20-60647

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

HORSESHOE ENTERTAINMENT, L.P., doing business as
HORSESHOE BOSSIER CITY HOTEL & CASINO,

Petitioner Cross-Respondent,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner.

ON PETITION FOR REVIEW FROM
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PETITIONER CROSS-RESPONDENT

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HORSESHOE BOSSIER CITY HOTEL AND CASINO,
Petitioners,
—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 20-60647

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case:

1. Horseshoe Bossier City Hotel & Casino is the trade name of Horseshoe Entertainment. Horseshoe Entertainment is a limited partnership comprising two partners: (i) New Gaming Capital Partnership; and (ii) Horseshoe Gaming Holding, LLC. New Gaming Capital Partnership is a partnership comprising two partners: (i) Horseshoe GP, LLC; and (ii) Horseshoe Gaming Holding, LLC. Horseshoe GP, LLC is wholly owned by Horseshoe Gaming Holding, LLC.
2. Horseshoe Gaming Holding, LLC is wholly owned by CEOC, LLC. The sole member of CEOC, LLC, is Caesars Resort Collection, LLC. The sole member of Caesars Resort Collection, LLC is Caesars Growth Partners, LLC. The

sole member of Caesars Growth Partners, LLC is Caesars Holdings, Inc. Caesars Holdings, Inc., is a Delaware corporation with its principal place of business in Nevada. Caesars Entertainment, Inc. owns the stock issued by Caesars Holdings, Inc., and is a publicly traded corporation with no parent corporation and no known publicly held corporation owning 10% or more of its stock.

3. Opposing counsel in this case is:

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Paul E. Wagner
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would give the Court the opportunity to ask counsel for clarification of the facts and legal standards applicable to this case.

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JURISDICTIONAL STATEMENT

This matter was initiated by the filing of Unfair Labor Practice charges with the National Labor Relations Board (the "Board") by the International Union, United Automobile, Aerospace, & Agricultural Workers of America (UAW), against Petitioner Horseshoe Bossier City Hotel & Casino ("Petitioner" or "Horseshoe"). The Board subsequently issued a Complaint against Petitioner pursuant to 29 U.S.C. § 160(b). An Administrative Law Judge conducted a hearing and on July 30, 2019, issued an opinion in which he ordered relief against the Petitioner, which subsequently filed exceptions to the ALJ's decision. The Board issued a final order pursuant to 29 U.S.C. § 160(c) on May 15, 2020, in which it granted relief against the Petitioner. This Court has jurisdiction of this case pursuant to 29 U.S.C. § 160(f). The underlying Petition for Review was timely filed on July 21, 2020.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Board erred in concluding that Dual Rate Dealers were not supervisors or managerial employees within the meaning of the National Labor Relations Act.
2. Whether the Board erred in concluding that the Union campaign "was initiated by DRD Judith Murduca."
3. Whether the Board erred in concluding that the discharge of Judith Murduca was due to her union activities.
4. Whether the Board erred in concluding that the Respondent unlawfully interrogated Murduca.
5. Whether the Board erred in concluding that the Respondent solicited grievances or impliedly offered to remedy them in violation of the Act, given that the Respondent routinely reviewed the results of their Employee Opinion Surveys early in the year.
6. Whether the Board erred in concluding that the Respondent stated that the DRDs were supervisors that would not be permitted to vote in a Union election.
7. Whether the Board erred in concluding that Respondent's statement of opinion that the DRDs were supervisors was unlawful under the Act.

8. Whether the Board erred in concluding that the Respondent "threatened" that the employees would no longer be permitted to take last-minute days off.
9. Whether the Board erred in concluding that the Respondent violated the Act by ordering employees to remove their Union pins from their badges, which legally must be kept clean.
10. Whether the Board erred in concluding that the Respondent unlawfully created the impression of surveillance.
11. Whether the Board erred in concluding that the Respondent unlawfully refused to allow DRDs to bid on full-time dealer positions.

STATEMENT OF THE CASE

Horseshoe is a full-service hotel and casino in Bossier City, Louisiana, employing at the time of the hearing approximately 1,400 employees, supervisors, and managers, including 43 Dual Rate Dealer/Supervisors (hereinafter "DRDs") and 185 table games dealers, the two job classifications that the Union, UAW, sought to organize in early 2018. (ROA.29-30; ROA.998; ROA.1001.)

Dual Rate Dealer/Supervisors (DRDs)

Consistent with their job description, the DRDs' duties are divided between working as a dealer of casino card and dice games and supervising both dealers and other DRDs acting in a dealer capacity. (ROA.1810.) DRDs spend 60% of their time supervising table games dealers and the remaining 40% in a nonsupervisory dealer capacity; thus, a DRD may be dealing a game with another dealer and then supervising that same dealer the next day. (ROA.1006-1007, ROA.1015, ROA.1016; ROA.2154 at 1, 2.) When the DRDs supervise, their duties are the same as the 42 full-time, or floor, supervisors employed by Horseshoe. (ROA.998-999, ROA.1015; ROA.1034.) DRDs supervise between three and ten dealers at any given time. (ROA.999-1000.) Horseshoe "can't run the business" without the flexibility derived from the DRDs' dual role. (ROA.1006.)

As supervisors, DRDs earn an hourly rate of $21 to $26, compared to $4.50 (plus tips) when serving in a non-supervisory capacity. Like other supervisors, DRDs wear "business attire," whereas dealers wear a uniform. (ROA.1009-1010.)

DRDs Supervise Dealers and Their Games.

While dealers are responsible only for their own performance, DRDs are responsible for ensuring that the dealers under their supervision comply with all the expectations of their job. (ROA.999-1000, ROA.1009.) If a dealer has performance problems, DRDs must use their discretion as supervisors "to correct these things [in] real time", and/or initiate the disciplinary process by submitting an incident report to a manager. If a dealer's mistake on a game is minor, the DRD will informally remind him or her after the game has concluded. For more serious infractions that "compromise[] the integrity of the game" or that could result in loss to either Horseshoe or a customer, the DRD will address the dealer's error immediately. (ROA.993; ROA.1019-1020.) By contrast, dealers complete incident reports only when requested by management, not on their own initiative. (ROA.1021-1024.) Dealers have no authority to make decisions on games; any correction of errors must be made under the direction of the DRD or Floor Supervisor. (ROA.1019-1020, ROA.1035-1037; ROA.2030; ROA.2050; ROA.2067.)

As shown in the record, DRDs frequently ensure compliance with table games policies and resolve disputes arising in games:

- On October 16, 2016, two dealers debated whether a customer's buy-in amount was $3.74 or $4.00. DRD Angela Dailey resolved the dispute by directing a dealer to credit the customer for a $4.00 buy-in. The dealer violated policy by continuing to debate the issue with Dailey because, as his supervisor, she "has the final sayso in it." On October 19, 2016, he received a Written Warning for his "insubordinat[ion]". (ROA.1065-1066; ROA.2146.)
- DRD Judy Murduca investigated and called a "dead hand" on a game, ended the game, and directed the dealer to "give [the players] back their money." She then reported the incident and recommended policy changes: "As the dynamics of the pit personnel's responsibilities change (i.e., watching 7 games), I believe that all employees on the floor should recognize, adapt, and also meet those same challenges." (ROA.2143; ROA.1055:1-19.)
- On November 14, 2011, Murduca reported a dealer "pre-occupied" with separating worn down poker chips from the newer ones, "hinder[ing] her game protection, her focus and game pace." Without management intervention, Murduca took "corrective action" and made her report. (ROA.2140.)

DRDs initiate the disciplinary process. Thus, for example, on June 21, 2011, Murduca confronted a dealer for rifling through paperwork without authorization

and for inappropriate workplace communications, reporting that she was "under medication that is disabling her from performing her job." (ROA.2131.) Horseshoe investigated Murduca's complaint, and consequently relieved the dealer from her duties. (ROA.417:14-25.) In June 2017, Murduca filed an incident report against a dealer who refused her instruction to cover for another dealer who needed to use the restroom. The dealer received a Documented Coaching "for not following Judy's instructions." (ROA.1063:4-1064:7; ROA.2149.)

DRDs are responsible for protecting Horseshoe's assets from threats posed by customers and employees alike. (ROA.1038-1039; ROA.1699.) In June 2011, Murduca reported a dealer for failing to "clear his hands" [showing the surveillance cameras that his hands were empty] numerous times over a thirty-minute period. (ROA.424-425; ROA.2135, ROA.2137.) In another instance, when a DRD observed a dealer placing chips into her blouse, the DRD reported the incident to a manager, who conducted an investigation. (ROA.1038:6-1039:1.)

If a DRD observes a customer's potential cheating, the DRD will direct surveillance personnel to review footage; there is no need for consultation with a higher manager. (ROA.1053:13-1054:19.) DRDs have discretion to resolve customer disputes without consulting higher managers, deciding whether to stop the game or to make a small payout even though the customer is incorrect. (ROA.1035-1037.)

