

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO OFFICE

WYNN LAS VEGAS, LLC

and

Cases 28-CA-21073
28-CA-21197

CYNTHIA FIELDS, an Individual

and

28-CA-21205

TYNISIA BOONE, an Individual

and

28-CA-21363

TRANSPORT WORKERS UNION
OF AMERICA, AFL-CIO

Joel C. Schochet, Esq., for the General Counsel.

Gregory J. Kamer, Esq and *Bryan J. Cohen, Esq.*
of Las Vegas, NV, for the Respondent.

DECISION

Burton Litvack, Administrative Law Judge

Statement of the Case

The original and amended unfair labor practice charges in Case 28-CA-21073 were filed by Cynthia Fields, an Individual, on November 8 and December 27, 2006, respectively. The original, amended, and second amended unfair labor practice charges in Case 28-CA-21197 were filed by Fields on January 8, 17, and 27, 2007, respectively. The original and amended unfair labor practice charges in Case 28-CA-21205 were filed by Tynisia Boone, an Individual, on January 18 and March 28, 2007. The original and amended unfair labor practice charges in Case 28-CA-21363 were filed by Transport Workers Union of America on May 1 and July 2, 2007, respectively. After investigating each of the above-described unfair labor practice charges, on July 3, 2007, the Regional Director of Region 28 of the National Labor Relations Board, herein called the Board, issued a Second Consolidated Complaint, alleging that Wynn Las Vegas, LLC, herein called Respondent, engaged in acts and conduct violative of Section 8(a)(1), Section 8(a)(1) and (3), and Section 8(a)(1) and (4) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer, denying the commission of any of the alleged unfair labor practices. Pursuant to a notice of hearing, as scheduled, a trial was conducted before the above-named administrative law judge on July 30 through August 3, 2007 in Las Vegas, Nevada. During the course of the trial, all parties were afforded the right to examine and cross-examine witnesses, to offer into the record any relevant documentary

evidence, to orally argue points of law, and to file post-hearing briefs. Both Counsel for the General Counsel and Respondent's attorneys filed post-hearing briefs and each has been carefully considered. Accordingly, based upon the entire record herein,¹ including my observation of the testimonial demeanor of the several witnesses and the post-hearing briefs, I make the following:

Findings of Fact

I. Jurisdiction

At all material times herein, Respondent, a State of Nevada corporation, with an office and place of business located at 3145 Las Vegas Boulevard South, Las Vegas, Nevada, herein called Respondent's facility, has been engaged in the operation of a hotel and casino. During the 12-month period ending November 8, 2006, Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. Respondent admits that, at all times material herein, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Issues

The second consolidated complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act on October 30, 2006 by informing its employees that it would be futile for them to select a union as their bargaining representative, threatening its employees with diminution of their wages if they selected a union as their bargaining representative or engaged in concerted activities to compel Respondent to return to its previous policy regarding payment of tips, threatening its employees that strikes would be inevitable if they selected a union as their bargaining representative, threatening its employees with discharge if they selected a union as their bargaining representative, threatening its employees with unspecified reprisals if they selected a union as their bargaining representative, and disparaging a union as the bargaining representative of its employees in order to discourage them from supporting or assisting a union; on or about January 12, 2007, by promulgating, and since maintaining, a no-talking rule, prohibiting its employees from discussing non-work related issues, including Respondent's tip policy and newspaper articles regarding said policy, during work time; and, on or about January 13, 2007, by threatening its employees with unspecified reprisals because they engaged in concerted activities, including assisting other employees in the investigation of their unfair labor practice charges filed with the Board. The second consolidated complaint next alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by issuing its employee Mark Baldino an undeserved and unwarranted written warning. Finally, the second consolidated complaint alleges that

¹ In his post-hearing brief, counsel for the General Counsel moved to withdraw paragraph 5(d) of the second consolidated complaint, and said motion is granted. Also, while not moving to amend the second consolidated complaint, counsel for the General Counsel notes that the alleged unlawful "no cross-fire" policy set forth in paragraph 5(e) should "more correctly" be termed a no-talking rule. Finally, I note that, while paragraph 3 of the second consolidated complaint alleges three entities, including Transport Workers Union of America, AFL-CIO, as being labor organizations within the meaning of the Act, Respondent denied the allegations, and counsel for the General Counsel offered no proof as the labor organization status of any of the named entities. Accordingly, I shall recommend that paragraph 3 of the second consolidated complaint be dismissed.

Respondent engaged in acts and conduct violative of Section 8(a)(1) and (4) of the Act by initially suspending and then terminating its employee, Cynthia Fields because she filed unfair labor practice charges with and gave testimony to the Board.

5 III. The Alleged Unfair Labor Practices

Since its public opening in April 2005, Respondent, which is a wholly-owned subsidiary of Wynn Resorts, has operated an opulent hotel, casino, and resort complex in Las Vegas, Nevada and, for the quality of its service to its guests and customers, has received such awards
 10 as five diamonds from the American Automobile Association. Steven A. Wynn, for whom Respondent's facility is named, is the chairman of the board of directors of Wynn Resorts; Andrew Pascal is the president of Respondent; and William Westbrook, Jr. is its director of casino operations. The genesis of the dispute, which resulted in the alleged instant unfair labor
 15 practices, were Respondent's decisions, announced to its casino employees on August 21, 2006 and implemented ten days later on September 1, to revamp the casino's existing, convoluted "hierarchical" structure² and to create a new position, casino service team lead, and permit the individuals in said position to share in the table games dealers' tips pool.³ In order to alleviate the first problem, Respondent eliminated the positions of floor supervisor,⁴ pit manager, and table games vice president and created the positions of casino manager, assistant casino
 20 manager, and casino service team lead, herein called team lead. With regard to the latter position, which it created to replace the floor supervisor position, Respondent's intent was to involve the team leads, who would work "side by side" with the dealers, in providing the guests' overall "experience" in the casino, including making the team leads responsible for welcoming players, "the cleanliness of the environment," and cocktail service, while, at the same time,
 25 maintaining the other "typical" responsibilities of the eliminated floor supervisor position.⁵ Respondent's president Pascal testified that Respondent believed it necessary to include the 200 team leads in the dealers' tip pool for two reasons. While the team leads and the dealers both would be "in the line of service" to the casino guests, a significant pay disparity existed between the floor supervisor position and that of dealer, with the former being paid at \$60,000
 30 per year and the dealers earning approximately \$100,000 per year in combined wages and tips. Also, Respondent was experiencing difficulty in attracting enough qualified individuals to fill its

2 Prior to September 1, 2006, Respondent's table games dealers reported to floor
 35 supervisors, who, in turn, reported to pit managers, who, in turn, reported to assistant shift managers, who, in turn, reported to shift managers, who, in turn, reported to operations directors, who, in turn, reported to a vice president of table games.

3 Rather than each dealer retaining any tips received during a shift, all dealer tips are pooled and divided equally among all of Respondent's dealers depending upon the number of hours worked during a pay period. On September 1, 2006, Respondent employed 588 dealers.

4 According to the job description, Respondent's floor supervisors, who were responsible for from two to six tables in a pit area, were responsible for issuing credit markers to guests, settling minor disputes involving mistakes on a table game, documenting the required information for complimentary "comps," protecting Respondent's assets from cheating or scams, and ". . .
 45 continually monitor[ing] and direct[ing] dealers to maintain conformity of established policies and procedures." Prior to September 1, 2006, Respondent employed approximately 200 floor supervisors.

5 According to the job description for a team lead, said individual is assigned to a "dealing team," and the team lead and his dealers ". . . must strive [to] develop excellent long-term relationships with new and existing guests through the delivery of flawless guest services." In
 50 addition, the team lead remained responsible for ensuring that "... proper procedures are followed by dealers in games within unit" and protecting the "integrity" of the games.

existing floor supervisor positions and believed that increasing the compensation of the team lead position would lead to an increase in the number of applicants. Including team leads in the dealers' tips pool along with increasing their hourly rate of pay,⁶ according to Pascal, effectively increased the rate of pay for individuals in said position to \$95,000 per year.

5

On August 21, Steven Wynn himself held separate meetings with the casino employees on each shift and announced the above-described changes, and, after explaining Respondent's rationale for the changes, he opined that "this is the right thing to do;" that "it would make us more of a family" Nevertheless, according to Cynthia Fields, given Wynn's panegyric predictions to dealers at the time Respondent opened its facility regarding the vast amounts of money they might earn⁷ and his announcement that team leads and box persons would now be included in the tips pool and, after he pejoratively compared the dealers to "muggers and thieves" for stealing from customers and lying when calling in sick,⁸ the only point the dealers "heard" on September 21 was that Respondent would be taking tips money, or, in the vernacular of the dealers, tokes, which they had earned, from them, and many left the meetings "extremely upset" with Respondent and Wynn personally.⁹ Thereafter, according to Fields, the primary topics for discussion amongst the dealers were the dilution of their tips pool, their consequent loss of income, and what, if any, actions they could undertake, including filing lawsuits and organizing a union, to stop Respondent from implementing Wynn's announced changes. In fact, some dealers did directly challenge the legality of Respondent's actions by filing a lawsuit in Nevada District Court and by filing a complaint with the State of Nevada Labor Commission.

Respondent's management was well aware of its table games dealers' discontent resulting from their loss of income. According to Pascal, ". . . we obviously got some feedback that dealers were unhappy about the changes . . . and we heard that there were a number of different things that were being contemplated, one being for them to organize" Likewise, Wynn understood that there was "dealer consternation" caused by the changes, which Respondent had instituted on September 1, "and a whole bunch of conversation had started around the hotel that can only be characterized as wild exaggeration and falsehoods," regarding such subjects as the possible firing of dealers, the elimination of tips for dealers, and "we ought to have a union because a union can make them give everything back." In these circumstances and believing he ". . . had not done a good job of explaining . . . the importance of making the change for everybody's sake," Wynn convened meetings with Respondent's management and labor relations "persuader," Mark Garrity, with regard to stifling the dissension amongst the dealers, which, Wynn believed, was the machination of "a group of 25 or 30" rabid employees, and the decision was reached to hold meetings with the dealers to further explain the rationale

⁶ Unlike dealers, the team leads did not receive a full share of tips. Rather, each team lead was given a 40 percent of a share as his or her share of the tips pool. In addition to the team leads, Respondent also gave individuals in the box person position, the employees, who are responsible for controlling the money at the craps tables, a share in the tips pool at a rate of 20 percent of a share.

⁷ According to Fields, Wynn had assured the dealers they would earn so much money they would be taking it home "in wheelbarrows," and, in fact, they did earn "an awful lot of money"--more than their counterparts at any other Las Vegas casino.

⁸ Wynn failed to deny Fields' testimony with regard to what he said on August 21.

⁹ In fact, there is no dispute that including 200 team leads and approximately 40 box persons diminished the shares of the dealers in their tips pool. According to Andrew Pascal, including the team leads and the box persons ". . . added somewhere around 88 additional shares . . . into the pool of 600, resulting in a fifteen percent dilution"

for the September 1 changes and to afford the dealers an opportunity to ask questions and exchange ideas, which Wynn had not permitted on August 21, and vent their perceived frustrations. Wynn and Respondent's management also decided to limit the number of dealers at each meeting to no more than 15 to 18, a group small enough to enable everyone to sit around a conference table and engage in a "two-way exchange." During the management discussions, there was no thought that Wynn himself would attend the meetings; rather, the plan was that Pascal and Garrity would conduct them.

A. October 30, 2006 Meeting and Respondent's Alleged Unfair Labor Practices Attributed by Steven Wynn

The first of the meetings, between Respondent's management and its casino table games dealers, was scheduled for midday on October 30. According to Pascal and Wynn, inasmuch as the latter desired to learn the extent of the prevalent rumors and falsehoods and to assess the dealers' "level of . . . awareness of the truth versus the fiction," sometime during the morning that day, Wynn telephoned Pascal and surprisingly said he wanted to attend and participate in the initial meeting. The said meeting was held in a human resources training room; fifteen dealers, including Cynthia Fields, Tynisia Boone, Thomas Golly, Kanie Kastroll, Tramel McKenzie, Keith Gazda, and Ljilj Ana Cerovina, and several representatives of management, including Wynn, Pascal, Westbrook, Garrity, Arte Nathan, the then- senior vice president for employee relations, and Pat Mosca, a casino manager, attended. As they entered, the employees were instructed to sit in seats, arranged around a conference table located in the center of the room, and the management officials sat in chairs along the walls. The last person to enter the room was Steven Wynn, and he arrived, sporting a set of vampire teeth, which had been given to him by a grandchild as Halloween was the next night, in order to establish a light mood for the meeting. According to Fields, who filed a lawsuit against Steve Wynn and Respondent, seeking damages in the amount of \$300,000 as a result of Wynn's "extreme and outrageous" statements and behavior during this meeting, upon entering, Wynn, who suffers from a degenerative eye disease known as retinitis pigmentosa, announced that he wanted to sit amongst the dealers and ". . . came back around to my side of the table and grabbed my chair," causing the former to have to move to another chair, which she arranged so that she was the first dealer to Wynn's left. With regard to what then occurred, all witnesses agreed that Wynn made several opening remarks and then fielded questions and comments from the employees to which he replied.

Four dealers testified on behalf of the General Counsel. First, Fields testified that Wynn's opening speech lasted "approximately" 15 minutes and that he began, saying ". . . I know that everybody here is upset about the tip situation. He said that people are talking about it in the break room and he said it had to stop. . . . It is not going to change. I know several of you have hired attorneys and I have nine attorneys of my own and they all say this is not going to change. I have them all on my side. And he said he checked with the labor commissioner and he is correct." Continuing, Wynn said "we all need to become a family again" and mentioned he had spoken to union organizers in Macau. After he explained to them that Respondent's supervisors were earning less than the dealers, they thought his solution was a great idea. Then, Wynn¹⁰ changed the subject to that of union representation, saying "the only thing a union can do for you is allow you to strike," and mentioning the valet parking employees at the Golden Nugget Hotel, who had voted to select representation by a union-- ". . . all it did for them was allow them to strike and subsequently they all lost their jobs." He added, ". . . those

¹⁰ At various times while he spoke, Wynn would stand up, sit back down, and stand up again.

poor guys were represented by the union and now they all lost their jobs and are still trying to get their jobs back, but they were all permanently replaced.” Wynn next mentioned the dealers at the Frontier Hotel “. . . and said look what happened to them. . . . They went on a strike and they are still striking.” He added that those dealers’ strike was “definitely prolonged” and they
 5 “. . . didn’t get anything out of it other than being allowed to strike.” Wynn then took questions, and the first employee to speak was Thomas Golly. Referring to the team leads, “he said that [they] should have been handled differently . . . that there were many, many people . . . applying for the jobs and they could have given [them] a raise . . . paid from the casino.” He added that this would have made the team leads happy and that what really made them
 10 unhappy was the thought of having to work six days a week at the Wynn Hotel. When Golly finished, Wynn said to him, “don’t speak about thing[s] you know nothing about because you have no idea what you’re talking about,” and, at this point, he “. . . slammed his fist on the table and said ‘do not talk about anything that you know nothing about.’” Wynn added that Respondent was not being able to hire floor supervisors off the street and, pointing to Arte
 15 Nathan, “. . . said we are having trouble hiring supervisors, right.” Nathan replied, saying “. . . yes, quality supervisors.” Golly replied that he owned stock in Respondent, “so he does have an interest in how the casino does.

