

Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel & Harvey's Inn and Hotel-Motel Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Cases 32-CA-83, 32-CA-90, and 32-CA-114 (formerly Cases 20-CA-11352, 20-CA-11540, and 20-CA-12044)

January 9, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND
TRUESDALE

On May 9, 1977, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed limited cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing written disciplinary warnings to employee Michael Brown because of his membership in or activities on behalf of the Union and because he filed charges with the National Labor Relations Board. The Administrative Law Judge further found that Respondent did not violate Section 8(a)(1) and (3) of the Act by interrogating, threatening to harass and discharge, issuing disciplinary warnings, and eventually discharging employee John Graham. The General Counsel filed exceptions to the Administrative Law Judge's failure to find that Respondent's interrogation, written warnings, threat of discharge and harassment of Graham, and his eventual discharge, pursuant to the threat, violated the Act. We find merit to the General Counsel's exceptions.

Graham was hired as a dealer by Respondent in 1967 and had an exemplary performance record for 9-1/2 years. From the beginning of his employment to March 1976, Graham was considered a skillful and valuable employee by Respondent. He consis-

tently received the highest rate of pay for the dealer classification, and he was granted a pay raise each time other dealers were given pay raises. New employees were regularly assigned to him for training, and Respondent's supervisors and Graham's fellow employees testified that his work performance and attitude improved during the year 1976.

In December 1975, Graham began actively to solicit support for the Charging Party, Local 86, and Respondent's attitude toward Graham changed radically. The first manifestation of Respondent's changed attitude took place on March 8, 1976,¹ when Graham received a written consultation (reprimand), the first received by Graham in 9-1/2 years of employment, for his failure to use a roulette marker. Although Graham did not use the marker consistently, many other dealers also failed to use the marker, and although this practice was well known to Respondent, it continued subsequent to Graham's consultation, and it appears that Graham was the only dealer who received such a consultation.²

On March 13, Graham notified Respondent of his appointment as Local 86's "shop steward," or organizer for all of Respondent's gaming employees. Within hours of this notification, according to the credited testimony, Supervisor Phillips told Graham that he had "a lot of balls for getting involved in the Union activity," and "they were going to harass and run (Graham) out the front door." This termination threat obviously violated Section 8(a)(1) and indicates Respondent's animosity with respect to Graham's organizing efforts.³ Approximately 1 month later, in mid-April, Supervisors Miller and Uptain told employee Altshuler that Graham "was stupid for getting involved in union activities." The Administrative Law Judge's characterization of the remark as "a perfectly expectable epithet under such circumstances" demonstrated once again, despite any "expectability," Respondent's union animus and its antipathy towards Graham's role in the organizing campaign.

The Administrative Law Judge found that in mid-April Supervisor Miller interrogated Graham, in the presence of Altshuler, concerning the progress of the union campaign. However, the Administrative Law Judge found no violation because it was an "isolated utterance devoid of coercive force." In view of the intensity of Respondent's union animus as previously set forth, the Administrative Law Judge's conclusions in this regard are clearly unjustified. Accord-

and Graham dissolved into "mutually understood humor" and was in keeping with "the hip manner in which dialogue is often exchanged at the casino." The record, however, does not support the Administrative Law Judge's holding. Graham credibly testified that Phillips' remarks were not made in a joking tone and that he did not consider the threat of termination to be a joking matter. Accordingly, we find that these remarks constitute a clear violation of Sec. 8(a)(1).

¹ All dates hereinafter refer to 1976.

² This consultation was not alleged as a violation of the Act and is considered only as an indication of Respondent's union animus.

³ The Administrative Law Judge found that these remarks by Supervisor Cady Phillips to Graham did not constitute a threat within the meaning of Sec. 8(a)(1). In so concluding, the Administrative Law Judge relied in large part upon his constituent findings that the conversation between Phillips

ingly, we find Respondent further violated Section 8(a)(1) by unlawfully interrogating Graham.

