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SANDS BETHWORKS GAMING, LLC  
d/b/a/ SANDS CASINO RESORT BETHLEHEM

**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SANDS BETHWORKS GAMING, LLC  
d/b/a/ SANDS CASINO RESORT  
BETHLEHEM,

Employer,

and

LAW ENFORCEMENT EMPLOYEES  
BENEVOLENT ASSOCIATION,

Petitioner

**CASE NO. 4-RC-21833**

**EMPLOYER'S EXCEPTIONS TO  
HEARING OFFICER'S REPORT ON  
OBJECTIONS TO ELECTION**

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Sands Bethworks Gaming, LLC d/b/a Sands Casino Resort Bethlehem (“Employer” or “Casino”) submits these Exceptions to Hearing Officer’s Report on Objections to Election. Specifically, the Employer takes exception to the hearing officer’s:

**No. Page(s) Exception**

1. 3 n.3 Failure to fully sustain the Employer’s unopposed Motion to Amend Reporter’s Transcript—specifically to correct the spelling on page 106 from “John Barnhardt” to “John Barnhart”—due to his misreading of record evidence that was compounded into other errant findings of fact.
2. 3 n.3 Finding that *John Barnhart* is the same person as *Bob Bernhardt*.
3. 3 n.4 Statement that he “reviewed and weighed all testimony in light of the entire record.”
4. 3 n.4 Statement that the “facts found in this report are based on the entire record as well as my observation of the witnesses.”
5. 3 n.4 Statement that the “[t]estimony not specifically mentioned has not been disregarded but has been rejected as not credible, overly vague, or not relevant to the issues posed by the Objections.”
6. 4 Granting of United Steelworkers Local 2599’s (“USW”) Petition to Revoke the Employer’s Subpoena Duces Tecum.
7. 4 Determination that “the evidence sought by the subpoena was not newly discovered or previously unavailable.”
8. NA Failure to even review *in camera* the documents the USW custodian of records brought to the hearing.

9. NA Refusal to acknowledge that a party is entitled to subpoenaed information if it relates to any matter in question *or if it can provide background information or lead to other evidence potentially relevant* to the inquiry.
10. NA Refusal to permit the Employer to review the documents the USW custodian of records brought to the hearing or to permit the Employer to question the custodian of records.
11. 4 Finding that “[t]he Employer should have known about Bonser’s and Fenstermacher’s prior affiliation with [USW] because each listed it on their employment application that they submitted to the Employer in 2009.”
12. NA Failure to find that long after the May 23 pre-election hearing the Employer learned that Bonser and Fenstermacher had deceived the Employer by falsely stating on their employment applications that each had merely been a “building manager” for the USW.
13. NA Failure to find that Bonser’s and Fenstermacher’s actual roles in USW could not have been discovered by the exercise of reasonable diligence because they had fraudulently concealed that they were officers in USW.
14. 4 Determination “that the evidence was not relevant because it was clear that Bonser and Fenstermacher had no current affiliation with either [USW] or the Petitioner.”
15. 5 Ruling “that this testimony [of Bonser] would not provide evidence that was newly discovered, previously unavailable, or relevant.”
16. 5 Limiting the Employer’s examination of Bonser.
17. NA Refusing to permit the Employer to call other witnesses in support of Objection No. 1.

18. NA Failure to find that Bonser and Fenstermacher were overheard discussing that they would be union officers or representatives for the security officers if the union was voted in.
19. 5-7 Rejection of the Employer's offer of proof and Employer Exhibits 5 through 44 and Employer Exhibit 46.
20. NA Failure to even consider evidence that Bonser told Casino management that he would remove Petitioner officials from the bargaining process.
21. NA Failure to even consider Bonser's intention to transform the elected representative from the Petitioner to one that he and the USW control, as exemplified by the logo ("\$\$BA") he and his fellow employees created.
22. NA Failure to even address Petitioner's fledging status and questionable legal compliance that calls into question its independence.
23. 6 Conclusion that he (the hearing officer) was "authorized only to consider evidence that was newly discovered or previously unavailable."
24. NA Failure to consider all evidence of a potential violation of Section 9(b)(3) of the Act whenever such evidence is brought to the Board's attention as required by Board precedent that includes *International Security Corp.*, 223 NLRB 1129, 1129 n.4 (1976), *Advance Industries Security*, 225 NLRB 151, 151 n.3 (1976), and *Bonded Armor Carrier*, 195 NLRB 346, 346 n.2 (1972).
25. 6 Determination that *Brinks, Inc. of Florida*, 276 NLRB 1 (1985), requires an employer to **introduce** "substantial and material" **evidence**, rather than raise a "substantial and material **issue**," before permitting further hearing on the Section 9(b)(3) issue.

