UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. HISTORY OF THE CASE

Between March 13, 2018 and April 10, 2019, the United Auto Workers (the Union) filed charges in the above-referenced cases alleging, among other things, that Horseshoe Bossier City Hotel and Casino (Respondent) violated Sections 8(a)(1) and (3) of the Act by: (1) interrogating employees about their union activity; (2) giving employees the impression their union activities were under surveillance; (3) soliciting grievances from employees with an implied promise of a remedy in order to erode Union support; (4) disparately applying its off-duty access, no-solicitation and no-distribution, and name badge policies to restrain employee exercise of protected activity; (5) threatening employees with the loss of existing benefits; (6) deliberately misclassifying employees to discourage Union participation; (7) discriminatorily refusing to consider employees for certain positions; and (8) discriminatorily discharging a lead employee organizer named Judith Murduca (Murduca). Following an investigation, Region 15 of the National Labor Relations Board (Region 15) found merit to the allegations above.

On June 29, 2019, Region 15 issued a Complaint and Notice Hearing followed by a series of amendments ending with the issuance of the Second Amended Consolidated Complaint and Notice of Hearing (the Complaint) on November 20, 2018 (GCX 1[yy]). [1] Respondent timely provided its Answer to the final version of the Complaint (GCX 1[bbb]).[2] A hearing was held before Administrative Law Judge (ALJ) Robert A. Ringler from December 3, 2018 through December 7, 2018 and from January 22, 2019 through January 24, 2019. Judge Ringler's decision issued on July 30, 2019. See JD-62-19.

[1] "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. Transcript references are denoted by "Tr." followed by the page number(s):line(s). References to "ALJD" are to the pages and lines of the Decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

[2] On February 25, 2019, the General Counsel filed a motion to withdraw paragraphs 10(c), 10(d), and 15(a) of the Complaint. Thus, these Complaint allegations were not addressed in the ALJD.

II. OVERVIEW

This case concerns Respondent's unlawful overreaction to an organizing campaign started by the Union to represent a bargaining unit of table games employees.

Respondent operates a hotel and riverboat casino facility located in Bossier City, Louisiana where it employs approximately 1,400 employees, including about 250 table games employees as part-time dealers, full-time dealers (dealers), and dual rate dealers (DRDs). DRDs serve two different roles depending on whether they are assigned to work as a dealer or a floor person on a given shift. When DRDs are working as floor persons they monitor a couple of table games to ensure the games are being dealt in accordance with pre-written procedures. As the ALJ correctly found, DRDs do not exercise supervisory authority when performing work at the casino (ALJD 23:16-19).

In October 2017, DRD and discriminatee Judy Murduca (Murduca) contacted the Union to initiate an organizing campaign focusing on Respondent's table game dealers. It is undisputed that on February 27, 2018,[3] the employees "went public" with their organizing campaign by handbilling employees in Respondent's garage as their coworkers entered and left for work. Within minutes of the commencement of the handbilling, Respondent unlawfully ejected the handbilling employees from the parking garage (ALJD 15:1-24).

After February 27, Respondent engaged in an aggressive anti-union campaign during which the ALJ found Respondent committed multiple unfair labor practices, including interrogating Murduca about her and other employees' union activity, soliciting employee grievances with the implied promise of remedying them, threatening the loss of existing benefits, creating the impression that employees' union activities were under surveillance, providing

[3] All future dates are for the year 2018, unless otherwise specified.

misinformation about the ability of DRDs to take part in the Union campaign, and excluding DRDs from bidding on full-time dealer positions (ALJD 15:1-19:37 and 20:34-21:28). Respondent has excepted all of these findings challenging both the ALJ's credibility resolutions and generally arguing the relevant statements were lawful. But, as indicated below, Respondent's exceptions are little more than a demand for the Board to substitute the ALJ's valid credibility resolutions and conclusions of law with the Respondent's preferred interpretation of the facts and the law.

Finally, as the capstone of Respondent's attempts to suppress the Union organizing drive, Respondent discharged long-term employee and known Union activist Murduca for flimsy and pretextual reasons. Respondent claims it was justified in discharging Murduca for making a joke about a friend needing a lock of her hair to help her win the powerball on the casino floor and subsequently not wanting to provide a statement about the unnoteworthy incident. However, the record shows Respondent's decision was motivated by Murduca's union activity. Respondent does not refute that Operations Director Roger Dodds (Director Dodds) and Vice President of Human Resources Ashley Wade (VP Wade) were aware that Murduca was advocating for the Union prior to her discharge (ALJD 23:fn 65). Furthermore, the unbroken chain of unfair labor practice violations beginning on February 27 and continuing until Murduca's discharge provide evidence that Respondent's discharge decision was motivated by animus (ALJD 23:28-33). Lastly, the evidence of inconsistent disciplinary treatment and past leniency for similar offenses cited by the ALJ undermines Respondent's proffered *Wright Line* defense (ALJD 24:1-31). As explained below, Respondent incorrectly asserts that the ALJ misapplied the *Wright Line* balancing test and/or exceeded the remedies for the violation authorized by law.

Accordingly, the General Counsel requests that the Board uphold the entire ALJ decision.

III. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS

1. Whether the ALJ properly discredited portions of the testimony of Respondent's witnesses Director Dodds and VP Wade (Exceptions 14-17).

2. Whether the ALJ properly determined the DRDs were not statutory supervisors and/or managerial employees (Exceptions 6 and 22).

3. Whether the ALJ properly found Respondent, through GM Rich and Director Dodds, had multiple conversations with employees that included unlawful statements (Exceptions 5 and 7-12).

4. Whether the ALJ properly found Respondent unlawfully prevented employees from wearing Union pins on their name badges (Exception 21).

5. Whether the ALJ properly found Respondent's refusal to allow DRDs to bid on full time dealer positions was unlawful (Exception 13).

6. Whether the ALJ properly applied the *Wright Line* formula in finding Respondent unlawfully discharged Murduca (Exceptions 1-4, 18, and 19).

7. Whether the ALJ's recommended order is in keeping with the permissible remedies for the alleged violations under Board law (Exceptions 20 and 23).

IV. Statement of Facts

A. General Background and Unexcepted Findings

It is undisputed there was an organizing campaign that began in later 2017, and Respondent became aware of the campaign on February 27. On that day, several off-duty employees, including full-time dealers Lisa Rios (Rios) and Nikki Castillo (Castillo) and DRDs Angela Dailey (Dailey) and Murduca, began distributing fliers (GCX 4 and 5) to their co-workers in the parking garage (Tr. 109:23-25, 221:3-25, and 689:20-23). Respondent did not challenge the finding that General Manager Mike Rich (GM Rich) and Director of Security Rob Brown violated the Act when they ordered Rios and Castillo to leave the garage (ALJD 15:1-25).

B. Interrogation of Murduca and Solicitation of Organizing Committee

On the morning of February 28, Murduca distributed Union leaflets in the breakroom before her shift. Near the beginning of her shift, Murduca saw Director Dodds on the casino floor.

In an attempt to assuage what she felt might be tension between them because of the handbilling, she told Director Dodds that the Union organizing campaign was not a personal rebuke of him (Tr. 226:1-2). Director Dodds seized this opportunity to have a long conversation with Murduca in which he methodically requested the names of the employees on each shift who were members of the volunteer organizing committee, and Murduca gave him the requested names (Tr. 227:5-15). According to Murduca, Director Dodds then asked her if the three volunteer organizing committee employees on her shift wanted to meet with GM Rich, and Murduca responded that she could not speak for the other employees (Tr. 227:16-18).[4]

Director Dodds confirmed he had Shift Supervisor (or Pencil) Monica Antwine (Pencil Antwine) tap Murduca, Rios, Castillo, and Dailey off their games for a meeting with Director Dodds in Dodds' office later that day (Tr. 1139:4-11).

Prior to the meeting with employee organizing committee members, Director Dodds met with GM Rich to get instructions on how to handle the meeting, and GM Rich instructed Director Dodds to take notes and report back to him (Tr. 1138:22-1139:11). In the meeting, Director Dodds asked the employees what they wanted, and the employees provided him with a litany of grievances, which he wrote down on a note pad. The grievances included a demand for lump sum paid time off (PTO) at the beginning of each year, a lower deductible and changes to the health insurance, revival of the holiday gift and holiday bonus programs, and revival of an additional 25 cents an hour for employees that learn new table games (Tr. 120:10-18, 230:1-19, and 691:14-18). Director Dodds' notes of the meeting corroborate all of the above (RX 62). After the meeting, Director Dodds reported back GM Rich with his notes (Tr. 1249: 2-17).

C. March 1 and March 2 Captive Audience Meetings

[4] Director Dodds' assertion that Murduca requested the meeting was discredited by the ALJ (ALJD 7:35-38 and Tr 138:18-21).

On March 1 and March 2, Respondent held a series of captive audience meetings with groups of either dealers or DRDs (GCX 23). GM Rich started each meeting by giving a brief introduction followed by a presentation from Respondent's Union avoidance speaker Charles Ahearn (Avoidance Speaker Ahearn). VP Wade was also present for these meetings.

The first meeting was held at 10:00 a.m. on March 1. According to Rios, GM Rich told the dealers that if they voted for the Union, they could not come to management and ask for time off. Instead, the employees would have to go through the Union representative (Tr. 126: 5-9).

Respondent conducted another meeting at 6:00 p.m. on March 1. According to dealer Virginia Burge (Burge), GM Rich told the assembled employees, "Remember if the Union gets in, there will be no more open-door policy. And that means no more switch forms." (Tr. 578:9-11).[5] Dealer Tasha Simmons (Simmons) was also in the 6:00 p.m. meeting on March 1 with Burge. Simmons testified that Avoidance Speaker Ahearn said, "Right now that we were able to negotiate days off and everything with our employers. And if we did this [vote for a Union], like he said, that we would no longer be able to talk with them and that we would have to deal directly with the rep. He went on to say that right now the company could do things -- more things for us, but once we let them [the Union] in, we -- we could no longer do it." (Tr. 642:7-14). Simmons also recalled that Avoidance Speaker Ahearn stated, "Once you get this Union in -- in there, that you can no longer speak to your supervisors about anything. You couldn't do [anything] about days off or any problems that you were having. You know, you had to speak exactly -- directly to your -- the Union rep to solve anything." (Tr. 640:18-23). Simmons also testified that Director Dodds and GM Rich

[5] Switch forms are used by the employees to switch between early and late start times if they can find a fellow coworker on their shift willing to switch their start time. Early and late start times refer to the two-hour staggered delay in the starting times of certain employees on certain shifts. For example, a swing shift employee could work from 11 a.m. until 7 p.m. or 1 p.m. until 9 p.m. By having staggered starts, Respondent does not have to shut down all of its tables simultaneously to accomplish shift changes.

mentioned that Respondent needed to get more information on whether DRDs would be allowed to vote for the Union (Tr. 643:25-644:12).

