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October 10, 2008

Electronically and via UPS

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001

Re: **DLC Corp. d/b/a Tea Party Concerts and/or Live Nation and I.A.T.S.E., Local 11 Case No. 1-RC-22162**

Dear Mr. Heltzer:

Enclosed please find an original and eight copies of the Petitioner's Exceptions to the Hearing Officer's Decision and Recommendation on Objections and Petitioner's Brief in Support of Exceptions to the Hearing Officer's Decision and Recommendation on Objections in the above referenced matter.

Thank you.

Sincerely yours,

Gabriel O. Dumont, Jr.

Gabriel O. Dumont, Jr.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

DLC CORP. d/b/a TEA PARTY CONCERTS
and/or LIVE NATION,
Employer

and Case 1-RC-22162

IATSE, LOCAL 11,
Petitioner

PETITIONER'S EXCEPTIONS TO THE HEARING OFFICER'S DECISION AND RECOMMENDATION ON OBJECTIONS

International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, Local 11 (hereinafter, "Union" or "Local 11") hereby asserts the following Exceptions to the Hearing Officer's Report and Recommendation on Objections in the above-captioned case:

1. The Hearing Officer erred when he concluded that it was not objectionable conduct for the Employer to offer all the prospective voters and to ultimately pay ten voters, 4 hours of pay, as a reward for coming to the Board election. Report and Recommendation at 15-23.

2. The Hearing Officer erred when he concluded that one cannot "distinguish the situation in which employees are paid for voting during their scheduled hours from that in the instant case on the basis that in the former situation the employees' voting is merely incidental to their working on the day of the election." Report and Recommendation at 17.

3. The Hearing Officer erred when he concluded that it was not objectionable conduct for the Employer to offer all the prospective voters and to ultimately pay ten voters, 4

hours of pay, when the payment was not linked to transportation expenses. *See* Report and Recommendation at 15 & 23.

4. The Hearing Officer erred when he concluded that the Employer had not violated the *Peerless Plywood* Rule through its agent Philip Dannemann. Report and Recommendation at 25-31.

5. The Hearing Officer erred when he concluded that DLC crew chief Lee Watkins had "called all the stagehands together on the stage and informed them that they were dismissed" prior to Dannemann making his anti-union speech. Report and Recommendation at 27.

6. The Hearing Officer erred when he concluded that Dannemann was not the agent of the Employer despite the fact that the Hearing Officer correctly concluded that "Dannemann, whatever else he might be, was an authority figure whose reasonable directives, express or implied, the stagehands would have realized they disobeyed at their peril. Therefore, when he spoke to them they were under compulsion to attend to his words because he gave them no choice." Report and Recommendation at 30.

7. The Hearing Officer erred when he concluded that "Dannemann was not an agent of the Employer because he was not subject to the latter's control in the exercise of his job functions and any supervisory authority which he may have exercised was exercised on behalf of R.E.M." Report and Recommendation at 30.

8. The Hearing Officer erred when he ruled that Local 11 was "equitably estopped from interposing Dannemann's speech as an objection to the election." Report and Recommendation at 30.

9. The Hearing Officer erred when he concluded that the Employer's repeated references to "Save Your Jobs" by voting "No" did not constitute objectionable conduct. Report and Recommendation at 4-15.

10. The Hearing Officer erred when he concluded that the "Employer's 'save-you-jobs' argument had a sufficiently rational basis that it constituted fair electioneering rather than misrepresentation." Report and Recommendation at 11-12.

11. The Hearing Officer erred by ignoring direct evidence that established conclusively that the Employer, based on its own experience, new that the message it was attempting to convey was false. *See* Report and Recommendation at 4-15.

12. The Hearing Officer erred when he concluded that the Local 11 hiring hall "is nakedly unlawful" (Report and Recommendation at 13) and when he relied, in part, on this erroneous conclusion in recommending that the Union's objection be overruled.