DRDs recommend which dealers to assign to the specific table games based on their knowledge of dealers' experience, skill set, and aptitude. (ROA.1040-1041.) Horseshoe accepts the DRDs' recommendations without independent investigation. (ROA.1044-1045 ["[W]hen they make the recommendation, it's a done deal."].) On January 21, 2019, for example, DRD Natasha Rogers recommended to Director of Casino Operations Roger Dodds that a dealer needed additional training on the Mini-Bacc game, and Dodds agreed to "get him back in our class and train him on Baccarat again." (ROA.1040.) By contrast, dealers' assignment suggestions are generally self-interested, e.g., complaints that a table is uncomfortable. (ROA.1041.)

DRDs also approve dealers' restroom breaks and reassign dealers when one needs to use the restroom, even reporting misconduct if a dealer fails to follow the chain of command, or, as described above, refuses a reassignment. (ROA.422, ROA.1042-1044; ROA.2135.) DRDs do not need upper management approval before reassigning a dealer.

DRDs make hiring and promotion recommendations for dealers and DRDs based on their knowledge of applicants' experience and proficiency in dealing table games; their recommendations are therefore taken more seriously than those of dealers, who often recommend friends or family for a position. (ROA.1069; ROA.1046-1048.) Horseshoe accepts the DRDs' promotional recommendations "pretty much a hundred percent of the time." (ROA.1048.)

DRDs evaluate dealers' performance annually. A negative evaluation from a DRD helps determine whether the dealer receives a promotion and/or a raise. (ROA.892-893, ROA.1049-1051; ROA.1950.)

DRDs Protect Horseshoe's Financial Bottom Line

If Horseshoe has multiple tables open with only one or two players at each table, DRDs adjust the betting limits on their own initiative to consolidate the players at one or two tables and close the others. (ROA.1748; ROA.1068-1072.) By doing so, they "consolidate labor" as well, by sending dealers home and reducing Horseshoe's labor costs. (ROA.1068-1071.)

DRDs also help to ensure Horseshoe's compliance with the Federal Bank Secrecy Act, which obligates the casino to report currency transactions in excess of $10,000. (ROA.1027-1028; ROA.2078; ROA.2104.) They monitor whether a player has crossed the reporting threshold by entering each player's buy-ins into the Computer Management System software. Dealers do not have to track these transactions. (ROA.1029, ROA.1051-1052; ROA.2109.)

DRDs also track players' gaming to determine eligibility for complimentary drinks, meals in the casino's restaurants, and other items (i.e., "comps"). DRDs decide whether to raise or lower a player's betting averages and length of play if a player leaves and then returns to the gaming table or sits at the table without gambling, and also has discretion to award a player a comp. (ROA.1029-1034.)

DRDs routinely recommend changes in department operations, such as streamlining the rotation of dealers among the various table games, recommending changes to table layouts, and so forth. DRDSs make such recommendations "daily." (ROA.1039-1040; ROA.1699; ROA.2151.)[1]

The Rules of the Road.

Horseshoe maintains a Team Member Handbook in which its employment policies are set forth, and each employee is required to sign an "Acknowledgment and Receipt" reflecting receipt of the Handbook and any amendments thereto. The policies at issue in this case were revised in an October 2016 handbook Insert, and DRD Judith Murduca, among others, signed an Acknowledgment and Receipt thereof. (ROA.1813; ROA.772-773.)

The Handbook sets forth "Rules of the Road" that its employees are required to follow at all times. Rule 2 prohibits harassment on any basis and requires professional judgment in workplace interactions:

> Team Members are expected to use appropriate business decorum when communicating with others, generally comporting themselves with general notions of civility and decorum. Team Members must demonstrate courtesy, friendliness, and professional language/tone/manner/actions with guests and vendors. Team

[1] The ALJ rejected Respondent's exhibits R41, 43-50, 53-56 (ROA.2141, ROA.2145, ROA.2148) on grounds that the exhibits were cumulative, and the Board found no abuse of discretion in the evidentiary rulings. Had these exhibits and testimony on the exhibits been permitted, they would have demonstrated that DRDs responsibly direct dealers and meet other supervisory indicia.

> Members will not use language that is vulgar, patently offensive, or otherwise harassing of other people on any legally recognized protected basis in violation of the Anti-Harassment Policy.

(ROA.1938). As discussed further below, DRD Judith Murduca, who had previously been disciplined for similar conduct, violated this Rule on April 2, 2018, by verbally associating a colleague from Southern Louisiana with "spells" or voodoo, ultimately disrupting the workplace and leading to her tearfully complaining that the colleague, Vicky Strickland, told her something "bad" was going to happen to her and Murduca calling Strickland a "witch." (ROA.1317-1320; ROA.1729) She also refused to write a statement about her interaction with Strickland, which violated Rule of the Road 3, requiring all employees and supervisors to be forthcoming in workplace communications and specifically stating, "Team Members will not … omit pertinent information in the performance of their work responsibilities, particularly regarding investigations into workplace misconduct." (ROA.1938) Her refusal to cooperate handicapped the investigation into the incident, as discussed further below.

<u>The Employee Opinion Surveys</u>

Employees at each of the properties under the Caesars Entertainment Corporation umbrella[2] are offered the opportunity to participate in an annual

[2] At the time of the hearing, Caesars Entertainment Corporation was the ultimate parent company of the property.

Employee Opinion Survey ("EOS") to provide feedback on areas of improvement. (ROA.817-818; ROA.1825.). Horseshoe has conducted an EOS each fall since at least 2003. (ROA.729, 814.) Although the survey is voluntary, approximately 90% of Horseshoe employees participate. (ROA.818-819.)

Horseshoe takes the survey seriously. Managers who receive low ratings are put on a development plan and then an action plan for receiving low scores in two consecutive years. *Id*. Low scores in the third year subjects the manager to termination. (ROA.819-820.)

Employees submit their written EOS responses in the fall. (ROA.729.) Department managers and/or Human Resources review the results with employees on a department level and "ask specifically, how can we do better? What can we do to improve?" (ROA.818.) Management then meets to decide both "what things will be done holistically for the property, that affects the vast majority of employees," and changes that Horseshoe will implement for individual departments. (*Id*; ROA.831.) In the first quarter of the year after the fall survey, Horseshoe holds all-employee meetings to "recap for the employees the various things that they asked for, and then what we did as a result of what they asked." (ROA.818.) This practice has been in effect since the survey's inception in 2003, as confirmed by witnesses for Counsel for the General Counsel ("CGC"). (ROA.153-154, ROA.819, ROA.826.) Previous years' changes were often much more significant than those at

issue in the Complaint, and have included implementing merit-based wage increases, adding 401(k) matching contributions, renovating, repairing, and purchasing new equipment, improving health benefits and employee discounts, and offering cake or free lunches on employees' birthdays. (ROA.1981-2020, ROA.2023; ROA.828-831.)

Horseshoe followed the same process for the 2017 EOS. It received the EOS results in early December 2017, showing that scores for the table games employees and DRDs were "one of the lowest" at Horseshoe, receiving an average rating of 3.6 out of 5.0. (ROA.836-837.) Roger Dodds was "very concerned." (ROA.838.) The results reflected the facts that the table games department was short-staffed and that its employees felt overworked. Many employees complained that PTO requests were denied too frequently or took too long for Horseshoe to approve, and that the DRDs were supervising more than dealing; DRDs prefer dealing, because they "make more money when they deal" by receiving tips from customers. (ROA.839-840, ROA.846-847; ROA.1114; ROA.2741.) Other employees requested training, new card dealing equipment, mats for dealers to stand on, and break room televisions and furniture. (ROA.2741.)

Consistent with prior years, General Manager Mike Rich and Vice President of Human Resources Ashley Wade met with Dodds in early December 2017 to discuss the scores. (ROA.836-838.) Rich "instructed Roger that he had to find out

from his employees what the problems were and fix them rather quickly." (*Id.*) He also directed Dodds to investigate ways to provide the DRDs more time dealing. (ROA.849-853.) Wade asked Dodds to send her updates on implementing improvements. (ROA.841.)

Dodds consulted with his counterpart at Harrah's New Orleans for advice on how to improve the EOS scores. (ROA.849-853; ROA.1101-1102.) Among other things, his counterpart recommended were allowing employees to take PTO on their birthdays to alleviate the PTO complaints, and he offered suggestions on how to give the DRDs more dealing time. (ROA.1115-1116.) He also emphasized "how important it was to communicate with your employees." (ROA.849-853.) Dodds also discussed with Rich in January 2018 ways to increase staffing, because business volume had increased substantially.[3] Horseshoe ultimately converted part-time dealers to full-time roles, hired new dealers, and hired new supervisors to meet the increased customer demand.

