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

SIROB IMPORTS, INC.

Employer

and Case No. 29-RC-113221

LOCAL 223, AMALGAMATED INDUSTRIAL
& TOY & NOVELTY WORKERS OF AMERICA

Petitioner

REPORT ON OBJECTIONS AND NOTICE OF HEARING

Upon a petition filed on September 13, 2013,[1] by Local 223, Amalgamated Industrial & Toy & Novelty Workers of America, herein called the Petitioner or the Union, and pursuant to a Stipulated Election Agreement signed by the Petitioner and Sirob Imports, Inc., herein called the Employer or Sirob, and approved by the undersigned on September 26, an election by secret ballot was conducted on November 1, among the employees in the following unit:

> All full-time and regular part-time maintenance, warehouse, production employees and shipping and receiving employees employed at the Employer's Melville and Lindenhurst New York facilities, but excluding all drivers, office clericals, guards, managers, executives and supervisors as defined in the Act.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	51
Number of void ballots	0
Number of ballots cast for the Petitioner	18
Number of votes cast against participating labor organization	22
Number of valid votes counted	40
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	43

Challenges are not sufficient in number to affect the results of the election.

[1] All dates hereinafter are in 2013 unless otherwise indicated.

A majority of the valid votes counted plus challenged ballots has not been cast for the Petitioner.

Thereafter, on November 8, the Petitioner filed timely objections to conduct affecting the results of the election. The Petitioner's objections are attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the Petitioner's objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The investigation revealed the following:

The Employer, a domestic corporation with its headquarters and a place of business located at 21 Gear Avenue, Lindenhurst, New York and a second place of business located at 515 Broad Hollow Road, Melville, New York, is a food importer engaged in the wholesale sale of specialty foods and condiments.

THE OBJECTIONS

Objection No. 1:

In this objection, the Union contends essentially that the Employer (1) harassed, coerced and then suspended Miguel Paz because of his activities on behalf of the Union; (2) humiliated and threatened Paz with termination in front of other employees; and (3) warned that it would discipline all employees who supported the Union. The Employer denies engaging in the alleged conduct. For the reasons described herein, I recommend that the portion of this objection alleging that the Employer harassed, coerced, humiliated and suspended Miguel Paz be overruled and direct that the remainder of this objection alleging that the Employer threatened employee Paz with termination in front of other employees and warned that it would discipline all employees who supported the Union proceed to hearing.

In support of its objection, the Petitioner provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that one witness will testify that Miguel Paz was harassed, coerced and then suspended because of his support for the Union, i.e., wearing a Union t-shirt during his lunch break.[2] This witness will further testify that Paz was humiliated and threatened with termination in front of other employees. Finally, the witness will testify that the Employer warned that once the Union was gone, it would discipline all employees who supported the Union. The Union also provided the names of four additional witnesses who it contends will testify that they observed the Employer's actions, heard the Employer's statements and will corroborate the testimony of the above-mentioned witness.

As noted above, the Employer denies engaging in the alleged conduct. More specifically, the Employer contends that the objection fails to name or provide any information as to who, on behalf of the Employer, committed the alleged objectionable conduct. Further, the Employer denies harassing, coercing and then suspending Paz because of his support for the Union or for wearing a Union t-shirt during his lunch break. The Employer also denies humiliating Paz or threatening that once the Union was gone, it would discipline all employees who supported the Union. Further, the Employer states that Paz was disciplined for conduct in which he engaged on October 4, involving cursing at a supervisor who instructed Paz to punch his time card at the end of his work shift.

The investigation revealed that on September 26, 2013, the Union filed an unfair labor practice charge alleging, among other things, that since on or about September 18, the Employer threatened and intimidated employees related to the Union's organizing drive and employees' support for the Union and threatened that employees would be suspended and terminated if they did not have proper documentation of their immigration/citizenship status. On October 22, the undersigned approved the Union's withdrawal of the charge in Case No. 29-CA-114198.

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[2] The name of the Employer agent who allegedly engaged in this conduct was not provided.