26. 6 Statement that “I am also mindful of the Board’s ‘strong policy favoring the end to litigation,’” and his reliance upon *R. L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), and *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978), neither of which addressed the risk of the Board violating Section 9(b)(3).
27. 6 Determination that to “allow relitigation of such issues without new or previously unavailable evidence wastes scarce resources on issues that have been settled” and his reliance upon *Bennett Industries*, 313 NLRB 1363, 1363 (1994), which did not address the risk of the Board violating Section 9(b)(3).
28. 6 n.6 Statement that, “[i]f, in the instant case, the Employer offered similarly compelling evidence [as in *Brinks of Florida*] then I would have allowed the Employer to present it.”
29. 6 n.6 Determination that “the Employer did not *present* the type of *substantial and material evidence* that was presented in *Brinks*,” instead of addressing whether the Employer “*raised* a substantial and material *issue* regarding the Union’s *possible affiliation* with an organization that admits nonguards to membership.
30. 6 n.7 Finding that “the Employer could reasonably have found that both [George Bonser and Richard Fenstermacher] had prior affiliations with [USW].”
31. 7 Conclusion that, “[i]n the light viewed most favorably to the Employer, these documents amount - at best - to nothing more than statements of mutual sympathy and common purpose, which, without more, does not establish indirect affiliation,” based on *International Harvester Co.*, 145 NLRB 1747 (1964).

32. 7 Rejection of documents offered by the Employer because they “did not have a tendency to make it more probable or less probable that the Petitioner was affiliated directly or indirectly with Local 2599.”
33. 7 Statement that as to “the material aid that the Petitioner received, it was determined in the pre-election hearing that use of [USW]’s hall was not evidence of indirect affiliation,” without considering that Petitioner continued to use the hall after the Regional Director issued her Decision and Direction of Election.
34. 7 Finding “that there is no direct or indirect relationship between the Petitioner and [USW].”
35. 7 Statement that “[t]o find otherwise would infringe upon the rights of guards to be represented by a union and of guard unions to represent guards,” and his reliance upon *Burns International Security Services, Inc.*, 278 NLRB 565, 568 (1986).
36. 7 Finding “that there is no evidence suggesting that the Petitioner is affiliated either directly or indirectly with a labor organization that admits nonguards to membership.”
37. 7 Recommendation of dismissal of Objection 1.
38. 8 Statement that the “Employer asserted that it did not retain the security footage, that it has subsequently been copied over and that no backup footage exists.”
39. 9 Refusal to “rely on Wakefield’s testimony because there is no supporting evidence. Specifically, I am persuaded by the fact that Wakefield did not request the video and the Employer did not save security footage showing Luck’s movements throughout the casino on the day of the election.”

40. NA Failure to find that the parties stipulated that: (1) Wakefield requested the video from the Employer; (2) the Employer retains copies only for a short period of time because of the large amount of data; (3) the parties discussed off the record the timeframe that the recorded video is kept (and, for security reasons, did not include it in the record), and (4) Wakefield's request was made shortly after the data had been recorded over.
41. 9 n.12 Reliance upon *Rejected* Employer Exhibit 29 to "find it unlikely that the Employer would save this security footage but not save the footage from purported misconduct that occurred minutes before the polls opened in full view of its attorney."
42. 9 Finding Petitioner representative Peter "Luck to be candid and forthright in his testimony."
43. 9 Crediting Luck's testimony "because the Employer provided no readily available evidence to corroborate Wakefield's testimony."
44. NA Failure to address that Luck testified that he could not name his fellow board members who hold the positions of "vice president" and "secretary," yet Petitioner's LM-3 report lists Luck as the "recording seceraty" [sic].
45. NA Failure to address that Luck first testified that he could not remember speaking to anybody on the way in to the Casino, but subsequently testified that he talked with the security officers to get directions.
46. NA Failure to address that Luck testified that after the ballots were counted the Board agent asked out loud of everyone in the room if there were "any objections to the procedures that had just taken place," and that no one responded.

