

**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-023436  
28-CA-062437**

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

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

**Respectfully submitted,**

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## **I. INTRODUCTION**

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge Gerald M. Etchingham [JD(SF) 05-12] (ALJD), issued on February 2, 2012. Under separate cover, the General Counsel also files with the Board on this date an Answering Brief to Stations Casinos, Inc., (Respondent) exceptions. It is respectfully submitted that in all respects, other than what is excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record.

The ALJ erred in failing to find that Relief Supervisor Martin Rubio (Rubio) is a statutory supervisor under the meaning of Section 2(11) of the Act. Paragraph 5(b) of the Amended Consolidated Complaint (Complaint) alleged Rubio as a statutory supervisor and agent of Respondent. In dismissing the allegation alleging Rubio as a statutory supervisor, the ALJ concurrently dismissed Paragraph 6(c) of the Complaint which alleges that Rubio unlawfully interrogated employees about their union and concerted activities, created an impression of surveillance, and threatened employees with discharge if they engaged in union activities. In making his decision, the ALJ misapplied the record evidence to the requisite legal standards to establish an individual's supervisory status.

## **II. FACTS**

### **A. Relief Supervisors - Palace Station**

Respondent utilizes Relief Supervisors at its Palace Station facility to replace and cover supervisors, whose Section 2(11) status is not in dispute, on their days off. Because they replace Respondent's full-time supervisors, when a Relief Supervisor is scheduled, they are the sole Internal Maintenance supervisor and manager present during the shift. (Tr. 111:3-

5; 111:14-19; 163:13-16)<sup>1</sup> Relief Supervisors do not report to anyone during their shift and are the highest ranking persons in the internal maintenance department. They are also the *only* persons who can re-assign team members to other job tasks. (Tr. 110:18-20; 111:17-19; 130:10-12; 134:2-9) Furthermore, while Relief Supervisors are employees under the meaning of the Act when they are not serving in that capacity, they earn an hourly, dual rate, with a premium being paid only when they serve as Relief Supervisors. Relief supervisors also wear different uniforms which distinguish them from employees. For example, Relief Supervisors wear polo shirts while porters wear a shirt with the Station Casinos logo. (Tr. 98:25, 99:1-3; 151:7-11; 165:1-3)

Relief Supervisors perform many of the same functions as the “regular” full-time supervisors they replace. They complete schedules of where team members will be stationed. (Tr. 79:12-22; GCX 9(a)) Relief Supervisors are also responsible for “checking-in” employees at the commencement of their shifts, passing out keys, radios, and assignment sheets. (Tr. 74:17-20; 164:3-5) They carry radios and a company phone through which they communicate with other departments and team members whom they are supervising. (Tr. 84:2-10; 91:12-15; 111:20-22; 172:19-20) Team members call Relief Supervisor on their assigned phones when calling out sick. In such instances, Relief Supervisors record such incidents in a supervisor log book. (Tr. 106:10-14; 106:19-25; 134:14-22) Where a Relief Supervisor determines that tasks or projects need to be completed, they notify team members, and when necessary, pull team members from outside their assigned areas. (Tr. 84:18-22; 173:15-20) In doing so, Relief Supervisors do not need permission before reassigning a team member. (Tr. 119:16-19) Relief Supervisors assign team members to perform tasks which go

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<sup>1</sup> Tr. \_\_:\_\_ refers to transcript page followed by line or lines of the unfair labor practice hearing held between October 18, 2011 and October 20, 2011. ALJD \_\_:\_\_ refers to JD(SF)-05-12 issued by ALJ Etchingham on February 2, 2012, followed by page and line.

beyond their typical job assignments and tell part-time team members what portions of tasks to complete. (Tr. 148:19-25, 149:1-5; 174:2-15; 175:19-22) During their shifts, Relief Supervisors check on team members' work and follow up on the work they were assigned. At the conclusion of each team member's shift, they collect task sheets from each team member which indicates whether their assignments have been completed. (Tr. 85:16-18; 109:16-21; 176:10-16; 176:23-25, 177:1; GCX 9(b) – (v); 10(b) – (v))