With regard to the evidence that employee Paz was threatened with termination in front of other employees and that the Employer warned that once the Union was gone, it would discipline all employees who supported the Union, the Board has found such threats, made during the critical period, to be objectionable.[3] Although the Union's offer of proof failed to provide the date(s) that the alleged threats took place, I note that the charge filed by the Union in Case No. 29-CA-114198 alleged that the Employer engaged in similar threats during the critical period. Accordingly, I find the better course is to send the alleged threats to terminate Paz and discipline all employees who supported the Union to hearing. In view of the above, there appear to be substantial and material issues concerning the alleged threats of termination and discipline, including issues of credibility, which would best be resolved by a hearing. I specifically note that at the hearing, it is the Union's burden to provide evidence to establish that the conduct alleged to be objectionable occurred within the critical period. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994).[4]

With regard to the allegation concerning the suspension of employee Paz, since the gravamen of this allegation is an unfair labor practice, requiring a finding that the Employer's conduct constituted a violation of Section 8(a)(3) of the Act, it must be decided in an unfair labor practice proceeding. See, *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961). More specifically,

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[3] See *Continental Investment Co.*, 236 NLRB 237 (1978) (where the Board directed that a hearing be conducted concerning an alleged statement by a supervisor that could only be taken as a direct threat to fire a whole crew if the union were successful in the election); *Waste Management, Inc.*, 330 NLRB 634 fn. 2 (2000) (where a supervisor threatened to discharge an employee because he defaced a piece of antiunion campaign literature distributed by the employer, the Board found that this threat was objectionable conduct warranting a second election); *Copps Food Center Inc.*, 296 NLRB 395 (1989) (where the Board held that an employer's threat of discharge and blackballing an employee if she signed a union card sufficiently interfered with the election requiring that it be set aside.) See also *Audubon Regional Medical Center*, 331 NLRB 374 (2000) (where an employer threatened employees by linking union support with plant closure or sale, job and benefit loss, discrimination and discipline, such conduct violated Section 8(a)(1) of the Act and also constituted objectionable conduct.)

[4] It is well settled that conduct upon which to set aside an election must occur within the "critical period." Generally, only conduct that occurs between the date a representation petition is filed and before the election may constitute grounds for setting aside an election. *Ideal Electric & Manufacturing Co.*, 134 NLRB 1275 (1961); *Goodyear Tire & Rubber Co.*, 138 NLRB 453 (1962). The Board requires a specific showing that the conduct occurred during the critical period. *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994).

where, as in the instant case, the conduct alleged to have interfered with the election can only be held to be such interference upon an initial finding that an unfair labor practice has been committed, it is the Board's policy not to inquire into such matters in the guise of considering objections to an election. Here, the Union's evidence in support of Objection No. 1 alleges that the Employer engaged in discriminatory conduct by suspending Miguel Paz motivated by his support for the Union. However, there is no pending charge related to the suspension of Paz. Since the gravamen of such an allegation would require a finding that the Employer's conduct constituted a violation of Section 8(a)(3) of the Act, such an allegation must be decided in an unfair labor practice proceeding. See, *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961). Inasmuch as there is no pending unfair labor practice charge, I find there is no merit to the portion of Objection No. 1 that alleges Paz was suspended for because of his support for the Union or wearing a Union t-shirt, and recommend that it be overruled.

Finally, the Union's submission that the Employer "harassed," "coerced" and "humiliated" employee Paz, is devoid of any specific content or substance, and in my view, fails to satisfy the Board's requirements of furnishing specific evidence in support of objections and thus, further investigation by the Region is not warranted. See *Audubon Cabinet Co.*, 119 NLRB 349 (1957) (conclusionary assertions, in the absence of specific supporting evidence, do not satisfy the Board's requirements of furnishing specific evidence about specific events and persons and further investigation is not warranted). See also, *Aurora Steel Products*, *supra*; *Cumberland Nursing & Convalescent Center*, 248 NLRB 322, 323 (1980) (where the Board held that it is not enough for the objecting party's evidence to merely imply or suggest that some form of prohibited conduct has occurred.)

Objection No. 2:

In this objection, the Union contends essentially that the Employer conducted mock elections during the employees' break times. The Employer denies engaging in the alleged conduct. For the reasons described herein, I direct that Objection No. 2 proceed to hearing.

In support of its objection, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that they were forced to participate in mock elections during their break times.

As noted above, the Employer denies engaging in the alleged conduct. Further, the Employer contends that the Union's allegation fails to provide any information about who, on behalf of the Employer, allegedly committed the alleged improper conduct and when or where it occurred.

The investigation revealed that on September 26, 2013, the Union filed an unfair labor practice charge in Case No. 29-CA-114198, alleging that since on or about September 18, 2013, the Employer engaged in repetitive interrogation concerning employees' Union support. On October 22, the undersigned approved the Union's withdrawal of the charge in Case No. 29-CA-114198.

