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November 5, 2011

National Labor Relations Board
Headquarters
1099 14th St., N.W.
Washington, D.C. 20570-0001

Re: SANDS BETHWORKS GAMING LLC and
LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION
NLRB Case No. 4-RC-21833

Dear Board Members:

I have enclosed eight (8) copies of Petitioner's Memorandum in Opposition to Employer's Exceptions to Hearing Officer's Report on Objections to Election along with an Affirmation of Service on Employer's counsel.

Very truly yours,

Terrence P. Dwyer

Terrence P. Dwyer

TPD/jmc
Enc.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

---------- X

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

Employer,

-- and --
LAW ENFORCEMENT EMPLOYEES
BENEVOLENT ASSOCIATION,
Petitioner.

----------X

NLRB CASE NO. 4-RC-21833

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION

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I. STATEMENT IN OPPOSITION

Petitioner opposes the Employer's Exceptions to the Hearing Officer's Report on Objections to the Election. The Employer failed at the objection hearing, held over a three day period, to meet its evidentiary burden of presenting prima facie evidence that employees were denied an opportunity to exercise their franchise in a free manner, unaffected by any actions or interference on the part of the Petitioner. The evidence adduced at the objection hearing negated each of the alleged objections raised by the Employer and preserved for the hearing. This evidence, consisting mainly of the testimony of witnesses, provided the basis for the Hearing Officer's report and recommendations after making an assessment of the credibility and veracity of the witnesses. The Hearing Officer's credibility resolutions should remain undisturbed. Further, the Employer is now improperly attempting in its exceptions to re-litigate a subject matter – the allegation that Petitioner is affiliated with a non-guard unit -- that was previously decided in the representation hearing and ruled at the objection hearing to not be newly discovered or otherwise unavailable information from the time of the representation hearing. The Hearing Officer properly rejected the Employer's offer of proof as to Objection 1 at the hearing and ruled in accordance with the Supplemental Decision on Objections and Notice of Hearing issued by the Regional Director on August 19, 2011. There has been no substantial issue raised by the Employer who is merely seeking to engage in drawn out litigation and delay certification of the Petitioner. The Board should deny any further review of the objections and certify Petitioner as collective bargaining representative.

II. CASE BACKGROUND

Petitioner, Law Enforcement Employees Benevolent Association (hereinafter "L.E.E.B.A."), filed a representation petition with the requisite showing of interest on May 10,

2011 seeking to represent the unit consisting of all full-time and part-time security guards, excluding supervisors and all civilians, employed by the Sands Casino Resort Bethlehem. A hearing was held on May 23, 2011 during which time the parties stipulated to petitioner's status as a labor organization as defined in section 2(5) of the National Labor Relations Act, as well as to Employer's involvement in commerce for purposes of jurisdiction. On June 21, 2011 Regional Director Dorothy L. Moore-Duncan issued a Decision and Direction of Election and in doing so found that Petitioner was a guard union within the strictures of section 9(b)(3). An election among the 92 eligible security guards encompassing the petitioned-for unit was scheduled to take place on July 21, 2011. The Employer filed a subsequent appeal of the Regional Director's decision. On July 20, 2011 the Board issued an Order denying the Employer's request for review. On July 21, 2011 the election took place as originally scheduled with an election result in the favor of Petitioner. The election was conducted by Board agent Barbara E. Mann and the tally of votes was signed by Ms. Mann, Matthew Wakefield on behalf of Employer and Kenneth N. Wynder on behalf of Petitioner. On July 29 objections with respect to the conduct of the election were filed by Employer. On August 5 Petitioner filed opposition papers to the Employer's election objections. On August 19 the Regional Director issued a Supplemental Decision on Objections and Notice of Hearing which preserved three of the Employer's initial seven objections and set a date for a hearing on the objections.[1] A hearing on the remaining objections was held at the Board's Region 4 office beginning on September 12, 13 and 14 before Hearing Officer Robert Gleason.

