UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STATION CASINOS, INC., ALIANTE GAMING, LLC, d/b/a ALIANTE STATION CASINO + HOTEL, BOULDER STATION, INC., d/b/a BOULDER STATION HOTEL & CASINO, PALACE STATION HOTEL & CASINO, INC., d/b/a PALACE STATION HOTEL & CASINO, CHARLESTON STATION, LLC, d/b/a RED ROCK CASINO RESORT SPA, SANTA FE STATION, INC., d/b/a SANTA FE STATION HOTEL & CASINO, SUNSET STATION, INC., d/b/a SUNSET STATION HOTEL & CASINO, TEXAS STATION, LLC, d/b/a TEXAS STATION GAMBLING HALL & HOTEL, LAKE MEAD STATION, INC., d/b/a FIESTA HENDERSON CASINO HOTEL, FIESTA STATION, INC., d/b/a FIESTA CASINO HOTEL, and GREEN VALLEY RANCH GAMING, LLC, d/b/a GREEN VALLEY RANCH RESORT SPA CASINO, a single Employer

and

Cases 28-CA-22918
28-CA-23089
28-CA-23224
28-CA-23434

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165, affiliated with UNITE HERE, AFL-CIO

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

By its exceptions, Station Casinos, Inc. (Respondent) seeks to have the Board disregard the record evidence and the well-reasoned credibility determinations of Administrative Law Judge Geoffrey Carter (the ALJ) concerning Respondent's unlawful

conduct, including numerous violations of Section 8(a)(1) and (3) and, during the course of the hearing, a violation of Section 8(a)(4). Respondent seeks to have the Board forgive the violations which it committed at the expense of the employees on whose rights Respondent trampled. Respondent's exceptions are without merit and should be denied.

II. Respondent's Exceptions

A. Credibility Determinations

The bulk of Respondent's exceptions consist of challenges to the credibility determinations of the ALJ. In support of its exceptions, Respondent makes several different arguments, all of which require the application of the same legal standard. Respondent should prevail on its numerous, duplicative, and unsupported exceptions only if the Board is willing to ignore or overrule its long established policy of not overruling the credibility resolutions of an administrative law judge, absent overwhelming evidence.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d. 1951). Respondent's numerous arguments are not supported by the record and provide no basis for reversing the findings of the ALJ.

In rendering his Decision and Recommendation, the ALJ carefully addressed the credibility of each witness and, where appropriate, addressed any issues that affected his credibility resolutions. Respondent's attempt to parse out the testimony of each witness and compare it to each of their out-of-court statements utilized at hearing is indicative of the lack of merit that Respondent's exceptions hold. For example, Respondent's argument that the ALJ's credibility resolution should be overturned with respect to the allegation involving

Delmi Aldana (Aldana) is based entirely upon Aldana's failure to record an incident in her unfair labor practice report to which she later testified at hearing. (RB 10)[1] This variation, as well as the countless others pointed out by Respondent are not substantive and do not undermine the credibility resolutions of the ALJ. Moreover, Respondent's arguments ignore the reality that it is not uncommon for a Board agent to fail to ask questions while taking a statement, which are later asked and answered by the field attorney in preparation for trial. It is also not uncommon for witnesses to recall matters and events previously forgotten. See *Southwestern of Dallas Optical Co., Inc.*, 153 NLRB 33, 38 (1965). Contrary to Respondent's claims, in this particular instance employees did not have the assistance of a third party to provide them with guidance in identifying what conduct, if any, was potentially violative of the Act when they completed unfair labor practice reports submitted to the Union.

Respondent's arguments that the ALJ erroneously credited the testimony of witnesses who were not proficient in the English language are wholly unsupported by the record. Respondent's lack of support for this assertion is evident in its brief in support of exceptions which lacks any objective evidence. While most of the witnesses who testified utilized the assistance of a translator during the proceeding, Respondent did nothing to establish each witness' proficiency in the English language. Not satisfied with the outcome of its tireless efforts to confuse witnesses through linguistic manipulation, Respondent now seeks to challenge the English-language proficiency of several witnesses, despite the lack of supporting evidence. Respondent seeks to have the Board ignore the widely-known fact that an individual's inability to speak a language has no bearing on their ability to understand it.

[1] RB__ refers to Respondent's Brief in Support of Exceptions followed by the page. Transcript references are: (Tr. __:__) showing transcript page and line or lines. ALJD __:__ refers to JD(SF)-59-11 issued by the ALJ on September 22, 2011, followed by page and line. RX followed by the exhibit number refers to Respondent's exhibits.