Here, the Union's evidence indicates that the Employer conducted mock elections. The Board has found that an employer engages in objectionable conduct when it conducts a preelection poll of employees. See, *Offner Electronics*, 127 NLRB 991 (1960) (where the Board found that an employer engaged in objectionable conduct when, after the Board's election machinery had been set in motion, the employer polled employees on the question of unionization); *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967) (where the Board stated that, "...a poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate purpose of the employer that would not be better served by the forthcoming Board

election.")[5] While the Union, in its proffer, does not provide specific dates as to when the mock elections took place, I note that the Union's unfair labor practice charge in Case No. 29-CA-114198, alleges interrogations on a September 18, 2013, date, i.e., a date after the filing of the instant petition. Although mock elections were not specifically alleged in the charge, it does place alleged interrogations concerning employees' Union support within the critical period. In these circumstances, in my view the better course is to send this objection to hearing.

In view of the above, there appear to be substantial and material issues concerning the mock elections/interrogations, including issues of credibility, which would best be resolved by a hearing. I specifically note that it is the Union's burden to establish that the conduct alleged to be objectionable occurred within the critical period. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961); *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994). I therefore direct that a hearing be held concerning Objection No. 2.

Objection No. 3:

In this objection, the Union contends essentially that the Employer forced employees to write statements in support of the Employer. The Employer denies engaging in the alleged conduct. For the reasons described herein, I recommend that this objection be overruled.

In support of its objection, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that the Employer forced them to write statements in support of the Employer.

As noted above, the Employer denies engaging in the alleged conduct. Further, the Employer contends that the Union's allegation fails to provide any information about who, on

[5] Compare, *Omni Manor, Inc. d/b/a Windsor House C & D*, 309 NLRB 693 (1992) (where the Board found that a petitioning union's mere circulation and distribution of a petition showing employee support is not objectionable conduct); *Kusan Manufacturing Co.*, 267 NLRB 740(1983) (noncoercive preelection polling by union not grounds for setting aside election); *Springfield Discount Inc., d/b/a J.C. Penney Food Department*, 195 NLRB 921 (1971)(polling by union not objectionable.)

behalf of the Employer, committed the alleged improper conduct, which employees were forced to write the statements and when those statements were written.

Here, the Union contends that on an unspecified date(s) the Employer "forced" employees to write statements in support of the Employer. The Union fails to provide any details with regard to this conduct, such as when the conduct occurred, who engaged in the conduct, where this took place, how the employees were "forced" to write the statements or specifically describing the contents of the statements. The Board requires that a party filing objections must present evidence available to it, sufficient to establish a *prima facie* case in support of its objections. National Labor Relations Board Rules and Regulations, Section 102.69(a). Conclusionary assertions, in the absence of specific supporting evidence, do not satisfy the Board's requirements of furnishing specific evidence about specific events and persons, and further investigation is not warranted. *Audubon Cabinet Co.*, 119 NLRB 349 (1957). Further, the Board requires a specific showing that the conduct occurred during the critical period. *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994). In light of the above, the Union has failed to establish a *prima facie* case of objectionable conduct and I recommend overruling Objection No. 3.

Objection Nos. 4, 5, 6 and 9:

In these objections, the Union contends essentially that the Employer (1) made announcements to employees that if the Union wins the election, the employees would get fewer benefits, fewer overtime hours and that the Employer would probably shut down operations;[6] (2) threatened employees with termination if they were seen taking literature from Union representatives or having conversations with Union representatives and then began to conduct surveillance of the employees to ensure that they were not engaging in such activity;[7] (3) held a

[6] Objection No. 4.
[7] Objection No. 5.

captive audience meeting with employees wherein the Employer told them that if the Union won, the Employer would never negotiate with them and would never agree to wage increases, the Employer said that employees would lose what they already had, threatened to close its factory and solicited grievances from employees and promised to remedy them if they kept the Union out;[8] and, (4) on October 31, in a closed door meeting, offered employees wage increases for voting against the Union.[9] The Employer denies engaging in the alleged conduct. For the reasons described herein, I direct that a hearing be held on Objection Nos. 4, 6, 9 and the portion of Objection No. 5 concerning threats to employees related to their Union activity and I recommend overruling the remaining portion of Objection No. 5 concerning alleged surveillance.

In support of Objection No. 4, concerning threats of fewer benefits, fewer overtime hours and closing down if the Union won the election, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that they heard the Employer make announcements that if the Union wins the election, the employees would get fewer benefits, fewer overtime hours and that the Employer would probably shut down its operations.

