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**Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc., and Victoria Operating Co., A Single Employer and Theatrical Stage Employees Union Local No. 2, I.A.T.S.E., Petitioner.**  
Case 13–RC–160240

September 30, 2021

DECISION ON REVIEW AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN  
AND RING

The issue presented in this case, on remand from the United States Court of Appeals for the Seventh Circuit, is whether the Petitioner’s conduct in giving hiring-hall job referrals to certain voters before the election held on May 16, 2016, constituted an objectionable grant of benefits. On remand from the Board, the Regional Director, following a hearing, issued a Supplemental Decision and Certification of Representative on September 20, 2019, in which he overruled the Employer’s objection. The Employer timely requested review of the Regional Director’s Supplemental Decision, and on April 24, 2020, the National Labor Relations Board granted the request for review. The Board has delegated its authority in this proceeding to a three-member panel. Upon review, we affirm the Regional Director’s overruling of the objection, but only for the reasons stated herein.

I. BACKGROUND

Jam Productions, Ltd., Event Productions, Inc., Standing Room Only, Inc. and Victoria Operating Co., operating as a single employer (collectively “the Employer” or “Jam”), are engaged in producing concerts and other events at multiple theaters in Chicago, Illinois. On September 17, 2015, the Theatrical Stage Employees Union, Local No. 2 (“Petitioner” or “Local 2”), affiliated with the International Alliance of Theatrical Stage Employees (“IATSE”), filed the instant petition seeking an election in a unit of approximately 60 stage production employees (also referred to as stagehands) employed by Jam at three specific theaters: the Riviera Theatre, Park West Theatre and Vic Theatre.

Jam stagehands are employed intermittently, depending on when shows are scheduled at the venues in question.

<sup>1</sup> The parties agreed to a voter eligibility formula requiring a minimum of 18 workdays during the year preceding the relevant eligibility date (i.e., from October 2014 to October 2015). The stagehands who had worked enough days to be eligible to vote are called the “Riviera voters” herein. Other stagehands who had worked at the Riviera too sporadically for eligibility are called the “Riviera non-voters.”

At the time the petition was filed, Jam had a practice of offering work to stagehands from its own on-call list. The Riviera theater, the largest of Jam’s three theaters, had a call list of approximately 55 stagehands, of whom approximately 21 were ultimately deemed eligible to vote in the election.<sup>1</sup> The supervisory crew chief at the Riviera theater was named Chris “Jolly Roger” Shaw.<sup>2</sup> Other, smaller crews worked primarily at the Park West and Vic theaters.

During the same week the instant petition was filed, the Employer announced that Shaw and the entire Riviera crew would be discharged. The Petitioner immediately filed an unfair labor practice charge (Case 13–CA–160319) and, pursuant to the Board’s blocking-charge policy in effect at that time, asked the Region to hold the petition in abeyance pending resolution of the charge; the Region granted the request. In the meantime, the Employer hired a new crew manager and approximately 25 to 30 new stagehands (the “new Riviera crew”) to replace the discharged crew. On December 18, 2015, the Regional Director issued a complaint alleging, inter alia, that the Employer’s discharge of the old Riviera crew violated Section 8(a)(3) of the Act. The representation case continued to be held in abeyance during the winter months, pending a hearing on the unfair labor practice allegations. During this abeyance period, Local 2 offered job referrals to about half of the discharged Riviera crew.

On March 28, 2016,<sup>3</sup> the Employer signed a settlement agreement with a nonadmission clause that pertained to 44 of the alleged discriminatees. As relevant here, the settlement agreement required the Employer to offer the alleged discriminatees full “participation” in the on-call list for work at the Riviera Theater (although not full “reinstatement”) and to provide them with backpay covering a period from the September 2015 discharges to the Regional Director’s approval of the settlement in early April 2016. The settlement further required that an election be held 21 days or more after the Regional Director’s approval of the agreement. The election was then scheduled for May 16.

The Petitioner refused to join the settlement agreement, but the Regional Director approved it unilaterally on April 6. The new Riviera crew manager thereafter implemented the settlement’s “participation” requirement by splitting the available work among the old/discharged crew and the replacement crew. The Riviera voters therefore received significantly fewer work offers at the Riviera in April 2016 than they did before their discharges.<sup>4</sup>

<sup>2</sup> The parties have also referred to the Riviera crew as “Jolly’s crew” and “Shaw’s crew.”

<sup>3</sup> All dates hereinafter are in 2016 unless otherwise indicated.

<sup>4</sup> The Union filed another charge in Case 13–CA–177838 alleging that the settlement implementation further discriminated against the old

The processing of the unfair labor practice case accordingly resulted in three time periods that are relevant here. First, the entire pre-election “critical period” during which the Board assesses objectionable conduct, which runs from the filing of the petition to the date of the election, see *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961), was 8 months long (September 17, 2015 to May 16). Second, the filing and processing of Case 13–CA–160319 resulted in an abeyance period covering the first 6.5 months of the critical period (mid-September 2015 to late March 2016). Because the Employer’s discharge of the Riviera crew coincided almost exactly with the filing of the petition, this abeyance period also coincided with the backpay period in the unfair labor practice case. And third, the last 1.5 months (or 6 weeks) of the critical period following the “unblocking” of the representation case, April 1 to May 16, constitutes what the parties now call the “focal period.”<sup>5</sup> The dispute in this case turns primarily on whether the Petitioner objectionably granted benefits by increasing the number of job referrals for Riviera voters during the focal period as an inducement for their support in the election or whether—as the Petitioner maintains—this increase happened to coincide with the beginning of its hiring hall’s busy spring season, when more stagehands are typically needed for an increased number of outdoor events.

At the election, the Petitioner prevailed by a vote of 22 to 10.<sup>6</sup> The Employer timely filed an objection alleging that the Petitioner “unlawfully<sup>7</sup> provided economic benefits to employees to induce them to support the Union by offering and providing premium work at Union venues, to which they were otherwise not entitled.” The Employer’s accompanying offer of proof alleged more specifically that the Petitioner provided lucrative job referrals to “Jolly’s crew” during the last 6 weeks of the campaign as an inducement for them to vote for representation, and that making those referrals impermissibly influenced the outcome of the election under Board precedent.<sup>8</sup> In support of this allegation, the offer of proof compared the “few” referrals the Riviera crew received during the abeyance/backpay period to the “multiple” referrals they started receiving in early April. In other words, the Employer objected, at least in part, that the Union *increased*

the number of job referrals as an inducement during the focal period.

On June 20, the Regional Director overruled the Employer’s objection without a hearing and issued a Certification of Representative. In finding that the Employer’s offer of proof was insufficient to raise substantial and material facts warranting a hearing, the Regional Director observed that it “would not be unusual for individuals in this industry to seek work through the Petitioner’s referral system, especially at a time soon after they had been displaced from their job with the instant Employer” and that the offer of proof had not proffered any evidence that the Petitioner actually made or promised to make a gift of tangible economic value to win support in the election. The Employer filed a Request for Review, but on January 5, 2017, the Board denied review in an unpublished order.

The Employer subsequently refused to bargain, and Local 2 filed an unfair labor practice charge. On May 16, 2017, the Board granted the General Counsel’s Motion for Summary Judgment, finding that the Employer’s failure to recognize and bargain with Local 2 violated Section 8(a)(5) of the Act. *Jam Productions, Ltd.*, 365 NLRB No. 75 (2017). The Employer filed a petition for review with the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-petition for enforcement.

On June 28, 2018, the court granted the Employer’s petition for review, denied the Board’s cross-application for enforcement, and remanded this proceeding to the Board. *Jam Productions, Ltd. v. NLRB*, 893 F.3d 1037 (7th Cir. 2018). The court concluded that the Employer had presented sufficient evidence in its offer of proof—namely, that there was a “dramatic increase” in early April 2016 in the number of job referrals to the voters who were formerly in the Riviera crew—to warrant an evidentiary hearing on its objection. *Id.* at 1044–1045. Although the court acknowledged that the evidence described in Jam’s offer of proof was “circumstantial,” the court also held that “[w]ithout subpoena power, Jam produced as much evidence as it had available to suggest that non-union voting employees received a sudden increase in offers to work union jobs in the period immediately preceding the election.” *Id.* at 1046. If subpoenaed, the court stated, Local 2’s hiring-hall records could establish whether the focal

Riviera crew, but the Board ultimately dismissed the complaint. *Jam Productions, Ltd.*, 367 NLRB No. 30 (2018).

<sup>5</sup> At earlier stages of this case, the Employer inadvertently called the 6-week period immediately before the election the “critical period,” and the Seventh Circuit’s subsequent opinion made the same inadvertent mistake. After the Board’s remand (which correctly identified the critical period as the full 8 months), the Hearing Officer, Regional Director and parties began referring to the 6-week period as the “focal period,” and we adopt that phrase here as well.

<sup>6</sup> There were 19 challenges, of which the Regional Director sustained 10, leaving the remaining 9 challenges nondeterminative. The Regional Director’s resolution of the challenges is no longer at issue.

<sup>7</sup> Although the Employer’s use of the word “unlawfully” initially appeared to allege a violation of the Act, the Employer has not further pursued such an allegation; no unfair labor practice charges have been filed against Local 2 regarding its hiring-hall operations.

<sup>8</sup> The Employer did not allege that the Petitioner offered job referrals to any other potential voters, such as stagehands at the Park View or Vic theaters.

period referrals were made according to the union’s “pre-existing standards and practice” or whether the Riviera crew “received different treatment” during that time. Id. at 1045. The court accordingly remanded the case for a hearing on the Employer’s objection. On April 4, 2019, the Board, having accepted the court’s opinion as the law of the case, re-opened the representation case and remanded it to the Regional Director for further analysis in light of the court’s opinion, including reopening the record and conducting a hearing.

