UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

PREMIER UTILITY SERVICES, LLC

Employer

and **Case 02-RC-187600**

LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA

Petitioner

Appearances:
Andrew Midgen, Esq., Counsel for the Petitioner
Cynthia K. Springer, Esq., Counsel for the Employer

HEARING OFFICER'S REPORT ON OBJECTIONS

On November 30, 2016, a Board Agent of Region 2 of the National Labor Relations Board conducted an election among certain employees of Premier Utility Services, LLC (herein "Employer"). A majority of employees casting ballots in the election voted against representation by Local 1101, Communications Workers of America (herein "Petitioner"). The Petitioner contests the results of the election claiming that the Employer engaged in objectionable conduct and therefore requests that the election results be set aside and that a new election be held. Specifically, the Petitioner contends that the Employer threatened and/or made promises to employees during the critical period and engaged in surveillance of employees near the voting area during the voting period.

After conducting the hearing and carefully reviewing the evidence as well as arguments made by the parties, I recommend that the Petitioner's objections be overruled in part and sustained in part. More specifically, although the record established that an Employer representative was present on the premises during the election and was seen by some of the employees that voted in the election, his presence was not near the voting area, there is insufficient evidence to establish that voting employees were required to pass him, and he did not engage in objectionably prolonged conversations with those employees. Thus, the representative's presence and actions on the day of the election do not warrant setting aside the election. However, portions of the campaign documents provided by the Employer to its employees in the days leading up to the election contained statements that, taken together, interfered with employee free choice and warrant setting aside the election results.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Then, I briefly describe the Employer's operation and give an overview of relevant facts. Finally, I discuss the objections.

PROCEDURAL HISTORY:

The Petitioner filed the petition on November 4, 2016. The parties agreed to the terms of an election and the election was held on November 30, 2016 in the Story Time Room, which is a reading room within the New City Public Library (herein "Library") in New City, New York. The employees in the following unit voted on whether they wished to be represented by the Petitioner:

> Included: All full-time and regular part-time utility locators and helpers.
> Excluded: All other employees, including office clerical employees, guards, and professional employees as defined by the Act.

The ballots were counted and a tally of ballots was provided to the parties. The tally of ballots showed that four ballots were cast for the Petitioner and five ballots were cast against representation. There were no challenged ballots. Thus, a majority of the valid ballots were not cast in favor of representation by the Petitioner.

Objections were timely filed. The Regional Director for Region 2 ordered that a hearing be conducted to give the parties an opportunity to present evidence regarding the objections. As the hearing officer designated to conduct the hearing and to recommend to the Regional Director whether the Petitioner's objections are warranted, I heard testimony and received into evidence relevant documents on Tuesday, February 21, 2017. At the hearing, the parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues.[1] The parties were permitted to file briefs, both parties timely filed their respective briefs, and I have fully considered the briefs in making my recommendation.

In the order directing a hearing, the Regional Director also approved the Petitioner's withdrawal of objection number 8.

THE BURDEN OF PROOF AND THE BOARD'S STANDARD FOR SETTING ASIDE ELECTIONS:

It is well settled that "[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *Lockheed Martin Skunk Works,* 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, "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), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a "reasonable doubt as to the fairness and validity of the election." *Patient Care of Pennsylvania*, 360 NLRB No. 76

[1] References to the transcript are identified as Tr. __. References to the Board, Employer, Petitioner, and Joint exhibits will be cited as Bd. Ex. __, Er. Ex. __, Pet. Ex. __, and Jt. Ex. __, respectively. References to the Employer's brief and/or its exhibits will be cited as Er. Br. __ or Er. Br., Ex.__. References to the Petitioner's brief will be cited as Pet. Br. __.

(2014), citing *Polymers, Inc*., 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.*, 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

In determining whether a party's conduct has the tendency to interfere with employee free choice, the Board considers a number of factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who are in the voting unit; (7) the effect (if any) of any misconduct by the non-objecting party to cancel out the effects of the misconduct alleged in the objection; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party. See *Student Transportation of America, Inc.*, 362 NLRB No. 156 slip op. at 2 (2015) and *Avis Rent-A-Car System, Inc.*, 280 NLRB 580, 581 (1986).

THE EMPLOYER'S OPERATION:

The Employer is a subsidiary of the United States Infrastructure Corporation and engages in the business of location of underground utilities and damage prevention related to those utilities. Those services are provided with respect to utilities in various locations including New York City and the Hudson Valley. At relevant times, the Employer's district manager for territories covering New York City and the Hudson Valley was Eduardo Opio. Opio was responsible for overseeing several supervisors and locate technicians throughout the territories he was assigned, including the locate technicians in this matter.

THE PETITIONER'S OBJECTIONS AND MY RECOMMENDATIONS:

The order directing hearing in this matter instructs me to resolve the credibility of witnesses testifying at the hearing and to make findings of fact. Unless otherwise specified, my summary of the record evidence is a composite of the testimony of all witnesses, including in particular testimony by witnesses that is consistent with one another, with documentary evidence, or with undisputed evidence, as well as testimony that is uncontested. Omitted

testimony or evidence is either irrelevant or cumulative. Credibility resolutions are based on my observations of the testimony and demeanor of witnesses and are more fully discussed within the context of the objection related to the witnesses' testimony.

Objections 1-3: Background of events that occurred on November 30, 2016

Record Evidence and Recommendation

Objections 1-3 contain no assertions of objectionable conduct and merely restate certain background facts that were otherwise stipulated to or found in the formal papers, including the date and location of the election and the election results. Accordingly, Petitioner's Objections 1-3 are overruled.

Objections 4-7: Employer representative Eduardo Opio engaged in objectionable surveillance of voters during the voting period

Record Evidence[2]

As stated above, the election was held on November 30, 2016, in the Story Time Room in the New City Public Library in New City, New York. The Library has a parking lot which is adjacent to the main entrance of the facility. The parking lot leads to a set of stairs that ultimately lead to the main entrance of the facility. The stairs are approximately 15 to 20 feet wide and include eight steps. At the top of the stairs is a portico in which, from the perspective of an individual walking up the stairs, the Library's main entrance is situated to the right and a wooden bench is situated to the left. The entrance comprises two sets of automatic sliding glass doors separated by a vestibule that runs the length of the glass doors and is approximately 6 feet wide. The bench is approximately 21 feet from the outermost glass doors. The Library has another public entrance in the back of the building.[3]

Immediately through the sliding glass doors is the Library's circulation desk, which is approximately 29 feet from the innermost set of glass doors. The Story Time Room is on a

[2] The facts concerning the layout of the Library and Opio's actions on the day of the election are largely undisputed. Much of the those facts were stipulated to by the parties or made clear by color photographs produced by the Employer. See Jt. Ex. 2 and Er. Ex. 1-13. The primary question of fact concerning the layout of the facility, i.e., the existence of a second public entrance, is discussed *supra*.

[3] Opio gave unrebutted testimony that the Library has another public entrance in the back of the building. Tr. 81-82. Although Petitioner argues that the main entrance is the only entrance to the Library, I find this argument to be unavailing. First, Kenneth Spatta's testimony that he was unaware of another entrance does not contradict Opio's testimony that there is another entrance. Tr. 14. Second, I find no reason to discredit Opio's testimony on this point. Petitioner argues that Opio's testimony that there was another entrance in the back of the building that led out to the street is contradicted by his later testimony that employee Adrian Roland told him that he parked two blocks away "because he didn't want to see the union" but nevertheless entered the building through the front entrance near the parking lot where union representatives were positioned. Tr. 87-88. I will not discredit Opio's testimony on the point of the additional entrance because Opio's testimony regarding Roland's parking spot constitutes hearsay and cannot be used to establish the precise location of Roland's parking spot. Further, even if Opio's testimony on that point was not hearsay it still would not establish that Roland saw or knew about the purported additional entrance, let alone that he parked by it.

sublevel of the Library that is accessible via either a single elevator bank or an enclosed stairwell that spirals down beneath the circulation desk. The distance from the circulation desk to the landing that allows access to the Story Time Room stairwell is approximately 8 feet. At the bottom of that stairwell is a large open hallway that contains an elevator bank and the entrance to the Story Time Room. The distance from the bench in the portico to the Story Time Room is approximately 200 feet. Jt. Ex. 2, para. 23.

