UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC Respondent, and INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA) Charging Party.	)	Case Nos. 28-CA-069588 28-CA-073617

BRIEF IN SUPPORT OF EXCEPTIONS OF EMPLOYER FLAMINGO LAS VEGAS OPERATING COMPANY, LLC TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Lawrence D. Levien
Richard N Appel
Elizabeth A. Cyr
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for the Employer,
Flamingo Las Vegas Operating Company, LLC

August 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Pursuant to 29 C.F.R. § 102.46(c), Flamingo Las Vegas Operating Company, LLC ("Flamingo," "Employer" or "Respondent"), submits this Brief in Support of its Exceptions to the Decision of Administrative Law Judge Gregory Z. Meyerson (the "ALJ") dated June 25, 2012 ("Decision" or "Dec."). In early September 2011, security officer Francis Bizzarro began a campaign to organize his fellow security officers and elect the International Union, Security, Police and Fire Professionals of America (SPFPA) as their bargaining representative. In accordance with Flamingo's culture of open and honest communication, from September 2011 to January 2012, members of Flamingo's management had various interactions and conversations with security officers about the priorities of the company, the concerns of the employees, and the merits of unionization. Despite Flamingo's constitutional right to provide its employees with an honest, non-coercive assessment of the possible effects of unionization, and despite the undeniably candid debate that Flamingo's open culture fostered, the ALJ unreasonably found these conversations violated the National Labor Relations Act (the "Act"). In reaching his conclusions, the ALJ ignored the historical and factual context in which these isolated interactions occurred, manipulated hearing testimony under the guise of "credibility" determinations to make conclusions that were both internally inconsistent and against the weight of the evidentiary record, and misapplied legal precedent to find violations of the Act where none occurred. For these reasons, and as more fully explained below, Flamingo excepts to the ALJ's adverse findings and respectfully requests that the National Labor Relations Board (the "Board") reverse the findings against it and dismiss the Amended Complaint in its entirety.[1]

[1] Specifically, Respondent excepts to the ALJ's factual findings and legal conclusions with respect to Paragraphs 5(b), 5(c), 5(e)(2), 5(e)(3), 5(e)(4), 5(e)(5), 5(f)(1), 5(f)(2), 5(g)(1), 5(h)(1), 5(h)(3), 5(i), 5(m), and 5(n) of the Amended Complaint. (General Counsel ("G.C.") Exhs. 1(q) and 1(o)).

II. PRELIMINARY STATEMENT

A. PROCEDURAL HISTORY

On February 14, 2012, the Regional Director for Region 28 consolidated the charge filed by SPFPA in case number 28-CA-073617 with the charge it filed in case number 28-CA-069588, and issued a consolidated complaint (G.C. Exh. 1(o)). Respondent filed an answer to the consolidated complaint on March 9, 2012, denying the unfair labor practices alleged therein. (G.C. Exh. 1(s)). On March 8, 2012, Counsel for the Acting General Counsel filed a notice of intent to amend the consolidated complaint to add paragraphs 5(l) through 5(n). (G.C. Exh. 1(q)). From March 13, 2012 through March 16, 2012, the ALJ held a hearing at the Board's office in Las Vegas, Nevada. At the opening of the hearing, the ALJ granted the General Counsel's request to amend the consolidated complaint and Respondent denied the newly added allegations (Hearing Transcript ("Tr.") 10:17-11:21). The February 14, 2012 consolidated complaint as well as the additional allegations reflected in General Counsel's notice to amend the complaint (G.C. Exh. 1(q)) are herein referred to collectively as the "Amended Complaint."

B. FACTUAL BACKGROUND

Flamingo is a hotel and casino in Las Vegas, Nevada operated by Caesars Entertainment ("Caesars"). Five Caesars properties - Harrah's, Imperial Palace, Flamingo, O'Sheas and Bills - are operated as a pod and referred to by the acronym HIFOB. (Tr. 59:10-11, 61:15-18). The union organizing drive at issue in this proceeding occurred only at Flamingo, and Flamingo is the only legal entity charged in the Amended Complaint. All of the relevant events discussed herein occurred at Flamingo or O'Sheas.

Striving to thrive in the fiercely competitive Las Vegas hospitality and gaming markets, from day one, Flamingo instills in its employees that impeccable customer service is essential. The term "upbeat and positive" is pervasive in Flamingo's culture and is used by management on

an almost daily basis to convey to employees the impression they should leave on each patron who visiting the property. (Tr. 318:7-15). But customer service is not merely a catchphrase at Flamingo, it is a skill to be evaluated, honed, and refined. In order to succeed, every HIFOB employee must demonstrate that they have adopted the customer service mantra, both in theory and in practice. Once a month, employees are subject to a "spotlight" during which they are graded on a series of behaviors as they interact with a customer. (Tr. 422:16-432:2). In addition to the spotlight, HIFOB also carefully tracks total service scores, which are designed to quantify customer feedback on the experience of visiting a HIFOB property. (Tr. 101:20-24). These total service scores are used by HIFOB management to evaluate employees' performance, including security officers as a group. (Tr. 101:20-102:4).

A core component of impeccable customer service is making sure that hotel and casino guests are protected against Las Vegas' criminal element. Accordingly, Flamingo's security department must operate flawlessly 24 hours a day, 7 days a week, 365 days per year. (Tr. 64:15-17). However, ensuring a safe environment is only one part of a security officer's duties. Stellar customer service is equally important. Indeed, security managers frequently communicate the importance of friendly customer service or "total service sweeps" to officers, emphasizing that these sweeps are a critical part of a casino's ability to succeed. (Tr. 186:20-188:4). Moreover, security officers are specifically tested about their knowledge of total service sweeps during the spotlight process. (Tr. 102:17-20, 196:20-24).

While HIFOB has over 5,000 employees, the security department is comparatively small. (Tr. 120:13-121:6). There are only about 300 HIFOB security officers in total, of which only 120 officers rotate through Flamingo, O'Sheas and Bills as their base facilities, and only 50 to 70 officers have Flamingo as their base facility. (Tr. 63:25-64:14). Bizzarro worked only at

Flamingo. (Tr. 212:16-19). The management of HIFOB's security operations is entrusted to a similarly lean group of managers and supervisors. Eric Golebiewski is the security director for all five of the HIFOB properties. (Tr. 58:22-59:11). Beneath Golebiewski are three HIFOB investigators and HIFOB investigations manager Jack Burgess. (Tr. 61:24-62:9). In addition, there are seven HIFOB security managers, four of whom work at Flamingo – Charles Willis, Cedric Johnson, Keith Berberich, and John Schultz. (Tr. 62:10-62:19). Under the security shift managers are eleven HIFOB security supervisors, six of whom work at Flamingo, including Kevin Quaglio and Thomas Heath. (Tr. 62:20-63:8). In addition to managers and supervisors, HIFOB also has employees designated as FTO Golds, who are essentially security officers in training for supervisor positions. There are three FTO Golds at Flamingo, including for purposes relevant to this action, Larry Myatt. (Tr. 63:9-16).

Given the intimate size of the Flamingo security department, and the importance of the security department to the organization's success, security management has a perpetually open dialogue with the officers. A central component of that dialogue is the pre-shift meeting. Flamingo officers begin each shift by attending a pre-shift meeting, also known as a pre-shift briefing, with their security managers and supervisors where they receive updates on what situations to expect in the upcoming shift and critical information about new policies and procedures. (Tr. 74:24-76:11, 367:1-15). These pre-shift meetings occur on the clock and officers are compensated for the time spent attending them. (Tr. 114:21-22). Each pre-shift meeting ends with the question "Do you have any concerns or comments?", ensuring officers have a daily opportunity to raise any issues they may be having with employment matters and management. (Tr. 367:10-15, 380:5-15). Over the past year, the security officers as a group have brought various concerns to management about issues such as equality, pay raises, and

proper equipment. (Tr. 135:2-9). In addition, officers regularly interact with supervisors and managers in the course of their shift, providing them yet another opportunity to raise any concerns. While officers are assigned to specific areas or posts, supervisors, managers and FTO Golds are not. (Tr. 68:16-69:14). By spending the majority of time on the floor, management is not only able to get a broad picture of how security as a whole is operating, but also to establish a relationship with each individual officer as they come across them.

As security director, Golebiewski develops policies and procedures for HIFOB security, oversees day-to-day operations, and reviews incidents which occur at any of the five HIFOB properties. (Tr. 61:8-12). Like HIFOB's managers and supervisors, Golebiewski knows that the only way to ensure that the vital security operations run smoothly is to remain connected to the security officers who implement those operations everyday on the ground. To that effect, Golebiewski gets regular communications about what's happening in the security operations at each of the HIFOB properties. (Tr. 65:15-18, 66:3-13). Golebiewski also attends many pre-shift meetings and makes frequent trips to each property, during which employees will come to him with any issues. (Tr. 76:12-17, 427:9-17). Perhaps most indicative of Golebiewski's relationship with his employees are the "chief meetings" he holds, where he invites the officers to a buffet lunch, at his expense, and grants the officers' an open forum to raise their concerns with him without any fear of the reaction of the rest of management. (Tr. 628:11-16).

In Fall of 2011, customer service scores at the HIFOB properties had reached a critically low level. (Tr. 417:10-24). Given the importance of customer service to the success of the company, such a drastic drop necessitated an all-hands-on board solution. Therefore, at the beginning of September 2011, Caesars called a mandatory series of meetings for all HIFOB managers and supervisors, across departments, to inform them of the unacceptable customer

service scores and to provide a strategy on how to improve them. (Tr. 417:25-418:20). With over 300 people in attendance, HIFOB management announced the "believe or leave" plan. (Tr. 547:12-25). The concept behind believe or leave was simple, in order for HIFOB to succeed, everyone had to work as a team. Flamingo security management relied on the pre-shift meetings to communicate believe or leave to the officers, telling them that "as a team we have a problem" but "as a team... we can get this turned around." (Tr. 471:20-472:8, 543:10-18). The ALJ expressly found that the believe or leave program was implemented independent of, and unrelated to, any union organizing campaign. (Dec. at 5-7).

Not all security officers responded positively to the believe or leave campaign. In particular, Bizzarro interpreted the customer service philosophy as a threat that the officers' jobs were in jeopardy. Shortly thereafter, Bizzarro sought union representation for the Flamingo officers. (Tr. 262:19-262:25, 29:25-230:8). Bizzarro quickly began distributing union literature, passing out over 100 authorization cards. (Tr. 230:14-19, 263:19-25). Because Bizzarro had recently acquired his real estate license, he used his business cards as a way to approach people and gauge their potential interest in union representation. (Tr. 232:3-13, 232:23-233:23). According to Bizzarro, the main reason he handed out his business cards was so that his co-workers would have his phone number and could contact him directly. (Tr. 233:21-23).

