

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BELLAGIO, LLC

Employer

and

Case 28-RC-088794

**INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES AND MOVING PICTURE
TECHNICIANS ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA LOCAL 720 AFL-CIO**

Petitioner

**HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON OBJECTION TO CONDUCT AFFECTING
RESULTS OF ELECTION**

This report contains my findings and recommendations regarding the Employer's Objections. I recommend that each of the Employer's objections be overruled. The evidence is not sufficient to establish that the Petitioner, its agents, or third parties engaged in conduct that constitutes a basis to set aside the election.

I. PROCEDURAL BACKGROUND

Pursuant to a Stipulated Election Agreement approved by the Regional Director on September 13, 2012,¹ in this case, an election by secret ballot was conducted under the Director's direction and supervision on October 10, by an agent of the National Labor Relations Board (the Board) among employees of the Employer in the unit found appropriate

¹ All dates are in 2012, unless otherwise indicated.

for collective bargaining.² The Tally of Ballots, which has been served on all parties, shows the following:

Approximate number of eligible voters	20
Number of void ballots	1
Number of votes cast for Petitioner	10
Number of votes cast against participating labor organization	9
Number of valid votes counted	19
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	19

Objections to conduct affecting the results of the election were timely filed by the Employer on October 17.³ Acting pursuant to Section 102.69 of the Board's Rules and

² All full-time and regular part-time convention audio-visual technicians and stage hands in the Production Services Department employed by the Employer at its Las Vegas, Nevada facility; excluding all other employees, office clerical employees, security guards and supervisors as defined in the Act.

³ The Order set out the following Employer objections:

1. The International Alliance of Theatrical Stage Employees and Moving Picture Technicians Artists and Allied Crafts of the United States and Canada, Local 720, AFL-CIO (the "Union"), by and through its agents, officers, representatives and individuals acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions on the day of the election, by harassing and coercing eligible voters who expressed opposition to the Union's position. Among other things, individuals acting on the Union's behalf or with its implied endorsement threatened eligible voters with physical harm and asserted that those voters would be discharged unless they either voted for the Union or refrained from exercising their right to participate in the election. These coercive acts and other conduct took place during the critical pre-election and actual voting period, intimidated eligible voters in the exercise of their section 7 rights, and were sufficient to unlawfully affect the results of the election.
2. The Union, by and through its agents, officers, representatives and individuals acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions on the day of the election, by intimidating and threatening eligible voters who expressed opposition to the Union's position with physical harm and damage to their property. These coercive acts and other conduct took place during the critical pre-election and actual voting period, intimidated eligible voters in the exercise of their section 7 rights, and were sufficient to unlawfully affect the results of the election.
3. The Union, by and through its agents, officers, representatives and individuals acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions on the day of the election, by threatening eligible voters that the Union would not represent their interests post-certification unless they either voted in favor of union representation or refrained from exercising their right to participate in the election. These coercive acts and other conduct took place during the critical pre-election and actual voting period, intimidated eligible

Regulations, Series 8, as amended, the Regional Director, after reasonable notice to all parties to present relevant evidence, caused an investigation to be conducted regarding the Employer's objections. On October 19, the Regional Director issued an Order Directing Hearing on Objections and Notice of Hearing, in which he ordered that a hearing be held before a Hearing Officer to be designated for the purpose of resolving the issues raised by the Petitioner's Objections, and further ordered said Hearing Officer to prepare, and cause to be served upon the parties, a report containing resolutions of credibility of witnesses, findings of facts, and recommendations to the Board as to the disposition of said objections.

Pursuant to the this Order Directing Hearing and Notice of Hearing, a hearing was held in Las Vegas, Nevada on October 26, before the undersigned Hearing Officer. All parties to the proceeding appeared at the hearing and were offered a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, and to make closing oral arguments to the Hearing Officer. Based upon the entire record in this case and upon my observation of the demeanor of the witnesses, including their manner

voters in the exercise of their section 7 rights, and were sufficient to unlawfully affect the results of the election.

