UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

KRAVE ENTERTAINMENT, LLC [1]

Employer

and **Case 28-RC-6600**

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 720, AFL-CIO, CLC[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 720, AFL-CIO, CLC (Petitioner), has filed a petition, as amended at the hearing, in which it seeks an election within a unit comprised of approximately five employees employed by Krave Entertainment, LLC (Employer), who perform lighting, sound, and video technician work at the Employer's facility known as the Krave Nightclub, located within the Miracle Mile Shops at Planet Hollywood, 3663 Las Vegas Boulevard South, Las Vegas, Nevada, excluding all other employees, office-clerical employees, guards and supervisors as defined by the National Labor Relations Act (Act). Contrary to the Petitioner, the Employer argues that the individuals who perform technician work at its Krave Nightclub are either independent contractors or "on-call" casuals with no reasonable expectation of scheduled work, and as such, are not employees as defined by the Act. Also contrary to the Petitioner, the Employer would seek to exclude Dan Hanna in any unit found appropriate on the basis of his supervisory or managerial employee status.

Based upon the reasons more fully set forth below, I find that the employees in the petitioned-for unit, as amended at the hearing, share a sufficient community of interest as to constitute an appropriate unit for purposes of collective-bargaining. In this connection, I find that the unit found appropriate herein is comprised of employees within the meaning of Section 2(3) of the Act; that Dan Hanna is neither a supervisor nor a manager so as to be excluded from the unit found appropriate herein; and that, because of the nature of the Employer's business and the concomitant irregular nature of the employees' hours, employees who were employed as lighting, sound and/or video technicians on at least two productions

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[1] The name of the Employer appears as corrected at the hearing.
[2] The name of the Petitioner appears as corrected at the hearing.

for a minimum of one (1) working day each in the year immediately preceding the date of issuance of this Decision will be eligible to vote.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. Hearing and Procedures: The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. Jurisdiction: At the hearing, the parties stipulated, and I find, that the Employer is a Nevada limited liability company with its principal offices in Las Vegas, Nevada, where it is engaged in the business of operating a nightclub (Krave Nightclub). For the 12-month period preceding April 29, 2008, the Employer received gross revenue in excess of $500,000 and has received goods and services valued in excess of $5,000 directly from points outside the State of Nevada. Based on the parties' stipulation to such facts, I find that the Employer is an employer within the meaning of Section 2(6) and (7) of the Act and is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.

3. Labor Organization Status and Claim of Representation: The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. Statutory Question: As more fully set forth below, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Unit Finding: The issues presented in this matter are: (1) whether the individuals sought in the petitioned-for unit are independent contractors or employees within the meaning of the Act; (2) if the individuals sought in the petitioned-for unit are employees, whether they share a sufficient community of interest to constitute an appropriate unit; (3) whether Dan Hanna is a supervisor or manager and, therefore, excluded from the unit found appropriate herein; and (4) what formula should be used to determine the eligibility of voters. To provide a context for my decision, I will provide an overview of the Employer's operations, including its organizational structure, a description of its employees' terms and conditions of employment, followed by the case law and the reasoning that support my conclusions on these issues.

A. Employer's Operations

1. Organizational Structure

The Employer is one of three entities owned and operated by Alternative Enterprises at its multi-venue facilities located at 3663 Las Vegas Boulevard South, #600, Las Vegas, Nevada, where it is in the business of producing entertainment functions and providing venues to and for the public and certain private businesses. The Employer operates a nightclub (the Krave Nightclub) that occupies approximately 20,000 square feet and is comprised of two rooms: the Krave Main room and the smaller Krave Lounge. The second entity owned by Alternative Enterprises, the Harmon Theater, occupies space adjacent to the nightclub and is used for all theater activities. The third entity is Lucky Cheng's, which regularly leases venue space for a drag dinner show cabaret. In addition to operating the Krave Nightclub, the Employer uses the nightclub space for self-sponsored "special events," for which it uses its own employees. These facilities are also rented out to third-party enterprises for on-going productions or single events. Although the Employer does not provide technicians as part of the rental agreement for these productions and events, it is not uncommon for the Employer's technicians to work directly for such third parties with the Employer's knowledge, and sometimes at its suggestion.

The individuals at issue in this proceeding are lighting, sound, and video technicians who work for the Employer at its nightclub during its regular Friday and Saturday hours of operation from about 11:00 p.m. to 4:00 a.m., as well as during "special events" in the nightclub that are sponsored or operated by the Employer. These individuals may or may not work on productions or other non-Employer "special events" at the Harmon Theater or Lucky Cheng's. However, if and when they do work on these other productions, they are neither employed nor paid by the Employer. In this connection, the Petitioner seeks to represent only those technicians employed by the Employer for work performed at the nightclub.

