UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

HORSESHOE BOSSIER CITY HOTEL & CASINO'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Administrative Law Judge Robert A. Ringler conducted a hearing in December 2018 and January 2019 regarding five consolidated unfair labor practice charges and the General Counsel's ("GC") Amended Second Consolidated Complaint ("Complaint"). In his July 30, 2019 Decision ("Decision"), the ALJ sustained some of the General Counsel's allegations that Horseshoe Bossier City Hotel & Casino ("Horseshoe," the "Company," or the "Employer) violated Sections 8(a)(1) and (3) of the Act while dismissing others for which the General Counsel had not satisfied his burden. As set forth in more detail below, the ALJ's determinations that Horseshoe violated the Act are wrong. They are contrary to both the record and established Board precedent. Horseshoe's exceptions should be sustained, and the Board should dismiss the allegations in ¶¶ 9(a), 9(b), and 9(b)(i)-(ii); 10, 10(a), (b), (c), and (d); ¶¶ 11, 11(a), (b), (c), and (d); ¶¶ 12, 12(a), (b), (c), and (d); ¶¶ 13, 13(a) and (b); ¶ 14; ¶¶ 15(d), (e), (f), and (g); ¶ 16; ¶ 17; and, ¶ 18 of the Complaint.

The Decision was silent as to ¶ 15(a), and the ALJ dismissed the allegations in ¶¶ 15(b) and (c). Those allegations also should be dismissed.

I. SUMMARY OF ARGUMENT

Section 10 of the Act imposes the burden of proof on the General Counsel. The "burden never shifts, and … the discrediting of any of [the Employer'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.").

The General Counsel did not meet its burden in this case with respect to any of the allegations presented in the Complaint. As set forth below, the ALJ sustained the General

Counsel's allegations by selectively disregarding evidence in the record and when necessary, using speculation and conjecture to fill in the gaps. The ALJ did not base his decision on the "preponderance of the testimony" as required by the Act. 29 U.S.C. § 160(b). He dispensed "his own brand of industrial justice[.]" *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

For example, in sustaining the General Counsel's central allegation – that Horseshoe terminated employee Judy Murduca because she had been involved in the early stages of the United Automobile Worker's organizing drive months earlier – the ALJ both used the wrong formulation of and misapplied the *Wright Line* standard. He held that Horseshoe's alleged general opposition to the organizing drive was sufficient to establish a *prima facie* case despite the fact that Section 8(c) specifically provides that such opposition cannot be a basis for establishing a violation of the Act and even though the General Counsel did not prove any facts which connected Murduca's termination to that opposition.[1] *See Libertyville Toyota*, 360 NLRB 1298, 1306 n. 5 (2014) (then-Member Miscimarra, concurring in part and dissenting in part, explaining that *Wright Line* necessitates a four part showing to establish a *prima facie* case). He then rejected the Company's *Wright Line* defense because, in his personal opinion, the Company could have reached a more "Solomon-like outcome" if it had delayed issuing discipline until after Murduca's preexisting progressive discipline expired.

Had the ALJ applied the correct standard, the allegation should have been dismissed for

[1] In this regard, Horseshoe requests that the Board take this opportunity to clarify that the General Counsel must prove four things in order to establish a *prima facie* case under *Wright Line* and overrule cases to the contrary. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). A *prima facie* showing should require: 1) that the employee engaged in protected concerted activity, 2) that the employer was aware of that activity, 3) that there is a causal connection or nexus between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker, and 4) that the protected activity was a substantial or motivating reason for the employer's action.

failure to state a *prima facie* case because the record contains no evidence that the individuals who made the decision to terminate Murduca possessed animosity towards *her* because she participated in the organizing drive. The facts on which the ALJ relied, *see* Decision at 23, established only that a member of Horseshoe management who was not involved in the decision to terminate Murduca, Roger Dodds, was generally aware of her organizing activity. It did not establish that Jason Williams, the manager who investigated her misconduct and made the decision to terminate her, was aware of the same activity. The record certainly does not establish that Williams harbored animus towards Murduca because of that activity. *See 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).

But even if one assumes that the General Counsel had made a *prima facie* case, the ALJ's decision still constitutes plain error. He made an error of law in characterizing the Employer's *Wright Line* defense as an "affirmative defense" on which the Employer had the burden of proof (Decision at 24), and he excused the General Counsel from proving its case by a preponderance of the evidence as required by Section 10 of the Act. He then made errors of fact when concluding that Horseshoe had not established a legitimate nondiscriminatory reason for Murduca's termination. There was no dispute that at the time of Murduca's termination, she was on a final written warning – the last step in Horseshoe's progressive discipline process. There was no dispute that Murduca, who at the time of the incident was working as a supervisor and overseeing an active craps game on the casino floor, engaged her fellow supervisor Vicki Strickland in a distracting

conversation about black magic spells and then subsequently called Strickland a "witch." GC32. There was no dispute that Williams conducted a full and fair investigation, during which Murduca provided a statement that not only did not dispute the factual accuracy of the foregoing, but also affirmed that she had been treated fairly: "I believe Jason Williams has conducted his approach to this issue with fairness + integrity [sic] and I appreciate his concern for the well being [sic] of his staff." GC21.

The reasoning behind ALJ's determination that Horseshoe subjected Murduca to disparate treatment is meritless. He cites an "informational entry," (R129) issued to Jackie Smith on January 9, 2018 as evidence of "great leniency and benevolen[ce]," and asserts that "there is no evidence that Horseshoe considered this track in Murduca's case." Decision at 14. What the ALJ does not mention, however, is that Murduca received the same informational entry on January 9, 2018 because she was the party with whom Smith was speaking! GC 20; 1335-37. Just as importantly, Horseshoe issued the January 9, 2018 informational entry to Murduca at a time when she was on a Final Written Warning. In other words, the basis for the ALJ's disparate treatment finding both confirms that Murduca was given an additional opportunity under the progressive discipline system and that she did not take advantage of it.

To summarize, when the ALJ sustained the General Counsel's allegation that Horseshoe violated Section 8(a)(3) of the Act when it terminated Murduca, he: 1) applied the wrong standard when determining whether the General Counsel met his burden under *Wright Line*; 2) he impermissibly invoked his own biases, disregarding Murduca's disciplinary history and admitted guilt, because he believed that the Company should have deviated from its progressive discipline system in order to avoid a result he considered "harsh;" 3) he did so even though Board precedent typically characterizes such artificial delays as evidence of pretext, not good faith; 4) ignored the

fact that Murduca's internal appeal challenging her discharge was denied unanimously by a group of three coworkers, including a coworker whom she handpicked, which should have dispelled his belief that the discharge was "harsh" under the circumstances; 5) completely mischaracterized evidence surrounding Smith and Murduca's January 9, 2018 informational entries in order to manufacture "disparate treatment"; and, 6) gave no weight to the fact that *all* of Murduca's prior discipline, including her final written warning, the January informational entry and her negative 2017 performance review, were issued *before* Murduca engaged in organizing activity. The Board should overrule the ALJ and dismiss the allegation.

As set forth in more detail below, the ALJ's other findings were similarly defective, and like the ALJ's determination that Horseshoe violated the Act when it terminated Murduca, they must be overruled. In refusing to recognize that Dual Rate Dealer Supervisors ("DRDSs") are supervisors within Section 2(11) of the Act, the ALJ ignored Murduca's repeated admissions that when functioning as a DSDR she was a "supervisor," ignored that DRDSs, on average, spend 60% of their time working as supervisors, ignored concrete evidence that DRDSs responsibly direct, assign and reward dealers, gave no weight to the fact that DRDSs exercise independent judgment when deciding when to intervene in casino games, and impermissibly manipulated the record by rejecting thirteen documented examples of responsible direction (Respondent Exhibits 41, 43-50, 53-56) as "cumulative."[2]

The ALJ's conclusion that Horseshoe violated Section 8(a)(3) by refusing to consider DRDSs for full-time dealer positions is premised on a fundamental misapplication of Board law. Even if one assumed that the General Counsel made a *prima facie* case on behalf of more than

[2] If the ALJ had, as the facts require, held that Murduca and other DRDS were supervisors under the Act, it would have been an independent basis for dismissing the allegations regarding her discharge, and several alleged 8(a)(1) violations, including her alleged "interrogation."

forty (40) DRDSs by showing that two (2) of those individuals engaged in protected concerted activity, the allegation would still fail. The ALJ mistakenly analyzed the allegation as failure to hire (Decision at 20-21), but that is clearly not the case. The DRDSs were not "applicants" off the street. They were current employees, and there was no dispute that Horseshoe had refused to consider DRDSs for full-time dealer positions for more than 23 years. The allegation should have been considered under the framework used to evaluate whether an employer has made an unlawfully motivated change to employees' terms and conditions of employment. *See, e.g.*, *Pittsburgh Post-Gazette*, 368 NLRB No. 41 at slip. op. 3 (Aug. 29, 2019). Under that analysis, Horseshoe was obligated to refrain from modifying DRDS' employment to address or suppress union activity. Had Horseshoe departed from a longstanding policy, modified the status quo and allowed DRDSs to bid for dealer positions, the General Counsel would have alleged that Horseshoe unlawfully conferred a benefit on DRDSs to suppress the union organizing drive. Put another way, if Horseshoe were to change its policy in the manner required by the Decision, it would have violated the law. The allegation should have been dismissed.

Indeed, ALJ did just that with respect to the allegations in Complaint ¶¶ 12(a), 13(b), 14. There, the ALJ concluded that the Company violated the Act by supposedly promising to give DRDSs the right to bid for full-time dealer positions in March 2018. Decision at 17. The ALJ's reasoning is incoherent. As noted above, if the Company was obligated to consider DRDSs for these positions as alleged above, how could the Company have violated the Act by telling DRDSs that it intended to do so? Just as importantly, the ALJ's decision is not supported by the facts. DRDSs may have *complained* about not being able to bid for full-time dealer positions. But there is no dispute, as noted above, that the Company had not allowed DRDSs to bid for such positions for 23 years. There is also no dispute that Horseshoe's General Manager, Mike Rich, sent a letter

on March 24, 2018 reaffirming that policy. The fact that two witnesses claimed that the matter was vaguely discussed does not prove by the preponderance of the evidence that the Company made an unlawful promise.

The ALJ's findings that the Company violated Section 8(a)(1) by interrogating Murduca, soliciting grievances, making implied promises to remedy such grievances, threatening employees with a loss of days off, loss of PTO, and elimination of the open door policy, creating the impression of surveillance, and unlawful enforcement of its badge policy, should be overruled for similar reasons. They rely on the ALJ's selective reading of the record, his misapplication of precedent, and disregard of undisputed facts.

II. STATEMENT OF THE CASE[3]

In the Decision, the ALJ sustained the General Counsel's allegations that Horseshoe violated Section 8(a)(1) by:

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

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

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

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

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

6. Promising DRDSs the right to bid on full-time dealer jobs, in order to undermine

[3] The Regional Director for Region 15 filed a petition for injunctive relief under Section 10(j) of the Act (the "Petition") in the U.S. District Court for the Western District of Louisiana premised upon the same conduct as alleged in the Complaint. The Petition sought, among other things, Murduca's reinstatement and a cease-and-desist order to prevent further alleged violations. On April 10, 2019, the District Court denied the Petition. *McKinney v. Horseshoe Bossier City Hotel & Casino,* No. 18-1450 (W.D. La. Apr. 10, 2019), ECF No. 40. At page 7 of the ruling denying the Petition, the Court noted that the Region did not demonstrate that either the alleged conduct or alleged consequences of that conduct were "concrete, egregious, or otherwise exceptional."

their Union support.

7. Creating the impression that employees' Union activities were under surveillance.

8. Blaming the union for DRDSs not being permitted to bid on full-time dealer positions.

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

The ALJ also sustained the General Counsel's allegations that Horseshoe violated Section 8(a)(3) by:

10. Refusing to consider DRDSs for full-time dealer positions.

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

The ALJ did not sustain the GC's allegations that Horseshoe violated Section 8(a)(3) in its assigning employees to work on their scheduled Saturdays off or by allowing part-time dealers to bid on full-time dealer positions.

III. STATEMENT OF FACTS

A. OVERVIEW OF HORSESHOE AND ITS TABLE GAMES DEPARTMENT

Horseshoe is a full-service hotel and casino in Bossier City, Louisiana. Horseshoe seeks to "[c]reate memorable experiences, personalize rewards and delight every guest, every Team Member, every time" and to "[c]reate a caring culture so every Team Member, can have fun and be at his or her personal and professional best." R2 at 7. In 2018, Horseshoe employed 1,400 employees, including 185 table games dealers, 42 table games floor supervisors, and 43 DRDSs who split their time between dealing games and supervising games. 28:24-29:3; 993:11-16; 996:11-13.

When supervising games, DRDSs are responsible, in general, for "supervis[ing] the operations of table games on an assigned shift, placing special emphasis on guest service, security of … assets and positive employee motivation and coaching." R1. When dealing, DRDSs "create

an entertainment environment for all guests. Provide courteous, friendly and prompt service in dealing table games." R1.

