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

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

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I. INTRODUCTION

Pursuant to 29 C.F.R. § 102.46(h) Flamingo Las Vegas Operating Company, LLC ("Flamingo," "Employer," or "Respondent") submits this brief in further support of its exceptions to the decision of Administrative Law Judge Gregory Z. Myerson (the "ALJ").

General Counsel's answering brief fails to engage in any meaningful way with Respondent's arguments explaining why the challenged conduct at issue complied with the National Labor Relations Act (the "Act"). Instead, General Counsel's brief parrots the ALJ's conclusory findings, committing the same errors as the ALJ in the process. Perhaps most significantly, like the ALJ's decision, the General Counsel's brief demonstrates a fundamental lack of appreciation for an employer's free speech rights under the First Amendment and Section 8(c) of the Act. By focusing primarily on the deference the Board affords credibility determinations, General Counsel misses the mark entirely.

While Respondent does take issue with the ALJ's credibility determinations (primarily as those determinations are contradictory, not based on demeanor, or fail to accurately account for the full record), the majority of Respondent's brief in support of its exceptions explains why, *even if the version of events credited by the ALJ is true, the conduct at issue still does not violate the Act.* Flamingo's conduct, even under the ALJ's formulation, was simply an exercise of its free speech rights. General Counsel's focus on the distinction between unlawful surveillance and an unlawful "impression" of surveillance is similarly misplaced. Respondent explained at length why no reasonable employee could conclude from Respondent's actions that Flamingo was monitoring their union activities – often because, again, the conduct at issue was actually a lawful exercise of Flamingo's free speech rights. Finally, General Counsel's dismissal of Respondent's explanations that, by definition, a work rule cannot be promulgated in an isolated

conversation between management and a single employee lack any merit or legal support. The Board should thus dismiss the Amended Complaint in its entirety.[1]

II. ARGUMENT

A. Respondent's Exceptions Do Not Rely On A Rejection Of The ALJ's Credibility Determinations.

General Counsel chiefly hangs his hat on the notion that Respondent's exceptions attack the ALJ's credibility findings and that these findings are unassailable. Neither assertion is correct.

1. Not All Credibility Determinations Receive Equal Deference.

The Board, and not the ALJ, is charged with making ultimate factual resolutions. *See* 29 C.F.R. § 102.48(b) (2012); *Standard Dry Wall*, 91 N.L.R.B. 544, 544-45 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951) ("[T]he Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence."). While an ALJ's credibility determinations are entitled to deference, where "credibility findings are based upon factors other than demeanor... the Board itself may proceed with an independent evaluation." *Canteen Corp.*, 202 N.L.R.B. 767, 769 (1973) (citations omitted); *see also National Plywood, Inc.*, 172 N.L.R.B. 1285, 1288 n.3 (1968) (citations omitted) ("Since the Trial Examiner's findings clearly are not predicated on the demeanor of the witnesses while testifying... we are impelled to substitute our findings for those of the Trial Examiner."). Thus, for example, where an ALJ's analysis is based "upon an objective analysis of [] testimony, and not exclusively on [] demeanor as a witness" the Board may "substitute [its]

[1] For purposes of this reply brief, "AB" refers to General Counsel's Answering Brief; "EB" refers to Respondent's Brief in Support of its Exceptions; "Dec." refers to the ALJ's June 25, 2012 decision; "Tr." refers to the transcript of the March 13, 2012 to March 16, 2012 hearing before the ALJ; and "G.C. Exh." refers to the General Counsel's Exhibits.

findings for those of the Trial Examiner." *Briggs IGA Foodliner*, 146 N.L.R.B. 443, 446 n.6 (1964) (citations omitted); *see also Red's Express*, 268 NLRB 1154, 1155 (1984) (stating that where an ALJ's finding is based on witnesses' "evasive and self-serving" testimony, not demeanor, the Board will undertake an independent evaluation).

