

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

**FLAMINGO LAS VEGAS
OPERATING COMPANY, LLC**

and

**Cases 28-CA-069588
28-CA-073617**

**INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA (SPFPA)**

**ACTING GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – WASHINGTON

**FLAMINGO LAS VEGAS
OPERATING COMPANY, LLC**

and

**Cases 28-CA-069588
28-CA-073617**

**INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA (SPFPA)**

**ACTING GENERAL COUNSEL’S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

Flamingo Las Vegas Operating Company, LLC (Respondent) violated the National Labor Relations Act (the Act) by threatening its employees, promulgating and enforcing overly broad and discriminatory work rules, and engaged in surveillance of its employees because of their concerted activities. As a result, the employees started an organizing campaign to obtain representation from the International Union, Security, Police and Fire Professionals of America (SPFPA) (the Union).

The employees’ right to organize is one of the fundamental purposes of the Act, and, during such organizing, employee rights are most subject to chill by an employer’s actions. Respondent learned of the Union’s organizing drive soon after the drive started and reacted immediately and repeatedly. In response to the organizing efforts of employees, Respondent committed additional violations of the Act, including threatening its employees, promulgating

and enforcing overly broad and discriminatory work rules, creating the impression of surveillance, interrogating employees about their Union sympathies, soliciting employee complaints and grievances, promising increased benefits and improved terms and conditions of employment, supervising its employees more closely, and discriminatorily restricting access to company bulletin boards because they engaged in Union activities or supported the Union. Respondent targeted the lead organizer-employee both directly and indirectly and its conduct taken in response to the Union organizing campaign exceeded the bounds of Section 8(c) of the Act.

II. BACKGROUND

A. Respondent's Operations

Respondent is a limited liability company with an office and place of business in Las Vegas, Nevada, and is engaged in the operating of a hotel and casino, providing food, lodging and gaming. (GCX 1(o); 1(s))¹ Respondent operates one of five properties in a pod under Caesars Entertainment. (Tr. 61:15-21) The properties in the pod are Harrah's, Imperial Palace, Flamingo,² which includes the Margaritaville Casino, OSheas, and Bill's, or HIFOB for short. (Tr. 59:10-11; 72:21-25, 73:1-2) The HIFOB senior chain of command consists, in relevant part, of president and general manager Rick Mazer (Mazer), assistant general manager Paul Baker (Baker), and various vice presidents for several departments. (Tr. 60:15-23; 120:12-13; GCX 2)

¹ GCX__ refers to General Counsel's Exhibit followed by the exhibit number; RX__ refers to Respondent's Exhibit followed by exhibit number; JTX __ refers to Joint Exhibit followed by the exhibit number; CPX __ refers to Charging Party's Exhibit followed by the exhibit number; "Tr. __:__" refers to transcript page followed by line or lines of the unfair labor practice hearing held between March 13 and 16, 2012.

² Most references to Respondent's facility refer to its Flamingo facility, although there is significant interaction among some of the properties, especially Flamingo, OSheas and Bill's.

Respondent's extensive security personnel include security director Eric Golebiewski (Golebiewski), who oversees HIFOB security operations as there is no vice president for security. (Tr. 61:5-7; 123:5-11; GCX 2) Investigations manager Jack Burgess (Burgess) reports to Golebiewski. (Tr. 61:24-25, 62:1) There are three investigators and seven security shift managers for the five HIFOB properties under Burgess. (Tr. 62:5-14) Four of the seven security shift managers are at Flamingo, and include Charles Willis (Willis), Cedric Johnson (Johnson), Keith Berberich (Berberich), and John Schultz. (Tr. 62:15-19) There are 11 security shift supervisors for the 5 HIFOB properties under the security shift managers, 6 of whom are at Respondent's Flamingo facility. (Tr. 62: 20-25, 63:1-8) The security shift supervisors include Curtis Walker, Janice Miller, Russ Roake, Kevin Quaglio (Quaglio), Thomas Heath (Heath), and Zina Miner. (Tr. 63:3-5) Respondent also uses FTO³ Golds in its security operations, which are security officers in training for supervisor positions. (Tr. 63:10-12) There are three FTO Golds at Flamingo: Lynn Jones,⁴ Dan Hayes, and Larry Myatt (Myatt). (Tr. 63:16) Baker, Golebiewski, Berberich, Willis, Johnson, Quaglio, and Myatt are supervisors and agents under Sections 2(11) and 2(13) of the Act. (GCX 1(s); JTX 1)

Respondent's operations require security officers 24 hours a day, 365 days a year. (Tr. 64:15-17) There are approximately 300 security officers among the 5 HIFOB properties. (Tr. 63:25, 64:1-2) Security officers' are primarily responsible for providing a friendly and safe environment for guests and team members, while protecting company assets. (Tr. 71:17-21; GCX 4) The Standard Operating Procedure for Respondent's security officers is the Standard Operating Procedure for Caesars Entertainment, and is not limited to the five properties of the HIFOB pod. (Tr. 72:6-10) The security officers rotate through various properties as part of their

³ Field Training Officer.

⁴ The transcript has intermittent incorrect references to Lane Jones. Cf. (Tr. 63:16; 350:3)

shift. (Tr. 67:13-16; 72:15-17, 21-24) Around 120 of those security officers rotate through Flamingo, OSheas and Bill's as part of a posted schedule limited to those 3 properties. (Tr. 64:3-5; 68:1-9, 16-21) Between 50 and 70 of those security officers are attached to Flamingo. (Tr. 64:9-14)

The security officers perform various tasks and interact with a variety of people. Security officers perform sweeps of "undesirables," which include homeless persons, prostitutes, pimps, thugs, drug dealers and persons covered under a BOLO or Be On the Lookout Alert. (Tr. 73:7-25, 74:1) Excluding seasonal variations and special events, security operations are normally busier after 9:00 p.m. (Tr. 65:10-14) Security officers receive much of their information through pre-shift meetings held at the beginning of every shift. (Tr. 74:24-25, 75:1-5) While pre-shift meetings typically last between 15 to 30 minutes, they can be extended at the discretion of Golebiewski. (Tr. 76:18-25, 77:1) In addition, the FTO Golds put information out to the security officers, including mandatory procedures and policies, flyers, and information such as BOLO alerts. (Tr. 75:18-25, 76:1-11)

B. Believe or Leave Campaign

Respondent measures customer feedback using a process called total service scores. (Tr. 101:20-24) The total service scores are used to evaluate employees, including security officers as a group. (Tr. 101:25, 102:1-4) Security officers have to meet and greet customers and perform certain steps including asking customers questions under a process called a total service sweep. (Tr. 102:5-14) Respondent tested security officers' knowledge of the total service process by a process called "spotlight" whereby a shift supervisor observed a security officer make contact with a guest and graded such contact. (Tr. 102:17-20; 169:14-19) Golebiewski implemented the service sweep process. (Tr. 102:15-16) Although customer

service scores were a long-running issue, the emphasis peaked in September 2011. (Tr. 173:14-22; 318:7-23; 367:17-25, 368:1-7)

Respondent held mandatory meetings for hundreds of managers and supervisors from all five HIFOB properties in early September 2011⁵ regarding extremely low customer service scores. (Tr. 418:4-17; 469:20-25, 470:1-11, 24-25, 471:1-14; 472:25, 473:1-2; 541:22-25, 542:1-9, 21-24; 547:12-20) In response to poor customer service scores, Respondent implemented a new campaign it called “Believe or Leave” to raise these scores. (Tr. 417:10-25, 418:1-4; 474:7; 542:10-14; 547:21-22, 24-25, 548:1-2) At its roll-out meetings, Respondent made it clear that customer service was the number one goal and the customer service scores needed to be raised or “changes” would be made. (Tr. 472:15-18; 480:13-22) The managers understood that their jobs were in jeopardy if they did not succeed. (Tr. 480:19-25, 481:1-4) The campaign had to be implemented by the security supervisors through the security officers. (Tr. 472:2-8; 481:5-25, 482:1-4)

Respondent held a number of meetings with security officers to implement the “Believe or Leave” campaign. In response to security officer complaints raised during the September 3 “Believe or Leave” pre-shift meeting,⁶ Respondent committed several unfair labor practices.

C. Union Organizing Begins

In response to the complaints about the “Believe or Leave” campaign and other officer concerns, security officer Francis Bizzarro (Bizzarro) contacted different unions and eventually found the Union. (Tr. 220:6-25, 221:1-12; 229:24-25, 230:1-8; 263:3-14) Bizzarro obtained Union authorization cards and started approaching officers in late-September with information,

⁵ All dates are in 2011, unless otherwise noted.

⁶ The facts supporting the unfair labor practices of the various allegations are fully detailed in Part III Argument, *infra*. The facts of Part II provide background information which extends beyond the allegations of the Complaint, but are relevant to Respondent’s broader campaign.

flyers, and authorization cards. (Tr. 139:5-8; 172:4-9; 230:6-8, 12-15; 263:19-25) Bizzarro passed out over 100 authorization cards to security officers of Flamingo, OSheas and Bill's. (Tr. 230:17-19; 235:1-3) Although Bizzarro openly shared his support for the Union with fellow security officers but was not immediately open to management. (Tr. 174:12-18; 340:25, 341:1-2, 8-14) He did not pass out authorization cards in front of management, and he handed out business cards so the officers could contact him with questions. (Tr. 230:23-25, 231:1-2; 341:3-7) At the same time, he passed out business cards to supervisors. (Tr. 231:3-25, 232:1; 286:21-23) He did not wear a union button or any clothing which identified him with the Union. The Union did not provide Respondent with an organizing letter to announce the names of the organizers. (Tr. 232:14-22)

D. Respondent's Response to the Organizing Campaign

Respondent learned of the organizing campaign no later than October 7, when it obtained a copy of a blank authorization card. (Tr. 439:4-9) Around October 7, shortly after learning of the organizing campaign, it conducted pre-shift meetings led by Burgess. (Tr. 140:11-17; 201:18-25, 202:1-2; 204:9-13) Burgess told employees that if they signed with the Union, the Union "make[s] empty promises and there would be a good chance that [the security officers] wouldn't make the current salary that [they] make or the hourly pay, [and] that [they] could very well have a chance of making a lot less[.]" (Tr. 140:20-25; 203:25, 204:1-8) Burgess then referenced the security officers at the Aquarius who make \$12 an hour.⁷ (Tr. 140:25, 141:1-2; 204:4-5)

⁷ Consistent with the message delivered in October, Respondent, by security supervisor Thomas Heath, sent an email to the security officers on December 29 which said, among other things, that "[t]he union can negotiate for things, but they can't make management give you anything that they are not willing to give" and "I, personally, do not want to see any of you officers lose anything that you already have earned, which is possible in the course of negotiations" while referencing portions of the security officer contract at the Aquarius Hotel and Casino. (GCX 12 at p. 6-8)

The security officers received further attention from two high-level managers of Respondent. While HIFOB Assistant General Manager Baker did not typically attend security officer pre-shift meetings, he attended several pre-shift meetings in October within a few days of each other. (Tr. 124:10-25, 125:1) Golebiewski has been the security director for all five of the HIFOB properties since August 2010, and is involved in hiring, firing and disciplining security officers at HIFOB. (Tr. 59:10-14, 18-19) In spite of his broad responsibilities, he set aside an unusual number of hours to address issues in mid-October. Thus, the October 14 pre-shift meeting for the 9:00 p.m. security officers lasted four hours. (Tr. 77:4-6) It is extremely rare, if not an exclusive event, for a pre-shift meeting to last four hours. (Tr. 241:21-25, 242:1; 326:18-22) Quaglio and Berberich started the October 14 meeting, but were told to leave by Golebiewski. (Tr. 141:11-14; 156:9-25, 1-6; 236:9-12; 323:19) Golebiewski was so focused on this group that the 1:00 a.m. shift was prohibited from participating in the pre-shift meeting and was turned away when they attempted to enter despite the fact that the floor was short-staffed and security officers needed their batteries and radios. (Tr. 77:13-14; 146:21-25, 147:1-7; 242:7-15; 355:21-25, 356:1-17) Bizzarro raised a number of concerns at the four-hour meeting, but he was not alone. At least two or three other security officers raised questions. (Tr. 195:15-22) Of all the persons at the meeting, Golebiewski did the most talking, followed by Bizzarro. (Tr. 195:23-25, 196:1-2)

In mid-December, around a week before the scheduled Union vote, Quaglio called Meadows to the office shortly after his shift began. (Tr. 149:10-14; 177:17-21; 180:18-19) Quaglio shut the door after Meadows entered the office, and then asked Meadows to sit with Quaglio and Johnson. (Tr. 149:13-15) Quaglio asked Meadows if he liked his job at the Flamingo, and where he stood with the Union. (Tr. 149:16-23; 150:2-5; 180:8, 21-23)

Meadows responded that he liked his job, but declined to say whether he was for or against the Union. (Tr. 181:1-4) Quaglio asked Meadows if he had any concerns about his job or issues he had with management, to which Meadows told him he had a problem with Casali, but that was taken care of by Casali's transfer. (Tr. 181:6-20) Meadows told Quaglio he had a problem with not getting a raise since 2008 when other less-productive officers had received raises during that time. (Tr. 182:2-4) He also spoke to Quaglio about his medical condition. (Tr. 182:8-9) Quaglio then asked Meadows if he was going to vote yes or no for the Union, and if he knew where his co-workers stood with the Union. (Tr. 182:24-25, 183:1-12) Meadows said he would rather not answer. (Tr. 183:13-15) Quaglio bowed his head, and said he hoped it was a "no" on the Union and urged Meadows to encourage other officers to vote no. (Tr. 150:11-17; 183:19-24)

The day after Meadows was called to the office by Quaglio, Baker led a pre-shift meeting for some of the security officers.⁸ (Tr. 152:25, 153:1-5) At the meeting, Baker said he wanted to hear the officers' input on how they felt about their employment with Respondent and wanted to hear their issues. (Tr. 152:16-20) Baker asked the officers if they were thinking about signing with the Union and asked what the officers believed the Union could offer them. (Tr. 153:8-11) The officers did not disclose whether they were for or against the Union but did disclose their concerns with Respondent. (Tr. 153:11-14) Baker explained if the Union came in, there was a chance the security officers would get less pay, they would not have representation through management, and they would be giving the Union money for nothing. (Tr. 153:20-25, 154:1)

⁸ Meadows only saw Baker on the floor twice – once following a robbery, and when he attended a pre-shift briefing for the 9:00 p.m. shift of security officers. (Tr. 151:2-10; 154:2-4)

III. ARGUMENT

A. Credibility Favors Employee Witnesses

Significant weight is given to an administrative law judge's credibility determination because the administrative law judge actually sees and hears the witnesses when they testify. It is for this reason that a witness's demeanor, including their expressions, physical posture and appearance, manner of speech, and non-verbal communication, may convince the administrative law judge that the witness is testifying truthfully or falsely. Credibility determinations may furthermore be based on the weight of the respective evidence (established or admitted), inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *Medeco Security Locks*, 322 NLRB 664 (1996); *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). Accord *V&W Castings*, 231 NLRB 912, 913 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978).

