

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

ATLAS ROLL-OFF CORP.)	
)	
)	
Employer)	
and)	Case No. 29-RC-114120
)	
LOCAL 175, UNITED PLANT & PRODUCTION WORKERS, INTERNATIONAL UNION OF JOURNEYMEN AND ALLIED TRADES)	
)	
Petitioner)	

**HEARING OFFICER'S REPORT AND RECOMMENDATIONS
ON OBJECTIONS**

This report contains my findings and recommendations regarding the Petitioner's objections to the election in the above referenced case. For the reasons contained herein, I recommend sustaining that portion of the Petitioner's Second Objection alleging that during the critical period, Rolquide Peralta, an alleged agent of the Employer, told employees to take a picture of their ballots and show those pictures to the Employer or they would be fired. I recommend overruling the remainder of the Petitioner's Second Objection and the Petitioner's First Objection.

Procedural History

On September 25, 2013,¹ Local 175, United Plant & Production Workers, International Union of Journeymen and Allied Trades, herein called the Petitioner, filed a petition in this

¹ All dates hereinafter are in 2013 unless otherwise indicated.

matter seeking to represent certain employees employed by Atlas Roll-Off Corp., herein called the Employer or Atlas. Pursuant to a Stipulated Election Agreement signed by the Petitioner and the Employer, and approved by the Regional Director on November 4, an election by secret ballot was conducted on November 20 among the employees in the following unit:

All full-time and regular part-time construction employees who are machine operators, concrete construction laborers, including form setters and carpenters, masons, asphalt workers, including screed men, asphalt rakers, asphalt shovelers and all other laborers employed by the Employer, located at 95-11 147th Place, Jamaica, New York, but excluding all employees of Atlas Transit Mix Corporation and Pro-Concrete Contractors Corporation, located at 95-11 147th Place, Jamaica, New York, all employees working out of Atlas Roll-Off Corp.'s 895 Essex Street, Brooklyn, New York location, including concrete plant workers, machine operators, mechanics, dump truck drivers, concrete construction workers, concrete delivery truck drivers, roll-off container drivers, and transfer station/recycling yard employees and further excluding all office clericals, guards, managers and supervisors as defined in Section 2(11) of the Act.

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

Approximate number of eligible voters	31
Number of void ballots	0
Number of ballots cast for the Petitioner	13
Number of votes cast against participating labor organization	15
Number of valid votes counted	28
Number of challenged ballots	3
Number of valid votes counted plus challenged ballots	31

Challenges are sufficient in number to affect the results of the election.

The Petitioner challenged the ballot of Merek Metejeksi on the ground that he is an alleged supervisor. The Employer challenged the ballot of Daniel Mazarina on the ground that he was

not employed by the Employer at the time of the election. The Board Agent challenged the ballot of Janderson De La Cruz on the ground that his name did not appear on the Excelsior² list.

The Petitioner filed timely objections to conduct affecting the results of the election. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be conducted and on December 13, issued and served on the parties a Report on Challenges and Objections and Notice of Hearing, in which he recommended sustaining the challenges to De La Cruz and Mazarina's ballots, thus rendering the remaining challenge to Metejeski's ballot non-determinative. In addition, the Regional Director directed that a hearing be held by a duly designated Hearing Officer regarding the Petitioner's first and second objections. The Regional Director recommended overruling the Petitioner's third objection, which alleged that during the critical period, the Employer drug tested certain employees and disparately applied the results of those drug tests, discharging certain employees who tested positive while allowing some employees who tested positive to remain employed. The Employer filed exceptions to the Regional Director's Report. On January 16, 2014, the Board issued a Decision and Order adopting the Regional Director's findings and recommendations.

On December 23, the Petitioner filed an unfair labor practice charge in Case No. 29-CA-119669 alleging, inter alia, that the drug testing conducted by the Employer and the resulting discharges violated Section 8(a)(3) of the Act. On December 30, the Regional Director issued a Supplemental Report on Objections in which he deferred further consideration of the Petitioner's third objection to the investigation of the unfair labor practice charge. The unfair labor practice charge also alleged that during the critical period, the Employer, by Tom Polsinelli, threatened workers that he would never hire workers from a union hiring hall, and that although the Employer had the ability to get more work at Kennedy Airport, if the Union won the election, the

² Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

Employer would go in a different direction. The Petitioner also alleged that the Employer introduced a new trust plan for employees where pre-tax money is set aside for workers' benefit. In the Supplemental Report on Objections, the Regional Director ruled that the Petitioner's allegations regarding statements made by Polsinelli and the introduction of the trust plan could not be considered as objectionable conduct because the charge was filed after the time to file objections had passed.

A hearing was held before the undersigned on January 8, 9, and 10, 2014, in Brooklyn, New York. The Petitioner and the Employer appeared at this hearing.

At the hearing, all parties were represented by counsel and afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues and present oral argument.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Petitioner's objections.³

THE OBJECTIONS

There were three work sites covered by this petition, a courthouse in Staten Island, Gabresky Airport in Suffolk County, and John F. Kennedy Airport in Queens, herein referred to as the JFK site. The Petitioner's objections pertain to the JFK site.

The work at the JFK site consists of replacing fuel liners in containment areas around fuel tanks. The job involves removing the liner around a fuel tank, replacing the liner, and replacing

³ References to the transcript are identified as Tr. ___. References to the Board, Petitioner, and Employer's exhibits will be cited as Bd. Ex. ___, Pet. Ex. ___, and Er. Ex. ___, respectively.

the stone over the liner. The Employer is performing this work in a number of fuel tanks at JFK. The Port Authority of New York and New Jersey makes two tanks available for the Employer to work in at a time. Tr. at 289.

