UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STATION CASINOS, INC., ALIANTE GAMING, LLC, d/b/a ALIANTE STATION CASINO + HOTEL, BOULDER STATION, INC., d/b/a BOULDER STATION HOTEL & CASINO, PALACE STATION HOTEL & CASINO, INC., d/b/a PALACE STATION HOTEL & CASINO, CHARLESTON STATION, LLC, d/b/a RED ROCK CASINO RESORT SPA, SANTA FE STATION, INC., d/b/a SANTA FE STATION HOTEL & CASINO, SUNSET STATION, INC., d/b/a SUNSET STATION HOTEL & CASINO, TEXAS STATION, LLC, d/b/a TEXAS STATION GAMBLING HALL & HOTEL, LAKE MEAD STATION, INC., d/b/a FIESTA HENDERSON CASINO HOTEL, FIESTA STATION, INC., d/b/a FIESTA CASINO HOTEL, and GREEN VALLEY RANCH GAMING, LLC, d/b/a GREEN VALLEY RANCH RESORT SPA CASINO, a single Employer

and **Cases 28-CA-022918**
28-CA-023089
28-CA-023224
28-CA-023434

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION LOCAL 165, affiliated with UNITE HERE, AFL-CIO

BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS

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I. INTRODUCTION

The Administrative Law Judge (ALJ) erred in dismissing the 8(a)(1) allegation involving Respondent's use of printed communications to threaten employees not to sign Union membership cards, when he failed to consider the context of the language and the effects it has on reasonable employees. Furthermore, the ALJ failed to consider all of the

evidence presented at hearing and did not address nor consider all the forms of communication utilized by Respondent which lacked any context or background language.

The ALJ also erred in dismissing several allegations wherein Respondent unlawfully promulgated and enforced overly-broad and discriminatory rules prohibiting employees from wearing Union buttons. The ALJ's reasoning that Respondent adequately repudiated its unlawful conduct by meeting the standards set forth by the Board in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), was erroneous. Specifically, the ALJ misapplied the Board's reasoning in *Raysel-IDE, Inc.*, 284 NLRB 879 (1987), when he found that Respondent adequately repudiated its unlawful conduct so as to avoid liability.

The ALJ further erred in dismissing allegations related to Respondent's promise of benefits in the form of vacations to dissuade employees from supporting the Union. In dismissing this particular allegation, the ALJ relied entirely upon testimony that employees had previously raised concerns about their vacation time. In relying on this testimony, the ALJ overlooked other factors such as the timing of Respondent's statements, the status of the employees against whom Respondent's conduct was directed, and the context of the conversation which led up to the statement in question.

Finally, the General Counsel takes exception to the ALJ's dismissal of an allegation which alleged that Respondent engaged in surveillance of its employees to discover their Union activities. While the ALJ correctly found that Respondent unlawfully promulgated an overly-broad and discriminatory rule prohibiting employees from engaging in Union activities at Respondent's Green Valley Ranch facility, the ALJ curiously found that Respondent did not act unlawfully when it followed the same employee it prohibited from engaging in Union activities, to his vehicle. The ALJ reasoned that Respondent did not engage in the unlawful

surveillance of employees but rather that it was observing employees for the purpose of ensuring that employees left the property. Such reasoning overlooks the fact that had the employees not engaged in Union activities; they would have been free to roam Respondent's property undisturbed. Thus, Respondent's motive for following employees to their vehicles was not limited to ensuring that that they left the property, but more importantly to see whether they would continue to engage in Union activities.

II. FACTS

A. Respondent's Operations

Respondent owns and operates hotel and casino properties in the Las Vegas metropolitan area. (JTX 1(a))[1] Respondent operates a total of 18 gaming properties in Las Vegas and employs 13,000 to 15,000 employees and 1,100 supervisors and managers. (Tr. 55:16-18; 99:8-14)[2] Of Respondent's 18 properties, Respondent's 10 largest properties are the focus of the Union's organizing campaign and the subject of the Complaint. (Tr. 55:10-15) The 10 properties involved in these proceedings enjoy common ownership, management, interrelation of operations, and centralized control of labor relations and constitute a single employer under the Act. (JTX 1(a); Tr. 55:16-18)

Executive Vice President and Chief Operating Officer Kevin Kelley is responsible for overseeing the management and operations of Respondent's properties. (Tr. 52:9-13; JTX 1(b)) Valerie Murzl, Respondent's Vice President of Human Resources and Training since June 1997, reports to Kelley and is responsible for overseeing "anything to do with human capital of the company, benefits, employee relations, communication, training, wage and

[1] GCX___ refers to General Counsel's Exhibit followed by exhibit number; RX___ refers to Respondent's Exhibit followed by exhibit number; JTX ___ refers to Joint Exhibit followed by exhibit number.
[2] "Tr. __:___" refers to transcript page followed by line or lines of the unfair labor practice hearing held between October 25, 2010 and May 3, 2011.

