

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

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In the Matter of	*	
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Associates And Leisure Activities, LLC,	*	
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<i>Employer,</i>	*	
	*	
and	*	Case 01-RC-087226
	*	
IATSE, Local 11,	*	
	*	
<i>Petitioner.</i>	*	
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**ANSWERING BRIEF OF PETITIONER IATSE, LOCAL 11**

Pursuant to Section 102.69(f) of the Board’s Rules and Regulations, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 11 (“Local 11”) hereby submits its opposition to the Employer’s Exceptions to Hearing Officer’s Report and Recommendation on Objections and Challenges filed by Associates And Leisure Activities, LLC (“ALA”).

**Background.**

ALA operates the Wilbur Theater in Boston, Massachusetts. At all times material, ALA has offered a combination of comedy shows and contemporary musical acts such as rock shows. On September 23, 2012, Region 1, pursuant to a Petition filed by Local 11, conducted an election among eligible stagehands employed by ALA at the Wilbur Theater venue. Four eligible stagehands voted in the election, *i.e.* James McEvoy, Alfredo Carballo, Corey Moses and Matt Baxter.<sup>1</sup> The votes were split 2 and 2.

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<sup>1</sup> The Eligible Voter List included the names of Jonathan Allen and John Coretto. Allen and Coretto voted in the election but their votes were challenged by Local 11. Three other stagehands voted under challenge as their names

Local 11 filed timely Objections to the Conduct of the Election, including Objection No. 3 which stated that “[t]he Employer threatened to reduce the number of shows to only comedy performances if Local 11 was successful in the election.” A hearing was conducted on the Objections before a Hearing Officer who ultimately concluded, in reference to Objection No. 3, that Local 11 had “met its burden of proving that the conduct occurred, that it is the kind of threat that tends to interfere with employee freedom of choice in an election, and that therefore it materially affected the results of the election.” Hearing Officer’s Report and Recommendation on Objections and Challenges at pp. 2-3.

This conclusion is challenged by ALA in its Exceptions to Hearing Officer’s Report and Recommendation on Objections and Challenges

**Argument.**

In its Brief in Support of Employer’s Exceptions to Hearing Officer’s Report and Recommendation on Objections and Challenges (“Employer’s Brief”), ALA constructs a classic “straw man” and then advances an argument around that straw man by citing to alleged “facts” that are not supported by the hearing record. In this regard, ALA begins its “Argument” by describing the objectionable statement of Mr. Blumenreich as follows:

Here, Mr. Blumenreich’s statement – that the theater was already losing money on music shows and that if he had to pay much higher union rates on music shows, he simply could not afford to do as many of them – can only be viewed as a lawful prediction based on objective fact. Employer’s Brief at p. 8, par. 1.

However, the record evidence concerning what Mr. Blumenreich told at least two voters shortly before the voting began is materially different. In this regard, there was no dispute that,

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did not appear on the Eligible Voter List. Prior to the start of the hearing, Local 11 and ALA agreed that all of the stagehands whose votes had been challenged were ineligible to vote.

shortly before the start of the voting, Mr. Blumenreich approached Alfredo Carballo, a stagehand and one of the eligible voters. Carballo recalled the conversation as being as follows:

[Mr. Blumenreich] said that if the Wilbur was to go union it would result in them not being able to afford to pay labor costs for big rock shows and that they would have to scale back and do mostly comedy, which would affect the employment of almost all the people that work at the Wilbur because you use less labor for smaller shows like comedy.<sup>2</sup>

I said that I was a member of IATSE, Local 481, which is different from the 11, so I was in a strange place, sort of sandwiched between two worlds here. And that I was making my decision – I would make my decision when I picked up the pencil, but that this was my whole life, and voting one way or the other could have a giant effect on me, making connections in other unions because I’m not a member of Local 11, I’m on their over-hire list. Tr. 53-54.

During his subsequent testimony on direct, Mr. Blumenreich, referring to the testimony of Carballo, stated that “[h]e pretty much told the truth” (Tr. 77); and, later, under cross examination, Mr. Blumenreich agreed that Carballo’s memory of his conversation with him was “fairly accurate.” Tr. 79.

In addition, during his testimony on direct, Mr. Blumenreich had the following exchange with his counsel:

Q. Did you refer at all, if you recall, to the cost of why you couldn’t – why if you were involved with a union contract you couldn’t afford to have those shows?

A. I don’t think I went into – my conversation with Alfredo is pretty short, like he said, and, you know, I don’t think we went into a lot of detail, I don’t remember going

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<sup>2</sup> Consistent with the testimony of Carballo, the Hearing Officer, in her Report and Recommendation (at page 6, par. 1), described the threat as follows:

During that time, [Carballo] testified, Bill Blumenreich approached him outside of the theater, near the stage doors, and told him that if the theater were to go union, Blumenreich would be unable to afford the labor costs for big rock shows, and would have to scale back and do mostly comedy, which would affect the employment of almost all employees, since such shows require less labor.

