UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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TREVCON CONSTRUCTION COMPANY, INC.
Employer,

and

REICON GROUP LLC
Employer,

and

Case No. 22-RC-070080

URBAN FOUNDATION/ENGINEERING LLC
Employer,

Case No. 22-RC-070402

and

GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.
Employer,

Case No. 22-RC-070380

and

DOCKBUILDERS LOCAL OF AMALGAMATED CARPENTERS AND JOINERS UNION,
Petitioner,

and

NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS,
Intervenor.

_____X

INTERVENOR'S ANSWERING BRIEF IN OPPOSITION TO THE EXCEPTIONS FILED BY THE PETITIONER

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INTRODUCTION

Intervenor New York City District Council of Carpenters ("District Council"), by and through its attorneys, Spivak Lipton LLP, submits this brief in opposition to the exceptions filed by Petitioner Dockbuilders Local of Amalgamated Carpenters and Joiners Union ("Petitioner" or "Amalgamated"), and in support of the report of Hearing Officer Joseph Calafut recommending that the Petitioner's objections to the representation election in this case be overruled. [1]

On November 19, 2012, Hearing Officer Calafut issued a report recommending that the Petitioner's objections be overruled in their entirety. Based on a careful examination of the record, including a thorough analysis of witness credibility, the Hearing Officer found no Intervenor conduct objectionable. (Report at 14.) Petitioner, a splinter group attempting to break away from the District Council, alleged that the District Council engaged in objectionable conduct when the District Council allegedly (1) "threaten[ed] bargaining unit members with immediate loss of medical benefits and cancellation of retiree medical benefits if the Petitioner prevailed in the election" (id. at 4), and (2) "threatened bargaining unit members with loss of pension benefits if the Petitioner prevailed in the election" (id.). But the Hearing Officer found Petitioner's objections to be unsupported, and concluded that the District Council did nothing

[1] The Hearing Officer's Report on Objections is referred to as "Report." All references to the transcript of the October 5, 9, and 15, 2012 hearings ("Hearing") appear as "Tr. __ [page number(s)]: __ [line(s)]." Exhibits introduced by the Petitioner during the Hearing are referred to as "Pet's. Ex. __." The Intervenor's exhibits appear as "Int. Ex. ___." The Board's formal papers which were entered as a single set of exhibits are referenced as "Bd. Ex. 1__." References to the Petitioner's Exceptions appear as "Excep. ¶ __." References to the Petitioner's Memorandum of Law in Support of Exceptions to Hearing Officer's Report on Objections to Election appear as "Pet.'s Br. at ___." All dates stated herein are in 2012 unless otherwise indicated.

more than lawfully inform unit employees of the consequences of a change in bargaining representation. (Report at 13, 14.)

Petitioner filed 31 exceptions to the Hearing Officer's Report.[2] Most can be characterized simply as disagreements with the Hearing Officer's well-reasoned findings. The Petitioner's Memorandum of Law in Support of Exceptions relies extensively on record testimony that the Hearing Officer discredited. Yet, Amalgamated offers absolutely no argument in favor of overturning the Hearing Officer's credibility determinations (let alone even acknowledging the Board's deferential standard of review in favor of fact-finder credibility determinations). Chief among Petitioner's arguments in favor of its Exceptions is its claim that "the Hearing Officer did not take into account critical undisputed facts of this case." (Pet.'s Br. at 23.) However, the Hearing Officer either expressly discredited the "evidence" that Amalgamated relies upon for this argument or found it to be of no consequence under the facts of this case.

Even more extraordinary are Petitioner's attempts to revive objections it withdrew well before the hearing. It further complains, incorrectly, that the Hearing Officer failed to consider "evidence" of alleged statements that the Petitioner failed to elicit specific testimony about during the Hearing. In effect, having lost the election by an overwhelming margin (nearly 2-to-1), and having failed before the Hearing Officer, Petitioner apparently attempts to remake its unmeritorious objections de novo through its Exceptions.

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[2] Exceptions 9 and 20 are material duplicates. Exception 9 states: "Petitioner takes exception to the Hearing Officer's finding that Petitioner failed to establish that Bilello was capable of carrying out his threats." Exception 20 adds the word "the" before "Petitioner," but is otherwise identical to Exception 9. Exception 20 cites only to page 13 of the Report, whereas Exception 9 cites to pages 6 and 13. Additionally, Exception 16 is grammatically nonsensical, leaving the parties and Board to guesswork in determining the Petitioner's specific exception. It should be disregarded.

Contrary to the Exceptions, the evidence shows that the Hearing Officer made proper factual determinations and credibility resolutions. His Report is amply supported by the record. In sum, the evidence at the Hearing overwhelmingly supports the Hearing Officer's determination that the District Council did not engage in objectionable conduct when it informed its own members, on the basis of objective facts, of the consequences of certifying a different collective bargaining representative. The election cannot be overturned on the basis of the Petitioner's unsupported assumptions.

For these and the reasons that follow, the District Council respectfully requests that the Board adopt the Hearing Officer's findings and conclusions, uphold the results of this election (which took place approximately nine months ago), and in the interest of promoting the finality of valid election results, promptly certify the District Council as the exclusive bargaining representative of the unit described below.

PROCEDURAL BACKGROUND

1. The Petition for the GCA-Wide Election

The several representation petitions filed by the Petitioner in this case seeking separate bargaining units with several individual employers were consolidated by the Regional Director on December 16, 2011. (Bd. Ex. 1(h).) On or about December 22, 2011, the Petitioner amended its petition and asserted that the petitioned-for unit included all employees of the employer-members of the multi-employer General Contractors Association ("GCA"), an association of approximately 140-150 heavy construction contractors. (Id.) The Regional Director issued a Decision and Direction of Election for the GCA-wide unit of: "All dockbuilders, pier carpenters,

shorers, house movers, pile drivers, divers, tenders, foundation workers, drillers and marine constructors employed by the Employer members" of the GCA. (Bd. Ex. 1(h).)

2. The District Council Wins the Election and Petitioner Files Objections

Following a mail ballot election, an initial tally of ballots was issued. After the parties stipulated to a resolution of several hundred challenged ballots, a Revised Tally was executed on April 19, 2012. A majority of votes (361) were cast for the District Council, while only 186 were cast for Amalgamated. On or about April 5, 2012, Amalgamated filed six objections to conduct allegedly affecting the results of the election. By letter dated September 7, 2012, the Petitioner specifically withdrew the Objections numbered 1, 4, 5, and 6. (Bd. Ex. 1(e); see also Pet.'s Br. at 5.) The Regional Director approved withdrawal of those objections, and ordered a hearing on the Objections numbered 2 and 3.

(a) Objection 2, Pertaining to Welfare Fund Coverage

Objection 2, addressing alleged threats regarding Welfare Fund coverage, states that the District Council's representatives, including the Executive Secretary-Treasurer and President of the District Council, "threatened bargaining unit members with the immediate loss of medical benefits, and the cancellation of retiree medical benefits, if the [Amalgamated] won the representation election, despite the rules of the District Council Welfare Plan prohibiting such actions." These statements were alleged to have been made at a meeting of Local 1556 (to which most dockbuilders, along with other crafts not involved here, belong), during a February 2012 HAZMAT training class attended by some bargaining unit members, and "at jobsites throughout New York City and New Jersey." (Bd. Ex. 1(e) at Appx.1.)

(b) Objection 3, Pertaining to Pension Fund Benefits and Assets

Objection 3 narrowly alleges that, "[a]t the Local 1556 meeting in February 2012, District Council representatives threatened bargaining unit members with the loss of their pension benefits if the Dockbuilders Local won the election. Specifically, the District Council Executive Secretary-Treasurer told the bargaining unit members in attendance (approximately 80-90) that he would never transfer pension fund monies from the District Council Pension Plan to a new union pension plan if the Dockbuilders won the election."

3. The Petitioner Files Exceptions

Following a three-day hearing, the Hearing Officer issued a Report on Objections in which he recommended that the Board overrule the objections in their entirety and certify the unit. On December 17, 2012, the Petitioner filed its Exceptions.

FACTUAL BACKGROUND

Much of Amalgamated's Memorandum of Law in Support of its Exceptions consists of unsupported "facts" relating to the alleged "threatening" statements regarding employee fringe benefits. The Petitioner's "facts" are frequently pure speculation (accompanied by no specific citations), expressly contradicted by the record and the Hearing Officer's findings, or wholly irrelevant to any issue before the Board. Amalgamated's reliance upon such unsupported conclusions should be disregarded as outside the scope of the record in this matter.[3]

Amalgamated's "facts"—entire pages of which contain no citation to record testimony—actually amount to mere labels, conclusions, and hackneyed shorthand. They are therefore

[3] For example, the Petitioner baldly recites nine enumerated pieces of "undisputed evidence," yet connects none of the nine conclusions with citation to the record. (Pet.'s Br. at 24-25.)

unsupportive of its Exceptions. It appears that, having recognized that the record evidence is insufficient to meet its burden of proof, Amalgamated simply chooses to ignore the material evidence and instead offer its own unsupported contentions in support of its Exceptions. Where its "facts" do not reflect the record, Amalgamated cannot and does not identify evidence which would require a result different than that recommend by the Hearing Officer. Therefore, contrary to Amalgamated's flagrant misrepresentations, the material facts in this case are summarized as follows.