compensation, and anything that might touch a team member." (Tr. 71:23-25; 72:1-2)[3] Her responsibilities extend to all of Respondent's properties. (Tr. 72:3-4; 77:22-23) Murzl communicates with each of Respondent's facilities and issues corporate-wide instructions and directives to be implemented at each property. To accomplish these and other tasks, Murzl works with human resources directors at each of Respondent's properties as well as with general managers and assistant general managers from each of Respondent's 10 properties. (GCX 5)

B. Union Organizing Campaign

Respondent's efforts to prevent the Union from organizing its employees – euphemistically called its desire to deal "directly with the team members with no third party interference" – has spanned over one decade. (Tr. 73:10-15; 87:4-6) At the forefront of its efforts is Murzl, who has taken the lead in shaping and directing Respondent's campaign to stop the Union from organizing. (Tr. 72:23-25; 73:1-3). The Union's latest campaign began on February 18, 2010,[4] and became public on February 19.

On February 18, the Union held meetings with Respondent's employees at its union hall and began signing up employees as Union committee leaders. Union committee leaders received folders containing Union cards, blank incident reports, a notepad, a committee leader pledge form, a petition, a summary of rights, and a Union button. (GCX 26) In addition to the folders, committee leaders were instructed on how to complete incident reports, advised on what their rights were and what to do in the event that they believed their rights were infringed. They were also encouraged to begin wearing their Union buttons at work on February 19. These organizing meetings continued throughout the month and were held at

[3] Respondent calls its employees Team Members or TMs.
[4] Unless otherwise noted, all foregoing dates referenced in this Brief occurred in 2010.

several different locations, including the homes of team members, restaurants, and various other meeting places.

To assist committee leaders and to continue building support among Respondent's employees, the Union assigned organizers to work with employees from specific properties. For example, Palace Station was assigned a set of organizers, as were the rest of Respondent's 10 properties. Organizers speak with committee leaders over the telephone and meet with them in person to provide them with information, union cards, flyers, and other union materials.

C. Respondent's Knowledge of Union's Organizing Campaign

Respondent first learned of the Union's organizing campaign on February 19, when supervisors and managers witnessed several of its employees arrive at work wearing Union buttons on their uniforms. Respondent also received formal notice of the Union's organizing campaign on February 19, when the Union delivered petitions signed by several committee leaders to Murzl. The petitions formally notified Respondent of the Union committee leader's efforts to organize. (GCX 5(g); Tr. 83:21-24; 84:1) Respondent, however, was already fully aware of the Union's desire to organize its employees.

D. Respondent's Reaction and Response

Even before "officially" learning of the Union's organizing campaign on February 19, Respondent was aware of the Union's plans and began a coordinated campaign of its own to counter the "union attack" and prevent its employees from unionizing. Two days before the Union campaign became public, in anticipation of the Union's campaign, Murzl sent out an e-mail vowing that she was "going to take it up 10-fold to insure our TM's don't step outside of our Company." (GCX 5(a)) Murzl even assigned an employee to monitor the Union's

website[5] and was actively involved in addressing an employee's grievance which was posted on the website days before the campaign became public. (GCX 5(a)) Respondent further utilized what it refers to as a Right to Manage or RTM Presentation and Program (RTM), which it used since at least 2009 to combat the Union's influence over its employees and to keep it "union free." (GCX 5(b)) Once the Union's campaign officially commenced, Respondent utilized the RTM beyond the legal bounds and engaged in the discriminatory and retaliatory conduct giving rise to the allegations in the Complaint. (GCX 5(b))

Murzl regularly communicated with human resource directors, general managers, and assistant general managers at Respondent's properties and provided them with instructions and directives which were disseminated to lower level managers and supervisors. Murzl's directives set a tone of intolerance towards the Union and gave supervisors tacit approval to take any means necessary to influence employees and stop them from unionizing. (GCX 5)

On the morning of February 19, Murzl sent out an e-mail to all the human resource directors, general managers, and assistant general managers at Respondent's properties, urgently reminding them not to break the law or interfere with the employee's rights to wear Union buttons. In the same breath however, Murzl ordered that "[a]ll management should *aggressively* state our Union sentiments FOE (Facts, Opinions, Examples) to TM's when asked individually and in huddles about unions." (emphasis added) She further requested that human resource directors call her if any buttons were seen on their property. (GCX 5(c)) That same afternoon Murzl e-mailed "Sound Bytes," in both English and Spanish to human resource directors, general managers, and assistant general managers at all of its properties. (GCX 5(d)) Instructions were included reminding recipients to make sure that operations managers read the Sound Bytes (to employees) "with conviction." (GCX 5(d)) Before the

[5] www.workerstation.org

end of the day, Murzl e-mailed a third Sound Byte with instructions to communicate their contents immediately and authorized additional huddles – Respondent's preferred form of communicating with employees – to "ensure these messages are communicated rapidly." In her e-mail, Murzl noted that the purpose of the Sound Bytes was to "minimize the impact of our 'Internal organizers' by making sure our Team Members are continuously hearing *our position*." (emphasis added) (GCX 5(e))

1. Sound Bytes

As part of its campaign against the Union's organizing efforts, Respondent utilized what it refers to as "Sound Bytes." Sound Bytes are short narratives about a specific topic or subject and are used to communicate Respondent's opinions, views, and directives. (Tr. 90:21-23) Murzl and Respondent's counsel developed the Sound Bytes in English and translated them into Spanish. Once received, human resource directors, general managers, and assistant general managers at each respective property distributed the Sound Bytes to lower level managers and supervisors with limited instructions on how to communicate the contents of the Sound Bytes. Managers and supervisors were instructed to plead the company's position "with conviction" and to share their stories with employees, though they were not given guidelines on what was appropriate or lawful. (Tr. 106-16-20) Occasionally, Sound Bytes were posted around Respondent's facilities, though the most common form of publicizing their contents was to hold team member "huddles" or pre-shift meetings with numerous employees so as to broadcast their contents to the greatest number of employees.

