

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC,

Employer,

and

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

Union.

Case No. 28-RC-088794

**BRIEF IN SUPPORT OF THE EMPLOYER'S  
EXCEPTIONS TO THE HEARING  
OFFICER'S REPORT AND  
RECOMMENDATIONS ON OBJECTIONS**

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## **BELLAGIO, LLC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS**

Hearing Officer Mitchell S. Rubin conducted a hearing regarding Bellagio, LLC's objections to the election in the above-referenced matter on October 26, 2012. On November 20, 2012, he issued a Report and Recommendation ("Report") in which he recommended that each of Bellagio's five objections to the election be overruled. For the reasons set forth in Bellagio's Exceptions to the Report, which are explained in more detail below, the Hearing Officer's conclusions are not contrary to the facts and prevailing Board law. The Board should sustain the Company's exceptions, set aside the results of the October 10, 2012 election, and order a new election.

### **I. SUMMARY OF ARGUMENT**

The outcome of this election was determined by a single vote. There were twenty eligible voters. Ten cast their votes for International Association of Theatrical Stage Employees and Moving Pictures Technicians Artists and Allied Crafts, Local 720 (the "Union" or "Local 720"). Nine voted no. And, one person essentially abstained from voting. He placed his "X" in the middle of the ballot so it was impossible to discern his intent.

The Board's fundamental obligation in election proceedings is "to provide a laboratory in which an experiment may be conducted, under conditions nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). That did not happen in this case. During the critical period between the date the petition was filed and the date of the vote, the Union's business agent and two Union members had engaged in misconduct that interfered with the employees' free and uncoerced choice in the election and which created a general atmosphere of fear and reprisal. Indeed, given the evidence presented at the October 26, 2012 hearing, there is no doubt that the Union, through its agents, engaged in a concerted effort to unlawfully manipulate the election. Specifically:

- In a meeting at the Union hall *less than one week* before the election, the Union’s Business Agent, Mr. Gorey, apprized a group of at least seven eligible voters that individuals who did not vote for the Union would not receive full and fair representation if the individual filed a grievance. Specifically, Mr. Gorey stated that “if someone voted yes for IATSE [and] had some kind of grievance, then we would get behind them 120 percent. And if we knew someone voted no and didn’t want the Union in Bellagio, then we’d give them maybe 50 percent of backing towards resolving this grievance.” 90:14-19. As the Board has recognized in a number of cases, including *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591, 594-95 (2006), when a union takes action that leads members of the voting unit to fear that the union may retaliate against an employee who did not support it during the organizing drive, it irreparably interferes with the free and proper exercise of the election. Here, just days before the vote, the Union’s business agent did exactly that. Such a threat is coercive and warrants setting aside the election.<sup>1</sup>
- The Union unlawfully threatened and coerced Mr. Spicka in an attempt to make him refrain from voting. The evidence at the hearing established that Mr. Gorey instructed Mr. Torres to target Mr. Spicka and convince him to vote for the Union. After Mr. Spicka publicly opposed the Union for the first time, Mr. Torres contacted Mr. Spicka by text message and by phone, calling him a “rat,” ERX 1, reprimanding him for ‘naming names,’ 111:19-21, and warning him that “if this vote goes through, you’re toast. ... The vote is going through, you better not vote.” 110:22. This threat, which Mr. Spicka understandably understood to be severe, was issued on the night of October 8th, *two days before the election*. When Mr. Spicka reported this alarming message to Bellagio, and Mr. Torres learned that Bellagio may remove him from its New Year’s Eve show, Mr. Torres directed his associate to contact Mr. Spicka, leaving a voicemail that threatened physical violence: “Hey dope fiend, you drug addict ... you’re gonna get hurt.” 129:1-2. The voicemail, which along with the earlier threat, threw Mr. Spicka into a panic, and was sent *the night before the election*.<sup>2</sup>
- The Union unlawfully threatened and coerced Mr. Taggart in an attempt to make him refrain from voting. Mr. Cohen targeted Mr. Taggart before the petition was filed. Mr. Cohen was concerned that Mr. Taggart would not vote for the Union, so he began accusing Mr. Taggart of being untrustworthy and chastising him for an alleged “conflict of interest.” After Mr. Taggart left a meeting at the Union hall without signing an authorization card, Mr. Cohen confronted Mr. Taggart in a supply room at the Bellagio. Mr. Cohen demanded that Mr. Taggart “look [him] in the eye, shake [his] hand, and tell [him] that [Mr. Taggart] won’t vote.” 27:7-8.<sup>3</sup> As Mr. Taggart testified, this demand was

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<sup>1</sup> See Employer Objections 1, 3, 4 and 5.

<sup>2</sup> See Employer Objections 1, 2, 4 and 5.

<sup>3</sup> Citations to the transcript are as follows: page number : line number. Employer exhibits are identified as “ERX \_.” Citations to the Report are as follows: Report at p. --.

incredibly coercive. Mr. Cohen was his lead and part-time supervisor, meaning he had the authority to exact retribution against Mr. Taggart if he sought to vote.<sup>4</sup>

- Threats and intimidation that Mr. Gorey, Mr. Torres and Mr. Cohen directed at Mr. Taggart and Mr. Spicka were disseminated throughout the voting unit. Mr. Gorey issued his warning regarding representation to at least seven members of the voting unit. Mr. Spicka apprized Mr. Taggart, Sidy Mbacke, and others of Mr. Torres' conduct. Mr. Taggart informed Mr. Spicka, Mr. Mbacke, and Mr. Brewer of Mr. Cohen's threat; and, Mr. Cohen also gloated about intimidating Mr. Taggart to at least three additional voters on his own initiative.

The Hearing Officer credited the Bellagio's witnesses on all but two of these issues. He concluded that Mr. Cohen had attempted to intimidate Mr. Taggart, and also concluded that Mr. Spicka had received violent threats from both Mr. Torres and Mr. Torres' associate, Aaron. He nonetheless refused to recommend setting aside the election because he believed that neither Mr. Cohen nor Mr. Torres were acting as agents of the Union and that the threats made against Mr. Taggart and Mr. Spicka were not sufficient in light of the Board's holding in *Mastec Direct TV*, 356 NLRB No. 110 (March 7, 2011). He also refused to credit Mr. Spicka's testimony regarding the threat made by Mr. Gorey at the October 3rd meeting. He also improperly gave credence to Mr. Gorey's testimony that he did not deputize Mr. Torres to seek out Mr. Spicka's vote. Finally, the Hearing Officer did not enter an adverse inference against the Union for failing to call Mr. Torres, even though Mr. Torres' conduct is at the center of the case and Mr. Torres clearly was predisposed to provide the Union with positive testimony.

These holdings are wrong and should not be adopted by the Board. The Hearing Officer's credibility determinations regarding Mr. Gorey and Mr. Spicka are against the clear preponderance of the record evidence. His refusal to enter an adverse inference as the result of the Union's failure to call Mr. Torres, and his characterization of that refusal as an act of discretion, is reversible error. *See, e.g., United Auto Workers v. NLRB*, 459 F.2d 1329, 1337-38

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<sup>4</sup> See Employer Objections 1, 2, 4 and 5.

(D.C. Cir. 1972). The Board should find that Mr. Gorey threatened members of the unit on October 3rd, and that Mr. Torres and Mr. Cohen were Union agents when they threatened Mr. Spicka and Mr. Taggart. If the Board does so, the case would be analyzed using the standard for party misconduct, and given both the record evidence and the closeness of the election, the Board would have no choice but to set the election aside.

If the Board does not reverse the Hearing Officer's credibility and adverse inference determinations, it should still refuse to adopt the Report. The Hearing Officer's application of the standard used to evaluate election misconduct by third-parties was incorrect and contrary to prevailing Board law. The Hearing Officer found that an outcome determinative number of voters – Mr. Spicka, Mr. Mbacke and Mr. Taggart – were aware of the threats made by Mr. Torres and his associate Aaron. These threats were made two days before and one day before the vote. And, the Hearing Officer concluded that Mr. Spicka and Mr. Taggart clearly believed that Mr. Torres had the ability to carry his threats of physical violence out. Under *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), and subsequent Board decisions such as *Robert Orr-Sysco Food Services*, these findings mandated that the election be set aside, even if the misconduct was committed by third parties, not agents of the Union. 338 NLRB 614, 615 (2002).

In sum, the Hearing Officer's reasoning is actually quite thin. It rests on two unsupportable credibility determinations regarding Mr. Gorey's testimony. Given the size of the unit – twenty voters – and the voting margin – one vote – any one of the above acts of misconduct warrants setting aside the election. Bellagio's exceptions to the Report should be sustained.

## **II. STATEMENT OF THE CASE**

The representation petition in this matter was filed on September 7, 2012. 85:18-24. The election was conducted on October 10, 2012, pursuant to a Stipulated Election Agreement. Bd. Ex. 1(a)-(d). The voting times of the election were 10:00 a.m. to 1:00 p.m. and 5:00 p.m. to 7:00 p.m. *Id.* The tally of ballots served on the parties at the conclusion of the election showed that of 20 eligible voters, 10 ballots were cast for the Union, and 9 were cast against the Union. *Id.* One ballot was deemed void. *Id.* The voter had essentially refrained from voting, placing an “X” in the middle of the ballot, making it impossible to discern his intent. 133:3-6.