An important factor in assessing a witness's credibility is whether the witness testified in the presence of other witnesses who might tailor their own testimony so as to avoid contradictory statements. In the instant case, employee witnesses testified outside the presence of other witnesses. Also, employee witnesses were employees or former long-term employees of Respondent at the time they testified at hearing. An employee's continuing employment by a respondent may be properly weighed and considered in resolving credibility, based on the particular reliability of such witnesses. In *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), the Board held that:

...every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing.... The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken. (footnote omitted)

Similarly, in *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977), an administrative law judge, with Board approval, observed that the testimony of current employees which is adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false.”

B. When in Conflict with that of Respondent’s Witnesses, the ALJ Should Credit the Testimony of Employee Witnesses

1. General Counsel’s Witnesses Testified Credibly

Each of witnesses called by Counsel for the Acting General Counsel (CGC) appeared pursuant to a subpoena. (Tr. 129:2-4; 212:13-15; 292:13-15; 313:7-9; 346:6-8) Each of these witnesses was highly credible and, contrary to Respondent’s likely assertion, was not a disgruntled employee looking for a way to get even with Respondent. Bizzarro, Ty Evans (Evans), and Christopher Rudy (Rudy) were all current employees of Respondent when they testified. (Tr. 212:16-25, 213:1-2; 292:16-19; 346:9-10) Evans was employed by Respondent for nearly five years when he testified. (Tr. 292:16-19) Meadows was a long-term security officer who worked for Respondent as a security officer for almost 11 years. (Tr. 129:9-14) Willequer worked as a security officer for almost three and a half years, but was terminated during the organizing campaign. (Tr. 313:10-19; 333:16-17) Rudy worked for Respondent for about 18 months, in addition to prior employment with Respondent. (Tr. 346:9-12; 366:19-25) Each of GGC’s employee witnesses provided testimony which was neither embellished nor exaggerated and provided foundational and other details which belies any claim of guile, deceit, or exaggeration.

Meadows did not embellish his testimony as he rejected assertions that: Union activity had existed during the initial “Believe or Leave” campaign; (Tr. 172:10-20) his supervisors’

futures depended on improving the customer service scores; (Tr. 173:2-5) the customer service scores were somehow of minimal importance; (Tr. 186:20-25; 187:1-4, 12-24) and Respondent put out a swarm of anti-Union flyers. With regard to the flyers, he could only recount more than 10 as his best guess, and did not exaggerate to claim 15 or more. (Tr. 189:12-22) When questioned about Baker and Mazer asking employees a week before the election how they were going to vote, Meadows responded that they did not ask how the security officers were going to vote; they only encouraged them to vote against the Union. (Tr. 195:1-9)

Although Meadows had a problem remembering dates, he was consistent on the dates he could remember, as shown when Respondent's counsel asked dates out of order, such as when Casali was transferred in relation to Meadows' conversation with Quaglio in mid-December. (Tr. 181:21-23) Notwithstanding the trouble with dates, he was very clear on who attended various meetings. (Tr. 185:6-20; 191:21-25, 192:1-15; 193:22-25, 194:1-14; 202:3-7, 23-25, 203:1-2) When Meadows was presented with the opportunity to shore up his testimony by claiming the four-hour meeting occurred on October 14, he declined to do so, sticking to his statement that he could not remember the date. (Tr. 162:10-15) When Meadows was confronted with an issue he did not recall, he did not embellish. He testified openly that he remembered several issues raised by Bizzarro in the four-hour meeting while admitting that he could not count recall others. (Tr. 163:1-25, 164:1-21) When confronted with an inconsistency in his affidavit, Meadows did not make excuses; he stated it was incomplete and apologized for not being more clear. (Tr. 200:8-25, 201:1-10)

Bizzarro also did not embellish his testimony as he refrained from claiming that other non-Union related flyers always stayed up longer than a week and truthfully stated that it was just "[m]ost of the time." (Tr. 257:24-25, 258:1-3). When asked whether a member of

Respondent's supervisory team removed pro-Union flyers from the bulletin board, he truthfully stated that he did not know who removed the flyers. (Tr. 265:9-13; 274:1-2, 13-20). When questioned whether Quaglio's September 3 comments had some connection to Union activity, Bizzarro answered with a simple "no." (Tr. 277:12-16)

Bizzarro demonstrated truthfulness in several areas which were unique to him. He was presented with multiple opportunities to claim Baker had more involvement in obtaining employment, but truthfully stated he did not know many of the details. (Tr. 266:7-17) He also testified truthfully about his conduct which could potentially reflect negatively on him. When asked if he raised his voice during the conversation with Baker, Bizzarro readily admitted that he had. (Tr. 271:6-7) Contrary to Respondent's likely assertion, Bizzarro is not a disgruntled employee who tried to utilize Respondent's internal process to resolve issues even after Respondent started its unlawful acts. (Tr. 226:9-24; 282:7-25, 283:1-25)

Although Evans' testimony was very limited, he also did not enrich his testimony based on the limited questions he was asked. In fact, he candidly answered questions about cut backs in other departments, testimony which could be used to undercut the claim that security officers were asked to take unpaid time off in response to the organizing drive. (Tr. 304:7-25, 305:1-10) However, he was not asked *when* the cutbacks occurred in other departments.

Willequer also testified in a straightforward and honest manner. When asked about the phrase "upbeat and positive," he did nothing to claim a recent special emphasis on the phrase, but acknowledged that being "upbeat and positive" was used for some time. (Tr. 318:7-23) When asked if he was terminated, he was not evasive. Instead, he answered "[y]es, I was terminated, sir" and did not hesitate in explaining the reason for his termination. (Tr. 333:16-21) He had an open opportunity to claim Golebiewski told the security officers they could not join

the Union, but answered simply that he had not. (Tr. 339:7-9) Willequer did not claim that Golebiewski threatened him with discipline because of Union activities. (Tr. 339:13-15) Willequer openly admitted that his understanding of the unpaid time off requests was management's stated reason of budget concerns. (Tr. 344:5-19)

Rudy did not enhance his testimony to claim there was a lot of complaining on his shift. In fact, he stated just the opposite – officers did not complain much on his shift because they are new. (Tr. 352:17-21) Rudy passed on the opportunity to claim the issues came to a head or that Respondent enforced its rule against security officers pooling together because of *Union* activity. (Tr. 368:5-14; 376:5-22) Although Respondent is likely to claim Rudy is biased against the company's view of the Union, its reliance is based on Rudy's affidavit statement that "I don't think it's right that I have to put up with the employer throwing flyers in my face, telling me how evil the union is, or what can or can't happen trying to get me to choose not voting for the union when *maybe* I want to." (Tr. 374:21-24; 375:17-25, 376:1-3) (emphasis added) It can hardly be argued that *maybe* someone wanting to choose to vote for the Union is indicative of bias.

2. CGC's Witnesses Corroborated Each Other

CGC's employee-witnesses all testified consistently with each other, and provided details which corroborated the testimony of other employee-witnesses notwithstanding their varied backgrounds. Meadows, Bizzarro, and Willequer all came from the same shift that started at 9:00 p.m. (Tr. 136:7-10; 138:19-21; 213:5-10; 313:20-25, 314:1) However, Evans and Rudy each worked different shifts. (Tr. 293:4-6; 347:6-13) In spite of the different shifts, all the employee-witnesses portrayed the same picture of Respondent's campaign in response to both the protected concerted activities and in response to the subsequent Union activities of the security officers. In stark contrast to Respondent's witnesses, they remained consistent

throughout direct examination and cross-examination. There is nothing in the employee-witnesses' testimony which suggests that they should not be credited. In contrast, Respondent relied exclusively on supervisors and managers for its case, and did not offer any of the more than 100 potential employee-witnesses to contradict any of CGC's employee-witnesses.

C. The Testimony of Respondent's Witnesses Should Not be Credited

1. Respondent's Avoidance of Questions

Golebiewski attempted to avoid answering questioning on several occasions. When asked whether FTO Golds wear business attire, Golebiewski first stated he was not sure, and then deflected a specific question about Larry Myatt's business attire before answering that Myatt wore mostly business attire in the month of October. (Tr. 81:3-25, 82:1-2) He initially denied that FTO Golds write evaluations for security officers, stating they "assisted in drafting them[,]” and tried to limit it on further questioning that they sometimes make initial drafts. Only through further questioning did he admit that he knew of no situation where the evaluation filled out by an FTO Gold was ever modified. (Tr. 83:12-21; 86:12-16) Not until his memory was refreshed with his November 30 sworn testimony in the representation case proceeding, Golebiewski adamantly testified that FTO Golds do not use independent judgment and that they “use feedback and documentation for the employee's performance.” (Tr. 84:6-20; 85:8-12; 86:3-11) When asked if the glass cover on the security officer bulletin board was new, he deflected by saying that it was several years old and had been brought from Harrah's. Again, only through further questions did he admit that it was installed in October. (Tr. 82:19-24) He was evasive when the ALJ tried to determine how often he has meetings with officers to address their concerns. (Tr. 462:13-22)

Golebiewski answered “I don’t know” or the equivalent in response to several questions which he later answered, and claimed he did not know answers for questions which seem odd for a person in his position, including whether the security officer scheduling system is password-protected. (Tr. 81:3-6; 82:1-6) Golebiewski made several implausible assertions regarding the preparation of flyers. He stated he did not know if human resources normally prepare the flyers *he signed*. (Tr. 92:10-15) He first testified that he was unsure if the anti-Union flyers were distributed among all five properties, but later remembered flyers posted at all of the five HIFOB properties. (Tr. 95:13-23; 100:1-7; GCX 5; GCX 6) He disclaimed any knowledge of the source of the questions listed on the flyers, and any knowledge of the hundreds of questions security officers asked him. (Tr. 97:8-25, 98:1-11) Golebiewski’s evasiveness leads to the inference that he refused to testify about additional facts because they would have reflected negatively on Respondent’s actions.

2. Respondent’s Contradictory and Shifting Testimony

Golebiewski contradicted himself on numerous occasions. He testified that the change in security officer call-ins for customer service contacts was due to efficiency. (Tr. 420:20-25, 421:6) He expanded this further by claiming that the required number of customer service contacts actually *increased* to a continuous requirement. (Tr. 422:10-12) However, there is nothing about efficiency in Respondent’s email communicating the change. (RX 2) Golebiewski’s asserted reason of “efficiency” should be discredited. Regardless, the “efficiency” reason was not communicated to the security officers.

Golebiewski had several significant inconsistencies in his testimony regarding the transfer of shift manager Casali. He first stated that he transferred Casali from Respondent’s Flamingo property around October, and could not remember if he had informed the security

officers why Casali was transferred, but said that Ricky (Casali) might have told them. (Tr. 100:11-25, 101:1-11) However, during Respondent's case, Golebiewski testified that he transferred Casali for cross-training purposes and told the officers that he transferred Casali for that purpose. (Tr. 403:3-11; 411:2-6) Oddly, Golebiewski made no mention of Casali in his detailed email sent soon after the meeting.⁹ (GCX 9) When confronted with his inconsistent testimony regarding what he told the officers and how he previously testified that he did not remember telling the officers why he transferred Casali, he acknowledged the inconsistency. (Tr. 440:2-21; 441:10-25) Forced to choose between the two inconsistent testimony statements he made, he claimed that he told the officers he transferred Casali for cross-training, as opposed to his earlier testimony that he did not give the officers a reason or that he could not remember giving them a reason. (Tr. 441:18-19) Golebiewski denied the transfer was because of security officer complaints about Casali but later admitted to security officer complaints against Casali. (Tr. 101:16-19; 457:13-18) By Willis' own testimony, he was not aware of his transfer to replace Casali until early October, which undercuts Respondent's likely claim that the transfer was pre-planned well in advance and had nothing to do with the organizing drive. (Tr. 526:23-25, 527:1-3) Respondent's asserted reasons for Casali's transfer, and the reasons given to the security officers should not be credited.

