

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO, CA**

WYNN LAS VEGAS, LLC

and

**Cases 28-CA-161779
28-CA-166890**

**INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA
LOCAL UNION 720 (IATSE)**

**GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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**GENERAL COUNSEL’S BRIEF
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I. INTRODUCTION

Wynn Las Vegas, LLC (Respondent) violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain with International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada Local Union 720 (the Union) following Respondent’s takeover from its predecessor Labor Plus, LLC (Labor Plus). Immediately after the filing of a petition for election as to Labor Plus stagehand employees, Respondent put into motion a plan to hire the Labor Plus employees as its own. Although the Union won the election as to Labor Plus, Respondent, as the successor employer, has not recognized the Union as the exclusive collective-bargaining representative of the stagehand employees notwithstanding that a majority of the stagehand employees hired by Respondent were former Labor Plus employees. Further, Respondent has refused to provide necessary and relevant information requested by the Union and subcontracted unit work without

¹ The caption was corrected pursuant to an amendment to the complaint made at hearing. (Tr. 11; 16)

bargaining with the Union. Without a remedy, the employees, who voted unanimously for the Union, would be left without representation. Respondent violated the Act by refusing to bargain with the Union, refusing to provide the Union with requested information, and by unlawfully subcontracting unit work for the Frank Sinatra Celebration Show (the Sinatra Show) and the Administrative Law Judge (the ALJ) should so find.

II. BACKGROUND

A. Respondent's Operations

Respondent operates a hotel and casino in Las Vegas, Nevada, providing food, lodging, and gaming. (GCX 1(g), (j))² Since approximately late 2014, Respondent has operated the ShowStoppers Show out of the Encore Theatre which is also referred to as the ShowStoppers Theatre. (Tr. 87) ShowStoppers is a musical review of the best of America's classic songbook, and is the primary, and generally the only, show at the Encore Theatre. (Tr. 86-88) In November 2014, Respondent contracted with Labor Plus to provide non-union stagehand labor for the Show. (Tr. 42-43, 46, 49; JTX 1(a); 20) Supervisor Monica-Marie Coakley (Coakley) is Respondent's Assistant Director of Technical Operations and assigns work to stagehand employees regardless of whether the stagehands worked for Labor Plus or for Respondent. (Tr. 84, 87; GCX 1(g), 1(j))

B. The Union Petition as to Labor Plus

On April 15, 2015,³ the Union filed a petition as to Labor Plus seeking to represent all "full-time and regular part-time on-call stagehand employees in the Wynn Showstoppers Theatre[.]" excluding all "other employees, including wardrobe, hair, makeup employees, guards and supervisors

² GCX___ refers to General Counsel's Exhibit followed by the exhibit number; JTX___ refers to Joint Exhibit followed by exhibit number; "Tr. _:___" refers to transcript page followed by line or lines of the unfair labor practice hearing held between November 3, 2016.

³ All dates are in 2015, unless otherwise noted.

as defined in the Act” with Labor Plus named as the employer. (JTX 2) The Union did not file a petition as to Respondent. Two days after the election petition was filed, on April 17, Respondent notified Labor Plus that it was ending its contract with Labor Plus and wanted to bring the stagehand work in-house. (Tr. 58, 90; JTX 3) Respondent's email to Labor Plus regarding this transition stated its: “...intention [is] to bring the stage technician [stagehand] jobs ‘in house’ by implementing the opening and posting of these positions on the wynnjobs site in the immediate future. In addition I will ask the current crew to apply as I am quite comfortable in ‘rehiring’ them if they so desire.” (JTX 3)

On April 24, the Union and Labor Plus entered into a Stipulated Election Agreement setting the election for May 2. (JTX 4(a)) Labor Plus and the Union agreed that casual employees could vote by challenged ballot. (JTX 4(b)) On April 28, Labor Plus submitted a voter list which included 19 unit employees and two additional employees subject to challenge as casual employees. (JTX 5; 20 at ¶ 6) The Region conducted an election on May 2 with all voters voting subject to challenge. (JTX 20 ¶ 7) On May 7, Labor Plus and Respondent executed a Mutual Termination of Agreement for Services effective May 9. (JTX 6(b)) On May 9, just one week after the election, Labor Plus ceased all work on the ShowStoppers Show. (Tr. 42-43) None of the Labor Plus employees resigned from or were terminated by Labor Plus. (Tr. 63-64, 77) Labor Plus filed objections to the election and a hearing was held on May 27, with a Hearing Officer’s Report on Challenged Ballots and Objections issuing on June 17. (JTX 7-11; 20 ¶¶ 9-10) The Hearing Officer’s Report sustained three challenged ballots and overruled Labor Plus’ objections. (JTX 11 at 13-15, 19) On July 1, Labor Plus filed exceptions to the Hearing Officer’s Report, and a Decision and Order Overruling Objections and Directing Opening and Counting of Ballots issued on August 10. (JTX 14; JTX 20 ¶¶ 14, 16) On August 24, Labor Plus filed a Request for Review of the Regional Director’s Decision and Order, but the Board denied the Request for Review on November 9. (JTX 20 ¶¶ 17, 19) On

