

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**ALLE PROCESSING CORP.**  
Employer

and

**Case No. 29-RC-11668**

**LOCAL 342, UNITED FOOD AND  
COMMERCIAL WORKERS**  
Petitioner

*Ira Wincott, Esq.*, Counsel for the  
Petitioner

*Jeffery A. Meyer, Esq.*, Counsel for the  
Employer

**DECISION ON OBJECTIONS**

**Statement of the Case**

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, on April 30 and May 5 and 6, 2009. Initially, a Petition in Case No. 29-RC-11650 was filed on September 8, 2008, but that was subsequently withdrawn. Thereafter, the Petition in the present case was filed on October 2, 2008. Pursuant to a Stipulated Election Agreement approved by the Regional Director on that same day, an election by secret ballot was held on November 13, 2008 in the following unit:

All full-time and regular part-time production, warehouse and hourly research and development employees employed at the Employer's facility located at 56-20 59<sup>th</sup> Street, Maspeth, New York, but excluding all drivers, office and clerical workers, salespersons, sales representatives, finance workers, Schechter, Mashgichim, Rav Hamaschsher, Rabbinic Representatives, salaried research and development employees, guards and supervisors as defined in Section 2(11) of the Act.

The election was held in a lunch room located in the basement of the Employer's main building located at 56-20 59<sup>th</sup> Street, Maspeth, New York. It was conducted in two sessions and the hours were from 5:00 a.m. to 8:00 a.m. and from 3:00 p.m. to 6:30 p.m. Each side had one observer for each session. The Tally of Ballots showed that of about 417 eligible voters, 113 votes were cast for the Union, 200 were cast against union representation, 53 persons cast challenged ballots and there were two void ballots. The challenges were not sufficient to affect the outcome of the election.

The Union filed Objections to the election on November 20, 2008. And on March 18, 2009, the Regional Director issued a Report on Objections. In the report, the Director overruled certain of the Objections and directed that a hearing be held as to the other issues.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the arguments of Counsel, I make the following

## Findings and Conclusions

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### I. Background

The critical period wherein conduct can be the basis for setting aside this election runs from October 2, to November 13, 2008. Any conduct before or after that time period would not be grounds for setting aside the election. *Ideal Electric & Mfg Co.*, 134 NLRB 1275 (1961).

The Company is engaged in the production of kosher food products. It has a large production facility in Queens and employs in excess of 400 people who work in about 20 departments. Many of the employees are Spanish speakers. There is also a large complement of Orthodox Jewish people who work in the facility.

Sam Hollander is the Company's President and Sruly Weinstock is a co-owner. There are two plant managers whose names are Jules Muscat and Ivan Talavera. Mr. Talavera, in addition to his supervisory functions, also acted as a Spanish translator at meetings where Sam Hollander spoke to employees about the upcoming election. According to Sam Hollander, Muscat and Talavera are the only persons who have supervisory authority. It would seem, according to his view, that these two individuals manage to supervise over 400 people by themselves. Either that or the employees are left mostly to their own devices.

The Company's main facility consists of a large building which has a working basement, a first floor and a second floor which is mainly used as company offices. It also has an annex building. There is a parking lot and the main entrance for employees is located to the right of the entrance to the parking lot. When employees go into the plant they go through some doors to an area where the time clock is located. About 10 feet away is an area where company notices are posted. This is very close to the office that is shared by Jules Muscat and Ivan Talavera. In the basement there are a number of working departments. There is also a lunch room which is where the election was conducted. This lunch room has a door leading out to a corridor where the voters lined up to enter the voting area.

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### II. The Alleged Objectionable Conduct

In *Taylor Wharton Division*, 336 N.L.R.B. 157 (2001), the Board stated that it considers the following factors in determining whether conduct is sufficient to set aside an election: (1) the number of employees in the bargaining unit; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

#### (a) Surveillance

There is no dispute and I find that on the day before the election, Sam Hollander directed his nephew, Jeffrey Hollander, to stand at the entrance to the facility and to photograph union representatives speaking to employees. Such activity has been held by the Board to be

coercive conduct, and is prohibited under Section 8(a)(1) of the Act unless the Employer can demonstrate that such picture taking had a legitimate purpose. *Randell Warehouse of Arizona Inc.*, 347 NLRB 591, (2006) and *Harco Asphalt Paving Inc.*, 353 NLRB No. 74 (2008).

5 In this case, Sam Hollander explained that he ordered the photographs to be taken because it was his belief that the meetings that union representatives were having with employees outside the plant with 24 hours of the election, constituted prohibited conduct under the Board's 24 hour rule. (Referring to *Peerless Plywood Company*, 107 NLRB 427 (1953)).

