

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

**STATION CASINOS, INC., ALIANTE GAMING, LLC,
BOULDER STATION, INC., D/B/A BOULDER
STATION HOTEL & CASINO, PALACE STATION
HOTEL & CASINO, INC., D/B/A PALACE STATION
HOTEL & CASINO**

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-023436
28-CA-062437**

RESPONDENT'S ANSWERING BRIEF

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent Station Casinos, Inc., Aliante Gaming, LLC, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, and Palace Station Hotel & Casino, Inc., d/b/a Palace Station Hotel & Casino submits this Answering Brief to the Acting General Counsel's Cross-Exceptions to Administrative Law Judge ("ALJ") Gerald Etchingham's Decision in the above-captioned matters. In his Decision, ALJ Etchingham found that Martin Rubio is not a supervisor of Respondent within the meaning of Section 2(11) of the National Labor Relations Act ("Act"), and thus, Respondent did not engage in unlawful activity as alleged in Paragraph 6(c) of the Consolidated Complaint. The Acting General Counsel's attempt to support its Cross-Exceptions to these findings by relying upon unsupported, incomplete, and disputed facts and ignoring bona fide facts and established Board law should not be accepted because, as discussed below, the clear preponderance of the evidence supports ALJ Etchingham's conclusions. Thus, Respondent respectfully requests that the Board adopt them.

I. THE ACTING GENERAL COUNSEL ERRONEOUSLY RELIES UPON UNSUPPORTED, INCOMPLETE, AND DISPUTED FACTS

In describing the “supervisory” duties of Palace Station’s Relief Supervisors, including Martin Rubio, the Acting General Counsel erroneously asserts unsupported facts and conveniently omits actual facts. For instance, the Acting General Counsel includes as “fact” that Team Members “appear to have generally complied with [Rubio’s] instructions.” (Brief in Support of Acting General Counsel’s Cross-Exceptions (“Cross-Exceptions Brief”), p. 3.) This “fact” is unsupported by the record and constitutes pure speculation. The Acting General Counsel also conveniently omits the “fact” that characteristics that differentiate Relief Supervisors from hourly Team Members also differentiate Relief Supervisors from statutory supervisors. For example, while the Acting General Counsel correctly notes that “Relief supervisors . . . wear different uniforms which distinguish them from employees” and “Rubio wore a different uniform than the employees he oversaw” when he was working as a Relief Supervisor (Cross-Exceptions Brief, p. 2, 3), the Acting General Counsel fails to note that Relief Supervisors wear different uniforms which distinguish them from statutory supervisors. (Tr. 98-99, 165, 185.)

In addition to relying upon these unsupported and incomplete facts, the Acting General Counsel describes the occurrences of February 18, 2011¹ as “fact.” (Cross-Exceptions Brief, p. 4-5.) However, as Respondent noted in its Exceptions, and the Acting General Counsel failed to address in its Answering Brief, there is a factual dispute as to the February 17-18, 2011 Palace Station incident. Thus, in evaluating the Acting General Counsel’s Cross-Exceptions, the Board must exercise caution and carefully examine the record to obtain a supported and complete set of

¹ Respondent has assumed that the Acting General Counsel’s references to “February 7, 2011” are typographical errors.

undisputed facts. *See, e.g., Comau Inc.*, 356 N.L.R.B. No. 21, 2010 WL 4622509 at *18 (2010) (rejecting General Counsel’s attempt to address disputed allegations as “facts” in its brief); *Airo Dye Casting, Inc.*, 354 N.L.R.B. No. 8, 2009 WL 1311471, at *14 (2009) (same); *Town Development, Inc.*, 2012 WL 983244 (N.L.R.B. Div. of Judges March 22, 2012) (same).

II. ALJ ETCHINGHAM PROPERLY FOUND RUBIO NOT TO BE A SUPERVISOR WITHIN THE MEANING OF SECTION 2(11) OF THE ACT

In its Brief, the Acting General Counsel focuses on two of ALJ Etchingham’s conclusions in support of its contention that ALJ Etchingham erroneously concluded that Rubio is not a statutory supervisor. First, the Acting General Counsel argues that ALJ Etchingham’s reasoning that assignment sheets were “dictated by the team members’ bidded shifts and instructions left by Rubio’s supervisors and department manager” is unsupported by the record. (Cross-Exceptions Brief, p. 6.) He writes, “The fact that employees bid on a shift says nothing about the daily tasks they are required to perform. Accepting the ALJ’s reasoning, would require accepting employee’s bidded shifts to also include defined tasks and assignments.” (*Id.*)

