UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:	)	
	)	
HORSESHOE BOSSIER CITY HOTEL AND CASINO	)	
	)	**Case Nos. 15-CA-215656**
Respondent,	)	**15-CA-216517**
	)	**15-CA-217795**
and	)	**15-CA-217797**
	)	**15-CA-218097**
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),	)	
Union.	)	

ANSWERING BRIEF OF CHARGING PARTY TO EMPLOYER'S EXCEPTIONS

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Comes now the International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America ("the Union"), and herein files its Answering Brief to the Exceptions of Horseshoe Bossier City Hotel and Casino ("the Company"):

I. The Employer's Exceptions and Brief Fail to Comply with Rules and Regulations Part 102.

The applicable portion of the Rules and Regulations ("R and R"), 29 CFR §102.46, states as follows:

> (1)(i) Each exception must: (A) Specify the questions of procedure, fact, law, or policy to which exception is taken; (B) Identify that part of the Administrative Law Judge's decision to which exception is taken; (C) Provide precise citations of the portions of the record relied on; and (D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section. (ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.
>
> (2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following: (i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented. (ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate. (iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on. . . .

The Exceptions vary widely from the required form in that they (A) fail to state a procedure, fact, law, or policy to which exception is taken; (B) Do not provide a reference to a specific portion of the judge's decision; (C) Do not all contain references to the records; and (D) Do not state the grounds for the objection.

Even though a supporting Brief was filed, the majority of the Exceptions contain argument and citation of authorities, in direct violation of §102.46(1)(i)(D). The language of §102.46(1)(ii) unequivocally states that any Exception that does not comply with these requirements may be disregarded by the Board.

Likewise, the Brief fails to refer directly to the exceptions, and does not follow the format required by §102.46(2). Instead, it contains a rambling summary of the Employer's favorite arguments made at trial. As detailed *infra* § II, many of the Exceptions made by the Employer are not argued in the "Argument" section of the Brief as required by the Rules, and some of the Exceptions do not appear in the Brief at all.

For these reasons alone, the Exceptions should be dismissed in their entirety.

II. Answers to the Company's Exceptions.

1. The Company's First Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R § 102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

   For the reasons described *infra* § IV, which is incorporated herein by reference, the General Counsel established a prima facie case that Horseshoe violated Sections 8(a)(1) and 8(a)(3) of the Act when it unlawfully terminated Judy Murduca ("Murduca"). (Tr. at 33, 72-72, 86, 189-196, 216, 221-223, 225-227, 233-236, 256, 455, 457, 576-577, 865-865, 1017, 1239-1240, 1315, 1318, 1341, 1346, 1355, 1356, 1392; GC Ex. 19, 22, 33, 34, 35).

   Even if a "causal connection" were a required showing, as urged by the Company in its Exception, it is well-established throughout the record that the Company disparately applied its progressive discipline policy to achieve Murduca's termination. As fully argued *infra* § IV, there was ample evidence of pretext presented by the General Counsel through

the course of proceedings. The facts on the record overwhelmingly support a finding of union animus as a motivating factor for discharge, rather than negate such a finding. The decision of the ALJ is therefore well-taken in both law and fact.

2. The Company's Second Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

For the reasons described *infra* § IV, which is incorporated herein by reference, the Company failed to satisfy its rebuttal burden. As fully argued *infra* § IV, there was ample evidence of pretext presented by the General Counsel through the course of proceedings, which the Company was entirely unable to explain at the hearing. The facts on the record overwhelmingly support a finding of union animus as a motivating factor for discharge, rather than negate such a finding. The decision of the ALJ is therefore well-taken in both law and fact.

3. The Company's Third Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

As fully argued *infra* § IV, which is incorporated herein by reference, the Company never offered a legitimate business justification for Murduca's discharge, only citing "voodoo." There was ample evidence of pretext presented by the General Counsel through the course of proceedings, which the Company was entirely unable to explain at the hearing. The decision of the ALJ is therefore well-taken in both law and fact.

4. The Company's Fourth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

As fully argued *infra* § IV, which is incorporated herein by reference, the Company never offered a legitimate, non-discriminatory business justification for Murduca's discharge. There was ample evidence of pretext presented by the General Counsel through the course of proceedings, which the Company was entirely unable to explain. In other words, as argued and cited *infra*, the evidence before the ALJ indicated that the reasons for discharge were never "honestly invoked," nor were they the "cause of the change." *See Healthcare Emples. Union, Local 399 v. NLRB*, 463 F.3d 909, 921-922 (9th Cir. 2006) (quoting *NLRB v. Savoy Laundry*, 327 F.2d 370, 371 (3d Cir. 1964)). The decision of the ALJ is therefore well-taken in both law and fact.

5. The ALJ's finding of fact and conclusion of law that on February 28, 2018, the Company violated Section 8(a)(1) of the Act when Roger Dodds ("Dodds") unlawfully interrogated Murduca concerning protected activities is well taken in fact and in law.

The Company's first argument regarding Dodds' unlawful interrogation is that the ALJ improperly credited the testimony of Murduca over Dodds. (Company Br. at 49-50). As an initial matter, this argument entirely fails to mention the fact that in addition to Murduca's testimony, the ALJ also considered the testimony of employees Nikki Castillo and Lisa Rios. (Decision at 6). Castillo and Rios' accounting of events was corroborative of and supported Murduca's testimony. (Decision at 6).

As argued fully *infra* § V, which is incorporated herein by reference, the Board "cannot overrule a hearing officer's credibility resolutions unless a clear preponderance of

all the relevant evidence convinces [the Board] they are incorrect." *Robert F. Kennedy Med. Ctr.*, 336 NLRB 765, 765 n. 2 (2001). "[O]n matters which the [ALJ], having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." *Universal Camera Corp. v. NLRB.*, 340 U.S. 474, 494 (1951). No such clear error has been shown here.

The Company's second argument is that the ALJ mis-applied the testimony taken during the hearing to the legal standard found in *Rossmore House, Westwood, and Bourne.* (Company Br. at 50-52). (citing *Rossmore House*, 269 NLRB 1176 (1984); *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Westwood Health Ctr.*, 330 NLRB 935, 939-40 (2000)). The ultimate issue remains "whether the questioning would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Orchids Paper Products Co.*, 367 NLRB No. 33 (2018). "This is an objective standard and does not turn on whether the employee was actually intimidated." *Id.* It is apparent from the transcript that Factors 2, 3, and 4 of the *Bourne* test demonstrate that Dodds' interrogation of Murduca violated Section 8(a)(1). (See Tr. at 117, 225, 227-228).

The Board instructs that each factor enumerated in *Bourne* should be viewed in light of the totality of the circumstances. *Westwood Health Ctr.*, 330 NLRB at 939-40. The circumstances at the time of this exchange were as follows: (1) Management, including Dodds, had just learned of the UAW organizing campaign going public the day before (Tr. at 770); (2) Mike Rich ("Rich") immediately instructed management to pull together training resources about how to address a union organizing campaign (Tr. at 717); (3) management training was conducted the day before (Tr. at 773-74); (4) Murduca had not participated in the hand billing activities disrupted by management the day before, and

therefore had no way of knowing why Dodds would choose to ask her about the identities of union supporters, and the Company hired two anti-union consultants immediately. For these reasons, the Exception to the ALJ's finding of fact and conclusion of law regarding the interrogation must be dismissed.

6. The Company's Sixth Exception claims that the ALJ improperly made a finding of fact and conclusion of law that dual rate dealers (conveniently referred to by the Company as "dual rate dealer supervisors") do not perform supervisory duties sufficient for the position to be deemed a "supervisor" under Section 2(11) of the Act. For the reasons submitted *infra* § III, which is incorporated herein by reference, the ALJ's findings of fact and conclusions of law to this effect are well-taken and the Company's Exception should be dismissed by the Board.

7. The Company's Seventh Exception argues that the ALJ erred in finding that Horseshoe unlawfully solicited grievances to undermine Union support in violation of Section 8(a)(1) of the Act. It is undisputed that Dodds solicited grievances on February 28, 2018; in mid-January 2018; and in mid-March 2018. Horseshoe argues that the fact that it solicited grievances on one occasion in mid-January 2018 somehow established a "past practice" of employee grievances that would allow it to continue soliciting such grievances during a union campaign. (Br. at 52). It also makes a factually unsupported argument that Dodds regularly solicited grievances from employees before January 2018. (Br. at 53).

This argument differs from the argument made by the Company at trial that the captive audience anti-union meetings and subsequent improvements were routine responses to the annual EOS survey. (Tr. at 832, 1102). At the hearing, a number of Exhibits related to the Company's EOS implementation were introduced. These Exhibits

included a number of one-sided emails, presentations, and notes kept by management regarding various minor changes made to employee benefits. (R-12; R-14; R-15; R-16; R-17; R-18; R-10; R-22; R-130). None of these Exhibits demonstrated any pattern or practice of Dodds routinely calling groups of employees into his office to discuss employee improvements.