Pursuant to the agreement between the parties, the voting period was 10 A.M. to 2 P.M. During the pre-election conference that was held just prior to the opening of the voting period, the Board Agent that conducted the election informed the parties in attendance at the conference that everyone other than the election observers could wait upstairs in the Library or outside the Library until the voting period ended. Additionally, the Board Agent identified the inside of the Story Time Room and the hallway adjacent to the Story Time Room as the areas in which non-observers and non-voters were prohibited to be during the voting period. No signage identifying the location of the voting area was posted near the main Library entrance or in the portico. Two of the nine voters in the election were observers and therefore stayed in the Story Time Room during the voting period.

The Employer's district manager, Eduardo Opio, was present during the pre-election conference. At the conclusion of the conference, Opio went outside and sat on the bench in the portico. Jt. Ex. 2; Tr. 43. Opio explained that he initially intended to sit in the Library and work on his laptop, but decided to go outside because he was going to be getting several phone calls throughout the day and did not want to disturb anyone in the library. Tr. 42-43. During the voting period, Opio sat on the bench in the portico behind a large brick column, worked on his laptop, periodically made and received phone calls, and entered the Library on one occasion to use the restroom. Tr. 22, 60. The restroom he used is located just inside the main entrance. During that same period Opio did not go downstairs to the Story Time Room or its adjacent hallway. At points during the polling period, Opio had interactions with seven of the nine individuals who ultimately voted in the election. Tr. 60-65.

Opio, on his way out to the portico immediately after the conclusion of the pre-election conference, crossed paths with employee Robert Kinsella near the main entrance. Kinsella asked Opio where to go and Opio replied he had to go downstairs. Tr. 102. That conversation lasted "seconds," according to Kinsella. Tr. 102. After Kinsella finished voting, he had a conversation with Opio as he was leaving the Library that lasted 10 to 15 minutes. Tr. 102-103. There is no evidence that other employees that had not yet voted saw, heard, or participated in that conversation.

At various points during the voting period Opio had brief interactions with six other employees. Those interactions all occurred while Opio was sitting on the bench in the portico, all six employees approached Opio, and any conversations Opio had with those employees were limited to the subject of work or the location of the polls.[4] Tr. 60-65. There is no evidence that

[4] Opio testified that an employee named Adrian approached him and indicated that someone from the union called him and requested a yes vote. I find that this testimony is both inadmissible hearsay and irrelevant to the Petitioner's objections.

any of those conversations lasted longer than one or two minutes. There is no evidence that, during the day of the election, the Petitioner objected to or notified the Board Agent of Opio's presence in the portico. Lastly, there is no dispute that the Petitioner stood in the parking lot during the voting period.

Board Law

The continual presence of party representatives in the area where employees have to pass in order to vote may be objectionable surveillance sufficient to overturn the results of the election. See *ITT Automotive*, 324 NLRB 609 (1997), enfd. in part 188 F.3d 375 (6th Cir. 1999); *Electric Hose & Rubber Co.*, 262 NLRB 186 (1982); and *Performance Measurements*, 148 NLRB 1657 (1964). However, an employer representative's continual presence by an entrance through which employees passed to get to a voting area is not necessarily objectionable conduct. See *J.P. Mascaro & Sons*, 345 NLRB 637 (2005).

In *Performance Measurements*, 148 NLRB at 1659, the employer's president stood by the door to the election area for prolonged periods and employees had to pass within 6 feet of him to gain access to the voting area. The Board held that "the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct…." *Id*. In *Electric Hose*, 262 NLRB at 216, the Board set aside an election based in part on the following employer conduct which was found by the ALJ to have destroyed laboratory conditions: (1) a supervisor's unexplained presence within 10-15 feet of the voting site during the voting period; and (2) supervisors' unexplained presence during the voting period in an area that employees had to pass in order to vote. In coming to the conclusion that those two instances of employer conduct destroyed laboratory conditions, the ALJ, with Board approval, relied on the fact that there was no explanation for those supervisors' presence in those locations. Based on that, it was reasoned that the only plausible explanation for the supervisors' conduct was to convey to employees that they were being watched. *Id*. In *ITT Automotive*, 324 NLRB at 623-25, the "continued presence" of managers standing in a circle directly adjacent to the aisle that employees had to walk through to get to the voting area, alongside the fact that managers observed from that location employees waiting in line to vote, interfered with the election.

In *J.P. Mascaro & Sons*, 345 NLRB 637 (2005), the election was held at the employer's facility in a snack room that was accessible from a hallway connected to the front door of the facility. The employer's president, Pat Mascaro, "was positioned outside the facility for most of the day… [and] was at least 30 feet and on several occasions as far away as 54 feet from the front door of the facility." *Id*. at 639. Although no explanation was proffered regarding the purpose of Mascaro's presence outside the facility, the Board nevertheless found that his conduct during the election did not constitute objectionable surveillance. Specifically, the Board noted that there was "insufficient evidence to establish that employees had to pass by Mascaro in order to vote." *Id*. In reaching its conclusion, the Board distinguished the facts in Mascaro's case from those in *Electric Hose*, *Performance Measurement*, and *ITT Automotive*, noting that "the company officials [in those cases] were either much closer to the voting area than Mascaro was, or employees had to pass the company officials as they entered the polling area." *Id*.

Recommendation

I find the facts of this case to be most similar to those in *J.P Mascaro & Sons* and distinguishable from those in *Electric Hose, Performance Measurement*, and *ITT Automotive*.[5] As a result, I find that Opio's actions described above did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. Therefore, I recommend that objections 4-7 be overruled.

As an initial matter, Petitioner's argument that Opio's conduct was objectionable surveillance because he was continuously present in a location that employees had to pass in order to get to the voting area rests on the assumption that the main entrance to the Library was the only public entrance to the facility. Although Petitioner argues that Kenneth Spatta's testimony raises a question of fact, the Petitioner (1) did not elicit any testimony to corroborate or expound upon Spatta's testimony[6] and (2) failed to establish how Spatta could credibly testify on that point, i.e., the basis of his belief that there was not another entrance. Thus, I find that there is no question of fact on this point and, as discussed above, the record establishes that the main Library entrance is not the only public entrance to the Library.

The above point undermines Petitioner's argument that Opio's presence at the bench in the portico is improper in and of itself because employees were "required to pass" that area to get to the voting area. Indeed, in light of the Petitioner's failure to establish that the main entrance was the only entrance, it cannot be said that it was necessary for employees to enter the building through the main entrance in order to vote. This is true even considering the fact that many of the voting employees actually used the main entrance to enter the Library. As a result, Opio's actions on the day of the election do not warrant setting aside the election results under *Performance Measurements*, et al.

However, even assuming that the Library's main entrance was the only public entrance to the facility I would still find that Opio's presence in the portico during the election did not interfere with employee free choice and thus would not warrant setting the election results aside.

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[5] The instant facts are also distinguishable from *Nathan Katz Realty, LLC v NLRB*, 251 F. 3d 981 (D.C. Cir. 2001) because the objectionable conduct in that case occurred in an established no-electioneering zone. Here, Opio did not enter or come near the areas that the Board Agent identified as the areas in which non-voters and non-observers were prohibited to be present in during the polling period, i.e., the Story Time Room and the downstairs hallway outside the Story Time Room. See also *J.P. Mascaro & Sons*, 345 NLRB 637, 639 (2005) (identifying as a distinguishing factor the issue of whether the allegedly objectionable conduct occurred within a designated no-electioneering zone) and *U-Haul Co. of Nevada, Inc.*, 341 NLRB 195, 196 (2004) (distinguishing *Katz* because, among other things, there was no evidence that the allegedly objectionable conduct occurred in a designated no-electioneering zone).

[6] While not dispositive, failure to call corroborating witnesses is a factor weighed in making credibility determinations. See *Noral Color Corp.*, 276 NLRB 567, 576 (1985) ("failure to corroborate must be deemed significant in a close question of credibility"); see also *West Irving Die Casting of Kentucky, Inc.*, 346 NLRB 349, 352 (2006) (finding the failure to call a corroborating witness as a factor in making credibility determinations); *C&S Distributors, Inc.*, 321 NLRB 404, 404 fn. 2 (1996) (stating that failure to call an identified, potentially corroborating witness is a factor in determining whether a party has established by a preponderance of the evidence that a violation of the Act has occurred).