The Acting General Counsel is mistaken. The record evidence demonstrates that when a Team Member bids, he bids not only for a shift but also an area, which includes defined tasks. For example, when Virginia bid, she bid for the moonlight shift and Area 1. (Tr. 157.) Thus, Rubio wrote her name in the blank next to “Area 1” on the assignment sheet (G.C. Exs. 9(a), 10(a); R. Ex. 3(a)) and Virginia was responsible for completing the tasks associated with “Area 1.” (G.C. Exs. 9(h), 10(h)). When Mostafa bid, he bid for the moonlight shift and Area 2. (Tr. 157.) Thus, Rubio wrote his name in the blank next to “Area 2” on the assignment sheet (G.C. Exs. 9(a), 10(a)) and Mostafa was responsible for completing the tasks associated with “Area 2.” (G.C. Exs. 9(i), 10(i)). *See also* Tr. 80 (“Whoever is in that area, that’s the person that you put their name.”) The Board has found such assignment to be routine. *See Oakwood Health*, 348

N.L.R.B. 686, 693 (2006) (if there is only one obvious and self-evident choice, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data).

Second, the Acting General Counsel argues that ALJ Etchingham's improperly concluded that when "respond[ing] to calls from other departments reporting biohazard spills, broken glass, etc." "there is no evidence suggesting that Rubio's direction involved other than routine aspects of internal maintenance." (Cross-Exceptions Brief, p. 6.) Again, the General Counsel is mistaken. The record evidence demonstrates Rubio's decision as to which Team Member would clean the "occasional spill" was merely routine. (*Id.*) Rubio simply "responded to the occasional spill by radioing the team member at or near the affected area to clean it," which was consistent with the routine practice in place since Rubio began working for Respondent. (Tr. 74-75, 84-85, 94.) *See, e.g., St. Vincent Hospital, LLC*, 344 N.L.R.B. No. 71, 2005 WL 1032708 at *16-17 (2005) (no evidence of independent judgment where, after receiving message that hospital room needed to be cleaned, purported supervisors assigned room to the employee nearest to the area involved); *In re American Armored Car, Ltd.* 339 N.L.R.B. 600, 612 (2003) ("It is not clear, however, if [the purported supervisors] exercised independent judgment in making these assignments or if it was a routine exercise, i.e., directing the crew nearest the location to make the pickup or delivery."); *Loyalhanna Health Care Assocs.*, 332 N.L.R.B. 933, 935 (2000) (no probative evidence that nurses exercise independent judgment in assignment of work to employees despite fact that nurses have authority to reassign aides in response to emergency situations; such reassignments are routine, made on a recurring basis, and involve "nothing more than routine deployment of available aides to serve a particular patient population.>"). While the Acting General Counsel is correct that it is the possession of authority

to assign with independent judgment, and not its actual exercise, that matters, the Acting General Counsel failed to offer evidence sufficient to demonstrate that such actual authority exists . (Cross-Exceptions Brief, p. 7.) *See, e.g., Mountaineer Park, Inc.*, 343 N.L.R.B. 1473, 1474 (2004).

III. ALJ ETCHINGHAM PROPERLY FOUND RESPONDENT DID NOT VIOLATE SECTION 8(A)(1) OF THE ACT

Because ALJ Etchingham properly found Rubio to be neither a supervisor nor agent of Respondent, he properly concluded that Respondent did not violate Section 8(a)(1) of the Act as alleged in Paragraph 6(c) of the Consolidated Complaint. Nevertheless, in the event the Board finds merit in the Acting General Counsel's Cross-Exceptions and finds Rubio to be a statutory supervisor, the Board must independently evaluate the credibility of the evidence offered in support of Paragraph 6(c) of the Consolidated Complaint.² After doing so, the Board should dismiss the allegations finding the Acting General Counsel failed to offer credible evidence in support of them.

First, as discussed in Respondent's Post-Hearing Brief, the allegations found in Paragraph 6(c) of the Consolidated Complaint should be dismissed because they are fabricated. Porter Casiano Corpus testified that the alleged incident took place in March 2011, March 2010, and February 2011. (Tr. 161, 184, 185, 201.) While Corpus eventually testified that the incident occurred on February 18, 2011 and that he was confident Rubio worked as an hourly dual rate relief supervisor on that date, the credible documentary evidence demonstrates otherwise. (*See* Resp. Exs. 2, 3). In fact, during ALJ Etchingham's examination of the witness, Corpus admitted

² As referenced above, a factual dispute exists as to the February 17-18, 2011 Palace Station incident. *See Pullman Power Products*, 275 N.L.R.B. 765, 767 (1985) (Board must evaluate all relevant evidence to determine whether General Counsel met its burden); *Oil Brass Works*, 147

that he returns his radio to “whoever is the supervisor that night” and that on February 18, 2011 he returned his radio to Granniss. (Tr. 221, 222.).