Quaglio contradicted himself and Myatt regarding the "Believe or Leave" campaign. Contrary to Myatt's earlier testimony, Quaglio tried to make the "Believe or Leave" campaign sound optional and something akin to team-building. He allegedly told the security officers "Guys, as a team we have a problem We need to improve our customer service scores. A saying came up, [Believe or Leave]. I did bring up [Believe or Leave]. When I was trying to tell

⁹ Respondent curiously failed to provide any of the communications which would have accompanied a transfer at the time.

the guys about [Believe or Leave], I wanted them to believe as a team, including Supervisors and Managers, that we can get this turned around.”¹⁰ (Tr. 543:9-16) “The way I brought the leave part of it was leave is more your choice. I want to get this done as a team. I want all you guys to be here. I want you to believe we can get this turned around.” (Tr. 544:19-22) On cross-examination, Quaglio denied that Respondent informed its managers that the changes had to be implemented immediately or changes would be made, and specifically claimed the “Believe or Leave” campaign was *optional*. (Tr. 548:3-11) However, he had great difficulty explaining how it was optional when he was asked questions like “It wasn’t believe or leave, please, was it?” and after he attempted to add extra phrases such as “believe or leave and let’s get our team turned around in the right direction.” (Tr. 549:1-25, 550:6-8) Quaglio had no response when asked how he could possibly believe the campaign was optional in light of the significantly rare and expensive meeting attended by hundreds of managers as Respondent rolled out its “Believe or Leave” program. (Tr. 553:22-25, 554:1-15) Eventually, Quaglio made a complete reversal and admitted that the “Believe or Leave” campaign was required and that there were consequences if it was not implemented. (Tr. 550:9-25, 551:18) On further questioning, he admitted “Leave” did not mean a transfer to other properties within HIFOB. While he tried to claim that the security officers could transfer to other departments, he later admitted they did not have any options through him as the “Believe or Leave” messenger since it was outside of his authority to transfer them. (Tr. 552:1-25, 553:1-21) Quaglio made no mention to the security officers of what positions they could transfer to if they decided to exercise the “Leave” portion of “Believe or Leave.” (Tr. 553:19-21) Quaglio later tried to soften “Believe or Leave” campaign, even after he flip-flopped and said it was mandatory. He testified that he approached the officers as “family” and asked the security officers if they had anything to bring to management’s attention

¹⁰ Quaglio inadvertently stated leave or believe instead of Believe or Leave. (Tr. 551:19-23)

to improve the scores. (Tr. 561:5-16) After categorically denying that he made any threats, Quaglio claimed he did not respond to officers who voiced their disagreement with the new campaign. (Tr. 54:5-14) He also denied any other claimed allegations. (Tr. 544:23-25, 545:1-20; 546:5-8) Quaglio should be completely discredited and the ALJ should conclude that Respondent attempted to shift its story in response to its prior unfavorable testimony.

Johnson's testimony corroborated Bizzarro's and contradicted Myatt's testimony regarding the September 3 meeting. According to Johnson, *Myatt took Bizzarro to the office* after the pre-shift briefing, not the other way around. (Tr. 566:18-25, 567:1-3) Johnson confirmed the essence of Bizzarro's version of the conversation. According to Johnson, Myatt told Bizzarro not to disrupt the briefing or make snide remarks or comments, and that if Bizzarro had a problem he needed to speak to Myatt and not get everybody riled up. (Tr. 567:2-7, 22-25, 568:1-2) Johnson characterized the tone of the conversation as non-offensive but firm, although he stated that Bizzarro's comments at the meeting were obviously offensive to Myatt and later clarified that Myatt was upset and disturbed. (Tr. 568:13-21; 572:6-11) Johnson elaborated that Myatt raised his voice with Bizzarro, and said that he was fed up with Bizzarro interrupting the briefings with snide remarks and if it happens again Myatt was going to a manager or have progressive discipline. (Tr. 570:12-25, 571:1-9) Myatt did nothing to indicate to Bizzarro that his instructions were optional or suggestions. (Tr. 569:23-25, 570:1-4) The ALJ should discredit Myatt's testimony where inconsistent with Bizzarro and Johnson.

3. Respondent's Incredible and Unlikely Assertions

Myatt made clear that the "Believe or Leave" campaign was mandatory and was implemented with the understanding that managers' and supervisors' jobs were in jeopardy if they did not raise customer service scores. (Tr. 472:15-18; 480:13-25, 481:1) He acknowledged

that management had to get the point through to security officers because of their importance in interacting with customers. (Tr. 481:2-23) However, he then claimed “Believe or Leave” did not mean employees would be terminated; instead, they would be placed in a non-front-line position outside of customer service. (Tr. 475:15-24; 482:5-25) However, on cross-examination, Myatt admitted “Believe or Leave” meant that a security officer would no longer be suitable for a customer service position such as their current job and they would not be able to transfer to the same job at another property. (Tr. 482:18-25, 483:1-9) Myatt claimed the officers’ response to “Believe or Leave” was limited to “grumbling” or “whining,” but later admitted that officers had specific complaints, including the number of customer service contacts and calling in to dispatch. (Tr. 474:18-25, 475:1-14; 484:13-25, 485:1-6) Myatt’s incredible assertion that “Believe or Leave” did not mean a loss of employment should be discredited, and the ALJ should find that his testimony was skewed in an attempt to put Respondent in a positive light.

Baker’s testimony is unbelievable given his position, his direct involvement in Bizzarro’s employment, and the level of attention given to Bizzarro’s actions. Baker has broad responsibilities for the five properties, overseeing the gaming, hotel, food and beverage, security and sometimes the leased operations of the properties. (Tr. 120:22-24) He oversees 8,000¹¹ employees, and has several HIFOB vice presidents who report to him. (Tr. 121:5-6; 122:18-25, 123:1; 517:17-19; GCX 2) Baker knew Bizzarro through their wives, through yoga classes, by Bizzarro’s assistance with Baker’s electrical problems, and Baker’s assistance in employing Bizzarro. (Tr. 125:17-25, 126:1-9, 19-21; 246:5-8; 266:22-25, 267:1-9; 268:1-7) Baker’s assertion that he was merely “disappointed” and no more is extremely unlikely when considering

¹¹ Baker initially could not remember the number of employees at the five properties, but knew the number during the presentation of Respondent’s case. (Tr. 517:17-19)

Baker's position and responsibilities, the undisputed and well-known fact that he personally referred Bizzarro for employment, the relationship between the two individuals, and the level of attention given to Bizzarro's actions which was communicated to the highest levels of HIFOB and beyond. Baker claimed he was not waiting for Bizzarro in the hallway in January 2012 at 9:00 p.m., and claimed he expressed that he was "just very disappointed that all this has occurred[.]" (Tr. 488:10-25, 489:1-16) He then "assumed" that Bizzarro screamed his name after he walked away. (Tr. 489:22-25, 490:1-12) He claimed he then went to Bizzarro to talk to him about Bizzarro walking away and how he felt "personally pretty – just upset and disappointed that you didn't come to me." (Tr. 491:6-25, 492:1-3; 493:3-5) He then claimed that *Bizzarro* initiated the conversation about the Union. (Tr. 492:9-14) Interestingly, he claimed that the confrontation was merely a conversation and that neither person was upset. Baker made a similar claim for the subsequent confrontation. (Tr. 494:12-16; 495:12-25, 496:1-24; 498:15-25, 499:1-25, 500:1-2) When asked if he told Bizzarro he was disloyal, Baker did not deny that he had; he merely stated he did not recall. (Tr. 500:3-4) In spite of the emails to his supervisors which specifically referenced Bizzarro, an employee he helped to obtain a job, Baker described his reaction as "disappointed. Just disappointed, that would probably be the – you know, in one sense I think I was pleased, too." (Tr. 506:6-16; GCX 9) He said he was pleased by the "open communication channels." (Tr. 506:18-25, 507:1-4) However, in furtherance of these "open communications" he professed to be so important, he did absolutely nothing in response to, to address, or to improve the situation after the confrontation even though he personally referred Bizzarro, and although he is responsible for continuous improvement in the organization. (Tr. 503:9-14; 507:2-13; 512:13-25, 513:1-25, 514:1-25, 515:1-10) In what appears to be a bizarre message to the upper echelons of the organization, Baker was copied on

the email about Bizzarro's non-attendance at Respondent's picnic. (Tr. 508:2-11; GCX 11)

Although he could remember no other employees reported to have missed *any* picnic, Baker initially claimed it was not unusual to receive an email of this type but then admitted that the content was unusual. (Tr. 508:12-25, 509:1-5; 517:2-3) In an apparent effort to deflect the unusual nature of the email, Baker stated he gets 500 emails a day, but admitted upon further questioning that very few of those reference an employee he helped obtain a job. (Tr. 509:8-12)

When asked specifically how many employees he referred had received this much attention and still have a job, Baker could not remember any numbers or names of any employees who met the criteria. (Tr. 509:16-25, 510:1-2) In an astounding twist, Baker later modified his "disappointed" claim to state it was not necessarily Bizzarro that he was disappointed in. Rather, he was somehow disappointed in the breakdown in the leadership organization and saw it as "almost an accusation against my leadership ability quite honestly, and that's a very disheartening thing" while noting his disappointment based on a personal relationship with Bizzarro. (Tr. 522:7-25, 523:1-9) Baker's testimony is unbelievable, self-serving, and should not be credited.

Willis claimed a completely different version of the events regarding Baker, Bizzarro, and the Margaritaville Casino. He claimed Bizzarro told him he was approached by Baker, who was intoxicated and belligerent. (Tr. 529:15-17; 538:1-5) He claimed he did nothing other than make a phone call in response to Bizzarro's claim that the assistant general manager over the 8,000 employees at Harrah's, Imperial Palace, Flamingo, OSheas, and Bill's casinos was intoxicated and belligerent. (Tr. 538:6-25, 539:1-25) Willis's assertions that he only made a phone call in response to Bizzarro's alleged "intoxicated and belligerent" comment raises at least two possible inferences. First, he did nothing more because Baker *was* intoxicated and

belligerent, which would tend to undercut Baker's credibility and testimony regarding his confrontations with Bizarro. Second, Willis did nothing more because Bizarro did not make the "intoxicated and belligerent" comment, which undermines Willis' credibility. Bizarro's testimony should be credited over Baker and Willis.

Golebiewski provided unbelievable testimony regarding security officer Rudy. He testified that security officers are not allowed to talk to other persons for extended periods of time or for non-business-related reasons. (Tr. 74:10-13) Security officers are generally discouraged from pooling together other than during sweeps but are allowed to talk to non-security personnel except for extended periods of time. (Tr. 74:6-13) However, when questioned about this policy, he was unable to identify any rule or policy prohibiting discussion for extended periods of time or for non-business-related matters and could describe no instances where such a rule was communicated to security officers. (Tr. 74:14-23) Golebiewski's position regarding non-business related discussions should be rejected as inconsistent with other witness's testimony, including Bizarro's uncontradicted testimony that he distributed real estate business cards during Respondent's working hours without consequence. (Tr. 331:3-13)

Golebiewski's assertion that Rudy was somehow guilty of some punishable form of misconduct is far-fetched. Golebiewski first asserted that Rudy was talking to his girlfriend and was caressing her hair which was somehow a problem because customers were allegedly watching. (Tr. 430:24-25, 431:1-7, 12-21) He later admitted he did not know if an employee touching the hair of his girlfriend or wife violated any of Respondent's rules and eventually admitted Rudy's alleged touching of hair did not violate any rules to his knowledge. (Tr. 442:12-25, 443:1-4) Still, he later claimed he could have disciplined Rudy, although he could cite no rule upon which to base any form of discipline. (Tr. 460:3-13) He stated that he

approached Rudy because he was ignoring the customers but subsequently admitted that the customers did not file a complaint and that he does not always talk to employees when he sees customers looking at them, which was different from how he treated Rudy. (Tr. 431:24-25, 432:1-1; 442:5-11) He then claimed that he mentioned language a Union contract would have about guest service. (Tr. 432:1-5) Golebiewski's assertion that his comment about the Union was somehow related to contractual language concerning guest service is difficult to conceive. Golebiewski's assertion that Rudy was doing something wrong which justified his comment should be rejected, and the ALJ should find, instead, that Golebiewski's comment was prompted by an opportunity for Golebiewski to implement harsher work rules if the employees selected the Union as their representative.

Golebiewski tried to credit Bizzarro for making the October 14 meeting last four hours, although Golebiewski had the authority to set the meeting length. (Tr. 114:2-13) Golebiewski testified that Bizzarro "dominated much of the conversation" but later admitted that although Respondent pays the employees to perform security services, Golebiewski paid them to be in a room with him. (Tr. 414:11-13; 455:5-10) Golebiewski essentially argues that the security director of all five HIFOB properties somehow lost his authority and was somehow "dominated" by Bizzarro in a meeting which Golebiewski initiated and had the authority to authorize, extend, shorten, or cancel at will. In a strange twist, Bizzarro's "domination" of the "dominated" Golebiewski was not communicated in the subsequent e-mail. (GCX 9) The meeting lasted four hours because of Golebiewski, not because of Bizzarro.

Golebiewski stated during Respondent's case that he met with the security officers on October 14 because they were upset with him. (Tr. 404:18-25, 405:1; 454:5-8) However, the communications which came out of the meeting showed anything but a concern for the security

officers being upset with Golebiewski; instead, it was a rant about Bizzarro and how “I suspect that many or much of Francis’s support has diminished as the [word] got around quick about this 4 hour open pre-shift meeting with me.” (Tr. 455:20-25, 456:1-25, 457:1-4; GCX 9)

Golebiewski’s testimony and his documented e-mail statements are inconsistent with each other.