Despite the fact that Bizzarro's solicitation of union interest occurred during working time (Tr. 231:12-13), true to its culture of open debate, Flamingo did not attempt to silence Bizzarro. Rather, Flamingo allowed Bizzarro to use its facilities to communicate his position. During the union organizing campaign, Flamingo permitted Bizzarro to use the bulletin board in the pre-shift meeting room to distribute information about the union, even going so far as to allow him to use the company's facilities to make copies of a pro-union flyer. (Tr. 131:4-6,

188:5-10, 214:12-21, 265:14-266:5). Free debate, however, cannot be one sided. Throughout the course of Bizzarro's union organizing campaign, Flamingo presented its honest views of the possible effects of unionization. Indeed, Flamingo's email server was used as a forum for free debate on unionization in an email string copying all security officers and all HIFOB security supervisors. (G.C. Exh. 12).

Because the ALJ's findings centered around several specific events, for ease of the Board's review, the Respondent has organized this brief chronologically with a separate section for each event.

III. STATEMENT OF QUESTIONS PRESENTED

(1) Whether the ALJ erred in finding the September 3, 2011 interaction between Larry Myatt and Francis Bizzarro violated the Act. (Exception Nos. 1-8)

(2) Whether the ALJ erred in finding the October 7, 2011 flyer violated the Act. (Exception Nos. 41-44)

(3) Whether the ALJ erred in finding the October 14, 2011 pre-shift meeting violated the Act. (Exception Nos. 9-20)

(4) Whether the ALJ erred in finding the October 16, 2011 flyer violated the Act. (Exception Nos. 21-26)

(5) Whether the ALJ erred in finding the mid-November 2011 conversation between Eric Golebiewski and Ty Evans violated the Act. (Exception Nos. 45-48)

(6) Whether the ALJ erred in finding the December 2, 2011 conversation between Eric Golebiewski and Christopher Rudy violated the Act. (Exception Nos. 27-29)

(7) Whether the ALJ erred in finding the January 13, 2012 conversation between Paul Baker and Francis Bizzarro violated the Act. (Exception Nos. 30-35)

(8) Whether the ALJ erred in finding the mid-January 2012 comments by Charles Willis violated the Act. (Exception Nos. 36-40)

IV. ARGUMENT

A. LEGAL STANDARDS

In finding that Flamingo's conduct violated the Act, the ALJ committed several clear errors. Perhaps most egregious is the fundamental misunderstanding of an employer's free speech rights reflected in the Decision. While an employer's right to express its honest, non-coercive view of unionization is expressly protected under both the First Amendment and Section 8(c), the ALJ often ignores these protections to find violations where Respondent has merely expressed an opinion. [2] Further, the ALJ frequently manipulates the factual record, often under the guise of "credibility determinations," to establish versions of events that ignore the historical and cultural context in which various interactions occurred.[3] Finally, even assuming the versions of events credited by the ALJ were true, the ALJ often went one step further by making unfounded logical leaps to find violations completely unsupported by applicable legal precedent.[4]

While Respondent has set forth the legal basis for its position on specific incidents in Sections IV.B to IV. J *infra*, because the ALJ misapplied some legal concepts universally, Respondent has provided a general overview of certain specific legal principles below.

1. The Board's Standard of Review

Where exceptions to an ALJ's decision and recommended order have been filed, the Board is not bound by the findings of the ALJ and must engage in an independent review of the

[2] *See, e.g.*, the ALJ's finding that distribution of flyer containing a blank authorization card constituted unlawful surveillance at Section IV.C *infra*.

[3] *See, e.g.*, the ALJ's finding that the October 14th pre-shift meeting constituted an unlawful interrogation, despite Golebiewski's history of open communications with the officers, at *Section* IV.D *infra*.

[4] *See, e.g.*, the ALJ's findings that a single, isolated conversation between an officer and a member of management constituted the promulgation of a work rule at Sections IV.B and IV.H *infra.*

record. *See Standard Dry Wall Prods., Inc.*, 91 N.L.R.B.. 544, 544-45 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951). "[T]he Act commits to the Board itself the power and responsibility of determining the facts" and the Board must base its findings "on a de novo review of the entire record." *RC Aluminum Indus., Inc.*, 343 N.L.R.B. 939, 942 n.1 (2004) (citing *Standard Dry Wall Prods.*, 91 N.L.R.B. at 544-45).

2. Section 8(c) Protects First Amendment Rights

The First Amendment provides an employer with a constitutional right to "communicate his views to his employees." *Roper Corp. v. NLRB*, 712 F.2d 306, 311 (7th Cir. 1983) (citations omitted). Though the Act regulates the permissible boundaries of an employer's reaction to protected activity, it was never intended to gag employers. Rather, "[a]s the Supreme Court has observed, Section 8(c) of the Act protects an employer's freedom under the Bill of Rights to communicate her opinions to her employees without fear of 'infringement by a union or the Board.'" *Salon/Spa at Boro, Inc.*, 356 N.L.R.B. No. 69, 2010 WL 5462286, at*25 (Dec. 30, 2010) (*quoting NLRB v. Gissel*, 395 U.S. 575, 617 (1969)); s*ee also* 29 U.S.C. § 158(c) (2011). "[S]ection 8(c) 'at an irreducible minimum protects the right of the employer to state its views, argument, or opinion, and to make truthful statements of existing facts.'" *Roper Corp.*, 712 F.2d at 311 (*quoting Dow Chem. Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981)). This "irreducible minimum" includes the employer's right "to conduct anti-union campaigns if [it] wish[es]." *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 832 (7th Cir. 2000) (citations omitted). *See also TNT Logistics N. Am., Inc.*, 345 N.L.R.B. 290, 290 (2005) (finding it "well settled" that an employer is free to communicate its views about unionism to its employees).

In contexts where supervisors and employees "interact with one another on a daily basis," it is not unusual for them to "converse about matters which affect their work." *NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 227 (7th Cir. 1996). Even a "lengthy and candid" discussion

of unionization, without more, is not a violation of Section 8(a)(1). *See Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1386-87 (9th Cir. 1984). This is especially the case where, prior to the organizing campaign, the workplace has been characterized by an open exchange regarding workplace conditions. *See Wal-Mart Stores, Inc*., 340 N.L.R.B. 637, 640 (2003) (continuation of open door policy during union organizing campaign did not violate the Act), *enforced as modified*, 400 F.3d 1093 (8th Cir. 2005). As explained in Section II.B *supra*, candid discussions were a hallmark of the HIFOB security department. Contrary to the ALJ's findings, Flamingo did not run afoul of the Act by simply continuing that open policy after the commencement of Bizzarro's organizing campaign, nor did it run afoul of the Act by exercising its First Amendment rights to give its employees the benefits of its views on unionization. The Board should, therefore, overturn the ALJ's findings that Flamingo's lawful expressions of opinion violated the Act. *See United Rentals, Inc.*, 349 N.L.R.B. 190, 190-91 (2007) (overturning ALJ's finding of an 8(a)(1) violation where the employer's comments were protected under Section 8(c)).

3. An ALJ Can Not Shield His Findings From Review By Simply Couching Them as Credibility Determinations

While an ALJ's credibility findings based on demeanor are entitled to deference, that deference is not without limits. As the Board in *Standard Dry Wall* made clear, ultimate fact finding authority rests in the hands of the Board, not the ALJ. *Standard Dry Wall Prods.*, 91 N.L.R.B. at 545. ("[I]n all cases which come before us for decision, we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."). Where an ALJ's finding is based on a witness' "evasive and self-serving" testimony and such a finding is not based primarily on demeanor, the Board will undertake an independent evaluation. *Red's Express*, 268 N.L.R.B. 1154, 1155 (1984).

Similarly, the Board will substitute its credibility findings for the ALJ's where the ALJ's findings were based "largely upon an objective analysis of [witness] testimony" and "not exclusively on his demeanor as a witness." *Briggs IGA Foodliner*, 146 N.L.R.B. 443, 446 n.6 (1964). "Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with 'the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.'" *Stevens Creek Chrysler Jeep Dodge, Inc*., 357 N.L.R.B. No. 57, 2011 WL 3781995, at *5 (Aug. 25, 2011) (citations omitted). The deference due credibility findings is diminished even further where the ALJ "omits reference to highly relevant testimony on a critical matter and mistakenly characterizes the state of the record." *Carlton Paper Corp*. 173 N.L.R.B. 153, 156, n.9 (1968).

Here, the ALJ frequently used "credibility" determinations, to find that a certain version of events was true, even when those determinations were inconsistent with the record as a whole and with the ALJ's prior findings. In particular, on numerous occasions, the ALJ found that Bizzarro was prone to exaggeration, self-aggrandizement, putting himself in the middle of key events with self-serving descriptions of such events and "invested in trying to obtain a successful outcome of this case" and discredited his testimony accordingly. (Dec. 6-7, 9-10, 25-26). Incongruously, however, at other times the ALJ credited Bizzarro's version of particular events over the testimony of other witnesses. The Board should not defer to those findings.

B. THE ALJ'S FINDINGS THAT MYATT'S COMMENTS TO BIZZARRO ON SEPTEMBER 3, 2011 CONSTITUTED A VIOLATION OF THE ACT SHOULD BE REVERSED

1. Factual Background

Customer service is a key ingredient to Flamingo's success. On the heels of historically low customer service scores, at a September 3, 2011 pre-shift meeting, Flamingo security supervisors announced to the officers HIFOB's new "believe or leave campaign" which was,

essentially, an admonition to employees that everyone needed to treat customer service as a top priority if they wanted to remain with the organization. (Tr. 135:15-137:20; 252:1-17, 253:8-10, 474:7-14, 475:20-24, 543:4-544:22). As the ALJ found, the believe or leave campaign was not related to the union organizing effort and, indeed, pre-dated that effort. (Tr. 138:8-13, 277:12-16, 335:6-336:8).

Not all security officers received this campaign with open arms. (Tr. 253:8-21). In particular, Bizzarro became extremely agitated and began challenging the supervisor making the announcement, Quaglio. As officer Meadows recalls it, "Bizzarro... spoke up and he was stating that... this was like a threat, are you threatening us and... him and Quaglio went back and forth" with Quaglio telling Bizzarro "I'm just relaying the message that I got in my manager's meeting... if you don't want to... do your job, that you could leave, if you weren't happy with your job." (Tr. 138:14-139:1). Bizzarro testified that he told Quaglio "by threatening the officers, you weren't creating the upbeat and positive attitude that the employer was looking for, and that it was doing the opposite" and that Quaglio told him in response that if "I didn't like the way management was doing things, I could go get a job at the Wynn." (Tr. 223:22-24:6).