Finally, Respondent's contention that the ALJ's credibility resolutions of employees James Estrada (Estrada) and Esperanza Sanchez (Sanchez) should be overturned because of the "inherent implausibility" of their testimony ignores the ALJ's reasoning and the record evidence. (RX 27-28) For example, while finding that Estrada was "generally forthcoming in his responses to questions" and noting that he was "diligent in the making of written record of his experiences in the workplace" the ALJ determined him to have "only limited credibility." The ALJ explained that significant portions of his testimony could not be credited because Estrada "periodically misinterpreted innocuous statements and conduct as personal attacks." (ALJD 88:16-20) In finding that Respondent violated the allegations contained in paragraphs 7(j)(1), (2) and 7(l), however, the ALJ credited Estrada's testimony that he spoke out at staff meetings in defense of the Union and noted that this fact went "unrebutted." (ALJD 89:8-20)

Similarly, Respondent's claim that the ALJ erred in finding that Sanchez was a credible witness because her testimony was "nonsensical and inherently implausible" is unsupported and itself senseless. (RX 28) Respondent's argument relies upon its disagreement with the ALJ's finding that Respondent violated Section 8(a)(1) when her supervisor called Sanchez into his office and questioned her about whether she recalled all the "favors" he had done for her and why she was stirring up employees while tapping the left side of his chest. (Tr. 1616) As noted by the ALJ, this conduct would have led a reasonable employee to conclude that Respondent was warning Sanchez to stop talking to employees about the Union and that failing to do so would result in loss of any future "favors." (ALJD 106:9-16) The fact that Sanchez had not yet begun to wear the Union button when the conduct in question took place is of little consequence, especially in light in of the

uncontroverted fact that Respondent's employees began wearing their Union buttons to work on February 19, 2010.

B. Legal Conclusions

1. Respondent's Exceptions Are Not Supported by the Record

In it exceptions and brief in support of exceptions, Respondent asserts that the ALJ erred in finding that Respondent committed the numerous violations of Section 8(a)(1) and (3), because his legal conclusions were not supported by the record evidence or the law. (RX 30) Respondent's exceptions, however, are unsupported and often ignore the very facts that Respondent claims did not (or did) exist to support to the ALJ findings.

Respondent filed exceptions to the ALJ's conclusion that it violated Section 8(a)(1) when a supervisor warned employees to "be careful what they sign " because *if* they signed a Union card they might get in trouble or receive more rooms to clean. (ALJD 42:41-43; Tr. 563-564) Respondent disputes the ALJ's reliance on the Board's decision in *Metro One Loss Prevention Servs. Group, Inc.*, 356 NLRB No. 20, slip op. at 1-2 (2010), arguing that the facts of the instant case are distinguishable because Respondent referred to the uncertain nature of collective bargaining before making the alleged unlawful statements and because the statements were not made in a one-on-one context. (RX 31) According to Respondent, prior to making the unlawful statements, Respondent's supervisor referred to the uncertain nature of collective bargaining. A close examination of the record, however, unequivocally reveals that Respondent did *not* refer to collective bargaining at the time the unlawful statement was actually made. When questioned about this very fact, witness Mayra Gonzalez testified that a Sound Bytes was read to employees but that it was done *several days before* the unlawful statement was made. (Tr. 565:11-21; GCX 6(c)) The coercive affects of Respondent's

statements in this particular instance, therefore, are not mitigated because any discussions relating to the nature of collective bargaining which did take place were too far removed in time from when the statements at issue took place. Furthermore, Respondent's statement that employees could get more rooms to clean was not based upon any objective facts and did not describe consequences beyond an employer's control. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

Similarly, Respondent's exceptions to the ALJ's findings that Respondent committed the violations contained in paragraph 6(b)(1), (c) and (i)(1) of the Amended Consolidated Complaint rely entirely upon the Board's willingness to ignore the record evidence and legal precedent. Respondent asserts that the ALJ erred in finding that Respondent violated the Act when Director of Hotel Operations Manager Michael Pavicich (Pavicich) and Team Member Relations Manager Marieugenia Vasquez (Vasquez) instructed employees not to sign Union cards, not to speak or listen to Union supporters, to notify human resources if Union supporters "bothered" or "harassed" them in their homes, and to call the police if Union supporters came to their homes. (Tr. 751:9-17) Respondent contends that contrary to the ALJ's finding, it did not threaten employees by telling them not to sign Union cards and that its comments were lawful admonitions protected by Section 8(c). Acknowledging that the ALJ's conclusion was unlawful based upon his other findings of unlawful conduct; Respondent naturally took exception to each finding of law in the hopes that by addressing each violation individually, it could draw attention away from its clearly unlawful and coercive conduct.