### **A. Post-Election Proceedings.**

Bellagio filed Objections to the election on October 17, 2012. The Objections were as follows:

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. 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 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.

The Regional Director scheduled a hearing to consider the objections for October 26, 2012, and the hearing was conducted on that date by Hearing Officer Mitchell S. Rubin. Four witnesses testified. Douglas Spicka and Lee Taggart, who were members of the voting unit, testified in support of the Bellagio’s Objections. Rob Cohen, a member of the voting unit and the employees’ liaison with the Union, and John Gorey, a Union Business Agent, testified on behalf of the Local 720.

## **B. The Hearing Officer's Report.**

The Hearing Officer issued the Report on November 20, 2012. He overruled each of Bellagio's five objections. In doing so, he found that the evidence presented at the hearing naturally fell into three "claims" for setting aside the election.

The first claim concerned the October 3rd incident at the Union hall. (Report at pp. 7-9.) There was no dispute that Mr. Gorey was an agent of the Union, nor was there any dispute that the threat alleged, if sustained, would be sufficient to set aside an election decided by only one vote. (*Id.*) Nonetheless, the Hearing Officer did not sustain Bellagio's First, Third and Fifth Objections, which were based in part on Mr. Gorey's statement. He based his ruling on a credibility determination. He found that Mr. Gorey's denial that he made the statement was credible in light of his belief that Nevada is a right to work state. *Id.* He discredited Mr. Spicka's testimony regarding the statement, but the only basis for doing so was the Hearing Officer's personal belief that the testimony lacked "plausibility and credibility."<sup>5</sup> (Report at p. 9.)

The second claim concerned Mr. Cohen's intimidation of Mr. Taggart. In this case, the Hearing Officer credited all of the testimony in Bellagio's favor, including Mr. Spicka's. (Report at pp. 4-6.) He found, however, that the conduct was not sufficient to sustain Bellagio Objections 1, 4 and 5 because Mr. Cohen was not a Union agent, because the incident occurred several weeks before the vote, and because Mr. Taggart's fear of Mr. Cohen was not reasonable or sufficiently serious under *Mastec*. (*Id.*)

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<sup>5</sup> The Hearing Officer observed that credibility determinations are not necessarily all or nothing propositions. However, the fact that he discredited Mr. Spicka on this issue, but sustained his testimony on all other matters, without any limitation whatsoever, is striking. It is even more striking when the credibility assessment had essentially no explanation or basis in the record, and was instead based on the Hearing Officer's own personal belief about its plausibility. The plausibility of the comment can be assessed by reviewing the transcript, and the conclusion is not entitled to deference. Moreover, as argued below, Mr. Spicka's testimony was in fact far more plausible than that offered by Mr. Gorey.

The third claim concerned Mr. Torres and Aaron's threats. Again, the Hearing Officer credited Mr. Spicka's testimony in its entirety and found that the threats had been disseminated to at least three individuals: Mr. Spicka, Mr. Taggart and Mr. Mbacke. Nevertheless, he did not sustain Bellagio Objections 1, 2, 4, and 5. (Report at p. 9-14.) He refused to enter an adverse inference against the Union for failing to call Mr. Torres, primarily because, in his opinion, there was no reason to believe that Mr. Torres was likely to give testimony that supported the Union's position. He then credited Mr. Gorey's testimony that he did not deputize Mr. Torres to seek out Mr. Spicka's vote, and found that neither Mr. Torres nor Aaron could be considered an agent of the Union. (*Id.*) As such, the Hearing Officer analyzed the case in light of the Board's decision in *Mastec*, and concluded that Mr. Torres' threats were insufficiently disseminated and could not have created a general atmosphere of fear and reprisal.

Bellagio has filed its exceptions to the Hearing Officer's report with this brief.

### **III. STATEMENT OF FACTS**

#### **A. Rob Cohen Began Attempting To Organize Bellagio's Stagehand Department In Or About August 2012.**

Mr. Cohen is one of Bellagio's A/V leads and functions as a part-time supervisor approximately four weeks per year. 14:2-17. Mr. Cohen considered himself to be the "quarterback" of the department and sometimes used his authority to govern the interaction between his coworkers and Bellagio, such as when he instructed a group of stagehands not to speak when they met with management in 2010. 16:1-17:7.

In August 2012, the International Union of Operating Engineers, Local 501, attempted to organize Bellagio's engineering department. 20:12-21:25; 201:1-206:7. Mr. Cohen desired to have the stagehands included in that bargaining unit, so he contacted Local 501 and spoke to "Hugo" in an effort to arrange for his and his fellow stagehands' inclusion. *Id.* Local 501 turned Mr. Cohen down and put him in contact with two representatives from Local 720: Mr. Gorey and Mr. Soltero. *Id.* After a brief meeting, Mr. Cohen followed up with Mr. Gorey, and by the end of August 2012, his effort to organize the department had begun in earnest.

**B. At The End Of August, Mr. Cohen Arranges For Members Of The Voting Unit To Meet At The Union Hall And Be Contacted By The Union.**

During the hearing, Mr. Cohen asserted that he did not “need” any of the other members of the department involved in his initial organizing and strategy meetings with Local 720. 220:1-222:5. In fact, it was not until the end of August that Mr. Cohen began contacting members of the department about the unit and making arrangements for officials from the Union to contact some of his colleagues. 23:13-18 (contacts Mr. Taggart); 87:2-23 (Mr. Gorey contacts Mr. Spicka).

Mr. Cohen spoke to Mr. Taggart, and explained that he had purposefully kept Mr. Taggart in the dark about the organizing effort because Mr. Cohen believed he was a “no” vote and had a conflict of interest. 23:13-18. At the hearing, Mr. Cohen explained that the supposed “conflict of interest” consisted of his personal concern that Mr. Taggart would release information about the strategy behind the organizing drive, to management. 229:1-13. In any event, Mr. Cohen invited Mr. Taggart to a meeting at the hiring hall which was scheduled to take place on or about September 6, 2012. 25:1-26:8. Mr. Taggart agreed.

At approximately the same time – end of August or beginning of September – Mr. Gorey reached out to Mr. Spicka, arranging to meet at Buffalo Wild Wings. 87:2-23. Mr. Spicka had never met Mr. Gorey before and did not know a lot about the Union, so he asked Mr. Gorey several questions about the pros and cons of unionization and union membership. 88:5-89:17. Mr. Spicka also asked Mr. Gorey if the Union treated supporters differently from non-supporters. 88:25-89:4. Mr. Gorey said yes: “why would the Union, what would somebody that voted no get the same benefits as somebody that wanted us here?” 89:12-14. Their meeting ended with Mr. Gorey asking Mr. Spicka to come to a meeting at Local 720’s union hall, scheduled to take place a few days later. 91:17-21.

**C. Mr. Spicka Did Not Attend The Meeting, So Mr. Gorey Directed Union Member Alfonso Torres To Contact Mr. Spicka.**

When Mr. Spicka did not attend the meeting to which Mr. Gorey had invited him, Mr. Gorey deputized Union member Alfonso Torres (who goes by “Fonzy”) to contact Mr. Spicka and to persuade him to support the Union. 92:21-94:19. They met at Brewskies, a bar on Durango Road, and discussed the Union and its supposed benefits in detail. Mr. Spicka explained that “Fonzy told me that J.T. had come to him knowing that he had worked at Bellagio several times and, you know, ‘You know these guys, so can you go,’ you know, ‘Talk to Doug.’”<sup>6</sup> 94:4-6. Mr. Torres told Mr. Spicka that Mr. Gorey’s motive was simple: “J.T. had said, after, you know, gathering information from the techs that he had been talking to from Bellagio, that [Mr. Spicka] was somehow a swing vote, like [Mr. Spicka] could make or break this vote somehow.” 94:15-18. Among other things, Mr. Torres explained that if Mr. Spicka supported the Union, he would, among other things, be put on the A-list. Mr. Torres then invited Mr. Spicka to another meeting at the hiring hall, which was scheduled to take place on or about September 6, 2012. 95:9-25.

**D. Mr. Spicka, Mr. Taggart And Other Members Of The Voting Unit Attended A Meeting At Local 720 On Or About September 4, 2012.**

On or about September 4, 2012, Mr. Spicka, Mr. Taggart, and others attended a meeting at Local 720’s hiring hall. Also present were unit members Mr. Cohen, Theo Mack, Mike Hines, RJ Phillips, Sidy Mbacke, and Billy Banister, Bevan, and Union representatives Mr. Torres and Mr. Gorey.<sup>7</sup> 96:1-17; 25:23-25. After about ninety minutes, Mr. Taggart and Mr. Mbacke stood

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<sup>6</sup> Mr. Spicka immediately understood that Mr. Torres’ contact with him at Brewskies was for Union organizing purposes. 143:3-8.