10 As the Board does not prohibit union representatives from talking to employees in a non-captive speech situation, with 24 hours of an election, the rationale for photographing employees talking to with union representatives must fail. That is, as there was no legitimate reason for photographing employees conversing with union representatives, this conduct is deemed by me to be coercive. Accordingly, I hereby sustain Objection No. 14.

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**(b) Alleged threats to close made at meetings**

20 The evidence shows that Sam Hollander met with all of the employees starting on October 27, 2008. In this regard, these meetings were held in a room on the second floor of the Company and employees from one or two departments were directed to attend each meeting by their department heads. (Anywhere from 20 to 50 employees at a time attended these meetings). The evidence also shows that there were three sets of these meetings and that because there is a day shift and a night shift, each set of meetings were conducted over a two day period. The first set of meetings was held on October 27 and 28, 2008, the second set on 25 November 3rd and 4th, and the third set was held shortly before the election. (There is some dispute as to how much before the election, the final set of meetings were held). At these meetings, Sam Hollander spoke in English and when necessary, plant manager Ivan Talavera translated into Spanish.

30 The petitioner presented the testimony of three employees who related what they heard Mr. Hollander say at these meetings. (They testified that he said basically the same thing at each meeting. And in this regard, Hollander also testified that he said the same thing at each meeting).

35 Lincoln Gachette, who works on the night shift, testified that at a meeting that he attended in October 2008 with the other people in his department, Mr. Hollander told the employees that unions, once representing about 35 percent of workers, now represented only 8 percent and that there were reasons why people were leaving. Gachette testified that Hollander mentioned another company named Agriprocessors and said that after a union tried to organize 40 that company, it closed down. According to Gachette, Hollander said that there was a possibility that Alle could close down because it could not afford to pay the employees what the Union wanted.

45 Darnell Pierre testified that at the first meeting that he attended, Hollander, mentioned a company called Agriprocessors, stated that it had closed and that he didn't want what happened at that company to happen here. He further testified that Hollander said something to the effect that the Union might threaten the employees with deportation. According to Pierre, Hollander said pretty much the same thing at the other two meetings that he attended.

50 Rafael Mateo testified that at the meetings he attended, Ivan Talavera, who was translating into Spanish, said that the Union would not do anything for us and that if the Union

won, they would call Immigration on the people. He did not describe any kinds of statements that could be construed as a threat to close the factory.

5 Sam Hollander was the only witness who was called by the Respondent to describe the meetings that he held with employees. He denied making any kind of threats to close the plant or any statements about Immigration or deportation. He denied that he told employees that the Company would never sign a contract with the Union, albeit he did say that the Union could not guarantee anything to employees. He testified that he referred to some statistics showing that 10 nationally, the number of people represented by unions had decreased from about 35% to about 7%. He states that he explained that the reasons related to the nature of the economy and “various other explanations.” Hollander testified that he explained the purpose of the election and that voting was very important to the employees and to the country. Hollander testified that each meeting lasted about 15 minutes and that they were held in a room on the second floor. He also testified that he used Ivan to translate from English to Spanish and vice versa. He also 15 testified that he did not use a prepared text to conduct these meetings and that he had no notes or recordings to corroborate his account. The Employer did not call any of the managers, supervisors or any other employees to corroborate Hollander’s account.

20 Based on my observation of the demeanor of the witness, I am going to credit the testimony of the three employees who described what Hollander said at the meetings that they attended. I therefore conclude that on numerous occasions Hollander told a substantial number of employees during meetings held on company time and premises, that another company called Agriprocessors had closed after a union had tried to organize it and that a similar fate could await the employees of Alle if they chose to have a union represent them. 25 These kinds of statements, particularly as the employees were not told of any objective basis for the assertions, are coercive under *Gissel Packing Co., v. NLRB*, 395 U.S. 575, 618 (1969); *Bi-Lo*, 303 NLRB 749, 750 (1991) enfd. 985 F.2d 123 (4<sup>th</sup> Cir. 1992); *Smithfield Packing Co. Inc.*, 344 NLRB 1, (2004); *Taylor Wharton Division Harsco Corporation*, 336 NLRB 157 (2001). As stated by the Board in *Eldorado Tool*, 325 NLRB 222 (1997):