4. The Union, by and through its agents, officers, representatives and individuals acting on its behalf or with its implied endorsement, interfered with the fair operation of the election process and destroyed the necessary laboratory conditions on the day of the election, by threatening eligible voters who expressed opposition to unionization that they would suffer retribution and/or be fired by the Employer unless the Union won the election or the eligible voters refrained from exercising their right to participate in the election. These coercive acts and other conduct took place during the critical pre-election and actual voting period, intimidated eligible voters in the exercise of their section 7 rights, and were sufficient to unlawfully affect the results of the election.
5. By the above and other conduct described in paragraphs (1)-(4), the Union has interfered with and coerced eligible voters with regard to the exercise of their section 7 rights under the National Labor Relations Act. Eligible voters were unable to exercise a free and reasoned choice and the "laboratory conditions" necessary to conduct a fair election were destroyed. The above coercive acts and other conduct took place during the critical pre-election and actual voting period, intimidated eligible voters in the exercise of their section 7 rights, and were sufficient to unlawfully affect the results of the election.

of testifying, their frankness or lack thereof, the inconsistencies and contradictions in, and the plausibility of, their respective testimonies, descriptions and accounts, and a reconciliation of conflicts in testimony, whenever necessary, and having carefully considered the position statements submitted by the parties, the Hearing Officer makes the following findings of fact, conclusions of law, and recommendations to the Board.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Employer's Objections 1, 4 and 5

Claim 1. The Employer's claim that the Union, through Robert Cohen (Cohen), on or about September 8, threatened and coerced Douglas Taggart (Taggart) in an attempt to make Taggart refrain from voting.⁴

Employee Taggart testified that around the end of August (before the Union representation petition was filed on September 7), he had a conversation with employee Cohen (Cohen) in a large equipment storage room at the Employer's facility called Tech Shop 1.⁵ Cohen was an audio visual lead and at times served as an acting supervisor.⁶ Cohen told Taggart that he was sure that Taggart had heard from other employees that he was looking into unionizing the department. Cohen further told Taggart that he knew Taggart was going to be a no vote, that Cohn knew that that Employer Director Greg Parton (Parton) and Taggart had been old friends,⁷ that the Employer was very comfortable without the Union, and that Taggart would not want to do anything to hurt Parton. As to the Union, Taggart informed

⁴ At the hearing the Employer presented evidence regarding four different claims; this report will address those four claims in chronological order. Because the Employer wrote their objections very broadly, some of these claims fall under several objections.

⁵ Taggart stated that Union officers never told him that Cohen was working for the Union.

⁶ Taggart stated that Cohen served as an acting supervisor "maybe" four weeks a year. In its Excelsior list, Employer Exhibit 4, the Employer included Cohen as an eligible voter.

⁷ At the hearing, Taggart stated he had been friends with Parton for 35 years.

Cohen that Taggart did not feel that he needed somebody else to manage his life, his career or the work between him and his employer. Cohen nevertheless invited Taggart to a Union meeting.

On or about September 4, Taggart, Douglas Spicka (Spicka), Cheikh Mbacke (Mbacke) nicknamed "City," and several other employees, attended a meeting at the Union's Las Vegas facility (Union hall). Taggart and Mbacke left before several employees at the meeting signed union authorization cards.

Taggart further testified that around September 8, Cohen had another one-on-one conversation with Cohen in Tech Shop 1. This conversation is the subject of this claim. Taggart states that Cohen told him, "I want you to look me in the eye, shake my hand, and tell me your not [sic] gonna vote." Taggart replied by looking Cohen in the eye and shaking his hand. Taggart states that within the next two or three days he told three different employees, Spicka, Mbacke and Kevin Brewer (Brewer), about this conversation with Cohen.

Employee Spicka testified that less than a week after the September 4 Union meeting he was in Tech Shop 1 with about three or other four other techs whose names he did not recall; Cohen entered and informed Spicka and the other techs, "I just got Lee [Taggart] to look me in the eye and shake my hand and tell me that he was not going to vote." Spicka later informed Taggart about Cohen's remark. Spicka also told Taggart something like, "Just blow it off Lee. You're going to do what you need to do."