<sup>7</sup> Mr. Gorey initially denied that Mr. Torres was present at *any* meetings. 248:8-23. However, Mr. Spicka’s version of events, in which Mr. Torres was part of the organizing effort and had been sent by Mr. Gorey to help organize the unit, is far more plausible given Mr. Torres’ attendance of at least one of those meetings and Mr. Torres’ offer to help. Indeed, when considering plausibility, it is highly implausible that a union business agent with, according to Mr. Gorey, limited organizing experience, would have turned down Mr. Torres’ offer to help organize the unit when it was known that Mr. Torres knew the Bellagio employees well and may

up and left. 26:7-8. Approximately thirty minutes later, the individuals who stayed at the meeting signed authorization cards and the Union filed the petition on September 7, 2012.

**E. Mr. Taggart Is Targeted For Intimidation Because Mr. Cohen Believes He Intends To Vote “No.”**

Just a few days later and shortly after the petition was filed, Mr. Cohen confronted Mr. Taggart at the Bellagio in Tech Room 1. 26:13-27:1. Mr. Taggart testified that Mr. Cohen said: “Lee, I want you to look me in the eye, shake my hand and tell me that you won’t vote.” 27:7-8. A short time later, Mr. Cohen gloated about supposedly obtaining Mr. Taggart’s agreement not to vote. As Mr. Spicka explained, Mr. Cohen came “bursting through the door with a big smile on his face and he was saying, ‘I just got Lee to look me in the eye and shake my hand and tell me that he was not going to vote.’” 98:6-9.

**F. The Union Targets Mr. Spicka For Intimidation After He Takes A Public Stance Against Unionization.**

On or about October 3, 2012, Mr. Spicka determined that the amount of pressure that the Union was exerting on some of his coworkers was beginning to be too much. In a meeting at the Union hall, Mr. Spicka asked Mr. Gorey a question which followed up on the conversation they had approximately a month earlier at Buffalo Wild Wings. 90:11-18. It was the last meeting at the hiring hall before the October 10th election. *Id.*

Mr. Spicka asked Mr. Gorey: “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 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.’” 90:11-18. Mr. Spicka stated that the

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be able to establish a positive connection between the employees and the Union. Because the Hearing Officer’s credibility determination was based on nothing more than his own view that the version of events was implausible, and not on demeanor or other things that only he could have observed, it should not be accorded deference. *See, e.g., Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957) (explaining the purpose for deferring to hearing officer credibility determinations).

meeting was attended by at least six other members of the voting unit, including Theo Mack, Rob Cohen, R.J. Phillips, Michael Hines, Kevin Brewer, and Alex Avila, as well as Mr. Gorey, Randy Soltero and Mr. Torres. *Id.*

On or about October 4, 2012, Mr. Spicka attended a meeting conducted at the Bellagio. As he explained, he was upset that one of the Union's supporters, Joe Webster, was acting smug and dismissive towards some of the other members of the voting unit. 104:23-106:17. So, he "blew up at Joe" and also identified Mr. Cohen as a leader of the Union's organizing efforts. *Id.*

Mr. Spicka suffered fallout from this public opposition almost immediately. 106:17-24. On the night of October 8, 2012 – *less than two days before the election* – Mr. Torres sent Mr. Spicka a text message. 106:21-109:24; ERX 1. The text message provided: "Really bro, I never pegged you for a rat. Live and learn, I guess. That's tough road you chose, Doug, you could have just voted no." 109:17-19.

After receiving the message, Mr. Spicka called Mr. Torres immediately in an attempt to prevent the situation from getting out of hand. 172:18-173:7. The phone call, however, did not resolve their issues. Mr. Torres chastised Mr. Spicka for identifying Mr. Cohen as a union supporter, and said:

**"Bro, you know, if this vote goes through, you're toast. ... The vote is going to go through, you better, you better not vote."**

110:21-25 (emphasis added).

Mr. Torres' threat made Mr. Spicka very nervous. 117:11-119:9. He could not sleep and he was concerned about his physical well-being. *Id.* Accordingly, he called Mr. Taggart to discuss the situation, and when Mr. Spicka came to work the next day, he reported the threat to his supervisor, Jim Hilliard and Steve McGillvary. 119:1-15. He also sent an email to his ex-wife regarding his concerns. 184:19-185:13; ERX 2. He wrote:

Please don't worry, or think about this to much. But, things are getting very heated about this union thing. The whole country is watching, and waiting to see if the Bellagio will go union. I am personally getting threats. And witch ever way this goes, I expect

to fucked with in some way. Maybe tier [sic] slashing, maybe violence. I don't know.

But, I want you to know what is going on just in case something bad happens, in any form, this is proof that I am getting pressure.

ERX 2.

Bellagio took immediate action to ensure that Mr. Torres and Mr. Spicka would not have to work again and told Mr. Spicka that it was considering removing Mr. Torres from the New Years Eve Show. 119:20-121:18. This put Mr. Spicka into a “panic.” *Id.* Because Mr. Torres had already retaliated and threatened him, he was concerned that removing Mr. Torres from the show, thereby preventing him from working, would cause Mr. Torres to seek further retribution. *Id.* Mr. Spicka reported these concerns to Bellagio Employee Relations, and when he was smoking and pacing outside on Frank Sinatra Boulevard, he told Mr. Taggart and Mr. Mbacke. 122:1-4. Mr. Taggart testified that Mr. Spicka appeared “scared to death.” 38:3-41:6.

That night, the Union threatened Mr. Spicka even further. When he got home, there was a voicemail on his second cell phone. 123:5-125-23. Mr. Spicka played the message and immediately identified the speaker as Mr. Torres’ roommate and coworker Aaron because of Aaron’s distinctive voice. 129:7-130:1. The message threatened physical violence, telling Mr. Spicka that he was “going to get hurt.” 128:25-129:1. Mr. Spicka was shocked and became panicked. He called Mr. Taggart, and spent the remainder of the night looking out his window. When he came to work the next day, he played the message for Bellagio Employee Relations, and additional precautions were taken to ensure that he would remain safe at work. Security was contacted, and Mr. Spicka was offered an escort to his car. Approximately one week later, Mr. Spicka filed an unfair labor practice against the Union. ERX 3.

#### **IV. ARGUMENT: THE UNION’S CONDUCT INTERFERED WITH THE EMPLOYEES’ FREE AND UNCOERCED CHOICE IN THE ELECTION**

The “laboratory conditions” required by the Board in election proceedings have been destroyed by the Union and its agents’ misconduct. “[T]he proper test for evaluating conduct of

a party is an objective one – whether it has ‘the tendency to interfere with the employees’ freedom of choice.’” *Taylor Wharton Div. Harsco Corp.*, 336 NLRB 157, 158 (2001). As set forth below, the weight of credible record evidence adduced at the hearing demonstrates that the Union and its agents engaged in misconduct which objectively interfered with employees’ freedom of choice. Bellagio Objections 1, 2, 3, 4 and 5 should have been sustained. The Hearing Officer’s failure to do so was erroneous. The Report should not be adopted.

**A. Mr. Gorey, Mr. Torres and Mr. Cohen Were Union Agents, And Therefore Their Reprehensible Behavior Is Directly Attributable To Local 720.**

Under Section 2(13) of the Act, employers and unions are responsible for the acts of their agents in accordance with ordinary common-law rules of agency. *See, e.g., International Brotherhood of Electrical Workers, Local 357, AFL-CIO (Newtron Heat Trace, Inc.)*, 343 NLRB 1486, 1498 (2004) (citing *Strack and Van Til Supermarkets*, 240 NLRB No. 172, at slip op. 9-10 (2004) and *Longshoremen Local 1814 ILA v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984)). The Board has held that “when applied to labor relations... agency principles must be broadly construed in light of the legislative policies embedded in the Act.” *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). And, to that end, “courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of union responsibility are presented.” *Id.* at 417.

**1. Mr. Gorey was the Union’s agent.**

Here, there can be no dispute that Mr. Gorey was an agent of the Union who had both actual and apparent authority. *See, e.g., Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984) (discussing agency); *Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1337 (2004) (finding union stewards had actual authority to act on behalf of union). He is a paid employee of the Union. 243:6-19. He was one of the two men who made contact with Mr. Cohen at Local 501’s hiring hall, and assisted Mr. Cohen with the organizing drive. 201:1-16. With Randy Soltero, he was responsible for directing the organizing effort. 243:6-19. With Mr. Cohen, he scheduled and headed the meetings that took place at Local 720’s facility, answering questions about

unionization, including the question from Mr. Spicka that led him to threaten individuals who may not have been planning on supporting the Union. 247:15; 202:4-203:6; 92:13-15. He met with Mr. Spicka on his own initiative and before the petition was filed in an attempt to solicit Mr. Spicka's vote, 247:17-18, and at that time, he both described the benefits of unionization to Mr. Spicka, and warned him that individuals who did not support the Union would not be entitled to the same benefits. 89:21-90:5. He dispatched Mr. Torres to obtain Mr. Spicka's vote, apparently hoping to leverage Mr. Torres' connections with the unit.<sup>8</sup> He met with other voters privately. 247:19. As such, the Union is liable for Mr. Gorey's conduct, all of which occurred while he was exercising his official duties: (1) threatening 33% of the voting unit with reduced representation if they did not support the Union, and (2) deputizing and directing Mr. Torres to target Mr. Spicka.

