

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

**In the Matter of:**

ISLAND HOSPITALITY MANAGEMENT II,  
LLC d/b/a HAMPTON INN – LONG ISLAND  
BROOKHAVEN

and

NEW YORK HOTEL & MOTEL TRADES  
COUNCIL, AFL-CIO

Case No. 29-RC-235501

**OPPOSITION OF THE NEW YORK HOTEL & MOTEL TRADES  
COUNCIL, AFL-CIO TO THE EMPLOYER'S REQUEST FOR REVIEW**

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**TABLE OF CONTENTS**

	<u>Page</u>
I. THE REGIONAL DIRECTOR CORRECTLY APPLIED <i>MIDLAND</i> .....	6
A. The Union’s Statement Does Not Threaten Employee Rights Under the Act .....	6
B. The Hotel Fails to Provide Any Sound, Let Alone Compelling Reason to Overturn <i>Midland</i> .....	8
C. The Hotel Fails to Prove that the Union’s Statement was False or Misleading.....	12
II. THE HOTEL FAILS TO DEMONSTRATE THAT THE REGION’S FACTFINDING WAS CLEARLY ERRONEOUS .....	13
A. The Hearing Officer Relied on Witness Demeanor in Rendering Credibility Findings.....	13
B. The Hearing Officer Correctly Credited Velez and Denton Over Trejo.....	14
C. The Hearing Officer Correctly Credited Velez and Denton Over Gutierrez .....	16

**TABLE OF AUTHORITIES**

	<u>Page</u>
<u>Cases</u>	
<i>Bituma Corp. v. NLRB</i> , 23 F.3d 1432 (8th Cir. 1994) .....	11
<i>Cambridge Tool</i> , 316 NLRB 716 (1995) .....	3, 12
<i>Certain-Teed Corp.</i> , 714 F.2d 1042 (11th Cir. 1983) .....	11
<i>Copps Food Ctr.</i> , 296 NLRB 395 (1989) .....	7
<i>Corn Products Refining Company</i> , 58 NLRB 1441 (1944) .....	9
<i>Delta Brands, Inc.</i> , 344 NLRB 252 (2005) .....	3, 5
<i>Didlake, Inc.</i> , 367 NLRB No. 125 (May 10, 2019) .....	7
<i>Durham Sch. Servs., Lp</i> , 360 NLRB 851 (2014) .....	8, 11
<i>Elec. Workers, Local 38</i> , 221 NLRB 1073 (1975) .....	13, 14
<i>Galax Apparel Corp.</i> , 247 NLRB 159 (1980) .....	14
<i>Hogan Transports, Inc.</i> , 363 NLRB No. 196 (May 19, 2016) .....	7
<i>Hollywood Ceramics</i> , 140 NLRB 221 (1962) .....	9
<i>Hopkins Nursing Care Ctr.</i> , 309 NLRB 958 (1992) .....	7
<i>Ibew, Local #58</i> , 234 NLRB 633 (1978) .....	6
<i>In Re United Steel Servs., Inc.</i> , 340 NLRB 199 (2003) .....	11
<i>Klochko Equip. Rental Co., Inc.</i> , No. 07-RC-104929, 2014 WL 2154268 n. 2 (May 21, 2014) .....	11
<i>Kokomo Tube Co.</i> , 280 NLRB 357 (1986) .....	14
<i>Kux Mfg. Co. v. NLRB</i> , 890 F.2d 804 (6th Cir. 1989) .....	5
<i>Lockheed Martin Skunk Works</i> , 331 NLRB 852 (2000) .....	3
<i>Mead Nursing Home, Inc.</i> , 265 NLRB 1115 (1982) .....	7

<i>Metropolitan Life Insurance Company,</i> 266 NLRB 507 (1983) .....	2, 8
<i>Midland National Life Insurance Co.,</i> 263 NLRB 127 (1982) .....	2, 8, 9, 10, 12
<i>N.L.R.B. v. St. Francis Healthcare Ctr.,</i> 212 F.3d 945 (6th Cir. 2000) .....	10
<i>NLRB v. Best Products Co., Inc.,</i> 765 F.2d 903 (9th Cir. 1985) .....	11
<i>NLRB v. DPM of Kansas, Inc.,</i> 744 F.2d 83 (10th Cir. 1984) .....	11
<i>NLRB v. E. A. Sween Co.,</i> 640 F.3d 781 (7th Cir. 2011) .....	11
<i>NLRB v. Queensboro Steel Corp.,</i> 217 F.3d 839 (4th Cir. 2000) .....	11
<i>NLRB v. Semco Printing Center, Inc.,</i> 721 F.2d 886 (2d Cir. 1983).....	11, 13
<i>St. Margaret Memorial Hospital v. NLRB,</i> 991 F.2d 1146 (3d Cir. 1993).....	11
<i>Starcraft Aerospace, Inc.,</i> 346 NLRB 1228 (2006) .....	15
<i>Stretch-Tex Co.,</i> 118 NLRB 1359 (1957) .....	4, 5, 13
<i>U-Haul Co. of Nevada, Inc. v. NLRB,</i> 490 F.3d 957 (D.C. Cir. 2007).....	11
<i>Wyandanch Day Care Center,</i> 323 NLRB 339 (1997) .....	14
 <u>Regulations</u>	
29 C.F.R. § 102.67(d) .....	5
29 C.F.R. § 102.67(d)(2).....	17
29 C.F.R. § 102.67(j) .....	21, 22

