JD−62−19
Bossier City, LA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HORSESHOE BOSSIER CITY HOTEL & CASINO

and **Cases 15–CA–215656**
15–CA–216517
INTERNATIONAL UNION, UNITED AUTOMOBILE, 15–CA–217795
AEROSPACE & AGRICULTURAL IMPLEMENT 15–CA–217797
WORKERS OF AMERICA (UAW) 15–CA–218097

Beau Pines* and *David Rose, Esqs., for the General Counsel.
Charles Birenbaum* and *Jonathan Sack, Esqs. (Greenberg Traurig, L.L.P.), for the Respondent.
Samuel Morris, Esq. (Godwin, Morris, Laurenzi & Bloomfield, P.C.), for the Charging Party.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Shreveport, Louisiana over multiple days in 2018 and early 2019. The complaint averred that the Horseshoe Bossier City Hotel & Casino (Horseshoe or the Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia: making threats; soliciting grievances; and firing Judy Murduca for her union activities. On the record, I make the following[1]

FINDINGS OF FACT[2]

I. JURISDICTION

Annually, Horseshoe, a corporation with a hotel and casino in Bossier City, Louisiana, earns over $500,000 in gross revenues and receives over $5,000 in goods directly from outside of Louisiana. I find that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act. I also find, that the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (the Union) is a §2(5) labor organization.

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[1] The General Counsel's (the GC's) Motion to Correct the Record dated February 25, 2019 is GRANTED.

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

II. ALLEGED UNFAIR LABOR PRACTICES[3]

A. Introduction

Horseshoe's casino offers blackjack, poker, roulette and other games.[4] Dealers and dual rate dealers (DRDs) staff these games, and report to Floor Supervisors.[5] The casino is a 24-hour operation, with day (11 a.m. to 7 p.m.), swing (7 p.m. to 3 a.m.) and graveyard (3 a.m. to 11 a.m.) shifts.[6] The Pencil creates the "roadmap" of dealer and DRD gaming assignments.[7] See, e.g., (GC Exh. 26). DRDs often act as both dealers and leads during their shifts.[8] DRDs earn $7.67 per hour plus tips as dealers,[9] and $23 per hour as leads.[10] FT DRDs and dealers receive the same vacation, insurance, pension and other benefits; they both wear uniforms. Floor supervisors, i.e., their direct superiors, wear business attire.

B. Union's Organizing Drive

In late-2017, DRD Murduca contacted Union organizer Derek Hernandez about unionizing. In January-2018,[11] they started an organizing committee, which included Murduca and other dealers.[12] VP of Human Resources Ashley Wade credibly stated that Horseshoe first learned about the drive on February 27, when leaflets were passed out in the garage.[13]

C. Supervisory Authority of DRDs

A central issue involves whether DRD Murduca is a supervisor. Horseshoe avers that she is, and her firing was not covered by the Act. The GC contends otherwise.

1. Background

Director of Operations Roger Dodds compared dealers and DRDs in this way:

> [A] dealer has one game …. They take care of … customers … in front of them …..
> A … [DRD] has multiple games … [and] up to … 10 employees that they're

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[3] The GC's motion to withdraw complaint ¶¶10(c), (d) and 15(a) dated February 25, 2019 is GRANTED.

[4] Games have comprehensive rules of play, which are set forth in hard-copy binders and on computers in the gaming pits. Computers rate gamblers and calculate their reward, credit and "comp" eligibility.

[5] In 2018, Horseshoe employed 185 dealers, 42 DRDs and 43 Floor Supervisors.

[6] A typical day shift has 80 FT and 10 PT dealers, 10 DRDs, 10 Floor Supervisors, a Pencil and an Assistant Manager.

[7] Dealers may, for example, operate a craps table for 20 minutes, then transfer to roulette, and then blackjack, etc.

[8] DRDs spend about 40% of their time dealing and 60% as a lead. (Tr. 1011).

[9] Tips can raise a dealer's wage to $30 per hour. (Tr. 492). FT Dealers typically earn more than DRDs.

[10] DRDs spend varying periods dealing and sometimes deal for 3 or 4 consecutive days. (Tr. 305-307).

[11] All dates that follow occurred in 2018, unless otherwise stated.

[12] Patton, a coworker, credibly stated Murduca was known as a Union leader. (Tr. 474).

[13] I find that Wade, in her role as chief HR officer, promptly informed management about the drive.

> responsible for. They're responsible for their interactions with customers as well as their performance. They're … responsible for tracking cash transactions ….

(Tr. 994-95). The DRD job description describes DRDs as "supervisors," who, "[r]ecommend … hiring, promotion, demotion and termination … [and] wage … changes …." (R. Exh. 1). In practice, however, while these tasks sound quite supervisory, reality is less convincing.

2. Hiring, Transferring, Promoting and Rewarding

In practice, DRDs do not hire, transfer, promote or reward dealers. Dealer Lisa Rios, DRD Roger Patton, DRD Tawana Sumbler and DRD Murduca all credibly stated that DRDs do not hire,[14] interview, extend job offers, evaluate,[15] demote, reward, recommend raises for, or transfer dealers. This testimony was consistent and generally unrebutted.

3. Disciplining, Demoting, Suspending and Discharging

DRDs do not discipline dealers. Dealer Rios denied ever witnessing a DRD issuing discipline. DRDs Murduca, Patton and Sumbler denied being empowered to issue discipline.[16] Dodds settled this issue, when he admitted that DRDs cannot discipline dealers.[17] (Tr. 1227).

4. Layoff and Recall

DRDs cannot layoff or recall dealers. The record on this point was undisputed.

5. Weekly and Daily Assignments

DRDs do not set weekly or daily dealer assignments. Central Scheduler Stephanie Lambert sets weekly schedules, and Pencil Monica Antwine sets daily gaming assignments.[18]

6. Directing Dealers

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[14] DRD Patton noted that, while he has previously referred employees to management to be considered for open dealer jobs, he is not part of the interviewing or decision-making process. (Tr. 464-65). He described his referrals as an exercise that can be performed by any incumbent, regardless of stature.

[15] Dodds admitted that Floor Supervisors prepare dealer and DRD performance evaluations. (Tr. 1226).

[16] Murduca has never been called into a meeting where management was issuing discipline to a dealer (tr. 312), and DRD Sumbler similarly denied participating in any disciplinary interviews or investigations.

[17] All workers, whether subordinate or superior, however, can initiate incident reports on coworkers, which may lead to discipline. (Tr. 1304; R. Exhs. 33, 34, 35, 36, 39).

[18] DRDs cannot reassign dealers between games. DRD Patton said that he's never told a Pencil to bar or remove a dealer from a game (i.e., only a Pencil or Shift Manager can do that). (Tr. 472). When a dealer seeks a restroom break, a DRD is cannot grant this request, which requires the Pencil's approval. DRD Sumbler said that her requests to not work alongside given dealers are afforded little deference and seldom granted. (Tr. 516-17).

DRDs are subject to highly-detailed rules, policies and regulations, which define "comps,"[19] rewards credits,[20] game play,[21] and payouts.[22] See also (GC Exh. 28). Dealer Burge stated that DRDs guide dealers by: signing off on large payouts; periodically addressing game play issues; or resolving gambling disputes in accordance with these detailed rules.[23] DRDs, thus, issue dealers directives in accordance with these detailed rules, policies and software applications and exercise little, if any, genuine discretion concerning such directives.[24] Dealer Rios credibly and adamantly testified that her work is directed by the Floor Supervisors, Pencils, Assistant Floor Managers and Shift Managers.[25] She denied being supervised by DRDs, whom she labels as her peers. DRDs Murduca, Patton and Sumbler corroborated her position.

