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April 1, 2014

**REQUEST FOR EMERGENCY RELIEF**

**REQUEST FOR EXTENSION  
TO FILE EXCEPTIONS**

**VIA FEDERAL EXPRESS**  
**VIA ELECTRONIC FILING**  
National Labor Relations Board  
1099 14th St. NW  
Washington D.C. 20570-0001  
Attn: Executive Secretary of the NLRB

**Re: NLRB Case No.: 29-RC-114120**  
**Atlas Roll-Off Corp., Employer and Local 175**  
**United Plant & Production Workers IUJAT, Petitioner**  
**MHH File No.: M-6591.005**

Dear Executive Secretary:

Please be advised that our law firm represents Atlas Roll-Off Corp. ("Atlas").

On behalf of our client, we hereby request "**For Good Cause**", a thirty (30) day extension of time to file **Exceptions** from the April 3, 2014 deadline in connection with the above-referenced NLRB case.

**The reasons for the requested short extension are as follows:**

1. Attached hereto, marked **Exhibit "1"** is a copy of a document entitled "Hearing Officer's Report and Recommendations on Objects" (hereinafter "**Report**"). The **28-page** Report is dated **March 20, 2014**. Atlas and the undersigned received the Report on **March 24, 2014**.



National Labor Relations Board  
April 1, 2014  
Page 2

2. The Report was issued after a three-day Hearing conducted on January 8, 9 and 10, 2014. NLRB Region 29 Hearing Officer took approximately 70 days to issue the Local/Brooklyn District Report.

3. Atlas has expended substantial funds, both prior to the aforementioned three-day Hearing and subsequent to January 10, 2014. Said Employer costs included, but were not necessarily limited to, defending and, to a certain extent, winning three (3) separate and distinct additional purported Unfair Labor Practice Charge(s) related to the instant NLRB case in which Atlas seeks to file Exceptions. These related Atlas/Local 175 NLRB cases are:

- (a) NLRB Case No. 29-CA-119669;
- (b) NLRB Case No. 29-CA-120389;
- (c) NLRB Case No. 29-CA-123415.

During the period from January 11, 2014 and in the month of February, 2014, the undersigned, on behalf of Atlas, never requested an adjournment. Whatever the NLRB deadlines were, no matter how tight the time parameters, our law firm complied with all of the NLRB requirements.

4. On Friday, March 27, 2014, a Decision from NLRB Region 29 by the Regional Director, was issued. Please see Exhibit "2" for a copy of this Decision. We respectfully assert that the Regional Director's March 27, 2014 Decision impacts, and to a certain extent, is both inconsistent with the NLRB Hearing Officer's March 20, 2014 Report (Exhibit "1").

5. In addition, Atlas, as per its statutory right, intends to Appeal on or before April 10, 2014, the March 27, 2014 Regional Director's Decision (Exhibit "2").

6. Atlas was of the opinion that it had won the aforementioned Hearing. As such, Atlas (to save money), did not order the Hearing transcript(s) from the stenographer at the Administrative Tribunal prior to last night. Atlas, except for one (1) important issue, did win (in my opinion) the 3-day Hearing. In addition, I specifically recall the Local NLRB Hearing Officer admonishing, on more than one occasion, the Petitioner (proposed Local Union 175) and its attorney that they were conducting a fishing expedition to try to prove their *prima facie* case against Atlas. This request for an adjournment is needed to properly represent Atlas in this important matter.



National Labor Relations Board  
April 1, 2014  
Page 3

7. Atlas needs more time than nine (9) business days to properly represent itself in filing Exceptions. Given that it took a substantial period of time for NLRB Region 29 to issue its Report, it is respectfully requested that the foregoing represents sufficient good cause to grant a thirty (30) day extension from the April 3, 2014 deadline to Atlas and this law firm.

8. No prior relief has been requested.

9. The interests of justice and old fashioned fair play are additional reasons why Atlas should be granted its request for a thirty (30) day extension from the April 3, 2014 deadline.

10. It is respectfully submitted that there is no prejudice to any party other than Atlas if this extension is not given.

**ANYTHING TO THE CONTRARY NOTWITHSTANDING, THIS REQUEST FOR AN EXTENSION TO FILE EXCEPTIONS IS SUBJECT TO BEING AMENDED.**

Respectfully submitted,

Encl.