Next, according to Fields, she spoke, saying that she had left a supervisor job at the
 20 MGM Hotel after having accumulated five weeks vacation “and that if I had known . . . I was going to come here and I was going to have money taken away . . . for nothing I had done, I . . . possibly would not have made the change.” Continuing, she said that she was a single mother with a one and half year old son and that losing \$15,000 to \$20,000 a year was a “huge financial burden on myself.” Wynn replied, saying “. . . if \$15,000 to \$20,000 a year makes that big of a
 25 difference in your life then you are doing something wrong.” Fields responded, “. . . I probably would not have bought an additional property. I said this has really made a very big strain on me financially. . . . That’s when he got extremely angry and got into my face approximately three to five inches [away] and said, ‘if you think you have financial troubles now, if you picket, you will be automatically terminated.’”¹¹ According to Fields, as she was on the verge of crying, during
 30 the next ten minutes, she concentrated upon composing herself and not upon what Wynn was saying, and the next exchange she remembered was Wynn asking “. . . what can we do to make things better for you here aside from giving you back the tips because that’s not going to happen. We need to become a family again. . . . He said that we can make over \$400 million he would be happy to share it with us.” At this, she again spoke, saying that since the dealers
 35 made only \$6.15 an hour, could they be given a regularly scheduled raise each year? Thereupon, Wynn “. . . lashed back at me and said ‘don’t take me for a dope and don’t put words in my mouth.’”

Tynisia Boone, who, like Fields, filed a lawsuit against Steve Wynn and Respondent,
 40 seeking damages in the amount of \$300,000 as a result of Wynn’s “extreme and outrageous” statements and conduct during the October 30 meeting, testified that, after finding his seat, Wynn said “he had a couple of things that he would like to discuss with the dealers . . . first he started with the tip issue. He said the tip issue would not change. It was a business decision . . . and he [knew] that we’re upset about it, but he had no other choice . . . to redistribute [the
 45

¹¹ According to Fields, Wynn made this asserted threat “leaning over me” so that “. . . I could feel the spit on my face from his mouth.” She also recalled that, while Wynn spoke, she had a water bottle on the table in front of her and that, “. . . as he was talking with his hands, he
 50 knocked the bottle of water right into me.”

During cross-examination, Fields admitted that, to her, being fired and being permanently replaced meant “the same thing.”

dealers' tips] thorough his management . . . because he had a problem hiring help." Then, referring to the lawsuit, which had been filed regarding the redistribution of their tips, Wynn said that he would not pay "a dime for the lawsuit" and that he would win in court. He added that he had "30,000 applicants for dealer jobs, 'and if you guys don't like my tip pooling arrangements, you can leave. You can quit.'" Continuing, Wynn turned to the subject of unions, saying ". . . 'and if you join [a] union, I can by law replace all 600 of you, and if you picket you will be automatically terminated because those are my sidewalks.'" ¹² Boone recalled that, at one point, Wynn mentioned the Golden Nugget Hotel, saying ". . . that he an incident with the valet guys . . . and they wanted to go on strike so he permanently replaced them. He exercised his right and permanently replaced them and they did not return to work." Finally, "[Wynn] said that the union would get us into trouble and it was not good for us."

Wynn next solicited questions, saying there would be no repercussions. Thomas Golly was the first employee to speak, and he said there were other ways Respondent could have helped the hiring situation for team leads without affecting the dealers' tips and, as Respondent had over 50,000 applicants for jobs, how could there be a problem. To this, Wynn, who had been sitting, suddenly became "very loud and irate," stood up, and said ". . . I am the most powerful man in Nevada. My name is on top of the building. I can do whatever it is that I want to do and I can run my business any way I want to run it. If you guys have a problem with the way I am handling things, you can leave.'" After Golly, Cynthia Fields spoke and ". . . told [Wynn] that she has to sell one of her houses because of the 20 percent decrease in her tips." In response, Wynn stood up and started screaming. "He said if you think you have money problems now, if you join [a] union, if we picket, we will be automatically terminated. And then he started getting up and down and slamming his hand and fist on the table." He then repeated he was the most powerful man in Nevada, pointed to Fields' face, and told her ". . . if you guys vote [a] union in, you will be automatically terminated. And if you think you have money problems now . . . He said that he cold put no tipping on the table. It was his right to [do so] . . . have us drop the tips and place us on salary and keep the tips for himself."¹³ Then, Golly spoke again and told Wynn that he couldn't do anything about this because "that's illegal."¹⁴ Wynn responded ". . . that his name was on the building . . . and he can do anything he wants to do." According to Boone, at this point, she had become so scared that she had to leave the room and go to a restroom,¹⁵ and, when she returned, Wynn had already finished speaking.

Tramel McKenzie testified that Wynn sat in a chair toward the middle of the conference table¹⁶ and began speaking, saying ". . . that there is a problem . . . around the casino, the atmosphere around the casino is no good." He identified the problem as being the "tip pool" and

¹² She described Wynn as screaming, gesturing wildly, standing up, sitting down, standing up, sitting down. And his hands were everywhere" to the extent that "he knocked a water bottle off the table."

¹³ Asked to describe what Wynn did while answering Fields, Boone said "she was sitting right next to him. . . . And she made the comment she had to sell one of her houses and that really upset him. . . . He started pointing and screaming and basically spitting in her face." According to Boone, Wynn had moved so that his face was no more than "a foot" from her face because "they were sitting very close together."

¹⁴ Boone believed Golly was referring to Wynn's comment that he could deny tips to the dealers. During cross-examination, she said that Wynn said this was "something that he could do if we were to join a union."

¹⁵ Westbrook corroborated Boone that she left the room at one point.

¹⁶ McKenzie confirmed that another dealer had been sitting in the chair in which Wynn eventually sat.

the dealers' complaint that money had been taken from them by Respondent. He said he understood that the dealers were very angry, but there had been a great difference between what the floor supervisors and the dealers had been earning. He said this situation was causing a problem in staffing the casino with floor supervisors. Wynn added that tips were as high as they were because his name was on the side of the building, and he was the most powerful man in Nevada. "He said that . . . it was a business move . . . and . . . we were making too much money and he had to do something about it." Then, Tom Golly ". . . told him that word around town was that you are not paying your supervisors enough money and that you work them too hard." At this, Wynn became "very upset" slammed his hand down on the table, asked Golly what he meant, and said the problem was he could not get any supervisors to come and work for him because of the money. Then, Cynthia Fields spoke, saying that, if she had known of the changed tips practice, ". . . 'I wouldn't have left the MGM to come over here to work to have money taken out of my pocket and lose vacation time.' . . ." Wynn looked at Fields and replied,¹⁷ ". . . You think you have money problems now? I assure you, if you bring in [a] union . . . you will all be terminated." He added that ". . . [a union] will not help you," and ". . . 'if you vote the union in, all 600 of you guys will be replaced.'" Continuing, Wynn first mentioned the valet parking employees at the Golden Nugget Hotel, saying ". . . they had formed a union and they [were all fired]. The union didn't do anything for them."¹⁸ Then he pointed to the dealers at the Frontier Hotel and said that ". . . they picketed for years and nothing has happened over there." Further, Wynn mentioned that he had the right to take away tips and could prohibit them entirely and the tips were really his money because the money was going into drop boxes under the tables.¹⁹ Finally, Wynn told the employees that they were free to organize for a union but that his mind was made up. He added that the only real leverage a union has is to call a strike and that if a union calls a strike, he has the right to permanently replace those employees. He said that if the 600 dealers struck, he would permanently replace the strikers and that there were plenty of people in Las Vegas who wanted their jobs.

Kanie Kastroll testified that Wynn began with a "kind of propaganda spiel" about the controversy surrounding the dealers' tips pool, stating that Respondent's decision to give a percentage share to the team leads had to do with the disparity between the floor supervisors' pay and the tips income earned by the dealers-- ". . . I'm not going to change it" and "I'm not giving you back your tips." He then invited questions from the dealers. Tom Golly spoke first, asking why Respondent did not pay any increase in wages for the team leads out of its profits and why did the team leads' pay increase have to come out of the dealers' tip money? Wynn replied that he did not want to discuss the subject any longer, that he was not going to give their tips back to the dealers, and that, if they did not cease complaining, he could implement a no tipping policy in the casino. According to Kastroll, Golly and Wynn continued to speak back and forth, with Wynn becoming "angry and frustrated" that Golly was continuing to pursue the subject. At one point, Golly asked why Wynn had decided not to pay the team leads out of the record profits, about which Wynn previously had bragged. This caused Wynn to stand up, ". . . and you could see . . . spit flying out of his mouth and a lot of pointing . . . he started belittling Tom because Tom had all these ideas." Wynn said ". . . oh, you think you're so smart. You know everything. You're so smart. You have all the answers." Cynthia Fields then spoke, saying the new tip policy would result in her losing \$15,000 a year in income. To this, Wynn

¹⁷ McKenzie recalled Wynn pointing at Fields with his finger no more than two or three inches from her face.

¹⁸ During cross-examination, McKenzie contradicted herself, agreeing that Wynn said, after the employees had gone on strike, they all had been replaced."

¹⁹ The witness was certain that Wynn mentioned withholding the tip money ". . . when he was talking about unions."

replied by “mocking” her, saying it wasn’t much money to lose.²⁰ At one point, according to Kastroll, either with a hand or a fist, Wynn “slammed the table” so that everyone heard it.

5 Kastroll, who worked as an in-house organizer for the Transport Workers Union, further testified Wynn also told the employees “that he understood that we were starting to talk or the topic of a union was coming up amongst the dealers” He said “that the union is just trying to take your money for dues. Your lawyers are trying to take your money. They’re all trying to take your money. They’re all lying to you. Its all about the money. They want your money.” He added that “. . . [unions are] only good for . . . leverage. Leverage or striking. That’s all they’re good for. Striking is your only leverage.” Further, “. . . he said look at when I had the Golden Nugget downtown. Those . . . young valet boys there, there about 40 of them . . . wanted to strike. They were talking about strikes. And so he ended up calling some union representatives” and asked what they were doing to those “poor boys.” According to Wynn, the valet parkers “persisted” in striking, and he ended up “firing” them-- he “. . . terminated about 40 of them.” Then, “. . . he told us . . . ‘when you dealers strike, you will be permanently terminated.’”²¹ Finally, “I remember he was saying he was the most powerful man in either Vegas or Nevada. . . . You don’t mess with me.” At this point, Kastroll interjected that Wynn previously had spoken to the dealers, telling them to make all the money they could and I’ll make all the money with you. We’ll roll it in wheelbarrows. . . . And I told him that the dealers were the most valuable . . .” employees because of their “interaction” with the guests. Wynn did not directly answer her comment; rather, he continued saying there existed a “disparity” between the dealers and the supervisors.

25 Three dealers, who were present, testified on behalf of Respondent. Kieth Gazda testified that Wynn spoke first, saying he wanted to address an issue, which was causing “resentment” amongst the dealers—the tips sharing program which had recently been initiated. Wynn said affording the team leads each a percentage share had been implemented because of Respondent’s difficulty in hiring supervisors, and Arte Nathan said something in support. Then, he said he wanted the employees to speak “openly” and no one would be reprimanded for what he or she said. Tom Golly spoke first and said he didn’t believe Respondent was having problems with hiring supervisors and didn’t believe that was the reason for the change in the tipping program. Wynn replied “. . . that was the reason . . . to correct the disparity in income levels to make the floor position more attractive. Then, Golly and Wynn engaged in a five minute dialogue, which was “not heated” but “maybe the emotion level was elevated some” Next, he remembered Cynthia Fields commenting that the new arrangement caused “financial hardships” for the dealers and that she had recently started a family and had purchased a house and would face financial issues. While Gazda could not recall exactly, he believed Wynn said that he was “surprised” that the new policy would lead to such financial problems for someone but that the policy would remain as instituted. According to Gazda, 30 Wynn next raised the subject of unions, mentioned the Teamsters Union, and derogatorily said that “. . . the only reason for unionization is that you get the right to ‘carry a stick.’” Wynn then

20 Asked about Wynn’s conduct while he spoke to Fields, Kastroll said “he was seated next to her. And he would stand up and then . . . sit down and yell. He pounded the table.” At one point, Wynn was “. . . leaning forward toward her” until he was “under a foot” from her,”

21 This remark upset Kastroll because she had been a long-time union member. She added that she was “stunned” by and “in shock” over what Wynn said, and “I couldn’t believe that he had the audacity to say that because I . . . had known it was illegal.”

During cross-examination, Kastroll said she understood the meaning of the words “permanently replaced” and equated them to “fired.” However, she insisted that Wynn’s words on October 30 were “permanently terminated.”

related what occurred at the Golden Nugget Hotel when the valet parking employees lost their jobs because of a threatened work stoppage. Also, while he could not recall the context, Gazda remembered Wynn saying something about “doing away with tipping” but such was not a “practical” possibility. Finally, while recalling that Wynn did knock over a water bottle when he struck the table with his hand, Gazda could not recall Wynn continually standing up and sitting down, sticking his face close to Fields when addressing her, or uttering the words terminated, permanently terminated, or permanently replaced.

Ljilj Ana Cerovina testified that Wynn began talking, saying that he didn’t want dealers speaking about tips being taken from them; that he did not like the rampant rumors; and that no one could trust anyone else. He said the dealers should be happy because they were earning “good money.” Then, a dealer named Tom spoke and tried to give Wynn “advice” on how he should handle things, “. . . and Steve told him that he was wrong, actually.” Arte Nathan interjected that no one wanted to do the floor supervisor job because it did not pay enough, and Tom replied that the reason no one wanted the job was the great amount of overtime. Then, Wynn and Tom spoke back and forth “a little bit louder” but not yelling at each other. Next, Cynthia Fields said many people with houses and cars had not expected this new tips sharing arrangement and it was “tough” with possibly losing money. Wynn replied that he “. . . was going to look into the bonus program and see if he can do anything about that.”²² Also, while recalling Wynn speaking about unions and saying “he didn’t like the idea of us unionizing,” Cerovina could not recall him mentioning anything about the Golden Nugget Hotel. She recalled that Wynn did gesture with his hands “maybe a little bit” and, after saying she could not recall him banging a hand down on the table, recalled “he did one time” but it was “not really loud. He was just talking about something I think it was about union. He was talking about he don’t want us to do that. . . .” Finally, the witness could not recall Wynn saying the word terminate but denied him using the word fire-- “I think I would remember that.”