Both explanations are false and pretextual. An employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the union campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), *enfd. mem*. 7 F.3d 223 (4th Cir. 1993), *cert. denied* 511 U.S. 1030 (1994). **It is not enough for an employer to demonstrate isolated, disparate instances in which it has solicited employee grievances in the past**; rather, the employer must "establish a consistent past practice of soliciting employee grievances." *Mandalay Bay Resort & Casino*, 355 NLRB. 529, fn. 6 (2010) (emphasis added). *See, e.g.*, *Evergreen America Corp.*, 348 NLRB 178, 215-216 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008).

Dodd's January 10, 2018 speech must be viewed in context with the events that occurred on February 28, 2018, and in mid-March 2018. (See Tr. at 121-22, 228-230, 646-649). It is apparent from the testimony and evidence presented at the hearing that Horseshoe failed to establish any consistent past practice of soliciting employee grievances in the manner it solicited grievances in February and March 2018. (*See* Tr. at 217, 453, 478).

The ALJ's finding of fact and conclusion of law that the Company violated Section 8(a)(1) when Dodds solicited grievances from employees is therefore well-established in both fact and law, and should be upheld by the Board.

8. The Company's Eighth Exception claims that the ALJ erred in finding that it violated Section 8(a)(1) of the Act when its managers, Rich and Dodds, threatened employees that they may lose various benefits if they engaged in Union or other protected concerted activities. The Company argues in its Brief that employers are permitted to communicate anti-union views so long as they do not carry threats of reprisal towards the employees. (Br. at 54-55) (citing *Medieval Knights, LLC,* 350 NLRB 194 (2007); *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969)).

Here, Dodds and Rich did not merely make generalized arguments regarding the potential pitfalls of union membership. Rather, the evidence overwhelmingly indicated that they lobbed threats of direct reprisal towards employees. During a captive audience meeting on March 1, 2018, Rich threatened the loss of the Company's open-door policy. (Patton, Tr. at 455; Sumbler, Tr. at 504; Burge, Tr. at 578). During a captive audience meeting on March 2, 2018, Rich threatened employees with the loss of being able to ask the Company for days off. (Tr. at 233).

On or about March 17, 2018, during a meeting with swing shift employees, including Virginia Burge and four other dealers, Dodds threatened the loss of PTO. (Tr. at 582-584). Dodds began by mentioning the Union organizing committee and expressed his belief that Unions did not improve conditions for employees. (Tr. at 583). He also discussed bargaining and strikes. (Tr. at 584). Dodds concluded by making the following promise to the employees:

> [H]e explained that … they are going to allow part-timers to go full-time, that they had a certain amount of slots open for the part-timers to put in to go full-time positions. And they had certain qualifications to do that.

(Tr. at 584-85).

The ultimate question remains: "Did these threats, statements, and promises reasonably tend to interfere with the free exercise of employee rights under the Act?" *Metro One Loss Prevention Services Group,* 356 NLRB 89, 101 (2010). The Company has tried both "carrot" and "stick" approaches, but each was designed to interfere with the Section 7 rights of its employees. The Company's goal was always to disrupt the organizing campaign, whether it achieved this by intimidating employees against union support through threats or casting itself as the "good guy" through promises to employees.

9. The Company's Ninth Exception claims that the ALJ erred in finding that it violated Section 8(a)(1) of the Act by telling dual rate dealers that they were supervisors who cannot unionize or vote in the Union election in order to undermine their Union support. The Company claims that, contrary to the finding of the ALJ, Sumbler's testimony to this issue contradicted Murduca's. It also argues that the ALJ improperly failed to credit the testimony of Ashley Wade to this issue. As argued *infra* § V, which is incorporated herein by reference, the Judge's findings of credibility are due deference under the law, absent clear error.

As an initial matter, the Company itself has argued throughout these proceedings, and from the outset of the campaign, that dual rate dealers are supervisors and/or employees with managerial authority, and they lack the Act's protections. (*See, e.g.,* Brief at 31-39). It therefore requires no stretch of the imagination to believe that its actual supervisors and members of its management team would have repeated that sentiment.

Over the course of the organizing campaign, the Company made numerous statements to employees regarding the status of dual rates as statutory supervisors and whether they would be allowed to vote in any election. The record shows that during a

captive audience meeting on March 2, 2018, the Company's management told dual rate dealers they were statutory supervisors and could not vote in any election. (Tr. at 648-649). In mid-March 2018, Dodds told a group of dealers that they would have the opportunity to be full-time dealers. (Burge, Tr. at 484-485). On March 24, 2018, Dodds then told employees that dual rates were statutory supervisors and could not vote in any election. (Tr. at 453-457). These statements were obviously made in violation of Section 8(a)(1) of the Act, and for this reason, the ALJ's finding of fact and conclusion of law to this end should be affirmed.

10. The Company's Tenth Exception is to the finding of fact and conclusion of law that in mid-March 2018, it violated Section 8(a)(1) of the Act when Dodds promised dual rate dealers the right to bid on full-time dealer positions, in order to undermine Union support. The record unequivocally indicates that Dodds promised dual rate dealers the right to bid on full-time dealer positions in March 2018. On or around March 17, 2018, Virgina Burge was tapped off her game to meet with Dodds in his office. (Tr. at 581-582). Four other dealers were in attendance. (Tr. at 582). Dodds began the meeting by mentioning the Union organizing committee and expressed his belief that Unions did not improve conditions for employees. (Tr. at 583). He also discussed bargaining and strikes. (Tr. at 584). According to Burge, Dodds concluded by making the following promise to employees:

> [H]e explained that . . . they are going to allow part-timers to go full-time, that they had a certain amount of slots open for the part-timers to put in to go full-time positions. And they had certain qualifications to do that.

(Tr. at 584-585).

The Company also argues that Dodds' own testimony indicated that he never told dual rate dealers that they would be allowed to bid on full-time dealer positions. (Br. at 60).

It claims that the ALJ's credibility determination regarding Dodds is incorrect and "should not be relied upon." As argued in *infra* § V, which is incorporated herein by reference, the ALJ's credibility determinations should not be disturbed absent clear error.

11. The Company's Eleventh Exception is to the finding of fact and conclusion of law that, in mid-March 2018, Horseshoe violated Section 8(a)(1) of the Act when it created the impression that employees' Union activities were under surveillance. Again, Horseshoe's primary argument is that Dodds' testimony should be credited over that of an employee whom the ALJ found to be more credible than Dodds. (Br. at 61). The Union would respectfully again submit that the ALJ's credibility determinations should not be disturbed absent clear error, as argued *infra* § V, which is incorporated herein by reference.

Furthermore, ample evidence exists in the record to support the conclusion that unlawful surveillance occurred. Tasha Simmons and 5-7 other dual rate dealers were tapped off their games to meet with Dodds in his office about a week after the March 1 mandatory meeting. (Tr. at 646, 648). In this meeting, Dodds made statements about the Union organizing committee's goals (turkeys and free food) and implied that he had spoken with the committee. (Tr. at 648). By making such statements, Dodds left employees to conclude that this knowledge was secured through the surveillance of Union activities. *See Orchids Paper Products Co*., 367 NLRB No. 33 (2018). In this conversation, Dodds also referenced the number of votes needed by the Union to "get it passed," which is further indicia of surveillance. *See Publix Super Markets, Inc*., 347 NLRB 1434, 1453 (2006) (finding respondent created impression of surveillance when it referenced number of votes cast for union).

There was also evidence that management was keeping track of the progress of the organizing campaign and the number of authorization cards submitted from a March 24, 2018 meeting between Roger Patton, Dodds, and consultant Frank Muscolina. (Tr. at 459-460). Muscolina introduced himself, told Patton that if the company did unionize, Muscolina would personally be involved in contract negotiation, and mentioned that he thought that unionization was "close. . . to happening." (Tr. at 460). Despite the Company's objections, it is apparent that multiple individuals testified that the Company conducted unlawful surveillance. This conclusion is consistent with the conclusion that the Company was desperate to squelch the campaign and its surveillance indicated that it had to fire Murduca to do so. The ALJ's decision to credit this testimony over that of Dodd's should not be disturbed.

12. The Company's Twelfth Exception is to the finding of fact and conclusion of law that on March 24, 2018, Horseshoe violated Section 8(a)(1) of the Act when Dodds blamed the Union for dual rate dealers not being permitted to bid on open full-time dealer slots. Although its first argument attempts to distinguish between the wording of the Complaint (which states that Dodds "told dual rate dealers they could not bid on regular full-time dealer positions to discourage union activity") and the wording of the Decision (which states that Dodds "unlawfully blamed the Union for its failure to offer [dual rate dealers] the opportunity to bid on [full-time] dealer slots"), the Company does not provide any argument as to how the language of the Complaint and the language of the Decision are substantively different. (Br. at 62). This is because the language in the Complaint is not substantively different from the language of the Decision.