Murduca attended a captive audience meeting Respondent conducted at 10 a.m. on March 2. In that meeting, GM Rich told the employees, "In the past you have been able to go to Roger for a last-minute day off for special occasions, but you won't be able to do that anymore if the Union comes in." (Tr. 233:3-5). Murduca also recalls GM Rich said DRDs would not have an opportunity to vote for the Union because they are considered supervisors (Tr. 233:7-9). DRD Tawana Sumbler (Sumbler) was in the same meeting, and she recalled that Avoidance Speaker Ahearn said Respondent did not know if the DRDs would be classified as supervisors or employees so the information about unions he was giving might not be necessary (Tr. 500:9-12). Sumbler further recalls that immediately following that statements about DRDs being supervisors the room went into an uproar because the DRDs were upset at being categorized as supervisors because they did not have the same benefits as full-time supervisors (Tr. 500:14-501:9).[6] Murduca testified that in response to a series of questions from multiple DRDs about when management decided to change the DRDs status from dealers to supervisors, either GM Rich or Assistant Manager Trent McIntosh (Manager McIntosh), said the decision was made two days ago (Tr. 234:23-25).

Towards the end of the same captive audience meeting, Sumbler testified, "He [GM Rich] didn't want the Union to come in. He said that because it would eliminate the communication with between him and us. And he said, right now he has an open-door policy and when the Union comes in, there would not be an open-door policy, that we'd have to communicate through our union rep." (Tr. 504:12-17). Sumbler responded to GM Rich by saying that it did not make a difference

[6] In 2012, Respondent changed how DRDs were paid when they took PTO to match how the dealers were paid, which had the effect of increasing the DRDs pay rate when they take time off. Near the same time, Respondent cancelled the DRD's employer email accounts and the requirement DRDs attend supervisor meetings. The DRDs in the meeting felt they might lose the benefit of the higher rate of pay when they took PTO (Tr. 543:22-545:2).

because the employees were unable to communicate with him now. GM Rich responded by stating that, "We [referring to the employees] could now go to Roger [referring to Director Dodds] if we needed time off and Roger would give it to us. Whereas, we'd have to go through our union rep if we wanted time off once we became a part of the Union." (Tr. 504:24-505:2).

Respondent's next captive audience meeting was at 11:00 a.m. on March 2. DRD Roger Patton (Patton) attended the 11:00 a.m. session and testified that GM Rich told the DRDs, "Obviously [they] 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 that they had." (Tr. 455:15-18). At the end of the meeting, GM Rich told the DRDs that management would have a meeting later to determine if DRDs were supervisors or employees for the purpose of the Union, and management would hold another meeting with the DRDs to let them know the decision (Tr. 457:18-20).

As indicated above, GM Rich and Avoidance Speaker Ahearn did not testify about any of the statements they made in the captive audience meetings. Instead, Respondent called VP Wade as a witness to testify about what she recalled was said at the meetings. VP Wade generally denied that GM Rich or Director Dodds made any remarks that would violate the Act. The ALJ found VP Wade's testimony of the meeting was generalized and drew an adverse inference from the failure to call GM Rich. Accordingly, the ALJ credited the employees (ALJD 8:35-41).

D. Continuation of Union Campaign

After Respondent conducted the larger captive audience meetings on March 1 and March 2, Union supporters continued to distribute pro-union literature (GCX 4, 5, 7, 8, and 51) in the employee break room until around March 16 (Tr. at 130:20-131:4). Throughout this period, the Union collected authorization cards (GCX 2) and held informational meetings with employees.

E. Follow-on Small Group Meetings and Unlawful Statements

Throughout March 2018, Director Dodds conducted mandatory meetings with small groups of employees in his office. Simmons testified that approximately a week after the large mandatory meetings, she and five to seven other employees were called into Director Dodds' office (Tr. 647:7-23). According to Simmons' credited testimony, after thanking the employees for attending the meeting, Director Dodds stated, "He [Dodds] wanted to reiterate about the Union and make sure that we understood about the Union before we [the employees] signed these cards. He told us that the -- the way that the Union came about was they were fight -- they were fighting for turkeys and free food and he said that, is this worth losing our tokes over?" (Tr. 648:10-14). Director Dodds then made a reference to how the Union campaign started with an employee meeting someone in a bar and said he knew the employees only needed 46 more votes to "get it passed" (Tr. 648:15-20). Director Dodds added that Respondent really did not want a Union (Tr. 648:18-20). Director Dodds also said that the DRDs were not going to be able to sign a card to join the Union because they would be considered full-time floor supervisors (Tr. 648:21-650:7). Director Dodds then asked employees what Respondent could do to make things better (Tr. 649:3-5). Director Dodds also mentioned that DRDs would be allowed to apply for full-time dealer positions, which Respondent would be posting soon (Tr. 651:1-3). At the end of the meeting, Director Dodds handed out his business card (GCX 9) and told the employees they could contact him with issues at any time (Tr. 651:11-14).

On March 17, full-time dealer Burge and about six other dealers were tapped off their tables to attend a small group meeting with Director Dodds in his office. Director Dodds opened the meeting by stating, "I know you all have heard that there is a committee that has formed, wanting the Union in. I don't like unions. I don't think they do anything good for the people. Some of the other Caesars properties have got the Union in, and the Union did either less or equal for them

than what they had before the Union." (Tr. 583:16-21). Director Dodds continued by stating, "I asked this committee some of the things that they wanted. One thing they wanted was a free turkey. Now imagine going to the bargaining table asking for a free turkey, and possibly losing 30 percent of your PTOs." (Tr. 584:3-7). Director Dodds then said Respondent would be able to replace the employees in the event of a strike because there would be people from all the other boats with gaming badges that will want to take the employees' jobs (Tr. 584:10-11). Director Dodds went on to mention that if the facility unionized there would be no more open-door policy and no more switch forms (Tr. 584:22-24). Finally, Director Dodds mentioned that five employees had come to him about revoking their union authorization cards (Tr. 585: 10-11).

In response to this testimony, Director Dodds confirmed he conducted the March 8 and the March 17 meetings; however, he only testified about his standard approach in the small group meetings and simply provided negative responses to leading questions from Respondent's counsel regarding what he allegedly did not say at the meeting (Tr. 1155:1-1157:5 and 1163:4-18). Director Dodds also claimed the meetings were only conducted in relation to the Employee Opinion Survey (EOS) scores and that he never discussed the organizing campaign beyond encouraging all employees to vote.

The ALJ credited the testimony of Simmons and Burges over Director Dodds for each of these meetings citing the fact Director Dodds was repeatedly led for this portion of his testimony and the two GC witness exhibited credibility and strong demeanors (ALJD 10:16-18 and 33).

F. March 24 Conversation between Murduca and Director Dodds

On March 23, for the first time in over 7 years, Respondent posted openings for full-time dealer positions in the employee break area (GCX 10). However, Respondent prohibited DRDs like Murduca from bidding on full-time dealer positions despite promising them they could apply

at points during the organizing drive. DRDs Murduca, Sumbler, and Patton all testified that Director Dodds informed DRDs in a January meeting that the Employer would begin to allow DRDs to bid on full-time dealer positions when those positions were posted (Tr. 330:2-6, 453:5-9, and 491:18-25). Director Dodds confirmed that in January 2018, he discussed the possibility of allowing DRDs to apply for full-time dealer positions (Tr. 1135:9-12). However, Respondent shifted its position on this issue after the organizing campaign began because it is undisputed that none of the DRDs were placed in a full-time dealer positions that were offered in GCX 10.

On March 24, Murduca saw GCX 10 and asked Director Dodds if she could bid on the dealer positions (Tr. 241:13-24). Director Dodds replied, "No, because we don't know where we stand with the classification of dual rights [rates]." (Tr. 242:3-7). Director Dodds denied having this conversation with Murduca in response to leading questions from Respondent's counsel (Tr 1134:24-1135:12). The ALJ credited Murduca, Sumbler, and Patton over Dodds again for the same reasons he credited the other employees in the other conversations (ALJD 11:1-2).

G. Unlawful Application of Name Badge Policy

Throughout the relevant period, Respondent maintained the following policy regarding employee name badges:

> Name Badges/Tags
>
> 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 (RX 2 at page 93).

From February 27 to March 24, dealer Rios wore a small Union pin (GCX 3) and an American flag pin on the plastic portion of her name badge holder (Tr. 136:11-17).

On March 24, Rios was tapped-off her table game and told to report to the shift office where Director Dodds, Pencil Antwine, and Assistant Shift Manager James LaFleur (Manager LaFleur) were waiting (Tr. 136:18-25). Director Dodds told Rios to take off the Union pin because it was not part of her uniform. He then added that he could not let somebody that was against the Union wear a button either (Tr. 137:2-5 and 1448:23-24). Rios was not asked to remove the American flag pin on her name badge holder during the meeting. But, a week later, on April 15, Respondent returned and asked Rios to remove the flag pin as well (Tr. 137:7-27).

Regarding Respondent's enforcement of the name badge policy, Manager LaFleur testified, without contradiction, that Respondent never enforced the policy until March and April 2018, after the start of the organizing drive (Tr. 1450:2-8). Sumbler and Castillo further corroborate Rios's account that the Employer did not enforce the name badge policy for years until after organizing campaign began (Tr. 507:24-508:18 and 706:24-708:8).