Thomas Golly testified that Wynn began speaking about the “current situation” with the general topic being “let’s get over it, let’s go beyond it,” and, during the next 25 to 30 minutes, “it evolved from the tip situation to the union and the court case.” Wynn said “. . . the union isn’t going to do anything for you. They can’t do anything for you. No one is going to get a penny. . . . He made a series of statements. Number one, the only leverage a union has is a work stoppage.” Wynn then related the Golden Nugget Hotel story, saying that a “gentleman” approached him and said that the valet parking employees were going to strike, and Wynn told him they have no leverage and a strike would only hurt his people. Later, “[The valet parking employees] went on strike,” and “they were immediately replaced. At that point . . . Mr. Wynn stopped looked around the room at every dealer counter clockwise he said if you strike, you’ll be replaced.”²³ Wynn added that, if the dealers organized a union, “. . . you’re not going to get anything. There’s a union across the street.” After Wynn invited comments, Golly spoke first, saying that Wynn operated his hotel and casino “under an archaic value system, one that says the suit must make more than the uniform. That’s the reason you took the tokes.” According to Golly, Wynn claimed that one reason for giving the team leads a share of the dealers’ tips was that he had not been able to hire competent “floor staff because of the pay disparity,” and Golly challenged him, saying their lack of benefits equal to other casinos was the real reason. Then, referring to Wynn’s comment that they would get nothing with a union, a

²² Cerovina, who sat next to Fields, did not believe Wynn leaned into Fields as he spoke.

²³ Golly described Wynn’s tone of voice as being “general” but there were times “when it wasn’t typical.” He denied that Wynn ever shouted at the dealers but said the latter’s voice was “elevated” at times.

woman to Wynn’s right asked “how do we know unless we try?”²⁴ According to Golly, at this point, he was not looking at Wynn, and, suddenly, “I hear a loud noise. Bam! I look over. Mr. Wynn’s fist is clinched on the table” Golly reiterated that the noise “. . . was loud. Anybody who tells you it wasn’t loud is lying. It was not unlike if you’re in a room and something falls and you look towards the sound It left an indelible on my mind.”²⁵ Finally, as to Wynn’s act, Golly added, rather than in response to anything, he was certain “[Wynn] was hitting [the table] in reply to the girl’s remark.” Golly next recalled that Cynthia Fields made a comment to Wynn about her property and having to sell a second property because of the loss of income. “And Mr. Wynn made a comment that if \$15,000 a year means that much to you, well then I’m sorry” Golly added that Wynn said more but that he can not recall what the former said. Finally, although he could not place the statement chronologically, Golly recalled Wynn making “. . . a comment that I could put up a sign on the table, no tokes. And I made a comment you wouldn’t do that.” At this point, Wynn asked if Golly was serious, and Golly offered an explanation as to why it was not economically feasible for Wynn to abolish tipping for the dealers.

Besides the three dealers, Westbrook, Pascal, and Wynn testified on behalf of Respondent regarding what the latter said during the October 30 meeting. According to Andrew Pascal, who testified he arrived late, Wynn was speaking about Respondent’s decision to give a percentage share of the dealers’ tips pool to the team leads and, “for the most part, he explained the rationale, explained that he understood that . . . they are upset by it and that they don’t necessarily agree with it. He explained that he has an obligation to explain the rationale . . . and that he wasn’t going to change the program.” At that point, dealers began making comments. Tom Golly spoke and said they understood the problem but did not agree with the solution. He described “alternatives,” which, he believed, accomplished the same purpose. Golly then mentioned how Wynn had to be concerned about “the overall performance of the resort” including its stock performance. When he finished, Wynn remarked that Golly seemed to be speaking “from the position of authority like you know absolutely everything that is going on related to this issue, and it clearly has an influence on other people and that can be destructive.”²⁶ Pascal was able to recall other dealers making comments, and “. . . they generally shared some of their stories or their issues. . . . [Wynn] acknowledged them . . . but . . . he was pretty resolved . . . we implemented the program for a reason and we are going to see it through.” Pascal also recalled that Wynn discussed the Golden Nugget Hotel situation during which he “drew the parallel” to the instant situation. Wynn wanted “. . . to make sure that the dealers understood, if ultimately that was their choice, that they were going to walk off or abandon their jobs then he would be left with no other choice than to replace them.” Wynn said “. . . if you abandon your jobs, and you choose to strike, then it will leave him with no other choice but to replace them.” While he further recalled that Wynn may have remarked that a “no tipping” policy had been “contemplated, he could not recall if such arose before, during, or after Wynn discussed the dealers possibly organizing a union. Pascal specifically denied that Wynn continually stood up, sat down, and stood up while he spoke or that Wynn said he was the most powerful man in Las Vegas or uttered the word, terminated.

²⁴ Golly believed the woman was referring to Wynn’s warning that the dealers would be replaced if they engaged in a work stoppage.

²⁵ Golly believed this was an example of Wynn’s “bad temper” as “. . . he was adamant that he did not want a union there.”

²⁶ While conceding that Wynn may have been “animated” in answering Golly and that he moves his arms when he talks and raises and lowers the volume of his voice, Pascal denied that Wynn was either aggressive or yelling. Further, while denying that Wynn pounded the table angrily and, while stating he could not recall such an act, Pascal conceded “to make a point, I can see how he may have pounded the table.”

William Westbrook, who corroborated Fields that, when Wynn moved to sit at the table, he took a chair already occupied by a dealer, who could have been Fields, testified that Wynn began speaking, saying he was there to open up a dialog with the dealers and everyone was free to express his or her opinion with “immunity.” He then acknowledged that some dealers were dissatisfied with the new tips pool arrangements but, notwithstanding how unpopular the changes were, they reflected a business decision and would not be changed. At that point, he became involved in a discussion with Tom Golly, who said he had ideas about a “couple” of alternative ways Wynn might have solved Respondent’s problems. After Golly concluded, Wynn responded, explaining “. . . that there a lot of other decision making . . . that [occurred] that Mr. Golly wasn’t aware of that wouldn’t allow [Golly’s ideas] to take place.”²⁷ Asked if Wynn, at one point, slammed his fist or hand down on the table, Westbrook replied that “he did not slam his fist down on the table, ever. . . . What he did was put his down like this or he will make a point” Westbrook recalled that Wynn did reference to a situation at the Golden Nugget Hotel, during which the valet parking employees had voted for union representation, and said “. . . if it were to happen here, just like it happened at the Golden Nugget, if they choose to go on strike, then they will be replaced and it could be some time before positions open up that would allow them to come back to work even if a settlement was reached.” Also, at a later point, Wynn remarked about his dealers’ “dissatisfaction” regarding the “climate” at Respondent’s facility with the tips policy changes and their exploration of union representation. “And he was saying that the union wouldn’t get them what they wanted; the union would not be able to provide them much or anything by leverage . . . should they not get what they wanted in a contract negotiation, that they would have the leverage of a strike . . . standing on the sidewalk . . . and he had a business to run. . . . And if they chose to do that . . . they would have to be replaced . . . on the tables.” Westbrook also recalled Cynthia Fields speaking about being a single mother, about the financial impact of reduced tips, “. . . and that she would have to be selling one of her homes to offset what the impact was to her.” However, he could not recall Wynn’s response “. . . because that didn’t stay with me.”²⁸ Further, Westbrook, while confirming that Wynn said it was “within his right” to place a “no tipping” sign on each table but that such would not be a good idea, denied that the latter uttered this statement while speaking about a union.²⁹

Steven Wynn testified he began by informing the listening dealers that he understood they had come to work for Respondent expecting that tips would be divided in a certain way and that now, as the procedure had been changed, they were “angry” and “frustrated.” Continuing, he stated that, historically, the casino “bosses” had earned more than the dealers but with, the advent of his three “mega-resorts,” the dealers tips had become “astronomically large” to the point they now earned more than the supervisors. He told the dealers that Respondent’s team leads were upset at the disparity in earnings between themselves and the dealers and, as they

²⁷ Westbrook denied that Wynn yelled at any point during the meeting, and, as to whether the dealers, who stated that Wynn had, in fact, shouted at them, were truthful, he proclaimed “I deal with the dealers . . . every day. You and I right now are yelling according to the way they interpret a discussion.”

²⁸ Nevertheless, he was able to specifically deny Wynn saying if she thinks she has problems now . . . they will be permanently terminated.” He also denied that Wynn leaned directly into her when he spoke.

²⁹ Westbrook denied that Wynn said he was the most powerful man in Las Vegas, and he said Wynn never uttered the words, terminate, will terminate, or fire while he spoke. Finally, while denying any dealer cried during Wynn’s presentation, “I do remember Ms. Boone leaving to use the restroom”

worked side-by-side with the dealers in serving customers, at their lack of participation in the dealers' tips pool. In these circumstances, according to Wynn, Respondent believed it was rectifying a bad situation and felt it had made the "right" decision. According to Wynn, he next dealt with the rumors, which had been circulating amongst the dealers. He told them they could
 5 be as angry as they wanted, but "nobody is getting fired. I have never been firing anybody except for severe cause. My reputation has been that the hardest place to get fired is . . . at one of my hotels. And that's been true for forty years here. . . . You could put an army of people in this room. And I said nobody is getting fired. This is a ridiculous rumor" unless ". . . somebody takes this up on the floor and disrupts the business at the table."³⁰ Wynn next told the dealers a
 10 second ridiculous rumor was that Respondent intended to take away all of their tips. He said that he could have given the team leads and the box people full shares in the tip pool but had not, and "the system that we had adopted was deliberately designed to minimize the impact on the dealers."

15 Then, Wynn testified, he discussed a third rumor-- that a union can change everything. He said a company is at a disadvantage when confronted by union organizing because a "union and [its] friends call people at home" and "intimidate" them during unrecorded conversations; while an employer speaks ". . . on the record . . . publicly." He added that it would be false for
 20 anyone to say a union could force Respondent to change a policy, which is a sound business practice. Rather, "I said the only thing that a union can do to management is to deprive us of your employment. That is to say they can call you off the job in a strike." Wynn told the dealers that a strike would be "an outrageous and terrible response" and "heartbreaking" from his point of view as they would be trading marching on the sidewalk for earning more in tips than dealers at any other hotel/casino in Las Vegas. Moreover, he told the dealers, if they did strike, ". . . I
 25 would be forced to replace and see to it that if dealers weren't at the table . . . other dealers were at the table. And that means replacement." During cross-examination, asked if he told the employees that the only leverage a union has is a strike, Wynn embellished and altered his direct examination testimony, stating "the only leverage that the union has ultimately, if they believe one thing and we believe another, we reach what's known as a [good faith impasse]. . . .
 30 And at the end of that impasse, the Union can walk away . . . they can deprive us of your labor. Those were the words I used. That's how I expressed myself." He then related to the employees what had occurred at the Golden Nugget Hotel to the striking valet parking employees, and told the dealers "So if they walked off the job, we would be in the same position we were at the Golden Nugget to do permanent replacements. And that's a permanent
 35 replacement instigated and made necessary by an action of the union in calling out the employees." Wynn then concluded his remarks, saying the employees' future and his were tied to Respondent's facility, they were all doing better than dealers at any other casino, and they should all settle down.

40 According to Wynn, at this point, he solicited questions and comments from the dealers, and "one fella" complained about Respondent's "shopping" system, saying he did not need a "shopper"³¹ telling him how he was doing. Wynn replied, saying what the employee thought was not "persuasive" and everyone was treated the same by the shoppers. Then, pointing to
 45 Cynthia Fields sitting at a counsel table, Wynn testified, "this gal" spoke and lectured to him that her income had been impacted to the point ". . . she had to sell one of her three homes. Apparently [she was in the real estate business]. And I thought that was an incredible

³⁰ According to Wynn, he meant that "I didn't want people criticizing the company to the customers," which act, he told the dealers, was "inappropriate" behavior.

³¹ As will be discussed *infra*, Respondent utilizes a so-called shopping service to perform
 50 quarterly performance evaluations for each its approximately 600 table games dealers.

statement because the . . . program had only been in existence for a few weeks. . . . She was a little teary Well, I didn't understand . . . and I thought that was an incredible statement. . . . I said I'm sorry that that's happened, but it doesn't make much sense to me."³² Finally, Wynn conceded banging his fist on the table ("Yes. . . that's the way I speak. I tend to be an
5 emphatic person and a little historical") and specifically denied saying that once employees picket, they will be automatically terminated ("absolutely not" and ". . . not only did I not say that, why would I when I knew that not to be true?")³³ or shouting at the employees.

As set forth above, the second consolidated complaint alleges that, during his remarks to
10 the fifteen dealers, with whom he met on October 30, 2006, Steven Wynn, acting on Respondent's behalf, informed the employees it would be futile for them to select a union, threatened them with diminished wages, threatened them that strikes would be inevitable, threatened them with discharge, threatened them with unspecified reprisals, and disparaged a union as a bargaining representative if they selected a union as their bargaining representative
15 and that, as a result of said acts and conduct, Respondent violated Section 8(a)(1) of the Act. In his post-hearing brief, without specifying to which of the complaint paragraphs they refer and without offering any legal theories or citing any decisions of the Board in support,³⁴ counsel for the General Counsel merely identified Wynn's threat of termination if they voted for a union, his threat to implement a no-tipping policy if the dealers voted for a union, and his comment that the
20 only thing a union could do for the dealers would be to call for a strike as the alleged unlawful acts committed by Respondent. Regarding these alleged unfair labor practices, I believe that Wynn's statements and actions during the meeting must be viewed in the context of his desire to frighten and intimidate the assembled dealers from supporting a perceived nascent union organizing campaign. Thus, both Andrew Pascal and Wynn testified that a reason, underlying
25 Respondent's decision to hold a series of meetings with its dealers, was its knowledge that the said employees were engaging in discussions about organizing for a union, and, according to Thomas Golly, whose demeanor, while testifying, was that of a veracious witness and whose account of the meeting I shall credit, when he raised and discussed the dealers possible desire for representation by a union, Wynn exhibited "a bad temper," clearly revealed to the dealers he
30 was "adamant" in his opposition to their representation by a union,³⁵ and, at one point, obviously demonstrating the intensity of his opposition to a union, banged his fist down hard on the conference table, making a conspicuously "loud" sound in doing so.³⁶

35 ³² Wynn added that another woman also seemed to be teary. Asked what he might have said to make the women cry, Wynn said "the reason they were teary is because I made the change in the program. They came in to the room teary in my view. . . . I'm certain it wasn't anything that I said. . . ."

