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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 BRIEF IN SUPPORT OF
EXCEPTIONS TO HEARING
OFFICER'S REPORT ON OBJECTIONS
TO ELECTION**

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I INTRODUCTION

This post-election objections case arises from an organizing drive among the security officers of the Sands Casino Resort Bethlehem (“Employer” or “Casino”). The Casino was built on part of the 124 acre site of the former Bethlehem Steel headquarters and steel-producing plant in Bethlehem, Pennsylvania. The location is regarded by the United Steelworkers as “hallowed ground.” It is undisputed that the fledgling Law Enforcement Employees Benevolent Association (“Petitioner” or “LEEBA”) received assistance in its organizing efforts from the United Steelworkers Local 2599 (“USW”).¹ The Employer sought to subpoena potentially relevant documents and to introduce relevant testimony and evidence to show that Petitioner is indirectly affiliated with USW. In barring the Employer from such actions, the hearing officer misread and failed to follow relevant Board precedent, thereby denying the Employer its fundamental right to due process in this matter. (Rpt 3-7)² Without providing the Employer the opportunity to properly and fully litigate this matter, the Board risks a violation of Section 9(b)(3) of the Act.

Aside from the unlawful affiliation issue, Petitioner indelibly tainted the outcome of the election by engaging in objectionable conduct during the critical period of May 10, 2011 through July 21, 2011.³ Even worse, in a desperate attempt to cover their trails, Petitioner representatives committed perjury and submitted an altered document during the hearing. Rather than properly

¹ Prior to passage of the Labor Management Relations Act of 1947, it was not uncommon for a labor organization such as the United Steelworkers to represent guards. *See, e.g., Bethlehem Steel Co.*, 56 NLRB 1390 (1944) (United Steelworkers petitioned for, and Board directed, an election among Bethlehem Steel security guards).

² The Hearing Officer’s Report on Objections to Election is cited herein as “Rpt” followed by the page number(s).

³ All dates herein are 2011 unless indicated otherwise.

address and evaluate all relevant facts and evidence adduced at the hearing, the hearing officer erred by:

- Finding facts that have no evidentiary support in the record;
- Failing to make findings of relevant, material fact despite ample record evidence;
- Disregarding a stipulation of the parties, and then discrediting an Employer witness based on the absence of evidence;
- Ignoring material evidence of impeachment of Petitioner’s witnesses; and
- Deeming as “irrelevant” Petitioner’s introduction into the record of an altered document and the conflicting testimony of two of Petitioner’s officers in connection therewith.

Absent LEEBA’s misconduct, the outcome of the July 21 election would have been markedly different. The Board will overturn an election where the conduct of a party “has the tendency to interfere with the employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995). “Objections must be carefully scrutinized in close elections.” *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 615 (2002). Here, a reversal of ***only eight votes, or less than ten percent of the eligible voters***, would have yielded a different outcome. As the court explained in *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116 (6th Cir. 1992), “[s]uch a closeness in election results has been recognized as an important consideration which demands that any minor violation of the National Labor Relations Act cannot be dismissed summarily for it could have swayed the crucial votes.” *Id.* at 122. Petitioner’s gifts of four baseball tickets and an expensive dinner destroyed the laboratory conditions required for the election.

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II. *PROCEDURAL HISTORY*

Petitioner filed the RC Petition herein on May 10. (BX 1)⁴ Pursuant to the Regional Director's June 21 Decision and Direction of Election, and the Board's July 20 denial of the Employer's Request for Review, an election was conducted on July 21 among the Employer's security officers.⁵ Of the approximately 92 eligible voters, 51 voted in favor of representation by Petitioner and 35 voted against. (BX 1)

On July 29, the Employer timely filed seven objections to the conduct of the election and conduct affecting the results of the election. The Employer withdrew objections 4, 6 and 7 on August 5. On August 19, the Regional Director issued a Supplemental Decision on Objections and Notice of Hearing ("Supplemental Decision") on the remaining Objection Nos. 1, 2, 3, and 5. An evidentiary hearing was held on September 12, 13, and 14 before Hearing Officer Robert Gleason, Jr. Following the filing of post-hearing briefs by the parties on September 21, the hearing officer issued his report on October 17, 2011. (Rpt 16)

Focusing primarily on the hearing officer's errors in connections with Objection Nos. 1 and 3, the Employer submits with this brief its Exceptions to the Hearing Officer's Report on Objections to Election.

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⁴ The Reporter's Transcript is cited herein as "T" followed by the page number(s). Board Exhibits are cited herein as "BX," Employer Exhibits as "EX," Rejected Employer Exhibits as "REX," Petitioner Exhibits as "PX," and Rejected Petitioner Exhibits as "RPX" followed by the exhibit number(s).

The Hearing Officer took administrative notice of the transcript and exhibits from the pre-election hearing on May 23, 2011. (T 226) For sake of clarity, references to the May 23 pre-election transcript will be designated as "PET" followed by the page number(s). Employer Exhibits from the pre-election hearing are cited herein as "PEEX" followed by the number(s).

⁵ Thus, the critical period was May 10 through July 21.

III. *DISCUSSION AND ANALYSIS*

A. *Petitioner Remains Indirectly Affiliated With a Non-Guard Labor Organization and May Not Be Certified*

OBJECTION NO. 1: Petitioner Law Enforcement Employees Benevolent Association (“Petitioner”) continues to be directly and/or indirectly affiliated with non-guard labor organizations.

At the May 23 pre-election hearing, LEEBA president Kenneth Wynder testified that an unnamed person from USW “told me to be there [at USW’s union hall] and that was it.”⁶ (PET 21) USW permitted LEEBA to use its union hall free of charge for two meetings. (PET 21-22) USW president Jerry Green was present at least part of the time. (PET 23) Wynder also testified that security officers who had “signed the cards” purportedly advised him “that we could use [USW’s union hall] to speak and let them know about ourselves. That was the first meeting. And then the second meeting they told us we could come back and meet the rest of the employees.” (PET 26) Green stated to *The Express-Times* that LEEBA’s organizing “attempt may bring new life” to USW’s previously unsuccessful organizing campaign. “I hope they’re successful in their drive and that could open some doors for us,” Green stated. (PEEX 11)

As discussed further herein, the Employer knew nothing more about Petitioner’s connection to the USW at that time. Contrary to the hearing officer’s unexplained assumptions that the Employer “should have known” (Rpt 4), and absent interrogating employees⁷ and/or

⁶ LEEBA is located in Catskill, New York, which is approximately three hours away from the Casino. (PET 19) In an effort to make LEEBA appear independent, Wynder testified on May 23 that LEEBA would open an office in Stroudsburg, PA, although he has not selected a location. (PET 28) The USW union hall is located at 53 East Lehigh Street, Bethlehem, PA 18018, which is less than two miles from the Casino. (PET 22; PEEX 10)

⁷ See, e.g., *Fachina Constr. Co., Inc.*, 343 NLRB 886, 886 (2004) (employer violated the Act by asking job applicant if he was a union member); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004), *enfd* 156 Fed. Appx. 330 (D.C. Cir. 2005) (employer violated the Act by asking an employee what he knew about the union); *Guess?, Inc.*, 339 NLRB 432, 434-35 (2003)

creating the impression of surveillance⁸ in violation of Section 8(a)(1) of the Act,⁹ there was little the Employer could do to learn more.¹⁰

In her Supplemental Decision, the Regional Director held, “I will allow the Employer to present evidence concerning the Petitioner’s alleged affiliation with a non-guard labor organization only to the extent that the Employer can demonstrate that presented evidence is newly discovered or was previously unavailable as of [May 23].” However, at the hearing it became readily apparent that the hearing officer read the Regional Director’s Supplemental Decision as somehow stating that “*the Employer should not be allowed to present any evidence on this objection, regardless of when it may have been discovered or become available.*” Indeed, the hearing officer even rejected all evidence that came into existence after May 23!