Because I find that there is merit to that portion of Objection No. 2 alleging that during the critical period before the election, Rolquide Peralta, an alleged agent of the Employer, told bargaining unit employees that they had to take a picture of their ballots during the election and show the picture to the Employer or they would lose their jobs, I will discuss that objection first.

Objection No. 2

In Objection No. 2, the Petitioner alleges that during the critical period before the election, Rolquide Peralta, an alleged agent of the Employer, told bargaining unit employees that they had to take a picture of their ballots during the election and show the picture to the Employer or they would lose their jobs. The Petitioner further alleges that this directive came directly from Tom Polsinelli, the Employer's owner. In addition, the Petitioner alleges that during the critical period prior to the election, Polsinelli told employees that if they voted for the Union and the Union won the election, the employees would not work in the industry again.

1. Threat by Peralta

Agency

The Petitioner alleges that Peralta is an agent of the Employer. During the critical period, Peralta worked as a foreman on the JFK Airport job. Tr. at 254. Peralta was identified as a foreman by employees working at the JFK Airport job, including Anthony Castellano, Roberto Martinez, and Daniel Mazarina. Tr. at 33 (Castellano), 91, 129 (Martinez), 336 (Mazarina).

Tom Polsinelli, the Employer's vice-president, and Gary Caparelli, another foreman,⁴ also identified Peralta as a foreman. Tr. at 254 (Polsinelli), 432 (Caparelli).⁵

The Petitioner presented evidence that Peralta plays a role in hiring employees. Roberto Martinez, a current employee of the Employer, testified that his brother, Kevin Cardenas, another Atlas employee, initially brought him to the job site and introduced him to Peralta. Martinez testified that Peralta tested his skills and put him to work. Tr. at 98. Peralta told Martinez how much he would be earning and has assigned him overtime. Tr. at 100, 102. In addition, on occasion, Peralta will tell Martinez to report to work later than the usual reporting time. Tr. at 102. Martinez stated that he has seen Peralta test individuals for employment and decide not to hire them. Tr. at 103.

The Petitioner presented evidence that Peralta directs employees' work. Martinez testified that Peralta is the one who tells the employees what to do and that he does not do anything at work without instruction from Peralta. Tr. at 91. Martinez also testified that Peralta would sometimes change an employee's assignment. For example, Peralta would move employees from one work location to another. Tr. at 99, 106. Alvin Colon, a former Atlas employee, worked at the JFK site from December 2012 until June 2013.⁶ He testified that during that time, Peralta directed his work. Tr. at 164. Daniel Mazarina, a former Atlas employee who worked at JFK, also testified that Peralta assigned him work and told him when to come into work. Tr. at 336-37. Anthony Castellano, a former Atlas employee who worked at JFK, worked for the Employer for approximately two weeks in July 2013. He testified that during this time,

⁴ Gary Caparelli's alleged agency and supervisory status is discussed in connection with Objection No. 1 below.

⁵ The transcript reads that Caparelli identified the other foreman at the JFK Airport job as "Roal Guida (ph) and we call him Ralph," Tr. at 432. It is clear from the questions that follow that Caparelli is referring to Peralta. Many of the employees referred to Peralta as "Ralph" during the hearing.

⁶ Colon was laid off in December 2013. Tr. at 162.

Peralta directed employees at the worksite. Tr. at 49. Caparelli confirmed that Peralta gave the employees direction. Tr. at 523.

The Petitioner also presented evidence that Peralta plays a role in terminating employees. Castellano was terminated on or about July 16 or 17. Caparelli told Castellano that he was being let go because Peralta did not like him. Tr. at 40. Roberto Martinez testified that Castellano was terminated after Peralta told Martinez that Peralta did not like the way Castellano was doing the job. Tr. at 105. Martinez testified that as the foreman and the “leader,” Peralta had the power to “terminate anyone who he doesn’t like or he doesn’t like the way that person performs their job.” Tr. at 129.

Employees Martinez and Mazarina both testified that Peralta told them they were not allowed to talk about the Union or he would fire them. Martinez testified that during the critical period, Peralta said that Martinez “was not allowed to say anything about the Union, otherwise he was going to get rid of” him. Tr. at 92. According to Martinez, Peralta repeated this threat to all the employees. Tr. at 93. Mazarina similarly testified that Peralta told him that he did not want anyone at work talking about the Union and that if employees did talk about the Union, “they were going to go home.” Tr. at 342.

Vice-President Polsinelli concedes that Peralta plays a role in terminating employees. Polsinelli testified that Castellano’s employment was terminated after Peralta told Polsinelli that Castellano was “not the type of guy that we want here.” Tr. at 400. Polsinelli only observed Castellano work “once or twice,” and did not think that Castellano was strong enough to do the work. Id. In addition, Polsinelli testified that if Peralta tells him that a worker is not doing a good job, that person will be “gone immediately.” Tr. at 279. Polsinelli also testified that he has always followed Peralta’s recommendations that a worker be terminated, which has occurred “quite a few times” since the JFK job began. Tr. at 418-19.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding Peralta's agency status, each witness appeared to be straightforward, honest, and testified in a clear manner. I note that the witnesses' testimony was consistent. In particular, I note that Vice-President Polsinelli and foreman Caparelli's testimony corroborated the testimony of the employees. I generally credit the foregoing testimony regarding Peralta's agency status.