2. Team Member Huddles

Huddles or pre-shift meetings are meetings, generally held prior to the start of a shift by a supervisor or manager and attended by several employees, ranging in number. Huddles are organized by department and shift and take place each day. Huddles are held in English and Spanish and are several minutes in duration wherein numerous topics and subjects are discussed by managers and employees. Topics include information about customer promotions, procedures, policies, and work assignments, though discussions were not limited to Respondent's operations. Employees often discussed issues unrelated to Respondent's operations, including the economy, sporting events, and even personal issues.

Once the Union's organizing campaign commenced, Respondent utilized its daily huddles to convey the contents of its Sound Bytes to its employees. Managers and supervisors led daily discussions about the Union and read or summarized the Sound Bytes provided to them. Supervisors, however, often went beyond the script contained in the Sound Bytes and provided employees with their own version of "facts and opinions" regarding the Union. In conducting huddles and stating Respondent's opposition to the Union, managers and supervisors were provided broad discretion to get Respondent's "position" across to employees. The only instructions provided to managers and supervisors, was to state the contents of Sound Bytes "with conviction" and to "aggressively" state Respondent's anti-union position. This lack of oversight and guidance, coupled with Murzl's communications regarding the Union and Respondent's response, set a tone of intolerance towards the Union and created an environment that was deliberately conducive to unlawful conduct. The continued barrage of Sound Bytes, scripts, and instructions without any attempt to ensure that

lower level managers did not violate the Section 7 rights of employees amounts to Respondent's tacit approval of clearly unlawful conduct.

In addition Respondent's use of Sound Bytes at team member huddles, Respondent also utilized other forms of communication to communicate its views about the Union.

3. Other Forms of Communication

i. RTM Sound Bytes

Beginning on February 22, Cookie Drescher, Respondent's General Manager at Respondent's Fiesta Henderson facility commenced distributing RTM[6] Sound Byte Alerts to managers, supervisors, and agents of Respondent to discuss and communicate directly with team members. (JTX 7(a)-(l)) RTM Sound Byte Alerts consist of portions of the Sound Bytes created and distributed by Murzl. Each RTM Sound Byte Alert consists of a short statement about the Union[7] followed by the statement "DON'T SIGN A UNION CARD." (JTX 7(b) – (l)) In addition to being communicated to employees by word of mouth, RTM Sound Byte Alerts were periodically posted in designated areas within the premises of

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[6] Right to Manage (Tr. 80:19-20)

[7] JTX 7(b) provides that "STATION CASINOS HAS AN OPEN DOOR POLICY. SPEAK UP IF YOU HAVE ANY ISSUE OR CONCERN. DON'T ALLOW A UNION TO COME BERWEEN US."
JTX 7(c) provides that "THESE ARE CHALLENGING TIMES. OUR DIRECT RELATIONSHIP WILL HELP US SUCCEED AND OVERCOME THE CHALLENGES."
JTX 7(d) provides: "YOU COULD LOSE YOUR RIGHT TO VOTE IN A SECRET BALLOT ELECTION IF YOU SIGN A UNION CARD."
JTX 7(e) provides: "FIESTA HENDERSON IS A GREAT PLACE TO WORK. DON'T LET OUTSIDERS INTERFERE WITH WHAT WE HAVE."
JTX 7(f) provides: "YOU ARE BETTER OFF WHEN YOU WORK UNION-FREE."
JTX 7(g) provides: "BE FIRM IN YOUR CONVICTION TO WORK WITHOUT UNION INTERFERENCE. DON'T GIVE IN TO PRESSURE OR INTIMIDATION."
JTX 7(h) provides: "YOU COULD UNWILLINGLY SIGN UP FOR UNION DUES BY SIGNING A UNION CARD."
JTX 7(j) provides: "STATION CASINOS DEVELOPED ITS BENEFITS PROGRAM IN RESPONSE TO YOUR REQUESTS AND DESIRES. STATION CASINOS OFFERS A HOME-OWNERSHIP PROGRAM, COMPUTER-OWNERSHIP PROGRAM, AFFORDABLE ON-SITE CHILDCARE, AND OTHER BENEFITS NOT OFFERED IN UNION CONTRACTS."
JTX 7(l) provides: "DON'T BE TRICKED OR PRESSURED TO SIGN A UNION CARD."