## **2. Mr. Torres and Mr. Cohen were Union agents.**

While the hearing did not produce evidence that either Mr. Torres or Mr. Cohen was employed by the Union, they nonetheless must be considered agents of the Union under the doctrine of apparent authority. In *Bio-Medical of Puerto Rico*, 269 NLRB 827 (1984), the Board set out the principles of agency as follows:

[I]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Rather, responsibility attaches to the Petitioner if, applying the "ordinary law of agency", it is shown that [putative agents] were acting in the capacity of Petitioner's agents. Thus, the determinative factor in establishing agency status is not authorization or ratification of the agent's acts by the principal, but rather the nature of the agency.

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<sup>8</sup> As noted above, Mr. Gorey asserted during the hearing that he simply refused Mr. Torres' offer of help. Given Mr. Gorey's relative inexperience in organizing matters, it is implausible that he would have refused the assistance of a union member who had close relationships with so many members of the voting unit. It is yet another reason why his testimony regarding Mr. Torres should not be given weight, and if the Hearing Officer had properly considered plausibility, he would have credited Mr. Spicka, not Mr. Gorey.

*Id.* at 828 (quoting 29 U.S.C. § 152 (13)).

A significant factor for establishing apparent authority is whether employees could “reasonably have believed” that the agent “was acting on behalf of the union.” *United Mine Workers of America, District 29*, 308 NLRB 1155, 1163 (1992), quoting *Penn Yan Express*, 274 NLRB 449 (1985). In *Bristol Textile Co.*, 277 NLRB 1637 (1986), the Board held the Union had given the employee apparent authority to act as its agent. In that case, the agent operated as the union’s contact among employees and served as “spokesperson” for employees. *Id.* The Board found:

Thus, although the Union did not designate [an agent] its representative or pay him for his services, he nonetheless served as the Union’s presence within the plant. [Official] used him as a conduit between the Union and the employees, who perceived him to be the Union’s representative. For these reasons we find that the union held out [agent] as its general agent.

*Id.*; see also *Tyson Fresh Meats*, 343 NLRB at 1337 (finding union stewards have apparent authority).

With respect to Mr. Torres, the manifestation by the principal to a third party occurred when the Union’s business manager, Mr. Gorey, deputized Mr. Torres and directed him to obtain Mr. Spicka’s vote. Mr. Spicka testified that Mr. Torres told him exactly that when they met at Brewskies a few days after Mr. Spicka did not attend a Union hall meeting at Mr. Gorey’s invitation.

The Union disputes this testimony of course, but its position is inherently implausible. As noted above, it is unreasonable to think that Mr. Gorey turned down Mr. Torres’ offer to help organize a group that Mr. Torres knew very well and which Mr. Gorey did not know at all. It is unreasonable to think that after Mr. Gorey turned Mr. Torres down, Mr. Torres went ahead and met with Mr. Spicka and then lied to Mr. Spicka about his instructions from Mr. Gorey. It is unreasonable to think that Mr. Torres then attended organizing meetings at the Union hall.

Simply put, if Mr. Torres was not acting on behalf of the Union, why would he have been doing any of these things?

Moreover, despite the fact that both Mr. Cohen and Mr. Gorey knew who Mr. Torres was and had knowledge of the fact that Mr. Torres threatened Mr. Spicka, the Union did not call him to the stand to contradict Mr. Spicka's statements. Indeed, the Union did not call him to testify even though there were several instances when its counsel was suggesting that Mr. Spicka was lying about the October 8th text message, the October 8th conversation and the October 9th voice message.

Under established Board law, the Hearing Officer should have drawn an adverse inference against the Union, and in favor of Bellagio, on this issue. *See, e.g., Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (ALJ may draw an adverse inference from a party's failure to call a witness who may be reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events). Indeed, there is little doubt that Mr. Torres' *would* have been favorable to the Union. *See, e.g., Fresenius USA Mfg.*, 352 NLRB 679, 684 (2008) (uncalled witness was involved in the union's organizing drive and therefore there "is a presumption that his testimony would be favorable" and finding it "appropriate to draw an adverse inference from the [u]nion's failure to call [him] as a witness) (abrogated on other grounds by *New Process Steel*).

- He *asked* to participate in the organizing drive by contacting Mr. Gorey at the Union hall,
- attended at least one organizing meeting at the Union hall, and
- if Mr. Gorey is to be believed, contacted Mr. Spicka on his own initiative in an effort to convince him to support the Union.

He did not merely attend a meeting and work as a member of the Union.

Accordingly, and as the Board explained in *Automated Business Machines*

when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. In particular, it may be inferred that the witness, if called, would have testified adversely

to the party on that issue. Thus, while we recognize that an adverse inference is unwarranted when both parties could have confidence in an available witness' objectivity, it is warranted in the instant case, where the missing witness is a member of [the union], and it supports the judge's findings on the issues on which [the missing witness'] testimony would have been probative.

285 NLRB 1122, 1123 (1987) (citations omitted).

In fact, the Board affirmed an ALJ's entry of an adverse inference under very similar circumstances in *Battle Creek Health System*, 341 NLRB 882, 884 (2004). There, allegations of "threats and intimidation of bargaining unit members [were] central to any assessment of the parties' actions in th[e] case," yet the union failed to call the individual accused of making those threats. *Id.* Because the union knew the identity of the person, could locate him, and it would have been reasonable to presume that the individual would have otherwise given testimony favorable to the union, the ALJ entered an adverse inference against the union as to whether the individual was a union representative and whether he had threatened and intimidated others. *Id.*

Understandably, Mr. Gorey denied that he instructed Mr. Torres to target Mr. Spicka and the manner in which he answered a string of extraordinarily leading questions made it clear that he had been well-prepared by his counsel regarding any question which would reveal the true scope of Mr. Torres' agency. His denials, however, are not credible. Beyond the glaring absence of Mr. Torres as a witness, the undisputed circumstantial evidence supports Mr. Spicka, not Mr. Gorey. The manifestation of authority was supported by the fact that Mr. Torres was the only non-Bellagio employee at no less than two different meetings at the Local 720 Hall, and that, according to the Union's own witness, Mr. Cohen, was there to answer questions about the Union and membership issues. Mr. Torres was also apparently empowered to offer Mr. Spicka A-list status as well as communicate the Union's agreement to waive dues – facts that Mr. Torres would not have know if Mr. Gorey's contention that he did not speak to Mr. Torres was accurate. 194:2-22.

The Union did not admit it, but the truth is simple: Mr. Gorey, seeking to take advantage of and leverage Mr. Torres' relationships with members of the Bellagio unit, asked Mr. Torres to contact Mr. Spicka and obtain his vote. This is the only plausible explanation for Mr. Torres' ongoing involvement. When Mr. Gorey made Mr. Torres an agent for this purpose, and then allowed him to come to general meetings in the hiring hall, Mr. Gorey transformed Mr. Torres into an agent of the Union. The Union is liable for his reprehensible conduct towards Mr. Spicka, and it warrants setting aside the election.

Mr. Cohen also denied serving as an agent.<sup>9</sup> Again, however, the fact that he was not employed by the Union is not dispositive. *Bristol Textile Co.*, is on point. 277 NLRB at 1637-38. As in that case, Mr. Cohen served as the Union's primary point of contact and conduit for information to the voting unit. From both Mr. Spicka and Mr. Taggart's perspective, Mr. Cohen was responsible for the organizing effort. 56:10-57:6. He initiated contact with both of the unions which expressed interest in organizing the Bellagio stagehands, and he arranged for meetings between the Union and his coworkers. 202:4-203:6; 223:6-9. He acted as "spokesperson" for employees with respect to both the Company and the Union. He called himself the "quarterback" and exerted a tremendous amount of leadership in the workplace. 20:12-21:25. Mr. Cohen decided to freeze Mr. Taggart out of the organizing effort because he did not want Mr. Taggart to have access to Union strategy. 229:1-13. The fact that he was able to do so demonstrates the role he played in sharing information with the unit. 31:6-9.

In *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436 (4th Cir. 2002), the Court held that employees acted as union agents when the sole professional union representative did not come to the facility to meet with or attempt to organize employees and where a handful of

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<sup>9</sup> Mr. Cohen also denied being a member of the Union. 199:1-200:5. On cross-examination, it was clear that this testimony was at best disingenuous. He had intentionally failed to tell the Hearing Officer that his application for membership was pending. 235:4-236:4. This purposeful attempt to mislead and deceive the Hearing Officer about the scope and depth of his relationship with the Union should weigh against crediting his testimony because the scope and depth of his relationship with the Union is a critical issue in the case.

employees carried out the organizing efforts. That is exactly what happened here. Mr. Gorey and Mr. Soltero relied on Mr. Cohen, and to an extent, Mr. Webster, to be the Union's representative at the Bellagio during the preelection period. The Union was benefitting from this agency relationship. It is therefore responsible for the consequences.