It is well established that the Board may find and remedy a violation not specifically alleged in the complaint without violating a party's due process rights if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990). The Company has not alleged, nor does the record indicate, that the Company failed to receive meaningful notice of the allegation or a full and fair opportunity to litigate the issue. *Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004). Its first argument in support of its Twelfth Exception therefore fails.

Contrary to the Company's second argument in support of its Twelfth Exception, the conclusion of the ALJ that Section 8(a)(1) of the Act was violated is well-established in both the evidence and in the law. Murduca testified that Dodds told her on March 24, 2018, that dual rate dealers could not bid on full-time dealer positions because the Company did not "know where [it] st[ood] with the classification of dual rights." (Tr. at 242).

The Company's argument again hinges on the assertion that the Board should ignore and dismiss the credibility findings of the ALJ with regards to Dodds. (Br. at 62-63). It urges the Board to find that Dodds' testimony on this subject was more credible than Murduca's. (Br. at 62-63). It also urges the Board to re-interpret the meaning of Dodd's testimony on the meaning this specific subject. (Br. at 63-64). The Union would again note that the Board should not reverse credibility determinations absent clear error, as argued in § V, *infra*, which is incorporated herein by reference. As the Company has demonstrated no clear error, its Twelfth Exception must be disregarded.

13. The Company's Thirteenth Exception objects to the finding of fact and conclusion of law that, since March 24, 2018, the Company violated Section 8(a)(3) of the Act by refusing to consider dual rate dealers for full-time dealer positions. The Company's Brief fails to distinguish between arguments for its Twelfth and Thirteenth Exceptions. However, for the reasons enumerated in response to the Company's Twelfth Exception, *supra*, which is incorporated herein by reference, the ALJ's determination was well-taken both in fact and in law.

14. The Company's Fourteenth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

The Company's Fourteenth Exception also fails to cite to a specific portion of the ALJ's Decision or to the record. The argument is not discussed in the "Argument" portion of the Company's Brief. The Exception therefore does not comply with §102.46(1)(i)(B)-(D), nor does it comply with §102.46(2)(i)-(iii), and should be disregarded for those reasons as well.

Moreover, the argument is legally incorrect and misleading. Board precedent not only permits, but encourages, ALJs to consider the demeanor of witnesses in making credibility determinations. It has found that when the testimony of two witnesses conflict, "[t]he ultimate choice . . . rests not only on the **demeanor** of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Bridgeway Oldsmobile*, 281 NLRB 1246, 1262 (1986). *See also Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7

(2014) (citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)).

The case cited by the Company, *Permaneer Corp.*, reiterates the same principle:

> **[A]s the demeanor of witnesses is a factor of consequence in resolving issues of credibility,** and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, i**t is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor.** Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect.

214 NLRB 367, 368-69 (1974) (emphasis added) (quoting *Standard Dry Wall Products, Inc*., 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)).

For these reasons, and for the reasons argued in *infra* § V, which is incorporated herein by reference, it is therefore submitted that the credibility determinations made by the ALJ based on demeanor are owed deference by this Board, and that the Board should disregard the Company's Fourteenth Exception.

15. The Company's Fifteenth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

The Company's Fifteenth Exception is also a generalized statement that fails to cite to a specific portion of the record or Decision. The argument is not discussed in the "Argument" portion of the Company's Brief. The Exception therefore does not comply with R and R §102.46(1)(i)(C)-(D), nor does it comply with §102.46(2)(i)-(iii), and should be disregarded for those reasons as well.

The Union would also again note that the credibility findings of the ALJ are owed great weight by the Board. In support of this argument, the Union incorporates herein by reference § V, *infra*, and its Response to Exception 14, *supra.*

16. The Company's Sixteenth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to § 102.46(1)(ii).

Furthermore, the Company's Sixteenth Exception is a generalized statement that is not discussed in the "Argument" portion of the Company's Brief. The Exception therefore does not comply with §102.46(2)(i)-(iii), and should be disregarded for those reasons as well.

The Union would also again note that the credibility findings of the ALJ are owed great weight by the Board. In support of this argument, the Union incorporates herein by reference § V, *infra*, and its Response to Exception 14, *supra*.

17. The Company's Seventeenth Exception is a generalized statement that fails to cite to a specific portion of the record. The argument is not discussed in the Company's 66-page Brief. The Exception therefore does not comply with R and R §102.46(1)(i)(B)-(D), nor does it comply with §102.46 (2)(i)-(iii),and should be summarily disregarded.

The Union would again note that the credibility findings of the ALJ are owed great weight by the Board. In support of this argument, the Union incorporates herein by reference Section V, *infra*, and its Response to Exception 14, *supra*.

18. The Company's Eighteenth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

Furthermore, the Company's Eighteenth Exception is a generalized statement that fails to cite to a specific portion of the ALJ's Decision or to the record. The Company does not bother to make the argument made in its Eighteenth Exception anywhere in its 66-page Brief. The Exception therefore does not comply with R and R §102.46(1)(i)(B)-(D), nor does it comply with §102.46(2)(i)-(iii), and should be disregarded for those reasons as well.

Even if the Company had properly put forth an argument in its Brief that it "thoroughly and fairly conducted investigation to refute the allegations of discrimination based on Union animus," the cases to which it improperly cites in the Eighteenth Exception would not support the Exception. (Exceptions at 6). Although *Jackson Hosp. Corp.*, 354 NLRB 329 (2009) does discuss that the employer at-issue had an investigative policy in-place, nothing in the decision would support the Company's assertion that the ALJ's decision in the instant case is incorrect for a failure to consider any alleged investigation.

The case *Boardwalk Regency Corp.*, holds that "[t]he quality of an employer's investigation of alleged misconduct is also a significant circumstantial factor in assessing allegations of illegality." 344 NLRB 984, 997 (2005) (citing *Rood Trucking Co., Inc.*, 342 NLRB No. 88 (2004)). But as the Company has failed to cite to or describe any specific "thorough and fairly conducted" investigatory measures it took, and has not discussed the issue in the Argument portion of its Brief, it is only a dream to speculate what measures the Company took to this end, or whether the quality of those alleged measures met the threshold described in *Boardwalk Regency Corp.* The Company's Eighteenth Exception must therefore be dismissed.

19. The Company's Nineteenth Exception is not argued in its 66-page Brief, and does not comply with R and R §102.46(2)(i)-(iii), and therefore should be summarily dismissed.

The finding urged by the Company that Tammy Pearce was not Strickland and Murduca's direct supervisor would only bolster the ALJ's decision. Tammy Pearce was present when Murduca had the exchange with Vicki Strickland for which she was illegally fired. (Tr. at 246-247). Pierce watched the incident occur, laughed, and failed to report it to upper management for disciplinary purposes. (Tr. at 246-47). However, the Company never attempted to discipline Pierce—a fact which would only strengthen the ALJ's finding of disparate treatment, if she were a unit employee. (Decision at 13, 23).

20. The Company's Twentieth Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

Furthermore, the Company's Twentieth Exception is a generalized legal argument that fails to cite to a specific portion of the record. It is not is not discussed in the "Argument" portion of the Company's Brief. The Exception therefore does not comply with §102.46(1)(i)(C)-(D), nor does it comply with §102.46(2)(i)-(iii), and should be disregarded for those reasons as well.

Even overlooking the fact that the Twentieth Exception is procedurally deficient, it would fail because it presumes that the Company was able to show that Murduca was, in fact, discharged for cause. The Company has not cited in its Exception to any portion of the record that indicates Murduca was discharged for cause, so the Board would be forced to guess which evidence and testimony the Company is referring to when making this assertion.

As argued in response to Exceptions 1-4, *supra*, and in *infra* § IV, which are incorporated herein by reference, the General Counsel established a prima facie under case

sufficient to satisfy the criteria set forth in *Wright Line* that Murduca's discharge violated Sections 8(a)(1) and (3) of the Act. 251 NLRB 1083 (1980). The Employer failed to meet its rebuttal burden. Any argument made by the Employer that the ALJ improperly reinstated Murduca would be therefore be precluded. For these reasons, the Employer's Twentieth Exception should be dismissed by the Board.

21. The Company's Twenty-First Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

The Company argues that the ALJ erred in finding that the Company violated Section 8(a)(1) of the Act by enforcing its name badge policy and requiring employees to remove UAW buttons from identification badges. The Company bore the burden of proving the existence of a special circumstance that would justify such a restriction. *Con-Way Freight, Inc.*, 366 NLRB No. 183 (2018); *AT&T*, 362 NLRB No. 105, slip op. at *3 (2015). The Company presented no such evidence of a special circumstance (for example, that other employees or customers were offended) at the hearing, nor have they cited to any in their Brief.

