

**UNITED STATES OF AMERICA
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

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

**Cases 28-CA-22918
28-CA-23089
28-CA-23224
28-CA-23434**

REPLY TO ACTING GENERAL COUNSEL’S ANSWERING BRIEF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“Board”), Respondent submits this Reply to the Acting General Counsel’s Answering Brief in the above-captioned matters. In its Answering Brief, the Acting General Counsel attempts to minimize the critical deficiencies in the testimony of the witnesses it offered and disregards the record evidence and well-established Board law in arguing that Administrative Law Judge (“ALJ”) Carter’s credibility determinations and legal conclusions should be upheld. As discussed here and in Respondent’s Brief in Support of Exceptions (“Brief”), Respondent

respectfully requests that the Board not be hoodwinked by the Acting General Counsel's contentions and that it refuse to adopt ALJ Carter's recommended remedy and order.

I. ALJ CARTER'S CREDIBILITY DETERMINATIONS

As the Acting General Counsel wrote, the Board does not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that the resolutions are incorrect. *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950). As discussed in Respondent's Brief, because the clear preponderance of all the relevant evidence demonstrates that many of ALJ Carter's credibility resolutions are incorrect, they should be overruled. The Board should find the Acting General Counsel's attempt to convince the Board otherwise ineffective.

A. Inconsistencies & Omissions Between Witness Testimony and Prior Statements Are Highly Relevant to Credibility

The Acting General Counsel contends that Respondent has urged the Board to disregard the reasoning behind ALJ Carter's credibility determinations and "parse out" the testimony of each witness to capitalize on inconsistencies without substance. (Acting General Counsel's Answering Brief ("G.C. Answering Brief") pp. 2-3.) The Acting General Counsel relies upon Delmi Aldana as an example. Aldana testified about conduct that allegedly occurred on February 27, 2010. (Transcript ("Tr.") pp. 2200-2208.) However, Aldana failed to include such alleged unlawful conduct in either her February 27, 2010 ULP report or her March 12, 2010 Board affidavit. (Tr. 2208-2213, 2217-2218.) The Acting General Counsel attempts to downplay these deficiencies by arguing that Aldana's omissions were "not substantive," that "it is not uncommon for a Board agent to fail to ask questions while taking a statement," and that it is not uncommon "for witnesses to recall matters and events previously forgotten." (G.C. Answering Brief p. 3.) However, the Acting General Counsel's arguments are unpersuasive.

Aldana's omissions from her ULP report and Board affidavit are substantive; they go to the heart of the allegations about which she testified.¹ In addition, because Aldana prepared the ULP report on the same day as the incident in question and her Board affidavit within two weeks of the incident in question, it is incomprehensible that almost a full year later, on January 13, 2011, she would recall conduct previously forgotten.

As discussed in Respondent's Brief, in addition to Aldana, the testimony of many other witnesses was materially inconsistent with prior statements that the witnesses prepared shortly after the alleged unlawful conduct about which they testified. (*See generally* Brief pp. 5-30.) These inconsistencies are precisely the sort of deficiencies that the Board deems critical to the determination of witness credibility. *See, e.g. Satellite Servs., Inc.*, 356 N.L.R.B. No. 17, 2010 WL 4474382, at * 9 (Oct. 29, 2010) (witness' failure to mention significant fact in Board affidavit rendered testimony incredible); *Napa Ambulance Serv., Inc.*, 352 N.L.R.B. 609, 616 (2008) (witness' failure to mention significant fact in Board affidavit rendered testimony "extremely implausible"). ALJ Carter's disregard for many of these inconsistencies is contrary to established Board law and clear grounds for the Board to overturn his credibility resolutions. *See, e.g., Domsey Trading Corp.*, 351 N.L.R.B. 824, 841 (2007) (overruling ALJ's credibility resolution where witness' testimony at hearing was inconsistent with prior written statement prepared closer in time to events in question). The General Counsel's willingness to accept these inconsistencies demonstrates an unacceptable tolerance for incredible claims.

¹ Contrary to the Acting General Counsel's unsupported claim, Aldana did have assistance in completing the ULP report. (Tr. 2209-2210, 2218-2221.) In addition, Aldana spoke with Charging Party's counsel prior to completing her Board affidavit. (Tr. 2223-2226.)