A. THE PARTIES

Amalgamated is a faction of District Council members attempting to displace the latter as representative of the bargaining unit. (Tr. 331:18-19.) It has no affiliation with any international union and has no collective bargaining agreements with any employers. (Id.; Tr. 42:5-8) It co-sponsors no employee benefit funds, no healthcare plans, no pension funds, and claims to have no elected leadership. (Tr. 47:19; 22-23; 135:17-20.)

The District Council is a 22,000-member labor organization composed of eight constituent local unions. (Tr. 323:10-14.) The bargaining unit in this election consists largely of members of Local 1556 of the District Council, which was formed in July 2011 as the result of the merger of two predecessor locals. (Tr. 261:17-18.) The local is comprised of approximately 3,000 members. (Tr. 323:18.) The bargaining unit is not coextensive with Local 1556. Only approximately one-third of the membership of Local 1556 was eligible to vote in this election. (Int. Ex. 9.)

Generally, the District Council's members (including the members of Local 1556) participate in the New York City District Council of Carpenters Benefit Funds ("Pension Fund" and "Welfare Fund"). The Funds are Taft-Hartley multi-employer benefit funds, and the assets

of the Funds are held in trust "for the sole and exclusive benefit" of participants. (Int. Exs. 10 and 11B; Tr. 324:20-335:5); see also 29 U.S.C. § 186(c)(5). The Funds are governed by a 12-member board of trustees, including six representatives of the District Council and six representatives of management. (Tr. 325:6-9.) The Funds are not a labor organization within the meaning of the National Labor Relations Act ("Act") and are not a party to this election. The Funds are, however, subject to the requirements of the Employee Retirement Income Security Act of 1974 ("ERISA").

B. THE EVIDENCE CONCERNING PETITIONER'S OBJECTION 2

Petitioner's Objection 2 alleged that the District Council interfered with the election by threatening bargaining unit members with immediate loss of medical benefits and cancellation of retiree medical benefits if Amalgamated prevailed in the election. (Report at 4.) Evidence was offered that the allegedly offending utterances were made a meeting of Local 1556, during a February 2012 HAZMAT training class attended by bargaining unit members, and "at jobsites throughout New York City and New Jersey." (Bd. Ex. 1(e) at Appx.1.) As even the testimony of Amalgamated's own witness demonstrates, health and welfare benefits under the District Council's Welfare Fund will not continue indefinitely when an individual leaves the employment of a District Council employer. (Tr. 136:20-137:20.) It is a truism, not a "threat," to inform members when and under what circumstances their coverage will end.

1. No Evidence Was Presented Concerning Statements at Jobsites

The credited evidence shows that, contrary to Petitioner's assertions, District Council Executive Secretary-Treasurer ("EST") Michael Bilello ("Bilello") never stated that if Amalgamated were to prevail, employee health benefits would end on the day that the election

results were certified. (See Tr. 349:11-16.) Amalgamated offered no evidence of any statements made at jobsites throughout New York City and New Jersey. (Bd. Ex. 1(e) at Appx. 1.)

2. The HAZMAT Training Course

Amalgamated offered the testimony of two witnesses to support its assertion that EST Bilello made improper "threats" at a February 4, 2012 HAZMAT training course. (Tr. 93:13-14; 159:20-22.) The testimony of those witnesses—Eugene Basile and Shawn Doyle—was found to be "lacking in specificity . . . otherwise vague" and not credible. (Report at 11.) Thus, the Petitioner is left with no record evidence to support Objection 2 in connection with the HAZMAT course. While there were "questions on welfare fund coverage" at that course, EST Bilello never stated that the welfare coverage would end on the day that Amalgamated was certified by the NLRB. (Tr. 345:4-12; 349:11-16.)

3. The February 28, 2012 Local 1556 Meeting

Credited testimony shows that EST Bilello also fielded questions about Welfare Fund coverage by members at a February 28, 2012 meeting of Local 1556. (Tr. 349:11-16.) EST Bilello did not say that that coverage under the Welfare Fund would cease as soon as Amalgamated were certified by the NLRB. (Tr. 349:1-13.) Other witnesses confirm that such a statement was never made. (See, e.g., Tr. 198:1-11.) At the February 28, 2012 meeting, EST Bilello testified that "I clearly stated that the welfare coverage—if anybody went with Amalgamated the welfare coverage would terminate at the end of the quarter in which they began disqualifying employment." (Tr. 349:20-23.) Disqualifying employment is work within the District Council's "trade jurisdiction for an organization or a contractor that is not signatory to a CBA with the New York City District Council of Carpenters," including a nonunion employer. (Tr. 349:24-350:5.) EST Bilello accurately recited the rules of the Welfare Fund in

effect at that time. (See Pet. Ex. 2.) Joe Geiger, former president of Local 1556, corroborated EST Bilello's testimony that he only recited the Welfare Fund's rules at the Local 1556 meeting on February 28, 2012. (Tr. 198:6-15.) Therefore, EST Bilello's remarks were not objectionable and Amalgamated's Objection 2 raises no substantial issue that could have affected the results of the election. (See Report at 13.)

4. Petitioner Provided No Specific Evidence Concerning the Alleged Loss of Retiree Benefits

Finally, it must be noted that the Petitioner's witnesses in its case-in-chief offered no specific testimony in support of the Petitioner's assertion in Objection 2 that the District Council "threatened" a loss of retiree medical benefits. Here, again, however, the Hearing Officer recognized that the record shows that EST Bilello explained only the Welfare Fund's rules with respect to retiree health coverage. (See Report at 13; Tr. 184:1-11.) Mr. Geiger testified that Bilello addressed "questions about retirees receiving medical benefits upon retiring" and stated that under the current Welfare Fund's rules "you need 30 years—30 vesting credits in order to receive full medical at retirement age. That if those individuals didn't have a full 30 years upon leaving to go if Amalgamated won, would be in risk of losing their medical coverage." (Tr. 184:1-6.) The Welfare Fund's current rules provide that, for participants retiring on or after August 1, 2006, "[i]n order to be eligible for retiree welfare coverage, you must satisfy one of the three requirements below: [The first one is that] [y]ou are at least 55 years old, and have earned at least 30 Vesting Credits . . . [or] . . . ." (Int. Ex. 11A, Summary of Material Reductions, dated June 1, 2006 at 2.) EST Bilello's statements regarding retiree welfare benefits were thus based on the objective rules of the Welfare Fund and do not amount to misconduct.

C. THE EVIDENCE CONCERNING PETITIONER'S OBJECTION 3

Amalgamated's Objection 3 alleges that the District Council threatened bargaining unit members with a loss of pension benefits if the Petitioner prevailed in the election. (Report at 4.) The credited testimony shows, however, that the District Council's representatives, when asked about the benefit fund consequences if Amalgamated were to win the election and be certified, accurately stated the legal restrictions governing multi-employer Taft-Hartley employee benefit plans and the simple rules of coverage under the District Council's Pension Fund.

1. The Evidence Concerning Vested Benefits

As an initial matter, the record is clear that rather than "threatening" any bargaining unit member, EST Bilello assured voters that if they were vested in the District Council Pension Fund—a defined benefit plan—their benefits are secure regardless of the election results. He repeatedly emphasized this point. At the February 4 HAZMAT training, EST Bilello explained that, "[a]nyone who was vested in the pension fund would always be vested and always be entitled to that pension." (Tr. 344:8-9.) He did so again at January 24, 2012 and February 28, 2012 meetings of Local 1556. (Tr. 183:17; 347:25-348:3.) As explained by Joe Geiger, EST Bilello said, vested beneficiaries "when they reached the age of retirement they were liable to collect their pension." (Tr. 194:4-7.) Thus, Bilello's "credited remarks served to lawfully inform unit employees of the consequences to their pensions of voting for the Petitioner . . ." (Report at 14.)

2. The Evidence Concerning Unvested Benefits

EST Bilello explained that individuals who were not vested and incur a permanent break in covered service under the Pension Fund will lose any accrued pension credits. (Tr. 344:10-14.) However, this is true for any individual who leaves covered employment regardless of the

reason, and such an explanation cannot therefore constitute objectionable conduct. (See Int. Ex. 10.) The material terms of coverage and participation in the Pension Fund provide that if a participant has a permanent break in service before becoming vested, all non-vested service credit is lost and cannot be restored. (Id. at 23-24.) In sum, Amalgamated failed to meet its burden of proving its allegation (as specified in the Notice of Hearing) that at the Local 1556 meeting EST Bilello, "threatened" individuals that they would "lose their accrued pension benefits." (Bd. Ex. 1(e) at 3.)

