

**Hartman and Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc. and UNITE HERE! Local 355, affiliated with UNITE HERE!** 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, and 12-CA-072263

April 25, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On September 18, 2012, Administrative Law Judge George Carson II issued the attached decision. The Respondent, Hartman and Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc., filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, cross exceptions, and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions, to amend the remedy,<sup>2</sup> and to adopt the recommended Order as modified and set forth in full below.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to rely on the judge's finding that the Respondent's decision to contest the validity of its Memorandum of Agreement with UNITE HERE! Local 355, affiliated with UNITE HERE!, suggested animus towards the Union. The Respondent's anti-union animus is evident in its unlawful interrogations, threats, and discharges.

<sup>2</sup> We have amended the remedy to conform to the Board's standard remedial provisions.

<sup>3</sup> We shall order the Respondent to electronically post the notice pursuant to *J. Picini Flooring*, 356 NLRB 11 (2010). In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012), we shall order the Respondent to reimburse the discriminatees in an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them. Further, we shall order the Respondent to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. We additionally find merit in the Acting General Counsel's exception to the judge's failure to order the Respondent to post the notice in English, Haitian Creole, and such other languages as the Regional Director determines are necessary to fully communicate with employees. See *O.G.S. Technologies, Inc.*, 356 NLRB 642, 648 (2011). We have amended the judge's recommended

In October 2011,<sup>4</sup> the Union began an organizing drive at the Respondent's facility. We agree with the judge that, over the course of the next few months, the Respondent violated Section 8(a)(1) of the National Labor Relations Act by: coercively interrogating Sochie Nnaemeka; threatening Tashana McKenzie with unspecified reprisals; coercively interrogating Yvrose Jean Paul,<sup>5</sup> threatening Amanda Hill, McKenzie, and Theresa Daniels-Muse with arrest; and informing Hill that she had been discharged for engaging in protected activity. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Daniels-Muse, McKenzie, and Hill and by discharging Diane Jean and Alicia Bradley. Finally, as explained below, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Nnaemeka, James Walsh, and Steven Wetstein.<sup>6</sup>

Sochie Nnaemeka

The Respondent discharged Nnaemeka on November 3. The judge found that the Acting General Counsel met his initial *Wright Line*<sup>7</sup> burden of showing that Nnaemeka's union activity was a substantial and motivating fac-

---

Order to reflect these modifications, and to conform to the Board's customary language.

We do not, however, grant the Acting General Counsel's exception to the judge's failure to recommend that the notice be read aloud to employees by the Respondent or a Board agent. The Acting General Counsel has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. See *Chinese Daily News*, 346 NLRB 906, 909 (2006), enf. mem. 224 Fed. Appx. 6 (D.C. Cir. 2007).

<sup>4</sup> Unless otherwise specified, all dates are in 2011.

<sup>5</sup> The judge found that the Respondent coercively interrogated Jean Paul about other employees' union sympathies when Facilities Manager Tommy Grozier asked, after an earlier conversation about the Union, if Jean Paul could identify the people who spoke with her. In its exceptions, the Respondent argues that Grozier's question did not inquire about the union sympathies of other employees because he had no reason to suspect that employees were making home visits. This argument is not supported by the record. Grozier's questioning of Jean Paul occurred in December, well after the Respondent obtained a flyer in which employee organizing committee members stated that they were visiting employees to answer questions about the Union. In fact, it was Jean Paul's image on the flyer that caused Grozier to question her in the first instance. Thus, the Respondent had reason to believe current employees were making home visits, and it violated Sec. 8(a)(1) by interrogating Jean Paul to learn those employees' identities.

<sup>6</sup> There are no exceptions to the judge's dismissal of the remaining complaint allegations.

<sup>7</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel meets his initial burden by showing that the employee engaged in union activity, that the employer had knowledge of that activity, and that the employer bore animus toward the union activity.

tor in the Respondent's decision to discharge her. The Respondent excepts to this finding and argues that the Acting General Counsel did not establish that it had knowledge of Nnaemeka's union activity.

The Respondent's contention is without merit. It is well established that the "knowledge" element of the *Wright Line* analysis need not be established by direct evidence, but "may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Here, the Respondent coercively interrogated Nnaemeka about her union activities and sympathies on October 30, only 4 days before it discharged her. This interrogation demonstrates that the Respondent knew, or at least suspected, that Nnaemeka supported the Union. See *Evenflow Transportation*, 358 NLRB 694, 696 (2012). In addition, a couple days before her discharge, Beverage Supervisor Nick Sanvil told Nnaemeka that he heard she was getting herself into trouble. When Nnaemeka asked what he meant, Sanvil merely laughed. Coming as it did on the eve of her discharge, we find that Sanvil's comment was a veiled reference to her union activity, and further demonstrates the Respondent's knowledge. Finally, we agree with the judge that the reasons the Respondent gave for Nnaemeka's discharge were false. Nnaemeka was originally told she was being discharged because of a string of absences and tardies. When Nnaemeka pressed the Respondent for its reasoning, it added that she was caught loitering in the poker room kitchen. Like the judge, we find this second justification incredible because Nnaemeka credibly testified that her supervisor observed her eating in the poker room kitchen and did not instruct her to return to her station. It is well established that knowledge of union activities can be inferred from the pretextual reasons given for adverse personnel actions. See, e.g., *North Atlantic Medical Services*, 329 NLRB 85, 85-86 (1999), enfd. 237 F.3d 62 (1st Cir. 2001). Considering all of this circumstantial evidence, we have little trouble inferring that the Respondent had knowledge of Nnaemeka's union activity when it discharged her on November 3.<sup>8</sup>

We therefore adopt the judge's finding that the Acting General Counsel proved that Nnaemeka's union activity was a substantial and motivating factor in her discharge, and, for the reasons the judge stated, that the Respondent did not show it would have discharged Nnaemeka absent her union activity. Accordingly, we find that the Re-

spondent violated Section 8(a)(3) and (1) of the Act by discharging Nnaemeka.

#### James Walsh and Steven Wetstein

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging James Walsh and Steven Wetstein. Applying *Wright Line*, supra, the judge found that the justifications given by the Respondent for both employees' discharges were false. The judge's findings and conclusions are fully supported by the record, and we adopt those portions of his decision.

The Respondent discharged Walsh on November 8. At the hearing, Assistant Food and Beverage Manager Jay Hasan testified that Walsh was discharged because of complaints by two of his coworkers. Christine Forbes complained that Walsh requested her cell phone number and asked for her address to meet with her, and Jacqueline Bello reported that Walsh asked her a couple questions about how she liked working for Mardi Gras.

The Respondent discharged Wetstein on November 23. That day, Wetstein encountered his coworker, Terrell Blow, while he was getting food from the food storage area. Wetstein told Blow that some employees were organizing a union and asked if he could speak to Blow outside of work. Blow answered that he was busy with school. Wetstein then asked Blow if they could exchange phone numbers. Blow said that his phone had been turned off. The exchange took less than a minute and, based on Wetstein's credited testimony, did not disrupt Blow's work. Later that day, Human Resources Director Steven Feinberg told Wetstein that he was being discharged because he had interfered with the work of another employee. It is undisputed that Wetstein's alleged interference was his brief conversation with Blow.

There is no evidence that the Respondent restricts employees from talking to each other while working. As found by the judge, the Respondent's employees regularly spoke about other nonwork subjects, such as the weather and commuting, during working time. There is also no evidence that the Respondent prohibited employees from requesting their coworkers' contact information or from arranging meetings outside of work.

Moreover, even if the Respondent had a rule that prohibited these discussions, Walsh and Wetstein's activity fits squarely within the range of activity protected by Section 7 of the Act. Walsh and Wetstein were members of the Union's organizing committee who requested their coworkers' contact information in order to discuss the Union outside the workplace. Employees are protected in requesting information that is relevant to organizational purposes. *Faurecia Exhaust Systems*, 355 NLRB 621, 621-622 (2010).

<sup>8</sup> We therefore find it unnecessary to rely on the judge's finding that another employee, Ron Shultz, told Food and Beverage Manager Bill Fodor that Nnaemeka and "the union lady" attempted to visit him.

Nor do we find, as the Respondent argues, that Walsh and Wetstein were lawfully discharged because they harassed and bothered their coworkers. The judge found that Walsh left Forbes and Bello alone after being requested to do so. Similarly, the judge found that Wetstein did not interfere with Blow's work and that their whole conversation lasted less than a minute. Walsh and Wetstein's conduct, therefore, can "hardly be deemed to amount to harassment under any reasonable construction of the term." *Id.* at 622 (internal quotations omitted). By admittedly discharging Walsh and Wetstein because of their protected activity, the Respondent violated Section 8(a)(3) and (1) of the Act.<sup>9</sup>

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by suspending and then discharging Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill and by discharging Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steven Wetstein, we shall order the Respondent to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful action against them.<sup>10</sup>

<sup>9</sup> There is no contention that Walsh and Wetstein were disciplined pursuant to the Respondent's no-solicitation rule, perhaps because Walsh and Wetstein could not have been lawfully discharged pursuant to that rule. Although the employees spoke to their coworkers on working time, the Board has long distinguished between solicitation and merely talking about union activities. See, e.g., *Wal-Mart Stores*, 340 NLRB 637, 638-639 (2003) (respondent unlawfully disciplined an employee for inviting other employees to a union meeting while on working time). Here, there is no evidence that Walsh or Wetstein solicited an authorization card or asked any employee to sign a petition while they were working.

<sup>10</sup> As explained above, we agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Sochie Nnaemeka and James Walsh. The Respondent argues that reinstatement and full backpay are inappropriate remedies for these unlawful discharges because after acquired evidence of the employees' misconduct would have caused the Respondent to discharge them even absent their union activity. Specifically, the Respondent argues that it would have discharged Nnaemeka and Walsh for omitting some of their postsecondary education from their applications. We find no merit to this contention.

The Respondent's argument is governed by our decision in *John Cuneo, Inc.*, 298 NLRB 856 (1990). There, the Board tolled an employee's backpay on the date the employer learned that the employee had falsified his employment history on his employment application. In *John Cuneo*, however, the credited testimony and other evidence established not only that the employer had a policy against hiring applicants who made misstatements on their applications, but also that the employer in fact had adhered to that policy, even though the employer previously had not been confronted with a similar situation. By contrast, although the Respondent appears to have a policy declaring that "material omissions" from an application may result in discharge, the

The backpay due shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

We shall also order the Respondent to offer the employees full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall be required to remove from its files and records all references to the employees' unlawful suspensions and discharges, and to notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

#### ORDER

The Respondent, Hartman and Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc., Hallandale Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union sympathies and the union activities of other employees.

(b) Threatening employees with unspecified reprisals because of their union activities.

