

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

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| DLC CORP. d/b/a LIVE NATION NEW ENGLAND |) | |
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| Employer |) | |
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| and |) | |
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| INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, LOCAL 11 |) | Case No. 1-RC-22162 |
| |) | |
| Petitioner. |) | |
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ANSWERING BRIEF TO PETITIONER'S EXCEPTIONS TO THE HEARING OFFICER'S DECISION & RECOMMENDATION ON OBJECTIONS

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Dated: October 28, 2008

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TABLE OF CONTENTS

I. INTRODUCTION4

II. LEGAL STANDARD OF REVIEW6

III. ARGUMENT.....7

A. Election Objection 1: The Hearing Officer Correctly Found That Live Nation’s Campaign Website Was Not Objectionable.....7

1. Factual Background7

2. The Hearing Officer Properly Concluded That Live Nation Had A Sufficiently Rational Basis For The Content On Its Campaign Website.....8

3. The Hearing Officer Did Not Err In Finding That Live Nation’s Website Did Not Include Any Intentional Misrepresentations Constituting Objectionable Conduct.....16

B. Election Objection 2: The Hearing Officer Correctly Found That Live Nation’s Offer To Pay Non-Scheduled Employees Was Not Objectionable17

1. Factual Background17

2. Live Nation’s Settled Past Practice Necessitated The Company’s Offer To Pay Off-Duty Employees Who Voted In The Election.....18

3. The Hearing Officer Did Not Err In Finding That Live Nation’s Offer Constituted A Lawful Reimbursement & Was Not An Unlawful Reward.....19

C. Election Objection 7: The Hearing Officer Correctly Determined That Live Nation Did Not Engage In Improper Electioneering.....24

1. Factual Background24

2. The Hearing Officer Properly Concluded That Dannemann Was Not An Agent Of The Company26

3. The Hearing Officer Properly Concluded That Live Nation Did Not Conduct A Captive Audience Meeting In Violation Of The *Peerless Plywood* Rule28

IV. CONCLUSION.....31

TABLE OF AUTHORITIES

CASE LAW

| | |
|---|------------|
| <i>Albertson's Inc.</i> , 344 NLRB 1357 (2005) | 16 |
| <i>Allen's Elec. Co.</i> , 340 NLRB 1012 (2003) | 19, 23 |
| <i>Cornell Forge Co.</i> , 339 NLRB 733 (2003) | 27, 30 |
| <i>Dayton Tire & Rubber Co.</i> , 206 NLRB 614 (1973) | 16 |
| <i>Edw. C. Levy Co.</i> , 351 NLRB No. 85 (2007) | 9 |
| <i>High Point Construction Group</i> , 342 NLRB 406 (2004) | 9 |
| <i>Mgmt. Consulting, Inc.</i> , 349 NLRB No. 27 (2007) | 9 |
| <i>Midland Nat'l Life Ins. Co.</i> , 263 NLRB 127 (1982) | 16 |
| <i>New Era Cap Co.</i> , 336 NLRB 526 (2001) | 20 |
| <i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) | 8, 10 |
| <i>PPG Indus.</i> , 350 NLRB No. 25 (2007) | 30 |
| <i>Shopping Kart Food Market</i> , 228 NLRB 1311 (1977) | 16 |
| <i>Snap-On Tools, Inc.</i> , 342 NLRB 5 (2004) | 16 |
| <i>Standard Dry Wall Prods.</i> , 91 NLRB 544 (1950), <i>enf'd</i> 188 F.2d 362 (3d Cir. 1951) | 6 |
| <i>Sunrise Rehab. Hosp.</i> , 320 NLRB 212 (1995) | 22, 23, 24 |
| <i>Tri-Cast, Inc.</i> , 274 NLRB 377 (1985) | 9 |
| <i>Unifirst Corp.</i> , 346 NLRB 591 (2006) | 9 |

STATUTES

29 U.S.C. § 158.....5, 8

MISCELLANEOUS

IR-2007-192

<http://www.irs.gov/taxprob/article/0,,id=156624,00.html>21

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ANSWERING BRIEF TO PETITIONER’S EXCEPTIONS TO THE HEARING OFFICER’S DECISION & RECOMMENDATION ON OBJECTION

Employer DLC Corp. d/b/a Live Nation New England (“Live Nation” or the “Company”) submits this answering brief to the exceptions and supporting brief filed by the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, Local 11 (the “Union” or “Local 11”). Live Nation files this brief in support of Hearing Officer Don C. Firenze’s September 29, 2008 decision that recommended that each of Local 11’s Objections be overruled and that a Certification of Results of Election issue in this matter.

I. INTRODUCTION

Following the representation election held at the Comcast Center on June 13 and 14, 2008, Local 11 filed seven election objections alleging certain conduct by Live Nation interfered with the laboratory conditions necessary to conduct a free and fair election. A Notice of Hearing was issued on these objections and a hearing was held on August 21-22 and September 3, 2008. Over the course of the proceeding, the Union withdrew two of the seven objections. The

Hearing Officer determined that the remaining five objections were without merit. Local 11 has now filed exceptions to the Hearing Officer's findings related to three of the five remaining objections.

The Union argues that the Hearing Officer's conclusion that Live Nation's campaign website constituted fair electioneering was improper. The record, however, reveals that the website did not include any unlawful threats of reprisal for supporting the Union. Moreover, Live Nation had a sufficiently rational basis for the opinions, positions, and concerns expressed on the website based on its knowledge of and experiences with Local 11 and its members in the years, months, and weeks leading up to the election in this matter. As the Hearing Officer properly concluded, any inaccuracies communicated by Live Nation to its employees during the campaign period, through its website or otherwise, were not intentional misrepresentations that would constitute objectionable conduct. Rather, the record supports the Hearing Officer's finding that the website contained, "at worst, a prediction of adverse consequences based upon a misrepresentation of the Petitioner's hiring hall structure" and that such a misrepresentation would not amount to coercion under Section 8(a)(1) of the National Labor Relations Act (hereinafter the "Act").

The Union also argues that Live Nation's offer to pay off-duty employees four hours' pay for time spent participating in the election was objectionable conduct. This offer, however, was merely keeping with the Company's standard practice of compensating employees for any work-related activity that requires an employee's presence at the Comcast Center. Any deviation from this settled practice would have exposed Live Nation to allegations of disrupting the status quo as reprisal for the organizing campaign such that a free and fair election could not take place. Moreover, any payment provided to employees was intended as nothing more than a lawful

reimbursement to employees for the expense of traveling to the venue and the lost earnings associated with participating in the election. As this offer would not reasonably have been construed by employees as a reward for voting “no” in the election, it does not rise to the level of an unlawful benefit and, therefore, is not objectionable.