Dodds met with employees including DRDs on January 16, 2018 to discuss the EOS results, as he had done in years past. (ROA.1101-1102.) He announced that Horseshoe had decided to grant employees' PTO requests on their birthdays. When asked if Horseshoe would allow the DRDs to return to regular dealing roles,

[3] It was 34% greater in March 2018 than in March 2017. (ROA.2185; ROA.1121-1126.)

Dodds explained that such a move was unprecedented and unlikely to occur in the near term ("in the 24 and a half years that I've worked at this casino, no dual rate has ever gone back down to dealing, no supervisor has ever gone back to being a dual rate."). (ROA.1115-1117.) In fact, Horseshoe could not allow DRDs to bid on full-time dealer positions because only DRDs were flexible enough to serve as dealers or supervisors as business needs dictate – per state law, games could not be offered without a sufficient supervisor to dealer ratio. (ROA.807-812.) In short, Horseshoe needed the DRDs to remain DRDs. But he said that Horseshoe was exploring other ways to allow DRDs to deal more frequently, including hiring more supervisors. (*Id.*)

On February 13, 2018 – before Horseshoe learned of the Union organizing drive on February 27 – Dodds emailed Wade to report his progress in addressing the EOS results and staffing shortage. Numerous changes were already in place, including: new equipment ("shoes"), new dealer mats, a new dealer training school, improved pest control, adjustments to previous attendance infractions, and allowing employees to take PTO on their birthdays, which he described as "in place and a big hit." (ROA.2741.)

<u>The Union Organizing Drive</u>

Horseshoe first learned of the UAW's organizing drive when three employees reported to human resources that two employees (Nicky Castillo and Lisa Rios)

along with an unknown man (Union organizer Derek Hernandez) were handing out UAW flyers in the parking garage on February 27, 2018. (ROA.773-776.) Rich directed Wade to "make sure that we pulled together the resources to train our employees, particularly our management team, because . . . he wanted to make sure we knew the rules" under the NLRA. Wade arranged the next day for Charles Lee, an attorney in the Caesars Entertainment corporate legal department, to conduct management training. (ROA.777-779.)

On March 1, 2018, Lee held training meetings for Rich, Dodds, and other managers, and a separate training for full-time table games supervisors. (*Id.*) Horseshoe did not include the DRDs in this training, because Horseshoe was "unsure whether or not they would be part of the union organizing campaign," given their dual roles. (ROA.779-780.)

During these meetings, Lee explained the "TIPS" rule for union organizing. Management cannot: "threaten" employees for engaging in union activity; "interrogate" employees about their Union activities or support; "promise" improvements to dissuade union organizing; or "spy" on employees' union activities. (ROA.780-781.) He also explained that supervisors cannot discriminate against employees based on their union activities. (*Id.*) All of the managers and supervisors at issue in the Complaint received the TIPS training. (*Id.*)

Horseshoe also educated the dealers and DRDs on their NLRA rights on March 1 and 2. Horseshoe held separate meetings over the course of two days based on the attendees' shift times. (ROA.1708.) Horseshoe engaged a trainer, Charles Ahearn, to lead these meetings because Horseshoe was "getting a lot of questions from our employees" such as "what does [the organizing] mean, do [employees] have to pay dues. . . . questions we didn't have answers to." (ROA.781-782.)

Each meeting followed the same format. Rich explained the meetings' purpose and introduced Ahearn, who then took the audience through the materials. (ROA.782.) "The same message was portrayed at every meeting." (ROA.783-784.)

At each meeting, Rich explained that the meeting was intended to explain employees' unionization rights under the NLRA and to answer employees' questions. (*Id.*) He referenced the birthday PTO change as an example of "something that all of you had wanted and we were able to give you" pursuant to the EOS process. (*Id.*) Contrary to the CGC's allegations, Rich never said that employees would no longer be able to approach management directly to request time off, or to obtain switch forms, or the like. Rather, he explained that employees currently may request exceptions to Horseshoe's PTO policy for emergency situations such as a death in the family, but if the employees elected a union, the collective bargaining agreement would "dictate whether or not those type[s] of exceptions can be made." (ROA.785-786.)

Rich also never told the DRDs that they were ineligible to unionize. Consistent with Horseshoe's decision to hold separate meetings for the DRDs, "he shared that unfortunately, we don't know at this point. He said, it's our belief that because you supervise 50 percent of the time, that you're supervisors. He said, but we don't know, and we're seeking clarity, ultimately, the Labor Board will have to decide that." (ROA.503; ROA.646-647; ROA.786-787.)

On March 8, 2018, Horseshoe mailed a follow-up letter to employees and DRDs to reinforce what they learned at the meetings. Horseshoe reminded employees that the choice to sign an authorization card "is your decision. Federal labor law protects your right to engage in union activity or to refrain from engaging in it. Neither the Union nor management may discriminate against you for exercising these protected rights." The letter assured employees, "if a union wins an election, Horseshoe would legally be required to bargain in good faith. And, of course, we would honor the law." (ROA.2187; ROA.815:2-816:21.)

Murduca Approaches Dodds About the Union

Shortly after Horseshoe learned of the organizing effort on February 27, Murduca approached Dodds, who was standing by the casino entrance, and "initiated the conversation" by apologizing to Dodds for the union effort. She assured Dodds it had nothing to do with him and requested that he meet with Murduca and a group of other employees. Dodds did not know whether he was permitted to meet with

employees to discuss unionization, given that Horseshoe had never experienced a unionization effort before and only learned of UAW's campaign moments earlier. He told Murduca he did not know whether he could meet and would let her know. (ROA.1141-1144.)

Dodds then called Rich for guidance, and Rich told him he could meet with the group, but that he should listen only and take notes. Dodds then instructed Pencil Monica Antwine to relieve the employees Murduca identified of their duties to meet with him. *Id.*; ROA.120. Approximately 30 minutes later, Dodds met with Murduca, Lisa Rios, Nikki Castillo, and Angela Dailey in Dodds's office. (ROA.1144-1155.) The employees generally complained about things that had changed since 2004, and identified changes they would like to see made, and Dodds took notes. At the end of the meeting, he said he would take their concerns to Rich, but never promised to remedy any grievances. The CGC's witnesses confirmed both that they were not intimidated by Dodds, and that they understood he could not promise them anything. They hugged him as they left his office. (ROA.122-123, ROA.350-351, ROA.363, ROA.1155-1157; ROA.2161).

After the management training on March 1, Dodds held additional voluntary meetings with small groups of employees because the employees continued to have questions about the campaign. He kept the meetings short (5 minutes), structured and consistent, advising the employees to educate themselves and make sure to vote.

He did not know the answers to all of their questions, and believed that he could not legally answer some of the questions even if he had known the answers, because he knew from the TIPS training that he could not say anything that could be interpreted as coercive or threatening. (ROA.1159:23-1171:10.)

Horseshoe enlisted a former company official, Frank Muscolina, later in March to assist Dodds with answering the employees' questions. They met with employee Roger Patton on March 24. (ROA.1171-1173.) Patton, the only witness for the CGC on this meeting, did not testify that any management representative said that DRDs could not bid on regular dealer positions. (*See* ROA.461-462.)

Horseshoe's Progressive Discipline Policy and Judith Murduca Prior to April 2, 2018

Horseshoe enforces its conduct standards through its progressive discipline policy, which is a four-step process described in the Team Member Handbook, encompassing Documented Coaching as the first step, Written Warning, Final Written Warning, and Separation Employment as the fourth and final step. (ROA.1840.) Separate from the four-step progressive discipline system, Horseshoe will occasionally issue an "Informational Entry," akin to a note to file, to document that a supervisor coached an employee regarding policy violations and job expectations. Because they are non-disciplinary, they are not described in Horseshoe's progressive discipline policy. They are often given when a supervisor is unable or unwilling to enforce the next step of the progressive discipline policy.

But failure to enforce the progressive discipline policy can be and has been grounds for termination of a supervisor. (ROA.884-885, ROA.1198-1200; ROA.2163).

Discipline is separated into three categories: Attendance, Performance/Policy, and Variances (money-handling). *Id*. Lower level discipline for a violation falling into one category (e.g., Attendance) is not used to substantiate further discipline for violating a different conduct standard category (e.g. Performance/Policy). *Id*. An employee's progressive discipline record resets when the employee goes a full 12 months without incurring further discipline. (ROA.872.) Thus, an employee on a Final Written Warning who violates policy 12 months after he or she received the Final Written Warning would not be terminated, absent particularly egregious conduct. On the other hand, if an employee who has received a Documented Coaching, Written Warning, or Final Written Warning violates policy again within 12 months of their last infraction, Horseshoe applies the next step of the progressive discipline ladder, whatever step that may be and without regard to the infraction's perceived seriousness. (ROA.873-874.)