30 An employer is free to predict the economic consequences it foresees from unionization so long as the prediction is “carefully phrased on the basis of “objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control.” *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Without the 35 necessary objective basis, such statements are not protected by Section 8(c) of the Act. In the instant case, the Respondent offered no explanation of the basis for its assertion that the UAW was to blame for the closings of the other plants. Nor did it offer any objective facts as the basis for a belief that, for reasons beyond its control, selection of the UAW as the employees’ bargaining 40 representative might well cause the Eldorado plant to suffer the same fate. In the absence of such an explanation, based on objective facts, and noting particularly that top employer officials were otherwise threatening closure, the message conveyed to employees was not that economic realities might lead the plant to close, but that the Respondent might retaliate against them and close the plant 45 merely because they chose union representation. We therefore find that the “UAW Wall of Shame” campaign in the context presented here, constituted an unlawful threat of plant closure, in violation of Section 8(a)(1). Our dissenting colleague contends that the “Wall of Shame” campaign was protected by the First Amendment Section 8(c) of the Act, and was therefore, not unlawful. 50 However, the Supreme Court in *Gissel* has taken these protections into account in enunciating the standard that we have discussed and applied above. In that regard, our colleague’s characterization of *Gissel* as holding that the Board “may

limit what would otherwise constitute employer First Amendment rights” is erroneous. The Court in *Gissel* explicitly stressed the point that Section 8(c) “implements” the First Amendment, but that the First Amendment does not protect a “threat of reprisal or force or promise of benefit.” 395 U.S. at 617–618. Accordingly, the Respondent did not have a First Amendment right to threaten its employees with plant closure, and our finding of a Section 8(a)(1) violation does not constitute a “limitation” of the Respondent’s First Amendment rights.

It therefore is my conclusion that Objections 1, 2 and 4 should be sustained as it is my opinion that the Company’s President, during the critical period, made statements that reasonably would lead employees to believe that unionization could lead to a closing of the plant and the concomitant loss of their jobs.<sup>1</sup>

### (c) Posters and Leaflets

David Young, a union organizer testified that on or about October 26 or 27, 2008, he saw a man who he identified as David Ganz drive into the Company’s parking lot and unload what he described as a group of fairly large rolled up papers. The following day, he received reports from employees in the factory that they observed a group of posters placed at various locations around the factory. In this regard, Sam Hollander conceded that David Ganz was used by him as an outside adviser in relation to the election.

Similarly, Darnell Pierre testified that about three weeks before the election, he witnessed Carlton Brathwaite putting up a poster on the bulletin board that is located in the basement of the main building. Pierre described this as a poster with a photograph showing a lock on a chain fence with the caption: “Don’t let this happen to us. Vote No.” Pierre described Brathwaite as being one of the supervisors in the Housekeeping Department and testified, albeit via leading questions, that Brathwaite could direct work and impose discipline. Pierre testified that Braithwaite was someone who carried a company phone and in this connection, Hollander testified that the Company issues walkie talkie type devices to about 30 or 40 of the 400 plus people who work in the factory. It is obvious to me that the people who are issued these phones are the people that management communicates with on a regular basis to give instructions and direction to the rank and file employees.

The evidence shows that except for one poster that ascribed certain views to Barak Obama, which was taken down, the other posters remained posted in the factory for about three weeks and were taken down only on the day before the election. Moreover some of the posters were placed in an area right outside the office of the plant managers and adjacent to the time clock. Some posters were placed on a bulletin board in the basement of the main building. And still others were placed in the Annex.

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<sup>1</sup> Given my conclusion that Hollander during these meetings, threatened plant closure, it is unnecessary to determine if his statements regarding immigration were objectionable. I note, however, the Board’s opinion in *Smithfield Packing Co. Inc.*, 344 NLRB 1, (2004), where it held that employees could reasonably understand that an employer’s statements to the effect that *the union* would call Immigration, did not threaten action that the employer would take, or could cause the union to take, if the employees voted in favor of the union.

In addition to the signs posted in the plant, the evidence shows that leaflets, (some of which containing the same message as contained in the posters) were either made available outside the plant managers’ office or were stapled to employee paychecks.<sup>2</sup>

5 For purposes of this decision, I will not describe every poster or leaflet as some of these were not objectionable. The remainder are described below:

Petitioner’s Exhibit 4 is a sign that read:

10 Today’s News  
 Circuit City filed Bankruptcy  
 DHL cuts another 9,500 jobs  
 General Motors cuts another 3,000 jobs  
 15 Agriprocessors filed Bankruptcy/1200 workers unemployed  
 10 Million Americans looking for jobs  
 Can we save our jobs?  
 Yes we can!  
 Vote “No Union”

20 Petitioner’s Exhibit 15 is a leaflet that either was made available to employees outside the plant manager’s office or was stapled to employee paychecks. It had the same text as Petitioner’s Exhibit 4.

25 Petitioner’s Exhibit 7 is a poor quality photograph of a sign that has some of its language obscured. To the extent that it is readable it says: “The bottom line ....Save your money & job; Vote No Union.”

30 Petitioner’s Exhibits 8 and 9 are photographs of signs that were continuously posted near the time clock and outside the office of the plant managers. This is also the area where the Company normally posts other signs including its “employee of the month” sign. The exhibits show two signs, one in Spanish and one in English and Spanish. The sign in English reads:

35 Important Notice  
 Dear Fellow Co-Workers  
 The Union will take your money as dues from your paycheck and  
 offer you to go on strike to get benefits  
 Vote “No Union!”  
 Obama says Unions are a bad deal for workers today.  
 40 Save your job  
 Vote “No” Union!