According to Bizzarro, FTO Gold Myatt then ordered him into the manager's office and told him, in a 30 second conversation, that "his comments to the officers were inciting the men that I needed to stop making those comments or there would be consequences." (Tr. 224:21-225:6, 280:10-12). According to security officer Thomas Willequer, it was actually Bizzarro who called Myatt and Quaglio into the manager's office after the pre-shifting briefing ended. (Tr. 320:25-321:10, 336:16-337:8). While Myatt did not recall a conversation with Bizzarro in the early September timeframe, he did recall that at one pre-shift meeting Bizzarro made a derogatory comment regarding Myatt's scheduling, after which Myatt asked Bizzarro to

accompany him into the coffee room and requested that he bring such complaints to him in the office rather than in front of the briefing. (Tr. 477:13-479:14). Security shift manager Johnson, who was also present in the manager's office during Myatt's and Bizzarro's interaction but did not speak, testified that Myatt simply asked Bizzarro to pull him aside if he had any questions or comments rather than disrupting the briefing, in response to which Bizzarro agreed and left the office. (Tr. 280:13-17; 566:18-569:12).

2. ALJ's Findings

Though finding that Bizzarro had "a tendency to over emphasize certain events so as to place himself and his actions in the best possible light" and "has much of his personal self worth invested in trying to obtain a successful outcome of this case," the ALJ credited Bizzarro's assertions that Quaglio's comments were threatening and harassing towards the officers and that Myatt responded by telling him he should be quiet and stop inciting the officers or there would be consequences. (Dec. 7-8). In an unfounded logical leap, the ALJ then concluded that by privately chastising Bizzarro for his outburst, Flamingo had threatened Bizzarro "with an unspecified reprisal because Bizzarro had engaged in protected concerted activity" and "had promulgated and enforced an overly-broad and discriminatory work rule prohibiting its employees from engaging in concerted activities." (Dec. 8-9).

3. Myatt's Comments to Bizzarro Were Not a Threat

An employer does not run afoul of the Act by disciplining an employee's insubordination. *See Metro Mayaguez, Inc.*, 356 N.L.R.B. No. 150, 2011 WL 1633940, at *21 (Apr. 29, 2011) (finding an employee "lost the protection of the Act when she was disrespectful toward her supervisor."); *Health Now, Inc*., 353 N.L.R.B. No. 43, 2008 WL 4774549, at *23 (Oct. 31, 2008) ("'[T]he right of an employer to maintain order and insist on a respectful attitude by his

employees towards their superiors is an important one. Verbal abuse directed at an employee's supervisor...would, if left undisciplined, tend to diminish the respect of other employees for their employer and encourage insubordinate conduct by them.'") (citations omitted). Impeccable customer service was crucial to the success of Flamingo, and the believe or leave campaign was management's attempt to combat dangerously low customer service scores. The supervisors were therefore relaying an important message at the September 3rd meeting, and Bizzarro's actions not only undermined the supervisors' authority over the officers, but also distracted the officers from learning about a critical management directive. Myatt's comments to Bizzarro were a lawful exercise of management's prerogative to keep order in its workplace. The comments were not directed to the substance of Bizzarro's concerns, but merely the manner in which he was raising them.

While the ALJ found it "immaterial whether the statements made by Quaglio were in fact threatening or harassing" (Dec. 8) if Bizzarro perceived them as such, an employee's subjective interpretation of his employer's actions are not without bounds. *See Flex-N-Gate Tex., LLC*, 358 N.L.R.B. 1, 2012 WL 2457873, at *6 (June 27, 2012) ("the standard for interference with Section 7 rights is not a subjective one based upon an employee's personal sensitivity," and an employee's perception is only one factor). In this case, the ALJ recognized that Bizzarro was "highly suspicious" of the Employer's conduct. Bizzarro's "personal sensitivities" to the Employer's conduct cannot transform otherwise lawful comments into violations of the Act. Because Myatt's comments to Bizzarro were simply a lawful reprimand for employee insubordination, the ALJ's finding that these comments constituted a threat should be reversed and Amended Complaint paragraph 5(b) should be dismissed.

4. Myatt's Comments to Bizzarro Did Not Constitute Promulgation of a Work Rule

Even assuming the version of events credited by the ALJ were true, and even assuming those events constituted a threat (which they did not), there is no reasonable basis on which the ALJ could have found those events constituted the promulgation of a work rule. The ALJ's contrary conclusion is merely a reflection of his predilection for making unfounded logical leaps to find violations of the Act which are unsupported by the relevant facts or legal standards. Here, the ALJ does not even specify what the alleged "rule" at issue is. Instead he merely accepts the General Counsel's contention that "Respondent has promulgated and enforced an overly-broad and discriminatory work-rule prohibiting its employees from engaging in concerted activity." (Dec. 9). The record evidence makes abundantly clear that there was no such rule. Rather, Flamingo encouraged its employees to have frank discussions, both with each other and with management regarding their concerns. *See* Section II.B *supra.* Indeed, Flamingo even granted Bizzarro free range to use its bulletin boards and its email servers to facilitate such discussions. *See* Section II.B *supra*; Section IV.I *infra.*

Further, a private conversation between a supervisor and an employee could not logically be considered the "promulgation" of a rule.[5] *See, e.g., Hanson Material Serv. Corp.*, 353 N.L.R.B. No. 10, 2008 WL 4490048, at *10 (Sept. 25, 2008) (finding that confiscation of an employee's union hat "was a separate, isolated incident that does not support a finding that [the employer] orally promulgated an antiunion apparel rule."); *St. Mary's Hosp. of Blue Springs*, 346

[5] In fact, in another portion of the Decision, the ALJ found that a single conversation between security director Golebiewski and security officer Rudy (*see* Section IV.G *infra*) did not constitute a work rule because "[t]here was absolutely no evidence" that Golebiewski's comment "was an attempt to promulgate a rule of any kind" and "no evidence that by his statements Golebiewski was trying to limit the union or protected concerted activity of Respondent's employees." (Dec. 19).

N.L.R.B. 776, 777 (2006) (reprimanding employee for misconduct which interrupted unit employees' work was an "entirely permissible" prohibition and "could not reasonably be interrupted as establishing that [the employer] intended to implement a new, more restrictive solicitation policy."). There is no testimony or other evidence that Myatt's request that Bizzarro refrain from disrupting the briefing was relayed to other security officers. Indeed, the majority of the testimony suggests that none of the other security officers could have even heard Myatt's reprimand as it occurred in a private office where only Bizzarro, Myatt, and Johnson were present. (Tr. 224:21-6, 225:23-5, 320:25-321:10, 336:16-337:8, 477:13-478:19).[6]

In addition, even if a work rule could be promulgated in a single, private conversation, the comments at issue here clearly could not be interpreted as such. While the ALJ correctly stated that a rule which does not expressly restrict Section 7 rights violates the act only if "(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," the ALJ incorrectly applied that standard to the instant case. (Dec. 9; *see Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 646, 647 (2004)). First, contrary to the ALJ's finding that Myatt's alleged "rule" was "an explicit restriction of the Section 7 right to engage in concerted activity," in fact, Myatt said nothing about Bizzarro's right to discuss working conditions with other employees, nor his right, individually or collectively, to act on his

[6] While the ALJ states that it was "not clear to me whether Myatt's statements were made in the pre-shift briefing room or immediately thereafter in the manager's office, or perhaps in part in both places" (Dec. 8), he does not rule conclusively on the location of the interaction. The only evidence supporting the idea that part of the interaction may have occurred in the briefing room is convoluted, contradictory testimony from Bizzarro. (Tr. 224:21-225:21). The Board should therefore find that Myatt's conversation with Bizzarro occurred privately in the manager's office. *See, e.g., Harmony Corp.*, 349 N.L.R.B. 781, 783 (2007) (rejecting an ALJ's findings where no evidence supported findings and the record suggested a different conclusion).

concerns or bring them to management. Flamingo's culture *encouraged* employees to raise their concerns with management. Myatt's remarks were aimed solely towards the manner in which Bizzarro raised his concerns, a manner which was insubordinate and disruptive to the pre-shift meetings. An employer's lawful reprimand for insubordination cannot be an "explicit restriction" on Section 7 rights. *See Metro Mayaguez*, 2011 WL 1633940, at *21. As Johnson testified, Myatt simply told Bizzarro that "[i]f he wants to say something to Larry, because he has a problem, he was saying to pull him aside." (Tr. 567:23-558:2). While the ALJ found specifically that "Bizzarro had a tendency to exaggerate and embellish his testimony," he credited Bizzarro's version of the events over Johnson's because "Johnson's version... lacked the sort of detail that Bizzarro supplied." (Dec. 7-8). Bizzarro's penchant for exaggeration readily explains why he may have provided more specific details than Johnson. The Board should, therefore, reject the ALJ's credibility determinations with respect to this subject. *See NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008) ("[A]n ALJ's credibility determinations will not bind the Court when they are 'inherently unreasonable or self-contradictory' or when they are 'based on inadequate reason, or no reason at all.'") (citations omitted); *Schrementi Bros., Inc.*, 179 N.L.R.B. 853, 853 (1969) (overturning an ALJ's conclusion that "contradict[ed] his own credibility findings.").

Finally, Myatt's comments could not constitute a work rule under any prong of the *Martin Luther Memorial Home* standard. No employee could reasonably construe Myatt's comments as a prohibition on Section 7 activity because a) there is no evidence that any employees other than Bizzarro even heard the comments, and b) they were directed only towards the insubordinate manner in which Bizzarro raised his concerns. Further, the alleged "rule" could not have been promulgated in response to union activity because the comments were made

before Bizzarro's union campaign even began. (Tr. 138:8-12, 262:15-263:21). Lastly, there is no evidence that the "rule" was applied at all, let alone applied to restrict the exercise of Section 7 rights. The ALJ's findings that Myatt's comments promulgated an unlawful work rule should therefore be reversed and Amended Complaint paragraph 5(c) should be dismissed.

C. THE ALJ'S FINDING THAT THE OCTOBER 7, 2011 FLYER VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

On or around September 29, 2011, Bizzarro started distributing union authorization cards to his fellow security officers. (Tr. 263:19-25). Shortly thereafter, in early October 2011, security officer James Diserio brought security supervisor Quaglio a copy of a union interest card, telling Quaglio "Bizzarro was really pushing this Union thing, and here are the cards that are being given out to all of the officers." (Tr. 546:9-15). This was the first time Quaglio heard that there was an organization effort amongst the officers. (Tr. 546:16-17). Around that time, a flyer that contained a copy of a blank union authorization card was posted to a bulletin board in the pre-shift meeting room. (Tr. 321:15-322:1). According to Bizzarro, the flyer "had circles around the union authorization cards where you would sign, it said 'Don't sign away your signature. You're giving authority to a union you know nothing about by signing these cards.'" (Tr. 235:20-25).

