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 ANSWERING BRIEF

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I. OVERVIEW

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (Board), Counsel for the Acting General Counsel (the General Counsel) submits this Answering Brief to the Exceptions filed by Wynn Las Vegas, LLC ("Respondent") to the decision of Administrative Law Judge (ALJ) James M. Kennedy (the ALJD).[1] Except to the extent that the General Counsel cross-excepts to the ALJ's dismissal of a single, interrogation allegation (addressed in its Cross-Exception filed separately), the ALJ's findings are appropriate, proper, and fully supported by the credible record evidence. Accordingly, the Board should sustain the ALJ's findings of fact, conclusions of law, proposed remedy and recommended order, adjusted only to find merit to the interrogation allegation.

II. PROCEDURAL BACKGROUND

The hearing in this case was held in Las Vegas May 11, 12, 13, 14, and June 7, 2010. At hearing, discriminatees Ronda Larson (Larson) and David Sackin (Sackin) testified, as did several of Respondent's managers. Also appearing were two currently employed table games dealers, as well as a former guest of Respondent, Nishat Mehta (Mehta), to whom a serious

[1] On February 11, 2011, Respondents filed 48 numbered exceptions.

complaint against Larson had been attributed. On December 14, 2010, the Administrative Law Judge James M. Kennedy issued his decision and recommended Order. (See Decision of ALJ Kennedy, dated December 14, 2010.)[2]

III. ANALYSIS

A. The Wynn's Tip-Pooling Controversy and Las Vegas' First Recognized Unit of Table Games Dealers.

The unique background of this case merits some discussion. On September 1, 2006, in an unprecedented move in the Las Vegas gambling industry, Respondent, which owns and operates the high-end casino known as "The Wynn," took the position that certain of its "team leads" were no longer managers for purposes of Nevada gaming law[3] and were therefore permitted to "share" in the dealers' tip pool.[4] In effect, Respondent's dealers were required to forfeit a substantial share of their tip pool to their team leads. (Tr. 604-05; see ALJD 3:13-17 & 31-40) As the ALJ found, "the change resulted in both public and private litigation," including a class-action lawsuit in Nevada state court and numerous complaints before the Nevada State Labor Commissioner. (ALJD 4:1-5) While this litigation proceeded, "Respondent's table games dealers and the Transportation Workers Union (TWU) [the "Union"] began to work toward union representation utilizing the procedures under the NLRA." (ALJD 4:11-16)

Discriminatees Larson and Sackin were active in organizing the Union; on March 30, 2007, the Union sent a letter to Respondent identifying them, along with other

[2] JD (SF)-67-05. References to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page number(s) and, where applicable, followed by a colon and the particular line number(s).

[3] Nevada gaming law forbids the reception of gratuities by casino management, including floor supervisors. See Nevada Revised Statutes 608.160.

[4] Respondent accomplished this by taking a group of employees who were previously classified as floor supervisors and renaming them "Customer Service Team Leads" or "CSTLs." (Tr. 58-59) As the ALJ properly noted, Respondent then redefined their duties and "recast[ed] that job as nonsupervisory." He did not, as Respondent's exceptions claim, "redefine the duties of the floor supervisor as nonsupervisory." (Exception 1)

employees, as in-house Union organizers. Shortly after the Union's election victory in the summer of 2007, Larson and Sackin became the shop stewards for the day shift, attending disciplinary meetings conducted by the Respondent. (ALJD 4:14-19; see also Tr. 488, 532-33) On July 1, 2009, both Larson and Sackin were disclosed as witnesses for Respondent's dealers in an upcoming hearing before the Nevada State Labor Commissioner over the legality of Respondent's tip-pooling arrangement.

As discussed below, Larson had previously complained directly to Respondent's President, Andrew Pascal (Pascal), about Respondent diluting the dealer's tip pool. Sackin, for his part, was immediately hauled in and interrogated by Respondent's Assistant Casino Administration Manager, Peggy Collura (Collura), about his role as a witness and whether other dealers had asked him about the case. Less than a month after being identified as witnesses against Respondent, Sackin was suspended, and Larson was fired. Both employees had worked at The Wynn since it opened in 2005. (ALJD 3:21-22)