Although a creative proposition (and one that is highly illustrative of the general tenor of the Company throughout the instant proceedings), the Company has cited to no portion of the transcript that would indicate Rios or any other employee was ever told by Dodds or any other member of management that they were allowed to wear the Union button on any other portion of their uniform. When management asked Lisa Rios to remove her button on March 24, 2018, Roger Dodds advised her that the button "was not part of [her] uniform and . . . he could not let somebody that was against the Union wear a button

either." (Tr. at 137). After being directly ordered to remove her pin by Dodds, her supervisor, it is difficult to imagine that Rios would assume she could then re-fasten the pin to a different portion of her uniform. Moreover, dealer Lisa Casey was permitted to wear a pink rhinestone breast cancer pin directly affixed to her name tag—a fact that is not addressed or refuted by the Company in its Exception or in its Brief. (Tr. at 138; Br. at 64-65).

The Company finally argues that the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), would "permit[] employers to distinguish between American flags on the one hand and Union buttons on the other." (Br. at 65). This is a gross mischaracterization of the Board's holding in *Register Guard*, which found an employer guilty of violating Section 8(a)(1) of the Act when it unevenly enforced a "vague, unwritten insignia policy" against an individual who was wearing union insignia, but permitted other employees to wear caps and shirts with various logos while dealing with the public. *Id.* at 1137. Nothing in *Register Guard* discusses American flags, or would suggest that employers can distinguish between American flags and Union buttons. *Id.* For all these reasons, it is apparent throughout the record that management selectively targeted Union insignia in violation of the Act. The Company's Twenty-First Exception should therefore be disregarded by the Board.

22. The Company's Twenty-Second Exception contains argument and citation of authorities in support of the Exception. It therefore violates R and R §102.46(1)(i)(D), and should be summarily disregarded pursuant to §102.46(1)(ii).

Furthermore, the Company's Twenty-Second Exception is not argued in the "Argument" portion of its Brief, does not comply with §102.46(2)(i)-(iii), and should be disregarded for that reason as well.

The ALJ exercises discretion in determining the relevancy and probative value of evidence submitted, and it is within the ALJ's purview to avoid cumulative evidence. *See generally* 29 C.F.R. § 102.35; *Mak-All Mfg., Inc. v. NLRB*, 331 F.2d 404 (2d Cir. 1964); *Intl. Brotherhood of Teamsters, Local 722*, 314 NLRB 1016 (1994). Indeed, the Fourth Circuit has noted that it is the ALJ's duty to "restrain[]" parties "from pursuing arguments without basis in Board law and served to limit the presentation of cumulative, irrelevant, and superfluous testimony." *Parts Depot, Inc. v. NLRB*, 260 Fed. Appx. 607, 183 LRRM 2458 (4th Cir. 2008).

As noted by the ALJ, the incident reports at-issue were excluded under Rule 403 because six or seven other nearly-identical incident reports had already been introduced by counsel for the Company. (Tr. at 430-431). The ALJ described the eleven other reports that Counsel attempted to introduce as being "redundant," and "ad-nauseum." (Tr. at 429, 431). As stated by the ALJ, by introducing the previous reports, the Company sufficiently "made [its] point that [Murduca, as a dual rate dealer] recommended infractions, in her mind, that could lead to discipline, and it means —it means whatever it means. . . ." (Tr. at 429). In other words, the eleven additional reports the Company sought to introduce were not necessary because the Company sufficiently made its point that dual rate dealers could submit incident reports with the six or seven reports that it had already introduced.

The Company does not cite to any legal authority in its Exception or in its Brief that would support the idea that the ALJ did not hold the discretion to determine the

relevance or necessity of the cumulative evidence it attempted to introduce. It merely makes a conclusory statement that the ALJ should have, but did not, allow the introduction of a number of records that were, on their face, cumulative.

Moreover, "[t]he preparation of written warnings and incident reports does not evidence the exercise of statutory supervisory authority." *Community Education Centers, Inc.,* 360 NLRB 85, 91-92 (2014). Both dual rate dealers and full-time dealers (which, according to the Company, dual rate dealers were supposedly supervising), were permitted to complete and submit the same incident reports. The reports themselves carried no authority and merely amounted to facts that were observed by dual rate dealers and full-time dealers. (Dodds, Tr. at 1018).

Further, it is notable that the Murduca writings proceeded back in time through a period of work when she was not a dual rate dealer, only proving that she was diligent in reporting on coworker transgressions, whether a regular dealer or dual rate.

The Judge's determination that the records were cumulative should therefore be upheld and the Company's Twenty-Second Exception should be disregarded.

23. The Company's Twenty-Third Exception is a generalized statement that fails to cite to a specific portion of the record. The exception is not discussed in the "Argument" portion of the Company's Brief. The Exception therefore does not comply with R and R §102.46 (1)(i)(C)-(D), nor does it comply with §102.46(2)(i)-(iii), and should therefore be summarily dismissed.

It is impossible to know from reading the Exception, which cites to the Order of the ALJ in its entirety, yet fails to cite to any portions of the transcript, exactly what the Company is requesting in the Exception other than a blanket recession of the ALJ's Order.

Neither the Exception nor the Brief contains any details regarding the specific objectives, nor is the Exception discussed with any sort of specificity in the Brief. Broad general exceptions, which do not clearly identify the issues, are not acceptable. *Howe K. Sipes Co.*, 319 NLRB 30 (1995). The Twenty-Third Exception does not identify a specific complaint or issue. The Exception should therefore be dismissed for a complete lack of specificity and legal authority.

III. Dual Rate Dealers are Far From "Supervisors" Under Section 2(11)c of the Act.

Section 2(3) of the Act excludes from the definition of the term *employee* "any individual employed as a supervisor." Section 2(11) of the Act defines the term "supervisor" as:

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

Community Education Centers, Inc., 360 NLRB 85, 90 (2014).

Section 2(11) of the Act sets forth the "12 listed supervisory functions" analyzed under the traditional three-part test for determining supervisory status:

> (1) whether the employee holds the authority to engage in any 1 of the 12 listed supervisory functions in § 152(11);
> (2) whether the exercise of such authority requires the use of independent judgment; and
> (3) whether the employee holds such authority in the interest of the employer.

Station Casinos, Inc., 358 NLRB 637, 643 (2012) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712-13 (2001)).

In applying the three-part test, the Board continues to follow certain established principles:

> **First, the party asserting supervisory status bears the burden of proof.** *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). **Second, any lack of evidence is construed against the**

> **party asserting supervisory status.** *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). **Third, purely conclusionary evidence is not sufficient to establish supervisory status.** *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

Community Education Centers, Inc., 360 NLRB at 90 (2014) (emphasis added).

The statutory functions listed in Section 2(11) must be exercised with "independent judgment." *Oakwood*, 348 NLRB at 687. "[T]o exercise 'independent judgment' an individual must at a minimum act … free of control of others and form an opinion or evaluation by discerning the comparing data," with a certain degree of discretion that rises above "the routine or clerical." *Id.* at 692-93. The Board has held that judgment is not "independent" if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood*, 348 NLRB at 693.

Mere "paper" is not sufficient to prove supervisory authority. "Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority." *Community Education Centers, Inc.*, 360 NLRB at 91.

A. The Company failed to carry its burden to prove that dual rates are statutory supervisors.

The Company failed to carry its burden to prove that dual rate dealers are supervisors under the Act. *Oakwood Healthcare, Inc.*, 348 NLRB at 687; *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). "[T]he exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on an employee." *Id.*

A dual rate's two core tasks are as follows: (1) to ensure that dealers are properly following game rules; and (2) to safeguard money. (Tr. at 315-317). Performing these functions never

requires the exercise of independent judgment, as each simply requires the dual rate to follow detailed instructions, policies, and rules provided by the Company. *See Oakwood,* 348 NLRB at 693. The dual rate tasks pertain to the Company's relationship with the customer, not other unit employees.

A dual rate's first task, ensuring compliance with game rules, simply requires him/her to follow the written policies for individual games.[1] The only "discretion" a dual rate exercises in this regard is deciding whether to wait to address a dealer on a rules mistake or to report more serious errors to management. (Tr. at 1014). The Board has consistently found that independent judgment is not exercised if it is "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood Healthcare, Inc.,* 348 NLRB at 693.

The ALJ correctly held that the dual rates' actions regarding compliance with game rules are non-supervisory because they are routine and clerical. (Decision at 3-4). The dual rates' actions are not based on independent judgment, but rather based on comprehensive gaming rules. The ALJ properly determined that dual rates "issue dealers directives in accordance with these detailed rules, policies and software applications and exercise little, if any, genuine discretion concerning such directives." (Decision at 3). As the ALJ further noted, the directives of dual rates were "regurgitations of Horseshoe's comprehensive gaming, payout, and reporting rules, which does not involve more than a de minimis level of independent judgment." (Decision at 4, fn. 25).