3. The Evidence Concerning the Transfer of Pension Assets

Amalgamated alleged that that Mr. Bilello stated that he "would never transfer pension fund monies from the District Council Pension Plan to a new union pension plan if the Dockbuilders won the election." (Bd. Ex. 1(e), at Appx. 1.) The Notice of Hearing specifies that EST Bilello was alleged to have made these statements at the February 28, 2012 Local 1556 meeting.

It is undisputed that employee benefits law establishes that in certain circumstances the assets of an existing multi-employer defined benefit pension fund can be transferred to another existing multi-employer defined benefit pension fund when an incumbent union is displaced as collective bargaining agent. Laura Kalik, interim executive director of the District Council's Fund's testified that "ERISA sets out a process for assets and liabilities to be transferred from one defined benefit pension plan to another in certain circumstances." (Tr. 240:7-9.) Yet, it is also undisputed that as of the election in this case (and currently), Amalgamated had no collective bargaining agreements with any employers, let alone any pension benefit funds whatsoever. (Tr. 42:8; 47:19; 48:19; 131:24-132:3.)

Accordingly, EST Bilello testified that during the February 28 meeting: "I said that the only way that funds could be transferred is if you had an existing defined benefit plan that funds from our defined benefit plan could be transferred to; you would have to have that requirement." (Tr. 414:8-11.) Laura Kalik testified that EST Bilello stated that he wasn't going to sign a check to transfer assets out of the District Council Pension Fund unless it was done correctly. (Tr. 235:24-25.) It is irrelevant that Amalgamated believed that it was "going to" have a defined benefit plan. (Tr. 132:6.) Moreover, the record also shows that Amalgamated publicly promoted employee participation in a 401(k) defined contribution plan as opposed to a traditional defined benefit plan. (Tr. 253:1-4; 270:2-5.) EST Bilello explained that assets could not be transferred from a defined benefit plan (like the District Council Pension Fund) to a 401(k) plan. And it was never shown that the Amalgamated had a defined benefit plan. (Tr. 196:1-6.) Specifically, Bilello testified that, "I explained why . . . I could not transfer assets to anything other than another defined benefit plan in existence, and it would have to meet the qualifications under ERISA law." (Tr. 347:20-24.) Accordingly, "it is not objectionable conduct for the Intervenor, herein the incumbent Union, by Bilello, to advise employees of the Intervenor's position that pension fund assets . . . could not be transferred to a non-existent pension fund of Amalgamated." (Report at 13-14.)

STANDARD OF REVIEW

In ruling on exceptions the Board reviews the entire record in light of the exceptions and briefs. See, e.g., Permanente Med. Group, Inc., 358 N.L.R.B. No. 88, slip op., at 1 (2012). It is well-settled that "[r]epresentation elections are not lightly set aside." Affiliated Computer Servs. Inc., 355 N.L.R.B. No. 163, slip op., at 2 (2010). And "the burden of proof on parties seeking to

have a Board-supervised election set aside is a heavy one." Delta Brands, Inc., 344 N.L.R.B. 252, 252 (2005). Where, as here, the prevailing party wins an election by a substantial majority of votes, the objecting party's burden "is even heavier." Permanente Med. Group, Inc., 358 N.L.R.B. No. 88, slip op., at 4 (citation omitted).

The Board applies an objective test in determining whether conduct alleged to affect the results of an election did so. Upon determining that alleged conduct occurred, the Board asks whether it has a "tendency to interfere with the employees' freedom of choice" and "could well have affected the outcome of the election." Delta Brands, Inc., 344 N.L.R.B. at 253; Cedars-Sinai Med. Ctr., 342 N.L.R.B. 596, 597 (2004). The Board applies an objective test to determine whether objectionable conduct occurred "and the subjective reactions of employees are irrelevant to that issue." Local 299, Int'l Bhd. of Teamsters (Overnite Transp. Co.), 328 N.L.R.B. 1231, 1231 n.2 (1999) (citing Emerson Elec. Co., 247 N.L.R.B. 1365, 1370 (1980)).

Here, the Petitioner fails to carry its "heavy" burden, because its evidence, as the Hearing Officer properly found, does not show that objectionable conduct occurred, and the credible evidence does not show that the election results should be overturned.

ARGUMENT

THE PETITIONER'S EXCEPTIONS LACK MERIT

A. THE RECORD FULLY SUPPORTS THE HEARING OFFICER OFFICER'S FACTUAL DETERMINATIONS AND HIS CREDIBILITY RESOLUTIONS SHOULD BE UPHELD. (Exceps. ¶¶ 1, 4-15, 17, 22, 20, 26, 28, 31)

1. The Hearing Officer's Credibility Determinations Should Not Be Disturbed

The Petitioner has excepted to several of the Hearing Officer's findings on the basis that the credibility resolutions in support of those findings are incorrect. Indeed, nearly half of the

Petitioner's Exceptions (Exceps. ¶¶ 1, 4-8, 10-15, 17, 22, 26) consist of disagreements with the Hearing Officer's credibility determinations. It is axiomatic that the Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. Stretch-Tex Co., 118 N.L.R.B. 1359, 1361 (1957). Moreover, recognizing that a fact-finder directly observes witness testimony, the Board affords great weight to credibility determinations related to witness demeanor. Hornell Nursing & Health Related Facility, 221 N.L.R.B. 123, 124 (1975) (noting that the Board is "loathe to upset findings" based on demeanor).

Thus, "the Board should reverse a judge's credibility resolutions only in rare cases." E.S. Sutton Realty, 336 N.L.R.B. 405, 405 n.2 (2001). The Hearing Officer's credibility determinations in this case were based on his observations of the witnesses' demeanor and, as noted, are entitled to great deference. See, e.g., Tuf-Flex Glass v. N.L.R.B., 715 F.2d 291, 295 (7th Cir. 1983) (a hearing officer's "assessment of witness credibility and demeanor . . . may not be overturned absent the most extraordinary circumstances"). In particular, the Hearing Officer found that the Petitioner's primary witness, Eric Gundersen, was "overly evasive during cross examination" and thus he "cannot credit [Gundersen's] testimony." (Report at 10.)[4] By contrast, he credited the testimony of the District Council's primary witness, EST Bilello (who was alleged to have made the core statements at issue in the objections), finding it to be "straightforward and more reliable than contradictory testimony." (Id. at 13.) With regard to others, he "fully evaluated their respective testimony and afforded it the proper weight in light of its specificity and other pertinent considerations." (Id. at 10.)

[4] The Hearing Officer also discredited the testimony of Louis Rioux, a District Council witness, whom he found had a "poor recollection of relevant statements." (Report at 10.)

The Hearing Officer is not obligated to detail all of the intricacies of his credibility resolutions. The Board may find that "there are substantial evidentiary factors in support of the Hearing Officer's credibility finding which he failed to note specifically in his report." Triple A Machine Shop, Inc., 235 N.L.R.B. 208, 209 (1978). Here, it is plain that the Hearing Officer based his decision on "the record as a whole and [his] observations of each of the witnesses." (Report at 3.)

The Report supports the Hearing Officer's statement that he took into account a number of factors in evaluating witness testimony, including consistencies, inconsistencies, and demeanor. (See Report at 3 n.3.). In the Report, he further explained that "my failure to detail each of these is not to be deemed a failure on my part to have fully considered it," and "evaluations of the testimony of each witness fully incorporate direct and cross examination." (Id.) [5]

2. Petitioner Relies on Discredited Testimony

Petitioner nevertheless excepts to the Hearing Officer's credibility resolutions by its heavy reliance on the testimony of the discredited witnesses themselves. For example, Petitioner claims that Bilello said "he would never sign the check transferring any of the District Council's pension assets to the Amalgamated Dockbuilders which would be done only over 'his dead body'" (Pet.'s Br. at 9); "Bilello advised union members on various occasions that he would never sign the check transferring some pension assets" (Pet.'s Br. at 15); "[a]ccording to Amalgamated's witnesses, Bilello had stated . . . that there was no way he would allow any such

[5] Petitioner inexplicably characterizes the Hearing Officer's statement as "self-serving" (Excep. ¶ 31), but fails to offer evidence that the Hearing Officer did not in fact take into account the various factors enumerated, and fails to provide any explanation as to why the Hearing Officer would make a "self-serving proclamation" (see id.).

transfer [of pension assets] to take place" (Pet.'s Br. at 22). Testimony purporting to support these assertions was not credited (see Report at 13-14) and reliance upon it in Petitioner's Exceptions represents the Petitioner's mere disagreement with the Hearing Officer's resolutions. It does not, however, provide evidence in favor of overturning them.