The hearing officer failed to observe that Section 9(b)(3) of the Act prohibits the Board from certifying a labor organization “as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” *See International Harvester Co.*, 145 NLRB 1747 (1964) (Board revoked the union’s certification based on indirect affiliation with a non-guard union); *Mack Manufacturing*, 107 NLRB 209 (1953) (same).

(employer violated the Act asking by asking an employee during a workers’ compensation deposition for the names of other employees who attended union meetings).

⁸ *See, e.g., St. Francis Med. Ctr.*, 340 NLRB 1370 (2004) (employer unlawfully told employee it knew who had attended a union meeting); *CBS Records Div.* 223 NLRB 709, 709 (1976) (employer unlawfully focused a security camera on the union’s headquarters across from employer’s parking lot, even though employer did not engage in actual surveillance).

⁹ In *Bethlehem Steel Co. v. NLRB*, 120 F.2d 641, 647 (D.C. Cir. 1941), the court agreed with the Board that an employer engages in surveillance even if the employees are unaware of the employer’s actions.

¹⁰ In following *Johnnie’s Poultry Co.*, 146 NLRB 770, 774 (1964), as the Employer did to investigate these objections, employees must be advised of their right to answer questions voluntarily, which substantially limits the information the Employer may discover.

The Act and Board precedent requires consideration of any and all evidence on this issue, *whenever such evidence is brought to the Board's attention*. In *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), the Board stated that it will entertain a motion to withhold or revoke the certification of a guard union if it is shown to be affiliated directly or indirectly with a non-guard union.

The Board is not permitted to ignore or vary from Section 9(b)(3) simply because a hearing officer disagrees with the timing in which a party produces evidence.¹¹ In *Henry Ford Health Sys. v. NLRB*, 105 F.3d 1139, 1145 (6th Cir. 1997), the court rejected the Board's position, similar to that of the hearing officer herein, "that it would be contrary to the intent of Congress to allow an employer to establish noncertifiability by collateral litigation." Rather, the court explained that "a policy of requiring definitive evidence but permitting collateral litigation is required by the plain language of the statute." *Id.*

In *Brinks, Inc. of Florida*, 276 NLRB 1 (1985), the Board held:

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations. The present case presents special circumstances with respect to the issue of the Union's alleged affiliation with a labor organization that admits nonguard employees to membership, such that we find reconsideration of that issue is appropriate. The Respondent has ***raised a substantial and material issue regarding the Union's possible affiliation with an organization that admits nonguards to membership. If such affiliation were established, the Board would be statutorily precluded, by Section 9(b)(3) of the***

¹¹ In stating the objectives of bringing an "end to litigation," and avoiding "relitigation of such issues without new or previously unavailable evidence," the hearing officer cited *R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994), *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978), and *Bennett Industries*, 313 NLRB 1363, 1363 (1994), none of which addresses a Section 9(b)(3) issue.

Act, from certifying the Union as the bargaining representative of the guard unit for which it petitioned. Under these special circumstances, we find that the Respondent is entitled to an evidentiary hearing on the affiliation issue. Therefore, we deny the General Counsel's Motion for Summary Judgment and ***remand this proceeding to the Regional Director to direct an evidentiary hearing before an administrative law judge on the issue of the Union's alleged affiliation with an organization that admits nonguards to membership.***¹²

Id. at 2 (emphasis added) (footnotes omitted). The hearing officer misread *Brinks of Florida*. Twice in his report he mistakenly transformed the requirement of "a substantial and material issue" into a requirement that an employer produce "substantial and material evidence." (Rpt 6, 6 n.6) He then used the elevated burden of proof to justify barring the Employer from subpoenaing or introducing any evidence in support of Objection No. 1. Apparently, it did not occur to the hearing officer that no employer could satisfy his mythical evidentiary burden without being able to subpoena potentially relevant documents and introduce relevant testimony and evidence.

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." NLRB Hearing Officer's Guide at 21 (emphasis added) (citing *Perdue Farms*, 323 NLRB 345, 348 (1997)). Rather than follow this standard, the hearing officer placed the Employer in the impossible position of trying to prove the relevance and ultimate legal import of the contents of the USW's files without even seeing them. Moreover, the hearing officer revoked the Employer's subpoena duces tecum to the USW without an *in camera* review of the files that the USW

¹² Significantly, the hearing the Board directed in *Brinks of Florida* was not one in which, as here, the Employer had both hands tied behind its back. Rather, the Employer was permitted full freedom to subpoena documents and introduce evidence over the course of 10 days of hearings. See *Brinks, Inc. of Fla.*, 283 NLRB 711 (1987) *enf. denied* 843 F.2d 448 (11th Cir. 1988).

president brought to the hearing.¹³ Without such information, the hearing officer required the Employer to be clairvoyant.¹⁴

Regardless, the evidence the Employer subpoenaed and sought to introduce was “newly discovered” or “previously unavailable” because the Employer did not know until well into Petitioner’s campaign that security officers George Bonser and Richard Fenstermacher were both key leaders in the campaign and also had been officers in the USW when they were hired (and had been officers for approximately nine years prior to their employment with the Employer). Prior to their roles in LEEBA’s campaign coming to light, the Employer had no reason to go searching records to see if these (or any of the Employer’s other 1500 employees) happened to have lied on their job applications. After the May 23 hearing the Employer learned that Bonser and Fenstermacher were the driving forces among the security officers in favor of union representation and had deceived the Employer by falsely stating on their employment applications that each had merely been a “building manager” for the USW. (T 67; REX 6-7) Contrary to the hearing officer’s errant assumptions, their actual roles could not have been discovered by the exercise of reasonable diligence because they had fraudulently concealed the fact that they were officers in the USW and because their roles in favor of unionization were not then known.¹⁵ See *Brown and Sharpe Mfg. Co.*, 312 NLRB 444,

¹³ NLRB Hearing Officer’s Guide at 23 (“if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection”).