(c) Threatening employees with arrest for engaging in protected concerted union activities.

(d) Informing employees that they have been discharged because they engaged in protected concerted union activities.

(e) Suspending, discharging, or otherwise discriminating against employees because of their union activities in support of UNITE HERE! Local 355, affiliated with UNITE HERE!, or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein full reinstatement to their former jobs or, if those jobs no longer exist, to sub-

Respondent has not established that it consistently adhered to that policy, much less that Nnaemeka's and Walsh's omissions of their postsecondary educations constituted "material omissions" under that policy. Therefore, we shall order reinstatement and full backpay to remedy Nnaemeka and Walsh's unlawful discharges.

stantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions and discharges and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Hallandale Beach, Florida facility copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, in English, Haitian Creole, and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 30, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union sympathies or the union activities of your fellow employees.

WE WILL NOT threaten you with unspecified reprisals because of your union activities.

WE WILL NOT threaten you with arrest for engaging in protected concerted union activities.

WE WILL NOT inform you that you have been discharged because you engaged in protected concerted union activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against you for supporting UNITE HERE! Local 355, affiliated with UNITE HERE! or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, offer Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any interim earnings, plus interest.

WE WILL compensate Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharges of Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill and the unlawful discharges of Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steven Wetstein, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

HARTMAN AND TYNER, INC., D/B/A MARDI GRAS CASINO AND HOLLYWOOD CONCESSIONS, INC.

*Susy Kucera, Christopher Zerby, and John King, Esqs.*, for the General Counsel.

*Robert L. Norton, Peter L. Sampo, and Suhail Machado, Esqs.*, for the Respondent.

*Mr. Michael Hill*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on June 25, 26, 27, and 28, 2012, pursuant to a consolidated complaint that issued on April 30, 2012, as amended on May 10, 2012.<sup>1</sup> The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in several respects and Section 8(a)(3) of the Act by discharging a total of 10 employees be-

cause of their union activities. The answer of the Respondent denies any violation of the Act. I find that the Respondent violated the Act in some respects but not in others.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, Hartman and Tyner, Inc., d/b/a Mardi Gras Casino, is a Michigan corporation with a facility in Hallandale Beach, Florida, at which it operates a casino and dog racing track. The Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Florida.

The Respondent, Hollywood Concessions, Inc., is a Florida corporation engaged in operations at the Mardi Gras Casino. The Respondent's answer admits, but only to the extent of its operations at Mardi Gras Casino, that Hollywood Concessions is a single-integrated business enterprise and a single employer with Hartman and Tyner.

I find that the Respondent, Hartman and Tyner, Inc., d/b/a Mardi Gras Casino and Hollywood Concessions, Inc., the Company, is a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Notwithstanding the Company's involvement in interstate commerce, the answer pleads that its operations are not subject to the Act because, insofar as "Mardi Gras operates a racetrack-casino under its racetrack license," the Board lacks jurisdiction. Section 103.3 of the Board's Rules and Regulations, provides that "[t]he Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries." The Board, however, "regularly asserts jurisdiction over enterprises engaged in casino gambling." See *Empire City at Yonkers Raceway*, 355 NLRB 225 fn. 5 (2010).

In *Empire City at Yonkers Raceway*, supra at 226, the Board referred to two cases in which both enterprises had begun as racetracks but which had added casino operations. In *Prairie Meadows Racetrack & Casino*, 324 NLRB 550, 551(1997), the Board found 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.'" In *Delaware Park*, 325 NLRB 156, 156 (1997), the Board held that "the racetrack was dependent on the casino, not the other way around."

In this case, as in *Prairie Meadows* and *Delaware Park*, the Company expanded its racetrack operation by adding casino operations, specifically slot machines. Patrons engage in pari-mutuel wagering, play the slot machines, or gamble in the poker room. The Board asserts jurisdiction over poker rooms. See *El Dorado Club*, 220 NLRB 886 fn. 5 (1975). Food and beverage employees serve all patrons. The Company's employee complement doubled, from about 300 to about 600, when the slot machines were installed.

<sup>1</sup> All dates are in 2011, unless otherwise indicated. The charges in all of the cases were filed on January 11, 2012. The charges in Cases 12-CA-72234, 12-CA-72245, 12-CA-72246, and 12-CA-72254 were amended on March 8, 2012.

The Company markets itself to the public as Mardi Gras Casino, not Hollywood Greyhound Track, its former name. The casino operations are conducted under a separate license from the racetrack; however, the laws of the State of Florida require that the racetrack operate if the casino is to operate, but it does not have to operate year round. During the past fiscal year the dog track operated for 5 months, December 2011 and January through April 2012. Danny Adkins, vice president and chief operating officer of the Company, explained that its permit requires from 100 to 140 live dog races a year. During the remaining months of the year, the kennel that is operated by the dog owners races the dogs at a different track. In an interview in 2011, Adkins told a reporter that the dog track had lost money the previous year and that the “live racing industry was dead.” At the hearing herein he pointed out that he never said that “pari-mutuel activity was dead.”

Over the last 3 fiscal years, documentary evidence establishes that the Company’s revenue from slot machines was approximately \$53 million for 2009–2010, \$52 million for 2010–2011, and \$53 million for 2011–2012. Parimutuel activity for the same three periods was \$23, \$14, and 19 million, respectively.<sup>2</sup> The Respondent, in its brief, argues that the foregoing figures are misleading insofar as it must pay various state and local taxes and fees with regard to its slot machine revenue. I note that the brief of the Respondent does not present the taxes and fees paid upon revenue from its pari-mutuel operations. The Board asserts jurisdiction on the basis of gross revenue, not profit. The revenue generated by the Company’s slot machine operations is more than double the revenue received from its pari-mutuel operations.

The Company’s casino operations do not involve the racing industry. 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. I find that the Board has jurisdiction over the operations of the Respondent.

The Respondent admits, and I find and conclude, that UNITE HERE! Local 355, affiliated with UNITE HERE!, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

This case arises in the context of organizational activity among the Company’s casino employees. Several years ago, seven companies began an initiative to bring slot machines to South Florida. Vice President and Chief Operating Officer Danny Adkins explained that “the Union came to the group of tracks that were funding the operation, seven of us, and said that they would be willing to support the initiative if we would enter into a neutrality agreement, and the seven of us did.” The agreement is dated August 23, 2004.

The events that followed are set out in *Mulhall v. UNITE HERE! Local 355*, 618 F.3d 1279 (11th Cir. 2010). The decision therein is relevant insofar as it sets out the background preceding the events herein. As set out therein, the support of the Union for the ballot initiative was substantial, the Union spent over \$100,000 in support of the initiative, and the initiative was successful. *Mulhall v. UNITE HERE! Local 355*, supra at 1285.

The neutrality agreement, referred to as the Memorandum of Agreement or MOA, which the Company entered into in exchange for the support of the Union for the ballot initiative, inter alia, sets out a bargaining unit and provides that the Company would grant the Union access to nonworking areas of its property to speak with employees in the unit. It also provides that the Company would provide the Union with lists of the names of unit employees and their addresses. The agreement provides that it would remain in effect for 4 years after slot machines were installed. Slot machines were installed in October 2006.

In May and July 2008, the Union sent the Company written notice of its intent to organize and demanded that the Company provide the organizing assistance promised in the MOA. The Company refused, “claiming, with the advice of new legal counsel, that the MOA was illegal and unenforceable.” *Mulhall v. UNITE HERE! Local 355*, at 1285. The Company’s claim was referred to arbitration and the arbitrator found that the agreement was enforceable and extended it for 1 year. The District Court confirmed the arbitration award but vacated the 1 year extension.

Notwithstanding the vacating of the extension, counsel for the Respondent, at the hearing herein, represented that “the agreement got extended a year . . . because we were found to have violated it . . . by sending out information to employees that the [a]rbitrator determined was not neutral materials.”

The Company contends that, counting the 1-year extension, the MOA expired on October 24, 2011, 5 years after the installation of slot machines. Organizer Michael Hill confirmed that the Union contends that, with the extension, the MOA was in effect through December 31, 2011. The brief of the General Counsel cites an unreported order that was not presented as evidence that purportedly extended the agreement until December 31, 2011. I do not consider evidence that is not part of the record and, regardless of when it expired, the date of expiration is not before me. In late 2011, the Union and the Company took actions consistent with their respective contentions regarding the viability of the MOA.

In September, the Union had two activist “salts” seek employment at the casino. Sochie Nnaemeka, a graduate of Yale University, did not, on her application, report any education beyond her graduation from high school. James Walsh, on his application, did report his graduation from Brown University but did not report that he also received a Masters Degree in journalism from Columbia University. Both were hired and, as employees, sought to identify potential leaders among the unit employees who would support the organizational objective of the Union. The Company did not learn that they were salts until a 10(j) proceeding held the week before the hearing herein opened.

<sup>2</sup> Pari-mutuel revenue includes both H & T Gaming, Inc. (formerly Bet Miami) and Mardi Gras RaceTrack and Gaming Center.

In late October, representatives of the Union and prounion employees began contacting employees at their homes relative to their working conditions. Initially, authorization cards for the Union were not solicited. Some employees reported to management that they had been visited by “strangers.”

On October 31, Wendi Walsh, president of the Union, wrote Vice President and Chief Operating Officer Adkins complaining that “[m]anagers have asked employees about visits by the Union to employees’ homes.”<sup>3</sup> The letter requests a meeting to “discuss possible remedies to the damage that has been done.”

Adkins replied the same day in a letter explaining that the reports received by the Company related to complaints regarding the “hours of the visits” and “false pretenses” in that the visitors “failed to identify themselves truthfully on the first visit.” The letter denied that the Company violated the neutrality agreement. It states that the Company would “respectfully decline your request to meet.” I note that the letter does not assert that the neutrality agreement had expired. That assertion was made in a letter dated November 17.

Walsh, on November 2, wrote Adkins stating that the Union had been talking with employees “off Casino property” and that “[s]oon, the Union expects to begin speaking with employees in non-work areas of the Casino as permitted” by the neutrality agreement. Walsh again stated the desire of the Union to meet. The Company did not respond to that request.

A delegation from the Union, with activists from the community, came to the casino on November 17. Organizer Michael (Mike) Hill requested to speak with Adkins. That request was refused, and the delegation was directed to leave. The members of the delegation did so.

On that same day, Adkins wrote Walsh protesting the “orchestrated, unrequested and unannounced entry onto the property.” The letter stated that “these actions will not be tolerated” and that “any employees engaging in these actions during working hours and on these premise will be terminated immediately.” The letter goes on to state that the neutrality agreement “terminated on October 24, 2011.”

