

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

BLUE MAN VEGAS, LLC

and

Cases 28-CA-21126
28-CA-21235
28-CA-21439
28-CA-21776

INTERNATIONAL ALLIANCE OF THEATRICAL
STAGE EMPLOYEES, MOVING PICTURE
TECHNICIANS, ARTISTS AND ALLIED CRAFTS
OF THE UNITED STATES AND ITS TERRITORIES
AND CANADA, LOCAL 720, AFL-CIO

John Giannopoulos, Atty., Counsel for the General Counsel,
Region 28, Phoenix, Arizona.

Lawrence D. Levien and Elizabeth Cyr, Akin Gump Strauss Hauer & Feld, LLP,
Counsel for Respondent, Washington, DC.

Michael A. Urban, Laquer, Urban, Clifford & Hodge LLP,
Charging Party, Las Vegas, Nevada.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Las Vegas on March 11 through 12 and April 29, 2008.¹ On February 25, 2008, the Regional Director of Region 28 (the Regional Director) of the National Labor Relations Board (the Board) issued an Order Consolidating Cases (the Complaint), which consolidated for hearing the Second Consolidated Complaint and Notice of Hearing (Second Consolidated Complaint) and the Complaint and Notice of Hearing (28-CA-21776 Complaint). The Second Consolidated Complaint and the 28-CA-21776 Complaint were issued, respectively, on August 29 and February 25, 2008 by the Regional Director based upon charges filed by International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO (the Union). The Complaint alleges Blue Man Vegas, LLC (the Respondent or Blue Man) violated Sections 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act).² Respondent essentially denied all allegations of unlawful conduct.

¹ All dates herein are 2006 unless otherwise specified.

² At the hearing, the General Counsel amended the Second Consolidated Complaint to delete Lisa Embs and Tammy Unglesbee from Paragraph 4 and to allege the Respondent's refusal on January 19, 2007 to employ or to consider for employment Marielle Thorne. The General Counsel moved to amend the Second Consolidated Complaint to allege the unlawfulness of the third provision of page 1 of the Respondent's 2007 Employee Handbook, which motion was denied. In his post-hearing brief, Counsel for the General Counsel requests reconsideration of the denial, which request is also denied.

II. Issues

1. Did the Respondent independently violate Section 8(a)(1) of the Act by the following conduct: threatening employees by informing them that they were being denied work opportunities because they engaged in union activities and because the Union had filed charges concerning them with the Board; maintaining in its Employee Handbook provisions relating to Confidentiality, No Solicitation/No Distribution, and Press Events/Opportunities that interfere with, restrain, and coerce employees in the exercise of their rights guaranteed in Section 7 of the Act?
2. Did the Respondent violate Section 8(a)(3) and (1) by refusing to transfer employee Marielle Thorne to the position of substitute employee because of her union activities and the union activities of other employees.
3. Did the Respondent violate Section 8(a)(3) and (4) by denying employee Marielle Thorne the opportunity to work as a substitute employee because of her union activities and because she was the subject of an unfair labor charge filed by the Union with the Board?
4. Did the Respondent violate Section 8(a)(1) and (5) of the Act by announcing and granting a \$1.00 wage increase to certain unit employees and by changing its compensation policy of Short Turnaround Pay Premium for unit employees?
5. Did the Respondent violate Section 8(a)(5) of the Act by failing and refusing to furnish the Union with information requested by the Union that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of unit employees?

III. Jurisdiction

At all relevant times, the Respondent, a Delaware corporation, has been engaged in the business of providing live entertainment with an office and place of business in Las Vegas, Nevada (the Respondent's facility).³ During the 12-month period ending December 18, in conducting its business operations, the Respondent derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$5,000, directly from points located outside the State of Nevada. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

IV. Findings of Fact

A. History of Union Representation

Blue Man Productions (BMP), located in New York City, is the umbrella entity for all Blue Man Group production companies, each of which stages unique musical and theatrical experiences revolving around three bald, blue men and combining live music, video imagery, and audience participation to create a distinctive, multi-sensory audience experience.⁴ The Blue

³ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony. Counsel for the General Counsel's unopposed post-hearing motion to correct the transcript and to substitute the complete declaration of Troy Poe for the incomplete document marked as Respondent's Exhibit No. 21 is granted. The motion and corrections are received as ALJ exhibit 1.

⁴ The Respondent's post-hearing motion that judicial notice be taken of five magazine articles descriptive of the Blue Man Show is denied.

Man Group production companies perform in multiple venues nationally and internationally with the Respondent being the Las Vegas production. The Respondent opened at the Las Vegas Luxor Hotel in 2000 and in 2005 transferred the production to the Venetian Hotel. Upon
 5 relocation to the Venetian Hotel in 2005, the Respondent employed stagehands and wardrobe employees, all of whom were unrepresented by any Union.

In December 2005, the employees began organizing a union at the company. The Respondent sought to have musical instrument technicians (MIT) including in any appropriate
 10 unit. Following a representation hearing, the Regional Director found, contrary to the Respondent's position, that the following unit of the Respondent's employees (the Unit) was appropriate:

15 All full-time and regular part-time stagehands and wardrobe employees, excluding all other employees, office-clerical employees, guards and supervisors as defined in the Act.

On May 25, the Board conducted a representation election among employees in the Unit, in which 20 votes were cast for the Union and 14 against. On June 5, the Board certified the Union as the exclusive collective-bargaining representative of the Unit under Section 9(a) of
 20 the Act, and on September 14, the Board ordered the Respondent to bargain with the Union.⁵ The Respondent refused to bargain with the Union and petitioned the Washington D.C. Court of Appeals for review of the Board's order in order to test certification. Success of the Respondent's appeal would require a new representation election.⁶ On June 10, 2008, the Court denied the Respondent's petition for review and granted the Board's cross-application for
 25 enforcement.⁷

B. Alleged Violations of Section 8(a)(5) of the Act

30 In mid September, Respondent unilaterally announced and implemented a \$1.00 pay raise for unit employees. On October 9, the Respondent changed its compensation policy of Short Turnaround Pay Premium (Pay Premium Policy), which eliminated the 3-hour minimum pay for employees who were not given an 8-hour rest period between work calls.

35 By letter dated April 25, 2007 the Union requested 24 specific items of information relevant to the Respondent's unit employees. The information sought covered personnel information, breakdown of benefits, wage rates and wage history by employee classification, copies of all employee benefit plans along with cost breakdown, actuarial reports and asset description of any retirement plans, paid time-off information, copies of evaluations and merit
 40 pay increases, copies of disciplinary actions within the last two years, information about the current workers' compensation carrier, information about safety training and procedures, breakdown of current staffing patterns and work schedules, copies of dress code, drug/alcohol,

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⁵ *Blue Man Las Vegas, LLC*, 348 NLRB No. 10 (2006).

50 ⁶ By memorandum dated January 30, 2007 the Respondent informed employees, in pertinent part, that should a new election be directed, "crew members employed at the time of [the] new vote [would] get to vote," including substitute employees.

⁷ *Blue Man Vegas, LLC v. N.L.R.B.*, ___ F.3d ___ (C.A.D.C. 2008).

and leaves of absence policies with usage details for the latter policies, and copies of employee equipment complaints along with complaint actions taken by the Respondent. The Respondent did not reply to the Union's request.⁸

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C. Alleged Violations of Section 8(a) (3), (4) and (1) of the Act

1. Denial to Marielle Thorne of Opportunity to Work as Substitute Employee

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At all relevant times the following employees held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

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- Phil Stanton - Owner and Founder
- Dan Boesch - Head of Props Department
- Troy Poe - Human Resources Manager
- Kori Prior - Production Supervisor
- Thomas Studer - Technical Supervisor

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The Respondent's Las Vegas Employee Handbook, version 9/05 (Employee Handbook)⁹ addresses, inter alia, the following subjects:

UNPAID LEAVES OF ABSENCE (pages 36-37)

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One of the unique characteristics about [the Respondent] is the number of company members with additional artistic/career interests. To continue to support company members' ability to grow professionally both within and beyond the organization, [the Respondent] offers a leave of absence option. A leave of absence is any absence longer than the amount of [personal time off] the requesting company member has accrued.¹⁰

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Upon one (1) year of continuous employment, company members in good standing (meeting job expectations, no disciplinary actions active) may apply for a maximum of 12 weeks leave of absence without pay...The request may be denied if, in the judgment of management, a company member's absence would be detrimental to the company...Management reserves the right in its sole discretion to deny a leave of absence.