December 1, a Certificate of Representative issued, certifying the Union as the representative of a unit of all “full-time and regular part-time on-call stagehand employees in the Wynn Showstoppers Theatre [, excluding] all other employees, including wardrobe, hair, makeup employees, guards and supervisors as defined in the Act.” (JTX 15(a), 20 ¶ 20) The relevant Tally of Ballots reflected that twelve votes were cast for the Union, while no votes were cast against the Union. (GCX 23)

C. Respondent Starts Hiring Stagehand Employees

Before the election, Respondent regularly employed 14 full-time stagehands of Labor Plus, with the remainder being steady extras or “swing” employees who filled-in as needed. (Tr. 53, 76-77, 88-89; GCX 21(a)-(c)) Prior to April 15, two to three additional stagehands worked directly for Respondent to provide audio and lighting. (Tr. 89; JTX 20 ¶ 24) Following Respondent’s decision to terminate its contract with Labor Plus on April 17, Respondent informed the Labor Plus stagehands that it was posting the positions online, and encouraged them to apply. (Tr. 90-91, 116, 127, 138; JTX 3) Although the hiring process normally takes one to four weeks after corporate is involved, Respondent started the first group of five stagehands on May 1, just two weeks after Respondent announced that the agreement with Labor Plus was being terminated. (JTX 20 ¶ 25) While the petition was being processed, Respondent continued to hire a mixture of stagehand employees, some of whom were previous employees of Labor Plus, while some were not. (JTX 20 ¶ 25-35) The employment of Respondent stagehands is summarized in the table below:

Event
Prior to April 15, 2015 - Respondent employs lighting stagehands Lynsey Oliver and Ben Clark and audio stagehand Gregory Bober ⁴
May 1, 2015 - Respondent hired full-time stagehand employees Heather Lewis, Jonathan Contini, James Herlihy, and William Stephenson, and steady extra stagehand employee David Weigant. Each employee was formerly a Labor Plus employee.

⁴ Coakley is excluded from the list as a statutory supervisor. (GCX 1(g), (j)).

May 5, 2015 - Respondent hired full-time stagehand employees Bret Portzer, Deborah Jensen-Miller, Eric Fouts, Eric Meyers, Eric Shafer and steady extra stagehand employee Collin Barnes. Each employee was formerly a Labor Plus employee.
May 6, 2015 - Respondent hired steady extra stagehand employee Matthew White. White was a former employee of Labor Plus.
May 8, 2015 - Respondent hired full-time stagehand employee Luke Cresson. Cresson was a former employee of Labor Plus.
May 11, 2015 – Respondent hired full-time stagehand employee Kendall Zobrist. Zobrist was a former employee of Labor Plus.
May 19, 2015 - Respondent hired steady extra stagehand employee Anthony Todaro. Todaro had not worked for Labor Plus.
May 26, 2015 – Todaro’s employment with Respondent ends.
June 2, 2015 – Respondent hired full-time stagehand employee Joel McMillon. McMillon had not worked for Labor Plus.
June 16, 2015 – Respondent hired full-time stagehand employee Joshua Perrill and steady extra stagehand employee Timothy Karlsen. Each employee previously worked for Labor Plus.
August 4, 2015 – Respondent hired steady extra stagehand employees Robert Bonanno, Ryan Yorty, and Bryan McNulty. None of the named employees had worked for Labor Plus.
August 6, 2015 – Lynsey Oliver transfers to another department within Respondent.
August 23, 2015 – Barnes’ employment with Respondent ends
October 13, 2015 – Respondent hired full-time stagehand employee Samantha Lemon. Lemon had not worked for Labor Plus.
October 31, 2015 – Bonanno’s employment with Respondent ends.
November 24, 2015 – Respondent hired full-time stagehand employee Jason Webb. Webb had not worked for Labor Plus.