Pursuant to Rule 102.67(f) of the Rules and Regulations of the National Labor Relations Board, Petitioner New York Hotel & Motel Trades Council, AFL-CIO (“Union” or “HTC”) submits this brief in opposition to the Request for Review (“RFR”) submitted by Employer Island Hospitality Management II, LLC d/b/a Hampton Inn — Long Island Brookhaven (“Hotel”) from the Order and Certification of Representative dated July 29, 2019 (the “Regional Director’s Decision”). For the reasons and upon the authority cited in the Regional Director’s Decision and below, the RFR should be denied as raising no ground warranting review.

## **FACTS**

### **Election Victory and Objections**

On February 7, 2019, the Union filed a petition with Region 29 of the National Labor Relations Board (“NLRB” or “Board”) seeking to represent a unit of Hotel employees under the National Labor Relations Act (“NLRA” or Act”). Pursuant to a Stipulated Election Agreement, the bargaining unit consists of:

All full-time and regular part-time housekeeping employees, room attendants, housepersons, laundry attendants, breakfast attendants, and maintenance/drivers employed by the Employer at the hotel located at 2000 North Ocean Avenue, Farmingdale, New York but excluding all other employees, including professional employees, clerical employees, guards and supervisors as defined by the Act.

On March 7, the Board conducted a secret ballot election. The Corrected Tally of Ballots showed 22 eligible voters and 20 votes cast, 11 for Union representation and 9 against, with no void or challenged ballots for an unchallenged majority in favor of the Union. Accordingly, the Board found that a majority of employees casting ballots voted for representation by the Union.

On March 14, the Hotel filed three objections, the third consisting of five subparts lettered (a) to (e). In Objections 1 and 2, the Hotel alleged that the Union engaged in improper conduct based on an email sent to Hotel employees on March 6 from Union President Peter Ward rebutting

management's campaign, explaining the many benefits of voting for HTC, and stating that "if you vote against our union on Thursday, you will not be able to change your mind in the future and this will be your one and only chance to join the real hotel workers union on Long Island, HTC." The email then refutes the Hotel's lies and discusses at length the many sound, unobjectionable reasons to vote for the Union. Aside from the email, Objection 3, and its subparts alleged improper conduct by Union organizers.

On March 29, Region 29 issued a Decision on Objections and Notice of Hearing ("NOH"), overruling Objections 1, 2, 3(c), and 3(d) and directing a hearing on 3(a), 3(b), and 3(e). With respect to Objections 1 and 2, the Regional Director concluded that Ward's statement constituted campaign propaganda rather than threats, and therefore the Board does not probe their truth or falsity, citing the longstanding precedent of *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) and *Metropolitan Life Insurance Company*, 266 NLRB 507 (1983). (NOH at 3). The Regional Director also overruled Objections 3(c) and 3(d), concluding that the Hotel's offers of proof were insufficient to constitute grounds for setting aside the election if introduced at a hearing. (NOH at 4-5).<sup>1</sup>

### **Hearing and Report**

On April 8, Hearing Officer Tracy Belfiore heard testimony and received evidence concerning the remaining Objections 3(a), (b) and (c). The Hotel presented two witnesses, Hilaria Cruz Trejo and Noris Gutierrez, and the Union presented two witnesses, Margirita Denton and Juana Velez. The Union, Hotel, and Hearing Officer all had full opportunity to examine the witnesses.

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<sup>1</sup> Despite reserving the right to revisit 3(c) and 3(d) in its Exceptions, the Hotel does not appear to challenge the Region's findings in its RFR, conceding the Region's conclusions and waiving review of the same.

The Hearing Officer issued the Hearing Officer's Report and Recommendations on Objections ("Report") on May 24, recommending overruling the remaining objections and further recommending certification of the Union. The Report begins by asserting the standard of review for representation elections, noting the strong presumption that Board conducted election results reflect the true desires of the employees and the heavy burden on objecting parties. (Report at 3) (citing *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000); *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005)). The Hearing Officer also explained that the Board reviews election conduct on an objective, rather than subjective, basis. (Report at 3) (citing *Cambridge Tool*, 316 NLRB 716 (1995)). With respect to Objection 3(e), the Hearing Officer noted that the Hotel elected not to present any evidence in support of its Objection and therefore recommended dismissal. (Report at 12). Thus, only Objections 3(a) and 3(b) remained in dispute.