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HOLIDAY SEASON MORATORIUM (page 36)

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Due to the intense Holiday Schedule, all company members directly connected with the running or production of the show may not request or take [personal time off] during the week of Thanksgiving or from mid-December through the first week in January.¹¹ All

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⁸ In its post-hearing brief, the Respondent represents that since the Court's ruling, the Respondent has recognized the Union as the collective-bargaining representative of the Unit and has begun to respond to the Union's request for information.

⁹ The parties stipulated that the Employee Handbook was in effect during Ms. Thorne's employment.

¹⁰ Personal, or paid, time off is an amalgamation of paid sick and vacation leave, which are benefits not generally available to substitute employees. Although, according to Ms. Prior, substitute employees may have been permitted to take leaves of absence the policy was written specifically for full-time employees.

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¹¹ The moratorium applied to both full-timers and substitutes although substitutes generally receive no benefits including personal time off. By Memorandum dated September 21, 2006, the Respondent notified Crew Department Heads of the moratorium period for 2006.

company members should submit requests to the HR Generalist four (4) weeks in advance for specific performances off.¹²

FULL TIME COMPANY MEMBERS (page 6)

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Substitutes

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Substitutes play an integral part in [the Respondent's] employment structure. Because of the intense number of performances scheduled per week, Substitutes ensure that the performance schedule is covered when company members are on vacation, performing an outside gig, or are unable to perform for other reasons. Substitute members are company members who are trained to perform the duties required of a full-time company member but do not work the equivalent of a full-time schedule on a regular basis. In order to stay current with the production, Substitutes must work a minimum number of shows per week.¹³ Show minimums vary according to position...If a substitute is consistently unavailable to cover in cases of schedule changes, it may lead to changes in his/her employment status, up to and including termination.¹⁴

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Marielle "Apple" Thorne (Ms. Thorne or Apple) began working for the Respondent in July 2005 as a production assistant.¹⁵ In September 2005, Ms. Thorne took a position with the props run crew in the properties department where she prepared and maintained props for the show under the supervision of Dan Boesch (Mr. Boesch) head of the props department and Kori Prior (Ms. Prior), Production Supervisor. When Ms. Prior offered the position to Ms. Thorne, she told Ms. Thorne the position was a non-union job because the company wanted to be able to cross-departmentalize among the crew, which the Union would not allow.

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In December 2005, Ms. Thorne became involved with the union organization effort at the Respondent. Ms. Thorne's union support was common knowledge, and on more than one occasion she told Ms. Prior she was a union supporter.

On May 23, two days before the union election, Ms. Prior held a parts department meeting in which she discussed the Respondent's existing disciplinary policy, stating that although the company had a three-step progressive discipline procedure—oral warning, written warning, termination—they also had the flexibility to give multiple oral or written warnings before terminating an employee. Ms. Prior warned that under a union contract, the company would be required to follow the discipline steps strictly. Ms. Thorne said her understanding was that under a union contract, the company could still work with an individual employee by giving multiple warnings before termination. According to Ms. Thorne, Ms. Prior said, "Why would I want to work with you if you went union?" Ms. Thorne replied that Ms. Prior's response was frightening to hear and was part of the reason many employees supported the Union. Kris Kennell (Mr. Kennell) and Justin Lex (Mr. Lex), current props department employees of the

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¹² While working as a sub, Mr. Lex was off work from approximately December 8-21 while he performed in "The Nutcracker." He thereafter returned to work but took the 2006-2007 New Year Holiday off when Mr. Boesch offered him the option. Although Ms. Prior was aware Mr. Lex was performing in "The Nutcracker," she did not "micromanage that situation."

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¹³ Although the minimum number was unspecified, Ms. Prior said substitutes were expected to work at least one show every week, which might be extended to every two weeks. The important factor was that the interval be "regular."

¹⁴ During the period relevant to the Complaint, the Respondent had three substitutes dedicated to the properties department each of whom typically worked two days a week.

¹⁵ Production assistants run errands, shop for show items, pick up orders for rigging, electrical and other equipment and supplies, supply refreshments, deliver paychecks, etc.

Respondent, corroborated Ms. Thorne's testimony, recalling that Ms. Prior asked employees at the meeting why, if they went union, she would want to work with them.¹⁶ I give weight to Ms. Thorne, Mr. Kennell, and Mr. Lex's testimony. Not only did I find all three to be persuasive witnesses, I note that at the time of the hearing the latter two witnesses were still employed by the Respondent, and as current employees their testimony is likely to be reliable when, as here, they have testified adversely to their current employer.¹⁷

In November, the Respondent issued Ms. Thorne a laudatory work evaluation accompanied by a 3.5% merit wage increase.¹⁸ At about the same time, Mr. Boesch recommended Ms. Thorne for employment as head of properties with Troika Entertainment (Troika), which was planning a national tour (the Troika tour).¹⁹ The Troika tour would last six-seven months with several intermittent breaks of two weeks or more.

On about November 12 Ms. Thorne applied for a six month leave of absence (LOA) from the Respondent in order to join the Troika tour. Ms. Thorne's immediate supervisor, Tom Studer (Mr. Studer), rejected the request as being beyond the leave-of-absence parameters set by the employee handbook. Mr. Studer told Ms. Thorne the Respondent had denied her application for a LOA, but, as he did not want to lose her as a crewmember, he suggested they talk to Human Resources Manager, Troy Poe (Mr. Poe) about other options. Mr. Studer, Mr. Poe, and Ms. Thorne discussed ways of preserving her employment with the Respondent while permitting her to join the Troika tour. The three considered the possibility of Ms. Thorne's accepting a demotion to a position as a substitute and working as a substitute during the Troika tour breaks (transfer to substitute plan). Mr. Poe said the plan would probably work as long as the affected department heads were willing to work around Ms. Thorne's tour and break schedule, but he first needed to get approval from Andrea Rupp (Ms. Rupp) Human Resources manager in BMP who had supervisory responsibility over him, as he had never before made such an arrangement.

On the same day, Mr. Poe telephoned Ms. Rupp and asked whether Ms. Thorne could transfer to a substitute position.²⁰ Ms. Rupp told Mr. Poe that such transfers occurred regularly.

A short time later, Mr. Poe told Ms. Thorne he had received approval from New York and that she only needed to sign a document voluntarily accepting demotion to a substitute position. It was specifically understood that upon transfer to a substitute position, Ms. Thorne would no longer receive benefits or guarantee of hours. Mr. Poe cautioned Ms. Thorne to understand it was completely up to the department heads whether or not they would call her in at all during Troika tour breaks.

At about this same time, the following persons exchanged the following email communications, as set forth in pertinent part:

¹⁶ The Respondent argues that the employees misunderstood a lawful question posed by Ms. Prior: "Why would the company deviate from a bargaining contract if it had one?" Mr. Kennell, whose testimony I found to be clear, direct, and reliable, credibly testified that although Ms. Prior initially asked why the company should deviate from the terms of a future collective-bargaining contract, she additionally asked employees, "Why would we work with you, if you went union?"

¹⁷ See *Advocate South Suburban Hospital*, 346 NLRB 209 FN1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995).

¹⁸ At the hearing, Mr. Boesch described Ms. Thorne as a "totally competent stage technician" and her performance as "great."

¹⁹ The tour involved a Broadway musical revue entitled "Chita Rivera" or "The Dancer's Life."

²⁰ Mr. Poe testified he did not specifically name Ms. Thorne in this conversation with Ms. Rupp, but Mr. Studer's email of November 14 (Email B below) makes it clear that Ms. Rupp was aware the transfer-to-substitute had been devised for Ms. Thorne when she approved it.

• Email A:
 Sent November 13, 5:03 PM
 Mr. Poe to Mr. Studer and Ms. Thorne
 5 [Ms. Thorne’s tour] is a done deal..... unless Apple decides she will miss us too much and stays! We will change employment status to Sub as of 12/3/06.