On the larger of the two signs, the Spanish portion reads:

45 The Union is destroying your jobs, creating conflicts and closing  
 businesses.  
 Save you job  
 Vote “No” Union

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50 <sup>2</sup> In this regard, the evidence shows that the Company, as a normal practice, has stapled various types of letters or leaflets to the paychecks of employees when they are distributed.

Petitioner Exhibit 10 is a sign that was continuously posted in the basement and in the annex. As described above, this has a photograph of a chain fence with a lock and a sign saying “Closed” The rest of the text is: “Don’t let this happen to us! Save your job. Vote “No Union.”

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Petitioner’s Exhibit 11 is a sign that was put up in the basement and in the annex. It has a picture of Barak Obama and the text reads: “Obama says unions are a bad deal for workers today. Save your job. Vote “No” Union!” This is the sign that was apparently taken down after the Union complained about it to the Company.

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Petitioner’s Exhibit 12 is a sign that was continuously posted in the basement and the annex. It read:

Important  
The Union is destroying your jobs.  
Creating Conflicts and even closing business!!  
Save your job  
Vote “No” Union

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Petitioner Exhibit 13 is a leaflet that was given to employees. It reads:

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Dear Co-workers  
The Union have been trying for years to organize the company. It is time, once and for all, to say No Union.  
The New York Post Tuesday, October 21, 2008  
“Unions are a bad deal for most workers.”  
If you vote yes union – you could lose your job.

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Mr. Hollander claims that he was not aware of and that he neither authorized nor approved any of the above signs or leaflets. He testified that he did not know who put up the signs or who could have attached the leaflets to company payroll checks. He did not offer an explanation as to how some of the leaflets were made available outside the plant manager’s office. Nor did he explain why some of the above described signs happened to be posted next to the time clock and right outside the plant managers’ office. Hollander’s testimony essentially boils down to a claim that “ignorance is bliss.” I don’t buy it.

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In my view the evidence shows that the leaflets described above were either stapled to payroll checks and distributed to employees or were made available outside the plant managers’ office. The posted signs were placed in areas that not only were where other notices were normally posted by the employer, but were right next to the offices of the plant managers. This was not a situation where the Company has shown that renegade supervisors or unknown anti-union employees were able to sneak up posters when management wasn’t looking. These signs were posted continuously for almost three weeks. Moreover, the messages contained in both the leaflets and the signs were consistent with the credited testimony regarding statements made by Sam Hollander at various employee meetings that were held during the period from October 27 to the election.

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The basic message in the leaflets and posters was that unions destroy or cause businesses to close; that unions cause conflict and strikes and that if the employees wanted to save their jobs, they should vote against unionization. For the same reasons described above regarding the speeches, I conclude that the content of these documents are, pursuant to *Gissel* supra, threats of plant closing and threats that voting for the Union would cause employees to lose their jobs. As such, I will sustain objections 5, 7 and 8.

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### Conclusions

5 Having decided to sustain objections 1, 2, 4, 5, 7, 8 and 14, I hereby conclude that this  
 conduct affected all or most of the employees, that it occurred close to the time of the election  
 and that it was sufficiently coercive so that it would substantially affect the outcome of the  
 election. I therefore conclude that there is no need to rule on the remaining Objections.

### ORDER <sup>3</sup>

10 It hereby is ordered that this case be remanded to the Regional Director and that the  
 election held on November 13, 2008 be set aside and that a new election be scheduled.

15 It further is ordered that in accordance with *Lufkin Rule Co.*, 147 NLRB 241, (1964), the  
 following language be included in the election notice.

### NOTICE TO ALL VOTERS

20 The election held on November 13, 2008 was set aside because the National labor Relations  
 Board found that certain conduct of the Employer interfered wit the employees' exercise of a  
 free and reasoned choice. Therefore, a new election will be held in accordance with the terms of  
 this notice of election. All eligible voters should understand that the National Labor Relations  
 Act, as amended, gives them the right to cast their ballots as they see fit and protects them in  
 the exercise of this right, free from interference by any of the parties.

25 Dated at Washington D.C. June 17, 2009

30 Raymond P. Green  
 Administrative Law Judge

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 50 <sup>3</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this  
 Report may be filed with the Board in Washington, D. C., within 14 days from the date of issuance of this  
 Report and Recommendations. Exceptions must be received by the Board in Washington by July 1,  
 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof  
 upon the other parties and shall file a copy with the Regional Director of Region 29. If no exceptions are  
 filed thereto, the Board may adopt this recommended decision.