

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**FLAMINGO LAS VEGAS
OPERATING COMPANY, LLC**

and

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

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

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Larry A. Smith
Counsel for the Acting General Counsel
National Labor Relations Board, Region 28
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101
Telephone: (702) 388-6062
Facsimile: (702) 388-6248
E-mail: Larry.Smith@nlrb.gov

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relation Board (the Board), the Counsel for the Acting General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by Flamingo Las Vegas Operating Company, LLC (Respondent), to the Decision (ALJD) of Administrative Law Judge Gregory Z. Meyerson (ALJ) in this matter.¹

By its exceptions and the arguments in support thereof, Respondent seeks to have the Board ignore the record evidence and the well-reasoned credibility determinations of the ALJ that Respondent, among other things: threatened its employees with unspecified reprisals because they engaged in union and concerted activities; threatened its employees with more strictly-enforced work rules, job loss, discipline or discharge if they selected the Union as their collective bargaining representative; threatened its employees by informing them they were disloyal because they supported the Union and engaged in Union activities; promulgated and enforced an overly-broad and discriminatory work rule that its employees had to follow

¹ The ALJD was issued on June 25, 2012.

the chain of command to resolve the employees' complaints; interrogated its employees about their Union membership, activities, and sympathies; solicited its employees' complaints and grievances, and promised them improved terms and conditions of employment to dissuade them from supporting the Union; and created an impression among its employees that their Union activities were under surveillance. Respondent should prevail on its numerous and duplicative exceptions only if the Board chooses to ignore the record evidence and overrule its established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the administrative law judge's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent's exceptions are without merit and should be denied in their entirety.

II. FACTS

A. Respondent's Operations

Respondent operates a hotel and casino, and provides food, lodging and gaming in Las Vegas, Nevada. (GCX 1(o); 1(s))² Respondent's Flamingo property is one of five Caesars Entertainment properties in the "pod" of Harrah's, Imperial Palace, Flamingo, O'Sheas, and Bill's Gamblin Hall and Saloon (HIFOB). (Tr. 59:10-11; 61:15-21; 72:21-25, 73:1-2) HIFOB security operates 24 hours a day, 365 days a year, and employs approximately 300 security officers among the HIFOB properties. (Tr. 63:25, 64:1-2, 15-17) Approximately 120 security officers rotate through the Flamingo, O'Sheas, and Bill's properties as part of a posted schedule common to those three properties. (Tr. 64:3-5; 68:1-9, 16-21)

² RB__ refers to Respondent's Brief in Support of Exceptions followed by the page. Transcript references are: (Tr. __:__) showing transcript page and line or lines. ALJD __:__ refers to JD(SF)-31-12 issued by the ALJ on June 25, 2012, followed by page and line. RX followed by the exhibit number refers to Respondent's exhibits. GCX__ refers to General Counsel's Exhibit followed by exhibit number.

Approximately 50 to 70 security officers are assigned to Respondent's Flamingo property. (Tr. 64:9-14) Respondent's security officers attend pre-shift meetings at the beginning of their shift which generally last 15 to 30 minutes, although some meetings have lasted longer. (Tr. 74:24-25, 75:1-5; 76:18-25, 77:1) The security officers interact with a variety of "undesirable" people as part of their security function, including homeless persons, prostitutes, pimps, thugs, and drug dealers among others. (Tr. 73:7-25, 74:1) Additionally, the security officers are expected as part of their main function "to provide a friendly and safe environment for [hotel and casino] guests and team members while protecting company assets." (Tr. 71:17-21; GCX 4)