In Objection 3(a), the Hotel alleged that the Union guaranteed it would win the election and threatened at least one worker that the Union would get her fired for not supporting the Union's campaign. After review of all testimony, including the demeanor of the witnesses, the Hearing Officer concluded that no record evidence supported the Hotel's claim that the Union told employees it would win the election. (Report at 10). The Hearing Officer also found no credible evidence that Union organizers told employees that they could lose their jobs if they did not support the Union. (Report at 10). Rather, the Hearing Officer determined that the Union organizers, who testified in a clear and forthright manner, told employees that a contract could provide protection against the Hotel's ability to discharge employees. (Report at 11). Moreover, the Hearing Officer found credible that Union organizers informed employees of the confidentiality of their ballots and cards, further undermining the Hotel's Objection. (Report at 10).

In Objection 3(b), the Hotel alleged that the Union threatened at least one employee who signed an authorization card that the Hotel would retaliate by firing her if the Union lost the election. The Hearing Officer noted that the Hotel did not present evidence supporting the statements it made in its offer of proof and further, no credible evidence showed that the Union threatened any employees who signed authorization cards that the Hotel would retaliate by firing them if the Union lost the election. (Report at 11). Once again, the Hearing Officer noted the comparative demeanors of the witnesses in finding that mention of job loss came in the context of a discussion regarding employment at will, and the ability of a union contract to provide job security. (Report at 11). Additionally, the Hearing Officer found that the record evidence did not suggest that employees could reasonably believe that the Hotel would learn that they signed cards. (Report at 11-12).

#### **Hotel Exceptions Denied and Union Certified**

On June 6, 2019, the Hotel filed Exceptions to the Hearing Officer's Report ("Exceptions") and a brief in support of the same, arguing that the Report's credibility findings on Objections 3(a) and 3(b) were flawed. The Union filed an Answering Brief in Opposition contending that the Hotel's Exceptions should be overruled and requesting certification as the bargaining agent for the petitioned for unit.

On July 29, Region 29 denied the Hotel's Exceptions as raising no substantive issue warranting review. The Regional Director explained that the Hotel excepted to the Hearing Officer's credibility findings but that, under "well-established precedent," the Board does not reverse such findings unless a "clear preponderance of all the relevant evidence convinces [the Board] that the [Hearing Officer's credibility] resolution is incorrect." (Regional Director's Decision, at 2 n. 2) (citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)). The Regional Director

concluded that the Hotel failed to demonstrate “that a clear preponderance of the record shows that the Hearing Officer’s findings are incorrect.” (*Id.*) Accordingly, the Region certified the Union.

### ARGUMENT

Pursuant to Rule 102.67(d), the Board will grant review only for one or more of the following reasons:

- (1) That a substantial question of law or policy is raised because of:
  - (i) The absence of; or
  - (ii) A departure from, *officially reported Board precedent*.
- (2) That the Regional Director’s decision on a substantial factual issue is *clearly erroneous* on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are *compelling reasons* for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(d) (emphasis added). In applying this rigorous standard, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (quoting *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989)).

The Hotel falls far short of this elevated burden. Rather than showing clear error, the Hotel repeatedly relies on conclusory statements regarding the strength of its case, ignores evidence and findings to the contrary, and aims meritless attacks on credibility determinations the Hearing Officer was best positioned to make. Rather than relying on precedent, the Hotel belittles it, advocating for the overturning of *Midland’s* 38 year old precedent from the Ronald Reagan NLRB, without a reasoned, let alone compelling basis beyond displeasure with the results of employee choice in this election. Failing any lawful basis for review, the Hotel’s request should be denied.

I.

**THE REGIONAL DIRECTOR CORRECTLY APPLIED *MIDLAND***

**A. The Union's Statement Does Not Threaten Employee Rights Under the Act**

The Hotel's RFR first contends that the Regional Director erred in applying *Midland* to the Union's emailed statement (RFR at 8). The Hotel's Objections contend that the statement was a threat that employees would lose rights under the NLRA, namely the "right to choose HTC as their representative." (RFR at 8). Rejected by the Regional Director, the Hotel now repeats the same argument in its RFR.