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be

drawn from the record as a whole. *Double D. Construction Group*, 339 NLRB 303, 305 (2003).

I credit Taggart's accounts of both his late-August and September 8 conversation with Cohen, as well as his subsequent conversations with three employees about that conversation as he appeared to be a forthright witness with a thorough recollection as to these particular events. Moreover, his account did not differ materially from Cohen's account of these two conversations, whom I also found to be a forthright witness with detailed recollection as to these two conversations. Additionally, I credit Spicka's account of Cohen's conversation in Tech 1 with the four other techs. To the extent that Cohen's testimony is inconsistent with that of Taggart and Spicka with regard to these particular events set out in this claim, I credit Taggart and Spicka.⁸

⁸ Cohen testified that he called Taggart and invited him to the Union meeting before the petition was filed. Cohen stated that he told Taggart about a Union meeting and Taggart expressed appreciation for the invitation. However he expressed some reticence. Cohen informed Taggart that the meeting was exploratory. Taggart expressed concern that Parton, who had given him his first job, may get in trouble. Cohen explained that he did not view the matter as a loyalty issue because he did not view Union activity as being disloyal to the company. Cohen further told Taggart that there was a third option – that he did not even have to vote. Cohen explained that Taggart could abstain because he had a conflict of interest, that Taggart's loyalty to Parton precluded Taggart from being able to become involved wholeheartedly.

Cohen further testified that a few days after Taggart attended a Union meeting, Cohen asked Taggart how he liked the meeting. Taggart thanked Cohen for inviting him by saying it was a nice gesture. Cohen asked, "Do you still feel you have this conflict that you're not going to be able to be involved in this Union organizing effort?" Taggart replied that he felt that he still had the conflict. Cohen asked, "You're going to honor this gentlemen's agreement that you're going to abstain because, you know, you obviously have a conflict?" Taggart agreed, shook Cohen's hand and promised that he would abstain. While Cohen did not remember going to Tech Shop 1 and telling employees that Taggart was not going to vote, he recalled telling various coworkers that due to Taggart's loyalty to Parton, Taggart was going to abstain from voting.

B. Employer's Objections 1, 3, and 5

Claim 2. The Employer's claim that the Union, through Business Agent John Gorey (Gorey), on or about October 4 or 5, informed employees that if they voted against Union representation they would not receive full and fair representation if they filed a grievance.

Spicka testified that around the end of August or early September before the Union filed its representation petition, Union Business Agent Gorey called Spicka and stated that he would like to meet with Spicka and go over what the Union has to offer. Spicka agreed. A few days later Spicka and Gorey met at a Buffalo Wild Wings restaurant. During this meeting, Gorey informed Spicka about what the Union had to offer Bellagio employees. Spicka testified that he asked Gorey various questions, including asking Gorey whether an employee who voted no would receive the same treatment as a voter who voted yes. Gorey replied, according to Spicka, "yeah, why would the Union, [sic] what would somebody that voted no get the same benefits as somebody that wanted us here."

Spicka further testified that on either Thursday or Friday, October 4 or 5, he attended a meeting at the Union hall where Torres spoke. Also present at this meeting were employees Cohen, Brewer, Theo Mack, R.J. Phillips, Michael Hines, and Alex Avila, as well as a freelance audio engineer who worked occasionally at the Bellagio named Alfonso Torres (Torres).⁹ Spicka testified that at this meeting:

I said, "Remember when we first met," I asked him about, you know, treatment of people that you knew who voted yes and you knew who voted no and I said, "Can you go into more detail about that?" And he said, "Well, if somebody that voted yes for IATSE had some kind of a grievance, then we would get behind them 120 percent. And

⁹ Gorey recalled that Torres showed up at a Union meeting of Bellagio employees. Gorey believed that one of the Bellagio employees had invited Torres.

if we knew somebody voted no and didn't want the Union in Bellagio, then we'd give them maybe 50 percent of backing towards resolving this grievance.”