2. ALJ's Findings

The ALJ found that Bizzarro's involvement in the organizing efforts was an "open secret," and that there was no evidence that "individual authorization card signers did so openly, or that they wanted the Respondent to be aware of their involvement in the campaign." On this basis, he concluded that the distribution of the flyer "constituted an unlawful impression of surveillance." (Dec. 28-29). According to the ALJ, because "management gave no explanation

as how it came to possess a blank union card, security officers might reasonably have feared that the Respondent was spying on their union activity." (Dec. 29).

3. Distribution of a Blank Authorization Card is Not Surveillance

Initially, the ALJ's statement that Bizzarro's role as chief union organizer was an "open secret" clearly misconstrues the factual record. There was nothing "secret" about Bizzarro's organizing efforts. The ALJ himself stated, during the first day of the hearing: "I mean, it's obvious from what little I've heard of this case to this point, that Mr. Bizzarro was an open union supporter, there is no secret here... It appears to me from what little I've heard already of the case, he openly engaged in much of this activity." (Tr. 160:25-161:6).

Further, the ALJ erred as a legal matter in finding management's distribution of a blank authorization card constituted unlawful surveillance. An employer engages in unlawful surveillance only when, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance... The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected activities." *Frontier Tel. of Rochester, Inc*., 344 N.L.R.B. 1270, 1276 (2005) (citations omitted) (emphasis in original), *enforced*, 181 F. App'x 85 (2d Cir. 2006). Here, no reasonable employee could conclude from this flyer that the employer was monitoring their union activities. As Quaglio's testimony demonstrates, Flamingo obtained the authorization card because a security officer provided it to Quaglio voluntarily. (Tr. 546:9-15). An employer does not violate the Act by publicizing information voluntarily provided by employees. *See Bridgestone Firestone S.C.*, 350 N.L.R.B. 526, 527 (2007).

A finding that the flyer constituted surveillance simply because Flamingo did not specify where the authorization card came from is another example of the ALJ's unfounded logical

leaps. Had Flamingo specified who the card came from, the ALJ could just as easily have found that the identification created an impression of surveillance. Indeed, the ALJ found on several occasions that implicit or explicit references to Bizzarro violated the Act. *See* Sections IV.E and IV.I *infra.* Flamingo could not win here, the ALJ would have found distribution of the blank authorization card violated the Act with or without identification of source, a predetermination clearly inconsistent with Flamingo's free speech rights. "It is well settled that an 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 benefit.'" *TNT Logistics N. Am., Inc.*, 345 N.L.R.B. 290, 290 (2005). There was no threat or promise, implicit or explicit, in the October 7th flyer. It merely advised employees not to sign unknowingly. The ALJ's finding undermines the rights explicitly guaranteed to employers by Section 8(c). Amended Complaint paragraph 5(m) should therefore be dismissed.

D. THE ALJ'S FINDINGS THAT GOLEBIEWSKI'S OCTOBER 14, 2011 PRE-SHIFT MEETING VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

As explained in Section II. B *supra*, pre-shift meetings are a central part of the open communication channels between security management and security officers. While these pre-shift meetings generally last 15-30 minutes, they can be longer. (Tr. 76:21-77:3, 141:8-9, 330:10-14). Intent on remaining informed about what's going on in his security department, Golebiewski attends many pre-shift meetings and makes a conscious attempt to attend meetings at each of the 5 HIFOB properties as he moves between them. (Tr. 76:12-14, 427:9-14, 460:19-461:10). On October 14, 2011, Golebiewski attended a pre-shift meeting at Flamingo. (Tr. 77:4-18).

According to Golebiewski, he chose to attend this particular meeting because shift manager Berberich had told him that the security officers were upset with him. (Tr. 404:18-22). Berberich confirms that the officers in his group had expressed concern that Golebiewski was too authoritative, and Berberich had suggested to Golebiewski that "it would probably do him some good if he just had some meetings, you know, that – you know, at his convenience with the different groups to kind of, you know, let them ask him where he could clarify it and it wasn't coming from me." (Tr. 588:11-21).

As the meeting began, Golebiewski told the officers "I heard you guys are upset with me, that, you know, you feel I don't care about you, and I'm here to talk about that." (404:24-405:1). When the officers remained silent, Golebiewski assured them "this will be a very informal conversation and open conversation, so feel free to talk.'" (Tr. 405:14-21). At that point, Bizzarro spoke up, stating he did not feel Golebiewski cared about the officers, to which Golebiewski responded that Bizzarro's perception was not true, and provided an example of when he had helped Bizzarro obtain a surveillance photograph of a prostitute who had spit blood in his face. (Tr. 406:5-408:12). Security officer Steve Fox then provided his own example of when Golebiewski had helped him obtain leave when he needed knee surgery, and security officer Eric Creegan discussed a problem he was having with a battery. (Tr. 411:19-412:3, 412:15-25). The group also discussed a construction project called the Link Project, which the officers had various questions about. (Tr. 413:18-414:3). As Golebiewski remembers it, the pre-shift meeting was an open discussion back and forth on a host of issues including complaints from employees on various employment issues, which was typical for Golebiewski, whom employees frequently came to with problems or issues. (Tr. 413:8-10, 427:9-17, 428:3-23).

According to Bizzarro, Golebiewski began the meeting by raising the issue of the union organizing campaign. Bizzarro testified that Golebiewski pulled a posting off the bulletin board "that had reasons why you would want to join a union. And he... basically went through and said there was no validity to these questions or to these statements. And he then asked anyone that had anything to say if they would like to say anything." (Tr. 236:20-237:3). As Bizzarro recalls it, he told Golebiewski that he wanted a union because he felt security management had been treating officers poorly and did not listen to the officers before making changes. (Tr. 238:1-9). Golebiewski responded that "he had no idea why that was being said by his management team, that these comments that we had mentioned to him, he said he never heard of that. He didn't understand where these things were coming from." (Tr. 238:1-9). The other officers then started expressing their complaints and coming up with specific examples, including Creegan raising an issue with a battery. (Tr. 238:17-23). Willequer did not recall Golebiewski referring to any document during the meeting. (Tr. 337:10-338:1). Golebiewski did not recall ever asking any individual employee, or the group generally, what their attitude was regarding the union. (Tr. 414:19-415:2).

According to Meadows, a lot of the meeting was taken up by Bizzarro airing his personal grievances. (Tr. 163:1-164:10). Indeed, Bizzarro admits that he raised a number of personal issues during the meeting. (Tr. 275:17-277:8). Bizzarro also admits that during the meeting he was critical of supervisors on a number of issues. (Tr. 277:9-11). Several of the officers testified that Golebiewski provided examples of when he had helped individual officers and informed them that he would not have the same leeway in helping them with their problems if there was a union. (Tr. 142:22-24, 239:3-14, 326:10-16). For example, Meadows testified that Golebiewski

had saved his job as well as the job of another officer, Wilikers, and would not have been able to do that if a union was present in the casino. (Tr. 142:22-24).

During this pre-shift meeting, Golebiewski also informed the officers that their supervisor, Rick Casali, was being transferred to Harrah's and replaced by supervisor Willis. Testimony from both Golebiewski and Meadows confirms that this transfer was only for six months. (Tr. 197:21-198:4). According to Bizzarro, Golebiewski said "that he realized that there was a problem with [Casali] and he was removed and sent to Harrah's property for retraining... He would be bringing in Charles Willis, which is a more favorable security manager and that the officers would really like him." (Tr. 239:18-25). Transferring managers between properties was a central element of Golebiewski's management philosophy. During the hearing, Golebiewski explained that he cross-trained managers "so that they could learn the best practices, policies and procedures and could be able to work at any one of the properties. So from an efficiency standpoint, if I was short a manager at one property, it would be very easy just to move one to another property." (Tr. 403:6-11). The decision to transfer Casali was based on these cross-training benefits and because he was having friction with a security supervisor. (Tr. 403:3-18; 586:11-21). The decision had nothing to do with the union organizing campaign. (Tr. 403:16-18).

Indeed, the process for transferring Casali began long before the October 14th pre-shift meeting. In order for Casali and Willis to swap locations, Golebiewski needed to check the supervisors' schedules, make sure there weren't any special events, and discuss the transfer with the employees themselves. (Tr. 463:14-464:11). Willis testified that he learned he would be transferred to Flamingo in early September, when he had a discussion with Golebiewski about "going down there and assimilating the property as I have done for the Imperial Palace and

Harrah's." (Tr. 526:15-527:3). Casali and Willis were not the only supervisors to move between properties. Security shift manager Johnson testified that prior to coming to Flamingo in August 2011, he had worked at both Harrah's and Imperial Palace because "[i]t's more efficient for one Manager to know all the properties and all operations just in case for vacation and stuff like that," and Berberich testified that Golebiewski was also moving a field training officer, an EMT, and eventually Berberich himself. (Tr. 565:15-18. 573:8-19, 586:22-587:13). Bizzarro admitted that Golebiewski never said Casali was being transferred because of the union organizing activity. (Tr. 288:18-21).

2. ALJ's Findings

According to the ALJ, the October 14, 2011 meeting resulted in four separate violations of the Act. (Dec. 11-16). Preliminarily, the ALJ discredited that Golebiewski attended the pre-shift meeting because of the concerns Berberich had brought to him, and instead found that the "real purpose of the meeting was so that Golebiewski could address [the union organizing] campaign." (Dec. 12). Crediting the testimony of the officers that Golebiewski began the meeting by asking the officers for their thoughts on the union, the ALJ found that "by Golebiewski's statements at the pre-hearing briefing on October 14, 2011, the Respondent has unlawfully interrogated its employees regarding their union membership, activities, and sympathies." (Dec. 14). The ALJ next found that "[w]hile his precise words are somewhat unclear, it is obvious from the context of the conversation that during the meeting Golebiewski discussed with the assembled security officers concerns that they had with Respondent's management" and that "[t]hrough these solicitations, Golebiewski was implicitly promising the officers increased benefits and improved terms and conditions of employment for the purpose of dissuading them from supporting the Union." (Dec. 15). Next, the ALJ found that informing the officers that Casali was being transferred to a different facility "was an unlawful promise of

improved terms and conditions of employment in order to dissuade them from supporting the Union." (Dec. 15-16). Finally, the ALJ found that by mentioning "how he allegedly saved the jobs of officers Meadows, Willequer, and Fox by his considerate treatment of their alleged infractions" and indicating "that if there had been a union contract in effect at the Flamingo that he would have to strictly adhere to that contract with no flexibility, and he would not have had the 'leeway' to assist the officers," Golebiewski threatened "to more strictly enforce work rules and with a corresponding potential of job loss if the security officers selected the Union as their collective bargaining representative." (Dec. 16). The Board should reverse these findings.