The remaining objections addressed at the hearing were as follows:

[1] In a letter to the Board dated August 5, 2011 the Employer withdrew three of its objections (Objections 4, 6 and 7). A fourth objection (Objection 1) was preserved by the Regional Director only to the extent the Employer had newly discovered evidence, previously unavailable as of the date of the representation hearing regarding Petitioner's alleged affiliation with a non-guard labor organization.

Objection 2 – Employer alleged that several minutes after the conclusion of the pre-election conference on July 21, 2011, Petitioner's Sergeant-at-Arms and Membership Coordinator Peter Luck, discussed the election with bargaining unit employees who were working at their posts and not free to leave.

Objection 3 – Employer alleged Petitioner promised or conferred benefits or things of value in order to influence employee votes, namely these alleged promises/benefits were four tickets to a May 28, 2011 New York Mets baseball game, a promise of a union position to an employee and payment of a $168.61 dinner bill between Peter Luck and Petitioner election observer Richard Fenstermacher.

Objection 5 -- Employer alleged that Petitioner election observer Richard Fenstermacher should not have been permitted to participate as an election observer based on an allegation that he was closely identified with Petitioner.

A fourth objection, that Petitioner was affiliated with a non-guard employee organization, was limited to the extent that the Employer presented evidence of newly discovered evidence previously unavailable to the Employer at the representation hearing. This objection was essentially foreclosed at the hearing since Employer did not present any newly discovered evidence and merely attempted to re-litigate a previously decided matter by the Board. On October 17, 2011 Hearing Officer Robert Gleason issued a Report on Objections to Election which, in sum, rejected the Employer's objections and recommended that Petitioner be certified as representative of the unit of security guards at the Sands Casino. On October 31, 2011 the Employer filed with the Board its Exceptions to the Hearing Officer's Report citing several alleged deficiencies in the findings focusing primarily on Objections 1 and 3.

III. ARGUMENT IN OPPOSITION

1) The credibility determinations made by the Hearing Officer were properly based on witness testimony and demeanor at the hearing and should not be overruled, especially in light of the Employer's deceptions made before the Board.

It is disturbing that the Employer in its brief would resort to characterizing the testimony of two Petitioner witnesses as perjury when the actions of its own counsel has called into question not only his own testimony but the credibility and veracity of Employer's claims and its counsel. The significance of the Hearing Officer's finding that the testimony of Petitioner witness Peter Luck was *"candid, forthright and detailed"* and that Richard Fenstermacher's testimony *"was consistent with that of Luck's"* should be accorded the utmost weight and deference especially in light of the Hearing Officer's determination that he did *"not rely on Wakefield's testimony."* Clearly the Hearing Officer as the person in the best position to determine the credibility of witnesses found Petitioner witnesses to be credible while rejecting testimony of Employer's counsel, a licensed attorney and active practitioner before the Board. This is the most troubling aspect of this case, that the Employer, who has resorted to as many deceptions and invented facts as it can muster, would label opposing testimony as perjury and allege that its own employees made material misrepresentations on employment applications (a matter which even if true had no bearing on the issue before the Board), while practicing its own deception before the Board. The Employer now seeks to force a re-run election by attacking the credibility determinations made by the Hearing Officer. It is established Board policy that a Hearing Officer's credibility resolutions will not be overruled unless a clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Laidlaw Transit Inc., 327 NLRB 315 (1998) citing Stretch-Tex Co., 118 NLRB 1359 (1957).* Short of clear error on the part

of the Hearing Officer the credibility resolutions will be sustained. *The Coca-Cola Bottling Company of Memphis, 132 NLRB 481 (1961).*