• Email B:
 Sent November 14, 12:09 PM
 10 Mr. Studer to Ian Pool,²¹ Ms. Prior and Mr. Poe, copying Ms. Rupp, Barbara Hodgen,²² and Mr. Boesch:
 After discussions with [Ms. Thorne, Mr. Poe and Mr. Pool] we have moved forward regarding [Ms. Thorne’s] desire to go on a non-Blue Man tour. I told her that we could not grant an LOA and hold her position because the request was too long and went over the holiday moratorium. I told her that I couldn’t promise her anything, but I would be
 15 interested in hiring her as a Sub when she got back. She was fine with that and we went to talk to [Mr. Poe] about how to quit and work out the logistics. [During the ensuing discussion regarding changing Ms. Thorne’s status to part-time, Mr. Poe] explained that [Ms. Thorne] would no longer receive benefits and no guarantee of hours. She was quite
 20 satisfied with that option. [Mr. Poe] took that back to Andrea [Rupp] and everyone was amenable.

So, effective 12/3/06, her employment status will change from full-time Crew to part-time Sub. [Mr. Poe] will get documentation from her that indicates she is requesting this voluntarily. Her last work day as a full-timer will be 11/30/06...Her Sub rate will reflect her
 25 merit increase. She will be available as a Sub during a month lay-off from the tour which will be mid January to mid February. She will let us know when she is available after the tour’s end, which should be early June.

Ms. Prior received Mr. Studer’s November 14 email while enroute to the airport in New York City. She decided she could not support the arrangement he and Mr. Poe had made with
 30 Ms. Thorne regarding a change to substitute status, and the decision would have to be reversed. Ms. Prior felt that permitting Ms. Thorne to transfer put the company in a situation where Ms. Thorne was dictating her availability and her schedule, which the company did not permit unless it was a day here or a day there very specifically outlined. In Ms. Prior’s view,
 35 unavailability for weeks at a time was not appropriate.

Ms. Thorne completed a reassignment request on November 15, as suggested by Mr. Poe, after which she signed an employment contract with Troika. The reassignment request read as follows:

REASSIGNMENT REQUEST

40 I am requesting reassignment from my position as Props Crew to Props Sub effective December 3, 2006. I am aware of and understand this change in employment status and its effect on my employment relationship with Blue Man Vegas.

45 At some point between November 15 and 20, Ms. Prior telephoned Mr. Studer and Mr. Pool. Although Ms. Prior told Mr. Pool why she was upset with the transfer-to-substitute plan, there is no specific evidence as to what she said to the two managers. The conversation apparently resulted in a determination that approval of the plan should be withdrawn. Ms. Prior thought the situation was “muddled” because, in her words, “[W]e had said that something was

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²¹ Ian Pool, production manager of the Respondent until early 2007, reported to Ms. Prior.

²² Barbara Hodgen was the Respondent’s company manager.

okay and then we were going to change our minds.” The three agreed they would have to “convene” on the issue when Ms. Prior returned to Las Vegas.

5 On the morning of November 20, a weekly human resources telephone conference call was held among Mr. Poe, Ms. Rupp, Ms. Prior, Suzanne Wackamoto (BMP Human Resource Director to whom Ms. Rupp reported), and Mr. Studer, who was included in the call since he had been an integral part of Ms. Thorne’s transfer-to-substitute plan. Although the group discussed the transfer-to-substitute issue “at length,” no specific evidence was provided as to what the participants said regarding the plan. Some general information was proffered: During the call, 10 Ms. Prior asked to revisit Ms. Thorne’s request to transfer to a substitute position. Ms. Prior told the conferees she thought it was in the company’s best interest to reverse the decision regarding Ms. Thorne’s transfer because it contravened clear and necessary company policies, i.e., the Holiday Moratorium and Leave of Absence policies. Although Ms. Prior testified she did not “push” the conferring group or tell them the decision had to be reversed, she acknowledged 15 she was “upset” with the decision, and she agreed that if she had not “presented the facts which were our policies,” the Respondent would have accepted Ms. Thorne’s transfer to a substitute position. No other manager reported having a problem with the arrangement.²³ After Ms. Prior presented her objections, the group agreed to deny Ms. Thorne’s request to transfer. Following the conference call, additional email communications were exchanged:

- Email C:

Sent November 20, 5:04 PM

Mr. Poe to Ms. Rupp and Ms. Prior

She will not be on our payroll after Dec 3 unless we use her at some point...which 25 may/may not happen.

- Email D:

Sent November 20, 9:15 PM

Ms. Rupp to Mr. Poe

Subject: RE: Apple

30 Since we do not grant LOAs longer than 12 weeks this is considered a resignation. She could contact us when she returned. At that point she could reapply...and we could go through the employment process with her if we so choose...I need to talk with Larry [Levien, the Respondent’s attorney] to see how we explain the form she signed.²⁴

35 We rarely have employees sign anything...In light of the union situation we need to be very careful about our communication.

- Email E:

Sent November 21, 1:45 PM

Ms. Prior to Ms. Rupp

40 Subject: FW: Apple’s LOA request and forwarding Mr. Studer’s Email B to Ian Pool, Ms. Prior and Mr. Poe

50 ²³ Mr. Poe testified that Ms. Prior was the only one to raise objections about the plan. Although Ms. Prior testified that during the conference call Mr. Studer said that he did not think [the transfer] was a good idea, I cannot accept her testimony in that regard, as it is inconsistent with her later testimony that “nobody informed [her] that they had a problem with [Ms. Thorne becoming a Sub].”

²⁴ Mr. Poe understood “the form” to refer to the reassignment request Ms. Thorne had signed.

This is the last thing as Tom knows it. I still have to talk to Troy. Kori²⁵

- Email F:
Sent November 21, 3:08 PM
Ms. Rupp to Ms. Prior
Re:Apple's LOA request

This sounds like this is what Tom wanted. I'm so confused.

After receiving Ms. Rupp's response (Email F), Ms. Prior telephoned her on the same day. Ms. Prior did not relate the substance of her November 21 conversation with Ms. Rupp but said the two agreed that Ms. Rupp would speak to Mr. Poe and Ms. Prior would speak to Mr. Studer to make sure everyone was clear about the Respondent's processes and how they were going to move forward. Ms. Rupp did not testify regarding the exchange. Mr. Poe did not testify about any follow-up conversation with Ms. Rupp, and Mr. Studer did not testify at all. Mr. Poe thereafter sent the following email:

- Email G:
Sent November 21, 5:41 PM
Mr. Poe to Ms. Rupp and Suzanne Wakamoto
There was some discussion after our call regarding Apple. It has fallen to me to handle the situation with her (no problem) but wish I would have known the circumstances initially....

2. Refusal to Reemploy Marielle Thorne
or to Consider her for Reemployment

On November 21 without explanatory preamble, Mr. Poe informed Ms. Thorne that the Respondent would not honor the previously agreed-upon transfer-to substitute arrangement and that she would have to resign her Blue Man employment if she wanted to do the Troika tour.²⁶ Ms. Thorne tendered her written resignation to the Respondent and began her employment with Troika on December 4.

After his conversation with Ms. Thorne, Mr. Poe notified the managers involved of his contact with Ms. Thorne:

- Email H:
Sent November 24, 9:37 PM
Mr. Poe to Adrian [Fisher, Managing Director of the Respondent], Ms. Rupp, Mr. Pool, Ms. Prior, and Mr. Studer.
I talked to Apple today and explained that her employment will end when she leaves. She understood and submitted a letter of resignation.

²⁵ Ms. Prior agreed that she forwarded Mr. Studer's November 14 email to Ms. Rupp on the day after the conference call. Her explanation as to what prompted Email E was, if not incomprehensible, at least unclear: Ms. Prior: Well, I was speaking specifically to process. I realize that it doesn't necessarily indicate that there, but [Ms. Rupp] and I had spoken on the conference call about generally—generally about to make sure that—we have to make sure that this doesn't happen again, meaning our miscommunication on the issues like these, and so, I went back to make sure that there was no e-mail in between, and essentially, Tom was being inconsistent between what he was telling me verbally and what this e-mail said, so I was trying to clear that up with [Ms. Rupp].

