

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**CARE ONE AT MADISON AVENUE, LLC
D/B/A CARE ONE AT MADISON AVENUE,**

Employer,

And

Case No. 22-RC-072946

**1199 SEIU, UNITED HEALTHCARE WORKERS
EAST,**

Petitioner.

**EMPLOYER'S MEMORANDUM OF LAW IN
SUPPORT OF EXCEPTIONS**

**Jedd Mendelson, Esq.
LITTLER MENDELSON, P.C.
Attorneys for Care One at Madison
Avenue, LLC d/b/a Care One at
Madison Avenue
One Newark Center – 8th Floor
Newark, New Jersey 07102
Tel. 973.848.4700
Fax 973.556.1612
jmendelson@littler.com**

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	5
I. OBJECTION NO. 16.....	6
II. OBJECTION NO. 9	8
III. OBJECTION NO. 19.....	10
ARGUMENT.....	11
I. THE BOARD SHOULD OVERRULE OBJECTION NO. 16 SINCE THE EMPLOYER DID NOT COMMUNICATE TO VOTING UNIT MEMBERS ANYTHING ABOUT HEALTH CARE CHANGES OUTSIDE THE VOTING UNIT, THE COMMUNICATION THE EMPLOYER ISSUED DID NOT AFFECT THE OUTCOME OF THE ELECTION, AND THE BOARD SHOULD PERMIT AN EMPLOYER TO MAINTAIN THE STATUS QUO IN CIRCUMSTANCES SUCH AS THOSE HERE.....	11
A. The Hearing Officer Erred In Finding That The Employer Was Obligated To Inform Voting Unit Members That Changes Would Be Applied Retroactively After The Election Regardless Of The Outcome And That It Had Postponed Implementation Of The Changes Within The Voting Unit To Avoid The Appearance of Influencing The Election.....	12
B. The Employer Was Denied Due Process Since The Objection Alleged That The Employer Sought To Discourage Voters From Supporting The Union And Neither The Union’s Evidence Nor The Hearing Officer’s Finding Addressed The Employer’s Purpose.....	17
C. Nothing In The Record Supports The Hearing Officer’s Conclusion That The Changes To The Health Insurance Plan For Employees Outside The Voting Unit Affected Any Unit Member’s Vote.....	18

D.	Assuming, <i>Arguendo</i> , That Under Existing Precedent The Employer’s Conduct Was Objectionable, The Board Should Adopt A Rule That Permits An Employer To Decline To Communicate About Future Terms And Conditions Of Employment In The Voting Unit During The Critical Period When A Non-Recurring Improvement Is Implemented Outside The Voting Unit.....	20
II.	THE BOARD SHOULD OVERRULE OBJECTION NO. 9 SINCE THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT ARISTIL WAS NOT PRESENT WHEN THE ALLEGED THREAT WAS SUPPOSEDLY VOICED, THE EMPLOYER’S AGENT DID NOT THREATEN WALSH, AND THE THREAT WOULD NOT HAVE AFFECTED THE OUTCOME OF THE ELECTION EVEN HAD IT BEEN VOICED.....	26
A.	The Board Should Credit Flaumenhaft’s Testimony That Aristil Was Not Present During The Frank-Walsh Encounter, Which Negates The Hearing Officer’s Conclusion That The Alleged Threat Of Violence Affected The Outcome Of The Election.....	27
B.	The Board Should Credit Flaumenhaft’s Testimony That Frank Did Not Threaten Walsh With Physical Violence.....	31
C.	Assuming, <i>Arguendo</i> , That Frank Threatened Walsh As Alleged, The Objection Should Be Overruled Since The Threat Was <i>De Minimis</i> And Could Not Have Affected The Outcome Of The Election.....	32
III.	THE BOARD SHOULD OVERRULE OBJECTION NO. 19 SINCE THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT THE EMPLOYER’S AGENT DID NOT SAY THAT THE EMPLOYER WOULD NEVER ENTER INTO A CONTRACT WITH THE UNION OR OTHERWISE INDICATE THAT IT WOULD BE FUTILE TO ELECT THE UNION.....	34
	CONCLUSION.....	38

TABLE OF AUTHORITIES

	Page
CASES	
<i>Atlantic Forest Products, Inc.</i> , 282 NLRB 855 (1987)	15, 16
<i>Bally’s Park Place, Inc.</i> , 352 NLRB 316 (2008) affirmed and adopted, 356 NLRB No. 40 (2010)	31, 37
<i>Cambridge Tool & Mfg. Co.</i> , 316 NLRB 716 (1995)	32
<i>Cedar-Sinai Medical Center</i> , 342 NLRB 596 (2004)	32
<i>Champion International Corp.</i> , 339 NLRB 672 (2003)	17
<i>Delta Brands, Inc.</i> , 344 NLRB 252 (2005)	27
<i>Factor Sales, Inc.</i> , 347 NLRB 747 (2006)	17
<i>John W. Thomas Co.</i> , 111 NLRB 226 (1955)	33
<i>Kaual Coconut Beach Resort</i> , 317 NLRB 996 (1995)	13, 14, 23
<i>Lamar Advertising of Hartford</i> , 343 NLRB No. 40 (2004)	17
<i>McAllister Towing & Transportation Company, Inc.</i> , 341 NLRB 394 (2004) enfd on other grounds, 156 Fed. Appx. 386 (2d Cir. 2005)	23
<i>Midland National Life Insurance Co.</i> , 263 NLRB 127 (1982)	21
<i>Network Ambulance Services, Inc.</i> , 329 NLRB 1 (1999)	13
<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405 (1964)	13, 22, 24
<i>Noah’s Bay Aarea Bagels, LLC</i> , 331 NLRB 188 (2000)	12, 13, 14, 20, 21, 22, 25
<i>Perdue Farms, Inc. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998)	24
<i>Russell Stover Candies, Inc.</i> , 221 NLRB 441 (1975)	15, 16
<i>Sonicraft, Inc.</i> , 281 NLRB 569 (1986)	15, 16

PRELIMINARY STATEMENT

The Hearing Officer recommended that the Board sustain three objections--out of the twenty objections that the Union initially filed--and those three objections concern two alleged comments that were never made (Nos. 9 and 19) and a memorandum that was directed to employees outside the voting unit that made no reference to the voting unit (No. 16).

Taking the two alleged comments and the circumstances surrounding them in the light most favorable to the Union, Objections No. 9 and 19 are of no moment since they cannot give rise to a rerun election. Even if the alleged remarks were voiced, only a single voter could have been affected and it was the same voter in each instance. Since neither remark was disseminated, the result would be a tie vote and certification of the tally of ballots would result in the Employer remaining non-union.

By its terms, the memorandum that is the subject of Objection No. 16 did not apply to voters, and it was distributed solely to employees outside the voting unit. The Hearing Officer found that the Employer had a legitimate business reason unrelated to the election petition for its announcement during the critical period to employees outside the voting unit that it was making changes in their health insurance plan. In the absence of a nexus between these changes and the voting unit, the Hearing Officer's recommendation that the Board order a rerun election is unfathomable.

Objection 16

Approximately two weeks before the election, the Employer announced to employees, all of whom were outside the voting unit, that it was instituting certain improvements in the health care plan for them. The Employer did not direct any communication to voters: a memorandum was issued solely to employees outside the voting unit that, by its clear terms, indicated that the health insurance changes pertained solely to them. When voters inquired about the health

insurance changes, the Employer declined to address the subject, consistent with the Employer's campaign protocol of not addressing questions or comments about possible changes in terms and conditions of employment or future terms and conditions of employment.

The Hearing Officer concluded that the Employer's conduct was objectionable because it failed to advise the voters that following the election, irrespective of its outcome, the health insurance changes would be implemented as to them and that the reason the changes were being postponed until then was that the Employer did not wish to give the appearance of interfering with the election ("current postponement-future implementation" announcement). The Hearing Officer's conclusion was erroneous on several grounds. First, the Hearing Officer's conclusion that the Employer was obligated to convey the "current postponement-future implementation" announcement was erroneous: a company has the option of conveying that message but is not required to do so. Second, the Hearing Officer ruled on a ground other than that which the objection alleged, violating the Employer's due process rights. Third, no record evidence indicates that the Employer's decision not to address the matter of the health insurance change with the voting unit affected how voters cast their ballots. Fourth, even assuming that under existing precedent the Board would have found that the Employer conducted itself objectionably, the Board should not do so and should instead adopt a rule that permits a company that follows a campaign protocol of strictly maintaining the status quo to **refrain** from communicating with voters about changes that were implemented outside the voting unit and whether such changes might later be instituted in the voting unit.