Gorey, who had served as a business agent for more than two years, testified that he had had a one on one meeting with Spicka at the Buffalo Wild Wings restaurant and four to six meetings in the Union hall with various Bellagio employees and at times discussed how insurance coverage would work if employees became Union. Gorey denied, however, making any promise to any Bellagio employees that if they voted in favor of the Union they would receive better representation than employees who voted against the Union. Gorey explained at the hearing that he knew that “Nevada is a right to work state, it's 100% member and non member Everyone has to be represented the same.” On cross-examination Gorey denied that he told Bellagio employees, including Spicka, that employees who vote yes would get 120% representation in grievances and that employees who vote no would get 50%.

Moreover, Cohen testified that he attended various meetings with Union representatives and that at these meetings employees asked several questions and the Union was very vague about the benefits it could provide. However, Cohen denied that there was any discussion as to the type of representation employees could expect from the Union.

In *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), the Board noted that an ALJ has discretion to draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent and thus within its authority or control. In the instant case, I do not draw an adverse inference against either the Employer or the Union for failing to call any of the other employees who attended the Union meeting with Spicka to testify. Mere attendance at a

Union meeting by an employee before a representation election does not mean that the employee can be assumed to be favorably disposed to either party.

Nevertheless, after having had the opportunity to observe the demeanor of Spicka, Gorey, and Cohen while testifying about this claim, and evaluating the inherent plausibility of their testimony, it is my conclusion that Spicka's testimony regarding Gorey's purported remarks lack plausibility and credibility. Credibility findings need not be all-or-nothing propositions. As the Board explained in *Daikichi Sushi*, 335 NLRB 622, 622 (2001), "nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony." I find that Gorey credibly testified that he would not have promised better representation to employees who voted yes because he knew that Nevada is a right-to-work state in which everyone has to be represented the same. In contrast to my findings regarding Spicka's testimony about these remarks by Gorey, I find that Gorey testified credibly that: he had not informed any Bellagio employees that employees who vote yes would get 120% representation in grievances; employees who vote no would get 50%; or that he otherwise informed any Bellagio employees that if they voted in favor of the Union they would receive better representation than somebody who voted against the Union.

C. Employer's Objections 1, 2, 4 and 5

Claim 3. The Employer's claim that the Union, through Torres, on October 8, threatened and coerced Spicka in an attempt to make him refrain from voting, or, in the alternative, that even if Torres is not found to be a Union agent, Torres' conduct warrants the setting aside of the election.

Torres, nicknamed "Fonzy," is a freelance audio engineer stage hand who worked occasionally at the Bellagio. Gorey testified that on a date before the Union filed its representation petition, Torres came by the Union hall after working on a job which had a

Union contract and asked to see Gorey. When Gorey went out to meet him, Torres introduced himself to Gorey. Torres stated that he had heard about the organizing efforts at the Bellagio, and told Gorey that that if there was anything he could do to help to let him know. Gorey responded that he and Union Agent Randy Soltoro had the organizing under control.¹⁰

Spicka testified that he received a phone call from Torres a few days after Spicka had met with Gorey at a restaurant. Torres informed Spicka that he was on Spicka's side of town and would like to get together and have a beer. The two met at Brewskies bar and restaurant. During their conversation at Brewskies, Torres informed Spicka that Gorey had come to Torres, knowing that Torres had worked at Bellagio several times, and asked him to speak to Spicka because Gorey believed that Spicka was a swing vote.¹¹

Spicka explained that on October 4, employees eligible to vote in the upcoming October 10 election attended an employee meeting at the Employer's facility. An open discussion between the employees took place after several supervisors and human resources representatives discussed election logistics and laws regarding Union representation. The open discussion turned into a heated and angry exchange between the employees, including between Spicka and Union supporter Webster. During the discussion Spicka revealed that he was opposed to the Union drive and that employees Cohen and Randy Phillips were leaders in the Union's organizing drive.