Following a 3-day hearing, the hearing officer recommended overruling the objection. The Employer filed exceptions and, as noted above, the Regional Director agreed with the hearing officer and overruled the objection in his Supplemental Decision, finding that the jobs to which the discharged Riviera voters were referred “were the result of the normal operation of the hiring hall” and were jobs to which the voters were entitled. The Employer thereafter filed the instant Request for Review, the Petitioner filed an Opposition, the Board granted review, and the parties thereafter filed briefs on review.

Having reviewed the entire record as well as the parties’ briefs on review, we agree with the Regional Director—for the reasons stated below—that the evidence brought forth by the Employer does not in fact sustain its objection. We therefore affirm the Regional Director’s Supplemental Decision overruling the objection.

## II. FACTS

As the Seventh Circuit’s decision made clear, the core dispute in this case—which the court found merited a hearing—is whether the Petitioner impermissibly granted benefits by increasing the number of job referrals to the Riviera voters during the focal period as an inducement to vote for it in the election. The hearing established—and there never has been any real dispute—that the Petitioner offered job referrals to at least some Riviera voters during the abeyance/backpay period, that it also did so during the focal period, and that the number of referrals increased during the focal period. In this regard, Jam’s Production Manager Behrad Emani and Vice President Nick Miller both testified (consistent with the Employer’s offer of proof) that the Jam employees terminated en masse from the Riviera theater in September 2015 were not referred to

work at certain “Local 2” shows in January and February 2016 but were referred for work by Local 2 on multiple days in April and May 2016.<sup>9</sup> Emani elaborated that when he attempted to recall formerly-discharged Riviera employees for work in April and May 2016 after the settlement in Case 13–CA–160319, he learned that some were not available on certain days because they had already accepted work via Local 2’s hiring hall. The hearing also established—and there has never been any real dispute—that stagehand jobs obtained via Local 2’s hiring hall paid a significantly higher rate (\$40–\$45/hour) than the wage rate paid by Jam in 2016 (\$14–\$20/hour).

Given the type of allegation involved and the absence of independent evidence, the Employer had to rely on evidence that was exclusively in Local 2’s control. As the court’s remand acknowledged, the hearing afforded the Employer an opportunity to subpoena evidence from Local 2 and, indeed, the Employer amply availed itself of that opportunity by subpoenaing two Local 2 employees (former Call Steward Thomas Herrmann<sup>10</sup> and Business Manager Craig Carlson) to testify as adverse witnesses, and by subpoenaing voluminous hiring hall records. In addition, the Employer subpoenaed two Jam stagehands (Justin Huffman and Gregor Kramer) to testify.<sup>11</sup>

### *A. Stagehand Work, Including its Seasonal Nature*

The record demonstrates that stagehands work at a variety of events, performances and venues. With respect to indoor venues, a small space such as Jam’s Park West theater seats 1,150 people, uses its own in-house sound and lighting equipment (requiring less load-in and load-out work), and thus typically requires 2 or fewer stagehands. The larger Riviera theater seats 2540 people, does not have in-house equipment (requiring more load-in and load-out work), and thus typically needs 8 to 12 stagehands per show. A large indoor arena used for concerts and sporting events, such as the United Center, requires a crew of 130 to 140 stagehands to unload more than 30 trucks filled with gear and to set up 150,000 pounds of steel including rigging structures up to 133 feet high; after a concert, another large crew is needed to take down and load all the equipment back into the trucks and may need to work long hours.<sup>12</sup> With respect to outdoor venues, stagehand work may also require building such structures

<sup>9</sup> For example, discharged Riviera workers were not referred for work in early 2016 at Chicago’s United Center (for a Muse concert on January 13, a Bruce Springsteen concert on January 19, and an AC/DC concert on February 17), whereas they were referred to work at the United Center during the focal period (including for a Rihanna concert on April 15).

<sup>10</sup> Herrmann was affiliated with Local 2 in various capacities over many years, including as a stagehand, member and steward. As relevant here, he was employed as the Call Steward from 2008 to 2017. During the focal period, he also served as a union officer. Finally, at the time of

the objection hearing in 2019, he no longer worked as the Call Steward, but instead served and was employed as the Secretary-Treasurer.

<sup>11</sup> The Employer also called attorney Raseq Mouizuddin to explain how he created certain summary exhibits, based on the subpoenaed hiring hall records, that were submitted into evidence. The Petitioner called one witness, staff member Christine Stephens, to authenticate certain additional hiring hall records and to provide background testimony concerning administration of Local 2’s hiring hall.

<sup>12</sup> As Business Manager Carlson stated, the post-concert crew may need to work “lickety-split” to clear the arena by the early morning hours

as bleachers, flooring and stages. For example, stagehands build bleacher seating at Chicago's Huntington Bank Pavilion every spring for a season of outdoor performances and then take it down every fall. Some large, multi-site events involve both indoor and outdoor work, including the multi-day National Football League (NFL) Draft in 2016, which required stagehands to build an outdoor stage, seating and "VIP" areas, in addition to working at indoor sites such as hotels and theaters.

Former Call Steward Herrmann testified that, to work as a "basic" stagehand (who generally performs load-in and load-out work) a person must be able to physically lift and move equipment from one location to another and be able to follow instructions to learn how to set up the equipment. Basic stagehands must also complete safety training. Through experience and/or training, stagehands may acquire other skills, such as operating lighting and audio equipment (possibly including high-tech digital equipment), high-altitude rigging, operating lifts, building scaffolding, carpentry for building stages and similar structures, and handling pyrotechnics (which requires a separate license); they must also learn more extensive safety measures.

Stagehands are in greater demand during the Petitioner's busy season. Herrmann, Carlson and stagehand Huffman all testified, without contradiction, that the warm months (roughly April through October) are much busier because of many additional outdoor events beyond the usual indoor events. More precisely, Herrmann characterized the busy period as starting in late March when (indoor) convention tourism usually starts to increase, then accelerating in April when outdoor events multiply dramatically, and concluding in late September or early October. Huffman likewise testified that spring, summer and fall are the busiest seasons for stagehands. Both Herrmann and Huffman agreed that the winter months (December to at least early March) are the slowest. The documentary evidence supports this testimony.<sup>13</sup>

#### *B. Local 2's Hiring Hall*

Call Steward Herrmann explained that the hiring hall had more than 1,000 participants during the 2016 focal period, divided into three subgroups: Local 2 members, non-members and members of other IATSE locals.<sup>14</sup> As described more fully below, Herrmann used Call Steward, an electronic program that shows who is available for

specific days in question, to match employers' requests for stagehands to the available stagehands themselves.

There is no dispute that Local 2's hiring hall is not "exclusive," i.e., that its contracts do not give it exclusive control over who will be hired for stagehand work with the signatory employers in the Chicago area. Employers who have contracts with Local 2 may hire stagehands on their own without going through the hiring hall and, similarly, stagehands may seek work directly with those employers without going through the hall. Some venues operated by employers with Local 2 contracts have their own, regularly-employed stage crews and do not use the hiring hall at all. Nevertheless, although employers are not required under their union contracts to hire stagehands via the hall, many choose to do so. As indicated, employer requests to hire stagehands for particular jobs are processed through the Call Steward program.

There are multiple ways to become a participant in Local 2's hiring hall. A stagehand does not need to be a Local 2 member in order to participate. In fact, the record indicates that 5 of the 20 Riviera voters, none of whom were Local 2 members, had already obtained work via Local 2's hall in the years before the instant petition was filed. Some new participants come through a formal apprenticeship program. New enrollees may be referred by other locals, or they may enroll in connection with an organization drive. A person with no prior connection to Local 2 can also simply walk in "off the street" and ask to sign up. In such cases, Herrmann testified that the call steward (or, on rare occasions, business manager) will generally ask to see the person's resume and conduct a short interview to verify the person's experience and skills. For example, if a resume indicates that an enrollee possesses audio skills, the call steward might ask how many times the person has worked with specific types of audio equipment. If the call steward (or business manager) approves, the person is referred to clerical staffer Christine Stephens, who enters the person's name, cell phone number, skills and other information to create a profile in Call Steward.

Herrmann testified that, once in the system, some people decide not to seek or accept any more referrals because they have found employment elsewhere, or because they have moved away, retired, become ill or died, or because they have simply decided they no longer wish to pursue

in order to allow the venue to be reset for sporting events scheduled for later that day.

<sup>13</sup> See *infra* for a discussion of Petitioner Exhibit 4, which indicates very few referrals to Riviera voters during the winter months as compared to the warmer spring months.

<sup>14</sup> The exact number of participants in the hiring-hall system is not entirely clear from the record. Herrmann stated that, as of the focal

period, there were at least 600 Local 2 members and "hundreds" of additional non-members and members of other locals, i.e., more than 1,000 in total. Local 2 staff member Christine Stephens stated that there were as many as 827 non-members and 709 members of other locals, which would bring the total to more than 2000.

stagehand work. Names cannot be deleted permanently from the Call Steward system, although they might be labeled as “inactive” or “unavailable” if they have not responded to job referrals in a while. Thus, not all of the 1000-plus names in the system are actively seeking work at a given time.<sup>15</sup>

During the relevant period here (2015–2016), the vast majority of referrals were processed by Herrmann, although he sometimes asked Carlson for help during very busy periods. Herrmann testified that in making referrals, he generally worked with two Call Steward computer screens at the same time: one showing the employers’ requests for stagehands on specific dates, the other showing lists of the stagehands available on those dates. Herrmann called the job-referral process “challenging” and “very hard to describe unless you see it in live time” because he had to juggle hundreds of names and a lot of “moving parts.” But generally speaking, he would first designate a lead person for each job and then send out “batch” text alerts via Call Steward to available stagehands to see if they wanted to accept a given job. Stagehands would accept or decline each offer via Call Steward, and the job slots would begin to “populate” within the system. Herrmann would work back and forth between the two screens, sending out more texts to available stagehands until each job was filled with a sufficient crew.