Discussion

When considering if an employee is an agent of an employer, the Board determines whether, given the totality of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. See Waterbed World, 286 NLRB 425, 426-27 (1987). In making this determination, the Board examines the "position and duties [of the alleged agent] as well as the context in which his conduct occurred." See Jules V. Lane D.D.S., P.C., 262 NLRB 118, 119 (1982). The burden of establishing agency rests with the party asserting that status. See Oakwood Healthcare Inc., 348 NLRB 686, 687 (2006).

In this case, I find that employees would reasonably believe that Peralta spoke and acted on behalf of management. Peralta is a working foreman, a title used by the employees at the JFK site as well as by Polsinelli and Caparelli. Employees were aware that Peralta plays a role in hiring employees. Martinez testified that when he applied for his job at Atlas, it was Peralta who tested his skills and told him to start work when he was hired. Martinez had seen Peralta test other applicants' skills and not hire those applicants. Martinez testified that Peralta told him how much he would be earning and if his work hours were going to vary from the usual schedule,

including assigning him overtime. Mazarina also testified that Peralta would tell him when to report for work.

Employees stated that Peralta directed their work. Martinez, Colon, Mazarina, and Castellano all testified that Peralta directed their work, including assigning them tasks and moving them from one work location to another. Martinez stated that he does not do anything at work unless instructed to do so by Peralta. Foreman Caparelli corroborated this testimony.

Employees were aware of Peralta's role in terminating employees. Employees were aware that Peralta recommended Castellano's termination. Castellano was told by Caparelli that it was Peralta who wanted him terminated. In addition, Martinez testified that Castellano was terminated after Peralta told Martinez that he did not like the way Castellano was doing his job. Martinez testified that he believed that Peralta had the power to terminate employees. In addition, both Martinez and Mazarina testified that Peralta threatened to send them home or terminate them if they spoke about the Union, suggesting to them that he had the authority to make such decisions. Vice-President Polsinelli confirmed that he has always followed Peralta's recommendations to terminate employees, including Castellano.

Based on the foregoing facts, I find that employees would reasonably believe that Peralta speaks for management and that he is an agent of the Employer within Section 2(13) of the Act. See El Paso Electric Co., 350 NLRB 151, 162 (2007) (finding agency status for an individual who corrected employees' mistakes, conveyed information regarding production and work rules, moved employees from one work location to another as needed, and served as a conduit between the employees and management); Wal-Mart Stores, Inc., 350 NLRB 879, 891 (2007) (finding agency status for an individual who directed employees' work and ensured compliance with policies).

Peralta's Alleged Threat

Two witnesses who heard Peralta discuss taking photographs of ballots testified. Santos Hernandez is employed by the Employer as a foreman. He worked at the Gabresky Airport location during the critical period. He testified that in late October or early November 2013, he attended a meeting held by Vice-President Polsinelli at Atlas's office in Jamaica, New York. Tr. at 527. Polsinelli, Caparelli, and Hernandez were in the office. Peralta and Joe Foram, another foreman, were not physically in the office, but were on speaker phone. Tr. at 529. Hernandez testified that Polsinelli asked the foremen to talk to the employees at their locations about the pros and cons of the Union. Tr. at 528. Hernandez testified that Peralta said that he had told "his employees to take pictures of the ballot and then he [said] that [if] the employee . . . didn't do that, he was not going to give them no – no work." Tr. at 528. Hernandez testified that he told Peralta that it was not a good idea to say that. Id.

JFK employee Daniel Mazarina testified that one day when he was leaving work with a group of co-workers, Peralta told them that it was a bad idea to take a picture of their ballots. However, Peralta also told the employees that they should vote the way they wanted, but that he wanted proof of how each person votes so he could send them home. Tr. at 355. Mazarina testified that all of his coworkers were present for this conversation, but did not identify any individuals. Tr. at 358.

JFK employee Roberto Martinez testified that during the critical period, he heard from another employee that Peralta told employees to take pictures of their ballots, but Martinez did not hear it directly from Peralta. Specifically, Martinez testified that employee Jose Lorenzo came over to a group of employees, including Martinez, Mohammed Fazel, Junior Valet, and Claudio De La Cruz, in the parking lot during their lunch break and told them that Peralta had said "something about taking a picture [of] the vote, so he can keep the right people with him."

Tr. at 93, 121. Mazarina testified that he heard co-workers discussing being told to take pictures of their ballots, but he did not indicate who had said this. Tr. at 350.

Employees at other locations also heard that Peralta had made the alleged threat. Alvin Colon, who was working at the Staten Island Courthouse during the critical period, testified that in November 2013, he heard from Mazarina and Martinez that Peralta was telling people that they had to take a picture of their ballot and that he wanted to see how they voted. Tr. at 192-93, 195, 196, 224-25. Colon originally heard from Mazarina that Peralta had told people to take pictures of their ballots and show it to him. Colon asked Martinez if this was true and Martinez confirmed that Peralta had said that. Tr. at 224-25. Colon testified that the allegation that Peralta told employees to take a picture of their ballots “spread like wildfire, so everybody knew.” Tr. at 225. Colon testified that he never heard anyone refute this statement on behalf of the Employer. Tr. at 196. Santos Hernandez also testified that although he never mentioned anything about taking a picture of a ballot to the employees working at the Gabresky Airport site, “it was something that was being spoken [about] by all of the . . . employees.” Tr. at 543.

