

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

INTERCOS AMERICA, INC.

Employer

Case No. 2-RC-102622

and

AMALGAMATED UNION LOCAL 298, AFL-CIO

Petitioner

REPORT ON OBJECTIONS AND RECOMMENDATIONS

This report contains the Regional Director's findings and recommendations regarding the Petitioner's objections to the election. The Petitioner alleges that the Employer engaged in the following objectionable conduct: 1) surveillance of its employees in order to discourage their membership and activities on behalf of the Petitioner; 2) termination of its employee Joselin Morel because of her membership and activities on behalf of the Petitioner; 3) held small meetings where it interrogated employees about their union activities and made unspecified threatening statements to employees regarding the election. As described below, I recommend overruling all of the objections. The evidence is insufficient to establish that the Employer engaged in conduct prior to, or during, the election which would require that the results of the election be set aside.

PROCEDURAL BACKGROUND

Pursuant to a Stipulated Election Agreement, entered into by the parties and approved on May 2, 2013,¹ an election in this matter was conducted on June 6, in the following unit of employees:

¹ All dates hereafter are in 2013, unless noted otherwise.

Included: all regular full-time and regular part-time Mechanics, Jr. Mechanics, Mechanic Leaders, Engineering Parts & Service Coordinators, Assembly Operators, Assembly Clerks, Assembly Line Leads, Assembly Material Handlers, Assembly Coordinators, Powder Processing Leaders, Hot Pour Bulk Coordinators, Bulk Operators, Lipstick Operators, Filling Pouring Operators, Filling Pouring Line Leaders, Filling Pouring Material Handlers, Interfila Operators, Interfila Line Leads, Interfila Coordinators, Color Station Technicians, R&D Technicians, Bulk Operators, Analytical Lab Technicians, Analytical Lab Chemists, Junior Chemists, Product Development Chemists, Quality Control Analysts, Quality Control Inspectors, Chemists, Loose Powder Coordinators, Loose Powder Line Leads, Pre-Weigh Operators, Pre-Weigh Leads, Order Pickers, Driver/Warehouse Workers, Label Room Workers, Drivers, Warehouse Leaders, Warehouse Coordinators, Shipping Clerks, Shipping Operators, Receiving Clerks, Receiving Operators, Facilities Workers, Facilities Leaders, Facilities Mechanics, Facilities Clerks, Senior Data Entry Clerks, Data Entry Clerks, Inventory Control Clerks, Pressing Operators, Pressing Coordinators and Production Clerks employed by the Employer at its facilities located at 200 Route 303N, Congers, New York, and 110 Brookhill Drive, West Nyack, New York.

Excluded: all other employees, including office clerical employees, and guards, and professional employees and supervisors as defined in the Act.

The tally of ballots, which was made available to the parties at the conclusion of the election, showed the following results:

Approximate number of eligible voters	119
Void ballots.....	0
Votes cast for Petitioner	55
Votes cast against participating labor organization	63
Valid votes counted	118
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	118

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has not been cast for Petitioner.

On June 12, the Petitioner filed timely objections to the election. The objections verbatim, are as follows:

1. On dates presently unknown, but in the month of May and June 2013, the employer by its officers, directors, employees and/or agents engaged in unlawful surveillance of its employees in order to discourage their membership in and activities on behalf of Local 298.
2. On or about March 25, 2013, the Employer by its officers, directors, employees and/or agents, terminated Joseline Morel for her membership in and activities on behalf of Local 298. Additionally, the Employer by its officers, directors, employees and/or agents terminated Joseline Morel to discourage other unit employees from engaging in activities on behalf of or becoming members of Local 298.
3. On dates presently, unknown, but believed to be on or about May 22, 2013, the Employer by its officers, directors, employees and/or agents conducted small meetings at which unit employees were interrogated and threatened regarding their vote in the upcoming election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, an administrative investigation of the objections was conducted. During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues. The results of the investigation are discussed below.

OBJECTION 1

The Petitioner asserts in this objection that in May and June the Employer engaged in unlawful surveillance. The Employer denies engaging in this conduct. The Petitioner has failed to provide any evidence that any agent or representative of the Employer engaged in the alleged conduct. Rather, the limited evidence provided, which includes video taken from an iphone, shows depict two unidentified individuals being in the vicinity of several of the Petitioner's organizers as they engaged in leafleting outside the entrance to the business complexes in which the Employer is located. The evidence shows that on four or five occasions, outside the Employer's West Nyack location, including on or about May 16 and May 20, in each instance the same unidentified individual walked from the direction of the Employer's entrance, past the organizers, and then leaned against a guard rail across the street from the organizers. This individual never said anything to the organizers, but rather

almost always had a phone to his ear. After about four or five minutes, the unidentified individual returned to the business complex, in the direction of the Employer's entrance. During the incident on May 16, Petitioner's organizers were handing leaflets to unit employees as they entered the parking lot. No unit employees were present on May 20. The second alleged instance of surveillance occurred outside the entrance to the Employer's Congers, New York, facility on or about June 3. According to the Petitioner's witness, an unidentified individual² was standing by the entrance to the supervisor's parking lot, smoking a cigarette, and was looking in the direction of the entrance to the employee parking lot, as Petitioner's organizers sought to hand leaflets to employees entering the employee parking lot. The unidentified individual was in the vicinity of the organizers for approximately three to four minutes, and then walked back toward the Employer's facility. This was the only incident that occurred outside the Congers facility.