Although the record is ambiguous as the Employer's exact chain of command, the evidence shows that Sia Amiri is the Employer's Chief Executive Officer/Owner; Kelly Murphy is the Employer's Chief Financial Officer; Michael Palmer is the Employer's Operations Manager; Bradley Walkup is the Employer's Assistant Operations Manager; Lisa Pittman is the Employer's Entertainment Director; Preston Cobb is the Employer's Promotions Manager; Kim Baker is the Employer's Accounting Manager; and Adriana Leyva is the Employer's Office Manager. The parties stipulated, and I find, that Murphy, Palmer, Walkup, Pittman, and Cobb are supervisors within the meaning of Section 2(11) of the Act on the basis that they, among other things, responsibly direct the work of employees.

The Employer employs approximately 54 employees in the following classifications: bartenders, servers, hosts, security, corporate office staff, marketing, management, and entertainment which includes DJs, go-go dancers, special entertainment, aerialists, and lighting, sound, and video technicians.

2. The Technicians

The Employer employs approximately three to five lighting, sound and video technicians who work at the nightclub, which has a couple of sound systems and lighting systems, many lights, several projectors, and several video screens. The technicians are hired by Murphy, Palmer, Walkup, or Pittman and report to whichever of the four are present while the technicians are working. The duties of the technicians range from operating a light board, operating a sound board, operating the video equipment, programming lights, rigging, minor lighting maintenance and repairs, minor sound maintenance and repairs, and minor video maintenance and repairs. The Krave Nightclub is regularly open on Fridays and Saturdays between 11:00 p.m. to 4:00 a.m., and the technicians work during these hours. Often they remain at work until 5:00 or 5:30 a.m. In addition, at the request of a member of management – Murphy, Palmer, Walkup, or Pittman – one or more of the technicians work "special events" that are sponsored by the Employer, the most recent ones being "Fetish Night" and "Gay Pride Week." Such "special events" may entail working several days or nights before the event and/or during the event. All of the technicians are expected to wear a black "uniform," that is, black pants or jeans and a black shirt or T-shirt. The technicians are not provided a work schedule, written or otherwise. Certain technicians regularly work Friday evenings; others regularly work Saturday evenings. All of the technicians work sporadically at other times during the week for "special events" that are sponsored or given by the Employer. When they cannot work as expected, technicians are responsible for finding other technicians to work in their stead. Technicians do not clock in or sign in; rather, they send e-mails to members of management stating the number of hours they worked on a given day.

Generally, the technician operating the light board does not also operate the sound board when there is a disc jockey (DJ) present who operates the music. However, when there is no DJ, the technician operating the light board might also operate the sound board, or there might be a technician running the light board and another technician operating the sound board. With respect to the video projectors, a technician will put a DVD in the loops of the visuals, psychedelics, or promotions.

When an employee is hired, the Employer provides the employee a New Hire Employee Information Packet which consists of the following:

(1) Information Sheet;

(2) Krave Entertainment LLC Confidentiality Agreement *(requires employee signature and contemplates interruption of employment with Employer by layoff or otherwise;*

(3) Disclaimer and Acknowledgement *(requires employee signature and mandates employee's conformance to the Employer's rules and regulations, which may be changed, withdrawn, added or interpreted at any time at Employer's sole discretion. Also provides for 90-day probationary period at the end of which employee is "considered an official employee" of the Employer);*

(4) Search Consent & Right to Monitor *(requires employee signature and provides, inter alia, the Employer's right, at its sole discretion, to search or inspect employee's personal property);*

(5) Attendance and Punctuality Policy *(requires employee's signature and provides progressive disciplinary procedure for various types of absences and tardiness);*

(6) Employee Release Form *(requires employee signature and grants Employer, partners, sponsors, subsidiaries, etc., the right to use employee's name, photograph and/or likeness for any promotion, publicity or advertising by the Employer);*

(7) Nightclub Access Policy *(requires employee signature and allows employee access to nightclub, permits employee to purchase alcohol in the club, requires employee conduct to be "appropriate," requires employee to represent the Employer and project positive image; requires employee to be out of uniform while consuming alcohol; and provides for disciplinary action up to and including termination for any violation of Employer's policies and procedures);*

(8) Team-Member Emergency Contact Form *(requires emergency contact names, addresses, and telephone numbers);*

(9) Krave Entertainment LLC Drug Testing Policy;

(10) Krave Entertainment LLC Physical Examination Policy *(requires employee signature and provides that employee might be required to undergo physical examination at the Employer's expense and employee authorizes release of all results or information obtained from physical examination);*

(11) Equal Employment Opportunity form *(voluntary);*

(12) Krave Entertainment LLC Work Cards Requirement;