¹⁴ Even after the Employer filed a Motion for Reconsideration and/or Appeal to the Regional Director (BX 3), which the Regional Director denied without even addressing the hearing officer’s most significant error (BX 2), the hearing officer continued to deny the Employer the opportunity to introduce any evidence on this Objection No. 1, ***even evidence that did not come into existence until after May 23.***

¹⁵ Fenstermacher even gave the Employer a false reference to cover for him by listing Tim Rehrig as his “supervisor,” when Rehrig was actually a USW employee who reported to Fenstermacher. (T 93; REX 7, 16) While Bonser’s employment application states that he was merely a “building manager” responsible for maintenance at the USW hall (REX 6; T 83-84), Bonser admitted under oath on September 12 that he was actually the vice president of the

444-45 (1993) (fraudulent concealment of operative facts may, among other remedies, toll the statute of limitations); *O'Neill, Ltd.*, 288 NLRB 1354, 1355-56 (1988) (permitting new evidence where an employer concealed operative facts from the union). The indirect affiliation only became apparent after the May 23 hearing when Bonser and Fenstermacher took on leading roles and began to openly tout their years of experience with the USW through communications with other employees and on Facebook. (See REX 24-44) Bonser proved to be the centerpiece of the campaign. (T 97; REX 31-34, 39-40)

The evidence reveals that Bonser brought in LEEBA in April 2011 (T 107) as his cover for a USW organizing campaign that he had commenced planning and orchestrating years earlier (*see* REX 18—May 21, 2007 letter from USW seeking to organize Employer, when Bonser and Fenstermacher were unquestionably USW officers). Bonser arranged to have at least three LEEBA meetings at the USW hall.¹⁶ (T 15) Bonser and Fenstermacher were also overheard discussing that they would be union officers or representatives for the security officers if the union was voted in. (T 120-21, 129) The hearing officer rejected not just pre-May 23 evidence on Objection No. 1, but also evidence that did not come into existence until after May 23, including the following:

USW—the second highest ranking position—from May 2003 to May 2009. (T 80, 81) From 1998 to 2005, he also held other elected positions in the USW in a fabrication shop in which he previously worked. (T 80-81) The USW’s LM-2s show that Bonser was also a guide from May 2000 to May 2003. (REX 8-10) While Bonser attempted to downplay the significance of these positions, the USW’s bylaws state that the vice president must report to the USW office “at least three (3) days per week.” (REX 5 at 10) Significantly, none of the LM-2 reports that the USW filed with the OLMS indicate that anyone was employed as a “building manager.”

¹⁶ As discussed above, at the time of the pre-election hearing on May 23, the Employer knew only that Petitioner used the USW union hall to hold two meetings with the Employer’s security officers. In or about June, Petitioner again used the USW union hall to conduct a day-long series of meetings with employees, covering all three shifts. (T 11-15) As revealed by Wynder on September 12, Bonser had arranged for Petitioner to use the USW facility. (T 15)

- Bonser repeatedly, proudly wearing various USW shirts. (EX 22-23) (Would the hearing officer have also rejected evidence of the USW president wearing a LEEBA shirt?);
- Bonser tying Petitioner’s campaign to the USW in a flyer distributed shortly before the election on July 21: “***WE ARE ON HALLOWED GROUND OF ONE OF THE BIGGEST UNIONS [USW] EVER IN THE LEHIGH VALLEY!! LET’S CONTINUE THE [USW] PATH SET BY MANY COMPANIES AND CITIZENS BEFORE US SINCE THE EARLY 1900’S***.” (REX 24)
- Bonser’s Facebook homepage displaying him wearing a USW shirt next to a picture of the logo for Petitioner that Bonser hopes to implement when he takes over, with the statement “Miss this. . .” under a listing of his prior employment as USW “Ex. Vice President.” (REX 25)
- Bonser’s affiliation with and support of the AFL-CIO on June 11. (REX 26)
- Bonser on the news in June at Gracedale in support of the nurses that the USW represents. He clicked “like this” on a comment about it on his Facebook page. (REX 27, 31)
- William Modzewleski, another former Steelworker whom Bonser assisted in obtaining a job as a security officer with the Employer, encouraged other employees to vote “yes” just six days before the election while wearing a USW shirt. (REX 29)
- On July 20, the night before the election, Bonser received a note of support on his Facebook page that “everyone here in Pittsburgh [the Steelworkers International headquarters] is rooting for you! When you get results, please let me know a.s.a.p. so we can announce here!” (EX 39)

- Bonser reiterated his support for the USW on August 17, quoting Steelworkers International President Leo W. Gerard, who said on August 15, “I’d rather fight to my last breath than let the fate of my children and grandchildren be dictated by billionaires on Bay Street and Wall Street.” He posted underneath the quote the USW logo. (REX 30)
- Bonser’s leadership of Petitioner’s campaign, including his direction of others such as Modzelewski, through and even after the July 21 election. (T 98; REX 31-42)
- One of Bonser’s fellow employees, in congratulating him (not LEEBA) on the July 21 election victory, stated, “Now that’s the way to run a campaign!!!!” (REX 40)
- Bonser’s statements to Casino management that he would remove Wynder and other LEEBA officials from the bargaining process.
- 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. (T 100-01; REX 43-44, 46; EX 45)

The hearing officer also ignored all evidence regarding Petitioner’s fledging status and questionable compliance with the law, all of which calls into question LEEBA’s independence. At the May 23 hearing, when asked if Petitioner had registered with the Pennsylvania Gaming Control Board (“PGCB”), Wynder admitted LEEBA has not registered with the PGCB. (PET 22) On September 12, Wynder testified that *Petitioner is still not registered with the PGCB.*¹⁷ (T 27)

¹⁷ Wynder then proceeded to make up inconsistent and nonsensical excuses for not registering, including that the PGCB told him that LEEBA “didn’t have to” register (T 36), they “never got back to us” (T 36), it “wasn’t necessary” (T 37), “we see nothing in [the PGCB regulations] that tells us a union has to register with them” (T 37), “no one has returned our phone calls” (T 37), and “we try to deal with the same person and that person has never

Prior to filing an LM-3 report on July 12 (P 4),¹⁸ LEEBA made no effort to comply with the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), which requires labor organizations to file financial statements annually with the U.S. Department of Labor’s Office of Labor-Management Standards (“OLMS”).¹⁹ In LEEBA’s case, it took a reminder of the civil and criminal sanctions from OLMS to compel compliance. (P 5) However, it begs the question why Petitioner failed to comply during the years 2002 through 2009. Moreover, the LM-3 report further calls into question Wynder’s veracity, if not also the credibility and independence of Petitioner. Wynder testified that LEEBA has at the Department of Environmental Police “about 176” members. (T 46) However, in its LM-3 report, LEEBA states that it only has 25 members, \$0 in cash at the beginning of 2010 (even though it was purportedly founded in 2002), and \$913 in cash at the end of 2011. (P 4) What is LEEBA trying to hide? Who is LEEBA trying to mislead? *Is USW providing financial support to Petitioner?* How is LEEBA effectively representing anyone without outside assistance?