B. Respondent's Exceptions Unsupported By Record Evidence Should Be Rejected. (Resp. Exceptions 4-7, 22)

Respondent has ignored the requirement set forth in 102.46(b)(1) of the Board's Rules and Regulations that a party filing exceptions refer to specific portions of transcript testimony supporting each exception. In fact, numerous of Respondent's exceptions on key points are wholly unsupported by any record evidence whatsoever. For example, Respondent claims that the ALJ erred in finding that discriminatee Larson had been "'outspoken'" and had "verbally opposed [Respondent's] toke pooling practice during a meeting with [Respondent's] president in September 2006." (Exceptions 4, 5)

In fact, the unrebutted record evidence demonstrates that the ALJ's determinations were spot-on: during a meeting led by Respondent's President Pascal, Larson spoke candidly and directly to him, expressing outrage over the dealers' pay cut:

> And I asked him, I said, well, you know, now you've taken the dealers' money, you know, you pay the dealers minimum wage and they're in contact with -- they have more guest interaction with guests. They're the lowest paid employees by the hotel of all the employees, but yet we have the most guest interaction of all the other employees in the hotel. And so the tips are our livelihood or the livelihood, and taking them, taking control of their money away I mean is destroying their morale and makes them feel like they're not valuable employees in the company at all.

(Tr. 604-06) Pascal, who was the ultimate decision maker with respect to Larson's termination and Sackin's discipline, did not testify, and no other witness disputed Larson's account of her comments at the meeting. (Tr. 134, 381) Nonetheless, Respondent now baldly criticizes the ALJ's findings regarding Larson's protected conduct, stating that it "had no reason to believe Larson was anymore influential than any other employee. . ." (Resp. Brief at 28) Pray tell, if brazenly challenging Pascal on Respondent's reduction in dealers' pay did not make Larson stand out to upper management, what would have?

Respondent's efforts to whitewash the record do not stop there. Despite additional – and again, unrebutted – testimony that Larson had openly collected $20,000 from other dealers at work in order to fund a class-action lawsuit against Respondent over its tip-pooling practices (Tr. 555-58), Respondent "excepts" to the ALJ's crediting such testimony, but incredibly, offers no evidence to the contrary. (See Respondent's Exception 6) Likewise, arguing that the ALJ should not have concluded that Larson "took a leadership role in the toke pool litigation" and was "heavily involved in the 2009 Labor Commission hearing,"

Respondent argues that she was simply "but one of numerous dealer employees who attended and participated in the proceeding." (Exceptions 4, 22; Respondent's Brief at 28) This blunt-force argument ignores the evidence unrebutted by Respondent at hearing and later credited by the ALJ: unlike the other participants, Larson (along with the Union's president and two or three others) attended every single day of the hearing; she also sat near the dealers' counsel and assisted them by passing them notes that she either drafted herself or collected from other dealers present. (Tr. 139-42) In other words, she took a leadership role.

Discriminatee Sackin's protected conduct is also the subject of Respondent's enthusiastic revisionism. Excepting to the ALJ's finding that Sackin "served picket duty for the Union," Respondent fails to address the (again unrebutted) testimony by Sackin that he had, in addition to acting as a day-shift steward for the Union, appeared on television picketing in support of the Union. (Tr. 488, 502, 532-33) Respondent's take on this evidence is elegant in its simplicity: "the ALJ erred in finding Sackin engaged in protected concerted activity." (Exception 7; Respondent's Brief at 22)

C. The ALJ Properly Found Respondent's Witnesses Lacking in Credibility.

The Board's established policy is not to overrule credibility resolutions unless the clear preponderance of all of the relevant evidence demonstrates that the credibility determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). An administrative law judge's credibility determinations may be based on a variety of considerations including: the demeanor and conduct of the witnesses; their candor and lack thereof, their apparent fairness, bias, or prejudice; their ability to know, comprehend, and understand the matters about which they testified; whether they had been contradicted or otherwise impeached; the interrelationship of the testimony of the witnesses

and the written and/or documentary evidence presented; and the inherent probability and plausibility of the testimony. *Young Broadcasting of Los Angeles*, 331 NLRB 323 (2000). As set forth below, the ALJ in this matter made numerous, well-grounded determinations that turned on witness credibility, and they should remain undisturbed.

1. The ALJ Properly Credited Larson's and Sackin's Testimony, as Corroborated By Video Footage, and Rejected Contrary Testimony offered by Respondent's Witnesses. (Resp. Exceptions 2, 18, 24, 33, 34, 38, 41, 44, 46)

Respondent's discipline and discharge of dealers Sackin and Larson, respectively, did not present any significant novel issues of law, and none are raised by Respondent in its exceptions. Instead, the determination of whether Sackin and Larson were disciplined in violation of the Act turned primarily whether they had in fact engaged in the misconduct of which they were accused, or whether management had instead embroidered a case against them. In this regard, on several critical points, the ALJ's credibility determinations were based on his comparing events as they were related by various witnesses with the actual video footage of such events.