B. RESPONSIBILITIES OF DUAL RATE DEALER/SUPERVISORS

1. DRDSS Spend the Majority of Their Time Supervising Dealers.

As noted, DRDSs split time between dealing games and supervising games, spending 60% of their time supervising table games dealers and the remaining 40% working in a non-supervisory dealer capacity. R1; 1001:6-1002:2; 1010:15-23; 1011:3-12. When supervising, the DRDS "[s]upervises for the operations of table games on an assigned shift, placing special emphasis on guest service, security of Horseshoe Casino & Hotel's assets, and positive employee motivation and coaching." R1. When supervising, DRDSs are responsible for ensuring that dealers provide excellent customer service, deal games according to game rules, and comply with currency transaction reporting and documentation requirements. 994:14-995:3; 1004:18-24. When supervising, DRDSs enforce the dealers' compliance with table games rules, and DRDSs have the same authority in running games under their supervision as do the full-time floor supervisors. 1010:15-23; 1014:7-1015:1; R24. A "dealer is under the primary authority" of the supervisor on duty for that area—whether that supervisor is a full-time floor supervisor, or a DRDS—and "under no circumstances is the dealer to make any decision on the game;" rather, correcting errors may only be performed by the supervisor on duty. R24 at X.c.2; *see also* R25 a X.g.2; R26 at X.q.1.[4]

2. When Supervising Dealers, DRDSS Exercise Independent Judgment and Discretion by Identifying and Correcting Dealers' Mistakes, Resolving Guest Disputes, and Issuing Instructions to Dealers.

Just like full-time floor supervisors, DRDSs are responsible for identifying dealer mistakes

[4] Evidence of DRDSs enforcing dealers' compliance with Horseshoe's customer service standards was excluded by the ALJ. *See* R46 (dealer reporting that when the DRDS "was my supervisor … she was nitpicking/critiquing every hand I dealt on a live game … by her being my supervisor, I respectfully accommodated everything she asked and requested to be done.") Horseshoe submits that the ALJ's ruling to exclude this, and other exhibits, was prejudicial error.

and training dealers on how to not repeat those mistakes. 1020:20-1021:12. While dealers are responsible for only their own individual performance, when supervising, DRDSs are responsible for determining whether a mistake has been made and either correcting dealers' performance problems on the spot or reporting the problem, whichever is appropriate as determined by the DRDS in his or her supervisory capacity. 1016:4-1018:2. Although there are "highly-detailed game rules, policies and procedures" as noted by the ALJ (Decision at 23:1-5), it is the dealers (not the DRDSs) that are directly responsible for following those highly-detailed game rules and procedures, and it does not follow that DRDSs are therefore "micromanaged" in executing their supervisory duties and making sure dealers follow those rules. When supervising, DRDSs use their own judgment to decide whether to either handle an issue on their own, request that the Surveillance department review video of an incident to obtain more information, or escalate a situation to management. 1048:13-1049:19. There are applicable gaming rules, regulations and policies for certain common types of issues, but there are not pre-determined procedures spelling out specifically all of the dealer mistakes a DRDS is to correct on the fly versus which ones a DRDS is to instead document and report. *Id.*; 1014: 7-1015:1.

When there is a dispute with a guest, just like full-time floor supervisors, DRDS use independent judgement and discretion to decide whether to pay out customers' winnings on a bet—including decisions to deviate from the rules and pay "winnings" to which, under game rules, the customer would not be entitled. 1030:20-1032:11. DRDS do not obtain manager approval before resolving customer disputes; rather, they must "look at the big picture" and make "a business decision." 1030:15-1032:1. Dealers do not perform this function.

Contrary to some of the GC's witnesses' vague denials of having the authority or ability to exercise judgment in performing their supervisory duties, the record contains multiple specific

examples of DRDSs using independent judgment and discretion in ensuring compliance with table games policies and procedures and resolving disputes that arise on live games. 601:2-603:4.

For example, DRDS Angela Dailey resolved a dispute and gave instructions to a dealer to credit a customer's buy in at a specific amount. 1060:3-1061:7. When the dealer continued to debate the matter with Dailey rather than following her instructions, the dealer received a Written Warning for his "insubordinat[ion]" to Dailey because, as his supervisor, she "has the final say so on it." 1060:3-1061:7; R91. Dailey did not consult a detailed manual for instructions on how to handle the situation. Another example is when DRDS Judy Murduca initiated disciplinary action with dealer Brenda Walker when Walker refused to follow Murduca's instructions while Murduca was working as a supervisor. 1058:4-1059:7; R57. A third example is when Murduca observed a card on the floor of a game, Murduca investigated and called a "dead hand," ending the game. R42; 1050:1-19. Murduca directed the dealer to "give [the players] back their money." R42. Rather than consulting a detailed manual for instructions on what to do in this situation, Murduca exercised her independent judgment and discretion. Dealers do not perform any of these functions.

3. DRDSS Assign Dealers To And Release Them From Table Games.

DRDSs have the authority to and do effectively recommend which dealers are assigned to specific table games based on DRDSs' knowledge of dealers' experience, skill sets, and aptitudes. 1035:7-1036:16. "Every weekend," if a less experienced dealer has been assigned by the "pencil" to a high-volume table game, the DRDS assesses the dealer's "skill set" and recommends, if necessary, that Horseshoe assign a stronger dealer to the table. 1039:12-1040:25; 1067:25-1069:5. Horseshoe accepts the DRDS' recommendations without independent investigation. 1039:12-1040:25 ("It's solely up to their discretion. They're responsible for that game. Therefore, when they make the recommendation, it's a done deal.") For example, DRDS Natasha Rogers recommended that dealer Gregory Field needed additional training in the Mini-Bacc game.

1035:10-25. Management agreed and decided to "get him back in our class and train him on Baccarat again." *Id.* GC witness DRDS Roger Patton admitted that DRDS will, at times, have a dealer moved from a game depending on considerations such as the DRDS' assessment based on their observations of guest issues or dealers' mistakes. 468:17-469:2; 472:14-20. Dealers do not perform these functions.

DRDS also assign dealers to and release dealers from games daily by raising and lowering betting limits to open and close tables. 1063:2-1066:16. If there are multiple tables open with only one or two players at each table, when on duty as supervisors, DRDS exercise their judgment and discretion to adjust betting limits to consolidate the players at one or two tables, and close the others. *Id.*; 1067:1-24; GC41 (showing DRDS Tawanna Sumbler exercising her authority to raise the betting limits on three tables, thereby closing one of them). When the DRDSs consolidate and close tables, they "consolidate" labor" as well by sending dealers home and reducing Horseshoe's labor costs. 1063:2-1066:18. DRDSs do this regularly and on their own initiative to reduce the Company's overtime expenditures. *Id.* (["my supervisors know what we have to do, they know the schedules. So they'll make the decisions and raise these limits and consolidate play."].) A dealer "can't initiate that on their own. . . A dealer just has to deal their game until told otherwise." *Id.*

4. DRDS Protect The Company's Assets.

As supervisors, DRDSs play a central role in protecting Horseshoe's assets from potential cheating or theft by customers and employees. DRDS must "remain[] alert to any unusual or questionable activities being displayed by any Table Games employee or gaming guest. . . .". GC14. When a DRDS working as a supervisor observes a customer engaged in activities that, in the DRDS' judgment, are indicators of cheating, the DRDS will direct surveillance personnel to review the video footage. 1048:13-1049:19. "Then surveillance will investigate it and tell him, yes, they did, or no, they didn't." The DRDS has to make the decision to direct surveillance

personnel to examine video footage based on his or her own judgment. *Id*.

DRDSs also protect Horseshoe's assets with respect to potential theft. 1033:6-1034:1. For example, when a DRDS observed a dealer placing chips into her blouse, the DRDS reported the incident to a manager and, based on the DRDS' recommendation, an investigation was commenced. *Id.* As Mr. Dodds explained, the DRDS:

> has to make the decision; is this something that I'll just monitor and see if it happens again? Is it something that I need to make the manager aware of? Do I need to make surveillance aware of it, or is it something that might be detrimental in the long-term? So do I have a compromised game, whereas somebody switched cards or something. They have to make the determination.

Id.

Another example is when DRDS Murduca initiated an investigation when a dealer under Murduca's supervision failed to "clear his hands," which means showing surveillance cameras that his or her hands are empty before touching their bodies. 422:19-423:7. On June 26 and 28, 2011, Murduca reported a dealer for failing to clear his hands numerous times over a thirty-minute period. R37, 38. Murduca wrote that "accountability is needed so employees can own up to their infractions." R38. She felt it was important to report the employee "in the interest of asset protection." 422:19-423:7. Dealers, on the other hand, are responsible only for their own individual actions; they are not responsible for ensuring other dealers comply with procedures and protocols related to asset protection.

5. Traditional Secondary Indicia Of Supervisor Status.

When supervising, DRDSs supervise anywhere from three to 10 dealers at a time. 994:14-995:3. While dealers wear a uniform consisting of a company-issued dealer shirt and vest along with pants, when supervising, DRDS wear business attire consistent with the appearance expectations for floor supervisors. 1004:25-1005:23. Dealers are paid an hourly rate of $4.50,

and they also receive tips, referred to as "tokes." 1008:5-6. When supervising, DRDS are paid an hourly rate ranging from $21 to $26 and they do not receive tokes like the non-supervisory dealers receive.

When supervising, DRDS are regarded by other employees as supervisors. *See e.g.*, 597:21-600:1-3 (dealer Virginia Burger testifying that dual rates "direct my work" when working as supervisors, "They are over me. They are my supervisor" … "And I have to do what they say as my supervisor."); 148:9-18 (dealer Lisa Rios acknowledging that a DRDS is her "supervisor"). The Decision mischaracterizes Rios' testimony on this point, stating (without citing to specific transcript pages) that Rios "credibly and adamantly testified that her work is directed by the Floor Supervisors, Pencils, Assistant Floor Managers and Shift Managers. She denied being supervised by DRDs, whom she labels as her peers." Decision at 4:5-10. Rios' testimony, which is at pages 97-168, does not say this. In fact, Rios specifically acknowledged the supervisory function of DRDS:

> Q Angela Daly is a dual rate dealer supervisor, correct?
>
> A Yes, sir.
>
> Q Has she supervised you?
>
> A Yes.
>
> Q How often?
>
> A Well, whenever a dual rate is pulled to supervise, it's usually because they're short supervisors. So Angela may supervise me maybe once every two weeks maybe or something like that. Because, you know, we -- she will be in separate pits, too, so we may not be all in the same pit.

148:9-18.

A relevant exhibit further demonstrating that DRDS are perceived as supervisors was improperly excluded by the ALJ. *See* R46 (dealer reporting that when Murduca "was my

supervisor … she was nitpicking/critiquing every hand I dealt on a live game … by her being my supervisor, I respectfully accommodated everything she asked and requested to be done.").

C. RELEVANT POLICIES AND PROCEDURES.

1. Conduct Standards

Horseshoe's employment policies are in the Team Member Handbook, as amended by an October 2016 Team Member Handbook Insert (collectively, the "Handbook"), which all employees receive. R2; 768:1-769:7. The Handbook's Rules of the Road ("Rules") contain employee conduct standards. Rules that are relevant in this case are as follows:

Rule 2 requires employees to demonstrate professionalism in workplace interactions:

> Team Members are expected to use appropriate business decorum when communicating with others, generally comporting themselves with general notions of civility and decorum. Team Member must demonstrate courtesy, friendliness, and professional language/tone/manner/actions with guests and vendors. Team Members will not use language that is vulgar, patently offensive, or otherwise harassing of people on any legally recognized protected basis in violation of the Anti-Harassment policy.

R2, Handbook Insert at 3.

Rule 3 requires employees to cooperate in workplace investigations;

> Team Members will be honest and forthcoming in all communications, written and verbal, created or sent as part of a Team Member's work responsibilities; this includes any Company documents, communication, and participation in investigations into workplace misconduct. Team Members will not make maliciously false statements or omit pertinent information in the performance of their work responsibilities, particularly regarding investigations into workplace misconduct.

Id.

2. Name Badge Policy

Louisiana law requires every casino to be licensed. La. Admin. Code tit. 42 § 2107 (2018). As a condition of licensure, casinos must comply with Louisiana's Gaming Regulations, which are enforced by Louisiana's State Police Gaming Enforcement Division in conjunction with the

Louisiana Gaming Control Board. *Id*. at § 2112. These regulations require casinos "to furnish and maintain all necessary equipment for the production and issuance of gaming employee identification/permit badges." *Id*. at § 2923. "Every gaming Employee," in turn, "shall keep his employee permit identification badge on his person and displayed at all times when on licensed gaming premises." *Id*. at § 2165 ("Display of Gaming Identification Badge"). Failure to comply with these requirements subjects the casino to a ***$500 penalty per violation***. *Id*. at §§ 2165, 2325. Continued violations of state gaming laws may result in the loss of the facility's gaming license. *Id.* at § 2325. The consequences of Horseshoe's losing its ability to require employees to display a name badge free of obstructions cannot be understated.

To ensure compliance with state law and its very ability to operate, Horseshoe – like other employers in the industry – requires that all employees display their name badges at all times and keep them free from obstruction. The policy provides in full:

> Name badges must be worn at all times while on duty (on upper left side of shirt/blouse/jacket unless otherwise specified in department). Name badges/tags and badge holders must be clearly visible and unaltered; nothing may be attached to or affixed to name badge/tags or badge holders unless authorized by the Company or allowed by law.

R2 at 93. Horseshoe maintains no policy otherwise limiting the locations where employees can wear insignia. Aside from the several square inches the name badge occupies, employees can wear insignia anywhere else they choose.