3. Petitioner Incorrectly Asserts that the Hearing Officer Ignored Certain "Undisputed Evidence"

In an attempt to diminish the importance of the Hearing Officer's credibility findings, Petitioner argues that the Hearing Officer ignored certain evidence "where credibility was not at issue." (See Pet.'s Br. at 24-25.) The list of "undisputed evidence" presented by Petitioner consists of evidence that, contrary to Petitioner's assertions, was not ignored. Rather, such evidence is (1) immaterial; (2) constitutes unsupported legal conclusions; or (3) as discussed below, pertains to withdrawn objections and thus has no place in this proceeding.[6]

For example, contrary to Petitioner's assertions, the Hearing Officer did not ignore evidence that Bilello "wore two hats," as a union officer and trustee of the benefit funds. (See Excep. ¶ 2; Pet.'s Br. at 24.) Petitioner relies heavily on its assertion that Bilello's "two hats" demonstrate that he could effectuate the alleged "threats" Petitioner claims he made. (See, e.g., Excep. ¶¶ 2, 20, 28; Pet.'s Br. at 24.) This argument is a red herring. The issue of whether Bilello—a single member of the Funds' Board of Trustees, composed of six union and six management representatives—could actually carry through on his alleged "threats" is, contrary to Petitioner's exceptions, simply not an issue in this case. Rather, the Hearing Officer properly found that, based on the facts and the law, there were no threats by the District Council. (See Report at 13, 14.)

[6] It bears repeating that the Petitioner's list of "undisputed evidence" (Pet.'s Br. at 24-25) includes no specific citation to any record evidence.

The question of whether or not Bilello could carry out what Petitioner's discredited witnesses claim are "threats" is thus irrelevant, because his remarks do not constitute threats. "Petitioner takes exception to the Hearing Officer's finding that Petitioner failed to establish that Bilello was capable of carrying out his threats." (Excep. ¶ 9, citing Report at 6, 13.) Petitioner misstates the Hearing Officer's findings. Contrary to Petitioner's characterization, the Hearing Officer found that Petitioner failed to establish that objectionable conduct occurred. (Report at 13-14.) In other words, he found that no such "threats" were issued. (Id.)

While the Hearing Officer specifically noted that Bilello testified that he "serves as the Executive Secretary-Treasurer for the District Council, as well as a trustee of the benefit funds" (Report at 9) (emphasis added), and he summarized the Objections as "primarily attributed to statements made by Michael Bilello, the District Council's Executive Secretary-Treasurer and Trustee of the benefit funds" (Report at 10 (emphasis added)), those roles were not necessary to determine the chief factual issue—whether objectionable conduct occurred here. Thus, the Hearing Officer did not disregard the evidence of Bilello's dual roles. Rather, the Hearing Officer clearly found that the dual roles were not determinative under the facts of this case.

The same is true with regard to former District Council President William Lebo. Petitioner alleges that the Hearing Officer failed to take note of the "undisputed evidence" that Lebo wore "two hats" and "in fact threatened to take such action against Amalgamated that was beyond the ability of a mere union official." (Pet.'s Br. at 24.) Leaving aside Petitioner's conclusory assertions (contradicted by the evidence concerning the Funds' structure) that Lebo and Bilello, as individuals, could simply take action to cause an immediate loss of medical benefits or loss of pension benefits if Petitioner prevailed, Petitioner conflates its assertion that Lebo and Bilello issued "threats" with evidence that such "threats" were made. The Hearing

Officer did not ignore "critical" and "undisputed evidence" of such alleged threats. He determined that they were not made.

In any event, this purportedly "undisputed evidence" fails to counteract the fact that (a) utilizing a credibility analysis, the Hearing Officer found that the District Council, primarily through EST Michael Bilello, had not said what Petitioner claimed was said; and (b) the District Council had engaged in permissible conduct attendant to the give-and-take of campaigning. As set forth below, with regard to each objection, the Hearing Officer made a credibility determination as to what was said regarding benefits, applied settled law (including that relied upon by Petitioner), and in each instance determined that no objectionable conduct had occurred.

4. The Hearing Officer Carefully Weighed the Testimony to Determine What Was Said

The Hearing Officer noted that "[v]arious witnesses testified as to what they heard, or did not hear, at several meeting or training sessions where Bilello spoke. As contradictory testimony was elicited concerning what was said by Bilello, I will afford the most weight to testimony deemed the most credible." (Report at 10.) Thus, insofar as Petitioner's Objections primarily related to statements allegedly attributable to the District Council (nearly all of which were allegedly made by EST Bilello), the Hearing Officer engaged in an analysis, based in large part upon credibility determinations, as to what was actually said.

The Petitioner's evidence at the Hearing pertained to alleged comments made on two primary occasions: (1) at a February 4, 2012 HAZMAT Training Class; and (2) at a February 28, 2012 Local 1556 membership meeting. It also offered some limited testimony relating to alleged comments made at a January 2012 Local 1556 membership meeting and at a March meeting held in New Jersey. In each case, the Hearing Officer carefully reviewed the evidence presented.

a. Credibility Determinations Regarding the February 4, 2012 HAZMAT Training Class (Exceps. ¶¶ 8, 14)

With regard to the alleged threats made at a February 4, 2012 Hazmat training class, the Hearing Officer chose to credit the testimony of EST Bilello over that of the Petitioner's witnesses, Eugene Basile and Shawn Doyle. (Report at 11.) He did so after "a full review of this testimony," in which he determined that Basile and Doyle were "lacking in specificity" and "otherwise vague" in their testimony. (Id.) In contrast he chose to credit Bilello's testimony, which he found to be "detailed, specific and was responsive to the questions posed." (Id.)

The record fully supports this finding. Petitioner presented only two witnesses to testify about the February 4 HAZMAT training. First, Eugene Basile identified no specific statement attributable to EST Bilello at the training, only a vague assertion that Bilello explained that "we would lose all our health program completely." (Tr. 96:5-6.) Shawn Doyle's testimony was similarly vague and unreliable. Doyle testified that at the HAZMAT training, Bilello said that "you would lose your medical and all your banked hours that you had." (Tr. 161:8-9.) Such vague statements should not be credited, and are insufficient to meet the Petitioner's burden of proof with regard to objectionable conduct.[7] See, e.g., Park N Go of Minnesota, 344 N.L.R.B. 1260, 1264 (2005) (testimony that "tended to be vague" was properly discredited).

Moreover, the Hearing Officer may properly base his credibility determinations on a witness's memory. See, e.g., Gibraltar Steel Corp., 323 N.L.R.B. 601, 601 n.4 (1997) (adopting hearing officer's credibility determination in objections hearing where factors such as witnesses' "general memory for detail . . . confusing and conflicting testimony, [and] recall" were

[7] Both Basile's and Doyle's testimony reflects a recollection that "they said" these statements. (Tr. 96:3; Tr. 161:8-9.) To credit such a vague conclusion, one would have to assume the speakers were speaking in unison.

considered) (emphasis added). If, as is the case here, the witness evinces general lack of memory for detail, his testimony should not be credited. See NLRB Hearing Officer's Guide, pp. 168-69 (credibility should be based on "specificity of the witness' testimony; how detailed it was; its vagueness . . . whether the witness provided conclusionary responses or implausible explanations" (citing Universal Camera v. NLRB, 340 U.S. 474 (1951)).

The Hearing Officer's crediting of Bilello's testimony over that of Petitioner's witnesses regarding the February 4, 2012 HAZMAT meeting should be upheld. Petitioner's exception concerning that testimony is without merit. (See Excep. ¶ 14.)

b. Credibility Determinations Regarding the February 28, 2012 Local 1556 Meeting (Exceps. ¶¶ 4, 10, 12, 13, 15.)

With regard to the February 28, 2012 Local 1556 union meeting, the Hearing Officer reviewed and summarized the range of testimony concerning EST Bilello's alleged comments at the meeting. (Report at 11-12.) The Hearing Officer noted that various witnesses testified to various recollections of those comments. (Id.) He credited Bilello's testimony that "if Amalgamated was elected the employees' representative, the employees' [health fund] coverage would end at the end of the quarter following the selection of Amalgamated." (Report at 11-12, 13.) And he noted that "Petitioner's witnesses did not agree as to when Bilello advised that medical benefits would be terminated, or when such termination would become effective—Gundersen testified that Bilello stated that it would be the day after Amalgamated was certified, Ostrander's testimony was that it would be the 'minute the election was certified,' and witnesses Basile and Doyle provided no specific date." (Report at 11.)

In light of these inconsistencies, the Hearing Officer specifically discredited that testimony and credited Mr. Bilello instead, who was "straightforward and more reliable than contradictory testimony." (Id. at 13 n.6.) Moreover, the Hearing Officer also discredited

Amalgamated's inconsistent witnesses, in part, based on their demeanor. (Id. at 3 n.3.) See also Triple A Machine Shop, Inc., 235 N.L.R.B. at 209 ("[W]e believe it is appropriate to infer that the Hearing Officer found the testimonial demeanor of [witnesses] to be persuasive of their veracity."). Where the Hearing Officer has expressly relied on his impressions of the witness in this way, his credibility determinations should not be disturbed.