The facts in this case, akin to those in *J.P. Mascaro & Sons*, establish that the employer representative was stationed outside the main entrance of the facility but was not near the actual voting area. The voting area in this case was not only 200 feet away from the bench in the portico and not visible from that bench, but it was also in a room that was accessible only from the inside of the facility and required going down an elevator or winding staircase. Unlike *Electric Hose*, *Performance Measurement*, and *ITT Automotive*, Opio could not see the voting area or the employees waiting in line to vote from his position on the bench and, indeed, it was physically impossible to see the voting area from that vantage point. These facts cut against a finding that employee free choice was affected by Opio's presence in the portico.

Further, unlike *Nathan Katz Realty*, at no point during the election did Opio enter or get near an area that had been identified by the Board Agent as prohibited to non-observers and non-voters. Although Opio was positioned in such a way that caused him to be seen by some of the voters, he gave a credible explanation as to why he there during the polling period.[7] Based on that credible testimony I cannot find that Opio's conduct was intended to convey to employees that they were being watched. As such, this case is distinguishable from *Electric Hose*.

In *J.P. Mascaro & Sons*, the question of whether an objecting party objected on the day of the election to a representative's presence near the entrance to a facility in which the voting occurred was important to Member Liebman in her concurring opinion, in which she noted that she would not set aside the election in light of the facts that "Mascaro did not stand in any designated no-electioneering area, he had no direct view of the polling place from where he stood, the Union never objected to his presence, and there was no other objectionable conduct." 345 NLRB at 640. Thus, the fact that the Petitioner did not object to Opio's presence on the day of the election or even notify the Board Agent of that conduct cuts against a finding that Opio's positioning that day interfered with employee free choice.

Lastly, (1) the 21 foot gap between the bench and the sliding glass doors and (2) the large brick column Opio was sitting behind are facts that distinguish this case from *Electric Hose*, *Performance Measurement*, and *ITT Automotive*, in which employees had to or were required to pass by or through employer representatives to get to the voting area. Here, the large brick column at least partially obscured Opio's presence on the bench from the perspective of a person walking up the steps. Furthermore, the size of the gap between the bench and the Library entrance ostensibly would have allowed people walking up those steps to enter the facility without seeing Opio. Thus, I find that employees did not "have to pass" Opio in order to enter the facility. This is true even though some employees did, in fact, see Opio and briefly speak with him on their way to the voting area. Based on the above, I do not find that Opio's positioning on the day of the election, in and of itself, interfered with employee free choice.[8]

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[7] I found Opio to be a credible witness. He forthrightly testified to each of the conversations he had with the employees and I found reasonable and credible his explanation that he went to the bench so that he would not disturb others in the Library with his phone calls.

[8] This determination is made without respect to any objectionable content found in either of the Employer's pre-election campaign documents, discussed *supra*.

Finally, I do not find that Opio's 10 to 15 minute conversation with employee Robert Kinsella on the day of the election constitutes objectionable conduct. That conversation occurred after Kinsella voted and there is no evidence establishing that the conversation occurred around or near any employees that had not yet voted. See *Lowe's HIW, Inc.*, 349 NLRB 478, 479 (2007) (no *Milchem* violation unless party's conversation is with voters that are waiting in line to vote).

Based on the above, I recommend that objections 4 through 7 be overruled.

Objection 9: The Employer distributed documents to employees two days prior to the election that contained implied threats and/or promises of changes to terms and conditions of employment.

Petitioner alleges in its Objections that the Employer committed the following unlawful conduct by its distribution of letters and leaflets to all employees on or about November 28, 2016:

a) threatened the employees that they would have problems if the Union was selected;

b) threatened employees that their pay would be reduced if the Union is selected;

c) threatened employees that there will be problems with work schedules if the Union is selected;

d) threatened the employees that they will be treated differently if the Union was selected;

e) threatened employees that they may lose their jobs if the Union was selected;

f) Threatened employees that their wages will be frozen if the Union is selected, while non-union employees' wages will be increased;

g) created the impression among employees that their wages will be reduced and their health insurance premium will be increased if the Union is selected;

h) created the impression among employees that their wages will not be increased if the Union is selected;

i) Created the impression among employees that they will lose current benefits, such as, PTO, paid holidays, health insurance and 401(k) if the Union is selected;

j) Promised the employees that if the Union is not selected the Employer will correct the employees' workplace problems and improve their working conditions;

k) Promised the employees that if the Union is not selected the Employer will discuss each employee's concerns with management;

l) Created the impression among employees that if the Union is selected there will be a strike, which will cause them to lose their jobs to permanent replacements;

m) Informed employees that they were being denied wage increases because of the Unions' presence;

n) Created an impression among the employees that if they abandoned their support for the Union the Employer would convey future benefits on them;

o) Created an impression among the employees that they have a contract with the Employer guaranteeing to them all of the above, which is enforceable as such as a matter of law.

Record Evidence

The parties stipulated that, on or about November 28, 2016, the Employer distributed to all employees (1) a "USIC Guarantees" document and (2) a letter discussing the election and its potential consequences. See Jt. Ex. 2, para. 30; Tr. 37-38. The content of the USIC Guarantees document is as follows:

USIC GUARANTEES

> Federal law prohibits USIC Locating Services, LLC (USIC) from making bargaining unit employees any promises concerning the terms and conditions of their employment pending a union election. However, USIC can GUARANTEE in writing what it will deliver if CWA Local 1101 loses the election. If CWA Local 1101 wins the election, everything is subject to negotiation and may change.
>
> USIC guarantees that if CWA Local 1101 loses the election, no Hudson Valley District bargaining unit employee's wage rate will be reduced through contract negotiations and no Hudson Valley District bargaining unit employee's health insurance premium payments will be increased through contract negotiations.
>
> USIC guarantees that if CWA Local 1101 loses the election, there will be no contract negotiations pay freeze. If CWA Local 1101 wins the election, the law requires USIC to bargain about each Hudson Valley District bargaining unit employees pay increase and there is no way to know how long that could take — it could be months or even longer. For example, we've been bargaining with CWA Local 1101 for 11 months in New York City & Long Island Districts and are not close to reaching a contract.
>
> USIC guarantees that if CWA Local 1101 loses the election, Hudson Valley District bargaining unit employees will not lose current benefits through trade-offs in negotiations. That includes PTO, paid holidays, health insurance including prescription coverage, wellness benefits, HSA contributions, dental, vision, and

> life insurance, voluntary benefits including disability, life, accident, critical illness, pre-paid legal, home and auto discounts, and the 401(k) Plan.
>
> USIC guarantees that if CWA Local 1101 loses the election, USIC will not discharge Hudson Valley District bargaining unit employees because they supported or did not support CWA Local 1101, signed or did not sign a Union card, or spoke in favor of or against CWA Local 1101.
>
> USIC guarantees that if CWA Local 1101 loses the election, it will keep working directly with Hudson Valley District bargaining unit employees to correct workplace problems and improve working conditions.
>
> USIC guarantees if CWA Local 1101 loses the election, USIC will treat Hudson Valley District bargaining unit employees as individuals, who will be able, on their own, to discuss concerns with management without getting a Union steward involved.
>
> USIC guarantees if CWA Local 1101 loses the election, no Hudson Valley District bargaining unit employee will be pressured to pay Union dues and CWA Local 1101 will not be able to fine any Hudson Valley District bargaining unit employee.
>
> USIC guarantee if CWA Local 1101 loses the election, there will be no CWA Local 1101 strike, no Hudson Valley District bargaining unit employee will lose his job to a permanent replacement, and no Hudson Valley District bargaining unit employee will be required to pay CWA Local 1101 dues to keep their jobs
>
> I, Rob Tullman certify that this guarantee is a contract between USIC and each USIC Hudson Valley District bargaining unit employee, and any USIC Hudson Valley District bargaining unit employee may sue USIC to enforce these guarantees. We also agree that if any statement in these guarantees is false, the National Labor Relations Board shall treat it as a material misrepresentation of fact with respect to the election in Case No. 02-RC-187600 if CWA Local 1101 loses that election."

Rob Tullman, referenced in the last passage of the USIC Guarantees document, is identified on that document as the "President & CEO." Pet. Ex. 2. On or around November 28, 2016, the Employer also distributed on a letter with the following content to all employees:

> Dear [Employee name],
>
> The decision you are going to make next week about the CWA is also important. For that reason, I wanted to write you with some final thoughts.
>
> Over the years, I feel we have worked well together, and that we have accomplished a lot without the interference of an outside third party, I pledge to

you that I will continue to work with you so we can continue to make improvements. I do not believe getting a union involved will help us in this process. A union does not solve problems—it only creates new ones. Here's how:

Money

A vote for CWA will mean a cut in your pay. CWA charges at least $10.18 a week in dues, so voting for CWA would mean about $529.17 or more a year withheld from your paycheck. That is a lot of money to lose. Given the fact that the CWA has lost members due to layoffs, lost work, and decertifications, it needs lots of new dues paying members to make up for all the money that it has lost. That is CWA's real interest in you.