It is against this backdrop of unfair labor practices, expressed union animus, and the unlawful threat to discharge Graham that Respondent's subsequent criticism of Graham and his eventual discharge must be considered. On April 12, Graham received his second consultation, which stated that Graham shuffled a deck of cards only once instead of the required three times, improperly collected a bet, and violated Respondent's no-solicitation rule. With respect to the alleged improper collecting of a bet, the Administrative Law Judge found that Respondent was simply wrong and that no impropriety occurred. The alleged violation of the no-solicitation rule highlights the pretextual nature of the consultation. Graham distributed wedding invitations to several other employees. However, Respondent's witnesses admitted that such conduct is permissible and occurs on a daily basis. Apparently recognizing this inconsistency, Respondent shifted its defense at the hearing and contended that Graham did not obtain prior supervisory approval before passing out the wedding invitations. The pretextual quality of this contention is plain from the record's disclosure that such activities were conducted without prior supervisory approval, and the consultation said nothing about any lack of approval. Indeed, the Administrative Law Judge recognized that the April 12 and March 8 consultations were the results of inconsistent applications with respect to Graham. The foregoing facts compel a finding that the April 12 consultation was discriminatorily motivated and violative of Section 8(a)(3) and (1), and we so find.

On June 21, Respondent denied Graham a routine, across-the-board increase. This was the first time Graham was denied such a raise during his 10 years of employment with Respondent. Respondent's asserted reason for the denial of the pay raise was Graham's two consultations. As previously set forth, the March consultation, concerning the failure consistently to use the roulette marker, was at variance with Respondent's treatment of other employees. The April consultation, which the Administrative Law Judge found demonstrated an inconsistency of application with respect to criticizing Graham, was a patent violation of the Act. Thus, the refusal to grant the wage increase was based on invalid and unlawful grounds and is discriminatory. The conclusion that Respondent utilized this incident to punish Graham further for his organizational activities is underscored by the fact that Graham received a written consultation because of his failure to receive a pay

raise. Therefore, the denial of the pay raise was additionally violative of Section 8(a)(3) of the Act.

On September 18, Graham observed an error by another dealer in paying a craps bet and, consistent with Respondent's rules, brought the matter to the dealer's attention. Supervisor Miller then told Graham to "shut up and pay attention to the game." Miller then reassigned Graham whereupon, according to Graham, he said to Miller, "Why don't you get off my back and quit harassing me?" As a result of this incident, Graham received a consultation for "inattentiveness." Shortly thereafter, Vice President Morgan learned of this last consultation and inquired as to the number of consultations which Graham had received. When Morgan learned of the number, he stated, "Well, that seems to be enough. Let's get rid of him." Graham was then summarily discharged.

The Administrative Law Judge found that the discharge was based on the consultations and was therefore lawful. He apparently recognized the inadequacy of the consultations, the lack of investigation of the September 18 incident, the evidence of disparate treatment, and the arbitrariness of Respondent's conduct toward Graham, for he states that the decision to discharge Graham was capricious, but not unlawful in view of the lack of a sufficient degree of union animus.⁴

We find that the flagrantly unlawful acts committed by Respondent, coupled with the events leading to Graham's termination, compel us to disagree with the Administrative Law Judge's finding that the discharge was lawful. As noted previously, the Administrative Law Judge found and we agree that the consultations given to employee Brown violated Section 8(a)(1), (3), and (4). We also found that Respondent unlawfully interrogated and threatened to discharge Graham because of his union activity, and on several occasions expressed its hostility towards the Union. Finally, the consultations upon which the discharge is allegedly based have also been found to be discriminatorily motivated.

In sum, it is clear from the record that Respondent interrogated and threatened to discharge Graham for engaging in union activities, did in fact discharge him, and was discriminatorily motivated in doing so. The asserted reasons advanced by Respondent, to wit, the consultations, have been demonstrated to be based on unlawful considerations. Therefore, we find that Respondent discriminated against Graham in violation of Section 8(a)(3) and (1) by issuing written consultations, denying him a wage increase, and discharging him. We also find Respondent violated Section 8(a)(1) by threatening Graham with dis-

⁴ It is noted that, although Local 86's campaign had little momentum by September 18, Graham continued openly to advocate union representation and contacted the Teamsters after the Local 86 campaign faltered.

charge and by interrogating him with respect to union activities.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the unfair labor practices committed by Respondent were of a character which goes to the heart of the Act, we shall also order Respondent to cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.