[1] *See, e.g.*, R-24: Blackjack "Rules of Play"; R-25: Craps "Rules of Play"; R-26: Roulette "Rules of Play."

The second core capacity of a dual rate is to monitor and safeguard casino assets. This again requires a dual rate to follow policies such as the currency transaction reporting procedures (R-27) and anti-money laundering procedures (R-28). The marker issuance policy (R-31) dictates the issuance of credit. (Tr. at 1216). The internal audit team under Michael DeMoss reviews the computer system to ensure dual rates are issuing credits according to the policy. (Tr. at 1217). Dual rates exercise no discretion in issuing lines of credit. (Tr. at 1024).

Dual rates are responsible for tracking cash transactions and directional flow and logging this information at various intervals. (Tr. at 995). Dual rates "roll the gaming day," meaning that they conduct inventories for chips, credits, and debits at the end of a shift. (Tr. at 1022). This is also dictated by policy. (*See* R-30). During the day, dual rates manage the rack of chips at gaming tables. (Tr. at 1022).

Calculating average bets requires dual rates to perform simple, grade school mathematics. The "average bet" is calculated by dividing the total dollar amount of bets by the total number of bets. (Dodds, Tr. at 1246). Similarly, assigning a "rating" to a player requires a dual rate to track how long a customer plays a game and what bets they are making to reach an estimate of the player's average bet. (Dodds, Tr. at 1024). These averages further dictate what "tier score" a customer is assigned and what comps they can receive. (Tr. at 1024).

"Issuing comps" is also non-discretionary. Tables games rewards are based on average bets, play time, type of game, and at the most basic level, the amount of money a customer spends. (Tr. at 1262). This data is stored in the table touch and CMS computer systems and is applied to an algorithm that calculates comp limits. (Tr. at 312). Dual rates are essentially charged with manually entering data into a computer system. (Tr. at 1025). The Company's internal audit team

then reviews the computer systems to ensure comps were being issued according to policy. (Tr. at 1218).

At all times, dual rates are accountable to a higher position, their immediate supervisors being a "floor" or full-time supervisor, and then the pencil position. If a dual rate has a question about performing their duties, they are required to address the question with the floor supervisor. (Tr. at 319). If a dual rate has a dispute with a customer, he/she must ask the floor supervisor to speak with the customer. (Tr. at 319). If a dual rate has a serious complaint about a coworker, they went directly to the shift manager's office. (Tr. at 320).

To further illustrate that dual rates solely report facts to management, the dual rate job description requires that the employee "[r]emain[] alert to any unusual or questionable activities being displayed by any table games employee or gaming guest, **and report[] any situations to an assigned superior.**" (Dodds, Tr. at 1033). At no time do the dual-rates exercise independent judgment in supervisory activities; rather their actions are routine, clerical, and based on instructions in rules and policies.

By the nature of their jobs, dual rates do not constitute "supervisors" under the act.

B. Dual Rates do not perform any employee supervisory functions.

Dual rates do not have the ability to take any employment action, including hiring, transferring, suspending, laying off, recalling, promoting, discharging, or disciplining other employees. All hiring decisions are made exclusively by upper management. (Wade, Tr. at 766). A dual rate's role in the hiring process, if any, is limited to essentially performing their daily job function in mock dealing scenarios, which are overseen by management. (Dodds, Tr. at 1124-25). Dual rates do not decide which employees are promoted or demoted. (Dodds, Tr. at 1043, 1225). They do not make any decisions regarding terminations. (Dodds, Tr. at 1226).

Dual rates do not "assign" other employees in any manner the Board has construed the term, including "[1] the act of designating an employee to a place (such as location, department, or wing), [2] appointing an employee to a time (such as a shift or overtime period), or [3] giving overall duties, i.e., tasks, to an employee." *Boulder Station Hotel & Casino*, 358 NLRB 637, 644 (2012) (quoting *Oakwood,* 348 NLRB at 689). Employees are directed to specific locations via the "road map"— the dealers' schedules, which are generated by Stephanie Lambert and the centralized scheduling department. (Tr. at 310, 1037).

Throughout the day, the "road map" is administered by the so-called "pencil" position. (Tr. at 310, 594, 992-93, 1243). Pencils assign dealers to their table games locations and give them their overall work assignments. (Tr. at 1243). Personnel changes throughout the day that are based on volume, such as directing a dual rate scheduled to supervise to fill in for a dealer, are also made by the pencil. (Tr. at 993, 1243). Dual rates play no role in transferring employees from table to table. (Tr. at 310). As noted by the ALJ's decision, any "limited directives" that dual rates issued to dealers, such as the recommendation to pencils that dealers be cut down, are made based on "regurgitations of [the Company's] comprehensive gaming, payout, and reporting rules, which do not involve more than a de minimis level of independent judgment." (Decision at 4, fn. 25).

Dual rates also do not "discipline" or "responsibly direct" other employees. "[T]he Board has consistently refused to find supervisory status when the alleged supervisor's role in discipline is found to be merely reportorial." *Community Education Centers, Inc.*, 360 NLRB 85, 91-92 (2014) (citing *Hillhaven Rehabilitation Center,* 325 NLRB 202, 203 (1997); *Ten Broeck Commons,* 320 NLRB 806, 813 (1996); *Northwest Nursing Home,* 313 NLRB 491, 497-498 (1993); *The Ohio Masonic Home,* 295 NLRB 390, 394 (1989)).

In order to "responsibly direct":

> [T]he person directing must have oversight of another's work *and* be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is (1) empowered to take corrective action, *and* is (2) at the risk of adverse consequences [or accountable for] others' deficiencies.

Community Education Centers, Inc., at 93 (2014) (citing *Oakwood Healthcare, supra* at 691-92, 695). "[A]uthority simply to evaluate employees without more is insufficient to find supervisory status." *Id.* (quoting *Passavant Health Center,* 284 NLRB 887, 891 (1987)). Where there is no showing of direction, one need not reach the issue of accountability, and vice versa. *Id.* (citing *Golden Crest Healthcare Center,* 348 NLRB 727, 730 (2006)). "The preparation of written warnings and incident reports does not evidence the exercise of statutory supervisory authority." *Id*.

Notably, this is the reason the Company's argument that the ALJ erred in rejecting 11 reports completed by Murduca (although the ALJ accepted six or seven nearly-identical reports at the hearing) should fail. The Company argues that the rejected exhibits demonstrate that the dual rates recommend dealer discipline within the meaning of 2(11). (Brief at 38-39). However, the exhibits are merely incident reports and only amount to facts observed by dual-rates and reported to their supervisors; the same of which can be completed by dealers and dual-rates alike. (Dodds, Tr. at 1018). As mentioned *supra*, many of the additional reports were made before Murduca became a dual rate.

Dual rates do not discipline other dealers in any manner. Testimony readily establishes that dual rates are not empowered to take corrective action. Their role is limited to reporting facts upon which management begins a wholly independent investigation. (Tr. at 1016-17, 1127, 1231, 1232, 1234; *see also* R-33, 34, 35, 36, 39, 41, 42, 43, 44, 45, 46, 50, 51, 103, 104). Full-time dealers can also write incident reports. (Castillo, Tr. at 713).

As a dual rate, Murduca was never called into any meeting when shift managers were issuing discipline to other employees. (Tr. at 311). She was never disciplined for a dealer's failure to perform his/her job and never completed an evaluation form or otherwise participated in the evaluation of any table games employee. (Tr. at 312). Only full-time supervisors conduct performance evaluations on both dual rates and full-time dealers. (Tr. at 1226).

The Board should find it unnecessary to analyze secondary indicia of supervisory status, as secondary indicia "are not dispositive without evidence of at least one statutory indicator of such status." *Boulder Station Hotel & Casino,* 358 NLRB at 644 (citing *Juniper Industries,* 311 NLRB 109, 110 (1993)).

Based on the foregoing, the ALJ's findings of law and fact with regards to the supervisory status of the dual rate dealers were well-founded in both law and fact.

IV. *Wright Line* and its Recent Progeny Support the ALJ's Decision.

A. *Wright Line* sets forth the proper legal standard.

Murduca's termination was analyzed under the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980). *See also Cayuga Medical Center,* 367 NLRB No. 21 (2018). At the time of her discharge, Murduca had worked for the Company for approximately 17 years. (Tr. at 214).

Under *Wright Line*, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the decision to discharge an employee. *Id.* The General Counsel must show (1) union activity by the alleged discriminatee, (2) employer knowledge of such activity, and (3) union animus by the respondent. *Id. See also Electrolux Home Products Inc.*, 368 NLRB No. 34, slip op. at 4-5 (2019).