Although Respondent ordered Rios to remove her American flag pin on April 15, she noticed other employees continued to wear American flag pins on their name badge holders while at work (Tr.137:22-23 and 138:8-24). On May 2, Rios noticed table game employees Arthur Smith and Carl Metzler were wearing American flag pins at the facility in violation of the name badge policy. Rios took pictures of Smith and Metzler wearing the American flag pins while they were working (Tr. 139:2-18, GCX 11, and GCX 12).

Respondent's witnesses argued the name badge policy was always enforced. However, the ALJ credited Rios and the other employees over the contradictory assertions of Respondent's supervisors (ALJD 11:24-30).

H. Discharge of Murduca

1.Murduca's Disciplinary History and Relevant Policies

Respondent maintains a progressive disciplinary system with disciplinary incidents divided into three types: attendance, policy and procedure, and variances (RX 2 at page 27).[7] Under the system, Respondent issues discipline in sequence beginning with a documented coaching, a written warning, a final written warning, and finally a discharge. The employee's discipline is escalated a single step in the progression if they are issued another discipline of the same type within twelve months of the last discipline. If an employee goes twelve months without receiving another discipline of the same type, the employee reverts to the documented coaching level (Tr. 1388:6-15). Respondent controls the exact day when discipline is issued. Respondent also issues informational entries in employee files for behaviors Respondent wants to document but that do not warrant discipline (Tr. 197:4-12).

On April 18, 2017, Shift Manager Jason Williams (Manager Williams) issued Murduca a final written warning (GCX 19). The final written warning was set to expire on April 18, 2018.

On January 9, Murduca received an informational entry in her file because there was a verbal disagreement with DRD Jackie Smith (Smith) about how many hours as a floor person Murduca had worked in comparison with Smith, which led to both individuals filing a complaint on the other (GCX 20). Manager Williams investigated the disagreement by taking a statement from each party and determined both employees were rude to one another, so he just issued informational entries in both employee files (Tr. 1333:16-22, GCX 20, and RX 129).

2. Events Leading to Murduca's Discharge

On April 2, Murduca was working as a floor person in a position that had her rate the gamblers at a set of tables and feed the information into Respondent's computer system. She was working alongside full-time floor person Vickie Strickland (Strickland) who was sitting as the box

[7] "Attendance" is self-explanatory. "Policy and Procedure" encompasses normal employee discipline. "Variances" refers to mistakes counting or handling money an employee might make that is not the result of malfeasance.

person supervising a craps table. The box person is located near the dealer for the craps table. During the course of her duties, Murduca needed to get some average bet information to feed into Respondent's computer system from one of the gamblers by the name of Crawford Bell. Murduca tried to ask Strickland for the information, but Strickland just demanded to know why Murduca cared about his bet information. Murduca replied it was her job and proceeded to get the information from the dealer (Tr. 246:9-24). Based on this rude exchange, Murduca could tell that Strickland was in a bad mood, but a few minutes later Murduca needed to get more information about another gambler's average bet to feed into the Respondent's computer tracking system. Strickland again refused to provide the information to Murduca, so Murduca had to ask the dealer again for information on the client's betting history.

As she approached the table to ask the dealer about the second client's average bet, Murduca had to pass by Strickland. To break the tension and distract the gamblers from the awkward approach to ask about their betting history, Murduca asked Strickland if she was from South Louisiana, and if Strickland believes in spells. In response, Strickland asked Murduca for a strand of hair. Murduca looked for a free strand of hair. Murduca did not have a loose hair, so Murduca pulled a strand of hair off her head and handed it to Strickland. Strickland put the hair in her pocket (Tr. 246:25-247:18).

Floor Supervisor Tammy Pierce (Pierce) was working at a nearby table and looked puzzled at what had just happened. Murduca joked to Pierce that Strickland was going to use the hair to help her win the Powerball. Pierce and Murduca laughed (Tr. 247:16-18). Strickland then turned around and warned Murduca that something bad would happen to her. Believing that Strickland was merely joking, Murduca simply returned to work (Tr. 247:19-21). Director Dodds and

Manager Williams admitted none of the employees involved in the incident were offended by what happened (Tr. 1240:4-24 and 1356:6-1357:11).

The following day in the employee break area, Strickland asked Murduca if anything bad had happened to her yet. Murduca said no and Strickland responded that it was coming. Murduca then playfully called Strickland a witch as Strickland headed to the door to the casino floor (Tr. 248:15-22). Shortly thereafter, Murduca saw Strickland and Manager Williams talking on the casino floor, which worried her because she thought Strickland had taken the joke the wrong way (Tr. 248:23-25). Near the same time, floor supervisor Sonya Seely (Seely) began to criticize Murduca about the arrangement of her dice in the dice bowl of the craps game Murduca was working (Tr. 249:6-11). Murduca became upset and asked Pencil Antwine for someone to replace her on her game (Tr. 249:12-22).

Pencil Antwine arranged for Murduca to talk to Manager Williams. Murduca relayed to Manager Williams she was fearful for her job after seeing Manager Williams and Strickland talking on the shop floor because Strickland might have taken her joke the wrong way. Murduca mentioned that recently she felt her job was in jeopardy since she spoke-up in the March 2 captive audience meeting (Tr. 250:10-18). Manager Williams then asked Murduca to elaborate a little more. Murduca described to Manager Williams the hair incident with Strickland and what happened with Seely. When Murduca explained the part about spells, Manager Williams interjected and stated one of his college friends had a voodoo doll and when they stuck pins in the doll bad things happened to people. When Murduca asked him if that was true, Manager Williams responded with a dismissive "No Judy. How could you believe that stuff?" (Tr. 250:19-251:2). After the meeting, Murduca returned to work. Murduca was not asked to complete an incident report or make any type of statement during this meeting.

3. Respondent's Truncated Investigation and Discharge of Murduca

Later during the day on April 3, Manager Williams asked Strickland to provide an incident report about her exchange with Murduca (Tr. 1312:18-21).[8] Strickland's statements do not indicate that employees or customers were offended, that the word voodoo was used, or that religion was any part of the hair incident. To the contrary, the statements indicate the employees thought the matter was a joke and that they were laughing. Furthermore, on cross-examination Manager Williams admitted that none of the employees mentioned the phrase voodoo to him or tied the hair incident to a religion. Instead, Manager Williams unilaterally decided that the hair incident was related to voodoo. Therefore, a religious belief was involved (Tr. 1358:5-18). Manager Williams also gathered a statement from Pencil Antwine on April 3 (GCX 32) and reviewed the security footage from the previous day (Tr. 1315:2-5).

After gathering statements from Strickland and Pencil Antwine, Manager Williams met with Human Resources Director Darlene Overton (Director Overton). Although Director Overton and Manager Williams admitted they are not aware of anyone actually being offended by the hair incident (Tr. 1356:6-1357:3), Director Overton and Manager Williams decided that Murduca had made a potentially offensive series of statements on the casino floor that could have offended other employees or customers (Tr. 1314:20-25). Director Overton then directed Manager Williams to obtain a statement from Murduca with the intent of investigating Murduca for misconduct (Tr. 1315:1-3).

[8] Respondent produced two statements from Strickland about the incident GCX 33 and GCX 35. Although Manager Williams admits he signed GCX 35 he has no recollection of the document and cannot testify as to how it came to exist (Tr. 1341:18-1342:20). Respondent also admitted that Strickland was required to sign a confidentiality statement threatening her with discipline to include possible termination if she discussed the investigation with others (GCX 36).

On April 4, Pencil Antwine told Murduca to write a formal human resources complaint about the incidents the day prior. Murduca questioned whether human resources wanted to go that route. In response, Pencil Antwine expressed frustration by throwing up her hands. After viewing Pencil Antwine's reaction, Murduca reluctantly wrote and handed to Pencil Antwine a formal human resources complaint regarding the incident with Supervisor Seely (Tr. 251:8-18).

About thirty minutes later, Murduca was summoned to Manager Williams' office where Manager LeFluer, Pencil Antwine, and Manager Williams were waiting when she arrived (Tr. 252:20-25). Manager Williams requested that Murduca write a statement about the hair incident with Strickland. When Murduca initially refused and stated she just wanted management to talk to Strickland, Manager Williams insisted that Murduca write a statement (Tr. 253:1-25). Murduca then asked if the employee handbook required her to write a statement. In response, Manager Williams said there was no requirement in the handbook, and she did not have to write a statement (Tr. 254:1-4). When Murduca replied if that was the case, she did not want to write a statement, Manager Williams corrected himself and told Murduca that he would be asking the questions for the purpose of the meeting (Tr. 254:5). Murduca then asked what normally happens when there is a complaint, and if other employees had to write a statement (Tr. 254:6-8). Manager Williams told her that his position required him to follow-up on this issue (Tr. 254:8-9). Murduca told Manager Williams that she understood that he needed to do his due diligence. Manager Williams said he did not understand what that meant and insisted Murduca write a statement (Tr. 254:10-12). Eventually, Murduca agreed to write a statement thanking Manager Williams for his concern, attesting she felt Manager Williams had conducted his due diligence, and stating that she did not want to write a statement (GCX 21).

After acquiring the statement from Murduca, Director Overton consulted with Vice President Wade before giving her recommendation to Manager Williams to discharge Murduca (Tr.1393:15-25). On April 7, Murduca was discharged on account of the conversation she had on the casino floor on April 3 and her alleged refusal to provide a statement on April 4 (GCX 22). On April 10, Strickland was issued a written discipline for the conversation on the casino floor (Tr 1123:4-19 and RX 88). Respondent did not issue any discipline to Pierce despite her participation in the events in question.[9]

V. Arguments

A. Respondent Failed to Provide any Reasons to Disturb the ALJ's Credibility Resolutions (Exceptions 14-17).

Respondent challenges the ALJ's decision to discredit parts of the testimony of both Director Dodds and VP Wade. It is well settled that the Board will not overrule an ALJ's credibility resolutions unless the clear preponderance of the evidence demonstrates that those resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Respondent is unable to meet that standard here.

Respondent's Exception 14 in form and substance is just an assertion that Respondent does not agree with the ALJ's use of a witness's demeanor to determine credibility. The Board has stated that it is loathed to overturn credibility findings based on witness demeanor because the trier of fact is uniquely positioned to make credibility findings. *Hornell Nursing and Health*, 221 NLRB 123, 124 (1975). Since Respondent failed to cite any compelling reason to support overturning the trier of fact's determination this exception lacks merit.