(13) Safety Standards and Policy *(3 pages)(requires employee signature acknowledging safety policies including, among other things, no throwing or tossing of anything at anytime);*

(14) Krave Entertainment LLC Risk Control Program Check List;

(15) Employee Manual Receipt; and

(16) Krave Management Team *(list).*

The New Hire Employee Information Packet is apparently maintained in the employee's personnel file, along with copies of identification cards, an I-9 form, a W-4 form, and/or a W-9 form. With the exception of lighting technician Michael "Trexx" Andrewshetsko, the Employer maintains a personnel file for each of the other four technicians at issue in this matter, three of which contained the New Hire Employee Information Packet. Although not contained in the personnel file of the fourth technician, Josh Wertsbaugh, he testified that he completed the Packet and returned it to Operations Manager Palmer. The Employer does not offer its technicians any medical benefits, leave benefits, retirement or life insurance benefits, or any other benefits not required by law, i.e., worker's compensation.

a. Dan Hanna

Hanna has worked for the Employer in a dual capacity for approximately four years. First, he is responsible for the regular maintenance and repair of the lighting, sound, and video equipment, for which he is paid a weekly salary of $200. In this capacity, he determines what equipment needs repair or modification (or it is brought to his attention by one of the other technicians). Hanna diagnoses the problem as best he can, and, if possible, fixes it himself, using his own tools. If the problem is something Hanna cannot fix, he relays the information to Murphy, who decides whether the equipment will be fixed. If Murphy decides the equipment will be fixed, Hanna contacts whomever he deems appropriate to make the repairs and either packs the equipment for shipment or delivers it himself to the repair company. If repairs cost more than a minimal amount, Murphy must approve the cost.

Hanna has no regular schedule to be at the Employer's facility to inspect equipment. He might know when equipment is broken or needs to be looked at if other technicians or managers tell him. Additionally, he comes to the facility at night, while the nightclub is open for business, to look around and take notes regarding equipment that needs repair or modification and has not otherwise been brought to his attention. When Hanna personally performs repairs, he may do so at any time of the day or night.

In addition to equipment repair and inspection duties, Hanna is expected to assist non-Employer related shows that rent or lease the space by helping them hang and rig their equipment or showing them how to work with the equipment that is already there. This, however, has not occurred for some time because most of the shows bring their own equipment.

Hanna does not train others on how to operate equipment. Although he may give instructions to other technicians if they ask his advice on how to operate equipment, this has not happened recently because the other technicians are well-trained. On occasion, a technician might call him to ask if something is broken, and Hanna will walk the technician through fixing it, or Hanna will come to the nightclub to look at the equipment in question and try to help the technician figure out the problem.

Hanna testified that the technician operating the light board will bring his or her own program, load the program into the board, turn it on and then operate it. The lights spin, change colors and patterns, and keep rhythm with the music.

Since March 2008, Hanna has been working three or four nights per week on the Amazing Jonathan show, which is a magician/comedian act that rents venue space from Alternative Enterprises, for which he needs no clearance or approval from the Employer.

In his other capacity with the Employer, Hanna works as a light operator, performs sound work, and works the video projection system, for which he gets paid a flat fee of $150 for the event (in addition to his $200 per week salary). Since mid-January 2008, Hanna has worked regularly on Friday nights at the nightclub as a light operator. When he works as a light operator, Pittman or one of the other managers tells him what colors to pick in general,

what changes need to be made when go-go dancers are on stage, and gives him other directives regarding the lights, as opposed to his maintenance work, where he receives little direction.

The Employer pays Hanna his salaried maintenance work by check that has standard deductions withdrawn, even though Hanna's personnel file contains only a W-9 form and no W-4 form. The Employer pays Hanna for the events on which he operates lights, sound or video also by check, but without taking the standard deductions.

b. Hernaldo "Rikk" Martinez

Like Hanna, Martinez has worked for the Employer for approximately four years as a DJ and, until May 9, as a sound technician. He did not perform any lighting work other than turn on the light boards. He has also changed light bulbs as needed. As a sound technician, he operated the sound board and the video equipment, which consisted of putting a DVD in the projector and hitting "play," which would cause projections to be displayed onto projection screens in the nightclub. On a couple of occasions, Martinez worked with technician Adam Bowlin, who worked the lights while Martinez worked the sound. Bowlin has also assisted Martinez set up and run sound and video projection.

Martinez worked regularly as a sound technician on Friday and Saturday nights at the nightclub, for which he was paid a set fee of $175 per night by check with standard deductions withheld. In addition to the fee he was paid as a sound technician, Martinez was paid $175 per night for his work as a DJ by check without any deductions withheld.[3] When Martinez needed someone to fill in for him to perform sound work on Friday or Saturday night, he would ask Hanna or Bowlin to cover for him.