Notwithstanding the foregoing letter, a delegation from the Union returned on the following day, November 18, and again requested to meet with Adkins. The request was refused and the delegation was directed to leave or face arrest. On this occasion the delegation did not immediately leave and police officers arrived and began taking names. Three current employees departed in order to avoid giving their names to the officers. Organizer Hill showed a copy of the neutrality agreement to the officers, one of whom told him that “you both have lawyers,” that he was not a lawyer, “we should fight it out in court.”

As hereinafter discussed, 10 employees are alleged as discriminatees, 5 of whom were discharged for coming to the facility with the union delegations.

#### *B. Preliminary Observations*

Despite the support provided by the Union to the ballot initiative that gave the Company the right to install slot machines,

<sup>3</sup> Local President Wendi Walsh is not related to alleged discriminatee James Walsh.

the Company in 2008, refused to provide the assistance set out in the MOA, “claiming, with the advice of new legal counsel, that the MOA was illegal and unenforceable.” *Mulhall v. UNITE HERE! Local 355*, at 1285. The Company’s decision to contest the validity of the agreement into which it had entered after the Union had rendered the assistance that had resulted in the successful initiative suggests animus towards the Union.

The Company presented letters from the subdirector of the Steelworkers Union in West Virginia and the president of a Teamsters local union in Michigan, unions that represent casino employees in those States, that refer to their longstanding relationship with Adkins and denying any antiunion sentiments by Adkins. The letters do not establish the absence of antiunion animus with respect to this employer that, in Florida, sought to have the agreement into which it had entered be found unenforceable. The letters establish 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.

The Union, notwithstanding its clear knowledge that the Company contended that the neutrality agreement expired on October 24 and that the Company was refusing to honor it, sent out a one page flier on November 19 stating, “The Union thanks Dan Adkins . . . for working together with the Union,” noting that the Union had been given the names and addresses of unit employees and that the Company had “agreed to stay neutral.” Following the ejection of the delegations from the Union and the receipt of the November 17 letter from Adkins stating the position of the Company that the neutrality agreement had expired on October 24, there was no basis for any assertion by the Union that Adkins was “working together with the Union.”

#### *C. The 8(a)(1) Allegations*

The General Counsel, in its brief, withdrew paragraphs 11, 12, 13, and 19 of the complaint.

Paragraph 7 of the complaint alleges that on or about October 26, 2011, Chief Operating Executive Cathy Reside, in a written memorandum, created an impression among employees that their union activities and protected concerted activities were under surveillance by Respondent and asked employees to report the union activities and protected concerted activities of other employees to Respondent.

Catherine (Cathy) Reside did not testify. On October 26, the Company attached a memorandum from Reside to employees’ paychecks stating that the Company had been informed that employees had received “unsolicited strangers knocking at their doors” who had identified themselves as “working for the ‘community’ or for ‘Mardi Gras Casino.’” The memorandum then states:

Please know that management at Mardi Gras would NOT visit your home. We are doing everything we can to protect your privacy.

If you have any questions or concerns-or have had a similar experience-PLEASE let us know.

The memorandum was issued after reports of contact by strangers. Tashana McKenzie, an alleged discriminatee, acknowledged that she was visited by an individual whom she did not know who stated that she was from "Freedom Charters." McKenzie told the individual that the time was not convenient. The individual returned the next week and stated that she was "with Freedom Charters and they were trying to change and better South Florida with transportation and jobs." McKenzie explained that, "a little bit after that, she explained that she was also from the Union."

Food and Beverage Manager Bill Fodor recalled that, in late October, three employees reported that individuals "from a group called Community Services or something similar to that" had come to their homes. Suzann Goslin was upset by the visit and "wanted to know who these people were." Monica Rakowska and Doreen DeCrescito reported being visited. Fodor stated that, "after hearing their stories, I put it together that this was probably the Union starting to organize."

Although Fodor denied asking employees whether they had been visited, employee James Walsh, whom I credit, confirmed that, at a preshift meeting in late October, Fodor told him and Monica Rakowska that two cocktail waitresses whom Fodor identified as Suzy [Goslin] and Doreen [DeCrescito] had reported that they had been visited by unidentified individuals. "He asked us if we had been visited, to which I replied no, and Monica immediately said she had been visited." Fodor asked if she knew who they were and whether she let them in. Rakowska replied that she did not let them in, "but they were very nice." Later in the shift, Fodor returned with Food and Beverage Director Sallyanne Kelly and Dan Adkins. Adkins asked Rakowska whether she knew "who these people were, did you ask for identification . . . what they looked like . . . what kind of questions they asked." He then told Rakowska, "[I]f they come back again be sure to come let me know."

At the shift change, which occurred at around 6 p.m., new cocktail waitresses and a new bartender came in. Fodor asked them if they had been visited. "Everybody said no." When Fodor left, one of those cocktail waitresses, Suzanne Garro-Arroyo, told Walsh that "they're talking about the Union . . . that she had been visited and was very excited about the Union."<sup>4</sup> She also stated that "management was purposely not saying the Union word, but all of the employees standing there knew that it was the Union." Garro-Arroyo did not report her basis for making the foregoing statement.

Fodor acknowledged that he reported to higher management that he thought "this [the home visits] might be the Union starting to organize."

The memorandum does not create an impression of surveillance nor request employees to report upon the union activities of their fellow employees. It requests information relating to strangers who identified themselves working for the "communi-

<sup>4</sup> An employee list provided to the Union pursuant to the MOA shows Suzann Goslin and Suzanne Garro-Arroyo as cocktail waitresses. The "Suzy" that Walsh recalled Fodor mentioning would have been Suzann Goslin insofar as Fodor named her as being upset about being visited. The Suzanne on the next shift would have been Suzanne Garro-Arroyo.

ty" or "Mardi Gras Casino." It asks that employees who have had a similar experience to "let us know." I shall recommend that paragraph 7 of the complaint be dismissed.

Paragraph 8 of the complaint alleges that Chief Operating Officer Danny Adkins interrogated employees about their union membership, activities, and sympathies and about the union membership, activities, and sympathies of other employees, and asked employees to report the union activities and protected concerted activity of other employees to Respondent.

This allegation arises from the testimony of Walsh that, after the preshift meeting at which Monica Rakowska acknowledged that she had been visited, Fodor returned with Food and Beverage Director Kelly and Adkins. Adkins asked Rakowska whether she knew "who these people were, did you ask for identification . . . what they looked like . . . what kind of questions they asked." He then told Rakowska, "[I]f they come back again be sure to come let me know." Walsh did not testify to any answers that Rakowska gave. There were no questions relating to any union activity by Rakowska or any other employees.

Adkins did testify, but he did not address his conversation with Rakowska, who did not testify. The report of Walsh regarding her conversation with Adkins contains no reference to the Union or any statement by Rakowska relating to the Union. In the absence of any reference to the Union, whether the Respondent was legitimately concerned regarding employees' privacy or opposed to their contact with the Union is immaterial. Adkins' request the Rakowska report whether "they" came back again does not establish a request that she report upon the union activities of other employees. I shall recommend that this allegation be dismissed.

Paragraph 9 of the complaint alleges that, "on or about a date in October," Bill Fodor interrogated employees about their union membership, activities, and sympathies and asked employees to report the union activities and protected concerted activities of other employees.

This allegation is predicated upon the testimony of Walsh, which I credit and which in substantial part is confirmed by Fodor. Although I do not credit Fodor's denial that he interrogated employees, there is no evidence that Fodor, prior to October 30, interrogated any employee with regard to union sympathies. He received reports of visits by unidentified individuals and inquired of other employees whom he supervised whether they had received such visits. Monica Rakowska acknowledged that she had. Fodor asked if she knew who they were and whether she let them in. Rakowska replied that she did not let them in, "but they were very nice." I shall recommend that this allegation be dismissed.

Notwithstanding my recommended dismissal of the foregoing allegations, President Wendi Walsh's letter of October 31 relating to managers' questioning of employees confirmed Fodor's suspicion that the visits were related to the Union's organizational effort. More significantly, after the Company's receipt of the October 31 letter from the Union, the Company would suspect that employees identified as making visits, as opposed to having been visited, were engaging in organizational activity on behalf of the Union.

Paragraph 10 of the complaint alleges that Fodor, on October

29, interrogated employees about their union membership, activities, and sympathies.

On October 30, rather than the 29, Sochie Nnaemeka noted that her supervisor, Bill Fodor, did not engage in conversation with her when she reported to work. After she began working, Fodor gestured for her to come to the supply closet. Once there he asked Nnaemeka if she had been “visited by strangers at my house.” Nnaemeka “kind of deflected the question,” and Fodor explained that another employee, Emilene Noel, had been visited and “was very scared.” He told Nnaemeka that if strangers were coming to her house to report it “because we want to make sure you guys are safe.” They continued talking, and Fodor then said, “[S]o the Union has not come to your house? You’re not with the Union?” Nnaemeka answered that she did not “know what you’re talking about.”

Following the conversation in the supply closet, Nnaemeka spoke with employee Ron Shultz whom she had, with an organizer for the Union, attempted to visit earlier in the day. Shultz called out to her and asked if that was “you this morning with the Union lady at my door?” Nnaemeka went to him and answered that it was and questioned why he had not come to the door. Shultz answered that he was “hung over.” Nnaemeka asked, “[D]id you by chance tell Bill [Fodor] that I had come to your door?” He answered, “[Y]eah, you know, he was the first person I saw when I walked in today, and it seemed weird that after we’d, you know, strangers coming to your door, that you show up to my door with a stranger.” Nnaemeka told Shultz that she asked that question because she had earlier had a conversation with Fodor, and “it was a little bit of a tight atmosphere.” She told Shultz that she had come to talk to him about the Union, but that “we can’t talk about it here.”

Although the brief of the Respondent asserts that Fodor denied receiving any report from Shultz, review of the transcript contains no such denial. Fodor did not mention Shultz in his testimony. Fodor denied asking Nnaemeka anything about the Union or asking any employees whether they had been visited. I do not credit that testimony. All employees had, in the October 26 memorandum, been asked to report visits from strangers. Fodor did not deny having a conversation with Nnaemeka in the supply closet. Walsh confirms that, in late October, Fodor had informed him and Monica Rakowska that other employees had reported being visited and asked if they had been visited.

The chronology of the foregoing events is totally consistent. Nnaemeka attempted to visit Shultz, he informed Fodor of her visit, and Fodor interrogated her in the supply closet. Thereafter she confirmed with Shultz that he had informed Fodor of the visit.

Fodor questioned Nnaemeka saying, “[S]o the Union has not come to your house? You’re not with the Union?” The foregoing questions demanded an answer, and Nnaemeka replied that she did not know what he “was talking about.” The interrogation of Nnaemeka by her manager in a supply closet was coercive. By interrogating an employee with regard to her union sympathies the Respondent violated Section 8(a)(1) of the Act.