In terms of how he would choose which stagehands to offer a job, Herrmann testified that he generally used his “discretion” to fill the jobs, considering who was available (especially who would be available for the whole duration of a multi-day job) and who could do the specific types of work required.<sup>16</sup> More specifically, Herrmann stated that if an employer had requested specific employees or crews, he would enter those names into Call Steward first. He also explained that he would try to refer at least some experienced stagehands for each job; at times, he would need to “pull” an experienced stagehand off of one jobsite in order to send the person to another job with a high number of inexperienced stagehands. He would use certain jobs, like huge rock concerts requiring 100-plus stagehands, as opportunities for new stagehands to work alongside more experienced people in order to learn what to do, and accordingly was more likely to refer new stagehands for such jobs. More generally, hiring-hall participants who had more experience working as stagehands were likely to

receive more referrals than those who had little or no experience. Of course, if certain jobs required specialized skills (audio, rigging, etc.), Herrmann would have to refer people who had those skills. In addition to honoring employer requests and considering stagehands’ relative experience and qualifications, Herrmann generally prioritized Local 2 members over non-members<sup>17</sup> and would also use his own rough assessment of fair work distribution. He emphasized that there are no strictly “objective” or numerical criteria (such as seniority dates or number of past referrals) used in prioritizing stagehands for referrals, and that no participant was “entitled” to any particular referral in the non-exclusive hall.

### *C. Local 2’s Campaign to Organize Jam Employees*

The Petitioner’s campaign to organize the Jam stagehands was run out of its office in Chicago, where Call Steward Herrmann and Business Manager Carlson—who led the organizing campaign—worked in the same general area of Local 2’s office space on the same floor, though not in the same room. Carlson commenced the campaign in the summer of 2015 and held a half-dozen meetings with Jam employees at the union office. Herrmann testified that he did not attend any such campaign meetings, that he did not know how many Jam campaign meetings took place at Local 2’s office, and that he did not know who attended them. Stagehands Huffman and Kramer both testified that they each attended several campaign meetings at Local 2’s office, and confirmed that Carlson was present at them, but that Herrmann was not. They further stated that any contact that they had with Herrmann during the relevant time period was unrelated to the campaign.<sup>18</sup>

Carlson likewise testified that he never discussed hiring-hall referrals with Jam stagehands during the campaign meeting. Although Carlson sometimes helped Herrmann process referrals during busy periods (including the focal period), he testified that he never made any promises to give job referrals in exchange for Jam stagehands’ support in the election. Stagehand Huffman confirmed that Carlson did not talk about job referrals during the campaign meetings. Indeed, the only suggestion that Carlson might have mentioned job referrals to Jam stagehands was Huffman’s tentative testimony that when, following the September 2015 termination of the Riviera

<sup>15</sup> Neither Herrmann nor Stephens knew how many of the names in Call Steward during the focal period were still active at that time.

<sup>16</sup> There is no dispute that the number of participants (more than 1,000) exceeded the number of jobs to be filled (hundreds), even on the busiest days.

<sup>17</sup> With respect to members of other IATSE locals, Herrmann stated that Local 2 tends to refer such stagehands in the busiest, “all hands on deck” situations.

<sup>18</sup> Huffman testified that he talked to Herrmann on one occasion at the union office about some pyrotechnic work Huffman had performed in the past, but that they did not discuss the organizational meetings. Kramer stated he had only indirect contact with Herrmann during this period, i.e., when Kramer received text alerts via the Call Steward system about potential job referrals.

stagehands, he asked about enrolling in the Call Steward system, there “might have been” questions about how to log in to the system and that “someone”—who “perhaps” was Carlson—said that he should talk to Christine Stephens to sign up. But Huffman also stated that he did not recall who told him this, and that it might have been Stephens herself. Kramer—who similarly inquired about enrolling in the system following the discharges—testified that although he, too, could not remember who sent him to Stephens, it was not Carlson.<sup>19</sup>

There accordingly is no evidence that Herrmann was involved in the Jam campaign, nor is there any evidence that Carlson discussed job referrals with Jam stagehands in connection with the campaign or election. Carlson did acknowledge that he generally discussed organizing campaigns and other matters at Local 2’s monthly executive board meetings and at general membership meetings, and Herrmann likewise acknowledged that he was generally aware of the Jam campaign. But Carlson explicitly denied talking to Herrmann about referring Jam stagehands or instructing anyone to give Jam stagehands preferential treatment, and Herrmann insisted that he was not “part of” the campaign<sup>20</sup> and that nobody instructed him to give, or even suggested giving, more referrals to Jam stagehands before the election. Their testimony denying any coordination between the campaign and the referrals was un rebutted.

#### D. Hiring Hall Referrals During the Focal Period

Both Herrmann and Carlson testified, without contradiction, that the spring of 2016 was the busiest in the hiring hall’s history up to that point, in particular due to the NFL Draft event held during the last 2 weeks in April and the first week of May.<sup>21</sup> Testifying in 2019, Herrmann stated that he could not remember how he had assembled specific crews on specific days during the 2016 focal

period (nor was he asked to explain how he made any specific referrals on specific days), but he testified generally that he followed the same processes during that time that he always followed, and that he did not treat Jam voters favorably. Carlson likewise testified that when he helped Herrmann with hiring-hall referrals at particularly busy times during the focal period, he used the usual criteria of availability and skills, without considering anyone’s status as a Jam employee or potential voter.

The hiring hall records in evidence document the number of referrals made during the focal period. There were between 17 and 57 different performances or events each day, and the hiring hall referred an average of about 333 stagehands per day. The slowest day was May 8, requiring only 113 stagehand referrals for 17 events; the busiest day was May 1, requiring 536 stagehand referrals.<sup>22</sup> These total referral numbers can be subdivided into referrals of Local 2 members, referrals of non-members (including the Riviera voters), and referrals of the 20 Riviera voters.<sup>23</sup>

Table A, shown on the following page, is based primarily on numbers from Joint Exhibit 2 hiring hall records and cross-referenced with other exhibits where necessary. It shows an overview of hiring-hall referrals during the focal period tracked at 5-day intervals. The top line (solid) shows the total number of referrals per day. The second line down (long dashes) shows the number of referrals that went to Local 2 *members*—clearly the majority of all referrals. The third line down (dots-and-dashes) shows the total number of referrals that went to *non-members* (including Riviera voters and non-voters, members of other IATSE locals, and all other hiring-hall participants who were not Local 2 members at the time). And finally, the bottom line (dotted) shows the number of referrals that went to Riviera voters, and thus a subset of the non-member total.<sup>24</sup> Table A notes three major 1-day

<sup>19</sup> Kramer thought that Shaw or Huffman might have sent him to Stephens, but that in any event it was Stephens who led some Jam employees through the Call Steward enrollment process after they had signed authorization cards. Both Huffman and Kramer had performed work for Local 2 in the past, but records confirm that both enrolled in and received their first referrals from the Call Steward program in October 2015.

<sup>20</sup> Herrmann also explicitly denied that he participated in any aspect of Board representation case, that he knew who the Jam stagehands were or which ones were eligible to vote, or that he knew that Huffman was the Petitioner’s “main contact” among the Jam stagehands (and would eventually serve as its election observer). Herrmann commented that both he and Carlson were “very busy” during the campaign and did not have time to discuss “everything.”

<sup>21</sup> Stagehand Huffman also testified that the NFL Draft required increased referrals. Herrmann, Carlson and Huffman’s testimony indicates that this event required hundreds of stagehands at multiple indoor and outdoor locations to load in equipment; to build outdoor stages, flooring, and seating areas; to perform general stagehand work (e.g., moving and setting up equipment for the individual events); and to strike sets and load out equipment at the conclusion of the events.

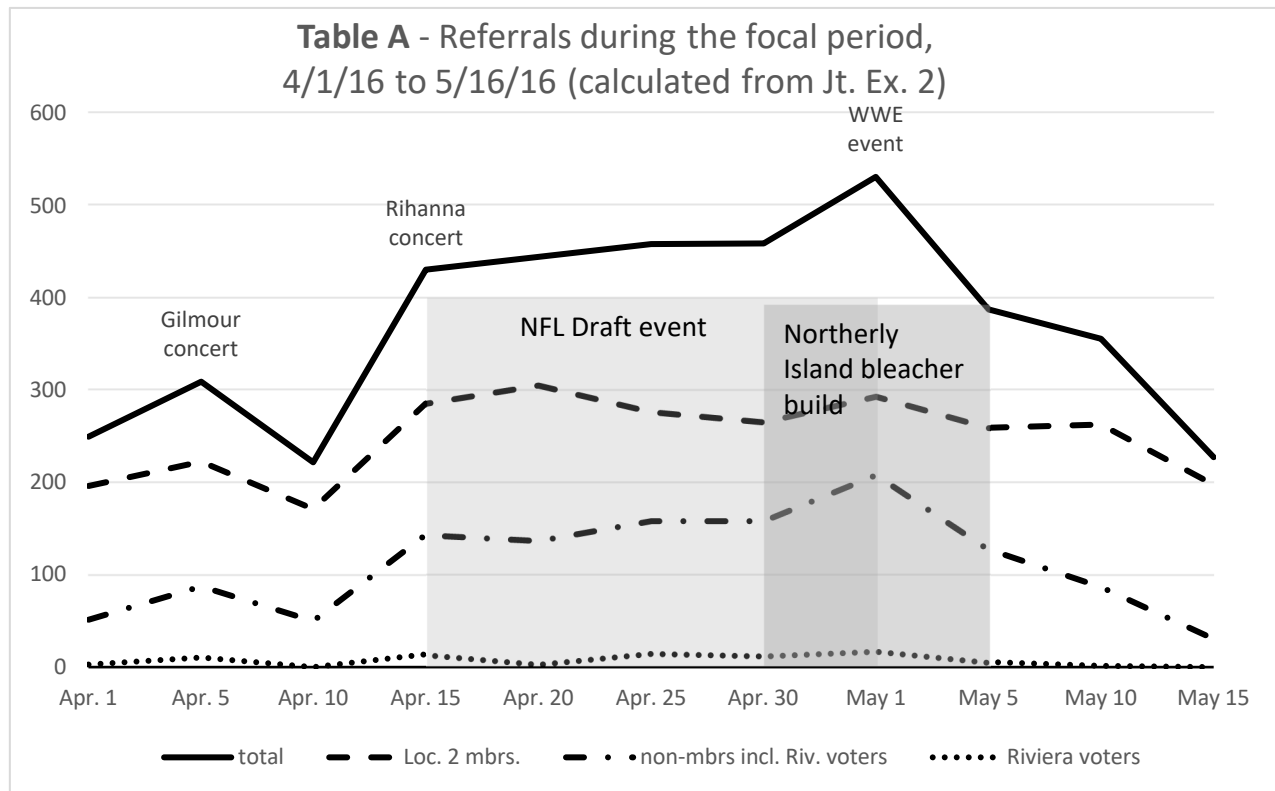
<sup>22</sup> The 536 referrals required on May 1 included 183 referrals for NFL Draft events, 134 for the 1-day WWE Payback event, 60 for James Beard Awards events, 57 for a theatrical production of “Bullets Over Broadway” and 102 for some two dozen smaller events.

