UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

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

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I. INTRODUCTION

The Employer's Opening Brief in support of its exceptions was comprehensive. The General Counsel and Charging Party's respective answering briefs ("GC Brief", "CP Brief" and collectively "Answering Briefs")[1], responded to only some of the Employer's contentions. This reply is therefore limited to those contentions which require a response. As set forth in more detail below, the Employer's exceptions should be sustained. The Board should accept this opportunity to clarify, once and for all, that generalized allegations of animus are insufficient to establish a prima facie case under *Wright Line.* Proof demonstrating a causal nexus between a charging party's protected concerted activity and the adverse employment is required. The General Counsel's statutory burden of proof should not shift to the employer because other alleged unfair labor practices were committed. It renders the burden shifting framework meaningless. The General Counsel could establish a prima facie case for any discharge that occurs during a union organizing drive. The ALJ's Decision should be overruled and the unfair labor practice allegations against Horseshoe, particularly Murduca's termination, should be dismissed.

II. ARGUMENT

A. DRDS Are Statutory Supervisors.

The Board should consider this issue carefully because sustaining the Company's position would mandate dismissal of virtually every allegation in the consolidated complaint. In denying that DRDS "assign" employees, CP relies upon *Station Casinos, Inc.*, 358 NLRB 637, 644 (2012). But *Station Casinos* supports Horseshoe's position. In that case, the putative supervisors did not

[1] The CP's request to dismiss Horseshoe's Exceptions under 29 CFR §102.46 has no merit. The Board has routinely rejected similar arguments where, as here, exceptions substantially comply with the rule. *Local 600, United Auto., Aero. & Agric. Implement Workers of Am. (UAW)*, 368 NLRB No. 54, n1 (2019). Additionally, contemporaneously with filing this reply, Horseshoe submits proposed amended exceptions, which Horseshoe will file with the Board's permission.

achieve Section 2(11) status because they merely "distribut[ed] assignment sheets that were dictated by the team members' bidded shifts and instructions left by [the employee's] supervisors and department manager[,]" "assigned keys and radios to team members, [and] responded to the occasional spill by radioing the team member at or near the affected area to clean it[.]" In other words, those employees did not exercise independent judgment. *Id.* DRDS, however, use independent judgment in making recommendations to assign dealers to specific games and deciding when to raise limits and close games.

CP asserts that DRDSs' "two core tasks are: …(1) to ensure that dealers are properly following game rules; and (2) to safeguard money. (Tr. at 315-317)." However, Murduca's testimony at these pages does not support this assertion. CP then summarily concludes, without support or explanation, that "[p]erforming 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." Horseshoe's Brief already explains why this statement is incorrect.

The plain language of Section 2(11) provides that the term "supervisor" includes those employees who have the authority *effectively to recommend such action*, provided it is "not of a merely routine or clerical nature, but requires the use of independent judgment." 29 USCS § 152(11). Even if the Board were to ignore the statute and find that the putative supervisor must be able to "require" certain activities, as established in Horseshoe's Opening Brief, and left unrebutted by the Answering Briefs, DRDS have authority to "require" dealers to end their shifts early by raising table limits to close games.

B. The ALJ's Determination That Murduca's Termination Violated The Act Should Be Overruled. The ALJ's Pretext Analysis Is Nonsensical And Not Support By Law. The GC Did Not Meet His Burden of Proof.

Horseshoe has not, as the GC contends, asked the Board to change the *Wright Line* test. Rather, Horseshoe asks the Board to reject flimsy motive based allegations based on attenuated allegations of animus and reaffirm traditional Board precedent, that *Wright Line* requires that "the General Counsel must prove a connection or nexus between the animus and the firing—i.e., that the discriminatory animus toward [the employee's] protected conduct was a substantial or motivating factor in the employer's decision to discharge him . . . " *Tschiggfrie Props. v. NLRB*, 896 F.3d 880, 886 (8th Cir. 2018) (internal quotations omitted). The Board has acknowledged that the GC's initial burden requires "establishing a nexus between [the charging party's] protected activity and discharge." *Velox Express, Inc.*, 368 NLRB No. 61 (2019). The GC must demonstrate that, "but for" Murduca's union activities, she would not have been discharged. *Southern Bakeries, LLC v. NLRB*, 937 F.3d 1154, 1159 (8th Cir. 2019). "Absent proof of this nexus, the General Counsel fails to establish a prima facie case, and the employer need not prove that it would have taken the same action even in the absence of the employee's protected activity." *Id.*