Last, Union alleges that the brief comments of a non-Live Nation employee, Phil Dannemann, who was, in fact, a member of IATSE on the day of the election, violated the Peerless Plywood prohibition on captive audience speeches within 24 hours of the election. The record clearly reveals, however, that the Union’s attempts to attribute Dannemann’s comments to the Company stretch the bounds of reasonable argument. In fact, the record reflects that this IATSE member spoke at the behest of the Union and that not a single Live Nation employee had prior knowledge that Dannemann intended to speak about the election or Local 11. The Union now tries to shirk responsibility for this conduct because it did not turn out quite as expected. An unwanted result, however, does not impact the analysis of this conduct, which clearly cannot be considered objectionable conduct by the Company.

In total, the Union’s exceptions are without merit. The Hearing Officer properly found that none of the Union’s stated objections interfered with the laboratory conditions necessary to conduct a free and fair election. The Hearing Officer’s decision is supported by the totality of the record and should be upheld by the Board.

II. LEGAL STANDARD OF REVIEW

The Union has excepted to several of the Hearing Officer’s conclusions, and more specifically, the credibility determinations that supported those conclusions. It has long been held, however, that the Board will not overrule a hearing officer’s credibility determinations unless a “clear preponderance of *all* the relevant evidence convinces the Board that the...resolution was incorrect.” *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), *enf’d* 188 F.2d

362 (3d Cir. 1951) (emphasis in original). Because key decisions made here by Hearing Officer Firenze involve credibility findings, as discussed herein, these decisions should be given appropriate deference by the Board.

III. ARGUMENT

A. Election Objection 1: The Hearing Officer Correctly Found That Live Nation's Campaign Website Was Not Objectable

1. Factual Background

In 2006, Local 11 filed a petition seeking to represent employees at all of Live Nation's non-unionized venues in the metro-Boston area. Hearing Officer's Report & Recommendation at 3-4 (hereinafter "Report"); Emp. Ex. 12. In response to this organizing effort, Live Nation created a website entitled "saveyourjobs.com" as a campaign tool. Report at 4; Tr. 258-60; Emp. Ex. 1, 2. In 2008, Live Nation, again, used the same website as a campaign tool to communicate with its employees during the organizing campaign at the Comcast Center. Report at 4; Tr. 258-60.

Live Nation's website included only factual information about Local 11, its referral procedures, the Company's experiences with Local 11 at other unionized Live Nation venues, the local stage labor market, and the collective bargaining process. Specifically, the website voiced the Company's concerns that unionization of the Comcast Center may result in long-term Live Nation employees losing their jobs to senior Union members. Report at 4-8; Tr. 258-59; Emp. Ex.1. The website theme was in no way a threat that Live Nation may reduce jobs or terminate employees as reprisal for supporting the Union. Report at 11; Emp. Ex.1. As noted by the Hearing Officer, it was "abundantly clear" that the "save your jobs" slogan solely referenced the "the possible impact of the Petitioner's hiring hall structure on the job opportunities of the current [Comcast] Center employees." Report at 11. A complete reading of the website clearly

supports the Hearing Officer’s conclusion that the website’s name and overall theme were tied to the Company’s serious and legitimate concerns about the impact of unionization and implementation of the Union’s hiring hall regulations on its employees. Emp. Ex.1. The website stated:

“The union may be telling you that you will keep your jobs and that you will receive better wages and benefits. However, there is NO GUARANTEE IN UNION NEGOTIATIONS.

There is a real lack of work on the union jobs right now in Boston. The most senior union members are filling calls that usually have gone to the already enrolled B and C list members since the union’s referral procedure rewards stagehands who have been members the longest, giving them first choice at all job opportunities. This means that, as a new member of the local, you may eventually get last priority on jobs that are now yours.

We strongly urge you to speak with us and the union to get all of the information you need to vote for what is best for your future and the future of all the stage employees you work with.” Emp. Ex. 1 (emphasis in original).

Other portions of the Company’s website included similar statements of concern regarding the Union’s hiring hall structure and its impact on the long-term job security of current Comcast Center employees. Report at 4-10.

2. The Hearing Officer Properly Concluded That Live Nation Had A Sufficiently Rational Basis For The Content On Its Campaign Website

Section 158(c) of the Act explicitly permits employers to express their views, arguments, or opinions on potential unionization in any form as long as “such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). The U.S. Supreme Court has similarly ruled that an employer may even share predictions about the consequences of unionization if the prediction is “carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control[.]” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Board rulings are also clear that employers may offer opinions and factual information about the consequences of unionization. *Unifirst Corp.*, 346 NLRB 591, 593 (2006) (“Under extant Board law, employers . . . may compare wages and benefits at their unionized and non-unionized facilities and may offer an opinion, based on such comparisons, that employees would be better off without a union.”). Employers may also make fact-based predictions about the economic consequences of unionization for both the company and the employees, so long as these statements are not threats to reduce employees’ wages if the union prevails in the election. *Id.*; *Edw. C. Levy Co.*, 351 NLRB No. 85 (2007) (explaining to employees that unionization could result in their replacement by striking workers lawful where union had discussed this possibility during bargaining; “[t]hat the Employer did not explain every possibility to employees does not transform its lawful statements into objectionable threats.”); *High Point Construction Group*, 342 NLRB 406, 406-07 (2004) (informing employees that one of the union’s proposed contracts would result in lower wages was not an unlawful threat); *Tri-Cast, Inc.*, 274 NLRB 377, 378 (1985) (informing employees of reasonable possibility that unionization might result in less business and less jobs was not an objectionable threat of retaliation even if this was only a “possible consequence” of unionization). Specifically, the Board has also held that employers may lawfully inform employees of the potential consequences of the union’s seniority and/or referral procedures. *See Mgmt. Consulting, Inc.*, 349 NLRB No. 27 (2007) (upholding ALJ ruling that employer lawfully made predictions about employees being placed at the bottom of the union seniority list and, therefore, losing their jobs, because its prediction was based on demonstrably probable consequences beyond its control). Thus, as the Hearing Officer correctly found, when employer campaign communications concern matters outside of the control of the employer, the communications must only be “carefully

phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). More simply put, the employer must have a sufficiently rational basis for the content of the communication and the beliefs it is expressing to constitute fair and proper electioneering.