There is nothing in the e-mail which suggests concern for security officer complaints against Golebiewski. It also seems bizarre that Golebiewski would have a meeting to address complaints against him and subsequently report himself to his superiors, including the top two managers of HIFOB and a Caesars Entertainment executive. (GCX 9) He admittedly did not remember any meeting to address security officer concerns since October 14, and avoided the question whether it was unusual for him to report to his bosses the issues his subordinates have with him. (Tr. 466:4-12) He also admitted it was unusual to meet with employees to address their concerns, and to subsequently call them out by name regarding their concerns. (Tr. 466:17-25, 467:1-6) He admitted his subsequent e-mail was essentially “Francis, Francis, Francis, Francis, Francis, Francis [Bizzarro], and no one else, correct? Yes.” (Tr. 467:3-6)

The documented e-mail is a more accurate reflection of Golebiewski’s motives in holding the meeting – crushing the support of the suspected Union organizer. Golebiewski’s assertions that he did not ask officers about their Union feelings is similarly undercut by his own e-mails, including his e-mail dated October 20 to the head managers of HIFOB where he stated “I would say this group has no union activity or if it did they quickly reconsidered and changed their minds.” (Tr. 443:17-25; GCX 10) Amazingly, he claimed that the diminished support was in reference to the diminished support of the employees *for Bizzarro’s anger with Golebiewski*, notwithstanding his earlier assertions that the meeting was held because *officers* were upset with him. (Tr. 467:14-23) Additionally, his October 22 e-mail reported the number of union cards

signed, which was also sent to upper management, including Caesars Entertainment. (GCX 15) Golebiewski admitted to reporting on employee Union activities and what support the employees had for the Union. (Tr. 444:8-20) He then looked at the ALJ and made the incredible assertion that he was able to report this without ever asking an employee a question about how they felt about the Union. (Tr. 444:21-24) Further, the Curtis Walker e-mail reported that Bizzarro stated he would put up more literature next week and that Walker would put a note in his file.

(GCX 16) In response, vice president of Caesars Entertainment employee labor relations Dean Allen (Allen)¹² instructed Golebiewski not to put a note in Bizzarro's file; he should put it in "your file."¹³ (Tr. 447:20-25; GCX 16) Golebiewski claimed he did not know what "your file" was, and never asked Allen what he was talking about regarding the file. (Tr. 448:1-14) He admitted he keeps individual files on employees but claimed he did not put a note in Bizzarro's file or follow-up with Walker. (Tr. 448:15-19; 450:5-11; 451:8-14) His testimony that the October 14 meeting arose out of the complaints security officers had with him should be disregarded. His assertions are further undercut by the timing of the recently discovered organizing campaign. Accordingly, Golebiewski's further assertions that he did not ask about Union attitudes should also be rejected by the Administrative Law Judge.

In summary, the testimony of employee-witnesses called by CGC should be credited over Respondent's incredible, contradictory, and self-serving testimony, especially given Respondent's flood of unlawful actions.

¹² For reference purposes, Allen is considered to hold a position even higher than Baker's. (Tr. 510:14-23)

¹³ Curiously, Respondent does not appear to have produced any notes from this file.

D. Respondent’s Unlawful Threats Because Employees Engaged in Union and Protected Concerted Activities

1. Legal Standard

a. Protected Concerted Activity

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. The Board has long held that employees who have no bargaining representative and no established procedure for presenting their grievances may take action to spotlight their complaints and obtain remedies. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12-15 (1962). Section 7 of the Act protects employees who engage in individual action which is engaged in with the objective of initiating or inducing group action. *Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (1964); *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Moreover, an employee need not first solicit other employees’ views for his activity to be concerted, as concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), *affd. sub nom Prill v. NLRB*, 835 F.2d 481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). See also *Whittaker Corp.*, 289 NLRB 933, 933-934 (1988); *Wyndham Development Corp.*, 356 NLRB No. 104, slip op. at 3 (2011). In *Wyndham*, the Board reversed the administrative law judge’s ruling that an employee’s protest of a change to the employer’s dress code policy in the presence of other employees did not constitute protected concerted activity, noting it has “consistently found activity concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees.” The Board further reasoned that “[t]he concerted nature of an employee’s protest may (but need not) be revealed by evidence that the employee

used terms like ‘us’ or ‘we’ when voicing complaints, even when the employee had not solicited coworkers’ views beforehand.” An employer can not rely on a legitimate and substantial business reason for its actions where the business reason was not the real reason for its actions. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (rejecting the respondent’s argument that its concern for patient healthcare was the reason for discipline when the *real* reason was found to be its concern the employee’s comments might have on her fellow employees).

b. Threats

Section 8(c) of the Act provides that the expression of “any views, argument, or opinion” shall not be “evidence of an unfair labor practice” unless such expression contains a threat of reprisal or force or promise of benefit” in violation of Section 8(a)(1). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)**Error! Bookmark not defined.**, the Supreme Court described the balance between employer free speech rights as codified by Section 8(c) and employees’ Section 7 rights in the following manner:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefits.” He may even make a prediction as to the precise effects he believed unionization will have on his company.

In determining whether an employer has violated the Act through interference, restraint, and coercion under Section 8(a)(1), one must apply the Board’s well-established test which is an objective test and depends on “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightway Co.*, 124 NLRB 146, 147 (1959) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). As the Board explained in *Double D Construction Group*, 339

NLRB 303, 303-304 (2003), “[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. at 617.

Threats of discharge for engaging in activities protected by Section 7 of the Act 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 threats of discharge where the purpose is to discourage employees from exercising their Section 7 rights. *NLRB v. Neuhoff Bros., Packers, Inc.*, 375 F.2d 372 (5th Cir. 1967). Similarly, a threat of stricter discipline in response to Union or protected activities violates the Act. *Schrock Cabinet Co.*, 339 NLRB 182, 185 (2003) (affirming the administrative law judge’s finding of a violation where the respondent threatened stricter discipline and enforcement of rules because the employee threatened to file a grievance).

The Board has consistently held that an employer which responds to an employee’s protected and concerted activity by telling them they can leave if they do not like the conditions, coerces employees within the meaning of the Act. Inviting employees to quit their employment in such circumstances interferes with the free exercise of employees’ Section 7 right to protest working conditions. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 2, 8 (Jul. 26, 2011) (finding a violation for the employer’s statement if the employee “could not support the Respondent’s policies, there were other jobs out there and perhaps ‘this wasn’t the place for him’”); *House Calls, Inc.*, 304 NLRB 311, 313 (1991); *Chinese Daily News*, 346

NLRB 906 (2006). In *McDaniel Ford, Inc.*, the Board reiterated this principle when it stated “[i]t is well settled that an employer’s invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that . . . engaging in . . . concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved.” 322 NLRB 956, 962 (1996).

An employer’s threat does not have to be explicitly stated; a violation can be found based on a non-specific threat of reprisal. The Board has found a violation where an employer told an employee that “there would be problems” if the employee did not return to work based on the employee’s reasonable belief there would be unspecified reprisals if he did not stop his union activity. *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB No. 37, slip op. at 1 fn. 2 (Aug. 5, 2011); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (finding the employer threatened unspecified reprisals by telling its employee “she should direct her concerns to management rather than discussing them with her coworkers and ‘bringing them down’”). The Board has repeatedly found “Be Careful” warnings to “convey the threatening message that union activities would place an employee in jeopardy.” *Gaetano & Associates*, 344 NLRB 531, 534 (2005) (finding, contrary to the administrative law judge that telling an employee to “be careful” talking to the union agent was a unlawful threat of unspecified reprisal) (citing *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor’s “watch out” statement was an unlawful implied threat))

An employer can violate the Act by threatening more strictly-enforced work rules if its employees select a union as their bargaining representative. *P H Nursing Home*, 332 NLRB 389, 392 (2000) (finding the employer unlawfully threatened employees with adverse working conditions if they supported the Union when it told its employee “with the Union in the facility

[the employees] would not be able to call in like we had before”); *Office Depot*, 30 NLRB 640, 642 (2000) (finding a violation where the respondent threatened the employees that they would earn less money if they selected the union); *Mediplex of Wethersfield*, 320 NLRB 510, 518 (1995) (affirming the administrative law judge’s finding that the respondent violated the Act by its threat to stop granting personal favors if the union was selected. The respondent stated that “if the Union were here, he could not do that, and could not do any special favors, pointing out that if a contract was negotiated, the Company would have to follow the contract” and “with a third party, there could be no favors[.]”) The change in work rules during an organizing campaign raises the inference of a coercive intent. *Carter’s Inc.*, 339 NLRB 1089, 1089 fn. 2, 1093 (2003) (affirming the administrative law judge’s finding of violations for changes in work rules some of which were beneficial (wage scale, matching contributions, more liberal dress code, better leave policies) and others which were detrimental (tighter attendance rules, non-work employee access.))

An employer can violate the Act with comments about “loyalty.” *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1200 fn. 3 (2005) (affirming the administrative law judge’s finding of a violation for telling an employee it would try to keep its “loyal employees”); *Hialeah Hospital*, 343 NLRB 391, (2004) (finding the employer violated the Act “by telling the employees that he felt ‘betrayed’ and ‘stabbed in the back’ because they had contacted the Union. Those statements conveyed to the employees the message that engaging in union activity, a protected statutory right, was tantamount to employee disloyalty, and implicitly threatened them with unspecified reprisals.”)

An employer’s threat to reduce hours violates the Act if in response to union activity. See *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (finding a violation where the employer

threatened it would not have flexibility to reduce hours during an economic downturn if the union was selected even though the employer did not actually threaten to reduce hours.

Respondent made the statement “[w]ho here would like to work 32 hours or get laid off? How do you like 32 hours? We can do that” in the context of the same speech where it threatened futility of union representation);

2. Analysis

a. Protected Concerted Activity

On September 3, before the Union organizing drive, Quaglio and Berberich told security officers during their 9:00 p.m. pre-shift meetings that they had to be “upbeat and positive” while also telling them to “Believe or Leave.” (Tr. 135:15-22; 136:7-16; 138:8-13) “Upbeat and positive” was nothing new to the security officers, but “Believe or Leave” was a new Respondent campaign. (Tr. 319:1-4, 17-25) Although the “Believe or Leave” campaign started because Respondent’s customer service scores were low – lower than most of the properties under Caesars Entertainment and in need of improvement – the campaign had an unquestionable impact on security officers and their understanding of future employment. (Tr. 172:14-25, 173:1; 262:10-18; 277:25, 278:1-5, 13-19; 279:12-25) During the meeting, several officers complained about the shortening of breaks and the spotlight policy, among other issues. (Tr. 221:13-25) Security officers Meadows and Eric Cregeen expressed their frustrations with the memorization of spotlight cards and about the nametags. (Tr. 222:20-24) Having last names on nametags are a special concern for security officers, especially those with unique last names, who have to deal first-hand with prostitutes who have spit blood in a security officer’s face,

pimps, criminals, and other persons whose character is unknown until after they are confronted.¹⁴ (Tr. 227:12-25, 228:1-16) Security Officer Willequer complained about the spotlight cards and shortening of breaks. (Tr. 223:10-13) Following the September 3 meeting, Respondent, through a variety of speakers, repeatedly used the slogan “Believe or Leave” at pre-shift meetings for security officers. (Tr. 252:1-25, 253:1-10) There were several security officer complaints in response to the “Believe or Leave” campaign starting from September 3, and continuing. (Tr. 253:11-25, 254:1-11; 350:15-25, 351:1-9, 15-17; 352:1-4)

The security officers’ actions at the September 3 meeting were protected concerted activity. Even if, as Respondent is likely to argue, there was only one security officer raising concerns, those actions are still protected concerted activities as an employee’s actions taken in a group meeting which address concerns common to the group or are intended to spur concerted discussion. Cf. *Meyers II*, 281 NLRB at 887; *Wyndham Development Corp.*, 356 NLRB slip op. at 3. As the testimony of several employee-witnesses revealed, the presentation of group concerns was accomplished by several employees as opposed to one employee. The argument that the employee activities were protected and concerted is strengthened especially where there is widespread evidence of discontent among employees, as is the case here. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB, slip op. at 1 fn. 4.

Respondent’s likely argument that “Believe or Leave” was not a response to Union activity or in response to concerted activity completely misses the point of the allegations in the complaint. It is not alleged that the concept of “Believe or Leave” was itself unlawful. It was the *implementation* of the “Believe or Leave” campaign and the *reaction* of Respondent *in response to employee complaints* which violated the Act. Respondent’s employees are allowed

¹⁴ Golebiewski ordered similar name badges for the approximately 300 security officers, but the name badges were rejected following group concerns over the security officers’ safety based on the undesirables with whom they have to deal. (Tr. 79:14-25, 80:1-3, 15-18; 105:6-14)

under the Act to engage in protected concerted activities including complaining about working terms and conditions. Employees' rights do not vanish simply because an employer rolls out a new campaign, even if it is in response to a legitimate business concern. If that were the case, an employer could simply crush employee rights to engage in protected concerted activities by concocting a new campaign to address a particular issue. In the instant case, Respondent can not rely on its "Believe or Leave" campaign, which was originally intended to address the legitimate concern for customer satisfaction, to justify crushing its employees' rights to engage in protected concerted activities, which was the *real* reason for Quaglio's comment discussed below. Cf. *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 205. Additionally, Respondent's actions in response to its employees' actions demonstrate that Respondent *believed* there was a concerted nature in their activities. This is demonstrated by the response Quaglio gave to Bizzarro when he directly confronted him *to stop inciting the men*. See Complaint Allegation 5(b), *infra*.