JTX 20 ¶¶ 24-35

The work performed by the stagehands remained the same; they continued to do the same work and continued to be supervised by Coakley. (Tr. 93-94) The ShowStoppers show never stopped due to Respondent hiring stagehands directly. (Tr. 93) According to Coakley, Respondent had obtained a full complement of stagehands, including steady extra employees, no later than December 2015 with 16 full-time and six steady extra employees. (Tr. 121-122) Respondent currently employs 16 full-time stagehands, including the two audio and lighting stagehands employed by Respondent prior to April 15. (Tr. 90; 100; GCX 24(a)-(d)) The

number of regular stagehands did not change as a result of the stagehands' transition to employment directly by Respondent. (Tr. 108) As a result of this transition from Labor Plus to Respondent, stagehand pay and benefits increased, but the supervision and day-to-day jobs remained the same. (Tr. 93-94; 132-133)

D. The Union Demands to Bargain and Requests Information

On June 26, the Union sent a letter to Labor Plus and to Respondent demanding to bargain, asserting, among other things, that Respondent was a successor to Labor Plus and requesting information for bargaining purposes. (JTX 12(a); 20 ¶ 12) Respondent answered on July 2, asserting that there was no bargaining obligation and requesting information from the Union in support of its claim that Respondent was a successor to Labor Plus. (JTX 13(a)) Respondent did not provide the requested information. The Union has not represented stagehand employees at Respondent. (Tr. 95)

E. The Frank Sinatra Celebration Show

In late 2015, Coakley informed employees that the ShowStoppers show would be dark in early December as part of a regularly scheduled dark week. (Tr. 96) She informed employees that there would be another show during this period at the theatre, and that the employees could work the show if they wanted. (Tr. 96-97) Respondent had entered into an agreement with AEG Ehrlich under which Respondent agreed to provide the venue and certain staffing in support of the Sinatra Show including load-in, preparation, and load-out. (GCX 22(a), (c)) As part of the preparation for the Sinatra Show, certain tasks were performed by persons other than Respondent's stagehands, including the building and installation of camera platforms. (Tr. 104-105, 129-130; GCX 22(d)) Further, Respondent's stagehands worked with others to clear props, bring in lights, hang signs and adjust seating. (Tr. 106-107) Most of Respondent's stagehands worked from November 29 to

December 2 in support of the Sinatra Show although they signed in on separate pay sheets. (Tr. 99-100; 131; GCX 24(a)-(d))

III. ARGUMENT

A. Respondent Is a Successor to Labor Plus

1. Legal Standard

The “test for determining successorship is: (1) whether a majority of the new employer’s work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor employer. *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 18 (2014) (citing *NLRB v. Burns Int’l Sec. Svcs., Inc.*, 406 U.S. 272, 278-281 (1972) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987)). The basic premise is that a “mere change of employers or of ownership in the employing industry is not such an ‘unusual circumstance’ as to affect the force of the Board’s certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer.” *NLRB v. Burns Int’l Sec. Svcs., Inc.*, 406 U.S. 272, 279 (1972). Under *Burns* and its progeny, an employer that acquires a predecessor’s operations generally succeeds to the predecessor’s collective-bargaining obligation if: (1) a majority of the successor’s employees, consisting of a “substantial and representative complement” in an appropriate bargaining unit were former predecessor employees, and (2) there is a “substantial continuity” between the predecessor’s enterprise and that of the successor. See, e.g., *Ready Mix USA, Inc.*, 340 NLRB 946, 946-48 (2003) (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 41-43).

The successor employer's obligation to recognize the union attaches after the occurrence of two events: (1) a demand for recognition or bargaining by the union; and (2) the employment by the successor employer of a “substantial and representative complement” of employees, a

majority of whom were employed by the predecessor. *Hampton Lumber Mills-Washington*, 334 NLRB 195, 195 (2001) (citing *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989)). The Board, with Supreme Court approval, has held that a union's demand to bargain is continuing in nature. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 52. If a successor employer fails to recognize and bargain with a union once these conditions have been met, it violates Section 8(a)(5) and (1) of the Act. *Id.*

2. There is Substantial Continuity of the Business Enterprise between Labor Plus' Operation and Respondent's Operation

The Board has considered several factors in determining a substantial continuity of the enterprise, including: "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 18 (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43). These factors are "assessed primarily from the perspective of the employees" including whether "those employees who have been retained will . . . view their job situations as essentially unaltered." *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007). Changes in administrative structure and managerial hierarchy are not enough, on their own, to prohibit the finding of a successor relationship. *Ready Mix USA, Inc.*, 340 NLRB at 947.