47. NA Failure to address that he (the hearing officer) took administrative notice of sections 11340 et seq. of the Board's Case Handling Manual, which explains the procedure for the counting of ballots and preparation of the tally of ballots, and that nothing therein even remotely suggests that a Board agent ask the parties if there are any objections.
48. 10 n.13 Failure to address the blatant inconsistencies between the testimony of Luck and that of Petitioner President Kenneth Wynder.
49. 10 n.13 Failure to address the internal inconsistencies in Wynder's testimony.
50. 10 n.13 Failure to address the inconsistencies between Wynder's testimony and that of Mets' representative Robert Hines.
51. 10 n.13 Failure to address that Wynder intentionally altered the ticket application that was submitted into evidence as Petitioner Exhibit 1.
52. 10 n.13 Finding it "irrelevant that irrelevant whether Wynder added the Boy Scout Troop number and [Luck]'s name and address to the ticket application."
53. 10-11 Finding that security officer Ryan Kocher "gave two tickets to employee Bob Bernhardt, although it is unclear whether Bernhardt went to the game."
54. 11 Finding that Bonser testified that he believed Bernhardt attended, but a Facebook post by Bernhardt suggests that he gave the tickets to two of his friends."
55. NA Failure to follow *Go Ahead North America, LLC*, 357 NLRB No. 18, slip op. at 1 (July 18, 2011).
56. 11-14 Application of *B & D Plastics, Inc.*, 302 NLRB 245 (1991), which pertains to an employer's, not a union's, grant of a benefit during the critical period.

57. 11 Finding that “only three employees, i.e., Bonser, Kocher and Bernhardt, out of a unit of 92 employees had possession of the tickets at any time, and it appears that only one employee actually used the tickets.”
58. 11 Determination that “this grant of benefit is distinguishable from *Mailing Services*, [293 NLRB 565, 565 (1989)], *General Cable Corp.*, [170 NLRB 1682, 1682-83 (1968)], and *Wagner Electric Corp.*, [167 NLRB 532, 533 (1967)], because in those cases the union provided a benefit to all employees.”
59. 11 Determination that “[i]t is also distinguishable from *Owens-Illinois, Inc.*, [271 NLRB 1235, 1235-36 (1984)], because in that case the jackets were given to employees between voting sessions and were given to enough employees to potentially effect the results of the election.”
60. 11 Finding that because only three employees had possession of the tickets, it “would be an insufficient number to effect the results of the election since the Petitioner prevailed by 16 votes.”
61. 11 Finding that “the three employees would not reasonably view the tickets as an inducement to vote for the Petitioner.”
62. NA Failure to find the benefit received by Kocher and Barnhart, which induced them to support Petitioner, and that they disseminated information about this to others.
63. 11 Finding that because “the game took place nearly nine weeks before the election was conducted. . . it was too far removed to reasonably be considered an improper inducement to vote for the Petitioner.”
64. 11 n.14 Finding that “[a]lthough the record is not clear who *Bernhardt*’s two friends were, they presumably were not fellow security guards because Kocher posted on

Facebook that he would introduce himself to *Bernhardt*'s friends. Had they been security guards, Kocher likely would have known them."