13. The Hearing Officer erred when he concluded that the position taken by Local 11 in an earlier proceeding in March 2006 could form part of the Employer's "sufficiently rational basis" for making "the possibility of a radical loss of job opportunities a cornerstone of [the Employer's] anti-union campaign." Report and Recommendation at 8 & 11.

14. The Hearing Officer erred when he concluded that the Union would not fulfill its obligation to represent fairly all employees who ultimately would have worked under the collective bargaining agreement, because the Union testified that it would want to include on the negotiating committee only employees who meet the voter eligibility standards and that the position taken by the Union on the composition of the future negotiating committee somehow could have become an element of the Employer's "sufficiently rational basis" for making "the

possibility of a radical loss of job opportunities a cornerstone of [the Employer's] anti-union campaign." Report and Recommendation at 8 & 11.

WHEREFORE, for the reasons set out in the Petitioner's accompanying brief, Local 11 respectfully requests that the Board reject, in relevant parts, the Hearing Officer's Report and Recommendation on Objections and ORDER that the election be set aside.

I.A.T.S.E., LOCAL 11,
By Its Attorney,

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October 10, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Exceptions to the Decision and Recommendation on Objections were served by hand on Regional Director Rosemary Pye and via Facsimile and Overnight Mail upon counsel for DLC Corp., Elizabeth Cyr, Esq., Akin, Gump, Strauss, Hauer & Feld, LLP, Robert S. Strauss Building, 1333 New Hampshire Avenue, N.W., Washington, D.C. 20036; on October 10, 2008.

Signed under oath this 10th day of October, 2008.

/s/ Gabriel O. Dumont, Jr.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

DLC CORP. d/b/a TEA PARTY CONCERTS
and/or LIVE NATION,
Employer

and Case 1-RC-22162

IATSE, LOCAL 11,
Petitioner

PETITIONER'S BRIEF IN SUPPORT OF PETITIONER'S EXCEPTIONS TO THE DECISION AND RECOMMENDATION ON OBJECTIONS

Pursuant to a petition filed by International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, Local 11 (hereinafter, "Union" or "Local 11") and in accordance with a Decision and Direction of Election that issued in January 2008, an election was conducted on June 13 & 14, 2008, at the so-called "Tweeter Center," an entertainment venue operated by Live Nation d/b/a DLC/Tea Party Concerts ("DLC" or "Employer").[1]

During the election, 103 votes were cast from a possible 134, with 48 votes having been cast for Local 11 and 53 votes having been cast against the Union. On June 20, Local 11 filed objections to conduct affecting the results of the election. On August 21-22 and September 3, 2008, a hearing was conducted on the objections before a Hearing Officer designated by the Regional Director; and, on September 29, 2008, the Hearing Officer issued his Report and

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[1] The petitioned-for unit, as amended by Local 11 and agreed to by DLC at the December 18, 2007 hearing, was as follows:

> All full-time and regular part-time stagehands, including carpenters, riggers, lighting technicians, camera operators, truck loaders and other similar technical positions employed by DLC/Tea Party Concerts engaged in the loading in, operation and loading out of equipment used in connection with the live entertainment events presented at the Tweeter Center, Mansfield, Massachusetts.

Recommendation on Objections, in which he recommended that all of the Union's objections be overruled. Local 11 has filed exceptions to certain of the Hearing Officer's findings and conclusions and this brief is submitted respectfully in support of those exceptions.

A. The Employer Offered and Paid Employees, as a Reward for Coming to the Board Election, Amounts that Greatly Exceeded Reimbursement for Actual Travel Expenses and, As Such, Engaged in Objectionable Conduct Under Well-Established Board Law.

Facts

The Employer's offer of 4-hours of pay was made in a May 6, 2008 letter sent by the Employer's Director of Labor Relations to all eligible voters. *See* Petitioner's Exh. 2 ("If you are not on call either of the two voting days, we would encourage you to come and vote (you will be paid for a 4-hour call if you vote and are not on a call either of those days.)"). *See also* Tr. 37-38. The offer was made in what was clearly an anti-union letter that also directed eligible voters to the decidedly anti-union Employer web site, www.saveyourjobs.com. *See* Report and Recommendation at 15 ("On May 6, the Employer sent all eligible voters a letter and attached 'Questions for the Union.' The latter document and most of the letter itself consisted of anti-union campaign propaganda, but neither document in express terms solicited the employees to vote 'no.'").

