

**Bellagio, LLC 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. Petitioner.** Case 28-RC-088794

May 31, 2013

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The National Labor Relations Board has considered objections to an election held October 10, 2012,<sup>1</sup> and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 10 for and 9 against the Petitioner, with 1 void ballot and no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings<sup>2</sup> and recommendations only to the extent consistent with this Decision and Direction of Second Election.

The hearing officer found, among other things, that Alphonse Torres, a freelance audio engineer who occasionally worked for the Employer,<sup>3</sup> was not an agent of the Union and, consequently, the Union did not engage in objectionable conduct when Torres told an employee in the petitioned-for unit that he "better not vote" and that if the vote "went through" he would be "toast." Contrary to the hearing officer, and for the reasons set forth below, we find that Torres' conduct was attributable to the Union and, as such, his comments constitute objectionable conduct.<sup>4</sup>

The relevant facts are as follows. The Employer operates a hotel and casino in Las Vegas, Nevada. On Sep-

tember 7, the Union filed a petition to represent the audio-visual technicians and stage hands in the Employer's Production Services Department. Torres had occasionally worked for the Employer in the past, but he did not work for the Employer at any time during the Union's organizing campaign. Sometime before the petition was filed, Torres visited the Union's union hall and met with its business agent, John Gorey, to offer his help with the Union's effort to organize the Employer's employees. Gorey declined Torres' offer. Torres, nevertheless, contacted employee Douglas Spicka and arranged to meet him at a restaurant. At the restaurant, Torres told Spicka that Gorey had approached him because Torres had worked at the Bellagio on several occasions, and asked him to speak with Spicka because Gorey believed that Spicka was a swing vote. Torres then spoke about the benefits of union representation.

Thereafter, on about October 4 or 5, Spicka and several other employees attended an organizing meeting, hosted by the Union at the union hall. In attendance at the meeting were employees in the petitioned-for unit, representatives of the Union, and Torres. Gorey led the meeting, distributed union literature, and answered questions about union benefits. During the meeting, Gorey noticed that Torres was in attendance, but did not ask him to leave.<sup>5</sup>

On October 4, the Employer held an employee meeting regarding the upcoming election. After the Employer opened the floor for discussion, several employees engaged in a heated, angry exchange about the merits of union representation. During this exchange, Spicka identified two employees as leaders of the Union's organizing effort, and added that he was personally opposed to that effort.

On October 8, less than 2 days before the election, Torres sent Spicka a text message that read: "Really bro? I never pegged u for a rat. Live & learn I guess. That's a tough road u chose doug, u could've just voted no." Upon reading the message, Spicka assumed it related to the statements he made at the Employer's October 4 meeting, and he immediately called Torres. Torres told Spicka that he heard what Spicka did at the meeting and it was "not cool." At the end of the conversation, Torres told Spicka, "Bro, you know, if this vote goes through, you're toast," and "[t]he vote is going to go through . . .

<sup>1</sup> All dates are 2012, unless otherwise noted.

<sup>2</sup> The Employer has excepted to some of the hearing officer's credibility findings. 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 us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> The Employer contends that Torres is a member of the Union. Torres is a member of IATSE and receives referrals from the Union's hiring hall; it is not clear, however, whether he is a member of Local 720. In any event, determining Torres' local membership status would not affect our finding, discussed below, that he was vested with apparent authority to act on the Union's behalf. We therefore do not pass on this contention.

<sup>4</sup> Because we find that Torres' comments warrant setting aside the election, we find it unnecessary to pass on the hearing officer's recommendations concerning the remaining allegations of objectionable conduct.

<sup>5</sup> The hearing officer's report incorrectly stated that Spicka testified that Torres spoke at the meeting. Spicka did not so testify, nor did any other witness. Employee Robert Cohen testified, however, that Torres attended one of the Union's organizing meetings. Cohen stated that he believed Torres was at the meeting as "a guy that we could talk to who works for the Union" because employees had "a lot of questions about what it's like to work for the Union."

you better not vote.” Prior to the election, Spicka shared the details of Torres’ comments with two other employees in the petitioned-for unit.

The hearing officer recommended overruling the objections relating to Torres’ October 8 comments to Spicka. The hearing officer found that the credited testimony failed to establish that Torres had actual or apparent authority to act on behalf of the Union, and he further found that his conduct was not objectionable third-party conduct. Contrary to the hearing officer, we find that Torres’ agency status is established under the doctrine of apparent authority and, accordingly, his comments to Spicka on October 8 constitute objectionable conduct warranting setting aside the election.