In March 2008, Murphy told Martinez that Amazing Jonathan was to start performing at the Employer's venue and that there might be a position open to do sound. Martinez was thereafter hired by the Amazing Jonathan as the sound technician for the Amazing Jonathan's Sunday, Monday, and Tuesday night performances. Although Hanna and Bowlin took over as sound technician for Martinez on Fridays and Saturdays, respectively, the record establishes that Martinez was still paid a "salary" check, less deductions, for work performed as a sound technician for the Employer for the pay period of April 27 to May 10, 2008. On May 9, Martinez resigned from the Employer as a sound technician to accept a better offer as a DJ at the Red Rock Casino. However, Martinez continues to work as a DJ for the Employer on Sunday and Wednesday nights.

[3] The parties stipulated, and I find, that DJs are excluded from the unit found appropriate herein based on the record evidence that in the performance of his DJ duties, Martinez relies on his personality in interacting with and entertaining customers, often on the dance floor with his microphone, to motivate them to dance, drink, and have an energetic time, which is markedly different than the duties performed by the technicians, who work behind the scenes and have little, if any, interaction or contact with the customers.

Martinez worked with Hanna, Bowlin, Josh Wertsbaugh, Michael "Trexx" Andrewshetsko, and Chris Shell,[4] all of whom worked lights and some of whom worked sound. Martinez testified that he viewed Hanna as just another employee – that they were all sound techs.

c. Adam Bowlin

Bowlin has been employed by the Employer as a lighting, sound, and video technician since about March 1, 2008. Almost immediately, he started filling in for Martinez as sound technician on Saturday nights. He is paid an hourly and fixed rate depending on what work he is performing. When he works at the Krave Nightclub on Saturday nights, he earns a flat rate of $150 for the night. He also earns an hourly rate of $20 when he sporadically works a few hours maintaining and repairing lighting and sound gear. In addition, he has worked as a technician, both lights and sound, for between five and ten special events sponsored by the Employer, many of which have occurred on a Sunday night, and some of which have occurred on a Wednesday night, when the nightclub is not normally open.

Bowlin was hired by Murphy and considers him his "main" boss, although he views Palmer and Walkup has his bosses in Murphy's absence. He has never reported to Hanna. He has worked with Hanna, Martinez, "Trexx" Andrewshetsko, and Josh Wertsbaugh.

After questioning Murphy about his pay in March, Murphy escorted Bowlin to the Employer's nearby corporate office. There, on April 1, Bowlin completed an "employee package" provided by the Employer. One of the documents Bowlin completed was a W-4 form. He did not complete a W-9 form. Nevertheless, the Employer has consistently paid Bowlin via check without withholding the standard deductions as indicated on his W-4 form.

Like a number of the Employer's other technicians, Bowlin works for the Amazing Jonathan for approximately 15 hours per week as head lighting technician and extra hours when the show brings in new props or any new rigging that has to be put up. There is no record evidence that Bowlin has worked for anyone other than the Employer and the Amazing Jonathan.

d. Michael "Trexx" Andrewshetsko

The record discloses that Andrewshetsko started working for the Employer over the New Year holiday, December 2007. He is the only technician for whom the Employer does not maintain an employee personnel file. He primarily operates the lights for the Employer on Saturday nights, but has worked as a DJ for the Employer on at least one occasion and operated the lights for special events sponsored by the Employer on at least two occasions.

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[4] The parties stipulated, and I find, that Chris Shell has not worked for the Employer for over a year – since January 2007 – and therefore will not be eligible to vote in an election directed herein unless circumstances have changed since the hearing vis-à-vis Shell's employment status with the Employer thereby making him eligible to vote pursuant to the formula set forth below.

The record also discloses that Andrewshetsko is a "lighting operator" for a company known as "Sexy Lites," and that Andrewshetsko operates the lighting for the Employer on Saturday nights and for another Las Vegas nightclub on other nights. The Employer has not entered into any contractual arrangement with Sexy Lites or with Andrewshetsko as a representative of Sexy Lites. The record does establish that the Employer pays Andrewshetsko $250 per night as a light operator. Andrewshetsko is paid more than the other technicians because he offered, through Sexy Lites, to develop new programs and different light shows. There is no written agreement memorializing this commitment, and the results are forthcoming. As is the case with the other light technicians, if the Employer wants certain lighting for an event or a promotion, or observes a lighting error, a member of the Employer's management team will instruct the lighting operator, including Andrewshetsko, how the lights should be adjusted, modified, or corrected.

e. Josh Wertsbaugh

Wertsbaugh was hired on about January 18, 2008, by Kelly Murphy, and worked as a lighting technician operating the lighting board every Friday night for the Employer at the Krave Nightclub, for which Wertsbaugh was paid $150 per night. The Employer maintains a personnel file for Wertsbaugh, but it consists solely of a single page, specifically, a W-9 form. Notwithstanding this dearth of documents in his personnel file, Wertsbaugh testified that he received an employee package to complete when he began work, which he did and returned to Palmer. The record shows that the Employer paid Wertsbaugh as an employee by check with standard deductions withheld.