"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 given to credibility findings based on demeanor 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). General Counsel's contention that Respondent's request that the Board make a decision based on the entire written record "would upset over 60 years of Board precedent and decisions since *Standard Dry Wall*" is, therefore, clearly unfounded. AB at 8.

2. Respondent's Challenges to the ALJ's Factual Findings Do Not Rest on Witness Demeanor.

Though Respondent challenges several of the ALJ's factual findings, these challenges do not rest on a disagreement with the ALJ's assessment of witness demeanor. Rather, Respondent takes issue with the ALJ's tendency to omit relevant record evidence, ignore important contextual considerations, and apply observations of witness demeanor inconsistently in reaching factual conclusions. For example, in finding that Willis' comments to various officers about a union "instigator" created an unlawful impression of surveillance, the ALJ made a predicate factual determination that while it was an "'open secret' that Bizzarro was the chief union organizer, Bizzarro had not directly represented himself to management as such." (Dec. at 23-

24). Regardless of whether or not the ALJ found Willis' demeanor made him a credible witness, this factual finding is wrong. The documentary evidence demonstrates that in the weeks leading up to Willis' comments Bizzarro had openly held himself out to the other officers as the leader of the organizing drive in an email string copying all of the security supervisors. (EB at 45-49; G.C. Exh. 12). The ALJ's failure to even reference this documentary evidence in his decision is ample reason for the Board to overrule this factual finding.

Similarly, in finding that the purpose of the October 14th pre-shift meeting was to address the union campaign, the ALJ looked to objective factors such as the proximity of the meeting to the start of the organizing campaign, the length of the meeting, and the topics discussed. (Dec. at 12). In analyzing these factors, however, the ALJ ignored other relevant evidence regarding the overarching context in which this meeting occurred, such as the nature of Golebiewki's relationship with the officers, Flamingo's culture of open communication channels, and the meeting's proximity to the announcement of the believe or leave campaign. (EB at 25-28). Again, Respondent's issues with the ALJ's factual findings are not related to the ALJ's assessment of Golebiewski's demeanor, but to the ALJ's selective analysis of the record. Thus, the Board may, and should, undertake an independent evaluation of the ALJ's factual findings and overrule those findings where they are "inconsistent with 'the weight of the evidence'" and "reasonable inferences drawn from the record as a whole." *Stevens Creek Chrysler Jeep Dodge, Inc*., 2011 WL 3781995, at *5.

Respondent's only arguments against the ALJ's credibility findings arguably related to demeanor focus upon the testimony of Bizzarro. However, even these arguments are not directed toward the ALJ's analysis of Bizzarro's demeanor, but toward the inconsistent manner in which the ALJ applied that analysis. For example, the ALJ explicitly found throughout his decision that

Bizzarro purposefully tried to testify in a way that would imply violations of the Act, exaggerated and embellished his testimony, and had an unrealistic sense of his importance to Respondent. (EB at 42-43; Dec. at 6-7, 9-11, 25-26). However, the ALJ failed correctly to apply these findings on numerous occasions where they would have provided a crucial context for analyzing Bizzarro's testimony or explaining why it differed from the testimony of other witnesses. (EB at 14, 17, 29-30, 32, 42-43). The Board is not bound to follow the ALJ's inconsistent application of his observations of Bizzarro's testimony. *See, e.g., NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1126 (11th Cir. 2008) (citation omitted) (finding an ALJ's credibility determinations are not binding when they are "inherently unreasonable or self-contradictory.").