a. The business of both employers is essentially the same

Here, there is substantial continuity between the business enterprises. The business of Labor Plus and of Respondent with respect to the ShowStoppers show is the same; each was to provide stagehand labor in support of the ShowStoppers show. Accordingly, the work of both Labor Plus and Respondent as to stagehands at the ShowStoppers show was the same. The fact

that Respondent performs work in addition to the work performed by stagehand employees at the ShowStoppers Theatre, or that it hired employees of a former contractor, does not dispel a finding that Respondent was a successor to Labor Plus. See *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 18-21 (CNN was a successor to TVS as CNN “continued the same business operations with employees who performed the same work, at the same locations, and using the same equipment, as the TVS technicians”)

- b. The employees are doing the same jobs in the same working conditions under the same supervisors

With the exception of increased pay and benefits, the same working conditions continue to apply to the stagehand employees since the transition from Labor Plus to Respondent. In bringing the work in-house, Respondent did not meaningfully change the work of the stagehands. To the contrary, the stagehand employees continued doing the same work they had previously performed. They continued working under the same conditions with the same supervisor; Coakley continued to direct stagehands’ work before and after Respondent hired stagehand employees in-house. Cf. *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 9 (2007) (finding substantial continuity of operations where the successor continued the business in unchanged form without an interruption or hiatus with the drivers continuing to drive the same trucks performing the same duties for the same customers under the same general working conditions with the same immediate supervision) Here, the stagehands continued doing the same jobs in the same working conditions under the same supervisor.

- c. Respondent has the Same Production Process, Producing the Same Products and the Same Body of Customers

There were no changes to the production processes. Respondent’s stagehand employees produce the same product, which is stagehand support of the ShowStoppers Show. The ShowStoppers Show continued on without interruption, and the stagehands continued doing the

same work they had previously done using the same processes as before. Further, the location did not change, as the show continued to operate out of the Encore Theatre. Nothing changed as to the equipment being used, and there were no changes to the day-to-day job of stagehands. The customer has not changed as the ShowStoppers show and the public attendees of the show were the stagehands' customers regardless of whether the stagehands worked for Labor Plus or for Respondent.

Accordingly, there is substantial continuity of the business operations. From the employees' perspective regarding the job and tasks to be performed, essentially nothing changed. The business continued uninterrupted and in the same manner that it had previously. Cf., e.g., *Ready Mix USA, Inc.*, 340 NLRB at 948 (finding substantial continuity of operations where the successor continued to operate the predecessor's facilities in essentially unchanged manner from the time of purchase); *Nephi Rubber Products Corp.*, 303 NLRB 151, 152 (1991) (job situation of former employees retained by the successor was not so altered that it would have changed employees' attitudes about union representation). The business of both employers is essentially the same, the employees continue to do the same jobs in the same working conditions under the same supervisors, and the employees are using the same production processes and producing the same products for the same body of customers. The ALJ should find that there is substantial continuity of the business enterprise between Labor Plus and Respondent.

3. There is Substantial Continuity of the Workforce Between Labor Plus' Employees and Respondent's Employees

Burns and its progeny require that a successor employer must satisfy the requirement that a majority of the successor's employees, consisting of a "substantial and representative complement" in an appropriate bargaining unit were former predecessor employees. See, e.g., *Ready Mix USA, Inc.*, 340 NLRB at 946-48 (citing *Fall River Dyeing & Finishing Corp. v.*

NLRB, 482 U.S. at 41-43) To determine when a new employer has hired a substantial and representative complement of workers by a given date, the Board has examined a number of factors. These have included “whether the job classifications designated for the operation were filled or substantially filled and whether the operations was in normal or substantially normal production[,] the size of the complement on that date and the time expected to lapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer’s expected expansion.” *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 48 (citing *Premium Foods, Inc. v. NLRB*, 702 F.2d 623, 628 (9th Cir. 1983))

- a. Each of the Stagehands Hired on May 1 Count as Former Employees of Labor Plus for Successor Purposes

Neither *Burns* nor *Fall River Dyeing*, or their progeny, address the question of whether employees who are hired by a successor before an election are considered to be employees of the predecessor for successor analysis. To the contrary, the cases simply distinguish whether an employee was a former employee of the predecessor. Board cases have counted employees as predecessor employees in a variety of situations and counts employees of the predecessor as contributing to a successorship majority if they are hired by the successor, even if they were not employed by the predecessor immediately prior to the successorship. *See, e.g., Derby Refining Co.*, 292 NLRB 1015, 1015 (1989), enforced *Coastal Derby Ref. Co. v. NLRB*, 915 F.2d 1448, 1454-55 (10th Cir. 1990) (employees laid off or retired from predecessor shortly before asset transfer and hired by successor were properly counted as contributing to successor finding); *Stewart Granite Enterprises*, 255 NLRB 569, 570 (1981) (predecessor reduced employees as it closed operations prior to transfer, and subsequently successor increased number of employees as it ramped up operations. All the employees hired in this way had worked at the predecessor before the reduction and they were counted towards successorship); see also *Nephi Rubber*