3. Golebiewski Did Not Unlawfully Interrogate Employees About Their Union Preferences

The October 14th meeting was not an unlawful interrogation. As the ALJ pointed out, to determine whether a supervisor's questions violate the Act, the Board should look at the totality of the circumstances and specifically consider "the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply." (Dec. 14). These factors are commonly referred to as the "*Bourne* factors" as they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). However, the ALJ ignored the background of the parties - a background which includes a long-standing culture of open and frank communications between the officers and management, including Golebiewski – when finding a violation here. When viewed in the appropriate context, application of the *Bourne* factors in this case demonstrates that the October 14th pre-shift meeting was not an interrogation.

The ALJ focuses on the meeting's length and Golebiewski's exclusion of other supervisors in finding the meeting was a purposeful interrogation of the officers' union sympathies. (Dec. 12-14). Given Golebiewski's relationship with the officers and his past

practices, however, neither of these facts is unusual. As Berberich explained, Golebiewski sometimes holds what he calls "'chief meetings' where he will actually set aside a day where he will invite all of the officers in the department to meet with him at the buffet. And he pays for the buffet and they can express anything that they want to express without any of the rest of the management team being there." (Tr. 628:11-16). These chief meetings, lengthy lunches where other management is excluded to encourage open debate, provide a critical backdrop for viewing the October 14th meeting, yet are glaringly absent from the ALJ's recitation of the pertinent testimony. Given Golebiewski's history of holding an open court with the officers, there was nothing inherently coercive about Golebiewski leading the October 14th pre-shift meeting. Nor is there anything unusual about a pre-shift meeting being used to flush out complaints. Pre-shift meetings are not only a time for management to distribute important information, but a "[t]ime for security officers to bring up questions or problems as well." (Tr. 367:1-15).

Moreover, the ALJ found that "based on the timing of meeting, which occurred as the union organizing campaign was gaining momentum," the purpose of the meeting must have been to address the organizing campaign. (Dec. 12). In so finding, the ALJ ignored the other relevant events that had also occurred in that time frame – namely the announcement of historically low customer service scores and the resultant believe or leave campaign just six weeks before, which would have been reasons alone to conduct the meeting. Given the central importance of customer service to Flamingo and the resistance some security officers were having to believe or leave, it is completely reasonable the Golebiewski would have attended a pre-shift meeting at this time to gauge the officers' concerns. Flamingo could not thrive without impeccable customer service, and, as the director of security, Golebiewski had an obligation to make sure his department was not the black sheep. Indeed, Golebiewski made a habit of attending pre-shift

meetings at the various HIFOB properties. (Tr. 427:9-17, 460:19-461:10). Therefore, when viewed in context, there was nothing inherently intimidating or out of the ordinary about officers being asked about their problems at a pre-shift meeting in general, or airing their grievances with Golebiewski in particular.

Further, even if union organizing was the sole motivation for holding the meeting, there is nothing inherently unlawful in an employer presenting its views of unionization to its employees. "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique" of unionization. *NLRB v. Pratt & Whitney Air Craft Div*., 789 F.2d 121, 134 (2d Cir. 1986). As to the nature of the information sought, assuming that Golebiewski did ask employees in a group setting to volunteer their thoughts on union representation, the context of this discussion takes it outside the bounds of unlawful interrogation. There were 8 to 10 officers present and only one supervisor in the meeting. (Tr. 324:13-16). The officers were used to interacting with Golebiewski and coming to him with their grievances. Under these circumstances, an intimate meeting designed to engage in an honest discussion about unionization, not to pressure employees one way or the other, is not a violation of the Act.

Finally, there is no evidence that the employees felt they could not be honest with Golebiewski, nor that they refrained from openly criticizing management to him. The security department had a culture which encouraged, and specifically solicited, officers' complaints, as Bizzarro's own testimony demonstrates. Bizzarro relayed that once Golebiewski told the officers he did not understand where their complaints about management were coming from, the officers started "expressing their complaints" and that Bizzarro himself was critical of his

supervisors on a number of issues. (Tr. 238:6-12, 277:9-11). Meadows, too, testified that Bizzarro was very open about his dissatisfaction during the meeting, and was very open with other employees about his union support. (Tr. 174:12-24). Based on the totality of the circumstances, it is clear that the October 14th pre-shift meeting was not an unlawful interrogation, and Amended Complaint paragraph 5(e)(2) should therefore be dismissed.

4. Golebiewski Did Not Solicit Employee Grievances in Order to Dissuade Them From Supporting the Union

Golebiewski's October 14th conversation with the officers was also not an unlawful solicitation of grievances. As ample hearing testimony demonstrated, it was routine practice for management, including Golebiewski, to ask employees if they had any complaints or problems during pre-shift meetings. (Tr. 367:10-15, 380:5-381:2, 427:9-17, 428:3-23). An employer does not violate the Act by simply continuing an open door policy through an organizing campaign. *See Wal-Mart Stores, Inc.*, 340 N.L.R.B. 637, 640 (2003), *enforced as modified*, 400 F.3d 1093 (8th Cir. 2005). In finding a violation here, the ALJ, yet again, ignored the past practice and relevant context in which this meeting and Golebiewski's statements occurred. There is no evidence that in listening to the employees complaints Golebiewski made any promise, implicit or explicit, to resolve those complaints if the employees did not elect a union. A willingness to listen to grievances, without evidence of a promise to resolve those grievances, is not an unfair labor practice. *See Idaho Falls Consol. Hosps., Inc. v. NLRB*, 731 F.2d 1384, 1386-87 (9th Cir. 1984). The October 14th meeting was not an unlawful solicitation of grievances, and Amended Complaint paragraph 5(e)(3) should be dismissed.

5. Casali's Transfer was Unrelated to the Organizing Campaign

Casali's transfer was not the result of the union organizing campaign. Golebiewski, Willis, Johnson, and Berberich all testified that moving supervisors between the different HIFOB

properties was a key component of the cross-training philosophy, and the exchange of Willis and Casali was planned long before October 14, 2011. (Tr. 401:12-19, 403:3-18, 463:14-464:11, 526:15-527:3, 565:15-18, 586:11-21). Golebiewski announced Casali's transfer at the October 14th meeting simply as a natural response to Meadows raising issues that he had with Casali. (Tr. 410:12-411:6). The ALJ's rote rejection of "Respondent's defense that the decision to transfer Casali had been made some time before the October 14 meeting," without even addressing the copious testimony establishing that to be the case, is yet another example of his tendency to ignore important factual foundations. (Dec. 16).

Moreover, contrary to the ALJ's findings, the fact that employees might interpret Casali's transfer as a benefit does not make the transfer unlawful. An employer does not violate the Act simply because it announces a pre-planned benefit while a union organizing campaign happens to be occurring. *See Stanadyne Auto. Corp*., 345 N.L.R.B. 85, 91 (2005) (finding employer did not violate the Act by announcing a planned increase in pension benefits prior to a election), *aff'd sub nom. UAW Int'l v. NLRB*, 520 F.3d 192 (2d Cir. 2008); *Sara Lee Bakery Group*, 342 N.L.R.B. 136, 142 (2004) ("[A]n employer does not violate the Act by promising or granting a benefit during an election campaign, as long as the employer can demonstrate that the benefit or increase was planned and decided upon prior to the commencement of any union activity.") (citation omitted), *aff'd*, 185 F. App'x 691 (9th Cir. 2006). Amended Complaint paragraph 5(e)(4) should therefore be dismissed.

6. Golebiewski Did Not Threaten Employee's With More Strictly Enforced Work Rules

Golebiewski did not threaten the officers during the October 14th meeting. Initially, the ALJ's credibility finding in favor or Bizzarro's version of events should be discarded for the reasons already stated. The ALJ's selective judgment as to when to accept and not to accept

Bizzarro's testimony is reason alone to discredit the credibility finding. (Compare Dec. at 21 with Dec. at 26).

Even crediting Bizzarro's recollection of the conversation, Golebiewski merely told the employees that "if we had a union that he would not be able to help them with personal issues or bend the rules for certain people because he had done that in the past to save their jobs." (Tr. 237:15-18). "An employer does not violate the Act by informing employees that unionization will bring about 'a change in the manner in which employer and employee deal with each other.' To the contrary, truthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)." *United Rentals, Inc.*, 349 N.L.R.B. 190, 191 (2007) (citations omitted). This protection extends to statements that an employer may have to resolve grievances differently if operating under a union contract. *See Sara Lee*, 348 N.L.R.B. No. 76, 2006 WL 3412554, at *5 (Nov. 22, 2006) ("An employer may lawfully tell its employees that its freedom to deal directly with them will be constrained if they choose union representation...The fact that such a statement might tend to discourage union support among employees who prefer to deal with their employer on an individual basis, does not render the statement unlawful."). At the hearing, Golebiewski testified that it was his personal experience when he previously worked in a union setting there was stricter enforcement of rules when a union was present because some of management's flexibility was taken away. (Tr. 103:3-15). Golebiewski was honestly relaying, based on his prior experience, the effects unionization may have. In finding that Golebiewski's statements constituted a threat, the ALJ, again, disregarded Respondent's free speech rights. Complaint paragraph 5(e)(5) should be dismissed.

E. THE ALJ'S FINDINGS THAT THE OCTOBER 16, 2011 FLYER VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

Around October 16, 2011, a flyer was distributed to security officers outlining issues Flamingo believed the officers should consider before signing a union authorization card. (Tr. 243:22-244:16; G.C. Exh. 6). The purpose of the flyer was to address questions officers had been asking their supervisors. (Tr. 97:3-12). Several words on the flyer were typed in all caps, including SPFPA, HIFOB, UNION CARDS, FACTS, BIZARRE, PLEASE and REAL-WORLD (G.C. Exh. 6). Because of the capitalization of the word "bizarre," Bizzarro testified that he believed the flyer was targeting him. (Tr. 245:1-5).

2. ALJ's Findings

The ALJ found that officers reading the flyer would have construed the capitalization of the word "bizarre" as a reference to Bizzarro, and "seeing his name used and convoluted in this way would have served to alert those employees that the Respondent was aware of Bizzarro's union activities and was targeting him and publicly ridiculing him for those activities." (Dec. 17). The ALJ thus found that "the play on words using Bizzarro's name in the flier created an impression among the security officers that their union activities might be under surveillance by the Respondent." (Dec. 18). The ALJ further found that capitalizing Bizzarro's name constituted "ridicule" and "was a personally demeaning action taken by Respondent against a union supporter because of his union activities." (Dec. 18). In addition, the ALJ concluded that the October 16th flyer was an unlawful threat. Both of these findings are unfounded.