In Respondent's casino, the cameras are always watching. As the ALJ noted (and Respondent does not dispute), "Respondent maintains an extensive network of over 1000 digital surveillance cameras throughout the casino that capture 99 percent of what occurs in the casino." There is no audio component to the video, but it does show the facial expressions and body language of those individuals filmed. (ALJD 3:19-27) As a result, the record in this case contains a substantial amount of video from Respondent's own surveillance cameras, including footage of the very events that Respondent claims precipitated Larson's discharge and Sackin's suspension.

Ultimately, the ALJ concluded that, when measured by the video evidence, Respondent's story simply did not "wash," and the discriminatees' version of events was in fact what had occurred. For example, based on the surveillance footage, he concluded that Sackin had not, as Collura testified, run through the casino "half-dressed" on his way to work. (ALJD 8:27-32; Exception 18) Collura's credibility, the ALJ suggests, did not bear up well:

> What was Collura's purpose to provide such a description? Why not simply say Sackin was putting on his uniform jacket or tying his tie as he came through the casino? The video shows what happened.

(ALJD 8, n.13) Based on the video evidence, the ALJ also rejected Respondent's contention that Sackin had "pushed a coworker." (ALJD 8:27-30) Ultimately, the ALJ rejected Collura's effort to frame Sackin as some type of violent, workplace "streaker" and concluded instead that he had merely broken some minor rules in his haste to get to work on time, none of which "jeopardized the integrity or security of the casino"[5] or breached decorum. (Exceptions 33, 34)

Likewise, the ALJ relied on the video evidence in crediting Larson's testimony that she had not deliberately disobeyed an instruction from her team lead. (ALJD 18:22-24; noting that the video revealed that Larson's actions were not "defiant" or "noncooperative;" see Exceptions 41, 44, 46) He also relied on the video in crediting Larson's testimony that she did not perceive that anything unusual had occurred at her table on the day she, according to Respondent, was rude to a group of players. The surveillance video, according to the ALJ, "supports Larson's contention that nothing occurred which was out of the ordinary or which

[5] Respondent now apparently argues that the ALJ should have considered the fact that "a person running though a casino could very well be in the midst of perpetrating a crime." In this regard, it invites the Board to consider a newspaper article post-dating the closing of the record in this case, regarding a chip robbery at the Bellagio. What bearing such "evidence" might have on the propriety of disciplining Sackin is beyond the General Counsel's comprehension; suffice to say such evidence was never properly before the ALJ and should thus be ignored by the Board. Respondent's Exception 2, which protests that, following the closing of the record in this case, the parties reached agreement on a collective bargaining agreement, is likewise ill-founded.

might be regarded as eventful." (ALJD 10:36-38; Exception 24) Based on the video, the ALJ concluded that, once again, Respondent's characterization of events was "overblown," that Larson had not been rude or insubordinate as Respondent claimed, and had only committed "relatively minor" infractions. (ALJD 17:29; Exception 38)

Respondent is essentially asking the Board to scuttle credibility determinations that the ALJ's made after comparing live witness testimony describing events with Respondent's own video footage of the same events. The Board should firmly decline. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) (Board's established policy is not to overrule an administrative law judge's credibility resolutions unless clear preponderance of evidence dictates they are incorrect).

2. The ALJ Properly Rejected as Pretextual Respondent's Explanation for Discharging Larson. (Resp. Exceptions 3, 25-28, 39, 40, 42, 43, 45, 47)

It is undisputed that, in Respondent's business, customer complaints are taken especially seriously. It was a customer complaint, according to Respondent's witnesses, that sealed Larson's fate: she had upset a table of players by "displaying inappropriate behavior in her interaction with a group of guests." (Resp. Brief at 18) According to Respondent, two players complained: Andrew Salute (who did not testify) and Mehta (who did). While it is undisputed that Larson, whose job includes making banter and "small talk" with guests, jokingly made an anti-smoking comment,[6] Respondent's management witnesses presented the "fall out" from this remark as a public-relations disaster that nearly dismantled its five-star rating.