The State of Louisiana provides Horseshoe with its employee name badges, which employees insert into a Company-issued plastic sleeve. R120; 852:4-11; 854:17-19. In addition to state law compliance, Horseshoe prevents employees from affixing pins to their name badges for "game protection surveillance." 852:4-22. "[I]f there's been a theft or an issue or a discrepancy with a player or allegations made," the Company needs to be able to identify the employees involved through its casino surveillance cameras, which are installed in the ceiling. *Id.* "You have

to clearly identify who the employee is that's standing at the game or interacting with whatever the situation is at hand." 853:6-9. In addition, affixing pins to the name badge "leaves a hole in the plastic," damaging Company property and creating an "unsightly" appearance. 855:7-856:12.

3. Progressive Discipline Policy

Horseshoe enforces its conduct standards through a progressive discipline policy stated in its Team Member Handbook:

> The Company typically uses the following four-step progressive discipline process:
>
> First Step – Documented Coaching
> Second Step – Written Warning
> Third Step – Final Written Warning
> Fourth Step – Separation of Employment

R2 at 27. Discipline remains active for 12 months. 868:6-14. An employee who again violates policy within 12 months of his or her most recent disciplinary action progresses to the next step. 869:5-870:16. An employee's disciplinary record resets when and if the employee goes 12 months without incurring further discipline. 868:6-14. There are three separate categories of discipline: "Attendance, Performance/Policy, and Variances (money-handling)." Discipline proceeds down a separate progressive track for each of three types of infractions. 864:9-865:25.

4. Board of Review Policy

Horseshoe is committed to "fair treatment" in disciplinary matters. R2 at 71. Employees who believe that "job-related performance issues have not been resolved through the department supervisor, manager, director, or Human Resources" may request a Board of Review to appeal disciplinary action, including separation of employment. *Id.* Board of Review panels consist of one Team Member selected by the employee requesting the Board of Review, an impartial manager from a different department, and a Human Resources representative who was not involved in the investigation or discipline at issue. *Id.* at 72. "The Board's decision is final and

cannot be appealed or reversed by anyone in the Company." *Id.*

5. Horseshoe's Annual Employee Opinion Survey

For many years, Horseshoe has conducted an annual Employee Opinion Survey ("EOS") whereby employees provide feedback on areas for improvement. R2 at 12; 725:1-15; 814:23-25. "Conducted at least once a year, this survey enables Team Members to provide valuable, anonymous feedback about the workplace." R2 at 12. The survey takes place each fall (725:19-22), then after survey results and comments are compiled by the survey administrator and provided to Horseshoe, department managers and human resources review the results with employees in department meetings and "ask specifically, how can we do better? What can we do to improve?" 814:5-22. Management then meets to decide upon "what things will be done holistically for the property, that affects the vast majority of employees," and changes Horseshoe will implement for individual departments. 827:2-12. In the first calendar quarter of the year after the fall survey, Horseshoe holds all-employee meetings to "recap for the employees the various things that they asked for, and then what [Horseshoe] did as a result of what they asked." 814:5-2. This practice has been in effect since the survey's inception in 2003. 815:4-7; 822:21-25.

In 2016, based on the 2015 survey, Horseshoe hired additional staff, bought new and repaired existing equipment, made an additional floor of the parking garage available for employees' use, and held more employee events. R19, R20. In 2017, based on the 2016 survey, Horseshoe hired and promoted additional staff, purchased new equipment, improved training programs, renovated facilities, and offered cake or free lunch in one of the property's restaurants on employees' birthdays. 824:2-827:1.

D. THE FALL 2017 EOS

Horseshoe followed this same process for 2017 EOS results, which were received in early December 2017. 833:11-18. The Table Games department's scores were low, and a major

complaint was that employees felt overworked because the department was understaffed. Among myriad concerns expressed by employees on the survey, DRDS complained about spending more time supervising than dealing, which they disliked because they receive tips while dealing but not when supervising. 835:13-836:11; 1109:2-3; R131. In December 2017, the property's general manager, Mike Rich, instructed Director of Operations Roger Dodds to quickly remedy what problems he could, and to develop a plan to get DRDS more time dealing. 832:9-834:2.

In tackling this assignment, Dodds spoke with a manager at another casino, Harrah's New Orleans (also affiliated with the same parent company as Horseshoe) to learn how they handle similar issues. 845:8-849:23; 1096:23-1097:18. Dodds learned that Harrah's New Orleans uses a points-based merit system for awarding DRDSs dealing time, although Dodds did not believe such a system was feasible for Horseshoe because Horseshoe was already short-staffed on supervisors, and Horseshoe's long-standing practice was to assign DRDSs dealing time based on seniority. 1109:23-1111:20. Dodds also grappled with the concern that, if DRDSs spent more time dealing, Horseshoe would be further shorthanded on supervisors, and this could have a ripple effect by causing other supervisors and managers to want to deal instead of bearing the brunt of even more supervisory work. *Id.*

On January 16, 2018, Dodds met with table games employees to discuss EOS results, as he had done in past years, and employees reiterated their complaints indicated on the survey. 1096:4-1097:4; 1104:1-1105:4; 1106:20-1107:23. Among the issues raised was DRDSs' desire for less time supervising and more time dealing. An employee asked Dodds if Horseshoe would consider allowing DRDSs to go back to being full-time dealers, and Dodds replied that, although Horseshoe was going to look at some things moving forward, dual rates had never been able to go back to dealing full-time and, as of right now, he did not see it happening. 1111:21–1113:1.

E. THE UNION ORGANIZING DRIVE

1. Horseshoe Learned About Organizing Activities on February 27, 2018.

Horseshoe first learned of the UAW's organizing drive directed at dealers and DRDSs (the only two groups of employees who were subjects of organizing activity) on February 27, 2018, when three employees reported to Human Resources Vice President Ashley Wade that union flyers were being circulated. 769:22-771:7. The employees said they were "upset because we are getting handed this information and we don't want unions." *Id.* Before that date, Horseshoe was unaware of any organizing activity. 771:23-772:1.

2. Horseshoe Promptly Sought Advice From Professionals.

Wade consulted with Rich, who directed Wade to "make sure that we pulled together the resources to train our employees, particularly our management team, because … he wanted to make sure we knew the rules" under the NLRA. 773:1-19. Horseshoe sought assistance from Charles Lee in the legal department of Horseshoe's corporate parent, and Lee conducted training with Rich, Dodds, other managers, and full-time table games supervisors. 773:16-21; 774:22-775:15. Horseshoe did not include DRDSd in the management training because it was "unsure whether or not they would be part of the union organizing campaign" given their dual roles. 775:23-776:5. Lee trained the managers on the "TIPS" rule for union organizing. Management cannot: "threaten" employees for engaging in union activity; "interrogate" employees about their union activities; "promise' improvements to dissuade union organizing; or "spy" on employees union activities. 776:6-777:22. Lee also explained that management cannot discriminate against employees based on their union activities. *Id.* All of the managers and supervisors at issue in the Complaint were trained on TIPS. *Id.*

Because Horseshoe was "getting a lot of questions from our employees," such as "what does [the organizing] mean, do [employees] have to pay dues … questions we didn't have answers

to," Horseshoe engaged a trainer, Charles Ahearn, to lead meetings to educate dealers and DRDSs about employees' rights under the NLRA. GC 23; 777:21-778:9. During these meetings, Ahearn referred to Board's publication, "Basic Guide to the National Labor Relations Act," and illustrated points using a flip chart. 808:10-809:16; R8, R121. Horseshoe "felt it important to have professionals come [to] our company and actually explain what's going on, and what the law and rules are surrounding union campaigns." *Id.* These meetings were held on March 1 and 2. GC23. Each meeting followed the same format, starting with Rich explaining the purpose of the meeting and introducing Ahearn, who went over the information. 778:18-25. "The same message was portrayed at every meeting." 779:3-780:24.

At each meeting, Rich stated that the purpose of meeting was to explain employees' unionization rights under the NLRA and to answer employees' questions. *Id.* Rich noted that, currently, employees may request exceptions to Horseshoe's PTO policy for emergency situations such as a death in the family. *Id.* Rich explained that if employees elected a union to represent them, the collective bargaining agreement would "dictate whether or not those type[s] of exceptions can be made." 781:3-782:4. Contrary to the ALJ's findings (Decision at 8:5-10, 20-30; 17: 5-15), Rich did not "threaten" loss of the open door policy on March 1 or "threaten" on March 2 that employees would no longer be permitted to ask for a last-minute day off. 781:3-782:4. The ALJ credited certain GC witnesses' accounts of the meetings while failing to consider the credible testimony from Wade—who was the only witness who attended all of these meetings—that rebutted their testimony and claims.

F. MURDUCA'S EMPLOYMENT AND DISCHARGE

1. Murduca's Disciplinary And Performance History

Judy Murduca was employed as a DRDS. 214:1-2. In December 2015, Murduca was issued a Documented Coaching for violating employee parking policies by parking in a prohibited

area. R82. Murduca was warned to "adhere to policy" and that future violations would lead to "progressive discipline up to and including separation of employment." *Id.*

In August 2016, Casino Operations Manager Jason Williams issued Murduca a Written Warning after an incident where Murduca was engaged in conversation with a co-worker and was not paying attention to performing her duties. R83. Murduca's inattention to her duties caused her to take customers' bets as though the customers had lost when, in fact, Murduca should have paid the customers out over $800. R83; 1327:20-1331:24.

On April 17, 2017, Williams issued Murduca a Final Written Warning for her rude behavior to a co-worker, specifically, raising her voice in front of customers and other employees. GC19. Murduca's conduct violated the rule requiring employees to demonstrate professionalism and courtesy towards guests and coworkers. *Id.*; R2 at 27. Again, Murduca was warned that "[f]urther infractions will … result in further progressive discipline up to and including separation of employment." GC19.

In November 2017, Murduca ran for a seat on the toke committee, a peer-elected position, but Murduca's peers declined to select her for this committee.[5] 1171:25-1172:7. For 2017, Murduca received the lowest possible performance rating, Development Opportunity. 886:12-887:9. Murduca was the only DRDS to receive this low performance rating in 2017, which was her most recent performance rating at the time of her termination. 890:24-891:1; 894:3-6.

On January 9, 2018, Murduca again had to be counseled about her interactions with co-workers. GC20; 1331:22-1336:14. Specifically, when DRDS Jackie Smith asked Murduca how many supervising hours Murduca has, Murduca did not answer, instead replying "more than you."

[5] "Tokes" are tips from customers, which are pooled then allocated among table games employees. Accounting for and allocation of tokes are performed by the toke committee. 653:1-13; 1009:1-110:1. Being elected to the toke committee is an expression of peers' trust.

When Murduca saw Smith talking to a supervisor and feared Smith was reporting Murduca's discourteous remark, Murduca made a "harassment" complaint against Smith. Casino Operations Manager Jason Williams investigated the incident. Both Murduca and Smith accused the other of misconduct, and there were no independent witnesses. Because Horseshoe could not conclusively determine which one was at fault for the disruptive squabble, both Smith and Murduca were issued non-disciplinary informational entries. GC20; R129. Murduca was reminded "it is expected that you address and resolve issues in a professional manner" and that "[i]f there are other instances in which a supervisor does not demonstrate the ability to communicate within the expectations of their job descriptions, progressive discipline up to and including separation of employment will be administered." Both Smith and Murduca were also given copies of the policy prohibiting harassment and the DRDS job description to ensure they understood expectations. *Id.*

2. The Incident That Resulted In Murduca's Termination

On April 2, 2018, Murduca and floor supervisor Vickie Strickland were both supervising a game of craps when Murduca observed that Strickland seemed irritated with Murduca and, according to Murduca, declined to answer Murduca's questions about customers. Although Murduca was fully aware that Strickland already appeared to be irritated with her, in front of other employees and customers (373:6-35), out of the blue, Murduca proceeded to ask Strickland if she was from South Louisiana and whether she believed in "spells."[6] Strickland said she was from Southern Louisiana and asked Murduca for a piece of her hair. 373:1-374:10. Murduca asked floor supervisor Tammy Pierce to check for a piece of hair on Murduca's back. Murduca then plucked a hair from her head and gave it to Strickland, who put the hair in her pocket. 376:13-23. Murduca said that, in response to a quizzical look from Pierce, Murduca jokingly said Strickland

[6] Murduca's statement was interpreted as referring to voodoo, or spiritual or religious beliefs and stereotyping people based on their places of origin.

is "going to help me win the Powerball with that hair." 377:1-4. *See also* 247:8-248-11. A short time later, Murduca told another employee, Sandy Jones, that Strickland asked for a piece of her hair. When Jones told Murduca she should not give Strickland the hair, and Murduca replied "…my Lord and Savior is bigger than anything" (apparently another reference to religion and "spells"). 377:11-378:11.

Murduca testified that, the next day, April 3, 3018, Strickland asked her "has anything bad happened to you yet?" and said "it's coming," and Murduca called Strickland a "witch." 378:12-379:22. When Strickland got up from her chair and left the area after being called a witch by Murduca, Murduca became worried that Strickland was going to report Murduca's conduct to Williams, a worry that escalated when Murduca saw Williams and Strickland talking a short time later. 382:3-19. Murduca further testified that, on that same date, Strickland had "made a very hostile mean face at" Murduca, and that Strickland, who appeared to be aggravated with Murduca, told Murduca (who is from New Jersey) "all your kinfolk from Jersey act like assholes." 379:18 – 381:23.