Paragraph 14 of the complaint alleges that, on or about November 14, Supervisor Evans Etienne threatened employees with unspecified reprisals if they engaged in union activities or protected concerted activities.

Tashana McKenzie, a floor attendant in the casino, was directly supervised by Casino Supervisor Evans Etienne. Uncontradicted testimony by McKenzie establishes that, on November 14, Etienne spoke with her on the job. He stated that he “had just talked to Emilene Noel, and she said that I had been talking to her about the Union.” Noel is the individual who had told Fodor that she had been visited and whom he named when speaking with Nnaemeka. Etienne continued, telling McKenzie “to be careful and just to watch my back.” Etienne did not testify and I credit McKenzie. The foregoing statement, notwithstanding that it came from a supervisor who was “concerned for the employee’s job security,” threatened unspecified reprisals. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462–463 (1995). By threatening employees with unspecified reprisals because of their union activity, the Respondent violated Section 8(a)(1) of the Act.

Paragraph 15 alleges that, or about November 18, Security Manager Rich Hopke threatened employees with discharge and arrest because they engaged in union activities.

As already discussed, a delegation from the Union sought to speak with Adkins on both November 17 and 18. When requested to leave on November 17, the delegation did so. On November 18, the delegation did not. Organizer Hill explained that the delegation did not leave because the Union “wanted documentation that they were refusing to provide us access.” Hill showed Hopke the MOA. Hopke told Hill that he worked “for the Company and they’re telling him there’s no agreement, so there’s no agreement.” Hopke then told Hill that he was “going to call the cops and arrest us.”

When the police arrived, Organizer Hill showed a copy of the neutrality agreement to one of the officers. The officer responded that “you both have lawyers,” that he was not a lawyer, “we should fight it out in court.” The officer stated that he was going to issue citations for trespassing. Hill explained that some of the members of the delegation were employees and asked what was going to happen to them. The officer spoke to Hopke. It is unclear whether Hill overheard their conversation, but it is undisputed that the officer reported that Hopke told him “if anybody comes back, they’re going to be arrested including those workers.” Hill immediately went to Hopke and told him, “[L]ook, these workers have to come back to work. They can’t be arrested.” Hopke “shrugged and put his hands up.”

Hill’s testimony was corroborated by Theresa Daniels-Muse who recalled that Hopke told Hill that he did not “know about any such agreement and that if we didn’t leave that he was going to have us cited for trespassing.” Whether Hill overheard the conversation between the officer and Hopke is immaterial. Hopke did not testify. I credit Daniels-Muse with regard to what she heard Hopke tell Hill.

Employees who are not on duty are permitted to return to the casino. Threatening off-duty employees with arrest, a citation for trespassing, because they engaged in protected concerted union activity violated Section 8(a)(1) of the Act.

Paragraph 16 of the complaint alleges that, on or about December 2, Adkins, threatened employees with discharge because they engaged in union activities.

This allegation is predicated upon a short conversation at which employee Amanda Hill, who had already been dis-

charged, protested her discharge. Adkins, his secretary, and Hill were present. Adkins asked why she was there, and Hill answered that she “never got a reason why I was fired, a letter, a paper or anything.” Adkins stated that she had come “with a group of people and we were being disruptive.” Hill answered that she was “never being disruptive.” Adkins replied, “[Y]ou came with a group of people, right?” Hill answered, “Yeah, but I wasn’t being disruptive.” Adkins answered that “is not the way that you come to meet him.” Hill stated that she thought that “we had permission . . . [to] speak to the workers while they weren’t on the clock.” Adkins said, “[T]his meeting is over now.” Adkins did not deny the testimony of Hill, whom I credit.

The General Counsel argues that the foregoing conversation, by informing “Hill that she had been discharged for being ‘disruptive’ because she had engaged in peaceful union activity” violated the Act. The foregoing statement linking the discharge of Hill to her protected concerted activity was coercive and independently violated Section 8(a)(1) of the Act. *TPA, Inc.*, 337 NLRB 282, 283 (2001).

Paragraph 17 alleges that, on or about December 5, Sallyanne Kelly interrogated employees about their union membership, activities, and sympathies and threatened employees with unspecified reprisals because of their union membership, activities, and sympathies.

Figene Pierre was a member of the organizing committee of the Union. Her picture appeared on a flier distributed by the Union that announced and identified members of the committee. At some point after the distribution of the flier, Director of Food and Beverage Sallyanne Kelly approached Pierre, who is a dishwasher at the casino and who speaks only Creole, with Kitchen Supervisor Joe Curci. A cook, Gregory, who speaks both Creole and English, translated. Kelly asked Pierre, “[I]f I signed for this, and I said yes.” She asked why she had signed. Pierre replied that “the Company give a paper for them [the Union] to collect all the people’s address, and that’s one of the reasons that I signed.” Kitchen Supervisor Curci twice asked Kelly whether Pierre would get into trouble. Kelly replied, twice, “[N]o.” Pierre testified, “He asked Sally if I will get in trouble, and Sally said no.”

In a pretrial affidavit, Pierre stated that Curci said that “I would be in trouble and Sally said no, that I wouldn’t be.” Whether something was lost in translation when the affidavit was given is unclear. I credit the testimony of Pierre given at the hearing. Even if I were to find that the pretrial affidavit was correct, Director Kelly immediately contradicted the assertion of Supervisor Curci.

As discussed above, the Union had, on November 19, distributed a flier that incorrectly stated that Adkins was “working together with the Union.” Kelly’s inquiry regarding whether Pierre had “signed this,” i.e., agreed to be identified as a member of the organizing committee of the Union, was not coercive nor was the followup question regarding why she had done so once Pierre confirmed that she had “signed this.” Kelly stated to Supervisor Curci that Pierre would not be in trouble. There was no coercive interrogation or threat. I shall recommend that this allegation be dismissed.

Paragraph 18 of the complaint alleges that, on or about a date

in December 2011, Facilities Manager Tommy Grozier interrogated employees about their union membership, activities, and sympathies and about the union membership, activities, and sympathies of other employees and impliedly promised benefits to employees if they refrained from engaging in union activities and protected concerted activities.

This allegation is predicated upon admitted conversations between Yvrose Jean Paul and Facilities Manager Grozier. Jean Paul speaks some English and understands English, but her native language is Creole. Grozier speaks no Creole. As the record reflects, Jean Paul testified with the assistance of an interpreter and alternated between Creole and English in her testimony which caused some confusion, particularly over the reference to \$30. I am satisfied that the \$30 reference, although not specifically stated, related to union dues. Even if I am in error in that regard, the substance of the conversations relating to the alleged violations of the Act is clear.

Jean Paul was called to Grozier’s office. He asked her to close the door, and she did so. He told her that she could relax. She answered that she was relaxed. Grozier said, “[Y]ou are Union.” Jean Paul, whose picture appeared on the union flier announcing its organizing committee, answered that she was. Grozier referred to whether she knew “you know you pay \$30 in Union?” Jean Paul answered that she did. Grozier asked why she supported the Union, and Jean Paul replied that it was because “insurance in my job is \$20 only for me and Union is every month,” an unexplained but implied belief that the Union could negotiate a contract providing insurance for her family. The conversation continued, and Jean Paul complained that she had not received a raise for 5 years. Grozier noted that when she needed to “switch your days, I help you.” Jean Paul confirmed that “I know you’re good, but you can help me for money?”

Jean Paul recalled two further encounters with Grozier that day. When she was eating lunch he asked if she could identify the people who spoke with her. She replied that she could not. As she was preparing to leave work, he asked again whether she could identify who spoke with her, and she answered that she could not “because after everybody, my sister, my brother, I don’t know.”

Grozier admits asking Jean Paul whether anyone “claiming to be from Mardi Gras” had visited her. He claims that the conversation was “at the second floor landing, which is outside the housekeeping break room.” He admits asking “what were they telling you,” and that Jean Paul replied that they “could get her better benefits and more pay and have a better life for yourself.” He asked what they were asking in return and she answered, “\$30 a month.” Grozier admits having a further conversation in which he asked if she knew the people supposedly coming from Mardi Gras,” and she answered that she did not.”

I credit Jean Paul. Employees remember when they are called to the office. Grozier’s initial comment, that Jean Paul could relax, is consistent with an assurance that this was not a disciplinary situation. Grozier wanted information. I do not credit his testimony that the Union was not mentioned. He interrogated Jean Paul regarding her reasons for supporting the Union and thereafter, twice, sought to learn the identity of other supporters of the Union by asking who had spoken with her.

Regarding the complaint allegations, there was no coercive interrogation with regard to the union sympathies of Jean Paul, whose picture was on the document announcing the organizing committee. There was also no threat, implied, or otherwise, relating to benefits. Jean Paul acknowledged that Grozier had “switch[ed]” her days when she needed that accommodation and there was no threat to discontinue that accommodation. Grozier’s questioning Jean Paul regarding the identity of who she had spoken to regarding the Union inquired into the union sympathies and activities of other employees. The Respondent, by interrogating employees regarding the union sympathies and activities of other employees, violated Section 8(a)(1) of the Act.

#### *D. The 8(a)(3) Allegations*

##### *1. Sochie Nnaemeka*

###### *a. Facts*

Nnaemeka began working as a cocktail waitress on September 6. She reported to Beverage Manager Bill Fodor. As already noted, both Nnaemeka and James Walsh were “salts,” but the Company did not learn of that until the 10(j) proceeding. Nnaemeka was discharged on November 3.

Nnaemeka made four or five home visits beginning on October 30. As discussed above regarding paragraph 10 of the complaint, she attempted to visit the home of employee Ron Shultz. After Shultz mentioned that Nnaemeka and the “union lady” had attempted to visit him, Fodor interrogated Nnaemeka regarding whether she had been visited and concluded the conversation by asking, “You’re not with the Union?”

A couple of days before Nnaemeka was discharged, Beverage Supervisor Nick Sanvil, told her, “in a kind of mocking way,” that “he had heard that I was getting myself into trouble.” She asked what he meant and “he just laughed.” Sanvil did not testify.

On November 3, Nnaemeka began work. After taking several orders she went to the bar and gave them to the bartender. A supervisor was at the bar and asked her to come to human resources with her. She was directed into an office at which Director of Human Resources Steven Feinberg, Director of Food and Beverage Sallyanne Kelly, Assistant Director of Food and Beverage Jay Hasan, and a security person were present.