The Regional Director considered the Hotel's argument and correctly rejected it. The Regional Director properly understood the Union's statement to argue that the upcoming election would be the workers only chance to join HTC, in no way speaking to the workers ability to join "some other labor organization" in the future. (NOH at 3). The Hotel concedes the same, noting that the email "may not have threatened employees' right to organize a union. . . ." (RFR at 8). In overruling the Hotel's objection, the Regional Director implicitly observed that Section 7 grants workers the right to join a union, not the right to compel a particular union of their own choosing to represent them. The Board has long recognized that it cannot compel a union to represent employees whom the Union does not desire to represent. *Ibew, Local #58*, 234 NLRB 633, 634 (1978). The Hotel notably concedes this fact, acknowledging that the Board's rules "*permit a union to file a petition to represent the same group of employees who voted against it in a prior election,*" but do not require a union to do so. (RFR at 8) (emphasis added). Thus, the Regional Director correctly rejected the Hotel's claim that the Union's statement, part of its President's pitch against Hotel propaganda and for the benefits of unionization, threatened employee rights under the NLRA.

Unsurprisingly, the Hotel cites no cases in support of its theory that a Union’s statement that it would not seek to represent a particular group of employees constitutes a threat to a right guaranteed under the Act, because none exists. The Hotel instead relies entirely on cases involving allegations of hallmark misconduct long prohibited under NLRA text and precedent. *See Hogan Transports, Inc.*, 363 NLRB No. 196 (May 19, 2016) (over the dissent of Member Miscimarra, finding Employer statements to threaten job loss, promise a wage increase, and accuse the Union of trying to take away that impermissible increase); *Hopkins Nursing Care Ctr.*, 309 NLRB 958 (1992) (employer threatened to impose more onerous working conditions on employees because of their efforts on behalf of the Union); *Copps Food Ctr.*, 296 NLRB 395 (1989) (employer threatened employee with discharge and “blackballing” if she signed a union card); *Mead Nursing Home, Inc.*, 265 NLRB 1115 (1982) (employer threatened employees with unilateral termination in the event of a strike).<sup>2</sup> Notably, the Board’s most recent decision in this area took a more cautious approach to finding election campaign statements threatening. *See Didlake, Inc.*, 367 NLRB No. 125 (May 10, 2019) (applying *Midland* to an employer’s statements regarding the job loss effect of a union security clause as they did not constitute an implicit threat, recognizing that the Board had never previously found such statements to constitute a threat). Unlike the allegations in these cases, and as recognized by the Regional Director, the Union’s statement in no way objectively threatens an impermissible act.

Eschewing the threat allegation, the Regional Director properly concluded that the Union’s statements constituted campaign propaganda to which *Midland* applies. (NOH at 3). The Regional

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<sup>2</sup> The Hotel cites to *Hopkins Nursing Care and Copps Food* for the proposition that a threat may constitute grounds for overturning a close election. (RFR at 8-9). This is beside the point, however, since HTC made no threat and the Union won a clear majority with no void or challenged ballots. In any event, unlike a threat (which the email is not), the challenged statement is isolated, far from severe, and only offered to offset the Hotel’s blatant cited misconduct.

Director determined that reasonable voters would have recognized the Union's email to be part and parcel of vigorous contrary campaign propaganda by the parties, and therefore the Board would not set the election aside, regardless of whether the statement was accurate. (NOH at 3). The Hotel does not contest this *Midland* analysis.<sup>3</sup> Accordingly, *Midland* governs, defeating the RFR.

**B. The Hotel Fails to Provide Any Sound, Let Alone Compelling Reason to Overturn *Midland***

The Hotel also argues that the Region erred in “blindly following *Midland*” considering the Board's distant vacillation on the issue. (RFR at 7, 9-11). While it is certainly true that the Board long ago wavered on its treatment of campaign propaganda between two rival standards, the *Midland* rule has now been in effect serving the labor-management community for more than 38 years since the Reagan Board adopted it. Thus, the “longstanding” decision is far more established authority than the Hotel wants to acknowledge. *Durham Sch. Servs., Lp*, 360 NLRB 851, 851 (2014).

The Hotel's RFR also fails to meet its heavy burden of producing compelling reasons to overturn *Midland*. The *Midland* Board espoused “numerous” reasons for its decision to cease probing the truth and falsity of campaign propaganda unless a party acted deceptively such that employees are rendered unable to recognize campaign propaganda. First, the Board recognized that it did not regulate campaign propaganda following passage of the Wagner Act. 263 NLRB at

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<sup>3</sup> To the extent the Hotel incorrectly construes the Union's statement to be making a representation about the application of the election bar, the Hotel misses the forest for the trees. (RFR at 10). There is no objective evidence that the Union was referring to an inability to represent employees on the basis of a bar and employees would not interpret the provision to be speaking to the election bar, especially since, as the Hotel itself suggests, they likely have no idea it exists. However, even had the Union statement been an explanation of the election bar, its statement would not be objectionable. *Metropolitan Life Insurance Company*, 266 NLRB at 508 (misrepresentations of law are treated as campaign propaganda).).