B. Respondent's Management

HIFOB's senior management consists of President and General Manager Rick Mazer, Assistant General Manager Paul Baker (Baker), and vice presidents of several departments. (Tr. 60:15-23; 120:12-13; GCX 2) Security Director Eric Golebiewski (Golebiewski) oversees the security department of all HIFOB properties. (Tr. 61:5-7; 123:5-11; GCX 2) Among those reporting to Golebiewski are Investigations Manager Jack Burgess (Burgess) and three investigators. (Tr. 61:24-25, 62:1-14) Seven security shift managers, including Charles Willis (Willis), Cedric Johnson (Johnson), Keith Berberich (Berberich), and John Schultz also report to Golebiewski. (Tr. 62:15-19) Respondent's 11 shift supervisors including Curtis Walker, Janice Miller, Russ Roake, Kevin Quaglio (Quaglio), Thomas Heath, and Zina Miner report to the security shift managers. (Tr. 62:20-25, 63:1-8) Respondent also uses FTO³ Golds in its security operations, which are security officers in training for supervisor positions. (Tr. 63:10-12) There are three FTO Golds at Flamingo, including Larry Myatt (Myatt). (Tr. 63:16)

³ Field Training Officer.

C. Respondent's Management "Believe or Leave" Campaign and Subsequent Union Organizing Campaign

In early September 2011,⁴ Respondent's management responded to low customer service scores by implementing its "Believe or Leave" campaign which was intended to improve customer service scores. (Tr. 417:10-25, 418:1-4; 474:7; 542:10-14; 547:21-22, 24-25, 548:1-2) Respondent's management understood that their jobs were in jeopardy if they did not succeed. (Tr. 480:19-25, 481:1-4) As a result of the "Believe or Leave" campaign and other officer concerns, security officer Francis Bizzarro (Bizzarro) contacted different unions and eventually found the SPFPA (the Union). (Tr. 220:6-25, 221:1-12; 229:24-25, 230:1-8; 263:3-14) Bizzarro obtained Union authorization cards and started approaching officers in late September with information, flyers, and authorization cards. (Tr. 139:5-8; 172:4-9; 230:6-8, 12-15; 263:19-25) Bizzarro passed out over 100 authorization cards to security officers of Flamingo, OSheas and Bill's and openly shared his support for the Union with fellow security officers. (Tr. 174:12-18; 230:17-19; 235:1-3; 340:25, 341:1-2, 8-14) He did not pass out authorization cards in front of management, and handed out business cards so the officers could contact him with questions. (Tr. 230:23-25, 231:1-2; 341:3-7) He did not wear a union button or any clothing which identified him with the Union. (Tr. 232:14-19) The Union did not provide Respondent with an organizing letter to announce the names of the organizers. (Tr. 232:14-22)

D. Respondent's Response to the Organizing Campaign

Respondent learned of the organizing campaign no later than October 7, when it obtained a copy of a blank authorization card. (Tr. 439:4-9) Its response was immediate, substantial, and continuous. Shortly after learning of the organizing campaign, it conducted

⁴ All dates are 2011 unless otherwise noted.

pre-shift meetings led by Burgess where the employees were told that if they signed with the Union, that the Union “make[s] empty promises and there would be a good chance that [the security officers] wouldn’t make the current salary that [they] make or the hourly pay, [and] that [they] could very well have a chance of making a lot less[.]” (Tr. 140:11-25; 201:18-25, 202:1-2; 203:25, 204:1-13) Burgess then referenced the security officers at the Aquarius who make \$12 an hour.⁵ (Tr. 140:25, 141:1-2; 204:4-5)

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

⁵ Consistent with the message delivered in October, Respondent, by Security Supervisor Thomas Heath, sent an email to the security officers on December 29 which said, among other things, that “[t]he union can negotiate for things, but they can’t make management give you anything that they are not willing to give” and “I, personally, do not want to see any of you officers lose anything that you already have earned, which is possible in the course of negotiations” while referencing portions of the security officer contract at the Aquarius Hotel and Casino. (GCX 12 at p. 6-8)

two or three other security officers raised questions. (Tr. 195:15-22) Of all the persons at the meeting, Golebiewski did the most talking, followed by Bizzarro. (Tr. 195:23-25, 196:1-2)