Flexibility & Teamwork

Without a union contract, we can treat every employee as an individual. For example, when extra flexibility is necessary in scheduling, we make it a point to try to help. Over the years I have been here, I have been pleased to help several employees with difficult problems. I want the flexibility to continue to do that. Unfortunately, under a Union contract, we would have to do everything "by the book" and it is far less likely we would be able to give special consideration on a case-by-case basis. Another real risk of having a union is that we will lose the teamwork we now have. With a union contract, supervisors may not be allowed to help out—only CWA-represented employees may be able to do this "bargaining unit work." So, not only do we lose teamwork, our customer loses too.

What Do You Really Get For Your Money?

The CWA says that, since you are "at will" employees you have no guarantees, but it is missing the point—CWA is asking you to pay them to help you get a contract but they are not going to guarantee you that they will get you what you want. You don't have to pay anyone now just to keep your job. The Union also wants you to believe that it will give you stability because it can bargain a successor contract for you. But the Union representatives conveniently gloss over the fact that CWA does not even always reach a first contract when employees vote them in. In fact, it has been bargaining with USIC in New York City and Long island for nearly a year and is not even close to reaching a contract. And during this entire time, those employees' wages have been frozen, while you have received wage increases. The Union representatives usually tell you the three things that are in the labor contracts that CWA has with other companies. The first is a "just cause" provision, which means the employer can't discipline or fire an employee without having a good reason. A couple of points on this…first, we are not looking to fire people. I think you can see that we don't just go firing people for the fun of it. Firing someone is a last resort and we take such decisions seriously. Second, we have had to fire people that CWA represents and those employees have all stayed fired. Which shows that we are fair when making these

> critical decisions and a just cause provision made no difference for those employees.
>
> As far as the other two provisions that the Union boasts are in its labor contracts, we offer all of our employees' health insurance and a 401(k) plan with matching to help them prepare for retirement. Before our Pennsylvania and North Carolina CWA-represented employees kicked CWA out, they had exactly the same health insurance and 401(k) plan that our non-union employees had.
>
> Importance of Voting
>
> It is very important that you exercise your right to vote. Voting will be at the New City, New York Library on November 30th from 10 AM to 2 PM ONLY. An agent with the National Labor Relations Board will be there during these times to run the election. Please take the time to vote. The election is decided by the employees who vote. If there are 9 eligible voters but only 5 of them vote, and 3 vote for the Union, the Union wins. The Union would then represent all 9 employees even though it received just 3 votes. Not voting is the same thing as a vote for the Union.
>
> The election is by secret ballot. If you have signed a Union card or told someone you would vote for the Union, you still have the right to VOTE NO.
>
> We've spent time during the last couple weeks talking with you about the Union issue. We have continued to spend time working to address the questions and issues employees have brought to us. I am committed to doing that without a Union. I ask you to give me the opportunity to show you what a good place this can be to work without risking all of the problems a union can bring. I hope you will VOTE NO.
>
> Signed,
>
> Tony McGill

Tony McGill is the supervisor of at least some of the employees that voted in the election and he distributed the above-referenced letter to employees. Tr. 72, 91, 104. It is undisputed that the Employer (1) maintained an employee handbook that included a process by which employees could discuss their work complaints or issues with their supervisors and (2) offered the following employees benefits: paid time off; paid holidays; health insurance including prescription coverage; a health savings account with Employer contributions; dental, vision, and life insurance; voluntary insurance coverage for disability, life, accident, critical illness, prepaid legal; home and auto discounts; and a 401(k) plan with discretionary matching. Tr. 72-73; Jt. Ex. 2, para. 29. The Employer offered employees annual wage increases. Tr. 75.

The Employer produced two employees as witnesses. On direct examination, employee Robert Kinsella responded “no” to Employer counsel’s question whether anything in the USIC

Guarantees document made him "feel that USIC was threatening or promising [him] anything as it related to the terms and conditions of [his] employment." Tr. 99. Similarly, during his direct examination employee Michael Hassel answered "no" to both of Employer counsel's questions whether anything in the USIC Guarantees document (1) gave him "the impression that the company was threatening that if [he] voted the Union in, something bad would happen to the terms and conditions of [his] employment" and (2) gave him "the impression that if the Union was voted out that USIC would give [him] some improvements in the terms and conditions of [his] employment." Tr. 114-115.

Credibility

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the foregoing employee witnesses regarding their perception or impression of the campaign materials distributed to them in the days leading up to the election, I find that that testimony has limited probative value. First, both employee witnesses gave terse and conclusory denials on direct examination in response to leading questions on the aforementioned topic. See *Colonial Parking*, 363 NLRB No. 90 slip op. at 5 fn. 19 (2016) (Board adopted ALJ's credibility resolutions which included discounting a witness's testimony in part due to a "terse and conclusory denial…in response to leading questions"). Second, the employees' subjective testimony as to their ability to evaluate the statements made by the Employer during the election campaign is not controlling. Indeed, "[t]he Board has long held that the subjective reactions of employees are irrelevant to the question of whether there was, in fact objectionable conduct." *Hopkins Nursing Care Center*, 309 NLRB 958, 958 fn. 4 (1992) (Board overturned hearing officer's finding that an alleged threat was de minimis, which relied in part on the employees' subjective testimony regarding the impact of the alleged threat on them).

Board Law

It is well settled that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).[9] An employer "may even make a prediction as to the precise effect he believes unionization will have on the company" but that prediction, however, "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control[.]" *Id*. at 618.

In determining whether an employer's pre-election statement is objectionable, we examine it from the perspective of a reasonable employee. See *Labriola Baking Company,* 361 NLRB No. 41 slip op. at 3 (2015). The test is not what the speaker may have meant to say, but whether his actual words would tend to interfere with employee free choice. *Id*. The standard for the reasonable employee analysis is informed by *Gissel*, 395 U.S. at 618 (1969), in which the

[9] Although the Employer argues that its statements are protected by Section 8(c) of the Act, "[t]he Board has long held that Section 8(c) does not apply in representation cases." *Student Transportation of America, Inc.*, 362 NLRB No. 156 slip op. at 1 fn. 5 (2015). See also *Kalin Construction Co.*, 321 NLRB 649, 652 (1996), citing *Dal-Tex Optical*, 137 NLRB 1782, 1787 fn. 11 (1962), and *General Shoe Corp.*, 77 NLRB 124, 127 fn. 10 (1948).

Court finds it necessary to "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id*. at 620. Further, "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion[.]" *Id*. at 618.

In *Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015), the Board set aside an election in which the petitioner lost 23 votes to 24, with 11 challenged ballots, after finding contrary to the hearing officer that an employer's vice president's statements at two pre-election meetings before 20 or 30 employees constituted objectionable conduct. Specifically, the employer's vice president told employees, who drove buses for the employer as part of a contract with the Bristol Township School District, "in effect that if unionization resulted in too much in the way of additional costs, [the employer] could cancel its contract with the Township." *Id*., slip op. at 3. The Board found that employees could reasonably infer from that statements that, if the union won the election, the employer's costs necessarily would rise and cause the employer to walk away from its contract with the Township, leaving the drivers out of work. As such, the Board found that the statement was an implied threat of job loss that warranted setting aside the election. In coming to that conclusion, the Board acknowledged that the employer did not directly threaten employees with job loss but noted that "a threat need not be direct in order to be coercive." *Id*., citing *Portola Packaging*, 361 NLRB No. 147 (2014) and *Sunnyland Packing Co.*, 106 NLRB 457, 461 (1953) (threats are no less coercive because expressed in veiled or indirect terms), enfd. 211 F.2d 923 (5th Cir. 1954).

In *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999), the employer, in response to an employee's question whether wage rates would go down if the union were voted in, stated that it was "a possibility." The Board concluded that the employer's response was an implied threat that violated Section 8(a)(1) because it "reasonably would lead those who heard the exchange to conclude that the Respondent was indicating that it might retaliate against the employees by cutting wages should the employees vote for the Union."[10] *Id*. The Board noted that "[t]he mere fact that [the employer's] remark was phrased as a 'possibility' rather than a certainty does not remove the coercive impact" but that the determinative factor was that the employer's response was not 'carefully phrased on the basis of objective fact' to convey the employer's reasonable belief as to a likely economic consequence of unionization that was beyond the employer's control, but rather left open the possibility that Respondent might cut wages in retaliation for the employees' selection of the union." *Id*.