Objection 9

Frank, one of the consultants engaged by the Employer to conduct employee training, is alleged to have threatened Union organizer Brian Walsh's physical safety in the presence of

Union observer Yvania Aristil. However, Sara Flaumenhaft, a manager who testified that she heard the exchange concerning Frank's age that the Union representatives agreed took place immediately before Frank allegedly threatened Walsh, was quite certain and precise in testifying that Frank did not threaten Walsh or, for that matter, say anything to Walsh or Elliot following the colloquy about Frank's age and, even more, that Aristil was not present during this exchange. A review of the testimony of Flaumenhaft relative to that of Walsh and Elliot highlights how Flaumenhaft's testimony was far more complete and detailed.

Since Aristil's testimony would have been most beneficial in determining whether Frank made the remark and Aristil was present and heard it, the Hearing Officer erred in not finding that the Union's failure to elicit testimony from Aristil should militate in favor of overruling the objection. The Union's assertion that employees were intimidated by the Employer from coming forward and testifying, aside from having no record support (and being untrue), warrants no significance as to Aristil since she served as Union observer for both voting sessions and quite obviously was not concerned about how the Employer viewed her association with the Union.

The Hearing Officer's failure to afford significance to Aristil's failure to testify as a factor militating against the Union's case is especially difficult to understand given his finding that the Employer did not explain its failure to elicit testimony from Frank (or Keith with respect to Objection No. 19). In fact, the Hearing Officer erred in so commenting in that during the hearing the Employer made clear that the consultants worked on a first-name basis only and were insistent for security reasons that the Employer not disclose their last names in response to the

Union's subpoena.¹ The Employer could not call the consultants as witnesses if it was to shield their identities from disclosure as they insisted. In view of the above, the Board should reject the Hearing Officer's recommended conclusion and overrule Objection 9.

Objection 19

Keith, another consultant engaged to conduct training, is alleged to have stated in the presence of Aristil that the Union would never get a contract at this or any CareOne facility. However, Asha George, a manager whose testimony confirms that she heard the exchange that the Union's witnesses agree preceded Keith's alleged statement of futility, maintained that Keith never voiced any statement of futility and that Keith walked away from Union employees Walsh and Ricky Elliot as well as Aristil without voicing another word following the coarse but lawful exchange that all agree took place. The Union's failure to call Aristil as a witness, as with Objection No. 9, should be fatal since her testimony would have confirmed whether Keith made the comment or, even more, whether she heard it (regardless of whether it was made). The Hearing Officer's failure to assess these points as well as other testimony correctly led him to an erroneous conclusion that the Board should reject in overruling Objection 19.

Ultimately, the Board must determine whether in connection with an election campaign that lasted two months (the petition was filed January 23 and the election was held on March 23) in which there were hundreds, if not thousands, of encounters and communications, laboratory

¹ The extensive discussion regarding this matter was principally off-the-record. *See* colloquy at Tr. 108:3-20 as well as testimony demonstrating that the Union was seeking to ascertain the identities and, in particular, last names of the consultants (e.g., Tr. 348:19-20; 71:20-72:6; 34:1-35:12; 46:23- 47:3) and additional background colloquy that related to this issue (Tr. 13:12-14:19 and 29:5-19). The Employer respectfully submits that it should not be prejudiced by the Hearing Officer's preference, which is confirmed by the transcript in numerous instances (e.g., Tr. 29:2-8; 14:20-22; 128:10-15; 249:2-4; 427:20-23), that the parties and he try to resolve matters such as this off-the-record. The Employer would not object to issuance of a Supplemental Report from the Hearing Officer addressing the accuracy of the Employer's representation here that during the hearing it asserted that the consultants worked on a first-name basis only and were insistent for security reasons that the Employer not disclose their last names in response to the Union's subpoena. To be clear, the Employer is not submitting that the Hearing Officer agreed with the substance of the representation but only that the Employer made the representation off-the-record.

conditions were upset by two alleged comments on the day of the election and a memorandum issued two weeks earlier solely to and about employees outside the voting unit. The record indicates that no voter was present for one of the two alleged remarks, and nothing in the record indicates whether the Union observer present for the other alleged remark even heard it. There is compelling evidence that neither alleged remark actually was voiced. Moreover, since there is no evidence indicating that either alleged remark was disseminated, even if Aristil heard the remark and it affected how she voted, that single vote could not have affected the outcome of the election since a tie is certified as a vote against union representation.

As for the memorandum, the record is devoid of evidence indicating that any voter read it or was affected by it. Moreover, the Employer declined to address the matter of the health insurance changes with voters, treating it the same as any potential change in terms or conditions of employment. Given the Employer's consistent approach to such matters with voters during the campaign, it is unlikely that these changes outside the voting unit had any impact upon voters. Under these circumstances, the Board should reject the Hearing Officer's recommendations and overrule the objections.

STATEMENT OF FACTS

On January 23, 2012, 1199 SEIU, United Healthcare Workers East ("Union") filed a petition seeking a representation election among certain employees of Care One at Madison Avenue, LLC d/b/a Care One at Madison Avenue ("Employer"). On February 7, 2012, the parties entered into a Stipulated Election Agreement scheduling the election for March 23, 2012 (Petitioner Exhibit 15). Following the election, which was held that day, the tally of ballots showed 58 votes cast against the Union and 57 cast in favor of it (Board Exhibit 1). One ballot was challenged. Thereafter, the Union timely filed twenty objections (Board Exhibit 1). The

Region recommended that the Board overrule three objections and scheduled the remaining seventeen objections for hearing.

The hearing was conducted over five days. During the course of the hearing the Union withdrew five objections. At the close of the hearing, the Union declined to withdraw any more objections. However, the Union withdrew four additional objections when the parties submitted their briefs to the Hearing Officer. On June 18, 2012, the Hearing Officer issued his Report On Objections (“Report”). He recommended that the Board overrule five objections and sustain three objections (Nos. 9, 16, and 19).

Below is a brief summary of the facts that relate to the three objections that the Hearing Officer recommended that the Board sustain. The Employer then sets forth arguments explaining why the Hearing Officer’s conclusions and recommendations are erroneous and the Board should overrule Objection Nos. 9, 16, and 19.

I. Objection No. 16

The objection reads as follows: “During the critical period, the Employer, through its officers, agents and representatives, notified employees that it reduced the share of health premiums paid by employees who are not in the petitioned-for unit in order to discourage employees in the unit from supporting the Union”.

In January 2012, the health insurance plan that covered employees at Madison Avenue and other Care One sites experienced premium increases and other changes. Employees complained about these modifications. In some instances, the premium increases resulted in employees reducing or even dropping their coverage. As a result, there was a reassessment of the January 2012 modifications. (Tr. 84:6-9)

On March 5, 2012, management at Madison Avenue and all of the other sites under the oversight of Regional Director of Operations Brian Karstetter, issued a memorandum

announcing rescission and other modifications of many of the January 2012 changes (Employer Exhibit 6; Tr. 271:20-273:5; 101:7-11). (Hereinafter the favorable modifications announced in March 2012 are referenced as the “health insurance changes”.) At Madison Avenue, the face of the March 5 memorandum indicates that it was directed solely to employees who were not part of the voting unit (Petitioner’s Exhibit 6; Tr. 274:2-8). Record testimony confirms that no communications were directed to members of the voting unit regarding the health insurance changes (Tr. 45:22-25; 272:3-6; 83:11-14; 86:13-17; 87:12-16). When voters inquired about the health insurance changes, Employer representatives responded that they could not discuss this matter (Tr. 45:22-46:4; 395:15-397:10), the same as they replied to questions during the campaign concerning any other change to a current term or condition of employment or consideration of possible future terms or conditions of employment (Tr. 408:12-409:13; 395:15-396:16).² The memorandum was posted at the site, but nothing in the record indicates whether voters reviewed the memorandum and the extent to which voters were aware of the health insurance changes.

At the hearing, the Union did not elicit any testimony going to the Employer’s purpose in instituting the health insurance changes outside the voting unit. Although there was some testimony to the effect that the health insurance changes were system-wide, no one with personal knowledge able to confirm that was the case testified. However, Karstetter testified that the health insurance changes were implemented as to personnel at every one of the ten facilities

² Notably, in Objection No. 15, the Union alleged that the Employer “promised improved benefits and pay if employees voted against union representation”. The Union withdrew that objection in connection with submission of its post-hearing brief. The Union also withdrew, during the hearing, Objection No. 14, which alleged that the Employer “reduced the workload of employees”. Finally, the Hearing Officer overruled Objection Nos. 11 and 12, respectively, which alleged that the Employer “solicited grievances and remedied certain grievances” and “implemented various improvements to benefits and other working conditions”. The absence of merit to these objections underscores that during the critical period the Employer maintained the status quo and refrained from addressing questions or voters’ attempts to discuss changes in terms and conditions of employment and future terms and conditions of employment.

under his supervision who were not subject to what the employing entity considered a question concerning representation (Tr. 272:24-273:2).