In mid-December, around a week before the scheduled Union vote, Quaglio called Security Officer Brian Meadows (Meadows) to the office shortly after his shift began. (Tr. 149:10-14; 177:17-21; 180:18-19) Quaglio shut the door after Meadows entered the office, and then asked Meadows to sit with Quaglio and Johnson. (Tr. 149:13-15) Quaglio asked Meadows if he liked his job at the Flamingo, and where he stood with the Union. (Tr. 149:16-23; 150:2-5; 180:8, 21-23) Meadows responded that he liked his job, but declined to say whether he was for or against the Union. (Tr. 181:1-4) Quaglio asked Meadows if he had any concerns about his job or issues he had with management, to which Meadows told him he had a problem with security supervisor Rick Casali (Casali), but that was taken care of by Casali's transfer. (Tr. 181:6-20) Meadows told Quaglio he had a problem with not getting a raise since 2008 when other less-productive officers had received raises during that time. (Tr. 182:2-4) He also spoke to Quaglio about his medical condition. (Tr. 182:8-9) Quaglio then asked Meadows if he was going to vote yes or no for the Union, and if he knew where his co-workers stood with the Union. (Tr. 182:24-25, 183:1-12) Meadows said he would rather not answer. (Tr. 183:13-15) Quaglio bowed his head, and said he hoped it was a "no" on the Union and urged Meadows to encourage other officers to vote no. (Tr. 150:11-17; 183:19-24)

The day after Meadows was called to the office by Quaglio, Baker led a pre-shift meeting for some of the security officers.⁶ (Tr. 152:25, 153:1-5) At the meeting, Baker said he wanted to hear the officers' input on how they felt about their employment with Respondent and wanted to hear their issues. (Tr. 152:16-20) Baker asked the officers if they

⁶ Meadows only saw Baker on the floor twice – once following a robbery, and when he attended a pre-shift briefing for the 9:00 p.m. shift of security officers. (Tr. 151:2-10; 154:2-4)

were thinking about signing with the Union and asked what the officers believed the Union could offer them. (Tr. 153:8-11) The officers did not disclose whether they were for or against the Union but some disclosed their concerns. (Tr. 153:11-14) Baker explained if the Union came in, there was a chance the security officers would get less pay, they would not have representation through management, and they would be giving the Union money for nothing. (Tr. 153:20-25, 154:1)

III. RESPONDENT'S EXCEPTIONS

A. The Clear Preponderance of the Evidence

In its exceptions and brief in support, Respondent makes several arguments which challenge the ALJ's numerous findings, the vast majority of which are based on credibility determinations or the conclusions based on those credibility determinations. Moreover, Respondent has attempted to challenge the ALJ's findings by arguing that the ALJ "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[.]" (RB 1; 8) According to Respondent, the ALJ then made "unfounded logical leaps to find violations completely unsupported by applicable legal precedent." (RB 1; 8)

Respondent asserts that the ALJ simply couched his findings under the guise of credibility determinations to shield those findings from review from the Board. (BR 10) Respondent continues, suggesting that the ALJ's credibility determinations were not based on demeanor of the witnesses. (BR 11) Curiously, Respondent fails to mention the ALJ's specific reference to demeanor, the record, exhibits, and reasonable probability. In considering the testimony of each witness and weighing the evidence presented at hearing, the ALJ assessed the credibility of witnesses based not only on a review of the record, but also

gave consideration to reasonable probability and the demeanor of the witnesses. (ALJD at 2 fn. 4) Respondent asserts that the Board should undertake a *de novo* review of the entire record, without mentioning the fact that the ALJ had the advantage of observing each of the witnesses who testified, or the considerable weight which the Board gives to an ALJ's credibility findings. (RB 9; Cf. *Standard Dry Wall Products*, 91 NLRB at 545) Respondent's arguments do not raise the necessary level of doubt to the ALJ's credibility resolutions in order to have those conclusions reversed. Moreover, Respondent's request that the Board undertake a *de novo review* would upset over 60 years of Board precedent and decisions since *Standard Dry Wall*.

