UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

HARTMAN AND TYNER, INC.
d/b/a MARDI GRAS CASINO AND
HOLLYWOOD CONCESSIONS, INC.

and

Cases 12-CA-072234, 12-CA-072238
12-CA-072245, 12-CA-072246
12-CA-072248, 12-CA-072251
12-CA-072254, 12-CA-072257
12-CA-072263

UNITE HERE! LOCAL 355, affiliated with UNITE HERE!

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF CASES

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (herein called the General Counsel) files the following Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision.[1]

I. Statement of the Case

On April 30, 2012, upon charges filed by UNITE HERE! Local 355, affiliated with UNITE HERE! (the Union), a complaint issued alleging that Respondent Hartman and Tyner, Inc. d/b/a Mardi Gras Casino and Respondent Hollywood Concessions, Inc. (collectively referred to as Respondent) have been engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. (GCX 1(a)-1(mm), 1(nn)). On June 25-28, 2012, a hearing concerning this matter was held before the Honorable George Carson II, Administrative Law Judge (herein called the "ALJ").[2] On September 18, 2012, the ALJ issued his detailed and well-reasoned Decision finding that Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act. More specifically, the ALJ concluded that Respondent unlawfully interrogated employees about their union sympathies and the union activities of other employees, threatened employees with unspecified reprisals because of their union activities, threatened employees with

[1] The ALJ's Decision will be identified by "ALJD," page, and line. Respondent's Exceptions will be identified by "RE" and the number of the exception, and Respondent's Brief in Support of Exceptions will be identified by "RB" and the page number. Transcript pages will be identified by the page, line, and name of the witness, where necessary for clarification. "GCX" refers to the General Counsel's exhibits, and "RX" refers to Respondent's exhibits.

[2] In *Diaz v. Hartman and Tyner, Inc. d/b/a Mardi Gras Casino and Hollywood Concessions, Inc*., Case 0:12-mc-60978-WJZ, on June 29, 2012, the U.S. District Court for the Southern District of Florida, by Judge William J. Zloch, granted in part a petition for injunctive relief pursuant to Section 10(j) of the Act, ordering that pending the final resolution of the instant administrative case before the Board, Respondent must cease and desist from the violations of Section 8(a)(1) of the Act alleged in the complaint and the violations of Section 8(a)(1) and (3) of the Act with respect to the suspensions of Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill and the discharges of those three alleged discriminatees and alleged discriminatees Dianese Jean, Alicia Bradley, and Steve Wetstein because they supported the Union. The District Court also ordered Respondent to provide a current list of the names and addresses of its food and beverage, gaming and housekeeping employees at Respondent's Hallandale, Florida facility to the Union. The District Court denied other interim relief sought, including the interim reinstatement of the six aforementioned alleged discriminatees. The Petitioner has filed an appeal with the U.S. Court of Appeals for the Eleventh Circuit in Case No. 12-14508, seeking interim reinstatement of those six alleged discriminatees, posting of the Court's order, public reading of the Court's order by an official of Respondent or reading by a Board agent in the presence of the official, and an affidavit of compliance. The Section 10(j) case is pending before the Court of Appeals. In view of the ongoing Section 10(j) case, the instant case should be given priority in its processing pursuant to Section 102.94(a) of the Board's Rules and Regulations.

arrest for engaging in protected concerted union activities, informed employees that they were discharged for engaging in protected concerted union activities, and suspended employees Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill and discharged those three plus employees Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steve Wetstein because they supported the Union. (ALJD 27:1-15). The ALJ also provided for a remedy, recommended Board Order, and Notice to Employees to remedy those violations of the Act. (ALJD 27:17 to 29:12; Appendix). On November 2, 2012, Respondent filed its Exceptions and Brief in Support of Exceptions.

II. The ALJ's Findings of Fact and Conclusion of Law that the Board has Jurisdiction over Respondent's Operations Should be Affirmed, and Respondent's Exception 1 Should be Denied.

A. Overview of Respondent's Operations

The ALJ thoroughly considered all of the facts relevant to his conclusion that the Board has jurisdiction over Respondent, and Respondent's Exception 1 should be denied. Respondent has a facility located in Hallandale Beach, Florida where it operates a casino and dog track. (ALJD 1) (Tr. 19, Adkins). Pursuant to a change in Florida's constitution, Respondent was allowed to operate slot machines and open a casino. (ALJD 3:30-32) (Tr. 30:24-25, 31:1-4, Adkins). Respondent began slot machine operations on December 28, 2006. (GCX 50). Prior to the opening of the casino, Respondent had a poker room, greyhound race track and flea market. Under Florida law, Respondent has always been required to run "live" greyhound races at the facility in order to conduct poker and simulcast wagering operations. A referendum passed by Florida voters in 2005, permitted Respondent to conduct slot machine operations as long as it continues live racing. (ALJD 2:33-37) (Tr. 30:24-25, 31:1-4, Adkins). However, Respondent's

live racing customers have decreased substantially over the years. (ALJD 2:42-45) (Tr. 32, Adkins).[3]

As the ALJ found, Respondent's marketing campaign is to advertise its facility to the public as "Mardi Gras Casino," not as a greyhound track. (ALJD 2:34-35) (Tr. 30:7-9). The casino is open Monday through Thursday, 9:00 a.m. to 3:00 a.m., and on weekends, 24 hours a day. (Tr. 20:8-25, Adkins, RX 51). Respondent has approximately 600 employees working at the facility. (Tr. 23:10-21). Notably, Respondent has at least doubled the number of employees since the casino opened due to the new slot department and the increase in the number of employees in preexisting departments. (ALJD 2:31-32) (Tr. 28:22-25, 29:1-8, 589:588:25, 589:1-12). Respondent's various departments including slots, poker room, food and beverage, operations and facilities, housekeeping, valet, surveillance , security, marketing, money room and cashiers either service the casino exclusively or perform functions for both the casino and the pari-mutuel activities. (GCX 74).

Respondent's pari-mutuel operations include pari-mutuel wagering on thoroughbred horses, standard-bred horses, greyhound dogs, and harness racing.[4] (Tr. 25:5-7, 25:15-17, 549:24-25, 550:1-2). The racing and mutuels departments are separate from the slot department and have a separate supervisory structure. (Tr. 559-570, GCX 67, #02351). Respondent's live racing calendar is limited to greyhound dog racing. In fiscal year 2011-2012 (July 1, 2011 through June 30, 2012), Respondent only held live greyhound races from December through April. (ALJD 2:36-40) (Tr. 58:15-25, 59:1-13, GCX 52). The other part of the fiscal year, Flagler Dog Track, an entity unrelated to Respondent, runs live greyhound races. (Id.).

[3] All of the testimony regarding the jurisdictional facts stated herein was provided by vice-president Daniel Adkins.
[4] Respondent includes jai alai simulcast activities in its pari-mutuel operations. The Board has exercised jurisdiction over jai-alai frontons. *Grand Resorts, Inc.*, 221 NLRB 539 (1975).

Respondent currently has about 39 racing employees, and the number of racing employees has remained the same since the casino opened in late 2006. (Tr. 563:11-15, 583:5-8, GCX 74).

B. The ALJ Properly Analyzed the Board's Jurisdictional Standards.

The ALJ applied the jurisdictional standards set forth by the Board and correctly concluded that Respondent's operations are subject to the Act. (ALJD 2:6-9). As found by the ALJ, the Board has consistently asserted jurisdiction over casinos that originated as racetracks, citing *Empire City at Yonkers Raceway*, 355 NLRB No. 35 (2010), slip op. at fn. 5; *Prairie Meadows Racetrack & Casino*, 324 NLRB 550, 551 (1997); *Delaware Park*, 325 NLRB 156, 156 (1997). (ALJD 2:10-25). See also *Riverboat Services of Indiana*, 345 NLRB 1286 (2005). The ALJ properly considered the Board's analysis in these cases, and found that Respondent doubled its work force for the casino operations, and that gross revenues from the casino are more than double the gross revenues that are generated by Respondent's racing operations. The ALJ ultimately found, as in *Prairie Meadows*, that "the revenue and employment generated by the casino so overshadowed those generated by the horseracing operations the enterprise was no longer 'essentially a racetrack.'" (ALJD 2:19-25, 2:31-32, 3:4-5). *Prairie Meadows*, 324 NLRB at 551. Moreover, as stated in *Delaware Park*, "the racetrack was dependent on the casino, not the other way around." (ALJD 2:24-25). Contrary to Respondent's argument, the Board does not require any specific percentage increase in gross revenues or specific increase in the number of employees to assert jurisdiction over an employer that is predominantly a casino. (RB 6). In fact, in *Delaware Park*, the Board noted that the fact that the casino generated 62 percent of the employer's income in that case versus 98 percent as in *Prairie Meadows* did not change the conclusion that the casino was not an adjunct to the racing enterprise. *Delaware Park*, 325 NLRB at 156, 161.

C. The ALJ Properly Relied on Respondent's Gross Revenue Reports.

Moreover, the ALJ correctly relied on the pari-mutuel revenue reports and slot activity reports that Respondent is required to file with the State of Florida to conclude that gross revenues for the casino and poker room far outweigh gross revenues for all pari-mutuel activities combined. (ALJD 2:46-50, 3:1-5). The state of Florida requires Respondent to report slot revenue and pari-mutuel revenue each month. (Tr. 34:19-25 and 35:1-16). The "Monthly Slot Activity Per Facility" report for fiscal year July 2011 to June 2012, shows that Respondent made about $53 million in slot revenue during that period. (ALJD 2:46-47)(GCX 50). In contrast, the "Permit Holder Activity Report" for pari-mutuel activities from July 2011 to May 2012,[5] reflects "total handle" (dollars wagered) on live racing and simulcast activities[6] of about $19 million as compared to about $58 million gross revenues from casino operations, consisting of about $53 million in gross revenues from the slots and $5 million in gross revenues from the poker room. (ALJD 2:48-49) (GCX 49, 50). Although, as Respondent contends, the 2011-2012 report is missing a month's worth of pari-mutuel revenues for that fiscal year, the records for 2006-2010 clearly show the same pattern that the casino revenues far outweigh pari-mutuel revenues. (ALJD 2:47-51) (RB 7). As found by the ALJ, the Board also asserts jurisdiction over poker rooms, citing *El Dorado Club*, 220 NLRB 886, fn. 5(1975), enfd. 557 F.2d 692 (9th Cir. 1977).