We have found that Respondent discriminated against and discharged employee John Graham because he engaged in protected concerted activities. Accordingly, we shall order that he be offered immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. We shall also order that Respondent make employee John Graham whole for any loss of pay suffered because of Respondent's unlawful failure to grant him a pay increase on June 13, 1976, and by his subsequent unlawful discharge. Backpay shall be based on the loss of earnings suffered from the date of the failure to grant the increase and the date of the unlawful discharge to the date of Respondent's offer of reinstatement. The backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁵

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel & Harvey's Inn, Stateline, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing disciplinary warnings because of employees' membership in, or activities on behalf of, Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, or any other union, or because they engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or because they have filed charges with the National Labor Relations Board.

(b) Threatening to fire employees for being involved in union activities.

(c) Interrogating employees for being involved in union activities.

(d) Failing to grant employees pay increases because of their involvement in union activities.

(e) Discharging employees for being involved in union activities.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Offer to reinstate employee John Graham to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make whole employee John Graham for losses he may have suffered by reasons of Respondent's unlawful failure to grant him a pay increase on June 13, 1976, and because of his subsequent unlawful discharge on September 18, 1976.

(c) Remove all record of employee consultations given John Graham on April 12, June 13, and September 18, 1976.

(d) Remove all record of employee consultations given Michael Brown on May 26 and June 11, 1976.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Stateline, Nevada, facility copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT issue disciplinary warnings because of employees' membership in, or activities on behalf of, Hotel-Motel-Restaurant Employees & Bartenders Union Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, or any other union, or because they engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or because they have filed charges with the National Labor Relations Board.

WE WILL NOT threaten to fire or harass employees for being involved in union activities.

WE WILL NOT interrogate employees for being involved in union activities.

WE WILL NOT fail to grant employees pay increases because of their involvement in union activities.

WE WILL NOT discharge employees for being involved in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer to reinstate employee John Graham to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make whole employee John Graham for losses he may have suffered, plus interest, by reason of Respondent's unlawful failure to grant him a pay increase on June 13, 1977, and because of his unlawful discharge on September 18, 1976.

WE WILL remove all records of employee consultations given John Graham on April 12, June 13, and September 18, 1976.

WE WILL remove all record of employee consultations given Michael Brown on May 26 and June 11, 1976.

HARVEY'S WAGON
WHEEL, INC., D/B/A
HARVEY'S RESORT HOTEL
& HARVEY'S INN

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: These cases were heard at South Lake Tahoe, California, during February and March 1977, cases¹ on charges filed or amended over the timespan² April 23 to October 18, and complaints (one consolidated) issued August 31 and November 30, alleging that Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel & Harvey's Inn, called Respondent, violated Section 8(a)(1), (3), and (4) of the Act by unlawfully motivated threats, interrogation, issuance of written disciplinary warnings, and denial of a pay raise to John Graham, occurring over inclusive dates March 13 to September 18, and by discharging Graham on September 18, all because of employees' membership in, or activities on behalf of, Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, called the Union, or because they engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

Upon the entire record, my observation of the witnesses, and consideration of briefs filed by General Counsel and Respondent, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSIONS
OF LAW

John Graham was formerly employed in Respondent's gaming department as a dealer; Michael Brown is currently employed in the Pancake Parlour of the food operations department as an assistant fry cook.³ Each department is a separate operating entity with common managerial control appearing first at the level of corporate executive vice president and general manager. Descending supervisory hierarchy in gaming is Jack Morgan, vice president of casino operations, casino manager, club managers, games shift managers ("number one men"), assistant games shift managers ("number two men"), pit supervisors ("number three men"),⁴ and floormen; that for the Pancake Parlour is Dominic Tanzi, food and beverage director, Fred Wolter, executive chef, Paul Amato, sous chef, Lawrence Orosco, Pancake Parlour chef and other designated persons in charge of shifts. On March 19 Decision and Direction of Election issued in Case 20-RC-13266 finding a petitioned-for unit of certain bingo and slot machine employees inappropriate. The Union (Petitioner there) was granted time to submit a showing of interest in the

¹ Howard Lawrence, Reno, Nevada, entered a limited appearance on behalf of the Charging Party only to move for a certain protective order.

