UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYNN LAS VEGAS, LLC

and **Case 28-CA-22818**

RONDA LARSON, an Individual

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS

Counsel for the Acting General Counsel (the General Counsel), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Limited Cross-Exceptions to the Decision of Administrative Law Judge James M. Kennedy (the ALJD) [JD(SF)-512-1007], issued on December 14, 2010, in the above captioned case.[1] Under separate cover, the General Counsel also files with the Board this date her Answering Brief to Respondent's Exceptions (the General Counsel's Answering Brief).

It is respectfully submitted that in all respects, other than the ALJ's failure to find that Respondent illegally interrogated its employee David Sackin (Sackin), the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence. These findings include his conclusions that: Respondent violated Section 8(a)(1) and (3) of the Act by suspending Sackin and, additionally, by discharging its employee Ronda Larson.

A. Factual Background

Since April 2005, Respondent has operated a high-end Las Vegas casino resort known as "The Wynn" (the Casino). (Tr. 43) A self-taught table-games dealer, Sackin came to the

[1] Wynn Las Vegas, LLC is referred to as Respondent. The Transportation Union Workers of America is referred to as Union. References to the Transcript are designated as (Tr.) with the appropriate page citations. References to the ALJD show the applicable page number.

Casino with 13 years experience dealing at Las Vegas casinos. (ALJD 5:26-27) Respondent's Assistant Casino Administration Manager, Peggy Collura (Collura), is third-in-charge of the Casino's operations. (ALJD 2:22-26)

As set forth more fully in the General Counsel's Response to Respondent's Exceptions, filed herewith, Respondent, in 2006, altered the formula whereby its dealers received their gratuities, significantly reducing their overall pay. (ALJD 3:1-30-40) As a result, Respondent's dealers organized for purposes of collective bargaining. (ALJD 4:12-14) Sackin was active in organizing. Shortly after the Union's election victory in the summer of 2007, he became a shop steward; as such, he "served as the Union's conduit to the employees, provided news and was a source of information to them as questions came to him," and even appearing on television picketing. (ALJD 4:1-4; 5:27-28; 5:17-18) His Section 7 activity, according to the ALJ, "was clear." (ALJD 5:18-19)

Another result of Respondent's reduction in the table-games dealers' pay was the initiation of a series of lawsuits by the dealers. (ALJD 4:1-4) These suits alleged in essence that Respondent had violated state gaming law by improperly allowing individuals serving a newly-created position, known as Customer Service Team Leads or "CSTLs," to receive tips. On July 1, 2009, Sackin was disclosed as a witness for the dealers in the tip-pooling litigation. (ALJD 4:31-33; 5:28-29) Twelve days later, Sackin was "tapped off" his game and summoned to Collura's office. (ALJD 5:31-35) Collura explained that she had set up the meeting at the behest of Respondent's attorneys, and that her instructions were to "reach out" to any of the dealers on the list with whom she was familiar, "just to find out if they knew that they were being called possibly to be a witness and what type of testimony that they were going to provide." (Tr. 50; ALJD 5:31-37)

Sackin immediately asked if he was in trouble and whether he needed a union representative. Collura "assured him he did not." (ALJD 5:42-46) According to the ALJ, this is what happened next:

> Collura asked if he was aware that he was on the list of potential witnesses, which he affirmed. Collura then asked if he was represented by counsel for the Labor Commissioner hearing. Sackin replied that he was not. Collura asked if Sackin was aware that he might be called as a witness and asked what he would testify to if he was called. Sackin evaded the question and told Collura he had not had an opportunity to think the matter over and that he had not decided whether to testify or not.
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> Collura then asked Sackin if he had ever received a tip in his capacity as a dealer. Sackin affirmed that he had. Her next question was whether Sackin had ever witnessed a CSTL receive a tip from a patron. Sackin stated that he had never seen a CSTL receive a tip. Collura testified that she questioned further on this point, "I think I asked how many years he dealt and I think he said fifteen. I said, 'You've never had a customer say, oh, hey put a dollar – what's your number – to a CSTL and put a dollar on their favorite number?'" Sackin replied that he had seen a guest tip someone other than a dealer a couple of times. Next, Collura asked Sackin if he had signed any forms agreeing to be involved in litigation against Respondent. Again, Sackin evaded the question. Sackin testified that he withheld information in the interview because, "I didn't want to bring any more questioning upon myself."