While one might assert that the date is not critical because the Consolidated Complaint alleges that the unlawful conduct occurred “on or about February 18, 2011” following a Union rally, such assertion must fail. As the Acting General Counsel wrote in his Brief, Corpus “distributed flyers on Respondent’s properties and openly participated in more than one Union rally at Palace Station,” the earliest of which was in March 2010. (Cross-Exceptions Brief, p. 10; Tr. 184.) Thus, the date of the alleged incident is critical here where the unfair labor practice charge was filed on August 10, 2011, rendering the charge approximately one week shy of being untimely if the February 17, 2011 rally date is accurate and certainly untimely if the March 2010 rally date is accurate.³ The Board has repeatedly dismissed unfair labor practice allegations where a witness’s testimony regarding the date of the alleged unlawful conduct is uncertain or incredible, and the date of the alleged incident is perilously close to being untimely. *See Procter & Gamble Mfg. Co.*, 160 N.L.R.B. 334, 412-13 (1966) (finding testimony of witness regarding date of incident too uncertain to conclude that incident occurred within 10(b) period); *Valley Transit Co.*, 142 N.L.R.B. 658, 667 n.4 (1963) (finding no violation of the Act where employee’s testimony regarding date of incident was too uncertain to establish that claim was timely); *Haynesville Mfg. Co.*, 140 N.L.R.B. 977, 985 n.3 (1963) (testimony of witness regarding date of alleged incident too uncertain to establish that event occurred within 10(b) period).

N.L.R.B. 627, 645 (1964) (it is essential to “carefully evaluate” weight of evidence when making factual findings, particularly where one party’s evidence is uncorroborated).

³ Section 10(b) of the Act provides, in relevant part, “. . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . .”

Next, even if the Board credits Corpus' testimony, it should find that Rubio neither unlawfully interrogated nor unlawfully created an impression of surveillance. With respect to the claim of interrogation, Rubio merely inquired whether Corpus (a known union supporter) attended a Union rally and went to jail. (See Cross-Exceptions Brief, p. 10 (Corpus “distributed flyers on Respondent’s properties and openly participated in more than one Union rally at Palace Station.”)) The Board has found that such questioning of an open union supporter does not constitute “interrogation.” See, e.g., *Millum Textile Services Co.*, 357 N.L.R.B. No. 169, 2011 WL 7080653, at *33 (2011) (questioning of open and active union supporter regarding participation in union petition did not violate the Act); *Verizon Wireless*, 349 N.L.R.B. 640, 652-53 (2007) (supervisor’s questioning of open and active union supporter regarding union solicitation did not violate the Act).⁴

With respect to the claim that Respondent unlawfully created an impression of surveillance, contrary to the Acting General Counsel’s assertion, Rubio’s inquiries did not serve “to place Corpus on notice that Respondent was aware of his participation in the rally.” (Cross-Exceptions Brief, p. 9.) The facts of the cases relied upon by the Acting General Counsel – *Fred’k Wallace & Son*, 331 N.L.R.B. 914 (2000), *Flexsteel Industries*, 311 N.L.R.B. 257, 257 (1993), and *U.S. Coachworks, Inc.*, 334 N.L.R.B. 955, 956 fn. 6 (2001) – are distinguishable from those in the instant matter. Indeed, in those cases, members of management specifically informed the employees that they were aware of their participation in union activities. In this case, as testified by Corpus, Rubio merely inquired as to whether Corpus attended the Union

⁴ In arguing that Rubio’s inquiries are unlawful, the Acting General Counsel perilously relies upon findings from the hearing in Case Nos. 28-CA-22918, 28-CA-23089, 28-CA-23224, and 28-CA-23434 to which Respondent has taken exceptions. (Cross-Exceptions Brief, p. 10-11.)

rally and whether he had gone to jail. (Tr. 170.) Rubio's inquiries suggest that he was unaware of Corpus's participation.

Additionally, the Union rally was conducted openly on the sidewalks and streets adjacent to Palace Station. (Tr. 162.) Under these circumstances, no employee would reasonably assume that his union activities had been placed under surveillance by these inquiries. *See South Shore Hospital*, 229 N.L.R.B. 363, 363-64 (1977) (employer does not create impression of surveillance merely by stating that he is aware of rumor pertaining to union activities, provided that there is no evidence indicating that employer could have only learned of rumors through surveillance); *Sunshine Piping, Inc.*, 350 N.L.R.B. 1186, 1186 (2011) (statement by supervisor did not create unlawful impression of surveillance where statement suggested only that employer observed open Section 7 activity on its premises, not that employer was closely monitoring degree and extent of organizing efforts); *Dynacorp*, 343 N.L.R.B. 1197, 1209 (2004) (supervisor did not unlawfully create impression of surveillance when he inquired regarding location of union meetings; question was innocuous and did not create impression of surveillance because meetings were publicized at plant).

IV. CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Board adopt ALJ Etchingham's conclusions with respect to Rubio's supervisory status and Paragraph 6(c) of the Consolidated Complaint, and dismiss the Consolidated Complaint in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2012, a copy of Respondent's Answering

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