[9] Pierce's supervisory role would be irrelevant to whether she engaged in the same conversation that allegedly warrants discipline.

Respondent's Exception 15 claims there is an issue with the ALJ's credibility findings because he used some of the same boilerplate language about the cooperativeness of a witness that he used in his decision in a prior case. This exception is a baseless distraction that has no bearing on the ALJ's decision in this case. The Board overruled the ALJ's credibility determination in the decision in question, *Int'l Longshoremen's Assn., Local 28*, 366 NLRB No. 20 (February 20, 2018), because the Board felt the ALJ infused a portion of his credibility finding with stereotypes of how people should react in certain situations. Importantly, the Board did not rule that the ALJ's use of the cooperativeness of a GC's lead witness was a reason to overturn the decision. Respondent does not identify what language the ALJ allegedly copied from the prior decision. However, the decision in this case is devoid of any language that could be construed as a stereotypical generalization. Accordingly, the ALJ's use of a boilerplate phrase to convey the completely permissible reason for discrediting a witness that he judged the witness to be "cooperative" or "uncooperative" is a non-issue.

Respondent's Exception 16 in form and substance is a gripe that the ALJ used the fact that Director Dodds was repeatedly led during his direct testimony as a reason to discredit his testimony at various points. To support this exception, Respondent argues there were no objections to the leading questions, and the General Counsel was allowed at times to ask leading questions of its witnesses. Both of these points are irrelevant to whether or not the ALJ felt the leading questions hurt the credibility of Director Dodds' testimony. As indicated above, the Board's policy is not to overturn ALJ credibility resolutions unless the clear preponderance of the evidence demonstrates that those resolutions are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Respondent's support for Exception 16 clearly fails to satisfy the requisite standard.

Respondent's Exception 17 argues the ALJ made an error by discrediting portions of VP Wade's testimony because her testimony about the captive audience meetings on March 1 and March 2, was generalized. Respondent neglects to mention in its exceptions that the ALJD clearly states the additional reason for discrediting Wade's testimony about the captive audience meetings was that Respondent failed to call General Manager Mike Rich to counter the allegations that he made the unlawful statements (ALJD 8:15-19 and 8:39-41). See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992). Also, the Board has a long held that vague or ambiguous testimony about a certain subject is a legitimate reason for an ALJ to discredit a witness' testimony. *Wilshire Foam Products*, 282 NLRB 1137, 1140 (1987). Lastly, Respondent cites the fact the ALJ credited other portions of VP Wade's testimony as evidence her testimony about the captive audience meeting should be credited. However, the fact that the ALJ credited other portions of VP Wade's testimony in no way prevents him from discrediting her generalized recollection of the captive audience meetings. *Burns Coal Co.*, 106 NLRB 590, 600 (1953) (holding there is nothing unusual with crediting portions of a witness' testimony). Accordingly, the ALJ's credibility resolutions should be affirmed in their entirety.

B. Dual Rate Dealers are Employees (Exceptions 6 and 22).

DRDs are not statutory supervisors or managerial employees. The Board's test to determine if employees are statutory supervisors is whether the employees: 1) hold the authority to engage in any one of the 12 primary supervisory powers, 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. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may also be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. *Id.* In

applying this three-part test, the party asserting supervisory status bears the burden of proof. *Kentucky River Community Care*, at 711-712. Additionally, any lack of evidence is construed against the party asserting supervisory status, and the Board has long recognized that purely conclusory evidence is not sufficient. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999); *Golden Crest Healthcare Center*, 348 NRLB 727, 731 (2006). Additionally, the party seeking to establish supervisory authority must show that the putative supervisor has the ability to require that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to request that a certain action be taken. *In Re Beverly Enterprises-Minnesota, Inc.*, 348 NLRB 727, 729 (2006); *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001); accord *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998). Finally, the Board has a duty "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985).

Regarding employees that function as putative supervisors only part of the time, the Board will consider such employees to be supervisors only if they actually exercise supervisory power during the periods they work as putative supervisors. *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (holding DRDs that spent over 30 percent of their time supervising were supervisors because they performed supervisory functions when they worked as floor supervisors); contra *Los Angeles Water & Power Employees Assn.*, 340 NLRB 1232, 1233-34 (2003) (holding the putative supervisor was not a supervisor because the functions he performed when filling in for the regular supervisor were not the same and did not meet the statutory criteria for supervisory status). Respondent correctly asserts the DRDs spent approximately half their time, if not more, serving

as floor persons. However, the point is irrelevant because the record in this case makes clear that the DRDs did not exercise supervisory authority during the periods they worked as floor persons.

Respondent argues the DRDs responsibly directed other employees, assigned other employees, and should otherwise be considered managerial employees excluded from the Act. But, all of these arguments are illusory. To the extent the DRDs provide any ad hoc direction to other employees or affect assignments they do not exercise any independent judgment in doing so. Respondent failed to produce evidence to support its baseless claim that DRDs meaningfully recommend to higher level supervisors the assignment of other employees. Lastly, contrary to Respondent's assertions that some of the rejected exhibits were probative of supervisory or managerial employee status, the rejected exhibits were not probative of supervisory status and were redundant examples of similar exhibits Respondent was allowed to put in the record and illicit testimony on (RX 33-35 and 37-39). Therefore, because the additional exhibits were not relevant and were cumulative, Respondent suffered no harm by their exclusion from the record.

1. Dual Rate Dealers Do Not Responsibly Direct Other Employees.

Although Respondent was vague on details, it claims that some of the directions the DRDs provide when acting as floor persons means they are responsibly directing other employees. Contrary to this assertion, the record shows the DRDs were not responsibly directing other employees on Respondent's behalf.

It is well settled Board law that the authority to "responsibly to direct" arises when "a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' … provided that the direction is both 'responsible' … and carried out with independent judgment." *Diversified Enterprises, Inc.* 353 NLRB 1174, 1180 (2009); *quoting Oakwood Healthcare Center*, 348 NLRB 686, 691 (2006). In order to prove

responsible direction, a respondent must show the putative supervisors were accountable for the performance of their subordinates. *Oakwood Healthcare Center*, 348 NLRB at 691-92. Furthermore, it is also necessary to show that the putative supervisors have the authority to take corrective action *Id.* at 692.

Respondent's attempt to claim the DRDs meaningfully direct other employees ignores several facts in the record. Manager Williams admitted the rules of the game, guidelines for the floor supervisors on how to correct mistakes made by dealers, and guidelines on how to give out "comps" are located in the procedures binders and the digital table touch system (Tr. 210:18-211:25). These procedures binders have all the game rules the DRDs use to determine what to do if they notice a mistake on a game. Thus, DRDs are just serving as a second set of eyes "playing umpire" in accordance with predetermined rules that cover any situation that might arise (Tr at 211:1-25, 308:24-309:19, and 470:18:22). The fact DRDs are constantly supervised by other senior supervisors while they monitor the table games and routinely call for surveillance or assistance from senior management further undermines the argument the DRDs use independent judgment in how they monitor table games. *Chevron Shipping Co.*, 317 NLRB 379, 381-82 (1995) (holding that junior licensed officers are not supervisors, where, inter alia, superior officers are constantly present or available). Furthermore, the DRDs are not held accountable for the actions of the employees under them.[10] Finally, Respondent's argument ignores the fact that Director Dodds admitted that the DRDs actions in directing dealers to pay a customer are largely a customer services task designed to redirect the gamblers frustration for a mistake or issue away from the dealer in order to keep games running (Tr. 1030:18-24). *In re Los Angeles Water and Power*

[10] None of the DRD evaluation forms in RX 60 showed that DRDs were ever evaluated on the performance of the dealers beneath them, but rather on how attentively and closely they watched the games they were assigned.

Employees' Assn., 340 NLRB 1232, 1233-34 (2003) (handling largely customer service disputes does not create supervisory status).

In conclusion, even a brief review of the record demonstrates that Respondent has failed meet its burden of showing the DRDs meaningfully direct other employees by referencing isolated incidents of DRDs telling a dealer how to correct a mistake at the table in accordance with a set of comprehensive rules, under supervision of senior management, and without being held accountable for the performance of those allegedly underneath them.

2. Dual Rate Dealers Cannot Assign or Meaningfully Recommend the Assignment of Employees

The record is equally devoid of evidence that DRDs can assign or meaningfully recommend the assignment of other employees. Board law is clear that the term "assignment" entails designating other employees' place of duty such as department, work area, wing of a facility; determining other employees' schedules, hours of work, or overtime; or designating the significant overall tasks and duties of other employees. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). However, ad hoc instructions on discrete tasks are insufficient to establish that an employee has the authority to assign work. *Id.* For example transfers of employees on the line to accommodate bathroom breaks or emergencies is not considered the power to assign. *Croft Metals, Inc.*, 348 NLRB 717, 721-22 (2006).

The records show that DRDs clearly lack the authority to assign other employees. It is undisputed the employees are assigned their shifts and start times weeks in advance by a centralized scheduling coordinator (Tr. 103:16-104:8, 201:14-16, 310:6-10, 513:9-24, 935:9-12, and 952:21-24). Furthermore, the daily road maps, which assign the dealers, DRDs, and floor supervisors to their table games and positions for each shift, are generated by the pencils or shift supervisors (Tr. 103:16-104:8, 201:14-16, 468:10-16, and 992:20-993:8).

Despite the obvious conclusion that DRDs cannot assigning employees, Respondent attempts to raise an argument that DRDs meaningfully recommend to senior supervisors when to pull a dealer off a table or when to close down tables for lack of game play based on vague testimony provided by Director Dodds. Director Dodds' testimony, which came in response to leading questions, was contradicted by multiple employee witnesses and Respondent's own documents (Tr. 1035:7-1036:16, 1039:12-1040:25, and 1067:25-1069:5). Specifically, Director Dodds' statements were rebutted by DRDs Patton and Sumbler who testified they have never taken part in or heard of a DRD talking to an assistant shift or shift supervisor to get a dealer pulled off a specific table (Tr. 469:12-24 and 516:11-517:4).[11] Additionally, Supervisor Seely testified that when she acts as the pencil supervisor she solicits factual input about the action on the casino floor from DRDs at the beginning of a shift so she can tweak the schedule, and there is no dynamic re-tasking of employees based on a DRD's recommendations (Tr. 1472:1-25-1473:5). In summary, the antidotal testimony cited by Respondent about DRDs requesting a dealer be pulled because a drunk client is giving the dealer grief or a DRD thinks a high roller wants a more experienced dealer fails to show the DRDs have the actual authority to meaningfully recommend the assignment of dealers to table games. Instead, the testimony shows the actual authority rests with the pencil supervisors who occasionally solicits information from the DRDs to make their decisions.