The value of the offer ranged from a high of $94.76 ($23.69/hour x 4) to a low of $40.00 ($10.00 x 4). *See* Petitioner's Exh. 12. The June 13 and 14 work calls were not made until about June 6. *See* Tr. 374. Thus, the monetary offer conferred a potential benefit on all eligible voters and not just voters who actually received the payments. In actuality, ten eligible voters received payments in accordance with the offer:[2]

[2] Local 11 lost the election by 5 votes with a tally in favor of the Employer of 53 to 48. *Cf. Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002) (Objections must be carefully scrutinized in close elections).

Name of Voter	*Voter's Address*[3]	*Amount Paid*
Colby, Austin	Acton, MA	$60.00
Ebbs, Thomas	Weymouth, MA	$60.00
Ferri, Richard	Coventry, RI	$80.00
Girard, James	Falmouth, MA	$68.00
Hagopian, Stephen	E. Bridgewater, MA	$68.00
Ippoliti, Francis	Norwood, MA	$60.00
Kaplan, David	Quincy, MA	$60.00
Lewis, Corbin	Woburn, MA	$68.00
Mobley, Jacob	Medfield, MA	$56.00
Santos, Richard	E. Providence, RI	$66.00

Argument

The Hearing Officer spends almost a full nine pages of his Report and Recommendation addressing Objection #2. Report and Recommendation at 15-23. From the length and meanderings of his efforts on this objection, one could reasonably conclude that this objection broke new ground. However, such is not the case. Rather, instead of performing the required function of applying established Board law, the Hearing Officer has spent those nine pages musing and philosophizing on what the law, in his opinion, should be. This, of course, was clear error.

In this regard, in *Sunrise Rehabilitation Hospital*, 320 NLRB 212, 212 (1995), the Board held that "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses … [constitute] objectionable conduct." In *Lutheran Welfare Services of Northeast Pennsylvania*, 321 NLRB 915, 915 (1996), the Board, subsequently, held that the Board does not even have to address the issue of whether the offer to pay represents a non objectionable offer of reimbursement of actual transportation expenses, if the "offer of pay was, on its face, an attempt to pay employees for the

[3] The addresses are taken from Petitioner's Exh. 3.

act of voting."[4] *See also Rite Aid Corporation*, 326 NLRB 924, 924n.1 (1998) (Board, in distinguishing the case before it from *Good Shepard Home*, 321 NLRB 426 (1996), states that "[h]ere, in contrast, in announcing to employees that it would provide 2 hours' pay in exchange for their coming to vote on their day off, the Employer did not describe this payment as reimbursement for transportation costs or other expenses associated with traveling to the worksite. Rather, it linked the payment to its antiunion message. Nor did the Employer thereafter establish that it based the payment amount on any good-faith estimate of employees' actual transportation expenses.").[5]

Lastly, in *Perdue Farms, Inc.*, 320 NLRB 805 (1996), the Board found irrelevant the fact that the objectionable payments were made "in pursuit of the goal of encouraging employees to vote" and that the offer of payment had been made to all eligible voters and not just to those employees who the employer perceived "as likely to vote against the Union." *Id.* at 805 (Member Cohen, dissenting).

On the instant facts, the offer of payments was *per se* objectionable. "First, the benefit was substantial – [in this case 4] hours' pay without the necessity of doing anything other than showing up to the Employer's facility on the day of the election." *Sunrise*, 320 NLRB at 212. *See also Lutheran Welfare Services*, *supra* (2 hours' pay objectionable); *Rite Aid Corp.*, *supra* (same). "Furthermore, this monetary payment was not linked to transportation expenses…." *Sunrise*, 320 NLRB at 212-213.[6]

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[4] In *Lutheran Welfare Services*, it does not appear that the objectionable offer of payment was linked with any anti-union message. *See also Perdue Farms, Inc.*, 320 NLRB 805 (1996).