confirmed that we need to register with the Gaming Control Board” (T 37). Ultimately, he landed on the canard that he reviewed the PGCB regulations and they do not require Petitioner to register. (T 41-43) However, had Wynder actually looked at the Regulations (a copy of which was provided to him on May 23 (PEEX 17)), he would have read on page 6 of the table of contents that chapter 438a is devoted to “LABOR ORGANIZATIONS.” (Alternatively, Wynder could have read the Employer’s post-hearing brief or request for review, either of which would have given him the citations to the exact page of the exhibit.) If he went to chapter 438a, he would have also read, “Each labor organization shall file a completed Labor Organization Notification Form with the Bureau of Licensing.” (PEEX 17 at 110) He also would have read, “Every labor organization officer, agent and management employee shall be registered in accordance with this section.” (PEEX 17 at 110)

¹⁸ Since the hearing, the Employer has confirmed that the OLMS received and filed LEEBA’s LM-3 report (P 4) on July 12. That report is now available online: <http://kcerds.dol-esa.gov/query/orgReport.do>

¹⁹ See 29 CFR § 403.2(a) (“Every labor organization shall, as prescribed by the regulations in this part, file with the Office of Labor-Management Standards within 90 days after the end of each of its fiscal years, a financial report signed by its president and treasurer, or corresponding principal officers”).

Section 9(b)(3) of the Act provides, among other things, that “no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.” “This mandate applies whether the representative is a labor organization or an individual.” *Armored Transport of Cal., Inc.*, 269 NLRB 683 (1984) (citing *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971)).

“The Board has consistently ruled that a guard union is ‘affiliated indirectly’ with a non-guard union within the meaning of Section 9(b)(3) of the Act, where ‘the extent and duration of [the guard union’s] dependence upon [the non-guard union],’ or vice versa, ‘indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.’” *Wells Fargo Guard Services*, 236 NLRB 1196, 1197 (1978) (quoting *Magnavox Co.*, 97 NLRB 1111, 1113 (1952)). While the Board has permitted a guard union to receive some assistance from a non-guard union during the guard union’s formative stages, where such assistance occurs beyond the formative stages, the Board will find an indirect affiliation. *Id.*

Section 9(b)(3) is violated where any “affiliation” exists; it does not require domination or control. *See, e.g., Schenley Distilleries, Inc.*, 77 NLRB 468 (1948) (Board refused to certify guard union whose charter declared it to be affiliated with American Federation of Labor without regard of any facts demonstrating that guard union lacked independence). An actual conflict of interests is not necessary. The *potential* for conflict is sufficient. *NLRB v. Brinks, Inc. of Florida*, 843 F.2d 448, 452 (11th Cir. 1988). Thus, LEEBA may not have any “direct or indirect” affiliation with non-guard organizations such as the USW.

In *Stewart-Warner Corp.*, 273 NLRB 1736 (1985), the Board dismissed a petition filed by the “International Union of Professional Security Guards,” where the petitioner had been

sought out by Teamsters Local 714, which had previously attempted to organize the employer's guards. The petitioner's president was a friend of Local 714, and Local 714 assisted in obtaining the showing of interest. The Board concluded that the petitioner was indirectly affiliated with Local 714. *Id.* at 1737. The similarities here, given the relationships between Bonser, Green, Fenstermacher, and the USW, are remarkable.

In *Mack Mfg. Corp.*, 107 NLRB at 212, the Board dismissed a petition filed by the Amalgamated Plant Guards, Local 504, where the United Auto Workers had conducted most of the organizing efforts. The petitioner held one meeting at the UAW union hall where at least one UAW official attended. In these circumstances, the Board found the petitioner was indirectly affiliated with the UAW. *See also Brinks, Inc.*, 274 NLRB 970, 971 (1985) (dismissing petition for guard unit where individual primarily responsible for the formation and continued existence of the petitioner was an officer in a non-guard union and petitioner's only meeting occurred at non-guard's office); *Armored Transport, Inc.*, 269 NLRB at 683-84 (dismissing petition for guard unit where petitioners were employees of a non-guard union); *The Wackenhut Corp.*, 223 NLRB 1131 (1976) (dismissing petition for guard unit where petitioner's officers were officials in a non-guard union and received free office space and services from the non-guard union); *The Magnavox Co.*, 97 NLRB at 1112-13 (dismissing petition for guard unit where self-formed labor organization of guards used non-guard union hall for 2 meetings without paying rent, as well as receiving office services and supplies from non-guard union); *Willcox Construction Co., Inc.*, 87 NLRB 371 (1949) (dismissing petition for guard unit where officials of petitioner also held offices in non-guard union).

The indirect affiliation between USW and LEEBA is evidenced by (1) USW, through Bonser, inviting both the security officers and LEEBA to use USW's union hall for free,

(2) USW’s initiation of authorization card signing, through Bonser, before LEEBA even met with any of the Casino’s security officers, (3) Wynder’s admitted lack of knowledge regarding the USW and reliance upon Bonser, Fenstermacher, and Green (who have a long-term relationship and ran for USW office on a slate together), (4) LEEBA’s failure to file annual reports with the OLMS and questionable independence and financial viability, (5) LEEBA’s unregistered status with the PGCB, (6) Bonser’s control of the organizing campaign among the Employer’s security officers, (7) Bonser’s efforts to exclude LEEBA leadership from the bargaining process,²⁰ (8) Bonser’s efforts to turn the campaign into one about a new entity other than the Petitioner, and (9) Bonser’s ongoing affiliation with the USW and the AFL-CIO. The unavoidable conclusion is that LEEBA and the USW are indirectly affiliated in their efforts to organize the Casino’s guards. Viewed collectively, this evidence reveals affiliations prohibited by Section 9(b)(3).

For all the foregoing reasons, the Employer requests that the matter be remanded to an administrative law judge to permit the Employer to subpoena potentially relevant documents and to introduce all relevant evidence in support of Objection No. 1.

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²⁰ See *Brink’s USA*, 354 NLRB No. 41, slip op. at 15 (2009), wherein the administrative law judge found that LEEBA’s “negotiators were inexperienced in bargaining under the NLRA.” The judge also noted that LEEBA ignored the company’s efforts “to dispel the Union negotiators’ erroneous belief that by law the contract had to be retroactive to the date of certification and that the negotiations were subject to mandatory binding interest arbitration by the NLRB.” *Id.* at 14.

B. *Petitioner Engaged in Objectionable Conduct by Providing Employees with Valuable Gifts during the Campaign to Influence the Outcome of the Election*

OBJECTION NO. 3: Petitioner promised and/or conferred benefits or other things of value in order to influence employee votes.

1. *The Hearing Officer's Flawed Credibility Analysis*

While the Board's established policy is normally not to overrule a hearing officer's credibility resolutions, this is a case in which the clear preponderance of all the relevant evidence should convince the Board that the hearing officer's determinations are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). Where a "credibility choice is based on an inadequate reason, or no reason at all," it will not be respected. *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (11th Cir. 1978); *see Lord and Taylor v. NLRB*, 703 F.2d 163, 169 (5th Cir. 1983) ("We cannot say that a decision which ignores a portion of the record is supported by substantial evidence").