Spicka further testified that on the evening of October 8, he was at his home on his couch playing guitar when he received a text message from Torres. The text message, which indicated that it was sent by Torres at 10:40 p.m. October 8, stated:

¹⁰ Gorey testified that Torres was neither: employed by the Union; hired to work on behalf of the Union in the Bellagio organizing effort; nor authorized to speak on behalf of the Union in connection with the organizing effort.

¹¹ Gorey avowed that Torres would be lying if Torres informed Spicka that Gorey told him to reach out to Spicka.

Really bro? I never pegged
u for a rat. Live & learn I
guess. That's a tough road
u chose doug, u could've
just voted no.

Spicka testified that the email made him feel nervous. Spicka knew that the term "rat" meant a person that informed on or outed someone, and he knew that he had named two employees as Union leaders at the company meeting. The text message's last sentence indicated to Spicka that there were "going to be consequences" due to the path he had taken.

After receiving the text message Spicka immediately called Torres. Spicka stated that he asked Torres, "what is this, like junior high school." Spicka told Torres that "it was not cool." Spicka explained to Torres how he had become angry at Webster during the Bellagio meeting. When the conversation was about to end, Torres remarked to Spicka, "Bro, you know, if this vote goes through, you're toast." Spicka did not respond. Torres then remarked, "The vote is going to go through, you better, you better not vote." After this phone call, Spicka called Taggart and informed him about the text message from and the subsequent phone conversation with Torres.

On October 9, Spicka went to work and informed AV Manager Steve McGillvary and Production Supervisor Jim Hilliard (Hilliard) about Spicka's recent communications with Torres.¹² Later that day, Hilliard informed Spicka that he was going to take Torres "off the New Year's gig." Torres was originally scheduled to run sound at the show, as he had done in the past. Hilliard informed Spicka that Hilliard did not want somebody whom was threatening a Bellagio employee in the same building.

¹² On the morning of October 9, Spicka sent his ex-wife an email in which Spicka stated that he was writing her to let her know what was going on "just in case something bad happens."

Spicka went outside and chain smoked as he walked up and down Frank Sinatra Boulevard. Spicka was in a panic. Spicka was thinking that Torres was “going to kick [his]ass” because Torres was going to lose income because of him. Spicka knew that Torres was a “big Italian guy, New York accent ... a tough guy talker.” As Spicka was pacing, he came across Taggart and Mbacke (who is usually driven to work by Taggart) on their way to the facility to start their shift. Spicka stated he told Taggart and Mbacke “what had happened, that they were going to kick Fonzy [Torres] off the show on New Year’s Eve,” and Taggart and Mbacke remarked that it was not good.^{13 14}

As to credibility, I credit Gorey’s testimony regarding his communications with Torres, including his testimony that he did not ask Torres to speak with Spicka. I likewise credit Spicka’s testimony regarding his communications with Torres and Spicka’s testimony regarding his communications with certain employees and managers about Torres. I credit Gorey’s testimony that he had neither authorized Torres to speak on behalf of the Union in connection to the Bellagio organizing effort, nor asked Torres to reach out to Spicka. It would have helped the Hearing Officer to have Torres testify at the hearing. However, I do not draw any adverse inferences from the Union’s failure to call Torres to testify. Merely because Torres obtained work at times through the Union’s hiring hall and attended a Union meeting of Bellagio employees does not mean that Torres should be assumed to be favorably disposed to the Union.

¹³ Taggart testified that he had never seen Spicka pace back and forth in this manner. Spicka remarked to Mbacke and Taggart that Torres threatened him. Taggart stated that Spicka “was talking so fast, because adrenaline was, was definitely flowing,” and that Spicka “was so afraid that it made [Taggart] afraid for him.”

¹⁴ Spicka stated that later that day he went to management and suggested that they allow Torres to work the New Year’s Eve show and he would take that evening off from work.

D. Employer's Objections 1, 2, 4 and 5

Claim 4. The Employer's claim that the Union, through Aaron, on October 9, threatened and coerced Spicka in an attempt to make him refrain from voting, or, in the alternative, even if Aaron is not found to be a Union agent, Aaron's October 9th conduct warrants the setting aside of the election.