Having credited Bilello's testimony, the Hearing Officer determined that the District Council did not engage in objectionable conduct when it advised employees that District Council Welfare Fund health coverage would be unavailable to employees should the District Council not be selected as their representative. (Report at 13.) He found that "[c]redited testimony establishes that Bilello did nothing more than explain the impact of loss of District Council membership on individuals' health insurance coverage." (Id.) The Intervenor's remarks do not become objectionable conduct because its witnesses were displeased with that outcome.

Similarly, as noted above, the Hearing Officer determined that with respect to pension fund benefits, the Hearing Officer credited EST Bilello's testimony concerning pension benefits. (Id. at 14.) The Hearing Officer noted, among other things, that Bilello's version of his remarks is in conformity with the campaign literature. (Id. at 13.) And Bilello's "remarks served to lawfully inform unit employees of the consequences to their pensions of voting for the Petitioner . . . ." (Id. at 14.) A clear preponderance of all the relevant evidence compels no other conclusion.

c. Credibility Determinations Regarding the January 2012 Local 1556 Membership Meeting and the March Meeting in New Jersey (Exceps. ¶¶ 5, 6.)

Petitioner takes exception to the Hearing Officer's failure to credit Eric Gundersen's testimony regarding alleged comments by EST Bilello at a January 2012 membership meeting of

Local 1556 (Excep. ¶ 5), and, conversely, excepts to the Hearing Officer's failure to discredit Local 1556 President Joseph Geiger's testimony regarding Bilello's comments at that meeting (Excep. ¶ 6).[8] Petitioner fails to present any evidence in support of these exceptions and its brief barely mentions the January meeting.

Likewise, with regard to the allegations concerning alleged comments at a March meeting in South Jersey, Petitioner asserts only that Bilello stated that "if members left and went with Amalgamated they would lose the ability to retire early with full medical benefits." (Pet.'s Br. at 20.) Petitioner contends that this allegedly "ignored" Petitioner's campaign literature that indicated that Petitioner's proposed health fund could include current retirees (id.) Bilello testified that he explained at the South Jersey meeting that members would be subject to the rules of the Welfare Fund regarding coverage. (Tr. 353:8-23.) The Hearing Officer credited Bilello's testimony and found his remarks concerning termination of health coverage not to be objectionable. (Report at 13.)

Moreover, the Hearing Officer properly determined that Gunderson's testimony, as a whole, was not credible. Witnesses are properly discredited where their testimony is "incoherent, unresponsive, and evasive." Addicts Rehab. Ctr. Fund, Inc., 330 N.L.R.B. 733, 740 (2000). See also New England Confectionary Co., 356 N.L.R.B. No. 68, slip op., at 4 (2010) (testimony discredited where "answers were frequently nonresponsive, evasive and/or contradictory"); Cherry Hill Convalescent Ctr., 309 N.L.R.B. 518, 520–21 (1992) (adopting judge's determination that testimony was unreliable where it was "manifested by a glibness which, when coupled with numerous instances of evasive answers, gave rise to an attitude

[8] This Exception, among others, contradicts Petitioner's assertion that the Hearing Officer found that "only the testimony of Michael Bilello . . . was to be credited." (Excep. ¶ 1; Pet.'s Br. at 1.)

bordering on smart-aleckiness.") Here, the Hearing Officer, found Gunderson "overly evasive" and therefore unreliable. (Report at 10.) Petitioner's Exceptions provide no reason to disrupt such findings.

B. THE HEARING OFFICER PROPERLY APPLIED WELL-SETTLED LAW TO THE MATERIAL FACTS

1. The Hearing Officer Properly Determined That Bilello Did Not Threaten An Immediate Loss Of Health Benefits And Did Not Engage In Objectionable Conduct (Exceps. ¶¶ 23, 25.)

Objection 2 alleged that District Council's representatives, including the EST and President of the District Council, "threatened bargaining unit members with the immediate loss of medical benefits, and the cancellation of retiree medical benefits, if the [Amalgamated] won the representation election, despite the rules of the District Council Welfare Plan prohibiting such actions." (Bd. Ex. 1(e) at Appx.1.) But, the Hearing Officer made a credibility determination that, contrary to Petitioner's assertions, EST Bilello had not threatened a loss of benefits "prior to the results of the election being final." (Report at 13.) Thus, the Hearing Officer did not "find[] [Bilello's] remarks regarding termination of health insurance benefits to be objectionable." (Id.)

The legal significance of the credibility finding was made clear by the Hearing Officer in citing Bell Security, Inc., 308 N.L.R.B. 80 (1992). Unlike Bell, "[t]his is not a case . . . where an incumbent union engages in objectionable conduct by threatening to cut off union benefits before the results of a decertification vote are final." JTJ Trucking, Inc., 313 N.L.R.B. 1240, 1240 n.1 (1994) (comparing Bell Security, 308 N.LR.B. at 80) (emphasis added). In other words, there simply was no statement, much less a "threat," that the health benefits would be lost before the bargaining unit members became represented by a labor organization other than the District Council (or by no labor organization).

Indeed, many of Petitioner's exceptions regarding Welfare Fund coverage merely reflect Petitioner's apparent disagreement with Welfare Fund rules. Such dissatisfaction cannot serve as a basis for overturning election results where, as in the present case, the Intervenor has only informed its members of Welfare Fund coverage rules. See JTJ Trucking, 313 N.L.R.B. at 1240 n.1. As discussed more fully below, the Petitioner's objection regarding the Welfare Fund's "banked hours" rule is not properly before the Board. Nonetheless, the District Council merely explained the rules for Welfare Fund coverage and it is irrelevant that the membership, as Amalgamated flagrantly speculates, "recognized" the "banked hours" rule as a "significant cutback." (Pet.'s Br. at 12.) The District Council "did nothing more than explain the impact of loss of District Council membership on individuals' health insurance coverage." (Report at 13, citing Shepherd Tissue, Inc., 326 N.L.R.B. 369 (1998).)

2. The Hearing Officer Properly Determined That Bilello Lawfully Informed Employees Of The Consequences To Their Pensions If Amalgamated Were To Be Certified (Exceps. ¶¶ 16, 19, 24.)

Objection 3 narrowly alleges that, "[a]t the Local 1556 meeting in February 2012, District Council representatives threatened bargaining unit members with the loss of their pension benefits if the Dockbuilders Local won the election. Specifically, the District Council Executive Secretary-Treasurer told the bargaining unit members in attendance (approximately 80-90) that he would never transfer pension fund monies from the District Council Pension Plan to a new union pension plan if the Dockbuilders won the election." (Bd. Ex. 1(e) at Appx.1.)

The Hearing Officer determined that "Bilello's version of his remarks is in conformity with the campaign literature distributed by the Intervenor. . . . In this regard, it is not objectionable conduct for the Intervenor, herein the incumbent Union, by Bilello, to advise employees of the Intervenor's position that such pension fund assets funds could not be

transferred to a non-existent pension fund of Amalgamated." (Report at 13-14.) Contrasting Carpenters Union Local 180, 328 N.L.R.B. 947 (1999), the Hearing Officer found that "there was no credited testimony to support the assertion that Bilello threatened employees with the loss of vested pension benefits if they supported Amalgamated." (Report at 14.) The Hearing Officer concluded that "Bilello's credited remarks served to lawfully inform unit employees of the consequences of voting for the Petitioner, including the impact on non-vested pension benefits." (Report at 14.) Here, the Hearing Officer sensibly relied on Trump Taj Mahal Assocs., 329 N.L.R.B. 256, 256 (1999). In that case, a union's remarks during the critical period preceding a deauthorization election that the vote "could jeopardize a secure retirement pension" were not objectionable. Id. The Board reasoned that,

> this is not a threat to retaliate against employees but a permissible statement about the consequence of a termination of the collective-bargaining relationship between the [union] and the Employer. Without such a relationship, the Employer could no longer lawfully contribute to the contractual pension plan on behalf of the employees, and their "continuation" in the plan would therefore cease. This could well jeopardize their entitlement to a full pension under that plan when they reach retirement age. Contrary to the petitioner's claim, this is not a threat to cancel previously vested benefits and the failure to spell out the distinction between vested sums and continued contributions in fuller detail does not make it so.

Id. at 256-57. The facts here are equivalent. Indeed, while the Trump Board held that the union was not required to spell out the difference between vested and non-vested benefits, the District Council in this case actually did so. (See, e.g., Int. Ex. 6.) The District Council's remarks in the present case can hardly be objectionable.