On August 16, 2016, DRD Judith Murduca was given a Written Warning for "Performance/ Policy" by Casino Operations Manager Jason Williams for not paying attention while an $800 mistake was made on a table she was covering. (ROA.2554; ROA.1333-1338). She had previously received a Documented

Coaching from Dodds for parking in a non-employee area of the parking lot on December 23, 2015. (ROA.2552).

On April 18, 2017, Williams issued Murduca a Final Written Warning for rudeness to a co-worker in the presence of customers and other employees. (ROA.1700; ROA.196-197, ROA.1338).

In her September 29, 2017 performance evaluation, Horseshoe explicitly counseled Murduca on her poor coworker interactions, advising her that she "needs to focus on consistent, positive coworker relations." (ROA.1954.) The Performance Evaluation, issued by supervisor Monica Yarborough, put her in the "Development Opportunity" category, the lowest rating. She was the only one of the DRDs to receive the DO rating, a rating held by fewer than 10% of the casino's employees. The rating means that an employee is in danger of losing their job without improvement. (ROA.888-891, ROA.894-895.)

On January 9, 2018, Williams gave Murduca an Informational Entry for rudeness to a supervisor and claiming "harassment" when she perceived her to be pointing and looking in her direction. (ROA.1702; ROA.197-198, ROA.1339-1340.) Williams could not determine exactly what happened between Murduca and the other employee, and so chose to give both of them an Informational Entry and remind them of the importance of professional interactions with co-workers, rather than imposing discipline.

All of these things happened before casino management had any idea that Murduca or anybody else was talking with the Union.

Murduca's Discharge.

On April 2, 2018, Murduca, ***while on duty as a supervisor***, approached another supervisor, Vicki Strickland, on the casino floor ***with customers and coworkers present*** and while large sums of money were being transacted on the casino games under their supervision. (ROA.1317-1321.) She informed Strickland that Murduca had a friend that was "under a spell" and "I asked her if she was from south Louisiana, and if she believed in spells."[4] (ROA.251.) Murduca then complied with Strickland's subsequent request for a strand of her hair. (ROA.1729.) As Murduca admitted, she also called Strickland a "witch." (ROA.249.)

On April 3, Strickland referenced their prior conversation by asking Murduca if she had had any bad luck the day before. *Id*. Murduca then saw Strickland and Williams conversing, falsely assumed they were talking about her, and decided to file a complaint against Strickland.

A short time later, she requested to be tapped off her live game to speak to Pencil Monica Antwine.[5] She reported to Antwine, in the managers' office, that

[4] There is a factual dispute about whether the word "voodoo" was actually used, but there is no dispute that spells were discussed in context of where Strickland was from, or that Murduca called Strickland a "witch."

[5] Pencils are supervisors who hold primary responsibility for dealer table game assignments.

Strickland had requested a strand of hair while omitting from her written statement that Murduca had initiated the conversation by asking Strickland if she believed in spells. (ROA.1729.) Williams entered the office while Murduca was reporting her version of events to Antwine. (ROA.1317-1320.) Murduca was visibly upset, and Williams asked what was going on. *Id*. Murduca then confirmed that she had approached Strickland on the casino floor on April 2 and asked Strickland whether she was from Southern Louisiana and practiced voodoo and/ or spells. *Id*.

Williams then spoke with and obtained statements from Strickland and Antwine. (ROA.1729, ROA.1733.) At a minimum, it was already clear that: 1) Murduca had initiated a conversation on the casino floor when she and Strickland were supposed to be paying attention to the games under their supervision; 2) the conversation involved an association between a place of origin and a religion or belief system; and 3) Murduca had called Strickland a witch. (ROA.1320-1325.) The surveillance footage confirmed that Murduca had initiated the conversation and that it occurred within earshot of customers. (ROA.1325.) Williams consulted with Darlene Overton, an Employee Relations Supervisor in Human Resources, who advised him to get a statement from Murduca, because she was the one who had made a complaint: "[S]he alleged that there was some type of misconduct in the workplace, and she would be the one to be able to provide the detail in order for an investigation to occur to determine whether that misconduct occurred." (ROA.1388-

1389.) When Williams asked Murduca to write a statement on April 4, however, she refused. Instead, she wrote that Williams had conducted a thorough investigation and, "I don't want to write a statement about this incident." (ROA.1322-1323; ROA.1704.)

Williams and Overton consulted with Ashley Wade and Employee Relations Specialist Tiffany Beauchamp, and all agreed that discipline was appropriate for both Murduca and Strickland. (ROA.1387-1394; ROA.1396-1400.) Strickland had no prior disciplinary history and was given a Documented Coaching. (ROA.2561; ROA.1393-1394.) By contrast, Murduca was still on an active Final Written Warning, which meant that the next step of discipline for her was discharge. (ROA.194:7-10). Murduca gave Horseshoe no reason to expect that lower discipline would result in improved performance, given that her Final Written Warning and Informational Entry were also for inappropriate workplace interactions, and her Performance Evaluation also reflected that her interactions with co-workers were problematic. (ROA.1343:2-14 ["she had continued to violate our conduct standards even after we'd give the final written warning, this information entry that we had, the incidents were similar, but she continued to violate our conduct standards and at that point we had to move to the next step in her file, which was termination."].)

Importantly, Murduca herself acknowledged that Union activity was not the basis for her discharge when she wrote in her initial written notes of the events that

she was terminated not for any alleged union activity but because "[she was] a dual rate – dealer – floor person, they look[ed] at [her] as if [she were] a substitute teacher to be disregarded and disrespected." She revised those notes after conferring with the Union. (ROA.2524; ROA.386-388.) Neither Overton nor Williams even knew at this time that Murduca was involved in the UAW campaign. (ROA.1315:14-23; ROA.1343:2-14.)

Employees who believe that "job-related performance issues have not been resolved through the department supervisor, manager, director, or Human Resources" may request a Board of Review ("BOR") to appeal the discipline. (ROA.1813.) BOR panels consist of one Team Member selected by the requesting employee, an impartial manager from a different department, and a Human Resources representative who was not involved in the investigation or discipline at issue. (ROA.1885.) "The Board's decision is final and cannot be appealed or reversed by anyone in the Company." *Id*. The three individuals on the BOR in this case were Murduca's selected representative, an HR representative who had no knowledge of the underlying matter, and an outside manager who barely knew Murduca.

(ROA.1409-1410, ROA.1437.) Overton put together a packet of materials for the panel's review comprising Murduca's written statements, the incident reports from the investigation, Murduca's active prior discipline, and her acknowledgments of

having reviewed Horseshoe's policies. (ROA.2582; ROA.1444.) During Murduca's presentation, she never asserted that she had been discharged due to her support of the union, though she asserted it in the statement she wrote after consulting with the UAW. (ROA.1440:14-1443:22.) The Board of Review panel – including Ms. Murduca's chosen representative – voted unanimously to uphold her termination. (ROA.878-879; ROA.1443-1444.)[6]

Horseshoe has consistently enforced the standards whose violation led to Murduca's termination. Several examples were given at the hearing:

- January 19, 2016 – Written Warning issued to DRD Angela Dailey for making a rude comment to a manager in reference to a VIP player where Dailey was on an "active gaming floor with customers all around". (ROA.2642; ROA.1192-1193.).
- June 28, 2016 – Manager discharged in part for failing to be forthcoming during a Horseshoe investigation. (ROA.2163.)
- August 20, 2016 – Supervisor discharged in part for failing to participate truthfully in Horseshoe's investigation, where the supervisor was on a final

[6] At the BOR, Murduca testified in the course of her presentation that other supervisors or managers had engaged in misconduct. Overton investigated Murduca's allegations and found them to be unsupported. (ROA.103-105, ROA.1411, ROA.1467-1473; ROA.2621, ROA.2627.)

written warning issued almost ten months earlier. (ROA.2168; ROA.1195-1196.)

- January 24, 2017 – Dodds and Williams, the same manager who terminated Murduca, discharged a supervisor for "demonstrating rude behavior towards a coworker by inappropriately using [his] knee to get her attention and using an aggravated tone of voice when speaking to her and a fellow supervisor." (ROA.2166.)

SUMMARY OF THE ARGUMENT

DRDs consistently exercise independent judgment in making assignments, responsibly directing dealers, resolving disputes, and effectively recommending discipline; they also make operational decisions and ensure statutory compliance. For more than half of their working time, they substitute for other supervisors, assigning dealers and effectively recommending both discipline and promotion. They use independent judgment in many ways and there are numerous other indicia of supervisory status. For this reason alone, it was error to find that Horseshoe violated the Act by stating that the DRDs were not eligible to vote in the union election or by precluding them from bidding on open dealer positions.