Nnaemeka was asked to sit down. Kelly told her that “they were not satisfied with my performance and that they were terminating me.” Nnaemeka asked her what in particular. Kelly said she “had a string of absences and tardies.” Nnaemeka replied that she had “at most two” and that no supervisor had ever brought them to her attention. Nnaemeka asked if she “could see them . . . if she had a record.” Kelly answered that she did not. Nnaemeka asked, “[O]kay, well what is this based on?” Kelly answered that she was “caught on surveillance loitering in the poker kitchen two nights ago.” Nnaemeka responded that she was “probably taking my break.” Hasan said it was an “unauthorized break.” Nnaemeka replied that she was “covered,” that “someone else was on the floor, and I went to go have my lunch.” Nnaemeka asked if she was “being fired for union activity.” Hasan shrugged and answered that Nnaemeka “could think whatever I wanted to.” Kelly told

Nnaemeka that she was in her “probation period, so they could review my performance and decide whether they wanted to keep me or not, and they decided that they don’t want to.”

Although Fodor claimed that he “spoke to Nnaemeka about the latenesses” he gave no specifics regarding when he did so or what he said to her. Fodor, in a memo regarding an entire evening’s activities, reported that Nnaemeka was absent that evening, but he did not claim that he ever addressed that absence with her. Nnaemeka denied being absent and, regarding tardies, said she had had “at most two.” I credit Nnaemeka that no issue regarding attendance had been brought to her attention.

The Company presented a document that purportedly reflected Nnaemeka’s attendance. Hasan stated that the document “most likely was prepared” by Administrative Assistant Victoria Singer. He did not testify to when the document was prepared. When asked whether Kelly had “a document that showed the absentee record” of Nnaemeka, Hasan answered that Kelly had “documents in her hand.” He was then asked whether the document presented at the hearing “appears to be the document that reflects the attendance record of Ms. Nnaemeka.” He was not asked whether the document was one of the “documents in her [Kelly’s] hand.” I credit Nnaemeka. Kelly had no document, and she admitted that fact to Nnaemeka.

Nnaemeka recalled that two managers, Nick Sanvil and Johnny Quinones, had seen her eating in the Poker Room kitchen, and they were “aware that I was eating and sitting there.” Neither made any comment to her. Hasan testified that, upon Nnaemeka being seen in the kitchen, the supervisor “would have asked her to go back to her station.” Hasan was asked, “He didn’t do that, did he?” He answered, “I’m pretty sure he did.” Neither Sanvil nor Quinones testified. I credit Nnaemeka. She did nothing improper.

Nnaemeka was “praised on my performance” the week before she was discharged and told that she would be transitioning to the VIP bar, where, because of tips, “you do make more money there.” Beverage Manager Fodor did not deny informing Nnaemeka that she would be transitioning to the VIP bar, but claimed that “[u]sually I put the newer people into that bar.” He explained that “one wrong word to one of the high rollers, you know, you have to be very careful. It’s an eggshell type place. I just put people in there because, you know, the better bartenders don’t really want to work it and they’ve been there long enough to where they don’t have to.”

Fodor’s attempt to discount the significance of the transfer of Nnaemeka to the VIP bar is incredible. I do not credit his testimony that the Company did not assign its best bartenders to attend to the “high rollers.” Even if I accepted the credibility of that testimony, if there had been any issue regarding unacceptable performance by Nnaemeka during her probationary period, she would not have been informed of a forthcoming to transfer to the VIP bar or any other bar. She would have been dismissed. She was not dismissed until the Company became aware of her union activity.

###### *b. Analysis and concluding findings*

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), I find that Nnaemeka engaged in union activity and

that the Respondent was aware of that activity. Beverage Manager Fodor did not deny that employee Ron Shultz told him that Nnaemeka and the “union lady” had attempted to visit him. After the announcement by the Union that it was visiting employees at their homes, I find that the Respondent suspected that employees identified as making visits, as opposed to having been visited, were engaging in organizational activity on behalf of the Union. The interrogations and threats relating to employee union activity, including specifically Fodor’s interrogation of Nnaemeka, establish animus. Her discharge was an adverse action that affected her employment. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for the discharge. *Manno Electric*, 321 NLRB 278 (1996). Thus, the burden of going forward to establish that the same action would have been taken against her is upon the Respondent.

The Respondent did not rely on Nnaemeka’s attendance record as a basis for her discharge. Kelly did not testify. When Kelly informed Nnaemeka that she was being discharged because “of absences and tardies,” Nnaemeka denied being absent and, regarding tardies, said she had had “at most two.” Although Fodor claimed that he “spoke to Nnaemeka about the latenesses,” he gave no specifics regarding when or how he did so. I credit Nnaemeka that no issue regarding attendance had been brought to her attention. Kelly had no attendance document. When Nnaemeka asked Kelly whether she had a record, Kelly answered that she did not. Nnaemeka asked, “[O]kay, well what is this based on?” Kelly then abandoned the absences and tardies basis for the discharge and answered that Nnaemeka was “caught on surveillance loitering in the poker kitchen two nights ago.” The Respondent did not rely upon a document that did not exist at the time.

Two supervisors, Nick Sanvil and Johnny Quinones, had seen Nnaemeka in the poker kitchen, taking a break and eating. Neither was called to deny that they had seen her, that what she was doing was improper, or that they said nothing to her. Nothing was said because Nnaemeka was not doing anything improper.

The Change of Status form relating to Nnaemeka’s discharge states “failure to pass probationary period.” Beverage Manager Fodor would not have informed Nnaemeka of a forthcoming transfer to any bar, much less the VIP bar, if he had not found her to be a more than satisfactory employee.

Probationary employees and salts are protected by the Act. When the reason for a discharge is either false or does not exist, the Respondent has not rebutted General Counsel’s prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent, by discharging Nnaemeka because of her union activity, violated Section 8(a)(3) of the Act.

## 2. Sabyn Gelin

### a. Facts

Gelin had worked as a cage cashier for the Company since September 2006. She was discharged on November 7. Cage cashiers pay customers for their winnings when the customer presents a voucher, also referred to as a ticket, reflecting those winnings. Gelin did not testify through an interpreter, but her native language is Creole as confirmed by a warning she was

given for speaking Creole with other employees as well as her accented testimony. Several exchanges during her testimony confirm at least a minor language barrier.

Gelin became involved in the organizing campaign and began making house visits in late October. There is no evidence that the Company obtained knowledge of that activity.

All monetary transactions at the casino are videotaped by surveillance cameras. On November 5, a customer came to the cashier cage at which Gelin was working and presented a ticket for \$59.85 and placed an additional 15 cents on the counter, stating that he wanted three \$20 dbills. Gelin cashed the ticket, gave the customer two \$20 bills, one \$10 bill, one \$5 bill, four \$1 bills and 85 cents in change, and cleared her hands. Upon the completion of a transaction, employees must clear their hands, i.e., show the palms of their hands which the cameras record, thereby confirming that no theft occurred. Gelin then took the additional 15 cents the customer had placed on the counter and the 85 cents in coins that she had tendered to the customer and gave him a \$1 bill. The customer demanded a \$20 bill. Gelin explained to the customer that she had performed two procedures and “I’m not allowed to do a third one.”

Gelin explained that the procedures she is required to follow are on a “paper taped on the door” of the cashier’s cage. Neither party introduced the “paper taped on the door.” Casino Operations Manager Charles Benitez, when asked whether there was a “limit to the number of transactions that can be done,” answered, “No.” I question the veracity of that answer insofar as a memo dated November 6 from Chief Financial Officer Mary Ann Robinson states that she respected the fact that Gelin “did not want to change up,” but she “could have been more accommodating.” Gelin honestly believed that she could not perform a third transaction with the same customer. She credibly testified that “[y]ou have to do one procedure first, . . . cash the ticket, pay the person, and clear your hand. . . . [H]e give me 15 cents. And I take the change and I give him a dollar. That make it two procedures. So I’m not allowed to do a third one. So he was upset.” Benitez noted that, insofar as the customer had requested \$20 bills at the outset, Gelin could have taken the \$19 in bills, the 85 cents, the additional 15 cents, and given him a \$20 bill.

The customer, who Robinson’s memo describes as being confrontational, told Gelin that he was a friend of Dan Adkins and he was “going to make sure I was fired.” The customer stated that he wanted to talk to Gelin’s supervisor, and she called her supervisor, Kristian Valdez, on the radio telephone and informed him she had an “issue with a customer.” He asked that she “call me on the phone.” She did so and explained the situation. Valdez initially said that he was coming, but “a few seconds later he called me back, he said do the transaction when he’s on the phone with me.”

Gelin informed that customer that her supervisor had approved the transaction. He asked why she had not done “it in the first place.” Gelin reexplained that that she was “not allowed to do it.” The customer put the money on the counter. Valdez had stayed on the line. Gelin told Valdez that “the customer just threw the money on the counter.” The surveillance video does not reflect that the money was thrown. It was shoved onto the counter under the grate at the cashier window. Valdez told her

to “leave it there, I’m coming.” It took approximately 5 minutes for Valdez to arrive. During that time, Gelin avoided any further interaction with the customer.

Valdez arrived, introduced himself and explained that the reason that Gelin could not give him the \$20 bill was because of the rules. “She don’t make the rules, she have [sic] to follow them.” The customer stated that he was “going to make sure the two of you don’t work here no more.” Valdez told Gelin to give the customer a \$20 bill and she did.

Gelin asked Valdez “if everything is okay?” He answered, “[Y]eah, everything is okay.” Gelin asked, “I’m not in trouble?” Valdez answered, “[Y]ou doing your job, you just follow the rules.” Gelin replied, “[O]kay.” Valdez did not testify.

The memo from Chief Financial Officer Robinson reports that the customer claimed that, after being told to give him a \$20 bill, Gelin refused to touch the money. She notes that the surveillance tape was being obtained and that Benitez needed to speak with the supervisor. It concludes that, if the customer’s account is correct, Gelin should be disciplined for insubordination. It concludes that, although she respected that Gelin “did not want to change up,” she did not “exhibit the image of Mardi Gras that we want to project to the public.”

The video confirms that Gelin refused to touch the money tendered by the customer. It also confirms that the customer did not “throw” the money, although that is what she reported to Valdez.

Gelin did not work on November 6. When she arrived at work on November 7 she was directed to report to human resources.

Present at the human resources office were Director Feinberg, Slots Department Director Charles Benitez, and a security officer. Feinberg told Gelin that she was terminated. Gelin asked who fired her and Feinberg replied that it was not him, “it came from above of me.” Gelin asked where Valdez was, that the customer had said that he was “going to make sure the two of us get fired, why Kristian [Valdez] is not here with me?” Either Feinberg or Benitez answered, “[D]on’t worry about it.” Gelin was told that she was disrespectful to the customer. Gelin replied that she was “not allowed to do it because of the rules,” and, addressing Benitez, said, “Charlie, you’re the one who put the rules on the door for us to follow.” Benitez did not reply. Gelin questioned why the rules did not contain an exception, that cashiers did that procedure every day and “[w]e never do like three times.” Neither Feinberg nor Benitez responded. Gelin was asked to sign a paper. She refused and asked whether this was “because I’m in the Union?” No one replied.