Although Respondent argues that there are "missing" pari-mutuel revenues from patrons who wager on Respondent's "signal," Adkins provided scant testimony on this subject and referred to the "signal" wagering revenues as "fees." (Tr. 48:23-25). The ALJ considered these

[5] This report does not include the pari-mutuel handle for June 2012, the last month of the fiscal year, but, as noted above, Respondent does not conduct live racing in June.

[6] "On-Track Live" refers to wagers on greyhound racing at the track and "On-Track Simulcast" refers to dollars that are handled at the track on out of state products. (Tr.41:12-14, 41:20-25, 42:1-4). "Intertrack" refers to wagers on other products within the state and "Intertrack Simulcast" refers to wagers placed through an out of state track on an in state product. (Tr. 42:23-25, 43:1-2, 43:9-13).

alleged missing revenues and properly rejected Respondent's argument that the figures in the reports are misleading. (ALJD 3:3-4). Moreover, Adkins specifically testified that the "handle" reflected in the pari-mutuel report is more than the gross revenues. (Tr. 46:1-3). Finally, Respondent did not present any documentary evidence to support its assertion regarding these purported missing "fees." (RB 7-8). With respect to Respondent's argument that there has been a resurgence in the pari-mutuel industry, the clear documentary evidence shows that Respondent's casino dominates its overall operations and the magnitude of its casino operations far exceeds that of its race track operations. While Adkins argued during his testimony that Respondent makes more "net money" today for pari-mutuel activities than for the slots, his testimony considered taxes, commissions, fees, and expenses that the ALJ correctly noted are not considered by the Board when defining gross revenues.[7] (ALJD 2:49, 3:1-5) (Tr. 56:4-13). Other than Adkins' disingenuous testimony concerning gross revenues, Respondent did not present any other evidence, or any documentation whatsoever to support its contention that gross revenues are higher for pari-mutuel activities than is shown by the reports in evidence. In fact, Adkins' testimony is belied by an interview he gave to a reporter in or about February 2011, wherein he stated that the dog track lost about $2.5 million in 2011. (ALJD 2:42-43) (Tr. 32:1-11). A comparison of the slot and pari-mutuel wagering reports for each fiscal year since the casino opened reflects that the casino's gross revenues have consistently far outperformed the

[7] Adkins testified that revenues on pari-mutuel simulcast activities are subject to complicated accounting which he contends must be considered in connection with the commissions taken plus fees and prizes paid out to customers. (Tr. 42:2-19, 44:18-22, 45:1-25, 45:14-25, 46:7-25:6-25, 49:1-3, 50:1-25, 51:1-19, 52:13-17, 53:1-25, 54:1-3).

combined live racing and simulcast operations.[8] (ALJD 2:48-51) (GCX 49, 50, 56-62, 64, 50). Moreover, although there was a $5 million dollar increase in pari-mutuel revenue from fiscal year 2010-2011 to fiscal year 2011-2012, the increase is not nearly as dramatic as it was described by Adkins, and remains far below the level of slot and poker room revenues. (Id.). The current pari-mutuel wagering handle of $19 million remains a far cry from the $45 million dollars in gross revenues from pari-mutuel activities in fiscal year 2006-2007, the fiscal year during which slot operations began. (GCX 74). In every fiscal year since 2007-2008, Respondent's gross revenues from casino operations have been far greater than its handle for pari-mutuel activities. (GCX 49-50, 57-58, 62, 71).

D. The ALJ Properly Relied on the Fact that Respondent Doubled its Workforce for the Casino.

Most of the jobs at Respondent's facility are solely for the casino operations or perform functions for the casino operations. For example, as supported by the record, the ALJ found that food and beverage employees serve all of the customers. (ALJD 2:31-32) (Tr. 543:1-18). There are only about 21 mutuels clerks and about 39 racing employees, a total of 60 employees out of the entire employee complement of 600, who are dedicated exclusively to the racing operations. (GCX 74). *Prairie Meadows*, 324 NLRB at 551. The Union has only organized among the casino employees, including gaming, food and beverage and housekeeping employees, and has

[8] Slot versus pari-mutuel (handle) gross revenues in millions:

Fiscal Year	Slots	Pari-mutuel
2006-2007	$46 (GCX 60)	$45/$59* (GCX 64)
2007-2008	$79 (GCX 61)	$20/$40* (GCX 59)
2008-2009	$68 (GCX 72)	$26 (GCX 56)
2009-2010	$53 (GCX 71)	$23 (GCX 57)
2010-2011	$52 (GCX 62)	$14 (GCX 58)
2011-2012	$53 (GCX 50)	$19 (GCX 49)

*The first figure excludes gross revenue from Bet Miami and the second figure included that revenue. Fiscal year 2006-2007 caption for the Bet Miami permit states "Bet Miami Greyhounds," so it is not clear if Respondent owned the permit at that time. Fiscal year 2007-2008 reflects the caption as "Miami Greyhounds at Mardi Gras." All subsequent years are noted as "H&T Gaming, Inc. (formerly Bet Miami)." However, notwithstanding this ambiguity in the status of the permit, Respondent's gross revenues for pari-mutuel activities decreased significantly after the casino opened at the end of 2006.

not sought to organize employees in any of the job classifications that are traditionally associated with or functionally integrated to racing or pari-mutuel operations, such as jockeys, trainers, grooms or pari-mutuel betting agents. *Prairie Meadows*, 324 NLRB at 552; *Empire City*, 355 NLRB No. 35, slip op. at 3.

Respondent's argument that the ALJ failed to consider that Respondent's employees are seasonal or that Respondent has high turnover rates is without merit. (RB 6). The Board has historically declined to assert jurisdiction over the dog racing industry under Section 103.3 of the Board's Rules and Regulations, in part due to the relatively unstable work force in the industry. However, this is clearly not the case with respect to Respondent's casino operations. *Delaware Park*, 325 NLRB at 159-160. Respondent has failed to show that its casino employee complement is seasonal. Respondent relies only upon testimony by Adkins that the number of money room employees varies by about five or ten employees depending on whether Respondent is in the "off- season." (Tr. 577:1-15). Respondent did not present any documentary evidence to substantiate Adkins' testimony, or any evidence to clarify what Adkins meant by "off-season." Moreover, a slight change in the number of employees in one department does not reflect a seasonal workforce. Notably, Adkins admitted that the number of money room employees increased from about 10 employees to 30 employees as a result of the addition of casino operations. (Tr. 577:1-21). Moreover, although Respondent discharged 75 out of 600 employees in 2011, this hardly supports a finding of high turnover rates at Respondent's facility so as to suggest a seasonal workforce. (RB 6). Rather, it is clear that Respondent's work force is stable, that a large number of employees have long-term employment, and Respondent employs its casino employees year round. (GCX 74).

Although Respondent contends that the ALJ failed to consider whether the number of customers increased after Respondent added the casino, there is no evidence that the number of customers declined. Rather, the evidence strongly suggests that the number of casino customers must have increased based upon the doubling of Respondent's workforce. Moreover, after the casino opened, Respondent increased the number of marketing employees and employees who coordinate groups who travel by bus to the casino. (Tr. 560:20-25, 561:1, 584:1-5, 569:9-13). In addition, the large increase in revenues after Respondent opened the casino supports a clear inference that the number of patrons must have increased dramatically as well. Accordingly, the evidence in this case is consistent with the facts in *Empire City*, where the Board found that there was an increase in the number of customers after the casino opened.

Respondent's contention that the facility attracted a large numbers of patrons before the casino existed predates the opening of the casino by decades. (Tr. 33). As noted above, Adkins testified that Respondent lost money on its pari-mutuel activities in 2011, and failed to present any documentary evidence of a resurgence in pari-mutuel activity that is even close to the revenues from the casino. (ALJD 2:43-45) (Tr. 33). The gross revenue reports demonstrate that the vast majority of Respondent's customers visit the casino. (RB 7) (Tr. 543-546). Given that the casino operates year round, Monday through Thursday, 9:00 a.m. to 3:00 a.m., and on weekends, 24 hours a day, and the dog track only operates for five months out of the fiscal year, it is clear that the hours of operation of the casino far exceed the hours of operation of the dog track. (Tr. 20:8-25, RX 51). In addition, the state of Florida requires Respondent to have about 100-140 live greyhound races per year, and it appears that Respondent does not exceed that minimum requirement. (ALJD 2:34-40) (Tr. 59:14-19, 58:15-25, 59:1-13, GCX 52).

While Respondent argues that the ALJ erred in concluding that Respondent's casino operations do not involve the racing industry, Respondent has not provided any basis to support this contention. (ALJD 3:7) (RB 8). Rather, it is clear that as stated by the ALJ, "the employees servicing the slot machines and serving the patrons at this multimillion dollar year round casino that markets itself as a casino, not a dog track, are entitled to the protection of their Section 7 rights, and it is appropriate that jurisdiction be asserted to assure the protection of those rights." (ALJD 3:6-10). Thus, Respondent has failed to establish that its business is primarily a pari-mutuel operation rather than a multi-million dollar casino. (RB 8).

Although Respondent is correct that the square footage of its facility remained the same after the casino opened, the facility was fully remodeled in anticipation of the casino operation. (Tr. 26:25, 27:1-3) (RB 8). The remodeling efforts reflected Respondent's shift to marketing the facility as "Mardi Gras Casino" rather than as Hollywood Greyhound Track, its former name. In fact, about two-thirds of the first floor was converted from pari-mutuel activity to slot machines, and the other third of the first floor, which had been a restaurant was converted to the new poker room. (Tr. 27:4-13). Upon remodeling the facility to build the casino space, Respondent placed many of the food and beverage areas in the casino. Obviously, this was done to better accommodate casino customers. The first floor now includes about 1100 slot machines and the poker room, and with the exception of a few terminals for the pari-mutuel activities, the casino operations are separate from the pari-mutuel terminals.

In summary, although Respondent did not build a new building for the casino, it transformed the building into a showcase for the casino operation. (ALJD 2:34-35). (Tr. 29:17-24, 30:4-6, 30:7-9). Respondent's casino operations now significantly overshadow its racetrack operations and Respondent has transformed its facility from primarily a greyhound track with

pari-mutuel activity to primarily a casino with a racetrack attached, a fact pattern in which the Board has applied the retail standard for the assertion of jurisdiction and has asserted jurisdiction. *Empire City,* 355 NLRB No. 35, slip op. at 3; see also *Delaware Park,* 325 NLRB at 159. Accordingly, the ALJ's finding of fact that the Board has jurisdiction over Respondent should be affirmed, and Respondent's Exception 1 should be denied.