Director Dodds also made the assertion that DRDs control when employees are sent home by raising the betting limits on certain tables to get customers to switch tables so the floor supervisors could count chips, close the table, and switch out the dealers at shift change (Tr.

[11] Patton mentioned if an intoxicated patron was being belligerent to a dealer because the patron was losing, he might ask the pencil to switch dealers in order to defuse the conflict. However, that interaction proves that the real authority to assign employees for employee safety reasons abides with the pencil supervisor.

1065:1-1066:8). However, Director Dodds' assertion was contradicted by witness testimony that the pencil or assistant shift supervisor is the one who directs DRDs to initiate this process unless it just happens to be a pre-scheduled shift change. For example, DRD Sumbler testified that either the assistant shift supervisor or shift supervisor gives DRDs the order to start the coordinated raising of the betting limits to either reduce labor requirements or herd gamblers away from certain tables for shift changes (Tr. 541:21-542:8). Sumbler's contention is buoyed by GCX 41. GCX 41 is an incident report Sumbler wrote after her assistant shift supervisor, Jennifer Whitaker, accused her of running players off by raising the table games limit too early. Although Director Dodds claims GCX 41 is evidence Sumbler had the authority to raise the betting limits on her own, the document indicates that the assistant shift supervisor was closely monitoring and coordinating the raising of the betting limits, as opposed to DRDs using their discretion. Sumbler's point is further reinforced by VP Wade's testimony that the pencil supervisor is the one who determines when people will be sent home and at what price point to set the betting limits because the pencil supervisors are responsible for the management of labor costs (Tr. 992:20-993:8).

In sum, the record shows that Director Dodds vague and self-serving testimony about DRDs assigning dealers is spurious. Accordingly, the determination that DRDs cannot assign other employees should be upheld.

3. Dual Rate Dealers are not Managerial Employees

The record shows that the DRDs do not even approach the threshold of being managerial employees. The relevant test for managerial employee status is as follows:

> Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." … These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." … Managerial employees must exercise discretion within, or even independently of,

> established employer policy and must be aligned with management.… Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

Allstate Ins. Co., 332 NLRB 759, 762 (2000); quoting *NLRB v. Yeshiva University*, 444 U.S. 672, 682-83 (1980). As with supervisory status, the party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005).

Respondent argues the 40 or so DRDs are managerial employees because they are charged with managing Respondent's labor cost by deciding when to raise and lower betting limits and because they help monitor the transactions on the table games. As discussed in the previous section, the first assertion is undercut by the DRDs' testimony, GCX 41, and VP Wade's own testimony that the pencil supervisors are responsible for labor costs, not the DRDs (Tr. 469:12-24, 516:11-517:4, and 992:20-993:8). Likewise, the argument that DRDs are managerial employees because they monitor the flow of cash for regulatory reasons lacks merit. Simply monitoring cash flow or performing other more clerical duties related to monetary decisions is not enough to create managerial employee status. *In re E.C. Waste, Inc.*, 339 NLRB 262, 279 (2003). Even the testimony from Director Dodds that Respondent cites in its brief includes the caveat that DRDs can be written-up for not correctly monitoring the cash flow serves to undermine the argument that the 40 or so shift workers with multiple levels of management between them, and even Director Dodds, are somehow senior management employees who make decisions about policy (Tr. at 1047:15-18). Accordingly, the argument that the DRDs are managerial employees is baseless.

4. Respondent's Cumulative Exhibits are not Evidence of Supervisory Authority and their Rejection was not a Prejudicial Error

In an attempt bolster its arguments, Respondent alleges the ALJ's decision not to admit cumulative evidence was a prejudicial error. Respondent conveniently neglects to mention that the

ALJ accepted seven similar exhibits, all allegedly proving the same point, before he rejected the remaining exhibits. Therefore, Respondent was not prejudiced. Moreover, the probative value of the rejected exhibits is highly questionable.

The Board's adoption of an administrative law judge's evidentiary rulings is reviewed for abuse of discretion. See *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same). The party challenging such rulings must prove prejudice. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67, 70-74 (D.C. Cir. 2015) (alleged procedural missteps did not result in prejudice); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from judge's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer "failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing").

As indicated above, the rejected exhibits (RX 41, 43-50, 53-54) are substantially similar in character to the exhibits admitted and marked as RX 33-35 and 37-39. To the extent there is any probative value in the rejected exhibits the same inferences could be drawn from the similar exhibits that were accepted and about which testimony was elicited. Therefore, Respondent was not prejudiced by their exclusion, and the ALJ did not abuse his discretion in rejecting the exhibits.

Furthermore, the rejected exhibits are not prohibitive of supervisory status. The rejected exhibits are an assortment of emails and incident reports from 2016 or earlier that involve Murduca operating as a DRD years prior to the incident in question (RX 41, 43-50, and 53-54).[12] Respondent argues that because Murduca was enforcing game rules on other employees and/or because Murduca or the other employee referred to Murduca as her supervisor, these documents are

[12] RX 56 cited in Respondent's brief was never technically rejected because Respondent failed to offer it into the record.

evidence that DRDs are supervisors. However, these remote in time documents are not particularly probative of what the powers and authorities of the DRDs were when Murduca was discharged. Moreover, the fact an employee labels another employee a supervisor has no bearing on supervisory status. Finally, the fact Murduca was purportedly enforcing game rules on other employees is evidence that she was only following the lengthy set of rules and regulations she must follow as she observes the dealers, as opposed to exercising independent judgment. In conclusion, the rejected exhibits are not probative of what Respondent claims. Even if they were, Respondent was able to enter multiple similar exhibits into the record, so there was no prejudice. Accordingly, the ALJ's determination that the exhibits were cumulative should be affirmed.

C. The ALJ Properly Found Respondent's Supervisors Committed Multiple Section 8(a)(1) Violations (Exceptions 5 and 7-12).

Respondent excepted to the findings that multiple statements made by Director Dodds or GM Rich were violations of the Act. As outlined below, each of these exceptions is without merit.

1. Director Dodds Unlawfully Interrogated Murduca (Exception 5).

The ALJ correctly credited Murduca's testimony over Dodds about their conversation on February 28, and correctly applied the law in determining that the conversation constituted an unlawful interrogation. The Board has determined that the issue of whether questioning is coercive interrogation is to be decided on the basis of all the surrounding circumstances. See *Rossmore House Hotel*, 269 NLRB 1176, 1179 (1984), enfd. sub. nom. *Hotel Restaurant Employees v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing the "totality of the circumstances" several factors are considered: (1) the background of the employer; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the reply. *Westwood Healthcare Ctr.*, 330 NLRB 935, 939-40 (2000). citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Although "strict evaluation of each factor" is not required,

the indicia have been found as a starting point for assessing the totality of the circumstances. See *Perdue Farms Inc.*, 323 NLRB 345 (1997) affirmed *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). This test does not depend on motive or the successful effect of the coercion. *El Rancho Market*, 235 NLRB 468, 471 (1978); *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993).

As an initial matter, Respondent did not cite any particular reason to justify the Board overruling the ALJ's credibility resolution regarding the interrogation allegation. The ALJ credited the testimony of Murduca, Rios, and Castillo over Director Dodds regarding all the various conversations he had with them on February 28, including the interrogation of Murduca (ALJD 7:35-38). Additionally, although not cited in the ALJD, Director Dodds' account could have been corroborated by Pencil Antwine, but Respondent chose not to call her.

The ALJD clearly cited to the *Bourne* precedent and determined that based on the nature of the information sought and the identity of the questioner, Director Dodds interrogated Murduca (ALJD 15:24-40-16:1-11). There is no requirement to go through an exhaustive analysis of each factor, just a requirement to use the factors as the starting point in the analysis. The ALJD clearly indicates that the nature of the information sought factor and the identity of the questioner factor weighed in favor of finding a violation. Respondent would like the Board to focus on the fact that the conversation did not appear overly threatening to Murduca at the time. Respondent cites cases that indicate conversations where an employee voluntarily tells a supervisor the identity of other employees who signed union cards as precedent for the contention that the conversation with Murduca was lawful. *Wal-Mart Stores, Inc.*, 341 NLRB 796 (2004). However, Respondent fails to mention this case is clearly distinguishable because here there is no doubt that Director Dodds asked Murduca for the names of all the Union organizers on each shift. Despite Respondent's

efforts to shift focus to how congenial the interrogator's approach might have been, questions of that nature by a senior supervisor leads to the unescapable conclusion that this was an unlawful interrogation. *Club Monte Carlo Corp.*, 280 NLRB 257, 262-63 (1986) (asking employees for the identity of other employees engaged in protected activity held to be unlawful despite a relatively benign atmosphere in which the offending conversation took place).

Contrary to Respondent's assertions, the ALJD is quite clear that Murduca's testimony was credited over Director Dodds' testimony, and the ALJ analyzed the conversation using the appropriate factors. Accordingly, the ALJ's ruling should be affirmed.

2. Respondent Unlawfully Solicited Employee Grievances (Exception 7).

The ALJ correctly found the small group meetings Director Dodds held with the volunteer organizing committee on February 28 and with small groups of employees throughout the month of March, constituted attempts to solicit employee grievances with the implied promise to remedy the grievances. When an employer institutes new procedures to solicit grievances from employees in response to a union organizing campaign it creates an inherent implied promise to remedy the solicited grievances regardless of whether there was an explicit promise to remedy them. *Albertson's, LLC*, 359 NLRB 1341, 1341 (2013); reaffirmed in *Albertson's, LLC*, 361 NLRB 761 (2014). A Respondent may rebut this implied inference to remedy any grievances solicited from employees during an organizing campaign by either establishing it had a past practice of soliciting grievances in a like manner prior to the critical period or by establishing the statements were not a promise. *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529-30 (2010).