² All dates and named months hereafter are in 1976, unless indicated otherwise.

³ Respondent corporation is engaged in the operation of a resort hotel and casino at Stateline, Nevada, annually deriving gross revenue in excess of \$500,000, and annually purchasing goods and materials valued in excess of \$50,000 which are received from suppliers located outside Nevada. I find that Respondent is an employer within the meaning of Sec. 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Sec. 2(5). Respondent's contention that jurisdiction over it should be declined on constitutional grounds is rejected. *Harrak's Club*, 150 NLRB 1702 (1965), *enfd.* 362 F.2d 425 (C.A. 9, 1966); *Primadonna Hotel, Inc., d/b/a Primadonna Club*, 165 NLRB 1111 (1967).

⁴ By custom intermediate (numbered) gaming supervisors rotate shifts on a 3- or 4-month cycle.

radically larger unit of all gaming casino employees found to be appropriate. On May 7 the Union's requested withdrawal of this petition was approved. Before and during pendency of this representation proceeding, Graham had manifested support for unionization by discussing with selectively chosen dealer-colleagues the benefits that could be anticipated. On March 13, spurred by a written employee consultation he believed unwarranted,⁵ Graham presented Games Shift Manager (or acting Club Manager) James Carr written notice of his appointment as union "shop steward in the Games Department."⁶ He testified that within several hours of this event Floorman Cady Phillips (who often filled in as Pit Supervisor while graveyard operations "condense[d] down" from the busier swing shift) remarked that Graham had "a lot of balls for getting involved in the Union activity" and "they were going to harass and run me right out the front door." Phillips denied making these utterances, recalling only innocuous conversation with Graham after "hear[ing]" of his designation as shop steward. Both participants agree that the remarks culminated jocularly. In the several months following, Graham conversed more openly and widely with dealers in heightened efforts to enlist their support for the cause of unionization. The particular labor organization he espoused was the Union until early August and the Teamsters thereafter. Michael Brown had commenced union activities in early 1976 by unobtrusively passing union literature and solicitation of food employees' signatures to authorization cards. Following return from 7-week medical leave in late April he continued this activity, advising Orosco in the process on May 1 that he was functioning as a "shop steward" for the Union. Orosco answered this by drawing Brown's attention to "what the no-solicitation policy says."

Graham was first employed by Respondent during 1967 and functioned in successively varied roles as a three-game dealer thereafter; Brown's capacity was preceded by several lesser classifications held in the food department following hire in 1975. Employee consultations were rendered these two employees as follows:⁷

⁵ At material times Respondent utilized employee consultation forms to counsel, advise, or reprimand employees. The technique contemplated signatures of the administering supervisor(s), entry of an employee's written response (if desired), a stated time in which to correct claimed deficiency or infraction (or in lieu of this facet a stated potential consequence) and procedures to circulate and file such a document upon issuance.

⁶ A nonconfidential statement of record described Respondent and the Union as having had a long bargaining relationship that was terminated in 1975 through action that led to separate, pending NLRB litigation on the primary issue of whether Respondent acted lawfully in such regard. The bargaining relationship so described had covered only food and beverage employees, the gaming department never having been organized by any union.

⁷ Those dated March 8 and July 1 are not the subject of particular complaint allegations and are instead seen only as background to primary facts. The heading "supervisor" refers to the person chiefly responsible for the employee consultation being given, but does not connote that others may not have shared in its formulation or been present at its delivery.

⁸ As to passing a paper to John Altshuler at the roulette wheel, Graham asserted that this was not untoward and was an act frequently engaged in by other gaming personnel in similar manner.