Benitez denied having any knowledge of the union activities or sympathies of Gelin. He denied that she mentioned the Union at the time she was discharged. I credit Benitez.

#### b. Analysis and concluding findings

Under the analytical framework of Wright Line, I find that Gelin engaged in union activity. The record establishes animus. The record does not establish knowledge. Even if it did, the Respondent established that it would have discharged Gelin in the absence of union activity.

Gelin claims to have begun making home visits in late October. She did not specify a number, nor did she identify anyone that she visited. She acknowledges that she kept her visits

“private.” There is no evidence that she was involved in any conversation with any supervisor or manager relating to the Union or visits from strangers. Charles Benitez credibly denied being aware of any union involvement by Gelin.

Counsel for the General Counsel argues that the timing of the discharge, the 8(a)(1) violations, the failure to present Valdez, and inconsistent testimony regarding disciplinary procedures support a finding that Gelin was discriminatorily discharged. I disagree.

The timing of the discharge related to the incident. Benitez was directed by Chief Financial Officer Robinson to investigate the claim of the customer that, after being told to give him a \$20 bill, Gelin refused to touch the money he placed on the counter. She notes that the surveillance tape was being obtained and that Benitez needed to investigate further. The failure of Valdez to testify is immaterial. Gelin admits that she was directed to give the customer a \$20 bill. That direction was retracted when Gelin informed Valdez that the “customer just threw the money on the counter.” The surveillance tape contradicts that statement which was the predicate for Valdez telling Gelin not to do anything, that he was coming. Benitez noted that Gelin had a long record of various infractions, but that “writeups” expire after 6 months or a year, depending upon the infraction. Gelin’s prior writeups were not mentioned at her termination. The employee handbook specifies that a first offense of lying or gross misconduct can result in dismissal.

The record does not establish that the Respondent had knowledge of Gelin’s union activity. Even if it did, the Respondent established that it would have discharged her in the absence of that activity. I shall recommend that this allegation be dismissed.

### 3. James Walsh

#### a. Facts

Walsh began working for the Company as a bartender on September 6. There is no evidence of any shortcomings in his work performance. He reported to Beverage Manager Bill Fodor. Walsh began making home visits in late October. As already discussed, he was asked by Fodor whether he had been visited. He was discharged on November 8.

On November 8, shortly after Walsh began working at the bar to which he was assigned, Food and Beverage Director Sallyanne Kelly told him to follow her, and she escorted him to human resources and left him in an office with Assistant Food and Beverage Director Jay Hasan, Human Resources Director Steven Feinberg, and a security guard. Hasan informed Walsh that he was still within his 3-month probationary period, that he had been employed for only 2 months, and that “they were deciding to end my employment.” Walsh asked for a reason and Hasan answered that “because it was a probationary period he didn’t need a reason.” Walsh kept “pushing the issue,” and Hasan told him it was “my work performance review.” Walsh asked to see the review, and was told that “it was purely observed.” Walsh asked Human Resource Director Feinberg if he “thought this had anything to do with my union activity.” Feinberg answered that “he wasn’t allowed to answer that question.” Walsh asked the same question of Hasan who replied “that was above him and he also wasn’t allowed to answer that

question.” Walsh noted that Feinberg was “clearly rattled by the question” insofar as he avoided eye contact and shuffled papers.

Feinberg did not testify. Walsh’s direct supervisor, Bill Fodor, was not present when Walsh was discharged. Fodor did testify and addressed problems relating to the attendance of Nnaemeka. He did not report any shortcomings in the work performance of Walsh or any improper actions by him.

Hasan did testify and claimed that Walsh was discharged because of complaints by “two different employees.” He stated that Christine Forbes came to him “and complained that Steve [sic] . . . asked her for her cell number, he asked her for her address to meet with her.” Hasan claimed that Jacqueline Bello reported that Walsh approached her and “asked a couple of questions about how does she like working for Mardi Gras, and she just told him she was happy and she asked him to leave her alone.”

Hasan asserted that he “took their statement and passed it on to HR and my Director.” No written statements were offered into evidence. As hereinafter discussed, Hasan sent employee Terrell Blow to human resources to give a written statement with regard to a short conversation he had with Steven Wetstein. Hasan admitted that he never confronted Walsh regarding the reports of Forbes and Bello. Neither Forbes nor Bello testified. Hasan stated that it “was determined” that Walsh “be terminated for his action, for . . . he has been working for the Company less than 90 days and his behavior was not acceptable.” The Company has no rule prohibiting employees from speaking with each other about nonwork related subjects. Hasan did not report that either Forbes or Bello claimed that their work was interrupted.

So far as this record shows, Walsh’s direct supervisor, Beverage Manager Fodor, was not involved in the discharge decision. Hasan’s characterization of the information he received as “complaints” does not comport with the evidence. Although stating that Forbes was “bothered by” Walsh’s asking for her cell phone number and address, she did not report whether she had given him that information or requested that he leave her alone. Hasan made no claim that, after Bello asked Walsh to leave her alone, he had not complied with that request. The “complaints” were not mentioned when Walsh was discharged.

#### *b. Analysis and concluding findings*

In assessing the evidence under the analytical framework of Wright Line, I find that Walsh engaged in union activity. Although there is no direct evidence that the Respondent was aware of that activity, Beverage Manager Fodor had asked Walsh whether he had been visited. In *Kajima Engineering & Construction*, 331 NLRB 1604 (2000), the Board held that knowledge may properly be inferred in circumstances establishing “an employer’s demonstrated knowledge of general union activity, the employer’s demonstrated union animus, the timing of the discharge in relation to the employee’s protected activities, and the pretextual reasons for the discharge asserted by the employer.”

The exchange of letters on October 31 and the letter to Adkins from Wendi Walsh establish that the Respondent was fully aware of the organizing effort of the Union. The record estab-

lishes animus both by interrogations and threats. Walsh was discharged soon after Hasan learned of his contact with Forbes and Bello with no investigation.

I note that, insofar as the October 26 memorandum requested that employees report visits by strangers, there could be no claim that Walsh was a stranger if the employee visited had given him her telephone number and address.

There is no evidence that employees may not request telephone numbers or addresses from fellow employees. Hasan did not report that Forbes requested that Walsh leave her alone. Bello reported that she told Walsh to leave her alone, and there is no claim that Walsh did not do so. I find that Hasan concluded that Walsh was requesting contact information from employees in order to seek support for the Union. My conclusion in that regard is confirmed by the failure of the Respondent to confront Walsh with the “complaints” in order to determine whether they were complaints or comments.

Accepting one version of an event without obtaining or considering all the facts suggests a discriminatory motive. As stated, with Board approval, in *Bantek West, Inc.*, 344 NLRB 886, 895 (2005), “The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain’ are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987).”

The Respondent did not obtain written statements from Forbes or Bello. There is no explanation regarding why Forbes reported that she was “bothered.” There is no evidence, following her request, that Walsh did not leave Bello alone. Hasan did not consult with Fodor, who testified to no shortcomings by Walsh regarding his work as a bartender. The Respondent never gave Walsh an opportunity to address the situation and did not, at the time of the discharge, even inform him of the “complaints.”

Human Resources Director Feinberg did not testify. Walsh credibly testified that, when being discharged, he asked Feinberg if he “thought this had anything to do with my union activity.” Feinberg, who was “clearly rattled by the question” insofar as he avoided eye contact and shuffled papers, answered that “he wasn’t allowed to answer that question.” Walsh asked the same question of Hasan who replied, “[T]hat was above him and he also wasn’t allowed to answer that question.”

There is no evidence that employees may not request telephone numbers or addresses from fellow employees. There is no evidence that employees are summarily discharged without investigation when another employee complains about a specific interaction. When the reason for a discharge is either false or does not exist, the Respondent has not rebutted General Counsel’s prima facie case. *Limestone Apparel Corp.*, supra. The Respondent, by discharging Walsh because of his union activity, violated Section 8(a)(3) of the Act.

#### 4. Juna Dorlean

##### *a. Facts*

Dorlean was a housekeeping employee under the supervision of Jean Michel. She began working for the Company in November 2007. Her native language is Creole, but she speaks and understands some English. She testified with the assistance of an interpreter. She and Supervisor Michel “mostly” speak

Creole with each other. Michel reports to Facilities Manager Tommy Grozier who speaks only English. Dorlean was discharged on November 11.

Dorlean signed a union authorization card on November 4 and thereafter made home visits. She recalled making about 15 such visits and specifically recalled attempting to speak with an employee named Jackie, whose last name she does not know. Both attempts were by telephone. Dorlean, so far as this record shows, did not tell Jackie what she wanted to speak about with her. On the first occasion, Jackie told her that she was in class and on the second occasion, she hung up the phone. Dorlean placed these calls as being on Tuesday and Wednesday, November 8 and 9, shortly before she was discharged. The complaint alleges that Dorlean was discharged on November 11, but she testified that she was discharged "on Thursday when I went to work," which would have been November 10. The change of status form reflecting the discharge for gross misconduct is dated November 12.

Dorlean explained that, on Thursday, her supervisor, Jean Michel, told her to report to Facilities Manager Tommy Grozier's office. She did so. When testifying in English, Dorlean said that she, a security person, Grozier and "Steve," presumably Human Resources Director Steven Feinberg, were present. When testifying in Creole, she did not mention "Steve."

Grozier informed Dorlean that she was being fired because Supervisor Michel "called me in his office and I didn't go." He noted that she had taken a 5-minute break before her scheduled 15-minute break. Dorlean claimed that "everybody do[es] it." She requested to speak with "Michael," presumably Senior Operations Manager Michael DeLuca. Grozier told her that she could make an appointment to speak with him. He gave Dorlean a paper with a number to call. Dorlean said, "[T]hey never answer the phone," but then she said that they "tell me to come [come] back and they don't tell me nothing."

Michel explained that he had observed Dorlean, prior to her 7 p.m. break on Sunday, October 30, out of her work area on the first floor ordering food at 6:25 p.m. on the second floor. He acknowledged that employees are permitted to do that if they obtain permission from their supervisor, but Dorlean had not obtained his permission. Michel was busy and did not speak with Dorlean on Sunday. On Monday, she did the "[s]ame thing." He did not speak to her immediately because he knew her shift did not end until after midnight. About 8 p.m., Michel asked Dorlean to come to his office. She waked away from him. He called again and she replied, "I'm working." She did not report to his office until 15 or 20 minutes later. Michel wrote a memo dated October 31 documenting the conduct and placed it under Grozier's office door because Grozier was on vacation.