D. §8(a)(1) Allegations

1. February 27 – Garage Leafletting[26]

Horseshoe maintains this no-solicitation rule:

> Solicitation or distribution of any literature at any time … by people who are not Team Members … is prohibited on Company premises. Team Members will not solicit or distribute any literature on Company premises during their working time or the working time of the Team Member(s) to whom the solicitation is directed. Team Members will not distribute literature of any description at any time in working areas or during the working time of the Team Member who is doing the distributing or the working time of the Team Member(s) to whom the distribution is directed …. ["W]orking time" includes all time for which a Team Member is paid and/or is scheduled to be performing services for the Company; it does not include break periods, meal periods or other specified periods where Team Members are not performing or are not scheduled to be performing their duties ….

(R. Exh. 2). Horseshoe also has an off-duty access policy, which states that, "visits are permitted as long as you are not in uniform." (R. Exh. 2).

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[19] "Comps" (i.e., complimentary meals) are based on a gamer's "comp" value, which is defined by an algorithm that assesses betting and play time. DRDs often consult with the Pencil or Shift Manager for comp guidance.

[20] The gaming pit computer determines reward credits.

[21] DRDs are subject to comprehensive gaming rules. See, e.g., (R. Exh. 24 (blackjack); 25 (craps); 26 (roulette); 27 (currency); 28 (anti-laundering); 30 (inventory); 31 (markers)).

[22] DRD Patton stated that he refers issues involving dealer payouts to the Pencil. (Tr. 472).

[23] A DRD might summon surveillance to address a gaming issue.

[24] DRDs may, for instance, apply these comprehensive rules to: direct dealers to spread cards further apart for surveillance; correct a dealer's payout; address a dealer error; or promote better dealer customer service.

[25] I credit this testimony for multiple reasons. First, Rios was a reliable and cooperative witness with a stellar demeanor. Second, she was consistent with Murduca, Patton and Sumbler, who were also reliable, consistent and credible. Finally, this testimony is consistent with the many exhibits herein showing that supervision of dealers is exercised by the tier of supervisors directly above the DRDs (i.e., Floor Supervisors, Pencils and higher), and that the limited directives that DRDs issue to dealers are regurgitations of Horseshoe's comprehensive gaming, payout and reporting rules, which does not involve more than a de minimis level of independent judgment.

[26] These allegations appear in complaint ¶¶ 7 and 8.

a GC's Case

Union organizer Hernandez testified that, on February 27, he and several off-duty employees, including Rios and Castillo, leafleted for the Union in the garage. (GC Exhs. 2, 4–5). He said that there were no employees working in the garage, where customers and employees park their cars.[27] He said that Director of Security Rob Brown and Senior VP Mike Rich told him that, "we were trespassing … [and] had to move out to the street." (Tr. 45–48). He replied that, although he was a non-employee and would move, Rios and Castillo were employees who could leaflet in a non-work area during their non-work hours. He recalled Rich insisting that leafletting was, nevertheless, prohibited. (Tr. 47). Rios and Castillo corroborated him. (Tr. 113, 688–89).

b. Horseshoe's Reply

Wade testified that employees could "gather together and discuss union activities, as long as they were doing so in break areas." (Tr. 776). Neither Brown nor Rich testified.

c. Credibility Resolution

Hernandez, Rios and Castillo are credited. They were believable and consistent witnesses with strong demeanors. An adverse inference has also been drawn from Horseshoe's unexplained failure to rebut their testimonies with Brown and Rich. *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference … regarding any factual question on which the witness is likely to have knowledge").

2. February 28 – Meeting with Dodds[28]

a. GC's Case

Murduca recalled this morning discussion with Dodds on the employee ramp:

> I said … none of this [i.e., the Union campaign] has anything to do with you ….
>
> [H]e asked me who is … involved in the Union. And I said I am one of four on day shift. And he said, are those [other 3] people here now [?] And I looked around and I said, yes …. [He then said] can you tell me who they are? [And I replied] Renee Rios, Angela Daly, Nicky Castillo and myself….
>
> And then he said … what about on swing shift [?] And I said some gentleman named Will …. And he said Boykin, and I said, yes …. [He then asked] … who on [the] graveyard [?] And I said, Roger Patton ….

[27] Manager Jason Williams indicated that the garage is not a working area. (Tr. 181).

[28] These allegations appear in ¶10(a) and (b) of the complaint.

> Then … Dodds asked me if we would be willing to talk to Mike Rich [?] I told [him] … I … would … talk to the other … girls….

(Tr. 226–28).

Rios stated that she, Murduca, Castillo and Daly met later that day with Dodds and had this discussion:

> [W]e said [to] Roger, [that the Union] … is nothing against you …. We don't … want to get you in trouble … but … we're … tired of everything being taken …. And he asked us … what has been taken away?
>
> And I said … we used to get a turkey and a ham at Christmas and Thanksgiving …. I said, we used to get our annual PTOs [and] every year we'd get our vacation time .... I said … our insurance … was a … lot better….
>
> [H]e said, but what do you really want? ….
>
> I said … our PTO time back …. [and] our insurance to be better …. [H]e … [was] writing everything down …. The other dealers were saying what they wanted, but I don't recall … all they said….
>
> He asked us if we would be willing to talk to Mike Rich, and I told him, no. I said that Mike Rich was part of the reason why we're in here trying to get stuff back. And he said that he would talk to Mike Rich.

(Tr. 120-22). Murduca and Castillo corroborated Rios' account. (Tr. 226-30, 691-97).

b. Horseshoe's Reply

Dodds recalled meeting them, but, generally denied interrogating or soliciting grievances.

c. Credibility Resolution

I credit Murduca, Castillo and Rios. They were credible witnesses with strong demeanors. Dodds offered a general denial and very little detail. He was also repeatedly led during his direct examination, which deeply undercut his credibility. See, e.g., (Tr. 1158–62).

3. March 1 – Meeting with Rich[29]

a. GC's Case

Rios recalled Rich holding a meeting for dealers; she described this exchange:

[29] This allegation appears in ¶11(b) of the complaint.

> Rich had said that he had called the … meeting because … the UAW was … trying to organize …. [He described] the pros and the cons of the Union. And he told us that if we voted for the Union, that we could not come to management and ask for time off … [and] that we would have to go through a union rep….

(Tr. 126). Burge recalled Rich stating that, "if the Union gets in, there will be no more open-door policy." (Tr. 578). Simmons corroborated their accounts. (Tr. 642).

b. Horseshoe's Reply

Wade said that Rich did not make these comments. (Tr. 781). Rich did not appear.

c. Credibility Resolution

I credit Rios, Burge and Simmons. They were credible and consistent witnesses, who corroborated each other. Although Wade was a generally sound witness, her recollection of the meeting itself was spotty and generalized. In addition, Rich's unexplained failure to testify about this key meeting enhanced the credibility of the GC's witnesses. *Douglas Aircraft Co.*, supra.

4. March 2 – Rich Meeting[30]

a. GC's Case

Murduca recalled Rich holding a meeting for 20 employees; she recalled him stating that:

> [I]n the past you have been able to go to Roger [Dodds] for a last minute day off …. [Y]ou won't be able to do that anymore if the Union comes in ….
>
> [DRDs cannot] vote for the Union, because … [they] are … supervisors ….