The record clearly supports the Hearing Officer's determination that Live Nation's website content was derived from the Company's experiences with the Union at other Live Nation venues, the local stage labor market, and factual information and objective conclusions about the Union and its referral procedures – all of which formed a sufficiently rational basis for the opinions, concerns, and conclusions expressed on the website. The Hearing Officer properly credited the testimony of Doug Borg, Live Nation's Senior Vice-President of Venues for New England, and Andrea Sweeney, Live Nation's Director of Labor Relations, who testified as to their varied experiences regarding Local 11 and its members. Report at 7-8. Both Borg and Sweeney testified that these experiences formed the basis of the Company's concerns regarding the long-term job security of its employees pursuant to the Union's hiring hall regulations. Report at 7-8; Tr. 258-60, 285-87, 379-82, 416-18. For these reasons, the Hearing Officer correctly determined that the website content did not interfere with the laboratory conditions necessary for a free and fair election and, as such, did not constitute objectionable conduct.

The Hearing Officer properly concluded that Company's experiences during the 2006 organizing effort and the positions advocated by Local 11 during that proceeding formed, in part, Live Nation's rational basis for the positions asserted on the campaign website. Report at 6-8; Tr. 258-60; Emp. Ex.1. Specifically, the Hearing Officer found that the Company's belief that its employees risked losing their jobs at the Comcast Center if the Union prevailed in the election was initially formed in the early stages of the Union's 2006 organizing effort. Report at 8. Prior

to the initiation of this earlier proceeding, Live Nation was aware that the Union had historically used its seniority-based hiring hall regulations to preserve jobs for its most senior members. Report at 7; Tr. 190-91, 315; Emp. Ex. 7. The Company was also aware that the Union historically did not engage in a significant amount of organizing activity, again, as an effort to maintain most jobs for its most senior members. Report at 7; Tr. 190-91, 315; Emp. Ex.7. The Union's witness, James Flanders, a member of the Local 11 Executive Board and the Organizing Committee, testified to these historical practices, confirming that the Union's hiring hall regulations were designed to favor Local 11's most senior members and that the Union had only minimal organizing activity throughout recent years.¹ Report at 7; Tr. 190-91.

With this historical backdrop to Local 11's 2006 organizing effort, the Company became concerned when the Union proposed an eligibility formula that would have greatly limited the number of employees eligible to vote in the representation election. Report at 7; Tr. 379-80; Emp. Ex.12. The Company was concerned by the significant difference in the number of eligible voters enfranchised by its proposed formula, which would have resulted in approximately 220 eligible voters, in comparison to the voters enfranchised by the Union's formula, which would have resulted in approximately 17 eligible voters. Report at 7; Tr. 378-80; Emp. Ex.12. Given the Union's historical tendencies to favor its most senior members and seek jobs only for those senior members, Live Nation believed that the eligibility formula proposed by the Union evidenced an intention to have a small number of Union members determine whether unionization was in the best interest of the entire workforce. Report at 7-8; Tr. 379-80, 315. The

¹ The Hearing Officer concluded that the Union had revised its approach to organizing new employees in 2003. Report at 7, fn. 6. The Company, however, would obviously not have been aware of, let alone privy to or in control of, this internal change in strategy by the Union. Rather, the Company's knowledge of the Union's practices were based largely on Local 11's organizing effort at another Live Nation venue, the Bank of America Pavilion, which was organized in 2000 or 2001. Tr. 404.

Company perceived the Union's eligibility formula, essentially, as an acknowledgement by Local 11 that the greater workforce may not see the same benefit in unionization as the small number of enfranchised voters, many of whom had been working out of the Union's hiring hall for many years, due to a hiring hall that benefited the most senior members of the Union. When the Regional Director issued a Direction of Election with an eligibility formula that resulted in 190 eligible voters, the Union withdrew its petition – which did little to pacify Live Nation's concerns about the Union's motives.² Report at 3; Tr. 379; Emp. Ex.12.

Live Nation's concerns about unionization continued to develop between the 2006 and 2008 organizing efforts. Borg testified that prior to the 2006 organizing, the Company was already aware that many long-term employees who worked at the unionized Bank of America Pavilion ("Pavilion") at the time of that venue's organizing were no longer working there.³ Tr. 270-71, 312, 381-82; Emp. Ex.13. By 2007, the Company had seen a significant shift in how jobs at the Pavilion were staffed, as most crew calls were filled primarily with A-list, senior

² The Union argues that the Hearing Officer erred when he concluded that Local 11's conduct during the 2006 representation proceedings could form part of the Company's sufficiently rational basis for the concerns expressed on its website during the 2008 campaign. The Union, however, does not cite to any case or provide any legal support for its assertion that a union's prior conduct cannot form the basis of an employer's opinions and beliefs regarding the value of union representation. In fact, it is precisely these types of prior experiences that typically form the foundation of an employer's opinions regarding unionization. It is undisputed that an employer can lawfully speak to employees regarding its company's prior experiences with unions. Thus, it is absurd to conclude that employers would be prohibited from using those same prior experiences as the basis of the opinions and positions regarding unionization contained in campaign literature.

³ The Union argues that the Hearing Officer ignored direct evidence establishing that the Company knew that its campaign messages were false. The Hearing Officer's finding to the contrary, however, is based on his credibility determinations to which the Board gives great deference and, thus, should not be disturbed in this instance. Even assuming that the Hearing Officer's findings should be reviewed by the Board, the Union's assertion grossly misstates the record. The Union states that Borg was aware that "no Pavilion employee had been displaced as a result of the rules governing the Local 11 hiring hall" and that this acknowledgement alone evidences that the Company knew its campaign message was false. In fact, what the record reveals is that Borg was aware that some Pavilion employees were no longer working at the venue while others continued their employment with the Company. Tr. 404-05. Borg testified that he was unaware of the reasons why certain employees were no longer with the Company but the mere depletion of the workforce heightened his concerns about the impact of unionization on Live Nation employees. Tr. 380-82. This testimony simply does not demonstrate that the Company was intentionally communicating false information to its employees. Rather, this testimony provides further support that Live Nation's communications were rationally based on objective facts and information constituting fair electioneering.