The credibility determination made by the Hearing Officer in this case that is most significant is the rejected reliance he placed on the testimony of Employer's counsel Mr. Wakefield. The conduct of Employer's counsel in testifying as a fact witness for his client stretched the boundaries of professional responsibility and ethics. The Board requires attorneys practicing before it to adhere to and conform to standards of behavior.[2] The Model Code of Professional Responsibility DR 5-102(A) states that an attorney, if after undertaking employment in a pending litigation matter, learns of or it is obvious that he or a lawyer in his firm must be called as a witness on behalf of his client then he must withdraw from the conduct of the trial.[3] Aside from the unusual nature of Employer's counsel Mr. Wakefield being called as a witness for his client it brought into question his objectivity and the relative veracity of the Employer's objections. Despite weeks for preparation and investigation in anticipation of the objection hearing the Employer did not subpoena certain relevant witnesses for its case and failed to produce corroborating evidence of alleged objections. This is a fact which the Hearing Officer properly took into consideration in assessing the testimony of Mr. Wakefield.

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[2] Section 102.177 NLRB Rules and Regulations, Subpart W – Misconduct by Attorneys or Party Representatives: a) attorneys before the Board are to conform to court standards of behavior; b) misconduct by an attorney at a hearing is grounds for discipline.....

[3] ABA Model Code of Professional Responsibility (1983), DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue the representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The rules of professional responsibility consider it "highly indecent and unprofessional conduct" for an attorney to appear as a witness on behalf of a client while simultaneously acting as an advocate. *Commonwealth v. Willis, 380 Pa. Super. 555, 552 A.2d 682 (Pa. Super. Ct., 1988).* The Third Circuit Court of Appeals has provided further authority discrediting such behavior and condemning such practice. *See eg., Sheet Metal Workers' Local 28 v. Gallagher, 960 F.2d 1195, 1208 n.8 (3d Cir., 1992); Universal Athletic Sales Co. v. Am. Gym Rec'l & Athletic Equip. Corp., 546 F.2d 530, 538-39 (3d Cir., 1976); Kramer v. Sci. Control Corp., 534 F.2d 1085, 1090-92 (3d Cir., 1976).* The Pennsylvania Rules of Professional Conduct Rule 3.7 limits the dual role of an attorney as advocate and witness to three circumstances: 1) where testimony relates to an uncontested issue; 2) the testimony relates to the nature and value of legal services rendered in the case; 3) disqualification of the lawyer would work substantial hardship on the client. These rules have been adopted by the U.S. District Court for the Eastern District of Pennsylvania which encompasses Philadelphia.[4] Application of any exception to the advocate-witness rule is to be construed "narrowly" since the basic policy of the courts is that "the roles of advocate and witness are fundamentally incompatible." *J.D. Pflaumer, Inc. v. U.S. Dept. of Justice, 465 F. Supp. 746, 748 (E.D. Pa., 1979).* Other Pennsylvania federal courts have taken a similar harsh view, such as that of the Middle District, wherein once an attorney becomes a witness on behalf of a client and gives evidence upon the merits of the case the attorney shall forthwith withdraw as counsel.[5] The actions of Mr. Wakefield as a witness for his client violate the most basic understanding of these rules. His testimony was not on an uncontested issue or the nature of legal services or some other innocuous formality but went directly to the merits of the case and his client's position relative to the dispute. The disciplinary rules of Pennsylvania

[4]See, U.S. District Court, Eastern District of Pennsylvania, Local Rules of Civil Procedure, Local Rule 83.6, Rule IV
[5] See, U.S. District Court, Middle District of Pennsylvania, Local Rules of Civil Procedure, Local Rule 43.1

as well as those of the American Bar Association reflect the problem of an attorney acting as witness for a client on the merits of a case. Chief among these concerns is the embarrassing and awkward situation where the advocate-witness must essentially argue as to the weight and veracity to be accorded his own testimony. It is the exact nature of this conflict that brought discredit to Mr. Wakefield's testimony. Again, this is a fact which should not have escaped the attention of the Hearing Officer.