In support of Objection No. 5, alleging threats of termination, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that they heard the Employer threatened them or heard other employees being threatened with termination if they were seen supporting the Union, taking literature from the Union representative or having conversations with the Union representative. The Union further contends that its 5 witnesses will testify that they observed the Employer "conducting surveillance" of the employees to ensure that they were not engaging in such activity.

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[8] Objection No. 6.
[9] Objection No. 7.

In support of Objection No. 6, alleging various threats, the solicitation of grievances and promises to take care of employees, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that they were forced to attend a meeting held by the Employer wherein they were told that if the Union won the election, the Employer would never negotiate with it and would never agree to wage increases; that negotiations would result in employees losing what they already had; and that the Employer would close the factory. The witnesses would also testify that the Employer solicited grievances from employees and made promises to certain employees that it "would take care of them" if they would help keep the Union out.

In support of its Objection No. 9, concerning promises of wage increases, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that on or about October 31, they were present at a closed door meeting where the Employer offered them a wage increase for voting against the Union.

As noted above, the Employer denies engaging in the alleged conduct. Further, the Employer contends that the Union's allegations fail to provide any information about who, on behalf of the Employer, allegedly made the alleged improper statements/ engaged in the alleged conduct and when or where the alleged statements were made/ conduct occurred.

The investigation revealed that on September 26, 2013, the Union filed a charge in Case No. 29-CA-114198, alleging, among other things, that the Employer threatened and intimidated employees regarding the Union's organizing drive and employees' support of the Union; that the Employer threatened that it would cease to give employees overtime and that it would close its operations. On October 22, the undersigned approved the Union's withdrawal of the charge in Case No. 29-CA-114198.

Here, the Union's evidence indicates that the Employer threatened employees with loss of benefits, termination, loss of overtime hours, plant closure, and that it would never negotiate with the Union or agree to a wage increase. The Union's evidence also indicates that the Employer solicited grievances from employees, promised certain employees that it "would take care of them" if they would help keep the Union out, and on or about October 31, promised wage increases for voting against the Union. It is well established that certain conduct of an employer, such as threatening employees with loss of benefits,[10] loss of jobs,[11] and/or plant closure[12] if the union wins an election constitutes election interference. Similarly, employer threats of futility,[13] soliciting grievances and promising to correct them[14] and making promises to increase wages for voting against the Union can also constitute objectionable conduct. In my view, the foregoing conduct attributed to the Employer, occurring within the critical period prior to the election, if true, could have affected the outcome of the election and would, therefore, warrant setting aside

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[10] See e.g. *Cooper Tire and Rubber Co.*, 340 NLRB 958 (2003) (where a Board majority agreed with the hearing officer that an employer engaged in objectionable conduct when it threatened unit employees with a loss of benefits if it voted for the union).

[11] See *Continental Investment Co.*, 236 NLRB 237 (1978) (where the Board directed that a hearing be conducted concerning an alleged statement by a supervisor that could only be taken as a direct threat to fire a whole crew if the union were successful in the election); *Waste Management, Inc.*, 330 NLRB 634 fn. 2 (2000) (where a supervisor threatened to discharge an employee because he defaced a piece of antiunion campaign literature distributed by the employer, the Board found that this threat was objectionable conduct warranting a second election); *Copps Food Center Inc.*, 296 NLRB 395 (1989) (where the Board held that an employer's threat of discharge and blackballing an employee if she signed a union card sufficiently interfered with the election requiring that it be set aside.)

[12] See *Waste Automation and Waste Management of Pennsylvania*, 314 NLRB 376 (1994)(where the Board set aside an election where it was found that a high ranking official of the employer made a post petition threat to close down if the union won, since such a threat cannot be considered de minimus.) See also *Glasgow Industries*, 204 NLRB 625 (1973); *General Electric Wiring Devices*, 182 NLRB 876 (1970).

[13] See *St. Luke's Hospital*, 258 NLRB 321, 322 (1981) (where the Board found an employer's bald assertion that the employer would never recognize the union clearly conveyed the message that the employees' support for the union would be futile); *Federated Logistics and Operations*, 340 NLRB 255 (2003) (election set aside where the Board found an overall message that support for the union would be futile where the employer made statements that if the union won, negotiations would take a long time and employees would not get any raises; and, that in bargaining, wages and benefits would start from zero, that the union would strike and that if a strike occurred, the operation could be shut down and moved to another facility in three days and that the employees could lose their 401(k) plan.)