Spicka further testified that shortly after he arrived home at the end of his shift on October 9, he observed that he had a voicemail on his secondary cell phone. When he played the message, he heard a gravelly voice he recognized as belonging to Aaron ____, last name unknown (Aaron), the friend or associate of Torres whom he had spoken with the night before. The taped voice message stated, "Hey dope fiend, you drug addict, you (inaudible), you gonna get hurt."

Spicka knew that Aaron, like Torres, was not a regular Bellagio employee. Spicka observed Aaron working three of four gigs a year with Torres, each lasting about 14 hours,¹⁵ and knew that in the past Torres and Aaron had been roommates.

After he listened to the voice mail from Aaron, Spicka called Taggart and replayed it for him. Taggart replied "Jesus Christ, this is getting out of control." The following morning, after letting Brenda Kruse (Kruse) of the Employer's human resources department listen to Aaron's voice message, Spicka worked with employee Theo Mack (Mack) to set up a show. That morning, Mack asked Spicka whether the Bellagio "was really going to kick Fonzy [Torres] off the New Year's . . . [and] that [it] would suck having to have someone new in there that doesn't know what they are doing." Spicka had not told Mack about Torres'

¹⁵ Spicka made small talk with Aaron when he saw Aaron at the Bellagio. Moreover, one time after Chinese New Year he socialized with Aaron away from the facility. Spicka knew that Aaron has a distinctive voice.

communications with him and Spicka did not know how Mack had found out about the possibility of Torres not working the New Year's eve show.

Aaron, like Torres, did not testify at the hearing. I find that Spicka credibly testified regarding his call from Aaron and his subsequent communications regarding that call with Taggart, Kruse, and Mack.

III. CONCLUSIONS AND ANALYSIS

As explained in *Bonanza Aluminum Corp.*, 300 NLRB 584, 590 (1990):

“[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees.” *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a “heavy one.” *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied, 416 U.S. 986 (1974); see also *NLRB v. First Union Management*, 777 F.2d 330, 336 (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but “[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.” *NLRB v. Bostik Div., USM Corp.*, 517 F.2d 971, 975 (6th Cir. 1975) (quoting *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064, 1067 (5th Cir. 1973)).

In the instant case, I overrule Employer's claim 1 (encompassed in Objections 1, 4 and 5), that the Union, through Cohen, on or about September 8, threatened and coerced Taggart in an attempt to make Taggart refrain from voting for a variety of reasons.

I find that the Employer failed to establish that Cohen was an agent of the Union. In *Tyson Fresh Meats*, 343 NLRB 1335, 1336-37 (2004), the Board explained that the burden of proving an agency relationship is on the party asserting its existence. The Board further explained that the determination of whether this burden has been satisfied rests on an analysis of the facts under common law agency principles:

[A]ctual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his

agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or “should know” that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, *Agency*, § 27.

In the instant case there is no record evidence that the Union conferred actual authority to Cohen. The Employer did not meet its burden of establishing that Cohen was a Union agent under the doctrine of apparent authority. The Employer failed to establish that Union officers acted in a way in the presence of Taggart, other employees, or third parties, in which the Union agent would or should have known that his conduct was likely to make others believe that Cohen had authority to act on behalf of the Union. Moreover, while it is undisputed that Cohen was one of the most active employees in the unit seeking to obtain Union representation, there is no evidence on the record suggesting that the Union manifested to a third party that Cohen was a Union agent.

Moreover, even if the Employer had established that Cohen was a Union agent, I would not sustain this claim. As explained in *Hopkins Nursing Care Center*, 309 NLRB 958 (1992), the Board applied an objective test, namely whether “whether the conduct of a party to an election has the tendency to interfere with the employees’ freedom of choice.” While the election was very close, with 10 votes cast for, and 9 votes cast against the Union, I find that this test was not satisfied here because Cohen’s remarks to Taggart (i.e. asking Taggart to look him in the eye, shake his hand and tell him that he was not going to vote) within these particular circumstances were not objectively threatening or coercive because there was no threat to effectuate even during the times when Cohen may have served as an acting supervisor,¹⁶ and that this conversation took place around September 8, more than a month before the election. As such, I find that

¹⁶ The Employer failed to establish that Cohen was a statutory supervisor. Indeed its Excelsior list included Cohen as an eligible voter in a unit which excluded statutory supervisors.