⁹ Events surrounding this employee consultation led to Graham's discharge before completion of the very shift. His version is that, upon calling attention of codealer Roy Tester to an error in paying a craps bet, Floorman Dewey Miller rushed up to the table and abusively told Graham

<u>Name</u>	<u>Date</u>	<u>Supvr.</u>	<u>Subject</u>
Graham	3/8	Fletcher	refusal to use roulette marker
Graham	4/12	Fletcher	improper collection of bet while dealing 21; shuffling cards only once while dealing 21; passing unknown literature while dealing in violation of no-solicitation policy
Brown	5/26	Kinney	presence in prohibited area and objectionable writing in a black book while on duty
Brown	6/11	Anato	loitering
Graham	6/13	Fletcher	denial of pay raise
Brown	7/1	Kinney	violation of no-solicitation policy
Graham	9/18	Pedersen	inattentiveness

Respecting use of the roulette marker (puck), Graham conceded only to intermittent forgetfulness while the game was dull from light or repetitive betting. He reconstructed the episode on which arguing with a player was based, describing it as one in which the reporting monitor (sky/security personnel) was simply in error. Graham testified that a single shuffle while dealing blackjack either did not occur or was reasonably occasioned by immediate circumstance of card handling, that on April 11 and 12 he had committed no impropriety,⁸ that he was fully deserving of a pay raise in June, and that an episode occurring early on his graveyard shift of September 18 was explainable.⁹ Brown testified regarding his employee consultations that the first arose only upon his perusing posted material at the main kitchen schedule board area while on a work break and that the other two were factually unfounded.¹⁰

Graham's termination evolved rapidly from circumstances of the employee consultation. It had transpired at

to shut his mouth and pay attention to the game. Graham recalled answering that he was and then being told by Miller to go directly to command pit 5. He did so, remarking to Miller as he passed by, "Why don't you get off my back and quit harassing me." Miller's version is that around 7 a.m. he had repeatedly observed Graham talking and instigating loud laughter at a craps table, causing him to approach and speak reprovingly to the three employees on the game. Miller recalled then hearing a "nasty, disrespectful" remark from Graham to the effect he was paying attention and upon this strove to send him to pit 5 for reassignment. Miller testified that while leaving the pit area Graham approached closely, stuck a finger an inch from Miller's face, and said, "Don't you give me any trouble or I'll just . . ." Miller reported the incident to Assistant Games Shift Manager David Pedersen (who actually recalled hearing of it from Phillips) and eventually participated in the employee consultation rendered shortly thereafter. Tester characterized Miller's initial approach as "no different than any other time," that Graham had replied in a "loud, gruff (but not completely out of line) voice" and he saw nothing further of the episode except Graham being at the pit stand used by Miller.

¹⁰ Brown's testimony reflected written comment he added to the first and second employee consultations as follows:

For May 26 — I was in fact checking the schedule not coping it on my lunch Break also I wanted to check the time & place of the Blood Bank — I also understand under Sec. 8 of the National Labor Relations Act I may, in fact, talk to my fellow Employ. 's during our break times in non-

an upstairs gaming office with Games Shift Manager Earl Murtaugh, Pedersen, and Miller facing Graham. Since Murtaugh was a personal friend of Graham's, Pedersen carried the conversation as chief employer spokesman. Adversaries Graham and Miller explained themselves and Graham testified this caused Pedersen to remark that Graham had "brought all this stuff on yourself with this situation [of the] Union solicitation crackdown policy that you got involved in."¹¹ Pedersen and Miller both deny such an utterance was made while Murtaugh cannot recall it. Murtaugh then presumed to conclude by stressing future obedience to supervisors and the employee consultation document was filled out. Shortly thereafter Morgan heard a full explanation of the incident from Miller and subsequently sought Murtaugh to ask how many prior employee consultations were shown in Graham's personnel record. Murtaugh checked, advised Morgan there were two others (exclusive of the pay raise denial) and later was directed by Morgan to discharge Graham immediately based on circumstances that he "could not allow anybody to talk to a supervisor the way John had talked to Mr. Miller." This was done before end of shift.