The ALJ should find that Respondent's employees, including Bizzarro and several others, were engaged in protected concerted activities when they complained about working terms and conditions during the September 3 meeting.

b. Threats (Complaint Paragraphs 5(a), (b), (e)(5), (f)(2), (g)(1), (h)(1), (h)(2), (h)(4), (j))

i. Complaint Allegation 5(a)

As part of the September 3 discussion, Quaglio told the security officers that if they were not happy with the total service sweeps, they could take their resume and go apply at the Wynn Casino and advising them that there are plenty of unemployed people waiting to get security jobs. (Tr. 137:17-20; 138:2-7; 176:23-25, 177:1-8; 319:17-24; 335:14-25, 336:1-3) Quaglio told the security officers that with 14% unemployment in the area, if the officers did not like what management was doing, they could go somewhere else for a job and specifically mentioned the

“Wynn” casino. (Tr. 222:4-11; 223:22-15; 319:21-25, 320:1-3) In response, several security officers were upset by Quaglio’s comments. (Tr. 320:5-13, 21-24) Bizzarro told Quaglio that threats against the security officers do not create the “upbeat and positive” attitude that Respondent was looking for. (Tr. 223:19-25, 224:1-3) Bizzarro spoke up and said he considered the “Wynn” comment a threat; Quaglio told him if he did not want to do it, he could leave if he was not happy with his job. (Tr. 138:14-25; 139:1; 224:4-6)

Quaglio’s comment regarding the Wynn can only be taken as an invitation to quit. Under the context of a mandatory “Believe or Leave” campaign under which management’s jobs were in jeopardy, the only logical conclusion is that Respondent’s management had the incentive to make it clear that “or Leave” meant that they would no longer be employed by Respondent. It is difficult to believe Respondent’s likely assertion that “Believe or Leave” meant the employees would be moved to a non-front-line job, especially when the find a job at the “Wynn” comment was added by Quaglio. The only reasonable belief an employee can take from the situation is that their employment will end if they do not comply. Quaglio’s threat took two different aspects. First, it was a threat to the group in general when he made the first “Wynn” comment. Second, he made a threat directly to Bizzarro when he spoke up about what he perceived as a threat. By his response, Quaglio essentially told Bizzarro that if he (Bizzarro) did not like it, he could go work somewhere else. The ALJ should find that Respondent violated the Act when Quaglio, in response to security officers’ protected concerted complaints about working terms and conditions, invited them to quit by getting a job at the “Wynn” as alleged in Complaint paragraph 5(a). Cf. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB, slip op. at 2, 8.

ii. Complaint Allegation 5(b)

At the end of the September 3 meeting, Bizzarro told FTO Gold Myatt that Quaglio's comments were threatening and harassing to the security officers. (Tr. 224:21-24) Myatt told Bizzarro to stop making comments because it was inciting the men, and then took him to the manager's office where he told Bizzarro again that his comments were inciting the men and he needed to stop or there would be consequences.¹⁵ (Tr. 224:24-25, 225:1-2, 7-21; 280:9-12, 18-21) Myatt told Bizzarro that Quaglio's comments were not threatening or harassing, and that Bizzarro should keep his mouth shut. (Tr. 281:7-9) Johnson was present, but did not speak up. (Tr. 225:23-25, 226:1-5) The meeting ended when Bizzarro asked if he could go back to work. (Tr. 226:6-7)

There is absolutely no logic in claiming that a statement of "consequences" can be taken as anything positive for Bizzarro under these circumstances. The only reasonable conclusion Bizzarro could take from Myatt's comments were that he had been given an unspecified threat based on the negative statement, especially in the immediate aftermath of Quaglio's comment to find a job at the "Wynn." The ALJ should find that Respondent violated the Act by threatening an unspecified reprisal because of concerted activities when Myatt told Bizzarro after the September 3 meeting that he was inciting the men and he needed to stop or there would be consequences as alleged in Complaint paragraph 5(b). Cf. *Atlas Logistics Group Retail Services (Phoenix)*, 357 NLRB slip op. at 1 fn. 2; *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 205

¹⁵ Respondent is likely to argue that Bizzarro asked Myatt to the office based on Willequer's testimony. However, it became clear during Respondent's examination that Willequer came onto the conversation after they had already started talking and were walking back to the office. (Tr. 336:18-25, 337:1-8)

iii. Complaint Allegation 5(e)(5)

During the four-hour pre-shift meeting on October 14, Golebiewski told the officers that if they had a union, he would not be able to help them with personal issues or bend the rules for certain people as he had done in the past to save their jobs.¹⁶ (Tr. 237:15-18; 239:3-5; 325:1-3; 326:14-16) Golebiewski told the group that he saved the jobs of security officers Meadows, Willequer, and Steve Fox, and would not have been able to do so if the Union was present. (Tr. 142:18-24; 239:5-17) Golebiewski said he was worried about Meadows' job because he had a medical condition and that Meadows had a problem with a supervisor on the grave-shift. (Tr. 143:4-12) Golebiewski told the group that until Meadows gets better and recovers from his surgery, he would not be fired for attendance. (Tr. 143:16-20) Other security officers, including Security Officers Ty Evans and Christopher Rudy, heard similar statements over the following weeks through other supervisors. (Tr. 301:5-13, 19-25, 302:1-3; 358:2-25, 359:1-3)

Golebiewski's statement that he would not be able to help with personal issues or bend the rules as he had in the past was an implied threat of reprisal if the employees selected the Union as their representative. It was a threat of a changed condition of employment in which past "favours" would be eliminated in the presence of the Union with no reference to changes based on potential collective bargaining. The timing of Respondent's actions, following so closely after it learned of the organizing drive, raises an inference of coercion. Cf. *Carter's Inc.*, 339 NLRB at 1089 fn. 2, 1093. The ALJ should find that Respondent violated the Act by threatening more strictly-enforced work rules if they selected the Union as their collective-bargaining representative when Golebiewski told the security officers during the October 14 pre-shift meeting that he would not be able to bend the rules for certain people as he had in the past if

¹⁶ Golebiewski testified that he has worked in union settings before and the rules were more strictly enforced, which takes away management's ability to be flexible, which are analogous to the statements attributed to him in the October 14 meeting. (Tr. 103:7-15)

they had a union as alleged in Complaint paragraph 5(e)(5). Cf. *Mediplex of Wethersfield*, 320 NLRB at 518.

iv. Complaint Allegation 5(f)(2)

Respondent distributed a flyer at the pre-shift meetings which stated “it’s a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up (without asking questions) for a union” (Tr. 243:18-25, 244:1, 8-10; GCX 6) Bizzarro and several other security officers understood the capitalized BIZARRE to be a direct reference to Bizzarro. (Tr. 245:1-5; 328:24-25, 329:1-11; 331:4-16; 362:8-19; 363:15-25, 364:1-13; GCX 6) Respondent had at least enough flyers to go around for the 300 security officers at all 5 HIFOB properties where the flyers were also posted. (Tr. 95:13-23; 100:1-7; 244:17-20)

By singling out Bizzarro in the flyer, especially in the context of “bizarre” actions, Respondent put its employees on notice that Bizzarro’s actions were known and out-of-line. This creates the logical inference that Bizzarro’s actions, or actions of trying to convince security officers to sign up for a union, could lead to discipline. The ALJ should find that Respondent violated the Act by threatening unspecified reprisal for engaging in Union activities when it distributed the “BIZARRE” flyer as alleged in Complaint paragraph 5(f)(2). Cf. *Gaetano & Associates*, 344 NLRB at 534. Further, since Respondent posted flyers at all five properties, the ALJ should require the Respondent to post an appropriate Notice at each of the five properties.

v. Complaint Allegation 5(g)(1)

About late-November, in Respondent’s lobby, Golebiewski walked over to Rudy while he was talking to a female, put his hand on Rudy’s shoulder, and quietly told him that “[i]f this was a union area, I would have to write you up” and then walked away. (Tr. 346:9-12; 359:18-25, 360:1-13; 361:2-4; 373:24-25, 374:1-16) Rudy is allowed to talk to persons, including

females, during his shift. The only limitation is on pooling together of security officers other than for sweeps. (Tr. 360:13-25, 361:1)

Golebiewski's statement, that if this was a union area, he would have to write Rudy up, was an implied threat of reprisal by discipline if the employees selected the Union as their representative. It was a threat of a changed condition of employment regarding discipline if the Union was selected with no reference to a mere possibility of changed discipline policies based on potential collective bargaining. The timing of Respondent's actions, following so closely after it learned of the organizing drive, raises an inference of coercion. Cf. *Carter's Inc.*, 339 NLRB at 1089 fn. 2, 1093. The ALJ should find that Respondent violated the Act by threatening discipline if the employees selected the Union as their collective-bargaining representative when Golebiewski told Rudy that he would have to write him up if the Union was his bargaining representative as alleged in Complaint paragraph 5(g)(1). Cf. *Schrock Cabinet Co.*, 339 NLRB at 185.

vi. Complaint Allegations 5(h)(1), (2), and (4)

Around mid-January 2012, Bizzarro was passing through an underground hallway on his way to work when he saw Baker waiting at the end of the hallway. (Tr. 246:11-13; 268:10-18) After brief introductions, Baker said he was not doing so well and then said he was upset with Bizzarro. (Tr. 246:15-17; 269:1-7) He said he thought Bizzarro betrayed him by trying to bring the Union in to organize the security officers. (Tr. 246:16-19; 269:11-13; 288:25, 289:1-6) Baker said he did not understand why Bizzarro did this to him. (Tr. 269:14-15) Bizzarro told Baker he had to clock in and began to walk toward the time clock. (Tr. 269:16-18) Baker then followed Bizzarro for about 100 feet to the time clock and began to yell at Bizzarro about how he felt betrayed and that Bizzarro did not follow the chain of command by bringing the Union in,

and how Bakers' job was in jeopardy. (Tr. 246:22-25, 247:1-5; 269:20-24; 270:10-18; 271:13-19) Baker said Bizzarro went outside the chain of command when he should have stayed within the hotel and gone to human resources with his complaints. (Tr. 269:24-25, 270:1) After telling Bizzarro that he did not follow the chain of command and he should have, he said that "all the problems [Bizzarro] ever had were taken care of through management[.]" (Tr. 247:2-4) Baker was very frustrated as shown by his reddened face and his voice which was raised to the point of attracting other persons. (Tr. 247:17-21; 270:22-25, 271:1-6) Baker and Bizzarro never had a prior conversation at this location, in spite of their acquaintance. (Tr. 248:11-13)

Baker's statements that Bizzarro had betrayed him would give Bizzarro the reasonable impression that reprisal or discipline could follow because of the actions Baker attributed to him. The only logical conclusion is that loyal employees were good employees and worth keeping. The direct implication is that Baker claimed Bizzarro was disloyal for supporting the Union. The ALJ should find that Respondent violated the Act by stating that Bizzarro was disloyal because he supported the Union and engaged in Union activities as alleged in Complaint paragraph 5(h)(1).

Baker's statements regarding the chain of command suggest that complaints will not be taken care of if the employees select the Union as their representative. Baker said that Bizzarro had not followed the chain of command when he should have, and further stated that "all the problems [Bizzarro] ever had were taken care of through management." The implication is that if the Union is selected, the employees would not be able to resolve their complaints with the chain of command as they currently do. The ALJ should find that Respondent violated the Act by Baker's statement which was a threat of loss of benefits that Respondent would no longer resolve its employees' complaints because they supported the Union and engaged in Union

activities as alleged in Complaint paragraph 5(h)(2). Cf. *Mediplex of Wethersfield*, 320 NLRB at 518; *Carter's Inc.*, 339 NLRB at 1089 fn. 2, 1093.

When Baker's told Bizzarro that his "disloyalty" had put Baker's job in jeopardy, the logical conclusion is that Bizzarro's job was also in jeopardy. The ALJ should find that Respondent violated the Act by implicitly threatening Bizzarro with discharge because he supported the Union and engaged in Union activities as alleged in Complaint paragraph 5(h)(4). Cf. *E.L.C. Electric, Inc.*, 344 NLRB at 1200 fn. 3; *Hialeah Hospital*, 343 NLRB at 391.

vii. Complaint Allegation 5(j)

Standard procedure for security officer requests for time off required two weeks advance notice by submitting an e-mail to their supervision team including FTO Golds who write the schedules. (Tr. 133:4-8; 218:10-20) In late December or early January 2012, during the 9:00 p.m. pre-shift briefing, Berberich told security officers that to cut costs, it would be appreciated if they would take unpaid time off and that those who did would be considered "team players." (Tr. 154:10-25, 155:1-4; 184:10-25, 185:1-4; 191:14-20; 255:11-18; 326:23-25, 327:1-21) As a result, they did not have to ask two weeks in advance, and could just call in for extra time off or an early out (leave early). (Tr. 133:23-25, 134:1-8; 154:7-15; 184:17-19; 191:1-4-13) Berberich told the security officers that if nobody took advantage of the unpaid time off, there could be layoffs. (Tr. 154:22-25, 155:1-4; 185:21-25, 186:1-3) Berberich's statement about taking unpaid time off was echoed in similar fashion by Willis and other supervisors at pre-shift briefings. (Tr. 255:19-25, 256:1-4; 300:14-25, 301:1-4) Similar "layoff" comments were made during the organizing campaign by other supervisors to security officers on other shifts, including mention of hiring outside security officers. (Tr. 359:7-17; 376:24-25, 377:1-25, 378:1-25, 379:1)

Respondent is likely to claim that security officers were cut back in the same way as other departments. Although it appears Respondent cut back in several departments, security officers were approached first – before other departments. (Tr. 256:4-7; 290:13-17; 304:19-25, 305:1-3; 327:6-8) Respondent told its security officers that they were first to be cut back, in the context of a known organizing campaign, without any additional explanation of why they were the first target for the cuts. A reasonable employee would conclude that Respondent selected security officers to be reduced in hours first because of their Union activities, especially in light of the other coercive actions taken by Respondent since the organizing drive began. The ALJ should find that Respondent threatened its employees with layoff because they engaged in Union activities when Berberich sought volunteers to take unpaid under the threat of layoff as alleged in Complaint paragraph 5(j). Cf. *North Star Steel Co.*, 347 NLRB at 1365.