Union members, rather than the newer, less senior C-list or D-list employees that had typically filled the calls previously. Tr. 260, 394-98; Emp. Ex.17-18. Borg and Sweeney both testified that, in 2007, the Company was shocked to learn that many senior, highly-paid, theatrical stagehands had taken the extraordinary step of working at the Pavilion on load-out shifts that paid up to \$13-16/hour below their typical wage rates. Tr. 285-87, 401, 416-18; Emp. Ex.17-18. Moreover, senior Union members were acknowledging to Live Nation management a downturn in the local labor market as well as expressing an interest in jobs at the Comcast Center should the venue unionize. Tr. 313, 340, 398-99; Emp. Ex.19, 21. The Hearing Officer properly credited the testimony of Borg and Sweeney regarding the Company's experiences and the information its managers were receiving from senior Local 11 members. Report at 7-8. The testimony by Borg and Sweeney offered yet another sufficiently rational basis for the content of the Company's campaign website.

As the Hearing Officer properly found, the Company's understanding of the Union's hiring hall regulations also formed a sufficiently rational basis for the content of the Company's website. Given the Live Nation's concerns regarding job security for its employees, the Company felt it was important to have a full understanding of the consequences of unionization on its employees, many of whom were long-term employees with up to 30 years of service at the venue. Tr. 387; Emp. Ex.16. The Union's hiring hall rules, however, offered little clarity on this issue. Report at 12-14. The Hearing Officer undertook a lengthy and detailed analysis of Local 11's hiring hall structure and its governing regulations, with particular attention to the provision regarding newly organized employees.⁴ Report at 12-14. The Hearing Officer correctly

⁴ Notably, the Union does not object to the Hearing Officer's findings regarding the drafting and interpretation of its hiring hall provision that addresses newly organized employees, which was clearly the focus of the Company's expressed concerns. The Union, however, does object to the Hearing Officer's claim that certain

concluded that Live Nation's interpretation of these rules, and the newly organized employees provision specifically, was reasonable and the Company's concern about the possible detrimental impact the hiring hall could have on Comcast Center employees was derived from this reasonable interpretation of the regulations. Report at 12-14.

Specifically, the record reflects that the hiring hall regulations appear to be both earnings and seniority based, creating a contradiction within the rules. Tr. 195; Emp. Ex.16; Pet. Ex.10. Additionally, the regulations offer a four-year guarantee of job priority to newly organized members but do not specify what occurs at the end of that four year period. Report at 12-14; Tr. 248-49, 260-61, 270; Emp. Ex.14; Pet Ex.10. Alison Cuff, a Live Nation employee and eligible voter, testified that she was confused as to the impact of the hiring hall structure on her job opportunities at the Comcast Center. Tr. 264-65, 410-14. The record reflects that Cuff contacted the Union to express her confusion and to seek clarification to her questions but that the Union failed to ever respond to her questions or provide an explanation of the hiring hall rules. Tr. 264-65, 410-14; Emp. Ex. 20. Even Flanders, the Union's own witness and a high-ranking Union official who had acted as the Union's business agent for 18 years, could not clearly explain the hiring hall regulations and his testimony offered more confusion than clarity in this matter, underscoring the Company's objective and reasonable basis for concern in this instance. Tr. 243-52. Based on the extensive record evidence on this issue, the Hearing Officer correctly concluded that the most natural interpretation of these regulations was the one offered by Live

portions of the regulations are "nakedly unlawful." Live Nation offers no opinion as to whether Local 11's hiring hall is per se unlawful, however, the dispute between the Union and long-tenured, experienced representative of the NLRB as to the lawfulness of these regulations reflects how challenging it is to understand these regulations and their intended impact on the administration of the hiring hall. The Union's dispute with the Hearing Officer merely underscores the conclusion that Live Nation had a sufficiently rational basis for the concerns its expressed regarding the impact of the hiring hall on its employees.

Nation.⁵ Report at 12. Thus, the Hearing Officer properly concluded that the Company's reasonable interpretation of the Union's hiring hall regulations offered an additional sufficiently rational basis for content of the campaign website.

Last, the Hearing Officer overlooked one additional, sufficiently rational basis for the opinions and concerns expressed in the Company's campaign literature. That is, based on the Company's fair and objective reading of the hiring hall regulations, Live Nation understood referral list placement for new employees to be based on a three year earnings "look back." Tr. 196, 387. For this reason, Borg performed an earnings analysis based on employee earnings for the previous three years. Tr. 387-90; Emp. Ex. 15. This analysis revealed that no employees would qualify for the A-list or B-list based on the earnings standards, save for one supervisory employee who was not a member of the bargaining unit. Tr. 389-90; Emp. Ex. 15. Only 10 employees, out of 132 employees eligible to vote in the election, would qualify for the C-list. Tr. 389-90; Emp. Ex. 15. Given the Company's experience at the Pavilion, where mostly A-list employees were filling crew calls, this objective, factual information further justified the Company's concerns and clearly provided an additional rational basis for the content of the Company's website.

The record clearly supports the Hearing Officer's findings that Live Nation had a sufficiently rational basis for the content of its campaign website. As such, the Hearing Officer properly concluded that the website constituted fair electioneering and not objectionable conduct.

⁵ As noted by the Hearing Officer, Live Nation was careful to never present its interpretation of the hiring hall regulations as the correct or applicable interpretation but rather that it was a possible reading of the rules and that "the loss of priority in obtaining work was a possibility, not a certainty." Report at 6.

3. The Hearing Officer Did Not Err In Finding That Live Nation's Website Did Not Include Any Intentional Misrepresentations Constituting Objectionable Conduct

The Union argues that the Hearing Officer erred when he concluded that the Company's campaign website and "save your jobs" theme did not constitute a misrepresentation. Local 11 argues that any misrepresentations included in Live Nation's website were per se objectionable and thus interfered with the laboratory conditions necessary to conduct a free and fair election. This argument by the Union, however, misstates the legal standard for campaign communications.

When an employer's rationally-based communications and opinions are ultimately determined to be inaccurate, the Board must determine whether those misrepresentations rose to the level of coercion such that the necessary laboratory conditions were destroyed. *Dayton Tire & Rubber Co.*, 206 NLRB 614, 626 (1973). The Hearing Officer accurately recounted the rule applied to campaign misrepresentations, which is that generally misrepresentations do not warrant the setting aside on an election absent an aggravating factor. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982); *Albertson's Inc.*, 344 NLRB 1357 (2005). Examples of aggravating factors that can transform rationally-based, albeit inaccurate, representations into coercive conduct are forgery, the prediction of violence, or improperly involving the Board or its processes. *Albertson's Inc.*, 344 NLRB at 1357; *Snap-On Tools, Inc.*, 342 NLRB 5, 20 (2004); *Shopping Kart Food Market*, 228 NLRB1311, 1313 (1977). In the absence of this type of aggravating factor, misrepresentations in the campaign context are not considered coercive if the misrepresentation does not concern something within the employer's control. *Dayton Tire & Rubber Co.*, 206 NLRB at 626.