II. Objection No. 9

The objection reads as follows: “On the day of the vote, the Employer, through its officers, agents and representatives and/or third parties threatened representatives of the Union with violence in the presence of eligible voters.”

On the day of the election, particularly during the hour or hour and a half preceding the opening of the polls for both the morning and afternoon voting sessions, the atmosphere around the Madison Avenue site was highly-charged. In the morning, well before the polls opened, the Union parked its bus for at least ten minutes on Madison Avenue, a busy road where parking is not allowed, immediately in front of the Madison Avenue parking lot (Tr. 366:16-19; 367:21-368:23; 375:3-8; 375:11-13). The result of this and other activity was a police presence at the site in the morning for a short time (Tr. 366:21-368:7). Despite the departure of the police, the intensity level of the parties’ representatives remained rather elevated. Union representatives taunted a female consultant engaged by the Employer, mocking her appearance and telling her that she looked like a man (Tr. 365:1-13). Union and Employer representatives exchanged insults, saying unpleasant things about one another’s relatives (Tr. 364:22-25; 374:10-16; 377:17-21).

Between approximately 1:40 and 1:45 pm, Union organizer Brian Walsh and Union Vice President Ricky Elliot walked on to the Madison Avenue parking lot from the entrance on a side street. At that juncture, standing near a pole in the parking lot, they had an exchange with a consultant named Frank who was working at the Madison Avenue site on behalf of the Employer. Walsh and Elliot testified that Employer representatives, including Frank, mocked Walsh by saying he looked like Harry Potter (Tr. 114:16-23); Walsh challenged Frank’s maturity

by asking “what are you, 50?” (Tr. 114:25-115:3); Frank responded “I’m 52, get it right” (Tr. 115:5-6); Frank then told Walsh that “I’m going to kick your ass anytime, anywhere” (the Walsh version) (Tr. 115:6-7) or “I’ll kick your ass right here, right now, anyplace, anytime” (the Elliot version) (Tr. 153:24-154:1); and because he “felt” that Frank might attack Walsh physically, Elliot stepped between them to prevent that from happening (Tr. 153:25-154:11). Walsh and Elliot also testified that Union observer Yvania Aristil as well as others (who they failed to identify with any specificity) were present for this exchange (Tr. 114:12-13; 115:8-10; 153:9-154:16).

Sara Flaumenhaft, the Employer’s Director of Recreation, testified that at this time she approached a group consisting solely of Frank, Walsh, and Elliot near the pole in the parking lot (Tr. 336:19-337:9; 337:21-338:2; 350:18-23). Neither Aristil nor anyone else was present in the immediate vicinity of the three men (Tr. 352:13-22). When she reached them, Flaumenhaft heard an exchange concerning Frank’s age (Tr. 337:21-338:8). She then called out Frank’s name (Tr. 338:4-8). Frank responded to her by moving toward her, away from Walsh and Elliot, and there was no further exchange between Frank and Walsh or Frank and Elliot (Tr. 338:6-10; 353:13-14; 353:22-23). She and Frank then left the parking lot and entered the Madison Avenue facility (Tr. 338:10-12).

In the Report, the Hearing Officer ascribed significance to the fact that Frank did not testify at the hearing. The Hearing Officer also found that the Employer did not explain the failure to call Frank as a witness. (Report at 7) The Hearing Officer’s finding that there was no such explanation overlooks colloquy in which Employer counsel, in addressing a Union subpoena request seeking, among other things, last names for Frank and other consultants, indicated that Frank and the other consultants work on a first-name basis only and had asserted

security concerns in refusing to provide him with their last names. In view of the unwillingness of the consultants to provide their last names, the Hearing Officer should have recognized that if the Employer was to respect the consultants' position that they should not have to disclose their last names for security reasons, the Employer was not in a position to call Frank as a witness.

III. Objection No. 19

The objection alleges as follows: "During the critical period, the Employer, through its officers, agents and representatives, told employees it was futile for employees to select the Union as their representative and that it would never enter into a contract with the Union".

The highly-charged atmosphere in and around the Madison Avenue parking lot on the day of the election was recounted above in connection with Objection No. 9. A few minutes before the parties entered the building for the morning pre-election conference, there was an exchange between a consultant named Keith and a group consisting of Walsh, Elliot, and Aristil (Tr. 151:14-152:2). Testimony of Walsh and Elliot, cumulatively, was that Keith asked Aristil why she was hanging out with "losers" and then stated in Aristil's presence that the Union had not gotten a new contract in ten years, would never get a contract at the Somerset Valley site, and/or would never get a contract at Madison Avenue (Tr. 111:22-112:7; 151:19-25).

Asha George, the Employer's Director of Rehabilitation, testified that she was present when Walsh, Elliot, and Aristil stood together in front of the building before the parties entered for the pre-election conference and heard the exchange about which Walsh and Elliot testified in which Keith asked Aristil why she was hanging out with losers (Tr. 373:10-17; 374:3-5; 374:11-16; 378:2-3). George testified that there was an exchange of insults between Keith, on the one hand, and Walsh and Elliot, on the other hand (Tr. 364:13-17; 364:22-23; 378:7-12). During that back-and-forth, Keith asked Aristil "why are you hanging out with these losers?" George testified that Elliot directed Aristil not to reply to Keith (Tr. 364:20-22; 374:10-11; 378:5).

George then testified that Keith separated from Walsh, Elliot, and Aristil without saying another word (Tr. 364:22-25). At no point did George hear Keith use the word “contract” or otherwise comment about the Union not being able to get an agreement at Madison Avenue or any other Care One site.

Although the Hearing Officer did not comment upon the Employer not calling Keith as a witness as he had in criticizing the failure of Frank to appear as a witness in connection with Objection No. 9, the Employer notes that Keith and Frank are employed by the same entity. The same objection the consultants raised concerning disclosure of their last names for security reasons as was referenced in Objection No. 9 is applicable here.

ARGUMENT

I.

THE BOARD SHOULD OVERRULE OBJECTION NO. 16 SINCE THE EMPLOYER DID NOT COMMUNICATE TO VOTING UNIT MEMBERS ANYTHING ABOUT HEALTH CARE CHANGES OUTSIDE THE VOTING UNIT, THE COMMUNICATION THE EMPLOYER ISSUED DID NOT AFFECT THE OUTCOME OF THE ELECTION, AND THE BOARD SHOULD PERMIT AN EMPLOYER TO MAINTAIN THE STATUS QUO IN CIRCUMSTANCES SUCH AS THOSE HERE.

The Board should reject the Hearing Officer’s recommendation that it sustain Objection No. 16. First, the Hearing Officer misapplied Board law in concluding that the Employer was required to notify the voting unit that it would be implementing changes in health insurance after the election, irrespective of outcome, and was postponing the changes to avoid the appearance of interference. Second, the Employer did not have notice of the claim that the Hearing Officer found the Union proved in concluding that the Employer’s conduct was objectionable. Third, the facts do not support the conclusion that the conduct in issue was undertaken with the purpose of discouraging support for the Union or, motivation aside, affected the outcome of the election.

Fourth, even if under existing Board precedent the Board would have found that the Employer conducted itself objectionably, when as here an employer's campaign is predicated upon maintaining the status quo and not communicating about future terms and conditions of employment, the Board should adopt a rule permitting the employer not to communicate with voting unit personnel about a broadly-instituted change outside the voting unit until the election is over.

A. The Hearing Officer Erred In Finding That The Employer Was Obligated To Inform Voting Unit Members That Changes Would Be Applied Retroactively After The Election Regardless Of The Outcome And That It Had Postponed Implementation Of The Changes Within The Voting Unit To Avoid The Appearance of Influencing The Election.

The Hearing Officer ruled that when a company institutes an improvement during the critical period across an entire system but not within the voting unit, it must inform voting unit members as follows: (1) the improvement will be instituted as to them retroactively following the election regardless of the outcome and (2) the purpose of the postponement is to avoid the appearance of trying to influence how they cast their vote (Report at 13). The Hearing Officer erred in so finding since under Board precedent there is no requirement that an employer issue such a "current postponement- future implementation" announcement.