The ALJ substituted his own judgment for that of the employer where, rather than citing actual evidence of unlawful animus, he based his finding of an § 8(a)(3) violation on his conclusion that Horseshoe could have chosen a less onerous punishment than discharge for Murduca's misconduct – even though the evidence overwhelmingly established that Horseshoe followed its own standard operating procedures in discharging her. There was no evidence that anti-union animus played any role in Murduca's discharge, even though the Board found some technical § 8(a)(1) violations. "[An employer] does not violate the NLRA … if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause." *N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393,

398 (1983). Notably, both the ALJ and the Board erroneously stated that Murduca "initiated" the union campaign, implying that Horseshoe had reason to single her out, but the evidence showed that she was only one of several employees who supported the Union's campaign, and she was the only one who received any discipline.

The law requires Horseshoe's employees to wear name badges, and its own policies require those name badges to be clear and unobstructed. The employees were not forbidden from wearing union pins, but only from wearing them on their name badges. Previous incidents of pin-wearing on the badges, unrelated to the Union, had also resulted in enforcement of these policies.

Expressions of opinion are protected speech and do not violate the Act if not accompanied by coercion. Because Horseshoe was not certain about the DRDs' status, it did not include them in the management trainings, and told the employees that, while it believed the DRDs to be supervisors, the ultimate decision would belong to the Board. There was nothing unlawful in Horseshoe's conduct.

Nor was there anything unlawful about refusing to let DRDs bid on full-time dealer positions, because the evidence undisputedly showed that Horseshoe requires the flexibility of the DRDs; by law, Horseshoe cannot operate games without enough supervisors, and only DRDs can act either as dealers or as supervisors as business needs dictate.

Finally, the conversation that the Board alleges was unlawful interrogation was initiated by Murduca, who asked Dodds to meet with her and other employees to discuss the reasons they were seeking a union. He had to ask who they were so he could arrange for them to be relieved of their duties to meet with him. It is unreasonable to find a violation of the Act under these circumstances.

ARGUMENT

A. Standard of Review: The Court Must Take Account of Evidence That Undermines the Board's Conclusions as Well as That Which Supports It, and Need Not Honor the ALJ's Credibility Findings Where They Are Unsupportable.

A reviewing court will uphold the Board's decision if it is reasonable and supported by substantial evidence on the record considered as a whole. *Valmont Indus., Inc. v. N.L.R.B.*, 244 F.3d 454, 463 (5th Cir. 2001). The "substantial evidence" standard does not leave factual questions wholly to the Board; instead, it requires the Court also to take account of evidence that undermines the Board's conclusions. *N.L.R.B. v. Gen. Sec. Servs. Corp.*, 162 F.3d 437, 444–445 (6th Cir. 1998). Substantial evidence is "such relevant evidence that a reasonable mind would accept to support a conclusion." *Valmont, supra*, citing *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951).

An unlawful purpose on the part of the employer is not lightly to be inferred. In assessing lawful versus unlawful motives, the record taken as a whole must present a "substantial basis of believable evidence pointing toward the unlawful one." *Nat'l Labor Relations Bd. v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956). In discharge cases, "even when there is evidence of anti-union animus, the Board must still affirmatively show that the discharges were improperly motivated.... If in fact there was no cause for discharge, there may well be an inference that the assigned reason was pretextual. But when cause exists, the Board must show an 'affirmative

and persuasive reason why the employer rejected the good cause and chose a bad one'." *N.L.R.B. v. Burns Motor Freight, Inc.*, 635 F.2d 312, 314 (4th Cir. 1980) (citations omitted).

Although this Court is ordinarily bound by the credibility choices of the Administrative Law Judge, the Court will not "merely rubberstamp" the ALJ's determinations. *N.L.R.B. v. Motorola, Inc.*, 991 F.2d 278, 282 (5th Cir. 1993); *Valmont Indus., Inc. v. N.L.R.B.*, 244 F.3d 454, 463-464 (5th Cir. 2001). *See also N.L.R.B. v. Moore Bus. Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978) ("If … the credibility choice is based on an inadequate reason, or no reason at all, we are not compelled to respect it, and shall not do so."); *Lord & Taylor v. N.L.R.B.*, 703 F.2d 163, 165 (5th Cir. 1983) (same). "Obviously, if the order is based on an invalid legal reason it will not be enforced." *Moore Bus. Forms, supra.*

"[G]ranting that we may not disturb the Board's choice between equally conflicting inferences where we find both a lawful and unlawful inference of employer motivation 'equally reasonable', we think the rationale of all the cases cited does permit our displacement of the Board's initial choice where, as here, we find no substantial evidence on the record considered as a whole to support the inference drawn by it as 'reasonable', and to the contrary, deem it contrary to uncontradicted testimony clearly showing a lawfully motivated discharge 'for cause'

under § 10(c) of the Act." *Nat'l Labor Relations Bd. v. Coats & Clark, Inc.*, 231 F.2d 567, 572 (5th Cir. 1956).

B. The Board Erred in Concluding DRDs Are Not Statutory Supervisors, Because They Meet the Statutory Requirements for Supervisory Status More Than Half of Their Working Time.[7]

Under the Act, a supervisor is any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11); *Oakwood Healthcare, Inc*., 348 NLRB 686, 687-688 (2006) ("If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of

[7] The ALJ erred in rejecting as cumulative 11 exhibits demonstrating DRDs' supervisory and/or managerial status, as well as testimony on those exhibits. (ROA.2142, ROA.2145, ROA.2148; ROA.430:3-433:25.) Horseshoe recognizes the ALJ's interest in conducting an efficient hearing and that in the haste of trial, exhibits may have appeared cumulative. However, the rejected exhibits are highly probative of ***the threshold issue*** on which Respondent bears the burden of proof. On their face, the rejected exhibits and the testimony that would have supported them would demonstrate that the DRDs assign dealers, direct dealers and effectively recommend dealer discipline, promotion and rewards within the meaning of Section 2(11). If the Court finds that Horseshoe failed to meet its burden on the DRDs' supervisory status, the ALJ's refusal to admit the above-referenced exhibits and testimony was clear prejudicial error warranting reversal.

the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment"); *El Vocero De P.R.*, 365 NLRB No. 29, slip op. at *40 (March 10, 2017). "[O]nly one of the powers set forth in § 2(11) need be present to qualify an employee as a 'supervisor.'" *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972); *Metro. Transp., LLC*, 351 NLRB 657, 660 (2007). Further, the Board has held that "[s]ection 2(11) requires only possession of ***authority*** to carry out an enumerated supervisory function, not its actual exercise." *Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007); *see also Oakwood*, 348 NLRB at 688 (cautioning against interpretations of Section 2(11) that "reach[] too far" against finding supervisory status).

Because "'[s]ection 2(11) is to be read in the disjunctive, with the existence of any one of the statutory powers,' or supervisory functions, 'sufficient to confer supervisory status,'" the Board erred by failing to find that DRDs meet the statutory definition of a supervisor, because they use independent judgment in a number of areas. *See International Brotherhood of Electrical Workers, AFL-CIO v. National Labor Relations Board*, 973 F.3d 451, 458 (5th Cir. September 2, 2020) (quoting *Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 479 (5th Cir. 2001) and *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1276 (5th Cir. 1986)).

As shown above, DRDs consistently exercise independent judgment in making assignments, responsibly directing dealers, resolving disputes, and

effectively recommending discipline; they also make operational decisions and ensure statutory compliance.

a. DRDs Qualify as Statutory Supervisors by Regularly Substituting for Other Supervisors

Under controlling Board precedent, the DRDs are statutory supervisors because they regularly substitute for other supervisors:

> Where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions. Under the Board's standard, "regular" means according to a pattern or schedule, as opposed to sporadic substitution; however, the Board has not adopted a strict numerical definition of substantiality. For example, the Board has found supervisory status where individuals served in a supervisory role for at least 10-15 percent of their total work time.

Oakwood, 348 NLRB at 694. In another case with peculiarly similar facts, the Board held that a casino's craps and blackjack dealers who substituted for supervisors an average of two times per month were § 2(11) supervisors. *Aladdin Hotel*, 270 NLRB 838, 840 (1984). As here, the Aladdin supervisor/dealers' duties were divided between dealing casino games on some shifts and supervising dealers on others. When supervising, the individuals "enforce[d] the game rules, dealing procedures, and the Employer's policies; monitor[ed] the dealers' performance; and ha[d] the authority to issue oral and written reprimands to the dealers and remove them from the game for rule or policy infringement." *Id*. at 838-839.

Applied here, these cases compel the conclusion that Horseshoe's DRDs qualify as supervisors. They substitute for floor supervisors approximately ***60% of their time***, much more than in *Oakwood* or *Aladdin*. *See also Honda of San Diego*, 254 NLRB 1248 (1981) (employee's substitution for supervisor during 25% of working hours sufficient to confer supervisory status); *Swift & Co*., 129 NLRB 1391 (1961) (15% of work time performing supervisors' duties sufficient); *Sewell*, *Inc*., 207 NLRB 325, 330-332 (1973) (one day every two weeks sufficient).