(Tr. 232-33). Sumbler corroborated her account. (Tr. 500-504).

b. Horseshoe's Reply

Wade, who attended the meeting, denied hearing these comments. Rich did not testify.

c. Credibility Resolution

I credit Murduca and Sumbler; they were credible and consistent. Although Wade was a generally sound witness, her recollection was generalized. Rich's failure to testify, as noted, supports an adverse inference. *Douglas Aircraft Co.*, supra.

[30] This allegation appears in ¶11(c) and (d) of the complaint.

5. Mid–March – Meetings with Dodds[31]

a. GC's Case

Murduca recalled this discussion at a mid-March employee meeting:

> [Dodds] said that …. [DRDs] would have an opportunity to bid on full time dealing positions based on seniority and then skill set ....
>
> He wrote his cell … number on the dry erase board. And told the group that if they have any questions or concerns, … call him at any time ….

(Tr. 220). Patton similarly recalled Dodds stating that:

> [S]ome full-time dealer positions [were] opening up ….
>
> Give … [Horseshoe] a chance … [and] they could maybe make it right ….

(Tr. 453). Murduca, Sumner and Rios corroborated this testimony. (Tr. 108-109, 217-218, 491).

Simmons noted that Dodds made these comments at another mid-March meeting:

> [Dodds] said that we would have to pay union dues and that the … Union [was] formed [by] … an employee … [who] met this guy at a bar …. He told us … that he knew that we only needed 46 more votes to get it passed. And that they really didn't want the Union.
>
> He said that the dual rates … weren't going to be able to … join the Union because they would be considered as full-time floor [supervisors]….
>
> [H]e … asked us what … they could do to … make things better ….
>
> He did say that they were going to open up full-time positions if … dual rates wanted to become full-time dealers ….
>
> I remember him giving us his card. He said that we could talk to him at any time …. [W]e weren't able to do this before….
>
> He said that … improvements … had to put them on hold at the time because of the Union. He said … there was a lot that they wanted to do for us ….

(Tr. 648-53)

[31] At the hearing, the GC amended ¶12 of the complaint to allege that these statements were also made in mid-January 2018. (Tr. 13). These allegations appear in ¶12(a) through (d) of the complaint.

b. Horseshoe's Reply

Dodds denied telling DRDs that they could bid on FT dealer slots. He recalled telling them to educate themselves about the Union. Regarding threats, he said that:

> This thing caught us totally off guard. [I received] … TIPS [training and knew that] … I can't threaten, … promise, … spy … [or] interrogate ….

(Tr. 1157). He denied offering to make things better or saying that DRDs could not unionize. Wade related that Horseshoe has a practice of conducting EOS surveys, evaluating suggestions, and implementing some ideas. (R. Exhs. 14-20, 22). She contended, as a result, that any discussion of improvements stemmed from the EOS program.

c. Credibility Resolution

For the reasons previously stated, I credit the GC's witnesses, who each possessed strong demeanors, and were consistent and cooperative. As noted, Dodds was a poor witness, who was repeatedly led by his own counsel, which eviscerated his credibility. See, e.g., (Tr. 1158–62).

6. March 17 – Meeting with Dodds[32]

Burge testified that she and 4 dealers met with Dodds; she recalled this exchange:

> He said, I know you all have heard that there is a committee that has formed, wanting the Union in ….
>
> He said … imagine going … to the bargaining table … [and] possibly losing 30 percent of your PTOs ….
>
> He stated … that if the Union got in, we would no longer have an open-door policy ….

(Tr. 583-85). Dodds denied these comments. As previously cited, I credit Burge over Dodds.

7. March 24 – Dodds' Comments on DRD Bidding on FT Dealer Jobs[33]

On March 23, Horseshoe posted several FT dealer jobs. (GC Exh. 10). Murduca said that, on March 24, she had this discussion with Dodds:

> I approached Roger and … said I see the notice up for full time dealer position openings. Can I bid on it now? And he said no, because we don't know where we stand with the classification of dual rights.

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[32] These allegations appear in ¶13(a) and (b) of the complaint.

[33] This allegation appears in ¶14 of the complaint.

(Tr. 242). Sumbler noted that no DRDs were given FT dealer jobs. For the reasons previously discussed, I credit Murduca and Sumbler over Dodds.

8. March 24 – Directions to Workers to Remove Union Buttons[34]

Horseshoe maintains this rule:

> **Name Badges/Tags:** Name badges must be worn … while on duty …. [and] must be clearly visible and unaltered; nothing may be attached to … name badge/tags or badge holders unless authorized by the Company or allowed by law.

(R. Exh. 2).

Rios credibly testified that, on March 24, she met with Dodds, LaFleur and Antwine. She recalled that:

> Dodds told [her] … to take off … [the] UAW pin [off her name badge], because it was not part of … [the] uniform and … he could not let somebody … against the Union wear a button either.

(Tr. 137). She said that she was still allowed to leave her flag pin on her name badge until April 15. (Tr. 137). She added that others were observed wearing non-union pins on their badges during this period. See, e.g., (GC Exhs. 11–12). Sumbler and Castillo corroborated her account. (Tr. 507-508, 706–707).

Wade explained that the name badge should be unobstructed for game protection and surveillance purposes. (Tr. 852). She added that wearing a pin on your badge detracts from the overall uniform. (Tr. 855-56). LaFleur conceded that he asked Rios to remove the flag pin from her badge. (Tr. 1447-48). He said that he has made similar requests to other workers. (Id.). For the same reasons previously stated, I credit Rios on these points.

E. §8(a)(3) Allegations

1. March 3 to April 28 – Saturday Work[35]

Burge, Butler, Lewis and others stated that they observed an increase in assignments on their scheduled Saturdays off, which coincided with the Union's drive. There was no evidence presented, however, regarding their Union activities.

Director of Administration Aaron Bronson testified that there is a bias-free centralized scheduling process, which flows from workload demands. He demonstrated that tables games volume declined from 2014 through mid-2017 and increased sharply and unexpectedly thereafter.

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[34] This allegation appears in ¶9 of the complaint. The underlying facts that follow are essentially undisputed.

[35] This allegation appears in ¶15(b) of the complaint. The underlying facts are essentially undisputed.

(Tr. 939; R. Exh. 78). He credibly said that this unanticipated change increased labor demands, which drove the need to assign workers on their Saturdays off.[36] See (R Exh. 70).

2. March 23 and 24– Bidding on FT Dealer Slots[37]

On March 23, Horseshoe posted several FT dealer jobs. (GC Exh. 10). Although PT dealers were allowed to bid on these slots, DRDs were not. Dodds explained that he needed to keep DRDs in their current roles for business and logistical purposes.

3. April 7 – Murduca's Firing[38]

DRD Murduca worked for Horseshoe from 2001 until her firing. At this time, she had a final written warning on the policy/performance disciplinary ladder.

a. Horseshoe's Disciplinary System – Generally

Horseshoe has 3 disciplinary ladders: policy/performance; attendance; and variance (i.e., monetary errors). Wade succinctly described the disciplinary system in the following manner:

> [It] is a step policy…. [with] various ladders. The most common … [ladder] would be policy [and] … performance. It starts with a documented coaching. If within a 12-month period of … the original infraction, … you have another issue on the policy and performance ladder, then you receive … a written warning. If within 12 months of the infraction date you have another issue, you'll receive a final written warning …. [T]he next … step is termination ….