In determining whether the conduct in question is unlawfully motivated, the Board relies on both circumstantial and direct evidence. *Wynn Las Vegas, LLC,* 358 NLRB 674, 685 (2012) (citing *Fluor Daniel, Inc.,* 311 NLRB 498 (1993)). It is well-established that "direct evidence of union animus is not required." *Caesar's Atlantic City,* 344 NLRB 984, 997 (2005) (quoting *Tubular Corporation of America,* 337 NLRB 99 (2001)).

"[S]ince direct evidence of motive is rare, one must look at all of the attendant circumstances to determine whether [r]espondent acted improperly or not." *Wynn Las Vegas,* 358 NLRB at 685 (quoting *Keller Manufacturing Co.,* 237 NLRB 712 (1978), *enfd. in part, enf. denied in part without opinion*, 622 F.2d 592 (7th Cir. 1980)).

"[1] Evidence of suspicious timing, [2] false reasons given in defense, [3] failure to adequately investigate alleged misconduct, [4] departures from past practices, [5] tolerance of behavior for which the employee was allegedly fired, and [6] disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation." *Medic One, Inc.,* 331 NLRB 464, 475 (2000). Discriminatory motive can also be established by "the presence of other unfair labor practices" and "statements and actions showing the employer's general and specific animus." *See Con-Way Freight, Inc.,* 366 NLRB No. 183 (2018) (internal citations omitted).

Once the General Counsel has made its requisite showing, the burden then shifts to the respondent to prove as an affirmative defense that it would have discharged the employee even in the absence of their union activity. *Cayuga Medical Center,* 367 NLRB No. 21 (2018). If the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is "substantial." *Ballys Park Place, Inc.,* 335 NLRB 1319, 1321 (2010).

"[The] employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence

of protected activity." *ODS Chauffeured Transportation,* 367 NLRB No. 67 (2019) (quoting *L.B.&B. Associates, Inc.,* 346 NLRB 1025, 1026 (2006). In other words, the issue is "not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Id.* (quoting *Carpenter Technology Corp.,* 346 NLRB 766, 773 (2006)).

If the respondent employer's proffered reason is "pretextual—*i.e.,* false or not actually relied on—the employer fails by definition to show that it would have taken the same action." *Id.*). "[W]hen the Respondent's stated reasons for its decision are found to be pretextual . . . discriminatory motive may be inferred, but such an inference is not compelled." *Electrolux,* 368 NLRB No. 34, slip op. at 3. "Shifting defenses or reasons for an employer's adverse employment action are persuasive evidence of discriminatory motive," and also "serves as evidence of animus and pretext." *Id.* (citing *Lucky Cab Co.,* 360 NLRB 271, 274 (2014)). "The mere existence of a valid ground for [discipline] is no defense to an unfair labor practice charge if such ground was pretext and not the moving cause." *Con-Way,* 366 NLRB No. 183 at *3.

B. The Board's recent decision in *Electrolux* does not obviate the *Wright Line* analysis, and the ALJ's decision is consistent with both *Wright Line* and *Electrolux.*

The Board recently held in *Electrolux Home Products Inc.* that pretext alone cannot satisfy the General Counsel's *Wright Line* burden where the record as a whole does not show any evidence that union activity was a motivating factor in the employee's discharge. 368 NLRB No. 34, slip op. at 4-5 (2019). Notably, this decision did not depart from Board precedent; it simply found that the facts of the *Electrolux* case were distinguishable from those of previous cases, as the surrounding circumstances and record as a whole undermined any inference that the

discharged employee's union activity was a motivating factor in the decision to discharge. *Id.* at 3-4.

Specifically, even though the Board agreed that the Company's stated reason – insubordination – was pretextual because the Company generally treated other insubordinate employees more leniently, the Board found there was "no basis to infer that [r]espondent discharged [employee] Mason because of her union activities." *Id.* at 4. *Unlike* the record in the instant case, which is replete with animus by the Company, the record in *Electrolux* "contain[ed] countervailing evidence that the [r]espondent bore no animus against collective bargaining or toward the employee members of the Union's bargaining team. *Id.*

The union in *Electrolux* was certified five months before the discharge at-issue and the parties, after quickly reaching interim agreements, bargained in good faith three days each month. *Id.* The record did not contain any evidence of animosity during the bargaining. The Board also found that the captive-audience incident held months prior during union organization efforts, which the ALJ relied on in his findings, did not demonstrate unlawful motivation. There the respondent's refusal to let the discharged employee speak, although rudely handled, was supported by law. *Id.* (citing *Livingston Shirt Corp.*, 107 NLRB 400 (1953)).

In *Electrolux*, with regard to the timing of the meeting that occurred more than seven months prior to discharge, the Board determined that "even assuming for argument's sake that one could reasonably find a hint of union animus in the captive-audience exchange . . . was too remote in time from Mason's discharge for us to infer that the discharge was unlawfully motivated." *Id.* (citing *New Otani Hotel & Garden*, 325 NLRB 928, 939 (1998) (declining to rely on employer's alleged expression of antiunion animus 8 months before discharge in part because

temporally remote); *Magic Pan, Inc.*, 242 NLRB 840, 853 (1979) (finding employer's alleged antiunion statements made 6 months before discharge too remote to support finding of animus)).

The instant case is patently distinguishable from *Electrolux* for multiple reasons. First, Murduca engaged in protected activity just days and weeks prior to her termination, whereas the similar protected activity in *Electrolux* took place over seven months before the discharge of the employee at-issue. In the case at hand, the record is bulging with evidence that the Company committed numerous 8(a)(1) violations, each designed to discourage union support. In *Electrolux*, the Board specifically found that the record lacked similar facts and actually contained facts that demonstrated the support of the company. Here, pretext is shown, as it was in *Electrolux*, by the Company's disparate application of its progressive discipline policy.

Importantly, unlike in *Electrolux*, all the facts on the record support a finding of union animus as a motivating factor for discharge, rather than negate such a finding. In an ALJ opinion subsequent to *Electrolux*, the judge cited *Electrolux* as standing for the proposition that "the Board may infer from the pretextual nature of the employer's proffered justification that the employer acted out of union animus **where the surrounding facts tend to reinforce that inference**." *See NSL Country Gardens LLC & New England Healthcare Employees Union 1199 & Katherine Minyo, and Individual*, No. JD-77-19, 2019 WL 4942481 (NLRB Div. of Judges Oct. 7, 2019) (emphasis added). Here, no such surrounding facts exist, nor can they be inferred from the contents of the record.

C. The General Counsel established a prima facie case.

Judy Murduca engaged in protected activity in the months, weeks, and days leading up to her termination. As the original union supporter at Horseshoe Bossier City, Murduca was UAW organizer Derek Hernandez's first employee contact. (Tr. at 33). They began communicating by

phone in late November 2017. (Tr. at 33). Murduca was one of the first members of the volunteer union organizing committee. (Tr. at 216). She began attending union meetings in January 2018. (Hernandez, Tr. at 72-73).

After the campaign went public on February 27, 2018, Murduca continued participating in protected activities, including: distributing Union literature to coworkers (Tr. at 221-23, 237); distributing union authorization cards and obtaining employee signatures (Tr. at 223); discussing joining the Union with fellow co-workers (Tr. at 223,); voicing support for the Union at the captive audience meetings (Tr. at 233-36); and attending union meetings with the volunteer organizing committee (Hernandez, Tr. at 86).

The Company was aware of Murduca's union activity at least as of February 28, 2018 around 11:00 a.m., when Dodds illegally asked her to identify the union supporters on each shift. (Tr. at 225-27). Prior knowledge by management of Murduca's union activity can be inferred, however—namely the fact that Dodds somehow knew to approach Murduca to ask the identity of union supporters on each shift, even though she did not participate in the hand billing activities that were disrupted by management on the morning of February 27, 2018. *See Orchids Paper Products Company*, 367 NLRB No. 33 (2018).[2]

As to the final element of the General Counsel's prima facie case, the record contains substantial evidence of union animus and/or discriminatory motive, ruled largely absent in *Electrolux*. The entire relevant period from February 27, 2018 (when the organizing campaign went public) to April 7, 2018 (when Murduca was terminated) was approximately 39 days, barely

[2] The Board provided in *Orchids* as follows: "Where an employer tells employees that it is aware of their union activities but fails to tell them the source of that information, Section 8(a)(1) is violated because employees are left to speculate as to how the employer obtained the information causing them reasonably to conclude that the information was obtained through employer monitoring." 367 NLRB No. 33 at *26.

over a month. This period was characterized by numerous 8(a)(1) violations, each designed to discourage union support and hinder communication between coworkers regarding the organizing campaign. Notably, Murduca's April 7, 2018 termination was approved by management just over a week before her final written warning, relied upon for the termination, would have become inactive for progressive discipline purposes on April 18, 2018. (*See* Williams, Tr. at 196).