Generally, an employer commits unlawful surveillance of employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive. *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Id.* Furthermore, random or isolated viewing of a union gathering by an employer agent is not prohibited surveillance. *Osco Drug, Inc.*, 237 NLRB 231 (1978). In this matter the Petitioner has failed to provide prima facie evidence establishing unlawful surveillance. First and foremost, no evidence has been provided to establish that any representative or agent of the Employer engaged in the alleged surveillance, as the identity of the individuals depicted in the videos, and described by Petitioner's witnesses, has not been established and is unknown. Further, even assuming it could be established that these unidentified individuals were Employer agents, the alleged incidents were isolated and short in duration,

² This individual, a woman, was not the same person involved with the incidents at the West Nyack facility.

there is limited evidence of unit employees being present at the same time, there is no evidence regarding whether or not the presence of these unidentified individuals was “out of the ordinary,” and, there is no contention that the individuals engaged in any other coercive behavior.

Inasmuch as the evidence fails to establish that the conduct as described constitutes objectionable conduct that interfered with the election results, I recommend Objection 1 be overruled.

OBJECTION 2

In this objection, the Petitioner contends that the employment of Joseline Morel was unlawfully terminated by the Employer because of her union activity and in order to discourage such activity. The Employer denies the material allegation that Ms. Morel was discharged because of her union activity. Further, I note that the discharge happened more than two weeks prior to the filing of the petition in this matter. The Board will not set aside an election based upon conduct which occurred before the critical period prior to an election. *Ideal Electric*, 134 NLRB 1275 (1961). The critical period begins to run from the day on which the representation petition is filed with the Board *Id.* In this case, the alleged conduct at issue occurred on or about March 25 and the petition was filed on April 12. Therefore, the alleged objectionable conduct occurred outside of the critical period, and as such it may not constitute objectionable conduct warranting a second election.

Accordingly, I find Objection 2 to be without merit, and I recommend it to be overruled.

OBJECTION 3

In Objection 3, the Petitioner contends that on or about May 22, representatives and agents of the Employer held small meetings with employees, during which employees were allegedly interrogated and threatened regarding their vote in the upcoming election. Specifically, the Petitioner alleges that

Employer representatives instructed employees to vote no, and threatened that they would lose their jobs if they did not do so.

The witnesses identified by the Petitioner in support of this objection did not corroborate these contentions. The Petitioner has not provided any other probative evidence to sustain these allegations.

It is the responsibility of the objecting party to timely furnish evidence, sufficient to support a prima facie case, which would then trigger a Regional Director's responsibility to conduct an investigation or issue a notice of hearing. Board's Rules And Regulations, Section 102.69(c)(1), (d); Representation Case Handling Manual Part Two, Section 11392.6. See *Care Enterprises, Inc.*, 306 NLRB 491, 491 fn. 2, (1992), (objecting party must present evidence raising substantial and material factual issues showing actions complained of had impact on election.) Here, the Petitioner did not submit any evidence to support its allegation that representatives of the Employer interrogated or threatened employees with regard to their vote in the election.

Inasmuch as no probative evidence was submitted in support of this objection, I recommend that it be overruled.

CONCLUSIONS AND RECOMMENDATIONS

Having found that all of the Petitioner's objections are without merit, it is hereby recommended that they be overruled.³ It further is recommended that a Certification of Results of Election should be issued by the Board.⁴

Dated at New York, New York
July 12, 2013

Handwritten signature of Karen P. Fernbach in black ink, with the initials "by EFT" written to the right of the signature.

Karen P. Fernbach
Regional Director
National Labor Relations Board
Region 2
26 Federal Plaza, Room 3614
New York, New York 10278

³No hearing is warranted with respect to the objections, inasmuch as no substantial and material factual issues have been raised thereby. Further, even assuming that the evidence proffered by the Petitioner were to be deemed to be true, no hearing is warranted and the election will not be set aside based there upon. See Whitney Museum of American Art, 247 NLRB 573 (1980); enff 105 LRRM 3239 (2nd Cir. 1980).

⁴ Pursuant to Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. Under the provisions of Sec. 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Exceptions must be received by the Board in Washington, D.C. by **July 26, 2013**, at 5:00 p.m. Eastern Time, unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically. If exceptions are filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date. If submitted by mail or sent by a delivery service, it must be received by the close of business at 5:00 p.m. Eastern Time on the due date, or be postmarked or given to the delivery service no later than July 25, 2013.