Cohen's conduct towards Taggart did not objectively interfere with employees' freedom of choice.

In the instant case, I also overrule Employer's claim 2 (encompassed in Objections 1, 3 and 5), that the Union, through Union Business Agent Gorey, on or about October 4 or 5, informed employees that if they voted against Union representation they would not receive full and fair representation when filing a grievance.

A threat of reduced representation if employees vote against union representation may constitute coercive conduct. In *Randall Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006), the Board explained that "once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them."

I find that Gorey was one of the Union agents involved in the Union's organizing drive at the Bellagio, was an agent of the Union within the meaning of Section 2(13) of the Act. As described above however, I do not credit Spicka's testimony that Gorey had informed Bellagio employees at a Union meeting that employees who vote yes will obtain 120%, and employees who vote no will receive 50%, representation when they file grievances. Rather, I credit Gorey's denial that he made such remarks. Having found no credible evidence that Gorey informed Bellagio employees that if they voted against the Union they would not receive full and fair representation when they filed grievances, I find that Gorey's remarks to the Bellagio employees did not objectively interfere with employees' freedom of choice.

In the instant case I also overrule Employer's claim 3 (encompassed in Objections 1,2, 4 and 5), that the Union, through Torres, on October 8, threatened and coerced Spicka in an attempt to make him refrain from voting; or that even if Torres is not found to be a Union agent, Torres' conduct warrants the setting aside of the election.

The Employer failed to establish that Torres was an agent of the Union within the meaning of Section 2(13) of the Act. In the instant case there is no credited evidence on the record establishing that the Union conferred actual authority to Torres. Moreover, I find that Employer failed to establish that Torres was a Union agent under the doctrine of apparent authority. The Employer failed to present any evidence that a Union agent such as Gorey manifested to Spicka or another Bellagio employee that Torres was a Union agent. Nor did the Employer establish that the Union through Gorey knew or should have known that his conduct in relation to Torres was likely to cause Spicka or other Bellagio employees to believe that the Union had authorized Torres to act on behalf of the Union. In *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), a case involving an employer's objections to an election, the Board found that the M. Muniz and E. Muniz (the Muniz brothers) relations with the petitioning union's officials reasonably manifested that the Muniz brothers were the petitioner's representatives. The Board found that the petitioner union:

held out the Munizes as apparent agents by failing to disassociate itself from the results of the Munizes' actions; by permitting the Muniz brothers to speak on behalf of the Petitioner at meetings held by the Petitioner for the employees; by permitting the Munizes to make special appearances with Petitioner officials at official election functions; by transporting the Muniz brothers to another Employer facility to campaign and vote on the day of the election; and by instructing M. Muniz to remain in the no-electioneering area on election day.

In the instant case, the Employer presented evidence that Torres attended a Union meeting with Gorey and the Bellagio employee. In contrast to the facts in *Bio-Medical of Puerto Rico*, *supra*, however, the Employer presented no evidence that Gorey allowed Torres to speak on behalf of the Union at even this one meeting. See also *United Mine Workers of America, District 29*, 308 NLRB 1155, 1163 (1992) (Board found a union responsible for the threats to drivers uttered by one or more of the four union members who assisted union executive board member Webb because “since Webb introduced himself to the drivers as a officer of the Union, and since the four were obviously accompanying Webb, the drivers could have ‘reasonably have believed’ that each of the four ‘was acting on behalf of the union.’”).

Since I do not find that Torres was a Union agent, I will analyze his conduct as a third party. In *Mastic Direct TV Employer*, 356 NLRB No. 110 (March 7, 2011), the Board explained:

It is settled that the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood*, *supra*, at 803.