**B. Supervisory Duties – Martin Rubio**

Rubio was a Relief Supervisor who replaced Internal Maintenance graveyard supervisor Ron Grannis (Grannis) on two graveyard shifts during the week. (ALJD 8:3-5; Tr. 162:24-25, 163:1; 164:11-12; 167:21-24; 190:11-14) As a Relief Supervisor, Rubio completed work schedules showing where employees were to be stationed, assigned part-time employees to perform tasks that went beyond their typical assignments, distributed and collected task sheets, keys, and radios at the beginning and end of his shift. (ALJD 8:17-21; Tr. 74:17-20; 85:16-18; 109:16-21; 164:3-5; 176:10-16; 176:23-25, 177:1; GCX 9(b) – (v); 10(b) – (v)) Rubio also responded to calls from other departments reporting incidents such as broken glass or bio-hazard spills by radioing the employee assigned to or nearest to the affected area. (ALJD 8: 23-24; Tr. 84:18-22; 173:15-20) In performing these tasks, Rubio wore a different uniform than the employees he oversaw and was the highest ranking individual in the Internal Maintenance department. (ALJD 8:29-30; 8:32-34) As pointed out by the ALJ, while he did not run the casino's operations, he dutifully completed the duties described above. In response to his role as Relief Supervisor, employees notified him when calling out sick and appear to have generally complied with his instructions. (ALJD 8:32-34; Tr. 106:10-14; 106:19-25; 134:14-22) When working as a Relief Supervisor, Respondent

paid him an additional premium of 35 cents per hour for his supplementary duties. (ALJD 8:6-8)

**C. Palace Station - February 7, 2011**

On February 7, 2011,<sup>2</sup> the Local Joint Executive Board of Las Vegas, Culinary Workers' Union Local 226, and Bartenders Union Local 165, affiliated with UNITE HERE (the Union) held a rally in front of the Respondent's Palace Station facility which was attended by several people, including Respondent's employees. In attendance that day was Casiano Corpus (Corpus), an employee in Respondent's Palace Station internal maintenance department. Corpus participated in the rally by carrying picket signs on the sidewalks and parking lot. (Tr. 162:3-6; 162:15-20)<sup>3</sup> Later that evening once the rally had concluded, Corpus reported to work at 11:00 p.m. to begin his graveyard shift. (Tr. 183:10-12) Rubio, who was filling in for Grannis, reported to work at midnight. As Relief Supervisor, Rubio was wearing his Relief Supervisor uniform, received calls from other departments, and reviewed the work of team members. (Tr. 162:24; 171:18-25, 172:1-4)

During his shift, while Corpus was working in his assigned area within the Feast Buffet, he was approached by Rubio. Rubio called Corpus into the lobby, an area outside of Corpus's work area. (Tr. 168:24-25, 169:1-5; 169:7-25, 170:1-7) When Corpus joined Rubio in the lobby, Rubio questioned Corpus if he had gone to the rally and whether he had gone to jail. (Tr. 170:9-14) Corpus responded that he went to the rally but denied that he went to jail. (Tr. 170:12; 170:14) Rubio answered back that somebody had told him that the next time team members pass out flyers at Station Casino, they will be immediately fired. (Tr. 170:16-

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<sup>2</sup> Unless otherwise noted, all other dates referenced in this Brief occurred in 2011.

<sup>3</sup> Even before participating in the February 17 Union rally, Corpus was an active Union supporter who previously attended rallies and passed out Union flyers at Respondent's casinos in team member dining rooms. (Tr. 171:10-17; 191:21-22; 192:1-3)

18) When Corpus asked Rubio who had told him this, Rubio walked away without answering. (Tr. 170:22)

### **III. ANALYSIS**

#### **A. The ALJ Erred by Failing to find that Rubio is a Statutory Supervisor Under the Act [Exception No. 1]**

The ALJ erred in failing to find that Rubio is a statutory supervisor under the meaning of Section 2(11) of the Act. In reviewing and analyzing the record evidence, the ALJ overlooked key facts and legal principles which establish Rubio's status as a statutory supervisor. In concluding that Rubio was not a supervisor, the ALJ reasoned that the General Counsel failed to prove that Rubio exercised independent judgment when carrying out his duties as a Relief Supervisor. (ALJD 15:24-26) Contrary to the ALJ's conclusion, however, the record evidence establishes that Rubio not only assigned work to employees but that he did so using his independent judgment.

Under Section 2(11) of the Act, an individual holds the status of statutory supervisor under the Act if he/she exercises independent judgment in connection with one or more of the 12 specific functions listed by that provision of Act. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). In *Oakwood Healthcare, Inc.*, the Board construed the meaning of the term "assign" to "refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.* at 689. The Board also shed light on the meaning of "independent judgment," noting that "[t]he authority to effect an assignment must involve a judgment, and the judgment must be independent, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.* at 693.

In his Decision, the ALJ agreed that Rubio assigned employees tasks. As previously noted, however, the ALJ concluded that “it is questionable whether he exercised the requisite independent judgment in assigning such tasks.” (ALJD 12:37-38) In reaching this conclusion, the ALJ recognized that Rubio passed out daily assignment sheets to employees but reasoned that the assignment sheets were “dictated by the team members’ *bidded* shifts and instructions left by Rubio’s supervisors and department manager.” (emphasis added) (ALJD 12:40-45) Such reasoning is not supported by the record. If assignment sheets and their respective tasks were in fact governed by the bidded shifts of employees, there would be no need for supervisors or Relief Supervisors to distribute *daily* task sheets with employees’ assigned tasks. The fact that employees bid on a shift says nothing about the daily tasks they are required to perform. Accepting the ALJ’s reasoning, would require accepting the employee’s bidded shifts to also include defined tasks and assignments.