²⁶ Ms. Thorne agreed that Mr. Poe may have given her three options: continue her employment with the Respondent, resign and go on the Troika tour, or limit her request to a 12-week leave of absence during a period outside the holiday moratorium. In any event, Ms. Thorne could only undertake the Troika tour if she resigned from the Respondent.

5 She explained that she would like to work during the periods in which she is home from the tour, if possible. I told her I did not know. She will be going to Tom to discuss that. I presume that leaves it under the discretion of Tom/Kori whether or not to do that, as would normally be the case.

On December 18, the Union filed an unfair labor practice charge with Region 28 alleging the Respondent had violated Sections 8(a)(1) and (3) of the Act by discriminating against Ms. Thorne.

10 Beginning on January 14 or 15, 2007, Ms. Thorne had a four-week break from the Troika tour, which she spent in Las Vegas. Mr. Boesch had previously told Ms. Thorne he would like to have her work when she was back in town, and a few days after January 14 or 15 Ms. Thorne went to the Blue Man production area in the Venetian Hotel. As she visited with her former co-workers, Mr. Boesch drew Ms. Thorne into the privacy of a stairwell and told her he had been
15 trying to bring her back into employment with Blue Man, but he had heard she had filed a lawsuit against the company, and he would not be able to bring her back.²⁷

20 The only evidence relating to the Respondent's substitute hiring in mid-January 2007 was Mr. Boesch's testimony that the Respondent had not hired a replacement for Ms. Thorne and his observation: "We were constantly bringing in people. We had also brought in some new subs to the department and...this was actually kind of an ongoing thing as far as scheduling goes."

25 D. Alleged Independent Violations of Section 8(a)(1) of the Act

1. Alleged Threat

30 On December 18, the Union filed an unfair labor practice charge with Region 28 alleging the Respondent had violated Sections 8(a)(1) and (3) of the Act by discriminating against Ms. Thorne. As detailed above, in mid January 2007 Mr. Boesch told Ms. Thorne he would not be able to reemploy her at the Respondent, as she had filed a lawsuit against the company.

2. Alleged Maintenance of Unlawful Employee Handbook Provisions

35 The Respondent maintains and issues to employees an employee handbook entitled Blue Man Group Company Member Handbook, the last revision of which was effected August 1. The following provisions are in issue:

CONFIDENTIALITY [at pages 28-29]

40 While employed by BMG, company members may have access to, receive, and/or develop information that is confidential and proprietary in nature. This confidential

45 ²⁷ Mr. Boesch, although no longer employed by the Respondent, was called as a witness by the Respondent. He testified that he absolutely did not tell Ms. Thorne she could not return to the Respondent after filing a charge against the company. However, the substance of his testimony suggests otherwise:

Mr. Boesch: I wanted to find out [if] she'd actually filed a suit or a wrongful dismissal, you know, charge against Blue Man...because up until that point...I had every intention of actually having her come back to work with me.

...

50 Mr. Boesch: Up until that point I had every intention of bringing her back if it was possible, if there was work available and I was really surprised when I had learned that there were, in fact, charges pending.

Mr. Boesch's testimony corroborates Ms. Thorne's account, and I credit her testimony.

5 information includes customer lists, price data and price lists, group sales information, trade secrets, financial and strategic information, operations and manuals, personnel data, records, pay rates, personnel corrective action or performance information, and computer programs. BMG requires company members to refrain from sharing confidential information with other company members or with anyone not employed by BMG. Occasionally, there are exceptions made regarding this confidentiality policy, including sharing information with other productions regarding Group Sales; BMG reserves the right to decide when these exceptions are made.

10 Except to the extent consistent with a company member's employment by BMG, s/he may not at any time, whether during his/her employment or after the termination of his/her employment with BMG, permit any person to examine or make copies of any documents which may contain or be derived from confidential information.

15 It is very important for all of us to recognize much of the information learned about our fellow company members (e.g., performance evaluations, salary information, and corrective actions) should be kept confidential between the Company and the particular company member. This is especially applicable to those who are in a supervisory or managerial capacity and who have access to this kind of information regularly. Please respect the concerns of each company member regarding any information which should remain private, and as a courtesy to other company members refrain from engaging in discussions about such information.

20 If a company member is unsure whether or not information is confidential in nature, s/he should ask a supervisor, the HR representative, or company management. Failure to comply with this policy may result in corrective action up to and including termination.

25 **NO SOLICITATION/NO DISTRIBUTION POLICY [page 33]**

30 In the interest of maintaining a professional environment and to prevent interference with work and/or inconvenience to others, company members may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time or non-working time in areas where it will disturb other company member who are working, or in any performance areas open to the public.

35 The Respondent defined "performance areas" as locations the public has access to: the Respondent's lobby, restrooms, retail store (the Blue Man Store), elevator area, and the theater itself, where employees occasionally spent break time when no performance was going on.

PRESS EVENTS/OPPORTUNITIES [page 33]

40 It is important to BMG that all matters regarding the media be coordinated through a central contact; therefore, all inquiries from the press, reviewers, or other media representatives must be referred to the local marketing representative or to the Managing Director. No one should respond to inquiries from media representatives in any other fashion.

45 No one should initiate contact with media representatives with respect to BMG. Furthermore, company members may not use, authorize the use of, or make any reference to the name or images of BMG, the name BMP, any variation of those names, or any comparable or similar names that would tend to cause confusion, in connection with any matter not directly connected with BMG, without the prior approval of the local marketing representative or the Managing Director.

50 BMG must be allowed to decide when, where, and how BMG is represented. Any connection to BMG in the press, or any participation of a company member in a non-BMG event, wherein the company member is listed/noted as a member of BMG, must be

approved by the Managing Director or the local marketing representative at least four weeks in advance. This includes workshops, sponsorships, any publicity/press for gigs, or any public statements, verbal or written, made to the press under the auspices of BMG. Please note this does not include mentioning BMG as a current or previous employer in an individual biography for programs/playbills or on a resume.

V. Discussion

A. Violations of Section 8(a)(5) and (1) of the Act: Unilateral Changes and Refusal to Furnish Information

In mid September, Respondent unilaterally announced and implemented a \$1.00 pay raise for unit employees. On October 9, 2006, the Respondent unilaterally changed its compensation policy of Short Turnaround Pay Premium (Pay Premium Policy).

Since April 25, 2007, the date of the Union's request, the Respondent has refused to provide the Union with the following information, all of which is presumptively relevant to the Respondent's unit employees: personnel information, breakdown of benefits, wage rates and history by employee classification, copies of all employee benefit plans along with cost breakdown, actuarial reports and asset description of any retirement plan, paid time-off information, copies of evaluations and merit pay increases, copies of disciplinary actions within the last two years, information about the current workers' compensation carrier, information about safety training and procedures, breakdown of current staffing patterns and work schedules, copies of dress code, drug/alcohol, and leaves of absence policies with usage details for the latter policies, and copies of employee equipment complaints along with complaint actions taken by the Respondent.

In its post-hearing brief, the Respondent did not defend its above-described unilateral changes or its refusal to furnish the information requested by the Union, merely stating that as a result of the Court decision, the Respondent has recognized the Union as the collective bargaining representative of its stage crew employees and has begun to respond to the Union's April 25, 2007 information request. There being no basis for finding that the Respondent's unilateral changes and its failure to provide information were lawful, I find the Respondent violated Section 8(a)(5) and (1) of the Act by instituting the above-described unilateral changes in terms and conditions of employment and by failing and refusing to furnish the Union with the information outlined above.