The Union argues that Live Nation's statements regarding possible job loss rise to the level of an aggravating factor such that the misrepresentations, if any, were objectionable. Local

11's argument, however, overlooks one critical factor relevant to this analysis – as properly addressed by the Hearing Officer – which is that any misrepresentations by Live Nation about possible job loss resulting from unionization were rationally based on objective facts and experiences forming the Company's belief regarding possible consequences outside of its control. Thus, any misrepresentations included on Live Nation's website could not be considered intentional misrepresentations.

Moreover, Local 11 suggests that the Company's rationally-based predictions and concerns can be considered an aggravating factor such that the misrepresentations should be deemed intentional. The Union's argument is unconvincing as a rationally-based campaign theme simply does not in any way equate to forgery or predictions of violence. In a campaign context, parties must be able to communicate reasonable and rational predictions, beliefs, and concerns related to unionization without fear that such comments, if ultimately proven inaccurate, could invalidate the election. In this instance, the content of Live Nation's website was nothing more than lawful, rationally-based predictions and opinions and, thus, cannot be considered intentional misrepresentations such that the election was tainted by the communication.

B. Election Objection 2: The Hearing Officer Correctly Found That Live Nation's Offer To Pay Non-Scheduled Employees Was Not Objectionable

1. Factual Background

In conformity with Live Nation's standard practice at the Comcast Center, employees eligible to vote in the representation election that were not scheduled to work on either June 13 or 14 were offered a "four-hour call", or compensation at the employee's standard hourly rate for four hours of time if they came to the facility to vote. The Hearing Officer found that employees regularly receive four hours' pay whenever they are required to report to the venue for any work-

related activity, such as orientation meetings. Report at 15; Tr. 59, 73, 76, 223. Employees are also guaranteed a minimum of four hours' pay for any shift worked at the facility, even if the employee works less than four total hours. Report at 15; Tr. 59, 73, 76, 223. Thus, four hours compensation comports with the Company's standard, minimum compensation for an employee's presence at the facility under any circumstances.

Live Nation's offer was not in any way tied to a pro-Company vote. Report at 15; Tr. 272. As properly found by the Hearing Officer, the letter in which the Company set out its offer did not solicit the employees to vote no. Report at 15; Pet. Ex. 3. Rather, as noted by the Hearing Officer, the Company's offer was explicitly tied to an encouragement that all employees participate in the election. Report at 15.

2. Live Nation's Settled Past Practice Necessitated The Company's Offer To Pay Off-Duty Employees Who Voted In The Election

Live Nation's undisputed practice was to offer employees a four-hour call for any work-related activity that required the employee's presence at the Comcast Center. Report at 15, 23. As such, this settled practice was the established status quo for the duration of the critical period surrounding the representation election. Given that Live Nation's settled practice was to compensate employees for any work-related activity, any change to that practice arguably would have altered the status quo and, thus, disrupted the laboratory conditions required to conduct a free and fair election. The Hearing Officer implicitly acknowledged that Live Nation could possibly face allegations of wrongdoing whether the Company continued or discontinued its practice. Report at 21, fn.11. The Hearing Officer's finding properly demonstrates that continuation of Live Nation's standard practice cannot reasonably be considered objectionable conduct.

The uniqueness of the Company's operations further legitimizes the decision to continue its standard four-hour call practice. Unlike most employers, Live Nation does not have an established or standard workforce and its employees have no guaranteed or regular work patterns. Tr. 68-70. Lee Watkins, the Crew Chief, contacts employees a few weeks prior to each show and determines which employees are available to work. Tr. 68-70, 353. Watkins then schedules the employees for each show based on the employee's expressed availability and willingness to work the offered shift. Tr. 68-70, 353. The election was scheduled on June 13 and 14 because those performances were identified as requiring a large complement of stage crew employees. Tr. 353-55. Despite this broad scheduling effort, approximately 50-60 employees were going to be unscheduled over the course of both days. Report at 15. Given the Company's complete control over the scheduling of employees, the Union, undoubtedly, would have filed an objection based on every scheduling decision made for the days of the election alleging discriminatory scheduling practices, whether such objections were frivolous or not.⁶ The only way for the Company to avoid any appearance of impropriety or favoritism in scheduling was to provide the minimum compensation to all employees for the time associated with voting. By conforming with its settled practice, Live Nation ensured a free and fair election.

3. The Hearing Officer Did Not Err In Finding That Live Nation's Offer Constituted A Lawful Reimbursement & Was Not An Unlawful Reward

Recent Board decisions have held that a party may lawfully compensate employees for the time and expense of coming to work to vote in an election. *Allen's Elec. Co.*, 340 NLRB

⁶ The Company's concerns are not unreasonable as evidenced by the numerous frivolous objections that were filed by the Union in this matter only to be later withdrawn. For example, the Union alleged that Live Nation allowed certain employees to vote during worktime and that these decision regarding when employees could vote were based on perceived pro-Company support. Yet the record evidence clearly revealed that both pro-Union and pro-Company employees were provided the same opportunities to vote. The Union did not have a good faith basis to raise this allegation but did so anyway underscoring Live Nation's concerns about frivolous objections.

1012, 1012-13 (2003) (holding that pre-election promises of wage reimbursement were not promises of election-related benefits); *New Era Cap Co.*, 336 NLRB 526, 526 (2001) (an employer can compensate employees for their time, where the purpose of the compensation is to encourage employees to vote). Reimbursements tied to travel or other expenses are distinguishable from benefits offered in connection with an election.

At most, Live Nation's offer to its employees constituted a lawful offer to reimburse employees for the expense and lost earnings associated with voting for off-duty employees. Tr. 271-72; Pet. Ex. 2. The Union argues that to qualify as reimbursement, the offer must be tied to the employee's travel expenses. The Union further argues that Live Nation failed to properly connect the payment to travel expenses to be deemed reimbursement. Contrary to the Union's contention, however, the Company's offer was entirely motivated by a desire to compensate employees for the time, expense, and lost earnings associated with coming to the Comcast Center.