(Tr. 863-64). Discipline can be appealed to the Board of Review (the Board), which may reduce the penalty.[39] (Tr. 872). Discipline drops from a ladder after a year, without added infractions.

b. Murduca's Disciplinary History

This chart describes her disciplinary history on the policy/performance ladder:

Date	Incident	Disciplinary Action
Dec. 23, 2015	Failing to park in the designated area.	Documented coaching
Aug. 16, 2016	Missing 2 rolls of the dice.	Written warning
Apr. 18, 2017	Rude to a coworker.	Final written warning
Apr. 7, 2018	Discussing spells on the casino floor.	Termination

(GC Exh. 19; R. Exhs. 82, 83, 102).

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[36] Saturday is, as would be expected, a high-volume day at the casino.

[37] These allegations are in ¶15(c) and (d) of the complaint. The underlying facts are generally undisputed.

[38] This allegation is in ¶15(e) of the complaint.

[39] The Board's 3-member panel has a department employee, management delegate and HR representative.

c. Chronology of Events Leading to Murduca's Separation

i. April 2

Murduca stated that she had this exchange with Dealer Vicki Strickland in the craps pit:

> I asked her … are you from south Louisiana? And she said yes. I said, do you believe in spells? And she said, give me a piece of your hair.
>
> So [supervisor] Tammy Pearce … was standing there, and I asked her if I was shedding [and] … can she get a piece of my hair from my back, and she said, you're not shedding. So I pulled a piece of hair out of my head, and I gave it to Vicki. And Vicki put it in her left sweater pocket. And … Pearce looked at us puzzled, and I said, Vicky's going to help me win the Powerball with that piece of hair. And Tammy and I both laughed.
>
> Then Vicki turned around and she said, something bad is going to happen to you.

(Tr. 246-47).

ii. April 3

Murduca recalled Strickland approaching her in the break area and asking, "[did] anything bad happen?" When she said "no," Strickland said that, "it's coming." (Tr. 248).

iii. April 4

Murduca had this exchange with Manager Williams:

> Jason asked me if I would write [down] … what happened … with the hair incident …. I didn't want to write one, because I didn't want her to get in trouble….

(Tr. 253).

iv. April 7

Murduca met with LaFleur, Antwine and Williams; this discussion ensued:

> Williams … said … I have to read … your termination paper [to you]….
>
> And as he read it, he used the word voodoo in my conduct standard explanation, and I interrupted … [and] said … I never used the word voodoo. He paid no attention … and just continued ….

(Tr. 257-58). She said that she was then escorted away. Murduca denied offending Strickland, insisted that they were friends, and contended that she solely said "spells" (i.e., not "voo doo").[40] (Tr. 259–60).

d. Investigation and Decision

Manager Williams testified that his investigation produced statements from Antwine and Strickland.[41] He recounted that:

> [Murduca] asked … [Strickland] if she knew anything about voodoo and spells, and Judy had mentioned that she had a friend … under a spell….

(Tr. 1311-12). He added that Strickland asked Murduca for a strand of hair. (Tr. 1314).

Williams stated that, because their childish conversation occurred in front of guests, it violated disciplinary standards,[42] which led to Murduca and Strickland being disciplined on the policy/performance ladder. He added that he watched video footage and observed guests in the vicinity, while Murduca and Strickland joked around. He said that that Strickland received a documented coaching because she had no other discipline on her ladder,[43] and Murduca was fired because she had a pending final warning on her ladder. Employee Relations Supervisor Darlene Overton testified that she consulted with Williams regarding the discipline and found that it was consistent with casino policies. She noted Murduca appealed to the Board of Review,[44] which upheld her firing. (R. Exhs. 90, 102, 125, 126, 127, 128).

e. Disparate Treatment Evidence

In some situations, Horseshoe exercises great leniency and benevolently issues non-disciplinary informational entries, when workplace rules are violated. See, e.g., (R. Exh. 129). There is no evidence that Horseshoe considered this track in Murduca's case. There is similarly no evidence that Horseshoe issued any discipline to supervisor Pearce, who observed the incident in real time, reportedly laughed, and failed to intervene and/or immediately report it to upper management for disciplinary purposes.

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[40] Sumbler stated that religious jokes are commonplace at the casino. (Tr. 509). She stated that management is aware of such jokes and has participated in making such jokes. (Tr. 510).

[41] Williams said that he tried to take a statement from Murduca about the incident, but, she was uncooperative.

[42] Horseshoe's anti-harassment policy prohibits harassment on the basis of race and religion, and bars derogatory comments and slurs. (R. Exh. 86).

[43] Strickland received a documented coaching dated April 10, 2018 in the policy/performance ladder. (R. Exh. 88).

[44] The Board of Review is comprised of an HR representative, outside manager, and employee. (R. Exh. 102).

III. ANALYSIS

A. §8(a)(1) Allegations[45]

1. Horseshoe Unlawfully Banned the Garage Leafletting[46]

Horseshoe, by Rich and Brown, unlawfully banned employees from leafletting in the garage on February 27. Employees can discuss unions and solicit support for unions on non-working time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline. See *Republic Aviation Corporation v. NLRB*, 324 U.S. 793, 803 (1945); *MBI Acquisition Corp.*, 326 NLRB 1246 (1997). An employer may forbid employees from talking about a union during working time, if that prohibition also covers other subjects not associated with one's work duties. *Sam's Club*, 349 NLRB 1007 (2007). Retail employers may also bar solicitation on the selling floor, even during employees' non-working time because such solicitation may disrupt the retailer's business. *J.C. Penny Co.*, 266 NLRB 1223 (1983). The Board, however, has not allowed these solicitation bans to be extended to non-selling areas of the store. *Gallup, Inc.*, 349 NLRB 1213 (2007).

In the instant case, Horseshoe's employees peacefully solicited for the Union during non-working hours in a non-working area. Horseshoe made no showing that its restriction was required to maintain discipline or that the leafletting hindered its operations. Horseshoe's interference, accordingly, violated the Act.

2. Horseshoe Violated the Act when it Interrogated Murduca[47]

Horseshoe, by Dodds, unlawfully interrogated Murduca on February 28. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board applied these factors to define an unlawful interrogation:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

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[45] The GC, in some cases, has alleged cumulative §8(a)(1) violations of the same strain (e.g., solicitations). In such cases, where merit was found, and the remedy was unaltered by finding cumulative violations, only a few illustrative examples were analyzed. See, e.g., *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228-29 (2006).

[46] These allegations are listed under ¶¶ 7, 8 and 16 of the complaint.

[47] These allegations are listed under ¶¶ 10(a) and 16 of the complaint.

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

Dodds' exchange with Murduca was an unlawful interrogation. The questioning involved protected activities, i.e., who are the Union's supporters. It could have reasonably led Murduca to conclude that Dodds, a high-level manager, wanted to retaliate against the Union's supporters. Under these circumstances, Dodds' query was coercive and unlawful.

3. Horseshoe Unlawfully Solicited Grievances[48]

Horseshoe, by Dodds, unlawfully solicited grievances from Murduca and others at the February 28 and mid-March meetings. Solicitation of grievances during a union campaign is unlawful when it "carries with it an implicit or explicit promise to remedy the grievances and 'impress[es] upon employees that union representation [is] . . . [un]necessary.'" *Albertson's, LLC*, 359 NLRB 1341, 1341 (2013). The Board has explained that:

> Absent a previous practice … solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act …. [Such] solicitation … inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a pre-election setting is a rebuttable one.