Employer counsel's lack of objectivity, aside from his serving as a witness for his client, was exemplified by his lengthy offer of proof relating to the Employer's failed objection number one. *(See Transcript, Vol. 1, p. 89, l. 20-p. 103, l. 6).* The transcript record reflects that rather than being an offer of proof of documents and what witness testimony may reveal the offer became an extended soliloquy by Mr. Wakefield of innuendo, conclusion, distortion of fact and veiled testimony on his part which highlighted his self-interest in the case and apparent alter-ego of Sand's Casino management as well as his attempt to re-argue objection number one despite the limits placed on such argument in the Regional Director's Supplemental Decision on Objections and Hearing Notice of August 19. His subsequent witness testimony showed him not only in the role of advocate but company detective as he followed Mr. Luck through the casino on July 21, over heard conversations between Mr. Luck and Mr. Fenstermacher, made copies of Sand's employees FaceBook pages and investigated whether Petitioner filed a LM-3 with the Department of Labor. Oftentimes Mr. Wakefield went far afield from the objections filed to launch personal attacks on George Bonser, Sand's Casino security guard supportive of the union, and Mr. Wynder, president of L.E.E.B.A. While relying on the premise that his inquiries were aimed at these witnesses' credibility issues the only witness credibility Mr. Wakefield succeeded in questioning was his own. Once again in its recent brief regarding the raised exceptions to the

Hearing Officer's Report the Employer seeks to mischaracterize and attack the credibility of witnesses such as George Bonser, Peter Luck, Richard Fenstermacher and Kenneth Wynder. In the nature of making an equitable argument it would be said that the Employer comes at this argument with unclean hands of its own. The Employer's credibility attacks of Bonser and Fenstermacher rely on their prior affiliation with United Steelworkers and their pro-union attitude which have no bearing on the objections originally filed by the Employer. Employer's arguments relating to these witnesses, especially its vociferous attacks against Bonser, amount to an attempt to deny him of a sacred and cherished constitutional right, that of free speech and free association. The Employer continues to strain credibility by trying to link either Bonser or Fenstermacher's prior United Steelworker affiliation to a present influence upon the actions of Petitioner.

The most glaring and bold example of the strained credibility and veracity of Employer's counsel as a witness relates to his testimony regarding Mr. Wynder's filing of L.E.E.B.A.'s LM-3 form. Mr. Wakefield testified that he had conducted research into whether the LM-3's were filed. *(Transcript, Vol. 2, p. 142, l. 9-22; p. 144, l. 1-10).* This testimony was proffered for the purpose of attacking the credibility of Mr. Wynder. Though there was an objection made at the hearing to this line of questioning the hearing officer allowed it for the limited purpose of Employer's attack on Mr. Wynder's credibility. Subsequently on the third day of the hearing Mr. Wynder took the stand to clarify the issue surrounding the LM-3 filing. *(Transcript, Vol. 3, p. 217, l. 9-p. 222, l. 4).* Petitioner Exhibits P-4 (an unsigned copy of the LM-3 form filed) and P-5 (a copy of the cover letter to the U.S. Department of Labor Office of Labor Management Standards) were admitted into evidence by Mr. Wynder and he testified as to the steps he took to file the LM-3. Additionally, a copy of a stamped and filed LM-3 for Petitioner received on July

12, 2011 by the U.S. Department of Labor was attached as Exhibit 1 to Petitioner's post-hearing brief as verification and support of Mr. Wynder's truthful testimony as to his filing of the LM-3 and a refutation of the false testimony offered by Mr. Wakefield. It was professional misconduct and a complete falsehood perpetrated upon the Board when Employer's counsel took the stand as a witness for his client and then testified as recklessly as he did regarding an easily verifiable fact. It is a fact which he testified to having researched as recent as Monday, September 12, the first day of the objection hearing. This is the most obvious example of a witness' false testimony in this case because it is the one where there has been a direct refutation and exposure of the testimony as being false. As such it is a gross fraud which has been placed before the Board.