In this case, Respondent's attempt to argue these meetings were part of Respondent's past practice of holding Employee Opinion Survey (EOS) meetings is contradicted by the record evidence. The record makes clear that Respondent's prior EOS score meetings were not the same

as the intimate small group meetings Director Dodds had with employees in his office after Respondent learned of the organizing drive. As the ALJD highlights, Respondent failed to show it had a similar practice of Director Dodds meeting employees in small groups in his office to solicit grievances and make personal appeals to give Respondent a chance to address the employees' concerns (ALJD 17:fn 49). Respondent argues that its EOS meetings were a similar past practice, but this argument ignores several inconvenient facts. First, Director Dodds admitted the EOS meetings that Respondent normally conducted were concluded by the end of January 2018, before Respondent learned of the Union organizing drive (Tr. 1100:15-1102:17 and RX 131). Therefore, the additional meetings Director Dodds conducted after February 27, had nothing to do with the EOS results and were not part of Respondent's past practice of soliciting employee grievances as a result the EOS. Second, the record shows that the EOS meetings were annual all-employee meetings held in the casinos amphitheater and led by senior management (Tr 154:18-155:15 and 814:15-22). These meetings with hundreds of employees at a time in an amphitheater are materially different from meetings with four to seven employees in Director Dodds' office where he made personal appeals to provide Respondent the opportunity to remedy the grievances. Lastly, Respondent raises the spurious argument that the employees knew Director Dodds could not remedy their grievances himself. However, but the argument is meaningless because the employees clearly knew Dodds was acting as the conduit through which Respondent would solicit their grievances in order to remedy them. In conclusion, the smaller group meetings held in Director Dodds' office after the normal round of EOS meetings concluded were not part of any past practice by Respondent. Therefore, Respondent's argument is without merit, and the ALJ's decision should be upheld.

3. Respondent, through GM Rich and Director Dodds, Threatened Employees with the Loss of Existing Benefits (Exception 8).

The ALJ correctly found Respondent violated the Act by threatening employees with the loss of benefits on several occasions. It has long been established that threatening employees with the loss of existing benefits is a violation of the Act. *Auto Nation, Inc*., 360 NLRB 1298, 1299 (2014) enfd. 801 F.3d 767 (7th Cir. 2015). Any statements about the loss of benefits are evaluated to determine if the employees would reasonably construe the statements to mean the loss of benefits was the result of union selection, not just the result of good faith bargaining. *BP Amoco Chemical*, 351 NLRB 614, 617-18 (2007); *Guardian Automotive Trim, Inc.*, 337 NLRB 412, 418-419 (2002) (affirming an ALJ's decision that the employer violated the Act by telling employees the open-door policy ends with unionization).

Respondent contends that the various offending statements made by GM Rich and Director Dodds were merely explanations of hypothetical results of bargaining protected by Section 8(c) of the Act. However, the facts fail to support this contention since the statements by these high-ranking officials unmistakably threaten the loss of existing benefits if employees chose to be represented by the Union. During a series of union avoidance meetings on March 1 and 2, GM Rich threatened that employees would lose the open-door policy and the ability to ask for time off from Director Dodds at the last minute if they were represented by a union (Tr 126:3-9, 578:9-24, and 642:7-14). The Board has found statements like these to be unlawful because they suggest employees will lose benefits if they select a union. *Guardian Automotive Trim, Inc.*, 337 NLRB 412, 418-19 (2002).

The *Tri-Cast, Inc.* case cited by Respondent in its brief fails to support dismissing this coercive statement's allegation because it is distinguishable from the facts under consideration here. In *Tri-Cast, Inc.*, 274 NLRB 377, 377 (1985), the Board found that the employer did not violate the Act when it distributed a leaflet stating, "We have been able to work on an informal

and person-to-person basis. If the union comes in this will change." Notably, the leaflet did not reference a specific benefit the employees would lose if they chose to be represented by a union. On the contrary, in the instant case, GM Rich told employees in clear and unequivocal terms that selecting the Union would trigger two negative consequences: the loss of the open-door policy and the loss of employees' ability to request last minute time-off. Rich's coercive threat clearly violated the Act.

Like GM Rich, Director Dodds also threatened employees with a loss of benefits. The record reveals that Dodds made the threat during meetings with small groups of employees in his office. After mentioning he discovered that the Union organizing committee wanted a free turkey, Dodds asked the assembled employees to imagine asking for the turkey at the bargaining table and losing 30% of their PTOs (Tr. 584:2-7). By making the statement, Dodds was not attempting to inform employees about what could possibly happen in a hypothetical bargaining situation as occurred in the case relied on by Respondent in its brief. Instead, his coercive statement was intended to inject fear in the hearts of the employees, and send a strong message, that Union representation would result in the loss of 30% of their tips. For the dealers, these tips represent the vast majority of their compensation. Lastly, the record reveals that Dodds not only threatened employees during the meeting, but also made several other unlawful statements.

Accordingly, Respondent's exceptions to the finding that GM Rich and Director Dodds made unlawful threats that employees would lose existing benefits if they were represented by a Union are unfounded, and the ALJ's decision should be affirmed.

4. Respondent Unlawfully Told the Dual Rate Dealers They Could Not Vote in a Union Election (Exception 9).

The ALJ properly found that GM Rich's statements that DRDs cannot vote for the Union violated the Act. Telling putative supervisors they cannot vote in an upcoming Union certification

election in order to chill their protected activity is an independent violation of the Act. *Shelby Memorial Hosp.*, 305 NLRB 910 (1991) (affirming the conclusion of law that inaccurately telling putative supervisors they cannot participate in an organizing campaign is a violation of the Act independent from any other acts or statements respondent committed that also violated the Act).

As an initial matter, Respondent inaccurately claims that the ALJ only cited to authorities that contemplated a violation if employees were promoted into supervisory positions to thwart the employees' protected activities. But, the ALJ's decision clearly cites to the conclusions of law that the misclassification is a separate violation found in *Shelby Memorial Hospital* (ALJD 17:21).

The remainder of Respondent's contentions regarding the allegation the DRDs were misclassified as supervisors simply attacks the ALJ's decision to credit the testimony of Murduca and Sumbler over VP Wade because Wade provided only a generalized recollection of the statements made in the meeting, and Respondent failed to produce GM Rich to testify to what statements he allegedly made (ALJD 8:39-41). Respondent's attempts to pick at any variations between Sumbler's testimony and Murduca's testimony does not somehow transform Wade's testimony into a credible rebuttal. Therefore, Respondent has failed to produce any compelling reason to disturb the ALJ's credibility resolution. Accordingly, the decision regarding this allegation should be affirmed.

5. Respondent Unlawfully Offered Dual Rate Dealers to Bid on Full-time Dealer Positions (Exception 10).

The record shows that during a small group captive audience meeting on March 8, Director Dodds told employees that DRDs would be allowed to bid on full-time dealer positions in order to discourage Union activity and support. The Board has long held that an employer cannot offer benefits to employees in order to induce them to vote against a Union during an organizing drive. *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003) enfd. in pertinent part 397 F.3d 548 (7th Cir. 2005).

More specifically, absent a showing of legitimate business interest, the Board will infer an improper motive if a respondent begins to grant employees new benefits during the middle of an organizing drive. *KOFY TV-20*, 332 NLRB 771, 773 (2000).

In this case, dealer Simmons credibly testified that in mid-March Director Dodds told her and other employees gathered for the small group captive audience meeting that the DRDs would be allowed to bid on full-time dealer positions (Tr 651:1-3). Although Director Dodds confirmed that the meeting Simmons attended occurred on March 8, he denied making the unlawful statement (Tr 1155:10-16). Respondent did not offer a lawful business justification for why Director Dodds would offer employees this opportunity during this meeting; instead, Respondent denied the statement was ever made (ALJD 18:fn 54). The ALJ credited Simmons' testimony over Director Dodds' testimony (ALJD 10:16-18), and Respondent failed to provide any justification to overturn that credibility determination.

All of the arguments Respondent provides in support of Exception 10 center around the fact that Rios, Murduca, and Patton testified that Director Dodds made similar comments during the EOS meetings in January, before Respondent learned of the organizing drive. However, statements Director Dodds allegedly made during meetings in January are irrelevant to determining what he said in the March 8 meeting with Simmons and whether the March 8 statements are unlawful. Moreover, Director Dodds admitted the EOS meetings concluded in January 2018 (Tr. 1100:15-1102:17). Further, the small group meetings were materially different from the formal presentations and question and answer sessions that normally occurred during the EOS meetings. Therefore, Respondent has failed to show these small group meetings were a part of Respondent's past EOS meetings. Accordingly, the ALJ's decision should be affirmed.

6. Director Dodds Created the Impression that Employees' Protected Activities were Under Surveillance (Exception 11).

Respondent, through Director Dodds, created the impression of surveillance during a small group meeting on March 8. Board law holds that an employer violates Section 8(a)(1) of the Act when under all the circumstances a reasonable employee would assume his or her protected activities were under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295-96 (2009). More specifically, in cases where an employer tells employees it is aware of their union activities, but fails to provide the source of the information, the Board will find a violation. *Conley Trucking*, 349 NLRB 308, 315 (2007); *Sam's Club*, 342 NLRB 620, 620-621 (2004). Furthermore, an employer does not have to inform employees that it has knowledge of their union activity as claimed by Respondent. *Peter Vitalie Co.*, 310 NLRB 865, 874 (1993) (holding it unlawful for an employer to identify to other employees who the ring leaders of union were without revealing how it obtained this information); *Adderley Industries, Inc.*, 322 NLRB 1016, 1027 (1997) (holding it unlawful for an employer to identify to other employees the names of two employees that signed union cards and the fact it knows other employees signed union cards).