Products Corp., 303 NLRB 151, 151 (1991) enforced *Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361 (10th Cir. 1992) (employees laid off by predecessor employer before it filed bankruptcy proceedings). While some of the former Labor Plus stagehands were hired prior to the election, this does not prevent them from being counted towards a determination that former Labor Plus stagehands composed a majority of the stagehands working for Respondent. Accordingly, the five stagehands hired on May 1 should be counted as former employees for purposes of establishing that Respondent hired a majority of employees from its predecessor Labor Plus.

b. Respondent Hired a Majority of its Stagehand Employees from Labor Plus

Respondent hired a majority of its employees from former Labor Plus employees.

Applying the data from JTX 20, the following chart was created through December⁵ and assumes that the five employees hired on May 1 should be counted as former employees of Labor Plus:

Event	Ratio of predecessor Labor Plus employees to other employees
Prior to April 15, 2015 - Respondent employs lighting stagehands Lynsey Oliver and Ben Clark and audio stagehand Gregory Bober	0:3
May 1, 2015 - Respondent hired full-time stagehand employees Heather Lewis, Jonathan Contini, James Herlihy, and William Stephenson, and steady extra stagehand employee David Weigant. Each employee was formerly a Labor Plus employee.	5:3
May 5, 2015 - Respondent hired full-time stagehand employees Bret Portzer, Deborah Jensen-Miller, Eric Fouts, Eric Meyers, Eric Shafer and steady extra stagehand employee Collin Barnes. Each employee was formerly a Labor Plus employee.	10:3
May 6, 2015 - Respondent hired steady extra stagehand employee Matthew White. White was a former employee of Labor Plus.	11:3
May 8, 2015 - Respondent hired full-time stagehand employee Luke Cresson. Cresson was a former employee of Labor Plus.	12:3

⁵ Coakley asserted that a full complement was hired no later than December. (Tr. 121-122; GCX 24(a)-(c))

May 11, 2015 - Respondent hired full-time stagehand employee Kendall Zobrist. Zobrist was a former employee of Labor Plus.	13:3
May 19, 2015 - Respondent hired steady extra stagehand employee Anthony Todaro. Todaro had not worked for Labor Plus.	13:4
May 26, 2015 – Todaro’s employment with Respondent ends	13:3
June 2, 2015 – Respondent hired full-time stagehand employee Joel McMillon. McMillon had not worked for Labor Plus.	13:4
June 16, 2015 – Respondent hired full-time stagehand employee Joshua Perrill and steady extra stagehand employee Timothy Karlsen. Both employees previously worked for Labor Plus.	15:4
August 4, 2015 – Respondent hired steady extra stagehand employees Robert Bonanno, Ryan Yorty, and Bryan McNulty. None of the named employees had worked for Labor Plus.	15:7
August 6, 2015 – Lynsey Oliver transfers to another department within Respondent.	15:6
August 23, 2015 – Barnes’ employment with Respondent ends	14:6
October 13, 2015 – Respondent hired full-time stagehand employee Samantha Lemon. Lemon had not worked for Labor Plus.	14:7
October 31, 2015 – Bonanno’s employment with Respondent ends	14:6
November 24, 2015 – Respondent hired full-time stagehand employee Jason Webb. Webb had not worked for Labor Plus.	14:7

JTX 20 ¶¶ 24-35

As established by this chart, at all times following May 1, the majority of Respondent’s stagehand employees were former Labor Plus employees.

c. A Substantial and Representative Complement was Employed by mid-June

Respondent filled or substantially filled its stagehand positions by June 16. Here, Coakley conceded that a full complement was hired no later than December. At that time, there were 21 stagehand employees, 14 of whom were former Labor Plus employees. However, as may be seen in JTX 20 and the chart above, Respondent had hired a substantial complement by June 16. On June 16, there were 19 stagehands, 15 of whom were former Labor Plus employees. Most of the classifications were filled, the production was running normally, the workforce was near normal size as Respondent had hired 19 stagehands which is nearly a full complement. Respondent’s hiring of stagehands ceased from June 16 to August 4, which indicates that

Respondent had hired enough full-time stagehands to maintain the show's operation and that there were no plans for a significant increase of employment. Respondent's transfer of Oliver to another department also shows that Respondent had enough stagehands to support the ShowStoppers Show. Otherwise, Respondent would not have transferred Oliver to another department.