[6] As characterized by the ALJ, Larson "was doing what she had been instructed to do, trying to get along with the players. She was being playful and amusing, even going along with their complaints about smoking." (ALJD 17:29-31) As he correctly found, this anti-smoking comment was a general one about second-hand smoke and table games dealers in general, and did not reflect poorly on Respondent in particular. (ALJD 17:31-34; Exception 39)

In fact, Larson's version of the events was fully corroborated by the surveillance video, as well as by Mehta himself. As the ALJ noted, the video itself showed nothing out of the ordinary at Larson's table – no angry exchanges or facial expressions from the guests. (ALJD 10:36-37; Tr. 554) Indeed, the surveillance footage is wholly unremarkable. Larson, who is pictured dealing, smiling and chatting with guests, does not appear in any sense "rude" in her body language or composure. (GC 12(a)-(c)) In fact, Respondent's own Surveillance Report stated that it was unable to find that "Larson acted in an inappropriate manner to the patrons." (JX 4)

Respondent claims that the ALJ improperly concluded that no guest complained at the time of this "incident," but fails to identify any testimony that would indicate that they did. (Exception 25) Again, what Respondent wishes were contained in the record and what the record actually contains appear to diverge. In any event, Respondent's hindsight does not provide a valid basis for excepting to the ALJ's findings in this regard. Likewise, Respondent cannot belatedly sanitize its managers' clumsy efforts to build a case against Larson. In this regard, the ALJ correctly noted that the two employees who were tasked with "documenting" the complaints they had supposedly overheard had actually struggled to describe what exactly the customers were upset about. (ALJD 11:30-33; 17:41-42) This is corroborated by the record evidence containing the employees' rather vague statements solicited by Respondent (in one employee's case, obtained only after her initial refusal and subsequent "acquiesce" after being called into the casino manager's office). The ALJ also appropriately concluded, based on both employees' testimony, that they considered the matter inconsequential and unnecessary to report to management. (See GC 5; 264-68, 319, 336; ALJD 11:30-33; 17:41-42; Exception 28)

The ALJ also properly concluded that Respondent made "extraordinary" efforts to obtain a guest complaint against Larson. (ALJD 11:4-7; Exception 27) The ALJ made this determination based on the unrebutted testimony of the customer in question – Mehta. Mehta testified that he was "astonished" by the efforts of Respondent's manager, Anthony Tyne, to obtain a written complaint from him regarding Larson, describing Tyne as "aggressive." (ALJD 18:4-8) After he initially refused to make a written complaint against her, Mehta received a message from his wife that a voicemail had been left in their room indicating that Tyne wanted to speak to him about the incident. (Tr. 445) Mehta did not return the call, but later that evening, Tyne tracked him down in a restaurant at the Casino and offered Mehta ten free nightclub passes in exchange for the statement. (ALJD 18:2-4) As Mehta testified:

> I didn't want to do it. He insisted I did. I asked if I could do something verbally or not sign my name to it. He indicated that wouldn't be helpful, that I needed to put my name on it.

(Tr. 446) Mehta offered his own explanation for Respondent's efforts to secure his "complaint" about Larson:

> I was uncomfortable because I think it had become clear to me -- I mean, I think it was an odd conversation earlier in the day and talking with my friends, we reached a belief that there was a reason why we were being so aggressively asked to fill out these comment cards. This sort of reinforced that.

(Tr. 446) For his part, Mehta -- himself a manager -- testified that he did not believe Larson's conduct merited discharge.[7]

[7]Contrary to Respondent's mischaracterization, Mehta testified that, assuming that she had never been previously been warned for such conduct in the past, he did not believe, that Larson should have been fired. It is undisputed, in fact, that, before September 6, Larson had never previously been accused of being rude to any guest. (Tr. 554-55)

Respondent additionally claimed that Larson was "insubordinate" to her team lead, Derek Corsaro (Corsaro).[8] Again, the ALJ made a determination, based in part on a review of the video tape, that she had done no such thing. Moreover, the ALJ outright discredited Corsaro, who testified that Larson had told him, "I don't feel like it" and "I don't have to do anything I don't feel like doing," instead concluding that what Larson had really said, "almost under her breath and in a sing-song, playful way," was "No-o-o." (ALJD 18, n.22) The ALJ specifically noted that, "[b]ased on Larson's generally good-natured personality, I credit her over Corsaro." (ALJD 18, n.22; Exception 40) Based on this testimony, the ALJ properly concluded that the Larson-Corsaro incident, to the extent there was one, was inconsequential and would have been ignored but for the trumped-up guest complaint. (ALJD 10:46-48; Exception 26)