In its Brief in Support of its Exceptions, ALA states that the “Employer does not contest the Hearing Officer’s factual findings as far as they go.” Employer’s Brief at p. 3, footnote 3. As such, ALA does not dispute that the Hearing Officer’s finding that Mr. Blumenreich made the threat described on page 6 of the Hearing Officer’s Report and Recommendations. However, ALA fails to argue in its Brief why that threat was based on objective fact and, as such, not objectionable.

into much detail with him, and I remember him just telling me – yeah, I remember now, like he said he told me he was a member of the other IATSE union, I remember that he did, just like he said, he told the absolute truth. So I figured, well, he’s probably got his mind made up. And it was a very short conversation. Tr. 77-78.

Then, on cross examination, Mr. Blumenreich testified that, shortly before the voting, he also spoke to voter Corey Moses and that the substance of his conversation with Moses was “probably” the same as his conversation with Carballo. Tr. 80.<sup>3</sup>

In its Brief, ALA then states that the straw man statement that “the theater was already losing money on music shows” and that “if he had to pay much higher union rates for such shows, he simply could not afford to do as many of them” was “objectively true and well known as such by the stagehands...” Employer’s Brief at pa. 8, par.1. However, there is not a scintilla of evidence in the instant record as to what voter Corey Moses knew or didn’t know about whether “the theater was already losing money on music shows” and/or that ALA would have to pay higher union rates if Local 11 prevailed and/or whether ALA “if he had to pay much higher union rates” for music shows, “simply could not afford to do as many of them.”

Further, in the case of Carballo, the record evidence directly contradicts the assertion in the Employer’s Brief. In this regard, the following exchange occurred during the cross examination of Carballo:

Q. And he told you – did he tell you that on musical shows, even at that point, he didn’t make any money?

A. No.<sup>4</sup>

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<sup>3</sup> Mr. Blumenreich also testified that he had the same conversation with voter Jonathan Allen some days prior to the election. Allen’s vote was challenged by Local 11 and, as noted by the Hearing Officer, Local 11 and ALA agreed, for purposes only of the election conducted on September 23, 2012, that Allen was ineligible to vote.

<sup>4</sup> On page 5 of the Employer’s Brief, ALA, in a similar manner, misstates the record evidence. In this regard, citing to page 56 of the record, ALA states that “[a]nother stagehand, Alberto Carballo, ‘absolutely’ knows that musical shows require that the theater employ more labor, resulting in higher costs and lost money.” However, the actual exchange between Carballo and ALA’s counsel was as follows:

Q. He didn’t explain to you – you know that with musical shows that much more labor has to be employed, correct?

Thus, not only does ALA in its Brief manufacture a “straw man” statement against which it then argues that the Hearing Officer erred in her recommendation but also certain of the key “facts” that ALA argues make the straw man statement non-objectionable are not supported by record evidence.

As noted in footnote 2, *supra*, the Hearing Officer, in her Report and Recommendation, describes the actionable threat by Mr. Blumenreich as follows:

During that time, [Carballo] testified, Bill Blumenreich approached him outside of the theater, near the stage doors, and told him that if the theater were to go union, Blumenreich would be unable to afford the labor costs for big rock shows, and would have to scale back and do mostly comedy, which would affect the employment of almost all employees, since such shows require less labor. Report and Recommendation at p. 6, par.1.<sup>5</sup>

ALA, in its Brief, simply ignores this finding by the Hearing Officer, which is well-supported by the record testimony, and, as such, never addresses why this statement would not be unlawful under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), and its progeny.<sup>6</sup> Quite possibly, ALA ignored the Hearing Officer’s findings concerning the threat made by Mr. Blumenreich, because it is not possible to argue that his statement was “carefully phrased on the

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- A. Absolutely.  
Q. And so it stands to reason that if he had to pay a higher rate for musical shows than comedy shows it would be a – I would say a much higher cost?  
A. Sounds reasonable.

While Carballo, as he testified, would be aware that ALA, at least generally, employs more stagehands for rock shows than comedy shows, there is nothing in this exchange to suggest that Carballo was aware that ALA “lost money” on rock shows or that, under a Local 11 contract there would be a “higher rate for musical shows than comedy shows.” In fact, there is no evidence that the stagehand rates vary according to the nature of the performance.