The Hearing Officer relied upon *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), as authority for the proposition that it is **mandatory** for an employer to issue a "current postponement-future implementation" announcement to members of the voting unit in circumstances such as those here. However, *Noah's Bagels* does NOT **require** such an announcement. Rather, a "current postponement-future implementation" announcement is voluntary. The Hearing Officer misread *Noah's Bagels* in holding otherwise.

In *Noah's Bagels*, the Board stated that "while an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it **may**, in order to avoid

creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election--regardless of the outcome". 331 NLRB at 189 (emphasis added). This language makes clear that the Hearing Officer misread *Noah's Bagels* in holding that a "current postponement-future implementation" announcement is required.

Other Board decisions confirm that this is so. The above-quoted language from *Noah's Bagels* cites to *Kaul Coconut Beach Resort*, 317 NLRB 996, 997 (1995) as support. *Kaul Coconut Beach* indicates that a company has the option of disclosing that a future improvement has been postponed **without requiring** that it do so:

[A]n employer may not inform employees that it is withholding wage increases or accrued benefits because of union activities. Conversely, however, an employer **may** tell employees that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference.

317 NLRB at 997 (emphasis added). Similarly, in *Network Ambulance Services, Inc.*, 329 NLRB 1, 2 (1999), the Board expressly stated that such an announcement is not required but, rather, an option. Plainly, then, the Hearing Officer erred as a matter of law in holding otherwise.

The general rule is that during the critical period an employer should refrain from changing the status quo and should leave terms and conditions of employment "as is". The United States Supreme Court endorsed that rule in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), pointing out the potentially enormous coercive message an employer conveys when it confers improvements upon voting unit members during the critical period:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Accordingly, during the critical period, the most prudent course for an employer to take in order not to interfere with NLRB “laboratory conditions” is to leave the status quo unchanged.

Here, the Employer followed that prudent course throughout its campaign. When the Employer instituted the health insurance changes solely for employees outside the voting unit, it neither implemented the changes within the voting unit nor directed communications concerning them to voters. The Employer limited its communications about the health insurance changes to employees outside the voting unit. The memorandum addressing the matter was distributed solely to employees outside the voting unit. As Arezzo testified and other managers confirmed, when potential voters inquired about possible changes to the health insurance plan, the Employer indicated that it could not discuss the matter, the same as it did as to inquiries or discussions about any term or condition of employment. That response was consistent with the Employer’s approach during the campaign, which was to refrain from altering the status quo or discussing possible changed terms and conditions of employment with voters (408:12-409:13; 395:15-396:16). In not directing any communications to members of the voting unit as to whether the same or similar improvements would be instituted as to them, the Employer also ensured that it was in compliance with the prohibition in *Noah’s Bagels* and *Kaual Coconut Beach Resort* against informing employees that a benefit is being withheld because of an election.

Aside from misreading *Noah’s Bagels*, the Hearing Officer also may have concluded wrongly that the posting of the memorandum directed to employees outside the voting unit amounted to the Employer communicating about this matter with voting unit personnel. Although the Report does not expressly set forth that concern, the Hearing Officer specifically references the posting of the memorandum twice. However, in then setting forth the factors that supported his conclusion that the Employer’s conduct was objectionable, the Hearing Officer

puzzlingly and inexplicably condemned the Employer's "widespread distribution [of the memorandum] to **non-unit** employees" (Report at 13)(emphasis added). This apparently distorted reasoning with respect to the memorandum, which says nothing about the health insurance changes in relation to the voting unit, is yet another reason for the Board to reject the Hearing Officer's conclusion and recommendation.

The Hearing Officer's reliance on *Atlantic Forest Products, Inc.*, 282 NLRB 855, 857-59 (1987), and *Russell Stover Candies, Inc.*, 221 NLRB 441, 442 (1975), is misplaced because those decisions are inapposite. Both involved situations in which the employer did not implement regularly-scheduled wage increases for voting unit members. The Board found that both employers committed violations of § 8(a) (1) and 8(a) (3) because the effect of withholding the **expected** wage increase was to discourage employee support for the union within the voting unit. In *Atlantic Forest Products*, several employees testified that supervisors specifically told them that the expected wage increase was not conferred because of the "union" or the "union campaign", clearly putting the onus for withholding of the regularly-scheduled increase on the union. 282 NLRB at 857-59. Supervisors also stated that the wage increase could be seen as a "bribe" to "buy" employees' votes and that withholding the increase protected the company from that allegation. 282 NLRB at 857. In *Russell Stover Candies*, management and supervision ascribed responsibility for the company withholding wage increases that the employees expected to the union: "Respondent's statements (even accepting its version of the words used in some of the conversations) could only lead employees to assume that the Union stood in the way of their getting the wage increases, and Respondent did nothing to dissipate that assumption". 221 NLRB at 442. Similar to *Atlantic Forest Products*, management (in this case the president of the company) told voting unit members that the wage increase implemented at other plants was

withheld at their plant “in order to avoid an appearance of trying to influence the election”. 221 NLRB at 441.

In the matter at bar, the Employer did not withhold a regularly-scheduled increase or improvement that employees expected to receive. The health insurance change was an **unexpected** adjustment. Accordingly, unlike in *Atlantic Forest Products* and *Russell Stover Candies*, where voting unit personnel were denied an improvement that they had expected, voters at Madison Avenue had no expectation of any change at the time the Employer implemented the health insurance change for employees outside the voting unit. It follows that the Employer did not need to explain the withholding of a benefit that voters had anticipated receiving. Against that backdrop, it was entirely sensible for the Employer (1) not to direct a communication to the members of the voting unit about a change that they had not expected and that was not instituted as to them and (2) to address any question put to management about this matter by members of the voting unit by stating, consistent with the message that the Employer had been conveying uniformly during the election campaign, that the Employer could not discuss future changes in terms and conditions of employment until after the election. Quite simply, the Employer treated the changes in health insurance implemented outside the voting unit no differently than any other matter relating to terms and conditions of employment that was raised during the critical period.

The above analysis underscores that the Hearing Officer’s reliance upon case law involving **recurring** changes is unwarranted here since the improvement that was implemented outside the voting unit was a non-recurring change. The decisions that favor a “current postponement-future implementation” announcement make sense in the context of disappointed employee expectations that result from recurring changes. When, as here, the improvement is

non-recurring, the premise behind that principle is absent. Nor is it an answer that *Noah's Bagels* involved a non-recurring change; as noted earlier, that decision cited to and evolved out of the Board's recurring change case law, and that body of decisions is ill-suited for non-recurring circumstances such as that here.

B. The Employer Was Denied Due Process Since The Objection Alleged That The Employer Sought To Discourage Voters From Supporting The Union And Neither The Union's Evidence Nor The Hearing Officer's Finding Addressed The Employer's Purpose.

Objection No. 16 alleged that “[d]uring the critical period, the Employer...notified employees that it reduced the share of health premiums paid by employees who are not in the petitioned-for unit in order to discourage employees in the unit from supporting the Union”. The essence of the allegation was that the Employer took certain action outside the voting unit with the **improper purpose of discouraging** support for the Union within the voting unit. At the hearing the Employer responded to the Union's allegation of improper purpose by introducing evidence showing that the Employer instituted the health insurance change outside the voting unit on the basis of legitimate business considerations but did not effect that change within the voting unit and was maintaining the status quo at least until the election was held.

The Board recognizes that “[d]ue process is a fundamental right, which we are obligated to protect.” *Factor Sales, Inc.*, 347 NLRB 747, 748 n. 7 (2006). Due process requires that an employer have meaningful notice and a full and fair opportunity to litigate, i.e., a clear statement of the accusation against it. *Factor Sales*, 347 NLRB at 747-48, quoting *Lamar Advertising of Hartford*, 343 NLRB No. 40, slip op. at 5 (2004) and *Champion International Corp.*, 339 NLRB 672, 673 (2003). When an objection set for hearing does not allege the conduct that the Hearing Officer ultimately finds objectionable, the Employer has been denied due process and the objection must be overruled.

At no time during the hearing did the Union introduce evidence going to the Employer's alleged improper purpose of discouraging support for the Union through implementation of the health insurance change. The Union did not subpoena any executive responsible for the decision to implement the health insurance change to elicit testimony as to the purpose behind it or its timing. When the hearing closed, the Union had failed to adduce any record evidence establishing the improper purpose that the objection specifically alleged. Moreover, the Hearing Officer did not make any finding relating to the Employer's purpose and recommended that the Board sustain the objection on a ground other than the face of the objection alleged.