Vice President Polsinelli testified that he heard that Peralta had told employees to take pictures of their ballots and give it to the company, which lead him to conduct an investigation into the allegation.⁷ Tr. at 322. Polsinelli did not indicate when he heard this. According to Polsinelli, he spoke to Peralta, who denied telling employees to take pictures of their ballots. Tr. at 427. Polsinelli testified that he also spoke to foreman Gary Caparelli, Bhola Seebajan, Daniel Mazarina, an employee referred to as “D.J.,” and other unidentified employees at the JFK site about the alleged threat. Tr. at 322-23, 389. Polsinelli testified that he did not speak to

⁷ During Polsinelli’s direct and cross examination on this topic, the parties referred to an affidavit Polsinelli had provided prior to the hearing. That affidavit was included in Board Exhibit 1 because it was an exhibit to the Employer’s Exceptions to the Regional Director’s Report on Challenges, Objections and Notice of Hearing. I have relied only on Polsinelli’s testimony at the hearing and have not considered the affidavit in making my findings of fact or credibility.

employee Jose Lorenzo about this allegation. On direct examination, Polsinelli testified that he did not speak with Lorenzo because he “didn’t realize that Mr. Lorenzo was the guy who made that mention until I really read Mr. Peralta’s or somebody’s affidavit.” Tr. at 325. On cross-examination, Polsinelli testified that as part of his investigation of the allegation, he heard from the employees that Jose Lorenzo was the “guy that had made the mention about [taking pictures of ballots], but [Polsinelli] never approached [Lorenzo] personally to ask him about it.” Tr. at 389. Polsinelli did not testify about the meeting he held with the foremen as described by Santos Hernandez. When asked if he refuted the threat, Polsinelli testified, “I said no pictures being on your vote because I knew the ramifications of taking pictures when you go into a ballot.” Tr. at 323. Polsinelli did not indicate to whom or to how many employees he made this statement.

Polsinelli denied that he ever told Peralta to tell employees to take pictures of their ballots. Tr. at 387.

Credibility

After observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding Peralta’s alleged threat, I generally credit the testimony of Hernandez, Mazarina, Martinez, and Colon. Each witness appeared to be straightforward, honest, and testified in a clear manner. I note that the witnesses’ testimony was consistent and each corroborated the other’s testimony. I further note that the Board has recognized that where the testimony of a current employee is adverse to the Employer, and where the employee is not a discriminatee with any financial interest in the case, that testimony is considered against self interest and more worthy of belief. Evergreen America, 348 NLRB 178, 207 fn.63 (2006); Meyers Transportation of New York, 338 NLRB 958, 968 (2003); Stanford Realty Assoc., 306 NLRB 1061, 1064 (1992); Georgia Rug Mill, 131 NLRB 1304, 1305 fn. 2 (1961), enfd. as

modified 308 F.2d 89 (5th Cir. 1962). This is true of Martinez and Hernandez, both of whom testified against the Employer's interest and are current employees.

With regard to Hernandez's testimony, the Employer argued that Hernandez testified in violation of the sequestration order in effect during the hearing because Hernandez's son, Francesco Hernandez, had testified previously during the hearing. Neither witness was present for the other's testimony. When asked about conversations he had had with his son about the hearing, Santos Hernandez testified that his son asked him to testify and to tell the truth, but that they did not discuss Francesco Hernandez's testimony or the details of the case. Tr. at 532. I credit this testimony. The Employer offered no evidence that either witness had violated the sequestration order.

I further note that while Santos Hernandez testified in Spanish, and the foreman's meeting was conducted in English, Hernandez testified that he was able to understand what was said during the meeting. Tr. at 545. I also note that he testified that he responded to Peralta during the meeting, telling him that he should not tell the employees to take a picture of their ballot, suggesting that he understood what had been said.

I further note that the testimony of Mazarina, Martinez, Hernandez, and Colon is unrebutted. Peralta did not appear at the hearing. Polsinelli was present for the entire hearing, but did not refute Hernandez's account of the meeting between himself and the foremen at which Peralta admitted to making the alleged statement. The Employer admits that there was discussion among employees that Peralta had made the alleged comments, prompting Polsinelli's investigation.

I do not rely on Polsinelli's testimony regarding his investigation of Peralta's alleged comment due to the inconsistencies within that testimony. Specifically, Polsinelli's testimony about his knowledge of Jose Lorenzo shifted between his direct testimony and his cross-

examination. Polsinelli originally testified that he did not know it was Lorenzo who allegedly told employees that Peralta made the alleged threat until he read it in another affidavit. On cross-examination, however, he stated that he heard that Lorenzo was telling employees that Peralta had made the alleged threat during his investigation, and yet did not speak to Lorenzo as part of his investigation. I find it incredible that the Employer would not speak to the person allegedly spreading the statement that employees should take pictures of their ballots or be fired as part of an investigation into that very allegation. Further, I do not rely on Polsinelli's assertion that he told employees not to take pictures of their ballots because this testimony lacked specificity. Polsinelli did not indicate the identities or number of employees to whom he made this comment.