The Board will set aside an election when a promise of benefits is made to the employees. See *G & K Services, Inc.*, 357 NLRB No. 109 (2011). The Board infers that such a promise interferes with employees' free choice in the election; an employer may rebut this

[10] In examining whether a party's conduct has interfered with an election, the Board is not precluded from considering cases involving alleged violations of Sec. 8(a)(1) based on similar conduct. See *Hacienda Resort Hotel and Casino*, 355 NLRB 950, 952 fn. 9 (2010).

inference by showing a legitimate purpose for the timing of the promise. *Id*., citing *Sun Mart Foods*, 341 NLRB 161, 162 (2004). In *Sun Mart*, the Board stated

> The Board will infer that an announcement or grant of benefits during the critical period is objectionable; however, the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. *Star, Inc.*, 337 NLRB 962, 963 (2002). The employer may rebut the inference by showing that there was a legitimate business reason for the timing of the announcement or for the grant of the benefit.

The Board has held that promises to maintain the status quo are not objectionable. See *Crown Electrical Contracting, Inc.*, 338 NLRB No. 36 (2002). Employer statements disclaiming promises are "immaterial … if in fact [an employer] expressly or impliedly indicates specific benefits will be granted." See *Unifirst Corporation*, 361 NLRB No. 1 slip op. at 1 fn. 3 (2014) and *G & K Services, Inc.*, 357 NLRB 1314, 1316 (2011), quoting *Michigan Products, Inc.*, 236 NLRB 1143, 1146 (1978).

The Board gives significant weight to the closeness of an election in deciding whether misconduct warrants setting the election aside. *Student Transportation of America, Inc.*, 362 NLRB No. 156 slip op. at 4 fn. 9 (2015), citing *Hopkins Nursing Care Center*, 309 NLRB 958, 959 (1992).

In *Hopkins Nursing Care Center*, the Board set aside an election in which the petitioner lost 33 votes to 34 based on a single threat of a loss of a benefit made by a high ranking official to two employees approximately one week prior to the election. There, the Board found that the objective test whether the conduct of a party to an election had the tendency to interfere with employees' freedom of choice was met "given the nature of the threat, the fact that Jellen, as director of nursing, had the power to effectuate the threat, the proximity of the threat to the election, and the closeness of the election." *Id*. The Board further noted that, while there was evidence the threat was heard by more than just the two employees at issue, "even if the threat only was heard by [those two employees], we would find that the other circumstances described above, suffice to establish that the threat reasonably had the tendency to interfere with their free choice[.]" *Id*.

Finally, "[i]f an employer uses factual information as a means to convey an objectionable message, the Board traditionally has not allowed this 'brinksmanship' to undermine employee free choice." *In re BCI Coca-Cola Bottling Co. of Los Angeles*, 339 NLRB 67, 68 fn. 5 (2003), citing *Turner Shoe Co.*, 249 NLRB 144, 146–147 (1980). "Communications which hover on the edge of the permissible and the unpermissible [sic] are objectionable as '[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double entendre should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians.'" *Turner Shoe Co.*, 249 NLRB at 146, quoting *Georgetown Dress Corporation*, 201 NLRB 102, 116 (1973).

Recommendation

Petitioner's objection 9 contains subparts (a) through (o). I find that the record evidence warrants a finding of objectionable conduct only with respect to subparts (e), (f), (l), (n), and (o) of Petitioner's objection 9. All other subparts of objection 9 are overruled.

Objection 9(a):

In subpart (a) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials amounted to a threat that employees "would have problems if the Union was selected." I find that there is nothing in the record evidence, including the content of both campaign documents proffered by the Employer prior to the election, which supports this objection.

As a result, I recommend that Petitioner's objection 9(a) be overruled.

Objection 9(b):

In subpart (b) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials amounted to a threat that employees' "pay would be reduced if the Union is selected." The pertinent portion of the Employer's USIC Guarantees document reads

> USIC guarantees that if CWA Local 1101 loses the election, no Hudson Valley District bargaining unit employee's wage rate will be reduced through contract negotiations and no Hudson Valley District bargaining unit employee's health insurance premium payments will be increased through contract negotiations.

The pertinent portion of the letter Employer distributed to employees reads

> A vote for CWA will mean a cut in your pay. CWA charges at least $10.18 a week in dues, so voting for CWA would mean about $529.17 or more a year withheld from your paycheck. That is a lot of money to lose. Given the fact that the CWA has lost members due to layoffs, lost work, and decertifications, it needs lots of new dues paying members to make up for all the money that it has lost. That is CWA's real interest in you.

I find that these two clauses, taken together, are reasonably read by employees as a statement that, if the Petitioner *wins* the election, employees' wage rates will be reduced due to dues payments or may be reduced through contract negotiations. With respect to the latter, although at no point did the Employer explicitly state that wage rates may be reduced pursuant to contract negotiations, the language in the USIC Guarantees document implies that that is the case. By making an explicit "guarantee" that wages will not be reduced through contract negotiations if the Petitioner *loses*, the Employer is overtly begging the question of the consequences concerning wages if the Petitioner *wins*. As such, the above-referenced language in USIC Guarantees document is an implied statement that wages may be reduced through contract negotiations if the Petitioner wins.

In any event, I would not find that that language constitutes an objectionable implied threat because it references the collective bargaining process as an objective basis for its implied prediction that wages may be reduced as a consequence of unionization and thus would not run afoul of *Gissel*, et al. Compare *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB at 77 (1999) (although Board found the threat violated 8(a)(1), it highlighted the lack of "reference to the collective bargaining process or other objective facts as a basis for its prediction that wages might be reduced"). Additionally, Petitioner offered no evidence to rebut the assertions concerning CWA dues found in the letter. Thus, in light of that I find that the above-referenced language from the Employer's letter predicting pay cuts in the event of unionization is based on the unrebutted objective facts regarding the amount of CWA dues and thus would not constitute an objectionable statement.

As a result, I recommend the Petitioner's objection 9(b) be overruled.

Objection 9(c):

In subpart (c) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials amounted to a threat to employees that "there will be problems with work schedules if the Union is selected." To the extent that this objection refers to the "Flexibility & Teamwork" portion of the Employer's campaign letter, I do not find that that language can be reasonably read as a threat to eliminate scheduling benefits if the Petitioner wins the election. In addition, the Employer letter's reference to supervisors possibly being unable to do unit work in the event of unionization is a prediction based on objective fact.

As a result, I recommend that Petitioner's objection 9(c) be overruled.

Objection 9(d):

In subpart (d) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials amounted to a threat that employees "would be treated differently if the Union was selected." This objection is vague and I find that there is nothing in the record evidence, including the content of both campaign documents proffered by the Employer prior to the election, which supports this objection.

As a result, I recommend that Petitioner's objection 9(d) be overruled.

Objection 9(e):

In subpart (e) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "threatened employees that they may lose their jobs if the Union was selected." The pertinent portion of the Employer's USIC Guarantees document reads

> USIC guarantees that if CWA Local 1101 loses the election, USIC will not discharge Hudson Valley District bargaining unit employees because they supported or did not support CWA Local 1101, signed or did not sign a Union card, or spoke in favor of or against CWA Local 1101.

The pertinent portion of the letter Employer distributed to employees reads

> The Union representatives usually tell you the three things that are in the labor contracts that CWA has with other companies. The first is a "just cause" provision, which means the employer can't discipline or fire an employee without having a good reason. A couple of points on this…first, we are not looking to fire people. I think you can see that we don't just go firing people for the fun of it. Firing someone is a last resort and we take such decisions seriously. *Second, we have had to fire people that CWA represents and those employees have all stayed fired.* Which shows that we are fair when making these critical decisions and a just cause provision made no difference for those employees. (Emphasis added.)

Here, I find that the above-referenced language from the USIC Guarantees document, when read in conjunction with the italicized portion of the Employer's letter, constitutes an implied threat of discharge in the event of unionization. The fact that the language does not explicitly state that the Employer may discharge employees based on their support or non-support for the Petitioner does not preclude a finding that that language nevertheless contained an implied threat of discharge. Indeed, it is clear that "a threat need not be direct in order to be coercive." See *Student Transportation of America, Inc.*, et al.