[14] See e.g. *Albertson's LLC.* 359 NLRB No. 147 (2013) ("Settled Board precedent prohibits employers from soliciting grievances during union campaigns where the solicitation carries with it an implicit or explicit promise to remedy those grievances," and impresses upon employees that union representation is unnecessary); *Reliance Electric Co.* 191 NLRB 44 (1971) (where the Board found that a management official solicited complaints and explicitly promised employees that the employer would strive to adjust them and set aside the election); *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058 (1999) (election set aside where, among other things, an employer unlawfully solicited grievances and impliedly promised to remedy those grievances).

the election. Inasmuch as there are substantial and material issues, including issues of credibility that would be best resolved by a hearing, I direct that a hearing be held before a hearing officer concerning Objections Nos. 4, 6, 9 and the portion of Objection No. 5 concerning threats to employees related to their Union activity. With regard to Objection No. 9, the evidence is unclear as to whether the "closed door" October 31, meeting was mandatory meeting within 24 hours before the November 1 election. I note that it is the burden of the Union at hearing to establish a violation of the *Peerless Plywood* rule.[15] It is also the Union's burden to establish that the other alleged objectionable conduct occurred within the critical period.

With regard to the remaining portion of Objection No. 5 alleging that the Employer began engaging in surveillance of employees' Union activities, while the Union's offer of proof indicates that named employees would testify in support of the allegation that they observed the Employer "conducting surveillance" of the employees to ensure that they were not supporting the Union, taking literature or having conversations with the Union, further details were not provided. Thus, the evidence does not attribute any specific conduct to the Employer to establish that it was engaging in conduct out of the ordinary so as to constitute surveillance.[16] Accordingly, the conclusionary assertion that the Employer engaged in surveillance after making the above threat of termination is unsupported by specific conduct that constitutes surveillance, does not satisfy the Board's requirements of furnishing specific evidence about specific events and persons, and further investigation is not warranted. *Audubon Cabinet Co.*, 119 NLRB 349

[15] It is well established that the Board prohibits election speeches by parties on company time to massed assemblies of employees within 24 hours before an election. *Peerless Plywood Co.*, 107 NLRB 427 (1953). The *Peerless Plywood* rule forbids such speeches, whether coercive or not. See, *Excelsior Laundry Co.*, 186 NLRB 914 (1970).

[16] See *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006) (where there was no allegation that managing partner/admitted supervisor's presence was "out of the ordinary," the Board reversed finding of unlawful surveillance); *Aladdin Gaming, LLC*, 345 NLRB 585 (2005) (where the Board stated that a supervisor's routine observation of employees engaged in open Section 7 activity does not constitute unlawful surveillance in finding managers' presence was routine, not "out of the ordinary" and their consequent observation was unaccompanied by coercive conduct). Compare *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992) (where an employer violated Section 8(a)(1) of the Act when its surveillance activity, including posting a guard with binoculars in order to observe employees and union agents soliciting union authorization card signatures across the street, constituted "more than ordinary or casual observation" of public union activity).

(1957). See also *Aurora Steel Products*, 240 NLRB 46 (1979). Further, there is no evidence or assertion that this surveillance occurred during the critical period. Accordingly, I recommend overruling the remaining portion of Objection No. 5 concerning alleged surveillance.

Objection No. 7:

In this objection, the Union contends essentially that on October 31, Employer Officers and supervisors called the Suffolk County Police and tried to have an ex-employee arrested in front of other employees. The Employer then stated to employees watching that only bad employees would support an organization of bad people. The Employer denies engaging in the alleged conduct. For the reasons described herein, I direct that Objection No. 7 proceed to hearing.

In support of its objection, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that on October 31, they observed supervisors Peter Boboris and Salvador Polanco call the Suffolk County Police to have an ex-employee arrested in front of them. The supervisors then stated to the employees watching that only bad employees would support an organization of bad people.

As noted above, the Employer denies engaging in the alleged conduct. More specifically, the Employer contends that the ex-employee brought to the job site by the Union representatives had prior altercations with various female employees. Upon seeing him and fearing for their safety, two female employees requested that the police be called. Employee Fernando Cardenas called the Suffolk County Police department at the request of those employees.

Under Section 8(c) of the Act, employers are free to express their opinions regarding protected activity as long as these expressions are not accompanied by threats of reprisal, force or promise of benefit. Derogatory statements are not per se violative of Section 8(a)(1) of the Act.

See *Carrom Division*, 245 NLRB 703 fn. 1 (1979) (where referring to union supporters as "clowns" was not found violative of Section 8(a)(1) of the Act). Further, statements equating protected activity with disloyalty are generally evaluated in the context of an employer's unlawful interference and coercion related to protected rights. See *Trailmobile Trailer, LLC*, 343 NLRB 95 (2006) (where disparaging comments did not suggest that employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with the employees Section 7 rights). See also *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000) (where employer's expression of extreme disappointment with union activity equated protected activity with disloyalty and contained a veiled threat of reprisal in retaliation for protected activity).