Neither Answering Brief points to any direct evidence that Murduca's union activity played any role in the termination decision. Instead, like the ALJ, they attack Horseshoe's business judgment, attempting to trivialize Murduca's final incident conduct by relying on a thesaurus full of conclusory labels such as "vacuous," "innocuous," "minor," "flimsy," "benign," "harmless," and "shrug worthy" in hopes that repetition will convince the Board that it is so. The Answering Briefs ignore the undisputed facts that, *before* Murduca engaged in any union activity, she was the lowest-performing DRDS, and *before* her union activity, she had already received a full complement of progressive discipline, *including a final written warning*, for infractions including multiple instances of instigating conflicts with other employees on the gaming floor.

In the final incident, Murduca initiated a conversation about Southern Louisianans and "spells" with a co-worker from Southern Louisiana then called the co-worker a "witch." Knowing she was already on the very last step of discipline for similar behavior, Murduca panicked and preemptively complained that the co-worker was being "mean" and she was being "harassed," then refused to provide a statement. If the incident between Murduca and Strickland was so "unnoteworthy," why did Murduca complain in the first place? It makes no difference whether any customer complained about Murduca's conduct; an employer need not wait until an employee's behavior generates formal customer complaints and causes tangible harm to the business before it may address the behavior.

1. The Answering Briefs Failed To Rebut Horseshoe's Proof that The Decisionmakers Had No Knowledge of Murduca's Protected Activity.

The GC tacitly acknowledges the absence of evidence that decision makers Overton and Williams had any knowledge of Murduca's union activities, asserting that the *Wright Line* knowledge element is satisfied merely because "one supervisor's knowledge of the protected activity is imputed to the other supervisors that may discharge an employee." Citing *Flex-N-Gate, LLC*, 358 NLRB 622, 630 (2012), the GC asserts there is a presumption of decision maker knowledge and that Horseshoe bears a burden to present compelling evidence to rebut this presumption. As already noted in Horseshoe's Brief, *both Williams and Overton credibly testified that they were not aware of Murduca's union activity.* 1337:12-14; 1350:24-1351:2; 1395:16-18. Moreover, *Flex-N-Gate* does not stand for the proposition attributed to it. It holds only that knowledge can be imputed under certain circumstances, none of which are present here.

"[C]redible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive." *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001). Absent evidence of knowledge by the decisionmaker, the GC fails to meet his initial

Wright Line burden. *See (e.g., Gruma Corp.*, 350 NLRB 336, 338 (2007); *Aljoma Lumber, Inc.*, 345 NLRB 261 (2005) absent credible evidence of knowledge, GC failed to satisfy initial *Wright Line* burden); *Reynolds Electric*, 342 NLRB 156, 157 (2004) (without knowledge, decision maker cannot discriminate).

2. The GC Proved Neither Nexus Nor Animus.

CP's Brief fails to dispute that a causal link or nexus between the animus and the discharge is necessary. Indeed, the CP concedes on page 39 of its brief that there are "no such surrounding facts" supporting an inference of union animus in this case. Instead, CP argues that animus should be found solely because the ALJ concluded that other garden variety unfair labor practices were occurring, and because Murduca was treated "disparately" in the issuance of discipline. Generalized animus is not enough. *See* Brief V.B.3. at 45-46. There was evidence of disparate treatment, however, neither Answering Brief refutes that Murduca was not considered the leader of organizing efforts or that no other employee who visibly and vocally participated in organizing activities was discharged or even disciplined.[2]

3. The Evidence Fails To Establish Pretext.

The GC contends that the Employer's investigation demonstrates pretext but cannot say why. On the one hand, he contends it was insufficiently thorough, calling it "truncated." GC Brief at 23. On the other, it was on an overly-thorough "lengthy investigation into a minor dispute" GC Brief at 55. In either case, characterizations are not evidence of pretext. Murduca received due

[2] CP's Brief falsely states at p. 40 that Dodds "somehow knew to approach Murduca" regarding the conversation on February 28; however, Dodds and Murduca herself unequivocally testified that it was Murduca who approached Dodds, and not the other way around. *See* Horseshoe's Brief, at 51 ("Murduca admitted that it was she—not Dodds—who initiated their February 28 conversation about the union when Murduca saw Dodds in the employee break area. 225:18-25; 340:1-14; 1138:1-17.")

process, was confronted with all allegations and given the opportunity to respond. It was a full and fair investigation, which dispels claims of pretext.