Moreover, Springfield Jewish Nursing Home, 292 N.L.R.B. 1266 (1989) and Willey's Express, Inc., 275 N.L.R.B. 631 (1985), relied upon by the Petitioner, are clearly inapplicable here. As an initial matter, the Board expressly distinguished both Willey's Express and

Springfield Jewish from the facts in Trump. The circumstances here are closely analogous to Trump, which therefore controls the present case. And Willey's Express and Springfield Jewish are distinguishable here for the same reasons. In Springfield Jewish, the employer made a threat to withdraw benefits, which is distinct from "a description of consequences that would necessarily follow from a lawful action," as the District Council has provided here. Trump, 329 N.L.R.B. at 257. (See also Report at 14. "[C]redited remarks served to lawfully inform unit employees of the consequences to their pensions . . .") In Willey's Express, a union committed objectionable conduct by telling a unit employee that he was illegally covered by the union's trust fund for vision and dental insurance. 275 N.L.R.B. at 631. The union's investigation into fund coverage was improper. Id. at 632. Here, however, as in Trump, "[n]o such actions were taken . . . . [The incumbent] was merely describing a consequence of an action that . . ., it was permitted to take." Trump, 329 N.L.R.B. at 257. The Trump Board's disregard of the Willey Express reasoning is equally appropriate here. Willey's Express presents unique and inapplicable circumstances that are not present here.[9]

3. The Hearing Officer Properly Concluded that the Remarks Attributed to William Lebo Were Not Objectionable

a. Petitioner Failed to Present Evidence on Conduct Allegedly Attributable to District Council President William Lebo (Exceps. ¶¶ 11, 25, 29, 30.)

The Hearing Officer noted that "[t]he alleged threats alluded to in these Objections are primarily attributed to statements made by Michael Bilello . . . ." (Report at 10.) Indeed, as noted, Petitioner based its case primarily on testimony concerning the so-called "Bilello statement." (See, e.g., Tr. 33:3, 80:20, 101:13, 102:16, 110:18, 125:22, 126:3, 145:15, 19.)

[9] It should be noted that the tally of ballots in Willey's showed a tie vote, with two determinative challenges. 275 N.L.R.B. at 631. By contrast, the District Council won the election here by an overwhelming margin: 361 to 186.

While it is unclear what exactly the "Bilello statement" was (other than some omnibus short-hand employed by Petitioner's counsel in his questioning), Petitioner's witnesses offered a varied collection of vague paraphrases and characterizations of things they claimed Bilello may have said concerning the effects on benefits that changing union representation would have. The Hearing Officer clearly rejected Petitioner's evidence on the "Bilello statement."

Thus, having failed to establish that the so-called "Bilello statement" constituted objectionable conduct, Petitioner suddenly attempts in its Exceptions and brief to elevate alleged statements by former District Council President William Lebo, basing a number of exceptions upon conduct allegedly attributable or partially attributable to Lebo. (See, e.g., Excep.¶¶ 11, 25, 29, 30; see also Pet.'s Br. at 4 (referring to action that "Bilello and/or Lebo had already taken"); id. at 9 (stating Lebo "advised that Dockbuilders would lose their benefits if they chose to leave the District Council"); Id. at 24 (stating that the Hearing Officer ignored (unspecified) evidence that Lebo "threatened to take such action against Amalgamated that was beyond the ability of a mere union official").)

Petitioner excepts to the "Hearing Officer's failure to credit Eugene Basile's testimony" concerning Lebo's alleged "threats." (Excep. ¶ 11.) Petitioner's exception misses the point, however, because the Report makes clear that even taking the Petitioner's testimony at face value, the Hearing Officer found that there was no objectionable conduct attributable to Lebo. (Report at 13 n.7.) In that regard, the Hearing Officer stated: "I further find the remarks attributed to William Lebo regarding the loss of health insurance benefits not to be objectionable as there is no allegation that Lebo stated that benefits would be terminated prior to the results of the election being final." (Id.) Basile was the only witness for either party who mentioned any alleged statements by Lebo. When asked what specifically Lebo said at the HAZMAT meeting,

Basile said, "That we're going to lose our benefit plan if we choose to leave." (Tr. at 95:22-25; see also Tr. 96:3-7.) He continued, "one of the things they said is that our benefits . . . that we would lose all our health program completely." (Tr. 96:3-6 (emphasis added).) Such a statement would, in any event, be an accurate and unobjectionable statement of what would happen under the Welfare Fund's rules if the unit employees were to leave representation by the District Council. See JTJ Trucking, 313 N.L.R.B. at 1240 n.1.

b. No Adverse Inference May Be Drawn from the Failure to Call Lebo as a Witness (Excep. ¶ 8.)

Petitioner makes the unavailing argument that the Board should draw an adverse inference from the District Council's failure to call former District Council President Lebo as a witness at the Hearing. (Excep. ¶ 8.) Petitioner—which bears the burden of proof here—offered very limited evidence concerning any conduct by Lebo. (See Tr. 95:16-25.) Indeed, Petitioner offers no reason why it could not have called Lebo as a witness itself. The Report, however, shows that the Hearing Office evaluated the limited testimony offered by Petitioner concerning alleged statements by Lebo, and determined it to be vague and insufficient to show any objectionable conduct. (See Report at 6.)[10]

Thus, the Report cites the testimony of Petitioner witness Eugene Basile, in which Basile testified that Lebo came to the February 4, 2012 HAZMAT training class and said that "we're going to lose our benefit plan if we choose to leave (the District Council)" and "if we choose to go with Amalgamated . . . we would lose all our health program completely." (Report at 6.) That the record concerning Lebo was limited to this testimony is evidenced by Petitioner's

[10] Basile's unreliable testimony, as the Hearing Officer points out, mistakenly identifies Lebo as District Council Vice President. (Tr. 95:9.)

Exceptions, which cite only to the same testimony as set forth in the Report. (See Excep. ¶ 8 (citing Report at 6).)

In any event, a party opposing objections has no burden to put on any case and has no obligation to rebut non-existent evidence. The Hearing Officer properly concluded that any evidence concerning Lebo failed to rise to the level of objectionable conduct, and no adverse inference may be drawn from Lebo's failure to testify. (Report at 13 n.7.) There would be no reason to rebut evidence which, even as presented by Petitioner, could not constitute objectionable conduct. Now, however, faced with the Hearing Officer's Report, Petitioner suddenly inserts Lebo into the case in a way that it failed to do at the hearing.

C. PETITIONER'S ARGUMENTS THAT ARE EITHER RAISED IN CONNECTION WITH SPECIFICALLY WITHDRAWN OBJECTION, OR RAISED FOR THE FIRST TIME IN ITS EXCEPTIONS MUST BE DISREGARDED

1. Arguments in favor of previously withdrawn objections are not properly before the Board (Excep. ¶ 27.)

To the extent that Amalgamated's argument in support of its Exceptions attempts to revive previously-withdrawn Objection number 4, it must be disregarded. Amalgamated's Objection 4 alleges the "the Trustees of the District Council Welfare Fund" "amended rules and regulations . . . to provide that any participant who worked under a non-District Council collective bargaining agreement would forfeit . . . 'banked' hours" and that "this amendment was adopted [by the Trustees of the Fund] . . . to influence the vote in the representation election . . . and retaliate" against those who voted for Amalgamated. (Bd. Ex. 1(e) at Appx. 1). Amalgamated, however, in its Memorandum in Support of its Exceptions specifically acknowledges that Objection 4 had been withdrawn prior to the Regional Director's issuance of the Report on Objections and Notice of Hearing. (Pet.'s Br. at 6; see also Bd. Ex. 1(e).)

The record further shows that the Hearing Officer acknowledged Amalgamated's specific withdrawal of the objection related to "banked hours" and repeatedly ruled that evidence related to the Welfare Fund's "banked hours" rules would be admitted for a limited purpose and otherwise disregarded. (Tr. 26:1-23; 119: 19-223; 138:19-20; 143:6-12.) Nonetheless, in its Memorandum in Support of Exceptions, Amalgamated inappropriately suggests that a February 28, 2012 Summary of Material Modification ("SMM") regarding "banked hours" authored by the Executive Director of the Benefit Funds constituted objectionable conduct. (Pet.'s Br. at 11-13, 31).[11] Amalgamated makes an unsupported conclusion that the District Council "arranged for copies of the February 28 SMM to be handed out at the February meeting and also mailed out to the membership." (Pet.'s Br. at 13.) However, ERISA mandates that when a material change is made to a covered welfare plan, the plan administrator is required to promptly furnish to each participant an SMM noting the amendment to the plan and the resulting changes in coverage. See 29 U.S.C. § 1024(a).