Discussion

When evaluating objectionable conduct, the Board will set aside an election when the alleged conduct “so interfered with the necessary ‘laboratory conditions’ as to prevent the employees’ expression of a free choice in the election.” Dairyland USA Corp., 347 NLRB 310, 313 (2006), enfd. sub nom. NLRB v. Food & Commercial Workers Local 348-S, 273 Fed. Appx. 40 (2d Cir. 2008). The Board employs an objective test to determine if “the conduct of a party to an election has the tendency to interfere with the employees’ freedom of choice.” Cambridge Tool & Mfg. Co., 316 NLRB 716 (1995). In the case of an alleged threat, the Board will consider the nature of the threat, the authority of the person making the threat, “the proximity in time of the threat to the election, and the closeness of the election.” Hopkins Nursing Care Center, 309 NLRB 958, 958 (1992).

The Board has routinely found threats of discharge made during the critical period to be objectionable and grounds for setting aside elections. In Waste Management, Inc., 330 NLRB 634 (2000), the Board set aside an election where the employer had threatened an employee with discharge for his support of the union. The Board noted that a threat of discharge “is highly

coercive and one of the most serious forms of employer misconduct.” Waste Management, 330 NLRB at 634 fn. 2. See also Asociacion Hospital Del Maestro, Inc. d/b/a Hospital Del Maestro, 323 NLRB 93 (1997) (in which the Board set aside an election following a threat of discharge). The objecting party must prove dissemination. See Sanitation Salvage Corp., 359 NLRB No. 130 (2013).

I further note that, as the Regional Director stated in his Report on Challenges and Objections, requiring employees to take a photograph of their ballots to prove how they voted is analogous to chain voting. Chain voting occurs where a voter takes an unmarked ballot out of the polling area, the ballot is marked by someone else, and the ballot is then deposited into the ballot box by a second voter. The Board has found such conduct objectionable. See Newport News Shipbuilding and Dry Dock Co., 243 NLRB 99 (1979).

In this case, the credible evidence demonstrates that Peralta told employees that they should take a picture of their ballots and show the picture to the Employer or they would lose their jobs. As Santos Hernandez testified without rebuttal, in a meeting with Vice President Polsinelli and other foremen, Peralta admitted that he told employees to take a picture of their ballots and that if the employees did not comply, they would be let go. Daniel Mazarina testified that Peralta told a group employees that it was a bad idea to take pictures of their ballots, but in the same conversation, Peralta stated that he wanted proof of how each person voted so he could send people home. Thus, Peralta basically reiterated the same threat, requiring proof of how each employee voted upon threat of job loss.

The Petitioner alleges that Polsinelli directed Peralta to make this threat to the employees. The Petitioner presented no evidence that Vice President Polsinelli directed Peralta to make this threat to employees and I do not find that Polsinelli did so.

The evidence further shows that the threat that employees had to take pictures of their ballots or lose their jobs was widely disseminated throughout the unit. Mazarina testified that Peralta told a group of employees that they had to prove how they voted or they would be sent home. Martinez testified that Jose Lorenzo reiterated to a group of employees that Peralta wanted employees to take pictures of their ballots or they would lose their jobs. Colon and Santos Hernandez testified that Peralta's threat was disseminated at the Staten Island and Gabresky Airport sites, even though Peralta worked at the JFK site. The Employer concedes it was aware that this statement was being repeated around the unit, as evidenced by Polsinelli's investigation. Thus, the Petitioner has established that the threat was disseminated throughout the unit. Compare Nabors Alaska Drilling, Inc., 325 NLRB 574 (1998) (threat that the employer could find out how people voted and that union organizers would be run off found not to affect election results where threat made to three employees in a unit of 291 employees and the union lost by more than 100 votes).

The Employer has not presented sufficient evidence that the threat was refuted. As noted above, I do not rely on Polsinelli's testimony that he told employees not to take pictures of their ballots. His testimony on this point lacks specificity. He did not indicate to whom or to how many employees he said this. None of the employees indicated that the Employer had refuted the threat. In fact, Colon specifically testified that he did not hear anyone from the Employer refute the threat.

I also note that Martinez and Mazarina both credibly testified that Peralta told them not to talk about the Union or he would get rid of them. This testimony is un rebutted. Martinez testified that all the employees at the JFK site were present when Peralta told them not to talk about the Union. I do not rely on this evidence in my recommendation to sustain this objection. See Precision Products Group, Inc., 319 NLRB 640 (1995) (finding that a hearing officer may

consider only those objections on which the Regional Director has directed a hearing). I do find, however, that this evidence provides relevant context for the alleged threat by Peralta, suggesting that the alleged threat may have carried additional weight with employees in light of the threat that employees could not discuss the Union or they would be terminated. See Ron Junkert, 308 NLRB 1135, 1135 fn 2 (1992) (in which the Board found that the context in which a threat was made was relevant in determining whether the threat was coercive); Farmtronix, 274 NLRB 898, 899 (1985) (finding that the context in which a threat was made was relevant in determining whether the threat could have impacted an election).

I find that this conduct could have interfered with employees' free choice and could have affected the outcome of the election. The threat of discharge was serious in nature, as noted by the Board in Waste Management, Inc., 330 NLRB 634, supra. In addition, the requirement that an employee produce proof of his or her ballot is also a serious infringement on the secrecy of the election process. See Newport News Shipbuilding and Dry Dock Co., 243 NLRB 99, supra. The evidence shows that the employees believed that Peralta had the authority to terminate employees, making the threat credible. The threat occurred during the critical period before the election. See Ideal Electric & Mfg. Co., 134 NLRB 1275, 1278 (1961) (in which the Board stated that "we believe that conduct [occurring between the filing of the petition and the election] which tends to prevent a free election should appropriately be considered as a postelection objection."). I also note that the Employer won the election by a very narrow margin, with 15 against the Petitioner and 13 votes for the Petitioner. See Cambridge Tool and Mfg. Co., 316 NLRB at 716 ("In making its determination as to whether the conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, inter alia, the closeness of the election."). This factor is especially significant given the evidence of wide dissemination of the threat. For these reasons, I recommend that this election be set aside and a new election held.