**B. The Election Should Be Set Aside Because Mr. Gorey Unlawfully Threatened Seven Members Of The Voting Unit Less Than One Week Before The Election.**

While the Board considers several factors in determining whether a party's misconduct warrants setting aside an election, the Board has determined that a single act can overturn an election. See *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006) (union photographing of employees receiving union literature outside the company's facility).

Indeed, it is clear that Board law requires the election to be set aside on this act of misconduct alone. For example, in *Pepsi-Cola Bottling Co. of Los Angeles*, the Board set aside an election with a one vote margin because the union merely *appeared* to videotape employees and such videotaping may cause employees to believe that they would be subject to reprisal. 289 NLRB 736, 737 (1988). Here, Mr. Gorey guaranteed that individuals who did not support the Union would be subject to reprisal in the form of reduced representation. While a threat of reduced representation is not as immediately galling as a threat of physical violence, it is no less coercive. As the Board recognized in *Randell*, “[o]nce 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.” 347 NLRB at 594-95 (citing, *inter alia*, *Letter Carriers Branch 3126 (Postal Service)*, 330 NLRB 587 (2000) (union unlawfully caused employer to deny overtime to nonmember), *enfd.* 281 F.3d 235 (D.C. Cir. 2002)); *Teamsters Local 17 (Universal Studios & Warner Bros.)*, 251 NLRB 1248 (1980) (union unlawfully caused employer to discharge nonmembers).

For these reasons, a reasonable employee could believe that a union could make good on threats to have antiunion employees fired or run off the job if the union won the election. *See, e.g., Kentucky Tennessee Clay Co.*, 295 F.3d at 446 (union agents told employees that if the union won they would run them off or get them fired); *Alyeska Pipeline Service Co.*, 261 NLRB 125 (1982) (union coerced employees during election campaign by promising to give union members an unlawful advantage over nonmembers in its operation of its hiring hall); *Graham Engineering*, 164 NLRB 679, 694-695 (1967) (union coerced employees who opposed the union by threatening to discharge and withhold its services from them). Indeed, the Board has explained that “employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative.” *Cal-West Periodicals, Inc.*, 330 NLRB 599, 600 (2000).

The Board has found that threats to a voter’s employment relationship, which is exactly what Mr. Gorey was making, are serious. They lead to both economic and emotional harm. *See, e.g., Q.B. Builders, Inc.* 312 NLRB 1141 (1993). Like the union in *Kentucky Tennessee Clay Co.*, 295 F.3d at 438, the Union was threatening employees who did support the Union, with being “squeezed out of [their] job” because the Union “[was] remembering the guys that...weren’t with them.” *Id.* In that case, the Fourth Circuit set aside an election because such comments had a probable and material effect upon the election results.

This case requires the same analysis. Mr. Gorey’s statement, given his position with the Union and his overall responsibility in the organizing campaign, was sufficient on its own to interfere with the election process. It concerned an area that was uniquely within the Union’s control, processing grievances, and which also can have a permanent impact on an employee’s relationship with Bellagio. The statement was coercive, and it unlawfully influenced the results of the election and the Board cannot let a Union profit from such misconduct.

**C. The Election Should Be Set Aside Because the Union Unlawfully Threatened And Intimidated Doug Spicka.**

The Hearing Officer should have sustained Objections 1, 2, 4, and 5 because the Union unlawfully coerced and intimidated Mr. Spicka. Mr. Spicka was intimidated and coerced in two ways. First, he is one of the individuals at the Union hiring hall when Mr. Gorey told members of the voting unit that individuals who did not support the Union during the organizing drive would not receive fair representation during the grievance and arbitration process. Indeed, Mr. Gorey made such a statement to Mr. Spicka twice: once in their initial meeting at Buffalo Wild Wings, and again in response to Mr. Spicka's request for more detail in the last meeting that took place at the hiring hall before the vote. 89:21-90:5; 92:13-15.

Second, Mr. Spicka was subjected to physical intimidation and threats in an attempt to make him change his vote or refrain from voting. As noted above, on October 4th, six days before the vote, Mr. Spicka took a public position against the Union for the first time. On October 8th, Mr. Torres, who had been directed by the Union to solicit Mr. Spicka and others, who had met with Mr. Spicka specifically because the Union believed Mr. Spicka was a swing vote, sent Mr. Spicka a text message, calling him a rat and telling him that he had chosen a tough road. When Mr. Spicka called and attempted to diffuse the situation, Mr. Torres threatened him, told him he was toast and warned him that he better not vote. The next day Mr. Spicka, who was understandably, incredibly alarmed by this, reported the threat to his employer and emailed his ex-wife.<sup>10</sup> When Mr. Torres subsequently found out that Mr. Spicka had reported his statements to Bellagio, Mr. Torres directed his friend and fellow IATSE member, Aaron, to leave Mr. Spicka another voicemail, telling him that he was going to be hurt physically.<sup>11</sup> That voicemail was left the night before the election took place.

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<sup>10</sup> The Hearing Officer correctly admitted and considered this document over the Union's objections.

<sup>11</sup> The Hearing Officer correctly admitted and considered the voicemail message over the Union's objections.

There is no innocent explanation for Mr. Torres' conduct. It is well-established that threats of physical violence and property damage are sufficient to set aside the results of an election, particularly under the circumstances present here: the election was decided by one vote, and the threats were widely disseminated throughout the voting unit. *See, e.g., Bristol Textile*, 277 N.L.R.B. at 1637-38. Nor does it matter that Mr. Torres ultimately attempted to prevent Mr. Spicka from voting rather than coercing him to vote for the Union. Such an act is just as prejudicial as attempting to force Mr. Spicka to vote for the Union. An employee's right to vote, or not to vote in an election, is a central tenant of Section 7. *See Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987).

Finally, it is important to note that Mr. Spicka's testimony was credible. It was specific, accurate, and not filled with overstatements and guesses. Moreover, the Union's cross-examination of Mr. Spicka did not undermine the credibility of his testimony in any way. To the contrary, it confirmed, in detail, that his testimony was consistent on both direct and cross-examination, which is one of the hallmarks of a credible witness. He answered questions readily and with no apparent efforts to embellish or slant them, was appropriately consistent in his answers on direct and cross-examination, and his testimony comported with that of Mr. Taggart, who was also credible. *See, e.g., Gestamp S.C., LLC*, 357 NLRB No. 130, slip op. at 7 (Dec. 8, 2011) (crediting witness whose testimony on cross and direct examination was consistent).

In attempting to intimidate Mr. Spicka into not exercising that right with threats of physical violence, the Union, through Mr. Torres, corrupted the election process, and interfered with Mr. Spicka's ability to exercise his Section 7 rights free of coercion. These threats easily satisfy the necessary standard necessary for setting aside the October 10th result: they would reasonably tend to interfere with the free exercise of the election. Objections 1, 2, 4, and 5 should have been sustained.

**D. The Election Should Be Set Aside Because the Union Unlawfully Threatened And Intimidated Lee Taggart.**

As noted above, the right to vote in a Board conducted secret ballot election is a fundamental element of Section 7. *Lemco Construction, Inc.*, 283 NLRB at 460. Here, Mr. Taggart testified in detail about how Mr. Cohen made every effort to intimidate him into not exercising his right to vote. Mr. Cohen demanded that Mr. Taggart promise not to vote, and any reasonable person would have understood Mr. Cohen to be making a thinly veiled threat to use his official authority as a lead and supervisor to make Mr. Taggart comply with this demand.

Indeed, as Mr. Taggart explained, Mr. Cohen was in a unique position to take action against him. Mr. Cohen's demand that he shake his hand and promise not to vote was intimidating because Mr. Cohen, as a part-time supervisor and lead, had the ability to control aspects of his employment relationship. 27:7-8; 27:14-28:15. Mr. Taggart testified:

[Mr. Cohen], the reason I felt pressured, he is my AV lead, he is my part-time supervisor, he is my quarterback and he is telling me to do something that in my eyes is immoral for him to expect me to answer what he wants me to say and I'm gonna be out on the floor working for this man again tomorrow and the next day and the next day and he is telling me not to vote. I have every right to vote as a man.

28:9-15. On cross-examination, Mr. Taggart elaborated further:

[Mr. Cohen] is my AV lead and my super, one of my part-time supervisors, I'm not gonna, I'm not going to go one-on-one with him. This right here scares me to death, because I don't know what kind of danger it is going to entail with my future job.

61:16-19.

The pressure Mr. Taggart felt was obvious.<sup>12</sup> Mr. Taggart had known Mr. Cohen and his nature for several years, and knew that he was obligated to "take whatever commands [Mr.