Here the hearing officer violated the foregoing principles with his determination to credit the testimony of LEEBA representative Peter Luck and Fenstermacher, and to discredit the testimony of Employer attorney Matthew Wakefield. While the hearing officer gave no explanation for discrediting Wakefield's testimony concerning Objection No. 3, in connection with Objection No. 2. the hearing officer stated:

I do not 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, despite the fact that Wakefield testified that that [sic] he was immediately concerned with Luck's purported conduct.

(Rpt 9) In making that finding, the hearing officer utterly disregarded 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. (T 222-24) The hearing officer erred by completely disregarding this stipulation and then using the purported absence of evidence to discredit Wakefield.²¹ *See, e.g., Eagle Transport Corp.*, 327 NLRB 1210, 1211 (1999) (hearing officer erred by disregarding the parties' stipulation and reaching a contrary result, *sua sponte*, after the close of hearing).

Further, nothing in the record supports the hearing officer's finding that "Wakefield testified that that [sic] he was immediately concerned with Luck's purported conduct" (Rpt 9), or any words to that effect. Finally, the hearing officer failed to address Wakefield's candid admission that he could not hear what Luck said to the security officers. (T 137) In rushing to discredit Wakefield, the hearing officer failed to consider why Wakefield would testify untruthfully about the details leading up to Luck's meeting with the security officers while admitting that he could not hear, and thus had no evidence on, the ultimate issue of what Luck said to the security officers.²² *See, e.g., El Rancho Market*, 235 NLRB 468, 470 (1978) (Board reviewed record *de novo* where administrative law judge who "ignored, misstated, or confused much of the relevant record evidence and testimony presented in this case").

²¹ In what can be charitably described as hypocrisy, the hearing officer used rejected evidence (photographs of Bill Modzelewski wearing a USW shirt, RE 29) to find that it is "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." (Rpt 9 n.12) The hearing officer cannot have it both ways—rejecting evidence—but then, *sua sponte*, using the rejected evidence to discredit Employer testimony without allowing the Employer a full hearing. If he wishes to be perceived as fair, neutral, and unbiased, why did the hearing officer not use the rejected evidence to discredit Fenstermacher? That evidence shows Fenstermacher lied on his Employer application and gave the Employer a false reference to cover for him. (T 93; REX 7)

²² The hearing officer also failed to address that Wakefield testified the election occurred on his birthday (T 139), a day in which one is mostly likely to accurately recall the details.

The Employer did not make arrangements for others witnesses to corroborate Wakefield's testimony because Petitioner represented that it would not be calling Luck or any other witnesses to testify. (T 35, 152) When Petitioner called Luck and Fenstermacher to testify, contrary to Petitioner's prior representations, it was obvious that their testimony was riddled with inconsistencies and contradictions to that of other witnesses and documentary evidence. In crediting Luck's and Fenstermacher's claim that Luck did not offer to buy dinner and Fenstermacher reimbursed Luck, the hearing officer *failed to even address the following evidence, all of which calls into question Luck's and Fenstermacher's credibility:*

- In response to the question on direct examination by Petitioner's hearing representative of whether he told Fenstermacher he would take care of dinner, Luck answered, "**No. There were no dinner plans at that time.**" (T 183-84) It was not clear whether he denied making the offer to Fenstermacher or simply denied making dinner plans with Fenstermacher at that time. However, on cross-examination by Employer's counsel, Luck first acknowledged having a discussion with Fenstermacher, Board agent Barbara Mann, and Wakefield about the artwork on display in the room. When he was then asked if he said to Fenstermacher "words to the effect that we'll take care of your dinner tonight," Luck answered, "**I don't recall that.**" (T 189) In light of these conflicting answers given by Luck, in one case denying making dinner planes and in the other case claiming not to have a recollection, *neither of which the hearing officer addressed in his decision*, there was no basis for the hearing officer to find that Luck's testimony was "candid,

forthright, and detailed.”²³ (Rpt 13) *See, e.g., Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) (judge erred by converting testimony of “I do not recall” into a denial of the conduct in question). Thus, *the hearing officer erred* by inexplicably crediting Luck’s equivocal and inconsistent answers, particularly that of “I don’t recall,” into a denial.²⁴ It was *further error* to use that incorrect finding to discredit Wakefield’s clear and unequivocal testimony that Luck said to Fenstermacher words to “the effect of we’re going to take care of your dinner tonight.” (T 136) *See United Parcel Serv.*, 325 NLRB 1, 1 (1997) (judge may not “implicitly discredit” contrary testimony and evidence by merely failing to acknowledge it in her decision).

- On direct examination, Luck answered the question of “did you speak to anybody” on the way in to the Casino, with “[n]ot that I remember.” (T 183) On cross examination, he testified that “*I might have* done that because *I was asking them* where in the hotel the Northampton Room was and I had to go there.” (T 190). Once again, *the hearing officer did not address the inconsistencies* between “[n]ot that I remember,” “*I might have*,” and “*I was asking them*.”

²³ Fenstermacher did not deny that Luck offered to have the Union pick up his dinner. Rather, he denied only that Luck himself offered to pick up dinner. (T 199) Regardless, the hearing officer acknowledged that “Fenstermacher’s testimony was not as clear and detailed as that of Luck.” (Rpt 13)

²⁴ In asserting that “it is not plausible that [Luck] would [offer to take care of Fenstermacher’s dinner] at the pre-election conference in front of the Board Agent and the Employer’s counsel” (Rpt 13), *the hearing officer failed to consider* that there is no evidence the Board Agent heard the offer (T 146). Moreover, *the hearing officer failed to address* that Luck is relatively new to LEEBA and was apparently unfamiliar that such conduct is objectionable. (T 178-79). Likewise, the hearing officer failed to consider not only that Luck in fact paid for the dinner of Fenstermacher that very same night, but also neglected the undisputed and similar conduct regarding the Mets tickets in assessing the overall picture and credibility.

- Luck testified that after the ballots were counted the Board agent purportedly asked of everyone in the room if there were “any objections to the procedures that had just taken place.” Luck testified that no one said anything. (T 186, 196-97) 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. Nothing therein even remotely suggests that a Board agent ask the parties if there are any objections, and anyone who has observed the counting of ballots and preparation of a tally of ballots is aware that Luck was not describing an actual agency practice.²⁵ (T 224-25) Yet again, ***the hearing officer did not even address*** this example of what, at best, could be described as his poor recollection or, more likely, his deliberate fabrication. *See Gold Standard Enterprises*, 234 NLRB 618, 618-19 (1978) (rejecting decision that “fails to set forth, consider, and/or analyze all of the relevant evidence” and provides no reason for ignoring such evidence).
- The hearing officer expressly refused to address the consciousness of guilt in Wynder in conferring the unlawful benefit of the Mets vs. Phillies tickets by Wynder seeking to distance Petitioner from, and to pawn off on Luck’s supposed role of a Boy Scout leader, the acquisition of the baseball tickets. Wynder tried doing this by adding Luck’s name to the ticket application and, thus, introducing a forged document. The hearing officer inexplicably characterized the significant evidence of the forged document and the perjury of Wynder in causing the altered ticket form to be admitted