Maple Grove Health Care Center, 330 NLRB 775, 775 (2000). "An employer may rebut the inference of an implied promise by … establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements … were not promises." *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Dodds' comments were unlawful. On February 28, Dodds asked Murduca, Rios and other employees, "what [things Horseshoe has] … taken away?", "what things do you really want?", and "if we would be willing to talk to Mike Rich?" At various mid-March employee meetings, Dodds stated, "that if they have any questions or concerns, … call him at any time," "[g]ive … [Horseshoe] a chance … [and] they could maybe make it right ….", "what … they could do to … make things better ….", and "there was a lot that they wanted to do for us …." A reasonable employee would have interpreted this collection of comments to be an implied promise to remedy their grievances in lieu of unionization. It is also noteworthy that Horseshoe made no showing

[48] These allegations are listed under ¶¶ 10(b), 12(c) and 16 of the complaint. No finding has been made regarding whether Dodds made similar unlawful statements in January because such a finding would not alter the remedy herein. *Smithfield Foods, Inc.*, supra.

that it had an established past practice of previously soliciting grievances in a comparable manner.[49] This solicitation, therefore, violated §8(a)(1). See, e.g., *Mandalay Bay Resort & Casino*, supra, 355 NLRB at 530.

4. Horseshoe Unlawfully Threatened Lost Benefits[50]

Horseshoe, by Rich and Dodds, unlawfully threatened that employees would lose a variety of benefits, if they unionized. On February 28, Dodds threatened that they would no longer be permitted to ask for a last-minute day off. On March 1, Rich threatened that the open-door policy would be lost. On March 2, Rich threatened that they would no longer be permitted to ask for a last-minute day off. On March 17 Dodds told them to "imagine going … to the bargaining table … [and] possibly losing 30 percent of your PTOs." Threatening lost benefits because of union activities is prohibited. *Wellstream Corp.*, 313 NLRB 698, 707 (1994).

5. Horseshoe Unlawfully Told DRDs That They are Supervisory and Cannot Vote[51]

Horseshoe, by Rich and Dodds, unlawfully told DRDs in March that they were supervisors to discourage their Union activities. On March 2, Rich stated that DRDs could not vote for the Union because they are supervisors. In mid-March, Dodds made similar comments. Given that DRDs are not supervisors, as will be discussed, these comments unlawfully chilled their §7 activities. *Shelby Memorial Home*, 305 NLRB 910 fn. 2 (1991) ("employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act.").[52]

6. Horseshoe Unlawfully Promised DRDs the Right to Bid on FT Dealer Slots[53]

Horseshoe, by Dodds, unlawfully promised to reward DRDs in mid-March by promising to allow them to bid on more lucrative FT dealer jobs, if they did not support the Union. Dodds told DRDs that they would have "an opportunity to bid on full time dealing positions based on seniority and … skill set," and "they were going to open up full-time positions if … dual rates wanted to become full-time dealers." These comments occurred at the commencement of the Union's drive, attempted to address some of the dissatisfaction giving rise to the drive, and occurred alongside several other unlawful threats and comments. I find, as a result that such promises were made to discourage

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[49] Although Horseshoe demonstrated that it conducts annual opinion surveys, it failed to show that upper level managers previously conducted captive audience meetings of this nature, personally pleaded for a chance to address things causing disaffection, invited employees to meet with Rich, handed out personal phone numbers and solicited them to call at any time. Such pleas went widely astray of Horseshoe's EOS practice, and fell short of showing that the statements at issue were not promises. *Mandalay Bay Resort & Casino,* supra.

[50] These allegations are listed under ¶¶ 10(c), 11(a) to (d), 12(d), 13(a) and 16 of the complaint.

[51] These allegations are listed under ¶¶ 11(a) and (d), 12(d), and 16 of the complaint.

[52] See also *Hospital Motor Inn, Inc.*, 249 NLRB 1036, 1036–37 (1989), enfd. 667 F.2d 562 (6th Cir.), cert. denied 459 U.S. 969 (1982) (employer violates §8(a)(1) and (3) by promoting employees to supervisory positions, and thus stripping them of their right to self-organization, because of a union campaign); *AMFM of Summers County, Inc.*, 315NLRB 727 (1994), enfd. 89 F.3d 829 (4th Cir. 1996) (an employer violates the Act by accelerating a promotion or other employment action affecting employee status, in response to union activity); *Matson Terminals, Inc*. 321 NLRB 879, 879 (1996), enfd. 114 F.3d 300 (D.C. Cir. 1997) (same).

[53] These allegations are listed under ¶¶ 12(a), 13(b), and 16 of the complaint. No finding has been made, however, regarding whether Dodds made a similar unlawful comment in January. *Smithfield Foods, Inc.*, supra.

unionization and were unlawful. *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003) (employer violates the Act, when it promises to reward employees, in order to curtail unionization); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The message behind these statements was that, if DRDs wanted to bid on FT dealer jobs, they should not unionize.[54]

7. Horseshoe Created an Unlawful Impression of Surveillance[55]

Horseshoe, by Dodds, unlawfully created the impression that employees' Union activities were under surveillance. An employer creates an unlawful impression of surveillance when, under all of the circumstances, reasonable employees would assume from a statement that their protected activities are being watched by management. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–96 (2009). As a result, when an employer tells employees that it is aware of their union activities, but, fails to tell them the source of that information, §8(a)(1) is violated because employees are left to speculate as to how their employer obtained the information, which could cause them to reasonably conclude that it was obtained via monitoring. *Conley Trucking*, 349 NLRB 308, 315 (2007). In the instant case, Dodds told employees, at a mid-March meeting, that, "the … Union [was] formed [by] … an employee … [who] met this guy at a bar …. [and] he knew that we only needed 46 more votes to get it passed." This commentary created an unlawful impression of surveillance, inasmuch as it conveyed that Horseshoe knew detailed information about the campaign, without revealing its source. These comments, accordingly, left employees with the reasonable impression that management was monitoring their Union activities.

8. Horseshoe Unlawfully Blamed the Union for Lost Job Opportunities[56]

Horseshoe, by Dodds, unlawfully blamed the Union for its failure to offer DRDs the opportunity to bid on FT dealer slots. Following Horseshoe's March 23 posting of several FT dealer slots, Dodds told Murduca on March 24 that DRDs could not bid on these jobs because "we don't know where we stand with the classification of dual rights [i.e., whether they are supervisors for the purpose of an NLRB election]." (Tr. 242). Under these circumstances, Dodds blamed the Union for its inability to open these jobs up to DRDs (i.e., had the Union not started its drive and put DRD supervisory status into play, we would have allowed DRDs to bid on these coveted jobs). The Board has found analogous commentary to be unlawful. See, e.g., *Atlantic Forest Products*, 282 NLRB 855 (1987); *Truss-Span Co.*, 236 NLRB 50 (1978).

[54] Horseshoe denied these comments and did not aver that they flowed from the EOS. Accordingly, it failed to show that it had a legitimate business reason for its timing. See *KOFY TV-20*, 332 NLRB 771, 773 (2000) (absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer an improper motive and find interference with employee rights under the Act).

[55] These allegations are listed under ¶¶ 12(b) and 16 of the complaint.

[56] These allegations are listed under ¶¶ 14 and 16 of the complaint.