Here, the Union's evidence shows that on October 31, supervisors Peter Boboris and Salvador Polanco summoned the Suffolk County Police to have an ex-employee arrested in front of the Employer's employees.[17] It is unclear what, if any, activity the ex-employee was engaging in when the police were summoned. The evidence does not establish whether the incident took place on the Employer's property. The evidence of the Employer summoning the police, standing alone, is insufficient to establish interference with the election. However, the evidence shows that the supervisors then stated to the employees present that only bad employees would support an organization of bad people. In the circumstances presented, I find that substantial and material issues exist with regard to the alleged statement of Supervisors Peter Boboris and Salvador Polanco. In my view, the allegations embodied in this objection, if true, could have a prejudicial effect on the election and would therefore warrant setting aside the election. See e.g., *Saginaw Control and Engineering, Inc.*, 339 NLRB 541 (2003) (telling an employee that he was

[17] The evidence does not show that the ex-employee was arrested. The objection, on its face states that the Employer "tried to have an ex-employee arrested in front of other employees." The evidence does not show what action, other than summoning the police, the Employer took to have the ex-employee arrested.

a bad employees because of his involvement with and support for the union and threatening to reduce his overtime found unlawfully coercive); *Bonanza Sirloin Pit*, 275 NLRB 310, 311, 314 (1985) (where an owner of a restaurant approached an employee, referred to his employees as "whores" who were trying to form a union, then threatened to burn the restaurant before he would accept a union and the next day referred to a union employee as a "piece of shit," immediately followed by a vow to get rid of that employee, the Board found the employer violated Section 8(a)(1) of the Act by insulting employees and making derogatory remarks concerning co-workers who are attempting to organize a union). Inasmuch as there are substantial and material issues, including issues of fact and credibility that would be best resolved by a hearing, I direct that a hearing be held concerning the allegation that the Employer told employees that only bad employees would support an organization of bad people, encompassed by Objection No. 7.

Objection No. 8:

In this objection, the Union contends essentially that the Employer suspended overtime work for two days to show employees what would happen if the Union wins the election. The Employer denies engaging in the alleged conduct. For the reasons described herein, I recommend that Objection No. 8 be overruled.

In support of its objection, the Union provided an offer of proof summarizing the testimony of five named employee witnesses. The Union contends that its five witnesses will testify that they had their overtime work suspended for two days in order to show employees what would happen if the Union wins.

As noted above, the Employer denies engaging in the alleged conduct.

On October 1, 2013, the Union filed an unfair labor practice charge in Case No. 29-CA-114622, alleging that in October, 2013, the Employer reduced the hours of employees in

retaliation for their attempt to unionize and to coerce them to vote against the Union. On October 22, the undersigned approved the Union's withdrawal of the charge in Case No. 29-CA-114198.

Since the gravamen of the allegation concerning the suspension of overtime for two days is an unfair labor practice, requiring a finding that the Employer's conduct constituted a violation of Section 8(a)(3) of the Act, it must be decided in an unfair labor practice proceeding. See, *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961). More specifically, where, as in the instant case, the conduct alleged to have interfered with the election can only be held to be such interference upon an initial finding that an unfair labor practice has been committed, it is the Board's policy not to inquire into such matters in the guise of considering objections to an election. Here, the Union's evidence in support of Objection No. 8 alleges that the Employer engaged in discriminatory conduct by suspending overtime work for two days motivated by their support for the Union. However, there is no pending charge related to the suspension of overtime hours. Since the gravamen of such an allegation would require a finding that the Employer's conduct constituted a violation of Section 8(a)(3) of the Act, such an allegation must be decided in an unfair labor practice proceeding. See, *Texas Meat Packers, Inc.*, 130 NLRB 279 (1961). Inasmuch as there is no pending unfair labor practice charge, I find there is no merit to Objection No. 8, and recommend that it be overruled.

Objection No. 10:

In this objection, the Union contends that the Employer engaged in surveillance of employees as they were voting inasmuch as the Employer and its attorney positioned themselves within 20 feet of the polls. The Employer denies engaging in the alleged conduct. For the reasons described herein, I recommend that Objection No. 10 be overruled.