3. The Flyer Did Not Create an Impression of Surveillance

Flamingo did not create an impression of surveillance simply by capitalizing a particular word in the flyer. To conclude this constituted surveillance, the ALJ was forced to make several

predicate findings. First, that the use of the word "Bizarre" was in fact a reference to Bizzarro. This is by no means a foregone conclusion. "Bizarre" was merely one of thirteen words capitalized in the flyer. (G.C. Exh. 6 (also capitalizing SPFPA (four times), HIFOB (twice), FACTS (twice), UNION CARDS (once), PLEASE (once), and REAL-WORLD (once)). Furthermore, the October 16th flyer is not the only flyer that used capitalization for emphasis. In another flyer, Flamingo also capitalized the words "EMPTY SALES PITCH" and "MEETING," along with the abbreviations SPFPA and HIFOB. (G.C. Exh. 7). As the ALJ found, Bizzarro had a tendency towards "exaggerated and embellished testimony," had a habit of "magnifying his importance to the Respondent" and was "highly suspicious" of the Employer's conduct. (Dec. 10). Bizzarro's belief that the flyer was directed towards him is simply a result of his paranoid, self-aggrandizing view that Flamingo viewed him as a significant threat.

Second, assuming the connection between the word and the name, the ALJ had to determine that, by referencing Bizzarro, Flamingo was actually saying it was monitoring his activities. However, there is simply no support for this conclusion. Reference alone to his name does not translate into surveillance. Nothing in the flyer stated or suggested that. The term bizarre, a synonym for odd or unusual, was simply used as a reference to the fact that it was odd that some employees were pushing for a union without a proven track record.[7] Even if it were true that by capitalizing "bizarre" Flamingo intended to imply that it was odd that Bizzarro was pushing this union, such an interpretation does not translate to surveillance.

[7] The exact sentence at issue in the flyer is: "We realize 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 that has absolutely no track record for achieving 'better' or 'more' for its dues-paying members." (G.C. Exh. 6).

Third, the ALJ then layered the additional finding that the October 16th flyer would have reasonably led other employees to believe Flamingo was monitoring their union activities. As Golebiewski testified, and as the text of the flyer makes clear, it was meant to address questions Flamingo had gotten *from the officers*. (Tr. 97:3-12; G.C. Exh. 6). "An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided." *Bridgestone Firestone S.C.*, 350 N.L.R.B. 526, 527 (2007) (citations omitted). Moreover, even if other officers thought the word "bizarre" was meant to refer to Bizzarro, it was no secret that Bizzarro was the driving force behind the organization effort. (Tr. 340:7-8, 340:25-341:7, 631:14-19). Relaying information the employees have "voluntarily provided information about the existence of the union campaign" is not surveillance. *Bridgestone Firestone*, 350 N.L.R.B. at 527. In order for an employer's conduct to constitute surveillance, a reasonable employee must be able to assume from the conduct that the employer is monitoring his or her activities. *See Frontier Tel. of Rochester, Inc*., 344 N.L.R.B. 1270, 1276 (2005), *enforced*, 181 F. App'x 85 (2d Cir. 2006). Here, no reasonable employee could assume that an employer's reference to the fact that an open advocate's choice of unions was odd to mean that the employer was monitoring their non-open union activities as well. Amended Complaint paragraph 5(f)(1) should therefore be dismissed.

4. <u>The Flyer Did Not Constitute a Threat</u>

Even if the Board finds that the capitalization of the term "bizarre" was meant to refer to Bizzarro, the flyer still did not constitute a threat. The ALJ's finding to the contrary is a clear example of his lack of appreciation for the protections afforded to employers by Section 8(c). To run afoul of the Act, an employer's conduct must be such that a reasonable person would be dissuaded from engaging in protected activity. *See Madison Indus., Inc.*, 290 N.L.R.B. 1226, 1229 (1988) ("[A]n employer violates Section 8(a)(1) of the Act if its actions would tend to

coerce a reasonable employee"). Here, the ALJ's only basis for finding the flyer threatening is his interpretation that "the play on words using Bizzarro's name" added up to "holding an employee up to ridicule" and "was personally demeaning" to him. (Dec. 18). First, the ALJ's interpretation of "ridicule" is patently unreasonable. Even if the flyer referred to Bizzarro, it did not make any negative statements about him personally. At worst, the play on words would bring attention to the fact that management knew Bizzarro was leading the union organizing drive, but Bizzarro's union proclivities were well known and he made no attempt to hide his identity or his union allegiance. Indeed, Bizzarro was posting pro-union flyers as well, even using Flamingo's copier to do so. (Tr. 274:7-12). Reference to Bizzarro's very public union support was not ridicule. Second, even if the flyer did ridicule Bizzarro, such ridicule would be a perfectly valid exercise of Flamingo's free speech rights. "Section 8(c) does not require fairness or accuracy, and does not seek to censor nastiness." *Optica Lee Borinquen, Inc.*, 307 N.L.R.B. 705 (1992) (citation omitted), *enforced*, 991 F.2d 786 (1st Cir. 1993); *see also Trailmobile Trailer, LLC*, 343 N.L.R.B. 95, 95-96 (2004) (finding disparaging comments did not violate the Act). Clearly then, Amended Complaint paragraph 5(f)(2) must be dismissed.

F. THE ALJ'S FINDINGS THAT GOLEBIEWSKI'S MID-NOVEMBER 2011 DISCUSSIONS WITH EMPLOYEES VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

Around mid-November 2011, Golebiewski ran into security officer Evans while Evans was on duty near the beer pong area of O'Sheas. (Tr. 298:3-9, 435:19-25). Both men testified that they then had a conversation of approximately two minutes during which they exchanged various pleasantries. (Tr. 307:1-308:1, 436:11-20). Golebiewski explained that it is his typical practice when he is walking around to ask officers "how they're doing, if they have any issues, concerns, questions of me" because Golebiewski does not see them that often and "it's an

opportunity to build a relationship with the employee. I'll also get information as to, you know, what's going on, who we have in custody, is there a fire alarm... Just get an idea of what's going on in that general area at the time." (Tr. 438:11-23). Consequently, on this particular occasion, Golebiewski asked Evans "how beer pong was going. Was there any problems with the beer pong, any ID checks, or do we have enough wrist bands." (Tr. 436:11-20). According to Evans, Golebiewski also asked him what his opinion of the union was, to which he replied "I haven't made up my mind, I don't know what my opinion is yet." (Tr. 298:21-299:5, 306:1-25). Once Evans told him he had not formed an opinion on the union, Golebiewski simply "didn't ask [him] any further questions and walked away." (Tr. 298:24-299:5, 306:1-25). Golebiewski does not recall raising the union in this conversation with Evans. (Tr. 437:2-4, 438:4-7).

2. ALJ's Findings

Discrediting Golebiewski's testimony, the ALJ found that Golebiewski "turned the employees' desire for union representation into a campaign they were waging against him, asking them what problems they had with him." (Dec. 29). The ALJ thus credited Evans' account that Golebiewski specifically asked about his union proclivities. (Dec. 29-30). Taking the totality of the circumstances approach as first set forth in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the ALJ concluded that Golebiewski's question to Evans constituted an unlawful interrogation. (Dec. 30). According to the ALJ, Evans would not have expected this question to come from Golebiewski while making his rounds, and because Evans was a rank-and-file officer while Golebiewski was security director, Evans must have felt "discomfort... in this one on one exchange with his boss."

3. Golebiewski Did Not Interrogate Evans

Golebiewski's conversation with Evans was not an interrogation. As with the October 14th meeting, the ALJ's contrary conclusion completely ignores the relevant context. As

explained at length in Section II.B *supra*, Flamingo had a culture of open dialogue between employees and management, and Golebiewski made a conscious effort to further that culture in his personal interactions with the officers. Furthermore, even crediting the ALJ's findings as to the substance of the conversation with Evans, the ALJ's conclusion that the conversation violated the Act is wrong.

Under the *Bourne* framework "interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards" which include consideration of:

> (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.

Bourne v. NLRB, 332 F.2d at 48.

Here, the *Bourne* factors weigh against a finding of interrogation. It was completely normal for Golebiewski to talk to Evans about any concerns he was having. Golebiewski's usual practice when he came across a security officer was to take the opportunity to build a relationship with the officer and get an idea of what was going on on the floor and, in fact, Golebiewski and Evans had many conversations near the beer pong area. (Tr. 435:19-21, 438:11-23). Evans' testimony confirms that the conversation began with an informal exchange of pleasantries and that the entire conversation took "[t]wo minutes at the maximum." (Tr. 307:1-308:8).

There is no testimony that Golebiewski made any threatening comments to Evans, or suggested in any way that Evans' answer would be used against him. When Evans responded frankly that he had not formed an opinion of the union yet, Golebiewski did not ask him any further questions and simply walked away. (Tr. 298:24-299:5, 306:1-25). It is highly unlikely that an employee would perceive a casual conversation lasting less than two minutes as threatening, and Evans did not testify that he felt threatened or coerced in any way. Thus, even assuming the exchange occurred as Evans testified, such an informal exchange between a supervisor and an employee during the course of the work day is not coercive interrogation. *See NLRB v. Champion Labs., Inc.*, 99 F.3d 223, 227 (7th Cir. 1996) (finding supervisor's question to subordinate regarding how many people attended union meeting was not interrogation). Indeed, "'[i]t would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to interfere with concerted activities in violation of section 8(a)(1).'" *Id.* at 228 (citations omitted). Amended Complaint paragraph 5(n) should, therefore, be dismissed.

G. THE ALJ'S FINDINGS THAT GOLEBIEWSKI'S DECEMBER 2, 2011 INTERACTION WITH RUDY VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

On or around December 2, 2012 Golebiewski encountered security officer Rudy speaking to a cigarette girl, whom he knew to be Rudy's girlfriend, in Flamingo's hotel lobby. (Tr. 359:18-360:12, 430:9-432:8). Accordingly to Golebiewski, when he spotted Rudy and his girlfriend he also noticed a pair of customers standing and waiting for Rudy to finish his conversation. (Tr. 431:12-18). Rudy testified that Golebiewski "came up to me and put his hand on my shoulder and said, 'If this was a union area, I would have to write you up.'" (Tr. 359:23-

360:1). Golebiewski testified that he "tapped him on his shoulder and said very quietly so the guests wouldn't hear it... If there was a Union contract it would have language in it about guest service. And then I nudged my eyes towards the customers. And he looked, and that's when he realized that there were customers waiting for him." (Tr. 431:24-432:5). Rudy responded that he was glad he was not getting written up or that he was glad there was no union contract. (Tr. 360:8, 432:8). According to Rudy, after he responded to Golebiewski, "security shift manager John Schultz, who was there as well, looked at me and said, 'Yeah, you can't talk to any women under 50. The cougars are okay.' And I said, 'Does that include guests?' And he laughed and walked off." (Tr. 360:8-12). Golebiewski further testified that his remark to Rudy was related to a conversation the two men had had two weeks prior regarding how contracts were negotiated. (Tr. 432:9-435:14). Golebiewski had explained to Rudy that "under negotiations everything is negotiable. And that the hotel and company would definitely include customer service spotlights and sweeps and taking care of the customers, guest interactions." (Tr. 432:21-24).