B. The Record Supports Respondent's Contention That Witnesses Offered by the Acting General Counsel Do Not Comprehend the English Language

The Acting General Counsel contends that Respondent's argument that ALJ Carter erred in crediting the testimony of witnesses who do not comprehend the English language is "wholly unsupported by the record" and lacking "any objective evidence." (G.C. Answering Brief p. 3.)² In fact, according to the Acting General Counsel, Respondent's argument is being made only because Respondent is "[n]ot satisfied with the outcome of its tireless efforts to confuse witnesses through linguistic manipulation." (*Id.*) Contrary to the Acting General Counsel's contention, Respondent's argument is supported by the record evidence. Several witnesses testified to their limited proficiency in both speaking and understanding English, and Respondent cited to such evidence in its Brief. (*See* Tr. 972, 986, 1756, 2418; *see generally* Brief pp. 24-26.)³ The charge that Respondent sought to "confuse witnesses through linguistic manipulation" is scurrilous and unsupported. Through its cross-examination of witnesses, Respondent was exercising a fundamental right to explore the legitimacy of the allegations made against it, particularly where minor changes in wording or tone could transform otherwise lawful expressions of opinion into coercive or threatening statements. *See, e.g., Advocate South Suburban Hosp.*, 346 N.L.R.B. No. 23, 2006 WL 92791, at *7 (2006) (in Section 8(a)(1) cases,

²Despite the Acting General Counsel's concern for the alleged unsupported exceptions made by Respondent, as noted here and in Respondent's Answering Brief, the Acting General Counsel repeatedly asserts unsupported facts in its Exceptions and Answering Brief.

³ The Acting General Counsel also asserts that it is a "widely-known fact that an individual's inability to speak a language has no bearing on their ability to understand it." (*Id.*) Notably, this "widely-known" fact is asserted without record support and is contrary to Board law. *See N. Cap Mfg. Co.*, 146 N.L.R.B. 198, 201, 204 (1964) (discrediting witness who could not speak English, but "purported to have been able to understand and remember what [the employer] said to his employees in [English]"); *see generally* N.L.R.B. Div. of Judges Bench Book § 13-606 ("[W]hen alleged threats are made in English, the witness should be able to recount what was said in English.").

slight variations in employer's statements are critical). In addition, such examination was necessary in light of the Acting General Counsel's failure to solicit relevant facts during its direct examination of witnesses. Indeed, one need not read further than the transcript testimony of the first witness from whom the Acting General Counsel failed to solicit facts concerning the repudiation of an alleged unlawful direction to remove a Union button. (Tr. 115-128, 130-131, 140-143.) If Respondent's examination of witnesses was inappropriate, surely the Acting General Counsel or the ALJ would have voiced an objection or intervened.

C. Respondent Does Not Ignore ALJ Carter's Reasoning or the Record Evidence With Respect to the Credibility of Estrada or Sanchez

The Acting General Counsel asserts that Respondent's contention that ALJ Carter erred in crediting the testimony of Estrada and Sanchez "ignores the ALJ's reasoning and the record evidence." (G.C. Answering Brief p. 4.) The Acting General Counsel's assertion is off mark. In its Brief, Respondent ignores neither ALJ Carter's rationale nor the record evidence. It simply disagrees with ALJ Carter⁴ and submits that, when viewing Estrada's and Sanchez's testimony as a whole, the Board will find the clear preponderance of all the relevant evidence demonstrates that ALJ Carter's credibility resolutions are incorrect. (*See* Brief pp. 27-29.)

II. ALJ CARTER'S LEGAL CONCLUSIONS

A. Respondent's Exceptions Are Supported by the Record Evidence

1. Paragraphs 5(g)(1)-(3)

The Acting General Counsel contends that ALJ Carter's conclusion with respect to Paragraphs 5(g)(1)-(3) of the complaint should be adopted by the Board because "any discussions relating to the nature of collective bargaining . . . were too far removed in time from

when the statements at issue took place” and “Respondent’s statement that employees could get more rooms to clean was not based upon any objective facts and did not describe consequences beyond an employer’s control.” (G.C. Answering Brief p. 6.) Contrary to the Acting General Counsel’s contention, there is no evidence that Respondent’s reference to the uncertain nature of collective bargaining was made “several days” before Barahona’s alleged unlawful statement. (G.C. Answering Brief p. 6.) Gonzalez testified that, while Respondent read General Counsel Exhibit 6(c) prior to April 1, 2010, she could not recall the date. (Tr. 565.) When asked how far in advance of the huddle the Sound Byte was read, Gonzalez testified, “I don’t know, I say probably a couple of days before.” (*Id.*) In addition, as discussed in Respondent’s Brief and Post-Hearing Brief, Barahona’s alleged comment about getting more rooms to clean was a lawful statement of the potential consequences of unionization. (*See* Brief p. 32; Respondent’s Post-Hearing Brief pp. 56-57.)