E. Surveillance and the Impression of Surveillance Because Employees Engaged in Union and Protected Concerted Activities

1. Legal Standard

a. Surveillance and the Impression of Surveillance

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 a per se violation of the Act, can have a natural, if not presumptive, tendency to discourage [union] activity." *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984); see also *Daytona Hudson Corp.*, 316 NLRB 85 (1995); *Reno Hilton*, 320 NLRB 197, 197 fn. 4 (1995) (finding, contrary to the administrative law judge, that the employer committed unlawful surveillance when its supervisor followed a union supporter around the facility); *Parsippany Hotel Management Co.*, 319 NLRB 114, 126 (1995) (affirming the administrative law judge's finding that the employer unlawfully surveilled its employee when

it was “certainly out of the ordinary to follow employees . . . as well as observing employees [for an extended period of time].”) An employer, however, cannot engage in such surveillance for unlawful reasons, e.g., in 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 act 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.” An employer’s conduct is evaluated from the perspective of the employee and is unlawful if the employee would reasonably conclude from the statement or conduct in question that the employee’s protected activities were being monitored. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 2-3 (Apr. 29, 2011) (finding, contrary to the administrative law judge, that the employer unlawfully created the impression of surveillance where the employees’ organizing effort was in its infancy, had been handled covertly, and the nature of the employer’s statement demonstrated the coerciveness of its knowledge); *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center*, 332 NLRB at 1540; *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

2. Analysis

a. Actual Surveillance (Complaint Paragraph 5(d))

i. Complaint Allegation 5(d)

September 4, the day after Respondent started its “Believe or Leave” campaign, Bizzarro noticed Quaglio following him around the casino floor and facing Bizzarro for about an hour during his shift. (Tr. 229:5-12; 283:20-25, 284:1-18) Bizzarro observed that it was unusual for Quaglio to be that close on a large casino floor, especially since the supervision normally spends much of their time in the office and usually only follows security officers to do spotlight checks. (Tr. 229:9-19) It is unusual, if not unheard of, for supervisors or FTO Golds to follow security officers on their routes as it is quite normal for FTO Golds and supervisors to stay in the office. (Tr. 296:2-4; 321:11-14) In this case, Quaglio was not performing a spotlight check of Bizzarro. (Tr. 259:6-8)

Quaglio’s observation of Bizzarro the day after the September 3 meeting where Bizzarro and several officers voiced their complaints about working terms and conditions raises a strong inference that the observation was a direct result of the officers’ concerted complaints. Bizzarro noticed Quaglio following him for about an hour, although Quaglio never approached him for a spotlight. Even assuming that Respondent expects its supervisors to walk the floor and observe security officers, it is not normal for supervisors to do so for this length of time. Other employees testified that it was unusual, if not unheard of, for supervisors to follow security officers for any length of time as they were usually in the office. The ALJ should find that Respondent violated the Act when Quaglio followed Bizzarro in an attempt to discover his and other employees’ concerted activities as alleged in Complaint paragraph 5(d). Cf. *Reno Hilton*, 320 NLRB at 197 fn. 4; *Parsippany Hotel Management Co.*, 319 NLRB at 126.

b. Creating the Impression of Surveillance (Complaint Paragraphs 5(m), (e)(1), (f)(1), (i))

i. Complaint Allegation 5(m)

Shortly after Bizzarro started passing out authorization cards, around October 7, Respondent, by Quaglio and Berberich, put out a flyer with a copy of a blank authorization card.¹⁷ (Tr. 139:9-25, 140:1-7; 235:7-17; 296:5-7; 321:15-25, 322:1; 353:22-25, 354:1-4) The flyer had a copy of a blank authorization card, with circles saying not to sign, and that the officers were giving authority to the Union by signing. (Tr. 235:20-25) Management did not say where they got the authorization card. (Tr. 140:7-10; 296:19-25, 297:1)

Evaluating Respondent's conduct from the eyes of an employee, the mass production and distribution of copies of blank authorization cards, without any explanation of how they were obtained, would give the employees the impression that Respondent was watching their Union activities. This was just after the employees started the organizing drive. In other words, it was in its infancy – where it was most vulnerable to threats and the impression of surveillance. Cf. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 (2011) at slip op. 2-3. At this point in the organizing campaign, all of the employee's actions were taken outside of management's gaze. Respondent learned of the organizing campaign and reacted immediately and frequently. Those employees who had participated in Union activities, or were considering signing authorization cards, would have the strong impression that their actions were being watched, especially in the context of the numerous meetings which immediately followed conducted by all levels of Respondent's security supervision team. The ALJ should find that Respondent's flyer with a copy of the blank authorization card, combined with a lack of explanation of how it came into

¹⁷ The flyer was not offered as an exhibit; it was not producible under the subpoena as it was not addressed in the Complaint. (Tr. 297:2-3, 20-24)

possession of the card, created the impression among its employees that their union and concerted activities were under surveillance as alleged in Complaint paragraph 5(m).

ii. Complaint Allegation 5(e)(1)

At the start of the October 14 four-hour pre-shift meeting with the security officers, Golebiewski went to the bulletin board, removed a posting with reasons for a union, and went through them stating why the reasons were not valid. (Tr. 236:20-25, 237:1; 339:7-12) Golebiewski asked the security officers about their concerns, what they were unhappy about, and why they would want a union. (Tr. 141:20-25, 142:1-15; 236:13-14; 237:1-4)

Evaluating Respondent's conduct from the eyes of an employee, Golebiewski's statements regarding the Union flyer, immediately followed by questions about why the security officers wanted the Union, would give the employees the impression that Respondent was not only watching their Union activities but also *knew* that some of the officers wanted the Union as their representative. This meeting followed the publication of the blank authorization cards by only seven days; hence, the organizing drive was still in its infancy. Cf. *Camaco Lorain Mfg. Plant*, 356 NLRB at slip op. 2-3. All of the coercive circumstances apply as previously addressed in Complaint allegation 5(m). The only reasonable conclusion an employee could come to during this focused, four-hour meeting, was that their Union activities were being monitored. Further, the extent of Respondent's actions emphasized the importance the issue held with Respondent, and provides the logical inference that their actions would be *closely* monitored. The ALJ should find that Golebiewski's actions, by asking officers why they would want a union, especially for a focused, four-hour session, combined with Respondent's numerous other actions taken at that time, created the impression among its employees that their union and concerted activities were under surveillance as alleged in Complaint paragraph 5(e)(1).

iii. Complaint Allegation 5(f)(1)

Respondent prepared several flyers for its security officers, although it is unclear who developed the flyers or what information was provided to create them. (Tr. 92:20-25; 92:1-15, 22-25; 93:1-10; 94:3-16; 96:13-19) However, it is clear that the flyers were developed in response to communications which extended well beyond the pod of HIFOB and into the executive and human resource levels of Caesars Entertainment. (Tr. 94:3-16, 22-23) The flyers were distributed among the five HIFOB properties. (95:13-23; 100:1-7; GCX 5; GCX 6) Within the next few days following the four-hour meeting, and the questioning of Bizzarro, Respondent put out flyers at the pre-shift meetings which stated “it’s a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up (without asking questions) for a union” (Tr. 243:18-25, 244:1, 8-10; GCX 6) Bizzarro understood the flyer to be directly targeting him and tried to find out who wrote the flyers but was never given an answer. (Tr. 244:2-7, 21-25; 245:1-5) Respondent had at least enough flyers to go around for the 300 security officers at all 5 HIFOB properties. (Tr. 244:17-20) One flyer in particular had one word capitalized in the body – BIZARRE. (Tr. 96:20-25; GCX 6) Respondent employs a security officer names Francis Bizzarro. (Tr. 96:25, 97:1-2) The security officers understood the capitalized BIZARRE to be a direct reference to Bizzarro. (Tr. 328:24-25, 329:1-11; 331:4-16; 362:8-19; 363:15-25, 364:1-13; GCX 6)

Although Respondent has not admitted that the flyer directly referenced Security Officer Bizzarro, its many focused actions on his activities demonstrate Respondent’s true intentions. Security Officer Francis Bizzarro seems to have attracted a disproportionate amount of attention from the highest level of Respondent’s HIFOB management, and to high levels in Caesars Entertainment. An email was sent shortly after the October 14 meeting, which lists security

officer complaints, but seems to focus on Bizzarro and how his “support” had “diminished” and as word got around about the four hour open pre-shift meeting with Golebiewski. (Tr. 105:15-25, 106:1-6; 113:3-15; GCX 9) The email was sent to the highest levels of HIFOB management – general manager Mazer and assistant general manager Baker, along with vice president of human resources Danzak and Caesars Entertainment’s Dean Allen. (GCX 2; 9) Another email reports on a group of security officers and their union activity. (Tr. 107:14-17; GCX 10) Separate emails on October 27 focuses on Bizzarro’s lack of attendance at a picnic where all of the approximately 300 security officers at the 5 HIFOB properties were invited, his posting something on the security officer pre-shift briefing room bulletin board, and a recommendation by the general manager for the 5 HIFOB properties that Bizzarro be disciplined, even though the general manager does not normally get involved in discipline of individual security officers. (Tr. 110:6-25, 111:1-24; 117:2-3; GCX 11) Golebiewski and other supervisors were watching to see if Bizzarro would be standing at the park entrance handing out flyers which was considered a “distraction.” (Tr. 116:15-25, 117:1) Golebiewski could not remember any other events which occurred at the picnic or any other security officer who did not attend. (Tr. 117:23-25, 118:1-2)

At the time of the flyer, Bizzarro was not out in the open to management. He had approached security officers, but did so with discretion in mind. He passed out his business cards to security officers, which offered his contact information if they wanted additional information about the Union. (Tr. 230:23-25, 231:1-2; 233:3-8, 15-19, 21-23; 286:1-4; 341:3-7) He did not wear union buttons or shirts or anything else to openly identify him with the Union and was not listed on a Union organizing letter to Respondent. (Tr. 232:14-22) As such, Bizzarro can not correctly be claimed to have been an open Union organizer at this time and was

therefore susceptible, along with the other employees, to the creation of the impression of surveillance.

It is clear that Respondent was focused on Bizzarro from the beginning of the organizing campaign and wanted to observe his actions and make it known to the security officers that it was paying attention to the organizing drive and its organizer. Curiously, Respondent's flyer stated that it was "a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up" but failed to mention anything strange, unusual, extraordinary, odd, ludicrous, outlandish, ridiculous, or weird about the Union's alleged threat to "bring 'hookers and homeless people' to picket" at Mandalay Bay. (GCX 7) The lack of such a description in that flyer is truly "bizarre" in comparison to a description of someone trying to sign up employees. The ALJ should find that the "BIZARRE" flyer, by implicitly referring to Security Officer Bizzarro, created the impression among its employees that their union and concerted activities were under surveillance as alleged in Complaint paragraph 5(f)(1). Cf. *Camaco Lorain Mfg. Plant*, 356 NLRB at slip op. 2-3. Further, since Respondent posted flyers at all five properties, the ALJ should require the Respondent to post an appropriate Notice at all five HIFOB properties.

iv. Complaint Allegation 5(i)

After management learned of the organizing drive, they took several actions which informed the security officers that they knew who was trying to organize them. Respondent, by many actions, indirectly named Bizzarro as the organizer. On Bizzarro's days off, management made indirect comments that he was not there today to answer their Union questions. (Tr. 148:16-25, 149:1-5) In mid-December, a security officer asked Berberich a question about the Union to which Berberich responded "I don't know the answer to that question, you'll have

to ask Francis [Bizzarro] that question.” (Tr. 147:11-15) When asked by Bizzarro why he was singled out, Berberich turned bright red, put his hands up, and stated that he “thought you were the mister know it all guy about the Union.” (Tr. 147:15-24)

Around mid-January 2012, Willis approached security officer Ty Evans outside the briefing room and started talking about the briefing for that night. (Tr. 299:10-13, 22-25, 300:1) Willis told Evans that he was tired of being told what he could and could not say about the Union issue. (Tr. 299:13-15) Willis went on to say that “the instigator of the union situation had been given a favor and given the job that he had and, as a result of family issues, he was having problems at home and he was given a favor with his job.” (Tr. 299:18-21)

Willis made similar comments referring to Bizzarro to security officers on other shifts, including the comment “[d]o you really want a guy who was juiced in by upper management to represent you in this cause?” which was said at a pre-shift briefing in late January 2012. (Tr. 361:6-25, 362:1-4) The comment was understood by the security officers as a reference to Bizzarro and the assistance he received from Assistant General Manager Baker. (Tr. 364:14-23)

About a week after the confrontation between Bizzarro and Baker near the time clock, Bizzarro was on post in the Margaritaville Casino when Baker approached him and asked if he was on post. (Tr. 248:17-21) Baker walked away and made a cell phone call when he learned that a “post” is a general location instead of a particular spot. (Tr. 248:20-25, 249:1-2, 20-23) Bizzarro called Willis for assistance with an undesirable at a machine. (Tr. 272:8-22, 273:5-8) After they removed the undesirable, Bizzarro asked Willis why he was in the area. (Tr. 273:7-8) Bizzarro explained the conversation with Baker after Willis said he was there because Bizzarro had a conversation with Baker. (Tr. 273:8-10) Willis told Bizzarro he should not piss off the

vice president of operations and left. (Tr. 249:2-8; 273:10-11) The area where the discussion took place is under video surveillance.¹⁸ (Tr. 256:11-18)

The allegations of the Complaint are much more limited than the extensive actions undertaken by Respondent to create the impression of surveillance. The ALJ should find that Willis' comments, referring to the "instigator of the union situation" in combination with other statements such as "a guy juiced in by upper management to represent you" were describing Bizzarro. Willis' comments about a guy juiced in by upper management was a direct reference to Bizzarro, who had obtained his position, at least in part, through assistant general manager Baker – the number two manager in charge of the five HIFOB properties and the more than 5,000 employees working there. When combined with Respondent's numerous other actions taken then and afterwards, Respondent, by Willis, created the impression among its employees that their union and concerted activities were under surveillance as alleged in Complaint paragraph 5(i).