General union animus was demonstrated by the comments of the Company's managers and/or agents during the captive audience meetings on February 29 and March 2, 2018. Rich told employees that management "obviously didn't want a union in." (Patton, Tr. at 455). Pencil Kevin Yetman told employees at a Friday dual rates-only meeting that "he had belonged to a union before at the Army Ammunition plant, and didn't feel that they did anything for him except for waste his money, and that he just didn't really have a good experience with [the union] in general." (Tr. at 457).

During a meeting on Thursday, March 1, 2018 at 6 p.m., Yetman told employees that the Union did not do anything to help him while he was at the plant and that he only received a minimal raise. (Tr. at 576). He then identified dual rate Virginia Burge as a former union steward at the plant and stated, "[Y]ou can ask her," pointing at Burge. (Tr. at 576). As the meeting progressed, consultant Charles Ahearn addressed Burge several times during his presentation and asked derisively: "[H]uh, union steward?" (Tr. at 577). Burge testified, "After the second or third time that he pointed at me, I told him I wished to remain neutral, that people needed to make up their own minds [about unionizing]." (Tr. at 577).

Finally, as argued in more detail below, the Company disparately applied its progressive discipline system, seizing upon an innocuous incident to discharge Judy Murduca. Her alleged terminable offense deserved no discipline. The Company's explanations regarding the

circumstances of Murduca's termination are pretextual. Policies and procedures were specifically and disparately applied to achieve the Company's desired result of removing a key member of the Union organizing committee.

D. The Company disparately applied its progressive discipline policy in order to achieve Murduca's termination.

The Company's progressive discipline process contains four steps: (1) Documented Coaching; (2) Written Warning; (3) Final Written Warning; and (4) Separation of Employment. (R-2). Generally, in the absence of very serious infractions, each disciplinary event will trigger the next step of progressive discipline. (Tr. at 190). After one year, discipline becomes inactive for purposes of progressive discipline. (Tr. at 190). This generally is understood to mean that the employee is returned to the "baseline" discipline, in this case "documented coaching." (*See* Wade, Tr. at 865).

Discipline is divided into three categories or "buckets": (1) attendance, (2) performance/policy, and (3) variance. (Tr. at 189-90). Policy/performance violations generally refer to violations of the "rules of the road" set forth in the employee handbook. (Wade, Tr. at 864). Variance policy violations relate to accounting errors or errors with chips. (Wade, Tr. at 865). As Wade described, "the variance ladder has to deal with when there is a miscounting or there is an accounting error or an error with chips that there's no malice attached to it, but the employee made a mistake." (Tr. at 865).

Assistant Casino Operations Manager Jason Williams agreed that "it is possible for an employee to have multiple final written warnings" if the employee has active discipline in different "buckets." (Tr. at 191). A violation in one category does not progress discipline up the ladder in another category. (Wade, Tr. at 865). For example, if an employee had active progressive discipline for a variance violation and then was rude to a customer, the employee would not get

terminated unless they were also operating on a final written warning in the performance/policy category. (Wade, Tr. at 865).

1. The April 2, 2018 conversation with Vicki Strickland did not warrant any discipline and was thus pretextual.

Murduca's termination documentation alleges that she violated two "conduct standards." Conduct Standard 2 provides:

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

Conduct Standard 3 provides:

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

(GC-22) (emphasis added).

The April 2 incident that allegedly violated both standards is described as follows:

> On 4/2/2018 you asked another co-worker whether she was from South Louisiana and whether she knew anything about spells and Voodoo. To make a stereotypical association between someone and a particular religion is offensive. This conversation was found to be inappropriate for the workplace. On 4/3/2018, you later verbally reported to your manager that this team member was being "mean" to you during a subsequent interaction. When asked to provide a statement in regards to this incident in order for an investigation into workplace misconduct to take place, you wrote that you did not want to provide a statement. This demonstrated that you would not participate into an investigation of workplace misconduct.

(GC-22).

The description above required management to make several unilateral determinations that are uncorroborated by additional evidence. Neither Murduca's nor Strickland's initial incident

reports used the phrase "voodoo." (Tr. at 1341; *see also* GC-33). The term may have originated in Monica Antwine's incident report. (*See* R-102, p. 16).[3]

The description also appears to equate "spells and Voodoo" and "religion" when it states: "To make a stereotypical association between someone and a particular religion is offensive." (GC-22). Neither Murduca nor Strickland characterized "voodoo" or "spells" as a "religion";[4] Jason Williams made this association. (Tr. at 1355). He acknowledged at trial that nothing about the conversation led him to believe this was a religious argument. (Tr. at 1355).

Management also incredulously determined that the conversation was "offensive" and therefore violated company policy, when no "offense" was complained of. (Tr. at 1315). Dodds acknowledged that there is no reference to Murduca offending any guests. (Tr. at 1240). Strickland's incident reports state that all parties involved "laughed" about the incident. (GC-33, 35). Supervisor Tammy Pierce was at the gaming table with Murduca and Strickland when the interaction occurred. Her incident report contains no indication that any employee or customer found Murduca's comments offensive. (GC-34). No customers or employees lodged any complaints about the interaction. (Tr. at 1346, 1356, 1392).

Dodds further acknowledged that Murduca did not provide any false information. (Tr. at 1239). He also testified that dual rates have discretion as to whether they complete an incident report and give it to a manager. (Tr. at 1017).

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[3] Pages 2-3 of Antwine's incident report read in pertinent part: "Jason ask how did this all started & why would you save her a piece of your hair. She [Murduca] ask Vicki was she from the South & **do she believe in Voodoo**. Jason said you the one who started the conversation, so why are you so upset. Judy went on trying to explain herself. Jason cut her off & said **that's part of religions & you shouldn't be talking about that on the job.**" (R-102) (emphasis added).

[4] Murduca also testified that she challenged Williams' insertion of the term "voodoo" in her conduct standard explanation on the day of her discharge. (Tr. at 256).

Attempting to sandbag the termination, Willliams also alleged that the conversation took Murduca's and Strickland's attention away from their game duties:

> So when Judy approached Ms. Strickland on the table and struck up a conversation about where she was from and asked her about spells and voodoo, that that conversation is inappropriate on the casino floor. It -- we have employees and guests that are in that area, and there's just no place for that in our business for those types of conversations. **And they are not -- they weren't doing their job. Their job description has them -- they should have been watching the games. They should have been watching the money and the policy and procedures on the tables.**

(Tr. at 1318) (emphasis added). Dodds acknowledged, however, that the documentation contains no reference about her neglecting her table games duties. (Tr. at 1240).

Accordingly, nothing about the interaction with Strickland violated either of the conduct standards alleged. There was no proof that any part of the exchange between Murduca and Strickland was "vulgar, patently offensive, or otherwise harassing," and Murduca did not provide any false information about the incident. (Tr. at 1239). This incident did not warrant <u>any</u> discipline, much less the supreme penalty of termination, and strongly indicates that Murduca's discharge was pretextual.

2. The Company manipulated its progressive discipline policy to achieve Murduca's termination.

Beyond its obvious efforts to trump up the April 2, 2018 incident, the Company also disparately applied its progressive discipline policy leading up to the termination. There are four (4) key disciplinary events relevant to this showing.

The "documented coaching" dated December 23, 2015 was issued to Murduca for parking on the third level of the parking garage. (R-82). This was the first progressive discipline she received which ultimately led to her termination. The document alleges violating Rule of the Road # 25: "Team Members will park in designated Team Member areas and will display their parking passes if passes are issued." (R-82). A parking infraction differs from the conduct triggering the

next step of progressive discipline, written warning. As a key and essential step in the Company's design to fire a union-supporting 17-year employee, a parking violation is laughable.

R-83, dated August 6, 2016, is a written warning for a mistake Murduca made on a table game. Murduca's conduct is alleged as follows:

> It was observed through a surveillance review on table 401 @ approximately 17:55 Judy locks up 7 players fire bets that had hit four numbers to win 25x1 odds. Also, @ approximately 16:48 is having a conversation with the base dealer, stands up from the box position the misses 2 rolls of the dice.

(R-83). Jason Williams described incident as an "800-plus-dollar mistake…." (Tr. at 1330). However, as a mistake involving chips/money, this begs the question, "Why was this not treated as a variance violation?" Ashley Wade testified that "the variance ladder has to deal with when there is a miscounting or there is an accounting error or an error with chips that there's no malice attached to it, but the employee made a mistake." (Tr. at 865). Regardless, there is no similarity whatsoever between the 12/23/15 documented coaching for a parking violation and the 8/16/16 written warning for the mistake on a game. The 8/16/16 error should therefore have resulted in a documented coaching in the variance category, <u>not</u> a progression to written warning for policy/performance.