Dorlean acknowledged that Michel asked her to come to his office, and claims she did so within 5 minutes. She denied replying that she "was working." I do not credit that testimony. Michel would have had no need to document a delay of 5 minutes. She asserted that Michel "didn't tell me anything, he didn't write me up, and then on Tuesday [sic] I get fired."

Grozier had, in early September, pursuant to a report from

Michel regarding an incident on September 3, spoken with Dorlean regarding her attitude. Michel reported that Dorlean, in Creole, had said "a lot of things," that he cautioned her regarding her language, and that she replied, "I don't care. You're [sic] going to get fired. I don't care." Grozier wrote on the September 3 report that he "[s]poke with Juna concerning her attitude." Upon receiving the report of October 31, Grozier spoke with Michel and human resources. They determined that the counseling in September was her final chance and that Dorlean should be terminated. "We decided . . . that's it."

Dorlean denied having any previous conversation with Grozier, being disciplined in September, or stating that she did not care if she got fired. I do not credit that testimony. Michel credibly testified that, when he cautioned her in September regarding what she was saying to him in Creole, Dorlean told that she did not care that he was going to fire her. The contemporaneous notes made by Grozier on the typewritten memorandum dated September 3 confirm that he did have a conversation with her regarding her attitude.

Grozier and Michel both credibly denied that the Union played in part in the decision to discharge Dorlean.

#### *b. Analysis and concluding findings*

In assessing the evidence under the analytical framework of Wright Line, I find that Dorlean engaged in union activity. The record establishes animus. The record does not establish knowledge, and even if it did, the Respondent established that it would have discharged Dorlean in the absence of her union activity.

As already noted, the record does not establish that Dorlean, in her two unsuccessful attempts to contact Jackie, told Jackie what she wanted to speak with her about. Dorlean, unlike various other employees, did not report that any supervisor questioned her about visits.

Regarding leaving her workstation to order food, Dorlean claimed that "everybody do[es] it." The General Counsel presented no corroboration of that testimony. Michel was clear that, although ordering food was permitted, the employee had to have permission to leave the assigned workstation in order to do so.

The brief of the General Counsel notes the timing of the discharge and the absence of evidence that Grozier was "on vacation for such a long period." It also notes that abusing break periods is an offense subject to progressive discipline. The problem with the foregoing arguments is that the memorandum prepared by Michel predated any union activity by Dorlean and she was not discharged for abusing break periods.

Dorlean was discharged for gross misconduct, her attitude as shown in refusing to obey the summons of her direct supervisor and responding, "I'm working." Her insolent refusal to comply with Michel's directive after having been counseled regarding her attitude by Grozier in September was the basis for her discharge. Refusals to comply with supervisory directives are not subject to progressive discipline. Both Dorlean's direct supervisor and manager testified. There is no probative evidence that the decision to discharge Dorlean related to her union activity.

The record does not establish that the Respondent had

knowledge of Dorlean's union activity, and, even if it did, the Respondent established that it would have discharged her in the absence of her union activity. I shall recommend that this allegation be dismissed.

#### 5. Steven Wetstein

##### *a. Facts*

Wetstein began working for the Company in January 2011 as a saucier, preparing soups and sauces for the French Quarter restaurant which is located on the third floor of the casino. Wetstein learned of the organizational campaign in October and began speaking to fellow workers on behalf of the Union and making home visits. He was discharged on November 23.

Wetstein recalled that, on November 9, the chef, identified as Chef Wally, commented that he understood that people from the Union were visiting people's homes and asked what a Union could do. Wetstein answered, "[H]igher wages." Chef Wally then referred to having to pay union dues and asked whether, if "you leave can you get them back." Weinstein answered that he did not know.

On November 22, Adkins spoke to the employees working in the French Quarter restaurant. He told them the Union would be making "false promises," that, contrary to what the Union was saying, "there was no neutrality agreement" and "he was looking to sue over this."

On November 23, Wetstein went from the third floor to the food storage area on the first floor, something he does "very often," to get some food. He saw Terrell Blow, the son of Security Supervisor Tammy McArthur. Wetstein told Blow that "some of us are organizing a union and I think we can do better with a union." He asked if they could speak about it outside of work. Blow answered that "he was busy with school." Wetstein asked if they could exchange phone numbers, Blow said that his phone had been turned off. The conversation was less than a minute.

Wetstein recalled that Blow was either taking food out of one of the walk-ins or preparing to take it to someplace outside of that area. He noted that Blow "didn't change anything because of me."

Blow reported his encounter with Wetstein to Assistant Food and Beverage Director Jay Hasan, stating that Wetstein had "approached him, asking him for his cell number, his home address, and to meet him outside to talk about whatever organization he was talking about and to meet with him outside, and he was bothered by it."

Hasan sent Blow to an administrative assistant in human resources where he executed the following statement:

On 11/23/11 at about 10:00 am in the morning, I was in the cooler, and fellow employee Steven Wetstein entered and started speaking to me about the union. He was asking me if I wanted to join, if I wanted to exchange phone numbers, and if I could meet up with him after work to talk about it. I replied that I am busy after work. so I can't, and my phone is currently disconnected, but I'm ok. He said ok, and asked me to get back with him, but I told him that most likely I would not. I then walked away.

The foregoing statement reports no interference with work.

Hasan admitted that he recommended that Wetstein "be fired without getting Mr. Wetstein's side of the story in person." No one obtained Wetstein's side of the story. The statement made by Blow does not reflect any interference with his work. People can still talk while sorting cans or lifting boxes.

Later that day, November 23, Assistant Food and Beverage Director Hasan came into the French Quarter kitchen and took Wetstein to an office in human resources where Director Feinberg, Food and Beverage Director Kelly, and Security Supervisor Tammy McArthur, mother of Terrell Blow, were present. Wetstein recalled that Hasan remained, but Hasan denied remaining. The foregoing disagreement is immaterial.

Feinberg told Wetstein that he was being terminated. Wetstein asked why. Feinberg said that he had "interfered with the work of an employee who told me that he was busy." Wetstein asked who, and, upon receiving no answer, repeated, "[W]ho was it." Feinberg said Blow. Wetstein stated, "[N]o, I didn't interfere with him in any way." Wetstein asked if there was any "paperwork to document my termination." Feinberg said, "[N]o." Wetstein said, "[W]ell, this is about the Union." Feinberg said that it was not. Wetstein responded that this was illegal that "I have a right to engage in legal union activity." McArthur asked for Wetstein's keys. As he was leaving he said that he would "see everyone there next when we had won a union contract and I'd been reinstated."

Hasan, at the hearing, asserted that Wetstein's discharge was related to a prior offense of "double dipping," using an unclean spoon to taste whatever was being cooked. Although Hasan claimed that he recommended termination at that time and a "Group 2" discipline was issued, no documentary evidence supporting that claim was introduced. The formal discharge documents do not reflect any reliance upon progressive discipline, and even if they did, Wetstein did nothing wrong on November 23. Hasan asserted that Wetstein was "out of his work area," but there is no probative evidence refuting Wetstein's credible testimony that he goes to the food storage area on the first floor "very often" to get food.

An unsigned memorandum, bearing Feinberg's name, reports, "On November 23rd, Steven Wetstein, a line cook was terminated for disrupting the workplace by interfering with Terrell Blow's ability to work. Steven approached Food and Beverage employee Terrell Blow about union-related inquiries while on company time." The "Change of Status" form, the discharge document, reports the reason for discharge as "disrupting the workplace by interfering with another employee's ability to work." There is no reference to progressive discipline or "double dipping a spoon."

Wetstein confirmed that he and other employees spoke about nonwork related subjects while working, the weather, commuting, things of that sort. There is no evidence that discipline, much less discharge, was ever imposed for such conversations.

##### *b. Analysis and concluding findings*

In assessing the evidence under the analytical framework of Wright Line, I find that Wetstein engaged in union activity and that the report of Blow establishes that the Respondent was aware of that activity. The record establishes animus. His

discharge was an adverse action that affected his employment. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for the discharge. *Manno Electric*, 321 NLRB 278 (1996). Thus, the burden of going forward to establish that the same action would have been taken against him is upon the Respondent.

There is no evidence that employees may not speak with each other regarding nonwork-related subjects or request telephone numbers or addresses from fellow employees. In this instance, unlike the failure of the Respondent to obtain written statements from Forbes or Bello with regard to the discharge of James Walsh, the Respondent did obtain a written statement. That statement reflects no interference with the work being performed by Blow. Blow was either taking food out of one of the walk-ins or preparing to take it to someplace outside of that area and, as Wetstein credibly testified, Blow “didn’t change anything because of me.” Blow did not testify.

Although Hasan referred to prior derelictions by Wetstein, no documentation of those alleged derelictions was presented at the hearing. The only reason stated when Wetstein was discharged was Feinberg’s claim that he had “interfered with the work of an employee who told me that he was busy.” Wetstein, after Feinberg identified Blow, stated, “[N]o, I didn’t interfere with him in any way.” There is no evidence to the contrary. The statement of Blow reports no interference with his work. He told Wetstein that he was “busy after work.”

When the reason for a discharge is either false or does not exist, the Respondent has not rebutted General Counsel’s prima facie case. *Limestone Apparel Corp.*, supra. The Respondent, by discharging Wetstein because of his union activity, violated Section 8(a)(3) of the Act.

#### 6. The discharges of the employees in the delegations

##### *a. Facts*

As already discussed, a delegation from the Union sought to speak with Adkins on November 17 and 18. The delegation that went to the casino on November 17 consisted of 14 people: Union Organizer Mike Hill, 3 other organizers, 2 community activists, the Reverend Richard Aguilar and Jeanette Smith, 4 former employees who had been recently discharged, and 4 current employees, Dianese Jean, Alicia Bradley, Amanda Hill, and Tashana McKenzie.

Hill explained that the purpose of the visit was to introduce themselves to Adkins, give him the flier showing the members of the organizing committee, and “hopefully sit down and talk” regarding exercising “our rights to access of the casino.”

The Company operates an extensive video surveillance system in order to account for conduct on the premises, including the conduct of its employees who regularly handle large amounts of cash. The surveillance video of November 17 shows the delegation arriving outside the casino and, from another camera, entering the casino. There is no audio.

The video shows the delegation following Hill and Aguilar to the reception desk. The video reflects that Aguilar was the first to speak to the receptionist. Hill then enters the conversation. The receptionist made a call. Hill testified that the receptionist reported that Adkins was on a conference call and “if we

could wait a few minutes they’d get back to us.” The video reflects that, in less than 2 minutes, an employee approached the group which then moved to an area away from the reception desk and between, but out of the way of, the two entrance doors. As reflected on the video, multiple customers, including a male customer in a red shirt, a male customer in a blue and white striped shirt, and a female customer with a pocketbook, walked through or around the delegation. There was no purposeful impeding of access, and any delay was incidental.