9. Horseshoe Unlawfully Directed Employees to Remove Their Union Pins[57]

On March 24, Horseshoe, by Dodds and LaFleur, disparately applied its "name badges/tags" rule by banning employees from wearing Union buttons on their ID badges, while continuing to permit others to wear non-union buttons on their ID badges for another month. As noted, Horseshoe maintains a "name badges/tags rule," which provides that, "nothing may be attached to … name badge/tags or badge holders unless authorized by the Company or allowed by law." (R. Exh. 2). On March 24, Rios was ordered by Dodds and LaFleur to remove her Union pin from her ID badge. At the time, however, she was permitted to continue to wear a flag pin on her ID badge, as were other casino workers for an extended duration.

The Board has held as follows:

> [E]mployees have a Section 7 right to wear union insignia on their employer's premises, which may not be infringed, absent a showing of "special circumstances." …. These protections … have always extended to articles of clothing, including pro-union T-shirts. There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons ….
>
> An employer cannot avoid the "special circumstances" test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia ….

Stabilus, Inc., 355 NLRB 836, 838 (2010)(citations omitted). Moreover, even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia, but, not other insignia was unlawful).

In the instant case, Horseshoe disparately enforced its rule restricting pins and badges against Union insignia, but, not against other insignia by ordering Rios to remove her Union pin from her ID badge, while allowing others to continue to wear non-union pins. Such disparate enforcement violates the Act. *Shelby Memorial Home*, supra.

B. §8(a)(3) Allegations

1. Legal Precedent

The framework for analyzing whether discriminatory actions violate §8(a)(3) is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S.

[57] These allegations are listed under ¶¶ 9 and 16 of the complaint.

989 (1982), which requires the GC to show, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. This initial burden is satisfied by showing protected activity, employer knowledge and animus. If the GC meets this initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, absent the protected activity. *Mesker Door*, 357 NLRB 591–92 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086, 1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Horseshoe Lawfully Assigned Employees Work on their Scheduled Saturdays Off[58]

Although, between March 3 and April 28, Horseshoe assigned Burge, Butler, Lewis, Rankin, Reno and Simmons to work on their scheduled Saturdays off, the GC failed to show that this action violated §8(a)(3). The GC failed to show that these employees engaged in any protected activity, or that Horseshoe was somehow aware of their alleged activity. In addition, Horseshoe credibly demonstrated that it had a legitimate non-discriminatory reason, i.e., the unexpected spike in business volume, for scheduling workers on their Saturdays off.

3. Horseshoe Lawfully Allowed PT Dealer Bids on FT Dealer Jobs[59]

Horseshoe's decision to allow PT dealers to bid on FT dealer slots was lawful. The GC failed to show that PT dealers as a class engaged in any protected activity, or that Horseshoe was somehow motivated to reward them to influence their alleged §7 activities. Also, allowing part-timers to bid on full-time jobs in the same classification is a typical, non-discriminatory, progression in most workplaces.[60] On these bases, Horseshoe allowing PT dealers to bid on FT jobs was valid.

4. Horseshoe Unlawfully Barred DRD Bids on FT Dealers Jobs[61]

Since March 24, Horseshoe has unlawfully refused to allow DRDs to bid on FT dealer positions. The GC satisfied its initial burden regarding this allegation. Regarding refusal-to-consider-for-hire allegations (i.e., Horseshoe's discriminatory refusal to consider DRDs for FT dealer slots), the Board has held that:

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[58] These allegations are listed under ¶¶15(b), (f) and (g), and 17 of the complaint.

[59] These allegations are listed under ¶¶15(c), (f) and (g), and 17 of the complaint.

[60] Assuming that Horseshoe made its FT dealer jobs available to both PT dealers and DRDs, it would be hard to believe that the GC would separately challenge allowing PT employees to bid on these jobs. Hence, the violation flows not from the grant of a PT dealer benefit, but, from the withholding of a DRD benefit.

[61] These allegations are listed under ¶¶15(d), (f) and (g), and 17 of the complaint.

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

FES, 331 NLRB 9, 14 (2000).

In the instant case, the GC met its burden. It demonstrated that FT dealer positions existed, and that Horseshoe excluded DRDs from the hiring process (i.e., management made express comments that DRDs would not be allowed to apply for FT dealer jobs). The GC also established that Union animus contributed to Horseshoe's decision to exclude DRDs from the hiring process by proving the following examples of Union animus: its firing of DRD Murduca; unlawful statements that DRDs were supervisors who could not organize; unlawful promises of DRD benefits to undermine their Union support; blaming the Union for its failure to grant DRDs FT dealer slots; and the other unlawful statements and acts established herein. Horseshoe failed to show that it would not have considered the DRDs for FT dealer slots, absent Union activity. On the contrary, it is undisputed that DRDs spend a large chunk of their workday performing dealer duties and were qualified to do these jobs. Simply put, there is no rational business reason for excluding them from consideration for these jobs.[62]

5. Horseshoe Unlawfully Fired Murduca on April 7[63]

Murduca's firing was unlawful. As a preliminary matter, she was not a supervisor. Additionally, the GC met his burden and Horseshoe failed to show that it would have taken the same action absent her protected conduct.

a. Supervisory Status

Murduca is not a statutory supervisor; §2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden is on the party asserting §2(11) supervisory status to establish by a preponderance of the evidence that the individual has the authority to perform or effectively recommend at least one of these listed actions. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710 (2001);

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[62] There is no sound reason why Horseshoe could not have permitted DRDs to apply for FT dealer jobs and then decided on a case-by-case basis amongst all applicants. This would have been a practical option for all parties.

[63] These allegations are listed under ¶¶15(e), (f) and (g), and 17 of the complaint.

Entergy Mississippi, Inc., 367 NLRB No. 109, slip op. at 2 (2019). As will be shown, Murduca does not use independent judgment to exercise any of these supervisory duties.

i. Hiring, Transferring, Promoting and Rewarding Dealers, and Adjusting Grievances

DRDs cannot hire, transfer, promote or reward dealers, or adjust grievances. Although DRDs may, like other non-supervisors, refer candidates to management to be considered for hire, they do not play any role in the interviewing or decision-making processes, and it is unclear what weight, if any, is afforded to their recommendations. DRDs do not, as a result, exercise supervisory authority in this regard. DRDs similarly do not prepare performance appraisals or evaluations for, demote, reward, grant or recommend raises for, or transfer dealers, or adjust their grievances. These duties are performed by Floor Supervisors and higher-level managers.

ii. Disciplining, Demoting, Suspending, Discharging, Laying Off and Recalling Dealers

DRDs do not discipline, demote, suspend or discharge. Dodds conceded that DRDs cannot issue coachings, warnings, suspensions or terminations. DRDs do not attend meetings where management plans to issue dealer discipline, and do not participate in disciplinary interviews or investigations. Although DRDs may be summoned by management to provide witness statements in disciplinary investigations or may initiate a complaint against a coworker that could lead to discipline, all employees (i.e., regardless of status) can play these roles. It is also undisputed that DRDs do not layoff or recall dealers.

iii. Weekly and Daily Dealer Assignments

DRDs do not create weekly or daily dealer assignments. Central Scheduler Lambert sets weekly work schedules, and Pencil Monica Antwine sets daily assignments. DRDs cannot reassign dealers to alternate games or remove dealers from games. DRD requests to not assign a dealer to a game are seldom granted by the Pencil or Shift Manager. When a dealer requires a restroom break, they must obtain a Pencil's consent (i.e., DRDs are not even empowered to let dealers leave to use the bathroom).