The Comcast Center is located in Mansfield, Massachusetts, approximately 40 miles from Boston. The venue sits on the outer edge of the metro-Boston area and is not particularly accessible from many parts of Massachusetts and greater New England. Implicit in the Company's practice of providing a four-hour call for any work-related activity that brings employees to the venue, even when the activity in question does not take four full hours, is an acknowledgment of the burdensome commute and a desire to compensate employees for the time it takes to travel to the venue and reimburse the expenses associated with the travel. Moreover, any event that requires an employee to travel to the Comcast Center likely prevented that employee from accepting stagehand work at another venue, as most of these employees regularly pick up shifts at any number of venues in the area. Thus, the Company's standard practice of

offering a four-hour call to employees similarly evidences a desire to compensate employees for the earnings likely lost in order to attend a work-related event at the Comcast Center.

The Union, however, appears to argue that Live Nation needed to explicitly tie its offer to off-duty employees to travel expenses to constitute a lawful reimbursement. The Union asserts that Live Nation did not connect these payments to travel expenses. This assertion, however, ignores the credible testimony of Sweeney who explained the basis for the Company's offer. Tr. 271-72. Sweeney testified that the four-hour call was offered to off-duty employees to ensure that no one suffered a financial loss to participate in the election, either due to lost work opportunities or the expense of traveling to the venue. Tr. 271-72.

Sweeney testified that Live Nation's decision to offer reimbursement to non-scheduled employees was based, in large part, on the soaring gas prices seen throughout the region during the summer. Tr. 271-72. As noted above, the Comcast Center is located 40 miles outside of Boston and many employees live a significant distance from the facility, including many who live out of state such as Michael Anderson, who resides in Maine, or Kyle Karnan, who lives in New Hampshire. Tr. 271-72; Pet. Ex. 3. The reimbursements paid to employees following the election averaged approximately \$45-\$55 after taxes, which accounted for most, if not all, of the average employee's travel expense, based on any reasonable reimbursement rate for business-related travel. Pet. Ex. 8-9. Even the IRS acknowledges that the cost for business-related vehicle use is 50.5¢ per mile (IR-2007-192⁷), meaning an employee traveling 80 miles round trip was reimbursed properly if they received the average reimbursement.

Moreover, Sweeney testified that for stagehand employees in the entertainment industry, Fridays and Saturdays are premium work days and many voters were likely forced to forego

⁷ Viewed at <http://www.irs.gov/taxprob/article/0,,id=156624,00.html>. Effective July 1, 2008, the IRS increased the reimbursement rate to 58.5¢ per mile and Live Nation followed suit immediately.

work at other venues in order to vote. Tr. 271-72. Mid-June is the peak of the season for the Comcast Center and, presumably, most other venues in the region when numerous concerts, fairs, and events are traditionally scheduled.⁸ Thus, this election was scheduled to occur on the busiest work days during the busiest part of the season, virtually ensuring that off-duty employees were forced to turn down other work in order to participate in this election. Employees who turned down work would most likely have received at least four hours pay, if not more, depending on the venue and length of the shift they were offered. Employees could have easily lost up to \$100 by choosing to participate in the election. Tr. 12. As a result, employees would have lost potential earnings as well as spent additional money to cover the expenses associated with travel to the venue. Thus, in order to vote in the election, these off-duty employees likely would have operated at fairly significant net financial loss. Sweeney's uncontroverted testimony clearly demonstrated that the Company's offer was intended as a reimbursement to employees for the time and expense associated with participating in the election. Thus, the Company's offer was clearly a lawful reimbursement rather than an improper benefit.

The Union argues, however, that Live Nation's offer constituted an improper benefit. An employer engages in objectionable conduct when it offers employees a reward for voting in a representation election. Election-related benefits are considered unlawful if they have a "reasonable tendency to influence the election outcome." *Sunrise Rehab. Hosp.*, 320 NLRB 212 (1995) (hereinafter *Sunrise*). To determine whether an employer benefit has a tendency to influence the election, the Board will consider such factors as: (1) the size of the benefit in

⁸ Due to the seasonal operations at the Comcast Center, the Regional Director directed the election to be scheduled during the peak of Live Nation's operations.

relation to its stated legitimate purpose, (2) the number of employees receiving the benefit, and (3) how the employees would reasonably construe the purpose given the context of the offer. *Id.*

The facts of this case, however, are clearly distinguishable from the facts in *Sunrise* and, as such, warrant a different result. In *Sunrise*, the Board emphasized that because the employer was also providing child care and free transportation to the polls, the payment "was not properly construed as expense reimbursement, but rather as 'something extra' for employees on election day." *Id.* at 213. It was because this payment would be reasonably perceived by voters as "a favor from the Employer which the employees might feel obligated to repay by voting against the Union" that the payments constituted objectionable conduct. *Id.* Payments to off-duty employees are permissible, however, where the employer compensates voters for the time and expense of coming to work only to vote, and voters reasonably understand that the payments are "to return them to the financial position they would have been in had they not lost work time by voting, and not to provide them anything extra." *Allen's Elec. Co.*, 340 NLRB at 1013.

The Union, however, cited several cases to support its contention that Live Nation's offer constituted an unlawful benefit. The Union's analysis fails to acknowledge a key fact that distinguishes its cited cases from this matter and, thus, leads to a different conclusion than is presented by the Union. That is, that Live Nation regularly and consistently offered its employees the same compensation for attendance at any work-related event. Report at 15, 23. The *Sunrise* analysis requires the Board to assess how the employees would reasonably construe the purpose of the Company's offer, given the context of the offer. *Sunrise Rehab. Hosp.*, 320 NLRB at 212. An offer is only improper if employees would perceive the compensation as "something extra" or a reward for voting. Given Live Nation's established practice of compensating all employees for any work-related activity that requires their presence at the

venue, employees would not reasonably construe the Company's offer as anything other than standard operating procedure. Employees would not believe that the Company's offer of a four-hour call was a benefit or "something extra" to induce a pro-Company vote. For this reason, the Union failed to meet its burden as set out in *Sunrise* and Live Nation's offer cannot be considered an unlawful benefit.