The ALJ correctly concluded that Larson's discipline was both unwarranted and motivated by her protected conduct. (ALJD 18:37; 19:7-8; Exceptions 3, 43, 47) In that regard, he found it significant that, in addition to the substantial evidence of pretext in the circumstances regarding her alleged "misdeeds," Respondent denied her full access to her *Weingarten* representative while she prepared a statement attempting to explain what had really happened. (ALJD 11:14-16; Exception 45) The representative in question? Discriminatee Sackin. As both Larson and Sackin testified, Larson was ordered into a room, alone, to write a statement, asked for Sackin to be present, and was refused. Only after the Union President became involved was Sackin was finally allowed to join Larson, but by then it was too late; her statement was written and he was prohibited from speaking to her in any event. (ALJD 11:20-26; Tr. 498-500, 518-19, 543-45) As one of Respondent's managers

[8] Respondent maintains both that Corsaro is *not* a supervisor within the meaning of 2(11) of the Act, and that Larson was insubordinate to him. (See Exception 42) Respondent cannot have it both ways.

explained, "[l]isten, we don't want anybody writing anybody else's statement." (Tr. 500) Respondent's exceptions are only half-hearted in this regard, noting "Sackin was present as an employee representative" and then "Larson was given the opportunity to prepare a written statement." (Resp. Brief at 20) It is unfortunate that the Board is tasked with parsing through this obfuscation. Such exceptions are a waste of its time and resources.

Respondent wants nothing more than to convince this Board to ignore the ALJ's careful, well-supported determinations, ignore the credible testimony of Larson, as corroborated by both Mehta and Respondent's own video footage, and instead credit Respondent's witnesses' unsupported and frequently outrageous versions of events. But to do so would reject essentially every single credibility determination made in this case based on nothing more than Respondent's whim. This is hardly a case in which the ALJ has presented the Board with a single witness contradicted by four others and expected a "rubber stamp" to his credibility determination. See *Permaneer Corp.*, 214 NLRB 367, 369 (1974). Respondent had its opportunity to present a credible explanation for its actions. It failed, and the ALJ's credibility determinations should be left intact.

3. The ALJ Properly Rejected as Pretextual Respondent's Explanation for Suspending Sackin.[9] (Resp. Exceptions 8-15, 17, 19-21, 29, 31, 35-37)

Respondents' defense to Sackin's suspension allegation relied on the ALJ turning a blind eye to the patently incredible explanation offered by Respondent's witnesses for suspending Sackin. This he did not do. Applying scrutiny as well as common sense, he properly rejected such evidence. For example, based on the fact that he only risked a tiny disciplinary "point" for reporting to work tardy, the ALJ concluded that Sackin was "trying to

[9] Two of Respondent's Exceptions simply take issue with the ALJ's inadvertent reference to discriminatee Sackin as having been discharged, as opposed to disciplined and suspended. See Exceptions 30, 32. Because these "exceptions" merely point out a minor drafting error, they are not addressed here.

do the right thing" by entering the casino through the guest entrance and rushing through the casino. (ALJD 9:14-16; Exception 21). Based on Collura's overall lack of credibility (which was amply demonstrated by her insistence that Sackin was partially nude in the casino when he most definitely was not), the ALJ correctly rejected her self-serving testimony about Sackin failing to provide her with his updated cell phone number, noting that Sackin had nothing to gain by delaying his return from suspension. (ALJD 8:40-42; Exception 20)

Likewise, the ALJ found that Respondent's documentation of his actions (including editing together a video compilation of his entire trip through the casino, captured by several different cameras), was "overkill." (ALJD 8:28-30; Exceptions 17, 35) Respondent now apparently claims that no such video was produced in connection with Sackin's discipline, and instead that it only prepared a compilation video before hearing "[a]s a matter of convenience for the presentation of evidence." (See Respondent's Brief at 11, n.3) But this claim is belied by the testimony of Respondent's own witnesses, Collura and Charlie Ward (Ward), each of whom admitted that, prior to Sackin's discipline, Respondent's surveillance department pieced together video footage of Sackin's entire trip through the casino. According to Collura, this project took "quite a long time" and was "really hard" work. (Tr. 74-75) As Ward explained, this effort was largely gratuitous since the same information could have been gleaned from a quick review of footage from the multiple cameras that captured his 2-minute, 40-second entrance into the casino. (Tr. 400; R 5) While Respondent may well *regret* that its managers engaged in such over-enthusiastic documentation of Sackin's alleged misdeeds, it is not privileged to rewrite the record to erase such facts.