B. September 3 Threat of Unspecified Reprisal (Complaint Paragraph 5(b))

Respondent argues that it lawfully reprimanded Bizzarro for insubordination following the September 3 "Believe or Leave" meeting, and that Bizzarro's personal sensitivities to its comments could not justify finding a violation. (BR at 13-14) Respondent essentially argues that such comments do not violate the Act under a claim of keeping "order in its workplace" and that it merely addressed the manner in which Bizzarro raised concerns. (BR at 14)

To accept this argument, the Board would have to ignore the ALJ's credited testimony that following Bizzarro's statement that he believed Quaglio's comments were threatening and harassing the men, Myatt told Bizzarro to stop inciting the men or there would be consequences. (ALJD at 7:47-48, 8:1-3; 8:48-51) The ALJ discredited Myatt, whose denials he found to be half hearted and with little conviction. (ALJD at 8:8-9) Additionally, the Board would have to reach the further conclusion that such statements would not interfere, restrain, or coerce an employee in the exercise of rights guaranteed under Section 7 of the Act. The credited testimony is that Bizzarro was told not to incite the men – an explicit

attempt to interfere with Bizzarro's attempt to engage or encourage group activity. (ALJD at 9:29-31) Further, there is absolutely no logic in claiming that a statement of "consequences" can be interpreted as anything other than a threat. Moreover, if Respondent's argument were accepted, an employer could simply disguise its attempts to crush protected activity or the presentation of group concerns under the guise of addressing *claimed* misconduct. If that were the case, employees' methods of engaging in protected concerted activity would be severely limited under what the Act provides and protects.

Further, Respondent makes legal arguments which do not reflect Board law. It relies, in part, on its assertions that it encouraged its employees to have frank discussions with each other and with management. (BR 15) Further, it makes the assertion that "a private conversation between a supervisor and an employee could not logically be considered the 'promulgation' of a rule." (BR 15, 16) Frank discussions do not transform unlawful threats into lawful statements. It also does not nullify a rule communicated to an employee, or the likelihood that the discussion will be communicated to other employees.

C. October 7 Flyer (Complaint Paragraph 5(m))

In its brief, Respondent argues that copying and distributing copies of blank authorization cards, without disclosing how it obtained the card, could not have constituted unlawful surveillance. (BR 19) However, the allegation at issue is the unlawful *impression* of surveillance. (ALJD at 28:25; GCX 1(o)) Although Respondent misidentified the issue, the result is still a violation even when applying the arguments to the impression of surveillance. The ALJ correctly found that the flyer, whose distribution and nature are not in dispute, could give the impression that its employees' union activities were under surveillance. (ALJD at 29:1-3) (citing *Mountaineer Steel Inc.*, 326 NLRB 787 (1998)) In the

eyes of employees, their employer's mass production and distribution of copies of blank authorization cards, without any explanation of how they were obtained, would give those employees the impression that Respondent was watching their Union activities. This occurred just after the employees started the organizing drive. In other words, it was in its infancy – where it was most vulnerable to threats and the impression of surveillance. Cf. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 2-3 (2011). Although the ALJ found that Bizzarro's activities became an "open secret," he did not find that to be the case for the other employees. (ALJD at 28:45-46) Those employees who had participated in Union activities, or were considering signing authorization cards, would have the strong impression that their actions were being watched, especially in the context of the numerous meetings which immediately followed and which involved all levels of Respondent's security supervision team including executive management of HIFOB. The manner in which the authorization card was obtained is of no importance to the effect on the security officers where the method of acquisition was not communicated to the officers. Respondent's arguments regarding credibility and legal conclusions lack merit.