(ALJD 5-6)

While the ALJ correctly credited virtually every detail of Sackin's version of the meeting, he failed, inexplicably, to take notice of a critical exchange that occurred at the end of this meeting. Specifically, after 'hitting a wall' with her questioning of Sackin about his own impressions of the tip-pooling litigation, Collura told him, "*I'm sure people come to you and ask you as a shop steward if – you know about this thing.*" (Tr. 462) Sackin responded that in fact some people had done so, but that the Union and the tip pooling litigation were separate things. Collura then said it was good he understood this because there was "only one

set of money" and there was "no reason to get a third party involved that may take a portion of that money because there's already representation." (Id.) Collura concluded the interview by explaining that she was "just calling people in today and letting people know that they are under no obligation to have somebody represent them." (Id.) However, as the ALJ correctly noted, Collura never interviewed any of the other dealers on the witness list. (ALJD 5:33-34)

B. The ALJ Erred by Failing to Find a Violation of Section 8(a)(1) of the Act Based on the Interrogation of Sackin By Respondent's Assistant Casino Administration Manager Collura

The ALJ's analysis of whether Collura had engaged in an unlawful interrogation was limited to a determination of whether Sackin was entitled to *Johnnie's Poultry* assurances in the meeting. But separate from this analysis and more fundamentally, as the final exchange between the two demonstrates, Collura was engaged in garden-variety interrogation of a steward.

The Board determines "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "Among the factors that may be considered in making such an analysis are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter." *Scheid Electric*, 355 NLRB No. 27, slip op. at 1 (2010) (citing *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009)).

Applied to the facts here, Collura's repeated inquiry as to how Sackin would testify about CSTLs receiving tips and whether other dealers had sought his counsel about the

upcoming litigation certainly suffices as a classic interrogation of a steward about his union activities and those of the workers he represents. First, Collura's position within Respondent's hierarchy made the questioning coercive. Collura was no light-weight; as Assistant Casino Administration Manager, she ranked third-in-charge of the entire Casino. (ALJD 2:22-26) Sackin had never been in her office before and understandably was alarmed to be called there. (Tr. 352-53, 457, 459) Indeed, in response to her questions, he watered down his answers, repeatedly evaded her questions, and feigned ignorance to avoid further questioning. (ALJD 6:1-2; 10-13)

Further, the coercive nature of Collura's questioning was exacerbated by the background of the upcoming litigation in which Sackin had been named as a witness. Collura was essentially demanding to know whether Sackin would "back up" Respondent's claim that CSTLs had often received tips (something he tried repeatedly to deny). See, e.g., *Scheid Electric*, 355 NLRB No. 27, slip op. at 1 (2010) (manager illegally interrogated steward by asking if he would remain employed if the employer withdrew recognition; question sought to illicit whether steward would remain loyal to union or support employer in unlawful scheme) (citing *F.M.L. Supply, Inc.*, 258 NLRB 604, 616 (1981) (finding such questions coercive because they tend to "force the employees to abandon their sympathy for and allegiance to the Union"). Thus, Collura's questions to Sackin suggested that he would place himself at risk if he testified inconsistently with Respondent's defense in the litigation (i.e., that the tipping practice was established).

In addition, Collura's suggestion that Sackin could either have Union representation or join the lawsuit, but not both, certainly signaled something ominous for Sackin and the other dealers should they proceed with their protected conduct. Indeed, by her statement that the

dealers could be represented by counsel in the lawsuit or remain represented by the Union, but not both, Collura suggested that Sackin would jeopardize his ability to represent other employees if he testified in favor of the dealers. This questioning was meant to pressure Sackin to reveal whether he would testify in a manner favorable towards Respondent, and, because Collura made clear that his representational duties were on the line, Sackin's status as an open Union supporter "reinforce[d], rather than ameliorate[d], the coercive effect." Id.

Finally, Collura made it clear that she planned on talking to other employees about their testimony, and then, in a leading fashion, announced that she was "sure" that Sackin had already discussed the lawsuit with his coworkers: *"I'm sure people come to you and ask you as a shop steward if – you know about this thing."* (Tr. 462) Clearly, Collura's aim was to elicit from Sackin both the names of those who had sought the Union's assistance, as well as whether the Union was "behind" the lawsuit. Tellingly, Sackin's response was to hedge; he admitted that "some people" had asked for his guidance about the upcoming litigation, but refused to name names. (Tr. 462) By interrogating Sackin about the union activities and sympathies of his coworkers, Collura violated the Act. See *Revere Armored, Inc.*, 310 NLRB 351, 352 (1993).

For each of these reasons, Collura's questioning of Sackin, when evaluated fully, reveals that the ALJ erred by refusing to find that she interrogated Sackin in violation of Section 8(a)(1) of the Act.

C. Conclusion

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's rulings as set forth above, and find that Respondent committed the

additional violations of § 8(a)(1) of the Act as delineated in the General Counsel's cross-exceptions and to provide an appropriate remedy for such violations.

Dated at Phoenix, Arizona, this 25th day of February 2011.

Respectfully submitted,

/s/ Mara-Louise Anzalone

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS in WYNN LAS VEGAS, LLC, Case 28-CA-22818, was served by E-Gov, E-Filing, E-Mail and overnight delivery via United Parcel Service on this 25th day of February 2011, on the following:

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