B. Even Accepting the ALJ's Version of Events as True, Flamingo Did Not Violate the Act.

In addition to misinterpreting Respondent's arguments regarding the ALJ's credibility determinations, General Counsel's focus on credibility, virtually exclusively, is fundamentally misplaced. General Counsel repeatedly characterizes Respondent's arguments as premised upon basic disagreements with the ALJ's credibility determinations. This characterization is simply inaccurate. The primary tenet of Respondent's exceptions brief is that the ALJ's findings must be reversed because, *even if his factual findings are accepted as true*, the logical leaps the ALJ then takes to find that those facts constitute violations of the Act ignore relevant contextual evidence, are logically unfounded, and are unsupported by case law. For example, in discussing Golebiewski's mid-January conversation with Evans, General Counsel focuses on Evans' credibility as a present employee testifying against the interest of his employer and characterizes Respondent's argument as "essentially one of credibility." (AB at 13-14). But Respondent's arguments as to why this conversation did not constitute an unlawful interrogation have nothing

to do with Evans' demeanor or the credibility of either his testimony or Golebiewki's. Rather, Respondent explains that "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" because analyzing the conversation under the framework of the *Bourne* factors, the conversation clearly did not constitute an interrogation.[2] (EB at 35-37). Respondent's argument is with the ALJ's legal analysis, not his credibility determinations.

Similarly, in discussing the December 2, 2011 interaction between Golebiewski and Rudy, General Counsel merely parrots the ALJ's legal conclusions and states that "[t]he ALJ's credibility resolution is well reasoned, and the finding is a thoughtful interpretation of the conversation." (AB at 14). But again, Respondent's argument does not rest upon a challenge to the ALJ's credibility determinations or his factual findings. As even General Counsel acknowledged, "Rudy and Golebiewski testified in [a] very similar manner" about this conversation. (AB at 14). Rather, Respondent's exceptions brief explains why, assuming all facts accepted by the ALJ, the ALJ's legal conclusion that this interaction violated the Act is wrong because comments regarding the possible effects of unionization are lawful free speech protected under Section 8(c). (EB at 38-40).[3]

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[2] General Counsel's apparent annoyance with Respondent's "totality of the circumstances" approach to analyzing allegations of interrogation (AB at 10-11, 13-14) is also odd considering that it is the same standard applied by the ALJ (Dec. at 14, 30).

[3] The fallacy of General Counsel's argument that Respondent's exceptions are premised on a challenge to the ALJ's credibility determinations applies with equal force to the other conduct challenged in this proceeding. For example, though General Counsel argues that "the Board would have to ignore the ALJ's credited testimony" to accept Respondents' arguments regarding Myatt's September 3rd comments to Bizzarro (AB at 8), Flamingo's arguments are premised not on what was actually said or how Bizzarro interpreted it, but on the fact that Respondent's conduct was a lawful reprimand for insubordination that could not logically be considered promulgation of a work rule on the facts alleged. (EB at 14-18). Though Respondent explains why the ALJ's credibility determinations on this subject are self-contradictory and should be rejected, Respondent's arguments do not rest on a rejection of the ALJ's credibility

C. General Counsel's Distinctions Regarding Surveillance Are Without Merit.

General Counsel argues numerous times that Respondent confused unlawful surveillance with an unlawful impression of surveillance (*see* AB at 9-10, 12-13, 16). This distinction is both inaccurate and without merit. The standard for determining when an employer creates an unlawful impression of surveillance "is 'whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance.' The standard is an objective one, based on the perspective of a reasonable employee." *Bridgestone Firestone S.C.*, 350 N.L.R.B. 526, 527 (2007) (citations omitted). Respondent applied exactly this standard in explaining why Flamingo's conduct conformed with the Act, frequently making explicit reference to the fact that Flamingo's conduct did not create an unlawful "impression" of surveillance. (EB at 19-20, 31-33 ("Flamingo did not create an impression of surveillance simply by capitalizing a particular word in the flyer."); EB at 48-49 ("Here, no reasonable employee could assume from Willis' statements that his or her union activities were being monitored by Flamingo... 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.")).