Shortly after the delegation moved to the area between the two entrance doors, Director of Security Richard Hopke, accompanied by others, approached the delegation and told them that they needed to leave. Hill introduced himself and explained that they were there to introduce themselves to Adkins and get access to the casino. He showed the folder he was carrying to Hopke. Hopke replied that there was no meeting, “that he’s going to call the cops and arrest us if we didn’t leave.” Hill answered that there was “no reason to do that,” and referred to the agreement. Hopke answered that, as far as he was aware, “there is no agreement.” Hopke refused to take the folder. Hill placed it on the reception desk. Hopke walked by and knocked it off, and one of the other security guard stepped on it. The delegation left.

A delegation from the Union led by Organizer Hill returned to the casino November 18. Neither Aguilar nor Smith accompanied this delegation. The delegation consisted of 10 people: Union Organizer Mike Hill, 3 other organizers, 3 of the recently discharged employees, and 3 current employees, Amanda Hill and Tashana McKenzie, who had been in the November 17 delegation but who had not, at that point, been discharged, and Theresa Daniels-Muse who had not been present on November 17. Hill explained that, having been denied a meeting the previous day, Adkins might have changed his mind, so that the group could introduce themselves and obtain access pursuant to the MOA. On this occasion the surveillance video reflects that security personnel appeared in 1 minute and 10 seconds. The delegation obeyed the instruction to leave the reception area. They went outside where the events discussed above regarding paragraph 15 of the complaint occurred. The video from November 18 reflects no interference with the access of customers.

Dianese Jean had worked as a cage cashier since 2006. She accompanied the delegation on November 17. She worked on November 18. Near the end of her shift, her supervisor directed her to report to human resources. She was accompanied by Casino Shift Manager Michael Patterson. At human resources, Director Feinberg, a security guard, Patterson, and Jean were present. Feinberg informed Jean that she had been terminated. Jean asked why and Feinberg replied, “[Y]ou know what you did, you violating work rules, you know what you did.” He noted that it was an “executive decision.” Jean asked whether she was “supposed to have a termination letter,” and Feinberg did not reply. He handed her a “post-it” with a phone number and told her that, if she wanted to appeal her termination, a meeting would be set up with “with you and Cathy [Reside].”

Alicia Bradley had worked as a “Players Club” representative since January 2011. She provided assistance to individuals who obtained Players Club cards. Her shift was from 4 p.m.

until midnight. After going to the casino with the delegation on the 17, she worked her normal shift. On the 18, shortly after she began her shift, she was directed to go to human resources where she met with Director Feinberg, a security guard, and her manager, Elizabeth Hobart. Feinberg told Bradley that the Company had decided to terminate her. She asked for what reason. He answered, “[F]or violating company policy.” Bradley asked which policy, could he “show me the policy in writing.” Feinberg answered, “[Y]ou know what you did.” Bradley asked whether this had “anything to do with me being a part of the Union.” Feinberg answered, “I’m not allowed to answer that question.” Bradley asked who decided to terminate her, and Feinberg answered, “[T]he Executive Office.” Bradley asked if he could be more specific and Feinberg told her, “Dan Adkins, Cathy Reside.” He then gave her a “sticky note” relating to any appeal of the discharge decision.

Amanda Hill, who had been employed since November 2006, worked as a money sweeper, collecting money from the slot machines and taking it to the money room. She worked from 4 until 8 a.m., and worked before returning to the casino on November 18 with the delegation. Her next workday would have been the early morning of November 21, but her supervisor called her and told her not to report, to meet at human resources at noon on the 21. She did so. Hill met with Director Feinberg and a security guard. Feinberg informed her that she was terminated. She asked for a letter but was not given one. Feinberg told her that “it was coming from the Executive, it wasn’t them.” He gave her a “sticky note” with a telephone number. Hill called and got an appointment to meet with Adkins the first week of December. That meeting is discussed above with regard to paragraph 16 of the complaint.

Tashana McKenzie was a floor attendant who began working at the casino in March 2007. As already discussed, her supervisor, Evans Etienne told her to “watch her back.” McKenzie was not scheduled to work on either the 17 or 18. After accompanying the delegation on the 18 she received a voice mail message telling her not to return to work on the 19, to report to human resources at 10 a.m. on Monday, the 21. As McKenzie was waiting for her appointment, Slots Department Director Charles Benitez walked over and said, “I can’t believe I’m losing two of my best floor attendants,” referring to McKenzie and Daniels-Muse. At human resources McKenzie met with Director Feinberg and Benitez. A security guard was present. McKenzie asked if she could record their meeting. She was excused from the meeting and, when recalled into the meeting, was told that “it won’t hold up in court” and that she did not have their consent “to record as to why I’m being fired.” McKenzie put her phone, which apparently was also a recorder, on the desk and stated that she “wasn’t going to record it without his consent.” Feinberg told her that he did not “believe a word that I’m saying, for me to get out.” She was not given a document reflecting her termination. When asked why she sought to record the meeting, McKenzie explained that she “felt as if I was being fired for being there to try to talk to Dan Adkins on the neutrality agreement.”

Theresa Daniels-Muse was also a floor attendant and had worked at the casino since November 2006. She had not been in the delegation that went to the casino on November 17. Fol-

lowing the visit she was told not to report on her next scheduled day, but to report to Human Resources on Monday, November 21. She and McKenzie went together. McKenzie had met with Feinberg first. Daniels-Muse entered the room in which Feinberg, Benitez, and a security guard, Tammy, were present. She nodded at Benitez, acknowledging his presence. Feinberg told her, “[W]e want to talk to you.” Daniels-Muse said, “[O]kay,” and asked “if the conversation could be recorded.” Feinberg replied that the conversation was over. The security guard, Tammy, asked if she had anything left in her locker, and Daniels-Muse explained that she already knew that she was going to be fired because “they never tell me not to report to work, and to come to Human Resources, I knew my time was up.”

Feinberg did not testify. Adkins testified that the employees were discharged for being “disruptive,” and he asserted that they “completely blocked the entrance for several minutes.” That assertion is incorrect. There is no claim that the members of the delegation engaged in any chanting or that they locked arms creating a barrier. The video reflects that, on November 17, they stood together behind Hill and Aguilar when Hill requested to meet with Adkins. The presence of the group, until they moved to the side, caused customers to either go around the group or work their way through. Any impeding was incidental. The surveillance video shows customers consistently going into the casino without any difficulty. Adkins acknowledged that customers “eventually” got through, but the delegation “did not voluntarily move out of the way.” He admitted that there “was less than a minute’s worth of delay” to any customer but that “one minute, that’s a long time.” The video reflects that any delay was less than 10 seconds. There is no evidence that any customer’s access to the casino was purposefully impeded. The video of November 18 reflects no disruption.

The change of status forms for all five employees report that the reason for termination was “violating company work rules,” but no rule is cited. When Adkins was called by the Respondent at the hearing, counsel for the Respondent referred him to paragraph 2 on page 55 of the employee handbook which, *inter alia*, provides:

If an employee is in a group of individuals that are not Mardi Gras employees and are not acting in accordance to the Mardi Gras standards or are not obeying House Rules the employee conduct thorough association may be subject to disciplinary action up to or including termination.

When examined pursuant to Section 611(c), Adkins characterized the presence of the delegation as “disruptive,” but he cited no rule. Adkins did not cite any rule when testifying at the 10(j) proceeding. Although asserting that Organizer Hill “shoved aside” a gentleman at the reception desk on November 17, he cited no misconduct by any employee.

*b. Analysis and concluding findings*

The delegation went to the casino in order to speak with Adkins regarding the access provided in the MOA. Although Adkins had, in his letter of October 31, refused to meet with the Union, the letter did not assert that the MOA had expired. The employees who went with the delegation were obviously supporting the organizational effort of the Union. Their support

was protected concerted activity. The Board, in *Red Top Cab & Baggage Co.*, 145 NLRB 1433 (1964), held that “[c]oncerted 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.” *Id.* at 1450.

The employees’ activity in support of the organizational objective of the Union, regardless of the viability of MOA, was protected union activity. Whether they were “mistaken in suspecting the Respondent of reneging on its agreement” to give the Union access pursuant to the MOA is immaterial insofar as there is no evidence that the employees were acting in bad faith. *Crown Plaza LaGuardia*, 357 NLRB 1097, 1099 (2011).

The Respondent argues that the video of November 17 shows that Organizer Hill “effectively shoved aside” a gentleman at the reception desk. The video does not reveal any shoving. Even if it did, precedent establishes that, in situations involving multiple employees, the Board will “analyze each employee’s specific conduct” before “finding that an employee has lost the protection of the Act.” *Crown Plaza LaGuardia*, supra, slip op. at 1099.

Insofar as the employees were discharged for engaging in protected concerted union activity, the proper analysis is that prescribed in *Atlantic Steel Co.*, 245 NLRB 814 (1979). As restated in *Crown Plaza LaGuardia*, the Board examines four factors to determine whether employees’ alleged improper conduct during otherwise protected activity warrants a forfeiture of 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 conduct was provoked by an employer’s unfair labor practice. The place was the entrance to a public gambling casino. The discussion was a request that Adkins meet with the delegation. There was no provocation relating to any outburst because there was no outburst. On November 17 the delegation moved to the side of the reception area when asked to do so and left the reception area when requested. On November 18, after being present for less than 2 minutes, the delegation left the reception area when requested to do so. The alleged misconduct consisted of participating in the protected concerted activity of seeking to meet with Adkins concerning the right of the Union to organize on the premises as provided by the MOA.

Contrary to the testimony of Adkins, review of the surveillance videos establishes that the delegation did not “completely” block “the entrance for several minutes.” The surveillance videos show patrons moving around and through the delegation and entering the casino. The longest it took anyone observed on the surveillance video of November 17 to do so was 10 seconds, far less than a stop at a traffic light. There was no chanting or locked arms blocking access. There was no disruption. The video of November 18 reflects no disruption.

The employees who engaged in the protected concerted activity of going with a delegation seeking to meet with Adkins

engaged in no misconduct that deprived them of the protection of the Act. The Respondent suspended Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill by directing them not to report to work but to report to human resources on November 21. The Respondent, by discharging, Dianese Jean, Alicia Bradley and suspending and discharging Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill because of their participation in protected concerted union activity violated Sections 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. By coercively interrogating employees regarding their union sympathies and the union activities of other employees, by threatening employees with unspecified reprisals, by threatening employees with arrest for engaging in protected concerted union activities, and by informing employees that they had been discharged because they engaged in protected concerted union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By suspending Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill, and by discharging Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully suspended Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill and then discharging them and by discharging Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steven Wetstein the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from computed on a quarterly basis from the respective dates of their suspensions and discharges to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent will also be ordered to post an appropriate notice.

[Recommended order omitted from publication.]