The Employer in its letter acknowledged that it has fired union members "and those employees have all stayed fired." Here the Employer is underscoring its authority to terminate employment and highlighting the CWA's inability to get represented workers their jobs back. The Employer guarantees that it will not, in the event of a union loss, terminate employees for their support or not support of the union. However, the Employer conspicuously fails to explain its position on that point in the event the Petitioner wins. Thus, when the campaign documents are read together, employees are left with the implication that the employer cannot or will not make the same guarantee if the Petitioner wins the election. In other words, the Employer is implying that it may terminate employees based on their union activities in the event of unionization.

This implied threat is objectionable even in light of the absence of (1) any definitive threat that employees *will* be discharged if Petitioner wins and (2) any additional context in the record, aside from the statements themselves, regarding employees' reasonable construction of those statements. See *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999) (establishing that the threat of the mere possibility of a wage cut is coercive) and *Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015) (Board responded to the dissent's argument that there was insufficient context in the record to infer a threat aimed at unionization by noting that additional context outside of the statement itself was unnecessary to reach a finding that it was objectionable). With respect to the latter point, the threat of discharge is implied based on the language in the USIC Guarantees document and additional context supporting that implied threat, i.e., the underscoring of Employer's ability to terminate employees who will "stay fired," is present in the Employer's letter.

In any event, I find that the circumstances surrounding the threat militate towards a finding that the threat interfered with employee free choice, viz. the election in this matter was

decided by a single vote and the campaign materials, which were endorsed by the company president and CEO, were distributed to all employees only two days before the election. See *Student Transportation of America, Inc.*, 362 NLRB No. 156 slip op. at 4 (2015) (holding that "where, as here, the threat involves one of the most fundamental aspects of employment conditions—i.e., job security—a single, widely disseminated threat can be sufficient to overturn election results in a very close election").

As a result, I recommend that Petitioner's objection 9(e) be sustained.

Objection 9(f):

In subpart (f) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "threatened employees that their wages will be frozen if the Union is selected, while non-union employees' wages will be increased." The pertinent portion of the Employer's USIC Guarantees document reads

> USIC guarantees that if CWA Local 1101 loses the election, there will be no contract negotiations pay freeze. If CWA Local 1101 wins the election, the law requires USIC to bargain about each Hudson Valley District bargaining unit employees pay increase and there is no way to know how long that could take — it could be months or even longer. For example, we've been bargaining with CWA Local 1101 for 11 months in New York City & Long Island Districts and are not close to reaching a contract.

The pertinent portion of the letter the Employer distributed to employees reads

> The Union also wants you to believe that it will give you stability because it can bargain a successor contract for you. But the Union representatives conveniently gloss over the fact that CWA does not even always reach a first contract when employees vote them in. In fact, it has been bargaining with USIC in New York City and Long island for nearly a year and is not even close to reaching a contract. *And during this entire time, those employees' wages have been frozen, while you have received wage increases*. (Emphasis added.)

Similar to the discussion above regarding Objection 9(e), the USIC Guarantees document language cited above, i.e., "USIC guarantees that if CWA Local 1101 loses the election, there will be no contract negotiations pay freeze" would reasonably be read as an implied threat that there would be a contract negotiations pay freeze if the Petitioner *wins* the election. Employees' understanding of that implied threat of a contract negotiation pay freeze is informed by the Employer's statement that the wages of CWA employees in New York City and Long Island have been frozen during their nearly yearlong contract negotiations.

Employer statements to employees that there will be a wage freeze during contract negotiations do not necessarily constitute a violation of Section 8(a)(1) or conduct sufficient to overturn an election. See *Mantrose-Hauser Co.*, 306 NLRB 377 (1992) and *Uarco*, 286 NLRB 55 (1987) review denied sub nom. *Auto Workers v. NLRB*, 865 F.2d 258 (6th Cir. 1988).

However, employer statements that there would be a wage freeze during contract negotiations that are unaccompanied by assurances that the status quo regarding wage increases would continue have been found to violate 8(a)(1). See *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010) (distinguishing *Mantrose-Hauser Co.* and *Uarco* on the ground that, inter alia, employees in those two cases had received assurances that the status quo regarding wage increases would continue).

Mantrose-Hauser Co. and *Uarco* are distinguishable from this case for the same reason they were distinguishable from *DHL Express, Inc*. Specifically, there is no evidence the employees received assurances that the status quo concerning their annual merit wage increases would continue. In the instant matter, the employer offered annual wage increases. However, the Employer proffered no evidence or testimony that it offered employees assurances that it would continue the status quo regarding wage increases during any potential contract negotiations that would commence if the Petitioner won the election.[11]

Thus, (1) the fact that employees were granted wage increases prior to the distribution of the campaign materials, along with (2) the implied threat of a contract negotiations pay freeze in the event of unionization and (3) in the absence of evidence of assurances of the continuance of the status quo regarding wage increases would result in finding that that conduct had a tendency to interfere with employee free choice.[12] The latter is particularly true in light of the other

[11] The Employer argues that granting union represented employees a raise without having negotiated with the union would be an unfair labor practice, and thus any statement that there may be a wage freeze if the union wins the election is an accurate statement of law. But the Board will not necessarily find an unfair labor practice based on an employer's grant of a raise to represented employees without bargaining. See, e.g., *Lee's Summit Hospital*, 338 NLRB 841, 843-44 (2003) (Board adopted ALJ finding that employer's *failure* to implement a recurring wage adjustment during bargaining was unlawful). Here, the record establishes that employees received at least two wage increases starting in mid-2015, one of which was an annual merit based increase. There is no evidence that any employees failed to get the merit increase. As such, I find that the Employer's argument that it would be an unfair labor practice to implement a wage increase during bargaining is not necessarily true. To the contrary, it may be an unfair labor practice for the Employer, during bargaining, to refrain from implementing an annual wage increase that it had given employees in the past.

[12] Note that the instant matter is distinguishable from *Flexsteel Industries*, 311 NLRB 257 (1993). In that case, the Board found important the distinction between the ALJ's characterization of the statements "present benefits *would* be lost" and "the Company could not *unilaterally agree* to give a wage increase" and the actual language of the employer's letter which read "present benefits *could* be lost" and "the Company could not *unilaterally give* a wage increase." (Emphasis added.) Based on that distinction, the Board found no 8(a)(1) violation because the letter merely contained statements of what could lawfully happen during contract bargaining. *Id*., citing *Montrose-Haeuser Co.*, 306 NLRB (1992) (statement in employer's literature that "while bargaining goes on, wages and benefit programs typically remain frozen until changed, if at all, by contract" held not unlawful) and *Oxford Pickles*, 190 NLRB 109 (1971) (accurate statements of law and facts did not amount to implied threats). Here, the language in the USIC Guarantees document must be read in connection with the statement that other CWA employees' wages have been frozen for months during contract negotiations in another locality. In light of that the Employer's implied threat more reasonably suggests that contract negotiations wage freeze *would* occur if the Petitioner won the election. Nevertheless, the Board in *Flexsteel Industries* was not analyzing the implied threat under the standard used here, i.e., the multi-factor analysis used to determine whether conduct had a tendency to interfere with employee free choice. Thus, it is possible to find that the Employer's implied threat of a contract negotiations wage freeze in this case interfered with employee free choice even if it might not be deemed a violation

objectionable conduct, i.e., the implied threat discussed above in Objection 9(e) and considering the Employer's slim margin of victory, the widespread dissemination of the campaign materials to all employees, the close proximity of the dissemination to the election date, and the fact that the materials were undersigned in part by a high ranking official. See *Student Transportation of America, Inc.*, 362 NLRB No. 156 slip op. at 2 (2015) and *Avis Rent-A-Car System, Inc.*, 280 NLRB 580, 581 (1986).

As a result, I recommend that Petitioner's objection 9(f) be sustained.

Objection 9(g) and Objection 9(h):

In subpart (g) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "created the impression among employees that their wages will be reduced and their health insurance premium will be increased if the Union is selected." In subpart (h) of objection 9, the Petitioner alleges that the Employer's campaign materials "created the impression among employees that their wages will not be increased if the Union is selected." To the extent that these objections refer to the portion of the USIC Guarantees document addressed in Objection 9(b), I rely on that discussion. Additionally, to the extent that objection 9(h) refers to the language in the Employer's letter comparing the wages of unionized employees to the wages of the nonunion employees-at-issue, I note that an employer has a right to compare wages and benefits at its nonunion facilities with those received at its unionized locations. See, e.g., *TCI Cablevision of Washington*, 329 NLRB 700 (1999); *Viacom Cablevision*, 267 NLRB 1141 (1983). I find that there is nothing else in the record evidence, including the content of both campaign documents proffered by the Employer prior to the election, which supports this objection.