GC-19, dated April 18, 2017, is the final written warning that the Company relied upon for Murduca's termination. Her conduct was alleged as follows: "On 4/15/17 while working at Horseshoe Bossier City you demonstrated rude behavior towards a co-worker by raising your voice in your section prior to leaving for your break." (GC-19). This incident is again entirely distinct from the accounting error that triggered Murduca's written warning. Thus, Murduca should not have been progressed to a final written warning as the conduct is distinct and a component of different categories or "buckets" of progressive discipline.

3. Further evidence of pretext.

Any attempt to justify Murduca's termination based on practice should fail. Dodds testified about the terminations of several other dual rates. The performance documentation for Roderick Davis shows that Davis was terminated in part for failing to be honest during an investigation. (*See* R-65). Dodds acknowledged that Murduca did not provide any false information about the April 2, 2018 incident with Strickland. (Tr. at 1239).

Rickey Wells received two "action plans" before being terminated, essentially a last chance agreement.. (Tr. at 1237). He was terminated only after yelling at a dealer and physically "bumping" her with his knee. (Tr. at 1237). The degree of offensiveness in Murduca and Strickland's interaction, if any, pales in comparison to Wells' incident on the casino floor. (*see* R-64; Vol. 6, Tr. at 1236-38- action plans are <u>not</u> progressive discipline).

In the category of "prior documentation," Murduca's termination documentation lists only: "Informational entry; 1/9/2018 (Policy/Performance); [and] 4/18/2017; Final Written Warning (Policy/Performance)." (GC-22). This is relevant to demonstrating pretext in two ways. First, GC-22 demonstrates that Murduca received an "informational entry" on January 9, 2018 while she still had an active final written warning dated April 18, 2017. An "informational entry" is not considered discipline. This demonstrates that: (1) the Company did not have to automatically terminate Murduca based on her final written warning; and (2) the option of issuing an informational entry was both available to the Company and appropriate to address the innocuous conversation between Murduca and Strickland on April 2, 2018.

Furthermore, at trial, the Company introduced additional disciplinary documentation (R-82 and 83) from Murduca's file to bolster the termination decision. Jason Williams acknowledged that these do not appear in the "prior documentation" section. When questioned whether this omission was related to the 12-month drop-off provision, he could only muster the weak

explanation: "I may have left them out of there accidentally." (Tr. at 1350). The Company's introduction of R-82 in particular emphasizes its efforts to "bootstrap" its way to Murduca's termination. This is a documented coaching dated December 23, 2015 reminding Murduca that she cannot park on the third level of the parking garage. (R-82).

Williams' overall testimony regarding Murduca's termination was notably evasive. (Tr. at 194-95). He was unable to provide answers to simple questions such as: (1) How many employees have been discharged within the last two years for failing to interact professionally with coworkers?; (2) How many employees have you discharged within the last two years for drawing a stereotypical association by their coworkers' place or origin or religion?; and (3) How many employees have you discharged in the last two years for refusing to participate in a workplace investigation? The scope of these inquiries was a reasonably narrow two-year period, and the Casino Operations Manager should know the answers to these questions. Williams' inability to answer these questions suggests that he was attempting to conceal the true reason for Murduca's termination: her known position as the key member of the Union organizing committee.

E. The Company failed to satisfy its rebuttal burden.

The Company's proffered reasons for Murduca's termination were pretextual.

> **A finding of pretext defeats any attempt by the [r]espondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the [r]espondent's action are pretextual—that is, either false or not in fact relied upon—the [r]espondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.**" It follows that "the mere existence of a valid ground for [discipline] is no defense to an unfair labor practice charge if such ground was a pretext and not the moving cause."

Con-Way Freight, Inc., 366 NLRB No. 138, slip op. at *3 (2018) (emphasis added).

In *Con-Way*, the Judge found and the Board agreed that the respondent had "manipulated the situation to trump up a disingenuous claim of falsification," and that "the reason the [r]espondent offered for terminating [the Charging Party] was pretext to mask unlawful retaliation." *Id.* "Specifically, the General Counsel has shown that the [r]espondent seized on a relatively minor incident—which resulted in no damage beyond the paint residue on [the Charging Party's] mirror—in order to discharge the leader of the Union's organizing campaign as it reached its climax." *Id.*

Pretext is demonstrated in this case by: (1) the vacuous nature of the incident seized upon by management to terminate Murduca, which was deserving of no discipline; (2) the Company's disparate application of its progressive discipline policy; (3) discrepancies within Murduca's termination documentation; and (4) the Company's attempt to bring in inactive discipline from Murduca's record to "bootstrap" its termination decision. *See Con-Way Freight, Inc.*, 366 NLRB No. 138 (August 27, 2018) (quoting *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) ("an employer's shifting explanation for a discharge, or … its post hoc attempt to rationalize such a decision, are suggestive of pretext.")).

Because the Company proffered reasons for Murduca's termination that are false, pretextual, and wholly made-up, it failed to satisfy its rebuttal burden.

For all of the reasons described *supra*, the ALJ's findings with regards to Murduca's termination were well-founded in both fact and law, and any and all of the Exceptions of the Company relating to such must be denied.

V. The Judge's Findings of Credibility Must Be Deferred To Under Established Law.

The kernel of the Company's Exceptions rest on allegations that the ALJ improperly credited the testimony of certain witnesses over others in making his findings of fact. The Board

has a long-established policy "not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces [the Board] they are incorrect." *Robert F. Kennedy Med. Ctr.,* 336 NLRB 765, 765 n. 2 (NLRB 2001) (citing *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957)); *see also Standard Dry Wall Prods., Inc.,* 91 NLRB 544, 545 & n. 3 (1950) (coll. cases), *enf'd,*188 F.2d 362 (3d Cir.1951) (per curiam). "[O]n matters which the [ALJ], having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 494 (1951). *See also Slusher v. NLRB,* 432 F.3d 715, 727 (7th Cir. 2005).

This principle was affirmed by the Fifth Circuit in *NLRB v. Fla. Med. Ctr., Inc.*, where the court held that unless an ALJ's findings are self-contradictory, it cannot overturn the decision of the ALJ on issues of believability, where the judge had the opportunity to hear testimony and view witnesses. 576 F.2d 666 (5th Cir. 1978).

As explained by the Seventh Circuit, "any of the ALJ's findings that turn on express or implied credibility determinations take on particular significance on review." *Local 65-B, Graphic Commc'ns Conference of Int'l Bhd. of Teamsters v. NLRB*, 572 F.3d 342, 349 (7th Cir. 2009) (quoting *Slusher*, 432 F.3d at 727). A credibility determination is a decision about whether or not to believe testimony in the first place or which witness to believe when testimony conflicts. *Local 65-B* (citing *Slusher* at 727 (assessing motive requires credibility determinations about witnesses); *United States v. Williams*, 553 F.3d 1073, 1080 (7th Cir.2009) (discussing credibility determination)).

With regards to conflicting testimony, "[t]he ultimate choice . . . rests not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Bridgeway*

Oldsmobile, 281 NLRB 1246, 1262 (1986). *See also Hills & Dales General Hospital*, 360 NLRB No. 70 , slip op at 7 (2014), *citing Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony *NLRB v. Universal Camera Corp*., 179 F.2d 749 (2d Cir. 1950).

A decision as to whether one witness was more credible than another rests solely with the ALJ, absent clear error. The Company has not established that the ALJ's findings that rested on credibility were made in clear error. The Company's argument with regards to credibility in its Brief (which is not actually contained in the "Argument" portion of the Brief), centers around the ALJ's decision to credit the testimony of the many and varied witnesses called by the GC, including Murduca, Castillo, Rios, Patton, and Sumner, over the self-serving testimony of Dodds. (Br. at 29). Instead of citing any specific evidence that Dodds was a trustworthy witness, the Company makes vague and unsupported allegations of unfairness. For example in its Brief, the Company, without citing to any portion of the transcript, claims that "Dodds answered questions readily and with no apparent efforts to embellish or slant." (Br. at 30). It is respectfully submitted that these are direct observations that can only be made firsthand by the ALJ and those who were in the room to observe Dodds' demeanor.

The Company's Exceptions and Brief entirely fail to cite to any specific testimony or evidence would indicate clear error in the ALJ's decision to credit the testimony of other witnesses over Dodds. All of its Exceptions that rely on this argument, in either the Exception document itself or the Company's Brief must therefore be disregarded as a matter of law.

VI. Conclusion.

For all the foregoing reasons, the Company's Exceptions should be dismissed in their entirety, and the decision of the ALJ affirmed.

Respectfully submitted,

/s/ Samuel Morris_____

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CERTIFICATE OF SERVICE

In addition to filing this Answering Brief of Charging Party to Employer's Exceptions via the NLRB's electronic filing system, I hereby certify that copies have been served this 31st day of October, 2019, by electronic mail, upon:

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