Wertsbaugh was referred to as a technician, and he worked with Bowlin, Martinez, and Hanna at the Krave Nightclub. The record reflects that both Murphy and Palmer have directed Wertsbaugh in his work; there is no record evidence that Martinez or Hanna similarly directed his work. Towards the end of March 2008, Palmer informed Wertsbaugh that the Employer was converting to automated lights and that he did not need to work on Fridays, which Wertsbaugh understood as being the end of his employment with the Employer. However, in April, Wertsbaugh worked for the Employer as a technician for one of its special events called the "Fetish Party." The record suggests that Wertsbaugh was paid an hourly rate for his work on the "Fetish Party," but the rate is unclear. After the "Fetish Party," Wertsbaugh has worked full-time for the Amazing Jonathan five days per week, Friday through Tuesday, from 8:00 p.m. to 11:00 p.m.

B. Legal Analysis

1. The Technicians Are Employees Within the Meaning of Section 2(3) of the Act

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the United States Supreme Court found that the common-law agency test applies when determining whether an individual is an employee or an independent contractor. In *Roadway Package System*, 326 NLRB 842 (1998), and *Dial-A-*

Mattress, 326 NLRB 884 (1998), both of which involved delivery drivers, the Board reaffirmed that the common law test of agency determines an individual's status as an employee or independent contractor. This test, set forth in Restatement 2d of Agency § 220(2), sets forth a non-exhaustive list of ten factors to consider in determining independent contractor status:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

The Board cautioned that this list of factors is neither exhaustive nor exclusive, and that it will, in applying the common-law agency test, consider "*all* the incidents of the individual's relationship to the employing entity." *Roadway*, supra at 850. Applying this test, I conclude that the Employer's technicians are employees rather than independent contractors. More specifically, for the reasons described below, I find that the Employer exercises substantial control over the details of the technicians' work; the Employer exercises supervisory authority over the technicians; the Employer supplies the technicians' equipment and situs of work; the technicians do not have a significant degree of entrepreneurial control over their rate of compensation; the parties appear to have intended to create an employer-employee relationship; and the work performed by the technicians, particularly, the operation of lights, sound, and video productions, are an integral part of the Employer's business as a provider of entertainment services, as opposed to an incidental function that would typically be performed by an outside vendor.

a. The Employer's Degree of Control over Details of Work

The record establishes that the Employer exerts ultimate control over the details of the work performed by the technicians. In this regard, the Employer directs the technicians to change lighting colors or patterns; dictates whether video productions or lights will be used, or how the two techniques will be otherwise coordinated; determines whether equipment will be repaired and, if not, what equipment will be used. The record reflects little independence

among the technicians in the performance of their duties. Indeed, Wertsbaugh's position as the Friday night light operator was eliminated as a result of the Employer's sole discretion to utilize video projections in lieu of light designs.

b. The Employer's Supervision of the Technicians

As Murphy testified, the technicians are under the supervisory authority of a number of members of management, including Murphy, Palmer, Walkup, Pittman, and Cobb, one or more of whom are present at the nightclub while the technicians are working, and all of whom responsibly direct the technicians' work. Moreover, according to the New Hire Information Packet given to the technicians, they are subject to the Employer's progressive discipline policy, which culminates in termination for various offenses, including absenteeism, tardiness, or other behavior the Employer may deem inappropriate while the technician patronizes the nightclub. The New Hire Information Packet also indicates that technicians are subject to a 90-day probationary period; are governed by an employee handbook; are required to follow the Employer's rules and regulations, including safety policies, which may be changed, withdrawn, added or interpreted at any time by the Employer; are required to submit to searches and inspections of their personal property; and are required to undergo a physical examination.

c. Provision of Supplies, Instrumentalities, and Places of Work

All of the lighting, sound, and video equipment used by technicians is provided by the Employer. The only technician who uses his own tools is Hanna, and that only occurs when he is functioning in his "salaried" maintenance capacity. The lighting, sound, and video technicians are provided with state-of-the-art equipment, all of which are housed and used in the nightclub, where the technicians perform their duties.

d. Method of Compensation and Entrepreneurial Potential

The record does not show that the technicians have any significant degree of entrepreneurial control over their compensation. To the contrary, the record establishes that the technicians are hired at a fixed rate of $150 - $175 per night when performing their duties as light or sound and video technicians. There is also evidence that some of the technicians are paid an hourly rate for certain services such as repair and maintenance. To the extent that certain technicians have completed W-9 forms, which may indicate an intent to establish an independent contractor relationship, the record establishes that the Employer does not consistently give effect to these forms. For example, although Wertsbaugh completed a W-9 form, the Employer continually withholds deductions from his checks. Conversely, although Bowlin completed a W-4 form, the Employer continually fails to withhold deductions from his checks.