Based on the foregoing and other issues raised by Petitioner in its Memorandum of Law Opposing Employer's Objections regarding Mr. Wakefield's testimony the Hearing Officer properly weighed the evidence presented and rendered a correct determination regarding Objections 1 and 3.

The other issues relating to the veracity of Mr. Wakefield's testimony which need to be re-counted in order to refute the stated exceptions involved his testimony regarding a number of key issues. First there was Mr. Luck's dinner with Mr. Fenstermacher and Mr. Luck's alleged conversation with security guards after the pre-election meeting. Mr. Luck had testified that the NLRB official conducting the election, Ms. Barbara Mann, at the close of the election inquired as to if there were any problems with the election. *(Transcript, Vol. 3, p. 196, l. 13-22).* Mr. Wakefield subsequently asked the hearing officer to take judicial notice of NLRB Case Handling Manual sections 1134-11350 and that there is no procedure for a Board agent to inquire about the conduct of an election. *(Transcript, Vol. 3, p. 224, l. 14-p. 225, l.14).* While his reliance on these sections offers little in the way of refuting Mr. Luck's testimony it was a last ditch attempt by

Mr. Wakefield to salvage his own testimony. Realizing the incongruity of his earlier testimony regarding Objections 2 and 3 in light of Mr. Luck's subsequent testimony Mr. Wakefield had to provide a reason why these issues were not addressed with the Board agent on the evening of the election. It is not uncommon for parties to a Board election to raise issues and objections at the close of the election in the presence of a Board agent. Similarly, with the knowledge that Mr. Luck had allegedly spoken to security guards prior to election Mr. Wakefield could have raised challenges to the votes of the identified guards who were allegedly spoke to by Mr. Luck. This was never done and Mr. Wakefield was left without any explanation as to why other than to seek judicial notice of a general section relating to election procedure.

A second issue regarding Mr. Wakefield's credibility as a witness relates to his testimony concerning Mr. Luck's activity in the casino on July 21, 2011 and Employer's statement that video surveillance Petitioner requested was no longer available. While Employer was unable to secure casino video from July 21 to corroborate its allegation regarding Mr. Luck's movement within the casino it was able to provide photographic stills captured from casino video surveillance on July 15 of security officer Bill Modzelewski on casino property. Though these photographs, marked as E-29, were placed in the rejected exhibits file as part of Employer's offer of proof they did raise a question as to why the Employer was able to retrieve these photos for its case but unable to secure those from July 21 which would presumably assist its case. Once again, this was a fact the Hearing Officer found to be persuasive.

The Employer's characterization of the Hearing Officer's report as having neglected or disregarded key aspects of the record is clearly wrong in interpretation and misstates the evidence adduced at the hearing as well as the relevant case law. The Hearing Officer properly

assessed the testimony and demeanor of the witnesses and the Employer failed to offer any evidence to upset the report and recommendations made by the Hearing Officer.

2) Petitioner did not engage in objectionable conduct prior to the election by allegedly conferring valuable gifts to influence the outcome of the election.

The Employer originally alleged Petitioner promised or conferred benefits or things of value in order to influence employee votes, namely these alleged promises/benefits were four tickets to a May 28, 2011 New York Mets baseball game, a promise of a union position to an employee and payment of a $168.61 dinner bill between Peter Luck and Petitioner election observer Richard Fenstermacher. At the hearing these objections were either rebutted or contradicted by Petitioner. Based on the evidence presented, which significantly was largely the testimony of witnesses, including the Employer's own counsel who took the stand as a fact witness, the Hearing Officer made his determinations in rendering his report. This determination also included his observations as to the veracity and forthrightness of the witnesses. It is this determination above all which should be accorded the greatest weight since it is the Hearing Officer who is in the best position to determine the credibility of witnesses.