Similarly, while observing that Rubio “responded to calls from other departments reporting biohazard spills, broken glass, etc, by calling the team member assigned to (or nearest to) the affected area to address the spill,” the ALJ concluded that “there is no evidence suggesting that Rubio direction involved other than routine aspects of internal maintenance, such as promptly cleaning the spill or directing someone to do it” (ALJD 12:34-38; 13:2-6) Such reasoning is flawed because it overlooks the fact that Rubio had to exercise independent judgment in determining which employee should be assigned to respond to area in need of attention. While Rubio did testify that such assignments are made to employees who were assigned to the area where the incident is located, Rubio did acknowledge that in situations where an employee is unavailable, he was required to assign another employee to respond to the area in need of attention. (Tr. 84:1-25) Such a decision is neither routine nor clerical, as it

required Rubio to determine the type of response needed, the number of employees required to resolve the issue, and which employee(s) to assign. In making each of these determinations, Rubio was required to make decisions not “dictated or controlled by detailed instructions.” Making such a decision presumably required him to determine which employee was closest to the area in need of attention as well as who had the requisite time to complete the required task and who was best trained to respond. The fact that Rubio may not have actually exercised this discretion in carrying out his duties is of little importance, so long as he was conferred such authority.

**B. The ALJ Erred by Failing to Find that Rubio Violated Section 8(a)(1) By Interrogating Employees, Creating the Impression of Surveillance, and Threatening Employees with Discharge Because they Engaged in Union and Protected Activity [Exception No. 2]**

The ALJ dismissed the allegations contained in Paragraph 6(c) of the Complaint because he erred in determining that Rubio was not a statutory supervisor. In concluding that his alleged threat to employees that “somebody told him that the next time we hand out flyers inside the Station Casinos, we will immediately get fired” is too vague, the ALJ did so in the context of analyzing whether Rubio was acting as an agent of Respondent. If analyzed for the purpose of determining the lawfulness of Rubio’s questions and comments, the ALJ would have concluded them to be unlawful because they constituted a threat of discharge, created the impression of surveillance, and interrogation.

**i. Interrogation**

The Board has held that while management officials may observe public union activity, it is unlawful for them to spy on employees’ union activities or to create the impression of surveillance since such actions “while not per se violation can have a natural, if

not presumptive tendency to discourage [union] activity.” *Belcher Towing Co. v. NLRB*, 726 F.2d 705 (11th Cir. 1984); see also *Daytona Hudson Corp.*, 316 NLRB 85 (1995). An employer, however, cannot engage in such surveillance for unlawful reasons such as reprisal for the employee's union activities or for the purpose of obtaining pretextual grounds for disciplining the employee in reprisal for such union activities. See *Brown & Root-Northrop*, 174 NLRB 1048, 1058 (1969) . Such conduct has been deemed to have coercive and restraining effects on employees’ Section 7 rights. The Board has deemed the impression of surveillance to be as serious as actual acts of surveillance. In *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-1540 (2000), the Board held that “[w]hen an employer creates the impression among its employees that it is watching or spying on their union activities, employees’ future union activities, their future exercise of Section 7 rights, tend to be inhibited.”

The Board’s “test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance.” *Flexsteel Industries*, 311 NLRB 257, 257 (1993) (citing *e.g.*, *Rood Industries*, 278 NLRB 160, 164 (1986)). The Board has found the impression of surveillance which violated the Act by asking an employee how conversations went with union organizers. *Fred’k Wallace & Son*, 331 NLRB 914 (2000). Statements were found violative where the supervisor stated he heard rumors about the employee’s union activity. *Flexsteel Industries*, 311 NLRB at 257-258. Mere statements identifying the employee’s union activity is sufficient to find the impression of surveillance. *U.S. Coachworks, Inc.*, 334 NLRB 955, 956 fn. 6 (2001) (finding a violation for stating “I know you are the one that is disbursing Union cards”).