C. Election Objection 7: The Hearing Officer Correctly Determined That Live Nation Did Not Engage In Improper Electioneering

1. Factual Background

Live Nation largely agrees with the Hearing Officer's factual findings related to the allegations contained in Election Objection 7. Report at 25-29. Specifically, the Hearing Officer found that R.E.M. was performing at the Comcast Center on June 13, 2008 the first day of the representation election in this matter. Report at 25. As with most performances at the Comcast Center, R.E.M. was a one-day performance that would require a load-in of all of the sound and stage equipment early on the morning of June 13, followed by the band's performance, followed by a load-out of the all of the same equipment. Report at 25; Tr. 70-72. On June 14, a different act, Tom Petty and the Heartbreakers, arrived at the venue to repeat the process as R.E.M. proceeded on to its next tour date. Each performance day, the Comcast Center's stage crew is joined by a new touring stage crew or the "road crew" that travels with the band. Tr. 105-106. On June 13th, Phil Dannemann was working as the R.E.M. Stage Manager responsible for overseeing the road crew and the equipment set-up process on behalf of the band. Report at 25; Tr. 86-87. Dannemann worked closely with Lee Watkins, the Comcast Center Crew Chief, in his oversight of the Comcast stage crew and the equipment set-up process on behalf of the venue. Tr. 71-74, 86-87. At the time of the election, Dannemann was an IATSE union member. Tr. 84.

The Hearing Officer also found that on June 9, 2008 Flanders sent an email to Bertis Edwin Downs IV, the manager and lawyer for R.E.M. Report at 25-26; Emp. Ex. 10. Flanders informed Downs that the representation election was to be conducted on the R.E.M. show day and explicitly requested “any kind of support from the band and its Road Crew... that might help sway any employees who may be ‘on the fence’ in terms of voting for the Union.” Report at 25-26; Emp. 10. According to Dannemann, Downs forwarded this email to Dannemann’s supervisor, Bill Rahmy, R.E.M.’s Production Manager. Rahmy then forwarded the email to Dannemann. Report at 26; Tr. 82-84.

The record is clear that at approximately noon on June 13, Watkins gathered a portion of the Comcast stage crew on the loading dock announcing the end of the load-in shift and notifying the employees that they were officially released from work. Report at 27. Immediately following Watkins’ announcement, Dannemann approached the group and offered his opinion on the representation election and Local 11’s efforts to organize the Comcast Center. Report at 27-28. As the Hearing Officer found, these comments struck Watkins “like a bolt out of the blue.” Report at 29; Tr. 259-60. Dannemann’s uncontroverted testimony was that he had not informed Watkins nor any other member of Live Nation management that he intended to speak to the employees about the election or Local 11. Report at 28; Tr. 84. As Dannemann spoke, Watkins was concerned that any involvement or intervention by him would be perceived as a violation of the 24-hour captive audience prohibition. Report at 29; Tr. 359-60. To avoid even the appearance of any involvement, Watkins stepped away from the group and remained silent until Dannemann finished addressing the employees. Report at 29; Tr. 359-60.

2. The Hearing Officer Properly Concluded That Dannemann Was Not An Agent Of The Company

The Union argues that the Hearing Officer erred in finding that Dannemann was not an agent of the Company and, thus, Live Nation could not be held responsible for his comments. As the Hearing Officer correctly found, however, the evidence demonstrates that Dannemann did not have nor could he reasonably be perceived to have authority to act on behalf of the Company. Report at 29-30. Dannemann was not an agent of Live Nation and, as such, his conduct cannot be attributed to the Company.

The Union's assertions that Dannemann was an agent of Live Nation are undercut by the undisputed record evidence related to this event. First, Dannemann was a member of IATSE, the same union as Local 11, but through a different local. Tr. 84. For this reason alone, Dannemann's comments must be attributed to the Union. Moreover, Dannemann's conduct was in response to a request from Local 11 further underscoring that the conclusion that these comments cannot be assigned to Live Nation. Contrary to what the Hearing Officer concluded, Flanders' email clearly authorized "any kind of support" by members of the R.E.M. road crew which technically contemplates either positive or negative support. Report at 25-26; Emp. Ex. 10. Flanders only further limitation was to say that the comments should be designed to help "sway any employees who may be 'on the fence' in terms of voting for the Union." Report at 25-26; Emp. Ex. 10. While the Union clearly sought positive support, its invitation and authorization to R.E.M.'s road crew certainly did not include such a specification. Report 25-26; Emp. Ex. 10. For this reason, if anything, Dannemann must be deemed an agent of the Union acting on its authorization as demonstrated in the June 9 email from Flanders to Downs.

Even if Dannemann was not acting as an agent of the Union, the record does not support Local 11's contention that he was acting as an agent of the Company. As the Hearing Officer

properly found, Dannemann was an agent and employee of the touring production and was not an employee of Live Nation. Report at 25, 30. Dannemann had not been at the Comcast Center for several years and the record clearly reflects that Dannemann was at the Comcast Center on June 13 for that single day only. Report at 25-28. It is also clear, as the Hearing Officer found, that Dannemann was an authority figure in some respects vis-à-vis the Comcast Center stage crew employees. Report at 29. Despite the Union's argument to the contrary, this position of limited authority does not, without more, elevate Dannemann to the role of an agent for the Company. While Dannemann, or any visiting Stage Manager, may have some limited authority relative to the Comcast Center stage crew, that authority is limited to oversight of the set up and break down of the band's sound and stage equipment.⁹ This authority clearly does not extend to Live Nation's labor relations or representing the Company in respect to the Union's organizing campaign. Moreover, there is no basis to find that any Live Nation employee would reasonably believe Dannemann to represent the Company on those types of issues given his limited and fleeting time at the venue.

The Union argues that Dannemann must be considered an agent of the Company because he was an authority figure that the employees "disobeyed at their peril." The Hearing Officer correctly found, however, that simply being an authority figure does not equate to being an agent of the Company. Report at 30. It is well-settled that the agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. *Cornell Forge Co.*, 339 NLRB 733, 733 (2003). As the Hearing Officer noted, Live Nation employees would be required to

⁹ The Hearing Officer accurately noted that Watkins gathered the employees on the loading dock after Dannemann informed him that the load-in was completed and the employees were no longer needed. Report at 27. This authority vis-à-vis the stage crew, however, was limited to an assessment of the progression of the load-in process. Thus, any authority Dannemann had was, again, limited to the oversight of the set up of the band's sound and stage equipment and only indirectly related to the management of the employees.

obey customers or representatives of the local fire department but, if one of these individuals were to make comments regarding the Union's organizing efforts, he or she would not likely be considered an agent of the Company by Live Nation employees. Report at 30. The distinction, again, lies in the fact that Live Nation employees would not reasonably conclude that a customer or a public official would be authorized by the Company in the context of Live Nation's labor relations. The Hearing Officer correctly applied the same analysis to the factual circumstances surrounding Dannemann's comments and properly concluded that the Union had failed to meet its burden to establish that the alleged agency relationship between Dannemann and Live Nation existed in respect to the specific conduct forming the basis of the Union's election objection. Report at 29-30. The record is clear that Dannemann was not an agent of the Company.