Horseshoe's DRDs have the same responsibilities as floor supervisors. (ROA.1034:16-25.) They enforce dealers' compliance with the gaming rules and dealing procedures and monitor the dealers' performance by overseeing their customer interactions. Although the DRDs do not issue formal discipline, their initiation of the disciplinary process is sufficient to confer disciplinary status. As described above, Horseshoe accepts the DRDs' recommendations as to most things without independent investigation. "The authority to 'effectively recommend' an action 'generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.'" *DirectTV*, 357 NLRB 1747, 1749 (2011); *cf*. ROA.1044:12-1045:25 ["It's solely up to their discretion. They're responsible for that game. Therefore, when they make the recommendation, it's a done deal."].

b. DRDSs Qualify as Supervisors By Regularly Exercising Independent Judgment to Assign and Effectively Recommend Dealer Assignments.

Under the National Labor Relations Act, to "assign" refers to "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee." *Oakwood*, 348 NLRB at 689. An employee is considered to have exercised his authority to assign using "independent judgment" if his decision is "free of the control of others" and not controlled by detailed instructions. *Id*. at 687. The DRDs exercise independent judgment in assignments when they "designat[e] [dealers] to a place," *Oakwood*, 348 NLRB at 689, adjust dealer staffing by raising the lowering the betting limits to close tables, and recommend dealer assignments according to skill sets. (ROA.1040-1041, ROA.1044-1045, ROA.1068-1071.) The exercise of this discretion is a supervisory function that is neither second-guessed nor dictated by policies and procedures. *IBEW, supra*, 973 F.3d at 463-464.

c. DRDSs Qualify as Supervisors By Effectively Recommending Dealer Discipline

The Board consistently finds supervisory status where a putative supervisor exercises independent judgment in initiating the disciplinary process. In *Mountaineer Park, Inc*., 343 NLRB 1413, 1474-1475 (2004), § 2(11) status existed for assistant supervisors who wrote disciplinary recommendations, which were reviewed by upper management and routinely resulted in formal discipline without

further investigation if the assistant supervisor's report was "justifiable." *See also Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) (finding that supervisor exercised statutory authority to recommend discipline by filling out disciplinary forms that "la[id] a foundation, under the progressive disciplinary system, for future discipline against an employee"); *Caesars Enterprises Svcs., LLC*, Regional Director's Decision and Order, Case 28-RC-208397 (Nov. 21, 2017) (finding supervisory status on the basis that employees "exercise independent judgment in determining whether and when a particular infraction warrants referral to the [employee]'s supervisor for counseling"); *Progressive Trans. Servs*., 340 NLRB 1044 (2003); *Starwood*, *supra*, 350 NLRB at 1116.

DRDs have full discretion to initiate the disciplinary process when they observe a perceived violation of Horseshoe's standard; there are no rules that establish which infractions must be reported and when. (ROA.1021-1023.) But when the DRD reports a violation, the matter is investigated and discipline usually results. (ROA.417; ROA.2149, ROA.2566.) The fact that DRDs do not impose the final discipline does not detract from their status as supervisors; as the Supreme Court has held, "the relevant consideration is effective recommendation or control rather than final authority." *NLRB v. Yeshiva Univ*., 444 U.S. 672, 684 n. 17 (1980); *see also ITT Lighting Fixtures, Div. of ITT Corp. v. NLRB*, 712 F.2d 40, 45 (2d Cir.

1983) ("The Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation.").

d. DRDs Qualify as Supervisors by Effectively Recommending Dealer Promotions

DRDs "promote" for purposes of § 2(11) because their participation in personnel actions is more than a mere reporting function and, in fact, amounts to an effective recommendation that affects employees' job status. *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). DRDs recommend dealers for promotion based on their evaluation of their performance. Moreover, Horseshoe follows the DRDs' promotional recommendations "pretty much a hundred percent of the time." (ROA.1047-1051; ROA.1699.) In short, the DRDs' participation in personnel actions is more than mere reporting, but constitutes effectively recommending promotion for purposes of § 2(11).

e. DRDs Qualify as Supervisors By Rewarding Dealers

DRDs' role in the dealers' annual performance evaluations directly affects the employees' compensation, another supervisory function. *See NLRB v. Hillard Dev. Corp.*, 187 F.3d 133 (1st Cir. 1999) (citing *Hillhaven Kona Healthcare Ctr.*, 323 NLRB 1171, 1171-1172 (1997)) (participation in an evaluation process constitutes the effective recommendation of a reward, where: (1) pay changes as a possible result from the evaluation; (2) a direct correlation between the employee evaluations and the evaluated employee's merit increases, and (3) no independent investigation

or alteration by the putative supervisors' superiors). The evidence here easily meets this standard, because, for example, employees who receive the lowest rating on their evaluations receive no raise while employees ranked the highest receive a more significant pay increase, thus establishing a direct correlation between the evaluations and the merit increases; and upper management does not conduct an independent investigation of the DRDs' performance evaluations of the dealers. (ROA.1050.)

f. Non-Statutory Supervisory Indicia Support the DRDs' Supervisory Status

As noted in the Statement of Facts, DRDs receive much higher hourly pay than dealers when they are supervising, wear business attire instead of a uniform, and the dealers and DRDs themselves view the DRDs as supervisors. *See N. Shore Weeklies, Inc*., 317 NLRB 1128 (1995) (differences in terms and conditions of employment support supervisory status); *Bama 69 Co*., 145 NLRB 1141, 1143 (1964) (that putative supervisor is held out as supervisor supports supervisory status). (ROA.602, ROA.1009-1010, ROA.1098-1099).

Further, DRDs:

- Enforce Horseshoe's compliance with the Federal Bank Secrecy Act, without which Horseshoe could be subject to liability under that act. (ROA.1027-1028, ROA.1051-1052; ROA.2078; ROA.2104.);

- Track players' gaming to determine eligibility for complimentary drinks, meals in the casino's restaurants, and other items (i.e., "comps"), and exercise discretion in deciding whether to award a comp. (ROA.1029-1033.);
- Recommend changes in department operations, such as streamlining dealer rotations and changing table layouts. (ROA.1039-1040; ROA.1699; ROA.2151.);
- Discretionarily resolve customer disputes that arise during game play, without obtaining manager approval. (ROA.1035-1037.).

These secondary indicia of supervisory authority are also relevant to the determination of supervisory status. *See, e.g.*, *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 209 (5th Cir. 2001), and cases cited therein (considering secondary indicia of supervisory authority to include perceptions of other workers, salary, distinctive clothing, and ratio of employees to supervisors); *see also Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989) (citing numerous cases applying secondary indicia to find supervisor status, including perception by co-workers, salary and clothing).

Because the DRDs are statutory supervisors, the Board erred by finding that Horseshoe violated the Act by asserting that the DRDs could not vote in a union election, or that management would decide their status, and by declining to let them

bid on full-time dealer positions. Those findings are nonetheless addressed further below.

C. The Board Impermissibly Substituted its Own Judgment for That of Horseshoe, Explicitly Suggesting a Different Way Murduca's April 2 Conduct Should Have Been Handled Rather Than Identifying Actual Evidence That Horseshoe Would Not Have Discharged Murduca But for Her Union Activity.

In a case alleging a violation of Section 8(a)(3) (29 U.S.C. § 158(a)(3)), the General Counsel initially has the obligation to prove that the employee's protected conduct was a "motivating factor" in the disputed discipline. If the GC does so, the employer can avoid liability if it can show that it would have taken the same action regardless of any unlawful animus. *Wright Line*, 251 NLRB 1083 (1980). The GC provided no evidence that Murduca's discharge was in any way related to her union activity – among other things, she was only one of several employees supporting the union campaign, yet was the only one who received discipline – but regardless, the evidence was overwhelming that Horseshoe would have discharged her for legitimate reasons.

The ALJ based his assertion to the contrary on his own conclusion that Horseshoe could have made a different choice. He characterized the timing of Murduca's discharge as "harsh" and went on:

> Given that Murduca was on the last rung of the policy and performance ladder and had an active final written warning dated April 18, 2017 that would have dropped from the policy and performance ladder on April

> 18, 2018 (i.e., after a year), Horseshoe had the choice of disciplining Murduca prior to April 18 and callously firing her (i.e., its chosen path), or moderately issuing her a documented coaching after April 18 (i.e., just waiting 11 additional days). This benevolent exercise in moderation would have allowed Horseshoe to retain a long-term and highly trained worker, and consistently and neatly issue the same documented coaching to both Strickland and Murduca for the same offense. Simply put, Horseshoe's decision to not wait a few additional days to achieve a more Solomon-like outcome produced an egregious outcome and flowed from invidious treatment.