²⁵ Indeed, for Board agent Barbara Mann to have asked whether anyone had any objections would have been contrary to section 102.69(a) of the Board’s Rules and Regulations, which gives a party seven days from preparation of the tally of ballots to file objections.

as “irrelevant.” (Rpt 10 n.13; P 1) ***This was a gross error on the part of the hearing officer.*** See *Precipitator Servs. Group*, 349 NLRB 797, 800 (2007) (an adverse inference is normally drawn against a party that introduces incomplete or altered evidence). Further, the ***hearing officer failed to address*** the blatant inconsistencies between the testimony of Wynder and Luck or the fact that Luck testified concerning the document. (T 178-81, 187) ***The hearing officer was required to address this issue as Luck may have been the one who altered the document.*** To put this in perspective, Wynder initially testified that no one gave him the baseball tickets, he did not give the tickets to anyone else, and he never had possession of the tickets.²⁶ (T 19) Rather, he claimed that Luck obtained the tickets from the Mets Community Outreach Program for the use of the Boy Scouts.²⁷ (T 20, 33) However, Luck testified that he obtained the tickets through Wynder.²⁸ (T 187) Mets’ community outreach manager, Robert Hines, testified that he does not know Luck and did not deal with Luck concerning the tickets for the Boy Scouts on May 28. (T 161) Rather, Hines dealt only with Wynder. (T 162) Significantly, as to the application for the tickets (P 1), Hines explained that ***Wynder requested and was given back the original document about a week before the hearing.*** (T 170) Sometime during the

²⁶ Wynder first testified that he does not have access to complimentary Mets tickets. (T 18) However, he later testified that he gets “complimentary tickets to every game. So if I need tickets for friends, associates, whatever, they’ll provide me with those complimentary tickets.” (T 32)

²⁷ When asked by the Hearing Officer if Luck gave Wynder the application for the tickets “to give to the Mets,” Wynder responded, “No, no. [Luck] gave it to the Mets.” (T 35) Even as to the application itself (P 1), Wynder attempted to distance himself entirely from the transaction by testifying, “I believe that’s the one, the receipt he [Luck] got, or he got it from the Mets, I’m not quite sure. But that’s the form he had to fill out in 2010” [sic] (T 43).

²⁸ While Wynder testified the tickets could not be “exchanged, returned, sold, nothing” (T 46), Luck testified they were for a ***fundraiser*** for his son’s scouting activity (T 180-81).

week before the hearing, Luck, Wynder, or someone on behalf of Petitioner altered the document before submitting it as Petitioner Exhibit 1. Hines testified that the words “Troop 86,” the contact name of “Peter Luck,” and the mailing address, telephone number, and e-mail address for Luck were not on the original document. (T 163, 167) ***Rather than address Petitioner’s obvious fraud on the Board, the hearing officer compounded it*** by subtly attempting to transform Luck into a “Scout Master”! (Rpt 10 n.13) Nothing in the record supports the hearing officer’s finding that Luck is a Scout Master.²⁹ In *Kanakis Co.*, 293 NLRB 435, 436 (1989) the Board explained its revulsion to a party’s attempt to defraud the agency: “Such conduct demonstrates a contempt for the Board’s processes that cannot be condoned.” To ignore it, would allow a party “to profit from its perjury and misconduct in deceiving the Board and encourage others to similarly abuse the Board’s processes.” *Id.*; see *Midland National Life Ins. Co.*, 263 NLRB 127, 133 (1982) (Board will set aside an election where a party uses a forged document during a campaign); see also *Goffstown Truck Center, Inc.*, 356 NLRB No. 33, slip op. at 1-2 (Nov. 18, 2010) (overturning election where union organizer misrepresented herself as “acting on behalf of” the Board).

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²⁹ While Luck testified that his son was working toward becoming an Eagle Scout (T 180), Luck did ***not*** testify that he had any role in the Boy Scouts of America. The only reference is Wynder’s speculative testimony about Luck: “He’s an assistant troop den, ***I don’t know*** what they call it, but assistant troop den leader, ***something like that*** for Troop 86, ***I believe.***” (T 33, emphasis added)

- While Luck is purportedly the “organizer” or “lead membership coordinator” for Petitioner (T 12, 178),³⁰ the *hearing officer failed to even address* that Luck did not know the names of any of the security officers that he walked past in the Casino, and was unfamiliar with the fact that some are part of the “drop team.” (T 189-90) How could Petitioner’s sole organizer not know the voters on the day of the election?³¹
- The hearing officer *failed to even address the photographic evidence that contradicts the testimony* that Fenstermacher repaid Luck six weeks after the election at Fenstermacher’s retirement party. While Luck testified that he went to the party with Bonser (T 193), a photograph of the attendees at the party reflects that only Bonser, but not Luck, was present. (EX 45; T 208-15) Apparently, when Luck and Fenstermacher planned their “repayment at the retirement party” story, they did not anticipate the Employer would have a photograph from the party. Fenstermacher, after admitting that a group picture of attendees was taken at the retirement party, could not contain his surprise when he was subsequently confronted by the photograph that did not have Luck in it, remarking, “I never saw that picture.” (T 214) *See Bralco Metals*, 227 NLRB 973, 973 (1977) (rejecting judge’s factual findings and credibility resolutions that were inconsistent with relevant and uncontradicted evidence).
- Finally, the hearing officer claims it is speculation for the Employer to assert “that Fenstermacher and Luck discussed their testimony in an effort to ‘square their

³⁰ Luck also testified that he could not name his fellow LEEBA board members who hold the positions of “vice president” and “secretary” (T 179), yet Petitioner’s LM-3 report lists Luck as the “recording seceraty” [sic] (P 4).

³¹ Unless, *the organizing was actually being done by USW*, with LEEBA acting merely as the straw person or front.

stories.’’ (Rpt 13) The hearing officer pays only lip service to the fact that Fenstermacher contradicted Luck when Fenstermacher testified that he “briefly” talked with Luck about “the testimony” and “what’s going on” when Luck called him and requested that he testify. (T 207; Rpt 13) The *hearing officer also failed to address* Wynder’s apparent influence. On the first day of the hearing, Wynder testified that *he did not “become aware of who ended up paying* for that dinner,” and “*I don’t know*” who paid for dinner. “*I don’t even know* where they ate at.” (T 38, emphasis added) However, when the receipt for dinner was introduced during Wakefield’s testimony on the second day of the hearing,³² Wynder objected to its admission as follows: “All this is, is a receipt. *It doesn’t reflect any payment arrangements between Peter Luck or Rich Fenstermacher.* I’m quite sure we’ve all gone out to dinner or anything and sometimes somebody will pay the bill and other people will pay them back. And on the grounds of that – that’s it.” (T 141) Obviously, the repayment story was hatched sometime after the first day of hearing and prior to Luck and Fenstermacher testifying on the last day.