Respondent's Fiesta Henderson facility. A total of nine RTM Sound Byte Alerts were distributed and communicated to employees. (JTX 7(b) – (l))

ii. "Que Pasa" Newsletters

Similar to Sound Bytes and RTM Sound Byte Alerts, Respondent, at its Fiesta Rancho facility, utilized a printed weekly newsletter called "Que Pasa[8]" to communicate directly with team members. In addition to information specific to its Fiesta Rancho facility, the newsletter included information that was relevant to Respondent's overall operations. From February 2010 through October 2010, Respondent printed and distributed weekly "Que Pasa" newsletters which, incorporated RTM Sound Byte Alerts, or portions thereof, into its "Que Pasa" newsletter. (JTX 8)

Respondent's weekly "Que Pasa" newsletter consists of several pages which are made up of announcements. Each announcement is contained in a shaded and bordered section of the page with a heading to indicate what the announcement pertains to. Each newsletter published and distributed by Respondent from February 2010 through October 2010 contains a section titled "RTM Sound Byte of the Week." The "RTM Sound Byte of the Week" often incorporated all or parts of the RTM Sound Byte Alerts previously described. On at least two occasions, however, Respondent's "RTM Sound Byte of the Week" consisted of the last sentence contained in each Sound Byte and RTM Sound Byte Alert, without any context: "Don't sign a union card!" (JTX 8(l), 8(o))

[8] "Que Pasa" is Spanish for "What's Happening"

III. ANALYSIS

A. The ALJ Erred by Failing to find that Respondent did not Threaten Employees Through the use of "Sound Byte" Communications and Other Printed Communications in Violation of Section 8(a)(1) of the Act [Exception No. 1]

The ALJ erred in failing to find that Respondent violated Section 8(a)(1) when it utilized printed materials, including Sound Bytes, RTM Sound Byte Alerts, and "Que Pasa" newsletters to communicate to employees that they should not sign Union cards. (ALJD at 31:29-39) While the ALJ did note that his finding was "limited to the text of the Sound Bytes, themselves," the ALJ did not fully consider the implications of the language contained in the Sound Bytes. (ALJD at 31 fn. 41) Furthermore, the ALJ overlooked the text contained in the RTM Sound Byte Alerts and the "Que Pasa" newsletter and never addressed the legality of the languages' use.

In finding that the language contained in the Sound Bytes utilized by Respondent was lawful, the ALJ acknowledged that "[a]lthough the Sound Bytes did exhort employees not to sign Union membership cards or support the Union," the ALJ reasoned that the Sound Bytes were not coercive or threatening when read in their entirety The ALJ reasoned that because the Sound Bytes presented information and then presented arguments as to why employees should reject the Union based on the information previously presented, "a reasonable person would understand that the exhortation 'Don't sign a Union card,' was being used as an emphatic conclusion to the Respondent's argument in opposition to the Union." (ALJD at 31:33-38) In reaching this conclusion, however, the ALJ assumed that the text of the Sound Bytes amounted to suggestive argument rather than directives aimed at coercing and employees from exercising their free choice.

1. The Language Contained in Respondent's Sound Bytes and RTM Sound Byte Alerts do not fall within the Protections of Section 8(c)

The Board has held that orders, instructions, or directions by a respondent to its employees not to sign union membership cards during a union organizational campaign are coercive and thus violative of Section 8(a)(1) of the Act. In *Robert Meyer Hotel*, 154 NLRB 521, 523 (1965), the Board adopted a finding by the trial examiner wherein it was found that a notice informing employees that the union would not be beneficial and concluded with the statement "Don't sign union cards" violated Section 8(a)(1). Similarly, in *Trojan Battery Company*, 207 NLRB 425 (1973), the Board reversed an administrative law judge and found that a written statement "don't sign cards" which was preceded by a reminder that employees should "[r]emember they [the union] want *Money – Your Money*" violated the Act. The Board explained that "[a]dmonitions, as opposed to views, arguments, or opinions, to employees not to sign union authorization cards, are violative of the Act." Statements standing alone may well be deemed instructions or directions. *Airporter Inn Hotel*, 215 NLRB 824, 826 (1974) (phrases "refuse to sign any union authorization card" and "reject the union" did not stand "alone as separate declarative statements" but were clauses in two sentences that constituted permissible propaganda.)

In the instant case, Respondent utilized several tactics and strategies in its anti-Union campaign. One such tactic included repeatedly telling employees not to sign Union cards. While the language in Respondent's Team Member Handbook expressed the "hope" that employees would "reject any attempt to pressure [them] to sign a union card" (JTX 4, p. 4), this hope turned into a directive when the Union began its organizing campaign. CEO Kelley first characterized Respondent's directive to employees not to sign Union membership cards

as an "admonition." (Tr. 66:17-25; 67:1-4) Kelley then reversed course and called it "friendly advice." (Tr. 67:7-10) Whether one refers to the concluding sentences of Respondent's Sound Bytes and RTM Sound Byte Alerts not to sign Union cards as "admonitions" or "advice," the statements were orders and directives issued by Murzl, posted at Respondent's facilities, distributed by managers and supervisors, and published in newsletters at Fiesta Rancho. The statements are neither "friendly" nor suggestive and do not fall within the protection of Section 8(c) simply because Respondent made an argument against the Union in the preceding sentences. The context of the statements, even when examined in their entirely ends with a clear and unambiguous statement "DO NOT SIGN A UNION CARD," amounts to a directive rather than a suggestion.