B. Violations of Sections 8(a)(3), (4) and (1) of the Act

1. Denial to Marielle Thorne of Opportunity to Work as Substitute Employee

The question of whether the Respondent violated the Act by withdrawing its approval of Ms. Thorne's transfer-to-substitute plan rests on its motivation. The Board established an analytical framework for deciding cases turning on employer motivation in *Wright Line*.²⁸ To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a

²⁸ 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

showing, the burden of persuasion shifts “to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line*, supra at 1089; *United Rentals, Inc.*, 350 NLRB No. 76 (2007); *Donaldson Bros, Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon and Its Subsidiary Telesector Resources*, 350 NLRB No. 53 (2007); *Group Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). The General Counsel has established all three elements in the instant matter. Ms. Thorne openly championed the Union’s organizational drive, and Ms. Prior, who was pivotal in the Respondent’s ultimate disapproval of Ms. Thorne’s transfer-to-substitute plan, knew she did. Finally, Ms. Prior revealed union animus when she warned adverse consequences would follow unionization by asking employees at a pre-union election meeting, “Why would I want to work with you if you went union?”²⁹

Ms. Prior posed her May 23 question during a discussion of rigid application of prospective union contract terms versus existing managerial flexibility. The reasonable inference to be drawn from Ms. Prior’s words is that she would curtail erstwhile managerial magnanimity toward individual employees if employees selected the Union. Shortly thereafter, the employees did just that. While Ms. Prior’s expressed animosity predated the Respondent’s final action on Ms. Thorne’s transfer-to-substitute plan by six months, there is no evidence Ms. Prior’s antagonism subsided. Although the Union had won the May 25 election, the union representation issue was very much alive at Blue Man. The Respondent had refused to bargain with the Union and was in the process of challenging the Board’s certification of the Union. As indicated by its January 30, 2007 memorandum to employees, the Respondent actively hoped a new election would be directed. In the absence of ameliorative evidence, it is reasonable to conclude that Ms. Prior’s disinclination to “work with” employees who selected the Union continued unabated and that her animosity could motivate a refusal to interpret or modify company rules for the benefit of a represented employee. Of the Respondent’s managers, Ms. Prior alone raised objections to the already approved transfer-to-substitute plan, and she alone persuaded other managers to reject it. Accordingly, the *Wright Line* analysis must focus on Ms. Prior’s motivation.

Ms. Prior’s explanation for her opposition to the transfer-to substitute plan is that the plan put the company in a situation where Ms. Thorne was dictating her work availability and schedule. Such is a hyperbolic assessment of the plan if not a deliberately inaccurate one. The plan called for Ms. Thorne to notify the Respondent of her Troika break schedule, but it was entirely up to the department heads whether or not they would call her in to work at all during the breaks. Such an arrangement cannot reasonably be called a dictation of availability and schedule, and Ms. Prior’s opposition to the plan reasonably supports an inference that she intended to apply company rules inflexibly. Of itself, such intent is not unlawful; the Board does not second-guess an employer’s business decisions. But the Board is charged with determining whether business decisions are motivated by union animus. See *Real Foods Company*, 350 NLRB No. 32 (2007). During the union campaign, Ms. Prior had threatened managerial inflexibility if employees selected the Union, and, by overthrowing the transfer-to-substitute plan, she delivered inflexibility. Ms. Prior’s justification for obstructing the plan (i.e. curbing employee autonomy) parallels her earlier threat that managerial responsiveness to individual employee

²⁹ Although Ms. Prior’s threat occurred outside the Section 10(b) period, it can be considered as background evidence of animus towards union activity. See *Wilmington Fabricator, Inc.*, 332 NLRB 57, 60 fn. 6 (2000), and *Kaumograph Corp.*, 316 NLRB 793, 794 (1995).

problems would cease upon their selection of the Union. Overall, the circumstances surrounding the plan's demise provide a perceptible nexus between Ms. Prior's union animosity and her opposition to the plan.³⁰

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The Respondent argues that its overall benign treatment of known employee union members and supporters and the lack of specific animosity toward Ms. Thorne must vitiate the impact of any bygone animosity. In the absence of acknowledgment and correction of expressed animosity, however, the animosity must necessarily form the context for correlative adverse action. As Ms. Prior's expressed animosity closely correlates to her overthrow of the transfer-to-substitute plan, I find the General Counsel has met his initial burden by "making a showing sufficient to support the inference" that Ms. Thorne's union support or the combined union support of a majority of unit employees, was a motivating factor in Ms. Prior's successful opposition to the transfer-to-substitute plan.³¹ The burden of persuasion therefore shifts to the Respondent to show it would have taken the same action even if Ms. Thorne had not been an open supporter of the Union and/or if the Respondent's employees had not selected the Union as their collective-bargaining representative.

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The Respondent maintains that two provisions of the Employee Handbook prohibited the transfer-to-Substitute plan: (1) the Holiday Season Moratorium, which required all employees to be available during holidays and (2) the Substitute provision, which required substitutes to work an unspecified minimum number of shows per week. The Respondent contends that Mr. Studer and Mr. Poe erred in devising and approving the transfer-to-substitute plan and that by later correcting their error, Ms. Prior reasonably applied the Employee Handbook provisions. Irrespective of Ms. Thorne or any other employee's union activity, the Respondent asserts, Ms. Prior would justifiably have taken whatever steps were necessary to ensure that valid Employee Handbook provisions were observed.

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No one disputes that the transfer-to-substitute plan devised for Ms. Thorne went beyond the parameters established by the Holiday Moratorium and the Substitute provisions. Although the Respondent apparently waived the Holiday Moratorium provision in 2006-2007 for substitute employee, Mr. Lex, who took the 2006-2007 New Year Holiday off, there is no evidence the Respondent regularly disregarded the rules. However, the Respondent does not meet its shifted burden merely by showing that it possessed a legitimate reason for declining to proceed with the transfer-to-substitute plan. The Respondent must show that Ms. Prior would have scotched the plan even if Ms. Thorne were not an open union supporter or even if employees had not selected the Union to represent them. See *Tower Industries*, 349 NLRB No. 117 Slip Op. 4 (2007).

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Emails exchanged by the Respondent's managers regarding Ms. Thorne's situation show that as of November 14, Mr. Studer, Mr. Poe, and Ms. Rupp had fully agreed to the transfer-to-substitute plan. Only Ms. Prior was "upset" with the plan. During the November 20

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³⁰ Although causal nexus between union animus and adverse employment action is not an evidentiary burden of proof element under *Wright Line*, the Board and the circuit courts of appeal have sometimes added it as an independent fourth element. *Frye Electric, Inc.*, 352 NLRB No. 53 FN 2 (2008). In light of my conclusion regarding Ms. Prior's animus, it is unnecessary to consider the General Counsel's additional theory that by refusing to transfer Ms. Thorne to a substitute position, the Respondent hoped to reduce its pool of prounion employees in the case of a court-ordered second election.

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³¹ See *Wright Line* at 1089. In light of my finding that the Respondent demonstrated union animus in its dealings with Ms. Thorne, I find it unnecessary to address Counsel for the General Counsel's argument that the Respondent's handbook provisions, bargaining stance, and refusal to consider Ms. Thorne for reemployment also evidence animus.

5 telephone conference among Mr. Poe, Ms. Rupp, Ms. Prior, Suzanne Wackamoto, and Mr. Studer, Ms. Prior asked to revisit the issue, telling the other conferees that she thought it was in the company's best interest to reverse the transfer decision. Ms. Prior testified she did not "push" a decision during the conference call and only presented the facts and reviewed the Respondent's policies with the group, but there is no specific evidence of the group's discussion, even though their consideration of the transfer-to-substitute plan continued, in Ms. Prior's words, "at length." The gap in evidence is further emphasized by Mr. Poe's November 21 email to Ms. Rupp and Suzanne Wakamoto (Email G), in which Mr. Poe states:
 10 "[I] wish I would have known the circumstances [behind the transfer-to-substitute plan] initially." The record fails to detail either the substance of the conference call discussion or the "circumstances" to which Mr. Poe was not initially privy.

15 Adding to the vagueness of what transpired in the conference call was a post-conference exchange of emails between Ms. Prior and Ms. Rupp. Ms. Prior forwarded to Ms. Rupp Mr. Studer's November 14 email (Email B) in which Mr. Studer outlined the approved transfer-to-substitute plan. Upon receipt of that information, Ms. Rupp responded with an implied query (Email F): "This sounds like this is what [Mr. Studer] wanted. I'm so confused."