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determinations to hold true. Similarly, though Respondent challenges the ALJ's credibility determinations with respect to the January interaction between Baker and Bizzarro (EB at 42-43), Respondent's arguments that an expression of personal disappointment could not constitute a threat and that an isolated conversation cannot constitute a work rule apply regardless of whether the Board accepts the ALJ's credibility findings or not. These are legal arguments, not factual disputes. Respondent's arguments as to why the October 14th pre-shift meeting did not violate the Act are of a similar legal nature, and despite General Counsel's characterization of these arguments as "boil[ing] down to a disagreement on the credibility resolutions of the ALJ," they do not rest on rejection of the ALJ's decision to credit the officers' testimony as to the substance of the meeting. (EB at 25-30; AB at 12).

Furthermore, General Counsel's focus on the surveillance versus impression of surveillance distinction is merely an attempt to deflect attention from the fact that General Counsel has utterly failed to engage Respondent's substantive arguments. As Respondent explained in detail in its exceptions brief, finding a violation of the Act in any of the events giving rise to an allegation of an unlawful impression of surveillance would require the Board to ignore Flamingo's undeniable right to engage in an open and non-coercive dialogue with its employees over the merits of unionization. (*See* EB at 18-20, 31-34). For example, with regard to the October 7th flyer containing a copy of blank union authorization card, General Counsel argues that, "[i]n 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." (AB at 9-10). It is beyond assail, however, "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). The October 7th flyer contained no threat or promise, implicit or explicit, but merely advised the employees not to sign the card unknowingly.[4] Though this communication was clearly permitted by Section 8(c), General Counsel does not even engage this argument, choosing instead to parrot the ALJ's

[4] In addition, it is worth nothing that copies of the SPFPA authorization card are readily available on SPFPA's website, further negating the idea that Flamingo's possession of the card would give the employees the impression that that their union activities were under surveillance. *See* http://www.spfpa.org/sites/default/files/downloadables/SPFPAMembershipCard.pdf.

findings and state summarily that "Respondent's arguments regarding credibility and legal conclusions lack merit." (AB at 10).[5]

D. An Isolated Conversation Does Not Constitute Promulgation of a Work Rule.

General Counsel's summary dismissal of Respondent's arguments that a single, isolated conversation cannot be considered promulgation of a work rule further demonstrates General Counsel's unwillingness to engage with the substance of Respondent's arguments. Twice General Counsel makes conclusory statements that imply disagreement with Respondent's arguments regarding why the conduct at issue could not be considered promulgation of a work rule. (*See* AB at 9 (stating in response to a recitation of Respondent's argument regarding rule promulgation: "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."); AB at 15 ("Additionally, Respondent repeats its argument that there was no promulgation of a work rule because any communication was only made to one employee.")). As Respondent explained, a single, isolated conversation between management and an employee cannot logically be considered promulgation of a work rule, where, as here, there is no evidence the conversation was relayed to other employees. (EB at 15-18, 44-45 (*citing Hanson Material Serv. Corp.*, 353 N.L.R.B. No. 10, 2008 WL 4490048, at *10 (Sept. 25, 2008); *St. Mary's Hosp. of Blue Springs*, 346 N.L.R.B. 776, 777 (2006)). General Counsel does not even superficially attempt to respond to the logic of Respondent's arguments,

[5] General Counsel similarly fails to engage Respondent's substantive arguments as to why the October 16th "bizarre" flyer, or Willis' mid-January comments regarding the union "instigator" could not lead a reasonable employee to believe Flamingo was monitoring their union activities. (*See* AB at 12-13, 16; EB at 31-34, 45-49). Furthermore, while General Counsel puts forth a cursory argument as to why the October 16th flyer created an impression of surveillance, he does not even attempt to address Respondent's arguments as to why that flyer did not constitute a threat. (*See* AB at 12-13; EB at 33-34).

nor does he offer any legal authority suggesting the Board should reach a contrary conclusion. Rather, General Counsel acts as if his mere identification of Respondent's argument is enough to refute it.

III. 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,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September, 2012, I caused a copy of the foregoing Reply Brief in Further 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:

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