In the event that the Board does not adopt my recommendation regarding the threat by Peralta, I make the following recommendations regarding the remainder of the Petitioner's objections.

2. Threat by Polsinelli

The remainder of the Petitioner's second objection alleges that during the critical period prior to the election, owner Polsinelli told employees that if they voted for the Union and the Union won the election, the employees would not work in the industry again. The Petitioner presented no evidence that Polsinelli made the alleged statement. Polsinelli specifically denied making the threat. Tr. at 399.

The Petitioner presented evidence that Polsinelli discussed the Union with employees during the critical period. Three employees, Francesco Hernandez, Alvin Colon, and Daniel Mazarina, testified that Polsinelli held meetings during the critical period to discuss the Union. Francesco Hernandez testified that in a group meeting held at the Staten Island site during the critical period, Polsinelli told employees that it would be harder for him to bid on and secure new jobs if there were a Union. Francesco Hernandez said that Polsinelli laid out the pros and the cons of the Union and left it for the employees to decide. He also testified that Polsinelli told Hernandez that he could stay home on the day of the election if he wanted. Tr. at 154-55.

Colon testified that during a meeting held in early October at the Staten Island site, Polsinelli told employees that he had never hired anyone from a union hall and that is not how he runs his business. According to Colon, Polsinelli told the employees that there was additional work ahead and that the people who want the Union could go their way and the "rest of the company will go in their own direction." Tr. at 191. Colon also testified that Polsinelli told him that he could stay home on the day of the election. Tr. at 205.

Mazarina testified that he attended a meeting held by Polsinelli in November at the JFK site. According to Mazarina, Polsinelli told the workers that he did not want them to vote for the Union because the Union would change things. Polsinelli said that the Union would not be good for the employees because they would pay too much money for it. Tr. at 340. He also told employees that if the Union won, it would be more costly for him to bid on jobs. Tr. at 341. Mazarina also testified that Polsinelli said that if the Union won the election, he was not going to do any more work, and that the people who wanted the Union could go and work with the Union. Tr. at 342.

I credit Polsinelli's denial regarding the allegation that he told employees that if they voted for the Union and the Union won the election, the employees would not work in the industry again.

Discussion

The Petitioner's objection alleges that Polsinelli told employees that if they voted for the Union and the Union won the election, the employees would not work in the industry again. The Petitioner presented no evidence that the Employer made such a threat to employees. Polsinelli credibly denied this allegation. Accordingly, I recommend overruling the portion of the Petitioner's Second Objection regarding statements made by Polsinelli.

Although Petitioner presented evidence that Polsinelli made several comments to employees regarding the Union during the critical period, none of these comments are covered by this objection. In his Supplemental Report on Objections, issued on December 30, the Regional Director specifically ruled: "I will not consider the Petitioner's allegations that Tom Polsinelli threatened workers that he would never hire workers from a union hiring hall, and that although the Employer had the ability to get more work at Kennedy Airport, if the Union won the election, the Employer would go in a different direction . . . as objectionable conduct."

Certain statements testified to by Francesco Hernandez, Colon, and Mazarina, including statements that Polsinelli never hired workers from a hiring hall, and that employees could go with the Union and the company would go in its own direction, are specifically covered by the Regional Director's Supplemental Report. To the extent that these witnesses testified to statements that are not covered by the objection or the allegations discussed in the Supplemental Report, such allegations constitute late filed objections. For these reasons, I make no findings or recommendations regarding the statements attributed to Polsinelli. See Precision Products Group, 319 NLRB 640 (1995) (finding that a hearing officer may consider only those objections on which the Regional Director has directed a hearing).

Objection No. 1

In its first Objection, the Petitioner alleges that Gary Caparelli, an alleged supervisor or agent of the Employer, surveilled voters while they were voting during the election at the John F. Kennedy Airport site.

Agency or Supervisory Status

During the critical period, Caparelli was employed by the Employer as a working foreman at the JFK site. Tr. at 431. Caparelli testified that his job duties included keeping the equipment in working order, keeping inventory of materials, ordering materials for the job, and working with the employees, including directing their work and telling them what to do. Tr. at 432. Caparelli was involved in determining daily work projects for the employees and communicating the plan to the employees. Caparelli and Vice President Polsinelli spoke daily to form a work plan. Tr. at 254 (Polsinelli), 435 (Caparelli). Caparelli and Peralta also discussed what needed to be done each day and directed the employees accordingly. Tr. at 433, 435. When assigning tasks to employees, there are some employees who have defined responsibilities,

such as the crane and bobcat operators. Tr. at 523. With regard to the remaining employees, Caparelli and Peralta assigned the work based on each employee's strengths. Tr. at 523. Caparelli explained that the work is very repetitive because the employees performed the same work from tank to tank. Tr. at 522. Polsinelli confirmed that there is not much discretion involved in assigning tasks since the work is identical from tank to tank. Tr. at 288.