3. The Hearing Officer Properly Concluded That Live Nation Did Not Conduct A Captive Audience Meeting In Violation Of The *Peerless Plywood* Rule

The Union also excepts to the Hearing Officer's conclusion that Dannemann's conduct did not violate the *Peerless Plywood* rule prohibiting election speeches to massed assemblies of employees on company time within 24 hours of the start of a representation election. The sum of the record evidence clearly demonstrates that Dannemann's comments cannot be considered a captive audience speech attributed to the Company, as Live Nation did not conduct the meeting for electioneering purposes, it did not intend to engage in electioneering, the employees had been released from work, and Dannemann intervened in the meeting on the request of the Union. Tr. 83-84, 92-93; Emp. Ex. 5.

The Hearing Officer properly found that Watkins' gathering of the employees on the loading dock was normal practice at the conclusion of the load-in shift. Report at 27, 28; Tr. 151. This finding was based, in part, on the Hearing Officer's determination that the Union's main witness, Rob George, was not a credible witness – a conclusion which must be given great

deference by the Board. Report at 27. The Hearing Officer also found that this meeting was not conducted for electioneering purposes but rather was “a routine act which would have occurred in the absence of a Board election.” Report at 28. Dannemann’s conduct was not arranged by or in any way a product of the Company’s requests or actions. Tr. 82-85. The record is clear that no Live Nation employee, management or otherwise, knew that Dannemann intended to speak to employees about Local 11. Thus, it is absurd to conclude that this meeting is somehow attributable to Live Nation when not a single employee had knowledge of it. The Union’s assertion that this meeting was held for electioneering purposes is simply not supported by the record evidence.

The Union also argues that Dannemann’s comments constituted a captive audience speech because the employees had not yet been released from work and, thus, were still on Company time. To the contrary, the Hearing Officer found that the employees had been released by Watkins prior to Dannemann’s comments. Report at 27. This finding is, again, based on critical credibility determinations made by the Hearing Officer and must be given great deference. The Union’s own witness, however, Margaret Norris testified that Watkins had released the employees prior to Dannemann’s involvement. Tr. 158. Moreover, in the days immediately following the election, Norris provided her account of the Dannemann speech in an email to Flanders. Tr. 158; Emp. Ex. 5. Norris stated in that written account, which would likely be most accurate given its proximity to the actual events, that Watkins had cut the employees and released them from work prior to Dannemann’s comments. Tr. 158; Emp. Ex. 5. As such, the employees were not on Company time and attendance at that moment was voluntary. Report at 27; Tr. 83-84, 158, 358, 370. For this reason, the meeting cannot be considered a captive audience speech.

Moreover, the Hearing Officer properly concluded that Dannemann's conduct was undeniably the product of the Union's request. As noted by the Hearing Officer, the *Peerless Plywood* rule applies to employers and unions alike and similarly prohibits unions from giving captive audience speeches. In this instance, there is little dispute that the Union sought to have its surrogates conduct speeches to massed assemblies of Live Nation employees within 24 hours of the election. Local 11 was fully aware that the R.E.M. road crew would only be at the venue and able to speak to employees on the actual day of the election and that such commentary would like be offered to assembled groups of employees. Report at 30; Tr. 105-07. The Union solicited and encouraged this conduct nonetheless. The Hearing Officer's conclusion that the Union is equitably estopped from objecting to Dannemann's conduct is merely an acknowledgement that Local 11 invited its surrogates to violate the *Peerless Plywood* rule and then, when the content of the requested captive audience speech was to the Union's detriment, attempted to shift responsibility for the conduct onto Live Nation despite the Company's utter lack of involvement. The Hearing Officer properly concluded that the Union simply could not object to the legality of the conduct it had requested and, thus, was ultimately responsible for.

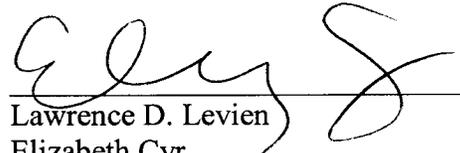
If Dannemann's conduct is not attributed to the Union, it must be evaluated as third-party conduct. When alleged misconduct is conducted by a third party, and not a party or its agent, the conduct is only objectionable if it creates "a general atmosphere of fear and reprisal." *PPG Indus.*, 350 NLRB No. 25, 6 (2007). Absent threats, such conduct in the workplace does "not substantially impair the employees' exercise of free choice" and does not "create a general atmosphere of fear and reprisal" that renders a free election impossible. *Cornell Forge Co.*, 339 NLRB 733, 734 (2003). There is no dispute by the Union that Dannemann's comments, albeit negative towards Local 11, did not include any threats. Report at 27-28. As such, there can be

no dispute that Dannemann's conduct would not reasonably be perceived as creating an environment of fear and reprisal among Live Nation employees. Tr. 83-84. In fact, Dannemann only spoke for a few minutes and spoke only about his personal experiences with the Union. Report at 27-28; Tr. 83-84. As such, Dannemann's conduct is not objectionable under the third-party electioneering standard.

IV. CONCLUSION

For the foregoing reasons, the Union's exceptions and supporting arguments are without merit. Live Nation respectfully requests that the Board adopt the Hearing Officer's findings and conclusions, and certify the election results in Case No. 1-RC-22162.

Respectfully submitted,



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Dated: October 28, 2008

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CERTIFICATE OF SERVICE

This is to certify that the undersigned caused to be served on October 28, 2008, the original and eight copies of the Answering Brief to Petitioner's Exceptions to the Hearing Officer's Decision & Recommendation on Objections via e-file and overnight delivery to the following:

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Executive Secretary

Further, this certifies that the undersigned caused to be served on October 28, 2008, a copy of the Answering Brief to Petitioner's Exceptions to the Hearing Officer's Decision & Recommendation on Objections via facsimile and overnight delivery to the following:

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