It would damage the agency’s reputation to sustain the hearing officer’s factual findings and credibility analysis which disregard the foregoing evidence. In no way should the hearing officer’s conclusions—that Luck and Fenstermacher were credible and Wynder’s credibility was irrelevant—be sustained.³³

³² Petitioner’s attorney was unable to attend the second and third day of the hearing, leaving Wynder as Petitioner’s hearing representative.

³³ Additionally, as noted previously, the hearing officer disregarded Petitioner’s failure to comply with federal and Pennsylvania law, particularly the failure to file an LM-3 report prior to July 12, 2011 and the glaring inconsistencies between that report and Wynder’s and Luck’s testimony.

2. *Free Tickets to the May 28 Mets vs. Phillies Game at Citi Field*

On May 20, Petitioner, through Bonser, gave security officer Ryan Kocher four tickets to the New York Mets May 28 home game against the Philadelphia Phillies. (T 49-51, 104-06; EX 4) Kocher “absolutely loves the Phillies” and was overjoyed to get the tickets, and shared his experience with all of his friends on Facebook. (T 51; EX 1-3) The tickets were worth \$50 or \$60 each, for a total of between \$200.00 and \$240.00.³⁴ (T 164) The hearing officer erred in concluding that “employees would not reasonably view the tickets as an inducement to vote for the Petitioner.” (Rpt 11)

Kocher clearly recognized he owed Petitioner his support in exchange for the tickets. When Kocher invited two of his Facebook friends to join he and his girlfriend in attending, one of his friends asked, “*did you get it approved thru the union?*” (E 1, emphasis added) Kocher and his girlfriend attended the game with Kocher’s fellow security officer, John Barnhart, and his girlfriend. (T 106) Both Kocher and Barnhart were excited to get these tickets, as they are both Phillies fans. (T 106)

The hearing officer once again erred by turning *John* Barnhart (misspelled in the transcript as “Barnhardt”) into “*Bob Bernhardt*.” (Rpt 3 n.3, 10-11, emphasis added) Bonser’s testimony that John Barnhart attended the game with Kocher is undisputed. Despite the Employer’s motion to correct the spelling of John Barnhart’s last name (among other corrections) being unopposed, the hearing officer distorted the record further by assuming that security officers *John Barnhart* and *Bob Bernhardt* are one and the same.³⁵ The hearing officer

³⁴ Curiously, the tickets were located in section 106, row 37, in Citi Field’s right field (E 4), which Wynder testified is “my usual” area to work as a security supervisor (T 18).

³⁵ To distort the record further, the hearing officer reviewed Kocher’s Facebook comment (“On our way to New York...”), Bob *Bernhardt*’s comment (“two of my friends are using my tix seats 8&9 in probably same row”), and Ryan Kocher’s witty follow up comment (“Yeah probably

failed to appreciate that one of these security officers is a steadfast supporter of Petitioner (RE 36 and RE 38), and the other was influenced to vote for Petitioner by receiving free tickets to the Phillies for he and his girlfriend. Thus, the hearing officer erred yet again in finding that “it appears that only one employee actually used the tickets.” (Rpt 11)

The hearing officer mistakenly assumed that the timing of this gift was too far removed from the election. For 50 years, the Board has considered *all conduct* during the critical period which commences with filing of the petition and closes with the election. *Ideal Electric and Mfg. Co.*, 134 NLRB 1275, 1278 (1961).³⁶ Buying support early in the campaign, as Petitioner did, is more likely to yield exponential benefits for Petitioner, particularly inasmuch as Kocher and Barnhart disseminated the message to others. The U.S. Supreme Court recognized this principle in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), when it reasoned that an employee’s “outward manifestation of support must often serve as a useful campaign tool in the union’s hands to convince other employees to vote for the union, if only because many employees respect their coworkers’ views on the unionization issue.” *Id.* at 277. Thus, if a union is allowed “to buy endorsements” early in the campaign, the union will be able to “paint a false portrait of employee support during its election campaign.” *Id.*

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I’ll introduce myself you know that!!”) (EX 2), to conclude that this “suggests that he [Bernhardt] gave the tickets two of his friends.” (Rpt 11) The hearing officer then noted 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.” Actually, this suggests only the hearing officer’s poor sense of humor and lack of logic. He failed to appreciate that Kocher already knew the recipients of the tickets—John Barnhart and his girlfriend.

³⁶ The Board recently reaffirmed the *Ideal Electric* principles in *Stericycle, Inc.*, 357 NLRB No. 61, slip op. at 5 (Aug. 23, 2011).

In sum, LEEBA used tickets ostensibly obtained for a Boy Scout Troop as a gift to influence the outcome of the July 21 election.³⁷ Bonser conferred this valuable benefit from Petitioner on fellow voting unit members. (T 105-06) Security shift manager Benjamin Sherwood overheard the conversation on May 20 in the security office between security officers Bonser, Kocher, and Joe Sgro. Specifically, Bonser offered the tickets to Kocher, explaining that they were a gift from the “guys,” referring to LEEBA.³⁸ (T 49-52; 105-06)

The conflicting and irreconcilable testimony of Luck and Wynder, combined with Petitioner’s altered document (P 1), demonstrates their consciousness of guilt as to the underlying objectionable conduct. The tickets were valuable to the recipients and sent a message to the entire voting unit of what Petitioner would do to obtain support. Indeed, Bonser confirmed that they were valuable and highly valued by the recipients (Kocher and Barnhart) (T 106), and Kocher even publicized his receipt of the tickets and his attendance at the game on his Facebook account.

3. *Free Dinner at Emeril’s Chop House on the Day of the Election*

It is undisputed that Luck paid for Fenstermacher’s dinner at the Casino’s premiere restaurant, Emeril’s Chop House, during the hiatus between voting sessions on July 21. (T 140-42; EX 47) As discussed previously, Wakefield credibly testified that Luck said to

³⁷ While the hearing officer found that Petitioner gave the tickets to Bonser with no limitations other than to see that they were used (Rpt 11), which he believed was consistent with “Luck’s and Hines’s testimony that the Mets desire that all tickets distributed through the Community Outreach Department be used (Rpt 11 n.15), the hearing officer failed to acknowledge that “[t]he Mets wanted people from Pennsylvania *through the troop from Boy Scouts of America* to come to the game” (T 20, emphasis added).

³⁸ Realizing there might be someone else in the office, Bonser walked past Sherwood’s cubicle, saw him, and announced to Kocher that it was “only” Sherwood. (T 50-51)

Fenstermacher words to “the effect of we’re going to take care of your dinner tonight.” (T 136) The cost of the dinner between Luck and Fenstermacher was \$168.61.³⁹ (EX 47)

Even though Luck and Fenstermacher speciously testified that Fenstermacher reimbursed Luck \$70.00—only 41.5% of the cost of dinner—they claimed that the payment was made on September 1, or 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. (T 184-85, 200) *The hearing officer attempted to diminish this fact by removing a month from the timeline* by incorrectly finding that “Fenstermacher repaid Luck after the Employer’s objections were filed on July 29.” (Rpt 13 n.16) 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. Moreover, given that it occurred after the election, anyone whose vote may have been influenced would not have known that Luck was to be repaid.