F. Interrogation Concerning Union and Protected Concerted Activities

1. Legal Standard

In *Rossmore House*, 269 NLRB 1176, 1177, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board considered the lawfulness of the questioning of employees as "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act" and cited *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964) to show some of the factors which may be applied in a non-mechanical way to evaluate interrogation. In *Medicare Associates, Inc.*, 330 NLRB 935, 939 (2000), the Board set forth the *Bourne* factors as:

¹⁸ Respondent uses video surveillance in the area, but curiously failed to produce any video to support its version of the events.

- (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?
- (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.

The Board reaffirmed that the tests are not exhaustive, should not be mechanically applied, and do not require strict evaluation of each factor. Instead, “[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the ‘totality of the circumstances.’” *Id.* The Board has further held that a meeting is not to be considered in isolation where employees have been subjected to several different incidents; instead the full extent of what each employee experienced must be considered. *Id.* at 940-941 (disagreeing with the administrative law judge’s dismissal of several allegations based on the individual incidents considered in isolation)

2. Analysis

a. Interrogation (Complaint Paragraphs 5(e)(2) and (n))

i. Complaint Allegation 5(e)(2)

During the October 14 pre-shift meeting, Golebiewski asked the security officers if they would like to say anything; when they did not, he started with Bizzarro and asked him what complaints he had. (Tr. 237:1-6; 237:22-25) He also asked the group why they wanted a Union. (Tr. 323:19-23; 338:3-7) The two talked back and forth about several issues including treatment of officers, respect, reasonableness of changes, and management’s failure to listen to the officers. (Tr. 238:1-4) He then asked the security officers individually why they wanted to join the Union by turning his chair toward each individual and then asking them why they wanted to join the Union. (Tr. 323:24-25, 324:1; 338:11-17) Some officers answered Golebiewski’s questions, but

some did not. (Tr. 324:7-10; 338:18-25, 339:1) Other officers started expressing their concerns, including Eric Cregeen's issue about a battery, and Willequer's and Meadows' comments about spotlight cards. (Tr. 238:10-23) Respondent gave the security officers two anti-Union flyers during the meeting. (Tr. 166:13-25, 167:1-6)

Under the circumstances, the only conclusion is that a four-hour interrogation was coercive and would reasonably tend to interfere with the employees' exercise of their Section 7 rights. The interrogation involved 7 or 8 security officers on that shift by the security director over 5 properties and 300 security officers. He asked questions specifically addressed at each individual about why they wanted a union. He held them captive at the meeting with no breaks. The determined nature of Golebiewski's interrogation is demonstrated by the fact that no other pre-shift meeting lasted this long, and the length of this meeting left Respondent with an inadequate security force on the property. Under the *Bourne* factors, 1) there is a recent and relevant history of hostility towards organizing as demonstrated by the numerous allegations of the complaint; 2) the information sought was seeking information to determine which of its employees supported the Union, a very coercive and prying inquiry into Section 7 activity; 3) the questioner was the security director himself – a man who does not normally work the night shift and is responsible for much higher levels of administration. He emphasized his importance by removing the security officer's supervision at the outset of the meeting. Turning to the fourth factor, place and method, although the pre-shift meeting area was one where security officers would normally be comfortable and informal, Golebiewski altered the situation by making it his area to control the interaction, much like a predator visiting its prey's lair. Golebiewski's captive audience meeting, with the added interrogation and prohibition against leaving, created an unnatural formality which weighs towards finding a violation. Finally, the security officers'

testimony shows that they were uncomfortable with telling Golebiewski the truth. Some of them did not answer, and some stated they preferred not to answer. Under the totality of circumstances which is the focus of the *Bourne* factors, the questioning was coercive interrogation. The ALJ should find that Golebiewski's questioning of the officers about why they wanted a union was an unlawful interrogation about their Union membership, activities and sympathies as alleged in Complaint paragraph 5(e)(2).

ii. Complaint Allegation 5(n)

Around mid-November, Security Officer Ty Evans was on duty near the beer pong area at OSheas when Golebiewski went to Evans and asked him what his opinion was of the union issue. (Tr. 298:7-9, 24-25; 300:2-5; 306:1-23; 307:16-17) Golebiewski walked away when Evans told him he was undecided. (Tr. 298:25, 299:1-5; 306:20-25) The conversation was extremely short and only included minor pleasantries when Golebiewski walked up. (Tr. 307:1-14; 308:6-8)

The ALJ should find that when Golebiewski asked Evans what his opinion was of the union issue, he unlawfully interrogated Evans about his Union membership, activities and sympathies as alleged in Complaint paragraph 5(n) for the same reasons addressed in Complaint Allegation 5(e)(2). Cf. *Medcare Associates, Inc.*, 330 NLRB at 939-941.

G. Unlawful Promises

1. Legal Standard

a. Soliciting Employee Complaints

The Board has long held that soliciting employee complaints and grievances during a union organizational campaign carries with it an implied promise of remedial action. See, e.g., *Associated Mills, Inc.*, 190 NLRB 113 (1971); *Swift Produce, Inc.*, 203 NLRB 360 (1973). As

the Board explained in *Maple Grove Health Care Center*, 330 NLRB 775 (2000), citing the observations of the administrative law judge in *Capitol EMI Music*, 311 NLRB 997 (1993):

[T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one.

The solicitation of grievances during a union campaign carries with it an implied promise of benefit in the form of anticipated remedial action, and is an explicit expression which interferes with the rights of employees under Section 7 of the Act.

b. Promise or Grant of Benefits

In *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), the Supreme Court held that “the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union,” interferes with the employees’ protected right to organize. While an election was imminent in that case, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a representation petition has been filed. See, e.g., *Curwood Inc.*, 339 NLRB 1137, 1147-1148 (2003) enfd. in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005) (holding that a pre-petition announcement and promise to improve pension benefits violated the Act where the employer was reacting to knowledge of union activity among its employees). Similarly in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), the Supreme Court noted that “[t]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.”

2. Analysis

a. Solicitation of Grievances (Complaint Paragraphs 5(e)(3))

Golebiewski asked the security officers about their concerns, what they were unhappy about, and why they would want a union. (Tr. 141:20-25, 142:1-15; 236:13-14; 237:1-4) He told them that if they were unhappy at the Flamingo, he wanted to know what they were unhappy about, and wanted them to share their concerns with him, including what their dislikes were with their employment. (Tr. 142:2-15) This is a stark contrast to the other times where it may have been part of a normal pre-shift briefing to simply ask if they have any concerns or comments. (Tr. 380:14-25, 381:1) After Golebiewski told the group about saving the jobs of Meadows, Willequer, and Fox, and would not have been able to do so if the Union was present, he told the group that until Meadows gets better and recovers from his surgery, he would not be fired for attendance. (Tr. 142:18-24; 143:16-20; 239:5-17) In response to Golebiewski's questions, the security officers commented about things they were unhappy about, including Cregeen's issue about a battery and Willequer's and Meadows' comments about spotlight cards. (Tr. 238:10-23)

The inference of an illegal promise of benefits is strengthened by subsequent events. On October 15, the security officers were told they did not have to call in for the total service sweeps anymore. (Tr. 145:3-18; 168:1-7, 18-25, 169:1-5; 171:23-25, 172:1-3; 240:13-24; 288:5-9; 354:22-25, 355:1-20; 370:6-25, 371:1-5; RX 2) There was nothing in the communications to dispel the employees' logical conclusion that the change was due to the organizing campaign. (RX 2) Maintaining a number of customer contacts was a concern for the security officers as it was difficult to meet their minimum if they were scheduled in certain areas or to tasks where it was difficult to interact with customers, such as the garage, the security service center, or assigned to box drops. (Tr. 241:3-20) Around the same time, security officers were no longer

spotlighted or tested on their knowledge of the total service sweeps. (Tr. 169:13-25, 170:1-4; 196:15-19, 25, 197:1-3) After the meeting, management took a more laid-back, friendlier attitude with the security officers, including easing up on what the officers were doing wrong, guest service scores, and write-ups. (Tr. 145:25, 146:1-3, 11-20)

Golebiewski questioned the officers during the four-hour pre-shift meetings specifically about their concerns, which was accomplished in the context of giving reasons not to vote for the Union and asking them why they wanted to vote for the Union. He made promises of improved working conditions during the meeting when he said that Meadows would not be fired for attendance while he recovers from his surgery, and reinforced the promise of benefits by easing up on the security officers' total service requirements, including calling in the required number of customer service contacts. Under such a situation where the Employer solicits grievances during an organizing campaign carries an implied promise of remedial action even if no commitment is given to take corrective action. Cf. *Maple Grove Health Care Center*, 330 NLRB at 775. Here, corrective action was taken and no reasons were given to disqualify the notion that it was in response to the organizing campaign. The ALJ should find that when Golebiewski asked the security officers about their concerns during his anti-Union speech and interrogation, he unlawfully solicited employee complaints and grievances, promised the employees increased benefits and improved terms and conditions of employment for the purpose of dissuading the employees from supporting the Union as alleged in Complaint paragraph 5(e)(3).

b. Promise of Benefits (Complaint Paragraphs 5(e)(4))

Golebiewski told the officers during the October 14 pre-shift meeting that Security Shift Manager Casali was transferred to Imperial Palace because of problems and that Charles Willis was taking his place. (Tr. 143:21-25, 144:1-4; 239:18-21) Golebiewski told the officers that

Charles Willis was brought in to replace Casali, and that the officers would really like Willis. (Tr. 239:23-25) Golebiewski and the security officers talked about the complaints the officers had with Casali. (Tr. 144:8-20) Casali was transferred from Respondent's Flamingo property around October 2011, just before the October 14 four-hour pre-shift meeting. (Tr. 100:11-22; 101:10-11; 181:21-23; 353:15-20) Casali's transfer was fast and followed several complaints by security officers. (Tr. 353:10-14) Casali was exchanged for security shift manager Willis, who took his place at Respondent's Flamingo property.¹⁹ (Tr. 107:18-25, 108:1-2; 352:25, 353:1-5; GCX 10)

Golebiewski's statement to the officers that he transferred Casali because of problems, and that Casali would be away for six months, was a current and future promise of benefits as it relieved the officers of a problematic supervisor. The transfer was an immediate and lasting benefit to the officers which was given in the immediate interrogation about the employees' support for the Union. The ALJ should find that Respondent violated the Act when Golebiewski told the security officers that it transferred Casali as a promise of improved terms and conditions of employment and told them they were no longer required to perform sweeps in order to dissuade them from supporting the Union as alleged in Complaint paragraph 5(e)(4).

H. Unlawful Rules

1. Legal Standard

The appropriate inquiry to determine whether the mere maintenance of rules violates Section 8(a)(1), is to determine whether the rule at issue would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board may find a violation notwithstanding a lack of enforcement where the rule is likely to have a chilling effect on Section 7 rights. *Id.* A rule is unlawful if it explicitly restricts

¹⁹ The transcript incorrectly states the name as Scales instead of Casali.

Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, (2004). If a rule does not explicitly restrict Section 7 rights, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. Additionally, “[i]n determining whether a challenged rule is unlawful, the Board must ... give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

The Board weighs the employer’s interest against the Section 7 rights of employees. Accordingly, an employer may lawfully infringe on Section 7 rights for a legitimate business concern. *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 2, 4 (2011) (finding lawful prohibition on employee use of electronics to take pictures of patients, equipment or facilities based in part on the weighty privacy interests of hospital patients); *Caesar’s Palace*, 336 NLRB 271 (2001) (reversing the administrative law judge’s finding of a violation for a rule prohibiting employee discussion during on-going drug investigation notwithstanding the Board’s finding that the rule infringed on employee Section 7 rights). Preventing employees from harassment has been determined to be a legitimate business interest. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). “Under similar circumstances, the Board has held that an employer may lawfully assure employees that it will not allow them to be threatened by anyone and that it may ask them to report such threats.” *River’s Bend Health & Rehabilitation Services*, 350 NLRB 184, 186 (2007) (citing *Liberty House Nursing Homes*, 245 NLRB 1194, 1196-1197 (1979) (reversing the administrative law judge’s finding of a violation for a letter sent to employees asking them to report harassment in the context of a pending strike) Additionally, the context of

the situation affects validity of a rule. *David Van Os & Associates*, 346 NLRB 804, 807 fn. 10, 813-814 (2006) (finding lawful rule requiring loyalty and honesty where rule was narrowly framed to address recent, specific problems and the employees were aware of this context).