<sup>23</sup> As previously indicated, there is no evidence that Local 2 made any referrals to stagehands who worked at Jam’s other theaters (Park West and Vic); rather, Local 2 referred only Jam stagehands who had worked at (and were discharged from) the Riviera theater. Although 21 Riviera voters were ultimately eligible to vote in the election, one was too ill to participate in the hiring hall. Thus, our subsequent discussion of referrals to the 20 “Riviera voters” who participated in the hiring hall does not include the approximately 34 stagehands who worked at the Riviera too sporadically to be eligible to vote in the election. Nevertheless, these 34 “Riviera non-voters” also received referrals during the focal period; their referrals are included in the non-member and overall totals of referrals per day.

<sup>24</sup> Although not shown on this Table, the number of referrals to members from other IATSE locals (ranging from 0 to 36) slightly exceeded referrals to Riviera voters on the busiest days of April 30 and May 1.

events (a David Gilmour concert on April 5, a Rihanna concert on April 15, and the WWE Payback event on May 1), as well as the two most substantial multi-day events

(the NFL Draft event from April 15 to May 1, and the Northerly Island bleacher build from April 30 to May 5, which are indicated by the light grey areas).



This is consistent with Herrmann’s testimony regarding “all hands on deck” scenarios.

Table A specifically illustrates that the total number of referrals per day during the focal period ranged from 222 to more than 500.<sup>25</sup> Referrals to the 20 Riviera voters ranged from a low of 0 (on April 10 and May 15) to a high of 17 on the busiest day (May 1). Referrals to *all* non-members (including the Riviera voters) ranged from 30 to 208 referrals per day, and referrals to all Local 2 members ranged from 171 to 305 referrals per day. As Table A also illustrates, the pattern of referrals to Riviera voters followed roughly the same pattern as the overall number of referrals and referrals to non-members during the focal period, i.e., increasing on April 5, decreasing on April 10, increasing (sharply overall and for nonmembers, though perhaps less so for Riviera voters) on April 15, peaking on May 1 and then declining markedly through May 15.

There is only limited evidence for how referrals during the focal period compare to referrals prior to the focal period. As indicated, Joint Exhibit 2 is limited to the focal period. Another exhibit, Petitioner Exhibit 4, consists of hiring hall records for both the Riviera voters and non-voters from September 2015 to May 2016 (the longest period of time covered by the documentary evidence), but there are no statistics in the record concerning referrals for other hiring-hall participants prior to the focal period.<sup>26</sup> Petitioner Exhibit 4 reflects (1) that the 14 Riviera voters who enrolled in the hiring hall from September to November 2015 averaged 2.5 to 2.9 referrals per voter per month during that period; (2) that between December 2015 and March 2016, the enrolled Riviera voters (now totaling 18) averaged fewer than 1.0 referrals per voter per month; and (3) that the enrolled Riviera voters (now 20) averaged 7.35 referrals per voter in April and the equivalent of 6.7 referrals per voter for the month of May.<sup>27</sup> Thus, as noted above, (Pet. Exh. 4), confirms that referrals to Riviera voters reflect the seasonal pattern alleged by the Petitioner by showing a marked decrease during the coldest months followed by a marked increase at the outset of spring. It also confirms, as the hearing officer found, that (1) the average number of referrals to Riviera voters each day increased by more than eightfold from the abeyance period to the focal period, and (2) although Riviera *non*voters received fewer referrals than Riviera voters at all times, the average number of referrals to Riviera nonvoters each day increased even more dramatically—more than fifteenfold—

from the abeyance period to the focal period.<sup>28</sup> But again, Petitioner Exhibit 4 is limited to the Riviera voters and nonvoters; there is no evidence concerning referrals to other participants prior to the focal period, and thus no basis for comparing the increase in referrals to Riviera voters against any other participants during the focal period.

As discussed in more detail below, the Employer claims that the records show a disproportionate increase between two allegedly “similarly situated” groups: (1) the 14 or 15 Riviera voters who received Local 2 referrals for the first time between September 2015 and May 2016 (i.e., excluding those 5 Riviera voters who had received referrals from Local 2 before 2015), and (2) all other stagehands who enrolled in Call Steward for the first time between September 2015 and May 2016. The records indicate that the former subset of Riviera voters obtained an average of more than 9 referrals each *during the focal period*, whereas the latter “comparator” group averaged less than 3 referrals each during the same focal period.<sup>29</sup> Using another comparison with a narrower time frame, the records also show that the 2 Riviera voters who enrolled in Call Steward for the first time in April 2016 received 2 referrals each during the month of April, whereas the other 43 people who enrolled in April 2016 (including many members of other locals) received an average of 3.8 referrals each during the same month.

In sum, the hiring hall records confirm that Riviera voters received more referrals during the focal period than they did in the preceding months. And the records also show that the ebb and flow of referrals to Riviera voters during the focal period generally mirrored the ebb and flow of referrals to other subgroups and of *all* referrals during a very busy season. The records do not, however, contain sufficient information about pre-focal period referrals to other hiring hall participants to determine whether the Riviera voters’ increase starting in April was disproportionately large compared to the others at that time.

#### E. Drug Testing

Aside from the issue of referrals, the Employer also contends that Local 2 treated Riviera voters favorably by waiving a drug-testing requirement for them. Article 10, Section 1 of Local 2’s By-Laws provides that “Referral

<sup>25</sup> Because May 8 did not fall on one of the 5-day intervals, its low number of referrals (only 113) is not specifically shown on Table A.

<sup>26</sup> It appears that the Petitioner attempted to introduce an exhibit (Pet. Exh. 1) to show an overall seasonal increase in referrals, but it withdrew the exhibit after the Employer objected.

<sup>27</sup> The number of referrals for the first half of May (3.35) was doubled to 6.7 for the purpose of making a monthly comparison.

<sup>28</sup> Specifically, for Riviera voters, the Petitioner offered an average of 0.54 referrals per day from September 2015 to March 2016, and then

increased to an average of 4.67 referrals per day during the focal period, resulting in an 860 percent increase. For Riviera non-voters, the Petitioner offered an average of 0.11 referrals per day from Sept. 2015 through March 2016, and then increased to an average of 1.65 referrals per day during the focal period, resulting in a 1 500 percent increase during the focal period.

<sup>29</sup> The Employer never asked Herrmann and Carlson about the status of those “comparators,” or why some received few or no referrals in the focal period.



Rules shall control the eligibility of all individuals” for referral. The Referral Rules then state in part:

2. An individual must be compliant with any applicable rules and programs of the Stagehands Local Union No. 2 Journeyman & Apprentice Training Fund (“JATF”). An individual who is not compliant with any applicable rules and programs of the JATF will not be referred for work, including but not limited to failure to comply with drug testing requirements.

The record does not contain a copy of JATF rules, or any other document showing what drug testing may be required under those rules.

Herrmann testified that new hiring-hall enrollees, such as a person coming in “off the street” with a resume, should “typically” pass a drug test, and that “[w]e try to get that in, yes.” But Herrmann also stated that he did not know the JATF rules, that he was not part of the JATF administration, that he (when he was Call Steward) did not determine whether new enrollees were in compliance with drug testing or any other JATF rules before referring them for work, that he was not involved in the drug-testing process, and that he did not verify whether new enrollees had taken a drug test. Herrmann testified that he did not know specifically whether any Riviera voters were tested before they were referred for jobs. Similarly, Carlson testified that people who go through the formal apprenticeship program are tested; that “most” new enrollees are tested; that there is “an effort” to get them tested; but that he couldn’t say “definitively” that “all” new enrollees are tested, and he did not know whether the Riviera voters were tested before they were referred for work.<sup>30</sup>

Similarly, stagehands Huffman and Kramer—who had participated in Local 2’s hiring hall prior to the filing of the instant petition—testified that they were not required to take a drug test before participating. Huffman added that he had “no idea” whether any other Riviera voters were tested before they started receiving job referrals via the hiring hall; Kramer likewise testified that he never “heard of anyone being drug tested,” but he also emphasized that he was not “aware” of anyone’s status but his own. No other witnesses were examined on this issue, nor did the Employer subpoena any new enrollees to testify about drug testing or any other Local 2 records pertaining to drug testing. There is accordingly no further evidence showing whether Riviera voters who were *new* participants in the hiring hall during the critical period took a drug test, or whether any other new enrollees were

required to do so (or were treated differently than the Riviera voters in this regard).