40 Wynn was unable to recall saying to Fields that, if \$15,000 is an issue for you, you have bigger problems, and noted that her comment was "inherently unbelievable" as the new policy on tips had been in effect for just a month.

³³ Answering a question from me, Wynn said he was well aware of the legal distinction between firing and permanently replacing a striking employee. "Of course, I know that, your honor, and that's why I would never make such a ridiculous statement."

45 ³⁴ Counsel commented only that Wynn's cited comments are "plainly unlawful."

³⁵ Kieth Gazda described Wynn as speaking derogatorily about union organizing.

50 ³⁶ The four dealers, who testified on behalf of the General Counsel, and Thomas Golly all recalled Wynn slamming the table with his hand, an act which caused a loud noise. On the other hand, while Wynn conceded that he banged down on the table with his fist, Pascal and Westbrook, neither of whom impressed me as being a candid witness, deceitfully denied that he did so.

In this context, I consider the General Counsel’s allegation that Wynn threatened the dealers with termination if they voted for a union. As to this, I note that this contention is based upon the testimony of Cynthia Fields, Tynisia Boone, Tramel McKenzie, and Kanie Kastroll, each of whom testified to a variant of the alleged unlawful threat-- the dealers would be automatically terminated (Fields and Boone), permanently terminated (Kastroll), or terminated (McKenzie) if they picketed (Fields and Boone), joined a union (Boone), voted in a union (Boone), brought in a union (McKenzie), or engaged in a strike (Kastroll). I further note that, while Wynn, Pascal, and William Westbrook denied that Wynn uttered the alleged warning, none of the dealers, who testified on Respondent’s behalf (Keith Gazda, Ljilj Cerovina, and Thomas Golly), specifically denied the asserted threat.³⁷ With regard to credibility, while neither Fields nor Boone impressed me as being a particularly honest witness,³⁸ both were corroborated by Golly, Westbrook, and Wynn regarding aspects of their respective testimony regarding Wynn’s statements during the October 30 meeting.³⁹ Also, while McKenzie and Kastroll impressed me as being basically truthful witnesses, as both offered dubious testimony regarding Wynn’s comments about the Golden Nugget Hotel’s valet parking employees,⁴⁰ I have difficulty accepting the entirety of the testimony of each as to the above meeting. Wynn, who specifically denied the alleged threat and averred that he never would have uttered such a “ridiculous” statement, exhibited a haughty and insolent attitude while testifying, and, as a result, did not impress me with his demeanor. In particular, I note his sardonic and disingenuous testimony that, notwithstanding having admittedly informed the listening dealers that a union’s only leverage is “a strike” and that, if they do strike, he would be “forced” to replace them just as he had previously done at the Golden Nugget to the valet parking employees, he believed the two women, whom, he noticed, were crying, had become “teary” before they entered the meeting room and “. . . I’m sure it wasn’t anything that I said. . . .” Nevertheless, while I am irresolute to credit Wynn’s denial, in view of the incandescently inconsistent testimony of Fields, Boone, McKenzie, and Kastroll on this issue, I am not comfortable crediting, and do not credit, any of them that Wynn used the word “terminate” in discussing his reaction if the dealers were to organize a union or engage in a strike.

Counsel for the General Counsel next asserts that Steven Wynn’s threat to extirpate guest tipping for the casino table games dealers was violative of Section 8(a)(1) of the Act, and there is no dispute that Steven Wynn raised this subject during the October 30 meeting. Thus, Boone, McKenzie, Kastroll, Gazda, Pascal, Golly, and Westbrook recalled Wynn mentioning this, and I rely upon Golly, who recalled Wynn making “. . . a comment that I could put up a sign

³⁷ Gazda and Cerovina could not recall whether Wynn uttered the words, and Respondent’s counsel failed to ask Golly.

³⁸ As I shall discuss *infra*, both in the events surrounding her discharge and while testifying at the instant hearing, Fields exhibited a proclivity for dissembling. Moreover, given their respective lawsuits against Respondent involving the October 30 meeting, Fields and Boone harbored obvious bias against Respondent.

³⁹ Golly corroborated Fields as to Wynn’s rather sarcastic remark regarding her perceived loss of at least \$15,000 resulting from the change in the tips policy; Westbrook corroborated Fields regarding Wynn taking her chair from her in order to sit at the table on October 30; Westbrook corroborated Boone that she left the meeting in order to go the restroom; and Wynn corroborated both women that each was crying during the meeting.

⁴⁰ Before contradicting herself during cross-examination, McKenzie had initially testified that Wynn said the Golden Nugget valet parking employees had formed a union and “they were all fired.” Likewise, Kastroll quoted Wynn as saying that the valet parkers had “persisted” in striking and he retaliated by “firing” them-- he “. . . terminated about 40 of them.” This latter testimony was, of course contradicted by Golly, Fields, and Boone.

on the table, no tokes. And I made a comment you wouldn't do that." Of course, the issue herein concerns the timing of Wynn's asserted threat; did he raise the issue while discussing the new tips pool arrangements or while discussing the possibility of union representation for the dealers? As to this, the record evidence is uncertain and contradictory. Thus, while neither
 5 Gazda, Golly, Pascal, or Westbrook was able to recall when, during his remarks, Wynn raised the matter and Boone and McKenzie each asserted that Wynn made his alleged threat while discussing the dealers' possible union organizing efforts, Kastroll recalled Wynn uttering the comment while she and the other dealers questioned and complained to him about having to share their tips with the team leads. Undoubtedly aware of the dubious state of the record, in
 10 his post-hearing brief, counsel for the General Counsel enigmatically suggests that Wynn uttered his threat twice-- "in the context of both the dealers' dissatisfaction with the tip-sharing plan and any ideas they may have had about bringing in a union;" however, I am unable to find anything in the record to support his assertion. In these circumstances, as the record evidence is manifestly uncertain as to the timing of Wynn's alleged threat, I am unable to conclude that
 15 such was violative of Section 8(a)(1) of the Act.

As to whether, during his remarks on October 30, he unlawfully told the listening dealers that the only thing a union could do for them is to call a strike, before astuciously altering his testimony during cross-examination, Wynn admitted saying that not only could a union never
 20 force a company to change a policy but also the only thing a union could do is "to call you off the job in a strike." Further, Golly credibly quoted Wynn as warning ". . . that the union isn't going to do anything for you. They can't do anything for you. No one is going to get a penny. . . . the only leverage a union has is a work stoppage." As stated above, without offering any legal argument or case support, counsel for the General Counsel labels Wynn's comments unlawful; while the attorneys for Respondent argue that anything Wynn said to the employees was
 25 opinion privileged by Section 8(c) of the Act, which provision privileges an employer to express any arguments or opinions as long as said expressions contain neither threats of reprisals or force nor promises of benefit. Although counsel failed to offer any rationale, the General Counsel must believe that, by his comment, Wynn threatened the dealers that supporting a union as their bargaining representative would be futile. While in *Weldon, Williams & Lick*, 348
 30 NLRB No. 45 at slip. op 4 (2006), the Board held that "an employer violates Section 8(a)(1) by threatening employees that attempts to secure union representation would be futile [and an] unlawful threat of futility is established when an employer states or implies that it will ensure its nonunion status by unlawful means," the Board has also held that "it is a violation of Section
 35 8(a)(1) of the Act for an employer to warn employees that there will be strikes . . . if they choose to be represented by a union." *Gold Kist, Inc.*, 341 NLRB 1040, 1041 (2004). In *Gold Kist*, the employer warned employees that a strike was the union's "only weapon" to force it to agree to their union's contract proposals. *Id.* Likewise, I find herein Wynn warned the employees that a union would be unable to do anything for them and that the only leverage a union has is a strike.
 40 In these circumstances, I find that Wynn's remark constituted a threat of the futility of union representation to the listening dealers, was not privileged by Section 8(c) of the Act, and, therefore, was patently violative of Section 8(a)(1) of the Act. *Gold Kist, Inc., supra*; *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003); *AP Automotive Systems*, 333 NLRB 581 (2001).
 45

Finally, with regard to the October 30 meeting, besides his above unlawful threat of the futility of union representation and other legal, but derisive, comments about said subject, several witnesses, including Golly and Pascal, recalled that Steven Wynn threatened to replace
 50 the dealers if they chose to "strike," and Wynn himself admitted that he told the employees that, if they engaged in a strike, exactly as what happened to the valet parking employees at the Golden Nugget, such would necessitate "permanent replacement" for them. The attorneys for Respondent are quite correct that an employer does not unlawfully threaten employees with

discharge by informing them, in the event of an economic strike, they may be subject to permanent replacement without also fully detailing the protections, which are afforded to economic strikers, enumerated in *Laidlaw*.⁴¹ *Eagle Comtronics*, 263 NLRB 515 (1982).⁴² Clearly, the scenario, contemplated under *Eagle Comtronics*, is an economic strike, which is initiated by a labor organization for its members' gain, and not an unfair labor practice strike, which is undertaken to protest the unlawful acts of the employer. *Unifirst Corp.*, 335 NLRB 707, 707 (2001). Herein, there is no dispute, and Wynn conceded, that he used the word "strike" without identifying the type of strike-- economic or unfair labor practice-- about which he spoke. This is significant, for the reinstatement rights of unfair labor strikers are significantly greater than those of economic strikers. Thus, unlike an economic striker, upon an unconditional offer to return to work, an employer must immediately reinstate an unfair labor practice striker (*Nortech Waste*, 336 NLRB 559, 565 (2001); *Mauka, Inc.*, 327 NLRB 803 (1999)), and, in my view, warning a potential unfair labor practice striker that he or she may be permanently replaced is a misstatement of Board law tantamount to a threat of discharge. Moreover, in the context of the rights of strikers, the use of the word "strike" alone is fraught with ambiguity, and, clearly, ". . . any ambiguity should be resolved against the employer." *Unifirst Corp., supra; L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000). I recognize that the rationale, underlying the Board's decision in *Eagle Comtronics*, was that "an unwarranted burden" would be placed upon an employer to explicate all the possible consequences of being an economic striker, and the Board specifically did not adopt the view of the administrative law judge that the permitted half-truth might lead listening employees to erroneously believe that their jobs would be permanently forfeited, a misconception held by, at least, two of Respondent's dealers. Nevertheless, while it may increase the burden upon an employer to define the type of strike when speaking to its employees about the consequences of withholding their services, I think such must be balanced against the resulting damage to a listening employee, who may refrain from engaging in a strike against the employer to protest an unfair labor practice, a Section 7 right, for fear of forfeiting his employment. I believe that this is especially true in the context of an employer's speech, such as Steven Wynn's, warning employees about the possible adverse consequences of union organization rather than in the context of an employer's remarks when confronted with an imminent or on-going economic strike. Accordingly, I find that, in the course of derisive comments about the effects of union representation at a time when no strike was imminent, by discussing the consequences for Respondent's employees of engaging in a "strike" without defining the term, Wynn crossed over the *Eagle Comtronics* line, sufficiently confusing the issue to the point that his warning constituted a threat of discharge, which coerced and restrained the listening employees in violation of Section 8(a)(1) of the Act.⁴³

⁴¹ *The Laidlaw Corporation*, 171 NLRB 1366 (1968).

⁴² The Board, in *Eagle Comtronics* affirmed that, pursuant to *Laidlaw*, even if permanently replaced, economic strikers retain the right to make unconditional offers to return to work and to be reinstated upon such offers if positions are available and to be placed on a preferential hiring list if positions are not available at the time of the offer to return to work. *Eagle Comtronics, supra*, at 515

⁴³ The Board, in *George L. Mee Memorial Hospital*, 348 NLRB No. 15 at slip. op. 2 (2006), did state that "an employer may lawfully inform employees that they would be permanently replaced if they went on strike." However, the Board cited to *Chromalloy American Corp.*, 286 NLRB 868 (1987) as support; and, in the cited decision, the statement, regarding permanent replacement, was written in letters to economic strikers.

B. The Alleged Unlawful Suspension and Subsequent Discharge of Cynthia Fields

Notwithstanding Steven Wynn’s assurances to the dealers during the October 30 meeting that none of the dealers would be fired except for “severe” cause and that “the hardest place,” from which to be fired, is one of his facilities, Respondent initially suspended and subsequently terminated Cynthia Fields on January 12, 2007, acts, which the General Counsel alleges, were in violation of Section 8(a)(1) and (4) of the Act.

On November 8, 2006, nine days after the above meeting, Fields filed the original unfair labor practice charge in Case 28-CA-21073, which concerned Wynn’s unlawful threats during the said meeting. On December 28, the Regional Director of Region 28 issued a complaint, alleging that Respondent, through Wynn, had engaged in unfair labor practices violative of Section 8(a)(1) of the Act. According to Fields, neither subsequent to the filing of the unfair labor practice charge nor after the issuance of the complaint, did any supervisors or management officials speak to her regarding her involvement with the Board. Thereafter, on January 4, 2007, a local Las Vegas daily newspaper, the *Las Vegas Review-Journal*, published an article, entitled “NLRB Files Complaint Against Wynn Las Vegas,” which detailed the allegations of the complaint and specifically named Fields, Tynisia Boone, and Tramel McKenzie as assisting during the investigation of the unfair labor practice charge.