20 Ms. Rupp's email indicates that Ms. Rupp, at least, had not been aware Mr. Studer had approved the transfer-to-substitute plan and that the preceding conference call discussion was not as simple or straightforward as Ms. Prior's abbreviated testimony of it suggested. If Ms. Rupp's confusion was allayed by Ms. Prior's ensuing telephone conversation with her, the clarification did not, unfortunately, extend to the record. Ms. Prior failed to recount any specifics of the conversation, and the record remains devoid of evidence as to managerial discussions that might have explicated the reasoning behind the Respondent's withdrawal of plan approval.
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30 In its post-hearing brief, the Respondent acknowledges that its response to Ms. Thorne's approved transfer-to-substitute request was "muddled and awkward" and that the company's "communication with Ms. Thorne throughout this process was poorly managed." The Respondent points out that its muddled, awkward, and poor management of the matter "does not demonstrate anti-union motivation." That is true, and I have not considered the Respondent's enigmatic handling of the situation as evidence of animus. However, the burden of persuasion has shifted from the General Counsel to the Respondent, and I must examine the evidence to determine whether or not the Respondent's proffered explanations support the Respondent's contention that "numerous significant business justifications" compelled its denial of Ms. Thorne's request to transfer.
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40 In the absence of clear and specific evidence of the concerns or arguments Ms. Prior presented to management in opposing the transfer-to-substitute plan, it is difficult, if not impossible, to weigh or balance the factors the Respondent's managers relied on in withdrawing approval of the plan. It is likewise impossible to find that the Respondent has demonstrated it would have taken the same action even in the absence of Ms. Thorne's or the employees' union advocacy. Since the Respondent's defense evidence is equivocal at best, it is insufficient to satisfy the Respondent's evidentiary burden. The Respondent having failed to meet its shifted burden of proof, the evidence shows that the Respondent violated Section 8(a)(3) and (1) of the Act by denying Ms. Thorne the opportunity to work as a substitute employee.
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2. Refusal to Employ Marielle Thorne

50 About a month before Ms. Thorne's four-week Troika tour break began in mid-January 2007, the Union filed an unfair labor practice charge alleging the Respondent had unlawfully denied substitute work to Ms. Thorne. Having previously told Blue Man managers she hoped

the company would reemploy her during the break, Ms. Thorne went to the Blue Man theater area in the Venetian Hotel at the beginning of it. During her visit, Mr. Boesch told her he had been trying to bring her back into employment with Blue Man, but he had heard she had filed a lawsuit against the company, and he would not be able to.

Section 8(a)(3) of the Act provides, in relevant part, that it is “an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Section 8(a)(4) of the Act provides that it is an unfair labor practice for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.” Conduct violating either or both of these provisions discourages employees’ Section 7 rights and derivatively violates Section 8(a)(1) of the Act.

Whether Mr. Boesch’s conduct constituted a discriminatory refusal either to employ Ms. Thorne or to consider Ms. Thorne for employment in violation of Section 8(a)(3) and (4) of the Act depends on the outcome of the analysis set forth in *FES*.³²

Regarding discriminatory refusals to hire, under the analytic framework in *FES* the General Counsel must show: (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the positions available for hire, and (3) that antiunion animus contributed to the decision not to hire the applicants.³³

The General Counsel has met his burden of proof as to elements two and three of the *FES* analysis, i.e., the qualifications of Ms. Thorne and the Respondent’s animus toward her exercise of her rights protected under the Act. Whether the General Counsel has proven the first element in the *FES* refusal-to-hire analysis is a more difficult question.

As its first element, *FES* requires the General Counsel to show the Respondent was hiring or had concrete plans to hire substitutes for work Ms. Thorne was qualified to perform at the time Ms. Thorne was available during her Troika break. The General Counsel must prove this *FES* element at the hearing; the proof cannot be deferred to the compliance stage.³⁴ While it does not follow that the proof must consist of evidence that a substitute employee who met Ms. Thorne’s employment constraints was actually hired during the relevant time, the evidence must show that such an opening was at least available or that a concrete plan existed to create one.

The Respondent argues that the General Counsel has not shown Ms. Thorne applied for employment during the relevant time period. The evidence shows Ms. Thorne intended to seek Blue Man employment during her Troika breaks, and the Respondent’s managers, notably Mr. Boesch, knew it. In fact, Mr. Boesch repeatedly told Ms. Thorne he hoped to reemploy her. By informing Ms. Thorne that he would not reemploy her because she had filed a lawsuit

³² 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). I have considered both the 8(a)(3) and (4) allegations under an *FES* analysis, as Ms. Thorne’s protected activity is protected by an overlap of the two sections. By cooperating with the Union’s unfair labor practice charge, Ms. Thorne both engaged in union activities as covered by Section 8(a)(3) and gave testimony as contemplated by Section 8(a)(4). See also *Toering Electric Company*, 351 NLRB No. 18, FN 18 (2007) (8(a)(3) antidiscrimination protection logically consistent and coextensive with the express protections provided in 8(a)(4)). The same evidence supports both the 8(a)(3) and 8(a)(4) allegations and same remedy applies.

³³ *FES*, at 12.

³⁴ See *Sproule Construction Company*, 350 NLRB No. 65 slip op. 2 (2007); *FES* at 14.

5 against the company, Mr. Boesch preempted any application she might have made. The Board does not require an individual to perform a futile act.³⁵ Therefore, Ms. Thorne's failure to make formal application for a specific position does not abrogate the General Counsel's prima facie case.

10 The Respondent also argues the General Counsel has not shown the Respondent was hiring in relevant substitute positions or had concrete plans to do so at the time of Ms. Thorne's Troika break. Mr. Boesch provided the only evidence of substitute hiring at the time of the break, testifying the Respondent was "constantly bringing in people. [The Respondent] had also brought in some new subs to the department [which] was actually...an ongoing thing as far as scheduling goes." Mr. Boesch's testimony provides evidence of general ongoing, albeit unstructured, contemporaneous substitute employee hiring.³⁶ His testimony does not, however, provide evidence that an opening for a temporary, short-term (i.e. four-week or less) substitute position was available during the four-week period commencing mid-January 2007. Mr. Boesch hoped to employ Ms. Thorne during her four-week Troika break, "if it was possible [and] if there was work available," but his expressed "hope" suggests his plan was merely tentative if not speculative and for fruition depended on something beyond his wishes, The General Counsel bears the burden of showing the Respondent was hiring or had concrete plans to hire for the type of short-term substitute position for which Ms. Thorne was available. There is no evidence of such an opening during the relevant period, and Mr. Boesch's hope of employing Ms. Thorne cannot be described as a concrete plan. The General Counsel has not, therefore, met his burden, and I shall dismiss the complaint allegations relating to the Respondent's refusal to employ Ms. Thorne on January 19, 2007.

25 3. Refusal to Consider Marielle Thorne for Employment

30 The *FES* analysis regarding discriminatory refusals to consider for hire differs somewhat from the refusal-to-hire analysis, and a discriminatory refusal to consider may violate the Act even when no hiring is occurring.³⁷ In order to establish a discriminatory refusal to consider under *FES*, the General Counsel bears the burden of showing (1) that the respondent excluded the applicant from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicant even in the absence of union activity or affiliation.³⁸

40 The first element in the refusal-to-consider analysis requires the General Counsel to show the Respondent excluded Ms. Thorne from a hiring process in effect at the time of her four-week Troika break. The Respondent argues that no hiring process existed at the time. Although no details have been provided, Mr. Boesch's testimony demonstrates that some

³⁵ *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

45 ³⁶ Although the Respondent, citing to transcript pages 174-75 in its post-hearing brief, states that Mr. Boesch testified his department had full coverage at that time and did not need additional employees, a review of the transcript shows no such testimony. The closest Mr. Boesch came to claiming full employee coverage was at transcript page 176: "[N]umerous departments were...sharing subs. So, at the time obviously we were able to carry on with the day-to-day functions because [Ms. Thorne] didn't, in fact...come back." Mr. Boesch's testimony that the Respondent made do with existing employee resources provides no basis for concluding the Respondent had a full complement of employees in January 2007.

50 ³⁷ *FES* at 15. See also *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB No. 1, slip op. 5-6 (2007).

³⁸ *FES* at 15.

description of hiring process existed when Ms. Thorne began her four-week Troika break, as the Respondent was “constantly bringing in people.” Mr. Boesch intended to use the process to reemploy Ms. Thorne during her breaks. Mr. Boesch ceased to consider Ms. Thorne for reemployment or to make efforts to secure her reemployment when he learned of her inclusion in the Union’s unfair labor practice charge, informing her that since she had filed a lawsuit against the company, he would not be able to reemploy her. Mr. Boesch thereby excluded Ms. Thorne from any hiring process because she had exercised her protected rights under the Act. The General Counsel having established both applicant exclusion from a hiring process and animus, the burden shifts to the Respondent to show it would not have considered employing Ms. Thorne even in the absence of her protected activity.