### III. ANALYSIS

A union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election. See *Mailing Services, Inc.*, 293 NLRB 565, 565 (1989) (free medical screenings); *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235–1236 (1984) (jackets); *General Cable Corp.*, 170 NLRB 1682, 1682–1683 (1968) (gift certificates); *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (life insurance). “It is, like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled.” *Mailing Services*, supra.

Not every grant during an election campaign requires a “per se finding” of objectionable conduct, however. *Gulf States Cannery, Inc.*, 242 NLRB 1326, 1327 (1979), *enfd.* 634 F.2d 215 (5th Cir. 1981), *cert. denied* 452 U.S. 906 (1981). The standard in preelection benefit cases is an objective one, i.e., whether the donor’s conduct would reasonably have a “tendency to influence” the outcome of the election. *Id.* at 1326–1327; *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991). Whether a particular grant is objectionable depends on such factors as the size of the benefit in relation to the stated purpose for granting it, the timing of the benefit vis-à-vis the election, the number of employees receiving it, and how employees would reasonably view the purpose of the benefit. See *Gulf States Cannery*, supra at 1326 (union grant); *B & D Plastics*, supra at 245 (employer grant). With respect to timing, the Board draws an inference that benefits granted during the critical period are coercive, although the inference may be rebutted if the donor comes forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits. *B & D Plastics*, supra at 245. For example, granting a wage increase shortly before an election may not be deemed a gratuitous inducement if the employer can demonstrate that the increase would have occurred at that time, regardless of the election.<sup>31</sup> By contrast, if the donor fails to come forward with an adequate explanation for the critical-period timing, the inference of coercive timing is not rebutted. For example, in *Go Ahead North America, LLC*, 357 NLRB 77 (2011), the incumbent union’s agreement to waive employees’ months-old dues delinquency only after a decertification petition was filed was deemed objectionable because,

<sup>30</sup> In addition, Carlson rejected the characterization that “all” individuals enrolled in Call Steward are drug tested (stating “I don’t know that it’s ‘all’”) and likewise rejected the premise that there were “exceptions” to testing (stating “I don’t know that there’s ‘exceptions’”).

<sup>31</sup> Compare *STAR, Inc.*, 337 NLRB 962 (2002), and *Northern Telecom, Inc.*, 233 NLRB 1104, 1105 (1977).

under those circumstances, employees would reasonably infer that the purpose of the union's sudden willingness to forgive the delinquencies was to induce them to the support the union. *Id.* at 78.

Many cases alleging a union's objectionable promise or grant of benefits—such those cited by the Regional Director here—involve the internal incidents of union membership. In such cases, unions are allowed to describe pre-existing benefits to which employees would ordinarily be entitled as union members. *Dart Container of California*, 277 NLRB 1369, 1370 (1985). By contrast, a union may not extend preexisting benefits for which non-member voters would not otherwise be eligible before the election. *Mailing Services*, *supra*. Nor may a union create new benefits for the purpose of the election, or condition the receipt of such benefits on joining the union before the election or on voting for the union.<sup>32</sup>

Objections cases in the hiring-hall context do not involve mere “incidents” or benefits of union membership but, instead, implicate employees' access to *employment* and related benefits. They therefore raise a different set of analytical concerns including a union's obligation not to discriminate against non-members in an exclusive hiring hall.<sup>33</sup> To begin, a union's promise or grant of employment-related benefits may be objectionable depending in part on whether the benefit must be obtained through the collective bargaining process or whether the union has sufficient control over the benefit to grant it directly. For example, in *DLC Corp., d/b/a FleetBoston Pavilion*, 333 NLRB 655 (2001), the union's promise that it would negotiate a contract honoring employees' seniority with their particular employer in operating the hiring hall was not objectionable, given that the hiring/staffing procedures would be subject to the collective bargaining process.<sup>34</sup> But where a union effectively controls access to job referrals via an exclusive hiring hall, it may not promise such referrals as a preelection inducement to join and vote for the union. Thus, in *Alyeska Pipeline Service Co.*, 261 NLRB 125 (1982), the Board found that because the union operated an exclusive hiring hall, which the union was obligated to run in a nondiscriminatory manner,<sup>35</sup> it was objectionable for the union to promise to give voters an

unlawful advantage as members in securing future, high-paying jobs via the hiring hall if they voted for the union.

Board precedent further indicates that a union does not destroy laboratory conditions for an election by promising or granting a hiring-hall benefit to which the voters would have been entitled anyway, regardless of any pending election. Thus, in *International Brotherhood of Electrical Workers, Local 103 (Drew Electric Co.)*, 312 NLRB 591 (1993), the petitioning union operated a hiring hall with multiple employers and had two types of contracts: “inside” and residential. In order to work under the inside contract, which required greater skill and experience and which also paid a substantially higher rate, an employee needed to get an “A card” from the union. Before the election, the union told employees that since their company performed the type of work covered by the inside contract, they would immediately get A cards if they voted for the union. Following the union's election victory, the employer, citing *Alyeska*, *supra*, contended this statement was an objectionable (and also unlawful) promise of benefit. The Board, however, disagreed and overruled the objection. First, because the record supported an inference that the employees had the necessary skills to qualify for A cards, and that they would have been entitled to get them in the same way that any similarly-qualified applicant “off the street” could get them, the Board found that the employer had not shown that the employees were not “otherwise entitled” to receive the cards. *Id.* at 592. Second, the Board found that, under the circumstances, the employees would not have reasonably understood that a vote for the union was necessary to secure an A card. *Id.* Finally, the Board distinguished *Alyeska*, insofar as the union had not promised to give an unlawful preference to union members. *Id.* at 593, fn. 6. Similarly, in *Topside Construction, Inc.*, 329 NLRB 886, 898–899 (1999), *enfd.* 22 Fed.Appx. 848 (9th Cir. 2001), the Board found that absent evidence that the union favored certain voters over “others of like standing” or of any other “improprieties” in its hiring-hall operation, the union's grant of job referrals before the election was not objectionable. As these cases show, a grant of hiring-hall-related benefits before an election is not inherently coercive or objectionable, but

<sup>32</sup> See *General Cable Corp.*, 170 NLRB 1682 (1968); *Wagner Electric Corp.*, 167 NLRB 532 (1967); *Dart Container*, *supra* at 1370, fn. 8; *Crestwood of Stockton, d/b/a Crestwood Manor*, 234 NLRB 1097 (1978). See also *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (waiving initiation fees *only for those who joined the union before the election* was objectionable).

<sup>33</sup> The hearing officer and Regional Director did not discuss these types of cases.

<sup>34</sup> The Board has long held that a union's “promise” to obtain a benefit through the bargaining process is non-coercive campaign propaganda, in

part because employees easily realize that the union (unlike the employer) has no power to implement the benefit on its own. *Lalique N.A., Inc.*, 339 NLRB 1119 (2003).

<sup>35</sup> Unions who operate an exclusive hiring hall may not discriminate in favor of union members. *Plumbers Local 162 (Natkin & Co.)*, 283 NLRB 1160 (1987); *Truck Drivers, Chauffeurs and Helpers Local Union No. 100, a/w Internat'l Brotherhood of Teamsters (Beta Productions LLC)*, 370 NLRB No. 36, slip op. at 3 (2020).

must be assessed under all the circumstances including any evidence of improper, favorable treatment.

In similar contexts, the Seventh Circuit has likewise examined whether a union has given exceptional or favorable treatment to voters, beyond what they would have received within the union's normal or established practice. Compare *NLRB v. River City Elevator Co.*, 289 F.3d 1029 (7th Cir. 2002) (union's gratuitous grant of mechanics' cards to voters, even though they had not taken the requisite training and exams, smacked of a "purchase" of votes and thus destroyed laboratory conditions), and *NLRB v. Chicago Tribune Co.*, 943 F.2d 791, 797 (7th Cir. 1991) (union's promise and grant of apprenticeship cards were not objectionable where the voters would have been eligible for them under the union's normal practice, without a "change in the status quo"), cert. denied, 504 U.S. 955 (1992). Consistent with its prior cases, the court's remand in this case inquired, among other things, whether the job referrals "were in fact an aberration" from Local 2's ordinary referral system, whether the Riviera voters "were treated differently than others with access to the referral system," and whether the referrals given to those voters (who were non-members) in the weeks before the election were "previously unavailable" to non-members. 893 F.3d at 1045–1046.

Both Board and Seventh Circuit precedent are therefore in accord that employment-related benefits, including hiring hall-related benefits, granted by a union are not objectionable where there is no evidence that the union is engaged in favorable treatment of the employees in question or where the grant is consistent with the union's normal practice.<sup>36</sup> So long as the employees in question were otherwise qualified and eligible for the benefits, and were not granted favorable treatment in receiving them, "benefits" such as the referrals at issue here are not objectionable. *Drew Electric*, supra; *Topside Construction*, supra.

The Board has not previously articulated how cases addressing employment- and hiring hall-related benefits during a preelection critical period interact with our *B & D Plastics* framework for assessing other types of grants or promises, but we take this opportunity to do so now. To

<sup>36</sup> At one point, the Seventh Circuit's decision remanding characterized the Board as forbidding a union from giving voters "anything of 'tangible economic benefit'" during the critical period. 893 F.3d at 1044 (emphasis added). Taken in context, we understand the court's statement to refer to any benefit that reasonably can be seen as an economic inducement to vote for a union. See *id.* at 1044–1045. As the foregoing discussion demonstrates, Board and Seventh Circuit precedent otherwise make clear that the grant of a tangible economic benefit is not, by itself, inherently objectionable. The Employer is therefore incorrect in contending that any grant of benefit during the critical period is objectionable as a matter of law. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999), is not to the contrary. Although the court in *Freund* similarly

begin, we note that in hiring-hall cases, the Board has not expressly considered whether a union's promise or grant *during the critical period* may raise an inference of coercive timing, or whether any such inference could be rebutted by an alternative explanation of the timing. Nor did the Board weigh the other *B & D Plastics* factors (the benefit's size, how many employees received it, its stated purpose, and how employees would reasonably view its purpose) in assessing whether the donor's conduct would tend to influence the election's outcome under an objective standard. Thus, the Board in those hiring hall cases focused on whether the employees in question would have been entitled to the benefit under the union's normal practices, without expressly addressing whether the grant's critical-period timing raised a (rebuttable) inference of coercion. We think that both analyses have merit and may be reconciled as follows. Where an objecting party alleges a union granted access to a hiring-hall benefit during the critical period, it has the burden of proving not just that the union did so but also that the benefit was one to which the employees were not otherwise entitled. Consistent with the precedent cited above, objecting parties can meet this burden in multiple ways, including by showing that the eligible voters received favorable treatment, that the grant of benefits deviated from the status quo or the union's normal practice, or that the eligible voters were treated differently than others with access to the referral system, among others. If an objecting party meets this burden, then it has demonstrated a grant of benefits during the critical period as contemplated in *B & D Plastics*. Accordingly, the Board will draw an inference that the benefits granted are coercive, which the union can rebut by explaining the reason for the timing of the grant other than the pending election.