2. ALJ's Findings

The ALJ found that while Golebiewski could have instructed Rudy to return to work without issue, his reference to a "potential union contract and what impact contractual language would have on such a situation" was "implicit notice that under a union contract Golebiewski would have been required to take some disciplinary action against Rudy." (Dec. 19). The ALJ thus found Rudy's comments to be a "threat of a changed condition of employment in which past leniency would be eliminated by the existence of a union contract." (Dec. 19).

3. Golebiewski Did Not Threaten Rudy

The ALJ's finding that Golebiewski's comments to Rudy constituted a threat is unfounded in law or fact, and, again, demonstrates the ALJ's fundamental misunderstanding of an employer's free speech rights. If an ALJ "may take management statements that very

emphatically assert a risk, twist them into claims of absolute certainty, and then condemn them on the ground that as certainties they are unsupported, the [employer's] free speech right is pure illusion." *UFCW Union Local 204 v. NLRB*, 506 F.3d 1078, 1081 (D.C. Cir. 2007) (citations omitted).

As Golebiewski explained, his comment to Rudy was related to a conversation the two men had weeks earlier about the collective bargaining process. An employer is well within its rights to express its honest opinion about possible effects of unionization. *See TNT Logistics N. Am., Inc.*, 345 N.L.R.B. 290, 290 (2005) ("It is well settled that an employer is free to communicate to his employees any of his general views about unionism...He may even make a prediction as to the precise effect he believes unionization will have on the company."); *NLRB v. Gen. Tel. Directory Co.*, 602 F.2d 912, 914 (9th Cir. 1979) ("It is a well established rule that the predictions or opinions of an employer, reasonably based on fact, relative to the possible effects of unionization within its company, are not violative of the National Labor Relations Act."). Indeed, an employer's admonishment that "nothing is guaranteed in a contract and that everything is up for negotiation" is "an accurate description of the collective bargaining process" and is not an unlawful threat. *Conn. Humane Society*, 358 N.L.R.B. 1, 2012 WL 1249565, at *35 (Apr. 12, 2012). Given the vigor with which Flamingo management had been pushing the focus on customer service in preceding months, it is completely believable that the Employer would, in fact, have included customer service requirements in a collective bargaining agreement.

Moreover, Rudy's reaction to Golebiewski does not suggest that he even subjectively felt threatened by Golebiewski's comments. Rather, Rudy testifies that he and security shift manager John Schultz joked about whether he should take Golebiewski's comment to mean he should only talk to "cougars." (Tr. 360:8-12). Clearly playing on the fact that the cigarette girl was

Rudy's girlfriend, the men were obviously joking about which women Rudy could flirt with while on duty. *See, e.g., Waste Mgmt. of Ariz., Inc.*, 354 N.L.R.B. 1339, 1351(2005) (finding comment that employee "may want to look for a job with another waste company" did not constitute a threat where comment was "intended to be nothing more than an attempt to engage in teasing of a fellow employee."). Therefore, the ALJ's findings that Golebiewski's comments to Rudy constituted an unlawful threat should be reversed, and Amended Complaint paragraph 5(g)(1) should be dismissed.

H. THE ALJ'S FINDING THAT BAKER'S JANUARY 13, 2012 INTERACTION WITH BIZZARRO VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

Baker is the assistant general manager and vice president for the HIFOB properties and is responsible for overseeing the gaming, hotel, food and beverage, security and sometimes leased operations of those properties. (Tr. 120:3-24). Baker and Bizzarro were socially acquainted through their wives prior to Bizzarro's employment with Respondent, including through instances where the two couples attended yoga classes together. (Tr. 125:17-21, 266:18-268:7). In fact, Baker put in a referral for Bizzarro to help him acquire his job as a security officer at Flamingo. (Tr. 125:22-23; 246:5-8).

Sometime in mid-January 2012, Bizzarro and Baker ran into each other in a hallway and Baker expressed his disappointment that Bizzarro had not come to him to express his problems with Flamingo. According to Bizzarro, Baker was waiting for him when he came into work, and when Bizzarro asked Baker how he was doing, Baker replied that he was upset with Bizzarro and thought he had "betrayed him by organizing the security officers and trying to bring in a union." (Tr. 246:11-19). Bizzarro further alleges that Baker followed him as he walked to the time clocks to punch in and continued to yell at him "about how he felt I had betrayed him and that I

didn't follow the chain of command that I should've.... that I put his job in jeopardy by doing this, that I went outside the chain of command, I should've stayed within the hotel, I should've gone to human resources with my complaints." (Tr. 246:20-247:21, 269:8-270:6). Bizzarro testified that he responded to Baker by telling him that "it wasn't anything personal against him. The security officers wanted representation." (Tr. 247:6-10).

Baker's recollection of the conversation is different. According to Baker he ran into Bizzarro in the hallway as he was leaving work and "said something to the effect of, you know, Francis, I just want to tell you that, you know, I'm just very disappointed that all this has occurred and you just didn't come to me if there was a problem, you know, in the organization." (Tr. 488:10-489:16). Bizzarro then walked off and Baker proceeded to walk to his car, but ran into Bizzarro again as he passed the time clocks on his way to the garage. (Tr. 489:17-491:2). Baker then followed up on the earlier conversation, asking Bizzarro why he walked away and telling him that he just wanted to have a conversation since he was "personally pretty – just upset and disappointed" that Bizzarro did not come to him personally when he had helped him get the job at Flamingo. (Tr. 491:6-493:5). The conversation ended and Baker simply turned around and finished walking to his car. (Tr. 493:6-9). The total conversation, including the interaction in the hallway and the second conversation by the time clocks, took less than five minutes. (Tr. 493:10-19). Baker testified that he never told Bizzarro that he was disloyal or that management would take any adverse action against employees if they supported the union. (Tr. 500:3-21). Security manager Berberich, who overheard the interaction between Baker and Bizzarro, testified that Baker asked Bizzarro something along the lines of "how could you do this to me" given that Baker had helped get him the job when he was having family issues. (Tr. 589:18-591:24).

2. ALJ's Findings

The ALJ credited Bizzarro's version of the story over Baker's, despite explicitly stating that Bizzarro had "a tendency to exaggerate and embellish so as to put himself in the best possible light" because, according to the ALJ, Baker appeared more nervous than someone in his position should have and appeared to feel "deeply betrayed by Bizzarro's union activity." (Dec. 21). The ALJ thus accepted Bizzarro's representations that "Baker was red in the face, screaming at him, and said that Bizzarro's actions had placed [Baker's] job 'in jeopardy,' and that Bizzarro had 'betrayed him,' and found that by making these comments Baker "threatened [Respondent's] employees by informing them that they were disloyal because employees supported the Union and engaged in union activities." (Dec. 21). The ALJ then further found that in expressing his personal disappointment that Bizzarro had not come to him to talk about his problems, Baker was "promulgating a rule requiring employees to bring complaints through the human resource department and through the chain of command" and "was implicitly threatening Bizzarro with disciplinary action for failing to do so." (Dec. 22). Incongruously, the ALJ makes this finding despite also explicitly finding that "General Counsel's contention that Bizzarro would have reasonably understood [Baker's comments] to mean that because the employees had sought representation from the Union that the Respondent would no longer resolve their complaints is a leap of logic too great to reasonably make." (Dec. 22).

3. The Board Should Not Accept Bizzarro's Version of the Interaction

As an initial matter, the Board should not defer to the ALJ's credibility determinations regarding Bizzarro's version of the story. The ALJ explicitly found, throughout his Decision, that Bizzarro: purposefully attempted to tie management's activities to what he knew was protected conduct under the Act, even when such a connection could not logically be found (Dec. 6); had "a tendency to exaggerate and embellish his testimony, and to over emphasize certain

events so as to place himself and his actions in the best possible light" (Dec. 7); had "much of his personal self worth invested in trying to obtain a successful outcome of this case" (Dec. 7); "exaggerated and embellished" an interaction with his supervisor because he had "a habit of magnifying his importance to the Respondent, which I do not believe was always the case" (Dec. 10); and gave testimony that was "confusing, inconsistent, and somewhat difficult to believe" (Dec. 11). For these reasons, the ALJ rejected Bizzarro's version of events several times, including in relation to his testimony regarding an alleged incident with Baker. (Dec. 6-7, 9-10, 25-26).

Where an ALJ's credibility determinations are "inherently unreasonable or self-contradictory," those determinations are not binding. *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008); *see also Tom Johnson, Inc.*, 154 N.L.R.B. 1352, 1353 (1965) (rejecting ALJ's credibility determination where the testimony was "so grossly confusing, self-contradictory, equivocal, evasive, and in part apparently false, as to render such credibility findings wholly insupportable."), *enforced*, 378 F.2d 342 (9th Cir. 1967). Here, the ALJ's own findings as to Bizzarro's character and credibility militate against accepting his testimony regarding the interaction with Baker. The fact that Baker recalls the conversation as a spontaneous run-in where he merely expressed his personal disappointment, while Bizzarro recalls it as a pre-meditated attack where Baker waited for him in the hallway and accused Bizzarro of betrayal, is merely a reflection of Bizzarro's penchant for aggrandizement and delusions of self-importance. The Board should thus discredit Bizzarro's inflated testimony, and instead credit the more realistic account provided by Baker.

4. Baker Did Not Threaten Bizzarro

The ALJ erred in finding Baker's conversation with Bizzarro constituted an implicit "threat" that employees who supported the union were disloyal and could be terminated. (Dec.

21-22). Baker never told Bizzarro that he was disloyal. Rather, Baker merely expressed his personal feelings that he was upset Bizzarro was unhappy with the organization, and he wished Bizzarro had brought his concerns to him personally. "[A]n expression of hurt feelings and surprise does not amount to unlawful restraint or coercion within the meaning of Section 8(a)(1) of the Act." *Foamex,* 315 N.L.R.B. 858, 862 (1994) (citation omitted). Given the past relationship between Baker and Bizzarro, and the fact that Baker played a role in bringing Bizzarro into the company, Baker's comments are completely understandable and objectively non-coercive. Amended Complaint paragraph 5(h)(1) should therefore be dismissed.