The only exception to the fixed rate of $150 - $175 is the rate paid to Andrewshetsko, who receives a flat rate of $250 per night as the Employer's light operator on Saturday evenings. The ostensible reason for this higher rate of pay is that Andrewshetsko and/or Sexy Lites would write new programs for the lighting board, reconfigure some of the lights in the

grid work, and provide other value added services. The record, however, fails to establish that Andrewshetsko has any greater entrepreneurial potential than any of the other technicians, who likewise may seek higher pay rates based on their particular skills. Moreover, contrary to the Employer's assertions in its brief, the record does not support the conclusion that Andrewshetsko is a co-owner or officer of Sexy Lites or that he has provided the Employer with additional lighting operators. Rather, the record shows that Andrewshetsko submits his hours to the Employer by e-mail in the same manner as other technicians, the Employer pays Andrewshetsko (not Sexy Lites) directly by check, and the Employer retains complete control over lighting ideas and designs when Andrewshetsko performs his duties on Saturdays and at all other promotions or events at which he may work.

In its brief, the Employer also asserts that Hanna has a full time job with another employer. The record cited by the Employer, however, does not support this assertion. To the contrary, the cited testimony indicates that Hanna has worked for the Amazing Jonathan three or four times since March 2008, and that he has in the past worked for other employers while at the same time working for the Employer. Moreover, at the hearing, the Employer argued that Hanna and other technicians "also work for the Amazing Jonathan, and if they are on call, and they are working for the Amazing Jonathan, then they are not available for [the Employer.]" The record, however, is devoid of any evidence that Hanna or any other technician was "on call," or was otherwise ever unavailable to work for the Employer when scheduled. Notably, the Employer did not assert this argument in its post-hearing brief.

The Employer also asserts in its brief that Bowlin has been paid as an independent contractor; does not receive any employee benefits; does not have a set work schedule; has other full-time employment which makes it impossible to perform services for the Employer; and is only used on an "on-call" basis, i.e., used only "as needed." The record evidence does not support these assertions. Although Bowlin is paid by check without deductions or withholdings, the record reveals that Bowlin completed a W-4 form for the Employer, not a W-9 form. The record also reveals that Bowlin completed an employee package, just like other technicians. The record also demonstrates that Bowlin regularly works as the Employer's sound technician on Saturday nights, and has worked between five and ten special events at the Employer's request. Finally, the record is devoid of any evidence that Bowling has full-time employment elsewhere, or that he is otherwise unable to perform services for the Employer.

e. Parties' Intent

The parties' intent with respect to their relationship is reflected in the New Hire Information Packet. More specifically, this packet contains numerous documents that reflect an intent to establish an employer-employee relationship, including, for example, a disclaimer and acknowledgment signed by the technicians which states: "Once I have passed the 90-day probation period, I will be considered an official employee of [the Employer]." Similarly, the packet contains a confidentiality agreement signed by the technicians which recites as consideration the technicians' "employment" with the Employer. The packet also makes clear that technicians are also subject to a progressive disciplinary procedure and are subject to the Employer's rules and regulations, including those contained in its employee handbook.

f. Whether the Hired Party is Performing an Integral Part of Business; the level of Skill Required; the Duration of Relationship; and Whether the Principle Performs the Same Work

As to the remaining common-law factors, I note that the Employer is in the entertainment business, and that the operation of lights, sound, and video productions are an integral part of that business, as opposed to an incidental function that would typically be performed by an outside vendor. Further, the record indicates that the technicians are, for the most part, performing either unskilled work or work that can be learned by on the job training. The record also indicates that the technicians are hired for an indefinite period. Finally, while the record does not reflect that the Employer's managers perform the same work as the technicians on any regular basis, there is evidence that, on occasion, they have turned on the light or sound boards or operated the video equipment.

In light of all of these factors, I conclude that the technicians are employees within the meaning of Section 2(3) of the Act, and not independent contractors.

2. The Technicians Share a Sufficient Community of Interest Separate and Apart from Other Employees

Having determined that the technicians are employees within the meaning of Section 2(3) of the Act, I now turn to the issue of whether the technicians share a sufficient community of interest to constitute an appropriate unit.