2. Analysis

a. Respondent's Promulgation of Unlawful Rules (Complaint Paragraphs 5(c), (g)(2), (h)(3))

i. Complaint Allegation 5(c)

As previously discussed, Bizzarro was called to the office after the September 3 meeting. (Tr. 224:21-24) At the office, Myatt told Bizzarro to stop making comments because it was inciting the men, and then took him to the manager's office where he told Bizzarro again that his comments were inciting the men and he needed to stop or there would be consequences.

(Tr. 224:24-25, 225:1-2, 7-21; 280:9-12, 18-21) Myatt told Bizzarro that Quaglio's comments were not threatening or harassing, and that Bizzarro should keep his mouth shut. (Tr. 281:7-9)

The only interpretation of Myatt's rule to stop making comments is that he should stop talking to other security officers, especially in a group setting which could promote group complaints. The result is that Bizzarro was threatened with discipline if he were to continue engaging in protected activities of raising group concerns to Respondent. The reasons stated in Complaint Allegation 5(b) are equally applicable here to determine whether Myatt's comments would reasonably chill employees in the exercise of their Section 7 rights. The fact that there was no further enforcement of the rule does not avoid a violation. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. This rule is an explicit restriction of Section 7 rights and there are no legitimate reasons to justify Respondent's rule, especially in light of Respondent's other actions. A written rule cannot be interpreted in isolation. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. The interpretation is the same here; the rule was implemented immediately after a

meeting where group concerns were raised. The ALJ should find that Myatt's statement to stop making comments and that he needed to stop inciting the men or there would be consequences was the promulgation and enforcement by threat of punishment of an overly-broad and discriminatory rule prohibiting employees, including but not limited to Bizzarro, from engaging in concerted activities as alleged in Complaint paragraph 5(c).

ii. Complaint Allegation 5(g)(2)

About late-November, in Respondent's lobby, Golebiewski walked over to Rudy while he was talking to a female, put his hand on Rudy's shoulder, and quietly told him that "[i]f this was a union area, I would have to write you up" and then walked away. (Tr. 359:18-25, 360:1-13; 361:2-4; 373:24-25, 374:1-16) Rudy is allowed to talk to persons, including females, during his shift. The only limitation is on pooling together of security officers other than for sweeps. (Tr. 360:13-25, 361:1)

Golebiewski's statement was the implementation of a new rule which threatened a more onerous rule against Rudy. An employee would reasonably conclude that Golebiewski had just implemented a new rule against talking to non-security officers, a rule which did not appear to be in place at that time. The new rule was implemented under the threat of discipline as if this was a union area and that a write-up would issue. There was no reference to a mere possibility of changed discipline policies based on potential collective bargaining. The timing of the statement, especially in light of Respondent's other actions, raises an inference of coercion that the new rule was specifically because of Union activities. The rule at issue, in light of Respondent's other actions and the explicit reference to the Union, would reasonably tend to chill employees in the exercise of their Section 7 rights. Cf. *Lafayette Park Hotel*, 326 NLRB at 825. The ALJ should find that Golebiewski's statement was the promulgation and enforcement

by threat of punishment of an overly-broad and discriminatory rule prohibiting discussion of security officers with other persons when Golebiewski told Rudy that he would have to write him up if the Union were selected as alleged in Complaint paragraph 5(g)(2).

iii. Complaint Allegation 5(h)(3)

Around mid-January, 2012, Baker confronted Bizzarro near the time clock and yelled at Bizzarro about how he felt betrayed and that Bizzarro did not follow the chain of command by bringing the Union in, and how Bakers' job was in jeopardy. (Tr. 246:22-25, 247:1-5; 269:20-24; 270:10-18; 271:13-19) Baker said Bizzarro went outside the chain of command when he should have stayed within the hotel and went to human resources with his complaints. (Tr. 269:24-25, 270:1) After telling Bizzarro that he did not follow the chain of command and he should have, he said that "all the problems [Bizzarro] ever had were taken care of through management[.]" (Tr. 247:2-4)

Baker expressed his displeasure by yelling at Bizzarro for going outside the chain of command in contacting the Union, which impliedly created a rule requiring Bizzarro to follow the chain of command. The forcefulness behind the requirement is demonstrated by the fact that the message was delivered personally by the number 2 in command of the 5 cumulative properties with over 5,000 employees. The prior relationship between Bizzarro and Baker and the fact that Baker helped get Bizzarro the job does not reduce the force or coercive nature of the confrontation. Baker's statements regarding the chain of command are at least an implicit, if not an explicit, rule restricting Bizzarro's Section 7 right to join, form or assist a labor organization. Cf. *Lafayette Park Hotel*, 326 NLRB at 825. The ALJ should find that Baker's statements regarding the use of the chain of command was the promulgation and enforcement by threat of

punishment of an overly-broad and discriminatory rule requiring security officers to follow the chain of command to resolve complaints as alleged in Complaint paragraph 5(h)(3).

I. Closer Supervision

1. Legal Standard

An employer violates the Act by increased supervision of its employees because of Union activity. *Palagonia Bakery Co.*, 339 NLRB 515, 528 (2003) (affirming the administrative law judge's holding without comment that the employer unlawfully increased supervision of an employee by following the employee when he went to talk to other employees, went to change, or to take a break); *Domsey Trading Corp.*, 310 NLRB 777, 789-790 (1993) (affirming the administrative law judge's holding that the employer unlawfully supervised an employee more closely by staying longer in the area where the employee worked, in a pattern which was different from their earlier supervision).

2. Analysis

a. Respondent's Closer Supervision of Bizzarro (Complaint Paragraph 5(k))

About mid to late January 2012, around a week after the confrontation between Bizzarro and Baker near the time clock, Bizzarro was on post in the Margaritaville Casino when Baker approached him and asked if he was on post. (Tr. 248:17-21) Baker walked away and made a cell phone call when he learned that a "post" is a general location instead of a particular spot. (Tr. 248:20-25, 249:1-2, 20-23) Bizzarro called Willis for assistance with an undesirable at a machine. (Tr. 272:8-22, 273:5-8) After they removed the undesirable, Bizzarro asked Willis why he was in the area. (Tr. 273:7-8) Bizzarro explained the conversation with Baker after Willis said he was there *because* Bizzarro had a conversation with Baker. (Tr. 273:8-10) Willis

told Bizzarro he shouldn't piss off the vice president of operations and left. (Tr. 249:2-8; 273:10-11) The area where the discussion took place is under video surveillance.²⁰ (Tr. 256:11-18)

Baker's presence during the night shift, combined with the questioning of Bizzarro would give a reasonable employee the impression that they were being more closely supervised, in this case by the highest levels of management. The situation lends itself to a strong inference that Baker visited Bizzarro at the Margaritaville Casino because of his Union activities following the questioning occurred just a week and the confrontation about going around the chain of command by calling the Union. The ALJ should find that Baker's actions in coming to the area where Bizzarro was working and asking him about his post, was an increased supervision because Bizzarro supported the Union and engaged in Union activities as alleged in Complaint paragraph 5(k).

J. Discriminatory Access to Bulletin Boards

1. Legal Standard

An employer has a basic property right "to regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir. 1983). In addressing the right of employees to use employer-owned property such as email, bulletin boards, and various other communication media, the "Board has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory." *Register Guard*, 351 NLRB 1110, 1114 (2007) (finding no violation in the absence of discrimination against Section 7 communications for the use of the employer's email system.) In *Intermet Stevensville*, 350 NLRB 1349, 1351 (2007), the Board agreed with and affirmed the administrative law judge's finding that the employer violated the Act when it

²⁰ Respondent uses video surveillance in the area, but curiously failed to produce any video to support its version of the events.

removed bulletin boards shortly before a union election; the timing of the removal showed they were removed to thwart union organizing efforts. The Board agreed with the administrative law judge that “the evidence viewed as a whole warrants a finding that the Respondent acted to interfere with employee Section 7 rights [I]t is of little moment that the record does not show that employees had previously used the bulletin board to communicate about the Union” *Id.* at 1352. See also *Beverly Enterprises*, 310 NLRB 222, 265-266 (1993) (affirming findings of violations by the administrative law judge, including the respondent’s prohibition against using the break area bulletin board for union literature although other items were permitted to be posted there, including respondent’s antiunion literature).

2. Analysis

Respondent’s security officers have bulletin boards nearby the pre-shift briefing room, with one in the back of the briefing room and one just outside the briefing room. (Tr. 130:22-25, 131:1-3) A third bulletin board is nearby, but the information posted there is limited to “wanted” and Be On the Lookout (BOLO) alerts, service scores, and similar information, and has not been used for information for or against the Union. (Tr. 349:2-11) Non-work related information has been posted on the bulletin board inside the briefing room including fantasy football which remained unadulterated, birthday flyers, information about a baseball team, and personal items for sale. (Tr. 131:14-25; 214:14-17) These types of flyers typically stayed on the bulletin board for longer periods of time. (Tr. 257:20-25, 258:1-3) Some flyers promoting the Union were placed on the bulletin board inside the pre-shift briefing room, but they were quickly altered with negative writings or disappeared soon after. (Tr. 131:4-13; 132:15-17; 197:4-19; 214:18-25, 215:1-15; 217:16-25, 218:1-9; 257:17-19; 265:3-8) There was one specific exception after a pro-

Union flyer was removed and Bizzarro specifically asked to make copies to replace the flyer which had been removed. (Tr. 265:19-25, 266:1-5)

Around Christmas to New Years Eve, a new glass cover was installed over one of the bulletin boards outside the pre-shift meeting room. (Tr. 82:22-24; 215:25, 216:1-9; 245:25, 246:1-4; 348:4-7) The glass cover is protected by a lock for which regular security officers do not have the key. (Tr. 82:7-18) The new glass cover was particularly noticeable to the security officers at New Years Eve because that is the busiest day for them as they are all required to work. (Tr. 348:8-16) Since the glass cover was installed, the information posted there has been limited to company information and information against joining a union to the exclusion of information for the Union. (Tr. 216:24-25, 217:1-4; 295:5-17; 348:20-25, 349:1) No pro-Union flyers were seen on the bulletin board outside the briefing room under the glass case. (Tr. 132:15-25, 133:1-3) Anti-Union flyers were displayed on the bulletin boards in the briefing room and just outside the briefing room but were not marked up. (Tr. 132:1-14) Security officer attempts to post information on the new board have not been approved. (Tr. 217:5-15) Specifically, Bizzarro asked Johnson if he would be able to post a flyer for the Union on this bulletin board. (Tr. 217:5-10) He never received permission, or even an answer, in spite of asking Johnson several times. (Tr. 217:11-15) Security officers were not allowed to post information on bulletin boards as of the dates of hearing, although they were previously allowed to do so. (Tr. 214:4-13)

The ALJ should find that Respondent discriminatorily restricted security officer access to posting information on bulletin boards because they were engaged in Union and other concerted activities as alleged in Complaint paragraph 5(k). *Beverly Enterprises*, 310 NLRB at 265-266.

IV. CONCLUSION

Based on the foregoing reasons and the record evidence considered as whole, CGC respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint. Through its conduct, Respondent infringed upon the rights of its employees and members to engage in concerted activities without interference, restraint and coercion. The ALJ should so find and recommend that the Board fashion an appropriate remedy which would require Respondent to: cease and desist from such unlawful conduct; post an appropriate Notice to Employees at each of its Harrah's, Imperial Palace, Flamingo, OSheas, and Bill's properties and by electronic means, a proposed copy of which is attached; and order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Las Vegas, Nevada, this 23rd day of April 2012.

Respectfully submitted,

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the **ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in **FLAMINGO LAS VEGAS OPERATING COMPANY, LLC, Cases 28-CA-069588 et al.**, was served via E-Gov, E-Filing, and electronic mail, on this 23rd day of April 2012, on the following:

Via E-Gov, E-Filing:

Honorable Mary M. Cracraft
Chief Administrative Law Judge
National Labor Relations Board
Administrative Law Judge Division
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San Francisco, CA 94103-1779

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NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT threaten you with unspecified reprisals or with job loss by inviting you to quit because of your protected concerted activities, including your complaining to us about our threatening you with job loss.

WE WILL NOT make it appear to you that we are watching out for your activities on behalf of International Union Security Police & Fire Professionals of America (SPFPA) (the Union).

WE WILL NOT watch you in order to find out about your protected concerted activities, including your complaining to us about our threatening you with job loss.

WE WILL NOT ask you about your or other employee support for the Union.

WE WILL NOT ask you about your complaints and grievances and imply that we will fix them, or promise you better benefits or give you new or better benefits to discourage you from supporting the Union.

WE WILL NOT promulgate an overly-broad and discriminatory work rules that you have to follow our chain of command to resolve your complaints or stopping you from engaging in protected concerted activities, including complaining to us about our threatening you with job loss or stopping you from talking to co-workers because you engaged in Union activities.

WE WILL NOT threaten you with unspecified reprisals with stricter enforcement of our work rules, with job loss, with layoff, with discipline or with discharge because of your Union support.

WE WILL NOT threaten you with loss of benefits that we will no longer resolve your complaints because of your Union support.

WE WILL NOT threaten you by telling you that you are disloyal because of your Union support.

WE WILL NOT more closely supervise you while you work because of your Union support.

WE WILL NOT discriminatorily restrict your access to posting information on bulletin boards because you engage in Union activities.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

**FLAMINGO LAS VEGAS OPERATING
COMPANY, LLC**

(Employer)

Date: _____

By: _____

(Representative)

(Title)