III. The ALJ's Conclusion that there is Anti-Union Animus by Respondent Should be Affirmed, and Respondent's Exception 2 Should be Denied.

A. Neutrality Agreement

On August 23, 2004, Respondent and the Union entered into a neutrality agreement. (ALJD 3: 21-26) (GCX 13). As described by the ALJ, the Union was willing to support the ballot initiative to allow slot machines, in exchange for the signing of the neutrality agreement by seven companies, including Respondent. (Id.). *Mulhall v. UNITE HERE Local 355, 618 F. 3d 1279 (11th Cir. 2010).* [9] The neutrality agreement ("the Agreement") was effective by its terms for four years from the date the Employer began its slot machine operations on December 28, 2006. (ALJD 3:39-40) (GCX 50). The Agreement provides, in part, for the Employer to provide monthly lists of its employees' names and addresses to the Union, upon request. (ALJD 3:38-39) (GCX 13, paragraph 8). At times, Respondent provided lists to the Union pursuant to the Agreement. (Tr. 65:21-25, Adkins, GCX 5-7, 12). The Agreement also provides for Union access to employees on casino premises for the purpose of organizing in non-working areas of the casino and during non-work time. (ALJD 3:36-37) (GCX 13, paragraph 7).

[9] In *Mulhall v. Unite Here Local 355 and Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming*, 667 F.3d 1211 (11th Cir. January 12, 2012) and 618 F.3d 1279 (11th Cir. 2010), the Court of Appeals twice reversed and remanded decisions of the U.S. District Court for the Southern District of Florida dismissing the lawsuit by Mulhall, an employee of Respondent opposed to the Union, seeking to enjoin the Agreement. Mulhall asserts that the Agreement violates Section 302 of the LMRA because it provides a "thing of value" – a less expensive means of organizing - to the Union in exchange for the Union's financial support of the November 2004 ballot initiative legalizing the installation of slot machines at Respondent's premises. The 11th Circuit ordered the District Court to consider the merits of the lawsuit.

Since about 2008, Respondent and the Union have had ongoing legal battles over the implementation of the Agreement. The Union has repeatedly sought to compel arbitration or compliance with arbitration awards regarding alleged breaches of the Agreement by Respondent. The Union successfully sued the Employer to compel arbitration for alleged breach of the Agreement. *Unite Here Local 355 v. Hollywood Greyhound Track d/b/a Mardi Gras Gaming*, Case 08-61665-CIV-Seitz/O'Sullivan (2009). Then, on August 6, 2009, Arbitrator Arnold Zack extended the Agreement until December 31, 2011. However, on August 6, 2010, the District Court, by Judge Zloch, who also presided in the 10(j) proceeding related to the instant cases, vacated the portion of Arbitrator Zack's award extending the neutrality agreement. *Hollywood Greyhound Track d/b/a Mardi Gras Gaming v. Unite Here Local 355*, Case 09-61760-CIV-Zloch/Rosenbaum (2010).

The ALJ did not take official notice of the June 30, 2011, order of the U.S. District Court for the Southern District of Florida, by Judge Zloch, in *Unite Here Local 355 v. Hollywood Greyhound Track, Inc.*, Case 11-CV-60047-WJZ, confirming Arbitrator Jeffrey Ross' April 23, 2010 award granting a motion to extend the neutrality agreement for the additional one year period to December 31, 2011. However, the ALJ noted that both the Union and Respondent took actions consistent with their positions regarding the neutrality agreement. (ALJD 4:5-9).

On June 7, 2012, the Union filed another lawsuit in the U.S. District Court for the Southern District of Florida, which remains pending, seeking to compel Respondent to honor the Agreement, arguing that Respondent breached it by its statements and discharges (that are also alleged as unfair labor practices herein) and by refusing to select an arbitrator pursuant to the Union's demand to arbitrate these allegations. Case 0:12-cv-61135-WPD.

B. The Union's Organizing Campaign

In or about late summer 2011,[10] Union agents began making house visits to employees of Respondent. Starting in September 2011, Sochie Nnaemeka and James Walsh, who were covert union organizers ("salts") at the time they were hired by Respondent, sought to identify potential leaders for an organizing campaign planned by the Union. (ALJD 4:11-18). On or about October 28, 2011, an employee organizing committee was formed and started making house visits. (ALJD 4:20-23) (Tr. 130:16-25, 131:21-25, 132, 133:6-9, 134:9-19, 140:20-25, M. Hill).

On October 31, Union president Wendi Walsh sent a letter to Adkins stating that Respondent's managers were violating the Agreement by asking employees about the home visits. (ALJD 4:25-28) (Tr. 71:13-17, Adkins, GCX 8). On November 2, Union president Walsh sent another letter to Adkins, informing him that the Union intended to begin meeting with employees in non-work areas of the casino pursuant to the access provision of the Agreement. (ALJD 4:37-40) (Tr. 71:24-25, 72:1, Adkins, GCX 9). The letter further requested a meeting with Adkins to discuss, in part, the procedures for accessing the non-work areas. (Id.). Adkins declined to meet Walsh. (Tr. 750:19-25, 751:1-4, Adkins, RX 29).

C. The ALJ's Conclusion that Respondent Harbors Anti-Union Animus Should be Affirmed, and Respondent's Exception 2 Should be Denied

The ALJ properly concluded that the record establishes anti-union animus based on Respondent's decision to contest the Agreement with the Union and Respondent's unlawful interrogations and threats, set forth in detail below. (ALD 17:50-51). The record clearly supports the ALJ's finding that Respondent decided to contest the validity of the Agreement. (ALJD 5:18-20) (RB 9). Respondent's responses to the Union's organizing efforts and its position in the litigation in *Mulhall v. UNITE HERE Local 355* reflect its decision to contest the

[10] Unless otherwise specified, all dates hereafter are in 2011.

validity of the Agreement. (ALJD 4:8-9, 5:15-20). Adkins also oversees Mardi Gras Casino and Resort in Charlestown, West Virginia, and Hazel Park Harness Raceway in Hazel Park, Michigan. (Tr. 744:19-25, 745:1-2). Over the General Counsel's objections, the ALJ admitted two letters from representatives of two other unions that have collective bargaining relationships with Respondent at those facilities. (ALJD 5:2-29, RX 30-31). These letters are hearsay, self-serving and irrelevant to the issues in this case. Moreover, as properly found by the ALJ, these letters of support simply reflect that "Adkins is a businessman and, when business demands that he deal with a union, he does so. If business does not demand that he do so, he seeks to avoid doing so." (Id.). Assuming that the letters reflect an "ongoing partnership" as Respondent claims, the letters only concern Respondent's operations in West Virginia and Michigan, and do not negate the evidence that Respondent harbors anti-union animus against the Union in Florida. Accordingly, the ALJ's conclusion that Respondent harbors anti-union animus against the Union should be affirmed, and Respondent's Exception 2 should be denied.

IV. The ALJ's Finding of Fact and Conclusion that Respondent, on October 30, by Bill Fodor Interrogated Employees in Violation of Section 8(a)(1) of the Act Should be Affirmed, and Respondent's Exceptions 3 and 11 Should be Denied.

On or about October 30, Sochie Nnaemeka, who was an unpaid volunteer organizer, or "salt," for the Union went to visit bartender Ron Schultz at his home but was not able to speak to Schultz. (ALJD 8:1-21)(Tr. 482:20-25, 483:1-10, Nnaemeka). Later that day, when Nnaemeka went to work, Schultz asked Nnaemeka if she had been to his house and told her that he told food and beverage manager Fodor about her visit. (Id.) (Tr. 485:9-13). On that same date, manager Fodor asked Nnaemeka to come to the supply closet, where he asked her if she had been visited by strangers at her home, told her that employee Emiline Noel was scared because she had been visited, and asked her to report visits to her home to Respondent. (Id.) (Tr. 486:8-25, 487: 1-24,

Nnaemeka). When Nnaemeka said that she was not visited, Fodor pointedly asked if she was sure that she was not with the Union. (Id.) (Tr. 486:25, 487:1-4).

The ALJ properly credited Nnaemeka and discredited Fodor.[11] (ALJD 8:26). The ALJ noted that Fodor did not deny speaking to Nnaemeka in the supply closet or receiving a report from Schultz. (ALJD 8:23-28). Contrary to Respondent's contention, the ALJ summarized Fodor's testimony accurately. (RB 12). The ALJ stated that Fodor "denied asking Nnaemeka anything about the Union or asking employees whether they had been visited," but Fodor did not deny speaking to Nnaemeka in the supply closet. (ALJD 8:25-28) (Tr. 676:19-25). In finding that Fodor's interrogation of Nnaemeka violated the Act, the ALJ relied on employee reports to Fodor about house visits and Walsh's testimony that Fodor questioned employees about house visits (see infra), in addition to Nnaemeka's credited testimony.

More specifically, the ALJ found that an October 26 memorandum issued to employees by Respondent asked employees to report visits from strangers, and that in late October, Fodor told bartender James Walsh and cocktail waitress Monica Rakowska that other employees reported being visited and asked if they had been visited. (ALJD 8:27-30). Although the ALJ did not find Fodor's questioning of James Walsh and Rakowska to be a violation of Section 8(a)(1) of the Act, the ALJ fully credited James Walsh's testimony over Fodor's. (ALJD 6:26). As found by the ALJ, Fodor also testified that three employees including Rakowska , reported to him that they had received house visits. (ALJD 7:37-41) (Tr. 675:14:25, 676:1-15). Fodor admittedly surmised that the Union was trying to organize and reported this to his superiors, food

[11] Pursuant to the Board's established policy, Respondent's challenges to the ALJ's credibility findings should not be overturned unless a clear preponderance of all of the relevant evidence convinces the Board that Respondent is correct. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Respondent has not met that burden with respect to any of its challenges to the ALJ's credibility findings.

and beverage director Sallyanne Kelly and assistant food and beverage director Jay Hasan. (Tr. 684).

Contrary to Respondent's contention, the ALJ did not rely on the October 31 letter from Union president Wendi Walsh to Adkins in order to establish Fodor's unlawful interrogation of Nnaemeka. (RB 11). Rather, the ALJ astutely noted that the October 31 letter confirmed Fodor's suspicion that visits to the employees' houses were related to the Union. (ALJD 7:43-48) (Tr. 684:1-23).