The Board has long held that a fact-finder may not consider evidence bearing upon election objections that have been specifically withdrawn. In Precision Prods. Group, 319 N.L.R.B. 640, 641 (1995), the Board held that a hearing officer erred by considering an issue that had been withdrawn by the objecting party. In Precision Prods., the objecting party alleged that the employer improperly stated that it would "bargain from scratch" if the union won a representation election. Id. at 640. The Regional Director directed a hearing on objections and

[11] Petitioner's illogical argument that "[w]hatever objection the District Council might have had to any discussion of the February 28 SMM . . . was waived by the District Council, and such document can, and must be considered as part of the evidence in this case" must be disregarded. The Petitioner concedes that the February 28, 2012 SMM was admitted into evidence "for a limited purpose." (Pet.'s Br. at 12.) And, as discussed more fully below, it may not be relied upon as a basis for setting aside the election results.

at the same time approved the objecting party's withdrawal of the objection related to "bargaining from scratch." Id. The hearing officer nonetheless recommended setting the election aside on the basis that the employer had suggested that bargaining would commence from "square one" if the union won the election. Id. The Board reversed the hearing officer because the employer "had notice that the statement would not be an issue at the hearing—indeed . . . the Petitioner had specifically withdrawn that allegation." Id. at 641. The objecting party, the Board noted, "initially protested the Employer's references to negotiating from square one it its" objections. Id. Yet, the "petitioner withdrew that objection and the Regional Director approved the withdrawal while at the same setting other issues for hearing." Id.

The circumstances here are virtually identical. The Regional Director's Report on Objections and Notice of Hearing, states that "[b]y letter dated September 7, 2012, Petitioner requested withdrawal of its Objections No. 1, 4, 5 and 6, approval of which is hereby granted." (Bd. Ex. 1(e) at 2 n.3.) The Regional Director went on to order a hearing to resolve material issues with respect only to the Petitioner's Objections 2 and 3. As shown above, the Petitioner's Objection 4 alleged that the "Trustees of the District Council Welfare Fund amended the rules and regulations of the Welfare Plan to provide that any participants who worked under a non-District Council collective bargaining agreement would forfeit all of his 'banked' hours . . . ." Here, as in Precision Prods., the "petitioner, however, withdraw that objection and the Regional Director approved the withdrawal in his order directing a hearing." 319 N.L.R.B. at 641. Therefore, the Hearing Officer properly disregarded evidence regarding the withdrawn objection.

Here, as in Precision Prods., the hearing officer allowed evidence related to "banked hours" into the record for a narrow purpose. (Tr. 26:1-23.) In Precision Prods., the hearing officer noted that testimony related to the withdrawn objection in that case would be admitted for

a limited purpose. 319 N.L.R.B. at 641. The non-objecting party in that case, therefore "remained on notice, prior to and during the hearing" that the conduct related to the withdrawn objection "were not going to be litigated as objections to the election." Id. Here, the Hearing Officer admitted the February 28, 2012 "banked hours" SMM into evidence for the narrow purpose of identifying the Welfare Fund trustees and otherwise ruled that "I will not give any consideration to banked hours. That Objection is not at issue today." (Tr. 143:10-12.) The Petitioner takes no exception to that ruling. Furthermore, Amalgamated concedes that the SMM was only admitted for a limited purpose. (Pet.'s Br. at 11.) Thus, here, as in Precision Prods., the non-objecting parties were on notice that the Fund's "banked hours" rules would not be considered as a basis for setting aside the election.

In sum, Amalgamated first raised an objection based on the Welfare Fund's "banked hours" rule. Amalgamated then specifically withdrew that objection. It now attempts to revisit the withdrawn objection even though no record has been developed on that issue. Meanwhile, the Hearing Officer gave clear notice that the "banked hours" objection would not be considered. It is well settled, in these circumstances, that Amalgamated may not withdraw an objection and

then later attempt to rely on the withdrawn objection as a basis for setting aside the election.[12]

2. Arguments Raised For the First Time in the Petitioner's Exceptions Must Be Ignored (Exceps. ¶¶ 21, 29.)

Petitioner's argument alleging that the election was affected by a memorandum prepared by the District Council's law firm is not properly before the Board. (See Exceps. ¶¶ 21, 29; Pet.'s Br. at 16, 17, 31.) To be properly considered by the Board, objections to conduct affecting the results of an election must be filed by the seventh day after an initial tally of ballots is prepared. NLRB Rules and Regulations § 102.69(a). Objections in this case were due on April 5, 2012. (Bd. Ex. 1(e).) Therefore, any new objections raised by the Petitioner in its Exceptions are untimely. Nonetheless, Petitioner excepts to the "Hearing Officer's failure to consider Intervenor's campaign literature as coercive . . . as well as the Hearing Officer's failure to take into consideration the Spivak Lipton Memo," and argues that "Spivak Lipton's" statements were objectionable and had a "negative psychological impact on would be voters." (Excep. ¶ 21; Pet.'s Br. at 31.)

[12] Moreover, the Petitioner's Objection 4 alleged objectionable conduct by the Trustees of the District Council Welfare Fund, a legally distinct body and a non-party to the election. In evaluating third-party conduct, the Board only determines if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal, rendering a fair election impossible. Corner Furniture Disc. Ctr., Inc., 339 N.L.R.B. 1122, 1123 (2003). Amalgamated offers no suggestion that it could have met this heightened standard. Nor has it alleged (let alone proven) that the Funds are an agent of the District Council. Indeed, Amalgamated fails to present any meaningful explanation of its illogical assertion that evidence regarding the "banked hours" rule is "relevant to the ability of Bilello and the District Council to follow through on, and implement, the threats generally described in Objection No. 2, that workers would immediately lose medical benefits. . . ." (Pet.'s Br. at 6.) As Amalgamated acknowledges, the determinations and rules implemented by the Welfare Fund Trustees are determined by majority vote. (Tr. 403:3-5; 404:1-11.) If the Trustees are deadlocked, an unresolved decision is made by an arbitrator. (Tr. 404:1-11.) Thus, the Amalgamated's assertion that the District Council EST "controlled the District Council Benefit Funds" is false conjecture. (Pet.'s Br. at 9.)

This "evidence" is neither newly-discovered nor was it previously unavailable, thereby possibly warranting no consideration of it by the Board now. Petitioner's contentions regarding the "Spivak Lipton Memo" are untimely or otherwise not properly before the Board. Yorkaire, Inc., 297 N.L.R.B. 401, 401 (1989) ("A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.")

Remarkably, moreover, Amalgamated overlooks the fact that the "Spivak Lipton Memo" was itself a response to a memo created by Amalgamated's Spear Wilderman law firm. (Int. Ex. 6.) Where a petitioning union promises a benefit to potential voters, the union risks committing objectionable conduct. Mailing Servs., Inc., 293 N.L.R.B. 565, 566 (1989) (union's offer of free medical services to prospective voters constituted impermissible conduct); Wagner Elec. Corp., 167 N.L.R.B. 532, 533 (1967) (union's gift of immediate life insurance coverage to prospective voters objectionable). In this connection, the Spear Wilderman memo to which the Intervenor's counsel responded could be construed as an improper implied promise of benefit by Amalgamated, the petitioning union. The Intervenor's efforts to ameliorate the effects of that conduct cannot be objectionable.

Since the Petitioner and Intervenor both presented campaign statements by attorneys regarding the permissibility of transferring pension fund assets, the Board should not "probe into the truth or falsity of the parties' campaign statements." Midland Nat'l Life Ins. Co., 263 N.L.R.B. 127, 130 (1982). Rather, the Board should leave "the task of policing and evaluating [the incumbent union's] statements to the parties and, ultimately, to the employees themselves." Permanente, 358 N.L.R.B. No. 88 at 3. Bargaining unit employees "certainly had an opportunity to seriously and fairly consider the arguments raised" by both Amalgamated and the District Council. See id. Indeed, the record shows that no less than three separate attorneys affiliated

with three separate law firms, as well as an additional actuary, perpetuated Amalgamated's claim that pension fund assets would be transferred. (Int. Ex. 2; Tr. 134:3-136:13; 157:18-158:1; 155:7-14.)

D. THE HEARING OFFICER CORRECTLY IDENTIFIED THE FACTORS FOR DETERMINING INTERFERENCE WITH FREE CHOICE (EXCEP. ¶ 3)

Petitioner inaccurately asserts that the Hearing Officer "enumerated the various factors on which the Board has relied in determining whether to require a new election . . . [but] he never applied those factors to the facts in this case." (Pet.'s Br. at 30.) This claim, too, amounts to a mere disagreement with the Hearing Officer's findings.

The Hearing Officer correctly identified the objective factors applied when determining whether objectionable misconduct has a tendency to interfere with employee free choice in the election. (Report at 3-4, citing Cedars-Sinai Med. Ctr., 342 N.L.R.B. at 597.) Before turning to those factors, however, the Hearing Officer unequivocally concluded that since "contradictory testimony was elicited concerning what was said by Bilello, I will afford the most weight to testimony deemed the most credible." (Report at 10.) Upon crediting EST Bilello's testimony, the Hearing Officer concluded that no objectionable conduct occurred. Having determined that no objectionable conduct occurred—i.e., that the allegedly objectionable utterances were not actually made—the Hearing Officer had no reason to determine whether the conduct had the tendency to interfere with employee free choice and therefore did not have reason to conclude that any of the alleged conduct warranted setting aside the election.