Keenly aware that she had previous disciplinary action for similar behavior, including an active final written warning, Murduca panicked that Strickland was reporting her behavior to management. R75 (Murduca's statement which was dated April 3, 2018—but which she refused to provide to Horseshoe until after her termination—stating "Jason doesn't like me, I say that bc he has issued me two previous write-ups and I am sitting on a final written at this point. I immediately surmise Vicki telling him I called her a witch.")

Murduca said that at that same time, she was being "further harassed" by supervisors Sonya Seely and Pierce,[7] so she "cracked," began crying, and went to talk with supervisor Monica

[7] Murduca's conflicts with Seely and Pierce did not factor into Horseshoe's decision to terminate Murduca's employment. However, Murduca's own description of those incidents demonstrates

Antwine. 383:2-23. Williams joined Murduca and Antwine in the shift office and learned that Murduca reported that Strickland was "being mean" to her following a conversation about spells and Strickland being from south Louisiana. 395:3-15; 1311:4-312:11.

3. Horseshoe's Investigation And Discharge Of Murduca

Williams assured Murduca he would investigate her concern and proceeded to obtain written statements from Antwine and Strickland. 1312:15-25; GC 32, 33. What was clear was that Murduca had initiated a conversation on the casino floor, while she and Strickland were supposed to be paying attention to active games under their supervision, that the conversation involved an association between a place of origin and a religion, and that Murduca had called Strickland a witch. 1314:20-1319:5. Williams consulted with Employee Relations Supervisor Darlene Overton about whether Strickland and/or Murduca had violated policy, and Overton advised Williams to obtain a written statement from Murduca describing the incident "[b]ecause she alleged that there was some type of misconduct in the workplace, and she would be the one to be able to provide the detail in order for an investigation to occur to determine whether that misconduct occurred." 1382:22-1383:5. Williams also reviewed surveillance video of the interaction and, although the footage does not have audio, confirmed that Murduca's initiation of the conversation occurred in an area that was within earshot of customers. *Id.*, 1319:2-7.

On April 4, Williams met with Murduca, advised her that she may have violated policy by initiating an inappropriate casino floor conversation and directed her to provide a written statement of what occurred. GC21; 1316:22-1317:17. Murduca, realizing that her attempt to preemptively

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that, rather than her being the victim of purported "harassment," Murduca simply could not get along with others. Murduca's testimony about the incident is at 244:4-245:34, and her written statement is R74. Murduca's complained that she did not like the work area assignment she was given because it was a "high volume, high workload" area and asserted that supervisor Seely favored another employee, Van Harvey.

place blame elsewhere may be backfiring, refused to cooperate in the investigation or provide the requested statement, instead writing that Williams had conducted a thorough investigation and "I don't want to write a statement about this incident." *Id.*; GC21. Williams then reviewed Murduca's written statement with Overton and discussed the investigation's findings. 1318:3-1322-18.

Williams and Overton concluded that Murduca had violated conduct standards by: (1) initiating an inappropriate conversation in which Murduca made a stereotypical association between religion and place of origin; (2) in a conversation in front of guests and other employees; (3) that the conversation distracted Murduca and Strickland from the live action on the games that they were responsible for supervising; and, (4) Murduca refused to participate in Horseshoe's investigation by failing to provide a statement describing the incident she reported. 1385:18-1387:12. Overton recommended that Williams proceed to the next step of progressive discipline with both Murduca and Strickland. 1393:15-18. As both Williams and Overton credibly testified, neither Williams nor Overton was even aware of Murduca's union activity at that time. 1337:12-14; 1350:24-1351:2; 1395:16-18. Overton ran her recommendation by Wade and Employee Relations Specialist Tiffany Beauchamp, and they both concurred with Overton's recommendation to proceed to the next level of discipline with both Murduca and Strickland. 1394:1-4.

Because Strickland had no prior active discipline, she was issued the first progressive discipline step, which is a Documented Coaching. R88; 1387:22-1388:5. Murduca, however, was on an active Final Written Warning (plus she was previously rated a poor performer and had an Informational Entry for similar behavior from January 2018), and Williams has never issued two

final written warnings in a 12-month period to the same employee or DRDS.[8] 193:7-10. As a result, Horseshoe proceeded to the next step in the progressive discipline process, and Murduca was discharged. 1337:2-14; GC 21.

4. The Board Of Review Upheld Murduca's Discharge.

On April 18, 2018, at Murduca's request, a Board of Review panel reviewed her termination. 1398:21-1399:2. The panel was comprised of DRDS Derrick Grant as Murduca's chosen peer representative, marketing manager Andrea Evans as the outside management representative, and Jamie Davis from Human Resources. R102, R127. Neither Evans nor Davis had knowledge of the events underlying Murduca's termination. 1403:9-1404:24. In the previous ten years, Evans had not interacted with Murduca aside from greeting her in passing. 1431:3-8.

Overton assembled a packet of materials for the board to review consisting of Murduca's written statements (including those she submitted post-termination as part of her request for a Board of Review), the incident reports collected during Williams' and Overton's investigation, Murduca's active prior discipline, and her acknowledgements of having reviewed Horseshoe's policies. R102. Before the hearing, the panel members reviewed the packet. 1438:16-18.

Murduca and Williams presented to the panel members separately. Murduca described her conversation with Strickland on the casino floor and that she felt mistreated when supervisor Seely asked her to deal roulette. 1434:14-1437:22. Williams then presented Horseshoe's reasons for Murduca's discharge. *Id.* The Board of Review, including Murduca's chosen representative, voted unanimously to uphold her termination. 874:23-875:2.

G. HORSESHOE ENFORCED ITS LAWFUL NAME BADGE POLICY

As noted, Horseshoe's name badge policy requires all personnel to display their name

[8] Indeed, managers themselves are subject to discipline when Horseshoe becomes aware that they did not follow the progressive discipline policy with subordinate employees. R63; 867:20-868:5.

badges free of obstruction to comply with Louisiana gaming control regulations. R2 at 93 ("Name badges/tags and badge holders must be clearly visible and unaltered; nothing may be attached to or affixed to name badge/tags or badge holders unless authorized by the Company or allowed by law.")

Horseshoe enforced the policy in March 2018 without regard to Union activity. On March 24, 2018, Casino Operations Shift Manager James LaFleur and Dodds asked a dealer, Lisa Rios, to remove a UAW-related pin from her name badge that was affixed with a metal pin piercing the Company-issued plastic sleeve. 1446:23-1450:1. She was not prohibited from wearing the pin altogether; rather, their instruction was limited to the request that she remove the pin from her badge. *Id*.

After March 24, employees began affixing non-union-related, American flag pins to their name badges. Horseshoe enforced its policy in these instances as well. In late March, LaFleur asked Rios, as well as a supervisor, Amber Lee, to remove flag pins from their badges. *Id*. Graveyard Shift Manager Walter Garrett also instructed two dealers, John Erinstein and Jason Terry, to remove flag pins from their badges. *Id*. None of the employees or supervisors were disciplined for wearing union- or non-union-related pins. 1449:21-1450:10. Prior to these instances of enforcing the policy in March and April 2018, Horseshoe had not enforced the policy for the reasons that employees had not previously affixed pins to their badge or managers did not notice the pins. *Id*. To the extent other employees wore pins on their badges during or after March or April and were not asked to remove them, the reason is the same. "We enforce[] it as it's brought to our attention." *Id*.[9] Employees were on notice from the Handbook's name badge policy

[9] Although the General Counsel introduced a picture of dealer Karl Metzler wearing an American flag pin affixed to his badge, the record contains no evidence that any managers or supervisors actually saw Metzler wearing the pin. 1450:21-1451:3.

that they could wear pins or buttons anywhere else on their uniform.

IV. STANDARD OF REVIEW AND WITNESS CREDIBILITY

The General Counsel bears the burden of establishing each element of the contentions that the employer violated the Act, and "… the discrediting of any of [an employer'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."). The GC bears "the burden of proving the elements of an unfair labor practice, which means that it bears the burden of persuasion as well as of production." *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712 (2001) citing the Administrative Procedure Act, 5 USC § 556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 US 267, 276-278 (1994).

The Board is not bound by the ALJ's findings of fact or conclusions of law; rather, the Board may make its own determinations based upon the evidence, including credited testimony. 29 USCS § 160(c); *Loomis Courier Service, Inc. v. NLRB*, 595 F.2d 491, 495 (1979). It is well established that the Board will not overrule credibility resolutions unless the clear preponderance of all the relevant evidence is convincing that they are incorrect. *See, e.g., Daikichi Sushi*, 335 NLRB 622, 623 (2001); *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). This principle is based on the fact that the ALJ is in the unique position to evaluate witness demeanor and behavior. However, in situations where credibility does not depend on such personalized observations, and instead depends on a general review of the plausibility of witness testimony, that principle does not apply. As the Board has explained "an Administrative Law Judge cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by

uttering the magic word 'demeanor.'" *Permaneer Corp.*, 214 NLRB 367, 368-69 (1974). Thus, an ALJ's insufficiently explained or biased credibility determinations are not impervious and should be disregarded by the Board. *Int'l Longshoremen's Ass'n*, 2018 NLRB LEXIS 97 (2018).

The ALJ's credited GC witnesses Murduca, Castillo, Rios, Patton, and Sumner based on "strong demeanor." But the detailed observations supporting such a claim are not set forth in the record or in the Decision. More importantly, the ALJ's disregard for Dodds' testimony of what was said during meetings with employees was not supported by the record. The ALJ simply conclusively stated that GC's witnesses were "credible…with strong demeanors" while stating incorrectly that "Dodds offered a general denial and very little detail." Decision, at 7:25-40. In fact, Dodds' gave detailed accounts of the employee meetings, and it is unclear why the ALJ chose to disregard Dodd's testimony. 1137-1157; 1163-1168.

Dodds' testimony was credible because it was specific, accurate, and not filled with overstatements and guesses. The GC's cross-examination of Dodds did not undermine the credibility of his testimony in any way. Rather, Dodds' testimony was consistent on both direct and cross-examination, which is one of the hallmarks of a credible witness. Dodds answered questions readily and with no apparent efforts to embellish or slant, was appropriately consistent in his answers on direct and cross-examination, and his testimony was consistent with Wade's. *See Gestamp S.C., LLC*, 357 NLRB 1563 (2011) (crediting witness whose testimony on cross and direct examination was consistent). At Decision page 2:15-20, the ALJ even specifically referred to Wade's testimony on another point as credible.

The ALJ further stated that Dodds "was also repeatedly led during his direct examination, which deeply undercut his credibility." This makes no sense, particularly in this context. First, no objections were asserted on the grounds that these questions were "leading." More importantly,

the questions posed by Horseshoe's counsel at the pages cited by the ALJ (1158-1162) were posed only ***after*** Dodds' recollection had been completely exhausted (987-1157), which is permitted under evidentiary rules, and for the specific purpose of refuting previous false testimony from the GC's witness who claimed Dodds made very specific statements that he did not make. For example:

> Q. Did you say anything about the Company having to put changes on hold because of the union drive?
>
> A. No.
> …
>
> Q. Did you state that you knew that the Union only needed 46 more cards or votes?
>
> A. No.

1160:1-3; 19-21. How else can a witness be expected to refute claims that he said something he did not say unless he is specifically asked whether he made those statements? Further undermining this purported basis for finding Dodds' testimony not credible is the fact that, at one point in the hearing, the ALJ actually specifically instructed counsel for the GC to "lead" one of the GC's witnesses on direct examination. 459:4-6. Further, the ALJ overruled Horseshoe's objections to counsel for the GC asking his witness leading questions on direct examination. 460:15-16; 470:23-24. Thus, the ALJ's stated basis for failing to credit Dodd's testimony cannot be sustained.

V. ARGUMENT

A. HORSESHOE'S DUAL RATE DEALER/SUPERVISORS ARE STATUTORY SUPERVISORS AND/OR MANAGERIAL EMPLOYEES[10]

As a threshold issue, as detailed below, the AJL erred in determining that DRDSs are not

[10] There has, appropriately, been no assertion by either the GC or the ALJ, that the DRDS position would not be supervisory on the basis that DRDS do not spend enough of their work time supervising. "The appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks." *St. Francis Med. Center*, 323 NLRB 1046 (1997)

supervisors and/or managerial, and overruling this finding would require dismissal of the following alleged violations of the Act listed in the Statement of the Case, *supra*:

> 5. Telling DRDSs that they were supervisors, who cannot unionize or vote in the Union election in order to undermine their Union support;
>
> 6. Promising DRDSs the right to bid on full-time dealer jobs, in order to undermine their Union support;
>
> 8. Blaming the union for DRDSs not being permitted to bid on full-time dealer positions;
>
> 10. Refusing to consider DRDSs for full-time dealer positions; and,
>
> 11. Firing Murduca because she engaged in Union and other protected concerted activities.

Under Section 2(11), of the Act:

> The term "supervisor" means any 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.

29 USCS § 152(11). "Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

> [I]ndividuals are statutory supervisors if (1) they hold the authority to engage in ***any 1*** of the 12 supervisory functions (e.g., 'assign' and 'responsibly to direct') listed in Section 2(11); (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;' and (3) their authority is held 'in the interest of the employer.'

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quoting *Aladdin Hotel*, 270 NLRB 838, 840 (1984). DRDS act as supervisors for 60% of their work time and supervisory duties are a permanent part of their job, unlike the infrequent, sporadic and temporary supervisory duties of an individual found not to be a supervisor in *St. Francis Med. Center*.