129-30 (citing *Corn Products Refining Company*, 58 NLRB 1441, 1442 (1944)). The Board next criticized the alternative *Hollywood Ceramics* rule, which allowed an election to be set aside for misrepresentations involving “substantial departure from the truth, at a time which prevents the other party . . . from making an effective reply. . . .” 263 NLRB at 131 (citing *Hollywood Ceramics*, 140 NLRB 221, 224 (1962)). The Board reasoned that the *Hollywood Ceramics* test produces “vague and inconsistent rulings which baffle the parties and provoke litigation,” in “sharp contrast” to the clear and predictable test it imposed. 263 NLRB at 131. The Board also referenced a variety of ill effects attributable to the *Hollywood Ceramics* rule, including “extensive analysis of campaign propaganda, restriction of free speech, variance in application as between the Board and the courts, increasing litigation, and a resulting decrease in the finality of election results.” *Id.* at 131. The Board explained that its rule has the additional important benefit of reducing delay and achieving a uniform standard for both unions and employers. *Id.* at 131-32. Perhaps most crucially, the Board concluded that *Hollywood Ceramics* had an “unrealistic view of the ability of voters to assess misleading campaign propaganda.” *Id.* at 132. The Board argued that employees were aware that parties to a campaign are seeking certain results and thus employees “could not help but greet the various claims made during a campaign with natural skepticism.” *Id.* The Board lampooned *Hollywood Ceramics* as unwarranted “protectionism.” *Id.* Finally, the Board added that quick reversals in precedent had not previously afforded the *Midland* rule “a fair chance to succeed.” *Id.*

Though disingenuously phrased as requesting the modification of *Midland*, the Hotel’s RFR actually requests reversion back to *Hollywood Ceramics*. The Hotel argues that the Board should deviate from *Midland* “when the timing and nature of the misrepresentation renders employees unable to separate truth from fiction.” (RFR at 11). But that is exactly what the Board

rejected in *Midland*. The Board confronted and dismissed focus on timing given the uncertainty of how much time is needed to allow for the other party to correct the record. *Midland*, 263 NLRB at 131. Moreover, as explained above, the Board specifically rejected the case-by-case analysis of propaganda that the Hotel seeks in favor of a bright line test that would produce consistent and uniform results. *Id.*

The Hotel relies on outlier language picked from three federal court decisions to advocate for the abandonment of *Midland*. The Hotel cites *N.L.R.B. v. New Columbus Nursing Home, Inc.*, as purportedly critical of the proposition that employees can separate truth from falsehood. (RFR at 9) (citing 720 F.2d 726, 7289 (1st Cir. 1983)). There, the First Circuit actually endorsed the Board's application of *Midland* to a union's statements regarding its finances during an election campaign. 720 F.2d at 729. In dicta, the Circuit Court speculated that certain unspecified misrepresentations "may be *so material and fraudulent* as to undermine the employees' freedom of choice." *Id.* (emphasis added). The Hotel also relies on *N.L.R.B. v. Chicago Marine Containers, Inc.*, which applied *Midland* retroactively to statements made by a petitioner about an employer and its relationship with an incumbent union. 745 F.2d 493 (7th Cir. 1984). The Hotel again reaches for weak dicta, delegated to a footnote, stating that "there *may be* situations in which it *might* be inappropriate to be strictly bound by the *Midland* standard." *Id.* at 498 n. 4 (emphasis added). Finally, the Hotel refers to *N.L.R.B. v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 962 (6th Cir. 2000), which repeated and clarified the Sixth Circuit's "narrow" exception to *Midland* from *Van Dorn Plastic Machinery Co. v. NLRB*, for instances when a "misrepresentation is so *pervasive* and the deception *so artful* that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." 736 F.2d 343, 348 (6th Cir. 1984) (emphasis added).