[5] Both the *Sunrise* and *Rite Aid* decisions have been cited as controlling precedent as recently as March of this year. *See Community Medical Center*, 2008 NLRB LEXIS 73 (March 14, 2008).

[6] The then current IRS mileage reimbursement rate was $0.50.5/mile. The Employer's payment offer was made to eligible voters who lived close by to the venue. Indeed, in 4 instances, the offer was made to employees who reside in the same town in which the venue is located, *i.e.* Mansfield, Massachusetts. The round trip mileage for the

Second, the "offer was made to all employees." *Id.* at 213. Third, given both the amount (4 hours of pay) and the context of the letter in which the offer was made, employees would reasonable construe the offer not as reimbursement for actual transportation expenses but, rather, as a payment for coming in to vote. Lastly, the offer was made just a little more than 1 month before the election and made at a time when the eligible voters would not have known whether they would be on a call on either June 13 or 14.

While the Hearing Officer refers briefly to *Sunrise Rehabilitation Hospital*, he does not discuss the Board's holding and reasoning in that case nor does he explain why the Board's reasoning in *Sunrise Rehabilitation Hospital* should not govern his analysis of the objection. Moreover, the Hearing Officer does not even cite to, let alone discuss, the implications of the other decisions on point such as *Lutheran Welfare Services of Northeast Pennsylvania, supra; Rite Aid Corporation, supra;* and *Perdue Farms, Inc., supra.*

In this regard, in *Lutheran Welfare Services of Northeastern Pennsylvania*, the Board, in concluding that the employer's offer of "2 hours of pay to off-duty employees who came in to work to vote in the election" was objectionable conduct, stated as follows:

> In *Sunrise*, we held that "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses. . . . [constitute] objectionable conduct." In so holding, we found objectionable an offer of 2 hours of pay to employees not scheduled to work on the day of the election for coming in to vote.
>
> As noted by the Regional Director, it is undisputed that the instant offer of pay was similar to the offer found objectionable in *Sunrise*, as it was not linked in any way to transportation expenses. Indeed, there is no contention that the Employer's offer of payment was intended as, or perceived by employees as, reimbursement for transportation expenses. Therefore, the 2 hours of pay constituted an offer of payment for their time, and a reward for coming in to vote, and as such is objectionable under the guidelines set forth in *Sunrise*.

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employees who actually received payments were as follows: Colby - 102; Ebb – 65; Ferri – 99; Girard - 114; Hagopian – 35; Ippoliti – 35; Kaplan – 62; Lewis – 92; Mobley - 35; and Santos – 47.

> Our dissenting colleague contends that we have abandoned *Sunrise* because there is no showing that the offer of 2 hours of pay exceeded the actual transportation expenses of employees. We disagree. The offer of pay was, on its face, an attempt to pay employees for the act of voting. In the absence of any contention that the Employer was seeking to reimburse employees' transportation expenses, the offer of payment is objectionable under *Sunrise*. 321 NLRB at 915.

The facts in the instant case are identical to the facts in *Lutheran Welfare Services of Northeastern Pennsylvania*, with the exception of the fact that the Employer in the instant case offered and paid employees for 4 hours to come in to vote instead of the 2 hours of pay at issue in *Lutheran Welfare Services of Northeastern Pennsylvania*. As such, *Lutheran Welfare Services of Northeastern Pennsylvania*, which was called to the Hearing Officer's attention in Local 11's post-hearing memorandum, clearly deserved at least an acknowledgement by the Hearing Officer in his Report and Recommendation. Of course, had the Hearing Office acknowledged the existence of *Lutheran Welfare Services of Northeastern Pennsylvania* in his Report and Recommendation, he would have had to arrive at a contrary conclusion, which would not have squared with his belief of what the law should be.