The Respondent defends against the failure to consider allegations by arguing that Ms. Thorne was not eligible to work as either a substitute or full-time employee because of her limited availability. Although the period of Ms. Thorne’s proposed employment term was limited to four weeks, given Mr. Boesch’s description of the company’s hiring fluidity, it cannot be presumed the Respondent would decline to extend employment for that reason. No evidence was adduced to show the Respondent never hired substitutes for short-term employment. The burden of showing that Ms. Thorne would not have been employed for a four-week period in any circumstances is the Respondent’s, and the Respondent has failed to carry that burden.³⁹ Accordingly, the evidence establishes that by refusing to consider Ms. Thorne for employment during her four-week Troika break in mid-January 2007 because she was the subject of a union-filed unfair labor practice charge, the Respondent violated Sections 8(a)(3), (4) and (1) of the Act.

C. Independent Violations of Section 8(a)(1) of the Act

1. Threat of Refusal to Hire

In mid January 2007 Mr. Boesch told Ms. Thorne he would not be able to reemploy her at the Respondent, as he had heard she had filed a lawsuit against the company. Mr. Boesch’s statement constitutes a threat not to hire individuals who participate in the Board’s processes, which violates Section 8(a)(1) of the Act. See *Eastern Energy Services, LLC*, 349 NLRB No. 53 (2007).

2. Maintenance and Promulgation of Employee Handbook Provisions

a. Confidentiality Provision

Under the Confidentiality provision of its handbook the Respondent prohibits its employees from discussing their salary, pay rates, and performance evaluations. Specifically, the Confidentiality provision handbook reads, in pertinent part:

³⁹ Ironically, the absence of specific hiring practice evidence, which defeats the complaint allegation regarding the Respondent’s refusal to employ Ms. Thorne, also subverts the Respondent’s defense of the alleged refusal to consider Ms. Thorne for employment.

5 While employed by BMG, company members may have access to, receive, and/or develop information that is confidential and proprietary in nature. This confidential information includes . . . pay rates, personnel corrective action or performance information . . . BMG requires company members to refrain from sharing confidential information with other company members or with anyone not employed by BMG. . . .

10 [I]nformation learned about our fellow company members (e.g., performance evaluations, salary information, and corrective actions) should be kept confidential between the Company and the particular company member. . . . Please . . . refrain from engaging in discussions about such information. . . . Failure to comply with this policy may result in corrective action up to and including termination.

15 The Respondent contends that the Confidentiality provision is, at worst, ambiguous as to whether Section 7 rights are implicated by the policy. Even if the policy is deemed to prohibit protected conduct, the Respondent argues that it has demonstrated a substantial and legitimate basis for any infringements on employee rights, which business justifications outweigh minimal interference with employee rights.

25 The Board, in considering similar language in *The NLS Group*, 352 NLRB No. 89 Slip Op. 3 (2008), applied the *Lutheran Heritage Village-Livonia*⁴⁰ standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1). If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. The Board determined that the *NLS Group* confidentiality provision was unlawful because employees reasonably would construe it to prohibit activity protected by Section 7.

35 The same result applies here. Although the Respondent contends the Confidentiality Provision speaks only to proprietary information and not personnel information protected by Section 7, the language of the provision unambiguously prohibits employees from discussing pay rates, personnel corrective action (discipline) or performance evaluations with other company members or anyone not employed by the Respondent upon pain of discipline including termination. Employees would reasonably understand the language of the Confidentiality Provision as prohibiting discussions of compensation, discipline or evaluations with each other and with union representatives.⁴¹

45 The Respondent argues that the competitive and creative business environment in which it operates provides a sufficient business justification for its confidentiality restrictions. However, the Respondent has not shown why it cannot adequately protect proprietary information without infringing on employees' Section 7 right to discuss terms and conditions of

⁴⁰ 343 NLRB 646 (2004).

50 ⁴¹ Employees have a protected right to discuss among themselves and with their union representative the terms and conditions of their employment. Infringement of that right violates the Act. *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

5 employment with each other and/or with union representatives. Accordingly, the Respondent's prohibition of employee discussion of pay rates, discipline, or performance evaluations with other employees or with anyone not employed by the Respondent violates Section 8(a)(1) of the Act.

b. No Solicitation/No Distribution Policy

10 The solicitation and distribution provision of the Respondent's handbook prohibits employees from distributing materials or soliciting fellow employees "during working time or non-working time in areas where it will disturb other company members who are working, or in any performance areas open to the public." Performance areas, as defined by the Respondent, are the lobby, restrooms, retail store (the Blue Man Store), elevator area, and the theater itself.

15 An employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in non-work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983).

20 The Board addressed a rule comparable to the Respondent's no solicitation/no distribution provision in *Crowne Plaza Hotel*⁴² and concluded that to the extent the rule prohibited off-duty employee solicitation and distribution in customer and public areas, it was unlawfully overbroad. The no solicitation/no distribution provision herein is likewise overbroad. While the Respondent may prohibit active solicitation/distribution in the sales area of the Blue Man Store even during employee nonwork time because it might disrupt the store's business,⁴³ the Respondent may not maintain a general ban on protected activity in areas "where it will disturb other company members who are working" or "in any performance areas open to the public." As to the former restriction, it might reasonably be read to restrict lawful activity in any circumstances where employees who are working might hear or observe the activity even if the activity took place in customary break areas or areas utilized by employees for both work and nonwork activity. As to the latter restriction, "performance areas open to the public" is a broadly encompassing description which, as testimony demonstrated, includes even those areas which, during nonperformance times, may be used by nonworking employees. As such, it is overbroad. See *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999)

35 The Respondent's valid wish to maximize audience enjoyment of the Blue Man's unique multi-sensory theatrical experience does not entitle it to prohibit protected activity in nonwork areas because the activity might "disturb" working employees or to designate nearly all public areas as "performance areas" in which off-duty employees cannot exercise their Section 7 rights under any circumstances, including when audience members are not present. Accordingly, the Respondent's prohibition of employee solicitation/distribution during non-working time in areas where it will disturb other company members who are working, or in any performance areas open to the public violates Section 8(a)(1) of the Act.

c. Press Events/Opportunities

40 In pertinent part, the Press Events/Opportunities provision of the Respondent's handbook prohibits employees from contacting the media:

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⁴² 352 NLRB No. 55 (2008).

⁴³ See *J.C. Penney Co.*, 266 NLRB 1223 (1983); *Marshall Field & Co.*, 98 NLRB 88 (1952).

5 [A]ll inquiries from the press, reviewers, or other media representatives must be referred to the local Marketing Representative or to the Resident General Manager. No one should respond to inquiries from media representatives in any other fashion.

No one should initiate contact with media representatives with respect to BMG.

10 Any connection to BMG in the press, or any participation of a company member in a non-BMG event, wherein the company member is listed/noted as a member of BMG, must be approved by the Managing Director or the local marketing representative at least four weeks in advance.

15 The Respondent's stated purpose behind the Press Events/Opportunities provision is to coordinate Blue Man media reports through a central management contact in order to control "when, where, and how Blue Man Group is represented." That is a legitimate interest. However, the restrictions are broad enough to encompass media coverage of a labor walk-out or strike, an employee rally, or other protected union or employee activity. "A rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful." *Crowne Plaza Hotel*, supra. The Board instructs that the critical inquiry into employer rules regarding employee media contact is "whether the rule prohibits employees from communicating with the news media about [protected matters] or merely states that employees cannot speak *on behalf of the Respondent* in response to media inquiries about such matters."

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The Respondent's Press Events/Opportunities provision unqualifiedly restricts all employee communications with the media in all circumstances. No reasonable construction of the language can be made to support the Respondent's argument that the provision clearly applies only to statements to the media purporting to be on behalf of the Respondent. The reasonable interpretation of the provision is that it includes Section 7 activity in its broad prohibition. Although the Respondent has a substantial legitimate business interest in seeing that media coverage of its popular and unique theatrical presentation is uniformly positive, that interest cannot outweigh employees' Section 7 right to address labor dispute or other protected, concerted issues with the media. The Press Events/Opportunities provision is facially overbroad, and the Respondent's maintenance of it violates Section 8(a)(1) of the Act. See *Ibid*.