Oakwood, 348 NLRB at 687 (emphasis added) citing *NLRB v. Kentucky River*, 532 U.S. 706 (2001)).

"Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if the authority has not yet been exercised." NLRB, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings*, at 100 (2003) (hereinafter NLRB Guide for Hearing Officers), citing *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001). The "dividing line" between supervisors and non-supervisory employees characterized as "straw bosses, lead men, and set-up men" is whether the putative supervisor exercises any of the "genuine management prerogatives" listed in Section 2(11), or at least has the authority to effectively recommend any of those activities, provided that the authority is "in the interest of the employer" using independent judgment, rather than doing so in a routine, clerical fashion. *Oakwood*, 348 NLRB at 688. An "overly narrow construction" of the term of the definition of "supervisor" under Section 2(11) does not comport with the Act. *Id.* at 688.

1. DRDSs Meet the "Assign" Element of Section 2(11)

To "assign" means to "the act of designating an employee to a place (such as a location, department, or wing) … or giving significant overall duties, i.e., tasks, to an employee." *Id.* at 689. As detailed above, DRDSs possess and exercise the authority to effectively recommend and assign dealers to "places," such as to a certain game or to a higher- or lower-volume area based upon that dealers' skills and aptitude to deal with particular types of customers in particular situations. 1035:7-1036:16; 1039:12-1040:25; 1067:25-1069:5. These non-routine, non-clerical functions, which require exercise of independent judgment and discretion, are similar to the "designation of significant overall duties to an employee" that the Board, in *Oakwood Healthcare*, stated amounted to "assigning" for purposes of Section 2(11) (charge nurses assigning "nurses and aides to

particular patients"). 348 NLRB at 688.[11]

The act of "assignment" need not "affect 'basic' terms and conditions of employment" or an employee's "overall status or situation," a requirement that would improperly impose "a unique and heightened standard on the supervisory function of assigning" that is "supported neither by precedent or the language of the statute." *Id.* Matching clientele's needs to the skills and training of a particular employee based upon which employee is better suited to a more-demanding customer, as DRDSs do, is critical to an employer's ability to successfully deliver services to customers. *Id.*

Dodds testified that DRDSs: regularly recommend which dealers to assign to specific table games based on their knowledge and assessment of dealers' experience, skill sets, and aptitudes, and that those recommendations are followed. 1035:7-1036:16; 1039:12-1040:25; 1067:25-1069:5. Evidence further showed that DRDSs assign dealers to and release them from games daily by raising and lowering betting limits to open and close tables. GC41; 1063:2-1066:16; 1067:1-24. This requires independent judgment and discretion exercised in the interest of the Company, and is not routine or clerical. The Decision makes no finding that Dodds' testimony on this subject was not credible and fails to account for this evidence.

The entirety of the ALJ's rationale for concluding that DRDSs do not assign is because DRDSs "do not set weekly or daily dealer assignments," and schedules and daily assignments to tables are handled by centralized scheduling and the "pencil." Decision at 3:25-30. In arriving at this conclusion, in footnote 18, the Decision cites to testimony of two DRDSs. As explained below, the testimony upon which the Decision relies does not support the conclusion, and the

[11] These functions performed by DRDSs are distinguishable from those that do not amount to "assigning," such as a charge nurse's ad hoc instruction to an LPN to perform a discrete task, such as giving a sedative to a patient. *Oakwood Healthcare*, 348 NLRB at 688.

Decision actually misstates the witnesses' testimony.

First, the Decision cites to DRDS Patton's testimony at page 472 of the transcript, characterizing Patton's testimony as follows: "DRD[S]s cannot reassign dealers between games. DRD[S] 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)." However, at page 472, Patton actually testified the opposite of what is attributed to him in the Decision:[12]

> JUDGE RINGLER: Now, are you empowered if somebody's really messing up to say, hey, you better get off this game; you're done?
>
> THE WITNESS: No. I -- I won't be able to pull them off. I would have to call the pencil.
>
> JUDGE RINGLER: And the pencil would pull that person off?
>
> THE WITNESS: Right.
>
> JUDGE RINGLER: Okay.

472:14-21. Thus, Patton testified that the Pencil would follow his recommendation as DRDSs and reassign the dealer. The Pencil's obligation is to keep track of which dealer is on which table, which is why the Pencil is involved—but it is the DRDS that is exercising independent judgment

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[12] Elsewhere in the transcript, Patton provided additional testimony consistent with DRDSs having the ability to assign dealers. For example:

> JUDGE RINGLER: Had you ever been in a situation where maybe you've said, you know what, Joe's terrible at this game. Can you not put him here? Do you ever tell the pencil something like that?
>
> THE WITNESS: I've never said anything – we've had some customer issues with like somebody doesn't like you personally, and you know, it can -- you know, people are losing money and drinking, it -- it can get heated. So you can say, hey, can you get -- can you get Roger off this game? This guy's been badgering him all night. Put somebody else over here for a minute? I mean, that -- that happens.

468:17-25.

and discretion about whether a particular dealer should be on a particular game and making effective recommendations.

In footnote 18, the Decision further states "DRD[S] Sumbler said that her requests to not work alongside given dealers are afforded little deference and seldom granted. 516-517." Even if that had been Sumbler's testimony, the ability to select which employees he or she will supervise is not a factor in determining whether or not a particular employee is a statutory supervisor.[13]

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[13] Not only did Sumbler's testimony not say what is attributed to her in the decision, Sumbler's testimony does not actually say anything. Sumbler simply said that she personally has not seen a DRDS assign dealers. This does not mean that other DRDS do not assign dealers, particularly when evidence in the record, including testimony from the GC's own witnesses, demonstrates that DRDS do, in fact, assign dealers. For Sumbler's testimony to have any actual meaning supporting the allegations in the Complaint, the ALJ necessarily draws impermissible inferences in the GC's favor, which is inconsistent with the GC's burden of proof. Sumbler's actual testimony is as follows:

> JUDGE RINGLER: Okay. And now, have you ever worked with another dealer or -- and have you ever said to the pencil person that I work with Joe, for example, and Joe is a really terrible dealer. He's terrible at craps, or whatever. Can you stop assigning Joe craps or blackjack or poker or kind of thing? Has that ever happened to you?
>
> THE WITNESS: No.
>
> JUDGE RINGLER: Okay. The dual rates do that kind of thing?
>
> THE WITNESS: They -- they said that, but that doesn't -- they don't get what they request.
>
> JUDGE RINGLER: Okay. Okay. So the person is –
>
> THE WITNESS: It doesn't add -- it has no merit.
>
> JUDGE RINGLER: It has no merit.
>
> THE WITNESS: Because no –
>
> JUDGE RINGLER: Okay. So you've never, at least as far as you've seen, you've not seen a dual rate say, hey, so-and-so is terrible at this game. Don't road map them on this game?
>
> THE WITNESS: Yeah.
>
> JUDGE RINGLER: Now we're really getting fancy with all the terms that I'm learning.

2. DRDSs Are Managerial Employees

Even assuming *arguendo* that the DRDSs are not supervisors under Section 2(11)'s criteria, they are excluded from the Act's protections as managerial employees. Under NLRB case law, an employee will be excluded as managerial if he or she represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *Allstate Insurance Co.*, 332 NLRB 759, 762 (2000). Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980). Final authority is not required to show managerial status; instead, "the relevant consideration is effective recommendation or control." *Yeshiva*, 444 U.S. at 684 n. 17. While the existence of detailed policies may constrain an individual's discretion below the threshold necessary to show managerial status, managerial employees may include those who "exercise discretion within . . . established employer policy." *The Republican Co.*, 361 NLRB No. 15 (Aug. 7, 2014) (citing *Yeshiva*, 444 U.S. at 683).

The DRDSs meet this standard. First, controlling labor costs is a clear management interest. DRDSs effectuate this management interest by consolidating play on table games, thereby

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THE WITNESS: Right.

JUDGE RINGLER: But –

THE WITNESS: But no. I've –

JUDGE RINGLER: -- do you understand my question?

THE WITNESS: Yeah. I understand it, but no, I've never seen it met.

JUDGE RINGLER: You've never observed it?

THE WITNESS: Yeah.

516:11-517:14.

closing tables and sending dealers home. As detailed above, DRDSs perform this function on a regular basis. Second, complying with federal currency transaction reporting laws is also a management interest. DRDSs "make[] the determination of whether" dealers' transactions with customers comply with the law. 1046:13-1047:18. Dealers lack these responsibilities. 1024:1-2; R29.

At the hearing, 11 exhibits demonstrating DRDSs' supervisory and/or managerial status, as well as testimony on those exhibits, were rejected on the grounds that they were cumulative R41, 43-50, 53-56; 428:3-431:25. Horseshoe's counsel was permitted to make the following offer of proof:

> Rejecting these exhibits is highly prejudicial because not only do they go to supervisory status with regard to discipline but they also will go to demonstrate independent judgment and discretion with regard to policy enforcement, assigning work to dealers, recommending changes in terms and conditions of employment, and the authority to responsibly direct dealers.

Id. Horseshoe recognizes the Judge's prerogative in conducting an efficient hearing and that in the haste of trial the exhibits may have appeared cumulative.

However, the rejected exhibits are highly probative evidence on a threshold issue 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 likely other supervisory indicia. *See e.g.* R46 (dealer reporting that when DRDS "was my supervisor . . . she was nitpicking/critiquing every hand I dealt on a live game. … By her being my supervisor, I respectfully accommodated everything she asked"); R56 (Murduca's June 10, 2017 incident report that dealer Brenda Walker refused Murduca's assignment directive); R43 (Murduca's May 13, 2013 incident report that dealer Cindy

Grant "lacks game knowledge"); R50 (Murduca's December 10, 2014 incident report that dealer Connie Hunt improperly "double shuffled" a deck of cards and for having "a very bad attitude, consistently, whether or not I am her co-worker, supv., etc."); R43 (Murduca's May 13, 2013 incident report that dealer Cindy Grant's "BLATANT DISREGARD OF SUPERVISOR AND DEPARTMENT POLICY" (emphasis Murduca's); R45 (Murduca's November 26, 2013 incident report that dealer Shevetta Frazier failed to comply with the DRDS's "requests for compliance in accordance with standard operating procedures"]; R49 (Murduca's November 15, 2014 incident report that dealer Cleo Webb "did not protect her game" and "was resistant to a supervisor's [Murduca's] request"). Especially because the ALJ decided that the Company has not met its burden on the DRDSs' supervisory status, Horseshoe maintains that the refusal to admit these exhibits and testimony thereon was prejudicial error.

B. HORSESHOE DID NOT VIOLATE SECTION 8(A)(3) IN DISCHARGING MURDUCA.

The *Wright Line* test applies to determine whether an employer has violated Section 8(a)(3) of the Act in taking an adverse employment action. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, (1982). To establish a *prima facie* case of discrimination, the GC must demonstrate: (1) union activity; (2) employer knowledge of union activity; (3) employer animus and (4) a nexus or connection between the employer's alleged animus and the disputed employment action. *See, e.g., Gruma Corp.,* 250 NLRB 336, 349 (2007). Taken together, the GC's *prima facie* case must establish by a preponderance of the evidence that an employee's union activity was a substantial or motivating reason for the employer's action. *Wright Line, supra*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

Importantly, the mere existence of some kind of union animus is not enough to show discriminatory discharge; rather, the GC must show that the discharge itself was improperly

motivated by animus. As stated in *Wright Line*, the GC must make "a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. The GC must demonstrate a link or nexus between the employee's protected activity and the adverse employment action. *Tschiggfrie Props. v. NLRB*, 896 F.3d 880, 886 (8th Cir. 2018). This means that the GC must show "a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker." *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015). The employee must have been "discharged for his union activities or membership—that but for his union activities or membership, he would not have been discharged. Simple animus toward the union is not enough." *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554-555 (8th Cir. 2015) (internal quotations omitted), denying enforcement of 361 NLRB No. 22 (2014).

"If, and only if, the General Counsel meets that burden, the burden shifts to the employer to exonerate itself by showing that it would have taken the same action for a legitimate, nondiscriminatory reason regardless of the employee's protected activity." *Nichols Aluminum, LLC*, 797 F.3d at 554-555 (internal quotations omitted). Where the employer has offered a legitimate business justification for its conduct, the GC has the burden of establishing by substantial evidence the existence of an affirmative and persuasive reason why the employer rejected good cause and selected a bad one as motivation for the discharge or discipline. *See e.g., Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595 (1st Cir. 1979).

The Board considers evidence of a thorough and fairly conducted investigation to refute allegations of discrimination based on union animus. *See, e.g., Jackson Hosp. Corp.*, 354 NLRB 329 (affirming ALJ finding at 2009 NLRB LEXIS 217 (Ness, D., ALJ) (Jul. 9, 2009) that "the hospital conducted a full, fair, and appropriate investigation" which supported the employer's

claim that it did not take action against the employee because of his union activities); *Boardwalk Regency Corp.*, 344 NLRB 984, 997 (2005) (considering the quality of the employer's investigation, including the reasons for investigating, and finding that a complete investigation supported a conclusion that the adverse action against the employee was lawful).