iv. Independent Judgment to Responsibly Direct Dealers

Although DRDs may specify a gambling payout, direct dealers to spread cards wider or narrower, or issue other game-play directives, such direction does not involve "independent judgment" within the meaning of §2(11). The Board has held that judgment is not independent within the meaning of that provision if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules [or] the verbal instructions of higher authority." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). Consistent with §2(11), this interpretation distinguishes "true supervisors who exercise 'genuine management prerogatives' with 'straw bosses, leadmen, [and] set-up men,' who are still entitled to the Act's protections despite the exercise of 'minor supervisory duties[,]' *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 [] (1974)," and ""faithfully implements the Supreme Court's guidance" in *NLRB v. Kentucky River Community Care*, 532 U.S. at 714, that "'detailed orders and regulations issued by the employer' might preclude a finding of independent judgment." *NLRB. v. Sub Acute Rehabilitation Center at*

Kearny, LLC, 675 F. Appx. 173, 177 (3d Cir. 2017). In the instant case, DRDs rely upon highly-detailed game rules, polices and procedures that micromanage game play in virtually every anticipated aspect. DRDs, do not, as a result, exercise independent judgment in their direction of dealers on game play issues, which renders them non-supervisory in this regard.[64]

v. Job Description

Even though the DRD job description states that DRDs "recommend … hiring, promotion, demotion [,] … termination … [,] wage and salary changes for personnel," this authority is not exercised in practice and, hence, insufficient to establish actual §2(11) supervisory authority. See *Chi Lakewood Health*, 365 NLRB No. 10, slip op. at 1, n. 1 (2016); *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F.3d 960, 962-964 (D.C. Cir. 1999).

vi. Synthesis

DRDs do not exercise supervisory authority. They do not hire, transfer, promote, reward, discipline, demote, suspend, discharge, layoff or recall dealers, or adjust their grievances. They do not create weekly and daily dealer assignments or exercise independent judgment to responsibly direct.

b. Analysis

Given that Murduca is not a §2(11) supervisor, it must now be assessed whether her firing violated §8(a)(3). I find that it did.

i. Prima Facie Case

The GC made a prima facie showing that Murduca's protected activity was a motivating factor. She initiated the Union's organizing drive, was an important member of the organizing team, and actively led early organizing efforts. Horseshoe was keenly aware of these activities.[65] There is also significant evidence of Union animus as evidenced by unlawful surveillance, interrogation, disparate application of workplace rules, solicitation of grievances, threats and promises.

[64] It is also noteworthy that there is no evidence that DRDs suffer concrete consequences, if they fail to appropriately direct dealers; this circumstance further detracts from any conclusion of supervisory status. See *Oakwood Healthcare*, 348 NLRB at 691-692; *Golden Crest Healthcare Center*, 348 NLRB 727, 731 and fn. 13 (2006); *UPS Ground Freight, Inc. v. NLRB,* 921 F.3d 251, 255 (D.C. Cir. 2019).

[65] Following the Union's February 27 leaflet, Dodds sought out Murduca, reported his knowledge of the Union's campaign, unlawfully interrogated her about the Union's other leaders, and unlawfully solicited grievances.

ii. Affirmative Defense

Horseshoe failed to show that it would have fired Murduca, absent her protected activity. Although it asserted that it evenhandedly applied its rules and fired her under its progressive disciplinary policy, the record demonstrates otherwise.

For several reasons, I find that Horseshoe would not have fired Murduca, absent her protected activity. *First*, the harsh timing of Murduca's discipline reeks of unfairness. Specifically, Horseshoe defines an employee's disciplinary date as the date of implementation (i.e., when discipline is received), which is a discretionary event that falls under Horseshoe's total control. See, e.g., (R. Exh. 102). Given that Murduca was on the last rung of the policy and performance ladder and had an active final written warning dated April 18, 2017 that would have dropped from the policy and performance ladder on April 18, 2018 (i.e., after a year), Horseshoe had the choice of disciplining Murduca prior to April 18 and callously firing her (i.e., its chosen path), or moderately issuing her a documented coaching after April 18 (i.e., just waiting 11 additional days). This benevolent exercise in moderation would have allowed Horseshoe to retain a long-term and highly-trained worker, and consistently and neatly issue the same documented coaching to both Strickland and Murduca for the same offense. Simply put, Horseshoe's decision to not wait a few additional days to achieve a more Solomon-like outcome produced an egregious outcome and flowed from invidious treatment.[66] *Second,* there is disparate treatment in Horseshoe's overall handling of the Murduca matter beyond unfair timing, as evidenced by its failure to discipline Strickland's and Murduca's direct supervisor, Tammy Pearce, for witnessing their transgression, and then failing to report it to upper management and/or initiating prompt discipline. Given the alleged seriousness of this transgression, the decision to hold harmless an eyewitness supervisor, who simply sat on her hands, is unconscionable. An evenhanded employer would have acted against all supervisory and non-supervisory participants and would have clearly disciplined a supervisor for failing to enforce its workplace rules. *Third*, the extensive level of animus present herein further supports the conclusion that Horseshoe's motivations and timing were improper. On these bases, each of which would suffice in isolation, I find that Horseshoe failed to show that it would have taken the same action against Murduca regardless of her protected conduct.[67]

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[66] This unfairness becomes magnified, once one appreciates that Horseshoe is haphazard in its disciplinary timing. See, e.g., (R. Exh. 54(a) (11 day lag), 54(b) (7 days), 82 (0 days), 55(a)(1day), 55(c) (19 days), 55(d) (4 days), 98 (15 days), 129 (7 days), 113 (16 days)); GC Exhs. 20 (7 days), 46 (4-10 days), 44 (22 days (L. Smith)). There is simply no valid reason why Horseshoe could not have waited until after April 18 (i.e., only 16 days from the occurrence date) to discipline Murduca, when it has waited much longer to implement discipline in many other cases. Murduca's stakes were exceedingly high, and a short lapse would have promoted fairness. This is not to say that Horseshoe should wait multiple months to save a worker's job, but, it should minimally act reasonably and at least consider the dire impact associated with its timing and failing to afford a long-term worker a short delay, which it did not herein. As an alternative, Horseshoe could also establish a consistent disciplinary timing practice going forward, which would eliminate any opportunity to use timing as a weapon to remove its Union adherents.

[67] It is also noteworthy that Horseshoe periodically issues informational entries instead of discipline, when circumstances warrant. Given that there is no evidence that a customer heard Murduca's juvenile exchange and Horseshoe considered it to be so minor that it failed to even discipline the direct supervisor for flatly ignoring this matter, a solid argument could be made that informational entries were warranted.

CONCLUSIONS OF LAW

1. Horseshoe is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization.

3. Horseshoe violated §8(a)(1) by:

a. Prohibiting employees from distributing Union organizing materials in non-work areas during non-work time.

b. Interrogating employees about their Union and other protected concerted activities.

c. Soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support.

d. Threatening employees that they may lose various benefits, if they engage in Union or other protected concerted activities.

e. Telling DRDs that they were supervisors, who cannot unionize or vote in the Union election in order to undermine their Union support.

f. Promising DRDs the right to bid on FT dealer jobs, in order to undermine their Union support.

g. Creating the impression that employees' Union activities are under surveillance.

h. Blaming the Union for DRDs not being permitted to bid on open FT dealer slots.

i. Ordering employees to remove Union pins from their ID badges.