B. The Employer Violated the *Peerless Plywood* Rule through its Agent Philip Dannemann.

Facts

Philip Dannemann, as Stage Manager for the band REM, working together with the Employer's Crew Chief, Lee Watkins, was responsible for the load in and set up of the show that was performed on June 13, for the actual show performance and for the load out of the show. Dannemann acted directly as a supervisor/manager of the local stagehands; and Dannemann, either acting alone or through his department heads who were part of the REM traveling crew, supervised the local stagehands by providing instruction and direction; by assigning the employees to work with the touring crew; by overseeing the placement, assembly and testing of equipment; by deciding the number of employees to be assigned, to

work the show call and to be cut or retained; by determining the timing of the cut; and by conveying the cut to the employees.[7] Tr. 86-87, 91 & 365. Additionally, Dannemann evaluated the employees' performance and set forth required tasks for the afternoon. Tr. 365. Finally, as was the practice, Dannemann addressed the employees on the dock prior to dismissing them.

On the morning of June 13, Dannemann and Watkins spoke concerning the election. Tr. 82 & 360. Later, Dannemann, decided to cut a number of employees and so informed Watkins in a private conversation. Tr. 91-92. At around noon, Watkins assembled a group of approximately 15-20 employees on the dock, including those who were going to be cut and those who were to continue working.[8] Tr. 92-93, 99-100, 120, 357-358, 366, 368 & 373.

Dannemann called the employees together and stated that he had been all over the country and had worked with several stagehand unions and that Local 11 was one of the worse stagehand unions in the country. Tr. 92, 99 & 101. While Dannemann was addressing the assembled employees, Watkins was present, standing alongside Dannemann, and in clear view of the employees. Tr. 95, 120 & 371-372. Watkins testified that when Dannemann "began to speak and it appeared he was going to – that he was saying something concerning what the election would be, [he] stepped back and let him proceed and did not intervene in any way … or do anything." Tr. 371. None of the employees left during Dannemann's speech. Tr. 372-373. After his anti-Local 11 speech, Dannemann made a statement that would have been understood

[7] While employees began receiving direction and instruction from the touring crew at the start of the load-in, Dannemann controlled the employees by ensuring that they brought in the equipment on a timely basis, properly assembled and tested the equipment and stored different equipment. Tr. 179-180, 362-363 & 364-365.

[8] Prior to the cut, Watkins customarily asks the employees whether they are available to continue working; but the employees are not informed of whether they will be cut until they are assembled on the dock. Tr. 366-368.

by the employees that they were being dismissed.[9] Tr. 373. Only then did the employees disperse. Tr. 373. The next opportunity to vote was at 1:30 p.m. *See* Petitioner's Exh. 2.

Argument

In his Report and Recommendation, the Hearing Officer correctly concluded that: "Dannemann, whatever else he might be, was an authority figure whose reasonable directives, express or implied, the stagehands would have realized they disobeyed at their peril. Therefore, when he spoke to them they were under compulsion to attend to his words because he gave them no choice." Report and Recommendation at 30. In light of this conclusion, amply supported by the record evidence set out in summary immediately above, Dannemann clearly was an agent of the Employer.

In this regard, the Board applies common law agency principles to determine the existence of an agency relationship. The Board, therefore, may "find an agency relationship between the purported agent and the principal where the agent possesses either actual or apparent authority to act on the principal's behalf.... For responsibility to attach under either theory, it is not necessary that the principal expressly authorize, actually desire, or even know of the action in question." *Wal-Mart Stores, Inc.*, 350 NLRB No. 71, at p. 24 (2007). *See also* 29 U.S.C. §152(13).[10]

In the instant case, the local stagehands were/are employees of the Employer and not REM. Nevertheless, as concluded by the Hearing Officer, Dannemann "was an authority figure

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[9] In his testimony, Watkins conceded that, after Dannemann's speech, Watkins informed the employees to, "Have a good day and we'll see you at 10:30" - thus cutting the employees. Tr. 124 & 359. Further, Bryan Salmon, an employee present on the dock, testified that the employees were cut by Watkins after Dannemann's speech. Tr. 122. In addition, David Connell, while passing by the dock, observed Dannemann and Watkins and overheard Watkins' cut and observed that, thereafter, the employees dispersed. Tr. 124.