If the employer cannot rebut the *prima facie* case, the employer may alternatively demonstrate that the same action would have occurred even in the absence or protected conduct and union animus. *See Bloomfield Health Care Ctr.*, 352 NLRB 252, 253 (2008); *Manno Elec. Inc.*, 321 NLRB 278, 280 n.12 (1996).

1. Murduca's Discharge Was Not Motivated By Anti-Union Animus, and the ALJ Improperly Substituted His Judgment for That of the Business.

As a threshold issue, Murduca's discharge could not have violated the Act because the DRDS position is, as detailed above, supervisory and/or managerial; thus, Murduca is outside the scope of the Act's protections. However, even if Murduca were not a supervisor and had been entitled to the protections of Act, as explained below, her discharge still did not violate the Section 8(a)(3).

The GC did not satisfy his burden of proof to establish a *prima facie* case because no evidence was presented of any nexus or link between Murduca's union activity and her discharge. Even assuming that the GC has set forth a *prima facie* case under *Wright Line*, which he has not, Horseshoe presented substantial evidence that Murduca was discharged for the legitimate, non-discriminatory reason that she violated policy while on a final written warning and that termination was the next step in the progressive disciplinary process. Given Murduca's poor performance rating coupled with previous progressive discipline for similar conduct, Horseshoe's thorough investigation of the final incident, and the independent Board of Review's decision to uphold Murduca's discharge, substantial credible evidence was presented that Horseshoe would have

terminated Murduca regardless of any union activity. The ALJ's decision completely ignores this evidence and, inexplicably, finds that Horseshoe would not have discharged Murduca citing three purported reasons:

(1) The ALJ contends, inexplicably, that Horseshoe should have—for the sole purpose of conjuring a way to grant Murduca leniency—gamed the timing of disciplinary action for Murduca's benefit by *intentionally delaying* action until Murduca's active Final Written Warning for the very same type of behavior could have been considered expired.

(2) The ALJ finds supposed disparate treatment based on the fact that fellow floor supervisor, Tammy Pierce—who observed only one part of the chain of events that resulted in Murduca's discharge—was not disciplined for "failing to report it to upper management and/or initiating prompt discipline." Decision at 24:20-25.

(3) The ALJ cites what he characterized as "the extensive level of animus present" as "further support[ing] the conclusion that Horseshoe's motivations and timing were improper." Decision at 24:25-30.

None of these reasons cited by the ALJ is sufficient to overcome Horseshoe's showing that it would have discharged Murduca irrespective of any purported animus.

2. Horseshoe Should Not Have Intentionally Delayed Disciplining Murduca

The ALJ's conclusion that Horseshoe should have artificially delayed Murduca's discipline flies in the face of the Board's longstanding view that "a delay between alleged employee misconduct and an employer's disciplinary action is evidence of pretext." *Doctors' Hosp. Staten Island, Inc.*, 325 NLRB 730, 738 (1998) citing *Care Manor of Farmington*, 314 NLRB 248, 255 (1994); *Aquatech, Inc.*, 297 NLRB 711, 717-718 (1990), enf'd. 926 F.2d 538 (6th Cir 1991); *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enf'd 837 F.2d 575 (2d Cir. 1988).

The conclusion that Horseshoe should have intentionally postponed acting on Murduca's

policy violation until her active Final Written Warning expired is clearly an impermissible substitution of his own judgment for Horseshoe's business judgment. The ALJ decided Horseshoe should have been "more Solomon-like" and demonstrated a "benevolent exercise in moderation [that] would have allowed Horseshoe to retain a long-term and highly-trained worker, and consistently and neatly issue[d] the same documented coaching to both Strickland and Murduca for the same offense." Decision at 24:15-20.

The Act does not vest the Board with the managerial authority to:

> substitute its judgment for that of the employer in the conduct of his business. It d[oes] not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation. It did not authorize the Board to absolve employees from compliance with reasonable rules and regulations for their government and guidance.

NLRB v. Union Pacific Stages, Inc., 99 F.2d 153, 156 (9th Cir. 1938) citing *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

First, there is zero evidence that Horseshoe has ever engaged in such intentional gamesmanship in administering discipline to any other employee. Second, the ALJ's characterization of Horseshoe's timing of issuing discipline as "haphazard" is completely unsupported by any evidence. The ALJ cites to multiple exhibits showing that, in other cases, varying numbers of days passed from the date of the infraction until discipline was issued (Decision at 24, n 66); however, this completely ignores the existence of myriad legitimate, non-arbitrary reasons that routinely delay issuing discipline including: how soon after the infraction Horseshoe actually became aware of it; witness availability and complexity of investigation; and, whether the employee being disciplined was on vacation or leave of absence during the interim. There is absolutely no evidentiary basis for the ALJ's assertion that Horseshoe's administration of disciplinary timing is not "consistent" or that timing of discipline was used "as a weapon to remove

its Union adherents." *Id.* The ALJ simply drew inferences in favor of the GC's position where there was no evidence to support those inferences. The ALJ's "theory is mere speculation without a jot of evidentiary support in the record," and this finding must therefore be overruled. *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137, 1142 (D.C. Cir. 2011).

Second, Murduca and Strickland did not engage in the "same offense." The ALJ's judgment that Murduca and Strickland should have both received the same discipline (documented coaching) completely ignores the undisputed evidence that Murduca—a poor performer with a history of creating discord and instigating conflicts with other employees (R88; 1387:22-1388:5)—was the one who initiated the inappropriate on-duty conversation about southern Louisianans and "spells" (1311:4-1314:12) with Strickland, who had no history of this type of conduct, and then called Strickland a "witch." The ALJ also ignores the fact that Murduca refused to fully cooperate in the investigation and provide a written statement while Strickland fully cooperated and provided a detailed written statement when asked to do so.[14]

As evidence that Horseshoe purportedly sometimes "exercises great leniency and benevolently issues non-disciplinary informational entries, when workplace rules are violated" (Decision at 14, 25-30) the ALJ cites to R29. However, again, this is an impermissible inference drawn when there is nothing in this exhibit that supports this conclusion. As explained above, evidence demonstrates that informational entries were issued to Murduca and Smith in January 2018 not out of discretionary leniency, but because Horseshoe's investigation could not substantiate which of the two employees, both of whom were blaming the other, had instigated the conflict, so both employees were issued informational entries.

[14] Further, circumstances suggest that Murduca's report to upper management that Strickland was "being mean" to her was actually a calculated effort to head off what Murduca feared would be consequences of her having called Strickland a "witch."

The ALJ suggesting that Horseshoe should have engaged in disciplinary gymnastics to find a way to be lenient to an employee on a Final Written Warning turns the fundamental concept of progressive discipline on its head.

3. Murduca Was Not Treated Disparately

The ALJ's second stated basis for finding that Horseshoe would not have otherwise discharged Murduca is further impermissible substitution of his judgment for Horseshoe's business judgment. The ALJ concluded that Murduca was somehow treated disparately because another supervisor, Tammy Pierce, was not disciplined. Importantly, there is no evidence or even any suggestion that Pierce engaged in conduct similar to that for which Strickland and Murduca were disciplined. Rather, the ALJ's personal judgment is that Pierce should have been disciplined because she did not report the small portion of events leading to Murduca's discharge that Pierce witnessed. Pierce's conduct was dissimilar from Murduca's conduct. Pierce was merely present at the beginning when Murduca initiated the conversation with Strickland by asking if she was from south Louisiana and believed in spells. Pierce neither instigated nor participated in the inappropriate conversation nor refused to participate in an investigation, as did Murduca. Further, the ALJ's conclusion that Pierce somehow had a heightened duty to report the conduct is based on the flatly incorrect assertion that Pierce was "Strickland and Murduca's direct supervisor." Pierce was simply a fellow supervisor.[15] (247:11).

[15] At page 14, n. 40 of the Decision, the ALJ notes that a lone witness, Tawana Sumbler, stated that religious jokes are common, and that management is aware of and has participated in such jokes. However, Sumbler's testimony, which was elicited by counsel for the GC through leading questions, is not credible. Sumbler claimed that "someone" tells a joke related to religion "at least once or twice a week" yet, curiously, Sumbler could not provide even a single example of one of these supposedly numerous jokes, nor did she identify a single individual manager she contended was aware of the purported jokes. 509:18-510:22. When asked on cross-examination upon what she based her statement that management was aware of religious jokes, Sumbler responded vaguely and unconvincingly by stating "Most of – most of the time when we say something funny, it – trickles up, so somebody else repeats it and they'll repeat it back to management." Notably, no other witness corroborated this testimony.

Horseshoe also consistently enforces the conduct standards that precipitated Murduca's termination – without regard to union activity or organizing efforts – against employees and supervisors alike, including on the following occasions:

- On January 19, 2016, Dodds issued DRDS Angela Dailey a Written Warning for making a rude comment to a manager in reference to a VIP player. R116; 1187:3-1188:14. Although there was no evidence that anyone other than the manager heard her comment, that Dailey was on an "active gaming floor with customers all around" justified the discipline. *Id.*
- On June 28, 2016, Horseshoe terminated a manger in part for failing to be forthcoming during a Company investigation. R63.
- On August 20, 2016, Horseshoe terminated a supervisor in part for failing to participate truthfully in its investigation into whether the supervisor inappropriately issued a customer a complementary buffet coupon. The supervisor was on a final written warning issued almost ten months earlier. R65; 1190:9-1191:10.
- On January 24, 2017, Dodds and Williams, the same manager who terminated Murduca, terminated a supervisor for "demonstrating rude behavior towards a coworker by inappropriately using [his] knee to get her attention and using an aggravated tone of voice when speaking to her and a fellow supervisor." R64.

4. There Is No Evidence Connecting Murduca's Termination With Anti-Union Animus.

The ALJ misapplied the animus element of the GC's burden of proof in finding that the purported existence of other garden variety unfair labor practices in previous months established animus. The GC's burden is not to show a vague or generalized atmosphere of animus; rather, the GC's burden is to prove a connection between Horseshoe's purported union animus and Murduca's discharge. The key is whether the direct decision-maker(s) had anti-union animus. *NLRB v. Louis*

A. Weiss Mem. Hosp., 172 F.3d 432, 443 (7th Cir. 1999).

While they ran their decision by others to ensure the validity of their decision, evidence demonstrates that the primary decision-makers were Williams and Overton—both of whom credibly testified that, at the time of the termination decision, they were not even aware of any union activity by Murduca.[16] The ALJ made no finding that either Williams or Overton was not credible, and no evidence was presented that either was, in fact aware of Murduca's union activity. Nor did the GC present any evidence of anti-union animus—whether towards Murduca or even in general—by Williams or Overton. To the extent the ALJ infers animus from Dodds, Dodds was on vacation out of town when the incident occurred and when Murduca was discharged. 1285:3-9.

Evidence, including Murduca's own testimony, establishes that she was not considered to be the leader of organizing efforts.[17] 240:9-14; 473:19-474:18. The fact that none of the other union activists was subjected to any adverse action further undercuts any theory that Murduca's termination was motivated by animus.[18] The mere fact that an employee participated in union activities, alone, does not insulate her from discipline or discharge for misconduct or give her immunity from ordinary employment decisions. The Board has repeatedly held that timing alone,

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[16] The ALJ did not indicate that Overton's demeanor or anything else undermined her credibility.

[17] Record evidence demonstrates that these other employees included: Lisa (Rene) Rios, Nicky Castillo, Angela Daily (109:8-110:5); Lisa Robinson (216:21); Will Boykin, Roger Patton (227:5-15); John Arastein, Linda Johnson (473:19-474:18); Tasha Simmons (659:19-661:4).

[18] One of the GC's witnesses, dealer Nicky Castillo, even admitted that "when [employees] found out the truth that, you know, there was other stuff going on too, then I think maybe they realized that the Union activity didn't get [Murduca] fired." 720-:11-20. Another witness, Roger Patton, testified that Murduca's discharge did not make him afraid to support the union. 486:10-17. At page 7 of its decision on the injunctive relief Petition, the U.S. District Court for the Western District of Louisiana stated "In fact, the record evidence suggests that Murduca's termination had little, if any impact on the union activities of other employees." *McKinney v. Horseshoe Bossier City Hotel & Casino,* No. 18-1450 (W.D. La. Apr. 10, 2019), ECF No. 40.

or the mere fact that one thing happened after another is not sufficient evidence of animus. *Neptco, Inc.*, 346 NLRB 18, 20 (2005); *Royal Coach Sprinklers, Inc.*, 268 NLRB 1019, 1026 (1984). Murduca was just one of multiple union activists.

Finally, the ALJ's conclusion that the Company bore animus because it opposed the Union's organizing drive and because, in his view, the Company committed other violations of Section 8(a)(1) reflects a fundamental misunderstanding of *Wright Line* and the General Counsel's burden of proof. An employer is legally entitled to oppose a union organizing drive. That right to free speech is codified in Section 8(c) of the Act. Opposition, even antipathy, does not establish unlawful animus. Similarly, even if the ALJ's conclusion that the Company committed other technical violations of Section 8(a)(1) does not establish that the Company – much less the decision makers for her termination – harbored hostility towards Murduca because she engaged in organizing activity. In making repeated assumptions in favor of the General Counsel's case, the ALJ excused the General Counsel from meeting his burden of proof.