In support of its objection, the Union provided an offer of proof summarizing the testimony of its Organizer, Cesar Alarcon. The Union contends that Alarcon will testify that he observed the Employer conducting surveillance of employees as they were voting. The Employer and its attorney positioned themselves within 20 feet of the polls.

As noted above, the Employer denies engaging in the alleged conduct. Further, the Employer objects to the fact that the Union fails to provide any information about who specifically on behalf of the Employer engaged in the alleged conduct or where it occurred.

The investigation established that the election took place at the employee break room at 515 Broadhollow Road, Melville, New York from 8:00 a.m. to 10:00 a.m. and at the employee break room located at 21 Gear Avenue, Lindenhurst, New York from 11:00 a.m. to 1:00 p.m.

The Board has found that the mere presence of one of the parties to an election at or near the polling area is not per se objectionable. See *Equitable Equipment Company, Inc.*, 214 NLRB 939 (1974) (where the presence of 86 foremen, later found to be supervisors, in the polling area, was an inadequate basis to set aside an election.); *Marathon Metallic Building Co.*, 224 NLRB 121 (1976) (where the Board overruled an objection regarding the momentary appearance of a supervisor in the polling area.)

However, in *Performance Measurements, Inc.*, 148 NLRB 1657 (1964), the Board found that the continued presence of an employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct that interfered with the employees' freedom of choice in the election. The Board noted that the president's continued presence was not justified by the fact that part of the time he was instructing supervisors on the release of employees for voting purposes. Similarly, in *ITT Automotive, a division of ITT Corp.*, 324 NLRB 609 (1997), the continued presence of employer agents at a location where employees were required to pass in order to enter the polling area, as well as where they observed the

employees waiting to vote, was found to interfere with the employees' freedom of choice in the election. Compare, *Blazes Broiler*, 274 NLRB 1031 (1985) (where a union agent was seated at a table approximately 20 feet away from the entrance to the polling area and engaged in extended conversations with employees, the Board overruled the employer's objections concerning the conduct of the union agent during the election noting that the union agent had no direct view of the door to the voting area and there was no evidence that the union agent was engaged in electioneering, nor stationed just outside the entrance to the polling area, nor speaking to employees waiting on line to vote); *Roney Plaza Management Corp.*, 310 NLRB 441 (1993) (the employer's presence 25 feet from the entrance to the voting area was found unobjectionable where there was no evidence that the supervisors communicated with employees and they were in an area where they regularly worked); *Patrick Industries, Inc.*, 318 NLRB 245 (1995) (where, for work related reasons, supervisors stood at a foiler machine next to the route employees took to the polling area, it was found that their purpose was not to convey to employees that they were being watched and their behavior was not objectionable); *C& G Heating and Air Conditioning, Inc.*, 356 NLRB No. 133 (2011) (where a union representative parked his truck on the street near a garage entrance through which employees entered in order to vote inside the garage, the Board noted its existing precedent that the "[p]resence [of a union representative in the vicinity of the polls] alone, in the absence of evidence of coercion or other objectionable conduct, is insufficient to warrant setting aside an election.").

Here, the Union presented evidence indicating that the Employer and its attorney conducted "surveillance" of employees as they were voting and that they positioned themselves within 20 feet of the polls. There is no evidence that the Employer representatives kept a list of employees entering or leaving the polls, that any employee entering the polls to vote saw the Employer representatives or that the secrecy of the balloting was compromised. The evidence

presented does not establish or make a claim as to the length of time that the Employer representatives were present or provide a specific location of the Employer and its attorney.[18] Further, the evidence does not indicate that the employees had to pass the Employer's agents as they entered the voting area; nor does the evidence indicate that the agents had a direct view of the voting area. Thus, in these circumstances, there is insufficient evidence to establish that the Employer's mere presence on the day of the election constituted objectionable surveillance. See *C & G Heating and Air Conditioning, Inc.*, *supra*; *J.P. Mascaro & Sons*, 345 NLRB 637 (2005) (where employer president's continual presence during the election outside the front door to the employer's facility was found unobjectionable); *Blazes Broiler*, *supra.* Accordingly, I recommend that Objection No. 10 be overruled.

Additional, Unnumbered Objection:

In this objection, the Union contends that Employer conduct alleged in its Objection Nos. 1 through 10 and by other acts discovered during the Board's investigation, warranted the setting aside of the election and conducting a new election. The Employer contends that the Union's objections lack merit.

The Union did not present any evidence in support of this objection that was not previously considered in connection with Objection Nos. 1 through 10. Accordingly, I recommend that this additional unnumbered objection be overruled.