**D. The Four-Hour Pre-Shift Meeting of October 14
(Complaint Paragraph 5(e))**

Although pre-shift meetings are held for security officers each day, they normally last between 15 and 30 minutes. (ALJD at 11:38-40) Although Respondent claims it maintains open communication channels, it ignores the unusual nature of holding the security officers at a four hour meeting and simply passes it off as part of its open communications. (BR 20, 21) It is curious how the argument attempts to use a "totality of circumstances" approach to ignore the coercive nature of a four-hour meeting with the security director in control of 300

security officers. (BR 25; 28) Oddly, it draws comparisons to occasionally *inviting* employees to a *buffet*. (BR 26)

Even assuming it had a channel of open communications, an employer is still not allowed to violate its employees' rights by specific acts, even under a "totality" approach. This was a unique, focused, contentious meeting which was targeted on the shift with the "open secret" Union organizer. Similarly, the timing and otherwise lawful nature of the "Believe or Leave" campaign does not cleanse the unlawful nature of the acute acts of the October 14 meeting. Instead of finding this a channel of open communications, the ALJ found that the Union campaign was the real reason for the meeting based, in part, on the timing and length of the meeting. (ALJD at 12:6-10) The ALJ found that the four-hour meeting was highly unusual, and resulted in a decreased security presence on Respondent's casino floor. (ALJD at 12:12-17) Golebiewski's testimony was contradicted by security officers Bizzarro, Thomas Willequer (Willequer), and Meadows. (ALJD at 12:29-52, 13:1-27) The ALJ credited the testimony of Bizzarro, Willequer, and Meadows over Golebiewski in finding that Golebiewski asked the security officers individually and collectively why they wanted a union. (ALJD at 14:4-14) The ALJ also found Golebiewski's stated reason of meeting with the security officers to discuss their complaints about him to be inconsistent with the email he sent right after the meeting. (ALJD at 14:11-23; GCX 9)

Similarly, the ALJ credited the security officers in finding that Golebiewski transferred Casali in response to security officer complaints. (ALJD at 15:46-52; 16:5-11) Golebiewski's stated reasons given to the security officers varied while testifying at the hearing, first testifying that he could not remember if he told the security officers why Casali was transferred, but subsequently testified that he told the security officers that Casali was

transferred for cross-training purposes. (Tr. 100:11-25, 101:1-11; 403:3-11; 411:2-6; 440:221; 441:10-25) In crediting the security officers' version of the October 14 meeting, the ALJ found that Golebiewski threatened more strictly-enforced work rules by mentioning how he had saved some of the security officers' jobs and that he would not have the flexibility to assist security officers had there been a union contract in effect. (ALJD at 16:13-37) Golebiewski told the group that he saved the jobs of security officers Meadows, Willequer, and Steve Fox, and would not have been able to do so if the Union was present. (Tr. 142:18-24; 239:5-17) Golebiewski said he was worried about Meadows' job because he had a medical condition, that Meadows had a problem with a supervisor on the grave-shift, and that until Meadows gets better and recovers from his surgery, he would not be fired for attendance. (Tr. 143:4-20) Other security officers, including Security Officers Ty Evans and Christopher Rudy (Rudy), heard similar statements over the following weeks through other supervisors. (Tr. 301:5-13, 19-25, 302:1-3; 358:2-25, 359:1-3)

Respondent's arguments regarding the October 14 meeting boil down to a disagreement on the credibility resolutions of the ALJ. The ALJ's credibility determinations were particularly well reasoned, especially regarding the October 14 meeting. These findings were supported by the witnesses' demeanor, the testimony of a number of witnesses who testified consistently with the ALJ's finding, and Respondent's own email which demonstrated the true reason for the meeting. Respondent's arguments lack merit.