As always, the burden is on the objecting party—here, the Employer—to bring forth evidence to sustain its allegations. *Acme Bus Corp.*, 316 NLRB 274 (1995), enf. 101 F.3d 1392 (2d Cir. 1996); *Campbell Products Dept.*, 260 NLRB 1247 (1982), enf. 707 F.2d 1393 (3d Cir. 1983).

stated that a union may not give voters anything of tangible economic value during the critical period, *id.* at 931, here too this was in the context of discussing benefits granted in exchange for employee support. Moreover, although the *Freund* court stated that gratuities are still objectionable when offered on the same terms to employees who make no pledge of support, the court was citing *Mailing Services*, supra, which—as discussed—involved a grant of benefits for which the employees were not otherwise eligible before the election as nonmembers (described by the court as a "free sample" of medical services). *Freund* does not hold that any grant of benefit during the critical, regardless of context, is inherently objectionable.

We conclude that the Employer here has failed to prove the union provided referrals to the Riviera voters to which they were not otherwise entitled. First, as the hearing officer and Regional Director found, the referrals here were consistent with Local 2's usual practices. The record shows that Local 2 operated a non-exclusive hiring hall, referring members and non-members alike for work with Local 2 signatory employers long before the filing of the petition. Non-members have been allowed to enroll in the hiring hall in a variety of ways—including walking in “off the street” with a resume, being referred as part of an organizing campaign, or being referred by other IATSE locals—and non-members who have enrolled via these methods (including 5 Riviera voters) have been given job referrals for many years. Therefore, allowing Jam voters to enroll in the hiring hall as non-members and to receive job referrals did not give them anything for which they were not already eligible. See *Drew Electric*, supra. Moreover, Herrmann, Carlson, and others testified that the referrals made during the focal period (and indeed during the entire critical period) followed Local 2's usual practice, and there is no direct evidence to the contrary. Further, there is no evidence that Local 2 created the job referrals as a new benefit in connection with the election, cf. *General Cable Corp.*, supra (newly created benefit), or that Local 2 gave referrals only to those who signed authorization cards, who became members or who otherwise showed support for the union before the election, cf. *Savair*, supra (waiving initiation fees only for those who joined the union before the election).

Of course, it is undisputed that all 20 eligible Jam voters from the Riviera Theater received referrals (a significant portion of the three-theater voting unit); that access to the higher-paying jobs was indeed valuable; and that a dramatic increase in referrals occurred in the weeks before the May 2016 election. These facts were noted by the circuit court in remanding the case. We find, nevertheless, that even if the increase in job referrals during the critical

period were construed as a grant of benefits, the Union's alternative explanation of the April 2016 increase—in terms of its busy season—is sufficiently supported by the evidence to rebut any inference of coercive, election-related timing or purpose under the *B & D Plastics* framework.<sup>37</sup> In sum, the evidence submitted by the Employer failed to meet its burden of showing that the grant of job referrals under all the relevant circumstances would have impermissibly tended to influence the outcome of the election.

The Employer's arguments do not require a different result.<sup>38</sup> In various ways, the Employer argues that the discretionary structure of Local 2's referral system mandates a finding of objectionable benefits, but this is not so. To begin, the fact that Local 2 does not use any “objective” referral system is of no moment here.<sup>39</sup> It is true that when a union runs an *exclusive* hiring hall (and the union therefore effectively controls access to employment), the union is legally obligated to allow non-members to participate without discrimination and is required to use objective, verifiable criteria, such as using the participants' seniority dates or out-of-work dates; a union's failure to do so constitutes an unfair labor practice. See, e.g., *Plumbers Local 162 (Natkin & Co.)*, 283 NLRB 1160 (1987); *Local 394 Laborers (Kvaerner Songer, Inc.)*, 247 NLRB 97, 97 fn. 2 (1980). See also *Alyeska*, supra (promise to give unlawful preference to members was objectionable). By contrast, when a hiring hall is *not* exclusive, a union is *not* required to use objective criteria and it is allowed to favor its members. *Local 889 Laborers (Anthony Ferrante & Sons, Inc.)*, 251 NLRB 1579, 1581 (1980). Here, the record clearly establishes that Local 2 operates a non-exclusive hiring hall. Thus, the fact that Herrmann (or Carlson) had wide discretion in making referrals is not legally significant, let alone inherently suspect. Rather, the issue here is whether their discretion was exercised in a way that favored Riviera voters to constitute an objectionable benefit.<sup>40</sup> Contrary to the Employer's implicit argument, Local

<sup>37</sup> Member Ring would find that the Employer met its burden of showing a benefit granted to the Riviera voters during the critical period by proving they received a significant increase in referrals during that time. However, he agrees that the Petitioner rebutted the inference of coercion by explaining the increase was due to the increased amount of work that was available in the spring and summer versus the winter. As discussed below, the referral data supports that explanation by showing an increase in referrals for all groups—not just the Riviera voters—during the spring season and by showing *another* increase in referrals during the summer season after the election, a time when the Petitioner had no election-related incentive to give extra referrals to the Riviera voters. The pre- and post-election referral data thus supports the Petitioner's explanation that the increase in referrals was due to seasonal fluctuations in work and not the election.

<sup>38</sup> The Employer's brief on review argues that many of the Regional Director's factual findings were clearly erroneous and that the Regional

Director failed to address certain factual contentions that the Employer had raised in its exceptions, including the statistical analyses discussed above.

<sup>39</sup> We agree with the Employer that the Regional Director erred to the extent he characterized Local 2's hiring hall as non-discretionary, and that the Regional Director inaccurately described certain considerations used in making referrals as “objective.” As explained below, however, this error was harmless because Local 2's hiring hall is not exclusive.

<sup>40</sup> The Employer's brief also complains that the Petitioner “failed to rebut the evidence showing that Herrmann and Carlson picked whom-ever they want to fill referrals.” But such rebuttal was unnecessary, given Herrmann's admissions that (1) he used some discretion in making referrals (there were more stagehands available on any given date than the number of employer requests), and (2) the hiring hall does not use a strictly numerical or “objective” system. The Employer further argues the Board should draw an adverse inference against the Petitioner based

2's discretion in this area does not require an inference that it used that discretion to influence Riviera voters in the election, nor will we draw such an inference based solely on the existence of that discretion.

In a similar vein, the Employer asserts that the Riviera voters were not "entitled" to job referrals (either before or during the critical period) and that the grant of such referrals was therefore objectionable. Although Herrmann also testified that no Riviera voter or other hiring-hall participant was "entitled" to any *specific* referral (given the absence of a seniority system or similar objective criteria), no one is "entitled" to specific referrals in a discretionary, non-exclusive hiring hall, in the sense that no participant has an absolute right to a specific referral in such a system. The Riviera voters were, however, "entitled" to referrals as a general matter, in that they were eligible to receive referrals once they had enrolled in the system, which any stagehand (Local 2 member or otherwise) could do. Here too, the mere fact that Local 2 ran a discretionary, non-exclusive hiring hall does not—in the absence of evidence that the Petitioner gave Riviera voters referrals that they were not otherwise "entitled" or eligible to receive—warrant an inference that Herrmann or any other Local 2 official used the discretion they possessed to give Riviera voters referrals they were not otherwise eligible to receive as an inducement for their support in the election.

The Employer's efforts to counter the Petitioner's explanation of the focal-period increases are equally unpersuasive. As an initial matter, the Employer contends that the record does not support a finding that the focal period coincided with a busy period for Local 2, but this contention is belied by un rebutted testimony from multiple witnesses (1) that stagehand work generally increases in Chicago in the spring because of the increase in warm weather

and outdoor work and (2) that April 2016 was the busiest month in the hiring hall's history up to that point due to events like the NFL Draft.<sup>41</sup> Further, the documentary evidence in the record, partly summarized in Table A above, shows that there was a marked increase in overall referrals within the focal period (i.e., from April 1 to May 1) and that the rate of referrals to Riviera voters generally tracked the rate of referrals to all hiring hall participants in this respect. Although Riviera voters received increased referrals during the focal period as compared to the earlier abeyance/backpay period, this is consistent with the testimony about the busy season. At any rate, the absence of evidence regarding referrals to all other hiring hall participants prior to the focal period forestalls a showing that the Riviera voters received a disproportionately high increase in referrals starting in April.<sup>42</sup>

The Employer is also wrong that the number of referrals did not correspond to the amount of available work. Table A shows that increases in referrals to Riviera voters did in fact correspond to total number of referrals, as both the Riviera and overall referrals spiked on April 5, April 15 and especially May 1 (the peak date for referrals during the focal period). The Employer's focus on certain specific dates, such as April 20 (an otherwise busy day on which only 3 Riviera voters received referrals) does not negate the overall correlation, and therefore does not detract from the Petitioner's attribution of the timing of the referrals to its busy period. In addition, the Employer's complaint that the pool of available stagehands was not "exhausted" during the focal period holds no weight. In operating its non-exclusive, discretionary hiring hall, Local 2 was under no obligation to "exhaust" the pool of other participants before referring Riviera voters.<sup>43</sup>