In arguing that the ALJ erred in finding that Respondent acted unlawfully when it improperly promised to solve employees problems and informing employees that it would be

futile for them to support the Union, Respondent attempts to separate the two violations and treat them independently of each other. (RX 41, 46) Such an approach, however, is improper because the ALJ relied upon both statements in determining their unlawfulness. In finding that Pavicich and Vasquez improperly promised benefits to employees by asserting that they would solve employees' problems, the ALJ reasoned that the meeting wherein the conduct took place was not routine and served the explicit purpose of responding to the Union's organizing campaign. (ALJD 46:25-33, 33 fn. 68) Moreover, the ALJ reasoned that "to emphasize that the Respondent would solve the employees' concern and problems, Pavicich asserted that by contrast, the Union would not able to solve any of the employees problems." The ALJ, thus, correctly concluded that Respondent's initial unlawful statement promising to solve employees' problems gave rise to a second unlawful statement wherein employees were explicitly told that the Union could do nothing for them. (ALJD 46:25-41; 47:5-6) As noted by the ALJ, such a statement was not based on objective facts and thus, unlawful. (ALJD 47:6-9) Respondent's attempts to divorce the two statements to limit their context and to undermine the ALJ's reasoning should not be entertained.

In yet another example, Respondent's exception to the ALJ's conclusion that Respondent unlawfully solicited complaints and grievance from Red Rock Station employees Jesus Hernandez (Hernandez), Gabino Solis (Solis), and Ramon Diequez (Diequez), is without merit and based upon facts (pointed out by Respondent) which contrary to Respondent's arguments, support the ALJ's reasoning. According to Respondent, the ALJ erred in finding a violation because Respondent had a "longstanding and established program of soliciting and resolving Team Member grievances." (RX 56) Moreover, Respondent points to the testimony of Diequez who testified that he submitted complaints to Respondent

in March and September 2009, which were later resolved, to support of its exception. While Respondent correctly points out that the Board has held that an employer is entitled to continue its past practice of soliciting employee grievances during a union's organizing campaign, the facts in the instant case are distinguishable. The record evidence establishes that Respondent had several means by which employees could voice their concerns and grievances to Respondent, including calling a hotline. (Tr. 81:18-25; 82:1-2) The record does not, however, contain any evidence that prior to the Union's campaign Respondent had a past practice of approaching individual employees and soliciting grievances and making promises to resolve them. In the case of Diequez, the record shows that in March and September 2009, *he* voluntarily approached Respondent about concerns. (Tr. 1565:23-25) Despite Respondent's attempts to analogize the two, both are clearly distinguishable. An employer's open door policy encouraging employees to voluntarily provide suggestions or notify the employers about grievances is quite different from approaching employees without invitation, as was the case in the instant case, for the purpose of soliciting grievances and prying out of employees their concerns without invitation.

2. Respondent Did Not Meet Board's Requirements Under *Passavant*

Respondent filed a number of exceptions to several of the ALJ's findings, arguing that the ALJ erred by failing to find that Respondent adequately repudiated any unlawful conduct so as to avoid liability. One such argument applies to the ALJ's finding that Respondent violated Section 8(a)(1) when a supervisor told employee Fermina Medina (Medina) to remove her Union button. According to Respondent, the ALJ erred by failing to find that Medina's supervisor Genelud Generillo (Generillo) met the Board's requirements for repudiation of Respondent's unlawful conduct. (RX 63-64) In finding that Respondent failed

to adequately repudiate its conduct, the ALJ reasoned that "although Generillo apologized for how he spoke [to Medina], Generillo's apology was ambiguous because he did not mention Medina's right to wear the Union button. Generillo also did not assure Medina that she would be permitted to wear her Union button without interference." (ALJD 104:15-19) Respondent's argument, therefore, lies in its unsupported assertion that Generillo's apology was not ambiguous because according to Respondent, "both parties reasonably understood that Generillo's apology concerned the unlawful conduct." (RX 64) This assertion is not supported by the record as pointed by the ALJ, because Generillo did not specify what he was apologizing for and did not provide any type of assurances which a reasonable employee would have understood to authorize them to continue to engage in the protected activity which had previously been prohibited.