5. Horseshoe Did Not Unlawfully Bar DRDSs From Bidding On Full-Time Dealer Positions.

Section 8(a)(3) prohibits adverse employment actions taken to encourage or discourage Section 7 activity, and the *Wright Line* framework applies. By Horseshoe continuing its longstanding policy of not allowing employees, including DRDSs, to take demotions, the Decision summarily concludes that the necessary element of anti-union animus was met by referencing the findings that other garden variety ULPs were committed. There is no evidence establishing any nexus between Horseshoe simply continuing to follow the same rules that it had followed for 23+ years and any anti-union animus.

Once again, it is clear from the face of the ALJ's statements that he substitutes his own personal judgment for that of the business: "Simply put, there is no rational business reason for

excluding them from consideration for [full-time dealer] jobs." Decision at 21:20-25. "There is no sound reason why Horseshoe could not have permitted DRD[S]s 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." Decision, at 21, n. 62. The ALJ ignored the testimony of Roger Dodds explaining the business reason behind this longstanding practice of not allowing voluntary demotions:

> Q. For purposes of maintaining your dual rates and your supervisors, are any of them allowed to move back into a dealer position?
>
> A. No, sir. We never allow that in any position in any department.
>
> Q. Why is that?
>
> A. It's a progression. Theoretically you start off as a dealer. Then you work your way up to the dual rate. … You move up. You move through the Company. If we start allowing DRDs to step back down, then I don't have this dual rate staff to run this business from. And then it also creates a ripple effect … in table games, if I let my DRDs go back down to being dealers, do I let my supervisors go back to being DRDs and eventually back to dealers? Do I let management go back down? … that's something that we've never allowed. That's never happened. So if you're a dual rate dealer, the thought is you move up. You become a supervisor. Then you become an assistant manager. And that's your career path.

1002:6-1003:2.

> So in the 24 and a half years that I've worked at this casino, no dual rate has ever gone back down to dealing, no supervisor has ever gone back to being a dual rate.

111:18-20. This is a legitimate, non-discriminatory, rational business reason for not allowing DRDSs to take voluntary demotions.

C. HORSESHOE DID NOT OTHERWISE VIOLATE SECTION 8(A)(3).

1. Horseshoe Did Not Unlawfully Interrogate Murduca or Any Other Employees During the February 28 Meeting with Dodds.

A prerequisite to any finding of unlawful interrogation in the February 28 conversation, in which only Murduca and Dodds were present, is a determination that Murduca was completely

truthful while Dodds was completely lying in their respective accounts of this conversation. The only evidence of this purported interrogation is the testimony of Murduca, who has a substantial vested personal interest in the outcome of these proceedings. Dodds denied—***not*** in response to any leading questions—that he asked Murduca who was supporting the union, testifying that it was Murduca who asked Dodds if he would meet with a group of employees chosen by Murduca. 1138:18-1139:3. The ALJ's Decision fails to explain why Dodds' testimony on this point was not credited; in fact, the ALJ's decision fails to even acknowledge Dodds' testimony on this point. Decision at 6:25-7:40.

Further, even if the February 28 conversation had happened exactly as Murduca described, there was still no unlawful interrogation. It is well established that interrogations of employees are not *per se* unlawful; rather questioning must be evaluated under the standard of "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), aff'd sub nom. *Hotel Emps. Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The "totality of the circumstances" test determines whether the questioning of an employee constitutes unlawful interrogation. *Westwood Health Care Ctr.*, 330 NLRB 935 (2000). Factors considered in this test are: (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 the 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?; and (5) truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 47 (2d Cir. 1964). In his Decision, the ALJ recites these *Bourne* factors then ignores their application to the evidence, instead summarily

concluding that merely because Dodds' questions purportedly involved protected activities, they "could have reasonably led Murduca to conclude that Dodds, a high-level manager, wanted to retaliate against the Union's supporters" and was therefore necessarily "coercive and unlawful." Decision at 16:5-10. The Board should overrule this conclusion.

Even assuming Murduca's claim that Dodds asked her who was supporting the union is true, none of the other factors point to unlawful interrogation. Murduca knew that she had handed out union materials, unfettered by management, just the day before, and by Murduca's own admission, she was not shy about approaching Dodds and bringing up the union. Murduca admitted that it was she—not Dodds—who initiated their February 28 conversation about the union when Murduca saw Dodds in the employee break area. 225:18-25; 340:1-14; 1138:1-17. Murduca walked up to Dodds and said "I'm sorry…you know, Roger, I just want you to know, none of this has anything to do with you. And I shook his hand. And he started talking to me…And we were just talking about general stuff." 225:25-226:7. There is nothing coercive about a manager's conversation with an employee when the employee voluntarily initiated and participated in the conversation. *See, e.g., Wal-Mart Stores, Inc.*, 431 NLRB 796 (2004) (no unlawful interrogation where employee himself initiated the meeting and voluntarily disclosed certain information about his union activity on his own and in response to questions).

Murduca said their conversation "migrated to the casino floor" when Dodds supposedly asked Murduca who was involved in union activity. (227:1-15). Even assuming this occurred as Murduca described, Murduca testified that she was not uncomfortable in answering this question. 341:13-23. The atmosphere of Dodds' conversations with Murduca and other employees could have hardly been less formal or coercive. *See, e.g.*, 152:7-9 (Rios responding "No, sir" when asked "You weren't intimidated by him in that meeting, were you?"); 349:6-14 (Murduca stating

"Everybody was comfortable"); 665:4-8 (Patton stating he was not intimidated and was comfortable talking to Dodds); 733:19:25 (Simmons stating she was not intimidated by meeting with Dodds). Nor is there evidence that Horseshoe used any information purportedly supplied by Murduca to discipline or discriminate against the employees—in fact, quite the contrary. No other union supporters were subjected to any adverse action. Considering all of the *Bourne* factors, the evidence demonstrates that Dodd's purported "interrogation" cannot reasonably be construed to restrain, coerce or interfere with rights guaranteed by the Act, and thus the conversation was not unlawful.

2. Horseshoe, Through Dodds, Did Not Unlawfully Solicit Grievances on February 28 or in mid-March Meetings or Make Implied Promises To Remedy Employees' Grievances in Order to Undermine Their Union Support.

"It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign." *Johnson Techns, Inc.*, 245 NLRB 762, 764 (2005); *see also*, *Longview Fibre Paper and Packaging, Inc.*, 356 NLRB 796 (2011) (adopting ALJ finding that employer did not violate Section 8(a)(1) by soliciting grievances from employees and promising to remedy them where it had a history of soliciting employee suggestions, concerns, complaints and positive comments and of resolving complaints when possible, including through the use of detail surveys of employee attitude, concerns, and suggested changes). Further it is not the solicitation of grievances itself that is problematic under the Act; rather, the key issue is whether there has been a promise of benefits, express or implied, ***in order to influence a union campaign***. *See e.g., MacDonald Mach. Co.*, 335 NLRB 319, 320 (2001).

The GC produced no evidence of any express promises, and the ALJ's conclusion that Dodds' conversations with employees were unlawful implied promises is founded upon the

following statements attributed to Dodds:

> "what [things has Horseshoe] …taken away?"
> "what things do you really want?"
> "if we would be willing to talk to Mike Rich?"
> "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 …"
> "there was a lot that they wanted to do for us …"

Decision, at 16:35-45. Meeting attendees—both management and non-management employees—knew that Dodds and Horseshoe could not make any promises to employees in an attempt to influence union organizing. *See, e.g*., dealer Rios' testimony at 118:17-23; 153:20-22; DRDS Sumbler's testimony at 502:16-25; HR VP Wade's testimony regarding what employees were told at meetings at 786:5-787-11.

The GC's witnesses consistently acknowledged that, since January—indisputably before Horseshoe became aware of organizing activity on February 27—Dodds had been having meetings with employees and discussed things Horseshoe was trying to improve upon. (Sumbler 547:25-548:213.)

The ALJ states in the Decision as evidence that Horseshoe did not have "an established past practice of previously soliciting grievances in a comparable manner" that:

> Although Horseshoe demonstrated that it conducts annual opinion surveys, it failed to show that upper level mangers 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.

Decision at 17:0-5, n. 49.

In fact, evidence demonstrates that prior to Horseshoe becoming aware of any organizing activity, Rich and other senior management routinely attended the mandatory EOS meetings (154:6-155:8; 814:5-22; 1104:12-11-5:10), and that Dodds customarily wrote his phone number

on a white board in employee meetings and handed out his business card (1113:4-22). The evidence is contrary to the ALJ's finding.

3. Horseshoe Did Not Unlawfully Threaten Employees That They May Lose Various Benefits If They Engage in Union or Other Protected Concerted Activities.

The ALJ concludes that Horseshoe, through Dodds and Rich, unlawfully threatened employees with losing the ability to ask for a last-minute day off, losing the open-door policy and to "imagine going … to the bargaining table …[and] possibly losing 30 percent of your PTOs." Decision, at 175-15.[19] Even assuming that these statements were made, none of the purported statements amounts to an unlawful threat of losing benefits.

An employer's preference not to have a union is lawful and is not evidence of animus. *Wireways, Inc.*, 309 NLRB 245, 252 (1992). Under Section 8(c) of the Act, "[t]he expressing of any views, argument, or opinion, or the dissemination thereof … shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit." 29 USCS § 158(c).

> An employer is free to communicate to his employees any of his general views about unionism … so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company.

NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969)(quoting Section 8(c)).

"An employer does not violate the Act by informing employees that unionization will bring about a change in the manner in which employer and employee deal with each other." *United Rentals, Inc.*, 349 NLRB 190, 191 (2007). "To the contrary, truthful statements that identify for

[19] GC witness Patton's account of what Rich said was "He said that, you know, they obviously didn't want a union in. They wanted to be able to keep their -- their open-door policy and the policies they have in place and the freedoms they had. And they felt like, they, I guess, maybe couldn't do that. And then he [gave the] floor to the consultant." 455:12-21.

employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)." *Id.* "The Board has consistently held that, absent threats or promise of benefits, an employer may explain the advantages and disadvantages of collective bargaining in order to convince employees that they would be better off without a union." *Medieval Knights, LLC,* 350 NLRB 194 (2007).

Dodds' and Rich's comments about last-minute requests for time off and the open door policy are analogous to the employer's communication found to be lawful in *Tri-Cast, Inc.*, 274 NLRB 377 (1985). In that case (on the day of the election), the employer distributed a letter to its employees that stated "[w]e have been able to work on an informal and person-to-person basis. If the union comes in this will change." *Id.* The Board stated "[t]he employer's statement, crafted in layman's terms, simply explains that one of the changes which occur between employers and employees when a statutory representative is selected." *Id.* "There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Id.* "This is especially so, as implied in the Employer's statement here, where a collective bargaining agreement is negotiated." *Id.* The message that union representation could result in a contract that with fixed rules instead of flexibility is not a threat; rather, it is Horseshoe's lawful prediction of what would happen if the Union becomes the employees' bargaining representative. Such expressions of Horseshoe's views regarding unionization are within the bounds of Section 8(c) of the Act.

Nor is the statement attributed to Dodds by Burge, which the Decision selectively quotes out of context, a threat. Burge said, "He said, one thing they wanted was a free turkey. He said, now imagine going – going to the bargaining table asking for a few turkey, and possibly losing 30

percent of your PTOs." 584:4-7. Even assuming Dodds had made this statement,[20] such a statement is hardly an impermissible threat of reprisal; rather, it is a lawful illustration of the give and take of bargaining and that one party could not promise anything without the other party first agreeing to it in negotiations. *See Medieval Knights, LLC* 350 NLRB at 195 (remarks made in a hypothetical bargaining exercise where there was no evidence that the employer threatened or suggested this would be the employer's actual bargaining strategy were lawful; "employees can distinguish between a hypothetical exercise about bargaining and an employer's description of its actual or planned bargaining strategy"); *Fern Terrace Lodge*, 297 NLRB 8 (1989)(finding lawful the part of the employer's speech that stated a "union couldn't force us to agree to anything that we could not see our way clear to putting into effect from a business standpoint.")

DRDS Sumbler acknowledged she was aware that she Horseshoe's statements about requesting time off were references to the collective bargaining process. 546:17-547:7. Based on testimony of the GC's own witnesses, employees did not feel threatened by statements made in the employee meetings. Sumbler stated that "the spokesperson for the manager really did more in favor for the Union…he pretty much stated that one, the company couldn't do anything. He stated that the negotiations wouldn't last pret- -- long, that the company wanted no – nothing more than to make sure that they were satisfied, because anything – any idea to strike will cost the company just as much as it would cost us, and he gave us the idea that it was the same grade that we have with the company alone." 527:12-528:15.

Rios testified that, at one of the employee meetings, one of the trainers brought in by Horseshoe said "it was within our right, we were protected by federal law, to join a union if we wanted to join a union." 126:1-129:18. Rios also said "He was telling us that – you know, to

[20] Dodds denied making these statements. 1160.

know all your facts, you know that if you wanted to be – that the Company could not follow you, they could not show up, they could not harass it, they couldn't do anything. And he said that – he told people, he says, show up for the meetings, he said, and that way make up your own mind." 127:2-9. Rios said the other company trainer told her that he had bargained with UAW—the same union engaging in organizing at Horseshoe—that he had a good relationship with the UAW, and the UAW got a good contract for employees at a Baltimore casino that is also affiliated with Horseshoe's parent company. 162:8-163:8. This was not a threatening atmosphere.

4. Horseshoe Did Not Unlawfully Tell DRDS That They are Supervisors Who Cannot Unionize and Cannot Vote in the Union Election in Order to Undermine their Union Support.