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on its purported failure to "fill in" unspecified "blanks" regarding how referrals are made by eliciting "specific, favorable testimony" from the Employer's witnesses. The Employer, however, had the burden of proving that eligible voters received referrals to which they were not otherwise entitled, and failed to meet its burden for the reasons explained above. We find that an adverse inference is unwarranted under the circumstances presented here. See *Riverdale Nursing Home*, 317 NLRB 881, 882 (1995) (improper for judge to rely on adverse inference to fill evidentiary gap in General Counsel's case); *Iron Workers Loc. 373 (Building Contractors)*, 295 NLRB 648, 652 (1989) ("It would have been unnecessary for the Board and the court of appeals to stress that the burden of proof . . . falls on the General Counsel if they had meant that that burden could be met merely by drawing an adverse inference against the respondent."); see also *NLRB v. Louis A. Weiss Memorial Hospital*, 172 F.3d 432, 446 (7th Cir. 1999) ("An absence of evidence does not cut in favor of the one who bears the burden of proof on an issue."). In any event, it is not even clear what inference the Employer wanted the Region to make in this specific context, or what inference it asks the Board to make now. Thus, the Petitioner's alleged failure to ask more questions about the witnesses' discretion does not warrant an adverse inference even if the issue were one as to which it had the burden of proof.

<sup>41</sup> The Employer's claim that there were no outdoor "concerts" during the focal period does not negate the testimony regarding the increase in other outdoor work, particularly given that the NFL Draft and Northerly Island build required construction of outdoor stages, flooring, bleachers, and other seating areas.

<sup>42</sup> Further, contrary to the Employer's complaint, the record does contain evidence of post-election referrals (see Pet. Ex. 4) which reflect that after 215 referrals during the focal period, Riviera voters received 155 over the next 6 weeks (a 28 percent decrease) but then received 291 in the six weeks after that (at least a 35 percent increase). If anything, the continued referrals to Riviera voters during the summer months tends to confirm that the focal period referrals were *not* connected to the election, given that Local 2 would no longer have any incentive to "induce" their support after the election.

<sup>43</sup> In its brief on review, the Employer complains that the hearing officer erroneously "found" that Riviera voters received as many referrals in the Fall of 2015 as they did during the focal period. The hearing officer made no such finding. Rather, he noted that the "substantial" number of referrals in the Fall, many months before the election, did not support a finding of objectionable timing for the focal period referrals. That said, we do not rely on the hearing officer's finding that the increase

Further, the Employer has not demonstrated that the hiring-hall records otherwise reflect a disproportionate number of referrals or other preferential treatment for Riviera voters. The Employer argues that certain similarly-situated stagehands—namely, hiring hall participants who, like some Riviera voters, initially enrolled in Call Steward in Fall 2015—averaged substantially fewer referrals during the focal period than the Riviera voters averaged during the focal period, and that the difference shows an intentional favoring of Riviera voters. The Employer deploys a flawed assumption, however—that all stagehands who initially signed up in the Fall of 2015 were still available and actively seeking work several months later in the spring of 2016.<sup>44</sup> These numbers appear to be accurate, as far as they go—but they do not go very far because they do not prove these other stagehands were, in fact, similarly situated to the Riviera voters. The Employer has assumed that all hiring hall participants who initially enrolled in Fall 2015 were still available and actively seeing work in the focal period, but the record does not show how many of those stagehands were still willing and able to accept referrals several months later in the focal period. It may be that some of these non-Riviera stagehands who received no referrals during the focal period had found other work or were otherwise unavailable at that time. As noted earlier, names are not removed from Call Steward in such situations (although some people may be labeled as “inactive”), and the record is insufficient to show why these “similarly situated” voters received no referrals.<sup>45</sup>

We acknowledge that a proven statistical disparity could arguably demonstrate favorable treatment or a grant of benefits. The Employer’s witnesses, however, provided uncontested testimony that the Petitioner considered

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in referrals during the focal period occurred a “considerable amount of time” before the election.

<sup>44</sup> For example, out of 11 “comparators” who enrolled in Call Steward during the month of September 2015, two (Jose Campos and Aileen Dimery) received 22 referrals each during the focal period. The other 9 comparators who enrolled in September 2015 may have received any number of referrals in the intervening months (the relevant records are not in evidence), but they received zero referrals during the focal period. The Employer’s assumption that those 9 still actively desired job referrals several months later appears to be speculative at best.

<sup>45</sup> The Employer never asked Herrmann and Carlson about the status of those “comparators,” or why some received little-to-no referrals in the focal period. As previously indicated, the narrower comparison of participants who enrolled in April indicates that the 2 Riviera voters who enrolled at that time received fewer referrals that month than the other stagehands who enrolled for the first time during the same month.

<sup>46</sup> As the hearing officer noted, the Riviera voters may have received more referrals due to their possessing more stagehand experience than the non-voters. The record in this case shows that many Riviera voters had years of experience. Huffman, for example, had worked for Jam for about 20 years prior to the filing of the petition. At first, he was hired only sporadically to work on Shaw’s crews at the Riviera (and also another non-Employer venue), but he started to be employed more

such factors as availability and skill level, among others, which provide a legitimate basis for the disparity. Based on such factors, established stagehands like the Riviera voters, with proven work histories and demonstrated availability (due to their terminations and subsequent reduced work from the Employer), would be likely to receive more referrals than individuals who came off the street and might no longer be available. The Employer did not address these factors and thus failed to prove the disparate number of referrals to the Riviera voters were referrals to which they were not otherwise entitled.

The Employer also contends that it is “undisputed” that Riviera voters received a “disproportionately high” number of referrals during the focal period compared to Riviera employees who had not worked sufficient hours to be eligible to vote in the election. But this is very much disputed. Although the record indeed shows that Riviera voters received more referrals on average during the focal period than Riviera “non-voters,” this could be attributable to the Riviera voters having more experience as stagehands than the non-voters.<sup>46</sup> Furthermore, Herrmann’s uncontested testimony that he did not know who was eligible to vote belies any intentional effort to favor Riviera voters over non-voters. And finally, as the hearing officer also noted, referrals to the Riviera “non-voters” increased by an even greater percentage during the focal period than those to the Riviera voters, undercutting the Employer’s claim that the referrals were aimed to induce those voters in the election.

The Employer’s remaining arguments concerning the focal period referrals are wholly circumstantial and, like its attempted statistical analysis, do not undercut the clear testimony—supported by documentary evidence—that

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frequently as he gained seniority and, by about 2004 or 2005, became a “regular” on Shaw’s crews. This testimony is consistent with Shaw’s testimony in Case 13–CA–177838 that his practice was to call stagehands from Jam’s on-call list in order of seniority, *Jam Productions*, 367 NLRB No. 30, slip op. at 1. It is also consistent with call steward Herrmann’s general testimony that the more experience you have, the more likely you are to get referrals through the hiring hall, although he did not explicitly say that Riviera voters got more referrals for that reason. We think the hearing officer made a reasonable inference on this score that Riviera voters generally had more experience than the Riviera non-voters who had been employed by Jam less regularly.

The Employer’s related claim that the Riviera voters’ skills and experience do not explain the increased number of referrals to them during the focal period is beside the point, because there is no claim, nor has there ever been any finding, to that effect. In this regard, the hearing officer only generally noted some voters’ experience and advanced skills (such as Huffman’s pyrotechnic license) and did so in the limited context of explaining why Riviera voters may have gotten more referrals during the focal period than the sporadically-employed Riviera non-voters. To be clear, neither the hearing officer nor the witnesses claimed that Riviera obtained more referrals than any other hiring hall participants based on their skills and experience.

the referrals were consistent with Local 2's usual practice and its busy season. For example, the fact that Local 2 maintained a list of Riviera voters and the fact that some of them were referred "as a group" are of no moment, because neither circumstance itself demonstrates that the Riviera voters were given preferential treatment in referrals. Further, the record demonstrates that there are many reasons why Local 2 identifies employees as a group (including that they have previously worked together as a crew, as was the case for the Riviera voters who worked as Shaw's crew for the Employer and at other venues), and therefore maintenance of this list does not, as the Employer contends, require an inference that it was kept as a means to target and favor Riviera voters for referrals. And although there were several events to which subsets of Riviera voters were referred, the Employer did not examine any witnesses concerning these groupings and the fact that those voters had all previously worked together as a crew is sufficient answer to the Employer's claim that the groupings "defie[d] innocent explanation."<sup>47</sup>

Although the court and the Board's remands specifically addressed referrals during the focal period, the Employer also contends now that referrals made during the earlier abeyance/backpay period, were also objectionable grants of benefit. To the extent this argument is properly before us,<sup>48</sup> we agree with the hearing officer and Regional Director's conclusion that the argument has no merit. The Employer repeatedly states that the Petitioner started granting job referrals to the Riviera voters "after the petition was filed" in September 2015 or at the onset of the critical period, but fails to acknowledge that this was also when those voters were terminated. As the hearing officer found, the timing and purpose of the abeyance period referrals were closely linked to the voters'

contemporaneous discharge and their need to find work,<sup>49</sup> and the Petitioner therefore "met its burden" of providing an alternative explanation for the referrals.<sup>50</sup> In addition, the fact that the Petitioner made referrals only to the discharged Riviera voters—not to those working at Park View or Vic, who were not discharged—further supports the referrals' connection to the discharges, rather than the election. And as with the focal period referrals, there is no evidence that providing the abeyance period referrals departed from Local 2's normal hiring hall practices by giving the Riviera voters anything for which they were not otherwise eligible. To the extent that referrals to Riviera voters increased in September 2015, the timing is clearly explained under the *B & D Plastics* framework by their contemporaneous discharge.