4. *Petitioner’s Gifts to Voters Tainted the Election*

In *Go Ahead North America, LLC*, 357 NLRB No. 18, slip op. at 1 (July 18, 2011), the Board reiterated as a matter of law, “A *union cannot make*, or promise to make, *a gift of tangible economic value* as an inducement to win support in a representation election.” *Id.* (emphasis added) (citing *Mailing Services*, 293 NLRB 565, 565 (1989) (free medical screenings); *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235-36 (1984) (\$16 jackets to 5 or 6 employees); *General Cable Corp.*, 170 NLRB 1682, 1682-83 (1968) (\$5 gift certificates to each employee and their spouse); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (life insurance)). A union, like an employer, is “barred in the critical period prior to the election from

³⁹ July 21 was Wakefield’s birthday, which he celebrated that evening with Casino president Robert DeSalvio at Emeril’s Chop House. Consistent with the conversation Wakefield overheard earlier in the day between Luck and Fenstermacher, Wakefield and DeSalvio saw Luck and Fenstermacher being seated and dining together. (T 136, 139-40)

conferring on potential voters a financial benefit to which they would otherwise not be entitled.”⁴⁰ *Id.* at 2 (quoting *Mailing Services*, 293 NLRB at 565). “The Board has long held that *a union’s actual grant of benefits* is ‘akin to an employer’s grant of a wage increase in anticipation of a representation election . . . [which] *subjects the donees to a constraint to vote for the donor union.*’” *Stericycle, Inc.*, 357 NLRB No. 61, slip op. at 3 (Aug. 23, 2011) (emphasis added) (quoting *Wagner Electric Corp.*, 167 NLRB at 533).

In *Go Ahead*, the union offered to waive back dues owed by employees during a decertification election campaign. The Board explained, “In these circumstances, we find that *employees reasonably would infer that the purpose* of the Union’s expressed willingness to forgive the obligation *was to induce them to support the Union.*” 357 NLRB No. 18, slip op. at 2 (emphasis added); *see also Labor Services*, 274 NLRB 479 (1985) (overturning union election victory where union representative provided free alcoholic beverages to voter before and during an election). “*When a benefit imposes a sense of obligation to the union, it suffices to invalidate the election.*” *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 495 (6th Cir. 2000) (emphasis added).

Here, the hearing officer chose to disregard the bright-line test of *Go Ahead North America*, in favor of the multi-factor test of *B & D Plastics*, 302 NLRB 245 (1991). However, a majority of the Board has not applied *B & D* to a benefit conferred by a petitioner during the critical period. Indeed, the hearing officer omitted the following two sentences that immediately follow the four factors listed in *B & D*: “In determining whether a grant of benefits is objectionable, the Board has drawn the *inference that benefits granted during the critical*

⁴⁰ However, where the value of the gift is so minimal that it would not reasonably interfere with employee free choice, the Board has found such a gift unobjectionable. *E.g.*, *Nu Skin International*, 307 NLRB 223, 223–224 (1992) (pro-union t-shirts); *R.L. White Co.*, 262 NLRB 575, 576 (1982) (same).

period are coercive. It has, however, *permitted the employer to rebut the inference* by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits.” *Id.* at 245 (emphasis added). The hearing officer omitted these sentences despite the substantial import thereof because Petitioner offered no credible or logical explanation to rebut the inference that the baseball tickets and the dinner were coercive.

Petitioner conferred valuable gifts on employees with the clear intent of influencing their votes. It gave out baseball tickets worth hundreds of dollars and paid for an expensive dinner for its election observer in plain view of voting unit members. As in *Wagner Elec. Corp.*, 167 NLRB at 533, “by such a gift the Petitioner destroyed the atmosphere which the Board seeks to preserve for its elections in order that employees may exercise freedom of choice on representation questions.” While the hearing officer points to the fact that “Petitioner prevailed by 16 votes” (Rpt 11), he failed to consider that a switch of only 8 votes would have yielded an entirely different outcome. While less than 8 employees actually received gifts, the significant value of the gifts and the dissemination of information concerning the gifts—as evidenced by Kocher’s Facebook postings—inevitably influenced a larger number of voters to the point that it likely changed the outcome of the election.

In *Drilco, a Division of Smith Int’l, Inc.*, 242 NLRB 20 (1979), the Board overturned an election in which 326 ballots were cast for, and 371 against, the petitioner. Significantly, the Houston, Texas employer offered certain raffle prizes to eligible voters, in which the main prize was a trip for two to Hawaii or a trip for a family to either Disneyland or Disneyworld. The Board reasoned that “such a substantial prize inherently induces those eligible to vote in the election to support the Employer’s position.” *Id.* at 21; *see also Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 3 (2011) (setting aside election where employer maintained unlawful

handbook rules, even though none of the rules was enforced against employees during the campaign and there was no evidence that any employees were actually deterred from engaging in campaign activity).

Likewise, in *Comcast Cablevision-Taylor*, 232 F.3d 490, the court overturned an election where 31 votes were cast in favor, and 17 against, the petitioner. The petitioner offered a free weekend trip to Chicago (worth approximately \$50 per person) to meet with union officials. Five employees made the trip. In overturning the election, the court held that providing van transportation and one night's lodging so that employees could have a free weekend in Chicago in conjunction with the two-hour union meeting "was sufficiently valuable to influence the vote without relations to the merits of the election." *Id.* at 498; *see also S.T.A.R.*, 347 NLRB 82, 84 n.7 (2006) (Board found that a union's misstatement concerning the waiver of initiation fees was objectionable because it "could have affected the election result," regardless of the effect on employees).

Given the foregoing Board and court precedent, the election must be set aside because of the objectionable conduct of Petitioner.

IV. CONCLUSION

The Employer respectfully requests that the Board direct an evidentiary hearing before an administrative law judge on the issue of Petitioner's alleged affiliation with the USW, including permitting the Employer to subpoena potentially relevant documents and to introduce relevant evidence in support of its position that LEEBA is indirectly affiliated with the USW. Anything short of that would violate the Employer's right to due process and risks the Board violating section 9(b)(3) of the Act.

Even assuming *arguendo* a new hearing is not directed, as to Objection No. 3, there can be no question that but for Petitioner's gifts of four baseball tickets and an expensive dinner there

would not have been a LEEBA victory in the July 21 election. Indeed, a reversal of only eight votes for Petitioner would have produced a different outcome. Accordingly, the election should be set aside and a new election should be directed.

Dated: October 31, 2011

BALLARD, ROSENBERG, GOLPER, & SAVITT
MATTHEW T. WAKEFIELD
MATTHEW COYLE

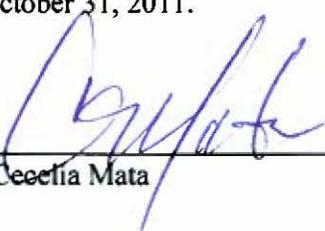
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PROOF OF SERVICE

On October 31, 2011, I served the foregoing document described as: **EMPLOYER'S BRIEF IN SUPPORT OF 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.

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: _____


Cecilia Mata