<sup>5</sup> Later in her Report and Recommendations, the Hearing Officer similarly stated that “[i]n the instant case, Blumenreich threatened unit employees that, if the Union won the election, they would be at risk of losing their jobs or that there would be substantially less unit work available to them because he would be unable to afford Union labor costs.” Report and Recommendation at p. 10, par. 1.

<sup>6</sup> See footnote 2, *supra*.

basis of objective fact” to convey his belief as to “demonstrably probable consequences beyond his control.”

In this regard, it is well-settled that ALA, at the hearing on the objections and challenges, had the burden of proof “to demonstrate that its prediction [that ‘if the theater were to go union, ALA would be unable to afford labor costs for big rock shows’ was] based on objective fact.” *Metro One Loss Prevention Services Group*, 356 NLRB No. 20 (2010), citing *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995). However, as noted by the Hearing Officer, ALA never offered any evidence – persuasive or otherwise – that Blumenreich’s statement was based on objective fact.

For example, there is no evidence that Carballo and/or Moses would have had any knowledge of whether Local 11 had standard rates for its collective bargaining agreements and, if so, what those rates were. In addition, there is no dispute that Blumenreich never distributed a Local 11 collective bargaining agreement to Carballo and/or Moses in conjunction with making his prediction that “if the theater were to go union, ALA would be unable to afford labor costs for big rock shows” nor did ALA introduce into evidence at the hearing a Local 11 collective bargaining agreement or evidence of ALA’s then-current wage and benefit package for stage hands. Compare *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995)(“We do not find that Weissberg’s simple act of waving a contract in front of the unit employees was sufficient to constitute objective evidence supporting his prediction that employees would suffer adverse consequences if they voted in the Union. We emphasize that the Respondent did not introduce this contract into evidence here or otherwise attempt to document its claim”).

Further, even assuming that Local 11 has an “industry standard” collective bargaining agreement (which it does not) and that that industry standard agreement provided for wages and

benefits greater than those provided by ALA to its stage hands (again there is no evidence of what those wages and benefits are), these “facts” would not constitute objective evidence supporting Blumenreich’s statement because there is no evidence of what a final Local 11/ALA collective bargaining unit would contain. *See id.* (“Moreover, even assuming the Union’s standard collective-bargaining agreement provided for the wages and working conditions that Weissberg had predicted, this does not mean that the bargaining unit employees would automatically be covered by such a collective-bargaining agreement following negotiations”).

In sum, as found by the Hearing Officer, there is no dispute that the owner of ALA, on the day of the election, threatened voters that, if the theater was to go union, he would have to significantly scale back available work for all ALA employees including the stage hands.<sup>7</sup> ALA, having conceded that its owner made this threat, had the burden of proof at the hearing on the Objections and Challenges, “to demonstrate that its prediction [that ‘if the theater were to go union, ALA would be unable to afford labor costs for big rock shows’ was] based on objective fact.”

As a review of the record will demonstrate, ALA didn’t produce any evidence that its owner’s threat was based on objective fact let alone meet its burden of proof that its prediction was based on objective fact. In fact, as noted *supra*, when the owner of ALA was asked by his counsel if he referred at all to “why if you were involved with a union contract you couldn’t afford to have those shows,” when he spoke to Carballo, Blumenreich replied, “I don’t think I went into – my conversation with Alfredo is pretty short, like he said, and, you know, I don’t think we went into a lot of detail, I don’t remember going into much detail with him....” Tr. 77-78.

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<sup>7</sup> As previously noted, in its Brief in support of its Exception, ALA states that the “Employer does not contest the Hearing Officer’s factual findings as far as they go.” Employer’s Brief at p. 3, footnote 3.

ALA, having conceded, on the record, that Mr. Blumenreich did not explain why he couldn't afford rock shows if the Wilbur was to go Union, it is beyond peradventure that the Hearing Officer's findings and recommendations concerning Objection No. 3 are unassailable and, as such, ALA's Exceptions should be rejected and the Board should adopt the findings and recommendation of the Hearing Officer in this matter and order a rerun election.

Respectfully Submitted,

IATSE, Local 11,

By its Attorney,

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Date: January 9, 2013

#### STATEMENT OF SERVICE

I, Gabriel O. Dumont, Jr., hereby certify that I have served the Answering Brief of IATSE, Local 11 via email on Alan S. Miller, Esq., Stoneman, Chandler & Miller LLP, [amiller@scmlp.com](mailto:amiller@scmlp.com) and on Jonathan B. Kreisberg, Regional Director, Region 1, [Jonathan.Kreisberg@nlrb.gov](mailto:Jonathan.Kreisberg@nlrb.gov).

/s/ Gabriel O. Dumont, Jr.  
Gabriel O. Dumont, Jr.

Date: January 9, 2013