E. October 16 Flyer (Complaint Paragraph 5(f))

Respondent argues that the ALJ incorrectly construed the October 16 "BIZARRE" flyer as a reference to security officer Bizzarro, and that the ALJ's reasoning was unfounded. (BR 31) Oddly, Respondent once again confuses the impression of surveillance allegation for

a surveillance allegation. (BR 31, 32) The allegation involves creating the impression of surveillance, which is what the ALJ found. Although it is correct to point out that there are other portions of the flyer which contain capital letters, it is truly unusual how the flyer capitalizes on the word “BIZARRE.” As pointed out by the ALJ:

The word certainly stands out from the rest of the sentence, which in whole reads as follows: “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.” (ALJD at 17:18-22)

The ALJ further found that the “play on words” was not just a coincidence, and that the readers would understand the connection to Bizzarro. (ALJD at 17:29-33; 18:5-7) Respondent makes the argument that no reasonable employee could reach this conclusion, and that the ALJ’s reasoning is “patently unreasonable.” (BR 33, 34) However, by singling out Bizzarro in the flyer, especially in the context of “bizarre” actions, Respondent put its employees on notice that Bizzarro’s actions were known and were out-of-line. Respondent’s arguments clearly miss the point and should be rejected.

F. Mid-November Discussions (Complaint Paragraph 5(n))

The ALJ credited Evans in finding that Golebiewski asked Evans about the Union. (ALJD at 29:36-39; 30:4-5) In reaching this conclusion, the ALJ relied both on the incredible nature of Golebiewski’s testimony, but also on the fact that Evans, as a current employee, was testifying against the interest of his employer at his own peril. (ALJD at 29:47-52) (citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978)) Respondent impliedly raises the credibility findings of the ALJ, while renewing its “totality of circumstances” argument that this interaction could not violate the Act based on the “culture of open dialogue between employees and management[.]” (BR 35, 36) While making this argument, it ignores what the

ALJ succinctly summarized: “Evans was merely a rank and file security officer, while Golebiewski was the Respondent’s security director, and Evan’s [sic] ultimate supervisor. Therefore, he likely would have been intimidated by a question from Golebiewski on his opinion of the Union[.]” (ALJD at 30:16-19) The argument is essentially one of credibility, and is insufficient to reverse the ALJ’s finding.

G. December Threat of Discipline to Rudy (Complaint Paragraph 5(g)(1))

Rudy and Golebiewski testified in very similar manner about a conversation which occurred around December 2. (ALJD at 18:34-50, 19:1) The ALJ found that the “notice that under a union contract Golebiewski would have been required to take some disciplinary action against Rudy” meant that Golebiewski “would no longer be able to be lenient with Rudy regarding discipline if the Union were successful in organizing the facility and getting a contract” which the ALJ found was a threat of a changed condition of employment in violation of the Act. (ALJD at 19:18-24) According to Respondent, the ALJ’s conclusions are “unfounded in law or fact [and] demonstrates the ALJ’s fundamental misunderstanding of an employer’s free speech rights.” (BR 38) It continues, impliedly arguing that the ALJ’s conclusion is somehow twisted into “claims of absolute certainty” and makes employer’s free speech rights “pure illusion.” (BR 39) Contrary to the ALJ’s finding, Respondent would categorize the conversation as that “the men were obviously joking about which women Rudy could flirt with while on duty.” (BR 40) Although it may be strange what some persons may perceive as a joke, it was clear that Rudy did not understand the comments as a joke. (ALJD at 19:10-16) The ALJ’s credibility resolution is well reasoned, and the finding is a thoughtful interpretation of the conversation. Respondent’s argument that the ALJ reached the wrong conclusion is without merit.

H. Vice President Baker and Bizzarro (Complaint Paragraph 5(h))

Respondent contests the determination of the ALJ in crediting Bizzarro over Baker and implicitly argues that the ALJ's holding is "inherently unreasonable or self-contradictory." (BR 42, 43) It goes further, arguing that the past relationship between Bizzarro and Baker makes "Baker's comments completely understandable and objectively non-coercive." (BR 44) However, the ALJ discredited Baker for detailed reasons. The ALJ specifically noted Baker's nervous demeanor which seemed inconsistent with his position of authority within HIFOB. (ALJD at 21:16-24) The ALJ also interpreted the testimony as Baker's attempt to hide the depth of his feelings which were just barely in control. (ALJD at 21:16-24) In contrast to the general discrediting of Baker, the ALJ found that Bizzarro was generally credible, but tended to exaggerate and embellish "to put himself in the best possible light." (ALJD at 21:26-27) In evaluating the conflicting testimony, the ALJ found Bizzarro's testimony more credible than Baker's given the witnesses' testimony, demeanor, and plausibility. (ALJD at 21:16-33)