In this case, Respondent created the impression of surveillance by virtue of Rubio's question of whether Corpus attended the Union rally and whether he went to jail. (Tr. 170:9-14) Rubio's statement served to place Corpus on notice that Respondent was aware of his participation in the rally. Moreover, Rubio demonstrated Respondent's negative opinion of the Union and Corpus's union activities by asking him whether he went to jail, as though doing so were a crime. (Tr. 170:9-14) Such a bold interrogation combined with the subsequent threat of termination had significant intimidating force which was directed squarely at Corpus's union activities, and would reasonably lead an employee to believe that his or her protected union activities were under surveillance. See *Flexsteel Industries*, 311 NLRB at 258 (finding an unlawful impression of surveillance where the employee's union activity was identified).

## ii. Applicable Legal Standard

The Board has held that allegations of interrogation must be decided on a case-by-case basis to determine whether an employer's questioning, when viewed in context, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Stabilus, Inc.*, 355 NLRB No. 161, slip op. at 15 (2010). To make such a determination, the Board utilizes the *Bourne*<sup>4</sup> factor which it set forth in *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). These factors are:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?

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<sup>4</sup> *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)

- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Respondent interrogated and threatened Corpus because he was active in organizing its employees. He distributed flyers on Respondent's properties and openly participated in more than one Union rally at Palace Station. (Tr. 162:3-6; 162:15-20; 171:10-17; 191:21-22; 192:1-3) It is particularly relevant that the interrogation occurred so soon after Corpus's participation in the February 17 rally. (Tr. 183:10-12) Analysis of the *Bourne* factors is quite revealing. First, there is a history of hostility and discrimination towards team members who participate in Union activity as found in the prior proceeding. Second, Corpus was questioned directly about *his* participation in the rally and whether he went to jail which is information Respondent could arguably use to take action against Corpus, especially if his actions had resulted in his arrest. (Tr. 170:9-14) Third, Rubio, as the highest Internal Maintenance supervisor on shift, he held an elevated status since he reported to no other person in the department and was the only person who could assign work to team members, including Corpus. (Tr. 134:2-9) Fourth, the fact that Corpus was called outside of his normal work area by Rubio created a level of formality similar to being called to the office of a supervisor. (Tr. 168:24-25, 169:1-5; 169:7-25, 170:1-7)

There should be little doubt that Rubio threatened Corpus when he informed him that "somebody" told him that the next time team members passed out flyers at Station Casino, they would be immediately fired. (Tr. 170:16-18) Such a threat is not vague or ambiguous when made by a statutory supervisor. The nature and source of the statement allows no other feasible interpretation other than one intended to get Corpus to stop handing out flyers. See *Double D Construction Group*, 339 NLRB at 303. In the context of Respondent's anti-Union

campaign and numerous other unfair labor practices, the statements were intended to have a coercive effect by putting Corpus on notice that his union activities were known, and that Respondent was ready, willing, and able to take action against him.

### **iii. Threat of Discharge**

Threats of discharge for engaging in union activities violate Section 8(a)(1) of the Act. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339 fn. 4 (2005); *Jamaica Towing, Inc.*, 632 F.2d 208 (2nd Cir. 1980). In fact, the Board and the courts have long held that an employer violates Section 8(a)(1) by making direct or implied threats of discharge where the purpose is to discourage employees of their Section 7 rights. *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372 (5th Cir. 1967) In *Double D Construction Group*, 339 NLRB 303, 303-304 (2003), the Board explained that “[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.” In determining whether an employer’s remarks are unlawful, they must also be analyzed in the context of the employer’s other misconduct. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

In the instant case, there is little room to argue that Rubio’s statement that “somebody” told him that the next time team members passed out flyers at Station Casino, they would be immediately fired, is not coercive and restraining. (Tr. 170:16-18) Such a threat is not vague or ambiguous when made by a statutory supervisor and was clearly made following his attendance of a union rally. The nature and source of the statement allows no other feasible interpretation other than one intended to get Corpus to stop handing out flyers. See *Double D Construction Group*, 339 NLRB at 303. In the context of Respondent’s anti-Union campaign and numerous other unfair labor practices, the statements were intended to have a coercive

effect by putting Corpus on notice that his union activities were known, and that Respondent was ready, willing, and able to take action against him.

#### **IV. CONCLUSION**

Based on the foregoing, the General Counsel respectfully submits that the Board, relying on the credited record evidence and the factual findings and conclusions of the ALJ, find that Respondent violated Section 8(a)(1) of the Act by the conduct described above, and requests that the Board issue an order otherwise affirming and adopting the Decision and Recommendations of the ALJ.

Dated at Las Vegas, Nevada, this 15<sup>th</sup> day of March 2012.

*/s/ Pablo A. Godoy*

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*/s/ Larry A. Smith*

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## CERTIFICATE OF SERVICE

I hereby certify that the **BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S CROSS- EXCEPTIONS** in Cases 28-CA-023436 and 28-CA-062437, was served via E-Gov, E-Filing, and electronic mail, on this 15<sup>th</sup> day of March 2012, on the following:

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