In this case, Simmons testified that Director Dodds told her and other employees gathered in his office on March 8 that "the Union [was] formed [by] … an employee … [who] met this guy at a bar … [and] … that's how it [the organizing drive] got started." Director Dodds also revealed that he knew about the level of Union support when he told the employees that they "only need 46 more votes to get it passed." (ALJD 18:5-10 quoting Tr 648:16-20). Director Dodds denied making the statements, but the ALJ rightfully credited Simmons testimony over Director Dodds (ALJD 10:16-18). As previously mentioned, Respondent has failed to provide any reason to disturb the ALJ's credibility resolutions.

Director Dodds' act of meeting with a small group of employees in his office to reveal intimate details about the organizing drive without disclosing the source of his information is

exactly the kind of circumstances that would lead a reasonable employee to believe their protected activity was under surveillance. The inference is only strengthened by the fact that during the same meeting Director Dodds repeatedly expressed that Respondent did not want the Union and made other unlawful statements. Accordingly, the ALJ's finding that Respondent created the impression of surveillance should be affirmed.

7. Director Dodds Unlawfully Blamed the Union for Respondent Refusing to Allow Dual Rate Dealers to Bid on Full-time Dealer Positions (Exception 12).

On March 24, Director Dodds told Murduca she could not bid on the posted full-time dealer position because, "We don't know where we stand with the classification of the dual rights [rates]." Murduca testified that Director Dodds was referring to whether the DRDs were supervisors for the purpose of the NLRB election (ALJD 18:25-29 quoting Tr 242:5-7). Director Dodds denied ever having a conversation with Murduca (Tr. 1134:24-1135:4). However, the ALJ credited Murduca over Director Dodds (ALJD 11:1-2). Although Respondent quibbles with that credibility determination, Respondent has not presented any compelling reason to question it.

Respondent also alleges that this allegation was not in the General Counsel's Complaint. However, this contention has no basis in reality since Complaint paragraph 14 alleges Respondent violated Section 8(a)(1) of the Act in the following manner: "About March 24, 2018, Respondent, by Roger Dodds, told dual rate dealers they could not bid on regular full-time dealer positions to discourage union activity." (GCX 1[yy] and ALJD 18:fn 56). Respondent argues the Complaint language lacks a clear and concise description of the acts that constituted the unfair labor practice because it does not use the same phrase "blaming the Union" that the ALJ used in his decision. The argument is spurious since the Complaint undoubtedly put Respondent on notice of the exact act that constituted interference with employees' protected activity. Furthermore, in the *Bellagio* case cited to by Respondent in its brief, the Board changed the theory of the violation to find a

violation after the record had closed. *Bellagio, LLC v. NLRB*, 854 F.3d 703, 712 (D.C. Cir. 2017). However, in this case, the issue of what Director Dodds allegedly said on March 24 was fully litigated. *MEK Arden, LLC v NLRB*, 755 Fed. Appx. 12, 19 (DC Cir 2018) (distinguishing situations where respondent has the opportunity to cross-examine witnesses and present a full defense to a slightly different theory of a violation based on the same underlying conduct from the procedural history of *Bellagio*). Moreover, Respondent's defense was that Director Dodds denied the underlying conversation ever happened. That defense would not have changed no matter what theory the ALJ used to determine that Respondent violated the Act.

Finally, the statement Director Dodds made to Murduca unequivocally connects the refusal to allow DRDs to bid on full-time dealer positions to Respondent's prior position on whether DRDs were supervisors for the purpose of the organizing campaign. Therefore, it is directly analogous to cases cited by the ALJ where the Board held an employer unlawfully refused to provide a benefit to employees because of an organizing drive. *Atlantic Forrest Products*, 282 NLRB 855, 857 (1987) (unlawful for an employer to blame recession of pay increase on an organizing drive). Accordingly, the ALJ decision should be affirmed.

D. Respondent Unlawfully Enforced Its Name Badge Policy (Exception 21).

Respondent unlawfully enforced its name badge policy in a disparate manner that was designed to restrict protected activity. Employees have a Section 7 right to wear union insignia on an employer's premises, absent a showing of special circumstances. *Stabilus, Inc.*, 355 NLRB 836, 838 (2010). An employer cannot simply order employees to wear uniforms to qualify under the special circumstances exception. *Id.* Even if a rule is facially lawful, an employer cannot disparately enforce the rule in order to discourage protected activity. *Shelby Memorial Home*, 305 NLRB 910, 919 (1991).

Applying the law to this case, it is clear that Respondent's actions violated the Act. Respondent has a facially lawful rule against employees obscuring their State law mandated name badges (RX 2 at pg. 93). However, Manager LaFleur admitted Respondent never enforced this rule until the organizing drive began (Tr 1450:2-8). Moreover, Respondent did not proffer any evidence to show that it consistently applied its rule prior to or even after the start of the organizing drive. In fact, VP Wade admitted that the Respondent's enforcement of the rule was spotty, at best, as documented in an email she sent after there was a "rash" of American flag pins being worn in August 2018 (Tr. 858:17-20 and GCX 45).

The record contains ample evidence to Respondent disparately enforced the policy. For example, Rios testified that on March 24, Director Dodds called her off the floor to attend a meeting with him, Pencil Antwine, and Manager LaFleur. In the meeting, Director Dodds instructed Rios to remove her UAW pin (GCX 3) and her American flag pin she had been wearing on her badge holder for over a month and mentioned he would have given the same instruction to someone who did not support the Union (Tr. 137:2-5). Rios documented that after this conversation, several other employees continued to wear American flag pins on their badge holders (GCX 11 and 12). Corroborating Rios, Castillo testified that she received similar instructions from management only after she began wearing a UAW pin (Tr. 705:14-708:9). Sumbler further confirmed that employees frequently wore various types of pins on their name badges on the casino floor without any enforcement of the rule until the organizing campaign began (Tr. 507:14-508:17). The record makes clear that Respondent only began to enforce the policy after the organizing drive and enforced the policy against employees who were wearing Union pins. Therefore, this is a clear case of disparate application of a lawful rule.

Furthermore, the two arguments Respondent raises in Exception 21 are both spurious. First, the argument that Rios and Castillo were not required remove the Union pin from their uniform completely ignores the fact that Director Dodds and Manager LaFleur failed to clarify to Rios and Castillo during the meetings that they were permitted to wear the pin on any other portion of their uniform (Tr. 1169:21-25 and 1455:6-14).[13] Instead, they directed the employees to remove the pins from their name badges. In doing so, the managers succeeded in suppressing protected activity because both employees made the obvious assumption that management was telling them not to wear a Union pin. Claiming an employee should have known the rule did not prohibit wearing the pin anywhere else on their uniform impermissibly places the onus on the employees to become labor law experts in order to exercise their statutory rights.

Second, the argument that the decades old principle in Board law that an employer cannot disparately restrict employees from wearing union pins when other types of pins are allowed to be worn is in no way connected with the more controversial portions of the Board's *Purple Communications, Inc.* decision concerning employees' rights to use an employer provided electronic communication system for protected activity. Respondent's argument otherwise is just a misconstruing of the applicable law. *Register Guard*, 351 NLRB 1110 (2007); upheld in relevant part by *Purple Communications, Inc.*, 361 NLRB 1050 (2014).

Accordingly, Respondent's Exception 21 is without merit, and the ALJ's determination should be affirmed.

E. Respondent Refused to Consider Dual Rate Dealers for Full-time Dealer Positions in order to Retaliate Against and Discourage Union Support (Exception 13)

[13] There is a dispute between Rios and Respondent as to whether Director Dodds or Manager LaFleur actually gave her the order to remove the pins. However, Respondent freely admits Rios was ordered to remove her UAW pin on the day in question. Whether Director Dodds or Manager LaFleur gave the order has no bearing on the violation since they are both clearly supervisors.

Respondent unlawfully excluded DRDs from the application process for full-time dealer positions. In the refusal to consider context, the General Counsel meets his initial burden by showing the relevant applicants were excluded from the process and anti-union animus contributed to the decision. *FES*, 331 NLRB 9, 14 (2000). An employer can rebut the inference created by the initial showing by proving it would have excluded the applicants regardless of their suspected union sympathies. *Id.*[14]

The record shows Respondent unlawfully refused to consider the DRDs for full-time dealer positions it solicited applications for around March 23 (GCX 10). Respondent admits that it did not consider any of the DRDs for the full-time dealer positions (Tr. 227:5-15 and 1002:6-10). Evidence of animus is derived from the multiple unfair labor practices committed by Respondent leading up to the job posting (ALJD 21:13-18). Further evidence of animus is shown from the timing of the refusal to consider the employees for the open positions. Respondent's conduct arose during an on-going organizing campaign where Respondent inaccurately and unlawfully claimed DRDs could not participate in the Union election, but full-time dealers could vote in an election. Therefore, allowing DRDs like Murduca, Sumbler, or Dailey to become full-time dealers could increase support among the pool of potential voters, if Respondent's contention that the DRDs could not vote was ultimately proven correct.

In response, Respondent asserts that for the last 23 years it has never allowed DRDs to become full-time dealers because it is a step down, and Respondent needed the DRDs to act as floor persons in order to have a full complement of employees to staff the casino floor. However, Respondent had not posted new job positions for full-time dealers in over seven years (Tr 135:6-

[14] With regards to this case the fact that the DRDs spend half of their time working as dealers negates any arguments that they lacked the proper qualifications for the 16 full-time dealer positions. Furthermore, the undisputed fact the DRDs make more money as dealers with less responsibility would meet any requirement that these applicants were "genuinely interested" in seeking the employment in question under *Toering Elec. Co.*, 351 NLRB 225 (2007).

9), so any argument that Respondents had a past practice of not allowing DRDs to apply is undercut by the fact that the posting of new positions is so vanishingly rare that there really is no established pattern of past behavior. Furthermore, as noted by the ALJ, Respondent provided no evidence that it could not assess on a case-by-case basis whether it could afford to lose individual DRDs as floor persons in order to fill the full-time dealer positions (ALJD 21:fn 62). In so doing, the ALJ was not substituting his business judgment for Respondent's. Instead he was pointing out Respondent failed to meet its rebuttal burden of showing it had a lawful reason to categorically exclude the DRDs, as opposed to examining the applications on a case-by-case basis.

Accordingly, the ALJ's finding that Respondent violated the Act by refusing to consider DRDs for full-time dealer positions should be upheld.