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Conclusions of Law

- 40 1. Blue Man Vegas, LLC (the Respondent) is and has been at all times material an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 45 2. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
- 50 3. The Respondent violated Section 8(a)(1) of the Act by
- (a) Maintaining the following work rules that restrain and coerce employees in the exercise of their Section 7 rights: the Confidentiality rule, the Solicitation and Distribution Rule, and the Press Events/Opportunities rule.
 - (b) Threatening an employee that the employee was denied work opportunities because the employee engaged in union activities and because the Union had filed charges concerning the employee with the Board.

4. The Respondent violated Section 8(a)(3) and (1) by denying employee Marielle Thorne the opportunity to work as a substitute employee because of her union activities and the union activities of other employees.
- 5 5. The Respondent violated Section 8(a)(3), (4), and (1) by refusing to consider employee Marielle Thorne for employment because of her union activities and because she was the subject of an unfair labor charge filed by the Union with the Board.
6. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and granting a \$1.00 wage increase to certain Unit employees and by unilaterally changing its compensation policy of Short Turnaround Pay Premium for Unit employees.
- 10 7. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information requested by the Union that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.
- 15 8. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(1), (3), (4) and (5) and Sections 2(6) and (7) of the Act.

Remedy

20 Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

25 The Respondent having unlawfully denied employee Marielle Thorne the opportunity to transfer to a position as a substitute employee on November 21, 2006, it must offer her immediate and full reinstatement to the position of substitute employee insofar as it has not already done so, or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges that would exist but for its unlawful actions and make her whole for any loss of earnings and other benefits, computed on a
30 quarterly basis from the date of denial of opportunity to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

35 In light of the above reinstatement and backpay order for Ms. Thorne, it is unnecessary to order further remedy for the Respondent's January 2007 failure to consider Ms. Thorne for employment, as the latter remedy is subsumed by the broader former remedy. See *Dial One Hoosier Heating & Air Conditioning*, 351 NLRB No. 48, FN 20 (2007), citing *Jobsite Staffing*, 340 NLRB 332, 333 (2003).⁴⁴

40 The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective bargaining representative of the following unit:

45 All full-time and regular part-time stagehands and wardrobe employees, excluding all other employees, office-clerical employees, guards and supervisors as defined in the Act.

50 ⁴⁴ The customary refusal-to-consider remedy consists of: A cease and desist order; an order to place the discriminatee in the position she would have been in, absent discrimination, for consideration for future openings and to consider her for openings in accordance with nondiscriminatory criteria; and an order to notify the discriminatee, the charging party, and the Regional Director of future openings in positions for which the discriminatee applied or substantially equivalent positions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁵

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ORDER

The Respondent, Blue Man Vegas, LLC, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

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(a) Maintaining those portions of the following work rules that restrain and coerce employees in the exercise of their Section 7 rights: the Confidentiality rule, the Solicitation and Distribution Rule, and the Press Events/Opportunities rule.

(b) Threatening any employee with denial of work opportunities for engaging in union activities and because the Union filed charges with the Board.

(c) Denying any employee the opportunity to work as a substitute employee because of union activities and/or the union activities of other employees.

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(d) Refusing to consider employees for employment because of union activities and because they were the subject of an unfair labor charge filed by the Union with the Board.

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(e) Failing and refusing to bargain in good faith with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO, as the collective bargaining representative of its employees in the above unit by unilaterally announcing and granting a \$1.00 wage increase to certain Unit employees, by unilaterally changing its compensation policy of Short Turnaround Pay Premium for Unit employees, and by failing and refusing to furnish the Union with the information requested by the Union in its letter dated April 25, 2007 that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

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(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) On request, bargain with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and if requested by the Union (1) rescind the unilateral \$1.00 wage increase paid to certain Unit employees, (2) rescind the unilateral change of compensation policy of Short Turnaround Pay Premium for unit employees.

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(b) Make employees whole, with interest, for any loss of earnings or benefits suffered as a result of the unilateral changes described in subparagraph (a).

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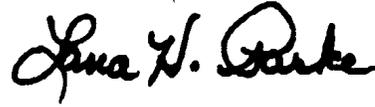
⁴⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- 5 (c) Rescind from the Employee Handbook those portions of the Confidentiality rule, the Solicitation and Distribution Rule, and the Press Events/Opportunities rule found to be unlawful and inform employees in writing that such portions of the rules are no longer in force or effect.
- (d) Furnish the Union with the information requested by the Union in its letter dated April 25, 2007.
- 10 (e) Within 14 days from the date of this Order, insofar as it has not already done so, offer employment to Marielle Thorne as a substitute employee, or if that job no longer exists, to a substantially equivalent position, without prejudice to the seniority or any other rights or privileges she would have enjoyed had she not been unlawfully denied the opportunity to work as a substitute employee.
- 15 (f) Make Marielle Thorne whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.
- (g) Remove from its files any reference to the unlawful denial to Marielle Thorne of opportunity to work as a substitute employee and the unlawful refusal to consider Marielle Thorne for employment and thereafter notify her in writing that this has been done and that the unlawful actions will not be used against her in any way.
- 20 (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 25 (i) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada copies of the attached notice marked "Appendix."⁴⁶ Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since November 21, 2006.
- 30 (j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.
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50 ⁴⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

5 Dated: Washington, D.C. July 18, 2008



Lana H. Parke
Administrative Law Judge

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APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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 that interferes with these rights. More particularly, **WE WILL NOT** refuse to bargain in good faith with International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and its Territories and Canada, Local 720, AFL-CIO (the Union) as the collective bargaining representative of our employees in the appropriate unit by unilaterally announcing and granting a \$1.00 wage increase to unit employees and by unilaterally changing our compensation policy of Short Turnaround Pay Premium for unit employees. The unit is:

All full-time and regular part-time stagehands and wardrobe employees,
excluding all other employees, office-clerical employees, guards and supervisors
as defined in the Act.

WE WILL NOT refuse to furnish the Union with information requested by the Union that is necessary for the Union's performance of its duties as the collective-bargaining representative of the unit.

WE WILL NOT deny any employee the opportunity to work as a substitute employee because of the employee's union activities and/or the union activities of other employees.

WE WILL NOT refuse to consider any employee for employment because of the employee's union activities and/or because the employee was the subject of an unfair labor practice charge filed by the Union with the National Labor Relations Board.

WE WILL NOT maintain or enforce rules prohibiting employees from engaging in union or other protected solicitation or distribution during nonwork time and in nonwork areas or restricting protected employee communications with each other, with the Union, and with the media.

WE WILL NOT threaten employees with denial of work opportunities because they engaged in union activities and/or because the Union filed charges with the National Labor Relations Board.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, on request by the Union, rescind our \$1.00 wage increase to unit employees and the change in our compensation policy of Short Turnaround Pay Premium for unit employees, and we will bargain with the Union regarding any such changes.

WE WILL make employees whole, with interest, for any loss of earnings or benefits suffered as a result of the changes.

WE WILL furnish the Union with the information requested by the Union in its April 25, 2007 letter.

WE WILL offer Marielle Thorne a job as a substitute employee or, if such a job no longer exists, to a substantially equivalent position, without prejudice to the seniority or any other rights or privileges she would have enjoyed but for our unlawful actions.

WE WILL make Marielle Thorne whole for any loss of earnings and other benefits resulting from our refusal to transfer her to a position as a substitute employee and our refusal to consider her for employment.

WE WILL remove from our files any reference to our unlawful refusal to transfer Marielle Thorne to a position as a substitute employee and our unlawful refusal to consider her for employment, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that the refusals will not be used against her in any way.

WE WILL remove from the Employee Handbook those portions of the Confidentiality rule, the Solicitation and Distribution Rule, and the Press Events/Opportunities rule found to be unlawful and inform employees in writing that the unlawful portions of the rules are no longer in force or effect.

Blue Man Vegas, LLC

(EMPLOYER)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.