Two days later, in the afternoon on Saturday, January 6, while she was dealing blackjack, Fields was “tapped off” by a replacement and instructed to report to the baccarat room and meet with “three headhunters,” an employee term for casino managers. Arriving at the baccarat room, she noticed Pat Mosca standing outside an office. He invited her inside the room in which Anthony Tyne, another casino manager, Vincent Collura, an assistant casino manager, who was seated behind a desk, and Debra Rollins, a team lead, were waiting. Fields sat in front of the desk, and Collura announced that they were there to give her a “shopper’s report.” He then “. . . pulled out the shopper’s report and what he said was you scored . . . below the acceptable rate of 80 percent.”⁴⁴ He continued, explaining that she scored perfect on appearance, game procedures, and game protection; however, regarding customer relations, “. . . I was uninviting to the customer. I did not smile. I did not welcome them to the table.” According to the shopper, “. . . he did not feel invited or welcome at the table. . . .” Collura then said that, inasmuch as she scored below 80 percent, she needed to show improvement over the next two weeks. He said she would be shopped again within that time period, “. . . and if you do not show any improvement . . . I would be given a written warning after that.” At this point,

⁴⁴ Respondent contracts with a shopping service to perform quarterly evaluations of each of its approximately 600 dealers. Basically, a “shopper,” who acts the role of a typical customer, sits or stands at a gaming table and pretends to play the game, utilizing money supplied by Respondent, while performing an evaluation of the dealer. Upon completing his or her evaluation, utilizing a performance criteria form, which covers such points as greeting/first interaction, appearance, body language, game dialogue, and game protection, and awards maximum point totals for each one, the shopper is tasked to score the dealer on each criterion, awarding points up to the maximum. The maximum point total is, of course, 100, and a dealer is expected to score a minimum of 80 percent. According to Westbrook, meetings are held with each dealer to go over the shopper’s report, but, given the large number of dealers, employed by Respondent, there are significant delays between the completion of a report and the meeting with the employee. According to Collura, who is the assistant manager responsible for meeting with dealers to discuss the shopping reports, he may be up to three months behind in receiving shopper reports from the vendor; at the time of the hearing (the first week of August), “. . . I am going over reports . . . that were done in April. Just finishing those.”

aware that Respondent normally issues a “counseling notice” to an employee prior to a written warning, Fields asked to see the counseling notice, and Collura gave her the said document, which, on its face, states December 12, 2006 as the preparation date, states that her score on the shopper’s report was 77.78 percent and that the counseling report was for her “failure to
 5 meet standards, and, for corrective action, states “Ms. Fields will make immediate improvements to performance in order to bring up future reports scores.” Upon reading the counseling report, and the shopper’s report, Fields told Collura “. . . that’s not me. That’s way out of my character. I am an extremely friendly person with all the guests. I’ve never had any issues with anyone.” She then told Collura she would refuse to sign the counseling report but
 10 requested a copy. Collura said she could not receive a copy unless she signed the document. According to Fields, becoming emotionally upset over the negative counseling report and the counseling notice, she began crying uncontrollably, and she complained to Collura, saying that she had never before experienced a customer complaining to a supervisor about her job performance and that she believed the basis for the shopper’s report and the counseling notice
 15 was the Board finding merit to her unfair labor practice charge. Collura replied “. . . we know nothing about that and . . . this is a simple counseling notice over shopper’s report.” Then, as Fields continued to cry, Collura abruptly ended the meeting, saying to Fields “since you’re so upset, go downstairs and compose yourself and then when you’re done with that, come back upstairs and return to your game.”⁴⁵

20 Claiming she was “crying in hysterics,” Fields walked out of the small office⁴⁶ and through the casino, went downstairs, stopped in a bathroom in order to calm herself, and then walked to the dealers’ lounge. Once there, she immediately called the Board agent, who had investigated her unfair labor practice charge, as “. . . I perceived it as I am going to be fired
 25 because I made the charges with the NLRB.” However, the Board agent was unavailable to speak to her, and, while others attempted to console her, one dealer handed Fields a phone and told her to speak to his father, who is “a really big advocate for the tip policy.” She spoke to this person for a few minutes but was unable to stop crying. At this point, given her emotional state and appearance from crying, Fields decided she could not return to her blackjack table.

30 ⁴⁵ There is no dispute regarding what occurred during this meeting. Thus, according to Vincent Collura, on, at least, six occasions between December 12 and January 6, he attempted to meet with Fields regarding the shopper’s report; however, due to her having left work early or not having reported for work, he was unable to do so. Finally, he met with the alleged
 35 discriminatee on January 6 because she “happened” to be at work and he had an extra dealer to work as a substitute. During the meeting, he read verbatim from the shopper’s report, including the shopper’s comments, and told Fields that her 77.78 percent “barely missed” the required 80 percent. He added that she had only “a couple errors” and suggested some improvements. As he read from the report, Fields began acting “visibly irritated or agitated, and
 40 “she became teary-eyed and started to cry.” She accused Respondent of deliberately targeting her because of her affiliation with a union which, Collura told her, was untrue. At the end of the meeting, Collura testified, he told Fields that she should go downstairs in order to compose herself, take a break, and return to her table.

45 During cross-examination, Collura conceded that Fields demanded he produce a counseling report. As to why said document was dated December 12, Collura said that he did not receive the shopper’s report until early December 2006, that, as is his practice for every dealer, who receives a failing shopper’s report, he prepared a counseling notice with the intent of immediately meeting with Fields and giving the notice to her.

50 Fields conceded that she missed work on, at least, two occasions in December because her child was ill.

⁴⁶ According to Fields, it was approximately 4:30 p.m.

Accordingly, she left the lounge and walked towards Respondent’s scheduling window, which is located down a hallway, approximately 100 yards from the lounge.⁴⁷

5 Arriving at the scheduling window, Fields testified, she found Jeff Maheu, a team lead, who was, at the time, the acting scheduler for Respondent, behind the window. “I went up to him and I was crying and hyperventilating, and said to him, ‘I’m so sorry, but I really need to go home.’ I said, ‘I cannot work like this.’ I said, ‘I’m crying and crying and crying, and I can’t stop.” Maheu replied, “I understand,” and Fields responded, “I’m too embarrassed to go back to upstairs and clock out and sign out because I don’t want to [be seen by customers with red, teary eyes].” Maheu then asked Fields for her employee number, which game she had been working on, and whether someone was then working at her table. Fields replied that there was a substitute but that she did not know how long her replacement was supposed to continue on her game. Insisting that Maheu seemed to be “doing something” at that point, she began “babbling to myself” that she had to pick up her son but couldn’t drive in her agitated state of mind, that she had just been in a meeting which shouldn’t have occurred, and that she had just spoken to her attorney who said she shouldn’t be working in her condition. According to Fields, she “. . . was just pretty much rambling.” Then, asked by counsel for the General Counsel whether Maheu said anything else, she replied “I just looked at him and he was like, okay, you can go.” At this point, I interjected and asked Fields to just state Maheu’s words, and Fields replied, “He basically just looked at me like-- and said okay.” Then, after she apologized several more times, Fields turned and walked away from the scheduling window.⁴⁸

25 Asked why she went to the scheduling window, Fields replied, “Well, when I do call in sick . . . that’s where I call for an okay to call in sick. . . . I went [there] because that’s where I felt that I should be going to. There wasn’t a casino manager . . . downstairs, and I didn’t feel I could go upstairs. So, it was my understanding of the policy that that’s where you go.” Continuing, Fields said that she knew of no written policy regulating what an employee should do if he or she found it necessary to leave work early and that Maheu never told her she had to speak to an assistant casino manager or a casino manager or that he had to check with a casino manager or an assistant casino manager. Finally, asked if she had considered telephoning a casino manager or assistant casino manager, Fields replied, “It never occurred in my mind.”

35 Upon leaving the scheduling window, according to Fields she went to the uniform room and exchanged her uniform for her next day’s uniform, then went to the bathroom, and returned to the dealers’ lounge and to her locker. She saw Jeff Maheu there, told him she was leaving the facility, and said “I just don’t want to be on the clock and taking . . . Mr. Wynn’s money while I’m trying to calm down to drive my car. . . . He just said okay.”⁴⁹ Fields then left the lounge,

40 ⁴⁷ Employees speak to the scheduler through a glass window, which is akin to a bank teller’s window. Behind the scheduling window is the scheduling office in which Respondent’s scheduler works. The record establishes that said individual is the person to whom the dealers call if unable to work on any given day. Further, the scheduler prepares the daily “road map,” which sets forth on which gaming table dealers are working on each shift, and maintains the early out list, which is the list of employees, who inform Respondent they will be unable to finish their work shift and must leave early. Said list is administered on a first on-first out basis. Also, the scheduler is responsible for the weekly dealer schedule and for employee vacations.

45 ⁴⁸ Asked, by me, did she explicitly tell Maheu she needed to leave and go home, Fields replied, “I said I needed to leave.” I then asked if Maheu understood she wanted to leave and said, okay, and Fields answered “yes” to both questions.

50 ⁴⁹ Again, according to Fields, Maheu said nothing about her having to speak to a manager.

spoke briefly to Tynisia Boone in a hallway, and departed Respondent's facility at approximately 5:15pm. Thereafter, Fields picked up her son from day care, arrived at her home, and, at approximately 6:00pm, received a telephone call from William Westbrook on her cell phone. "He said we are placing you on a SPI," and he explained what that meant.⁵⁰ Continuing, Westbrook explained that her suspension was ". . . for walking off the job without permission. . . ." She replied, "No, I talked to Jeff Maheu. I told Jeff Maheu that I needed to leave because I was so upset." Westbrook responded that she could not obtain permission to leave from a team leader, and Fields replied that she didn't know that and "if I had known I needed to go to somebody else, I certainly would have." Westbrook replied ". . . that he would be contacting me in the next couple of days for my SPI meeting."⁵¹

On the following Monday or Tuesday, Fields received a telephone call from Respondent's office, instructing her to report the next day for her suspension interview, and, the next day, she went to Westbrook's office where she met with Westbrook and Peggy Collura. During the interview, Fields explained to Westbrook her understanding of what she was required to do in order to leave work early and mentioned two other individuals who had followed the exact same procedure and had not been disciplined-- Sandra Holton and another employee, whom Fields was able to describe but not identify. To this, Westbrook said that "we're not looking at anyone else. We're only looking at you." Nevertheless, Westbrook said he would speak to any witnesses and do an investigation. The meeting lasted for no more than 10 or 15 minutes. Westbrook next telephoned Fields on January 11 and told her to come to his office the next day. She followed his instructions, and, inside Westbrook's office, he explained ". . . according to our policies and procedures, you left the property without permission, without the proper authority, and we are going to separate you from the property." Continuing, Westbrook explained ". . . that I could only go home through a casino manager or table games supervisor. And he used the supervisor word all the time during this. He never [said team lead]." She responded that Maheu was a supervisor, and Westbrook replied that "he was not acting in that capacity at the time." According to Fields, Westbrook never disputed that she told Maheu she wanted to leave and he said, okay.

During cross-examination, with regard to the events of January 6, questioned about her meeting with Vincent Collura about the shoppers' report, Fields conceded that Collura never actually showed her the shopper's report but only read from it. Asked why she became so emotional when her score was just a little more than two points below acceptable, she averred that ". . . I have never ever been in trouble at work before, ever taken into the office and reprimanded. And the RJ article had just come out, and I had just received in the mail that the NLRB found merit in my charges. . . . So I'm thinking uh-oh . . . this is the beginning of the end for me." Further, upon leaving Collura's office and while on her way to the dealers' lounge, notwithstanding crying "uncontrollably," Fields admitted stopping and speaking to several other dealers, telling them she had received a "terrible" shopper's report and she didn't think she could continue working that day. She added that 20 to 25 minutes elapsed between her leaving the meeting with Collura and going to the scheduling window.

As to her conversation with Jeff Maheu, Fields stated that no one was standing behind her during their exchange and that, while "crying uncontrollably," she told Maheu she was sorry

⁵⁰ In Respondent's terminology, this acronym means suspended pending investigation and is the disciplinary step preceding termination.

⁵¹ Fields stated that, if Maheu had not said okay, she would not have left for the day and that Westbrook failed to dispute her. He said only that Maheu had no authority to permit a dealer to leave the facility early.

and had to go home because she could not stop crying. “And then he is like, ‘Oh, I understand.’” She then said she could not stop crying, and was sorry for that, and had to leave to pick up her son. “And he said, ‘Okay, I understand.’” She again apologized and said she could not go upstairs to clock out because she would be too embarrassed to do so. “And he
 5 said, ‘I understand, ‘I understand. What is your employee number?’” After denying saying to Maheu her attorney advised her she did not have to return to work, Fields stated that she did tell him that her attorney had advised her not to work in her condition and then conceded she actually was not represented by an attorney at the time.⁵² Then, after stating she could not recall telling Maheu that Respondent was not supposed to have any meetings with her during
 10 the pendency of the NLRB matter, upon being shown her pretrial affidavit, in which these words appear, she conceded she “possibly” could have said this to Maheu-- “. . . but I was mumbling and rambling because I was so upset that it could have been something more or less that I was thinking as opposed to saying.”

Two major tenets of the General Counsel’s theory underlying the instant alleged violation of Section 8(a)(1) and (4) of the Act are that, while a dealer must seek and obtain permission before leaving Respondent’s facility prior to the end of his or her work shift,⁵³ Respondent maintained no work rule or policy, written or oral, setting forth exactly from whom a dealer must obtain such permission and that other employees have received permission from the scheduler to leave early and have not been terminated. In these regards, table games dealers Donna Blair, Sandra Holton, and Kanie Kastroll each corroborated Fields, and, with regard to the initial contention, William Westbrook conceded, that no such written rule or policy existed. Thus, corroborating Fields, Sandra Holton testified that on October 23, 2006, while in the dealer’s lounge, she became ill and, after being unable to reach an assistant casino manager or casino
 25 manager,⁵⁴ she then noticed that Jeff Maheu, who was the acting scheduler, had entered the lounge. She approached, and “I told him I was very sick and I didn’t know what to do.” Maheu replied, “Well, go home. I need to know what table you’re on’ so that he could put somebody back up there. And I asked him if I should clock out, and he said, ‘I’ll take care of it’” and asked for Holton’s identification number. At that point, according to Holton, she left Respondent’s
 30 facility and never received any discipline for leaving without permission. Likewise, Tynisia Boone testified that, on a “few” occasions, she approached Maheu, “[who] was in the scheduling office at the time,” and asked permission to leave the facility early and that he permitted her to leave. Finally, Blair testified that, in February 2007, subsequent to the discharge of Fields, Nancy Martinez, an assistant manager of employee relations, requested that she come to her
 35 office. As instructed, Blair went to the former’s office and, upon arriving,⁵⁵ Martinez told Blair that “she wanted to gather information about unscheduled early outs” and, after Blair gave her

⁵² Compounding her falsehood to Maheu, subsequent to her discharge, Fields wrote a letter to Andrew Pascal, seeking to be reinstated. In said letter, she wrote that, after her meeting with Collura on January 6, “my face was red and puffy from crying and I had been hyperventilating as well. I had called my attorney and they recommended I go home because I would be in more trouble if I went in on the game hysterical.” Fields admitted this claim was a fabrication and that she never had called a lawyer on January 6.

⁵³ Pursuant to Respondent’s progressive discipline policy, “walking off the job at any point after the shift has commenced without express permission from a supervisor” is grounds for termination.

⁵⁴ Holton stated she did this because no one was in the lounge, and she did not know what she should do in order to leave.