Employees Anthony Castellano, Alvin Colon, and Daniel Mazarina all testified that Caparelli directed employees' work. Tr. at 43, 165, 337. Castellano testified that Caparelli gave out assignments every day, assigned the employees to work in a certain tank, and directed their work in the tank. Tr. at 46, 49. Colon testified that Caparelli moved employees from one task to another. Tr. at 165. Mazarina testified that Caparelli would occasionally tell him to use the pay loader to bring rocks or carpet to the fuel tanks. Tr. at 337.

Caparelli also served as the safety officer and would correct employees if he noticed a safety violation, such as an employee operating a chop saw without safety glasses. Tr. at 438. Polsinelli confirmed that Caparelli was responsible for keeping the site safe. Tr. at 301.

Caparelli testified that he does not have the authority to hire employees, but stated that he evaluates applicants and makes recommendations to Polsinelli as to whether an employee is working out or not. Tr. at 439-40. Caparelli testified that about ten employees had been hired on the JFK job and that he made recommendations regarding six of them. Tr. at 441. Polsinelli testified he relied on Caparelli to evaluate applicants for jobs. Tr. at 281. Both Anthony Castellano and Tom Polsinelli testified that when Castellano applied for a job, Caparelli tested him and put him to work. Tr. at 32-33 (Castellano), 281 (Polsinelli). Polsinelli did not find out Castellano had been hired until a day or two later. Tr. at 281.

Caparelli testified that on one occasion, he sent an employee home at the request of the Port Authority resident engineer who oversees the JFK job. According to Caparelli, the resident

engineer told Caparelli that an employee smelled of marijuana and to remove him from the site. Caparelli told the employee that the Port Authority resident engineer wanted the employee off the site and the employee left. Tr. at 446.

Caparelli testified that he has told Polsinelli that an employee is not working out. For example, Caparelli stated that he told Polsinelli that Anthony Castellano was not working out as an employee. Caparelli maintains that he did not recommend firing him. Tr. at 496. Caparelli said that there were approximately three other times he told Polsinelli an employee was not working out. Two of those employees were transferred out of the JFK site. Tr. at 492.

Caparelli is paid a salary, unlike most of the Employer's employees who are paid hourly. Tr. at 257. He drives a company van, which is not intended for his personal use. Tr. at 262. The company also provides Caparelli medical benefits for which Caparelli makes no contribution. Tr. at 265-66.

Castellano and Colon both testified that the employees regarded Caparelli as a supervisor and followed his direction. Tr. at 74 (Castellano), 171, 174 (Colon). Polsinelli conceded that many employees regard Caparelli as their supervisor. Tr. at 298.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing witnesses regarding Caparelli's status, each witness appeared to be straightforward, honest, and testified in a clear manner. I note that the witnesses' testimony was consistent. I note that Caparelli and Polsinelli's testimony corroborated the testimony of the employees. I generally credit the foregoing testimony regarding Caparelli's status.

Discussion

As discussed above, the Board finds agency when, given the totality of the circumstances, employees would reasonably believe that the employee in question was reflecting company

policy and speaking and acting for management. See Waterbed World, 286 NLRB 425, 426-27 (1987). In this case, I find that employees would reasonably believe that Caparelli was speaking on behalf of management.

Like Peralta, Caparelli is employed as a foreman. Like Peralta, Caparelli assigned work to employees and sometimes moved employees from one work location to another at the JFK site, as described by Castellano, Colon, and Mazarina. Caparelli also served as the site safety officer and gave employees direction with regard to safety issues, such as wearing protective apparatus.

With regard to hiring, Caparelli and Polsinelli testified that Caparelli, like Peralta, tested applicants and made recommendations to Polsinelli about whether applicants should be hired permanently. Castellano testified that it was Caparelli who hired him and who told him he was fired. When Castellano started work, Polsinelli did not know he had been hired until a day or two after Caparelli put him to work.

On at least one occasion, Caparelli sent an employee home for smelling of marijuana. While Caparelli credibly testified that he did not make the decision to send the employee home and that he was acting on the direction of the Port Authority, he was the one to convey the message to the employee on behalf of Atlas.

Colon, Castellano, and Polsinelli all testified that the employees regard Caparelli as a supervisor.

Based on these facts, I find that employees would reasonably believe that Caparelli speaks for management and that he is an agent of the Employer within Section 2(13) of the Act. See El Paso Electric Co., 350 NLRB 151, 162 (2007) (finding agency status for an individual who corrected employees' mistakes, conveyed information regarding production and work rules, moved employees from one work location to another as needed, and served as a conduit between

the employees and management); Wal-Mart Stores, Inc., 350 NLRB 879, 891 (2007) (finding agency status for an individual who directed employees' work and ensured compliance with policies).⁸

Caparelli's Alleged Conduct

Caparelli was the sole witness who testified to the alleged surveillance.

The election poll at the JFK site was held in a trailer from 7 a.m. to 9 a.m. Employees usually sign-in on a sheet maintained in this trailer. On the day of the election, the employees could not access the sheet in the trailer, so Caparelli maintained the sign-in sheet in his van. Tr. at 461. Caparelli signs the sign-in sheets everyday as the Employer's representative. Tr. at 255; Pet. Ex. 1.