With respect to Murduca's January 2018 coworker conflict, the GC falsely asserts that Horseshoe issued Murduca an "informational entry because it was not worth investigating any further." GC Brief at 54. As already explained in Horseshoe's Brief, Informational Entries were issued to Murduca and Jackie Smith because there was nothing further Horseshoe could to do determine which employee, Murduca or Smith, started the squabble—each blamed the other and there were no witnesses. 1333:7-15. What stands out is that Murduca is the common denominator in these continued employee conflicts. The Informational Entries expressly warned both Murduca and Smith that, if either failed to "address and resolve issues in a professional manner" and "there are other instances in which a supervisor does not demonstrate the ability to communicate within the expectations of their job descriptions, progressive discipline up to and including separation of employment will be administered." GC20; R129.

CP's Brief attacks the validity of Murduca's previous discipline as evidence of disparate treatment, quibbling with the levels and categorization of discipline into the three "buckets"—while ignoring the critical fact that all of Murduca's previous discipline, including her final written warning, indisputably occurred before Horseshoe was aware of any organizing activity by anyone. It is not possible that discipline preceding Murduca's union activities could have been pretext designed to "trump up" a termination basis on account of union activities.

No other employee, let alone one on a final written warning for instigating pointless co-worker conflicts, engaged in similar behavior as Murduca. The CP's suggestion that Williams should have been able to spout answers to the GC's questions whether others were terminated based on certain behaviors, in isolation, is meaningless because it was the aggregate totality of

Murduca behavior while on a final written warning for similar behavior that resulted in her termination. Contrary to the ALJ's and CP's assertions, the reason Tammy Pierce was not disciplined was because there was nothing about Pierce's conduct, which was not similar to Murduca's conduct, that warranted discipline. Pierce was a bystander witness for one portion of the events that resulted in Murduca's discharge. Pierce did not instigate or participate in an inappropriate conversation, nor did Pierce refuse to cooperate in an investigation, as did Murduca.

C. Horseshoe, By Dodds, Did Not Unlawfully Interrogate Employees.

The GC suggests that Horseshoe could have, but failed to call Monica Antwine to testify about the February 28 Murduca/Dodds "interrogation" conversation, and the CP asserts that Castillo's and Rios' testimony on this point supported Murduca's testimony. Both assertions are nonsensical because the ALJ's interrogation finding is based solely on one conversation that took place starting in the break area that "migrated onto the casino floor" (227:1-15) that both Murduca and Dodds testified was between just the two of them—there were no other witnesses.

Even crediting Murduca's account of this conversation with Dodds, the GC expressly acknowledges the ALJ found this Murduca/Dodds conversation to be unlawful based on only two of the five *Bourne* factors: the information sought and the identity of the questioner—completely ignoring the other *Bourne* factors, all three of which militate against a finding of unlawful interrogation. The applicable test is "whether under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." *Johnston Fire Servs., LLC & Rd. Sprinkler Fitters, Local Union 669,* 367 NLRB No. 49 (2019). Even by Murduca's account of the conversation (that Dodds asked her who the union organizing committee members were), there is nothing suggesting Dodds sought information in order to take action against the employees, and indeed, no adverse action of any kind was taken against any of the employees Murduca identified.

D. The ALJ's Finding that Horseshoe Solicited Grievances Is Meritless.

Absent express or implied promises of benefits in order to influence a union campaign, neither solicitation of grievances nor "generalized expressions of an employer's desire to make things better" is unlawful. *MacDonald Machinery Co., Inc.*, 335 NLRB 319 (2001). Neither the GC nor the CP disputes Horseshoe did not make any express promises to remedy grievances. The statements attributed to Dodds (detailed in Horseshoe's Brief) are akin to the casual inquiries found to be lawful. *Best Plumbing Supply, Inc.*, 310 NLRB 143, 148 (1993)(asking employees "what was going on, whether something was wrong and whether they wanted to talk about it").