This case is necessarily evaluated as a continuum covering the first three quarters of 1976. Within that span Graham and Brown each at first surreptitiously rendered support to the general goal of unionizing their respective departments and then both by overt acts and charge filing gave Respondent ample grounds to understand their singularly plain allegiance. As Respondent was served with various charges, their employment continued for 6 months thereafter in Graham's case and indefinitely still in Brown's.¹² In that overall period of time, only occasional verbalisms have been advanced to flesh out General Counsel's contentions that unlawful motivation should be inferred in regard to several highlights of the employment relationships. Chronologically the first of these arose March 13 when Phillips (whose more innocuous version of

working areas. I may also in fact inquire them if they wish to join or not. Any denial of these rights could constitute an unfair labor practice to my understanding.

For June 11 — In terms of the above comment I believe I am being discriminated against — I have witnessed numerous visits to the P.C.P. By other cooks & they haven't been written up.

Respecting the third, it related to notice of a union meeting distributed shortly before the scheduled date by Brown, which he asserted was done strictly on nonworking time and in nonworking areas and which resulted in no employee contact reaching him while engaged in working time tasks within the Pancake Parlour kitchen comprising his work station.

¹¹ Miller had interjected the "finger-shaking" facet of the incident and Graham's seemingly menacing remark to him near the pit stand which, Pedersen credibly testified, was admitted by Graham to have been telling Miller not to give the former "any shit."

¹² Case 20-CA-11352 was filed April 23 and solely alleged 8(a)(1) conduct occurring toward Graham since about February 1. It was enlarged upon in a first amended charge dated May 3 by alleging unlawful termination of one John Gould and was finally amended August 20 to reiterate original matters and add that such conduct further conceptually violated Sec. 8(a)(3). Case 20-CA-12044 was filed as a separate charge on October 18 claiming Graham's September termination was unlawfully motivated by union activities and earlier charge filing on his behalf, all in violation of Sec. 8(a)(1), (3), and (4). Case 20-CA-11540 covers only Brown as originally filed June 3 because of alleged intimidation, threats, and demotion. This approach was refined August 20 in a first amended charge alleging interference and threats since about May because of his union activities and discrimination occurring early in June (a second amended

the point I discredit) taunted Graham about his just-disclosed role as shop steward.¹³ In the months following, insofar as Graham's case might be judged, the only notable matter advanced by General Counsel (expressly not as an allegedly independent violation) was an exchange of remarks between Miller and Floorman Keith Uptain as overheard by Altshuler in April. I credit the utterers in this regard over Altshuler, particularly to the extent that they voiced only apprehension concerning whether unionization would lead to strike-related loss of joint (with their wives) income. I do believe Altshuler's recollection is more reliable than denials on the point of whether Graham was alluded to as "stupid[ly]" being involved with the Union. Given the unconcealed personality conflict even then extant between Miller and Graham, this is a perfectly expectable epithet under such circumstances. However, standing alone or viewed in conjunction with the sweep of events within the casino over this timespan, the testimony established little of significance. Slurs, bombast, and jargonizing is a common genre of communication within this employment setting. Considering the comprehensive round-the-clock nature of gaming operations, little out of the ordinary has been shown.¹⁴ Graham was denied a pay raise in June, however, Respondent has related this to factors suggested from the very existence of earlier employee consultations. Although some testimony would suggest Graham had demonstrably improved in competence from April on, Altshuler (himself also temporarily denied a pay raise) described quite pointedly in a voluntarily rendered written evaluation that Graham was other than "considerate" to those he did not respect (a group which Altshuler further understood to include Miller). Respecting the underlying employee consultations of March-April, the context of their being issued is the utterly unpredictable manner in which supervisors view the swirl of activity on the gaming floor and react based on highly individualized factors of mood and moment. Under this rationale, the

charge dated August 30 corrected the operative date of this aspect) because of previous charge filing, all in claimed violation of Sec. 8(a)(1), (3), and (4).