Similarly, assuming that the Employer's contention that Local 2 waived drug testing for the Riviera employees is properly before us,<sup>51</sup> the record does not demonstrate that drug testing is an absolute or consistently-enforced prerequisite for enrolling in Local 2's hiring hall or the Call Steward system. As noted above, Local 2's Referral Rules prohibit referral of any individual who is not compliant with its JATF rules, "including but not limited to failure to comply with drug testing requirements." But the JATF rules governing drug testing are not in evidence and the reference to drug testing in the Referral Rules is too vague to support a finding that drug testing is required for all registrants. Moreover, the record clearly indicates that drug testing is not consistently required in practice in any event. Thus, Herrmann testified that he did not usually verify new enrollees' drug-testing status before referring them, Carlson could not say "definitely" that "all" new enrollees were tested, and neither of them knew whether the Riviera voters had undergone testing. Likewise, Huffman and

<sup>47</sup> The Employer's singling out of one group of referrals—to a David Gilmour concert—as "extremely suspicious" fares no better. About 9 Riviera voters were referred to this event, which began on April 5 and continued on April 6, along with 23 Local 2 members and 18 other non-members. The record does not establish precisely when Local 2 first offered referrals to this event, but it appears to have been no more than 2 days before the concert, as 9 Local 2 members accepted referrals on April 3 and the other stagehands (including the 9 Riviera voters) accepted them on April 4. It is true that this was close in time to the April 6 approval of the settlement agreement that unblocked this petition, but this does not establish that these referrals were the result of a "last minute decision" to refer the Riviera voters because the Petitioner knew an election was "forthcoming." The timing of the concert itself may also explain the timing of the referrals (indeed, there is no indication the Riviera voters received the referrals before any other, non-Riviera stagehands who were also referred to the concert), and in any event Herrmann was never asked to explain why or when he offered the Gilmour referrals.

<sup>48</sup> As described above, the Employer's offer of proof was concerned with the focal period (which it misdescribed as the "critical period"), but at the hearing the Employer subpoenaed documents covering the entire critical period and, in its post-hearing brief to the hearing officer, argued

that referrals made in Fall 2015 were objectionable. We assume, without deciding, that this expansion beyond the focal period was "reasonably encompassed within the scope of the objections" that the Board set for hearing. *DLC Corp., d/b/a FleetBoston Pavilion*, supra, at 656, citing *Precision Products Group, Inc.*, 319 NLRB 640 (1995), and *Iowa Lamb Corp.*, 275 NLRB 185 (1985).

<sup>49</sup> We note that for backpay purposes, the discharged Riviera voters were obligated to mitigate their losses by seeking employment. See, e.g., *United Supermarkets, Inc.*, 287 NLRB 394, 401 (1987).

<sup>50</sup> The Regional Director likewise stated that Riviera voters became "available" for referrals at the beginning of the critical period because they had been discharged. The Employer argues that this finding was clearly erroneous because work at the Riviera had always been somewhat intermittent (a characterization we accept as accurate) and therefore that the Riviera voters were always "available" and could have sought work from Local 2 prior to their discharges. This argument is meritless. The fact that the voters *could* have sought work from Local 2 prior to their discharges in no way diminishes the conclusion that they *actually* started getting referrals due to the discharges, not due to the filing of the petition.

<sup>51</sup> The Employer's offer of proof made no mention of drug testing; instead, the subject first arose during Herrmann's hearing testimony.

Kramer testified they were never tested when they originally started working via the hiring hall (before the critical period), and they did not know whether any other Riviera voters had been tested.<sup>52</sup> Furthermore, the record contains no evidence regarding whether new enrollees were tested during the relevant time period. As the objecting party, it was the Employer's burden to produce evidence that any drug-testing requirement was selectively waived for the Riviera voters. It is no answer that Local 2 did not produce evidence that the Riviera voters or other new enrollees were tested, and in any event the Employer is incorrect that the Petitioner's "failure" to produce such evidence merits an adverse inference.<sup>53</sup> In sum, the record fully supports the Regional Director's conclusion that drug testing was not a per se requirement, as well as the hearing officer's finding that no evidence establishes that the requirement was in fact waived for any Riviera voters.<sup>54</sup>

Finally, the Employer was not subjected to too high a burden to prove its objection. Although the hearing officer (and by extension the Regional Director) noted the lack of evidence expressly linking Local 2's referrals to the May 2016 election, he did not require any such evidence and proceeded to consider the Employer's indirect or circumstantial evidence. As we have fully explained above, the indirect evidence was not sufficient to sustain the objection and did not warrant drawing the inferences the Employer contends are "required" here. The Employer also complains that the Region did not shift a heavy enough "burden" onto the Petitioner to prove that its actions were *not* objectionable. *B & D Plastics* and its progeny do not speak in terms of a donor party bearing a "burden" when offering an alternative explanation to rebut the inference that benefits granted during the critical period are objectionable,<sup>55</sup> nor do the hiring hall grant-of-benefit cases discussed above. But even if the Petitioner did bear some sort of evidentiary burden here, the hearing officer

and Regional Director clearly found—and we agree—that its alternative explanation is not only plausible, but legitimate, persuasive, and supported by evidence. Both the hearing officer and the Regional Director clearly accepted Herrmann's general testimony that he made referrals to Riviera voters using the same criteria he always used; that he did not "target" them for referrals as an election-related inducement; and that their referrals increased significantly in early April 2016 because it was an extremely busy season for the hiring hall. As fully explained above, Herrmann's testimony in this regard, as well as Carlson's similar testimony, was not contradicted by any other witnesses and was supported by substantial documentary evidence. The fact that Herrmann and Carlson "failed" to explain how they made specific referrals (e.g., why "so many" Riviera voters were referred to work at the Gilmour and Rihanna concerts) does not prevent the Petitioner from meeting any rebuttal burden here; it illustrates only that the Employer did not avail itself of the opportunity to ask those questions at the hearing.

#### CONCLUSION

At the hearing on remand, the Employer had ample opportunity to develop a factual record to support its objection, including subpoenaing voluminous records from Local 2 and testimony from multiple witnesses. There is no claim or indication here that the Employer was prevented from obtaining or presenting any relevant evidence. We agree with the Regional Director's ultimate conclusion that, despite this opportunity, the Employer failed to meet its burden to prove that objectionable conduct occurred as alleged. As demonstrated above, the Employer has not identified any clearly erroneous factual findings, relies on inferences that are not mandated on this record, and offers no compelling reason to doubt the entirely plausible, and

<sup>52</sup> The Employer's brief on review selectively quotes Herrmann and Carlson in contending that their testimony established an absolute, per se requirement. For example, the Employer turns Carlson's reaction to the question about "exceptions" to the alleged requirement ("I don't know that there's 'exceptions'") into an affirmative statement that "To Carlson's knowledge, there are no exceptions."

<sup>53</sup> The Employer did not ask the hearing officer to draw an adverse inference on this basis, but first sought such an inference in its exceptions to the hearing officer's report. As the drug testing requirement was not raised until the subject was mentioned in the middle of the hearing, the Petitioner arguably was not on notice that it would be a material issue. Cf. *American Armored Car, Ltd.*, 339 NLRB 600, 604 fn. 12 (2003) (no adverse inference warranted where respondent was not put "on notice" that failure to introduce certain records might lead to adverse inference, and GC had not requested those records). In addition, the adverse inference rule does not apply when a party fails to call *employee*-witnesses because they "may not reasonably be presumed to be in favor of either party." *Daikichi Corp., d/b/a Daikichi Sushi*, 335 NLRB 622, 622 fn. 4 (2001), *enfd. mem.* 56 Fed. Appx. 516 (D.C. Cir. 2003). The adverse

inference cases cited in the Employer's brief on review are therefore inapposite as they concern parties who failed to call their own agents to testify and/or to produce subpoenaed records regarding a material issue. In any event, the decision to draw an adverse inference lies within the discretion of the factfinder, *Tom Rice Buick*, 334 NLRB 785, 786 (2001), and the Employer has not established that the failure to draw an adverse inference here would constitute an abuse of discretion.

<sup>54</sup> As such, this case is distinguishable from *NLRB v. River City Elevator*, *supra*, cited by the Employer, because there is no showing that any prerequisite requirement was in fact waived here.

<sup>55</sup> See, e.g., *STAR, Inc.*, 337 NLRB 962 (2002). It is true that certain unfair labor practice cases alleging that a grant or promise of benefits violates of Sec. 8(a)(1) and (3) speak in terms of shifting the burden onto the respondent. See, e.g., *American Sunroof Corp.*, 248 NLRB 748 (1980); *Mercy Hospital Mercy Southeast Hospital*, 338 NLRB 545 (2002). But *Community Options NY, Inc.*, 359 NLRB 1534 (2013), a representation case cited the Employer, does not speak of the donor's "burden" (and, moreover, is a recess-Board case invalidated in *NLRB v. Noel Canning*, 573 U.S. 513 (2014)).



indeed persuasive, explanations Local 2 has offered for the timing of the referrals at issue.

Based on all the foregoing, we find that the Petitioner's actions in referring Riviera voters for work via its non-exclusive hiring hall—for which the voters were already eligible, irrespective of the election—did not constitute a gratuitous grant of benefits under the relevant Board and Seventh Circuit precedent cited above. To the extent that the *increases* in referrals, which indisputably occurred during the relevant critical period in Fall 2015 and Spring 2016, may have raised an inference of coercive timing, the Petitioner has given alternative explanations sufficient to rebut any such inference. The Regional Director therefore properly overruled the Employer's objection. Accordingly, we affirm the Regional Director's Supplemental Decision and Certification of Representative.

ORDER

The Regional Director's Supplemental Decision and Certification of Representative is affirmed.

Dated, Washington, D.C. September 30, 2021

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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John F. Ring, Member

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