⁵⁵ According to Blair, when she arrived, a woman, working as a transcriber, was also inside Martinez’ office.

consent to questions, asked the latter to explain what an early-out is.⁵⁶ Then, Martinez asked about unscheduled early outs, and “I said that when someone gets sick, if they’re on a game . . . and they have to go home, they tell a supervisor that they have to go home and then they go home.” Blair then gave Martinez an example-- “I also told her that if for instance . . . I was
 5 downstairs and I got sick, if I had to leave, if I got an emergency phone call or if I had to go home . . . because I was ill I told her I would . . . stop at the scheduler’s office and let them know that I had to go home” At the end of the meeting, according to Blair, Martinez “. . . told me that the purpose of the meeting was try to get employees and management on the same page about EOs.”⁵⁷ During cross-examination, Blair agreed that, pursuant to Respondent’s
 10 termination policy, walking off the job at any point after the commencement of a shift without express permission from a supervisor, is grounds for termination.

William Westbrook testified that Cynthia Fields, who had never previously been disciplined,⁵⁸ was first suspended, pending investigation, on January 6, 2007 and later
 15 discharged for leaving Respondent’s facility without permission and for no other reason⁵⁹ and that he made the decision to terminate her. According to Westbrook, he learned that Fields had left early that day when he received a telephone, and the person, whom Westbrook does not recall, “. . . kind of described the situation that had led up to it, the meeting with Fields, that she needed a few minutes so they gave her 20 minutes to compose herself and that she went down
 20 and just told the scheduler that she was leaving and that her lawyer said . . . she didn’t have to work under these conditions and that she was leaving.” Admitting that he spoke to no one else, Westbrook then telephoned Fields and informed her she was being suspended pending investigation.⁶⁰ During the next two days, Westbrook testified, he collected statements from witnesses and surveillance tapes, and he then telephoned Fields and asked her to come to his
 25 office for her due process meeting. During this meeting, he stated, Fields changed her version of what occurred at the scheduling window-- “she changed it and said that when she talked to

⁵⁶ Blair testified that “the early out list is a list that a dealer will sign when they either come into work or sometime during the course of the day. And if [there are] extra dealers, the people
 30 on the list will be allowed to leave if their name is on the list.”

⁵⁷ General Counsel’s Exhibit No. 10, the transcriber’s notes of the meeting corroborate Blair’s testimony. Thus, according to the exhibit, Martinez asked Blair what she would do if she got sick during a work shift, and Blair replied, “if she was downstairs and she got sick then she would stop by the scheduler’s office to be considerate and let them know, but she would not
 35 clock out. . . . she would say there is no way I am going to be able to finish my shift, I have to go home. . . . she takes the scheduler for granted and believes they would do the right thing and call her team lead or pit boss and tell them she had to leave.”

⁵⁸ Apparently, she was the subject of discipline in August 2006 but Westbrook cancelled it.

⁵⁹ Westbrook testified that there are two methods for leaving early. First, a dealer may place
 40 his or her name on the early out list, which is kept in the scheduler’s office, and, if the dealer, whose name is on the list, is told he or she can leave, the dealer clocks out and leaves. The names go in a first on-first out order. Also, “if someone needs to leave in the middle of their shift . . . they must gain permission . . . directly from a casino manager or an assistant casino manager or they can go through a team lead to . . . convey the message to a casino manager or
 45 assistant casino manager.”

⁶⁰ According to Westbrook, he informed Fields that she was being placed on SPI for walking off the job, and she said that she had gone to the scheduling window and told “them” she was leaving. Westbrook testified he said, “I understand you told him you were leaving ‘because you had spoken with your attorney, and you are not working under these conditions, and you turned
 50 around and walked away. She did not deny that” and never said she told Maheu she was leaving and he said okay.

her attorney, she meant that she could not work under the conditions of her being upset and crying. She said that by Mr. Maheu expressing okay while listening to her story, that that was permission. I explained to her that he had no authority to grant permission and that she had the duty and the obligation to go back to the pit where Mr. Collura had said that she was to go back to. She had the team lead waiting there . . . and she never, during the almost an hour that she remained on property, reached out to either my office, the casino manager's, or an assistant to gain permission to leave." Also, Fields gave him the names of three other employees who had left early after informing the scheduler but not a manager; Westbrook recalled two of the employees were Donna Blair and Sandra Holton.

According to Westbrook, after meeting with Fields, he met with Holton but was unable to substantiate her story inasmuch as, while maintaining she did ask the scheduler for permission to leave, Holton did not know whether the scheduler had contacted a manager. In any event, he believed Fields' situation was different, for she had not requested permission to leave-- "she declared she was leaving and no permission was implied or granted." Further, Westbrook noted that Maheu refuted Fields' story-- "I think critical elements of it," including "what he said."⁶¹ Also, after speaking to Fields, Westbrook spoke to Kathy Femia, an official in Respondent's human resources department, to ascertain Respondent's exact policy regarding an employee, who is not on the early out list, leaving the facility as . . . I wanted to be sure what the procedure has been and what their interpretation was" On this, he discovered, "anybody in the scheduling office can not unilaterally grant anyone the permission to leave . . . they always have to get authority from an assistant casino manager or a casino manager," and, notwithstanding that he was acting as the scheduler, Maheu is a team lead and individuals in said classification are not authorized to permit employees to leave early.⁶² With regard to his former point, Westbrook testified that, if a dealer, who has not placed his name on the early out list, becomes ill while in the lounge, he or she must telephone a manager for permission to leave. Asked if this procedure is in writing, Westbrook averred that it always has been "standard policy" and, while perhaps not in writing, it was ". . . verbal, by communication back to the shift manager." Also, during cross-examination, asked why he thought Fields went to speak to Maheu if her intent was just to walk off the job, Westbrook opined, "I felt that Ms. Fields was upset at . . . being given a shopper's report. She didn't like the score. . . . I think she felt powerless. She wanted to express to someone without going back to the floor that she was leaving, and that her attorney told her to leave, and she was leaving . . ." ⁶³ In the foregoing

⁶¹ Westbrook added that, even if Maheu had assented, he would nevertheless have terminated Fields, for [Maheu's] okay does not grant permission. His okay is an acknowledgement that he understands what she is saying." Also, asked if Fields could know Maheu was not authorized to grant permission, he said, "It is common practice, and she has been there since day one, that only casino management can give you permission to leave the property, period." Asked if Fields would have known Maheu was not a manager, Westbrook said "Yes, sir," and added that, while Maheu had been a floor supervisor, he denied that the phrase, "without the express permission of a supervisor," referred to a floor supervisor.

⁶² On the latter point, Westbrook testified, without contradiction, that "individually, a team lead . . . does not have permission to send someone home . . . They have to get authorization from either an assistant casino manager or casino manager."

⁶³ Westbrook testified that Fields admitted she never contacted her team lead to say she needed to leave and never contacted casino management.

circumstances, according to Westbrook, he decided to terminate Fields and did so at their termination meeting on January 12.⁶⁴

5 Jeff Maheu testified that, while classified as a team lead, he was working as a table games scheduler for Respondent on January 6, 2007 and had been acting in that capacity for several months. Maheu, who admitted having authority to send dealers home early off of the early out list but specifically denied having authority to permit dealers, who were not on the said list, to leave Respondent's facility early, testified that, on January 6, at approximately 5:00 p.m., Cynthia Fields, with whom he was acquainted, appeared at the scheduling window, and "she was emotional, teary-eyed, and seemed a little distraught." He left his desk chair, walked over to the window, and asked if he could help her. "She said 'I can not work under these conditions,' and I said, 'Okay, what do you want me to tell Mosca,' who is our casino manager. She said, 'Tell him that I just got off of the phone with my lawyer, and that my lawyer said . . . You do not have to work under these conditions.' To go ahead and go. I said, 'Okay.' At that time, I picked up the phone, and she walked away." During cross-examination, Maheu admitted that, before she walked away, he asked Fields for her employee identification number.⁶⁵ As Fields walked away, Maheu telephoned Pat Mosca and informed the casino manager of his conversation with Fields; Mosca just replied, "Okay." A few minutes later, according to Maheu, he passed by Fields in the hallway but nothing was said by either. During cross-examination, 20 asked if he knows of any written policy that dealers have to contact a casino manager or assistant casino manager in order to obtain permission to leave Respondent's facility prior to the end of a shift, he answered, "No." Also, asked if he believed Fields did anything wrong that day, Maheu said, "She basically came to my window and said she was leaving regardless of what I had said that day" He believed this "because of her attitude. Because of the way she spoke to me. She said, 'I am leaving. I can't work under these conditions.' I assumed she was leaving." Finally, while conceding he was not oblivious to her physical condition, Maheu pondered, "What am I supposed to say?"⁶⁶

30 While Fields testified that no one was behind her while she was at the scheduler's window, speaking to Maheu, Marian Rizan, another table games dealer, contradicted her, testifying that, in fact, he came to the window and stood behind Fields as she spoke to Maheu. A surveillance tape, Respondent's Exhibit No. 13, corroborated Rizan in this regard. Rizan, who

35 ⁶⁴ Westbrook conceded that, during this meeting, he told Fields that she was required to seek permission of a supervisor in order to leave prior to the end of her shift; that Fields stated Maheu is a supervisor; and that he said Maheu was not functioning as one when working as the acting scheduler. He averred that, if he used the word supervisor, it was merely "semantical."

Westbrook testified Fields was the first dealer, whom he had ever terminated for walking off of the job.

40 ⁶⁵ According to Maheu, he did so in order to place her name in the "sick log" to delineate "when somebody goes home, what time they are leaving at."

45 ⁶⁶ Maheu gave two statements to Respondent with regard to the incident. In the first, dated January 6, he wrote "Cynthia Fields came to me and said she has to leave and that she cannot work under these conditions. I asked her what do you want me to tell Pat Mosca. She said that she spoke to her lawyer and her lawyer said to go home and not work under those conditions." Subsequently, asked by Westbrook to give another statement, Maheu did so on January 9, adding that after Fields said her lawyer said she should not work under these conditions, "I said o.k. because I was under the assumption she was leaving no matter what I said," and he was not granting her permission to leave. He added that he had no authority to do so. Finally, with regard to his second statement, while admitting that Westbrook said it should be more 50 "elaborate," Maheu denied that Westbrook told him what to write.

was acquainted with Fields, testified that he was able to overhear part of the conversation between the alleged discriminatee and Maheu. According to him, “. . . Cynthia was really emotional in her voice, and she was almost crying. . . . And she said, ‘I just come back from the office . . . because of the shopper’s report’ . . . and she said then ‘Because of who I am here, between dealers and a casino and I am out’ and she said, ‘I spoke with my lawyer’ and . . . ‘I don’t even supposed to work in these conditions. I am out ‘ And then, she actually said that ‘there is a dealer in my game, a replacement in my game.’” Maheu asked her what he should tell Mosca as to her leaving, and Fields replied, “I cannot say.” Asked if Maheu ever said o.k. to her, Rizan replied, “No, he didn’t say anything.” During cross-examination, Rizan conceded he heard Fields say, “I’m sorry, I can’t stay.”

All parties recognize the importance of the conversation between Cynthia Fields and Jeff Maheu. While I earlier expressed my belief that the former’s testimony exhibited a clear bias against Respondent, my main problem with Fields is that she demonstrated a distressing proclivity for dissembling in order to buttress her legal or factual positions. Thus, she admitted that her comment, regarding having just had a conversation with her lawyer who advised her not to work in her condition, to Maheu during their January 6 conversation and her similar statement, in her subsequent letter to Andrew Pascal, in which she requested reinstatement to her job, were fabrications. Further, Fields’ deceit extended to her testimony during the trial. In this regard, in response to counsel for the General Counsel’s question, whether Maheu said anything in response to her “babbling” and “rambling” about her excuses for having to leave work early, Fields said “I just looked at him and he was like, okay, you can go.” In my view, she certainly was aware, if credited, such a calculated response would remove any ambiguity from what Maheu said to her, and only after I admonished her to state Maheu’s exact words did she concede he said only, “okay.” In these circumstances, I have scant, if any, confidence as to the reliability of her account of this conversation. Unfortunately, I have the same bitter taste with regard to the respective testimony of Maheu and Rizan. The most significant aspect of the former’s account of his conversation with Fields is, of course, his assertion that, rather than asking permission to leave, she began, saying she could not work under these conditions, and, after Maheu asked what he should tell Pat Mosca, Fields said her attorney told her she did not have to work in those circumstances and “to go ahead and go.” Contradicting Maheu, during his direct examination, Rizan testified that Fields merely said “I am out;” however, during cross-examination, he changed his testimony, stating that she actually said “I’m sorry, I can’t stay.” Moreover, Rizan corroborated Fields that she said a replacement dealer was working at her table. Nevertheless, having assessed the demeanor of the three witnesses, while testifying, I believe that Maheu and Rizan were each surpassingly more forthright than Fields, and I shall rely upon their respective accounts for what was said between Fields and Maheu.

In light of my foregoing credibility resolutions and the record as a whole, I find that, late in the afternoon of January 6, 2007, Vincent Collura summoned for Cynthia Fields to come to his office in Respondent’s baccarat game area in order to discuss the most recent shopper’s report regarding her work;⁶⁷ that, during their meeting, Collura read the shopper’s comments

⁶⁷ In his post-hearing brief, counsel for the General Counsel’s position as to the timing of the meeting regarding the shopper’s report is that, while “curious,” there is no record evidence that the timing was unlawful. Contrary to counsel, I view the timing as coincidental. In this regard, I note that the dating of the counseling notice indicates that Respondent intended to meet with Fields in mid-December. Collura stated that he just was unable to find a day and time to meet with Fields prior to January 6, and the latter stated she missed work for a couple of days in December to care for her sick child. Moreover, there is no record evidence that Respondent deliberately delayed the meeting until after Region 28 issued its complaint on December 28.

about her work to Fields, said she had scored slightly more than two points below the acceptable score of 80 percent, discussed how she could improve her work, said she would be shopped again within two weeks, warned her, if she did not improve, she would be given a written warning, and gave Fields a counseling notice, dated December 12. Further, I find that
 5 Fields become extremely agitated and emotionally upset at what Collura said and began crying; that Collura observed Fields' emotional distress and told her, before returning to her table, to go downstairs and compose herself; and that, crying uncontrollably, Fields left the meeting with Collura, went downstairs to the dealers' lounge, spoke to other dealers about what had just occurred, spoke on her cell phone with the father of a dealer, but remained emotionally upset
 10 and crying.