E. Horseshoe Did Not Unlawfully Threaten Loss of Benefits

Section 8(c) expressly permits an employer to "express[] any views, argument, or opinion" as long as the expression "contains no threat of reprisal or force or promise of benefit." The GC's own witnesses refuted the GC's conclusory labelling that "unmistakable threats" were made during what the Answering Briefs repeatedly refer to as "union avoidance" and "captive audience" meetings. Concerning the meetings, employees testified that they: did not perceive Horseshoe's statements as threats; knew Horseshoe's statements referred to the collective bargaining process; were told by Horseshoe's speakers that federal law protects their right to unionize; knew Horseshoe could not take adverse action against employees for union activity; were told to get informed and make up their own minds; and, were told by a Horseshoe representative that the Union obtained a good contract for employees at another casino. As one employee put it, the Horseshoe speaker "really did more in favor for the Union…" 527-528.

There is nothing unlawful about an employer pointing out that unionization may have some disadvantages such as changing informality and flexibility in certain processes, which is exactly what Horseshoe did. *Hendrickson USA, LLC v. NLRB*, 932 F.3d 465, 471 (6th Cir. 2019). When not made on the eve of election, while the union has plenty of time to respond, negative statements

such as that negotiations would begin "from scratch," employees could gain or lose as a result of collective bargaining, "the culture will definitely change," "relationships suffer," and "flexibility is replaced by inefficiency" are protected under Section 8(c). *Id.* at 471-72. Horseshoe's statements are analogous to the lawful statements in *Hendrickson.*

F. Horseshoe Did Not Unlawfully Tell DRDS They Are Supervisors.

The GC's brief parrots the ALJ's "decision to credit the testimony of Murduca and Sumbler" while ignoring Sumbler's *actual* testimony, quoted in Horseshoe's Brief, that directly contracts Murduca. Sumbler *twice* testified consistently with Wade that Rich said "the Labor Board decides" whether DRDS are supervisors. There is not substantial evidence to support this claim. This was clear error, and not a "credibility" determination. Even if Horseshoe said DRDS are supervisors who cannot vote in a union election, Board law is clear that this does not violate the Act. In *Velox Express, Inc.*, 368 NLRB No. 61 (2019), the Board expressly rejected the argument that an employer incorrectly classifying employees and effectively telling them they are not covered by protections of the Act restrained and interfered with their ability to engage in protected activities. Although *Velox* involved independent contractors, the same principles apply in the context of "any other classification excluded from the Act's coverage, such as supervisors or managers[.]" *Id.* The employer's "legal opinion" as to an employee's status, and expression thereof, is protected by Section 8(c) of the Act, and "the communication of that legal opinion is no less protected by Section 8(c) if it proves to be erroneous." *Id.* The GC's brief also mischaracterizes the holding in *Shelby Memorial Hospital Ass'n*, 305 NLRB 910 (1991), where the employer "violated the Act by telling employees they (a) could not vote in a Board conducted election, (b) could not participate in union activities or *they would be subject to dismissal*, and (c) had to be loyal to Respondent and *they would be discharged if they engaged in union activities*."

Id. at 918-919 (emphasis added). Even crediting Murduca's testimony, Rich's statements are nothing like the statements in *Shelby*.

G. To the Extent The ALJ's Factual Findings Rely on Credibility Determinations, They Must Be Reversed. The ALJ's Credibility Determinations Were Based on Subjective, Circular Factors That Are Not Entitled To Deference.

The ALJ's findings that Horseshoe violated Section 8(a)(1) of the Act were based on credibility, and more specifically, his conclusions that certain GC witnesses were more credible because those witnesses possessed "strong" demeanors. These subjective impressions cannot be corroborated. They are not in the record. They amount to nothing more than a conclusion that certain witnesses were credible because they had credible demeanors – a rationale which is, at best, circular. The Board may draw different inferences than the ALJ based on the "whole of the testimony." *Kopack v. NLRB,* 668 F.2d 946, 952 (7th Cir. 1982). It should do so in this case because the ALJ's credibility determinations were – when based on alleged "demeanor" – vague, subjective, and ultimately circular.

III. CONCLUSION

Horseshoe respectfully requests that its exceptions be sustained

Dated: November 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

In addition to filing this HORSESHOE BOSSIER CITY HOTEL & CASINO'S REPLY IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION via the NLRB's electronic filing system, I hereby certify that copies have been served this 14th day of November, 2019 by electronic mail, upon:

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