the Employer hired any para-transit drivers, i.e., when there was no possible demonstration that a majority of those employees designated Local 270 as their bargaining representative. One issue at the pre-election hearing was

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[3] A narrow exception to the Midland National rule, regarding forged documents, does not apply in the instant case.

whether the contract would bar an election. The Decision and Direction of Election, citing General Extrusion, *supra*, found that the contract would not bar an election.

In response to this Objection, the Employer and the Intervenor point out that the Decision merely concluded that the contract did not bar an election, without actually finding the contract "unlawful."

Although the Decision did not expressly deem the contract "unlawful," it is true that an Employer violates Section 8(a)(2) of the Act if it executes a contract negotiated with a non-majority union. Sheraton Great Falls Inn, d/b/a Bootlegger Trail, Inc., 242 NLRB 1255 (1979). But, the only unfair labor practice charges addressing that issue (Case Nos. 29-CA-28009 and 29-CB-13300) were withdrawn before the election. Therefore, no unfair labor practice findings were ever made, and no remedial relief was ever ordered. However, even where the Boards finds an employer entered into a minority contract with a labor union, it does *not* necessarily order the employer to withdraw or eliminate any wage increases or benefits which employees received under the contract. Sheraton Great Falls inn, *supra*, 242 NLRB at 1256; The Maramont Corp., 317 NLRB 1035 (1995); Keystone Shipping Co., 327 NLRB 892 (1999). As the Board has explained, "[I]t would be contrary to the purposes of the Act to … penalize employees by depriving them of benefits previously provided," Maramont Corp., *supra*, 317 NLRB at 1037. Thus, in the instant case, even assuming *arguendo* that the Employer and Local 270 entered into their contract unlawfully, the Employer would not have been ordered to withdraw any employee benefits which were established under the contract.[4]

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[4] Payment of union dues under the contractual union security provision was not an issue in those charges.

In this objection, the Petitioner objects that the Employer "falsely claim[ed] that it has a valid contract with Local 270." However, in my view, the Employer's references to the Local 270 contract in its campaign document merely encourage employees, by voting for Local 270, to continue to retain whatever benefits they got under that contract. Thus, the Employer stated: "All I can ask is a chance to prove to you that any contract we got with Local 270 can work." I do not see this statement as a "false claim" that the contract was valid. In any event, even if the document implied that a valid contract was still in effect ("give our contract with Local 270 a vote of confidence"), it would be a misrepresentation, at most. As stated above, false statements or misrepresentations do not cause an election to be set aside. Midland National Life Insurance Co., *supra*.

In sum, although there is no factual dispute that the Employer distributed the two-page document to employees, the statements therein regarding any contract with Local 270 do not constitute objectionable conduct. I therefore find no merit to Objection No. 6, and direct that it be overruled.

Objection No. 7

Objection No. 7 is essentially a catch-all objection, alleging that the Employer : "improperly interfered with the free exercise of employee choice and destroyed the requisite laboratory conditions for the election." The Petitioner provided no specific allegations or evidence with regard to this objection, and the independent investigation adduced no such evidence not previously considered.

I therefore direct that Objection No. 7 be overruled.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held concerning the Petitioner's Objections 1 through 3, and that the Petitioner's Objections 4 through 7 be overruled.

Accordingly, pursuant to the authority vested in the undersigned Regional Director by the National Labor Relations Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the above Objections 1 through 3.

IT IS FURTHER ORDERED that the hearing officer designated for the purposes of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Regional Director simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that at 9:30 a.m. on Monday, April 23, 2007, and on consecutive days thereafter until concluded, at Two MetroTech Center, 5th Floor, Brooklyn, New York, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board on the issues set forth in the above Supplemental

Decision, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, a Request for Review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-001. The Request must be received by the Board in Washington, D.C. on or before April 26, 2007.[5]

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance can also be found under "E-Gov" on the National Labor Relations Board website at www.nlrb.gov. On the homepage of the website, select the **E-Gov** tab and click on **E-filing**. Then select the NLRB office for which you wish to E-file your documents.

[5] Under the provisions of Section 102.69(g)(3) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections, and which are not included in the Regional Director's Supplemental Decision, are not part of the record before the Board unless appended to the Request for Review or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.

Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Dated at Brooklyn, New York this 12th day of April, 2007.

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Alvin Blyer
Regional Director
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Brooklyn, New York 11201