The decisions cited by the Hotel do not suffice to meet its burden in this case. First, even if the Hotel was situated within the jurisdiction of any of the above-cited courts, which it is not, the Board is not bound to circuit court gloss. Second, and decisively, the Board itself has continuously adhered to *Midland* despite the cases cited by the Hotel. *Klochko Equip. Rental Co., Inc.*, No. 07-RC-104929, 2014 WL 2154268, at \*1 n. 2 (May 21, 2014); *In Re United Steel Servs., Inc.*, 340 NLRB 199 (2003).<sup>4</sup> This is consistent with the overwhelming number of circuit courts that have applied and enforced *Midland* over the decades, including the D.C. and Second Circuit which do have jurisdiction over this Hotel. *See NLRB v. E. A. Sween Co.*, 640 F.3d 781, 784-785 (7th Cir. 2011); *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 963 (D.C. Cir. 2007); *NLRB v. Queensboro Steel Corp.*, 217 F.3d 839 (4th Cir. 2000); *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1438 (8th Cir. 1994); *St. Margaret Memorial Hospital v. NLRB*, 991 F.2d 1146, 1158 (3d Cir. 1993); *NLRB v. Best Products Co., Inc.*, 765 F.2d 903, 911-913 (9th Cir. 1985); *NLRB v. DPM of Kansas, Inc.*, 744 F.2d 83, 86 (10th Cir. 1984); *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 892 (2d Cir. 1983); *Certain-Teed Corp.*, 714 F.2d 1042, 1054-1055 (11th Cir. 1983). In any event, not even the Sixth Circuit advocated turning back the clock to reinstate *Hollywood Ceramics*. The Hotel, tellingly, steers clear of requesting the Sixth Circuit’s “so pervasive” and “so artful” exception, effectively acknowledging it could not meet the same since the Union’s email is neither.

Finally, the Hotel decries the injustice of *Midland*, fashioning a scenario contrived out of whole cloth, speculating that the Union sent its email because it believed that it did not have

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<sup>4</sup> Some dissenting Board members have taken the position that *Midland* should not apply when a union publicizes an employee’s intended vote because it risks not only misrepresentation but also ballot secrecy. *Durham Sch. Servs.*, 360 NLRB at 854. No such ballot secrecy concerns are raised by the Hotel’s objections.

sufficient support and had nothing to lose. The Hotel's claim is a naked attempt to invoke a concurring opinion in *New Columbus*, which reflected on the potential impact of *Midland* mere months after issuance, long since proven false. Moreover, the Hotel cites no evidence validating its errant mystical mind-reading, thus the *New Columbus* concurrence, about as old as *Midland* itself but cited by no subsequent court despite ample opportunity, offers no compelling ground to revisit the well-established teaching of *Midland* today.<sup>5</sup>

C. **The Hotel Fails to Prove that the Union's Statement was False or Misleading**

Not only would the Hotel fall short of meeting the high bar of *Van Dorn*, it cannot even muster evidence to demonstrate that the Union's statement was false or misleading. As explained *supra*, the Hotel's employees are not entitled to representation by HTC; rather, the Union must also be agreeable to serve as their representative. The Hotel's allegation is premised entirely on its own intentional misunderstanding of the rights protected by Section 7 of the Act. Accordingly, the Hotel fails to demonstrate any actual falsity in the Union's email.<sup>6</sup> As a result, even if the Board were inclined to overturn *Midland* and return to *Hollywood Ceramics*, this case does not provide a suitable vehicle.

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<sup>5</sup> The concurrence forecasted a potential disparity between the results of *Midland* for unions and employers. However, it relies on faulty premises, such as arguing that a union suffers no harm if it makes misrepresentations in a campaign, wins election, and has the falsehood discovered. On the contrary, the Act permits disgruntled employees to decertify their union. The employer's conjectural harm to ongoing employee relations may or may not occur, but is nothing more than a function not of *Midland* but of the fact that the employer remains whereas the union does not. Additionally, and importantly, the *Midland* Board argued and time has proven, that the *Midland* rule achieved uniformity, contrary to the *Hollywood Ceramics* rule that had introduced ambiguity allowing for the very favoritism the concurrence feared. *See 263 NLRB at 131-32. The concurrence ignored the defects in Hollywood Ceramics, as does the Hotel, but the Board has not for decades and should not now.* w.

<sup>6</sup> No hearing could find otherwise because, despite the Hotel's repeated insinuations to the contrary, the Board reviews election conduct on an objective, rather than subjective, basis. *Cambridge Tool*, 316 NLRB 716 (1995). Moreover, the Hotel's confusing claim that the Region found the Union's email to be untrue, RFR at 8, is unsupported by the Regional Director's findings. (NOH at 3).

## II.

### **THE HOTEL FAILS TO DEMONSTRATE THAT THE REGION'S FACTFINDING WAS CLEARLY ERRONEOUS**

As noted by the Regional Director, the Board does not reverse credibility findings unless a “clear preponderance of all the relevant evidence convinces [the Board] that the [Hearing Officer’s credibility] resolution is incorrect.” (Regional Director’s Decision, at 2 n. 2) (citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)). As explained in *Standard Dry Wall Products*, “the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and . . . the Trial Examiner . . . has had the advantage of observing the witnesses while they testified[.]” 91 NLRB 544, 545 (1950), *enfd*, 188 F.2d 362 (3d Cir. 1951). On request for review, the bar is even higher, requiring fact finding to be clearly erroneous. 29 C.F.R. § 102.67(d)(2). Here, the Hotel alleges that the Hearing Officer wrongly credited the Union’s witnesses instead of its own, thereby finding no violation of the Act.<sup>7</sup> Accordingly, the Hotel faces the enormous burden of establishing clear error in the Hearing Officer Report. *Id.*