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<sup>12</sup> At the conclusion of cross-examination, the Union's counsel asked Mr. Taggart a series of abstract questions, using the legal language contained in Bellagio's objections. 79:10-80:11. She did the same thing with Mr. Spicka, obviously hoping to use the questions to manufacture inconsistent testimony. 187:23-189:19. Neither Mr. Spicka nor Mr. Taggart are lawyers, so their ability to apply abstract principles to the actual events that took place is not probative.

Cohen] might give.” 51:4-16. From his perspective, it is a question of when, not if, Mr. Cohen will retaliate against him. 60:17-61:19. When testifying about the matter, his hands were shaking, he was passionate, and he was detailed. 69:17-70:9. In other words, unlike Mr. Cohen, who denied these statements in a glib, unserious manner, conjuring a story in which the handshake was actually for Mr. Taggart’s benefit, Mr. Taggart’s testimony was believable.

Accordingly, under both *Bristol Textile Co.*, 277 NLRB 1637 (1986) and *Baja’s Place*, 268 NLRB 868 (1984), the Hearing Officer should have sustained Objections 1, 2, 4, and 5. Mr. Cohen’s conduct was disseminated to other members of the unit, including Mr. Mbacke and Mr. Brewer. It was severe and coercive enough to affect Mr. Taggart and any other reasonable person’s believe that he could exercise his right to vote freely and without fear of reprisal. The election was decided by one vote. It cannot be a coincidence that one of the ballots was voided because the employee essentially decided to abstain. This is exactly what Mr. Cohen and the Union had sought to do. On these facts, the results of the election must be set aside.

**E. Even If Neither Mr. Torres Nor Mr. Cohen Was A Union Agent, The Election Should Be Set Aside Because The Threats They Directed At Mr. Spicka And Mr. Taggart Were Disseminated Throughout The Voting Unit And The Election Was Decided By One Vote.**

Even if the Board concurs with the Hearing Officer that these individuals were not agents of the Union, and Mr. Torres and Mr. Cohen are deemed to have acted as third parties, it remains true that their conduct made a fair election impossible. The Board will set aside an election because of the conduct of third parties “if the conduct creates a general atmosphere of fear and reprisal that renders a fair election impossible.” *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); *see also Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002); *Steak House Meat Co.*, 206 NLRB 28, 29 (1973).

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What is probative is the testimony that the men provided about what they did, saw and experienced. In that regard, their statements were precise and consistent on both direct and cross-examination and should be credited.

In determining whether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election. *Id.* The critical question is whether the conduct prevented a free election:

It is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible....If the conduct, though that of a mere Union adherent and not that of a Union agent or employee, is sufficiently substantial in nature to create a general environment of fear and reprisal such as to render a free choice of representation impossible, then it will require the voiding of the election.

*YKK, Inc.*, 269 NLRB 82, 83 (1984) (citations omitted).

As described above, Mr. Torres’ and Mr. Cohen’s conduct created a general environment of fear and reprisal that rendered free choice of representation impossible. The voting unit was small, and a significant number of individuals were aware of the treatment being directed at both Mr. Spicka and Mr. Taggart. The Board has addressed the serious repercussions of conduct by pro-union employees on an election:

Where prounion employees are issuing threats of *any* kind against antiunion coworkers, opponents of the union will likely think twice before pinning on a “vote no” button, passing out antiunion literature, or speaking their minds freely. Two consequences may ensue. First, the union may appear to command a degree of support that it does not in fact enjoy, which in turn may influence the votes of undecided employees. Second, the arguments in favor of unionization will tend to predominate among employees during the campaign, possibly swaying some to vote “yes” who might have voted “no” had the voices of all employees been heard.

*Robert Orr-Sysco Food Services, LLC*, 338 NLRB at 615. In fact, in both *Robert Orr-Sysco* and *SteakHouse Meat Co.*, the Board set aside elections based on third party conduct even though the misconduct was directed at only a handful of individuals in the voting unit. 206 NLRB at 29. The Board explained that the behavior would have affected the outcome. When Mr. Torres, Aaron and Mr. Cohen's behavior is considered in light of Mr. Gorey's statement in the October 3rd meeting at the Union hall, it is clear that the evidence is sufficient to require a new election.

**F. Mr. Gorey Was Not A Credible Witness.**

The Union's position in this case depends entirely on the credibility of Mr. Gorey and, to a lesser extent, Mr. Cohen. Unless his testimony that he did not tell a group of voters that they would receive lesser representation if they did not support the Union is credited, the election should be set aside. Similarly, and especially in light of the fact that Board precedent requires the entry of an adverse inference against the Union for its failure to call Mr. Torres, the Hearing Officer should not have credited Mr. Gorey's testimony that he did not instruct Mr. Torres to target Mr. Spicka during the organizing drive. The Hearing Officer should have found that the physical threats made to Mr. Spicka constitute a second basis for ordering a new election.

Credibility determinations 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. *See, e.g., Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Using these standards, Mr. Gorey's testimony cannot be believed.

First, most of Mr. Gorey's testimony on direct was given in response to a series of leading questions, including his denial of the threat at the Union hall and his denial of his relationship with Mr. Torres. It is well-established that a witness whose direct examination testimony is elicited through little more than a series of leading questions is not credible, particularly when it is inconsistent with answers to questions on cross-examination. *See, e.g.,*

*Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at \*107 (Aug. 11, 2011) (witness not credible because he was “overeager to answer blatantly leading questions”); *San Luis Trucking, Inc.*, 352 NLRB 211, 221 (2008) (credibility “is substantially discounted because of the leading question.”) (abrogated on other grounds by *New Process Steel*); *R.J. Corman R.R. Constr.*, 349 NLRB 987, 1000 (2007) (witness who, in response to leading questions from his counsel, corrected his testimony about meeting another individual on a prior occasion was deemed not credible).

Second, Mr. Gorey’s testimony Mr. Torres was inconsistent. He testified on direct that he met Mr. Torres only once and never saw or spoke to him again. 245:11-246:19. Indeed, his testimony was emphatic. He asserted that the meeting in the hiring hall was the “last time” he had seen Mr. Torres, and when his counsel asked a follow-up question, Mr. Gorey repeated “I met him that first time, that was the last time.” 246:15.

This striking testimony turned out to be totally false. On cross-examination, Mr. Gorey reaffirmed that he had seen Mr. Torres only once. 256:12. When confronted with the fact that Mr. Torres had attended subsequent meetings regarding the Bellagio organizing effort, Mr. Gorey admitted that he had in fact seen Mr. Torres again. 256:5-258:2. Just as importantly, Mr. Gorey did not admit he made a mistake or had a faulty recollection. Instead, he dissembled and attempted to save his testimony on direct by explaining that he had testified that he had only “met” Mr. Torres once. *Id.* Only an inherently disingenuous and incredible witness would take such a position.

It was also implausible. Mr. Gorey’s description of how he met Mr. Torres was bizarre, and his version of events, in which Mr. Torres is told to stay out of the organizing effort, gives no explanation for Mr. Torres’ obvious and ongoing involvement and presence at the Union’s meetings. He was not a Bellagio employee. If Mr. Gorey is telling the truth, and Mr. Torres had no role, *what was he doing there?* (Report at p. 9.) Mr. Torres’ attendance at the meeting is strong evidence that Mr. Spicka would have considered Mr. Torres to be a Union agent.

Third, Mr. Gorey's testimony about his meeting with Mr. Cohen was also faulty. Mr. Cohen testified in great detail about how he came to meet Mr. Gorey. According to Mr. Cohen, he had been attempting to meet with a representative for IUOE 501, but that the Local 501 representative "Hugo" arranged for him to meet with Local 720 instead because of a jurisdictional issue. Mr. Gorey, in contrast, claims that Mr. Cohen contacted him and that when they first spoke to each other at Local 501's union hall, he did not discuss Local 720 with Mr. Cohen in any way – they just happened to be in the same place and they made small talk. 251:7-24. Again, such testimony is inherently implausible. Fourth, Mr. Gorey claimed that Mr. Spicka contacted him to arrange for their first meeting at Buffalo Wild Wings. 254:25. This statement simply could not have been true. The meeting took place before the petition was even filed. Mr. Spicka did not know who Mr. Gorey was, let alone how to contact him. Fifth, and finally, Mr. Gorey claimed that he did not promise members of the voting unit that they would be placed on the A-list. 259:25-260:20. This was contradicted by his own testimony, where he admitted he discussed the A-list with Mr. Spicka at Buffalo Wild Wings. *Id.* It was also contradicted by the testimony of Mr. Spicka, who stated that Mr. Gorey offered A-list status at several meetings. 193:6-194-9.

In sum, Mr. Gorey was not a credible witness, and his issues go directly to the primary substance of his testimony: what happened at meetings, and how many times he had seen and spoken to Mr. Torres. Under the circumstances, the Hearing Officer should not credit his testimony.

**G. Mr. Cohen Was Not A Credible Witness.**

Like Mr. Gorey, Mr. Cohen's testimony also lacked credibility. His denials that he was the Union's agent, that he served as the primary conduit of information for members of the voting unit, and that he served as the voting unit's representative with the Union, were elicited through leading questions and little else. 211:4-213:25.