A full complement does not need to be present in order to find a substantial and representative complement. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 49-50; *Avanti Health System, LLC*, 357 NLRB 1661, 1661 fn. 1 (2011) (finding, contrary to the administrative law judge, that a substantial and representative complement was hired during the first payroll period notwithstanding the employer's need to supplement permanent staff with temporary staff).

4. The Unit Remained Appropriate

“In order to establish the condition precedent for presuming continued majority support, the employees acquired from a predecessor themselves must constitute an appropriate unit.” *Irwin Industries*, 304 NLRB 78, 79 (1991) (emphasis removed). The “continued appropriateness of a bargaining unit for successorship purposes is measured at the time the bargaining obligation attaches.” *Cadillac Asphalt Paving Co.*, 349 NLRB at 9.

Here, a unit was found to be appropriate as to “all full-time and regular part-time on-call stagehand employees in the Wynn Showstoppers Theatre[,] excluding all other employees, including wardrobe, hair, makeup employees, guards and supervisors as defined in the Act.” (JTX 15(a)) Respondent acquired the whole operation when it hired a complement of stagehands to perform the same tasks in supporting the ShowStoppers show. There was no change in supervision as Coakley remained as the supervisor who assigned tasks to stagehands. The employees were doing the same job in the same working conditions with the same supervisors.

Further, any change in the number of stagehands employed, on its own, is not enough to find that the unit is no longer appropriate. *Dean Transportation, Inc.*, 350 NLRB 48, 58 (2007) (the fact that employees hired by successor were but a subset of a much larger bargaining unit was not determinative of the appropriateness of the unit); *Bronx Health Plan*, 326 NLRB 810, 812 (1998) (“the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operations is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation”) Accordingly, the unit remains appropriate for collective bargaining as there were no cognizable changes to the unit.

5. Respondent’s Obligation to Recognize the Union Attached as Early as June 26, 2015, but No Later than December 2015

Respondent’s obligation to bargain with the Union attaches when the union: 1) makes a demand for recognition or bargaining; and 2) the successor had a “substantial and representative complement” of employees, a majority of whom were employed by the predecessor. *Hampton Lumber Mills-Washington*, 334 NLRB 195, 195 (2001). Respondent had a bargaining obligation beginning on June 26 when the Union made a demand for recognition and bargaining. (JTX 12) At that time, as shown above, Respondent had a “substantial and representative complement” of employees as Respondent employed 19 stagehands, 15 of whom were former Labor Plus employees.

Even if a substantial and representative complement had not been achieved until December 2015, as likely claimed by Respondent, Respondent had a duty to bargain with the Union. As noted in *Fall River*, a union’s demand to bargain is treated as a continuing demand to bargain. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 52; *MSK Corp.*, 341 NLRB

43, 44-45 (2004). The Union also filed a charge on December 31 in 28-CA-166890, in which the Union alleged a failure to bargain over the subcontracting of the Frank Sinatra show, which serves as independent notice of the Union's request to bargain. Respondent has refused to recognize the Union as the representative of the stagehand employees. Respondent, therefore, has unlawfully refused to bargain with the Union in violation of Section 8(a)(5) of the Act and the ALJ should so find.

B. Respondent Unlawfully Refused to Provide Necessary and Relevant Information Requested by the Union.

An employer is obligated to furnish information to a union which is potentially relevant and which would be useful to the union in fulfilling its statutory responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). The test for relevance is a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Certain information is considered presumptively relevant and requires no showing of relevance. This includes information about the bargaining unit. *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

Respondent had a duty to bargain with the Union, and therefore also had a duty to provide requested information which was necessary and relevant to the Union in the performance of its duties. The Union requested information on June 26, but Respondent answered without providing any of the requested information. (JTX 12; 13) The information requested, which included "all benefit plans, company policies or procedures which apply to the employees at the Showstoppers Theater[,] an updated list of the employees, phone numbers, addresses, email addresses, classifications and rates of pay[, and] copies of the work schedules for the employees for the period May 1, 2015 to the present" are all related to the bargaining unit and are presumptively relevant. (JTX 12(a)) The information should have been produced, but was not.

(JTX 13(a)) Respondent's failure to produce the requested information violated Section 8(a)(5) of the Act, and the ALJ should so find.

