**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| HORSESHOE BOSSIER CITY HOTEL & CASINO<br><br>and<br><br>INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL WORKERS OF AMERICA, (UAW) | Case Nos. 15-CA-215656<br>15-CA-216517<br>15-CA-217795<br>15-CA-217797<br>15-CA-218097 |

**HORSESHOE BOSSIER CITY HOTEL & CASINO'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**[1]

Pursuant to section 102.46 of the National Labor Relations Board's Rules and Regulations, as amended, Horseshoe Bossier City Hotel & Casino ("Horseshoe" or the "Employer") excepts to Administrative Law Judge ("ALJ") Robert A. Ringler's Decision (the "Decision") as follows:

1. To the finding of fact and conclusion of law that Horseshoe violated Section 8(a)(3) of the Act by firing Judy Murduca because she engaged in Union and other protected concerted activities. Decision at 12:10-14:35; 21:25-24:30; 25:40-45. His decision is not supported by the facts and it is based on a fundamental error of law. Specifically, the ALJ's formulation of the

[1] Horseshoe's brief in support of its exceptions is being filed contemporaneously.

prima facie case was limited to three factors: protected activity, employer knowledge, and animus. Decision at 19:40-20:15. Under *Wright Line*, however, the General Counsel must establish a link or nexus between the employee's protected activity and the employer's decision to take the employment action alleged to be unlawful. *See Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014) (then-Member Miscimarra, concurring in part and dissenting in part), enfd. 801 F.3d 767 (7th Cir. 2015); *Starbucks Coffee Co.*, 360 NLRB 1168, 1172 fn. 1 (2014) (then-Member Miscimarra, concurring); *see also AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015) (holding that "there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker"); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554-555 (8th Cir. 2015), denying enforcement of 361 NLRB No. 22 (2014) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive.") (alterations and internal quotations omitted). To the extent that the Board, has held otherwise, it should take this opportunity to clarify the *Wright Line* standard, overrule cases to the contrary, and vacate the ALJ's decision in this case because the Counsel for the General Counsel failed to establish a nexus between Murduca's protected concerted activity and her termination.

2. To the ALJ's conclusion that the General Counsel satisfied the foregoing improperly-formulated initial burden [of showing protected activity, employer knowledge and animus], and his resulting determination that the General Counsel's *prima facie* case imposes a burden of proof on the employer to prove that it would have taken the same adverse action, absent the protected activity. Decision at 20:1-5. This formulation of *Wright Line* is contrary to law.

Under Section 10(c) of the Act, the General Counsel has the burden of proving by a preponderance of the evidence that a violation of the law occurred. The General Counsel's "burden never shifts, and … the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975); *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing.").

3. To the ALJ's failure to apply the correct standard as to the General Counsel's burden, upon Horseshoe's offering a legitimate business justification for Murduca's discharge, of establishing by substantial evidence the existence of an affirmative and persuasive reason why Horseshoe purportedly rejected good cause and selected a bad one as motivation for the discharge. *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595 (1st Cir. 1979).

4. To the ALJ's rejection of Horseshoe's legitimate, non-discriminatory reason for terminating Murduca because he personally believed that Horseshoe should have intentionally deviated from its progressive discipline policy, artificially delaying the issuance of Murduca's discipline in order to obtain a more "Solomon-like outcome." Decision at 24:1-32. In reaching this decision, the ALJ did not just substitute his business judgment for that of the Respondent in an impermissible manner. *See Healthcare Emples. Union, Local 399 v. NLRB*, 463 F.3d 909, 921-922 (9th Cir. 2006) (quoting *NLRB v. Savoy Laundry,* 327 F.2d 370, 371 (2d Cir. 1964)) (the "crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change."). He relied on reasoning that is contrary to Board precedent, which generally holds that artificially delayed discipline is proof of animus, not good faith. *See, e.g., New Otani Hotel & Garden,* 325 NLRB 928 (1998).

5. To the finding of fact and conclusion of law that, on February 28, 2018, Horseshoe violated Section 8(a)(1) of the Act through Roger Dodds unlawfully interrogating Murduca concerning protected activities by asking who are the Union's supporters. Decision at 6:25-7:5; 15:25-16:10; 25:5-15. The General Counsel did not satisfy his burden of proof with respect to this allegation for several reasons, and the ALJ failed to properly apply the factors stated in *Westwood Health Care Ctr.*, 330 NLRB 935 (2000).

6. To the finding of fact and conclusion of law that dual rate dealer supervisors ("DRDSs") do not perform supervisory duties sufficient for the position to be deemed a "supervisor" under Section 2(11) of the Act. Decision at 2:23-4:10; 21:30-23:35.

7. To the finding of fact and conclusion of law that, on February 28, 2018 and in mid-March 2018, Horseshoe violated Section 8(a)(1) of the Act through Dodds soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support, and that Horseshoe did not show that it had an established past practice of previously soliciting grievances in a comparable manner. Decision at 7:5-30; 16:15-17:5; 25:5-20.

8. To the finding of fact and conclusion of law that, on February 28, March 1, and March 2, 2018, Horseshoe violated Section 8(a)(1) of the Act through Mike Rich and Dodds threatening employees that they may lose various benefits if they engage in Union or other protected concerted activities. Decision at 7:40-8:30; 17:5-15; 25:5-20.

9. To the finding of fact and conclusion of law that, on March 2, 2018 through Rich and in mid-March through Dodds, Horseshoe violated Section 8(a)(1) of the Act by telling DRDSs that they were supervisors who cannot unionize or vote in the Union election in order to undermine their Union support. Decision at 8:20-30; 9:5-40; 17:15-25; 25:20-25.