1. The Hearing Officer Determined that There Had Been No Misconduct

Before determining whether misconduct had an impact on the election, it must first be established that misconduct occurred. Here, the Hearing Officer found that where the testimony of other witnesses conflicted with that of EST Bilello, his testimony was credited. (Report 11-

14.) Having credited Bilello, the Hearing Officer consequently concluded that no objectionable conduct occurred. For example, with respect to Welfare Fund coverage, the Hearing Officer correctly found that "it is not objectionable conduct for the Union representing employees, herein the Intervenor, to advise employees that its health coverage would be unavailable to employees should it not be selected as their representative." (Report at 13.) See also JTJ Trucking, 313 N.L.R.B. at 1240 n.1. With respect to the Pension Fund, the Hearing Officer concluded that "Bilello's credited remarks served to lawfully inform unit employees of the consequences to their pensions of voting for the Petitioner, including the impact on non-vested pension benefits." (Report at 14.)

2. The Hearing Officer Need Not Lay Out Each Cedars-Sinai Factor

Moreover, to the extent that application of the Board's Cedars-Sinai factors was necessary, the Hearing Officer did not err in refraining from a specific discussion of each factor. The Hearing Officer's application of the enumerated factors is intrinsic. No Board cases support the Petitioner's suggestion to the contrary that each must be addressed. Indeed, the weight of authority is the opposite. See, e.g., N.L.R.B. v. L & J Equip. Co., Inc., 745 F.2d 224, 237, n.17 (3d Cir. 1984) ("Although we do not explicitly examine each of these factors in our opinion, the . . . approach is implicit in our analysis.")

3. The Petitioner's Reliance on Subjective Reactions Is Misplaced

The Petitioner's references to the "impact" of undefined "Bilello actions" are not germane to its argument that the Hearing Officer failed in his application of the Cedars-Sinai factors. (See Pet.'s Br. at 31.) First, the Petitioner cities testimony regarding the subjective feelings of its witnesses, but the "subjective reactions of employees are irrelevant to the question of whether there was, in fact objectionable conduct." Emerson Elec. Co., 247 N.L.R.B. 1365,

1370 (1980). Second, the very factors are subjective factors. The Petitioner urges application of the Board's objective test, yet in the same breath seeks to rely on subjective evidence in support of its objections. Such contradictory reasoning is too confused to warrant significant consideration. Moreover, the Petitioner fails specifically to apply the Cedars-Sinai factors in its Memorandum of Law and therefore fails to establish that a different result could be reached than that of the Hearing Officer.[13]

E. PETITIONER'S ARGUMENTS REGARDING DISSEMINATION ARE IRRELEVANT (Excep. ¶ 30.)

Petitioner's attempts to demonstrate dissemination are irrelevant and Petitioner inadvertently supports the Hearing Officer's proper determination that there was a give-and-take of campaign information. (Pet's Br. at 18-20 (detailing the extensive campaigning undertaken by Petitioner and its supporters.)

1. The Hearing Officer Did Not Need to Reach the Issue of Dissemination

While the Petitioner largely disregards the totality of the Cedars-Sinai factors, it hones in upon the extent of dissemination of the alleged misconduct. The Petitioner's efforts to establish that the "objectionable statements" were widely disseminated are completely misplaced. Dissemination is only one of several factors to be considered upon determining that objectionable conduct has occurred. Cedars-Sinai, 342 N.L.R.B. at 597. And the Hearing

[13] To the extent Petitioner seeks to rely on Petitioner's Exhibit 3 (District Council March 7 Campaign Letter) in connection with its argument that the Hearing Officer failed to apply the Cedars-Sinai factors, that reliance is also misplaced. (Pet.'s Br. at 31.) Only three Amalgamated witnesses identified that document. (Tr. 82:13-19; 103:6-11; 143:14-16.) Two witnesses testified that they received it the mail, yet neither testified that they received the document during the critical period before the election. (Tr. 82:19; 103:11.) And Eric Henderson testified only that he had seen the March 7 letter, but did not specify whether he saw it before the election. (Tr. 143:14-16.) Such inconclusive evidence is insufficient to upset the Hearing Officer's conclusions.

Officer appropriately determined that no objectionable conduct occurred. Therefore, the Petitioner's "facts" with respect to dissemination are irrelevant.

2. Petitioner's Evidence of Dissemination Is Speculative

Moreover, the "facts" alleged by the Petitioner rest on pure speculation. For example, Amalgamated also argues that the "Bilello's February actions resulted in a substantial reduction in the number of Dockbuilders attending campaign meetings." (Pet.'s Br. at 19.) The Petitioner's conclusions that a reduction in attendance at "campaign meetings" was a result of the undefined "Bilello[] February actions" is only speculation. Similarly, testimony regarding the "average member of [*sic*] Dockbuilders in attendance" at "political meetings" is no more than mere guessing. (Id. at 19.) And a decline in attendance at "political meetings" is not a factor that the Board considers in determining whether, as an objective matter, objectionable conduct has affected the results of an election. See, e.g., Cedars-Sinai, 342 N.L.R.B. at 597. While the Petitioner alleges that the "phone banking" was conducted by Amalgamated, and "Bilello's statements" were "known" to "people" on the phone, there is no indication of what "Bilello's statements" specifically are, or that these "people" were even eligible voters. (See Pet.'s Br. at 19.) These "facts" are ambiguous and of no probative value.

Moreover, even if dissemination were a relevant factor here, the record does not support Petitioner's contentions. The record reliably provides, however, documentary evidence regarding attendance at the events specified in the Petitioner's objections. The Excelsior list compared against the sign-in sheet of the February 4 HAZMAT training shows only 29 eligible voters were in attendance. (See Int. Ex. 8 and 9.) While some illegible signatures were recorded, the sign-in sheets from the February 28, 2012 and January 24, 2012 meetings of Local 1556 unmistakably show respectively 35 and 38 eligible voters in attendance. (Int. Ex. 4, 5, 9.) Thus,

any remarks by the District Council at those meetings reached an extraordinarily small number of eligible voters and there is no reliable evidence that such remarks were extensively disseminated beyond those small numbers.

3. Petitioner Engaged in an Extensive Information Campaign (Excep. ¶ 18.)

Amalgamated's efforts in seeking to establish dissemination actually support the Hearing Officer's conclusion that "both the Intervenor and Petitioner provided extensive information to the membership in support of their respective positions" (Report at 12) and undermine Amalgamated's own argument that the Hearing Officer erred in recognizing the give-and-take of campaigning (see Excep. ¶ 18, citing Report at 13).

Amalgamated conducted extensive phone-banking during the critical period. Eric Henderson testified that, with respect to a transfer of pension fund assets, he told members that "Mike Bilello doesn't have that authority to withhold funds that legally need to be transferred over if we won the election." (Tr. 156:9-11.) When asked if it was "fair to say that Amalgamated was telling their own story about the benefit funds," Mr. Henderson testified, "No, we were telling the truth." (Tr. 155:22-24.) He further testified that he "told [people] that your monies were guaranteed under the ERISA Act." (Tr. 154:21-22.)

In addition to daily phone-banking, the Amalgamated organizing committee held meeting where, "we had explained to the members that under the ERISA Act that you will have your monies transferred over to the new union" (Tr. 146:4-6). Henderson testified that he relied in part on the Spear Wilderman memo in "explaining the members' rights with their pensions" (Tr. 157:15-17). Moreover Amalgamated's campaign website, which was maintained throughout the campaign, materials suggesting that "Your Pension is Protected by Federal Law" and upon clicking a link labeled "CLICK HERE FOR MORE INFORMATION!" viewers were shown a

section of the ERISA statute addressing transfers of assets between existing multi-employer defined benefit pension funds (i.e., ERISA Sections 1414 and 1415, 29 U.S.C. §§ 1414, 1415, with highlighting on Section 1415, "Transfers pursuant to change in bargaining representative.") (See Int. Ex. 1.)

Both unions strenuously sought to distribute their views with respect to the consequences of the election upon benefit fund coverage. As discussed above, since the bargaining unit employees had an opportunity to consider the arguments raised by both sides, the Board should leave "the task of policing and evaluating [the incumbent union's] statements to the parties and, ultimately, to the employees themselves." Permanente, 358 N.L.R.B. No. 88 at *3. The Hearing Officer properly determined that he saw "no reason to depart from this policy." (Report at 13.)

CONCLUSION

For the foregoing reasons, and in light of the record as a whole, the Petitioner's exceptions are meritless. The District Council respectfully requests that the Board reject the Petitioners' Exceptions, wholly adopt the Hearing Officer's report, and certify the election.

Dated: New York, New York
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Respectfully submitted,

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