Similarly, Respondent's exception to the ALJ's finding that Respondent effectively repudiated any unlawful conduct associated with the suspension and termination of employee Adelina Nunez (Nunez) is without merit. In dismissing Respondent's affirmative defense that it repudiated any unlawful conduct, the ALJ reasoned that Respondent's "repudiation defense fails because among other defects, the attempted repudiation was untimely because it occurred over nine months after the unlawful suspension and discharge. (ALJD 65:11-16) The ALJ further noted that there was no evidence Respondent expunged the unlawful suspension and discharge from Nunez' record or gave Nunez any assurances that the Respondent would not interfere with employees' Section 7 rights in the future. (ALJD 65:16-19) Despite Respondent's claim that any violation was "effectively cured" because Nunez was reinstated with full back pay and without loss of seniority ***and*** because Nunez was provided with *adequate assurances* that Respondent would not interfere with her Section 7 rights, the record

is void of any such assurances being given, evidenced by Respondent's failure to cite the record in support of its assertions. In spite of its claims, Respondent failed to provide sufficient evidence to support its affirmative defense that it "effectively repudiated" its conduct.

Respondent also took exception to the ALJ's finding that Respondent violated Section 8(a)(1), (3) and (4) of the Act when it terminated the employment of employee Teresa Debellonia. (RX 86-87) Respondent disputes the ALJ's finding that it did not adequately repudiate its unlawful conduct because while record "shows that the Respondent rescinded Debellonia's suspension and discharge….it does not show that the Respondent advised Debellonia of its reasons for doing so (i.e., by telling her that the suspension and discharge were unlawful under the Act). Debellonia was therefore left to speculate as to the reasons why the Respondent reinstated her with full backpay." (ALJD 74:52-53, 75:5-8) Respondent's exception is based on assertion that Debellonia was advised why she was reinstated. (RX 87) Of particular concern is Respondent's attempt to include evidence in support of its argument which is not part of the record. Thus, Respondent points to a posting on the Union's website (http://www.workerstation.org/2011/06/teresa-wins.html) to support its argument that Debellonia was aware of the reasons for her reinstatement is wholly inappropriate and should be stricken from Respondent's brief in support of exceptions, as Respondent is precluded from attempting go beyond the record evidence to support its exceptions. See *A.J.R. Coating Corp.*, 292 NLRB 148 fn. 1 (1988) (wherein Board struck portions of respondent's brief in support of exceptions which made reference to extra-record evidence); *Chicago Tribune Co.*, 304 NLRB 665 fn. 1 (1991).

C. Respondent Freely Overstates the Record

In considering Respondent's exceptions and the arguments in support thereof, the Board should exercise caution and carefully examine the record before relying upon Respondent's arguments. In several notable instances, Respondent exaggerates the record in an attempt to make it conform to its arguments and in at least one instance (discussed in the foregoing paragraph), relies on evidence which is not part of the record. Respondent's embellishment of the facts and record is not limited to those instances already discussed and is evident throughout its brief. In its arguments, Respondent inexplicably references "facts" not contained in the record which can neither be supported nor verified by the record. For instance, Respondent's representation that the Union's "relentless harassment" of Respondent is based on Respondent's refusal to yield to the Union's demand for voluntarily recognition is entirely unsupported by the record. (RX 47) Respondent inappropriately relies on this unsupported detail in its exception to the ALJ's finding that Respondent committed the violation contained in Paragraph 9(f) of the Amended Consolidated Complaint which alleged statements of futility and its exception to ALJ's denial of Respondent's Motion to Dismiss. (RX 47, 96, 97, 114) In its exception to the ALJ's finding that Respondent made unlawful statements of futility, Respondent argued that "a reasonable Team Member would understand Salazar's statement to be a lawful prediction that Station would vigorously resist and prevail against the Union's efforts to achieve recognition through a *voluntary card-check agreement*." (RX 47) This argument implies that the record contains reference to the Union's demand for a card check and that employees had knowledge and understanding of such demands. With the exception of Respondent's opening statement at hearing, however, the record contains no reference and Respondent made no attempts to introduce any evidence to support the validity

of this statement. (Tr. 47:6-10) Similarly, Respondent's arguments in support of its exception to the ALJ's denial of its Motion to Dismiss are based in part on this unsupported statement and should therefore be stricken. See *A.J.R. Coating Corp.*, 292 NLRB 148 fn. 1.