#### **A. The Hearing Officer Relied on Witness Demeanor in Rendering Credibility Findings**

Perhaps recognizing that the highly deferential standard dooms its RFR, the Hotel, for the first time, argues that the Hearing Officer’s credibility determinations are not entitled to weight because they are not primarily based on demeanor. (RFR at 13) (citing *Elec. Workers, Local 38*, 221 NLRB 1073, 1074 (1975)). *Electrical Workers Local 38* is inapposite, however, as the Board concluded that an Administrative Law Judge made determinations not on demeanor or objective considerations, but “principally on his own inferences” as to what must have been the witness’s

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<sup>7</sup> On this basis alone does the Hotel distinguish *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886 (1983), thus conceding the applicability of the same if the Hearing Officer’s credibility findings are upheld.

intent. 221 NLRB at 1074. The Hotel alleges no such inferences made by the Hearing Officer here.

In any event, the Hotel's contention is palpably false. The Hearing Officer repeatedly referenced demeanor of the witnesses in reaching conclusions as to the credibility of the witnesses, far more than the "passing reference" the Hotel claims. (Report at 3, 7, 8, 9). In demanding that the Report provide specific explanation as to the Hearing Officer's evaluation of witness demeanor, the Hotel requests a level of detail not mandated by any decision it cites and directly inimical to the governing rule.

Moreover, the Hearing Officer did explain the demeanor findings, noting that she found Velez to be "straightforward" and Denton to be "direct," in contrast to testimony of Trejo and Gutierrez, which was "not direct," "inconsistent," and admittedly plagued with issues of memory. (Report at 7-9). The Hearing Officer's reference to the testimonial quality of the Union witnesses in determining their credibility more than serves to demonstrate reliance on demeanor. *See Galax Apparel Corp.*, 247 NLRB 159, 161-62 (1980) (crediting witness testimony based on "straightforward" demeanor whereas other witnesses were not "forthright," appeared to "equivocate and quibble," and were forced to recant testimony).

**B. The Hearing Officer Correctly Credited Velez and Denton Over Trejo**

With respect to testimony concerning the February 6<sup>8</sup> meeting between Trejo, Velez, and Denton in Velez's car, the Hearing Officer did not credit Trejo's testimony that Velez told Trejo

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<sup>8</sup> While not addressed by the Hearing Officer, the February 6 meeting took place outside the "critical period" during which laboratory conditions must be maintained, which begins with the filing of the petition, in this case February 7. *Wyandanch Day Care Center*, 323 NLRB 339 n. 2 (1997). While prepetition conduct that is serious enough to significantly impact an election may warrant consideration, the Hotel's allegations fail to meet this high bar. *See, e.g., Kokomo Tube Co.*, 280 NLRB 357, 358 (1986) (a 25-cent-wage increase announced before the filing of a petition was insufficient to warrant a new election), overruled on other grounds by 332 NLRB 40 fn. 8 (2000).

that if she did not sign a card, she could lose her job because “they would have preference for” the people that signed. (TR. 17:13-17). The Hearing Officer based this credibility finding on Trejo’s demeanor and testimony. (Report at 7). The Hearing Officer noted that Trejo’s testimony was vague<sup>9</sup> and appeared to consist of her understanding of what the organizers said rather than what they actually said. (Report at 7-8). Trejo demonstrated evident confusion, requiring the Hotel’s counsel on direct examination to inquire as to what transpired multiple times, resulting in inconsistent statements and culminating in Trejo admitting that her testimony was merely what she understood, that she was not paying attention, and that she did not remember everything well. (Report at 8). Further, and completely ignored by the Hotel, when the Hearing Officer questioned Trejo regarding this meeting for clarification, Trejo did not repeat any of these allegedly threatening statements. (Report at 8). On the contrary, the testimony of Velez confirmed that the conversation concerned the benefits of a union contract and that, without union representation, Trejo would not have job security and could be terminated for any reason, consistent with conversations Velez and Denton had with groups of employees.<sup>10</sup> (Report at 9). The Hearing

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<sup>9</sup> The Hotel takes issue with one of the Hearing Officer’s examples demonstrating the vagueness of Trejo’s testimony – Trejo’s use of the word “they.” (RFR at 14). But if the meaning of the word was as obvious as the Hotel suggests, it is unclear why Trejo could not answer Hotel counsel’s simple question as to whom she was referring, as the Hearing Officer expressly recognized. (Report at 8). Moreover, the Hearing Officer used this interaction to demonstrate the non-responsiveness, indirectness, inconsistency, and vagueness present in Trejo’s testimony, even with respect to questioning by the party that called her. The actual meaning of the word “they” is not consequential. *Cf. Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1231 (2006) (ALJ ignored crucial testimony and relied on his own opinions regarding who had authority to make decisions for the employer).