Ultimately, the ALJ concluded that Respondent had "trump[ed] up Sackin's violations in order to subject Sackin to discipline." (Exceptions 19, 36) Further, the ALJ found the

circumstances surrounding Sackin's discipline – the fact that he had, days earlier, been singled out for an interrogation about his recently disclosed role in the upcoming hearing (Exceptions 2, 9, 10, 29) – to be suspect.[10] Ultimately, the ALJ concluded,

> I find that the degree of punishment in this case was not supported by the underlying facts and instead the discharge was due to its animus against protected conduct—his union stewardship and his willingness to testify in the Labor Commissioner hearing.

(ALJD 15:29-32; Exception 37) At day's end, Respondent's sole exceptions relating to Sackin's suspension are based on no more than credibility, and should therefore be disregarded. *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972) (when ultimate determination of motive or purpose hinges entirely upon the credibility determination of the trial examiner, those findings are entitled to special weight and are not to be easily ignored).

While Respondent suggests that the ALJ is attempting to substitute his own judgment for that of Respondent (i.e., in concluding that "the punishment did not fit the crime"), (Respondent's Brief at 24; Exceptions 31), this tortures the pretext analysis that the ALJ so carefully applied. As the Board made clear in the very case cited by Respondent, its role is to determine whether the reasons proffered by the employer for the discipline "were the actual ones or mere pretexts." *Cast-Matic Corp*., 350 NLRB 1349, 1358 (2007). The fact is that, unlike the employer in that case, Respondent here has utterly failed to demonstrate that its reasons for suspending Sackin were the real reasons. Respondent's pronouncement, "[i]nasmuch as the policy violations incurred by Sackin are not in dispute, the reason for his

[10] Respondent attempts to cast doubt on Sackin's credibility by noting that the ALJ found that he had been mistaken in believing that Respondent's manager, Anthony Tyne, had been presented as a "lawyer" in this meeting. As the ALJ made clear, Sackin appeared to have been confused on this point and was seated with his back to Lancaster. Respondent takes issue with this seating arrangement, but offers no testimony to rebut that of Sackin. (See ALJD 5:39-40; Exception 8)

discipline is not pretext," expresses a fundamental and borderline troubling misapprehension of this basic, established Board precept. (Respondent's Brief at 25)

4. The ALJ Appropriately Considered Evidence Regarding Respondent's Disciplinary System and Past Discipline. (Resp. Exceptions 11-16, 23)

Several of Respondent's exceptions are focused on the ALJ's characterization of its disciplinary system. First, it claims that the ALJ erred in finding that a prior warning issued to Larson's on July 9, 2009, for making dealing mistakes (which discipline was *not* alleged as discriminatory in this case) was issued inconsistently with Respondent's disciplinary practices. In reaching this conclusion, the ALJ credited Respondent's own witness, Collura, who testified that verbal discipline for a small error (under $1,000) often go undocumented in its Human Resources recordkeeping system. (ALJD 6:24-31; Exceptions 11-15, 23) Respondent offers no evidence to the contrary.

Second, Respondent claims that the ALJ improperly relied on evidence of lesser discipline meted out to similarly-situated employees. (Exception 16) But the record evidence of lesser discipline speaks for itself. Indeed, even if Respondent's accounts of Larson's and Sackin's conduct had passed muster, credibility-wise, Respondent is faced with a mountain of evidence indicating that similarly-situated employees were not punished as harshly for conduct similar to that attributed to the discriminatees. In other words, even if the Board were to reassess the extensive credibility determinations made by the ALJ and find that Larson had engaged in insubordinate conduct or that Sackin had shoved another employee, the record evidence indicates that their discipline was unwarranted.

IV. CONCLUSION

That Respondent's management witnesses made particularly incredible witnesses led to the ALJ to discount their histrionic accounts of Larson's and Sackin's conduct, as well as their contrived denials of anti-Union animus. The overwhelming documentary evidence corroborates Larson and Sackin, as did Respondent's own guest, Mehta. For all of these reasons, the Board should reject Respondent's attempts to retry the case they so thoroughly lost before the ALJ. Based upon the foregoing, it is respectfully submitted that the Board should adopt the ALJ's findings of fact and conclusions of law that Respondent violated Sections 8(a)(1) and (3) of the Act.[11]

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

Respectfully submitted,

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[11] As noted, the General Counsel has contemporaneously filed limited cross-exceptions to the ALJ's failure to find that Respondent, by manager Collura, illegally interrogated Sackin in violation of Section 8(a)(1) of the Act.

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF 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:

Via E-Gov, E-Filing:

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