The ALJ had a substantial basis to infer from Nnaemeka's hearsay report that Schultz told Fodor that she had visited Schultz, but did not need to rely on that hearsay evidence in view of Nnaemeka's credited testimony regarding the interrogation itself. The ALJ clearly stated on the record that he was admitting Nnaemeka's testimony as to what Schultz told her as a report of a conversation that she participated in rather than for the truth of the report. (Tr. 484:11-18). Moreover, the ALJ accurately found that Fodor did not deny having received a report from Schultz. The ALJ discredited Fodor for other reasons as well, namely that Fodor did not deny that he called Nnaemeka into the supply closet and spoke to her there; Fodor lied about not asking employees about house visits as Walsh credibly testified; Respondent had asked employees to report about house visits in its October 26 memo; and Fodor admitted that employees reported house visits to him. (ALJD 8:23-25, 8:32-34).

Respondent's arguments about Walsh and Nnaemeka's credibility are without merit and should be denied. (RB 17). The omissions on the employment applications of Nnaemeka (a college degree from Yale) and Walsh (a graduate degree from Columbia) were not pertinent to the job requirements of their positions as a bartender and cocktail waitress, respectively, and do not demonstrate that any of their testimony should be discredited. (Tr. 500:21-25, Nnaemeka,

501:1-19, 434-435, Walsh). With respect to Respondent's assertion that Nnaemeka and Walsh are incredible because they did not tell the Board agent of their status as salts when they provided their affidavits, Nnaemeka and Walsh both candidly acknowledged that this was the case in their testimony before the ALJ. (Tr. 500:1-20, Nnaemeka, 437, Walsh). Contrary to Respondent's assertions, the ALJ made reasoned, logical credibility determinations regarding the testimony of Nnaemeka, Walsh and Fodor, and Respondent has failed to support its argument that the ALJ's credibility findings should be overturned. (RB 13, 17).

The ALJ correctly found that Fodor's interrogation of Nnaemeka was coercive because his question, "[S]o the Union has not come to your house? You're not with the Union?" demanded an answer. (ALJD 8:36-40). An interrogation violates Section 8(a)(1) of the Act if, "under all circumstances, it reasonably tends to restrain or interfere with employees' exercise of rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176 (1984). The Board looks at the totality of circumstances to determine whether a supervisor's questioning of an employee about union activity is coercive, including 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. *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 85, slip op. at 18 (2011) (store manager who asked employees to write statements about "union harassment" unlawful where store manager was truly interrogating employees regarding their union activity, including home visits taking place by union organizers); *Westwood Healthcare Center*, 330 NLRB 935 (2000). Nnaemeka had not disclosed to manager Fodor that she was a union supporter, and Fodor interrogated Nnaemeka in the confines of the supply closet. Accordingly, the ALJ's finding of fact and conclusion that Fodor interrogated Nnaemeka in violation of Section 8(a)(1) of the Act should be affirmed, and Respondent's Exceptions 3 and 11

should be denied. *Fresh & Easy Neighborhood Market, Inc., 356 NLRB No. 85, slip op. at 18; Stoody Co.*, 320 NLRB 18, 18-19 (1995).

V. The ALJ's Finding of Fact and Conclusion that Respondent, on November 3, Discharged Sochie Nnaemeka in Violation of Section 8(a)(1) and (3) of the Act Should be Affirmed and Respondent's Exceptions 8, 9, and 11 Should be Denied.

As set forth and thoroughly considered by the ALJ, Sochie Nnaemeka spoke to co-workers about the Union, visited employee homes, and collected signed union authorization cards from other employees. (ALJD 12:1-5) (Tr. 475:13-14, 479:22-25, 480:1-25, Nnaemeka). Respondent fired her on November 3, less than a week after manager Fodor asked her if she was sure she was not with the Union, and supervisor Nick Sanvil told Nnaemeka that he heard she was getting herself into trouble. (ALJD 12:1-9) (Tr. 476:5-8, 505:18-25, 506:1-2, Nnaemeka, GCX 19). Prior to her discharge, Schultz mentioned to Fodor that Nnaemeka and the "union lady" attempted to visit him. (ALJD 12:1-5). Nnaemeka was confronted by managers Kelly and Hasan, human resources (HR) director Steven Feinberg, and a security manager. (Tr. 489:19-25, 490:1). The ALJ credited Nnaemeka's testimony concerning the meeting, and neither Feinberg nor Kelly testified. (ALJD 12:16-29). At the meeting Kelly asserted that Nnaemeka had a string of absences and tardies. (Tr. 490:6-7). Nnaemeka replied that she had only two or three tardies but no absences, and asked to see her attendance record. Kelly then conceded to Nnaemeka that she did not have a record of that, and Kelly then asserted that Nnaemeka had loitered in the kitchen the night before.[12] (Tr. 490:11-17, 509:13-15, Nnaemeka).

Respondent's contention that Nnaemeka's break the night before her discharge was unauthorized is without merit. As the ALJ held, Nnaemeka did nothing improper. (ALJD 13:51) (RB 20). Nnaemeka explained that she had gone to the kitchen to get a meal during her break

[12] Respondent classifies loitering as a "Group 1" offense subject to progressive discipline: first offense – documented verbal warning; second offense – written warning; third offense – final warning with suspension; fourth offense – discharge). (GCX 15).

and had gotten another employee to cover for her. Assistant food and beverage director Hasan claimed that the break was unauthorized, but Nnaemeka's credited testimony establishes that the employees in her department were allowed to take their break in a nook or the poker room kitchen, the only two places outside of customer's presence, as long as they had coverage for their shift. (Tr. 490:18-19, 492:5-25, 493:1-5, 514:5-25, 515:1-5, Nnaemeka). Other servers have left their work areas unattended and taken breaks in the poker room without being disciplined, much less summarily discharged. (Tr. 493:6-25, 494:1-6, Nnaemeka). Nnaemeka had received praise for her work by Fodor, and was transitioning to the "VIP" bar. (Tr. 491:8-25, 492:1-4, Nnaemeka). The ALJ found Fodor's testimony that he places new employees in the VIP bar to be incredulous, and that Fodor would not have informed Nnaemeka of a forthcoming transfer (which Fodor did not deny) if Respondent intended to discharge her. (ALJD 13:5-19) (Tr. 680:13-25, 681:1-2).

Hasan testified that supervisor Nick Sanvil, the night supervisor on duty, told Hasan that Nnaemeka was loitering, and Hasan testified that he saw a tape showing that Nnaemeka was talking to coworkers for about 25 minutes who were trying to do their work. (Tr. 632:1-23, Hasan). However, Sanvil and Johnny Quinones, the casino manager were in the poker room kitchen with Nnaemeka during her break and did not tell her that she was on an unauthorized break or to go back to her work station. (Tr. 510:1-25, 511:1-17, 515:6-25, Nnaemeka). Hasan testified he was pretty sure Sanvil or Quinones told her to go back to work, yet as the ALJ found neither manager testified. (ALJD 12:48-51). Hasan equivocated, testifying that he would need to review "Sanvil's statement" to determine if Sanvil told Nnaemeka to return to work when he observed her "loitering" in the poker room, and that he believed there was a document with respect to the incident, and probably a surveillance tape. (Tr. 651:9-25, 652:17-25, 653:1-4,

653:14-25). However, Respondent did not produce any such tape, any written statement about the incident, and failed to present supervisor Sanvil or casino manager Quinones as witnesses. (ALJD 12:47-51) (RB 20). Thus, the "loitering" defense is also without merit.

Hasan did not testify that Kelly had the attendance record in her hand or that Kelly gave Nnaemeka a copy of her attendance record. (ALJD 12:38-46). The ALJ properly credited Nnaemeka's testimony that Kelly did not show her the attendance record. (Id.) (Tr. 634:1-17, RX 13). Assuming Nnaemeka was a no call-no show on September 18, as Respondent contends, this was about five weeks before her discharge. (Tr. 678:10-25, 679:1-25, 680:1-12, Fodor, GCX 14). As the ALJ found, Fodor did not have any specific information about when he claims to have counseled Nnaemeka regarding tardiness nor does the memo of September 18 indicate that Nnaemeka was counseled. (ALJD 12:31-36). The ALJ credited Nnaemeka's testimony that she was never counseled regarding lateness. With respect to her attendance record, Nnaemeka testified that she was only late two or three times, not eight times as claimed by Respondent, and that she was never a "no call-no show". (Tr. 497:22-25, 498:16-20, Nnaemeka). Assuming for the sake of argument that Nnaemeka was late eight times during her employment, as Respondent's attendance report purports to show, the alleged tardies occurred throughout her period of employment, but did not become an issue until just a few days after Fodor's coercively interrogated Nnaemeka about her union activities, and expressed suspicion as to the veracity of her denial that she had engaged in any union activities. (RX 13). Moreover, Nnaemeka had some "missed punch sheets" which she completed four or five times when her card did not swipe properly because she was a new employee. (Tr. 498:1-15, Nnaemeka). Hasan admitted that these missed punches do occur, yet Respondent's attendance record does not show Nnaemeka's missed punches. (Tr. 656:13-25). Moreover, although there is not a single

disciplinary warning in Nnaemeka's file for attendance, Hasan testified that Nnaemeka received a discipline on October 8 for not counting her bank.[13] (658:1-25, Hasan, Tr. 685:22-25, 686:1-4, Fodor, GCX 69-70). For the above reasons, Respondent's poor attendance defense regarding the discharge of Nnaemeka is also incredible.

The ALJ applied the appropriate analytical framework under *Wright Line,* 251 NLRB 1083), enfd. 662 F.2d 899 (1st Cir. 1981). (ALJD 13:22-51). In cases like those involving the discharge of Nnaemeka and the other discharged employees in these cases, the General Counsel must first show that the employer's actions were motivated, at least in part, by antiunion considerations. The ALJ found that Nnaemeka engaged in union activity and that Respondent was aware of the activity, thereby concluding that the General Counsel met her burden. (ALJD 13:23-24). The ALJ relied on a number of facts to establish that Respondent held animus against Nnaemeka because of her union activities, including Fodor's failure to deny that Schultz told him that Nnaemeka and the "union lady" attempted to visit him; the interrogations and threats relating to union activity, particularly Fodor's interrogation of Nnaemeka; and the fact that Respondent suspected that the employees making home visits were engaged in union activity after the Union's announcement to Respondent of its intent to begin home visits to employees. (ALJD 13:22-34). For the above reasons, the ALJ concluded that the General Counsel has met the burden of proving that Nnaemeka's union activity was a substantial and motivating factor for her discharge. (ALJD 13:31-32).