It follows that in concluding that the Employer's implementation of the health insurance change solely outside the voting unit affected the outcome of the election, the Hearing Officer did not decide the issue that was noticed in the objection. The question presented by the objection was whether the Employer had implemented the health insurance change for the purpose of discouraging employees from supporting the Union and in doing so had affected the election's outcome. Since the Union failed to develop a record that supported that assertion and the Union did not place the Employer on notice as to the accusation on which the Hearing Officer found against it, the Board must reject the Hearing Officer's recommendation and overrule the objection.

C. Nothing In The Record Supports The Hearing Officer's Conclusion That The Changes To The Health Insurance Plan For Employees Outside The Voting Unit Affected Any Unit Member's Vote.

The Union did not introduce any evidence that indicates, directly or indirectly, that the changes the Employer made in the health insurance plan for employees outside the voting unit were implemented either with the purpose of discouraging support for the Union or had the effect of discouraging any employee in the voting unit from supporting the Union or casting a ballot in favor of the Union.

The objection, on its face, alleges that the Employer instituted the health insurance change outside the voting unit “in order to discourage employees in the unit from supporting the Union.” As noted above, the gravamen of the objection could not be clearer: it alleges an improper motive on the part of the Employer in conducting itself as it did. Critically, the Union adduced no evidence of any kind indicating that the Employer’s purpose in implementing the health insurance change outside the bargaining unit was to discourage employees within the bargaining unit from supporting the Union. Indeed, no witness with knowledge of the particulars of the Employer’s process, substance, and timing in making the decision to implement the health insurance change and its roll out was called to testify. In the absence of such testimony, the Union could not satisfy its burden of proving an unlawful and/or objectionable motive.

Assuming, *arguendo*, that the objection can be read to challenge implementation of the health insurance change because it had the effect of discouraging employees within the voting unit from supporting the Union, the Hearing Officer still erred. No employee so testified. No documentation was identified, let alone admitted into the record, that so indicated. The Hearing Officer’s conclusion is entirely speculative without any supporting record evidence.

All the record establishes is that on March 5, 2012, the Employer notified employees outside the voting unit that it was making employee-favorable changes to the health insurance plan. The Employer circulated a memorandum to those non-unit employees, and those employees alone, notifying them that it was implementing those changes. The Employer also posted that memorandum, but nothing in the record indicates that any employee in the voting unit reviewed, let alone was influenced by, the memorandum. No record evidence indicates that representatives of the Employer spoke with voting unit personnel about the health insurance changes. Madison Avenue Administrator Arezzo specifically testified that when potential voters

asked about the health insurance changes, he told them that he could not discuss that matter, like any matter involving future terms and conditions of employment, with them (Tr. 45:22-46:4).³ In the absence of any such evidence, the Hearing Officer's conclusion is insupportable. This is especially the case since the record evidence relates exclusively to employees outside the voting unit and the Hearing Officer drew a conclusion as to employees within the voting unit.

D. Assuming, *Arguendo*, That Under Existing Precedent The Employer's Conduct Was Objectionable, The Board Should Adopt A Rule That Permits An Employer To Decline To Communicate About Future Terms And Conditions Of Employment In The Voting Unit During The Critical Period When A Non-Recurring Improvement Is Implemented Outside The Voting Unit.

If, *arguendo*, the Employer's conduct was otherwise objectionable under current Board precedent, the Board should adopt a rule for the critical period in circumstances like that here that permits an employer to refrain from (i) instituting non-recurring changes in the voting unit and (ii) communicating with voting unit members whether such changes will be implemented following the election. At minimum, this should be the rule when, as here, the Employer's campaign has consistently communicated to voters that until the election has been held it cannot discuss changes in terms and conditions of employment.

Noah's Bagels and like decisions establish a rule grounded in a faulty premise. There is

³ The Hearing Officer wrongly ascribed to Arezzo the testimony that "Administrators were instructed to discuss the health insurance changes 'on all shifts, with all employees'" (Report at 12). Brian Karstetter, the Regional Director for Operations responsible for Madison Avenue, made that remark (Tr. 294:13-21). However, a full reading of that testimony in context makes clear that Karstetter qualified his statement to indicate that the communication announcing the health insurance changes was distributed to and discussed with all staff "except those previously discussed" (294:13-21). On his direct examination and earlier on cross-examination, Karstetter testified that voting unit personnel were **not notified** of the health insurance changes (Tr. 272:1-6; 272:20-23; 292:22-25; 293:18-294:8). Accordingly, to the extent the Hearing Officer's conclusion was grounded in a finding that anyone testified that the health insurance changes were discussed with voting unit members, it is erroneous. Furthermore, all Karstetter testified about was the directive he issued to facility Administrators. He did not profess to have first-hand knowledge as to whether communications with voting unit employees actually took place. It follows that insofar as the Hearing Officer's conclusion was based upon a finding that Arezzo or anyone else communicated with voting unit personnel at Madison Avenue about the health insurance changes, that conclusion is misplaced.

no basis for believing that when an employer tells voters that it is postponing implementation of a change until after an election, irrespective of its outcome, in order to avoid the appearance of influencing the election's outcome, the rule accomplishes its intended purpose. The *Noah's Bagels* "current postponement-future implementation" announcement is extraordinarily muddled. As such, it cannot possibly prevent employees from concluding that the employer is promising the improvement in order to secure employee votes and, therefore, doing exactly what the Employer has said it will not do. In fact, common sense suggests that a mixed up communication of this kind is likely to lead voters to draw conclusions contrary to what is intended since in one breath the employer is telling voters it is seeking to avoid the appearance that it is "buying" their votes and in the very next breath the employer is promising them the very benefit it has just said it is not using to "buy" their votes.

The natural retort to this criticism is likely to be that an employer should not be concerned since employees are likely to lean favorably toward the employer in such circumstances. This Employer could not disagree more strongly. When an employer builds its campaign on the theme that it is straightforward and truthful, *Noah's Bagels* undermines the employer's campaign by forcing it to convey a muddled, disingenuous message. The Board is not supposed to interfere with the content of parties' communications. *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). *Noah's Bagels* not only does that but in doing so highlights the very reason the Board stays out of the business of dictating what the parties communicate: it prescribes transmission of a message that no employer attempting to build credibility could possibly want to convey.

Noah's Bagels is even more perverse given that it dictates what an employer is to convey to voters in response to employer action outside the voting unit. There is no reason that an

employer seeking to govern its relations with employees not involved in a union campaign cannot do so without being forced to convey a message to the voting unit that is inconsistent with its campaign approach and theme. An appropriate rule would not infringe upon the employer's communications with voters.

The above indictment of *Noah's Bagels* is applicable to any critical period situation in which a change in the status quo is presented. Since the instant case involves only a non-recurring improvement in benefits, the Employer confines its analysis hereafter solely to that circumstance. The Employer believes that when it has conducted itself consistent with *Exchange Parts* and built its campaign on the premise that it cannot communicate with voters about future terms and conditions of employment until after the election has been held, the Employer should be privileged to implement a non-recurring change outside the voting unit for legitimate business reasons without having to communicate about that change with members of the voting unit.

The virtue of the proposed rule is its consistency with *Exchange Parts* and its simplicity. An employer that has maintained the status quo in compliance with *Exchange Parts* should not have to alter its campaign and begin explaining to voters that even though until then it has been unable to discuss future terms and conditions of employment it is now doing so. Such a requirement, far from being understandable, is confusing and off-putting. As such, it is a recipe for undermining employer campaigns, especially if voters misapprehend the scope of what the employer can discuss and then inquire about future terms and conditions of employment that an employer is unable lawfully to discuss. A rule that affords the employer the option of **not** communicating with voters about non-recurring changes that are implemented outside the bargaining unit is straightforward and clear as well as easily enforceable. The Board can, of course, also decide that the only employers that can avail themselves of this rule are those that

have conducted themselves in accordance with *Exchange Parts* through the point in time when a non-recurring improvement has been implemented outside the voting unit.