2. Paragraphs 6(b)(1)-(3), (c), and (i)(1)-(2)

With respect to Director of Hotel Operations Michael Pavicich’s alleged promise and statement of futility and Team Member Relations Manager Marieugenia Vasquez’s alleged promise, the Acting General Counsel argues that Respondent improperly “separate[d] the two [categories of] violations and treat[ed] them independently of each other” to “draw attention away from its clearly unlawful and coercive conduct.” (G.C. Answering Brief pp. 6-7.) In support of its argument, the Acting General Counsel writes, “Such approach . . . is improper because the ALJ relied upon both statements in determining their lawfulness.” (*Id.* at p. 7.) The Acting General Counsel is mistaken. Respondent analyzed each statement in a separate section

⁴ In fact, when discussing Sanchez’s credibility, the Acting General Counsel writes, “Respondent’s argument relies upon its *disagreement* with the ALJ’s finding . . .” (emphasis added) (G.C. Answering Brief p. 4.)

of its Brief neither “to limit their context” nor “to undermine the ALJ’s reasoning” but because each is subject to a different legal standard.⁵ (*Id.*) Further, contrary to the Acting General Counsel’s assertion, ALJ Carter’s conclusion concerning the lawfulness of neither category of statement turned upon the lawfulness of the other. (*See* Decision pp. 46-47.)

3. Paragraphs 8(i) and (r)

The Acting General Counsel argues that ALJ Carter’s conclusions with respect to Paragraphs 8(i) and (r) of the complaint should be upheld because, while Respondent had several means by which Team Members could voice their concerns and grievances to Respondent, Respondent did not have a “past practice of approaching individuals and soliciting grievances and making promises to resolve them.” (G.C. Answering Brief p. 8.) This argument is unsupported by the record evidence. Respondent’s Team Member Handbook explicitly provides, “At Station Casinos, managers approach Team Members at their work stations, on breaks, during Team Member meetings and recognition events to ask for Team Member comments and input. Managers want to know what we are doing well and what we can improve.” (Joint Exhibit (“Jt. Ex.”) 2, p. iv.) Respondent approaches Team Members twice a year to solicit feedback, including grievances, through a Team Member Satisfaction Survey. (Jt. Ex. 2, p. 6; Tr. 78, 755, 888-889, 2783, 3132.) In addition, Respondent approaches Team Members to participate in focus groups during which it solicits grievances from them. (Jt. Ex. 2, p. 6; Tr. 77, 754, 888, 1402-1404, 1408, 1445-1450.) In fact, Red Rock Station Team Member Leonardo Calderon participated in these focus groups. (Tr. 1402-1404, 1408, 1445-1450.)

⁵ Unlike other allegations of 8(a)(1) violations, when determining whether a promise to employees is unlawful, an employer’s motive for conferring the benefit is relevant. *Manor Care of Easton, LLC*, 356 N.L.R.B. No. 39, 2010 WL 4929679, at *32 (Dec. 1, 2010). To establish a violation, the employer’s motive must be to interfere with or influence union organizing. *Id.*

B. Respondent's Repudiation of Alleged Unlawful Conduct Was Effective

The Acting General Counsel argues that Respondent's repudiation of alleged unlawful conduct was ineffective because it did not meet each and every requirement listed in *Passavant Memorial Area Hosp.*, 237 N.L.R.B. 138 (1978). (G.C. Answering Brief pp. 8-10.) However, as discussed at length in Respondent's Brief, the Acting General Counsel conveniently ignores more recent decisions, which hold that an employer need not satisfy all of the *Passavant* factors for a repudiation to be effective. (See Brief pp. 63-64, 79-80, 84, 86-87.) As such, the Acting General Counsel's contention that the repudiations at issue were ineffective because they did not comply with all the technicalities of *Passavant* reflects a meaningless elevation of form over substance that the Board has repeatedly rejected. See *Atlantic Forest Prods., Inc.*, 282 N.L.R.B. 855, 855, 872 (1987) (unlawful instructions to remove buttons were effectively cured despite not meeting all the *Passavant* requirements, where the unlawful instructions were rescinded shortly after issuance).