The Board applies common law principles when considering whether an individual is an agent of the union. “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Great American Products*, 312 NLRB 962, 963 (1993). “[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief.” *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82, 83 (1988) (citation omitted). In evaluating whether an individual is vested with apparent authority to act as the principal’s representative, the Board also considers “whether the statements or actions of an alleged . . . agent [are] consistent with statements or actions of the [principal].” *Pan-Ostion Co.*, 336 NLRB 305, 306 (2001). As stated in Section 2(13) of the Act, when making the agency determination, “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

Application of these principles here warrants a finding that Torres acted with apparent authority when he spoke to Spicka on October 8. Specifically, we find that, under the totality of the circumstances, Gorey should have realized that employees in the petitioned-for unit reasonably would have believed that Torres was an agent of the Union. As set forth above, Torres had approached Gorey, offering to assist in the Union’s campaign. Gorey observed Torres, an IATSE member who was not in the petitioned-for unit, in attendance at the subsequent union organizing meeting. Although Gorey testified that he assumed another employee had invited Torres to the union-sponsored meeting, he did nothing to confirm that assumption or to otherwise clarify for the employees the purpose of Torres’ attendance. Rather, he simply allowed Torres to remain present at the organizing meet-

ing. In these circumstances, Gorey should have realized that, without such clarification, Torres’ presence at the meeting would reasonably create the impression among the employees that Torres—like Gorey himself—was working on behalf of the Union in this organizing effort.

Further, Torres’ prepetition statement to Spicka—that Gorey had asked that he contact Spicka—although false, was conduct consistent with the impression created by Gorey in allowing Torres to attend the union meeting. This action, too, supports a finding of apparent authority. See *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1018 fn. 8 (2001), *enfd.* 309 F.3d 452 (7th Cir. 2002) (consistency between alleged agent’s threats and threats made by the respondent supported finding of apparent authority).<sup>6</sup>

In finding that Torres did not have apparent authority, the hearing officer relied on the lack of evidence that Gorey allowed Torres to speak on behalf of the Union during the meeting at the union hall. While the existence of such evidence would certainly weigh in favor of finding that Torres was vested with apparent authority,<sup>7</sup> the absence of such evidence does not necessarily warrant a contrary conclusion. Indeed, the relevant inquiry requires a broader consideration of “all the circumstances” to determine whether the principal’s conduct created a reasonable basis for a third person to believe that the purported agent was authorized to act on behalf of the principal. *Great American Products*, *supra*, 312 NLRB at 963. When all the circumstances are considered, the lack of evidence that Torres spoke at the meeting is not dispositive. Accordingly, we disagree with the hearing officer that a finding of apparent authority necessarily requires evidence that Torres spoke on behalf of the Union at the union meeting.

Having found that Torres’ conduct is attributable to the Union, we further find that his comments to Spicka on October 8 were objectionable. Specifically we find that Torres’ statements, “if this vote goes through, you’re

<sup>6</sup> The hearing officer declined to draw an adverse inference from the Union’s failure to call Torres as a witness, finding that Torres was not favorably disposed to the Union. We disagree. The record shows that Torres offered to help the Union with the organizing effort, spoke favorably about the Union when he met with Spicka, and attended the Union’s organizing meeting. These circumstances demonstrate that he was indeed favorably disposed to the Union, and thus the Union’s failure to call him as a witness warrants an inference that his testimony about “any fact[s] [of] which [he] is likely to have knowledge” would have bolstered the apparent authority finding. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* mem. 861 F.2d 720 (6th Cir. 1988).

<sup>7</sup> See, e.g., *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984) (apparent authority found where the union allowed pronoun employees to speak on its behalf at meetings held by the union for unit employees).

toast,” and “[t]he vote is going to go through . . . you better not vote,” threatened Spicka with an unspecified reprisal, attributable to the Union, which would reasonably tend to interfere with the employees’ free choice in the election. See generally *Baja’s Place*, 268 NLRB 868, 868–869 (1984) (union representative’s statement, that he would “get” an employee who opposed the union, found objectionable as a threat of unspecified reprisal). Significantly, Torres’ statements were made just 2 days

before the election, and they were disseminated to two other employees in the petitioned-for unit, thereby affecting a sufficient number of voters to have potentially changed the outcome.

For these reasons, we find, contrary to the hearing officer, that Torres’ comments warrant setting aside the election and directing a second election.

[Direction of Second Election omitted from publication.]