¹³ I believe that Graham was alert early in this period to reaction among Respondent's managerial cadre and that he correctly recalled the essence of Phillips' remarks of March 13. However, noting the level of Phillips' supervisory status, Graham's seasoned length of employment, his personal friendship with the highly authoritative Murtaugh, the hip manner in which dialogue was often exchanged at the casino, and the mutually understood humor into which these remarks dissolved, I find it unrealistic to hold them as threat of termination within the meaning of consolidated complaint par. VI(a). I have a similar view of Miller's April utterance, credibly described by Graham and Altshuler to have been conversational inquiry at the employee cafeteria about the state of union recruitment and outlook toward an election. Miller's remarks (his denial of having made them is discredited) cannot be dissociated from further immediate comment showing Miller not unamenable to the prospect of unionization. Given the informal origin of this exchange and Graham's known role at the time, I do not feel that it constitutes interrogation as a matter of doctrine. An isolated utterance devoid of coercive force and only randomly quizzical does not in any event warrant remedial action, and I find for this reason that par. VI(b) is not established from the evidence.

¹⁴ Claimed steady assignment to dealing blackjack during April was not convincingly established and in any event would have no weight since Graham himself characterized it as a job task less likely to offer Respondent the opportunity for pretextual mischief than if he were on craps. A recollection of Uptain once having stood "toe-to-toe" barely warrants comment, while other miscellaneous mouthings bear too remotely on any informed evaluation of whether Graham was being singled out as an object of discriminatory conduct.

merits of such employee consultations are a standoff. While sheer inconsistency of application is present with respect to criticizing Graham respecting roulette puck usage, blackjack deck shuffling, and document passing (in regard to claimed arguing with a player, Respondent's monitoring apparatus was simply flawed), it is equally true that employees Altshuler and Bendinelli were shown to have been comparably reprimanded and a nexus between supervisory action in this regard and Graham's union activities is not shown.¹⁵

The import is that by September Respondent had equanimously abided Graham's role in a rather withering cause.¹⁶ On September 18 an episode of modest origin escalated into a formal employee consultation attended passively by Graham's personal friend Murtaugh in the process of an apparent disposition. The unexpected influence was Morgan; both as a matter of involvement and executive action. Pedersen relayed full scope of the incident, ostensibly as routine advice to a superior, and Morgan sought immediate confirmation from the reportedly threatened Miller. Morgan's reaction was swift and final. These closing dynamics are the key to Graham's case. If Respondent harbored a retaliatory intent all along, seizing upon it only when high official Morgan felt confident enough to so act, a patiently executed pretext discharge has been shown. If, on the other hand, Morgan acted harshly, particularly by the arbitrary guide of how many employee consultations were upon Graham's record, it is nonetheless an action that will survive this review.¹⁷ I choose the latter notion as controlling rationale for this branch of the case because insufficient proof exists to support the former. Graham's union activities had drastically paled as a threat to Respondent's presumed desire to avoid unionization of its casino, and a woefully inadequate quantum of evidence is present to say that as of September Respondent was gripped by such a degree of animus as to unlawfully discharge this long-service dealer. The fact that neither Pedersen nor Murtaugh saw fit to even think in Morgan's terms is noted as magnifying the sting of his decree.¹⁸ At the same time it makes General Counsel's burden of proof even more difficult to carry, absent some evidence that would connect Morgan to unlawful motivation. It simply does not exist. Morgan's failure to solicit a version from the

¹⁵ General Counsel vigorously argued that "disparate treatment" principles applied pervasively to the case. I limited the extent of evidence permitted on the point. *Even had few other employee consultations been rendered within the casino during material times*, I would not find the residual configuration of facts sufficient to overcome the more compelling explanation that Respondent's supervisors (noting that mild disciplinary action can emanate at any moment and from any level of the supervisory hierarchy) behave randomly if not arbitrarily. Respecting the allegedly violative pay raise denial, which I find not sufficiently supported from evidence as a whole, General Counsel did not in a pretrial *subpoena duces tecum* seek comparative wage records of casino employees.

¹⁶ The Union had vacated office premises in the immediate vicinity of Stateline in August, and little momentum with respect to any serious organizing drive among gaming employees was present thereafter.