Relative to the allegation that N.Y. Mets tickets for the May 28, 2011 game were provided as a benefit both Mr. Wynder and Mr. Luck provided testimony. The Employer additionally called Rudolph Hines, manager in the Mets' community service department, as a witness. Four tickets, part of a 100 ticket complimentary pack provided by the Mets organization community affairs office to the Boy Scouts of America, were given to Sands Casino employee George Bonser by Mr. Luck. Testimony from both Mr. Wynder and Mr. Luck indicated that Mr. Luck was involved with his son's Boy Scout troop and had obtained complimentary Mets tickets from the organization in 2010. *(Transcript, Vol. 1, p. 20, l. 1-25; Vol. 3, p. 180, l. 10-p. 181, l. 17).* Mr. Luck applied again in 2011 for these tickets for a Mets

game. These tickets, as indicated by Mr. Hines of the Mets, were applied for in April 2011. *(Transcript, Vol. 3, p. 170, l. 2-3).* This was well before Petitioner filed its representation petition in May 2011 thus negating any suggestions the tickets were applied for any purpose other than that stated relating to the Boy Scouts of America. After disbursing the tickets to those who would use them Mr. Luck had four tickets left over and offered them to Mr. Bonser. *(Transcript, Vol. 3, p. 180, l. 18-24).* The tickets were for a game between the Mets and the Philadelphia Phillies. Mr. Luck's offer to Bonser came with the inquiry as to whether he was Phillies fans. Mr. Bonser said he was not a fan but he knew friends who were fans and would likely use the tickets. Mr. Bonser's own testimony indicated that the tickets were made available to anyone he knew who would use the tickets, there being no restrictions on who they were given to, such as Sand's security officers. *(Transcript, Vol. 1, p. 107, l. 24-p. 108, l. 12).* The Employer's representation in its exceptions as to the testimony of the witnesses stretches the boundaries of credibility and masks its attempt to present testimony of its own making in place of legal argument. The Hearing Officer's report indicates that Mr. Gleason carefully considered the testimony he heard and accorded it the proper weight in regard to each specific allegation within Objection 3. The report methodically addresses the Hearing Officer's findings of fact and analysis of these allegations with a final recommendation as to each. There has been no argument put forth in the Employer's exceptions or brief that should disturb the findings of the Hearing Officer.

The alleged benefit that Mr. Luck paid for a $168.61 dinner for him and Sands Casino security employee Richard Fenstermacher, who served as Petitioner's election observer, . Evidence put forth by the Employer consisted of lead counsel Matthew Wakefield taking the witness stand and testifying to a conversation he overheard between Mr. Luck and Mr.

Fenstermacher at the pre-election meeting wherein Mr. Luck said he would take Mr. Fenstermacher to dinner. Mr. Wakefield fortuitously wass the only person to allegedly hear the comment made by Mr. Luck to Mr. Fenstermacher. This evidence along with a copy of a paid dinner receipt on Mr. Luck's personal credit card from a restaurant within the Sands Casino constituted the sole proof of the Employer as to this objection. Yet, testimony from Mr. Wynder established that Petitioner did not issue any credit cards to Mr. Luck, Mr. Wynder was the only one authorized to use the L.E.E.B.A. credit card and that L.E.E.B.A. board members were reimbursed only for gas and lodging if need be but that the need for lodging had not arisen for any L.E.E.B.A. board members due to the small size of the union. *(Transcript, Vol. 1, p. 22, l. 16-p. 23, l. 14).* Additional testimony from Mr. Luck and Mr. Fenstermacher established that Mr. Fenstermacher did not have sufficient cash on him when he went to dinner with Mr. Luck on July 21, 2011. *(Transcript, Vol. 3, p. 185, l. 4-11; p. 199, l. 19-p.200, l. 4).* Mr. Luck responded by stating he would place the dinner on his credit card and Mr. Fenstermacher could pay him back at a later date. This reimbursement payment was subsequently made by Mr. Fenstermacher to Mr. Luck a few weeks later at Mr. Fenstermacher's retirement party. *(Transcript, Vol. 3, p. 185, l. 12-21).*