As a result, I recommend that Petitioner's objection 9(g) and (h) be overruled.

Objection 9(i):

In subpart (i) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "Created the impression among employees that they will lose current benefits, such as, PTO, paid holidays, health insurance and 401(k) if the Union is selected." The pertinent language from the USIC Guarantees document states

> USIC guarantees that if CWA Local 1101 loses the election, Hudson Valley District bargaining unit employees will not lose current benefits through trade-offs in negotiations. That includes PTO, paid holidays, health insurance including prescription coverage, wellness benefits, HSA contributions, dental, vision, and life insurance, voluntary benefits including disability, life, accident, critical illness, pre-paid legal, home and auto discounts, and the 401(k) Plan.

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of 8(a)(1) under *Flexsteel Industries*. In any event, no unfair labor practices have been alleged in this matter and thus it is not necessary to determine whether the implied threat discussed herein would violate 8(a)(1).

There is no dispute that at the time employees received the campaign materials they received the benefits listed in this portion of the USIC Guarantees document. Similar to the discussions above, that language would reasonably be read as a statement that employees may lose current benefits through tradeoffs in negotiations should the Petitioner win the election. I do not find this language to be objectionable because it links its implied suggestion of potential loss of benefits in the event of unionization to tradeoffs in negotiations, which is a suggestion of what may lawfully happen during the give and take of contract bargaining. See *Flexsteel Industries*, 311 NLRB 257 (1993) (holding that a letter that contained statements of what could lawfully happen during contract bargaining is not a threat in violation of 8(a)(1)).

Moreover, the Board has held that promises to maintain the status quo are not objectionable. See *Crown Electrical Contracting, Inc.*, 338 NLRB No. 36 (2002), citing *Weather Shield Mfg.*, 292 NLRB 1, 2 (1988), revd. on other grounds 890 F.2d 52 (7th Cir. 1989); *El Cid, Inc.*, 222 NLRB 1315, 1316 (1976). Thus, I find that the above-referenced language does not constitute an objectionable promise of benefits because at best it would be understood by employees as a promise to maintain the benefits they already enjoyed.

As a result, I recommend that Objection 9(i) be overruled.

Objection 9(j) and Objection 9(k):

In subpart (j) of objection 9, the Petitioner alleges that the Employer's campaign materials "promised the employees that if the Union is not selected the Employer will correct the employees' workplace problems and improve their working conditions." In subpart (k) of objection 9, the Petitioner alleges that the Employer's campaign materials "promised the employees that if the Union is not selected the Employer will discuss each employee's concerns with management" The pertinent language from the USIC Guarantees document states

> USIC guarantees that if CWA Local 1101 loses the election, it will keep working directly with Hudson Valley District bargaining unit employees to correct workplace problems and improve working conditions.
>
> USIC guarantees if CWA Local 1101 loses the election, USIC will treat Hudson Valley District bargaining unit employees as individuals, who will be able, on their own, to discuss concerns with management without getting a Union steward involved.

The record establishes that the Employer maintained an employee handbook that included a process by which employees could discuss their work complaints or issues with their supervisors. As such, the two above-referenced statements from the USIC Guarantees document constitute an unobjectionable promise to maintain a benefit that employees already enjoyed. Moreover, the Board has held that promises to maintain the status quo are not objectionable. See *Crown Electrical Contracting, Inc.*, 338 NLRB No. 36 (2002).

As a result, I recommend that Petitioner's objection 9(j) and (k) be overruled.

Objection 9(l), Objection 9(n), and Objection 9(o):

In subpart (l) of objection 9, the Petitioner alleges that the Employer's campaign materials "created the impression among employees that if the Union is selected there will be a strike, which will cause them to lose their jobs to permanent replacements." In subpart (n) of objection 9, the Petitioner alleges that the Employer's campaign materials "created an impression among the employees that if they abandoned their support for the Union the Employer would convey future benefits on them." In subpart (o) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "created an impression among the employees that they have a contract with the Employer guaranteeing to them all of the above, which is enforceable as such as a matter of law."

The pertinent language from the USIC Guarantees document states

> USIC guarantees if CWA Local 1101 loses the election, there will be no CWA Local 1101 strike, no Hudson Valley District bargaining unit employee will lose his job to a permanent replacement, and no Hudson Valley District bargaining unit employee will be required to pay CWA Local 1101 dues to keep their jobs
>
> …
>
> I, Rob Tullman certify that this guarantee is a contract between USIC and each USIC Hudson Valley District bargaining unit employee, and any USIC Hudson Valley District bargaining unit employee may sue USIC to enforce these guarantees. We also agree that if any statement in these guarantees is false, the National Labor Relations Board shall treat it as a material misrepresentation of fact with respect to the election in Case No. 02-RC-187600 if CWA Local 1101 loses that election."

Similar to the discussion above regarding Objections 9(e), (f), and (i), the above-referenced language from the USIC Guarantees document would reasonably be read as an implied statement that there may be a strike in the event of unionization and that may result in an employee "los[ing] his job to a permanent replacement." An employer "does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike." *River's Bend Health & Rehabilitation Service*, 350 NLRB 184 (2007) (holding that an employer's statement that the hiring of replacements "puts each striker's continued job status in jeopardy" was not inconsistent with *Laidlaw* and thus is not an unlawful threat). However, employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement. *Baddour, Inc.*, 303 NLRB 275, 275 (1991) (noting that "[t]he phrase 'lose your job' conveys to the ordinary employee the clear message that employment will be terminated" and "if the employee is also told that his/her job will be lost because of replacement by a 'permanent worker', that message is reinforced[]"). Moreover, an employer's statements that link employee strike activity to job loss are unlawful. *Id*.; see also *Wild Oats Markets, Inc.*, 344 NLRB 717, 718, 740 (2005). Statements that strikers can "lose their jobs" are unlawful even if they refer only to economic strikers. *Stahl Specialty Co.*, 364 NLRB No. 56, slip op. at 1 fn. 1 (2016).

Here, the USIC Guarantees language fails to make clear that the language regarding permanent replacements refers only to economic strikers. The plain text of the language connects unspecified strike activity with job loss, and thus would constitute coercive conduct even if it referenced an economic strike. *Id*. Because the statements in this matter are closer to those found unlawful in *Baddour, Inc.* and *Stahl Specialty Co.* and distinguishable from those in *River's Bend Health & Rehabilitation Service*, I find that they interfered with employee free choice and warrant setting aside the election results.

In addition, the above language explicitly promises in the event that the Petitioner loses the election that "no Hudson Valley District bargaining unit employee will lose his job to a permanent replacement[.]" Employees may, of course, engage in strikes without union representation. See, e.g., *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319 (2014). Hence, the above language is reasonably construed as an explicit promise by the Employer, if the Petitioner is voted down, to either refrain from using permanent replacements in the event of a strike or to immediately reinstate former strikers if permanent replacements were used in the interim. In light of the fact that employers may use permanent replacements in the event of an economic strike, the employer's guarantee would be a promise to employees to refrain from doing something it could otherwise legally do. Moreover, under *Laidlaw* and its progeny, employees previously engaged in an economic strike do not have a right to immediate or guaranteed reinstatement if their positions have been filled by permanent replacements. See, e.g., *River's Bend Health & Rehabilitation Service*, 350 NLRB at 185 (explaining that, under *Laidlaw*, et al., "[i]f, at the conclusion of an economic strike, the strikers' positions are filled by permanent replacements, the employer is legally justified in not reinstating the strikers"). Thus, the Employer's explicit guarantee that no employee would lose his job to a permanent replacement in the event of a strike is a promise of an additional right that employees do not enjoy under Board law. This construction of the language is bolstered by the explicit "guarantee" by Rob Tullman that each of the guarantees described in the document are enforceable as a contract. The implication of this is that an employee would believe he could sue the Employer in the event he was displaced by a permanent replacement if he engaged in a strike without representation. This is a promise of benefit.