Additionally, the Acting General Counsel's reliance on *A.J.R. Coating Div. Corp.*, 292 N.L.R.B. 148 (1988), and *Chicago Tribune Co.*, 304 N.L.R.B. 259 (1991), for the proposition that Respondent inappropriately relied on extra-record evidence with respect to the reinstatement of Teresa Debellonia is misplaced. Indeed, the facts in the instant matter are distinguishable from those cases. In both, the Board affirmed an ALJ's decision to strike the employer's submission of a transcript from a separate 10(j) proceeding that was not part of the record. 304 N.L.R.B. at 259 n.1; 292 N.L.R.B. at 148 n.1. In so holding, the Board relied on the fact that the transcripts were not introduced into the record. *Id.* In the instant matter, the web posting at issue was not made until after the close of the record and, being unaware that it would be made, Respondent was without knowledge to introduce it into the record. As the web posting at issue is highly probative of the effectiveness of Respondent's repudiation, Respondent urges the Board

to take judicial notice of it. F.R.E. 201; *Drummond Coal Co.*, 277 N.L.R.B. 1618, 1618 n.1 (1986) (after due notice, Board took official notice of an arbitral award issued after close of hearing, despite party's objection).

C. Respondent Does Not Overstate the Record

Finally, although maybe most troubling, the Acting General Counsel advises the Board to exercise caution in evaluating Respondent's Brief because "[i]n several notable instances, Respondent exaggerates the record in an attempt to make it conform to its argument." (G.C. Answering Brief p. 11.) According to the Acting General Counsel, Respondent's "embellishment of the facts . . . is evident throughout [Respondent's Brief]." (*Id.*) In support of its argument, the Acting General Counsel cites two of Respondent's representations it claims are unsupported by the record.

First, the Acting General Counsel claims that "Respondent's representation that the Union's 'relentless harassment' of Respondent is based on Respondent's refusal to yield to the Union's demand for voluntary recognition is entirely unsupported by the record." (G.C. Answering Brief p. 11.) The Acting General Counsel is mistaken. The record clearly reflects the Union's demand for a card check as well as the Team Members' knowledge of that demand. (*See* G.C. Exs. 5(g), 26; Jt. Ex. 16; Ex. E to Station's Reply Brief in Support of Dismissal at 1:28-2:02.)

Second, the Acting General Counsel claims that Respondent's argument that the testimony of witnesses be subjected to heightened scrutiny due to the General Counsel's "re-preparation" of them is unsupported by the record. (G.C. Answering Brief p. 12.) According to the Acting General Counsel, he "questioned each witness prior to their recall for the sole purpose of determining whether they provided the Union with any statements (written, audio, or video) to ensure that all statements were furnished to Respondent in accordance with Respondent's

subpoena duces tecum and the ALJ's order." (*Id.*) The Acting General Counsel is mistaken. Despite his unsupported assertion as to what occurred when he met with witnesses to be recalled, Antonia Gutierrez testified unequivocally that the Acting General Counsel "prepared" her for her recall testimony. (Tr. 3428.) Lorena DeVilla testified that the Acting General Counsel told her what questions Respondent's counsel might ask her during recall. (Tr. 3428.) And, Aldana testified that the Acting General Counsel showed her videos prior to providing her recall testimony. (Tr. 3444.) If the Acting General Counsel met with the witnesses solely to determine whether they provided the Union with any statements, there was no need to prepare Gutierrez, inform DeVilla what questions Respondent's counsel might ask, or show Aldana videos.

III. CONCLUSION

For the foregoing reasons, the Board should find the arguments asserted in the Acting General Counsel's Answering Brief unpersuasive and overturn the portions ALJ Carter's Decision to which Respondent has excepted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this 29th day of December, 2011, that a copy of Respondent's Reply was filed electronically and via overnight mail to the following:

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