The ALJ credits Murduca's testimony that, at a March 2 meeting, Rich said that DRDSs could not vote for the union because they are supervisors, and asserts that Sumbler's testimony at pages 500-504 corroborates Murduca's testimony on this point. In fact, Sumbler's testimony actually ***repeatedly contradicted*** Murduca's assertion:

> A. And Chuck began by saying that he didn't know if we would be classified as supervisors or dealers, so he didn't know if the information he was giving us would be necessary anyway.

500:9-11.

> Q. Now, going back to the meeting; we were at the point he made the statement. There was a response from the room. What happened next?
>
> A. Judy asked, who decides if we are going to be – who decides that; whether the status would be dual rates or supervisor, and Trent and Mike said that the Labor Board decides.
>
> Q. Okay. And what was next?
>
> A. Then Angela asked who decided before, and if they were to decide that we were going to go back to supervisors, would we then return our reward -- would they -- would they then return our reward credits and give us retro for the rewards that they took from us.
>
> Q. Okay. And was there any response from the Employer to that question?

A. There was no real response. They all went around it and –

Q. Now, you said "they," who spoke on behalf of the Employer when that was –

A. Mike and Trent, and there was no real response, the --there. It -- and Trent was like, there was some things that they just had to look into.

501:11-502:7.

Q. And you said that you're tired of – "you," meaning management -- deciding to make us supervisors when it's convenience for you?

A. Right

Q. And then was it Judy or Angela who asked when did you decide to look into that?

A. It was either Judy or Angela. I'm not sure which one.

Q. And then someone asked, who decides, right?

A. Yes. One of those two asked, who decides.

Q. And what was the answer?

A. The Labor Board. Then one asked, who decided before -- who decided before, and there wasn't an answer.

546:5-26. Further, Ashley Wade also credibly testified that Rich said the Labor Board would decide whether DRDSs were supervisors. 782:19-25; 783:11-16. Thus, substantial evidence does not support the finding that Horseshoe told DRDSs that they were supervisors who cannot unionize.

Moreover, even if Horseshoe had made the statements alleged (which it did not), such statements would not violate the Act. In concluding that the statements would somehow chill employees' Section 7 rights, the Decision cites to Board decisions holding that actually promoting employees to supervisory positions and accelerating a promotion for the purpose of removing the

individual from a bargaining unit shortly before a union election violated the Act.[21] Decision at 17:20-25, n 52. However, there is no allegation that Horseshoe actually promoted anyone out of a bargaining unit position; thus, the cases cited do not support a finding that the allegations, even if true, amount to violation of the Act.

5. Horseshoe Did Not Unlawfully Promise DRDSS the Right to Bid on FT Dealer Slots to Undermine Union Support.

The ALJ concludes:

> Horseshoe, by Dodds, unlawfully promised to reward DRDs in ***mid-March*** by promising to allow them to vid on more lucrative FT dealer jobs, if they did not support the Union. Dodds told DRDs 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."

Decision at 17, 25-30 (emphasis added). First, the ALJ erroneously concludes that "these comments came at the commencement of the Union's drive." *Id.* The record evidence shows that this conclusion is demonstrably false. In fact, the testimony cited in the Decision at 9:5-10; 9:30-35, referred to statements that Dodds supposedly made at a meeting in ***early January*** regarding EOS scores (107:5-108-12; 217:16-18; 491:1-25) – which was indisputably well before the date that Horseshoe learned any organizing activity was occurring, on February 27.[22] Thus, it is not possible that this statement, even assuming it was made, had anything to do with deterring support for the Union.

Moreover, Dodds never made any such promise. DRDS Roger Patton attended this same meeting and when asked about this meeting, he did not say Dodds made this promise:

> Q. And do you recall Mr. Dodds speaking about the topic of dealers and positions that would be available or dealers?

[21] *Hospital Motor Inn, Inc.*, 249 NLRB 1036 (1989); *AMFM of Summers County, Inc.*, 315 NLRB 727 (1994); *Matson Terminals, Inc.*, 321 NLRB 879 (1996).

[22] At 451:15-17, GC witness Patton confirmed he was referring to the January EOS meeting.

> A. I know there – there was a possibility of some full-time dealer positions opening up or maybe the possibility of dual rates doing back to full-time dealer.
> …
> Q. Now, do you recall if Mr Dodds said anything about what the Company can do it or can't do?
>
> A. I don't think so.

453:5-19. Dodds denied stating that DRDSs would be allowed to bid on full-time dealer positions, Dodds consistently testified that the only conversation he ever had relating in any way to DRDSs and the amount of time they spend working as dealers was in a January meeting with swing shift dual rates when the dual rates inquired whether the company would consider giving them more hours as dealers or letting them bid on full-time dealer positions. 1111:21-1112-5; 1134:24-1135:12.

The ALJ's credibility determination states that the GC's witnesses "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.*, 1158-62. No objections were lodged to the line of questioning during the hearing, Dodds' recollection had been exhausted, and there is nothing suggesting that Dodds testimony was inconsistent or that he was not cooperative. As explained above, the ALJ's credibility determination as to Dodds should not be relied upon.

6. Horseshoe Did Not Create an Unlawful Impression of Surveillance.

The Board test to determine whether an employer has created an unlawful impression of surveillance "is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Tel. of Rochester*, 344 NLRB 1270, 1276 (2005). A required element in this analysis is that employee(s) must have reasonably assumed "under an objective

standard, not the subjective reaction of the individual involved" that the employer was monitoring them. *Id.*

The ALJ's conclusion that Horseshoe unlawfully created in impression of surveillance is based on the testimony of a lone witness[23] who attributed the following statement to Dodds: " 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." Decision at 185-10, quoting 648:16-20. Importantly, the employee did not say that that these purported statements caused her to believe—whether reasonably or unreasonably—that Horseshoe was surveilling employees' union activities.

Even assuming Dodds made these statements,[24] it is unclear how these statements would be construed to imply that employees were being watched, unless employees were to conclude that someone was spying on the employee in the bar before the organizing campaign had even begun or that Horseshoe was watching employees "vote" when there was no voting occurring. This vague and non-sensical testimony stands in stark contrast to statements the Board has found to unlawfully imply surveillance. *See, e.g., Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (manager summoned individual employees to his office, prefaced conversations by stating "that he already knew about the union meeting and that cards had been distributed" without identifying his source then proceeded to interrogate each "about whether they attended the meeting and signed authorization cards"); *Conley Trucking*, 349 NLRB 308, 314 (2007) (manager approached employee individually and said "I heard something today … I heard you, Tim Gilbert, and Steve Delabar were trying to get a union in here"). The GC has not demonstrated by a preponderance of evidence that the statements attributed to Dodds were made or, even if they were

[23] The employee testified that there were five to seven employees at this meeting (646:15-647:9), but the GC did not call any of the other employees to corroborate this testimony.

[24] Dodds denied making these statements. 1160:19-21. Again, as explained above, the ALJ's credibility determinations are invalid.

made, that the statements would unlawfully imply surveillance.

7. The Finding That Horseshoe Unlawfully Blamed the Union for Lost Job Opportunities Must Be Dismissed.

(a) This Purported Violation is Not Alleged in the Complaint.

The Decision concludes "Horseshoe, by Dodds, unlawfully blamed the Union for its failure to offer DRDSs the opportunity to bid on FT dealer slots." Decision at 18:25-30. However, this purported violation of the Act, unlawfully blaming the Union, was not alleged in the Complaint. "A complaint … must include '[a] clear and concise description of the acts which are claimed to constitute unfair labor practices.'" *Bellagio, LLC v. NLRB*, 854 F.3d 703, 712 (D.C. Cir, 2017) quoting 29 C.F.R. § 102.15(b). "The Board may not find and remedy a violation of the Act not specified in the complaint unless the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Id.* (internal quotations omitted). "[T]o do otherwise would violate fundamental principles of procedural due process, which require meaningful notice of a charge and a full and fair opportunity to litigate it." *Id.* (internal quotations omitted).

Although the Complaint at ¶ 14 alleges "About March 24, 2018, [Horseshoe], by Roger Dodds, told dual rate dealers they could not bid on regular full-time dealer positions to discourage union activity," this is not the same thing as alleging that Horseshoe unlawfully blamed the union for this action. By the AJL finding a violation that was not alleged in the Complaint, Horseshoe was deprived of an opportunity to defend itself against this allegation.

(b) Even If Such a Violation Were Sufficiently Alleged in the Complaint, Evidence Does Not Establish A Violation.

Further, even if a finding of purported unlawful "blaming" could be sustained, such a finding is not supported by substantial evidence. The ALJ's finding that Dodds made the statement attributed to him ("that DRDs could not bid on these jobs because 'we don't know where we stand with the classification of dual rates [i.e., whether they are supervisors for the purpose of an NLRB

election].'") is based solely on solely on Murduca's testimony that Dodds said this in a private conversation. Decision at 18:25-35; 242:1-7. Dodds denied making this statement; in fact, Dodds denied there would have been a reason for him to say this because he never said Horseshoe would deviate from its longstanding practice of not allowing DRDSs to take demotions back down full-time dealer positions in the first place. 453:1-19; 1112:14-126. Thus, it does not make sense that Dodds would have made the statement Murduca attributed to him.

Even if this purported violation had been alleged in the Complaint, and even if Dodds had made this statement, such a statement still would not amount to violation of the Act. The ALJ transplants his own subjective interpretation onto the purported statement, stating: "Under these circumstances, Dodds blamed the Union for its inability to open these jobs up to DRD[S]s (i.e., had the Union not started its drive and put DRD supervisory status into lay, we would have allowed DRD[S]s to bid on these coveted jobs." Decision at 18:25-35. There is no evidence that the ALJ's interpretation is what Dodds purportedly said or meant.

Further, the ALJ erroneously concludes this conduct is "analogous" to "commentary found to be unlawful" in two other cases. *Id.* However, Horseshoe's conduct is far from analogous to those cases, both of which involved employers that rescinded pre-planned, scheduled pay increases and expressly stated that the union was the reason. In *Atlantic Forest Products*, one of the cases cited by the ALJ, the employer posted a written notice stating:

> I regret to notify you that the January adjustments in wage rates and benefits will have to be postponed for all employees involved in the pending NLRB Election. … Without a union, we are in a position to adjust rates as conditions require. You all know that we adjust rates twice a year, as we are able, and as it is needed. Under union contracts, wage rates are fixed, usually for periods of one year -- sometimes longer.

282 NLRB 855, 857 (1987). In that case, management also stated "You guys lost out on your raise because you brought the Union in. The plant would have to close down" and that recently a laid

off employee who was desperate to return to work "would be recalled as soon as the 'union people' were "out of there'." *Id.*

In the second case cited by the ALJ on this point, *Truss-Span Co.*, 236 NLRB 50 (1978), management told employees, among other things, that the pension and profit-sharing plan "would be dropped" if the Union were voted in and urged employees to "vote the Union out" so that the company "could make it up" or, in other words, "conditioning benefits upon a favorable vote." Both of those cases directly involved withholding previously scheduled pay and benefits coupled with express promises of rewards contingent upon employees keeping the union out. Even if the statement as alleged had been made by Dodds, it is more reasonably interpreted as uncertainty over whether dual rates were part of the bargaining unit, and not as taking away something to which employees were clearly entitled while offering to give it back if the union did not get in.

8. Horseshow Lawfully Enforced Its Name Badge Policy.

Horseshoe did not violate the Act when it asked Lisa Rios to remove a pin from her name badge on March 24, 2018, the Complaint's only allegation involving UAW insignia. Horseshoe consistently enforces its name badge policy against employees by asking employees to remove Union and non-union related insignia alike from their name badges. Horseshoe has enforced this policy against employees wearing non-union-related American flag pins on at least four occasions. Horseshoe's instruction that Rios remove a UAW pin from her badge was both consistent with Horseshoe's prior instances of enforcement – and with the policy itself. As Dodds and LaFleur consistently testified, their instruction was limited to asking Rios to remove a UAW pin *from her name badge*. Horseshoe never directed Rios or any other employee to remove a pin altogether.

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).

D. THE ALJ'S RECOMMENDED ORDER CANNOT BE ENFORCED.

The Board should sustain Horseshoe's exception to the ALJ's order of reinstatement of Murduca "without prejudice to her seniority" with back pay and benefits, as well as reimbursement of other expenses (Decision at 28:10-30) because Murduca was discharged for cause (i.e., as a result of continuing to violate policies despite administration of progressive discipline). "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).

VI. CONCLUSION

For the foregoing reasons, Horseshoe respectfully requests that its exceptions be sustained and that the allegations in ¶ 9(a), 9(b), and 9(b)(i)-(ii); 10, 10(a), (b), (c), and (d); ¶¶ 11, 11(a), (b), (c), and (d); ¶¶ 12(a), (b), (c), and (d); ¶¶ 13, 13(a) and (b); ¶ 14; ¶¶ 15(d), (e), (f), and (g); ¶ 16; ¶ 17; and, ¶ 18 of the Complaint be dismissed. The Decision was silent as to ¶ 15(a), and the ALJ

dismissed the allegations in ¶¶ 15 (b) and (c). Dismissal of those allegations should be sustained.

Dated: September 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

In addition to filing this HORSESHOE BOSSIER CITY HOTEL & CASINO'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION via the NLRB's electronic filing system, I hereby certify that copies have been served this 18th day of September, 2019 by electronic mail, upon:

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