F. Respondent Discharged Judy Murduca in Retaliation for her Protected Activity (Exceptions 1-4, 18-19, 22).

Respondent unlawfully discharged Murduca in retaliation for her protected activity. In order to prevail on an unlawful retaliatory discharge allegation, the General Counsel bears the initial burden of showing that the employee's Section 7 activity was a motivating or substantial factor in the adverse employment action. The three elements required to support such a showing are: (1) the employee engaged in union activity; (2) the employer had knowledge of that activity; and (3) the employer's actions were motivated by animus toward the protected activity. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (May 31, 2018); quoting *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

In its brief, Respondent requests that the Board change the *Wright Line* test. However, Respondent offered no compelling reason to modify the long-standing test in this case. Furthermore, even if Respondent's modified test were applied to the facts of this case, the numerous contemporaneous unfair labor practices Respondent committed, the timing of

Murduca's discharge, the suspicious nature of Respondent's proffered reasons for her discharge, and the disparate treatment evidence are sufficient to prove there is a causal nexus between Murduca's protected activity and her discharge.

With regards to the knowledge element of the *Wright Line* test, it has long been held that one supervisor's knowledge of the protected activity is imputed to the other supervisors that may discharge an employee, absent Respondent providing a compelling reason to rebut the presumption. *Flex-N-Gate, LLC*, 358 NLRB 622, 630 (2012). Regarding the animus element, animus towards the protected activity is normally established through indirect evidence since an employer will rarely, if ever, openly acknowledge that an employee was fired for an unlawful reason. *Sahara Las Vegas Corp.*, 284 NLRB 337, 347 (1987). Accordingly, animus toward the protected activity may be established by (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee(s), (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). Moreover, although the Board will not substitute its opinion for that of a respondent's agent regarding the appropriate standards of employee conduct, the Board will consider harsh discipline for very minor violations evidence of pretextual motive *Presbyterian/St. Luke's Medical Center, Valmont Indus, Inc.*, 258 NLRB 93, 104 (1981).

If the above elements are met, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity. See *Auto Nation Inc.*, 360 NLRB 1298,

1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).[15] The employer will not sustain its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Kitsap Tenant Support Services*, supra, citing *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015).

Applying the *Wright Line* standards to the facts in the record of this case, the General Counsel made an initial showing that Murduca's discharge was unlawfully motivated and Respondent's proffered defense is flawed and insufficient.

As an initial matter, it is undisputed that Director Dodds learned of Murduca's Union sympathies on February 28 when he unlawfully interrogated her (Tr. 226:1-5). GM Rich and VP Wade learned first-hand of Murduca's Union support based on her statements in the captive audience meeting a few days later (Tr. 235:18-21). Although Respondent repeatedly asserts in its brief that Manager Williams and Director Overton did not have knowledge of Murduca's protected activity, Respondent failed to produce any evidence to rebut the presumption that knowledge is imputed to the other supervisors. This failure is only further underscored by the fact Director Overton admitted that she consulted with VP Wade about Murduca's discharge prior to deciding whether or not to proceed with the discharge (Tr. 1393:19-25).

Regarding animus, the record is full of evidence indicating that Respondent's decision to discharge Murduca was motivated by animus toward her protected activity. More specifically, the timing of Murduca's discharge six weeks after the initiation of the campaign and the discovery of

[15] Although a finding of pretext is not sufficient to preclude an employer from mounting a *Wright Line* defense as held by the two-member Board majority in *Auto Nation, Inc.*, the ALJ in this case did not rely on a finding of pretext. Instead, the ALJ relied on evidence of disparate treatment, the existence of numerous other unfair labor practices, and suspicious timing to conclude Respondent failed to rebut the General Counsel's initial showing that Respondent was at least partially motivated by Murduca's protected activity when it discharged her. This distinguishes this case from Member Miscamarra's dissent in the *Auto Nation Inc.* case.

her union activity raises an inference of animus. This inference is heavily reinforced by the fact Respondent engaged in a series of unfair labor practices in response to the Union campaign, including unlawfully and disparately enforcing work rules to prevent Union supporters from organizing, threatening the loss of existing benefits, promising to remedy grievances, misclassifying employees, interrogating Murduca about her protected activity and the protected activities of others, and restricting certain employees from applying for full-time dealer positions (ALJD 23:30-33). The Board considers an employer's contemporaneous commission of other unfair labor practices as probative evidence of unlawful motivation. *Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005). This is particularly true when the other violations are directed at the same employee who is later subjected to the adverse action under evaluation. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enfd. 519 F.3d 373 (7th Cir. 2008).

Additional evidence of animus can be derived from the shifting reasons Manager Williams gave for insisting that a truly shrug-worthy incident be investigated and used to discharge Murduca. The incident between Murduca and Strickland was a harmless conversation that did not affect casino operations in anyway. All the employees agree they were laughing about the incident (GCX 33/35 and GCX 21). Manager Williams admitted he inferred that the word “spells” implied voodoo that could conceivably be considered a religion, after the fact (Tr 1358:5-18). Moreover, Manager Williams was forced to retract his claim that the conversation distracted employees from their duties on cross-examination when he was confronted with the fact the discharge documents never indicated there was an issue with the conversation distracting other employees or putting casino assets at risk (Tr. 1345:5-1346:6). The fact Respondent continues to give slightly shifting reasons, all of which attempt to make this conversation between Murduca and Strickland into

something bigger than it was, is strong evidence that the true motivation behind Respondent's actions was animus toward Murduca's protected activity and an opportunity to squelch the organizing campaign by publicly removing one of the lead organizers.

Finally, evidence of disparate treatment supports a finding that Murduca's discharge was unlawfully motivated. A few weeks before Respondent learned of Murduca's protected activity she was involved in a similar incident involving of minor verbal dispute with another employee. In response, Respondent simply issued an informational entry because it was not worth investigating any further (GCX 20). A few weeks later, after Respondent learned of Murduca's protected activity, a similar innocuous incident occurred. Suddenly, Respondent determined it was necessary to take statements from multiple witnesses and ultimately discharge Murduca. This striking example of disparate treatment, with the only variable being the Respondent's knowledge of Murduca's protected activity, is strong evidence that the decision to discharge her was motivated by a desire to retaliate against her for engaging in protected activity.

Accordingly, the ALJ's determination that the General Counsel met his burden in making an initial showing that Murduca's discharge was motivated by animus toward her protected activity is supported by substantial evidence in the record.

Similarly, the ALJ determination that Respondent's affirmative defense was insufficient to overcome the General Counsel's initial showing is also supported by the record. Although Respondent repeatedly tries to claim the ALJ substituted his business judgment for that of Respondent's judgment by hanging on the use of the phrase "to achieve a more Solomon-like outcome", the truth of the matter is the ALJ's decision simply points out that Respondent's affirmative defense is undermined by the fact that Respondent repeatedly delayed in issuing discipline to other employees for more than 11 days for one reason or another (ALJD 24:fn67, RX

54(a), RX 54(c), RX 98, RX 113, and RX 44). Had Respondent delayed in issuing discipline as it had done repeatedly in the past, Murduca would have been issued a documentary coaching, the same discipline Respondent chose to issue to Strickland. Instead, by rushing to issue discipline, Respondent discharged Murduca after two decades of employment over a minor disagreement. The ALJ also correctly points out that Floor Supervisor Tammy Pierce did not receive any discipline for her participation in the exchange that involved talk of spells on the casino floor (ALJD 24:20-25).[16] The fact Pierce was not disciplined further undermines Respondent's argument that Murduca would have been disciplined absent her protected activity.

Lastly, Respondent contends in Exception 18 that the ALJ failed to take into consideration the lengthy and thorough investigation Respondent conducted as evidence weighing against the finding of an unlawful motivation. Although Respondent clearly conducted an investigation, the very fact that Respondent launched such a lengthy investigation into a minor dispute between two employees is evidence Respondent was looking for a reason to take action against Murduca. See *Murtis Taylor Human Services Systems*, 360 NLRB 546, 559-60 (2014) (holding investigating launched against employees for protected activities can in themselves be an unfair labor practice); *Northfield Urgent Care, LLC*, 358 NLRB 70, 89 (2012) (concluding the employer's investigations were likely launched to find pretextual reasons to conceal unlawful motivation in discharging employee). The thoroughness of Respondent's investigation fails to erase the unfair labor practices leading up to Murduca's discharge, change the suspicious timing of her discharge, explain the disparate treatment, explain why Respondent's supervisors were so determined to investigate a benign incident, or otherwise legally justify the decision to terminate Murduca's employment.

[16] To the extent Pierce was not overseeing Strickland and Murduca at that exact moment is irrelevant to the question of whether she should have been disciplined since she participated in the conversation. Therefore, Respondent's Exception 19 has no bearing on any of the ALJ's decisions or determinations.

To summarize, the ALJ did not find Respondent violated the Act because Respondent failed to delay Murduca's discipline or failed to discipline Pierce. Instead, the ALJ found that the General Counsel met its initial burden, and Respondent's proffered defense was insufficient. The ALJ based this finding about the insufficiency of Respondent's defense on three separate and each individually sufficient criterion. Specifically, Respondent repeatedly delayed in issuing discipline in other prior instances, failed to discipline Pierce for the same conduct, and failed to present a defense that could rebut the substantial amount of animus evidence presented by the General Counsel to show that by a preponderance of evidence Respondent was not motivated by animus and retaliation toward Murduca's protected activity.

Accordingly, Respondent's various exceptions to the finding that Murduca's discharge was unlawful retaliation are without merit, and the ALJ's decision on the discharge should be affirmed.

G. The ALJ's Ordered Remedy is Appropriate (Exceptions 20 and 23)

Since the ALJ properly found that Murduca's discharge was unlawful it is axiomatic that her discharge was not for cause and was not outside the bounds of 29 USC § 160(c). Accordingly, the Board should affirm the ALJ's ordered remedy as well.

VI. Conclusion

For the reasons discussed, Counsel for the General Counsel requests the Board deny Respondent's exceptions and affirm the Decision and Order of the Administrative Law Judge.

Dated: October 31, 2019

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2019 a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was electronically filed via E-Filing with the NLRB Office of the Executive Secretary.

I further certify that on Occtober 31, 2019, a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was served by email on the following:

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