Accepting the credited version of the conversation, Baker's statements would give Bizzarro the reasonable impression that reprisal or discipline could follow because of the actions Baker attributed to him. Baker claimed Bizzarro was disloyal for supporting the Union. The direct implication is that Bizzarro's employment was in jeopardy. Once again, Respondent has not presented a sufficient basis for the Board to reject the ALJ's credibility determination. Additionally, Respondent repeats its argument that there was no promulgation of a work rule because any communication was only made to one employee. (BR 44, 45)

I. January 15 Willis Creation of the Impression of Surveillance (Complaint Paragraph 5(i))

For the third time, Respondent addresses surveillance where the allegation is an impression of surveillance. (BR 47 - 49) The ALJ did not credit Willis' testimony, finding it to be disjointed, self serving and implausible in comparison to other witnesses' testimony which the ALJ credited. (ALJD at 23:31-46). Instead, the ALJ credited Security Officers Evans and Rudy that Willis made statements to them which were intended to single out and disparage Bizzarro as the union organizer and which served to create the impression of surveillance. (ALJD at 24:1-10, 22-26) As summarized by the ALJ, "Willis' comments would reasonably chill the Section 7 activities of the security officers by causing them to be apprehensive that if they engaged in union activities the Respondent would be monitoring such activities as it appeared it had been doing with Bizzarro's activities." (ALJD at 24:22-24) Respondent's argument, even applied by analogy to the impression of surveillance, lacks merit.

IV. CONCLUSION

It is respectfully submitted that, based on the foregoing reasons, the credited record evidence, and applicable Board law, the Board should issue a Decision and Order adopting the ALJ's findings, conclusions, and recommended Order, and providing whatever other remedies deemed appropriate to address and remedy Respondent's violations of Section 8(a)(1) of the Act, including, but not limited to electronic Notice posting.

Dated at Las Vegas, Nevada, this 27th day of August 2012.

/s/ Larry A. Smith

Larry A. "Tony" Smith

Counsel for the Acting General Counsel
National Labor Relations Board
Region 28 – Las Vegas Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101-6637
Telephone: (702) 388-6062
Facsimile: (702) 388-6248
E-Mail: Larry.Smith@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the ACTING GENERAL COUNSEL'S ANSWERING BRIEF in Flamingo Las Vegas Operating Company, LLC, Cases 28-CA-069588 and 28-CA-073617, was served via E-Gov, E-Filing, and electronic mail, on this 27th day of August 2012, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570

Via Electronic Mail:

John D. McLachlan, Attorney at Law
Fisher & Phillips, LLP
One Embarcadero Center, Suite 2050
San Francisco, CA 94111-3712
E-Mail: jmclachlan@laborlawyers.com

Richard N. Appel, Attorney at Law
Lawrence D. Levien, Attorney at Law
Elizabeth A. Cyr, Attorney at Law
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036-1564
E-Mail: rappel@akingump.com
E-Mail: llevien@akingump.com
E-Mail: ecyr@akingump.com

Scott Brooks, Attorney at Law
Gregory Moore Jeakle & Brooks, P.C.
The Cadillac Tower
65 Cadillac Square, Suite 3727
Detroit, MI 48266-2822
E-Mail: Scott@unionlaw.net

/s/ Nicholas J. Brown
National Labor Relations Board
Region 28 – Phoenix Regional Office
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004
Telephone: (602) 640-2199
E-Mail: nicholas.brown@nlrb.gov