C. Respondent Unlawfully Subcontracted Unit Work with the Frank Sinatra Show

Subcontracting unit work is a mandatory subject of bargaining. See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-12 (1964). Where the primary change brought about by subcontracting is the identity of the employees, rather than major capital investments or similar changes in scope, there is a duty to bargain over such changes. *Torrington Industries*, 307 NLRB 809, 810-811 (1992). Bargaining is not excused simply because no employee was laid off or experienced a significant negative impact to employment. *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 2 (2014). As described above, Respondent was the successor to Labor Plus' bargaining obligations. Respondent has been on continuing notice of the Union's request to bargain since June 26. Notwithstanding the bargaining obligation, persons other than stagehands performed the building and installation of camera platforms and assisted stagehands to clear props, bring in lights, hang signs and adjust seating. However, as demonstrated by the July 2 response, Respondent has refused to recognize and bargain with the Union, including as to contracting unit work.

Respondent will likely argue that it merely provided access for AEG Ehrlich for the Frank Sinatra Show. However, the bargaining unit work that Respondent took over from Labor Plus was for a unit of stagehands at "Wynn Showstoppers Theatre" rather than work for any particular show. Many of the Respondent's stagehands worked on the setup for the Frank Sinatra Show, albeit on unique sign-in sheets. Because the Union represented the stagehands at the ShowStoppers Theatre, when Respondent contracted with AEG to put on the Sinatra Show, which involved stagehand work by largely the same employees, Respondent's arrangement with

AEG was tantamount to subcontracting the stagehand work. Further, the contact between Respondent and AEG requires AEG “to utilize the existing lighting, audio, scenic and dressing room set ups,” from the ShowStoppers production for the Sinatra show. (GCX 22(c)) Thus, for stagehands on the Sinatra show, the work was largely the same; they worked on the same set, with the same equipment, and signed in and out of the same place. What changed was who their putative boss was for the work and their terms and conditions of employment on that work, all of which are matters “peculiarly suitable for resolution within the collective bargaining framework.” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 213-14. Because Respondent effectively subcontracted stagehand work to AEG without bargaining, it breached its Section 8(a)(5) bargaining obligation as alleged in the Complaint.

D. The reasoning of *Burns* and *Fall River Dyeing* should be extended to situations, as here, where a successor takes over operations while a petition for election is pending

Although *Burns* and *Fall River Dyeing* address situations where a successor comes in where a union is established, similar reasoning can, and should, be applied to a situation where a successor takes over operations where a union petition has been filed. *Burns* and *Fall River* dealt with the lasting obligation to recognize a union notwithstanding a change in ownership or a hiatus in operations. The fundamental concept is retaining representation for those employees who chose to be represented by a union, and that a change of ownership is not such an unusual circumstance as to affect the employees’ choice to be represented. The same concept should apply here. In this situation, although there is not a certified representative at the time that Respondent began hiring stagehands, there is an expression of interest in being represented by the Union as demonstrated by the fact that a petition was filed. Further, if there was any doubt as to whether the employees wanted to be represented by the Union, this doubt was dispelled by the voting results demonstrated in the tally of ballots which shows that the employees voted

unanimously for the Union. Viewing the situation from the employees' perspective, the employees have voted for the Union but have yet to receive any of the benefits of Union representation because Respondent has refused to recognize the Union. Respondent, or any other successor which enters the scene while a representation petition is being processed, should not be allowed to avoid a bargaining obligation simply by hiring the employees from the unit. Accordingly, the reasoning of *Burns* and *Fall River Dyeing* should be extended to situations, as here, where a successor takes over operations while a petition for election is pending and the union wins the election.

E. The Northwest Glove Company

The ALJ directed at hearing that the parties examine *The Northwest Glove Co.*, 74 NLRB 1697, 1700 fn. 3 (1947). In its footnote, the Board noted that it did not pass on the obligation of a successor who takes over without notice of the predecessor's obligation to bargain. Here, Respondent is likely to argue that it had no notice. Neither documentary nor testimony at hearing established knowledge. However, timing indicates that Respondent had notice that the Union was seeking to represent stagehand employees. Where Respondent had operated the ShowStoppers Show for months but announced its termination of the agreement with Labor Plus just two days after the Union filed its petition for representation, the inescapable conclusion should be drawn that that the Union's petition accounted for Respondent's actions. Further, as demonstrated by the agreement between Respondent and Labor Plus, Labor Plus was contracted to provide non-union stagehands for the ShowStoppers Show. (JTX 1(a)) This agreement, combined with timing, shows that Respondent was aware of the pending representation petition and sought to avoid having union labor at the ShowStoppers Theatre. Therefore, *Northwest Glove Company* is inapplicable as Respondent was aware that employees sought to be

represented by the Union and was aware of the petition when it started hiring Labor Plus stagehands.