4. Horseshoe violated §8(a)(3) by:

a. Refusing to consider DRDs for FT dealer positions.

b. Firing Murduca because she engaged in Union and other protected concerted activities.

5. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

REMEDY

The appropriate remedy for the violations found herein is an order requiring Horseshoe to cease and desist from its unlawful conduct and to take certain affirmative action. It must offer Murduca full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. It must also make her whole for any loss of earnings and other benefits suffered as a result of the unlawful termination of her employment on April 7, 2018. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, it must compensate her for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director a report allocating the backpay award to the appropriate calendar years. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). It must compensate her for her search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. See *King Soopers, Inc.*, 364 NLRB No. 93 (2016). The search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest compounded daily as prescribed in *New Horizons*, supra, and *Kentucky River Medical Center*, supra. It shall remove from its files any references to her unlawful April 7, 2018 termination, and notify her in writing that this has been done and that this action will not be used against her in any way. Regarding Horseshoe's discriminatory refusal to consider DRDs as a class for FT dealer openings, the Board has held that, "the question whether the applicant would have been offered that job had he been given nondiscriminatory consideration at the outset is a remedial issue appropriately determined in the compliance stage of the refusal-to-consider violation." *FES*, 331 NLRB 9 (2000).[68] Finally, Horseshoe shall post the attached notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[69]

ORDER

Horseshoe Bossier City Hotel & Casino, Bossier City, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[68] Because Horseshoe's unlawful actions prevented the DRDs from applying for these FT dealer jobs, it must first be shown at the compliance phase exactly which DRDs would have applied for these jobs in order to identify who Horseshoe refused to consider. Once this is established, "if it is shown at [the] … compliance stage … that the Respondent, but for the failure to consider the [DRD] discriminatees [on March 23, 2018], would have selected any of them for any [FT dealer] job openings …, the Respondent shall hire them for any such position and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them." *Mainline Contracting Corp.*, 334 NLRB 922, 924 (2001).

[69] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Prohibiting employees from distributing union organizing materials in non-work areas during non-work time.

b. Interrogating employees about their Union and other protected concerted activities.

c. Soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support.

d. Threatening employees that they may lose various benefits, if they engage in Union or other protected concerted activities.

e. Telling DRDs that they were supervisors, who cannot unionize or vote in the Union election in order to undermine their Union support.

f. Promising DRDs the right to bid on FT dealer jobs, in order to undermine their Union support.

g. Creating the impression that employees' Union activities are under surveillance.

h. Blaming the Union for DRDs not being permitted to bid on open FT dealer slots.

i. Ordering employees to remove Union pins from their ID badges.

j. Refusing to consider DRDs for FT dealer positions because of their Union or other protected concerted activities.

k. Firing or otherwise discriminating against any employee because they engaged in Union or other protected concerted activities.

l. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

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

a. Within 14 days from the date of this Order, rescind its prohibition against hiring DRDs for FT dealer positions.

b. Consider for hire those DRD applicants identified at the compliance phase for any of FT dealer job openings that were posted from March 23, 2018 through 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Union and the Regional Director for Region 15 of future openings in positions for which they would have applied or substantially equivalent positions for a period of 6 months from the date of this Order. If it is shown at a compliance stage of this proceeding that Horseshoe, but for the failure to consider

the DRD discriminatees to be identified at the compliance stage, would have selected them for FT dealer openings, Horseshoe shall hire them for any such position and make them whole for any losses, in the manner set forth in the remedy section of this Decision and Order.

c. Within 14 days from the date of this Order, notify all DRDs in writing that any future job applications will be considered in a non-discriminatory way.

d. Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider the DRD discriminatees for FT dealer jobs, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for these positions will not be used against them in any way.

e. Within 14 days from the date of the Board's order, offer Murduca full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

f. Make Murduca whole for any loss of earnings and benefits suffered as a result of the April 7, 2018 discriminatory termination of her employment, in the manner set forth in the remedy section above.

g. Make Murduca whole for her reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section above.

h. Compensate Murduca for the adverse tax consequences, if any, of receiving a lumpsum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar year.

i. 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 analyze the amount of backpay due under the terms of the Board's order.

j. Within 14 days of the date of the Board's Order, remove from its files any reference to the unlawful April 7, 2018 termination of Murduca, and within 3 days thereafter, notify her in writing that this has been done and that those actions will not be used against her in any way.

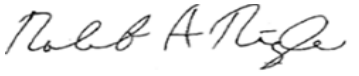
k. Within 14 days after service by the Region, post at its Bossier City, Louisiana facility and other facilities where the unit performs work copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region

[70] 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."

15, 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 February 27, 2018.

l. Within 21 days after service by the Region, file with the Regional Director for Region 15 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated Washington, D.C. July 30, 2019



Robert A. Ringler
Administrative Law Judge

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 prohibit you from distributing Union organizing materials in non-work areas of our facility such as our parking garage during your non-work time.

WE WILL NOT interrogate you about your Union and other protected concerted activities.

WE WILL NOT solicit grievances from you and make implied promises to remedy these grievances in order to undermine your Union activities and support.

WE WILL NOT threaten that you could lose your P.T.O. leave, ability to make last-minute leave requests, access to management and other present benefits, if you engage in Union or other protected concerted activities.

WE WILL NOT tell our DRDs that they are supervisors, who cannot unionize or vote in the Union election in order to undermine their Union activities and support.

WE WILL NOT promise our DRDs the right to bid on FT dealer jobs, in order to undermine their Union support.

WE WILL NOT create the impression that your Union activities are under surveillance.

WE WILL NOT blame the Union for DRDs not being permitted to bid on open FT dealer slots.

WE WILL NOT order you to remove Union pins from your ID badges.

WE WILL NOT refuse to consider DRDs for FT dealer positions because they support the Union or any other union.

WE WILL NOT fire or otherwise discriminate against any of you for supporting the Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL consider for hire those DRD applicants identified at the compliance phase for any of FT dealer job openings that were posted from March 23, 2018 through 6 months from the date of this Order in accord with nondiscriminatory criteria, and notify them, the Union and the Regional Director for Region 15 of future openings in positions for which they would have applied or substantially equivalent positions for a period of 6 months from the date of this Order.

WE WILL, if it is shown at a compliance proceeding that, but for our failure to consider the DRD discriminatees to be identified at the compliance stage, we would have selected certain DRDs for FT dealer openings, hire them for these positions and make them whole for any losses, in the manner set forth in the remedy section of this Decision and Order.

WE WILL, within 14 days from the date of the Board's Order, notify all DRDs in writing that any future job applications will be posted and considered in a non-discriminatory way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to consider the DRD discriminatees for FT dealer jobs, and within 3 days thereafter notify them in writing that this has been done and that the refusal to consider them for these positions will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's order, offer Judith Murduca full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Murduca whole for any loss of earnings and benefits suffered as a result of our unlawful termination of her employment on April 7, 2018.

WE WILL also make Murduca whole for her reasonable search-for-work and interim employment expenses.

WE WILL also compensate Murduca for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Board's Regional Director a report allocating the backpay award to the appropriate calendar year.

WE WILL also remove from our files any reference to Murduca's unlawful April 7, 2018 discharge and notify her in writing that this has been done and that those actions will not be used against her in any way.

HORSESHOE BOSSIER CITY HOTEL & CASINO
(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-215656 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 321-9476.