Horseshoe Bossier City Hotel & Casino, 369 NLRB No. 80 (May 15, 2020), at 16. There are numerous, significant problems with this decisive portion of the ALJ's decision (which the Board adopted). First of all, the ALJ completely ignored the fact that, in addition to the Final Written Warning from April of 2017, Murduca had also been given a poor performance evaluation in September and then an Informational Entry in January 2018 for her interactions with another co-worker. Instead, he implied that Horseshoe's decision not to retain Murduca was some kind of missed opportunity rather than the final straw from an employee who had been repeatedly causing problems with her co-workers. Moreover, his suggestion that Horseshoe should instead have issued Documented Coaching to both Strickland and Murduca is completely unfair to Strickland, who had a clean disciplinary record and did not initiate the interaction with Murduca that led to Murduca's complaint. Another point that the ALJ conveniently overlooked is that it was Murduca who made the complaint to management, not Strickland, and Murduca then refused to

cooperate with the investigation ***that she herself initiated*** by refusing to write a statement. Her situation was nothing like Strickland's, and it was completely inappropriate for the ALJ to suggest that Horseshoe "should have" simply given them both the same disciplinary treatment. Finally, the ALJ and the Board inexplicably ignored the fact that a Board of Review comprising individuals who had nothing to do either with Murduca or the union campaign unanimously upheld Murduca's discharge, which ***alone*** should satisfy Horseshoe's burden of proving that it would have taken the same action regardless of the union campaign.[8]

A belief that the employer could have handled a situation differently is a fundamentally inappropriate basis on which to find a § 8(a)(3) violation.

> But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-

[8] The Board claimed that the bases for Murduca's discharge were "exaggerated", because the ALJ found that "religious jokes were common and tolerated by Respondent's management." 369 NLRB No. 80, n.15. This conclusion was based on the testimony of a single, uncorroborated witness. *Id*. at n.40. Moreover, it was undisputed that Murduca was the one who made a complaint against Strickland, admittedly called Strickland a "witch", and then refused to write a statement to support her own complaint. The Board's finding that the timing was evidence of animus likewise ignores the fact that not a single other employee who was publicly supporting the Union received any discipline at all. *Id*. at n.15. The Board said that Murduca "initiated" the union campaign, but the evidence is undisputed that the first meeting with Union organizer Derek Hernandez included not only Murduca but Lisa Rios and Angela Daly as well, and Murduca was not involved in the union's "going public" leafletting in the parking garage on February 27, 2018. ROA.34, ROA.43-49, ROA.61, ROA.64, ROA.83-84, ROA.106, ROA.110-115, ROA.146-149, ROA.217, ROA.222-223, ROA.687-693. This distinction is important, because there consequently was no reason for Horseshoe to single her out for her support of the Union.

> the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.

Nat'l Labor Relations Bd. v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956). *See also Syncro Corp. v. N.L.R.B.*, 597 F.2d 922, 924 (5th Cir. 1979) ("[A]bsent a showing of anti-union motivation, an employer may discharge an employee for good cause, or bad cause, or no cause at all. … improper motivation is not to be inferred lightly."). Here, the Board did not find that the "real motivating purpose" was to violate section 8(a)(3), but simply decided that Horseshoe's decision to impose entirely appropriate discipline must have been motivated by anti-union animus because it could have chosen to impose a lesser sanction.

The fact that Murduca's discharge occurred during a union campaign is not evidence that the two things were connected. "Timing alone is insufficient to establish a causal connection." *Royal Coach Sprinklers*, 268 NLRB 1019, 1026 (1984); *Pilot Freight Carriers, Inc*., 265 NLRB 129, 132 (1982) ("[W]hile the firing and the concerted protected activities were sufficiently proximate in time to warrant closely examining the circumstances of both to determine if they were related, there was ample time for an independent intervening cause to arise, and, therefore, timing, alone, is insufficient to prove the tainted relationship alleged by the General Counsel."); *Neptco*, 346 NLRB 18, 20 (2005) ("[C]oincidence in time between union

activity and discharge or discipline is one factor the Board may consider… But mere coincidence is not sufficient evidence of [union] animus."). Murduca had incurred numerous disciplines and warnings well before Horseshoe learned of the organizing drive.

There is no evidence to support the notion that Horseshoe maintained the kind of "anti-union animus" that could have led it to intentionally discharge a union organizer without adequate cause to do so. Most employers would prefer to operate non-union, not for invidious reasons, but simply because it is easier. The fact that Horseshoe resisted the organizing campaign, or even the Board's conclusion that it committed other technical infractions of the Act, does not comprise evidence of unlawful intent in the discharge of Murduca. "[A]ntiunion bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act is not itself an unfair labor practice." *Nat'l Labor Relations Bd. v. McGahey*, 233 F.2d 406, 409 (5th Cir. 1956). Moreover, "[w]hile hostility to [a] union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, ... general hostility toward the union does not itself supply the element of unlawful motive." *Tschiggfrie Properties, Ltd. v. Nat'l Labor Relations Bd.*, 896 F.3d 880, 886-887 (8th Cir. 2018),

quoting *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 690-691 (8th Cir. 1967).[9]

"[An employer] does not violate the NLRA … if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause." *N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 398 (1983). "An employer could escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons." *Id*. at 399. There have been countless cases, including many of those cited here, in which animus has been found in one situation but not another. It is absolutely inappropriate for the Board to hold that a few alleged technical 8(a)(1) violations are sufficient to attribute anti-union animus to a discharge that was wholly justified and unrelated to those violations.

In *Poly-Am., Inc. v. N.L.R.B.*, 260 F.3d 465, 491-492 (5th Cir. 2001), this Court refused to enforce an NLRB order finding that a probationary employee was discharged due to anti-union animus when there was plenty of evidence that the employee deserved discharge, even though the Court assumed arguendo that there was sufficient evidence to establish that anti-union sentiment was a motivating factor

[9] The Board has repeatedly refused to formally require the finding of a nexus between the alleged anti-union animus and the complained-of action. 369 NLRB No. 80 at n.15. This habit of attributing anti-union animus to every action an employer takes based on a few isolated and technical violations of the Act is precisely why it should.

in his discharge. "There is no evidence on the record that Poly-America's handling of Snow's probationary period differed in any way from its handling of the probationary period of other employees." *See also Syncro Corp., supra*, where this Court refused to enforce a Board order requiring reinstatement of an employee who had made threats against other employees: "This conduct of Hill was cause for her discharge; the Act does not insulate an employee from discharge for engaging in conduct disruptive of employee relations." 597 F.2d at 925.

Similarly, in *Midwest Reg'l Joint Bd., Amalgamated Clothing Workers of Am., AFL-CIO v. N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977), the court refused to find that a discharge was a violation of Section 8(a)(3) where the Board's basis for the finding was that the Company chose the most severe form of personnel action "for strategical reasons." *Id*. at 440. "The ALJ and the Board found that there was adequate cause to discipline Mahoney but held that the discipline imposed was too harsh. The decision of what type of disciplinary action to impose is fundamentally a management function." *Id*. The Court added that engaging in union activity does not insulate an employee from appropriate discipline: "In addition, the mere fact that a specific employee not only breaks a company rule but also evinces a pro-union sentiment alone is not sufficient to vitiate the just cause for his discharge." *Id*. "The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good

cause and chose an illegal one. … Unless the Board can show by affirmative and persuasive evidence that an improper motive was the reason for the harshness of the discipline, the management's decision must stand." *Id*. Horseshoe acted consistently with its disciplinary policies in discharging Murduca, but because of the union campaign that temporally coincided, the Board found without basis that it should have given her a lesser discipline and that her discharge must have been motivated by anti-union animus.

In *Merillat Indus., Inc.*, 307 NLRB 1301 (1992), the Board found that the discharge of a long-tenured employee for stealing sandpaper worth $2 was consistent with its prior practices and evinced no anti-union animus, even though the prior incidents were not identical to the disputed incident. "[I]t is to be remembered that Respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence." *Id*. at 1303. "The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it. … [I]t is rare to find cases of previous discipline that are 'on all fours' with the case in question…" *Id*.

> The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial

> considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. … In passing the Act, Congress never intended to authorize the Board to question the reasonableness of any managerial decision nor to substitute its opinion for that of an employer in the management of a company or business, whether the decision of the employer is reasonable or unreasonable, too harsh or too lenient. The Board has no authority to sit in judgment on managerial decisions.

N.L.R.B. v. Fla. Steel Corp., 586 F.2d 436, 444-445 (5th Cir. 1978) (citations, some punctuation omitted).

Notably, no anti-union animus was attributed to decision-maker Jason Williams. *Compare, e.g., Poly-Am., Inc. v. N.L.R.B.*, 260 F.3d 465, 490 (5th Cir. 2001) (citations omitted) (While it is permissible to "'rel[y] on circumstantial evidence to infer that the knowledge of one supervisor has been communicated' to the other," the Board is not permitted to "mechanically impute" the knowledge of one supervisor to the decision-making supervisor.). Likewise, the ALJ's conclusion that it was somehow wrong for Horseshoe not to discipline supervisor Tammy Pierce, who witnessed the interaction between Murduca and Strickland, is another example of his substituting his own judgment for that of the employer, not evidence of invidious discrimination.