As explained by Members Fanning and Jenkins in their dissent in *Airporter Inn Hotel*, 215 NLRB 824, 827 (1974), orders, instructions and directions by an employer to its employees not to sign cards are coercive and violative of Section 8(a)(1) of the Act:

> The obvious reason for this view-point is the very nature of such an order, instruction, or direction. As noted above, the essence of a direction from an employer to an employee lies in the impression created in the mind of the employee that if he does not follow this direction, the employer will see to it that the employee will somehow suffer economically. The message need not be explicit; i.e., an employer need not couch his order or direction in terms of "Refuse to sign the union cards or else I will . . . ." On the contrary, the threat may be implicit. Thus, in *Robert Meyer Hotel*, the communication found by the Board to be coercive consisted merely of an instruction not to sign anything coupled with statements to the effect that the employer had a "no-union policy," the union could not benefit the employees, and the employer, not the union, paid the wages. Even though the employer never specified in that case what kind of retaliation it would take if the employees signed the cards, the Board perceived an implied threat violative of Section 8(a)(1).

Here, Respondent issued its directives in the form of Sound Bytes and RTM Sound Byte Alerts that its employees should not sign Union membership cards. With no monitoring of the team meetings or huddles where managers and supervisors conveyed these directives to

employees, it is no wonder that in some cases, the threat not to sign included explicit messages of the consequences of unionization, as found by the ALJ on several occasions. (ALJD at 45 - 47; 70; 81; 92; 98)

2. The Language Contained in Respondent's "Que Pasa" Newsletters is Violative of the Act.

In dismissing the allegation contained in Paragraph 16 of the Complaint, the ALJ failed to analyze or make a finding on the lawfulness of Respondent's use of RTM Sound Byte Alerts or the incorporation of all or part of the RTM Sound Byte Alerts in its "Que Pasa" newsletter. As discussed in the foregoing paragraphs, the RTM Sound Byte Alerts utilized by Respondent constitute directives and, therefore, violate Section 8(a)(1). However, in determining whether Respondent violated Section 8(a)(1) through the use of RTM Sound Byte Alerts in its "Que Pasa" newsletter, the appropriate inquiry should not be limited to whether the RTM Sound Byte Alerts are unlawful. A determination on the lawfulness of the text contained in the "Que Pasa" newsletters can by made independently of whether all the RTM Sound Byte Alerts are unlawful.

In at least two instances between October 2010 and February 2010, Respondent published and distributed "Que Pasa" newsletters to employees of its Fiesta Rancho facility which contained the statement "Do not sign a Union card!" prominently printed on the first page of the newsletter. (GCX 8(l), 8(o)) This statement was not accompanied by any other statements related to the Union or Respondent's position on the Union. Thus, no foundation or background was offered for this conclusory statement which urged employees not to sign Union cards. Absent further explanation which would indicate that the statement was suggestive in nature, there is little question that a reasonable employee who viewed the newsletter would find it to be coercive because of its tone and explicit meaning.

B. The ALJ Erred in Finding that Respondent Repudiated its Unlawful Conduct When it Prohibited Employees From Wearing Union Buttons and Questioned Them About Their Union Activities. [Exception No. 2, 3, 4]

The ALJ erred when he found that Respondent sufficiently repudiated its unlawful conduct on two separate occasions after it unlawfully interrogated employees about their Union sympathies, threatened employees, and orally promulgated and enforced an overly-broad and discriminatory rule prohibiting employees from wearing Union buttons. (ALJD at 36:15-25; 107:15-33) Similarly, the ALJ erred when it held that Respondent successfully met the standard for repudiating unlawful conduct as set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978), after it told employees that they could not wear Union buttons at work. (ALJD at 72:18-33)

1. Facts

i. Aliante Station

Paragraph 5(a) and (b) of the Complaint alleged that Respondent interrogated employees about their Union activities, promulgated and enforced an overly-broad and discriminatory rule prohibiting employees from wearing Union buttons, and threatened employees with discipline by ordering employees to a supervisor's office because they were wearing Union buttons.

More specifically, on February 19, Cashier Hostess Maria Lourdes Cruz (Cruz) arrived for work wearing her Union button on her uniform for the first time. (Tr. 568:13-17; 569:14-17) When she went at her manager's office to pick up a coworker, Assistant Room Manager[9] Craig Browning (Browning) was present. After Cruz and Browning exchanged greetings, Browning noticed the button on Cruz's uniform and immediately questioned her

[9] All job titles are from paragraph 4 of the Complaint reflecting amendments by the General Counsel and admissions by Respondent.