Once a discriminatory motive is established, the burden shifts to the employer to show that it would have taken the same action absent the union activity or other protected conduct. The employer cannot meet its burden merely by showing that a legitimate reason factored into its

[13] This contradicts Hasan's testimony that probationary employees do not receive discipline. His claim that the October 8 discipline came from "surveillance" is not credible, given that he signed the warning and gave it to Nnaemeka. (Tr. 661:5-7, Hasan).

decision, but must show that it would have acted for the legitimate reason even in the absence of the employee's union and protected activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

The ALJ concluded that Respondent failed to make that showing, and Respondent's asserted reasons for Nnaemeka's discharge are false or do not exist. (ALJD 13:36-46, 14:6-9). (RB 18). Respondent did not rely on Nnaemeka's attendance record for her discharge as evidenced by Fodor's failure to give specifics regarding his claim that he counseled Nnaemeka, the fact that Kelly did not testify, the fact that Respondent failed to show Nnaemeka her attendance record after she disputed Kelly's assertions, and the fact that Respondent abruptly shifted its defense from poor attendance to loitering. (ALJD 13:36-46).

The ALJ also found that the loitering defense was a pretext for the reasons stated above, i.e. that supervisors Sanvil and Quinones, who saw Nnaemeka taking her break, said nothing to her at the time because she was not doing anything wrong, and noted that neither was called to testify. (ALJD 13:13:48-51). Finally, as the ALJ noted, Nnaemeka's record was not unsatisfactory, as Respondent contends because Fodor would not have told her about an upcoming transfer to the VIP bar, if he did not consider her to be a good employee. (ALJD 14:1-4) (RB 19).

Respondent's various shifting reasons for discharging Nnaemeka raised in its brief are also meritless and further demonstrate that the real reason for her discharge was her union activities. Thus, her attendance record at her previous employer is irrelevant and although Respondent argues that Nnaemeka was issued a discipline for not counting her bank, Respondent did not mention this discipline in Nnaemeka's discharge meeting, and it occurred almost a month before Respondent fired her. (Tr. 658-661, GCX 69-70) (RB 19). In summary, the ALJ's finding that Nnaemeka, as a probationary employee and salt, is protected by the Act, that

Respondent's reasons for her discharge are false or a pretext, and Respondent failed to rebut the General Counsel's prima facie case should be affirmed. *Limestone Apparel Corp.*, 255 NLRB 722 (1981) (ALJD 14:6-9). Respondent's Exceptions 8,9, and 11 should be denied.

VI. The ALJ's Finding of Fact and Conclusion that Respondent, on November 8, Discharged James Walsh in Violation of Section 8(a)(1)and (3) of the Act Should be Affirmed, and Respondent's Exceptions 10 and 11 Should be Denied.

Just five days after firing Nnaemeka, on November 8, Respondent discharged bartender James Walsh, another covert "salt" at the time of his hire by Respondent. Walsh planned the Union's organizing effort in September, with Union agent Mike Hill. (Tr. 419:18-22, Walsh). Walsh discussed the Union with co-workers, visited their homes, and solicited them to sign union cards. (Tr. 426:13-15, Walsh, Tr. 422, 423:1-14, Walsh). The ALJ found that, in October, manager Fodor asked Walsh whether he had been visited. (ALJD 16:41-42) (Tr. 423:15-24, 424:1-24, Tr. 424:24-25, 425:19-25, 426:1-2, Walsh).

The ALJ set forth Walsh's discharge meeting in detail. (ALJD 16:44-51). About 20 minutes after the start of Walsh's shift on November 8, he was called to HR where HR director Feinberg, assistant manager Hasan, and a guard met him. Hasan told Walsh that the Respondent was discharging him and did not need a reason because Walsh was on probation. Walsh asked for a reason, and Hasan said it was a performance review. Walsh then asked to see a performance review, and Hasan said there was an "observed" review, and admitted to Walsh that the decision was "above him," but Respondent did not show Walsh any written review. (Tr. 428, Walsh). Walsh asked first Feinberg and then Hasan whether his discharge had anything to do with his union activity. Neither denied it. Both said they were not allowed to answer that question, and Hasan also replied that it was above him, i.e. that the decision was made by a higher authority. As established by Walsh's credited testimony, Feinberg was clearly rattled

by the question, avoided eye contact with Walsh, and shuffled papers. (ALJD 18:28-33) (Tr. 428-429, Walsh). Respondent's witnesses did not testify about any purported shortcomings in Walsh's work performance. (ALJD 17:10-11). Also contradicting any claim that Walsh or Nnaemeka were poor performers is the fact that Respondent had assigned Walsh to shifts coveted by more senior bartenders, and beverage manager Fodor had told him and server Nnaemeka that he was very happy he had hired them. (Tr. 429:11-25. 430:1-13, Walsh).

As the ALJ found, when Respondent's counsel asked assistant food and beverage director Hasan about his involvement in the "termination of ex-employee James Walsh," Hasan testified that employees Christina Forbes and Jacqueline Bello "complained" to him that "Steve" (Walsh's name is James) was asking them for their phone numbers, addresses, and how they liked working for Mardi Gras. (ALJD 17:13-29) (Tr. 629:14-25, 630:1-25, 631:1, Hasan).

Neither Forbes nor Bello testified. (ALJD 17:24-25). Although Respondent's counsel asked Hasan blatant leading questions suggesting that Walsh spoke to Forbes and Bello during working time, and also "bothered" other employees for their addresses and phone numbers, there is no evidence, not even hearsay evidence, that Walsh spoke to Forbes or Bello (or other employees) either during working time or on Respondent's premises. (Tr. 630:8-10, Hasan; RB 20). As the ALJ found, there is no claim that Walsh interrupted the work of Forbes or Bello, or that Walsh failed to comply with any request made by either reported complainant that Walsh leave her alone. (ALJD 17: 29-30, 32-37). As the ALJ found, there is no evidence that employees are prohibited from asking coworkers for their addresses and phone numbers. (ALJD 18:35-36).

Contrary to Respondent's assertion, the ALJ did not link the employees' reports to Hasan to the October 26 memo, but rather simply found that Respondent cannot rely on the October 26

memo to justify its assertion that Walsh engaged in misconduct by telling employees to report to management if they were approached by strangers, because Walsh was not a stranger to Forbes or Bello. (ALJD 18:2-5) (RB 21).

Hasan conducted no investigation into Walsh's conduct, notwithstanding his admission that it is his practice is to investigate complaints about probationary employees. (Tr. 650-651, Hasan). Rather, he simply reported the "complaints" by Bello and Forbes about Walsh to Feinberg and Kelly, who, Hasan claimed, decided to terminate Walsh because his actions were unacceptable and he was on his probationary period. (Tr. 600:7-15, 631:2-8, 649:18-25, 650:1-6, Hasan). Respondent gave Walsh no chance to explain his version of events, even at Walsh's discharge meeting, and Hasan did not even consult with beverage manager Fodor, Walsh's immediate supervisor, before the decision was made to fire Walsh. (Tr. 415, Walsh; Tr. 649-650, Hasan).

Moreover, Respondent did not obtain written statements from Forbes or Bello, in sharp contrast to its procedure in the November 23 incident that led to the discharge of saucier Steve Wetstein, discussed infra, when Respondent obtained a written statement from food porter Terrell Blow about his short conversation with Wetstein about the Union. (ALJD 17:21-23). Hasan asserted that there was no need to document Walsh's alleged misconduct in asking Forbes and Bello, for their phone numbers and addresses, because Walsh was on probation. (Tr. 649-650, Hasan). However, this contradicted Hasan's own testimony just minutes earlier, when, in the course of testifying about probationary employee Nnaemeka's attendance record, Hasan stated that Respondent documents "pretty much everything." (Tr.634-635, Hasan).

As relied upon by the ALJ, the Board has found that an employer's failure to consider all the facts is indicia of discriminatory intent, citing *Bantek West, Inc.*, 344 NLRB 886, 895 (2005);

K&M Electronics, 283 NLRB 279, 291, fn. 45 (1987). As noted above, Respondent did not present any probative evidence to show that the employees' reports regarding Walsh were actually complaints, as opposed to mere reports from which Respondent could easily infer that Walsh was engaged in organizing activity.

By November 8, when Walsh was fired, Respondent was well aware that union organizing activity was underway, and based on reports that Walsh was trying to get contact information from co-workers, Respondent could easily figure out that he was engaged in union activity. The food and beverage department managers were admittedly aware of the union activity. Bar manager Fodor admitted that employees Monica Rakowska, Doreen Decristo and Suzanne Goslin told him about home visits they had received before Walsh and Nnaemeka were discharged. (Tr. 675:14-25, 676:1-18, 682:17-25, 683:1-12, Fodor). Fodor immediately told his superiors, Hasan, who was directly involved in the discharge of Walsh, and Kelly about the home visits and that the Union was probably starting to organize. (Tr. 684:4-23, Fodor). Union President Walsh's October 31 letter to Respondent had confirmed Fodor's suspicion. Fodor had accusatorily interrogated food and beverage employee Nnaemeka about her union activities, and Respondent had discharged Nnaemeka because she engaged in union activities. In addition, Respondent may have realized that Nnaemeka and Walsh were working together for the Union, since they both started working for Respondent in September.Based on the above evidence, the ALJ properly inferred Respondent's knowledge of Walsh's union activity, citing *Kajima Engineering & Construction*, 331 NLRB 1604 (2000). (ALJD 17:41 to 18:40.

In determining that Respondent discharged Walsh because of his union activities, the ALJ also relied on Respondent's interrogations and threats, the timing of the discharge of Walsh immediately after Hasan's conversations with Bello and Forbes, Respondent's failure to

investigate the "complaints" about Walsh, Feinberg's and Hasan's evasive responses to Walsh's inquiry as to whether he was fired because of his union activity, and the pretextual reasons for the discharge of Walsh. (Id.). Respondent, as the ALJ noted, did not present any evidence that employees are not allowed to request telephone numbers or addresses from other employees or that employees are subject to discharge, without investigation. (ALJD 18:35-37) (RB 20). The ALJ's finding of fact and conclusion that Respondent failed to rebut the General Counsel's prima facie case, offered false or pretextual reasons for Walsh's discharge, and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging James Walsh should be affirmed, and Respondent's Exceptions 10 and 11 should be denied.

VII. The ALJ's Finding of Fact and Conclusion that Respondent, by Evans Etienne, on November 14, Threatened Employees with Unspecified Reprisals in Violation of Section 8(a)(1) of the Act Should be Affirmed, and Respondent's Exception 4 Should be Denied.