Section 9(b) of the Act provides that "the Board shall decide in each case whether, in order to assure to employees fullest freedom in exercising the rights guaranteed by the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, or subdivision thereof." A union is not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons,* 141 LRB 1103 (1962). In *Pacemaker Mobile Homes,* 194 NRLB 742, 743 (1971), the Board explained that when no other labor organization is seeking a unit larger or smaller than the unit requested by the petitioner, the sole issue to be determined is whether the unit requested by the petitioner is an appropriate unit. In addition, although the Board will "consider a petitioner's desires relevant," this will "not, however, obviate the need to show [a sufficient] community of interest on the facts of the specific case." *Airco, Inc.,* 372 NLRB 348 n.1 (1984).

The Board has historically found separate departmental units appropriate when there is no showing of a more comprehensive bargaining history, no other labor organization seeks to represent the same employees in a more comprehensive unit, and where it is established that the petitioned-for employees have a community of interest separate and apart from other employees. *Macy's West, Inc.,* 327 NLRB 1222, 1228 (1999); *American Cyanamid Co.,* 131 NLRB 909 (1961). In determining whether the requisite community of interest among employees exists, the Board looks to such factors as a common interest in wages, hours, and other working conditions; common supervision; degrees of skill and common functions;

frequency of contact and interchange with other employees; and functional integration. *Franklin Mint Corp.,* 254 NLRB 714, 716 (1981). Moreover, the Board will find a limited group of employees to be an appropriate unit, despite some degree of functional integration with a broader group, where the employees are separately supervised, possess skills unique to their classification, receive the highest hourly wage, are assigned work in a different manner, and where transfers are infrequent. See *Ore-Ida Foods,* 313 NLRB 1016, 1019 n.3 (1994).

In this case, the evidence establishes that the technicians share a common interest in wages, hours, and other working conditions. Specifically, the technicians are paid a flat rate for working the nightclub on Friday and Saturday evenings, or special events on other days of the week, as light, sound, and video technicians. In addition, they are paid an hourly rate for other duties performed. They are required to wear the same "uniform," that is, black pants and shirts. They are also subject to the same rules, regulations, and policies of the Employer, and are subject to the same progressive disciplinary procedure for attendance, tardiness, and other rule infractions. The technicians also share common supervision insofar as they report to whichever member of management is present at the Krave nightclub at the time – Murphy, Palmer, Walkup, or Pittman. The technicians often work side by side, one operating the light board and another operating the sound board, or work together in setting up for a production. There is no evidence that any other employees, or group of employees, operate, maintain, or handle the equipment that the technicians operate and maintain. Finally, the technicians have frequent contact and interchange with each other, as evidenced by their filling in for one another on their own initiative. In these circumstances, I find that the technicians share a sufficient community of interest so as to constitute an appropriate unit for purposes of collective-bargaining.

3. Supervisory or Managerial Status of Hanna

The Employer maintains that Hanna is the only person in charge of the Employer's equipment, including maintenance, purchasing, and repair, and is viewed by the Employer as the "Lead Tech." Accordingly, the Employer argues that it heavily relies upon Hanna, who is and identified with management and, therefore, Hanna should be excluded from the any unit found to be appropriate.

Supervisors are specifically excluded from the Act's definition of "employee" by Section 2(11) of the Act which defines a "supervisor" as:

> any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Under this definition, individuals are statutory supervisors if: (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely

routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer." *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 713, (2001). Supervisory status may be shown if the asserted supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory status is on the party asserting it which, in this case, is the Employer. Id. at 711-712.

The Board avoids construing supervisory status too broadly because a supervisory finding removes an individual from the Act's protection. *Chevron Shipping Co.,* 317 NLRB 379, 381 (1995). Thus, the Board distinguishes two classes of workers: true supervisors vested with "genuine management prerogatives," and employees such as "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The dividing line between these two classes of workers, for purposes of Section 2(11), is whether the putative supervisor exercises "genuine management prerogatives." Those prerogatives are specifically identified as the 12 supervisory functions listed in Section 2(11) of the Act. If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, Section 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment. *Oakwood Healthcare Inc.*, 348 NLRB No. 37, at 3 (2006); *Croft Metals, Inc.,* 348 NLRB No. 38 (2006); *Golden Crest Healthcare Center,* 348 NLRB No. 39 (2006).

The Board will not normally find supervisory status when the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority. *Kentucky River,* 532 U.S. at 711 (2001); *Franklin Hospital Medical Center,* 337 NLRB at 829; *Crittenton Hospital,* 328 NLRB 879, 882 (1999). However, the Board will confer supervisory status on individuals who possess the authority to "assign," which encompasses the designation of an employee to a certain department or shift, as long as the act of assigning is performed by the asserted supervisor using "independent judgment." *Oakwood*, 348 NLRB No. 37, slip op. at 4, 10. For one or more of the supervisory indicia to be exercised using "independent judgment," the authority must be "independent," meaning "free of the control of others," and it must "involve a judgment," which requires "forming an opinion or evaluation by discerning and comparing data," and the judgment must involve a "degree of discretion that rises above the 'routine or clerical.'" *Id.* slip op. at 8.