about it, telling her that she was not permitted to wear it and informing her that it was not part of her uniform. Cruz responded that she had a right to wear the button and refused to remove it. (Tr. 570:4-15) Browning then informed Sous Chef Lonnie Haney (Haney) of Cruz's use of the button and Haney joined Browning in telling Cruz that she was not permitted to wear the Union button. (Tr. 570:19-21) Browning then added that Cruz could do whatever she wanted if she worked at the Paris (a casino not owned by Respondent located on the Las Vegas strip), but not on the Aliante property. (Tr. 571-572) Browning then contacted Food and Beverage Director John Bray (Bray) and after a short delay, accompanied by Haney, escorted Cruz to Bray's office. Upon arriving, Browning informed Bray that Cruz was wearing a Union but was not permitted to do so. Bray responded that it was fine for Cruz to wear the button and allowed her to return to work. (Tr. 571:5-25; 576:1-10) Later that day, Browning called Cruz to the office and apologized to her. (Tr. 572:12-25)

iii. Santa Fe Station

Paragraphs 9(a) and 9(b) alleged that Respondent, at its Santa Fe facility, interrogated employees about their Union activities and orally promulgated and enforced an overly-broad and discriminatory rule prohibiting employees from wearing Union buttons. The allegations involve two separate employees.

On February 19, buffet cooks Damian Villa (Villa) and Janette Blazquez (Blazquez) each reported to work at the buffet while wearing their Union buttons. (Tr. 116–118, 202–203) In the morning as Villa prepared for his shift, his supervisor, Sous Chef Judy Nichols (Nichols) approached him in the hallway, pointed at Villa's Union button, and asked Villa what it was. After Villa responded, Nichols told him to take it off. (Tr. 116:19-25,117:1-9, 19-25; 118:1-25; 119:1-7)

In a separate incident that same day, Executive Chef George Jaquez (Jaquez) approached Blazquez while she was working in the buffet station. Speaking to her in Spanish, he directed her to take off her Union button. As a result, Blazquez removed her Union button. (Tr. 202:2-16; 203:3-25; 204:1-22)

After approximately 20 minutes, Jaquez returned to the buffet floor and called both Villa and Blazquez into his office. Jaquez apologized to Villa and Blazquez and advised them that they could wear their Union buttons and return to work. (Tr. 130:13-25, 131:1-2; 205: 2-8)

iii. Green Valley Ranch

Paragraph 14(a) alleged that Respondent, at its Green Valley Ranch facility, orally promulgated and enforced an overly-broad and discriminatory rule prohibiting employees from wearing Union buttons. More particularly, on February 19, House Runner Carlos Gaitan (Gaitan) arrived to work wearing his Union button for the first time. As Gaitan was waiting for the elevator on the fourth floor, Housekeeping Supervisor Yamile Metlige (Metlige) exited the elevator. (Tr. 3180:9-10; 3181:3-12) Upon seeing Gaitan, Metlige told him that he could not wear the Union button on his uniform. When Gaitan responded that he could wear the button, Metlige reiterated that he could not and informed Gaitan that it was against company policy. (Tr. 3182:8-20) Later that day, Supervisor Margarita Bautista apologized for the conduct of Metlige and told Gaitan he could wear the Union button. (Tr. 3200:8-25; 3201:1)

2. Respondent did not Meet the Board's Standards for Repudiation of Unlawful Conduct

In *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), the Board summarized the conditions under which a respondent may remedy its unfair labor practices:

> It is settled that under certain circumstances an employee may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

See also *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1289 (2001).

In dismissing each of the allegations described in the foregoing paragraphs, the ALJ held that Respondent met the Board standards set forth in all *Passavant Memorial Area Hospital*, 237 NLRB at 138. (ALJD at 72:22-29) In reaching this conclusion, the ALJ relied upon the Board's decision in *Raysel-IDE, Inc.*, 284 NLRB 879, 881 (1987). In *Raysel-IDE, Inc.*, the Board reversed the administrative law judge's findings that the respondent had violated Section 8(a)(1) when respondent's general manager instructed an employee that she could not wear a union button. Id. In reversing the administrative law judge, the Board provided three reasons why the respondent's repudiation was adequate. First, the Board reasoned that the respondent retracted its unlawful rule within 24 hours of the occurrence by apologizing and assuring the employee that she could wear her union button. Second, the Board reasoned that the record revealed no evidence that any one other than the employee against whom the unlawful conduct was directed heard the unlawful statement. Finally, and most importantly, the Board reasoned that respondent's statement "*occurred in a context free from any other unlawful conduct.*" Id. at 881.

Despite the ALJ's finding, the facts in the present case are distinguishable from those in *Raysel-IDE, Inc*. In the instant case, the unlawful conduct committed by Respondent was

not isolated and was not committed "in a context free from any other unlawful conduct." To the contrary, Respondent's unlawful conduct was not limited to those allegations which Respondent asserts and the ALJ found were cured by Respondent's assurances and apologies. Respondent's pervasive conduct preceded the allegations in question and continued well after they were committed. Such conduct was not limited to interrogating employee about their union activities or prohibiting them from wearing union paraphernalia. Respondent's conduct was centered upon disrupting and discouraging the organizing efforts and on at least two occasions resulted in the termination of two employees. (ALJD at 64-65; 73-75) Accepting the ALJ's findings with respect to the allegations to which the General Counsel takes exception would undermine the purpose of the Board's holding in *Passavant Memorial Area Hospital* and permit repeat offenders, such as Respondent, to limit its liability by simply issuing false assurances and apologies while continuing to violate the Section 7 rights of employees.