As found by the ALJ, on November 14, supervisor Evans Etienne approached slot attendant Tashana McKenzie, told her that employee Noel reported that McKenzie had discussed the Union with her, and warned McKenzie to watch her back, thereby threatening McKenzie with unspecified reprisals if she engaged in union activities. (ALJD 8:46-52) (Tr. 357:20-25, McKenzie). Respondent did not call Etienne to testify. (ALJD 8:47). Even if supervisor Etienne was concerned about McKenzie's job security, the statement was a threat of unspecified reprisals, as found by the ALJ, citing *Jordan Marsh Corp.*, 317 NLRB 460, 462-463 (1995). Contrary to Respondent's argument, it is irrelevant that McKenzie considered Etienne her friend. (RB 13). As McKenzie testified, Etienne was her supervisor, and they were at work at the time. (Tr. 364:11-12). Contrary to Respondent's assertion, the evidence does not reflect that McKenzie did not feel threatened by Etienne's statement. (RB 13). The ALJ properly sustained General Counsel's objection to that question given that McKenzie's subjective impression is

irrelevant. (Tr. 364:19-23) (RB 13). In addition, the context of the statement does not suggest, as Respondent contends, that Etienne's statement referred to threats by employees who opposed the Union. (RB 13). Etienne's threat may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. *International Baking Co. and Earthgrains*, 348 NLRB 1133, 1136 (2006), citing *Exterior Systems*, 338 NLRB 677 (2002). Accordingly, the ALJ's finding of fact and conclusion that Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals should be affirmed, and Respondent's Exception 4 should be denied. (ALJD 9:3-4).

VIII. Protected Concerted Activity ("The Delegations") on November 17 and 18

A. Delegation on November 17

As thoroughly considered by the ALJ, on November 17, Union organizers Mike Hill, Petit-Joseph, Richardson, and Rodriguez-Cambry, a delegation for the Union, entered the main entrance of the casino with off-duty employee organizers including Dianese Jean, Alicia Bradley, Amanda Hill, and Tashana McKenzie. Father Richard Aguilar and Interfaith Worker Justice representative Jeanette Smith were also present.[14] (ALJD 4:42-44, 23:11-51). (Tr. 73:4-25, 74:1-13, Adkins, Tr. 141:25, 142:1-17, M. Hill, Tr. 240-243, Jean, Tr. 358:10-25, 359:1-6, McKenzie, Tr. 384:9-19, 384:20-24, Bradley, Tr. 397:1-25, A. Hill). Mike Hill testified that the purpose of the visit was to formally introduce themselves to vice president Adkins and gain access to the break room under the terms of the neutrality agreement. (Tr. 143:4-9, M. Hill). The group introduced themselves as being from the Union and asked to see Adkins. Security manager Hopke demanded that they leave, said there was no agreement with the Union, called the police, and threatened to have them arrested. (Tr. 75:75:25, 76:1-6, Adkins, Tr. 143:23-25, M. Hill, 359:9-25, 360:1-10, McKenzie, 384:25, 385, Bradley, Tr. 397:21-25, A. Hill). Mike

[14] By this time, Respondent had fired Dorlean, Gelin, Nnaemeka and Walsh.

Hill left a cover letter and Union flyer that the Union also mailed to Respondent on that same date, with pictures of the 15 employees on the organizing committee on a desk. (Tr. 144:23-25, 145:1-6, GCX 11, 16, M. Hill, Tr. 461:7-16, Smith). Hopke swept the flyer to the floor. (Id.). The Union group then left the casino. (Id.). The ALJ found that Respondent's surveillance tape of the event shows the group was not disruptive, that the group did not purposely impede access, and any delay was incidental. (ALJD 23:27-36) (Tr. 472:19-23, Smith, RX 41).

That day, Adkins sent a letter to the Union asserting that the unannounced entry of 15 persons at the casino's main entrance demanding to meet him was intended to disrupt the workplace and create a scene in front of patrons. In the letter, Adkins also threatened that any employees engaging in these actions during working hours and on casino premises would be terminated immediately. (ALJD 4:46-50) (Tr. 78:13-25, 79:1-5, Adkins, GCX 10). Adkins testified that he meant this as a warning to employees that they would be fired for engaging in those activities. (Id.).

B. The ALJ's Finding of Fact and Conclusion that Respondent, on November 18, by Rich Hopke, Threatened Employees with Arrest in Violation of Section 8(a)(1) of the Act Should be Affirmed, and Respondent's Exception 5 Should be Denied.

On November 18, the Union agents returned to the casino with off-duty employee organizers who included Theresa Daniels-Muse, Amanda Hill, and Tashana McKenzie. (ALJD 5:1-8, 23:48-51, 24:1-8) (Tr. 339:16-25, 339:23-25, Daniels-Muse, 360:18-25, McKenzie, Tr. 398:10-12, 398:21-25, A. Hill). The group returned because Alicia Bradley had worked her shift without incident after the November 17 visit, and the Union was hoping that casino officials would speak to the casino's legal team and grant the Union access. (Tr. 79:14-25, Adkins, Tr. 146:17-25, 147:1-20, M. Hill). On November 18, the Union group was again met by security manager Hopke. (Tr. 148:19-25, 149:1-15, M. Hill). Union agent Mike Hill asked to speak with

vice-president Adkins pursuant to the neutrality agreement. (Id.). Hopke maintained that there was no agreement. (Id.). At Hopke's request, the Union group stepped outside the casino. (Id.). Hopke then told them that if they did not leave, he would call the police and have trespass warnings issued. (Tr. 149:16-18, M. Hill, 341:12-13, Daniels-Muse, Tr. 361:4-5, McKenzie). Hill told Hopke to call the police in order to document the Employer's failure to comply with the neutrality agreement. (Tr. 149:19-23, M. Hill). Hopke called the police. (ALJD 9:9-15). Two police officers arrived, said they were going to issue citations to the group, and instructed them to leave. (Tr. 150:5-14). Hopke said that current employees would also be arrested if they returned to work. (ALJD 9:21-32) (Tr. 150:15-24, M. Hill, Tr. 341:23-25, 342:1-3, Daniels-Muse, Tr. 339:22-25, 400:1, A. Hill). The group left. (Tr. 151:1-6, M. Hill). Contrary to Respondent's argument, there is no evidence that the employees were disorderly on November 18 so as to require Hopke to threaten the employees with arrest if they returned to the facility. (RX 41). Respondent failed to call security manager Hopke as a witness. (ALJD 9:31). As found by the ALJ, the surveillance video shows that the group did not interfere with customer access to the casino. (ALJD 24:8).

As found by the ALJ, Hopke's threats to have the employees arrested for engaging in union activity violated Section 8(a)(1) of the Act. (ALJD 9:34-36). *Winkle Bus Co.*, 347 NLRB 1203, 1218-1219 (2006). (ALJD 9:31). Hopke's threat to arrest employees if they returned later to work their scheduled shifts was an unlawful threat of discharge for engaging in union activity because the statement can lead a reasonable employee to believe that support for the Union could result in discharge. *Furniture Renters of America, Inc.*, 311 NLRB 749, 752 (1993), enfd. in part 36 F.3d 1240 (3d Cir. 1994). Accordingly, the ALJ's finding of fact and conclusion that Respondent violated Section 8(a)(1) of the Act by threatening off-duty employees with arrest

because they engaged in protected concerted union activity should be affirmed, and Respondent's Exception 5 should be denied.

C. The ALJ's Finding of Fact and Conclusion that Respondent Violated Section 8(a)(1) and (3) of the Act by Suspending Daniels-Muse, McKenzie, and Hill, and Discharging Daniels-Muse, McKenzie, Hill, Jean, and Bradley Should be Affirmed and Respondent's Exceptions 14 and 15 Should be Denied.

That same day, on November 18, Respondent suspended floor attendant Daniels-Muse, floor/slot attendant McKenzie, and money sweeper Amanda Hill, who each had about five years of seniority. (ALJD 24:21-51, 25:1-22). All three were notified by voice mail messages from their managers that they should not to report to work again until meeting with HR on November 21. (Tr. 342:19-25, 343:1-7, Daniels-Muse, 361:14-25, 362:1-3, McKenzie, Tr. 400:18-22, A. Hill). As a result of their suspensions, McKenzie missed work November 19 and 20, Daniels-Muse missed work November 20, and Hill missed four hours of work on November 21 because she was scheduled to work 4:00 a.m. to 8:00 a.m. on November 21. (Tr. 361:14-25,362:1-3, McKenzie; Tr. 342:22-25, Daniels-Muse; Tr. 393:1-14, 400:18-22, A. Hill).

On the same date as Daniels-Muse, McKenzie and Amanda Hill were discharged, November 18, Union committee member Alicia Bradley, a player's club representative, was called to the HR office and met by manager Elizabeth Hobart, HR director Feinberg and a security manager. (ALJD 24:21-33) (Tr. 387:14-25, Bradley). Feinberg told Bradley that Dan Adkins and Cathy Reside of Respondent's executive office had decided to fire her for "violating company policy." Bradley asked what policy. Feinberg replied, "You know what you did." Bradley asked if it had to do with the Union, and Feinberg said he was not allowed to answer that. (Tr. 387:14-25, 388, Bradley, GCX 34). Later that day, Union committee member Dianese Jean, a five year cage cashier, was called to HR and met by Feinberg, casino manager Mike Paterson and a security officer. (ALJD 24:10-19) (Tr. 245:20-25, 246:1-6, Jean). Feinberg

told her that based on "an executive decision" she was fired for "violating work rules." (Tr. 247:5-7, Jean). Jean questioned what rules she violated. Feinberg replied, "You know what you did," and refused to provide any specifics. (Tr. 246:6-12, Jean, GCX 32).

On November 21, Daniels-Muse, McKenzie, and Hill reported to the HR office as instructed and met separately with HR director Feinberg. (ALJD 24:35-51, 25:1-22) (Tr. 343:8-25, Daniels-Muse, Tr. 365:21-25, 363:1-11, McKenzie, Tr. 401:3-12, A. Hill). Hill was told they were fired for "violating company work rules." No further explanation was given except that the decision was made by the "executive office." (Tr. 401:3-12, A. Hill, GCX 41). McKenzie and Daniels-Muse were not specifically told that they were fired, but both employees received termination letters. (Tr. 344:1-16, 345:25, 346:1-3, Daniels-Muse, Tr. 363:12-13 McKenzie, GCX 36, 38,39, 54).