MORITT HOCK & HAMROFF LLP

By: \_\_\_\_\_

Gary Wirth, Esq.

cc: Via Facsimile: (718-330-7579) (w/attachment)  
National Labor Relations Board  
Attn: James G. Paulsen, Regional Director

Via E-Mail: rachel.zweighaft@nlrb.gov (w/attachment)  
National Labor Relations Board  
Attn: Rachel Zweighaft, Esq.

Via E-Mail: nancy.reibstein@nlrb.gov (w/attachment)  
National Labor Relations Board  
Attn: Nancy K. Reibstein, Esq.



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National Labor Relations Board  
April 1, 2014  
Page 4

Via E-Mail: [tpatlasco@cs.com](mailto:tpatlasco@cs.com) (w/attachment)  
Atlas Roll-Off Corp.  
Attn: Tom Polsinelli, Vice-President  
*(Employer)*

Via E-Mail: [chaikinlaw@aol.com](mailto:chaikinlaw@aol.com) (w/attachment)  
Law Offices of Chaikin & Chaikin  
Attn: Eric Chaikin, Esq.  
*(Attorney for Proposed Union)*

Via E-Mail: [kate.anderson@nlrb.gov](mailto:kate.anderson@nlrb.gov) (w/attachment)  
National Labor Relations Board  
Attn: Kate Anderson, Investigator

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 29

-----X  
ATLAS ROLL-OFF CORP.,

Employer,

- and -

LOCAL 175, UNITED PLANT & PRODUCTION  
WORKERS, INTERNATIONAL UNION OF  
JOURNEYMEN AND ALLIED TRADES,

Petitioner.  
-----X

Case No.: 29-CA-114120

**AFFIDAVIT AND**  
**CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of April, 2014, I served a genuine copy of **EMPLOYER ATLAS ROLL-OFF CORP.'S REQUEST FOR EXTENSION TO FILE EXCEPTIONS WITH ACCOMPANYING EXHIBITS** upon:

Via Facsimile: (718-330-7579)  
National Labor Relations Board  
Attn: James G. Paulsen  
Regional Director

Via E-Mail: tpatlasco@cs.com  
Atlas Roll-Off Corp.  
Attn: Tom Polsinelli, Vice-President  
(Employer)

Via E-Mail: rachel.zweighaft@nlrb.gov  
National Labor Relations Board  
Attn: Rachel Zweighaft, Esq.

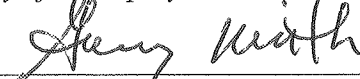
Via E-Mail: chaikinlaw@aol.com  
Law Offices of Chaikin & Chaikin  
Attn: Eric Chaikin, Esq.  
(Attorneys for Proposed Union)

Via E-Mail: nancy.reibstein@nlrb.gov  
National Labor Relations Board  
Attn: Nancy K. Reibstein, Esq.

Via E-Mail: kate.anderson@nlrb.gov  
National Labor Relations Board  
Attn: Kate Anderson, Investigator

by transmitting the papers by electronic means to the Facsimile and Email address(es) listed above, which facsimile number and email address(es) were designated by the aforementioned recipients for such purpose. I received Facsimile and Email confirmation(s) indicating that transmission(s) were received.

MORITT HOCK & HAMROFF LLP  
Attorneys for Employer Atlas Roll-Off Corp.

By:   
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UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29

ATLAS ROLL-OFF CORP.	)	
	)	
	)	
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,<sup>1</sup> Local 175, United Plant & Production Workers, International Union of Journeymen and Allied Trades, herein called the Petitioner, filed a petition in this

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<sup>1</sup> All dates hereinafter are in 2013 unless otherwise indicated.

**Exhibit** 1

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 95-11 147<sup>th</sup> Place, Jamaica, New York, but excluding all employees of Atlas Transit Mix Corporation and Pro-Concrete Contractors Corporation, located at 95-11 147<sup>th</sup> 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 Excelsior<sup>2</sup> 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

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<sup>2</sup> 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.<sup>3</sup>

### 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

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<sup>3</sup> 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,<sup>4</sup> also identified Peralta as a foreman. Tr. at 254 (Polsinelli), 432 (Caparelli).<sup>5</sup>

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.<sup>6</sup> 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,

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

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup> 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

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<sup>7</sup> 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 un rebutted. 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