65. 12 Conclusion that "[a]fter applying the *B & D Plastics* test, I find that the Petitioner did not engage in objectionable conduct based on the relatively small number of employees that received the benefit and the timing of the benefit. Accordingly, I recommend dismissal of this portion of Objection 3."
66. 13 Finding that "Luck denied that he told Fenstermacher at the pre-election conference that he would take care of his dinner."
67. 13 Finding that "Fenstermacher and Luck agreed that Luck would pay using his credit card and that Fenstermacher would reimburse him later."
68. 13 Finding that "[t]he next time that Luck saw Fenstermacher was at Fenstermacher's retirement party in early September, when Fenstermacher gave him \$70."
69. 13 n.16 Finding that "Fenstermacher repaid Luck after the Employer's objections were filed on July 29," when the record reflects that the purported repayment occurred 6 weeks after the election and 13 days after the Regional Director issued her Supplemental Decision in which the dinner was identified as one of the issues set for hearing.
70. 13 Finding that "Luck paid the bill and Fenstermacher reimbursed him \$70 when he saw him at his retirement party on September 1."
71. 13 Finding "Luck's testimony to be candid, forthright, and detailed."
72. 13 Determination that he was "persuaded by Luck's and Fenstermacher's version of the incident."

73. 13 Finding “that Luck did not tell Fenstermacher at the pre-election conference that he would ‘take care of his dinner.’”
74. 13 Finding that “it is not plausible that he would do so at the pre-election conference in front of the Board Agent and the Employer’s counsel.”
75. NA Failure to find that Luck has only been with Petitioner for about one year.
76. 13 Crediting “the testimony of Luck and Fenstermacher in that they made plans to meet for dinner between the first and second voting session, that Fenstermacher did not have enough cash to pay for his share of the bill so Luck paid, and that Fenstermacher reimbursed Luck several weeks later at Fenstermacher’s retirement party.”
77. NA Failure to address that a period of six weeks is unquestionably a long time for Fenstermacher to delay payment if he had truly agreed to reimburse Luck at the time they had dinner.
78. NA Failure to address that although Luck testified that he went to the party with Bonser, a photograph of the attendees at the party reveals that only Bonser, but not Luck, was present.
79. 13 Failure to seriously address, particularly given the sequestration order, that while Luck denied discussing his testimony with anyone, Fenstermacher admitted that Luck called him and they briefly discussed the matter.
80. 13 Application of “the test in *B & D Plastics*,” to “find that the benefit did not influence the outcome of the election.”
81. 13 Determination he could “not accurately calculate the financial benefit to Fenstermacher.”

82. 14 Determination that “the number of employees receiving the benefit - favors a finding that it did not materially affect the results of the election.”
83. 14 Finding that “[e]ven when considered in the aggregate, this one employee and the three who were given Mets tickets would not materially affect the results of the election. *Mailing Services*, above, *Owens-Illinois, Inc.*, above, *General Cable Corp.*, above, and *Wagner Electric Corp.*, above, where the Board found it objectionable when all employees or a number that would materially affect the results of the election received a benefit.”
84. 14 Determination that “the most critical factor” was “that Fenstermacher would not reasonably have viewed the benefit as an inducement to vote for the Petitioner.”
85. 14 Finding that Luck did not tell Fenstermacher that he would ‘take care of his dinner’ at the 12:30 p.m. pre-election conference.”
86. 14 Placement of “little weight on the timing of the benefit.”
87. 14 Finding “that the above factors, particularly the fact that only one employee received a benefit and that the employee would not reasonably view it as an inducement to vote for the Petitioner, weigh in favor of finding that the benefit did not influence the outcome of the election.”
88. 14 Recommendation to dismiss “this portion of Objection 3.”
89. 16 Conclusion “[b]ased on the foregoing, the record as a whole, and applicable legal principles,” to “recommend that the Employer’s Objections be overruled.”
90. 16 Recommendation “that a Certification of Representative be issued.”

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Dated: October 31, 2011

BALLARD, ROSENBERG, GOLPER, & SAVITT  
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**PROOF OF SERVICE**

On October 31, 2011, I served the foregoing document described as: **EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION** via e-mail to Terrence P. Dwyer, Esq., counsel for Petitioner, at [tpdlaw@aol.com](mailto:tpdlaw@aol.com).

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States of America. Executed on October 31, 2011.

By:  \_\_\_\_\_  
Cecelia Mata