As part of its exceptions to the ALJ findings, Respondent, in two separate instances, argued that the Board should subject the testimony of employees Delmi Aldana (Aldana) and Lorena DeVilla (DeVilla) "to heightened scrutiny due to the General Counsel's re-preparation" of these witnesses "between their initial cross-examination and recall." (RX 10, fn. 3; 21, fn. 5) Here too Respondent's assertions are not supported by the record. In both instances, the General Counsel questioned each witness prior to their recall for the sole purpose of determining whether they provided the Union with any statements (written, audio, or video) to ensure that all statements were furnished to Respondent in accordance with Respondent's subpoena duces tecum and the ALJ's order. At hearing Respondent questioned Aldana about whether she had spoken to anyone between the time she last testified and the date of her recall. Respondent's blanket assertion that Aldana was "re-prepared" relies upon the following testimony:

Q Between the time you testified last and today, have you spoken with anybody about your press releases or the radio interview?
A No.
Q Did you review any materials before coming here today?
A I just came here last week and he showed me the videos.
Q What videos?
A The video about the press conference.
Q When you said him --
MS. LaROCCA: Let the record reflect that she was pointing to Mr. Godoy.
JUDGE CARTER: Is that correct?
WITNESS: Yes.
MS. LaROCCA: Can we go off the record for a minute?
JUDGE CARTER: Okay, go off for a second.
(Off the record)
JUDGE CARTER: We're back on. (Tr. 3444:14-25; 3445:1-5)

Despite Respondent's claim that Aldana was "re-prepared," Respondent did not question Aldana about the extent of her "preparation" or what was discussed with the General Counsel. The record reflects that Respondent requested to go off the record following Aldana's response that she was shown the videos by "Mr. Godoy." While off the record, Respondent's counsel preceded to question the General Counsel about the purpose and extent of his interaction with Aldana. When Respondent resumed her questioning of Aldana, no further questions or inquiries were made as to the so-called "re-preparation" Aldana received.

Respondent's claim that the General Counsel "re-prepared" DeVilla is similarly meritless. Respondent's claim relies on the following testimony:

> **Q** Before you commenced testifying today, what did you do in advance of your testimony to prepare to testify?
> **A** I didn't prepare because I didn't know what I was going to be asked. Just that last week, I had an interview with Pablo and he told me that they had called me back and maybe they were going to ask me if I had seen videos, had I remembered about the radio interview. I said, yes, I had remembered but it hadn't been aired. I asked if we could do it Tuesday because I had extra work on Monday, I couldn't come on Monday. That was all.
> MS. LIPKIN: Could we take a quick break, Your Honor?
> JUDGE CARTER: Okay.
> MS. LIPKIN: Thanks.
> JUDGE CARTER: We can go off for a second.
> **(Off the record)**
> JUDGE CARTER: We're back on.
> MS. LIPKIN: Could I just have one moment, Your Honor?
> JUDGE CARTER: Okay.
> MS. LIPKIN: Thanks.
> **(Long pause)**
> **(Off the record)**
> MS. LIPKIN: Thanks, Your Honor.
> JUDGE CARTER: Okay, we're on.
> MS. LIPKIN: We have no further questions, thank you. (Tr. 3427:23-25; 3428:1-21)

Similar to when Respondent questioned Aldana, during the recall of DeVilla, Respondent asked to go off the record to confer with the General Counsel. Here too, Respondent declined

to continue questioning DeVilla about her conversations with the General Counsel once questioning resumed, presumably because Respondent's counsel was satisfied that the General Counsel's limited interactions were not to "re-prepare" the witness for recall.

III. CONCLUSION

It is respectfully requested that the Board find that Respondent's exceptions are without merit and affirm the ALJ's decision, save for those matters to which the General Counsel has filed his exceptions.

Dated at Las Vegas, Nevada, this 15th day of December 2011.

/s/ Pablo A. Godoy
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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in STATION CASINOS, INC., ALIANTE GAMING, LLC, D/B/A ALIANTE STATION CASINO + HOTEL, BOULDER STATION, INC., D/B/A BOULDER STATION HOTEL & CASINO, PALACE STATION HOTEL & CASINO, INC., D/B/A PALACE STATION HOTEL & CASINO, CHARLESTON STATION, LLC, D/B/A RED ROCK CASINO RESORT SPA, SANTA FE STATION, INC., D/B/A SANTA FE STATION HOTEL & CASINO, SUNSET STATION, INC., D/B/A SUNSET STATION HOTEL & CASINO, TEXAS STATION, LLC, D/B/A TEXAS STATION GAMBLING HALL & HOTEL, LAKE MEAD STATION, INC., D/B/A FIESTA HENDERSON CASINO HOTEL, FIESTA STATION, INC., D/B/A FIESTA CASINO HOTEL, AND GREEN VALLEY RANCH GAMING, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASINO, a single Employer, Cases 28-CA-22918 et al., was served by E-Gov, E-Filing, and E-Mail, on this 15th day of December 2011, on the following:

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