The ALJ, in rejecting Respondent's arguments, determined that the delegations on November 17 and 18 were not disruptive and did not purposefully impede access to customers. He also found that any delay experienced by customers passing by the delegations was brief and incidental. (ALJD 25:24-36). In so doing, the ALJ did not accept Adkins' testimony that he made the decision to terminate all of the employees involved in the group visits on November 17 and 18 for gross misconduct and disrupting the workplace. (Tr. 77:19-25, 78:1-12. 81:1-9, 761:3-25). Adkins admitted that he fired Alicia Bradley and Dianese Jean, two employees who did not participate in the delegation on November 18, notwithstanding that Adkins did not send the letter threatening termination until after Bradley and Jean participated in the delegation on November 17. (Tr. 80:2-10, 81:24-2582:1-4). Adkins, who did not personally observe the Union visitors on November 17 or 18, testified that he relied on the surveillance tape of the Union visitors' conduct that showed the individuals were blocking ingress and egress of

customers on the morning of November 17 (Tr. 76:8-12, Adkins). However, Respondent did not present Security Manager Hopke or any eyewitnesses to testify about the discussion that took place between the Union group and Respondent's representatives, or about the actions of the Union group on November 17 and 18. After evading General Counsel's questions, Adkins finally admitted that it took less than a one minute for any customer or employee to walk through the Union group on November 17 or 18. (Tr. 82:14-25, 84-85). Moreover, the surveillance tape clearly shows that the group was not purposefully blocking ingress or egress, and that customers and employees were able to get through the group during the short time period before they stepped away from the reception area. (RX 41, Tr. 261:7-25, Jean). Contrary to Respondent's contention, the ALJ rejected its arguments that the employees violated company rules during the delegation visits. As the ALJ noted, Adkins did not cite to any rule violation during his testimony in the administrative hearing pursuant to Fed. R. Evid. 611(c), or in his testimony during the related Section 10(j) proceeding, and that he did not point to any misconduct by an employee. (ALJD 25:40-51) (Tr. 761:3-25, Adkins, GCX 15, pg. 55, par. 2) (RB 28-29). Moreover, the Board has held that employees do not lose the protections of the Act because that activity may violate an employer's rules or policies. *Louisiana Council No. 17*, 250 NLRB 880, 882 (1980).

As the ALJ found, Respondent suspended Daniels-Muse, McKenzie and Amanda Hill and fired those three plus Jean and Bradley precisely because of their union activity, consisting of peaceful visits to the casino with union organizers by Jean, Bradley and Amanda Hill on November 17, and by Daniels-Muse, McKenzie and Amanda Hill on November 18. Because Respondent suspended and discharged these employees for engaging in union activities, these actions must be found unlawful, unless, during the course of their union activities, the employees

engaged in misconduct so egregious that it removed them from the protection of the Act. (ALJD 26:3-10).

The ALJ properly applied the Board's standards in *Atlantic Steel Co.*, 245 NLRB 814 (1979) as restated in *Crown Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 3 (2011), finding that the employees engaged in protected concerted activities and did not lose the protection of the Act. (ALJD 26:24-37). The Board considers four factors to determine if an employee's conduct warrants losing the Act's protection: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the misconduct was provoked by an employer's unfair labor practice. *Crowne Plaza LaGuardia*, supra, slip op. at 4 (ALJD 26:25-30).

At the outset, the ALJ found that Adkins' October 31 letter to the Union did not assert that the Agreement had expired. (ALJD 26:4-5). Moreover, the ALJ found that the employees' activity was protected even if the Union was mistaken in its belief that Respondent was reneging on the Agreement, citing *Crown Plaza LaGuardia*, slip op. at 4 (2011); *Red Top Cab & Baggage Co.*, 145 NLRB 1433 (1964). (ALJD 26:1-16). The ALJ found that the surveillance tape does not reflect that on November 17, Mike Hill shoved aside a customer at the reception desk, and that even if Hill did so, the Board analyzes each employee's specific conduct before finding an employee to have lost the protection of the Act. *Crowne Plaza LaGuardia*, supra, slip op. at 4 (ALJD 26:18-22). Mike Hill is not an employee of Respondent. Moreover, although Respondent contends that the Union's conduct violates the neutrality agreement, the employees who were discharged for engaging in protected activity are not parties to the neutrality agreement nor was the event disruptive. (Tr. 753:21-23, Adkins). Paragraph 7 of the neutrality agreement clearly states that once the Employer is notified of the Union's intent to organize, it shall have

access to the non-work areas of the casino during non-working times as the "parties may mutually agree upon". The Union provided that notice by Walsh's letter to Adkins on November 2, and Adkins declined to meet with the Union. As Mike Hill testified, the Union was trying to obtain compliance with the Agreement when it visited the casino on November 17 and 18. (GCX 9, GCX 13, par. 7, RX 29). Respondent's arguments that the Union violated the Agreement based on the unsubstantiated assertion that non-employee Union organizer Mike Hill shoved aside a customer or that the delegation was improper because an advance appointment with Adkins had not been scheduled, should be denied. (RB 26-29). In this regard, as the ALJ found, "[concerted activities in pursuit of a legitimate employee objective do not lose their protected character because engaged in concertedly with nonemployees who happen to have a legitimate concurrent interest with employees, citing *Red Top Cab & Baggage Co.*, 145 NLRB 1433, 1450. (ALJD 26:7-10).

In analyzing the four factors considered by the Board, the ALJ found that the entrance to the casino was public; the subject matter of the discussion was a request to meet with Adkins to arrange for break room organizing by the Union pursuant to the neutrality agreement; there was no provocation or outburst; the delegation moved aside when asked by security, and left when asked by security. (ALJD 26:30-37). Moreover, there was no locking of arms or chanting by the delegation and no disruption of Respondent's business. Any delay in customer access was incidental and took no more than 10 seconds, "far less (time) than a stop at a traffic light". (ALJD 26:39-44). See *Goya Foods of Florida,* 347 NLRB 1118, 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (customer services not disrupted when employees engaged in protected concerted activity engaged in shouting for less than a minute, and video showed guest walking past employees without any issues); *Bloomfield Health Care Center*, 352 NLRB 252 (2008)

(employer's discharge of employee who was protesting employer's discriminatory policies prohibiting union supporters from visiting the employer's premises unlawful, as employee did not engage in profanity or threatening conduct); *Accurate Wire Harness,* 335 NLRB 1096 (2001) (employer's discharge of employees due to alleged threat to other employee and participation of employees in walkout over terms and conditions of employment unlawful where employer sent letter essentially acknowledging it knew employees were involved in protected conduct and discharged employees as a result).

In summary, the alleged discriminatees did not engage in any outburst or misconduct. They were discharged for engaging in protected concerted and union activities. The ALJ's finding of fact and conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill, and by discharging Dianese Jean and Alicia Bradley should be affirmed, and Respondent's Exceptions 14 and 15 should be denied. (ALJD 26:47-51).

IX. The ALJ's Finding of Fact and Conclusion that Respondent, on November 23, Terminated Steve Wetstein in Violation of Section (8)(a)(1) and (3) of the Act Should be Affirmed, and Respondent's Exceptions 12 and 13 Should be Denied.

Steve Wetstein, saucier, was part of the employee organizing committee, made home visits to employees, and collected signed authorization cards. His photo was on the Union flyer presented to Respondent on November 17, six days before Respondent fired him on November 23. (ALJD 20:48-49) (266:4-17, 267:9-25, 268, 269:1-11, Wetstein, GCX 16). The ALJ correctly found, contrary to Respondent's assertion, that on November 9, Chef Wally told Wetstein that he knew the Union was visiting homes and asked questions about union dues. (ALJD 20:50-51, 21:1-3). The ALJ also noted that on November 22, Respondent vice president Adkins spoke to the employees in the French Quarter restaurant and told them, among other

things, that the Union was making false promises, that there wasn't a neutrality agreement and that he was looking to sue over that issue. (ALJD 21:5-7) (Tr. 271:1-18). As found by the ALJ, on November 23, Wetstein was getting food from the food storage area when he encountered food porter Terrell Blow and asked to meet to discuss the Union outside of work. (ALJD 21:9-19) (Tr. 273:9-25, 274:1-2, 274:16-20, Wetstein). Blow said he could not meet. (Tr. 274:10-15, Wetstein). Wetstein asked for Blow's phone number, and Blow said his phone had turned off. (Id.). The entire exchange took less than a minute. (Tr. 274:15). Later that day, Wetstein was sent to the HR office, where he was met by HR director Feinberg, food and beverage managers Sallyanne Kelly and Jay Hasan, and security shift manager Tammy McArthur. [Tr. 275:2-25, Wetstein; GCX 1(rr), par. 5 re McArthur job title]. Feinberg told Wetstein, that he was being discharged for interfering with the work of another employee when that employee was busy. (ALJD 21:43-51, 22:1-5) (Tr. 276:2-13, Wetstein). Terrell Blow, who is security shift manager McArthur's son, wrote a memo to Respondent concerning the incident that essentially corroborates Wetstein and states that Wetstein was talking to Blow about the Union. (ALJD 21:26-36) (Tr. 639:24-25, 640:1-3, Hasan, GCX 45). The ALJ found that Wetstein engaged in union activity, that Respondent was aware of the activity, and that Respondent failed to prove that it would have taken the same action against Wetstein absent his union activity. (ALJD 22:29-36).

The ALJ noted that the evidence shows that workers spoke about non-work related subjects during working time, without incident or write-up and that there are no rules prohibiting that conduct. (ALJD 22:38-40) (Tr. 276:17-25, 277:4-12, Wetstein, 92:1-9, Adkins, GCX 91:24-25).

The ALJ properly rejected Respondent's argument that Wetstein was on final warning for double dipping a spoon because none of the documentation relating to his discharge (i.e. the memo by Feinberg or the discharge form) mentions the double-dipping a spoon, and no documentation of discipline for double-dipping a spoon is in the record. (ALJD 22:7-12, 47-48) (Tr. 88:21-25, 89:1-13, GCX 43-44). Accordingly, Respondent's assertion that the ALJ ignored this testimony is without merit. (RB 22).

Similarly, Respondent's argument that its policy is not to document prior discipline on termination documents should be rejected. (Tr. 771:18-25, 772:1-2, Adkins). Feinberg's memo documenting the discharge specifically states that Wetstein was terminated for interfering with Blow's ability to work and that he was speaking to Blow about "union related inquiries while on Company time." (ALJD 22:16-19) (GCX 44).