SUMMARY AND RECOMMENDATIONS

In summary, I have directed that a hearing be held concerning the portion of Objection

[18] The Union does not claim nor is there any evidence that these individuals engaged in electioneering. The evidence does not indicate that Employer representatives were in an area designated by the Board Agent conducting the election as a no-electioneering area. Nor is there evidence that the line of voters extended outside the voting areas or that the Employer violated any instructions of the Board Agent conducting the election. And, the evidence does not indicate that the Union complained to the Board Agent conducting the election about the Employer's presence. Thus, in my view, there is insufficient evidence to establish that the presence of the Employer's agents was objectionable electioneering under the factors articulated in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982).

No. 1 concerning threats to terminate Paz and discipline all employees who supported the Union, Objection Nos. 2, 4, 6, 7, 9 and the portion of Objection No. 5 concerning threats of termination. I have also recommended that Objection Nos. 3, 8, 10, the unnumbered omnibus objection, and the remaining portion of Objection Nos. 1 and 5 be overruled.

Accordingly, pursuant to the authority vested in the undersigned by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated hearing officer with respect to the issues raised by the portion of Objection No. 1 concerning threats to terminate Paz and discipline all employees who supported the Union, Objection Nos. 2, 4, 6, 7, 9 and the portion of Objection No. 5 concerning threats of termination.

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 December 19, 2013, 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

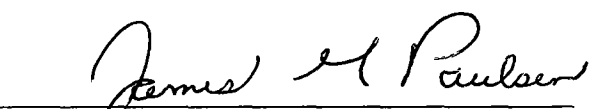
issues set forth in the above Report, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

RIGHT TO FILE EXCEPTIONS

Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, and 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Request must be received by the Board in Washington, D.C., by 5 p.m., EST on December 26, 2013.[19] The request may **not** be filed by facsimile.

The parties are advised that 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 exceptions electronically, please refer to the guidance which can be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated at Brooklyn, New York, on this 12th day of December, 2013.



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

[19] 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 Report, are not part of the record before the Board unless appended to the Exceptions 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 Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding

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November 7, 2013

James G. Paulsen, Regional Director
National Labor Relations Board, Region 29
Two Metro Tech Center, Ste 5100
FL 5
Brooklyn, NY 11201-3838

Re: Sirob Imports, Inc.
Case No.: 29-RC-113221

Dear Mr. Paulsen,

This firm represents petitioner Amalgamated, Industrial and Toy & Novelty Workers of America, Local 223 ("Local 223") in the above matter.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Local 223 files the following objections to conduct affecting the results of the election held on November 1, 2013:

1. The Employer harassed, coerced and then suspended Miguel Paz for his support of the Union and for wearing a union t-shirt during his lunch break. Mr. Paz was humiliated and threatened with termination in front of other employees. The Employer warned that once the Union is gone, it will discipline all those employees who supported the Union.

2. The Employer conducted mock elections during the employees' break times.

3. The Employer forced employees to write statements in support of the Employer.

4. The Employer made announcements to the employees that if the Union wins the election, the employees would get fewer benefits, fewer overtime hours and that the Company would probably shut down operations.

5. The Employer threatened employees with termination if they were seen supporting the Union, taking literature from the union representative, or having conversations with the union representative. The Company then began to conduct surveillance of

Exhibit "A"

the employees to ensure that they were not engaging in said activity.

6. The Employer held a captive audience meeting with employees. At the meeting, the Employer told the employees that if the Union won, the Employer would never negotiate with them and would never agree to wage increases. The Employer further stated that negotiations would result in the employees losing what they already had. The Employer threatened that he would close the factory because of the Union. At this meeting, the Employer solicited grievances from his employees and made promises to certain employees that it "would take care of them" if they would help keep the union out.

7. On or about October 31, 2013, the above named employer by officers Peter Boboris and Salvador Polanco and other supervisors, called the Suffolk County Police and tried to have an ex-employee arrested in front of other employees. The Employer then stated to the employees watching that only bad employees would support an organization of bad people.

8. The Employer suspended overtime work for two (2) days to show employees what would happen if the union wins.

9. On or about October 31, 2013, in a closed door meeting, the Employer offered employees wage increases for voting against the Union.

10. The Employer conducted surveillance of employees as they were voting. The Employer and its attorney positioned themselves within 20 feet of the polls.

The original along with five (5) copies of these Objections is being sent by mail. We stand ready to provide you with supportive evidence for each of the Objections and to cooperate with you in the investigation of these matters.

Very truly yours,

Sam E. Khalaf