In addition, although not dispositive of the issue of supervisory status, non-statutory indicia can be used as background evidence on the question of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). As the Board has explained, nonstatutory indications of supervisory status, or "secondary indicia," such as higher pay, supervisor to non-supervisor ratios, or attendance at supervisor meetings, may bolster evidence demonstrating that individuals otherwise exercise one of the powers listed in the statute. See *Marian Manor for the Aged and Infirm*, 333 NLRB 1084 (2001); cf. *Ken-Crest Services*, 335 NLRB 777 (2001).

The record does not support the Employer's contention that Hanna is a statutory supervisor. There is no question that he does not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend any such action. Likewise, the record does not support a conclusion that Hanna responsibly directs other employees in their work. At most, Hanna occasionally offers advice to other technicians on how to operate equipment or assist them in working out a problem. It is incontrovertible, however, that his advice or problem-solving had no effect on other employees' terms and conditions of employment. See *Armstrong Machine Co.*, 343 NLRB 1149, 1149-50 (2004) (no supervisory status for the most senior employees in the department who, among other things, answered questions concerning work). Under these circumstances, Hanna is not a supervisor within the meaning of Section 2(11) of the Act and, therefore, should be included in the unit found appropriate herein.

4. Eligibility Formula for Purposes of Voting

The technicians at issue in this case are similar to stagehands who are often on-call employees, and the irregular pattern of their employment in the entertainment industry has prompted the Board to fashion a specific formula for those who have a reasonable expectancy of further employment with the employer. Thus, in *Medion, Inc.*, 200 NLRB 1013 (1972), employees who were employed on at least two productions for a minimum of five working days in the year preceding the date of the decision were deemed eligible to vote. See also *Julliard School*, 208 NLRB 153 (1974). In *American Zoetrope Productions*, 207 NLRB 621 (1973), the Board eliminated the 5-day requirement on a showing that most unit jobs at that employer lasted only one or two days. The Board has maintained a flexible approach to developing formulas suited to the conditions in different areas of the entertainment industry. See *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004); see also *DIC Entertainment, L.P.*, 328 NLRB 660 (1999) (storyboard supervisors in television animation industry).

Based on my review of the limited payroll records provided by the Employer at hearing, and the record as a whole, I conclude that the Employer's technicians have a reasonable expectancy of further employment, even where, as in the case of Wertsbaugh, the technician's regular gig with the Employer has been eliminated. Accordingly, I conclude that the eligibility formula best suited to the working conditions of the technicians in the particular area of the entertainment industry of which the Employer is a part shall be those employees who were employed as lighting, sound and/or video technicians on at least two productions for a minimum of one (1) working day each in the year preceding the date of this Decision and are eligible to vote.

In conclusion, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All lighting, sound, and video technicians employed by the Employer at its facility known as the Krave Nightclub, located within the Miracle Mile Shops at Planet Hollywood, 3663 Las Vegas Boulevard South, Las Vegas, Nevada,

but excluding all other employees, office-clerical employees, guards and supervisors as defined in the Act.

There are approximately 5 employees in the unit found appropriate herein.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above unit at a time and place that will be set forth in the notice of election that will issue soon, subject to the Board's Rules and Regulations.[5] The employees who are eligible to vote are those in the unit who were employed as lighting, sound and/or video technicians on at least two productions for a minimum of one (1) working day each in the year immediately preceding the date of issuance of this Decision and Direction of Election. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the unit are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

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

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and

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[5] Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. The notices shall remain posted until the end of the election. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays. A party shall be estopped from objecting to non-posting of notices if it is responsible for the non-posting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within **seven (7) days** of the date of this Decision, the Employer file with the undersigned, two (2) copies of election eligibility lists containing the full names and addresses of all eligible voters. The undersigned will make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, the undersigned must receive the list at the National Labor Relations Board Resident Office, 600 Las Vegas Boulevard, S., Suite 400, Las Vegas, Nevada, 89101-6637, on or before **June 19, 2008**. No extension of time to file this list shall be granted except in extraordinary circumstances. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570. This request must be received by the Board in Washington, DC, by the close of business at 5:00 p.m. (EDT) on June 26, 2008**. The request may be filed electronically through E-Gov on the Board's website, www.nlrb.gov,[6] but may **not** be filed by facsimile.

Dated at Phoenix, Arizona, this 12th day of June 2008.

/s/Cornele A. Overstreet
Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28

[6] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**. To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, www.nlrb.gov.