The proposed rule offers employers an option and is not mandatory. An employer that wishes to make a non-recurring change within the voting unit or communicate about its future implementation with voting unit members can do so, but that employer does so at its peril in that the Board may conclude that the business reason it offers for its actions does not withstand scrutiny. Board and court case law confirm that there are many instances in which an employer may reasonably have doubts about whether the Board will agree that a change in the status quo is occasioned by legitimate business reasons. *See, e.g., Kauai Coconut Beach*, 317 NLRB at 997, where the Board majority pointed out that in considering implementation of a wage increase during the critical period the employer “was faced with a dilemma” and “would assume the risk and burden of justifying” the increase with “reasonable doubt as to whether it could meet its burden” because there was not a perfectly consistent pattern of semi-annual increases in the past. The majority went on to acknowledge that “[w]e do not think that the law in this area...is as crystal clear as our colleague believes it to be” and concluded that the employer there “could reasonably be concerned that the increase, if granted, would be condemned”. *See McAllister Towing & Transportation Company, Inc.*, 341 NLRB 394, 399, 423-24 (2004) (Administrative Law Judge found that “extension of the [401(k)] plan corporatwide might reasonably have been calculated to discourage union activity throughout McAllister Brothers”), *enf’d on other grounds*, 156 Fed. Appx. 386 (2d Cir. 2005). Accordingly, the rule proposed here offers a safe harbor to an employer that has a business reason for instituting a change during the critical period but is uncertain whether the Board will view that rationale the same as it; the rule would permit the employer to implement the change solely outside the voting unit and as to the voting

unit not make the change and subsume any communication with voting unit members regarding future implementation as to them within its overall message that it cannot discuss future terms and conditions of employment prior to the election.

The proposed rule also makes sense since the general rule, as reflected by *Exchange Parts*, is that employers are to maintain the status quo during the critical period. The underpinning of the *Exchange Parts* rule is that conferral of benefits (or discussion of conferral of benefits) during the critical period unfairly advantages the employer since implicit in such implementation or discussion is the premise that the employer can withdraw anything it grants or bestows. It follows that the employer's power is unnecessarily highlighted and underscored when the employer is permitted to confer or discuss any unilateral change during the critical period. The Supreme Court's concern over "the first inside the velvet glove" is abated when the employer refrains from making changes and does not provide some complicated explanation but, instead, merely informs voting unit members that it cannot discuss future terms and conditions of employment during the period leading up to and through the election the same as it does in connection with any other matter.

The safe harbor this proposed rule offers is responsive to Judge Randolph's trenchant dissent attacking the Board's case law concerning critical period changes in *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 839 (D.C. Cir. 1998):

When a traffic light simultaneously blinks "Stop" and "Go" everyone knows repairs are needed. If a motorist encountering the light proceeds ahead while another motorist pauses, it is unimaginable that both would be guilty of failing to heed the signal. The Board's "law" governing pre-election wage increases is like the faulty traffic light and the Board's enforcement of that "law" approaches the unimaginable.

Judge Randolph then pointed out the tension between NLRB decisions that hold that both the granting and withholding of wage increases violate the law. He characterized the Board's

competing doctrines as arbitrary, noted judicial exasperation with them in other appellate decisions, and lambasted the principle set forth in *Noah's Bagels* that favors informing voters that an increase is deferred until after an election no matter the outcome of the election on the ground that this approach does nothing to neutralize the “fist inside the velvet glove” threat implicit in such communications.

The rule the Employer proposes here would simplify Board law, consistent with Judge Randolph’s criticism, while affording an employer that wants to take a more aggressive position the right to do so at its peril. It is indisputable that in many instances an employer cannot predict whether the Board would conclude that it has conducted itself permissibly, *i.e.*, as it would absent the pendency of a petition. The proposed rule affords an employer wishing to avoid such guesswork an opportunity to do so.

Here, the Hearing Officer concluded that “the Employer has presented a persuasive business reason for announcing a reduction in health insurance premiums for non-unit employees and established...that its announcement and implementation were governed by factors other than the Union’s campaign” (Report at 12). However, it was far from certain that the Hearing Officer would arrive at that conclusion. Another fact finder might have concluded that with two petitions pending, voting at the Woodcrest Health Care Center to be conducted within days of the March 5 memorandum issued to employees outside the voting unit there, and voting at Madison Avenue to be conducted a mere three weeks thereafter, the decision to implement and roll out the health insurance changes for employees outside the voting unit had an improper purpose and was objectionable. The fact that Board law necessitates that the Employer engage in this sort of self-critical analysis, essentially arguing a worst case scenario against itself as shown here, underscores the defect inherent in the existing rule. Accordingly, another virtue of the proposed

rule is that it eradicates the difficult, delicate, and anomalous task of having to predict whether the Board will find that an employer's conduct would have been the same in the absence of a petition.

Adoption of a simple, understandable, and bright line rule that will enable parties to know with certainty that conduct is lawful is valuable, especially when the proposed rule conforms to companies' regular conduct in maintaining the status quo during the critical period. Assuming, *arguendo*, that the Board would find the Employer's conduct objectionable under existing precedent, the Employer respectfully submits that the Board should adopt and apply the rule proposed here and overrule the objection.

II.

THE BOARD SHOULD OVERRULE OBJECTION NO. 9 SINCE THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT ARISTIL WAS NOT PRESENT WHEN THE ALLEGED THREAT WAS SUPPOSEDLY VOICED, THE EMPLOYER'S AGENT DID NOT THREATEN WALSH, AND THE THREAT WOULD NOT HAVE AFFECTED THE OUTCOME OF THE ELECTION EVEN HAD IT BEEN VOICED.

The Board should reject the Hearing Officer's recommendation that it sustain Objection No. 9. Review of the record makes clear that there is no basis for the Hearing Officer's conclusion that the testimony of Union witnesses Walsh and Elliot was "a more detailed recollection of the details" of the encounter between Frank and Walsh than that of Flaumenhaft, the Employer witness, "whose recollection lacked the same degree of specificity" (Report at 7). Indeed, Flaumenhaft was a particularly impressive witness with precise and specific recall, her testimony about the Frank-Walsh encounter was especially detailed, and she testified with certainty that Union observer Aristil was not present during the Frank-Walsh encounter. Significantly, the Hearing Officer failed to acknowledge that Flaumenhaft testified that Aristil was not present, let alone address and resolve that conflict in testimony. This oversight on his

part should prompt the Board to examine the record with great care, refrain from affording any deference to the Hearing Officer's findings, and overrule the objection.

The Board should also reject the Hearing Officer's recommendation because Flaumenhaft testified convincingly that Frank never threatened Walsh. Furthermore, even if, *arguendo*, Frank threatened Walsh, the Board should still reject the Hearing Officer's recommendations for two reasons. First, the remark allegedly made was *de minimis* against the backdrop of numerous insults and antagonistic back-and-forth between Union and Employer representatives that took place in the parking lot at the Employer's premises for much of the day on which the election was held. Second, since Aristil did not disseminate the remark, even if it affected her vote, the one-vote swing results in a tied tally of ballots and the Union cannot be certified in the absence of majority support.

A. The Board Should Credit Flaumenhaft's Testimony That Aristil Was Not Present During The Frank-Walsh Encounter, Which Negates The Hearing Officer's Conclusion That The Alleged Threat Of Violence Affected The Outcome Of The Election.

Flaumenhaft testified with confidence and certainty that as she approached Frank at the very moment when Walsh and Elliot testified Frank threatened Walsh with violence, the only persons present were Frank, Walsh, and Elliot (Tr. 336:19-337:9; 337:21-338:2). Neither Aristil nor any other voter was standing with them at that moment. Inasmuch as the Hearing Officer's recommendation that the Board sustain this objection is grounded in the premise that Aristil heard Frank threaten Union organizer Walsh with violence, the Board must reject the Hearing Officer's recommendation and overrule the objection if the Board finds that Aristil was not present. *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (objecting party must show that the conduct in question "affected employees in the voting unit").

Walsh and Elliot both testified that Frank voiced the supposed threat immediately after an

exchange between Walsh and Frank in which Frank mocked Walsh, Walsh challenged Frank's maturity by asking "what are you, 50?", and Frank responded "I'm 52, get it right". Flaumenhaft testified that as she approached Frank, Walsh, and Elliot, she heard an exchange concerning Frank's age. Plainly, then, Flaumenhaft came upon Frank, Walsh, and Elliot at exactly the point that Walsh and Elliot testified that Frank threatened Walsh. Flaumenhaft further testified that nothing more was said by Frank after the exchange concerning Frank's age (Tr. 338:4-12).

Plainly, then, Flaumenhaft heard no threat. She was sufficiently close to Frank, Walsh, and Elliot to hear the remark about Frank's age. She testified clearly and with certainty that following the remark about Frank's age, Frank responded to her having called out his name by moving away from Walsh and Elliot toward her and nothing more transpired between Frank and Walsh and/or Elliot.

Flaumenhaft further testified that she saw nothing resembling the beginnings of a physical confrontation (Tr. 338:13-18). Walsh and Elliot testified that immediately after Frank threatened Walsh, Frank's body language created the impression that he might attack Walsh physically. Flaumenhaft not only did not observe that but, as explained above, testified with certainty that Frank moved away from Walsh and Elliot following mention of Frank's age (Tr. 338:4-8). Once again, then, her testimony directly disputed that of Walsh and Elliot.