In addition, Mr. Cohen was inconsistent in his testimony about his ability to discipline and/or recommend discipline as a part-time supervisor. On direct, he claimed he had no such authority, 198:1-11, but on cross-examination, he admitted that he had reported violations to management, including when individuals had allegedly been insubordinate to him. 239:20-240:11. He was inconsistent regarding his testimony about bragging to Mr. Spicka about obtaining Mr. Taggart's agreement. 227:14-23. After testifying on direct that he never bragged about taking such action, claiming it was not in his nature, he changed his testimony on cross-examination to say that he did not "recall" bragging to Mr. Spicka – a small, but important difference that should be considered when evaluating credibility. 227:14-23.

As noted above, Mr. Cohen was also misleading about a material issue: his relationship with the Union. On direct, he denied being a member of the Union. 199:1-200:5. On cross-examination, however, it became clear that this testimony was at best disingenuous and at worst, intentionally deceptive. He had omitted any reference to his pending application even though mere membership in the Union would plainly not establish an agency relationship. 235:4-236:4.

Finally, Mr. Cohen's testimony about shaking Mr. Taggart's hand, Mr. Taggart's alleged conflict of interest, and his denial that he told Mr. Spicka about coercing Mr. Taggart, was not credible. With respect to shaking Mr. Taggart's hand, he conceded that the bulk of Mr. Taggart's testimony was correct, and confirmed that his statement to Mr. Taggart was an imperative: "you're going to honor this deal." 209:8-11. Mr. Cohen nonetheless claimed that he was merely shaking hands to memorialize a gentlemen's agreement not to vote. Given Mr. Taggart's emotional testimony about his desire to vote, Mr. Cohen's contention that Mr. Taggart was relieved to withdraw from the process is at best implausible. Mr. Taggart would not have "jumped" at the chance not to vote. 231:21-232:7. Similarly, although on direct Mr. Cohen claimed that it was Mr. Taggart who concluded that he had a supposed "conflict of interest," on cross-examination, it became clear that the person who was most concerned about a conflict of interest was Mr. Cohen, and that he had pursued this line of discussion because he was concerned that Mr. Taggart would vote no. 207:23-208:6.

**V. THE BOARD SHOULD SUSTAIN BELLAGIO'S EXCEPTIONS TO THE REPORT AND SET ASIDE THE ELECTION**

Despite the evidence, the Hearing Officer failed to sustain Bellagio's objections. The Report is detailed, but in reality, its conclusions, and recommendation that the Objections be overruled, are based on two very thin credibility determinations that are in favor of Mr. Gorey, and the misapplication of the third party misconduct standard set forth in *Westwood Horizons Hotel*. Bellagio has excepted to these findings. The Board should consider the arguments set forth above as well as below, sustain the Company's exceptions and set aside the results of the October 10, 2012 election.

**A. The Hearing Officer Should Have Concluded That Mr. Gorey Threatened Members Of The Voting Unit On October 3rd And Set Aside the Election On That Basis.**

During the hearing, the Company presented evidence that established a very powerful objection: a week before the vote, Mr. Gorey stood before a group of seven voters and told them that they would receive severely compromised grievance representation if they did not support the Union during the election. Mr. Spicka testified that this comment was in line with a comment that Mr. Gorey made at their first meeting at Buffalo Wild Wings, where Mr. Gorey stated that individuals who did not support the Union may not receive the same benefits. As noted above, because this comment was made by the lead Union official involved in the organizing drive at an extraordinarily sensitive time, it is sufficient to set aside the election, on its own. The Hearing Officer's sole basis for not sustaining this claim was a credibility determination.

The standard of review for credibility determinations is well-established. The Board's policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *See, e.g., Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). This principle is based on the fact that the Hearing Officer is in the unique position to evaluate witness demeanor and behavior. In situations where credibility does

not depend on such personalized observations, and instead depends on a general review of the plausibility of a witness' testimony, however, that principle does not apply and the Board should not accord the Hearing Officer deference.

Here, the Hearing Officer credited Mr. Gorey's testimony that he did not inform seven members of the voting unit that they would receive reduced representation if they did not support the Union. This credibility determination is against the preponderance of the evidence. First, the basis for Hearing Officer's determination appears to be nothing more than his conclusion that Gorey would not have made such a statement because Nevada is a "right to work state." (Report at p. 9.) This is, at best, illogical. Right to work laws have absolutely nothing to do with the Union's obligation to represent members of the voting unit in grievance proceedings, and to presume one supports the other is nonsensical. Second, as set forth above, Gorey's testimony on this and other issues lacked any indication of credibility. It was offered in response to a series of leading questions. Third, Gorey's general demeanor was not credible. As also set forth above, there were numerous instances in his testimony was contradictory and implausible. Fourth, Mr. Gorey's supposed denial of this statement was far less specific than the Hearing Officer suggests. Here is what he said, in its entirety:

Q At any point, did you make any promise to any of the workers from the Bellagio that if they voted in favor of the Union, they would get better representation than somebody who voted against the Union?

A No, Nevada is a right to work state, it's 100% member and nonmember. There's no favoritism getting work, who gets it, who doesn't. Everyone has to be represented the same.

Q This election was a secret ballot election. Is that right?

A Yes.

Q Would you have any way of knowing who voted in favor or against the Union?

A No.

Q Did you make any threats to any individuals if they didn't vote in favor of the Union?

A No.

248:8-23.

These general denials offered in response to leading questions should not have received any weight, let alone be credited against conflicting testimony. In contrast, Mr. Spicka was a credible witness. The Hearing Officer found him credible on *all* other issues, and gave no explanation for his finding here other than an apparent belief that it was “implausible” for Mr. Gorey to make such a statement. There was nothing implausible about it. Mr. Gorey had motivation for making such a statement: it benefitted the Union at the ballot box. Moreover, Mr. Spicka’s testimony and recollection of the October 3rd meeting was specific. And, it was tied to a conversation he had with Mr. Gorey at Buffalo Wild Wings – a conversation in which the Hearing Officer credited Mr. Spicka’s testimony and which Mr. Gorey admitted occurred.

Simply put, there is no basis in the record for the Hearing Officer to have credited Mr. Gorey on this issue and the Report does nothing to explain his reasoning for doing so. The Board should reverse the Hearing Officer, find that Mr. Gorey made the October 3rd statement, and set the election aside under *Randell Warehouse of Arizona, Inc.*, 347 NLRB at 594-95.

**B. The Hearing Officer Should Have Set Aside The Election On The Basis Of Mr. Torres’ And Aaron’s Conduct.**

The Hearing Officer credited Mr. Spicka’s testimony regarding Mr. Torres and Aaron’s conduct in its entirety. Nonetheless, he declined to find that Mr. Torres was an agent of the Union, and therefore declined to sustain Bellagio’s objections. This determination was wrong and against the preponderance of the evidence.

First, the Hearing Officer’s conclusion that Mr. Gorey did not instruct Mr. Torres to solicit Mr. Spicka’s vote is against the preponderance of the record evidence. As noted above, it is much more plausible to believe that Mr. Gorey accepted Mr. Torres’ offer of assistance than to believe Mr. Gorey’s assertion that he turned Mr. Torres down without any further discussion. Moreover, as noted above, Mr. Gorey’s testimony was in response to yet more leading questions, and there is no doubt that Mr. Gorey did not testify honestly about how many meetings he had with Mr. Torres. Yet, the Hearing Officer did not even mention that credibility problem. The Hearing Officer also failed to consider Mr. Gorey’s disingenuous attempt to cure his testimony

about “meeting” Mr. Torres only once. The Hearing Officer offered no explanation for his decision to overlook these deficiencies and no basis for giving Mr. Gorey’s statements weight.

Second, the Hearing Officer should have entered an adverse inference for the Union’s failure to call Mr. Torres to corroborate Mr. Gorey’s statements. The Hearing Officer’s only explanation for failing to do so is his determination that one could not have reasonably expected Mr. Torres to give testimony that was favorable to the Union. (Report at p. 12.) This analysis is totally unfounded. Indeed, based on the Report, the Hearing Officer determined that Torres should not be assumed to be favorably disposed to the Union “merely because [he] obtained work at times through the Union’s hiring hall and attended a Union meeting of Bellagio employees[.]” (Report at p.12.) This is contradictory to the Hearing Officer’s own findings. Mr. Torres did not merely attend a Union meeting. He attended an organizing meeting during the critical period. More importantly, the Hearing Officer expressly credited Mr. Gorey’s testimony that Mr. Torres had approached him at the Union hall and offered to assist the Union in organizing the Bellagio unit. (Report at p.12.) In other words, there is little doubt that Mr. Torres’ *should* have been favorable to the Union. He *asked* to participate in the organizing drive by contacting Mr. Gorey at the Union hall, attended at least one organizing meeting at the Union hall, and if Mr. Gorey is to be believed, contacted Mr. Spicka on his own initiative in an effort to convince him to support the Union.