The ultimate question for the Board to resolve in any election objection case is whether during the critical period the conduct of a party has the tendency to interfere with an employee's free choice. *Cambridge Tool & Manufacturing Co., 316 NLRB 716 (1995).* Conduct relating to benefits or gifts must focus on whether those benefits or gifts were of a type reasonably calculated to have the effect of influencing an employee's vote. *See, United Airlines Services Corp., 290 NLRB 954 (1988).* The Employer's allegations as to the benefit of a job with the union were contradicted by the Petitioner as was the allegation of providing an employee with a

dinner. The provision of four Mets tickets was explained by Petitioner and put in its proper context which had no influence or effect on the election let alone was done with any intent to do so. These were complimentary tickets of no external value which were provided in connection with a Boy Scouts of America fundraiser and organizational activity whose only connection to Petitioner was that Mr. Luck, L.E.E.B.A.'s Sergeant-at-Arms and Membership Coordinator, was his son's scout leader and had undertaken this outing for the past two years and needed to dispose of extra tickets. Gifts must be given to employees as an inducement to secure support in a Board election. *See eg., General Cable Corp., 170 NLRB 1682 (1968).* Whether or not such alleged benefits or gifts amount to objectionable conduct the Board has established a four part test: 1) the size of the benefit conferred in relation to the stated purpose of granting it; 2) the number of employees receiving it; 3) how employees would reasonably view the purpose of the benefit; and 4) the timing of the benefit. *B&D Plastics, 302 NLRB 245 (1991).* The four tickets were given to Mr. Bonser to give to any friends or acquaintances that would use them. There was no proviso that they be given to security employees. The fact that Mr. Bonser gave them to two security employees who went with their girlfriends was of no consequence in the scheme of the election. Petitioner had no say or involvement in the disposition of the tickets once given to Mr. Bonser. Even so the tickets themselves had no value and were part of a complimentary pack provided by the Mets Office of Community Affairs. Under the criteria established by *B&D Plastics* it is not prima facie proof of objectionable conduct requiring a re-run election. The margin of election results was predominately in the favor of Petitioner to the point that there is nothing to suggest any untoward conduct by the Petitioner.

The Hearing Officer's Report properly applied the relevant case law and in systematically assessing each allegation of the Employer reached a conclusion firmly grounded in prior Board

decisions. There was no evidence adduced at the hearing to suggest Petitioner's conduct in any way influenced or was meant to influence the outcome of the election. Furthermore, in its post-hearing brief, the Employer did not even address the allegation relating to Petitioner's alleged offering of a union position to an employee. It can be surmised that this was due to the lack of proof and fairly to present prima facie evidence at the hearing. Accordingly the Hearing Officer's report and recommendation as to Objection 3 should be sustained.

3) The Employer is improperly attempting to re-litigate Objection One and should be barred by collateral estoppel.

The Petitioner has been certified by the Board as a guard union in two prior decisions out of Region 29. (See, *Brinks U.S., 29-RC-11291* and *Sea Gate Association, 29-RD-1096*). Membership in L.E.E.B.A. is restricted to private sector security guards or public sector law enforcement officers. The non-certifiability of a guard union must be shown by "definitive evidence" *Burns Security Services, 278 NLRB 565 (1986).* After a representation hearing held on May 23, 2011 the Regional Director issued a decision where, among other things, she found Petitioner to be a unit comprised solely of guards. This is a subject matter the Employer has repeatedly attempted to re-litigate and in doing so improperly proceeded at the objection hearing by introducing non-relevant, pre-existing and available information which was outside the scope of the objection hearing. The Employer's attempt to further push the issue resulted in the Employer filing a Motion for Reconsideration and/or Appeal to the Regional Director. This resulted in the Regional Director's reconsideration and subsequent finding that the Employer did not present any newly discovered evidence regarding the Employer's affiliation argument as to Petitioner. No direct appeal was taken by the Employer however the Employer now seeks to challenge that decision. At the conclusion of the representation case the Employer appealed the Regional Director's decision to the Board. A denial of the request for review followed.