Caparelli arrived at JFK between 6:30 and 7:00 a.m. Tr. at 458. He facilitated a number of visitors' vehicles through JFK security, including the vehicle for the Board Agent conducting the election. Tr. at 458. Caparelli then drove to the trailer, which was about 650 feet from the security gate. Tr. at 521. He parked his van approximately 25 feet away from the trailer. Tr. at 521. He entered the trailer during the pre-election conference to turn on the heat. Tr. at 459. Caparelli then exited the trailer and walked over to his van. Approximately five employees approached Caparelli's van to sign in. Once they signed the sign-in sheet, they walked away from the van. Tr. at 461.

Caparelli then got on line to vote. He voted shortly after 7 a.m. After voting, Caparelli exited the trailer and returned to his van a few minutes after 7 a.m. Tr. at 463. More employees approached his van to sign in. Caparelli allowed the employees present to sign in. At about 7:15 a.m., he drove his van to the tank where the employees were working that day, which was about

⁸ Because I find that Caparelli is an agent within the meaning of the Act, it is not necessary for me to make a finding regarding his alleged supervisory status within the meaning of Section 2(11) of the Act.

800 feet from the trailer. Tr. at 466. Caparelli stated that he did not know how long it took the employees at the JFK site to vote. Tr. at 467.

I generally credit Caparelli's testimony regarding his conduct on the morning of the election. Caparelli testified in a clear, straightforward manner. His testimony is un rebutted.

Discussion

The evidence establishes that Caparelli voted shortly after 7 a.m., when the polls opened. After he voted, Caparelli remained approximately 25 feet away from the trailer, where he allowed employees to sign the Employer's sign-in sheet until approximately 7:15 a.m. At that time, Caparelli drove to the fuel tank where he was working for the day, approximately 800 feet from the trailer.

The Board has found that the presence of supervisors near the polls, without additional evidence of interference, is not sufficient to support an objection alleging surveillance. In Roney Plaza Management Corp., 310 NLRB 441 (1993), a group of three supervisors were stationed approximately 25 feet away from the entrance to the polling place. There was no evidence that the supervisors approached the line of people waiting to vote or spoke to any employees. Moreover, the evidence established that the supervisors were in an area where they regularly stand as part of their duties. The Board adopted the hearing officer's recommendations that there was no evidence of interference with the election and found that the presence of these supervisors was not objectionable. See Roney Plaza Management, 310 NLRB at 447. Similarly, in Patrick Industries, Inc., 318 NLRB 245 (1995), three supervisors met on the production floor in plain sight of the voting area for approximately ten minutes while voting was taking place and remained in that location after the voting ended. The supervisors were discussing a piece of equipment which was not working. That equipment was located about 35 feet from the door of the polling room. The Board found that this conduct was not objectionable because the

supervisors were in the area for a reason unrelated to the voting, did not converse with employees, and remained a reasonable distance from the polling place, and there was no evidence that the supervisors' conduct was intimidating. See Patrick Industries, Inc., 318 NLRB at 256; see also Standard Products Co., 281 NLRB 141, 163-165 (1986) (finding that the occasional presence of supervisors near the polls and a congregation of supervisors 50 to 60 feet from the polling area were not objectionable); compare ITT Automotive, 324 NLRB 609 (1997) (finding a continued presence of supervisors in an area where employees must pass in order to enter the polling area in order to vote is objectionable).

In this case, Caparelli was standing about 25 feet away from the trailer, the same distance as the supervisors stood from the polling place in Roney Plaza Management, supra. There is no evidence that he engaged in any electioneering or interfered with the election in any other manner during this time. I note that while Caparelli was not in an area where he might usually stand, he was present to allow employees to sign in, which is a regular requirement for the employees. Moreover, it is the Employer's usual practice for Caparelli to sign the Employer's sign-in sheets. See Patrick Industries, Inc., 318 NLRB 245, supra (declining to find surveillance where a supervisors were within sight of the polls, but were conducting regular business). He testified credibly and without rebuttal that he did not know how long it took employees to vote, suggesting that he was not monitoring the line. Absent evidence that Caparelli's presence near the polling place on the morning of the election interfered with the election, I recommend overruling the Petitioner's first objection. See Roney Plaza Management, 310 NLRB 441, supra; Patrick Industries, Inc., 318 NLRB 245, supra; Standard Products Co., 281 NLRB 141, supra.

RECOMMENDATION

I have recommended sustaining that portion of the Petitioner's second objection alleging that Rolquide Peralta told employees to take a picture of their ballot and show it to the Employer or they would be fired. I have recommended overruling the remainder of the Petitioner's objections. Accordingly, I further recommend that the election held on November 20, 2013 be set aside and a new election held. I further recommend, in view of the foregoing, that the Notice of Second Election should include the following paragraph, in accordance with the Board's decision in Lufkin Rule Co., 147 NLRB 341 (1964):

NOTICE TO ALL VOTERS

The election conducted on November 20, 2013 was set aside because the National Labor Relations Board found that certain conduct of Atlas Roll-Off Corp. interfered with its 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.

RIGHT TO FILE EXCEPTIONS

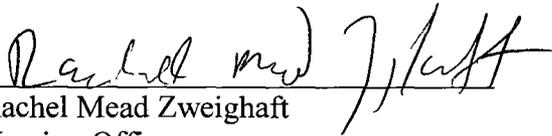
Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on

April 3, 2014, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions 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. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Brooklyn, New York, on March 20, 2014.


Rachel Mead Zweighaft
Hearing Officer
National Labor Relations Board, Region 29
Two MetroTech Center
Brooklyn, New York 11201