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

whose reasonable directives, express or implied, the stagehands would have realized they disobeyed at their peril." Necessarily imbedded in this conclusion is a finding that Dannemann had both actual and apparent authority to act on behalf of the Employer since, otherwise, the local stagehands would have had no reason to view Dannemann as "an authority figure" to be disregarded at their peril. Therefore, Dannemann was an agent of the Employer when he gave his anti-union speech.

In arriving at a contrary conclusion, the Hearing Officer simply held that "Dannemann was not an agent of the Employer because he was not subject to the latter's control in the exercise of his job functions and any supervisory authority which he may have exercised was exercised on behalf of R.E.M." Report and Recommendation at p. 30. Not surprisingly, the Hearing Officer does not cite to any Board authority that supports his conclusion that an individual can be an agent of an employer only if he is subject to the employer's "control in the exercise of his job functions." As noted above, it is well-settled that agency is determined based on whether the individual, in this case Dannemann, possessed either the actual or apparent authority to act on behalf of the Employer – not on whether the Employer had actual authority to control Dannemann.

Accordingly, it appears clear that, based on the Hearing Officer's own findings, Dannemann was an agent of the Employer. In addition, the Hearing Officer correctly concluded that the meeting was compulsory and that it involved a massed assembly of prospective voters. *See id.* at 30-31 ("Therefore, when he spoke to them they were under compulsion to attend to his words because he gave them no choice not to. Since it would not be reasonable to consider this voluntary attendance, there would be a violation of the *Peerless Plywood* rule if the Employer could be made responsible for Dannemann's conduct."). Therefore, the Employer, acting

through its agent, Dannemann, violated the *Peerless Plywood* rule, which was objectionable conduct.[11]

Lastly, in support of his recommendation that Objection 7 be overruled, the Hearing Officer applied his own notion of equitable estoppel, based on an email that had been sent by Local 11 to the REM's manager and lawyer soliciting support from the band and the road crew. Again, not surprisingly, the Hearing Officer is unable to point to any decision in which the Board applied similar principles of equitable estoppel in overlooking clear violations of the rights of employees.

In this regard, in applying his own brand of equitable estoppel, the Hearing Officer forgot, or at least ignored, that the Act, in general, and the *Peerless Plywood* rule, in particular, exist to protect employee rights and not the rights of the Union or the Employer for that matter. As such, estoppel notions based on the conduct of Local 11 have no place in an analysis of whether the *Peerless Plywood* rule was broken. *See Peerless Plywood*, 107 NLRB at 429-430 ("We institute this rule pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammeled choice. Implicit in this rule is our view that the combined circumstances of (1) the use of company time for preelection speeches and (2) the delivery of such speeches on the eve of the election tend to destroy freedom of choice and establish an atmosphere in which a free election cannot be held. Also implicit in the rule is our judgment that noncoercive speeches made prior to the proscribed period will not interfere with a free election, inasmuch as our rule will allow time for their effect to be neutralized by the impact of other media of employee persuasion.").

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[11] In addition to its agency argument, Local 11 also argued that the presence of Watkins two feet from Dannemann was sufficient to impute to the Employer Dannemann's anti-union captive audience speech. See *NLRB v. Litho Press of San Antonio*, 512 F. 2d 73, 75 (5th Cir. 1975). The Hearing Officer did not address, at least directly, this argument in his Report and Recommendation.