Next, I find that, given her emotional state and appearance, resulting from her crying, Fields decided that she could no longer work that day; that she, therefore, walked to Respondent's scheduling office, located approximately 100 yards from the dealers' lounge, and that, at the scheduling office window, she spoke to the acting scheduler, Jeff Maheu.⁶⁸
 15 Crediting Maheu, I further find that he immediately observed Fields to be crying and emotionally distraught; that he asked if he could help her; that Fields said she was sorry, but she could not work under these conditions and could not stay; that he said "okay" and asked what she wanted him to tell Pat Mosca, the casino manager; that she replied she had just talked with her lawyer on the telephone and he told her she did not have to work under these conditions, the lawyer said to go ahead and go,⁶⁹ and there already was a substitute dealer working on her game;⁷⁰ that Maheu said "okay" and asked Fields for her employee identification number. Finally, I find that Fields then left the scheduler's window; exchanged her work clothes; and, after talking to other dealers and walking by but not speaking to Maheu, left Respondent's facility.
 25

The parties agree that a determination as to whether Respondent's termination of Fields was violative of Section 8(a)(1) and (4) of the Act must be analyzed pursuant to the burden-shifting framework set forth in the Board's *Wright Line* decision. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002); *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).
 30 Thus, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), ". . . the General Counsel has the initial burden of proving that the employee's protected activity was a motivating factor in the employer's action. If the General Counsel meets the initial burden, the burden shifts to the employer to prove that it would have taken the adverse employment action even in the absence of the employee's protected activity."
 35 *McKesson Drug Co.*, *supra*, at 936. Two points are relevant to this analytical approach. First, a pretextual discharge should be viewed as one in which ". . . the defense of business justification is wholly without merit" (*Wright Line, supra*, at 189, n. 5), and the "burden shifting" analysis of

⁶⁸ I do believe Fields that she went to speak to Maheu about leaving work early because employees must telephone the scheduler if they do not intend to report for work any day. In this regard, while Respondent's written policy is to terminate employees who walk off the job and leave Respondent's facility without permission and employees may not leave work prior to the completion of their shift without permission, I believe and find that, at no material time herein,
 45 did Respondent maintain any written or oral rule or policy regarding from whom dealers must receive permission to leave work early.

⁶⁹ Specifically, I do not believe Fields that, while speaking to Maheu, she babbled, rambled, mumbled, prattled, or, in any other way, trivialized a feigned conversation with her attorney as her excuse for leaving work early.

⁷⁰ While Maheu did not recall Fields making the latter statement, Rizan corroborated Fields that she did mention that a substitute was working at her table.

Wright Line need not be utilized. *Arthur Young & Co.*, 291 NLRB 39 (1998). Also, regarding the latter point, “it is . . . well settled . . . when a respondent’s stated motive for its actions is found to be false, the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal.” *Flour Daniel, Inc.*, 304 NLRB 970 at 970.

5

At the outset, there does not appear to be any dispute and there is clear record evidence regarding the first three elements necessary to establish the General Counsel’s initial burden under *Wright Line*. Thus, Fields engaged in protected concerted activities by filing the unfair labor practice charge in Case 28-CA-21073 and assisting the Board during its investigation. *McKesson Drug Co.*, *supra*. Moreover, inasmuch as Fields’ name appeared on the unfair labor practice charge and the subsequent complaint in the above-captioned matter, Respondent was clearly aware of her actions. Next, of course, Respondent suspended and subsequently terminated Fields. The controversy herein revolves around the fourth element necessary for the General Counsel to establish a *prima facie* violation of Section 8(a)(1) and (4) of the Act-- whether a “motivational link or nexus” exists between Fields’ protected concerted activities and her discharge by Respondent. *American Gardens Management Co.*, *supra*, at 645. I do not believe that the General Counsel has established the existence herein of the required unlawful animus.

10

15

20

Counsel concedes that there exists no direct record evidence herein of discriminatory motivation but argues two alternative theories with regard to the existence of such-- that there is circumstantial record evidence establishing unlawful motivation underlying the termination of Fields or that her discharge was pretextual in order to disguise Respondent’s true, unlawful motive. As to the first, while also pointing out that Fields was the first dealer terminated by Respondent, counsel essentially argues that the timing of Respondent’s suspension of Fields, the precursor of her discharge, occurring just nine days after Region 28 issued its complaint in Case 28-CA-21073 and two days after the newspaper article regarding the complaint, demonstrates that Respondent’s adverse employee actions were unlawfully motivated. It is, of course, well settled Board law that “. . . the timing of an employer’s action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.” *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004). However, close analysis of the record evidence, as to the events of January 6, demonstrates the fallacious nature of counsel for the General Counsel’s assertion. Thus, while counsel avers that the timing of the intervening January 6 meeting, initiated by Collura in order to discuss Fields’ negative shopper’s report, is “curious,” the General Counsel alleged neither the shopper’s report itself nor the meeting, regarding said report, as being unlawful. Further, I note that the counseling notice, concerning the shopper’s report, was dated December 12, Vincent Collura was uncontroverted that he attempted, but was unable, to meet with Fields on, at least, six occasions in December, and Fields was absent from work a few days in December in order to care for her sick child and that these militate against inferring anything nefarious from the scheduling of the above meeting. Moreover, of course, it strains credulity that Respondent was prescient enough to have foretold Fields becoming hysterical as a result of the negative shopper’s report and the resulting counseling notice, initiating the conversation between herself and Maheu, and leaving Respondent’s facility prior to the end of her work shift. In these circumstances, I believe there is insufficient record evidence to warrant the inference that, rather than being merely coincidental, the timing of Respondent’s suspension and discharge of Fields was somehow directly related to her involvement with the Board.

25

30

35

40

45

50

The General Counsel next asserts that Respondent’s stated reason for its discharge of Fields-- that she left Respondent’s facility prior to the end of her shift without permission-- was pretextual. In my view, this is the more troubling contention, for accepting its validity necessitates finding that Respondent sought to conceal its actual, motive for discharging Fields.

In this regard, William Westbrook’s demeanor, while testifying, was that of an utterly disingenuous witness, and I am loath to accept significant aspects of his account of the events herein or of his disciplinary decision-making rationale. Thus, while Respondent undoubtedly did maintain a policy, requiring dealers to seek permission from a supervisor in order to leave work prior to the end of their work shift, there is no dispute that it maintained no written policy delineating exactly from which supervisors dealers were required to seek such permission, and I do not believe Westbrook that any oral policy had ever been disseminated amongst the dealers, specifying the management officials who must grant such permission. That this is true, of course, is seen from the conversation between Donna Blair, and Nancy Martinez, an assistant employee relations manager, during which the latter interrogated Blair as to her understanding as to the procedure for leaving early. Martinez’ questions to Blair not only establish that the dealers were unaware of the putative procedure, outlined by Westbrook, but also that Respondent itself had not yet devised or published such a policy. Further, I do not believe Westbrook that Respondent’s scheduler is not authorized to permit dealers to leave work early. However, whether the individual working in said capacity was explicitly authorized to grant such permission is not the issue, for I believe that Fields reasonably believed the scheduler possessed such authority. Thus, I note that, slightly less than three months earlier, Sandra Holton⁷¹ had requested and received permission from acting scheduler Maheu to leave early, an incident about which Fields was aware, and that Respondent required dealers, who intended to be absent from work for any reason, to telephone the scheduler on the day of the absence.

Notwithstanding that Westbrook may have been deceitful regarding aspects of Respondent’s rationale for its suspension and subsequent termination of Fields, I do not believe that Respondent’s stated reason for her discharge was a sham. Thus, the record establishes, and counsel for the General Counsel concedes, that, pursuant to Respondent’s progressive discipline procedure, leaving its facility prior to the end of the work shift without the express permission of a supervisor constitutes grounds for termination. Contrary to counsel, I believe that, on January 6, while inside the dealers’ lounge subsequent to her meeting with Vincent Collura, Fields decided that, under no circumstances, would she continue to work that day and that she left Respondent’s facility prior to the end of her work shift without explicit permission to do so. Thus, there is no dispute that, prior to her conversation with the acting scheduler, Jeff Maheu, Fields was in a highly agitated emotional state and distraught over the negative shopper’s report and, given her emotional and physical condition caused by her hysteria, desirous of leaving work early. I have previously concluded that, during her conversation with Maheu, Fields, at most, apologized for being unable to work in her present condition and said she could not stay; that, when Maheu asked her what the reason he should give to Pat Mosca, she dissembled, telling Maheu her attorney said she did not have to work under these conditions and advised her to leave; that Maheu replied, o.k.; and that Fields then left the scheduler’s window. Certain points are, I believe, readily apparent. First, Fields never actually requested permission to leave, and, given her choice of words, not only did she have no intention of remaining on the job that day as she approached the scheduling window but also she made her attitude explicitly clear to Maheu, who rightly assumed she was leaving no matter what he said. Second, Fields’ fabrication was clearly designed to induce an affirmative response from Maheu. Given her emotional state, which was obvious to Maheu, why else would she prevaricate a nonexistent conversation with a lawyer? Next, and of utmost importance, inasmuch as she was untruthful to Maheu, noting the ambiguous nature of his response, “okay,” which likely was meant merely as an acknowledgement of her excuse, I do

⁷¹ Holton impressed me as testifying in a candid manner, and, noting that such was not controverted by Maheu, I credit her version of events. I do not rely upon the testimony of Tynisia Boone, who seemingly always corroborated the dubious testimony of Fields.

not believe she honestly believed Maheu had assented to her leaving work early. Finally, I previously stated my view that, prior to speaking to Maheu, Fields assuredly had made up her mind to leave work. and, as the former did not respond negatively to her, she did so. I think Maheu justifiably believed her intent was to leave, and, therefore, contrary to counsel, I do not draw any negative implication from his failure to advise her not to leave or to seek permission from a casino manager. In the above circumstances, notwithstanding that, in order to buttress Respondent's position, Westbrook undoubtedly puffed regarding Respondent's work rules and dissembled regarding what Maheu said to Fields, I believe he was being truthful in stating that Respondent discharged Fields for leaving work prior to the end of her work shift without permission. Accordingly, the General Counsel failed to establish that Respondent's reason for suspending and subsequently terminating Fields was a mere pretext, disguising an unlawful motive.

Accordingly, pursuant to *Wright Line, supra*, as I do not believe that the General Counsel has met its *prima facie* burden of establishing the existence of unlawful animus, the necessary "motivational link" between Cynthia Fields' filing of an unfair labor practice charge against Respondent and the Board's subsequent issuance of a complaint based upon said unfair labor practice charge and Respondent's suspension and discharge of Fields, I shall recommend dismissal of the second consolidated complaint insofar as such alleges that Respondent suspended and subsequently discharged her in violation of Section 8(a)(1) and (4) of the Act.

C. Respondent's Alleged Publication of An Unlawful Work Rule and Alleged Unlawful Written Warning Issued to Mark Baldino

Mark Baldino, who worked for Respondent as a table games dealer from the opening of its facility in April 2005 until April 24, 2007, testified that the January 4, 2007 *Las Vegas Review Journal* article, regarding the Board's complaint in Case 28-CA-21073, caused "fervent" discussion amongst Respondent's dealers on a daily basis ". . . because one of our own . . . was in the newspaper, and it was big news for this industry." In this regard, according to Baldino, he participated in such conversations in the break room while off duty and "inside the pits at times" during working time, and these conversations involved both dealers and team leads. Baldino added that, whenever he worked at Respondent's craps tables, the dealers would engage in conversations about such subjects as sports, politics, and "whatever was common news at that time," and "a lot of time, it would be discussion with the customers . . . because [they] participated . . . in various conversations." Baldino further testified that, one day in January, he was working at a roulette table, and, while the table was "dead," meaning no customers were at the table, he and another dealer working at the table, whose name is J.R., engaged in a conversation regarding the above newspaper article. Baldino recalled that J.R. ". . . had asked me a question . . . because I knew Cynthia . . . because it was very big news . . . inside the Wynn that a dealer . . . made a complaint to the [NLRB] about the current policy that exists now in the hotel. . . . I was giving him a brief description of what happened with Cynthia We were . . . pretty much standing there side by side." Suddenly, Jerry Jackson, a team lead, approached and told them to "knock it off," and they stopped talking.

Baldino testified that, about a week later, an assistant casino manager "removed" him from the floor and escorted him upstairs to the casino office and that, inside the office waiting for him were Pat Mosca, Vincent Collura, and another assistant casino manager. Upon arriving, Collura handed him a counseling notice, dated January 12 and executed by Collura and William Westbrook, and asked him to sign it. Baldino did so. The counseling notice, General Counsel's

Exhibit No. 5, states,⁷² as to the details of the incident, “On 1/04/07 in Pit 8 while performing mucking duties on a live Roulette game, Mr. Baldino was witnessed by [team lead] talking to the dealers on the wheel about an article written in the local paper regarding certain employees and Wynn Las Vegas. This caused disruption in the pit with both employees and customers” and, regarding corrective action, states “Mr. Baldino will need to make immediate improvements towards following all policies and procedures. He must maintain a professional dialogue while on the casino floor with all employees and customers. Any further infractions of this nature will result in counseling up to and including termination.” Regarding what is stated in the counseling notice, while denying that any customers were at the roulette table, Baldino admitted that “. . . there was a customer that wondered onto the game” just when Jackson told them to stop talking. Further, he denied the conversation disrupted a game and said there was no more than the one customer at any point during the conversation, and “. . . we were dead for a while. . . . It was . . . pretty quiet, so we were just talking amongst ourselves.” Finally, according to Baldino, he had never previously been told by Jackson or any supervisor to stop talking about any other subject, and he had never before received discipline for engaging in such conduct.

The record establishes that, upon ordering Baldino and J.R. to stop talking at the roulette table that day, the team lead, Jerry Jackson, who failed to testify at the hearing, wrote a “note to file” as to what had occurred. He wrote, “Mark Baldino was scheduled to muck in Pit 8. As soon as he got into the pit he started talking about what was in the paper about the Wynn situation. This is not the first time this has happened. I was just about to say something to him when he asked to go to the restroom. . . . He never returned to the pit and I saw him going to his next game at 1:20pm in Pit 9. He is a constant bother to my team dealers, who feel threatened when he is in Pit 8. I have asked that he not be placed in Pit 8 and Do Not want him in here anymore.” While conceding that Baldino may have engaged in conversations with dealers on numerous occasions without receiving discipline “because it was never brought to my attention,” William Westbrook testified that Respondent maintains a policy absolutely prohibiting any conversations between dealers on the casino floor-- the policy is “they should not have it--“and that no distinction is made between the types of dialogue-- “it is personal dialogue.”⁷³ According to Westbrook, who also conceded that “not many” dealers have been disciplined for talking in the pit areas since Respondent opened for business,⁷⁴ “. . . I have had several conversations with [Mark Baldino] over a short period of time prior to this and cautioned [him] on his behavior and his language. . . . I had personally talked to him about . . . not to interact into dialogue with others.” Also, he testified, Baldino had been previously suspended “. . . for rude and discourteous behavior and vulgar language. And so, when [the instant situation occurred] . . .