Although it was Feinberg's decision to discharge Wetstein, Respondent did not present Feinberg or Chef Wally to testify concerning Wetstein's discharge. (Tr. 87:6-23, Adkins, Tr. 640:4-25, 641:1-3, Hasan). Respondent only presented assistant director of food and beverage Jay Hasan, who testified that he asked Blow to write-up his complaint. (Tr. 626:12-25, 627:1-25, Hasan). Without even reading Blow's written statement or giving Wetstein a chance to address the issue, Hasan testified that he recommended that Wetstein be discharged immediately, claiming that this was the "icing on the cake" and that Wetstein should have been fired previously for double-dipping the spoon. (ALJD 21:38-39) (Tr. 628:25, 628:1-25, 629:1, 647:1-25, 648:11-25, 649:1-14, Tr. 646:1-25, Hasan). The ALJ also noted that whereas Respondent obtained a written statement from Blow, Respondent did not obtain written statements from Forbes or Bello concerning Walsh's discharge. (ALJD 22:39-41). Respondent's contention that the ALJ improperly credited Wetstein's testimony, while

discounting Blow's statement should also be rejected, especially because Blow did not testify. (ALJD 22:45) (RB 22).

On cross-examination, Hasan added that he also recommended Wetstein's termination because Wetstein left a tray outside instead of storing the tray in the proper area. (ALJD 22:46-47) (Tr. 645:15-25, Hasan). Thus, Respondent provided shifting defenses for yet another employee's discharge. The ALJ properly discredited Hasan's testimony because of the uncontroverted evidence that Respondent knew Wetstein was talking to Blow about the Union, that was the only reason Respondent cited at the time it fired Wetstein, the conversation between Wetstein and Blow was less than a minute, there is no evidence that Wetstein interfered with Blow's work, Respondent did not ask Wetstein about the incident before deciding to fire him, and Respondent failed to present Feinberg, the top level manager who decided to terminate Wetstein. Also, non-work related talk about subjects other than unions is permitted by Respondent. (ALJD 22:38-52). Accordingly, the ALJ's findings of fact and conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wetstein should be affirmed, and Respondent's Exceptions 12 and 13 should be denied.

X. The ALJ's Finding of Fact and Conclusion that Respondent, on or about December 2, by Daniel Adkins Informed Employees that they were Discharged for Engaging in Protected Concerted Activities in Violation of Section 8(a)(1) of the Act Should be Affirmed, and Respondent's Exception 6 Should be Denied.

The ALJ fully credited Amanda Hill's testimony regarding her meeting on December 2 with Respondent official Adkins at the casino. (ALJD 9:41-50). During the meeting, Hill asked for a reason why she was discharged. Adkins told Hill that she had been discharged for being disruptive when she came to the facility (on November 17 and 18) and violating work rules. Hill replied that the group had not been disruptive. She asked to see the policy she allegedly violated,

and said that she thought that employees were allowed to speak about the Union in the break room when they were not working. (Tr. 401:22-25, 402:7-12, A. Hill). Adkins told Amanda Hill this was not a way to come to see him, and then stated that the meeting was over. (Id). Adkins did not deny Hill's testimony, and Respondent's argument that Adkins only supplied a reason for Hill's termination should be rejected. (RB15) (ALJD 9:49-50). Adkins coercively linked Hill's discharge to her protected concerted activity, in violation of Section 8(a)(1) of the Act, as found by the ALJ, citing *TPA, Inc.*, 337 NLRB 282, 283 (2001) The ALJ's finding of fact and conclusion should be affirmed, and Respondent's Exception 6 should be denied. (ALJD 10:2-4).

XI. The ALJ's Finding of Fact and Conclusion that in or about December, Respondent, by Tommy Grozier, Interrogated Employees about their Union Activities and that of other Employees in Violation of Section 8(a)(1) of the Act Should be Affirmed, and Respondent's Exception 7 Should be Denied.

The ALJ found that in or about late November or December,[15] manager Grozier called organizing committee member and housekeeper Yvrose Jean Paul to his office, where Grozier unlawfully interrogated Paul. (ALJD 10:41-51) (Tr. 294:7-12, 297:1-14, 297:15-25, Tr. 311:1-25, GCX 16). Grozier asked Paul if she was a member of the Union and why she wanted to be part of the Union. (Tr. 300:5-9, 300:23-24, 305:7-8, 305:25, 306:1). Paul explained that she had been working for five years without a raise. (Tr. 300:25, 301:1). Grozier replied that when she needed to switch her days, he would help her, and he had done that previously (Tr. 301:2-3, 306:10-13. 310:4-12). As found by the ALJ, later that same day, Grozier twice asked Paul if she remembered the names of the union members who visited her home and also asked her what they had said to her. (ALJD 11:10-22) (Tr. 300:12-14, 302:17-18, 303:7-9, 305:14-16). Grozier admitted that he approached Paul and asked her twice if anyone visited her home claiming to be

[15] Wetstein had been fired by the time Grozier spoke to Paul. (Tr. 312:1-16).

from Mardi Gras, asked her what they were telling her, and what are they were asking for in return for better benefits and more pay. (Tr. 692:12-20, Grozier). Grozier also admitted approaching Paul later that day and asking her if she knew the names of people coming from Mardi Gras. (Tr. 693:1-6).

Although Grozier denies using the word Union and said he was not aware there was a union organizing campaign or that the neutrality agreement existed, this is simply not credible. (Tr. 693:7-10, 695:8-13, Grozier). By the time of this interrogation the employees' union activities were well known. Paul, credibly testified that Grozier used the word "Union", and the ALJ credited Paul's testimony that Grozier sought to learn the identities of other union supporters. (ALJD 11:24-30) (RB 16). Moreover, Respondent had held meetings with managers about the neutrality agreement that Grozier attended, Respondent's managers and supervisors had unlawfully threatened and interrogated employees, and Respondent had discharged eight employees because of their union activities within three weeks. (Tr. 751:10-25, 752:1-3, 780:23-25, 781-782, Adkins, Tr. 675:14-25, 676:8-14, 675:25, 676:1, 684:4-14, Fodor). Although Paul was an open supporter of the Union, Respondent violated Section 8(a)(1) of the Act by Grozier's coercive interrogation of her about the union activities of other employees, the ALJ's finding of fact and conclusion of law should be affirmed, and Respondent's Exception 7 should be denied.

XII. The ALJ's Recommended Order that Respondent Offer Reinstatement, Backpay, and Other Remedies to Nnaemeka, Walsh, Jean, Bradley, Daniels-Muse, McKenzie, and Hill Should be Affirmed, and Respondent's Exceptions 16-20 Should be Denied.

The Respondent mistakenly relies on *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), *review denied sub nom. Brewers and Maltsters, Local Union No. 6 v. NLRB,* 303 Fed. Appx. 899 (DC Cir. 2008) for its contention that the employees are not entitled to a make-whole remedy that includes reinstatement. (RB 31). In that case, the Board found that Respondent violated

Section 8(a)(5) and (1) of the Act by unilaterally installing hidden surveillance cameras at its facility. The Board also found that 16 employees discharged or suspended for misconduct uncovered through the video cameras were not entitled to make-whole relief. In that case, the employer discovered the employees' misconduct, including the possible use of illegal drugs, urinating on the roof, and sleeping on duty, by virtue of the unlawfully installed video cameras. All of the employees admitted engaging in the alleged misconduct. Accordingly, *Anheuser-Busch* relates to cases where it is established that an employee has engaged in misconduct, and the employer would not have detected the employee's misconduct but for its own unlawful actions. The facts in this case are completely inapposite because the employees in question did not engage in any misconduct whatsoever, as found by the ALJ. Moreover, Section 10(c) of the Act which provides that reinstatement and back pay shall not be granted to individuals suspended or discharged for cause, mentioned in *Anheuser-Busch,* does not apply to the employees in this case, who were discharged in retaliation for their protected concerted and union activities.

Respondent's reliance on *John Cuneo, Inc.*, 298 NLRB 856 (1990) for the proposition that Nnaemeka and Walsh should be precluded from receiving reinstatement and backpay due to minor omissions on their employment applications is misplaced. In that case, the employee in question did not state in his employment application that he had been laid off from an employer in the same field and lied on the application about having been self-employed as a carpet installer. The Board noted that the employer relied heavily on the information in the employment history section of the application by checking references on work similar to the work available so the employer could determine the applicant's work skills. Thus, as the Board noted, the employer proved that the employment history section of the application was the "heart of the form". Id. In that case, the employer also proved that it had a policy of not hiring

employees who misstated their employment background on applications. *John Cuneo*, at 856-857. Accordingly, the Board limited back pay to the time the employer discovered the employee's misconduct with respect to the employment application.

In this case, Nnaemeka and Walsh applied for food and beverage positions in the casino, did not lie about anything in the employment applications and accurately stated their employment histories. The failure to include degrees from prestigious universities has no bearing on the jobs they were seeking, and there is insufficient evidence to show that it affected Respondent's hiring process in any way. Respondent has not shown that it has a policy or practice of disciplining, let alone discharging employees for making similar minor omissions in their employment applications, or that it would not have hired Nnaemeka or Walsh had it known about their education.

Respondent cites to its policy in Section 206 of its Employee Handbook in support of its assertion that Nnaemeka and Walsh are not entitled to reinstatement offers but that document is not in the record, and therefore it must not be considered by the Board.[16] Moreover, Respondent has not shown that it has ever discharged any employees for falsifying their employment applications, particularly on the basis of such minor omissions that are unrelated to job requirements.

Accordingly, the ALJ's recommended backpay and interest remedies for Nnaemeka and Walsh should be affirmed, and Respondent's Exceptions 16-20 should be denied.

XIII. The ALJ's Conclusions of Law Should be Affirmed, and Respondent's Exception 21 Should be Denied.

Based on the foregoing, the ALJ's conclusions of law his recommended remedy, Order and Notice to Employees should be affirmed, with the modifications based on the additional

[16] Counsel for the Acting General Counsel hereby moves to strike the portion of Respondent's exceptions and brief that relies on Section 206 of Respondent's Employee Handbook.

remedies sought in the Acting General Counsel's cross-exceptions, and Respondent's Exception 21 and all of its exceptions should be denied in their entirety.

Dated at Miami, Florida, this 16th day of November, 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Acting General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision in the matter of Hartman and Tyner, Inc. d/b/a Mardi Gras Casino and Hollywood Concessions, Inc., Case 12-CA-072234, et al., was electronically filed with the Executive Secretary of the National Labor Relations Board and served by electronic mail upon the below-listed parties on this 16th day of November, 2012.

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