10. To the finding of fact and conclusion of law that, in mid-March 2018, Horseshoe violated Section 8(a)(1) of the Act by Dodds promising DRDSs the right to bid on FT dealer jobs, in order to undermine their Union support. Decision at 9:1-40; 17:25-18:5; 25:25-30.

11. To the finding of fact and conclusion of law that, in mid-March 2018, Horseshoe violated Section 8(a)(1) of the Act by creating the impression that employees' Union activities were under surveillance. Decision at 9:20-30; 18:5-25; 25:25-30.

12. To the finding of fact and conclusion of law that, on March 24, 2018, Horseshoe violated Section 8(a)(1) of the Act through Dodds blaming the Union for DRDSs not being permitted to bid on open FT dealer slots. Decision at 10:35-11:5; 18:20-35; 25:30-35.

13. To the finding of fact and conclusion of law that, since March 24, 2018, Horseshoe violated Section 8(a)(3) of the Act by refusing to consider DRDSs for FT dealer positions. Decision at 12:5-10; 20:30-40; 25:35-40.

14. To relying on the witnesses' respective "demeanor" when determining credibility, when witness demeanor is an exceptionally poor indicator of truthfulness, *see, e.g.*, Judge Richard A. Posner, REFLECTIONS ON JUDGING, p.124 (2013) (explaining that "nonverbal clues to veracity are unreliable and distract a trier of fact … from the cognitive content of a witness' testimony" and collecting authority). *See Permaneer Corp.*, 214 NLRB 367, 368-69 (1974).

15. To the ALJ's credibility determinations generally, because his assessment of the witnesses' demeanor consists of little more than formulaic boilerplate descriptions of their alleged "cooperativeness" and appears to be lifted from other decisions that the ALJ has authored. *Compare* Decision at 7:20-40; 10:, *see, e.g., International Longshoremen's Assn, Local 28*, 366 NLRB No. 20, at slip op. (February 20, 2018).

16. To the failure to credit the testimony of Dodds on the basis that he "offered a general denial and very little detail;" was "repeatedly led during his direct examination, which deeply undercut" and "eviscerated" his credibility; and "was a poor witness." Decision at 7:20-40; 10:15-20. The ALJ's finding was arbitrary, capricious and inconsistent with his assessment of other witnesses, including Murduca, who was led by Counsel for the General Counsel, Counsel for the Charging Party and the ALJ himself on a number of critical issues, including whether she used the words "spells" or "voodoo" when she made the offensive, religious comments to Vickie Strickland which led to her termination. Tr. 247-249.

17. To the failure to credit the testimony of Ashley Wade on the grounds that, "Although Wade was a generally sound witness, her recollection of the meeting itself was spotty and generalized" (Decision at 8:15-20) and "her recollection was generalized." Decision at 8:35-40.

18. To the ALJ's failure to consider evidence of Horseshoe's thorough and fairly conducted investigation to refute the allegations of discrimination based on Union animus. *Jackson Hosp. Corp.,* 354 NLRB 329 (2009); *Boardwalk Regency Corp.,* 344 NLRB 984, 997 (2005).

19. To the ALJ's finding that Tammy Pierce was "Strickland and Murduca's direct supervisor," which is incorrect. Decision at 24: 20-25; Tr. 247:11.

20. To the ALJ's order to reinstate Murduca "without prejudice to her seniority" with back pay and benefits, as well as reimbursement of other expenses. Decision at 26:1-25; 28:10-30. Murduca was discharged for cause. "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 USCS § 160(c). An

order to reinstate or provide backpay to an employee who was discharged for cause violates the Act. *Taracorp Industries*, 273 N.L.R.B. 221, 222 (1984).

21. To the ALJ's decision that Horseshoe violated Section 8(a)(1) of the Act by enforcing its badge policy and requiring employees to remove UAW buttons from state-issued identification badges. Decision at 25:34. Horseshoe allowed employees to wear such buttons by affixing them to other parts of their uniforms, and to the extent the ALJ relied on alleged disparate enforcement of the rule because some employees claimed to have witnessed others wearing small American Flag pins affixed to their ID badge holders, he made an error of law. Board precedent permits employers to distinguish between American Flags on the one hand and Union buttons on the other, and to the extent that the Board's decision in *Purple Communications, Inc.* suggests a different result, it should be overruled. *See Register Guard*, 351 NLRB 1110 (2007), *overruled by Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

22. To the ALJ's exclusion of Horseshoe's exhibits (R41, 43-50, 53-56; Tr. 428:3-431:25) on grounds that the exhibits were cumulative when the excluded exhibits are highly probative evidence on a threshold issue, supervisor status, on which Horseshoe bears the burden of proof. On their face, the rejected exhibits demonstrate that the DRDSs assign dealers and effectively recommend dealer discipline within the meaning of Section 2(11). Had testimony on those exhibits been permitted, they additionally would have demonstrated the DRDSs responsibly directing dealers and other supervisory indicia.

23. To the ALJ's recommended Order because it contains provisions which exceed the Board's remedial authority under the Act. Decision at 26:31-29:15.

WHEREFORE, Horseshoe respectfully requests that its exceptions to the ALJ's findings of fact and conclusions of law regarding Case Nos. 15-CA-215656, 15-CA-216517, 15-CA-

217795, 15-CA-217797, and 15-CA-218097 be sustained, that the Decision be vacated, and the allegations in paragraphs 9(a), 9(b), and 9(b)(i)-(ii); 10(a), (b), (c), and (d); 11(a), (b), (c), and (d); 12(a), (b), (c), and (d); 13(a) and (b); 14; 15(d), (e), (f), and (g); 16; 17; and 18 be dismissed in their entirety.

Dated: September 18, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

In addition to filing these Exceptions via the NLRB's electronic filing system, we hereby certify that copies have been served this 18th day of September, 2019, by electronic mail, upon:

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