⁷² As to the level of discipline involved, the counseling notice bears an “x” in the box next to the words “verbal warning.” As will be discussed *infra*, William Westbrook denied that the counseling notice signified any discipline.

⁷³ While there does not appear to be a written rule prohibiting such dialogue, among the criteria for rating the dealers, used by Respondent’s shopping service, is whether they engage in conversations with fellow employees. Dealers, who engage in such conversations, are negatively rated.

⁷⁴ According to Westbrook, there have not been many disciplines for talking because many team leads “. . . just let it go. The ones that come to me are the ones that are either from the diligent people who report it or conversations that actually impair guest service where they are actually ignoring a guest.” Westbrook conceded that dealers do talk amongst themselves; however, he believes Jackson told Baldino to stop as “I think it was knowledge that the [team leads] and casino managers had regarding [his] prior disciplines and the cautionary state that he was in that generated that report. . . . Not because it was just him but because they knew that he had been warned about his behavior prior and several times in a short period of time.”

he had already reached a fairly high level of progressive discipline,”⁷⁵ and “. . . I had a choice of either taking . . . and putting him two feet out the door or having a conversation with him, rolling back and documenting that conversation with just a verbal . . .” Westbrook, who testified that he authored the counseling notice and obtained the information, which formed the basis of the notice, from Jerry Jackson’s “oral” statement and from casino managers, said he decided upon the latter course and did so with a warning to “stop it.” Westbrook denied that the counseling notice, which was given to Baldino, constituted discipline as “a verbal . . . is not part of [Respondent’s] progressive discipline.”⁷⁶ During cross-examination, Westbrook said he did not know whether the dealer, with whom Baldino was talking, had received a counseling notice and testified that the language in the counseling notice came from team lead Jackson’s note to file. Finally, I note that Respondent offered no explanation for Jackson’s failure to appear to testify.

In deciding what occurred, initially, I note that Mark Baldino impressed me as a straightforward witness, testifying in a frank manner, and I shall rely upon his version of the instant events. In contrast, as stated above, Westbrook was an unconvincing and dishonest witness, and I place no reliance upon his testimony except when corroborated. In this regard, his assertion, directly contradicted by Respondent’s own document, that verbal counseling is not considered a step in Respondent’s progressive discipline system, was preposterous. Also, Respondent offered no corroboration for his claim that Baldino had previously reached a high level of progressive discipline, and I give this assertion no credence. Further, of course, team lead Jackson failed to testify. Thus, as Westbrook conceded the information for the counseling notice came from Jackson, whatever the former wrote in said document must be considered uncorroborated hearsay, and, therefore, I shall afford it no weight. Accordingly, based upon the foregoing and the record as a whole, I find that, in early January, at a time when no customers were playing at the roulette game, at which they were working, Baldino and another dealer were discussing the January 4 *Las Vegas Review Journal* newspaper story, Cynthia Fields’ role in the case before the Board, and the effect of the Board case upon the recently implemented changes in the dealers’ tips pool policy; that team lead, Jerry Jackson, approached and demanded that they stop talking; that Jackson was aware of the subject about which Baldino and the other employee were talking; that, a week later, Respondent disciplined Baldino with a counseling notice, marked as a verbal warning; and that the counseling notice was based upon Baldino having been observed “. . . talking to the dealers on the wheel about an article written in the local paper regarding certain employees and Wynn Las Vegas” and warned Baldino “any further infractions of this nature will result in counseling up to and including termination;” and that, while pursuant to Respondent’s shopper’s guideline, dealers should not engage other dealers in conversations, as Baldino testified and Westbrook admitted, they regularly engage in nonwork-related conversations while working at the gaming tables.

Using the January 12, 2007 counseling notice as the basis, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by promulgating a “no talking” policy concerning the dealers’ terms and conditions of employment and Section 8(a)(1) and (3) of the Act by issuing the counseling notice itself to Baldino. Regarding the first, as the said counseling

⁷⁵ Respondent offered no corroboration for Westbrook’s assertion.

⁷⁶ In the document, which sets forth Respondent’s progressive discipline policy, the first step in the procedure is “verbal counseling/coaching. As to this, Westbrook claimed that “. . . this particular process was never in place . . . and the company did not adopt the verbal counseling as a step of progressive discipline.”

During cross-examination, Westbrook said there is no magic number of verbals an employee may receive before he or she is disciplined-- “they can have numerous verbal warnings. It depends on what the infraction is and whether it justifies progressive discipline.”

notice describes Baldino’s discussion of the local newspaper’s article concerned the Board’s complaint in Case 28-CA-21073, which involved a meeting during which Respondent discussed its recently implemented changes in the dealers’ tips sharing pool as the asserted misconduct and warns of possible termination for future such “infractions,” the said counseling notice clearly prohibits Respondent’s dealers from discussing subjects germane to their terms and conditions of employment. While I agree with counsel for Respondent that their client does have a valid interest in ensuring that its table games are well run, I note that no customers were present while Baldino and the other dealer engaged in their discussion and I do not believe that any “disruption” of service occurred. Moreover, notwithstanding being the subject of a shopper’s guideline, no record evidence exists that Respondent maintains a work rule, explicitly prohibiting conversations among dealers while working, and, in fact, such conversations, involving a variety of subjects, regularly occur. In these circumstances, it appears that, upon becoming aware of Baldino’s acts and conduct, Respondent selectively prohibited discussion of a subject about which it apparently had a sensitive self-interest. Board law is well settled that, while an employer may prohibit its employees from discussing matters pertaining to their terms and conditions of employment during working time if said prohibition also extends to other subjects not associated with their work, such a prohibition violates Section 8(a)(1) of the Act when employees are forbidden to discuss matters, pertaining to their terms and conditions of employment, but are free to discuss other non-work related issues, particularly when said prohibition is announced directly in response to specific protected concerted acts. *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003). Accordingly, I find that, by disciplining Baldino with the above-described counseling notice, Respondent, in effect, published a rule, prohibiting its employees from discussing matters, pertaining to their terms and conditions of employment, during their working time while, at the same time, permitting them to discuss other nonwork-related matters, and, therefore, engaged in conduct violative of Section 8(a)(1) of the Act.

As to whether Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by issuing the counseling notice to Baldino, I note at the outset that there is no record evidence or contention by the General Counsel that he engaged in any union activities prior to the alleged unlawful discipline. In any event, while once again counsel neglected either to set forth an underlying legal theory for the alleged violation or to cite any supporting Board decisions, I think that the merits of this allegation must be considered under the legal framework, set forth by the United States Supreme Court in *NLRB V. Burnup & Sims*, 379 U.S. 21 (1964). Therein, the Court concluded that Section 8(a)(1) of the Act is violated if the General Counsel establishes that the employee was, at the time, engaged in protected activity, that the employer was aware of said activity, that the basis for the adverse employment action was an alleged act of misconduct arising in the course of said protected activity, and that the employee was not guilty of the alleged misconduct. *Id.* at 23. Herein, Baldino clearly engaged in protected concerted activity by discussing the local newspaper article, which concerned the Board’s complaint against Respondent, the subject matter of which involved a term and condition of employment-- the dealers’ tips sharing pool, with a fellow employee. Further, given the wording of team lead Jerry Jackson’s note to file and of the disciplinary counseling notice, which Respondent gave to Baldino, it is clear that Respondent was aware Baldino had been discussing the newspaper article prior to Jackson ordering him to cease doing so. Moreover, while, given the wording of the disciplinary counseling notice, Respondent claimed that, as a result of this conversation, Baldino caused a “disruption in the pit with both employees and customers,” contrary to Respondent, inasmuch as I have found that no customers were present at the roulette table while Baldino and his fellow dealer discussed the newspaper article, I am at a loss to understand how, and do not believe that, any sort of disruption of work resulted from Baldino’s acts. Accordingly, I further find that, essentially, Baldino was disciplined because he engaged in acts, protected by Section 7 of the Act, and that, therefore, Respondent’s discipline of him was violative of Section 8(a)(1) of the Act.

D. The Alleged Unlawful Threat To Tynisia Boone

5 Tynisia Boone testified that, subsequent to the publication of the *Las Vegas Review*
Journal newspaper article, in which she was identified as having assisted Cynthia Fields in the
 filing of the unfair labor practice charge in Case 28-CA-21073, on January 14, 2007 at
 approximately 1:30 in the afternoon, while she was working at a craps table, a team lead, Steve
 Johnson, “. . . told me they are watching me closely, Tynisia. Don’t hawk the dice. You’re doing
 a horrible job hawking the dice. . . . I just said who is they . . . the customers? He just said that
 10 they’re watching every move I make.” Respondent failed to call Johnson as a witness regarding
 what Boone attributed to him. Asserting that the position of team lead is a supervisory position
 within the meaning of Section 2(11) of the Act, counsel for the General Counsel argues that,
 occurring just 10 days after publication of the newspaper article, Johnson’s comment should be
 construed as a threat violative of Section 8(a)(1) of the Act. Contrary to counsel, while Boone’s
 15 testimony was uncontroverted, Johnson’s comment is fraught with ambiguity and also can be
 reasonably understood as a statement of fact-- that she was engaging in an act contrary to
 Respondent’s procedures for dealing craps and Respondent’s overhead surveillance had
 observed her violation of policy. While the Board has found statements, similar to that of
 Johnson, violative of the Act, given the entirety of his comments and noting the existence of no
 20 record evidence that Johnson was aware of the newspaper article or of the reference therein to
 Boone, I agree with counsel for Respondent that the team lead was more likely commenting
 upon a perceived procedural error rather than threatening her because of her assistance to
 Fields. Accordingly, I find that Respondent did not violate Section 8(a)(1) of the Act by
 Johnson’s comments to Boone and, therefore, shall recommend dismissal of paragraph 5(g) of
 25 the second consolidated complaint.⁷⁷

Conclusions of Law

30 **1.** At all times material herein, Respondent has been an employer engaged in
 commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By threatening its employees with the futility of representation by a union,
 Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

35 **3.** At a time when no strike was imminent, without defining the type of strike, by
 threatening its employees, if they engaged in a “strike,” they would be permanently replaced,
 Respondent threatened its employees with discharge in violation of Section 8(a)(1) of the Act.

40 **4.** By promulgating a rule, prohibiting its employees from discussing matters, pertaining
 to their terms and conditions of employment during their working time, while, at the same time,
 permitting them to discuss other non-work related matters during their working time,
 Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

45 **5.** By issuing a disciplinary counseling notice to an employees because he engaged in
 protected concerted activities, Respondent engaged in acts and conduct violative of Section
 8(a)(1) of the Act.

6. Unless specified above, Respondent engaged in no other unfair labor practices.

50 ⁷⁷ In these circumstances, of course, I need not decide whether Respondent’s team leads
 are statutory supervisors.

7. Respondent engaged in unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

5

The Remedy

Having found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist from said unlawful acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Also, I shall recommend that Respondent be ordered to post a notice, setting forth its unlawful acts and obligations in order to effectuate the purposes and policies of the Act.⁷⁸

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁹

ORDER

The Respondent, **Wynn Las Vegas LLC**, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening its employees with the futility of being represented by a union in order to induce them to forego organizing for a union;

(b) At a time when no strike is imminent and without defining the type of strike, threatening its employees with discharge by warning them, if they engage in a strike, they will be permanently replaced;

(c) Promulgating a rule, prohibiting its employees from discussing their terms and conditions of employment during working time while permitting them to discuss other non-work related matters during their working time;

(d) Issuing disciplinary counseling notices to its employees because they engaged in protected concerted activities;

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

⁷⁸ Inasmuch as there is no record evidence that Respondent's rule, prohibiting dealers from discussing their terms and conditions of employment while working, was ever disseminated beyond the counseling notice, which was issued to Mark Baldino, and as I shall order said document to be expunged from Respondent's records, there is no need for any additional affirmative remedy with regard to the unlawful rule.

⁷⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

5 (a) Within 14 days from the date of this Order, expunge from its files any reference to the unlawful counseling notice, which was issued to its employee, Mark Baldino, and, within 3 days thereafter, notify Baldino, in writing, that this has been done and that the warning notice will not be used against him in any way;

10 (b) Within 14 days after service by the Region, post at its hotel/casino facility in Las Vegas, Nevada, copies of the attached notice marked “Appendix.”⁸⁰ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 2006.

20 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

25 **IT IS FURTHER ORDERED** that the second consolidated complaint be, and the same hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

30 Dated, Washington, D.C. December 31, 2007

35

Burton Litvack
Administrative Law Judge

40

45

50

⁸⁰ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD” shall read “POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.”

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten our employees with the futility of being represented by a union in order to induce them not to engage in organizing for union representation.

WE WILL NOT threaten our employees with discharge by warning them, at a time when no strike is imminent and without defining the type of strike, if they engage in a strike, they will be permanently replaced.

WE WILL NOT promulgate a rule, prohibiting our employees from discussing their terms and conditions of employment during working time, while, at the same time, permitting them to discuss other non-work related subjects during working time.

WE WILL NOT issue disciplinary counseling notices to our employees because they engage in protected concerted activities.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful counseling notice, which we issued to **Mark Baldino**, and, within 3 days thereafter, notify Baldino, in writing, that this has done and that the unlawful counseling notice will not used against him in any way.

WYNN LAS VEGAS

(Employer)

Dated _____ By

(Representative)

(Title)

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

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

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

602-640-2160.

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

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

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO OFFICE

WYNN LAS VEGAS, LLC

and

Cases 28-CA-21073
28-CA-21197

CYNTHIA FIELDS, an Individual

and

28-CA-21205

TYNISIA BOONE, an Individual

and

28-CA-21363

TRANSPORT WORKERS UNION
OF AMERICA, AFL-CIO

Table of Contents

Statement of the Case	1
Findings of Fact	2
I. Jurisdiction	2
II. The Issues	2
III. The Alleged Unfair Labor Practices	3
A. October 30, 2006 Meeting and Respondent's Alleged Unfair Labor Practices Attributed by Steven Wynn	5
B. The Alleged Unlawful Suspension and Subsequent Discharge of Cynthia Fields	18
C. Respondent's Alleged Publication of An Unlawful Work Rule and Alleged Unlawful Written Warning Issued to Mark Baldino	30
D. The Alleged Unlawful Threat To Tynisia Boone	34
Conclusions of Law	34
The Remedy	35
ORDER.....	35
APPENDIX.....	37