C. The Employer's Repeated "Save Your Jobs" by Voting "No" References Constituted Objectionable Conduct.

Facts

In his Report and Recommendation, the Hearing Officer noted that "the Board will find an objection to the election when the misrepresentation is accompanied by an aggravating factor such as forgery … or improperly involving the Board processes…"; and that it "would certainly be plausible to maintain that a widely disseminated threat of job loss is such an aggravating factor and *in the instant case the Employer went so far as to make the possibility of radical loss of job opportunities a cornerstone of its anti-union campaign*." Report and Recommendation at 11 (emphasis added).

In this regard, throughout the campaign, the Employer maintained a web site at www.saveyourjobs.com and repeatedly directed all eligible voters to that web site. *See* Petitioner's Exhibits. 2 & 11(a)-11(c). Each page of the website contained the caption: "Boston Stagehand Organizing Info" bracketed on both sides by the words "SAVE YOUR JOBS." *See* Employer Exh. 2. According to the Employer's own witness, the Employer's intent in using the domain name in the masthead of the web site pages "was to convey to the employees that by voting against the Union they would be saving their jobs." Tr. 298.

Argument

In recommending that this objection be overruled, the Hearing Officer concluded "that the Employer's 'save-your-jobs' argument had a sufficiently rational basis that it constituted fair electioneering rather than misrepresentation." Report and Recommendation at 11-12. In arriving at this conclusion, the Hearing Officer focused on the lengthy and convoluted testimony that was offered by the Employer in an effort to suggest that the Employer had a good faith belief that the rules governing the operation of the Local 11 hiring hall could jeopardize the jobs of the

Tweeter Center voters, while ignoring completely the direct evidence that established that the Employer, based on its own experience, new that the message it was attempting to convey was false.

In this regard, Douglas Borg, the Employer's Senior Vice-President of Venues in New England, testified that the Bank Boston Pavilion had been organized by Local 11 in 2000 or 2001; that, subsequently, no Pavilion employee had been displaced as a result of the rules governing the Local 11 hiring hall; and that many of the "A" list employees were, in fact, original Pavilion employees. Tr. 404-407; Employer Exh. 17. This evidence is not even mentioned in the Hearing Officer's Report and Recommendation.

In addition, in support of his recommendation regarding this objection, the Hearing Officer also stated that "even if paragraph 7 of the 'Newly Organized Workers' provision operates as the Petitioner claims and hence would have forever protected the job opportunities of the eligible voters from infringement by the A through C list employees, the fact remains that apart from this exemption preference in the Petitioner's hiring hall is based upon work performed under IATSE collective bargaining agreements and thus is nakedly unlawful." Report and Recommendation at 13. The Hearing Officer's conclusion is erroneous.

In this regard and, as pointed out to the Hearing Officer in the Local 11 post-hearing memorandum, membership in Local 11 is not a prerequisite to either referral from the hiring hall or for working under a Local 11 collective bargaining agreement, *i.e.* the Local 11 agreements do not contain union security provisions. Tr. 406. Additionally, an individual's position on the referral list is not contingent on whether the individual is a member of Local 11 or on the length of time he/she has been a member of Local 11. For example, the so-called "Pavilion" employees

were organized in 2000-2001, yet a number of those employees are identified in the record as having positions on the "A" list of the Local 11 Hiring Hall. *See* Tr. 404-405.

In support of his assertion that the Local 11 hiring hall is "nakedly unlawful," the Hearing Officer cites *Seafarers' International Union*, 244 NLRB 641 (1979), and *Bechtel Power Corp.*, 223 NLRB 925, 932-93 (1976). Neither decision, however, supports the Hearing Officer's ultimate conclusion. In this regard, in *Seafarers' International Union*, the Board held as follows:

> Contrary to the Administrative Law Judge, we find that the General Counsel has established a Prima facie case that Respondent's implementation of its hiring hall referral system, in strict adherence to the seniority preferences *and in tandem with the union-security requirements upon signatory employers*, unlawfully favors job seekers who are union members over nonmembers and also requires signatory employers to discriminate with respect to hiring. 244 NLRB at 642 (emphasis added).