In the instant case I find that the Employer failed to establish that Torres’ conduct was so aggravated as to create a general atmosphere of fear and reprisals rendering a free election impossible. As to the nature of the threats itself, I find that Torres implicitly threatened Spicka with unspecified reprisals that Spicka took seriously. As to the timing of the threat, I find that it was made on the evening of September 8, less than two days before the September

10 election. I find that the threats, however, were made to only one employee, Spicka, and the threats did not encompass all 20 employees in the unit. Moreover, as to the voting-eligible employees, these threats were only disseminated to two employees, Taggart, who had already openly expressed his opposition to the Union drive, and Mbacke, who frequently was driven to work by Taggart. While credible evidence at the hearing disclosed that on October 10, Mack asked Spicka about the Bellagio kicking Torres off the New Year's Eve show, there is no record evidence that Mack knew about Torres' threat to Spicka. In addition, the Employer failed to establish that Torres, the person making the threat, was capable of carrying it out and that the Bellagio employees acted in fear of that capability. There is no record evidence that Torres had a history of fighting or other type of violent behavior. When I look at these factors altogether, under these particular factual circumstances, I find that the Torres' conduct was not sufficiently substantial or aggravated in nature, so as to create a general environment of fear and reprisal that renders the free choice of representation impossible.

Finally, in the instant case, I overrule Employer's claim 4 (encompassed in Objections 1,2, 4 and 5), that the Union, through Aaron, on October 9, threatened and coerced Spicka in an attempt to make him refrain from voting; or that, even if Aaron is not found to be a Union agent, Aaron's conduct warrants the setting aside of the election. In the instant case, I find that the Employer completely failed to establish that Aaron was a Union agent based upon either actual or apparent authority. There is no record evidence of any manifestation by a Union agent to a Bellagio employee or another third party that Aaron was a Union agent.

When I analyze Aaron's conduct as a third party, like the situation with Torres, I find that the Employer failed to establish that Aaron's conduct was so aggravated as to create a

general atmosphere of fear and reprisals rendering a free election impossible. As to the nature of the threat itself, I find that Aaron threatened violence towards Spicka and that the circumstantial evidence showed that the threat was related to Spicka's protected conduct in opposing a Union drive. As to the timing of the threat, Spicka received it on the evening of September 9, the night before the day of the election. I find that the threat, however, was made to only one employee, Spicka, and did not encompass all 20 employees in the unit. Moreover, as to the voting-eligible employees, Aaron's threat was disseminated to only one employee Taggart, who as described above, already openly expressed his opposition to the Union drive. The Employer failed to establish that the person making the threat, Aaron, was capable of carrying it out and that the Bellagio employees acted in fear of that capability. There is no record evidence that Aaron had a history of fighting or other type of violent behavior. When I look at these factors altogether, under these particular factual circumstances, including Torres' threats to Spicka, I find that Aarons' and Torres' conduct was not so aggravated so as to create a general environment of fear and reprisal so as to render the free choice of representation impossible.

IV. RECOMMENDATION

Based on the foregoing, I recommend that each of the Employer's objections be overruled. I further recommend that the Regional Director issue a Certification of Representation.¹⁷

Signed at Phoenix, Arizona, this 20th day of November 2012.

/s/ Mitchell S. Rubin

Mitchell S. Rubin, Hearing Officer
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
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¹⁷ Within fourteen (14) days of service upon the parties of this report, any party may file with the Board eight (8) copies of exceptions to such report, with supporting brief, duplicated. Immediately upon filing such exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed upon each of the other parties, and simultaneously submit to the Regional Director a statement of such service. (See Section 102.69(e) as to the time limit for filing an answering brief to the exceptions.) If no exceptions are filed, the Board will adopt the recommendation of the Hearing Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTION TO CONDUCT AFFECTING RESULTS OF ELECTION** in **BELLAGIO, LLC**, Case 28-RC-088794 was served by E-Gov, E-Filing, and regular mail on this 20th day of November 2012, on the following:

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