<sup>10</sup> The Hotel’s attempts to discredit the Union witnesses falls flat. The Hotel alleges that Velez testified that she did not tell employees that a just cause provision had to be negotiated but subsequently changed her story. (RFR at 16). The Hotel bizarrely claims that the Hearing Officer ignored this supposed inconsistency. (RFR at 16). On the contrary, the Hearing Officer directly addressed the point, noting that Velez merely “clarified” that she informed employees that a contract had to be negotiated. (Report at 4 n. 4). Notably, however, this alleged contradiction is of no relevancy since it did not concern the February 6 conversation with Trejo. The Hotel also

Officer, directly quoting Trejo, correctly took account of the inconsistency and confusion in Trejo's testimony and understandably relied upon the detailed and consistent testimonies of Velez and Denton. Therefore, the Hearing Officer did not find any evidence in Trejo's testimony to support the Hotel's remaining Objections, 3(a) or 3(b).

**C. The Hearing Officer Correctly Credited Velez and Denton Over Gutierrez**

The Hearing Officer likewise found Noris Gutierrez, the Hotel's other witness, not credible with respect to her testimony that at group meetings Velez and Denton told employees that if they did not sign a card, they could be fired from the Hotel. (Report at 8-9). The Hearing Officer specifically noted that Gutierrez indicated her testimony was her understanding, as opposed to the language used by the organizers. (Report at 9). Much like with Trejo's testimony, the Hearing Officer had contrary detailed, straightforward, and credible testimony from the Union witnesses and therefore declined to credit Gutierrez based on her purported subjective understanding. (Report at 9). The Hotel asserts that reliance on Gutierrez's statement that she was testifying as to her understanding ignores that Gutierrez testified on "multiple occasions" that Velez and Denton told her if she did not sign she would be fired. (RFR at 15). The Hotel's argument misses the mark, as there is no indication that Gutierrez's other testimony was anything more than her understanding of the discussions as well. Her testimony additionally switches between "could" and "will" fire, further undermining the accuracy of what the Hotel claims are "verbatim"

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claims that the Hearing Officer failed to consider supposed bias of the Union representatives. The Hotel's witnesses, however, were no less "emotionally involved" than the Union witnesses. As in *Stop-N-Go Foods*, the Board recognizes that current employees understandably want to avoid "provoking [their] superiors." 279 NLRB 777, 786 (1986). The Hotel counters that no such provocation is possible since it could not lawfully punish them for refusing to testify and the testimony was not intended to shield the employer from liability. (RFR at 16 n. 9). The Hotel strains credulity to its breaking point. The Hotel conceded its interest in the proceeding by admitting it actively campaigned against HTC, a point which could not be lost on employees dependent on the Hotel for their jobs, schedules and benefits. (RFR at 14). Moreover, the Hotel fails to hide its ability to dole out more subtle forms of encouragement.

statements. (*Compare* TR. 38:22-23 *with* TR. 47:16-19). Rather than actually considering the totality of the testimony, the Hotel constantly cherry picks and bolds the examples it feels best suit its case. (RFR at 5-6, 14-15). The Hearing Officer, on the contrary, rendered a decision based on the totality of the evidence, which demonstrated that the Hotel’s witnesses’ credibility was undermined by the repeated inconsistencies that the Hotel ignores through carefully curated examples. Accordingly, the Hearing Officer reasonably determined that Gutierrez did not present any credible evidence supporting the Hotel’s Objections, such as 3(b), especially in the light of the far more credible, forthright testimony of the Union’s witnesses.

**THE HOTEL’S REQUEST FOR A STAY SHOULD BE DENIED**

Pursuant to Rule 102.67(j) of the Rules and Regulations of the National Labor Relations Board, the Hotel requests a stay of certification pending disposition of the request for review. Rule 102.67(j)(2) provides that “[r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case.” 29 C.F.R. § 102.67(j). The Hotel’s sole contention in support of its request is that it claims to be likely to succeed. (RFR at 17). For all the reasons discussed above, and the decisions of Region 29, the Hotel is plainly incorrect. But even this allegation of likeliness falls short of the demanding “clear showing” of necessity standard, else the relief would effectively become an entitlement rather than the “extraordinary relief” it is so designated. 29 C.F.R. § 102.67(j). Accordingly, no stay may issue.

**CONCLUSION**

For the reasons and upon the authority cited above, in the Region's Order and Certification of Representative, and in all other decisions, orders and reports of the Region, the Hotel's request for review should be denied.

Respectfully submitted,

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