Additionally, the Hearing Officer failed to discover that the Board's Decision and Order in *Bechtel Power Corp.*, 223 NLRB 925 (1976), was modified by the Board in *Bechtel Power Corp.*, 229 NLRB 613, 613 (1977), to reflect the fact that the "maintenance and enforcement of a collective bargaining agreement containing an exclusive hiring hall arrangement under which preference was given to applicants who were represented by Respondent Local 322 at prior places of employment" was not a per se violation of the Act because the union did not require union membership as a condition of employment under its agreements.

Lastly, in further support of his recommendation that this objection be overruled, the Hearing Officer stated as follows:

> The Employer's Director of Labor Relations, Andrea Sweeney, testified that the Petitioner's position as to who should be allowed to vote in 1-RC-22005 was the other factor, besides its hiring hall structure, which motivated the Employer's save-your-jobs campaign. But there could only be a causal link between the eligibility formula which the Petitioner had sought and a loss of work opportunities for the employees whom the Employer regarded as its current employees if that formula was also incorporated into the unit description, thereby restricting the Petitioner's duty of fair representation, if it had won the election, to a correspondingly small segment of the employees who had historically done the work at the Tweeter Center. But in both 1-RC-22005 and the instant

> case, the unit was stipulated by the parties and the full-time and part-time job classifications contained therein were not further defined in those stipulations in terms of any eligibility formula. However, the Employer's legal non-sequitur proved to be well-judged, for the Petitioner also appears to have assumed that its duty of fair representation, if it won the election, would only run to the employees who qualified under the eligibility formula, for on p. 9 of the Petitioner's website during the campaign (Employer's Exhibit 7) appeared the following: "The employees, who qualify to vote under the law as set forth by the National Labor Relations Board, are the members of the bargaining unit that will sit with the union and the employer to negotiate the agreement." Report and Recommendation at 8.

There are several flaws with the Hearing Officer's reasoning set forth immediately above. First, the Hearing Officer seemingly finds relevance in the fact that in an earlier matter, 1-RC-22005, which involved a petition filed by Local 11 ***in March 2006***, the Union had argued for an eligibility formula that would have resulted, apparently, in only 17 employees being eligible to vote. However, as noted in the Decision and Direction of Election in the instant case, Local 11 argued for the eligibility formula that the Regional Director had found appropriate in her prior decision, *i.e.* employees who were employed by the Employer on at least two shows in the year prior to the issuance of the Decision and Direction of Election, which, in fact, became the eligibility formula used for the instant election. Decision and Direction of Election at 6-7.

Given this fact, it is impossible to understand how the Hearing Officer could have concluded that the position taken by the Union in March 2006 somehow could have become an element of the Employer's "sufficiently rational basis" for making "the possibility of a radical loss of job opportunities a cornerstone of [the Employer's] anti-union campaign." Report and Recommendation at 11-12.

Secondly, the Hearing Officer seemingly exhibits an unfortunate bias when he concludes that the Union would not fulfill its obligation to represent fairly all employees who ultimately would have worked under the collective bargaining agreement, because the Union testified that it would want to include on the negotiating committee only employees who meet the voter

eligibility standards. Using his own phrase, the Hearing Officer's conclusion is a "legal non-sequitur."

Conclusion

For the reasons set out in detail above, IATSE, Local 11 respectfully requests that the Union's exceptions be granted and the election results should be set aside and a new election ordered.

I.A.T.S.E., LOCAL 11,
By Its Attorney,

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October 10, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of I.A.T.S.E., Local 11's Brief in Support of Petitioner's Exceptions to the Decision and Recommendation on Objections were served by hand on Regional Director Rosemary Pye and via Facsimile and Overnight Mail upon counsel for DLC Corp., Elizabeth Cyr, Esq., Akin, Gump, Strauss, Hauer & Feld, LLP, Robert S. Strauss Building, 1333 New Hampshire Avenue, N.W., Washington, D.C. 20036; on October 10, 2008. Signed under oath this 10th day of October, 2008.

/s/ Gabriel O. Dumont, Jr.