Respondent is likely to argue that the timing of the hiring only reflects a delay to determine whether the ShowStoppers Show would be successful. Although Respondent and Labor Plus deny that there was communication about the petition, the timing is too close to be mere coincidence. Respondent started hiring the Labor Plus stagehands immediately after it terminated the contract with Labor Plus. Respondent pushed the Labor Plus employees through the hiring process faster than normal, which further indicates that Respondent was aware of the petition for election. Accordingly, the ALJ should find that Respondent had knowledge of the election petition. As noted in *Fall River Dyeing* and other cases, the cases are evaluated from the perspective of the employees. *Bronx Health Plan*, 326 NLRB at 811-812. Here, from the employees' perspective, Respondent is a successor to Labor Plus.

F. Respondent's Likely Due Process Argument

Respondent will likely argue that it was not involved in the representation case and was thereby denied due process. Respondent is expected to essentially argue that it should have been a party in the prior representation case in order to ensure that its due process rights were not violated and that it cannot be found as a successor unless it was a party to the representation proceedings.

Respondent's due process arguments lack merit. Due process requires meaningful notice of a charge and a fair opportunity to litigate the charge. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004). "In determining whether a respondent's due process rights were violated, the Board has considered the scope of the complaint and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory." *Buonadonna Shoprite, LLC*, 356 NLRB 857, 858 (2011)

(finding the employer was deprived of due process where a violation was found by the administrative law judge of which there was no argument or allegations regarding the issue in either the complaint or the hearing) (citing *Sierra Bullets, LLC*, 340 NLRB 242, 242-243 (2003)); see also *Square One*, 362 NLRB No. 30, slip op. at 2 (2015) (reversing the administrative law judge finding of a violation where the violation was not alleged in the complaint, litigated at hearing, or addressed in the General Counsel's brief).

Here, Respondent was aware of the representation petition as demonstrated by timing as discussed above. Further, Respondent was on notice of the representation issue no later than June 26 when the Union sent its demand to bargain to Respondent. At that time, the Union made it clear that it claimed Respondent was a successor to Labor Plus. Accordingly, although Respondent was not a party to the representation proceedings, it was on notice of the Union's demand to bargain no later than June 26. Further, Respondent had notice as demonstrated by the October 13 charge in 28-CA-161779. (GCX 1(a)) Respondent had additional notice on December 31 when the Union filed its charge in 28-CA-166890. (GCX 1(e)) Moreover, Respondent was on notice as of August 31, 2016 as to the complaint and allegations against Respondent. (GCX 1(g)) Respondent has been afforded its necessary due process notwithstanding the fact that it was not named as an employer in the underlying representation petition.

IV. CONCLUSION

Based on the foregoing reasons and the record evidence considered as whole, Counsel for the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) and (5) of the Act as alleged in the Complaint by failing to bargain with the Union, failing to provide requested relevant information and by subcontracting unit work. The ALJ should so find and recommend that the Board fashion an appropriate remedy which would require Respondent to:

cease and desist from such unlawful conduct; post an appropriate Notice to Employees at its Las Vegas facility, a proposed copy of which is attached. The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Las Vegas, Nevada, this 8th day of December 2016.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-161779 and 28-CA-166890 was served via E-Gov, E-Filing, and Electronic Mail, on this 8th day of December 2016, on the following:

Via E-Gov, E-Filing:

Honorable John Giannopoulos
Administrative Law Judge
National Labor Relations Board
Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1735

Via Electronic Mail:

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NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union;
- Choose representatives to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to recognize and bargain in good faith with the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada Local Union 720 (Union) as your exclusive collective-bargaining representative of the following appropriate unit:

all full-time and regular part-time on-call stagehand employees in the Wynn Showstoppers Theatre in Las Vegas, Nevada excluding all other employees, including wardrobe, hair, makeup employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to provide the Union with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT refuse recognize and bargain in good faith with the Union by securing the services of an outside contractor to perform bargaining unit work without notice to and bargaining with the Union to agreement or good-faith impasse.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL recognize and bargain with the Union as the exclusive bargaining representative of the employees in the appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, **WE WILL** embody such understanding in a signed agreement.

WE WILL provide the Union with the information it requested on June 26, 2015.

WYNN LAS VEGAS, LLC

(Employer)

Dated: _____

By: _____
(Representative) (Title)