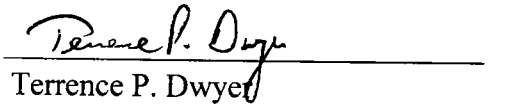
Objection 1 continues to be an improper objection and is a matter of res judicata as to this proceeding. The Employer is improperly attempting to raise and re-argue an issue that has been settled by the Board. The Employer should be collaterally stopped from further litigating the subject matter of Objection 1. Collateral estoppel "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction." *Ronald Evan d/b/a Evan Sheet Metal, 337 NLRB 1200 (2002) citing Montana v. U.S., 440 U.S. 147 (1979).* Re-litigation of already decided issues wastes the resources of the Board. *Bennett Industries, 313 NLRB 1363 (1994).* Collateral estoppel is available when an issue has been actually litigated and there has been a valid and final judgment on the issue and a party is attempting to re-litigate the issue in a subsequent proceeding between the parties. *NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31 (1st Cir., 1987).* In order to prevent the type of vexatious litigation undertaken by the Employer and to conserve the scant resources of the Board the Employer's exceptions to Objection 1 should be dismissed without further review. *See eg., Montana v. U.S., 440 U.S. 147 (1979).*

IV. CONCLUSION

The Employer's Exceptions to the Hearing Officer's Report on Objections to Election should be dismissed and the report and recommendations of the Hearing Officer sustained. There is nothing in the record to show that the Hearing Officer deviated from the evidence presented at the hearing or that his determinations were incorrect as a matter of law. The Employer's exceptions to the Hearing Officer's determination as Objections 1 and 3 should be dismissed without further review The Petitioner should therefore be certified as the collective bargaining representative for the group consisting of security guards at the Sand's Casino, Bethlehem, Pennsylvania.

Dated: November 4, 2011
Poughkeepsie, New York

Respectfully submitted,



Terrence P. Dwyer

Cc:
Matthew Wakefield, Esq.
Attorney for Employer

AFFIRMATION OF SERVICE

TERRENCE P. DWYER, an attorney duly admitted to practice before the Courts of the State of New York affirm, pursuant to Rule 2106 of the Civil Practice Law and Rules, and under penalty of perjury, and in compliance with Federal Rules of Civil Procedure Rule 5(b)(2), that on November 5, 2011, I served the annexed Petitioner Memorandum of Law on:

Matthew T. Wakefield, Esq.
Ballard, Rosenberg, Golper and Savitt, LLP
1200 New Hampshire Avenue NW
Third Floor
Washington, DC 20036

Said addresses being designated by the parties for service, by depositing a copy of the same, enclosed in a post paid wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: Poughkeepsie, New York
November 5, 2011

Terrence P. Dwyer

Terrence P. Dwyer

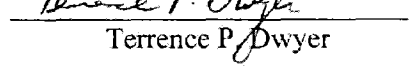
AFFIRMATION OF SERVICE

TERRENCE P. DWYER, an attorney duly admitted to practice before the Courts of the State of New York affirm, pursuant to Rule 2106 of the Civil Practice Law and Rules, and under penalty of perjury, and in compliance with Federal Rules of Civil Procedure Rule 5(b)(2), that on November 9, 2011, I served the annexed Petitioner Memorandum of Law in Opposition to Employer's Exceptions to Hearing Officer's Report on Objections to Election on:

National Labor Relations Board
Region 4
Regional Director Dorothy L. Moore-Duncan
Attn: Hearing Officer Robert Gleason, Jr.
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404

Said addresses being designated by the parties for service, by depositing a copy of the same, enclosed in a post paid wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: Poughkeepsie, New York
November 9, 2011



Terrence P. Dwyer