C. The ALJ Erred in Finding that Respondent did not Violate Section 8(a)(1) by Promising Employees Benefits in the Form of Vacations to Dissuade Them From Supporting the Union. [Exception No. 5]

The General Counsel respectfully submits that the ALJ further erred in failing to find that Respondent violated Section 8(a)(1) when it promised employees benefits in the form of vacations to dissuade them from supporting the Union. (ALJD at 57:24-41) In dismissing this allegation, the ALJ overlooked the timing of Respondent's conduct and the employee against whom said conduct was directed.

As previously noted, the Union's organizing campaign became public on February 19. On that day, several committee leaders delivered petitions to Respondent which formally placed them on notice of the commencement of the organizing campaign. (GCX 5(g);

Tr. 83:21-24; 84:1) In addition, committee leaders made up of Respondent's employees from each of Respondent's ten properties arrived to work wearing Union buttons on their uniforms for the first time. Among them was Buffet Kitchen Runner Norma Flores (Flores), an employee at Respondent's Fiesta Henderson facility. Flores arrived to work wearing her Union button prominently displayed on her uniform. (Tr. 2659:18-19; 2661:12-13) That same day, Flores was summoned to the office of Buffet Room Chef Rusty Hicks (Hicks). Once in his office, Hicks informed Flores that he was pleased with her work and repeatedly asked her if she was pleased with her own work. Hicks then offered Flores a vacation. Prior to this date, Hicks had never broached the subject of her vacation. (Tr. 2662:5-25; 2663:1-10)

In dismissing the allegation, the ALJ relied upon the Board's decision in *Network Dynamics Cabling*, 351 NLRB 1423 (2007), to conclude that Hicks did not raise the issue of Flores' vacation with an improper motive. (ALJD at 51:32-37) The ALJ reasoned that Flores had experienced problems with scheduling vacation time in 2009, and that "the evidentiary record does not show that it was improper or unreasonable for Hicks to raise the issue of vacation time in 2010, in light of the problems that Flores experienced in the past with that issue." (ALJD at 57:37-41)

The record evidence that the ALJ relied upon was the testimony adduced from Flores during cross-examination wherein Flores testified that in March 2009, Flores had met with the Director of Human Resources Marsha Striano after she lost her vacation time. (Tr. 2781:14-25; 2782:13-15; 2783:1-7) Relying upon this short line of testimony, the ALJ concluded that Hicks' conduct was not unreasonable and that his offer of vacation to Flores was thus not improper. (ALJD at 57:37-41)

In reaching this conclusion, the ALJ failed to consider the timing of Respondent's conduct. More specifically, the ALJ overlooked the fact that this incident occurred on the first day that the Union's organizing campaign became public and the first day that employees arrived to work wearing Union buttons. The ALJ did not address the fact that Flores was a Union committee leader who arrived to work wearing her Union button on the day this incident occurred. Furthermore, while Flores did in fact seek out Respondent to address her loss of vacation days in March 2009, the ALJ did not address and did not consider the fact that Respondent waited 11 months to approach Flores about her vacation and that when it finally did, it happened to do so on the first day that the Union's organizing campaign officially commenced and the first day that Flores arrived to work wearing a Union button.

The Board has long held that granting or promising benefits, during an organizing campaign are meant to improperly influence employees' choice in the selection of a bargaining representative. In order to validate the promise of benefits, an employer must demonstrate a legitimate business reason for the *timing* of a promise or grant of benefits during an organizing campaign. Absent such a showing, the Board has held that it will infer improper motive and interference with employee rights. *Yale New Haven Hospital*, 309 NLRB 363, 366-367 (1992); *Pacific FM, Inc., d/b/a KOFA TV-20*, 332 NLRB 771, 773 (2000). See also *McAllister Towing & Transp. Co.*, 341 NLRB 394, 399 (2004). Furthermore, in *Onan Corp.*, 338 NLRB 913, 913-914 (2003), the Board held that the timing of granting of benefits may be unlawful even if the benefit would have been granted at a later time.

In dismissing the allegation for which the General Counsel is taking exception, the ALJ did not rely upon a showing that Respondent had a legitimate business reason for its

conduct. Instead, the ALJ, assumed that Respondent acted lawfully despite the ill timing of the conduct and the absence of any testimony from the witnesses which would explain why Respondent took 11 months to discuss Flores' vacation time.

D. The ALJ Erred in Finding That Respondent did not Engage in the Surveillance of Employees After They Were Ordered to Leave Respondent's Green Valley Ranch Facility. [Exception No. 6]

In rendering his Decision, the ALJ dismissed the allegation in Paragraph 14(g)(1) of the Complaint which alleged that Respondent engaged in surveillance of its employees to discover their Union activity. (ALJD at 81:50-56; 82:5-6) However, the ALJ properly found that Respondent committed the violation alleged in Paragraph 14(g)(2) when it orally promulgated and enforced an overly-broad and discriminatory rule prohibiting its employees from engaging in Union activities at its Green Valley Ranch facility. (ALJD at 81:45-48) The allegations are directly related and the former gave rise to the latter, calling into question the ALJ's reasoning for dismissal.