The entry of an adverse inference is mandated by equitable principles. And as the D.C. Circuit has held when reviewing a decision by the Board, the failure to enter an adverse inference when circumstances indicate it is appropriate is a reviewable and reversible error. *See, e.g., International Union, United Auto., etc. v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972) (noting that it had previously remanded a case to the Board with instructions to consider the entry of an adverse inference, and explaining that the remand “clearly told the Board that its failure to draw the adverse inference was reviewable and reversible if prejudicial.”) (citing *NLRB v. Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 225 (8th Cir. 1970) and *NLRB v. Ford*

*Radio & Mica Corp.*, 258 F.2d 457, 463 (2d Cir. 1958) as examples of cases where courts suggested that the failure to enter an adverse inference was reviewable).

Here, the facts mandated that the Hearing Officer enter an adverse inference against the Union for failing to call Mr. Torres as a witness. The facts establish that if called, he would have been expected to testify favorably. The testimony would have been extremely probative considering that it would have resolved the conflict between Mr. Spicka and Mr. Gorey's contentions regarding Mr. Torres' actions as a Union agent. Nevertheless, the Hearing Officer avoided entering that inference by claiming that doing so was an exercise of discretionary power and by mischaracterizing the facts in order to suggest that Mr. Torres' involvement was limited and would not necessarily be supportive of the Union. (Report at p. 12.) This claim was not supported by the facts or the law.

If the Hearing Officer had resolved these two issues properly, the law would have required him to conclude that Mr. Torres and Aaron were acting on behalf of the Union.<sup>13</sup> Under that standard, as set forth above, there is little doubt that the election would have to be set aside.

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<sup>13</sup> During the hearing, the Union's counsel appeared to suggest that even if Mr. Torres's actions were attributable to the Union, the Union was not responsible for Mr. Spicka's distress because it did not become elevated until after he learned that Bellagio was considering removing Mr. Torres from the New Year's Eve show. The Hearing Officer also failed to consider whether the connection between Aaron and Mr. Torres when considering the effect of Aaron's actions. This argument has no merit for two reasons. First, it is not supported by the facts. As Mr. Spicka explained, he reported Mr. Torres's threats to Bellagio because he was concerned for his safety and well-being. 117:11-119:9. The same morning, he also sent the email to his wife, explaining that he was worried and expected "to be fucked with" in the form of tire slashing or violence. ERX 2. Second, it is contrary to law. The Board has repeatedly recognized that unions and their agents, as well as employers and their agents, are responsible for the foreseeable consequences of the agents' actions. Indeed, as the U.S. Supreme Court explained in *The Radio Officers' Union of the Commercial Telegraphers Union v. NLRB*, "a man is held to intend the foreseeable consequences of his conduct" under the common law. 347 U.S. 17, 44 (1954); see also *Los Angeles Building and Construction Trades Council*, 214 NLRB 562, 564-565 (1974) (citing *The Radio Officers' Union*); see also *Goodman Lumber Co.*, 166 NLRB 304, 305 (1967) (employer constructively discharged employee and was liable for unfair labor practice where employer was using another employee who happened to be the victim's father to pressure the victim, victim's mother was opposing the father's actions and threatened divorce, and victim resigned in order to alleviate stress on his parents' marriage). Accordingly, the Board should find that Mr. Torres was the Union's agent with respect to his contact with Mr. Spicka, and that

**C. The Hearing Officer Should Have Considered The Totality Of The Circumstances And Determined That There Was A General Atmosphere Of Fear And Reprisal.**

Finally, the Hearing Officer erred in applying the *Mastec* decision. The standard for evaluating third party conduct is well-established:

[W]hether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened. In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election.

*Westwood Horizons Hotel*, 270 NLRB at 803.

Subsequent Board decisions such as *Robert Orr-Sysco Food Services*, established that it is not necessary for threats to be disseminated to the entire voting unit, nor is it necessary for threats of violence to have been acted upon so long as an outcome determinative number of voters were aware of the threat and the threat was objectively serious enough to affect a reasonable person’s behavior. 338 NLRB at 615 (“The Board has set aside elections where, as here, threats have been made or disseminated to voters whose ballots might have been determinative.”).

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Mr. Torres’ use of Aaron is also imputed to the Union. Any contrary rule which would allow Mr. Torres and the Union to disclaim responsibility for this action, would be contrary to public policy and the purpose of the Act. It would insulate both the Union and its agents from being held responsible for the results of misconduct, thereby encouraging potential wrongdoing. It would also discourage employees from reporting threats of workplace violence and preclude employers from taking action to protect its employees from such conduct and interfering with an employer’s legal obligation to provide a safe workplace. *See generally IBM Corp.*, 341 NLRB 1288, 1293 (2004) (“Employers have the legal obligation, pursuant to a variety of federal, state, and local laws, administrative requirements, and court decisions, to provide their workers with safe and secure workplace environments.”).

Here, in applying *Mastec*, the Hearing Officer gave insufficient weight to the nature and timing of Mr. Torres, Aaron and Mr. Cohen's threats and the fact that they had been disseminated to enough employees to sway the election. The Hearing Officer did not consider the totality of the third party conduct at issue. With respect to the manner in which Mr. Cohen intimidated Mr. Taggart, the Hearing Officer discounted the action because it occurred early on in the voting period, and did not view it in combination with the actions of Mr. Torres and Aaron. Similarly, even if Mr. Torres and Aaron were not Union agents, there is no dispute that Mr. Taggart and Mr. Spicka were aware of the serious threats that the Hearing Officer credited, and that they were fearful for their safety. They, along with Mr. Mbacke, cast their votes in an atmosphere that was infected with fear and reprisal. See *Westwood Horizons Hotel*, 270 NLRB at 803; *Robert Orr-Sysco Food Services*, 338 NLRB at 615.

Similarly, while the Hearing Officer attempted to downplay Mr. Spicka's concerns about Mr. Torres' threats, and asserted that the Employer failed to prove that Mr. Torres had the ability to carry the threats out, his reliance on these apparent findings was clearly erroneous. With all due respect to the Hearing Officer, imposing such a requirement on an employer, and limiting its ability to contest elections on the basis of physical threats to situations where the violence had actually been carried out, would be contrary to public policy and the Act. The purpose of the Act is to promote peaceful resolution of labor disputes and to allow employees to select collective bargaining representatives in an atmosphere free of coercion and misconduct. By refusing to set an election aside unless actual violence occurs, or except in the circumstance where a threat is made by a known hooligan, the Hearing Officer's reasoning creates a perverse incentive for individuals involved in an organizing campaign. It elevates the showing required under *Westwood* to a height that cannot be satisfied. Prevailing Board law does not require an employer to show that an individual has capacity for violence, and imposing such a requirement

would only encourage the kind of behavior that destroys the laboratory setting that the Board is obligated to provide.

Similarly, the Hearing Officer also asserted that Bellagio could not satisfy the third-party conduct standard in *Mastec* because it failed to demonstrate that the threats changed Mr. Spicka and Mr. Taggart's behavior. Again, the Hearing Officer's reliance on this purported failure was clearly erroneous. The Board has never adopted a standard requiring the employer to interrogate employees to determine if a threat changed their vote in an election. Just as importantly, there is nothing in the record to support the Hearing Officer's conclusion. Neither Mr. Spicka nor Mr. Taggart testified regarding their vote and Mr. Spicka and Mr. Taggart were clearly affected by the threats made by Mr. Cohen, Mr. Torres and Aaron. And, the evidence at the hearing established that at least one person effectively chose not to vote. Given that both Mr. Spicka and Mr. Taggart were threatened to abstain from voting, it is possible that one of the men, or Mr. Mbacke affected the outcome of the election.

## VI. CONCLUSION

The election in this matter was decided by one vote. The facts established that Mr. Gorey threatened 33% of the voting unit less than a week before the election. The facts also establish that Mr. Torres, Mr. Cohen and Aaron threatened and intimidated members of the voting unit. Those threats involved physical violence and the men who received them, Mr. Spicka, Mr. Taggart and Mr. Mbacke, believed that Mr. Torres could carry them out. These coercive acts took place during a critical period, and in the case of Mr. Torres, occurred just two days before the vote. The October 10, 2012 election should be set aside.

November 4, 2012

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**CERTIFICATE OF SERVICE**

Case Name: BELLAGIO, LLC, 28-RC-088794

I, Paul Trimmer, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 3800 Howard Hughes Pkwy, Suite 600, Las Vegas, NV 89169. I am over the age of eighteen (18) years and am not a party to this action. I declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct.

On December 4, 2012, electronically filed **EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS** with the National Labor Relations Board using the Board's electronic filing system. In addition, I served additional copies of the Brief as follows by US Mail:

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- [ ] **BY ELECTRONIC MAIL (EMAIL):** I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, [christar@jacksonlewis.com](mailto:christar@jacksonlewis.com), to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.
- [X] **BY US Mail:** I placed a true and correct copy of the document, enclosed in a sealed envelope, and caused such envelope to be delivered at the above address within 24 hours by overnight delivery service.

Executed on December 4, 2012, at Las Vegas, NV.

/s/ Paul T. Trimmer