5. Baker Did Not Promulgate a Work Rule

The ALJ also erred in finding Baker's conversation with Bizzarro constituted promulgation of a work. As previously explained, the ALJ had a penchant for taking a given set of facts and finding, through unfounded logical leaps, that those facts violated the Act in multiple ways. The ALJ's findings here are yet another example of that propensity. As explained in Section IV.B.4 *supra,* one isolated conversation between an employee and a member of management cannot constitute promulgation of a work rule. *See, e.g., Hanson Material Serv. Corp.*, 353 N.L.R.B. No. 10, 2008 WL 4490048, at *10 (Sept. 25, 2008). There is no evidence that the substance of Baker's comments to Bizzarro were either communicated to other security officers or interpreted to mean employees would be disciplined if they did not follow the "chain of command." Indeed, the idea that an employee had to follow the chain of command is contrary to what Meadows, Golebiewski, and Baker all testified as to their understanding of Flamingo's actual rule to be. Officer Meadows testified that while the issue of the chain of command came up in an October 14, 2011 pre-shift meeting, it was not specified that employees could only use that method for resolving complaints and that it was not his understanding "that you had to

follow that chain." (Tr. 164:22-165:23). Similarly, Golebiewski testified that while there is a chain of command and "[w]e suggest that they go to their immediate supervisor right away when they have a question… it's not required. And they can go to whoever they want." (Tr. 426:16-427:8). Finally, Baker confirmed that the chain of command is "a way to resolve issues that may exist" but is not "a structural limitation of getting issues resolved." (Tr. 521:11-522:6). Characteristic of his tendency to ignore evidence, the ALJ's Decision does not reference any of this other chain of command testimony. Baker's conversation with Bizzarro cannot be considered promulgation of a rule. Not only would such an interpretation conflict with the general understanding of numerous witnesses, but the ALJ himself found that it would have been unreasonable for Bizzarro to conclude from the conversation that Flamingo would no longer resolve employee complaints. Amended Complaint paragraph 5(h)(3) should therefore be dismissed.

I. THE ALJ'S FINDING THAT WILLIS' JANUARY 15, 2012 COMMENTS VIOLATED THE ACT SHOULD BE REVERSED

1. Factual Background

Security supervisor Willis supervises about 35 officers on the graveyard shift at the Flamingo. (Tr. 527:4-7). As set out above, Willis was transferred to Flamingo in mid-October 2011 when the prior security supervisor, Rick Casali, was transferred to Harrah's for cross-training. (*See* Section IV.D *supra*). On December 29, 2011, security supervisor Heath sent an email to the security officers, copying the HIFOB Security Supervisors, which contained excerpts from the collective bargaining agreement negotiated by SPFPA at the Aquarius Hotel and Casino in Laughlin, Nevada. (G.C. Exh. 12). Over the next few weeks, various individuals, including Bizzarro, used Heath's email string to debate the pros and cons of unionization. (G.C. Exh. 12). One of the contract excerpts included in Heath's email was Article 4, Section H, a

management rights clause which referenced the employer's ability to subcontract. (G.C. Exh. 12).

Sometime in mid-January 2012, Willis made a statement during a pre-shift briefing that he was tired of being told what he could and could not say about the union. (Tr. 299:10-24, 536:3-23). According to officer Rudy, Willis' exact words were along the lines of "I've been quiet on the subject long enough and now I'm going to have to tell you how I feel because, you know, I care about you guys and I want you to make the right decision." (Tr. 381:8-13). Willis spends about 70% of the time on the casino floor. (Tr. 531:9-14). He therefore interacts with the officers on a routine basis. After excerpts of the Aquarius contract were sent to the officers, they naturally started coming to Willis with questions, and specifically, with questions about whether certain security services would be contracted out. (Tr. 531:21-537:12). At the mid-January 2012 pre-shift briefing, Willis finally agreed to give the officers his opinion and told them that he "felt that this was not a strong enough Union to represent them" because the union's bylaws "don't let the employees vote the first contract in" and "in this Aquarius contract they really didn't stand up for the employees because they allowed subcontracting of jobs out. They weren't a big enough Union to give them benefits such as medical or a pension plan like the Culinary and Teamsters do." (Tr. 536:12-23).

According to security officers Evans and Rudy, Willis also made certain vague comments about an unnamed union "instigator." (Tr. 299:10-16). Evans testified that Willis "stated that the instigator of the union situation had been given a favor and given the job that he had and, as a result of the family issues, he was having problems at home and he was given a favor with his job." (Tr. 299:18-24). Rudy testified that management made comments about the union organizing campaign along the lines of "'Well, you know who it is and you know who's doing

this,' but they never use a name" and that in a January pre-shift briefing Willis said "'Do you really want a guy who was juiced in by upper management to represent you in this cause?'" which Rudy understood to refer to Bizzarro being given his job by Baker. (Tr. 361:12-362:4, 364:18-23). Willis does not recall making any references to Baker getting Bizzarro his job, and indeed testified that when officers starting asking Willis what happened after Bizzarro and Baker's confrontation a few days earlier (*see* Section IV.K *supra*), Willis did not even know Baker and Bizzarro were friends at the time. (Tr. 530:20-24).

2. ALJ's Findings

The ALJ credited the testimony of Evans and Rudy, finding "that in January of 2012, Willis made several comments to security officers regarding an unnamed officer that Willis described as the 'instigator of the union situation' who was given his job as a 'favor' because he had family problems, and also as somebody trying to represent the employees who got his job because he was 'juiced in.'" (Dec. 24). According to the ALJ, the officers would reasonably have understood Willis' remarks to be referring to Bizzarro, which "would likely leave the security officers with the impression that Bizzarro's union activities were under surveillance by management." (Dec. 24). In reaching this conclusion, the ALJ found that while "it was at least an 'open secret' that Bizzarro was the chief union organizer, Bizzarro had not directly represented himself to management as such" and "Willis' remarks were designed to single Bizzarro out as the union organizer and to disparage him." (Dec. 24).

3. Willis Did Not Create an Impression of Surveillance

The ALJ erred in finding Willis' comments to the officers constituted surveillance. Again, the ALJ's statement that Bizzarro's organizing role was an "open secret" is a distorted interpretation of the testimony that ignores critical facts. It is indisputable that by mid-January

2012 Bizzarro was the self-identified union leader. On January 7, 2012, Bizzarro responded to Heath's Aquarius email string, stating, among other things:

> In the days leading up to January 19th, Officers will be subjected to a ton of "Important Information" provided to you by management. Please understand this is a tactic used to scare employees into a "No" vote...
>
> I have asked if a Union representative could be allowed to come into our briefings. Management laughed at me.
>
> Your decision on January 19th will not only affect you, but every Security Officer that comes after. Be sure to attend the Union meeting on Tuesday January 10th, to give the Union a chance to make their case. If you cannot attend, call Dwayne or Steve with your questions.
>
> Please read the letters sent to you by the Union, especially the Q&A section about the AFL-CIO, first Union contract and membership dues.
>
> Please feel free to email me with any questions. I will try to post other contracts from SPFPA.

(G.C. Exh. 12, page 4).

All "HIFOB Security Supervisors" were copied on this email. (G.C. Exh. 12, page 4). The ALJ's finding that Bizzarro "had not directly represented himself to management" as the chief union organizer was therefore in direct conflict with the record evidence and must be rejected. *See Marshall Engineered Prods. Co.*, 351 N.L.R.B. 767, 769-70 (2007) (rejecting the findings of an Administrative Law Judge that were contrary to the objective evidence).

Further, even if Evans' and Rudy's testimony regarding the substance of Willis' comments were true, those comments would not constitute surveillance. "'The Board's test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance.'" *Grouse Mountain Assocs. II*, 333 N.L.R.B. 1322, 1322 (2001) (citations omitted), *enforced*, 56 F. App'x 811 (9th Cir. 2003). Here, no reasonable employee could assume from Willis' statements that his or her union activities were being monitored by Flamingo. As Bizzarro's January 7th email amply demonstrates, he openly and

unabashedly represented himself as a union advocate and leader of the organization drive, even telling employees that they should contact him personally with any questions about the union. (G.C. Exh. 12, page 4). An employer does not create an impression of surveillance by merely relaying information employees have provided voluntarily, and Flamingo did not create an impression of surveillance here by referring to Bizzarro's self-proclaimed position as chief union organizer. *See Bridgestone Firestone S.C.,* 350 N.L.R.B. 526, 527 (2007) (relaying information employees have volunteered does not constitute surveillance); *Baptista's Bakery, Inc.*, 352 N.L.R.B. 547, 573 (2008) (finding "comment as to who was the Union's observer" did not constitute surveillance where "it was well known that [the employee] was a strong supporter of the Union."). Additionally, referring to a union supporter as an "instigator" or someone who has been "juiced in" is not a violation of the Act. Neither Section 8(c) nor the First Amendment require an employer to be nice. *See Trailmobile Trailer, LLC*, 343 N.L.R.B. 95, 95-96 (2004) (finding various disparaging remarks, including that "people in the Union were stupid," "did not suggest that the employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights" and, as a result, did not violate the Act). Therefore, Amended Complaint paragraph 5(i) should be dismissed.

J. THE ALJ'S REMEDY AND ORDER ARE INAPPROPRIATE

As set forth above, the ALJ's findings and conclusions are inconsistent with the record evidence and applicable law. As a result, the ALJ's recommended remedy and order are also inconsistent with the record evidence and applicable law, and therefore should not be adopted.[8]

[8] Respondent also specifically objects to the portion of the ALJ's Remedy and Order requiring Respondent to distribute notice electronically in addition to physically posting paper notices. Respondent will reserve its arguments on the appropriateness of the order, however, for the compliance phase, should such a phase be reached. (Exception No. 49).

V. CONCLUSION

For the foregoing reasons, the Employer respectfully requests that the Board refuse to adopt the ALJ's findings and conclusions with regard to the allegations in Paragraphs 5(b), 5(c), 5(e)(2), 5(e)(3), 5(e)(4), 5(e)(5), 5(f)(1), 5(f)(2), 5(g)(1), 5(h)(1), 5(h)(3), 5(i), 5(m), and 5(n) of the Amended Complaint, and dismiss the Amended Complaint in its entirety.

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD, LLP

By _/s/ Richard N Appel

Richard N Appel
Lawrence D. Levien
Elizabeth A. Cyr
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for the Employer,
Flamingo Las Vegas Operating Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2012, I caused a copy of the foregoing Brief in Support of Exceptions of Employer Flamingo Las Vegas Operating Company, LLC to the Decision of the Administrative Law Judge to be served, via the NLRB e-filing system and electronic mail, on the following:

Cornele A. Overstreet
Regional Director
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Larry A. Smith
Counsel for the Acting General Counsel
National Labor Relations Board – Region 28
600 Las Vegas Blvd. South, Suite 400
Las Vegas, NV 89101
larry.smith@nlrb.gov

Scott A. Brooks
Attorney at Law
Gregory, Moore, Jeakle & Brooks, P.C.
65 Cadillac Square, Suite 3727
Detroit, MI 48226-2893
scott@unionlaw.net

By /s/ Richard N. Appel
Lawrence D. Levien
Richard N Appel
Elizabeth A. Cyr
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for the Employer,
Flamingo Las Vegas Operating Company, LLC