Flaumenhaft's testimony is far more believable than that of Walsh and Elliot for several reasons. Nothing in the record indicates that Flaumenhaft was meaningfully involved in the Employer's campaign against unionization or felt strongly about whether the Union should represent members of the voting unit. In contrast, Walsh and Elliot are employees of the Union whose livelihood depends upon successfully organizing sites such as Madison Avenue (Tr. 156:4-9). Moreover, the Union is committed to organizing not just this Employer but affiliated

companies, as evidenced by the election at the Woodcrest facility two weeks before the election at Madison Avenue (Petitioner's Exhibit 16). Accordingly, the interest Walsh and Elliot had in successfully overturning the election at Madison Avenue was especially keen.

An examination of the testimony of Walsh and Elliot also suggests that it was carefully rehearsed. Moreover, Elliot heard Walsh testify (Tr. 55:24-56:5; 109-149). Notably, neither took the witness stand following Flaumenhaft's testimony to rebut anything she stated.

On cross-examination, neither Walsh nor Elliot were forthcoming witnesses. By way of example, Elliot was present during Walsh's examination, heard Walsh testify that Frank never touched him, and conceded that at the time of the encounter Walsh never complained that Frank had touched him (Tr. 178:12-13; 179:16-21). Yet, despite the above, Elliot insisted that he was not sure whether Frank's nose brushed or bumped Walsh's nose and refused to concede that there was no such contact (Tr. 177:14-178:13; 179:8-14). Elliot was also evasive. When asked whether he learned that the union bus driver cursed during an early morning confrontation between Union and Employer representatives on the day of the vote, rather than answer the question put to him Elliot responded "No. He's a Christian. He wouldn't say this" (Tr. 159:16). Pressed to be responsive, Elliot ended up waffling on whether the bus driver ever cursed, evasively and ambiguously stating that he had never heard him curse "like that" followed by a response to the question "Well, have you heard him curse?" with "Not really, no" (Tr. 159:17-20). That kind of imprecision marked Elliot's demeanor and remarks throughout his testimony. Indeed, even within the space of seconds, Elliot exaggerated that Keith "**kept** saying you guys are never going to get a contract here" (Tr. 175:2-3)--suggesting Keith stated this repeatedly--yet when pressed Elliot testified that Keith so remarked not several times but twice (Tr. 175:7-13).

Walsh was even more blatant, straining not to respond to Employer counsel's questions.

See Tr. 128:6-23 (colloquy of counsel debating whether Employer counsel had expended 5 minutes trying to secure responsive answers from Walsh beginning at page 120). The significance of these observations is that Walsh and Elliot were uncooperative witnesses who fought Employer counsel's efforts to elicit a full picture of what took place on the day of the election, including that the Union had several representatives present at the Madison Avenue site from the beginning of the day who conducted themselves provocatively and elevated the "temperature" in the parking lot.

The Hearing Officer erred in finding that the Employer did not explain Frank not appearing to testify about the alleged incident. There was considerable colloquy about the Employer's inability to provide the last names of Frank and the other consultants engaged to assist with the campaign. That inability arose out of the fact that Frank and the other consultants declined to provide their last names when asked for them. They work on a first-name only basis.

In view of the unwillingness of the consultants to provide their last names, the Employer could not call Frank or any other consultant as a witness with an assurance that such person would not have to provide his last name in conjunction with testifying. Accordingly, as demonstrated by the battle that ensued in connection with the Union's demand that the Employer provide Frank's last name and the Employer's resistance to doing so, the Employer was not in a position to subpoena Frank and elicit testimony from him. The Employer also was not in a position to set forth this explanation to the Hearing Officer explicitly since its disclosure might have induced the Union to attempt to subpoena Frank for no other reason than to elicit his last name. Given this circumstance, as well as the compelling testimony Flaumenhaft provided, the Board should not draw an adverse inference against the Employer because Frank did not testify.

In contrast, the Union offered no satisfactory explanation for its failure to call Aristil as a

witness to testify in support of the objection. Any generalized assertion that Aristil was afraid to appear as a witness in opposition to the Employer's position is belied by the reality that she served as the Union's observer for both the morning and afternoon voting sessions. Her willingness to do that undercuts the inference the Union hopes the Board will draw that her absence is a function of some fictional fear. In view of the fact that Aristil was the person best-positioned to confirm whether she was present during the alleged episode between Frank and Walsh, as well as whether she was aware of what allegedly happened and it affected her outlook on voting, the Board should draw an adverse inference against the Union inasmuch as the burden of proving the objection is on it. *E.g., Ready Mixed Concrete Co., v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996).

Against the above backdrop, the Employer submits that the Board should credit Flaumenhaft's testimony that Aristil was not present when Frank allegedly threatened Walsh with physical harm. Insofar as the Hearing Officer focused solely on the question whether Frank voiced the threat and did not address whether Aristil was present (Report at 6-8), the Board must assess the record itself and cannot defer to the Hearing Officer. When the Board completes this review, it will recognize that Flaumenhaft is a far more reliable witness than Walsh and Elliot, it should credit her testimony that Aristil was not present, and it should overrule the objection since no voter heard Frank threaten Walsh's physical well-being.

B. The Board Should Credit Flaumenhaft's Testimony That Frank Did Not Threaten Walsh With Physical Violence.

The Board should also credit Flaumenhaft's testimony that Frank never threatened Walsh. Although she was present at the precise point at which Walsh and Elliot claimed the threat was made (*i.e.*, just after the exchange between Walsh, Elliot, and Frank touching on Frank's age), she testified that Frank did not threaten Walsh. Moreover, she testified that Frank

moved toward her, rather than Walsh, at the very moment at which Walsh and Elliot contend that Frank made them feel that he was about to strike Walsh physically. For the same reasons that the Board should credit Flaumenhaft's testimony that Aristil was not present when Frank allegedly threatened Walsh, it should also conclude that Frank did not in fact threaten Walsh.

C. Assuming, *Arguendo*, That Frank Threatened Walsh As Alleged, The Objection Should Be Overruled Since The Threat Was *De Minimis* And Could Not Have Affected The Outcome Of The Election.

Even if, *arguendo*, Frank threatened Walsh as alleged, the Board should reject the Hearing Officer's recommendation and either overrule the objection or overrule the Hearing Officer's recommendation that the Board conduct a rerun election.

Under the circumstances at hand that day, the threat was inconsequential. It is well-settled that a single threat that is not disseminated is not a ground for setting aside and rerunning an election. E.g., *Bally's Park Place, Inc.*, 352 NLRB 316, 330 (2008), *affirmed and adopted*, 356 NLRB No. 40 (2010) (Board refused to overturn an election because of alleged threatening conduct of union officials since there was only "a single incident with only meager evidence of dissemination").

The record indicates that on the day of the election Employer and Union representatives traded numerous insults in and around the Madison Avenue parking lot. At one point, Union representatives insulted a female consultant by telling her that she looked like a man. There was a confrontation over the Union parking its bus for several minutes immediately in front of the facility on Madison Avenue, a busy street where no parking is permitted, that culminated in the police addressing the parties' differences. The record also reveals that Union representatives, including Walsh and Elliot, snapped photographs of Employer representatives without their consent, which antagonized several Employer representatives (Tr. 376:12-18; 377:2-10; 380:18-23; 381:2-6; 117:17-118:6; 119:16-120:2; 147:2-14).

To say the least, the interactions in the parking lot between Employer and Union representatives were highly charged. Against that backdrop, the mere single utterance alleged here is insufficient to overturn the election. Indeed, Frank's alleged conduct was rather innocuous notwithstanding the Union's attempt to magnify it (Tr. 140:16-23 [Walsh confirmed that Frank "didn't touch me"]). See *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995) (in assessing whether conduct is objectionable and can overturn an election, important factors that Board considers include number of incidents, severity of incidents likely to cause fear among eligible voters, number of eligible voters subjected to misconduct, and extent of dissemination). Citing *Cedar-Sinai Medical Center*, 342 NLRB 596, 597 (2004) the Hearing Officer pointed out that a factor in deciding whether conduct is objectionable is "the degree of persistence of the misconduct in the minds of the bargaining unit employees" (Report at 4). Here, the record is devoid of evidence of the alleged conduct having **any** affect on employee sentiment, let alone persisting in employees' minds such that it would impact how they cast their ballots. The Union's failure to secure the testimony of its observer, Aristil, should especially militate in favor of overruling the objection. The assertion that voters were intimidated from testifying, which is unsupported, is particularly unworthy of belief as to Aristil given that she served as the Union's observer for both the morning and afternoon votes and, quite obviously, in doing so was not intimidated from or otherwise reticent about revealing her support for the Union.