The Employer offers no explanation for these promises, let alone an explanation that could be deemed a legitimate business reason for the timing of the announcement. Moreover, the promise is explicitly conditioned upon the Petitioner losing the election.[13] Therefore, in the absence of any explanation or legitimate business justification I find the promise of benefit to interfere with employees' free choice. *Sun Mart Foods*, 341 NLRB 161 (2004).

As a result, I recommend that Petitioner's Objections 9(l), (n), and (o) be sustained.

Objection 9(m):

[13] On a related note, I find that the Employer's disclaimer found at the top of the USIC Guarantees document that reads, in part, "Federal law prohibits USIC Locating Services, LLC (USIC) from making bargaining unit employees any promises concerning the terms and conditions of their employment pending a union election[,]" is immaterial because the Employer in fact expressly or impliedly promised a benefit in other parts of the USIC Guarantees document. See *Unifirst Corporation*, 361 NLRB No. 1 slip op. at 1 fn. 3 (2014) and *G & K Services, Inc.*, 357 NLRB 1314, 1316 (2011), quoting *Michigan Products, Inc.*, 236 NLRB 1143, 1146 (1978).

In subpart (m) of objection 9, the Petitioner alleges that the Employer's aforementioned campaign materials "informed employees that they were being denied wage increases because of the Unions' presence." I find that there is nothing in the record evidence, including the content of both campaign documents proffered by the Employer prior to the election, which supports this objection.

As a result, I recommend that Petitioner's objection 9(m) be overruled.

Prior Regional Decisions Upholding Similar "Guarantees" Documents:

The Employer argues that I should not find the content of the USIC Guarantees document to be objectionable because two other Regions dismissed election objections to "virtually identical" documents. On April 2, 2004, Region 9 of the NLRB conducted an election at an Extendicare facility in London, Ohio. The union lost that election 11 votes to 21 with 2 challenged ballots. See Er. Br., Ex. 2. The union subsequently filed objections based on the employer's pre-election distribution of an "Extendicare Guarantees" document, which I find to be substantially similar to the USIC Guarantees document at issue in this matter. *Id*. On July 29, 2004, the Regional Director of Region 9 issued a three-page Report on Objections and Recommendations to the Board that recommended the objections be overruled in their entirety. On September 8, 2004, the Board issued an unpublished one-page Decision and Certification of Results of Election adopting the Regional Director's findings and recommendations. Er. Br., Ex. 3. [14]

I find that the underlying Report on Objections and the unpublished Board decision certifying the election results do not preclude a finding that portions of the instant USIC Guarantees document are objectionable on different legal grounds. Specifically, my recommendations to sustain Petitioner's objections 9(e), (f), (l), (n), and (o) are predicated on the theory that the relevant portions of the instant USIC Guarantees document constitute either implied threats or a promise of benefits. The Regional Director of Region 9 found that "each of the specific guarantees contained in the [Extendicares] document was either a statement of the employees' current benefits or an accurate statement of law." Er. Br., Ex. 2. However, No specific legal analysis was provided on the basis of any individual provisions of the Extendicares guarantees document and there is no reference to any relevant case law concerning implied threats or a promise of benefits. Moreover, I rely in my analysis on at least four Board cases that either issued after the Board's September 8, 2004 Decision and Certification of Results or were not considered in the Regional Director's decision. See *Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015); *Portola Packaging*, 361 NLRB No. 147 (2014); *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77 (1999); and *Sun Mart Foods*, 341 NLRB 161 (2004). Finally, the Board's unpublished one-page Decision and Certification of Results of Election did not consider whether the Extendicares Guarantee document may be objectionable on legal

[14] The Employer relies on this item but does not give a case citation and does not indicate whether it is an unpublished decision. Given that Er. Br. Ex. 3 indicates on its face that it is not to be included in bound volumes and that Decision cannot be found based on its date of issuance in the relevant volume of published Board Decisions, I conclude that it is an unpublished decision that is not binding precedent. *Associated Charter Bus Co.*, 261 NLRB 448, 450 fn. 7 (1982).

grounds different than those relied upon by the Regional Director in his Report on Objections and Recommendations to the Board.

I also find, for reasons similar to those addressed above, that the Supplemental Decision, Order, and Certification of Results of Election that the Regional Director of Region 25 issued on January 17, 2006 (herein "Supplemental Decision") concerning objections to an employer's campaign document similar to the instant USIC Guarantees document does not preclude a finding that portions of the latter are objectionable. There is no evidence that the Board issued any decisions regarding that matter or considered the Supplemental Decision.

The Supplemental Decision relies on *Langdale Forest Products Company*, 335 NLRB 602 (2001), which is distinguishable from the instant case. First, *Langdale* dealt with unfair labor practice allegations in the context of a unionized employer's conduct occurring during the campaign prior to a decertification election. There, the Board determined that the employer's conduct did not amount to a violation of 8(a)(1), and it did not engage in the multi-factor analysis of whether the conduct interfered with employee free choice. The latter is the standard I am bound by in determining whether the objections to the election should be sustained and, while I am not precluded from considering unfair labor practice cases addressing similar conduct, ultimately the instant question is whether the employer's conduct interfered with employee free choice. Thus, I find *Student Transportation of America, Inc.* to be more on point to the instant matter than *Langdale* because the former engages in such an analysis and the latter does not.

Second, unlike this case, the employer's statements in *Langdale* do not include any reference to job loss. Here, the Employer's USIC Guarantees document (1) references the employer's ability to discharge employees because of their support or nonsupport of the Petitioner and (2) links unspecified strike activity with job loss. More, the Employer's letter highlights its authority to terminate employees by its language touting the termination of union members who "stayed fired." The employer's statements at issue in *Langdale*, however, reference only wages, benefits, and generic improvements. Thus, the severity of the incidents in this matter are distinct from those in *Langdale*. See *Center Service System Division*, 349 NLRB 729, 745 (2005) ("[t]he threat of job loss is one of the most flagrant examples of interference with Section 7 rights").

Finally, the Supplemental Decision concludes that its guarantees document language referencing termination[15] "is merely a promise by the Employer to abide by its obligation under the NLRA not to discharge an employee because of his or her union activities" and that "[t]he fact that the Employer limited its guarantee to abide by their lawful obligations only to the circumstance where the Petitioner is rejected, does not make the statement unlawful." Er. Br., Ex. 5. I disagree. I find that it is precisely the conditional language that converts what may otherwise be a true statement of law into a veiled threat of discharge in the event of unionization. See discussion of Objection 9(e), *infra*. Moreover, I disagree with the conclusion in the Supplemental Decision that "[u]ltimately, the Employer can only be held accountable for the statements that it actually issued in its "Extendicare Guarantees" document." Er. Br., Ex. 5. It is

[15] That language is substantially similar to the language found in the USIC Guarantees language discussed in the section on Petitioner's objection 9(e), *infra*.

well settled that the Board is not precluded from reading implied threats or promises into an employer's statements. See, e.g., *Student Transportation of America, Inc.*, In any event, because (1) *Student Transportation of America, Inc.* and other cases that I rely on in this report were issued after both of the aforementioned Regional reports issued or were not considered therein and (2) the circumstances surrounding election are different, including the timing of the distribution of the statements and the margin of victory, I recommend that the USIC Guarantees document be scrutinized in this matter even in light of those reports.

CONCLUSION

I recommend that the Petitioner's objections be overruled in part and sustained in part. The Petitioner has established that one of its objections to the election held on November 30, 2016 reasonably tended to interfere with employee free choice. Specifically, I find that the objectionable conduct referred to above in Petitioner's objections 9(e), (f), (l), (n), and (o) interfered with employee free choice. Critically, it must be reiterated that this election was decided by a single vote and the allegedly objectionable campaign materials were undersigned by the president & CEO of the company and distributed to *all* employees just two days prior to the election. Those factors weigh heavily in my conclusion that employee free choice was affected by the Employer's conduct. See *Student Transportation of America, Inc.*, 362 NLRB No. 156 (2015) (implied threat of job loss sufficient to overturn election where union lost by a single vote); *Hopkins Nursing Care Center*, 309 NLRB 958 (1992) (single threat of a loss of benefit sufficient to overturn election where union lost by a single vote).

Therefore, I recommend that Petitioner's objections 9(e), (f), (l), (n), and (o) be sustained, the election results be set aside, and a new election be ordered.

APPEAL PROCEDURE

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 02 by April 5, 2017. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, [Regional address].

Pursuant to Sections 102.111 – 102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 5:15 P.M. on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Eastern Time on the due date.

Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated: March 21, 2017

NICHOLAS A. ROWE
Field Attorney