¹⁷ Concededly one other employee has absorbed three employee consultations and remains working. Respondent's explanation of this situation, regardless of how distastefully patronizing it might sound, does not in the overall scheme of employment realities offend common understanding. I therefore note the disparate handling between Graham and dealer Charles Cranshaw, but cannot view it as a significant indicator of discrimination forbidden by Sec. 8(a)(3).

¹⁸ I totally discredit Graham's testimony that attributes a culpable

involved employee mirrors still further the capricious tilt of his decision. It has always been true that, regardless of how poor a reason for discharge is advanced for these proceedings, it shall prevail in the absence of substantial proof that a pretextually unlawful reason was at least in part influential. Cf. *Golden Nugget, Inc.*, 215 NLRB 50 (1974).

The only remaining matters for decision are whether written disciplinary warnings issued Michael Brown on May 26 and June 11 were discriminatorily grounded. Here substantially different influences are shown. Aside from the litigation backdrop associated with the food and beverage department, Brown had returned to work following extended leave only in late April. Almost immediately he appraised a direct supervisor of his stepped-up role with the Union. Assistant cook Dan Catanio testified without contradiction that in March Amato called union leaders crooks, plainly questioned Catanio if he was a member, and suggested (taken jokingly by the hearer) that he withdraw. More significantly, on or about May 21 Amato conversed with food employee Doug Russell, saying he should "loyal[ly]" serve Respondent, equating avoidance of union talk with a preferred attitude and cautioning against involvement with Brown who was "causing problems for himself, and everyone else in the kitchen." The employee consultation delivered Brown scant days later, unwarranted from the facts as to its primary thrust, and unsupported as to a secondary aspect of supposedly complaining coworkers, was patently an attempt by Amato (using Kinney as his heavy) to intimidate Brown out of his volunteer role.¹⁹ The second employee consultation was even more blatant. Associating it to conduct of Brown no different in kind or degree from what other employees were typically engaging in, Respondent's supervisors concocted a spurious employee consultation document in an attempt to effectively squelch Brown's continuing solicitation of fellow employees toward collective representation. In the process, both Wolter and Amato displayed ill-concealed disdain for Brown's involvement with the Union, amply demonstrating that they were influenced only by such considerations and not a genuine desire to maintain reasonable order.²⁰

Accordingly, I render as conclusions of law that Respondent, by issuing written disciplinary warnings to Michael

remark to Pedersen in the course of dialogue passing during the employee consultation on September 18. Appropriate denials on the point are more convincing and Graham's recollection in this regard seems contrived, suggestible, or both. Pedersen was dealing at the time with only an exasperating personal flare-up between this experienced dealer and a minor supervisor. The entire tone during his handling of the episode and the known surrounding circumstances offer no basis to believe he would even associate the matter to any facet of Respondent's policies toward union activism. Pedersen's explanation of separate discussion, one that may have caused confused recollection in Graham's mind, has an eminently truthful ring.

¹⁹ It is amply evident that employees randomly, and without unusual governance by mingling supervisors, spoke together while on duty, congregated at and around the main kitchen schedule board area, socialized briefly with food issue clerks, and solicited for miscellaneous causes.

²⁰ The conduct alleged in par. VI(c) of the consolidated complaint merges into that of par. IX (General Counsel's response to order for more definite statement characterizes these allegations as involving the "identical incident"). Utterances made at the time were disclaimed as a threat of termination, were at most rhetorical in nature, and serve primarily to illuminate the conscious prejudices under which Wolter and Amato were laboring. Because of similarity in remedy any explication addressed to par.

Brown because of his membership in or activities on behalf of the Union, or because he engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or because he filed charges with the National Labor Relations Board, has violated Section

VI(c) would be superfluous. On the operative findings that two employee consultations constituted discriminatory written disciplinary warnings see *Baptist Hospital, Inc.*, 223 NLRB 344 (1976); *The Hanna Building Corporation*, 223 NLRB 703 (1976); *Florida Steel Corporation*, 224 NLRB 45 (1976).

8(a)(1), (3), and (4) of the Act, but that Respondent has not violated the Act in any respect other than as specifically found.

[Recommended Order omitted from publication.]