Furthermore, nothing in the record indicates that Aristil disseminated Frank's remark if she was present and heard it. Accordingly, even if Frank's conduct affected her vote, the one-vote swing results in a tied tally of ballots and nothing more. Since neither party sought to open the challenged ballot, the final tally of ballots here is a tie. The Union cannot be certified in the absence of majority support. *John W. Thomas Co.*, 111 NLRB 226 (1955); *Sonicraft, Inc.*, 281

NLRB 569, 570 (1986). It follows that if, *arguendo*, the alleged conduct occurred, the outcome of the election does not change and the Union does not represent the voting unit.

III.

THE BOARD SHOULD OVERRULE OBJECTION NO. 19 SINCE THE WEIGHT OF THE EVIDENCE ESTABLISHES THAT THE EMPLOYER'S AGENT DID NOT SAY THAT THE EMPLOYER WOULD NEVER ENTER INTO A CONTRACT WITH THE UNION OR OTHERWISE INDICATE THAT IT WOULD BE FUTILE TO ELECT THE UNION.

The Board should reject the Hearing Officer's recommendation that it sustain Objection No. 19. The Hearing Officer concluded that a consultant named Keith stated in the presence of Aristil that the Union has never gotten a contract at another Care One facility and that it would never get one at Madison Avenue. However, review of the record reveals that the Hearing Officer's conclusion is against the overwhelming weight of the evidence. Accordingly, the Board should overrule the objection (Report at 14-15).

The Hearing Officer credited the testimony of Walsh and Elliot that Keith made statements of futility in the presence of Aristil despite contrary testimony of Asha George, the Employer's Director of Rehabilitation. The Hearing Officer rejected George's testimony that Keith never made the statements attributed to him on the ground that George made "contradictory" statements with respect to whether she heard the entirety of the back-and-forth in which Keith allegedly made the remarks the Hearing Officer ascribed to him (Report at 14). The record makes clear that the Hearing Officer erred in so concluding.

George testified that she observed the **entire** exchange between Keith and Union representatives Walsh and Elliot in which Keith referred to the Union representatives as "losers" (Tr. 378:2-3; 378:13-379:19). This is noteworthy since in the version of the encounter that both Walsh and Elliot related, the alleged futility remarks **followed** Keith asking Aristil why she was

hanging out with “losers” (Tr. Tr. 111:22-112:7; 136:22-137:5; 151:19-25). The Hearing Officer’s failure to acknowledge that George specifically testified that she heard everything after Keith referred to the Union representatives as “losers” underscores that he misunderstood this portion of her testimony and its importance in determining whether Keith made a statement of futility.

George underscored that Keith traded several insults with Walsh and Elliot (Tr. 364:12-19, 23; 374:14-16; 378:6-12; 379:17-18)--a feature of the discussion about which both Walsh and Elliot failed to testify and an omission that the Hearing Officer failed to note--which were principally disparaging remarks about one another’s mothers and wives. George then heard Keith ask Union observer Aristil “why are you hanging out with these losers?” (Tr. 364:20-21; 374:3-5; 379:15). Elliot directed Aristil not to reply to Keith (Tr. 364:21-22; 374:10-11; 378:4-5, 17-20; 379:16)--another detail Walsh and Elliot overlooked and the Hearing Officer failed to mention--and Keith then departed without further comment (Tr. 364:24-25; 379:18-19).

George testified that she was rather surprised at the rough and tumble of what transpired in the parking lot on the day of the election. As a result, she was quite alert and attentive. She testified clearly and carefully as to her observations and at no time did she indicate that Keith voiced any remark about contracts or the like, let alone the statements that the Union representatives attributed to Keith to the effect that the Union never had or would get a contract at a Care One facility.

The Hearing Officer discounted George’s testimony because at one juncture she acknowledged that she had not heard everything in the exchange between Keith, Walsh, and Elliot (Tr. 374:17-18). However, the record makes clear that George did not mean by this remark that she had not heard the entire exchange relating to the Union representatives being

“losers” and what followed. Under aggressive cross-examination, George clarified that what she had meant by her acknowledgement that she had not heard “everything” was that (a) she only could testify to what she had heard and that she had heard the entirety of the exchange following Keith’s reference to them as “losers” (378:13-20; 379:12-22) and (b) she did not recall all the insults that had been exchanged (Tr. 383:11-385:10). George steadfastly stood her ground that she had been present and had heard the entirety of the back-and-forth when Walsh, Elliot, and Union observer Aristil stationed themselves under the overhang in front of the entrance to the building (Tr. 371:22-372:20): Walsh, Elliot, and Keith exchanged insults (Tr. 374:10-11), including Keith’s question to Aristil as to why she would hang out with “losers” like Walsh and Elliot (Tr. 374:3-9), and the exchange concluded with Keith walking away without Keith saying anything about the Union never being able to get a contract (Tr. 378:13-379:19). *See also* Tr. 381:11-386:4.

At the hearing Union counsel challenged George’s testimony on the ground that she had actively opposed the Union’s organizing effort and had been part of another confrontation in the parking lot on the day of the vote. Although the Hearing Officer did not comment on George’s alleged bias, her testimony about other encounters in the parking lot that day underscore that George was a reliable and precise witness. George readily admitted that she had opposed the union organizing drive (Tr. 386:15-387:4) and had become embroiled in a confrontation of her own earlier that morning when she repeatedly asked colleagues of Walsh and Elliot to move the Union bus (Tr. 366:16-24). George objected to the Union having parked the bus on Madison Avenue directly in front of the facility for approximately ten minutes when the Union representatives maintained that the only reason for doing so was to let one or more persons off the bus (Tr. 367:6-368:2). George told one of the Union representatives, a female, that since

they had accomplished their purpose they should move the bus (Tr. 367:8-10). It was around this time that George heard one or more of these Union representatives mock Keith's colleague by stating that she had no boobs and she looked like a man (Tr. 365:1-13). George then walked toward the building (Tr. 369:1-4), stood under the overhang in front of the entrance to the building, and was ultimately joined there by the persons (Walsh, Elliot, Aristil, and Keith) that engaged in the exchange that was the principal subject of her testimony (Tr. 371:22-372:20). Nothing in George's involvement in the Employer's campaign to remain nonunion or her exchange concerning the Union bus suggests that she was anything but completely truthful in testifying about what transpired between the Union representatives and Keith.

In view of the precision and clarity of George's testimony, the objection should be overruled. George's testimony refutes the Union's contention that Keith made any statement to the effect that the Union had not or would not secure a contract or that it was otherwise futile for the employees to select the Union. Accordingly, the Board should reject the Hearing Officer's recommendation and overrule this objection.

Further, as a matter of law, there is no basis for the Board to order a rerun election even if, *arguendo*, Keith made the statement attributed to him. First, the utterance of a single statement such as that ascribed to Keith here that was heard by at most one voter in the election unit is *de minimis* and, therefore, insufficient to support an objection and necessitate a rerun election. *See, e.g., Bally's Park Place, Inc.*, 352 NLRB 316, 330 (2008), *affirmed and adopted*, 356 NLRB No. 40 (2010), where the Board concluded that a single incident as to which there was insubstantial evidence of dissemination was not a basis for overturning an election. Here, as the Hearing Officer acknowledged, there was **no** evidence of dissemination. Beyond that, the Union did not meet its burden of establishing that Union observer Aristil was attentive to or

heard Keith's alleged remark. Without a scintilla of evidence of impact of Keith's alleged comment upon even one member of the voting unit, there is no basis for sustaining the objection and ordering a rerun election. Second, insofar as Aristil was the only voter to hear the remark, assuming that it was made and she in fact heard it, the one-vote swing results in a tie. Without majority support, the Union cannot be certified. Accordingly, the Board should reject the Hearing Officer's recommendation for a rerun election even if it sustains this objection.

CONCLUSION

For the reasons stated herein as well as the accompanying Exceptions, the Employer respectfully requests that the Board reject the Hearing Officer's recommendations, overrule Objection Nos. 9, 16, and 19, and certify the election.

Respectfully submitted,

s/ Jedd Mendelson
Jedd Mendelson
Littler Mendelson, P.C.
Attorneys for Care One at Madison
Avenue, LLC d/b/a Care One
at Madison Avenue
One Newark Center-8th Floor
Newark, New Jersey 07012
Tel. 973.848.4700
Fax 973.556.1612
jmendelson@littler.com

Dated: July 13, 2012

Firmwide:112950990.2 070487.1152