1. Facts

On June 10, Green Valley Ranch bartender Michael Wagner (Wagner) reported to work wearing his Union button. At approximately 8:30 p.m., after completing his shift, Wagner walked to the employee parking garage and positioned himself several feet from the employee entrance and began distributing union leaflets to passing employees. (Tr. 3040:9-1; GCX 54) Wagner was in the parking garage approximately five minutes before he was approached by a female security guard "wearing a black blazer, black slacks, and a security officer badge on her waist." (Tr. 3046:1-7) The security officer ordered Wagner to stop what he was doing and explained that Respondent had a no solicitation policy and that the garage was private property. The officer did explain that Wagner could go off the property and

handout fliers on the sidewalk around the property. When Wagner asked her if she was a security officer, she responded in the affirmative but refused to provide her name. (Tr. 3046:7-17) Wagner then proceeded to leave. As he was walking to his car, a security officer on a bike followed him and parked his bike behind his car, leaving enough room for him to pull out. The security officer observed Wagner until he got into his car and left the property. (Tr. 3048:11-18)

2. Respondent's Conduct Constituted Surveillance

The Board has held that while management officials may observe public union activity, it is unlawful for them to spy on employees' union activities, or to create the impression of surveillance, since such actions, "while not per se violation can have a natural, if not presumptive tendency to discourage [union] activity." *Belcher Towing Co. v. NLRB*, 726 F.2d 705 (11th Cir. 1984); see also *Daytona Hudson Corp*., 316 NLRB 85 (1995). An employer, however, cannot engage in such surveillance for unlawful reasons, e.g., in reprisal for the employee's union activities, or for the purpose of obtaining pretextual grounds for disciplining the employee in reprisal for such union activities. See *Brown & Root-Northrop*, 174 NLRB 1048, 1058 (1969) . Such conduct has been deemed to have coercive and restraining effects on employees Section 7 rights. The Board has deemed the impression of surveillance to be as serious as actual act of surveillance. In *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-1540 (2000), the Board held that "[w]hen an employer creates the impression among it employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." Being an objective standard, an employer's conduct is evaluated from the perspective of the employee and is unlawful if the employee would reasonably conclude from

the statement or conduct in question that employees' protected activities were being monitored. *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center*, 332 NLRB at 1540; *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999).

In the instant case, Respondent interfered with the Section 7 rights of its employees by prohibiting them from distributing leaflets which related to the Union's organizing campaign. In barring Wagner from distributing leaflets, Respondent ordered him off the property and proceeded to follow him to his car. In dismissing the allegation that Respondent engaged in surveillance, the ALJ reasoned that the record "fell short of demonstrating that Respondent was monitoring Wagner's union activities (as opposed to simply verifying that Wagner left the property as directed.)" (ALJD at 81:53-56; 82:5-6) The ALJ incorrectly assumed that Respondent followed Wagner for the simple purpose of ensuring that he left the property as instructed and that the absence of evidence as to why Wagner was followed to his vehicle requires dismissal of the allegation.

The ALJ, however, overlooked the fact that the only reason Respondent followed Wagner to his car was because he had previously attempted to engaged in Union activities; activities which Respondent did not permit. While Respondent may have certainly followed Wagner to his car to ensure that he left the property, the primary objective and purpose of following Wagner was to ensure that Wagner did not continue to engage in Union activities out of Respondent's line of sight. This is made evident by the fact that but for Wagner's attempt to distribute Union leaflets, he would have been welcome to remain in Respondent's facility. (Tr. 68:17-24)

IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's erroneous rulings as set forth above, and find that Respondent committed additional violations of Section 8(a)(1) as discussed above.

Dated at Las Vegas, Nevada, this 17th day of November 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS in STATION CASINOS, INC., ALIANTE GAMING, LLC, D/B/A ALIANTE STATION CASINO + HOTEL, BOULDER STATION, INC., D/B/A BOULDER STATION HOTEL & CASINO, PALACE STATION HOTEL & CASINO, INC., D/B/A PALACE STATION HOTEL & CASINO, CHARLESTON STATION, LLC, D/B/A RED ROCK CASINO RESORT SPA, SANTA FE STATION, INC., D/B/A SANTA FE STATION HOTEL & CASINO, SUNSET STATION, INC., D/B/A SUNSET STATION HOTEL & CASINO, TEXAS STATION, LLC, D/B/A TEXAS STATION GAMBLING HALL & HOTEL, LAKE MEAD STATION, INC., D/B/A FIESTA HENDERSON CASINO HOTEL, FIESTA STATION, INC., D/B/A FIESTA CASINO HOTEL, AND GREEN VALLEY RANCH GAMING, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASINO, a single Employer, Cases 28-CA-22918 et al., was served by E-Gov, E-Filing, and E-Mail, on this 17th day of November 2011, on the following:

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