Anti-union animus was not a factor in the discharge of Murduca, which was consistent with Horseshoe's policies. The Board's conclusions to the contrary should not be enforced.

D. Horseshoe Did Not Infringe on Workers' Rights by Asking Them to Remove Union Pins and American Flag Pins from Their Badges Per Well-Established Policy.

Louisiana law requires every casino to be licensed. La. Admin. Code (LAC) tit. 42 § 2107 (2018). As a condition of licensure, casinos must continually comply with Louisiana's Gaming Regulations. 42 LAC § 2112. These regulations require casinos "to furnish and maintain all necessary equipment for the production and issuance of gaming employee identification/permit badges." 42 LAC § 2923. "Every gaming Employee shall keep his employee permit identification badge on his person and displayed at all times when on licensed gaming premises." 42 LAC § 2165 ("Display of Gaming Identification Badge"). Failure to comply with these requirements subjects the casino to a $500 penalty per violation. 42 LAC §§ 2165, 2325. Continued violations of state gaming laws may result in the loss of the facility's gaming license. *Id*. at § 2325.

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

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

(ROA.1906 (emphasis added).) Horseshoe maintains no policy otherwise limiting the locations where employees can wear insignia. Aside from the several square inches the name badge occupies, employees can wear insignia anywhere else they choose. (ROA.2653; ROA.856, ROA.858.)

Horseshoe bars employees from affixing pins to their name badges also for "game protection surveillance." (ROA.856-857.) "[I]f there's been a theft or an issue or a discrepancy with a player or allegations made," Horseshoe needs to be able to identify the employees involved through the casino surveillance cameras. In addition, affixing pins to the name badge "leaves a hole in the plastic," damaging Company property and creating an "unsightly" appearance. (ROA.859-860.)

On March 24, 2018, Dodds and Casino Operations Shift Manager James LaFleur asked a dealer, Lisa Rios, to remove a UAW-related pin from her name badge that was affixed with a metal pin piercing the Company-issued plastic sleeve. He did not prohibit her from wearing the pin altogether; rather, his instruction was limited to the request that she remove the pin from her badge. (ROA.1452-1456.)

After March 24, employees began affixing non-union-related, American flag pins to their name badges. The Company enforced its policy in these instances as

well. In late March, Mr. LaFleur asked Ms. Rios, as well as a supervisor, Amber Lee, to remove flag pins from their badges. Graveyard Shift Manager Walter Garrett also instructed two dealers, John Erinstein and Jason Terry, to remove flag pins from their badges. None of the employees or supervisors were disciplined for wearing union- or non-union-related pins. (*Id*; ROA.1455-1456.) Prior to these instances of enforcing the policy in March and April 2018, the Company had not enforced the policy either because employees had not previously affixed pins to their badges or managers did not notice the pins. To the extent other employees wore pins on their badges during or after March or April and were not asked to remove them, the reason is the same. "We enforce[] it as it's brought to our attention." *Id*. Employees were on notice from the Handbook's name badge policy that they could wear pins or buttons anywhere else on their uniform.

E. Horseshoe Did Not Unlawfully Tell DRDs They Could Not Unionize, but Lawfully Told Them the NLRB Would Decide.

Expressions of opinion are protected speech and do not violate the Act if not accompanied by coercion. *See, e.g., Wilker Bros. Co.*, 236 NLRB 1371, 1372 (1978). Horseshoe was not certain about the DRDs' status, which is why it did not include them in the management trainings. Rich's statements in the employee meetings that "it's our belief that because you supervise 50 percent of the time, that you're supervisors. … we're seeking clarity, ultimately, the Labor Board will have

to decide that," (ROA.503, ROA.646-647, ROA.786-787), is on all fours with the statements held protected in *Armstrong Mach. Co., Inc.*, 343 NLRB 1149 (2004), where the manager stated that he thought the foremen were supervisors, they disagreed, and he concluded that the dispute would be resolved through a hearing. "As such, Porter's benign expression of opinion would not reasonably tend to intimidate or coerce employees in the exercise of their protected activity." *Id*. at 1152.

F. Horseshoe Declined to Let DRDs Bid on Full-Time Dealer Positions for Business Reasons, Not Because of Union Activity.

As discussed above, Horseshoe requires the flexibility of DRDs in order to maximize its efficiency, because by law, it cannot operate games without enough supervisors, and only DRDs can act either as dealers or as supervisors as business needs dictate. (ROA.807-812.) It is for this reason that it declined to allow the DRDs to bid on the full-time dealer positions that were posted due to the unexpected and undisputed increase in business volume between 2017 and 2018. The fact that a union campaign was happening was not entirely coincidental, because the new postings were necessitated by the increase in business that had in turn led to overworked employees, and employee dissatisfaction is usually what leads to union campaigns. However, the Board mistook the temporal coincidence for cause and effect and once again made a business decision for Horseshoe: "[T]here is no

rational business reason for excluding them from consideration for these jobs. There is no sound reason why Horseshoe could not have permitted DRDs to apply for FT dealer jobs and then decided on a case-by-case basis amongst all applicants. This would have been a practical option for all parties." 369 NLRB No. 80 at p. 15 and n.62. The DRDs were trained as both dealers and supervisors and Horseshoe needed them to continue in that flexible role in order to accommodate its increase in business volume, at least for the time being. Far from being an extreme or unusual decision, the undisputed evidence established that no DRDs at Horseshoe had ever gone back to being full-time dealers for at least the past 24 years. (ROA.1115-1117.) This decision was obviously made for business reasons unconnected with the Union.

G. Dodds's "Interrogation" of Murduca Was Both Innocent and Non-Coercive.

The Board found that the February 28 conversation between Murduca and Dodds was coercive because, it found, he asked her to identify the others who supported the Union. As the Board acknowledged, contrary to the ALJ, it was Murduca who approached Dodds asking for a meeting with her and fellow union supporters. Dodds explained that he simply needed to know the names so that he could instruct the Pencil to relieve them of their duties to meet with him. (ROA.119, ROA.1141-1144.) Obviously Murduca wanted the meeting, and obviously Dodds was going to find out who the other Union supporters were because they were coming to the meeting. This hardly constitutes coercion.

"We are of the opinion that in order to violate § 8(a)(1) such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce." *Nat'l Labor Relations Bd. v. McCatron*, 216 F.2d 212, 216 (9th Cir. 1954). In *N. L. R. B. v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 690-691 (8th Cir. 1967), one of the employer's supervisors inquired of an employee's union activities and even asked him to report back on the union activities of his co-workers. The Court found no unlawful interrogation, because it found that the interrogation was neither threatening nor coercive because "[a]n employer's interrogation of its employees, however, is not unlawful per se, unless conducted with such anti union animus as to be coercive in nature," and in this case it was not "conducted against a background of employer hostility and discrimination towards unionization, such as would induce in its employees a fear of reprisal for lawfully pursuing their union activities." 379 F.2d at 690.

CONCLUSION

The "interrogation" at issue here was "isolated and casual in nature", *id*. at 691, and took place ***the day after*** Horseshoe first became aware of the union campaign. There was no time for Horseshoe to have adopted an attitude of "hostility and discrimination towards unionization" that could have made the employees fear reprisal. It is undisputed that Murduca explicitly told Dodds the union campaign had nothing to do with him, and the employees with whom he met that day hugged him as

they left his office. (ROA.226-227, ROA.1155-1157.) This was not an unlawful interrogation under any view of the facts. *See also Care Inn, Collierville*, 202 NLRB 1065, 1066 (1973) (asking employee how he was going to vote was not unlawful where it was isolated, contained no coercive overtones, and was not asked against a background of hostility or discrimination against unions); *B.F. Goodrich Footwear Co.*, 201 NLRB 353 (1973) (supervisor questioning open union supporters as to how they felt about the union was not unlawful); *Trojan Steel Corp.*, 180 NLRB 704, 705 (1970) (interrogation of single employee as to who else was at a particular party "was innocuous, devoid of company hostility or animus, was not coercive and was not conducted in such a threatening manner as would induce … a fear of reprisal").

Respectfully submitted, this 2nd day of February, 2021.

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CERTIFICATE OF SERVICE

20-60647

20-60647 ***Horseshoe Entertainment, L.P. v. NLRB***

I hereby certify that an electronic copy was uploaded to the Court's electronic filing system. I also certify that I caused the foregoing Petitioner's Brief to be served on counsel for Respondent Cross-Petitioner via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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CERTIFICATE OF COMPLIANCE

Appellants' Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) or Fed. R. App. P. 28.1. Appellants' Brief contains 12,743 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Appellees' Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) since Appellants' Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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